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CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

JOHNNY WILLIAMS AND WIFE, SARAH WILLIAMS, PLAINTIFF V. HOUSES OF
DISTINCTION, INC., DEFENDANT

No. COA10-30

(Filed 21 June 2011)

**1. Construction Claims— Contractual obligations—exceptions
inapplicable—summary judgment proper**

The trial court did not err in a negligence action by granting summary judgment in favor of defendant with respect to its negligence claims. Plaintiffs' negligence-based claims stemmed from defendant's allegedly deficient performance of its contractual obligations to plaintiffs and none of the Ports Authority exceptions were applicable.

**2. Construction Claims— breach of contract—breach of
warranty—statute of limitations—date statute began to
run in dispute—summary judgment erroneous**

The trial court erred in a breach of contract and breach of warranty action by granting summary judgment in favor of defendant based on the plea of the statute of limitations. The point in time at which the construction defects in question became or should have become apparent to plaintiffs was genuinely in dispute between the parties, so that the date upon which the statute of limitations began to run should have been decided by a jury at trial rather than by the court as a matter of law.

**3. Appeal and Error— issue not addressed—estoppel—
statute of limitations**

Plaintiffs' argument in a construction case that defendant should have been estopped from asserting the statute of limita-

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[213 N.C. App. 1 (2011)]

tions as a bar to plaintiffs' claims was not addressed in light of the Court of Appeals' conclusion that the trial court erred in granting summary judgment with respect to plaintiffs' breach of contract and warranty claims.

Appeal by plaintiffs from order entered 14 October 2009 by Judge Ola Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 26 May 2010.

Block, Crouch, Keeter, Behm & Sayed, L.L.P. by Auley M. Crouch, III and Emily A. McNamara, for plaintiffs-appellants.

The Del Ré Law Firm, PLLC, by Benedict J. Del Ré Jr., for defendants-appellees.

ERVIN, Judge.

Plaintiffs Johnny and Sarah Williams appeal from a trial court order granting summary judgment in favor of Defendant Houses of Distinction, Inc. After careful consideration of Plaintiffs' challenges to the trial court's decision in light of the record and applicable law, we conclude that the trial court's order should be affirmed in part and reversed in part and that this case should be remanded to the Superior Court of Brunswick County for further proceedings not inconsistent with this opinion.

I. Procedural History

On 30 October 2008, Plaintiffs filed a complaint against Defendant in which Plaintiffs alleged that Defendant acted negligently and committed breaches of contract and warranty in connection with the construction of a house located on an ocean front lot owned by Plaintiffs at Ocean Isle Beach. According to Plaintiffs' complaint, Defendant:

- b. selected windows and doors that were not suitable for the location of the residence;
- c. failed to adequately flash or improperly flashed the residence;
- d. installed the decking membrane improperly;
- e. installed improperly all decking boards in violation of the manufacturers's installation instructions;
- f. installed the vinyl siding and trim improperly;

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g. installed stucco located on the lower level of the residence improperly;

h. constructed and installed stairs and other structural components improperly; and

i. used metal fasteners that were not suitable for the environmental conditions existing at the residence's location.

In its answer, Defendant moved to dismiss Plaintiffs' complaint for failure to state a claim for which relief could be granted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6); denied the material allegations of Plaintiffs' complaint; and asserted several affirmative defenses, including a contention that Plaintiffs' claims were barred by the applicable statute of limitations. On 23 September 2009, Defendant filed a motion for summary judgment that was accompanied by supporting affidavits and other materials predicated on its contention that Plaintiffs' claims were time-barred. On 6 October 2009, Plaintiffs filed a response to Defendant's summary judgment motion that was also accompanied by supporting affidavits and related materials. On 14 October 2009, the trial court entered an order granting Defendant's summary judgment motion and dismissing all of Plaintiffs' claims with prejudice. [R 94] Thereafter, Plaintiffs noted an appeal to this Court from the trial court's order.¹

II. Legal Analysis

A. Standard of Review

On appeal, Plaintiffs contend that the trial court erred by granting Defendant's motion for summary judgment. A trial court appropriately grants a motion for summary judgment when the information contained in any depositions, answers to interrogatories, admissions, and affidavits presented for the trial court's consideration, viewed in the light most favorable to the non-movant, demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Whisnant v. Carolina Farm Credit*, — N.C. App. —, —, 693 S.E.2d 149, 152 (2010). " 'It has been said that an issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail.' " *Kessing v. National Mortgage*

1. The factual information needed to understand and evaluate the legal issues before the Court in this case is stated in the course of our substantive opinion rather than in a separate statement of facts appearing at the beginning of this opinion.

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Corp., 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971) (quoting 3 Barron and Holtzoff, *Federal Practice and Procedure* § 1234 (Wright ed. 1958)). “[I]n ruling on a motion for summary judgment[,] the court does not resolve issues of fact and must deny the motion if there is any issue of genuine material fact.” *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972) (citations omitted). “A party moving for summary judgment under [N.C. Gen. Stat. § 1A-1,] Rule 56 has the burden of ‘clearly establishing the lack of any triable issue of fact by the record properly before the court,’ ” so that “[h]is papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded.’ ” *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting 6 J. Moore, *Moore’s Federal Practice* § 56.15[8] (2d ed. 1971), and citing *Singleton*, 280 N.C. at 465, 186 S.E.2d at 403). According to well-established North Carolina law, summary judgment is appropriate when “a claim or defense is utterly baseless in fact” or “where only a question of law on the indisputable facts is in controversy.” *Kessing*, 278 N.C. at 533, 180 S.E.2d at 829 (citing 2 McIntosh, *N.C. Practice and Procedure* § 1660.5 (2d ed., Phillips’ Supp. 1970) and 3 Barron and Holtzoff § 1234). As a general proposition, “an order [granting summary judgment] ’based on the statute of limitations is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the non-movant’s pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom.’ ” *Spears v. Moore*, 145 N.C. App. 706, 708, 551 S.E.2d 483, 485 (2001) (quoting *Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976)). An order granting summary judgment is, in turn, reviewed *de novo* by this Court. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

B. Substantive Legal Analysis

1. Negligence Claims

[1] On appeal, Plaintiffs contend that the trial court erred by granting summary judgment in favor of Defendant with respect to their negligence claims. We disagree.

As this Court has stated, “no negligence claim [exists] where all rights and remedies have been set forth in the contractual relationship.” *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 42, 587 S.E.2d 470, 476 (2003), *disc. review denied*, 358 N.C. 235, 595 S.E.2d 152 (2004); *see also Ports Authority v. Roofing Co.*, 294 N.C. 73, 81, 240 S.E.2d 345, 350 (1978) (stating that, “[o]rordinarily, a breach of contract

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does not give rise to a tort action by the promisee against the promisor”) (citations omitted), *rejected in part on other grounds, Trustees of Rowan Tech. v. Hammond Assoc., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985); *Spillman v. American Homes*, 108 N.C. App. 63, 65, 422 S.E.2d 740, 74142 (1992) (citing *Ports Authority*, 294 N.C. at 83, 240 S.E.2d at 351); *Warfield v. Hicks*, 91 N.C. App. 1, 910, 370 S.E.2d 689, 694, *disc. review denied*, 323 N.C. 629, 374 S.E.2d 602 (1988). In *Ports Authority*, the Supreme Court enumerated four exceptions to this general rule, explaining that a negligence claim will lie, despite the existence of a contract between the parties, when:

(1) The injury, proximately caused by the promisor’s negligent act or omission in the performance of his contract, was an injury to the person or property of someone other than the promisee.

(2) The injury, proximately caused by the promisor’s negligent, or wilful, act or omission in the performance of his contract, was to property of the promisee other than the property which was the subject of the contract, or was a personal injury to the promisee.

(3) The injury, proximately caused by the promisor’s negligent, or wilful, act or omission in the performance of his contract, was loss of or damage to the promisee’s property, which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm, as in the case of a common carrier, an innkeeper or other bailee.

(4) The injury so caused was a wilful injury to or a conversion of the property of the promisee, which was the subject of the contract, by the promisor.

Ports Authority, 294 N.C. at 82, 240 S.E.2d at 350-51 (internal citations omitted).

In their complaint, Plaintiffs alleged that Defendant agreed “to provide all materials” and “to construct [the home] in a good and workmanlike manner” in the contract providing for the construction of Plaintiffs’ residence. In an attempt to establish that they were entitled to a negligence-based recovery from Defendant, Plaintiffs further alleged that:

17. Defendant owed a duty to Plaintiffs to build the residence with the care and skill necessary to meet the standard of good and workmanlike quality as promised by Defendant.

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18. Defendant breached its duty and was negligent in the construction of the residence in that it:

- a. Failed to select and install appropriate windows and doors for use in the residence;
- b. Failed to comply with all manufacturers' installation specifications and instructions;
- c. Failed to correct all defective conditions; and
- d. Failed to make proper repairs leading Plaintiffs to believe that Defendant had repaired various defects when Defendant had failed to do so.

19. As a direct and proximate result of Defendant's negligence, Plaintiffs have been damaged in an amount exceeding \$10,000.00 and include those categories of damages enumerated in paragraph 15.

Each of the contentions of negligence recited in Plaintiffs' complaint relate back to, and ultimately hinge on, Defendant's alleged failure to adequately honor its contractual obligation "to furnish all materials and equipment and to perform or furnish all labor to construct in a good and workmanlike manner." As a result, Plaintiffs' negligence claims stem from Defendant's alleged failure "to properly perform the terms of the contract," and thus "the injury resulting from the breach is damage to the subject matter of the contract." See *Kaleel*, 161 N.C. App. at 42-43, 587 S.E.2d at 476 (quoting *Spillman v. American Homes*, 108 N.C. App. 63, 65, 422 S.E.2d 740, 741-42 (1992)). Furthermore, we are unable to conclude that any of the four exceptions set out in *Ports Authority* apply to the negligence-based claims asserted in Plaintiff's complaint. Because Plaintiffs' negligence-based claims stem from Defendant's allegedly deficient performance of its contractual obligations to Plaintiffs and since none of the *Ports Authority* exceptions are applicable given the facts before us in this case, we conclude that Plaintiffs have no valid negligence claims against Defendant and that the trial court properly granted summary judgment in favor of Defendant with respect to these claims.

2. Breach of Contract and Warranty Claims

[2] Secondly, Plaintiffs contend that the trial court erred by granting summary judgment in favor of Defendant with respect to their breach of contract and breach of warranty claims.² We agree.

2. The parties do not, in their briefs, distinguish between the defects in or damage that Plaintiffs allegedly sustained to the windows, doors, flashing, deck membrane,

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According to N.C. Gen. Stat. § 1-52, actions for breach of contract and breach of warranty are subject to a three-year statute of limitations, with claims arising from damage to the plaintiff's property beginning to run from the point at which "physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." N.C. Gen. Stat. § 1-52 (16).

The primary purpose of N.C. Gen. Stat. § 1-52(16) is that it is intended to apply to plaintiffs with latent injuries. Specifically, § 1-52(16) protect[s] a potential plaintiff in the case of a latent injury by providing that a cause of action does not accrue until the injured party becomes aware or should reasonably have become aware of the existence of the injury. [A]s soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run.

Soderlund v. Kuch, 143 N.C. App. 361, 370, 546 S.E.2d 632, 638, *disc. review denied*, 353 N.C. 729, 551 S.E.2d 438 (2001) (internal quotation marks and citations omitted). Therefore, a cause of action for breach of contract or breach of warranty arising from damage to a plaintiff's property accrues, and the statute of limitations period begins to run, as soon as damage becomes or should have become apparent, with damage occurring after the date upon which the plaintiff's claim accrues constituting nothing more than an aggravation of the original injury that does not operate to restart the applicable limitations period. *ABL Plumbing & Heating Corp. v. Bladen Cty. Bd. of Educ.*, 175 N.C. App. 164, 168, 623 S.E.2d 57, 59 (2005) (citing *Liptrap v. City of High Point*, 128 N.C. App. 353, 355, 496 S.E.2d 817, 819, *disc. review denied*, 348 N.C. 73, 505 S.E.2d 873 (1998)), *disc. review denied*, 360 N.C. 362, 629 S.E.2d 846 (2006). As a result, Plaintiffs had three years from the point in time at which the damage to their home became initially apparent or reasonably should have become appar-

water sills, decking boards, vinyl siding, stucco, and stairs. For that reason, we have discussed the statute of limitations issue raised by Plaintiffs' appeal from the trial court's order on the basis of an assumption that Plaintiffs' entire claim against Defendant accrued at a single time. However, the record does not clearly demonstrate that the alleged defects in or damage to the decking boards, vinyl siding, stucco, and stairs associated with Plaintiffs' residence is in any way related to the leaking associated with the water intrusion that occurred around the doors and windows. As a result, even if we were to determine that the intermittent leaks that Plaintiffs experienced around certain doors and windows triggered the running of the applicable statute of limitations with respect to water-related damage to Plaintiffs' residence, those aspects of Plaintiffs' claim stemming from damage to the decking boards, vinyl siding, stucco, and stairs would not have been time-barred as a matter of law.

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ent within which to file claims alleging breach of contract and breach of warranty against Defendant.

“Ordinarily, the bar of the statute of limitations is a mixed question of law and fact.” *Yancey v. Watkins*, 17 N.C. App. 515, 519, 195 S.E.2d 89, 92, *cert. denied*, 283 N.C. 394, 196 S.E.2d 277 (1973). Only when “the law is properly pleaded and *all the facts with reference thereto are admitted* [does] the question of limitations become[] a matter of law.” *Id.* (citations omitted) (emphasis in the original). On the other hand, “where the facts are in doubt or in dispute and there is any evidence sufficient to justify the inference that the cause of action is not barred, the trial court may not withdraw the case from the jury.” *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 317, 101 S.E.2d 8, 13 (1957) (citing *Garrett v. Stadiem*, 220 N.C. 654, 18 S.E.2d 178 (1942), *Majette v. Hood*, *Com’r of Banks*, 208 N.C. 824, 179 S.E. 23 (1935), and *Fort Worth R.R.*, 198 N.C. 309, 151 S.E. 641 (1930)); *see also Hatem v. Bryan*, 117 N.C. App. 722, 724, 453 S.E.2d 199, 201 (1995) (stating that, “[w]hen . . . the evidence is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury”) (citations omitted); *Yancey*, 17 N.C. App. at 520, 195 S.E.2d at 93 (holding that the issue of whether the statute of limitations had expired was “properly submitted to the jury” when “all the facts with respect to the statute of limitations were not admitted and [] more than one inference could be drawn from the evidence”). Thus, in the event that any fact relating to the issue of whether Plaintiffs’ claims were time-barred was subject to legitimate dispute, such a factual issue is properly submitted to the jury rather than being resolved during consideration of a summary judgment motion.

At the beginning of any attempt to analyze the merits of an issue such as the one before us in this case, which is focused on determining the appropriateness “of [a grant of summary judgment] based on the plea of the statute of limitations,” it is important to note that “it would serve no useful purpose . . . to restate the evidence favorable to [the movant],” since our decision “requires only that we determine whether the [nonmovant’s] evidence was sufficient to show *prima facie* that their cause of action was not barred.” *Solon Lodge*, 247 N.C. at 317, 101 S.E.2d at 13. In this case, the evidence, when taken in the light most favorable to the Plaintiffs, discloses that, on 18 May 2002, Plaintiffs entered into a contract with Defendant pursuant to which Defendant agreed to construct a house on an ocean front lot owned by Plaintiffs in Ocean Isle Beach, North Carolina; to “furnish all materials and equipment;” and “to perform or furnish all labor . . . in a good

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and workmanlike manner.” Acting in reliance upon the advice of Thomas C. Coyte, Defendant’s President, Plaintiffs selected Weather Shield windows and doors for installation in the home. Subsequently, Weather Shield products were purchased and installed in the Plaintiffs’ home by either Defendant or its subcontractors. Although Plaintiffs took possession of their newly-constructed home in April 2003, they did not reside there full time because it was a “vacation and retirement home” rather than their principal residence.

Shortly after moving into the home in 2003, Plaintiffs noticed water leaking in through the doors located on the second level. Plaintiffs reported this development to Defendant, who, in turn, dispatched a subcontractor to the Plaintiffs’ residence and ultimately informed Plaintiffs, either personally or through its subcontractor, that the needed repairs had been made. While at the Plaintiffs’ residence, Defendant’s subcontractor covered the doors through which water appeared to be leaking with a plastic film, sprayed the perimeter of the covered area with a hose, and explained to Plaintiffs that “the purpose of his ‘test’ was to show that the installation of the door units was not the problem.”

In early 2004, a broken window on the second level of the residence was reported by Plaintiffs to Defendant who, in turn, referred the issue to the distributor. In August of 2004, shortly after the distributor replaced the second floor window, Plaintiffs noted the presence of water damage in the area surrounding the replaced window. Although no repairs appear to have been made as a result of this leak, Plaintiffs saw no additional evidence of leaking in or around the window in either 2005, 2006 or 2007.

In late 2005, Plaintiffs discovered that water was once again entering the home through the second-level doors despite the fact that they had been informed by Defendant that this problem had been remedied in 2003. In response to this information, either Defendant or its subcontractor informed Plaintiffs in 2006 that “they were going to figure out the problem and fix it.” A representative of Defendant’s subcontractor made repairs to the doors and windows on 2 February 2006 and 10 February 2006. Upon completing these repairs, the representative told Plaintiffs that “[t]hat ought to do it.” Throughout this period of time, Plaintiffs were “confident” that Defendant was making “every effort to fix” the issues related to water leaking into their home. The 2006 repairs appeared to have been successful, since Plaintiffs did not note any additional water issues relating to the second floor doors during the remainder of 2006 and 2007.

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In 2007, Plaintiffs observed a water stain on the ceiling of a guest bedroom. Once again, Plaintiffs informed Defendant about the problem, and Defendant dispatched a subcontractor to make the necessary repairs. In March of 2008, Plaintiffs noticed water leaking in through the same window at which they had experienced problems in 2004, causing them to employ R.V. Buric Construction Consultants, PC, to examine their home. Shortly thereafter, Buric Construction inspected Plaintiffs' home and provided Plaintiffs with a report detailing the various construction defects that it believed to exist in the structure. Based on this evidence, Plaintiffs argue that the defects underlying their breach of contract and warranty claims "became apparent or should reasonably have become apparent" no earlier than March of 2008.³

On the contrary, Defendant argues that Plaintiffs became or should have become aware of the damage complained of in 2003, more than six years before filing their complaint and well beyond the applicable statute of limitations period. In support of this conclusion, Defendant cites *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985), a case in which the Supreme Court was required to determine when the statute of limitations began to run in connection with a claim stemming from the defective installation and construction of a roof. In *Pembee*, the defendants entered into a contract to construct a manufacturing building for the plaintiff. *Pembee*, 313 N.C. at 489, 329 S.E.2d at 351-52. Two months after occupying the building in 1973, the plaintiff discovered numerous leaks in the roof, as a result of which the defendants made some repairs to the roof. *Id.* at 489, 329 S.E.2d at 352. Some years later, over a five month period beginning in late 1976, the plaintiff complained of leaks in "many spots" in the roof. *Id.* In April 1980, the plaintiff hired an engineer, who examined the roof and discovered "blistering" throughout the entire roof which resulted from the entrapment of moisture in the several layers of roofing material." *Id.* at 490, 329 S.E.2d at 352. In November 1981, the plaintiff filed a complaint against the defendants alleging breach of contract, negligence, and unjust enrichment. *Id.* In June 1983, the trial court entered summary judgment in defendants' favor based on the determination that the plaintiff's claims were barred by the applicable statute of limitations. *Id.*

3. Although the record reveals that a letter was sent by the distributor to Defendant in 2006 asserting that the problems that Plaintiffs were experiencing with their home resulted from construction defects, the record also contains evidence tending to show that Plaintiffs did not learn of the existence of this letter until 2008.

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The Supreme Court characterized the leaks in *Pembee* as “discovered and recurr[ing] repeatedly” and, based on these “undisputed facts,” held that the plaintiff, “although perhaps not aware of the extent of [the] damage, knew that its roof was defective.” *Id.* at 493, 328 S.E.2d at 354. The plaintiff’s awareness of the existence of this defect put the plaintiff “on inquiry as to the nature and extent of the problem,” so that the statute of limitations began to run as to all related claims by at least 1977. *Id.* The plaintiff in *Pembee* did not dispute the date upon which it became aware of the defective roof; instead, the issue actually in dispute in *Pembee* revolved around whether “a distinction should be made between the leaks in the roof and the blistering caused by entrapment of moisture.” *Id.* The Supreme Court declined to recognize the validity of the distinction and held that the plaintiff’s entire claim was time-barred. *Id.* at 493-94, 329 S.E.2d at 354-55.

We are not persuaded that *Pembee* controls the outcome of this case, since we do not believe that Plaintiffs were necessarily put on notice of the alleged defects in the doors and windows of their residence in the same manner and to the same extent as was the plaintiff in *Pembee*. In *Pembee*, the plaintiff became aware of multiple leaks in its building within months of occupancy and lodged a series of complaints reporting “leaks in many spots” several years later. *Id.* at 493, 329 S.E.2d at 354. In its opinion affirming the trial court’s decision to grant summary judgment in favor of the defendant, the Supreme Court described the leaks as “recurr[ing] repeatedly.” *Id.* In this case, on the other hand, the record shows that only a handful of leaks occurred on an intermittent basis over the course of several years and that, in almost every instance, Plaintiffs had been assured that these leaks had been corrected. Although these differences between the facts before the Supreme Court in *Pembee* and the facts at issue here may seem minor, small points may prove determinative in resolving fact-specific issues such as the one before us here.

An example of the importance of such factual differences can be seen in the *Pembee* Court’s hesitance to conclude that the first round of leaks, which occurred immediately after the plaintiff occupied the allegedly defective building, was sufficient to start the running of the statute of limitations. Instead, the Court merely concluded that “the fact that [the roof] was defective was apparent at least by April 1977”—several years into plaintiff’s occupancy of the building and after the occurrence of a five month period in which the plaintiff reported numerous leaks. *Id.* at 494, 329 S.E.2d at 355. As a result, based upon a close reading of *Pembee*, we are unable to conclude, as the Court in

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Pembee did, that there is no genuinely disputed factual issue concerning whether Plaintiffs “clearly knew” of the construction-related defects underlying their claims against Defendant at a sufficiently early date to render their claims time-barred as a matter of law.⁴

On the contrary, it appears to us that our decision in *Baum v. John R. Poore Builder, Inc.*, 183 N.C. App. 75, 643 S.E.2d 607 (2007), is more relevant to the proper resolution of this case. The plaintiffs in *Baum* first noted the presence of cracked tiles on the deck connected to their residence in June of 2000. *Baum*, 183 N.C. App. at 77-78, 643 S.E.2d at 609. After they reported the existence of these cracks to the defendant, the plaintiffs were told to contact the tile company directly, resulting in the performance of certain repairs and the giving of assurances that there were no structural problems in the plaintiffs’ deck. *Id.* In this case, the record contains evidence tending to show that Plaintiffs noticed and reported leaks in the residence’s windows and doors to Defendant, who, in turn, had some repairs performed and instructed Plaintiffs to contact the distributor directly in order to obtain the performance of other repairs. Plaintiffs followed Defendant’s directive, leading to the making of repairs and the giving of assurances that the root of the problem that Plaintiffs were experiencing stemmed from the products utilized during the construction of the residence rather than the manner in which the residence had been constructed and the relevant products installed. In *Baum*, we held that, “viewing the evidence submitted to the trial court in the light most favorable to [the plaintiffs’] position,” the facts did not establish that the statute of limitations had run as a matter of law, since “at least an inference can be drawn that the limitations period [did not begin to run in June 2000, and therefore] the issue [was] for the jury to determine.” *Id.* at 82, 643 S.E.2d at 611-12. Given the similarities between the facts at issue in *Baum* and the facts at issue here, we conclude that, in this case, as in *Baum*, we are faced with a “genuine issue[] of material fact as to when Plaintiffs knew or reasonably should have known about the damage . . . , such that the evidence was sufficient on the question of when the three-year statute of limitations began to run to submit the issue to a jury for determination.” *Id.* at 81, 643 S.E.2d at 611.

4. Similarly, we believe that Defendant’s reliance on our decision in *Blue Cross and Blue Shield v. Odell Associates*, 61 N.C. App. 350, 358, 301 S.E.2d 459, 464, *disc. review denied*, 309 N.C. 319, 306 S.E.2d 791 (1983), is misplaced given the “repeated failures of the glass panels over the next few months” after the initial discovery of a problem with one of the panels.

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Additionally, we find *Everts v. Parkinson*, 147 N.C. App. 315, 555 S.E.2d 667 (2001), a decision cited in Plaintiffs' brief, helpful to a proper resolution of the issue before us. In *Everts*, we held that the defendants "were not entitled to summary judgment on the basis of the statute of limitations because the facts [were] in conflict as to when the statute of limitations period started to run." *Everts*, 147 N.C. App. at 319, 555 S.E.2d at 670-71. The plaintiffs in *Everts* noticed "water intrusion" into both their garage and living room within three months after they purchased their home from the defendants. *Id.* at 320, 555 S.E.2d at 671. Sometime thereafter, the plaintiffs were informed by their painter that, given his experience in working on the home while it was owned by the defendants, he had developed the opinion that the home had "water problems." *Id.* The Court disagreed with defendants' contention that these two facts put the plaintiffs on notice of the damage to their residence, concluding, instead, that a jury might reasonably determine that the limitations period began to run at the time that the plaintiffs received an expert report alerting them to the issues underlying the claim asserted in their complaint. *Id.* at 320-21, 555 S.E.2d 16 671. In *Everts*, as in *Baum*, we refused to hold that the fact that a plaintiff observed damage, regardless of whether it consisted of cracked tiles or water intrusion, established that the plaintiff's claim was time-barred as a matter of law.

In light of our analysis of these decisions, we conclude that, when the record is considered in the light most favorable to Plaintiffs, there is a genuine issue of material fact as to when physical damage to Plaintiffs' home sufficient to put Plaintiffs on notice of the existence of their claims against Defendant became apparent or ought reasonably to have become apparent to Plaintiffs. *See* N.C. Gen. Stat. § 1-52 (16). As a result, the point in time at which the defects in question became or should have become apparent to Plaintiffs is genuinely in dispute between the parties, so that the date upon which the statute of limitations began to run should be decided by a jury at trial rather than by the court as a matter of law in connection with its consideration of a motion for summary judgment. Thus, we conclude that the trial court erred by granting summary judgment in favor of Defendant with respect to Plaintiffs' breach of contract and breach of warranty claims.

3. Estoppel

[3] Finally, Plaintiffs contend that Defendant is estopped from asserting the statute of limitations as a bar to Plaintiffs' claims based on the actions, representations and conduct of Defendant and its sub-

contractors. In view of our conclusion that the trial court erred in granting summary judgment with respect to Plaintiffs' breach of contract and warranty claims, there is no need for us to address this argument, and we decline to do so.

III. Conclusion

As a result, based on our conclusion that Plaintiffs' negligence claims stemmed from the performance of a contractual obligation, we conclude that that portion of the trial court's order granting summary judgment in favor of Defendant with respect to Plaintiffs' negligence-based claims should be affirmed. However, in light of our conclusion that the record discloses the existence of a genuine issue of material fact with respect to whether Plaintiffs knew or should reasonably have known of the construction-related defects in their residence more than three years prior to the filing of their complaint, we find that the trial court erred in determining that Plaintiffs' breach of contract and breach of warranty claims were time-barred as a matter of law. Instead, the date upon which the defects in question became or should have become apparent to Plaintiffs constitutes an issue of fact that should be resolved by the jury at trial, with the jury's answer to that question treated as determinative of the merits of Defendant's statute of limitation defense. Thus, we affirm the trial court's order in part and reverse the trial court's order in part and remand this case to the Brunswick County Superior Court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges McGEE and STROUD concur.

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CANADIAN AMERICAN ASSOCIATION OF PROFESSIONAL BASEBALL, LTD. v. OTTAWA RAPIDZ, FORMER MEMBER OF CANADIAN AMERICAN ASSOCIATION OF PROFESSIONAL BASEBALL, LTD., ROB HALL, FORMER DIRECTOR OF OTTAWA RAPIDZ, SHELAGH O'CONNOR, FORMER ALTERNATE DIRECTOR OF OTTAWA RAPIDZ, AND OTTAWA PROFESSIONAL BASEBALL, INC., AS LESSEE OF THE OTTAWA RAPIDZ, RESPONDENTS

No. COA10-758

(Filed 21 June 2011)

1. Arbitration and Mediation— failure to move to modify or vacate arbitration award—confirmation of arbitration award proper

The trial court did not err in a dispute concerning an arbitration agreement by granting a motion filed by petitioner Canadian American Association of Professional Baseball, Ltd. to confirm an award in an arbitration proceeding. Respondents failed to move to vacate or modify the award based on the alleged irregularity in the form of the award or pursuant to any other statutory grounds.

2. Arbitration and Mediation— denial of motion to dismiss proper—neither respondent personally affected—no argument jurisdiction lacking

The trial court did not err in a dispute concerning an arbitration agreement by denying respondents Hall and O'Connor's motion to dismiss for lack of personal jurisdiction and because they were not parties to the arbitration. Neither Hall nor O'Connor were personally affected in their individual capacities by the trial court's judgment and no argument was made that they were not, in fact, respondent Rapidz's Director and Alternate Director at the relevant times, or that jurisdiction over Rapidz was lacking.

Appeal by Respondents from order and judgment entered 26 March 2010 by Judge Patrice A. Hinnant in Forsyth County Superior Court. Heard in the Court of Appeals 13 January 2011.

Hendrick Bryant & Nerhood, LLP, by Timothy Nerhood and T. Paul Hendrick, for Petitioner-Appellee.

Kilpatrick Stockton LLP, by Daniel R. Taylor, Jr., Adam H. Charnes, and James J. Hefferan, Jr., for Respondent-Appellants Ottawa Rapidz, Rob Hall, and Shelagh O'Connor.

BEASLEY, Judge.

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Respondents Ottawa Rapidz (Rapidz or Member), Rapidz' Former Director Rob Hall, and Former Alternate Director Shelagh O'Connor (collectively Appellants)¹ appeal from the trial court's order and judgment granting a motion filed by Petitioner Canadian American Association of Professional Baseball, Ltd. (the League) to confirm an award of the arbitrators in an arbitration proceeding between the League and Respondents. We affirm.

On 19 December 2008, the League filed a "Motion to Confirm Arbitration Award and for Order Directing Entry of Judgment" (Motion) in Forsyth County Superior Court against former League member Rapidz; Hall and O'Connor, as the Member's appointed representatives; and OPBI, the "Controlling Related Entity" with a leasehold interest in Rapidz prior to termination of the latter's membership. The Motion alleged that Rapidz entered into a "League Affiliation Agreement" (Affiliation Agreement) with the League on 19 May 2008, entitling Rapidz to operate a professional baseball team for play in the League during the 2008 and 2009 seasons, but, after completing one season in 2008, Director Hall announced that Rapidz would not be fielding a team for play in the 2009 season. Rapidz applied to the League for a voluntary withdrawal therefrom, and a hearing was held before the League's Board of Directors (Board) on 29 September 2008 to determine if grounds existed for the involuntary automatic termination of Rapidz' membership. The Motion further alleged that the Board, "acting as an arbitration panel pursuant to the League Agreements"—which include its Articles of Incorporation, Bylaws, the Affiliation Agreement, Regulations, and Lease of Baseball Operations—denied Rapidz' request for voluntary withdrawal and concluded, rather, that Rapidz had committed an unsanctioned withdrawal of its membership, subjecting it to automatic and immediate termination as a League member. The Board's decision dated 11 November 2008 (Decision) also indicated that the League was therefore entitled: (1) to draw down in full the \$200,000 (Canadian dollars (CDN)) letter of credit Rapidz had posted with the League to be eligible for membership; and (2) to the extent that Rapidz' stadium lease was assignable, to cause the lease to be assigned to the League at its sole option.

Without the consent of OPBI, Appellants removed the case to federal court on 4 February 2009 and included a request for a determination that OPBI had been either fraudulently joined in the action or misaligned due to its interests adverse to Rapidz. The League filed a motion

1. While Ottawa Professional Baseball, Inc. (OPBI) is not a party to this appeal, the term "Respondents" used hereinafter refers collectively to Appellants and OPBI.

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to remand the action to state court on 4 March 2009, and on 19 February 2010, the Middle District of North Carolina remanded the case due to Appellants' failure to obtain unanimous consent to removal. On 5 March 2010, Respondent Rapidz filed a Rule 12(b)(6) motion to dismiss, and Hall and O'Connor moved for dismissal also based on the League's failure to state a claim and for the lack of personal jurisdiction over them. Following a hearing on all motions, the trial court entered an order and judgment confirming arbitration, entering judgment in favor of the League pursuant to the arbitration award, and denying Appellants' motions to dismiss. On appeal, Appellants challenge the trial court's order and judgment based on contentions that: (1) Respondents' motions to dismiss should have been granted because there was no arbitration to confirm in the first place; (2) the arbitration award was not signed or otherwise authenticated by the arbitrators as required by the North Carolina Revised Uniform Arbitration Act (RUAA); (3) personal jurisdiction over Respondents Hall and O'Connor was lacking, and where neither was a party to the purported arbitration award, their motion to dismiss should have been granted.

Because "this appeal arises from a decision on a motion to confirm an arbitration award, we first note 'that a strong public policy supports upholding arbitration awards.'" *WMS, Inc. v. Weaver*, 166 N.C. App. 352, 357, 602 S.E.2d 706, 709 (2004) (quoting *Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 234, 321 S.E.2d 872, 879 (1984)). However, our public policy in favor of arbitration "does not come into play unless a court first finds that the parties entered into an enforceable agreement to arbitrate." *Evangelistic Outreach Ctr. v. General Steel Corp.*, 181 N.C. App. 723, 726, 640 S.E.2d 840, 843 (2007) (citation omitted); see also *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 120, 535 S.E.2d 397, 400 (2000) ("While public policy favors arbitration, parties may not be compelled to arbitrate their claims unless there exists a valid agreement to arbitrate . . ."). Reflecting this underlying principle, "[t]he question of whether a dispute is subject to arbitration is an issue for judicial determination[,] . . . reviewable *de novo* by the appellate court." *Rapset v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001) (internal citations omitted).

I.

[1] Appellants argue that the dispute resolution mechanism set forth in the agreement between the parties, together with the League Agreements, does not constitute arbitration and that the proceeding

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before the Board was not an arbitration because the dispute was not submitted to an impartial third-party. As such, Appellants contend that there was, in fact, no arbitration subject to confirmation by the trial court.

A. Whether Arbitration was Contemplated by the Parties

The determination of “[w]hether a dispute is subject to arbitration involves a two-pronged analysis; the court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether ‘the specific dispute falls within the substantive scope of the agreement.’” *Id.* (citation omitted). Only the first prong is at issue: while Appellants do not deny there was a valid agreement between the parties that included an internal dispute resolution mechanism, they suggest that the process so described did not constitute “arbitration.” Thus, their initial argument as part of the broader contention that there was “no arbitration award to confirm”—is that the parties did not intend the agreed-upon procedure for resolving member-League disputes to be characterized as arbitration.

“Ordinarily, ‘arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.’” *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 876, 140 L. Ed. 2d 1070, 1081 (1998); *see also Burgess v. Jim Walter Homes, Inc.*, 161 N.C. App. 488, 490-91, 588 S.E.2d 575, 577 (2003) (“The law of contracts governs the issue of whether there exists an agreement to arbitrate[,]” and “the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes.”). While neither the RUAA nor the Federal Arbitration Act (FAA) provides a definition of “arbitration,”² this Court has described the term as “a process to privately adjudicate a final and binding settlement of disputed matters quickly and efficiently, without the costs and delays inherent in litigation.” *Capps v. Virrey*, 184 N.C. App. 267, 272, 645 S.E.2d 825, 829 (2007).

In executing the Affiliation Agreement, Rapidz “agree[d] to be bound by and comply with all of the League Agreements” as a condition of membership and acknowledged that its affiliation with the League was subject thereto. The League’s Bylaws are specifically included in

2. While not fatal to our resolution of this appeal, the trial court did not include in its order and judgment any finding as to whether the FAA applies here, and we note that “[t]his is a question of fact, which an appellate court should not initially decide.” *Hobbs Staffing Servs., Inc. v. Lumbermens Mut. Cas. Co.*, 168 N.C. App. 223, 226, 606 S.E.2d 708, 711 (2005).

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the League Agreements. *See* Unif. Arbitration Act § 6 cmt. 1 (2009) (Uniform Law Comment) (noting that this section governing validity of agreements to arbitration “is intended to include arbitration provisions contained in the bylaws of corporate or other associations as valid and enforceable arbitration agreements”). Appellants argue that Article 13.2 of the Bylaws, entitled “Member-League Disputes,” governed this dispute between Rapidz and the League and, as reproduced below, does not contain the word “arbitration”:

Any dispute or controversy between any Member and the League arising out of the League Agreements or the breach thereof shall be heard and decided by the Board. . . . The Chairman of the Board will determine the schedule for a hearing which may be held in person or by telephone, in the Chairman’s sole discretion. Rules of the hearing shall be set by the Chairman of the Board. The Commissioner and General Counsel shall act on behalf of the League. The Member may be represented by counsel. The Chairman of the Board shall conduct the hearing in the presence of the Board. The Board shall decide the dispute by majority vote. The Chairman shall be entitled to vote.

While Appellants acknowledge that “the nomenclature used is not determinative,” they contend that the language outlining the dispute resolution process never refers to “arbitration” and the absence of that word “in the relevant provision of the Bylaws” suggests the proceedings before the Board did not constitute arbitration. However, several references to arbitration throughout the League Agreements, and therefore encompassed by Rapidz’ Affiliation Agreement, undercut Appellants’ contention.

The various documents comprising the League Agreements are replete with evidence that the Board is authorized to arbitrate disputes involving League members and that Rapidz agreed to submit any disputes over its membership to arbitration. Another Bylaw provision, under Article 2 dealing with “Membership,” addresses “Withdrawal from the League.” Specifically, § 2.8 distinguishing “Voluntary Withdrawal” from “Unsanctioned Withdrawal,” outlines the process for seeking voluntary withdrawal,³ and details the consequences of each. Subsection D thereof, whose heading reads “Injunctive Relief,” provides:

3. Where any member seeks to withdraw from the League prior to the end of the term set out in its affiliation agreement, it may voluntarily do so after the completion of a season if it can prove “financial hardship” to the Board, which requires approval by $\frac{3}{4}$ of the Directors.

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In the event of non-compliance by the withdrawing Member with the provisions described in this Section 2.8, the League shall have the right to seek injunctive relief from the court restraining the breach of the Affiliation Agreement and these Bylaws from a court of competent jurisdiction. This resort to the court for injunctive relief *is a specific exception to the requirements contained in these Bylaws for the **arbitration** of matters in dispute between the League and its Members. The Members agree that the decision of the Directors pursuant to a hearing conducted in accordance with Article 2 shall have the full force and effect of **binding arbitration** and a court of competent jurisdiction shall be permitted to issue an injunction upon receipt of the decision of the Directors after a hearing. The Members, New Members, and the League direct that the decision of the Directors after a hearing shall be entitled to the status of a decision of a validly constituted **arbitration panel** to which each of the parties have submitted to **final and binding arbitration**.* (emphasis added).

While Appellants argue that § 2.8(D) is not applicable because it “concerns injunctive relief and no party sought injunctive relief in connection with this dispute,” they ignore several fundamental tenets of contract interpretation. Initially, headings do not supplant actual contract language and are not to be read to the exclusion of the provisions they precede. *See Doe v. Jenkins*, 144 N.C. App. 131, 135, 547 S.E.2d 124, 127 (2001) (“[A]n insured is not entitled to read only the heading and ignore the operative language of the provision itself.” (internal quotation marks omitted)). Moreover, “a contract must be construed as a whole, considering each clause and word with reference to all other provisions and giving effect to each whenever possible.” *Williamson v. Bullington*, 139 N.C. App. 571, 574, 534 S.E.2d 254, 256 (2000) (citation omitted); *see also Lynn v. Lynn*, — N.C. App. —, —, 689 S.E.2d 198, 207 (2010) (“Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole.” (internal quotation marks omitted)).

Where the “entire agreement” between the parties includes the Bylaws, the provisions of the Bylaws themselves must be read in reference to each other and the individual clauses of the other League Agreements to discern the parties’ intent as to arbitration. Thus, we reject Appellants’ suggestion that our interpretation of the dispute resolution process set out in the contract must be limited to Article

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13.2 or any other component part of the entire agreement. Neither are we persuaded by their argument that “[o]ne isolated reference to ‘arbitration’ in Article 2.8(D) does not trump Article 13.2, which actually governed the proceedings.” First, there is not only “one isolated reference” to arbitration in the League Agreements: the League’s Articles of Incorporation specify that a primary purpose for organization was “*arbitration* and settlement of various disputes within the [League]”; the Affiliation Agreement specifically incorporates § 2.8(D) of the Bylaws and requires the parties to “recognize and agree that th[e] remedy to the court for injunctive relief *is in addition to the sole remedy of arbitration right as provided in the Bylaws*” (emphasis added); and a “Consent to Jurisdiction” clause in the Affiliation Agreement exposes the parties to personal jurisdiction in North Carolina “[s]ubject to the *arbitration provisions* set forth in the League Agreements.” (emphasis added). Thus, the entire agreement demonstrates that the parties intended for the dispute resolution process referenced in Article 13 of the Bylaws to be arbitration.

Second, there is no “trumping” to speak of; in fact, the provisions operate harmoniously, and Appellants’ contention that Article 13 governed the proceedings to the exclusion of Article 2 is misconstrued. While the hearing fell under the broader terms of Article 13 as it involved a Member-League dispute, Article 2’s more specific procedure for involuntary termination hearings governed this particular type of Member-League dispute. Bylaw 2.9(A)(3) establishes that a member’s failure “to field a team for play in the League during the season” or “take action reasonably necessary to operate as a going concern” are grounds for automatic, involuntary termination. The hearing process for any violation of § 2.9 is outlined by § 2.10, which requires, *inter alia*, a hearing before the Board at a special meeting. In this case, after Rapidz notified the League that it was seeking voluntary withdrawal on the basis of financial hardship, it received a “Notice of Charges for Automatic Termination of the Membership of the Ottawa Rapidz” for a hearing before the Board on 29 September 2008 in the event that its voluntary withdrawal motion was unsuccessful. The notice alleged possible violations of Bylaw 2.9A(3) as the grounds for the charges, and the Board’s 11 November Decision likewise details that the hearing was held to determine whether Rapidz failed “to take action reasonably necessary to operate as a going concern” and “field a team for play in the 2009 [s]eason.” The Decision also relates that Rapidz’ motion for voluntary withdrawal under Article 2.8A of the Bylaws was heard before the Board but failed to receive the necessary approval, and a hearing under Article 2.10 ensued. Where “[a]ll

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disinterested Directors thereafter voted to sustain the [c]harge made by the Commissioner," Rapidz' membership was automatically and immediately terminated pursuant to Article 2.11.

Thus, the hearing was "conducted in accordance with Article 2," and the provision of § 2.8(D) thereunder that such proceedings "shall have the full force and effect of binding arbitration" unquestionably applies. To the extent the hearing also proceeded under the general terms of Article 13 of the Bylaws, § 13.3 incorporates Article 2.10 and § 13.6 establishes that "[t]he dispute and appeal process provided in this Article 13 shall be the exclusive and sole remedy of all of the parties thereto" and that the Board's decision "shall be final, conclusive, and binding." Where this language clearly connotes arbitration, *see Capps*, 184 N.C. App. at 272, 645 S.E.2d at 829; where the entire agreement between the parties reveals their intent to arbitrate the type of dispute at issue in this case; and where "[a]ny uncertainty as to the scope of the arbitration clause should be resolved in favor of arbitration," *In re W.W. Jarvis & Sons*, 194 N.C. App. 799, 803, 671 S.E.2d 534, 536 (2009), the dispute resolution mechanism set forth in the League Agreements is properly referred to as arbitration.

Our conclusion is in accord with *Parke Construction Co. v. Construction Management Co.*, where our Court construed contract language very similar to the terms of the Bylaws laying out the dispute resolution procedure under the League Agreements as "simply and clearly" providing that a dispute arising thereunder "must be resolved by binding arbitration." *See Construction Co. v. Management Co.*, 37 N.C. App. 549, 553, 246 S.E.2d 564, 566 (1978) [*Parke*]. Paragraph X of the joint venture agreement in *Parke* read: "Any and all disputes of any kind under or in connection with this Agreement will be submitted to Mr. Ira Hardin for absolute and final decision." *Id.* at 551, 246 S.E.2d at 565. While the plaintiff contended that the provision was "not an agreement to arbitrate," and although Paragraph X did not contain the word "arbitration," the Court held that the intent of the parties was ascertainable from the plain words and clear language of the contract and excluded no dispute from arbitration. *Id.* at 553-54, 246 S.E.2d at 567. Similarly, Article 13.2 of the Bylaws as further defined by Article 2—does not exclude any Member-League dispute from arbitration, and the entire agreement reveals the parties' intent that the specific dispute at issue here was to be arbitrated by the Board.

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B. Whether The Board's Role as Arbitrator was Fatal

Appellants also argue that “the proceedings before the Board did not constitute arbitration because they did not take place before an impartial, third-party arbitrator.” Instead, the Board, “which consists of a representative from each League member,” was the final decision-maker, and Appellants believe that “the submission of a dispute to one of the parties itself” negated any understanding that an arbitration occurred.

Parke again informs our analysis. There, the plaintiff contended that Paragraph X was unenforceable as violative of a “generally prevailing public policy against permitting one of the parties to a dispute to serve as the arbitrator thereof” because “Mr. Hardin was designated by the parties to be arbitrator, and he [was] the Chairman of the Board of the company that owns [Defendant] Company.” *Id.* at 554-55, 246 S.E.2d at 567-68. Despite the understanding “that arbitrators not only be completely impartial but also that they have no connection with the parties or the dispute involved,” the Court noted: “It is well settled that parties knowing the facts, may submit their differences to any person, whether he is interested in the matters involved or is related to one of the parties, and the award will be binding upon them.” *Id.* at 555-56, 246 S.E.2d at 568 (internal quotation marks omitted). Observing that the plaintiff “had knowledge of the extent and nature of the relationship” between Defendant and Mr. Hardin at the time the agreement was executed, and where the plaintiff merely assumed that the arbitrator would not be impartial without any evidence to support its belief, this Court was “not permitted to interfere with the contractual rights of the parties when each was aware and understood the contracts it entered into.” *Id.* at 557, 246 S.E.2d at 568.

Here, Article 13.2 of the Bylaws provides that “[a]ny dispute or controversy between any Member and the League arising out of the League Agreements or the breach thereof shall be heard and decided by the Board[,]” and Article 2.10 more particularly delineates said hearing before the Board for disputes involving involuntary termination. There is no indication in the record that Appellants did not know “the extent and nature of the relationship” between the members of the Board and the League. *See Id.* Moreover, Appellants do not elaborate on how the Board members could not have been or indeed were not impartial in the performance of their duties as arbitrators of the dispute. They state only that Rapidz’ involuntary termination entitled the League to draw down on its \$200,000 letter of credit, but the

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League would have received nothing if the Board had ruled in Rapidz' favor. The Board, however, is made up of other teams' Directors—and therefore consists of Appellants' peers—who may themselves be compelled to arbitrate a similar dispute before the same panel, and it can thus also be presumed that the voting Board members would fairly safeguard each other's interests. Thus, without more than Appellants' generalized accusation, “we are not permitted to interfere with the contractual rights of the parties” where Rapidz voluntarily and willingly agreed to have the Board act as arbitrators when it joined the League. *See Id.*

II.

[2] In the alternative, Appellants argue that “even if an arbitration occurred, the trial court erred in granting the League’s Motion to confirm because the arbitration award was not signed or otherwise authenticated by the arbitrators as required by the RUAA.” However, where we have concluded that the proceedings which transpired were intended to be and in fact constituted arbitration, Appellants were required to file a motion to vacate the award or a motion to modify or correct the award under both the RUAA and the FAA if it sought to challenge any of the disputable aspects thereof. *See* 9 U.S.C. §§ 10-11 (2009); N.C. Gen. Stat. §§ 1-569.23-24 (2009). Otherwise, the court properly authorized to confirm the arbitration decision must enter an order confirming the award upon a motion for confirmation by any party to the arbitration. *See* 9 U.S.C. § 9 (2009) (“If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court *must* grant such an order *unless the award is vacated, modified, or corrected* as prescribed in sections 10 and 11 of this title.” (emphasis added))⁴; N.C. Gen. Stat. § 1-569.22 (2009) (“After a party to an arbitration receives notice of an award, the party may make a motion to the court for an order confirming the award. Upon motion of a party for an order confirming the award, the court *shall* issue a confirming order *unless the award is modified or corrected* pursuant to G.S. 1-569.20 or G.S. 1-569.24 or is vacated pursuant to G.S. 1-569.23.” (emphasis added)).

While Appellants argue they “did not know that the League conceded that the hearing was an arbitration until the League filed its

4. Appellants make no argument on appeal as to whether or not they conceded that confirmation of an arbitration award was proper.

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Motion,” they certainly knew the League considered its Decision to be an arbitration award when the Motion for confirmation was filed and served. At no time did Appellants seek to file a motion to vacate or modify by writ of certiorari or otherwise, and their motions to dismiss, even if they could be treated as motions to vacate, do not request such relief. Where Appellants did not move to vacate or modify the award based on the alleged irregularity in the form of the award or pursuant to any other statutory grounds therefor, the trial court was required to grant an order confirming the award and did so properly.

III.

Appellants’ final arguments deal solely with Respondents Hall and O’Connor, who contend that the trial court erred in denying their motion to dismiss due to a lack of personal jurisdiction and because they were not parties to the arbitration. However, as found by the Middle District in remanding this case, the League’s Motion to confirm names these two Respondents, who both represented Rapidz at the arbitration hearing, “solely in their representative capacities” as Director and Alternate Director respectively, of the Rapidz baseball team. *Canadian Am. Ass’n of Prof’l Baseball, Ltd. v. Ottawa Rapidz*, 686 F. Supp. 2d 579, 587 (M.D.N.C. 2010). “Because both individuals are sued in their representative capacities, therefore, their rights and liabilities in this action are derivative of the entity they represent, Ottawa Rapidz.” *Id.* Where neither Hall nor O’Connor are personally affected in their individual capacities by the trial court’s judgment and where they make no argument that they were not, in fact, Rapidz’ Director and Alternate Director at the relevant times, or that jurisdiction over Rapidz was lacking, the trial court did not err in denying Hall and O’Connor’s motion to dismiss.

Affirmed.

Judges GEER and STEPHENS concur.

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JOHN THOMPSON, EMPLOYEE, PLAINTIFF-APPELLANT v. STS HOLDINGS, INC.,
EMPLOYER, AND WAUSAU INSURANCE COMPANIES, CARRIER, DEFENDANTS-APPELLEES

No. COA10-581

(Filed 21 June 2011)

1. Workers' Compensation— calculation of compensation rate—fifth method—proper method

The Industrial Commission did not err in a workers' compensation case in calculating plaintiff's compensation rate pursuant to the fifth method enumerated in N.C.G.S. § 97-2. Plaintiff agreed that method one was not the appropriate method by which to calculate his average weekly wage and there was sufficient evidence before the Commission to support its findings that methods two, three, and four would not lead to fair and just results.

2. Workers' Compensation— calculation of compensation rate—fifth method—proper calculation

The Industrial Commission did not err in a workers' compensation case by calculating wages earned by plaintiff while in the employ of defendant in a fifty-two week period, then dividing that amount by fifty-two in order to obtain plaintiff's average weekly wage pursuant to the fifth method enumerated in N.C.G.S. § 9-72.

3. Workers' Compensation— calculation of compensation rate—exclusion of per diem, travel pay, and wage advances proper

The Industrial Commission did not err in a workers' compensation case in excluding *per diem*, travel pay, and wage advances from the calculation of plaintiff's earnings while working for defendant. Competent evidence existed in the record to support the Commission's findings of fact that those items were not advanced to plaintiff in lieu of wages.

4. Workers' Compensation— reduction in compensation—equitable estoppel not considered—no error

The Industrial Commission did not err in a workers' compensation case by failing to consider equitable estoppel as a means of preventing defendant from requesting that the Commission reduce the amount of compensation defendant was providing plaintiff. Plaintiff affirmatively denied the existence of any agreement between plaintiff and defendant concerning compensation, and expressly challenged the amount of compensation plaintiff was receiving from defendant.

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5. Workers' Compensation— credit for overpayment of compensation—no error

The Industrial Commission did not err in a workers' compensation case in allowing a credit to defendants for overpayment of compensation, as well as in failing to consider estoppel. The Court of Appeals had already rejected plaintiff's estoppel argument and plaintiff made no argument that the Commission abused its discretion by awarding defendants a credit.

6. Appeal and Error— preservation of issues—failure to cite authority

Plaintiff failed to cite to any authority on appeal and thus failed to preserve for appellate review the argument that the Industrial Commission erred in a workers' compensation case by allowing the admission of certain evidence.

Appeal by Plaintiff from amended opinion and award entered 24 February 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 December 2010.

Pamela W. Foster for Plaintiff-Appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Matthew J. Ledwith and M. Duane Jones, for Defendants-Appellees.

McGEE, Judge.

Plaintiff was an Airframe and Power Plant Mechanic (A&P mechanic) who worked contract jobs in the airline maintenance industry for various employers. STS Holdings, Inc. (STS) is a company specializing in providing contract aviation technicians to the aerospace industry. Plaintiff was working for STS in February 2008, pursuant to a contract between STS and TIMCO at TIMCO's facility in Greensboro. While working for STS on the TIMCO contract, Plaintiff tripped over a metal plate on 18 February 2008 and suffered a compensable injury by accident. At the time of Plaintiff's injury, the workers' compensation insurance carrier for STS was Wausau Insurance Companies (together with STS, Defendants). The compensability of Plaintiff's injury by accident is not in dispute. Defendants initially paid Plaintiff compensation in the amount of \$213.34 per week. This amount was subsequently increased to \$329.58 per week. Plaintiff was compensated at this rate until an opinion and award filed on 28 July 2009 by Deputy Commissioner J. Brad Donovan reduced

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Plaintiff's temporary total disability compensation to \$30.00 per week. Plaintiff appealed the deputy commissioner's opinion and award to the Commission, contesting the compensation rate as determined by the deputy commissioner. The Commission filed its opinion and award on 24 February 2010, wherein it affirmed the \$30.00 per week compensation rate, and concluded that "Defendants are entitled to a credit for payments that have already been made in excess of the compensation rate set forth [herein]."

In the fifty-two week period immediately preceding the accident, Plaintiff had worked a total of fourteen days for STS on five separate contracts. The bulk of Plaintiff's income in that fifty-two week period came from contracts with other employers. STS paid Plaintiff an hourly wage of \$7.50 an hour for Plaintiff's work with TIMCO. If Plaintiff worked overtime hours for STS, Plaintiff would earn overtime wages. STS also disbursed additional monies to Plaintiff while Plaintiff was in its employ. Plaintiff received a *per diem* amount for living expenses under certain circumstances. The Commission found as fact:

The per diem is paid as non-taxable, is set at differing amounts according to the costs of staying in any given location, and is meant to reimburse employees for cost of living expenses while they are on the road. The per diem is set as a maximum weekly amount, and is paid on a prorated basis if the employee works fewer than 40 hours in a particular week. Per diem payments are only available if a worksite is located greater than 50 miles from the employee's permanent residence and the employee certifies to [STS] that he is maintaining a temporary residence nearer to the worksite.

The Commission further found that the method used by STS to calculate the *per diem* rate to be paid to an employee was determined by first consulting the maximum allowable rate as set forth on the federal Government Services Administration website. STS would then reduce that amount by twenty percent and make additional downward adjustments related to the local cost of living, if applicable.

The Commission also found that Plaintiff received travel pay for certain jobs to help defray the cost associated with travelling to a job-site. An officer for STS testified

that travel pay is used to assist employees in travelling to the job and is paid as a business expense reimbursement. . . . [T]ravel pay

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is typically tied to a minimum stay at a particular work cite [sic], and if an employee does not meet the minimum stay, the travel pay is deducted from the employee's final check for that contract as a cost or wage advance.

The Commission further found that STS would sometimes give an employee wage advances. These advances constituted advance pay for work an employee had not yet performed, but was expected to perform. These advances were "deducted from the employee's subsequent post-tax earnings."

Finally, the Commission found that Plaintiff's "payroll records include[d] additional categories labeled 'RC' and 'RE.' However, the record of evidence [did] not include sufficient information for the . . . Commission to determine how, or whether, amounts listed in association with those categories may have influenced the wages earned by [P]laintiff."

Based in part on these findings of fact, the Commission concluded that, while working for STS, Plaintiff's wages consisted exclusively of his hourly wage and overtime pay. The Commission further concluded that the *per diem*, travel expenses, wage advances, and the additional "RC" and "RE" amounts did not constitute payments made by STS to Plaintiff in "lieu of wages."

Pursuant to N.C. Gen. Stat. § 97-2(5), the Commission conducted an analysis in order to determine Plaintiff's average weekly wage during his employment with STS. After conducting its analysis under N.C.G.S. § 97-2(5), the Commission determined, pursuant to N.C. Gen. Stat. § 97-29, that Plaintiff was entitled only to the "minimum disability compensation rate of \$30.00 per week." Pursuant to N.C. Gen. Stat. § 97-42, the Commission granted Defendants "a credit for disability compensation payments that [had] been made in excess of the rate of \$30.00 per week found applicable herein." The Commission based this determination on findings that, were it to utilize certain methods of calculation set forth in N.C.G.S. 97-2(5), Defendants would be obligated to pay compensation based upon an average weekly wage far in excess of what Plaintiff would have earned working for STS. Plaintiff appeals.

I.

We review opinions and awards of the Commission pursuant to the following standard:

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The Commission has exclusive original jurisdiction over workers' compensation cases and has the duty to hear evidence and file its award, "together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue." N.C.G.S. § 97-84 (2005). Appellate review of an award from the Industrial Commission is generally limited to two issues: (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. If the conclusions of the Commission are based upon a deficiency of evidence or misapprehension of the law, the case should be remanded so "that the evidence [may] be considered in its true legal light."

Chambers v. Transit Mgmt., 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006) (citations omitted).

The findings of fact made by the Commission are conclusive upon appeal when supported by competent evidence, even when there is evidence to support a contrary finding. In weighing the evidence, the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness' testimony entirely if warranted by disbelief of that witness. However, before finding the facts, the Industrial Commission must consider and evaluate all of the evidence. Although the Commission may choose not to believe the evidence after considering it, it may not wholly disregard or ignore competent evidence.

Lineback v. Wake County Board of Commissioners, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997) (citations omitted).

II.

[1] Plaintiff contends in his first argument that the Commission erred in calculating his compensation rate pursuant to N.C.G.S. § 97-2(5). We disagree.

The calculation of an injured employee's average weekly wages is governed by N.C.G.S. § 97-2(5). This statute sets forth in priority sequence five methods by which an injured employee's average weekly wages are to be computed, and in its opening lines, this statute defines or states the meaning of "average weekly wages."

McAninch v. Buncombe County Schools, 347 N.C. 126, 129, 489 S.E.2d 375, 377 (1997). N.C. Gen. Stat. § 97-2(5) (2009) states in relevant part:

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“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.

In *McAninch* our Supreme Court stated:

The final method [method five], 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 [the] decision.”

McAninch, 347 N.C. at 130, 489 S.E.2d at 378 (citations omitted); see also *Conyers v. New Hanover Cty. Schools*, 188 N.C. App. 253, 259,

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654 S.E.2d 745, 750 (2008) (Method five “may only be utilized subsequent to a finding that the previous methods were either inapplicable, or were applicable but would fail to produce results fair and just to both parties. *Wallace v. Music Shop, II, Inc.*, 11 N.C. App. 328, 181 S.E.2d 237 (1971).”).

In the case before us, the Commission addressed each of the five methods enumerated in N.C.G.S. § 97-2(5). The Commission determined that method one was inapplicable because Plaintiff “did not work continuously during the 52 weeks preceding his injury. *Loch v. Entertainment Partners*, 148 N.C. App. 106, 112, 557 S.E.2d 182, 186 (2001)[.]” Plaintiff agrees that method one was not the appropriate method by which to calculate his average weekly wage. The Commission concluded, upon the evidence before it, that methods two, three, and four could not be used to achieve fair and just results for both parties. Specifically, the Commission determined that use of any of these methods would require Defendants to compensate Plaintiff at a rate in excess of that warranted by the work Plaintiff would have performed for STS and, therefore, utilization of methods two, three, or four would not be fair or just to Defendants.

Though the Commission sets out as conclusions of law its determination of whether fair and just results can be achieved by the methods enumerated in N.C.G.S. § 97-2(5), they are findings of fact and bind our Court if there is competent evidence in the record to support the findings. *McAninch*, 347 N.C. at 130, 489 S.E.2d at 378. We hold that there was sufficient evidence before the Commission to support its findings that methods two, three, and four would not lead to fair and just results. Therefore, we affirm the Commission’s decision to apply method five in calculating Plaintiff’s average weekly wage.

[2] Plaintiff further argues that the Commission erred in the manner in which it applied method five to determine Plaintiff’s average weekly wage. We disagree.

Specifically, Plaintiff argues that, although the Commission purported to use method five, in reality it improperly used method one to determine Plaintiff’s average weekly wage. If Plaintiff’s contention were correct, the Commission would have erred. “Although ‘[w]hen the first method of compensation can be used, it *must* be used[,]’ that method cannot be used when the injured employee has been working in that employment for fewer than 52 weeks in the year preceding the date of the accident. *Loch v. [Entertainment Partners]*, 148 N.C. App. 106, 557 S.E.2d 182 (2001).” *Congers*, 188 N.C. App. at 258, 654 S.E.2d at 750 (citation omitted).

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However, our Court in *Conyers*, citing our Supreme Court's opinion in *Joyner v. Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966), and our Court's opinion in *Barber v. Going West Transp., Inc.*, 134 N.C. App. 428, 517 S.E.2d 914 (1999), held that the Commission may, pursuant to method five, determine an employee's average weekly wage by determining the employee's actual wages earned in the fifty-two week period preceding the injury by accident—in the employment in which Plaintiff suffered the compensable injury by accident—and dividing that amount by fifty-two. *Conyers*, 188 N.C. App. at 259-61, 654 S.E.2d at 750-51. This is because “[t]he language of the fifth calculation method neither requires nor prohibits any specific mathematical formula from being applied; instead, it directs that the average weekly wages calculated must ‘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).” *Id.* at 261, 654 S.E.2d at 751. The focus of method five is on the result, not the precise means by which that result is obtained. *Id.* at 261, n. 8, 654 S.E.2d at 751, n. 8. We hold that the Commission did not err by calculating wages earned by Plaintiff while in the employ of STS in a fifty-two week period, then dividing that amount by fifty-two in order to obtain Plaintiff's average weekly wage for his employment with STS.

The Commission recognized in its fourth conclusion of law that it was limited to considering Plaintiff's employment *with STS* in calculating Plaintiff's average weekly wage, stating:

Although [P]laintiff was also employed by employers other than [STS] during the 52 weeks preceding [P]laintiff's injury by accident, the calculation of [P]laintiff's average weekly wage must be based only on [P]laintiff's employment with [STS]. *See Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 146 S.E.2d 479 (1966); *McAninch v. Buncombe County Schools*, 347 N.C. 126, 489 S.E.2d 375 (1997) [(“Further, with respect to the Court of Appeals' recalculation to include ‘wages earned in employment other than that in which the employee was injured,’ we hold that this aggregation of wages conflicts with our established law. In defining ‘average weekly wages,’ N.C.G.S. § 97-2(5) explicitly provides that 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.’ N.C.G.S. § 97-2(5) (emphasis added). This issue was exclusively and definitively addressed by this Court in *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 146 S.E.2d 479 (1966).) *McAninch*, 347 N.C. at 132-33, 489 S.E.2d at 379].

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Plaintiff cites our Court's opinion in *Pope v. Johns Manville*, — N.C. App. —, 700 S.E.2d 22 (2010), for the contention that the Commission could aggregate Plaintiff's work for other employers in determining Plaintiff's average weekly wage. Our Court in *Pope* expressly rejected Plaintiff's contention. *Id.* at —, 700 S.E.2d at 31 (stating "the Supreme Court has clearly held that the Commission cannot, even if it relies on the fifth method for determining a claimant's average weekly wage set out in N.C. Gen. Stat. § 97-2(5), make the necessary calculation by *aggregating or combining* his wages from more than one job").

[3] Plaintiff further argues that the Commission erred in excluding *per diem*, travel pay, and wage advances from the calculation of Plaintiff's earnings while working for STS. "Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings." N.C.G.S. § 97-2(5). "The determination of whether an allowance was made in lieu of wages is a question of fact[.]" *Greene v. Conlon Constr. Co.*, 184 N.C. App. 364, 366, 646 S.E.2d 652, 655 (2007) (citations omitted). Though Plaintiff argues that evidence in the record supports his contention that he was paid the above items "in lieu of wages," our review of the record shows that competent evidence exists in the record to support the Commission's findings of fact that those items were not advanced to Plaintiff in lieu of wages. Because some competent evidence exists supporting these findings of fact, they are binding on appeal—regardless of whether conflicting evidence might exist. *Lineback*, 126 N.C. App. at 680, 486 S.E.2d at 254.

We recognize that the average weekly wage computed by the Commission does not reflect the total wages Plaintiff would have earned from all employment Plaintiff would have undertaken, and this leaves Plaintiff with compensation greatly reduced from that which he would have recovered had he performed all his contract work through STS alone. We sympathize with the difficult financial position Plaintiff now faces as a result of having been injured while working for STS. However, the General Assembly enacted our workers' compensation act considering what it deemed "fair and just" to *both* parties.

Results fair and just, within the meaning of G.S. 97-2[], consist of such "average weekly wages" as will most nearly approximate the amount which the injured employee would be earning were it not for the injury, *in the employment in which he was working at the time of his injury*.

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Liles v. Electric Co., 244 N.C. 653, 660, 94 S.E.2d 790, 796 (1956) (emphasis deleted; emphasis added).

“[N.C.G.S. § 97-2(5)] contains no *specific* provision which would allow wages from any two employments to be aggregated in fixing the wage base for compensation. Plaintiff contends, however, that such authority is implied in method [5], since ‘the amount which the injured employee would be earning were it not for the injury’ necessarily includes earnings from all sources if the employee had more than one job.

....

It seems reasonable to us that the Legislature, having placed the economic loss caused by a workman’s injury upon the employer for whom he was working at the time of the injury, would also relate the amount of that loss to the average weekly wages which that employer was paying the employee. Plaintiff, of course, will greatly benefit if his wages from both jobs are combined; but, if this is done, [the employer] and its carrier, which has not received a commensurate premium—will be required to pay him a higher weekly compensation benefit than [the employer] ever paid him in wages. . . . [T]o combine plaintiff’s wages from his two employments would not be fair to the employer. Method [5], ‘while it prescribes no precise method for computing “average weekly wages,” sets up a standard to which results fair and just to both parties must be related.’

After having specifically declared, in the usual situations to which method (1) is applicable, that an injured employee’s average weekly wages *shall be* the wages he was earning in the employment in which he was injured, had the Legislature intended to authorize the Commission in the exceptional cases to combine those wages with the wages from *any* concurrent employment, we think it would have been equally specific. As was said in *De Asis v. Fram Corp.*, [78 R.I. 249, 253, 81 A.2d 280, 282 (1951)]: ‘If that radical and important change were intended, it is not likely that the legislature would have left such intent solely to a questionable inference.’

....

We hold that, in determining plaintiff’s average weekly wage, the Commission had no authority to combine his earnings from the employment in which he was injured with those *from any other*

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employment. Barnhardt, 266 N.C. at 427-29, 146 S.E.2d at 484-86 (final emphasis added).”

McAninch, 347 N.C. at 133-34, 489 S.E.2d at 379-80 (citations omitted). It is the province of the General Assembly, not this Court, to make these policy determinations. Any result that flows from the enforcement of our state’s workers’ compensation act, and that is unfair to Plaintiff, is an issue for the General Assembly to address. Plaintiff’s first argument is without merit.

III.

[4] In Plaintiff’s second argument, he contends the Commission erred in failing to consider equitable estoppel as a means of preventing Defendants from requesting that the Commission reduce the amount of compensation Defendants were providing Plaintiff. We disagree.

Plaintiff relies on *McAninch* for the proposition that, because Defendants had voluntarily decided to compensate Plaintiff at a weekly rate of \$329.58, Defendants should be estopped from contesting the amount of compensation. Plaintiff’s reliance on *McAninch* is misplaced. In *McAninch*, the employer and employee had entered into a Form 21 agreement, agreeing on the rate of compensation. The Commission had approved that Form 21 agreement. The employer then attempted to have the Commission reduce the rate of compensation established by that Form 21 agreement. Our Supreme Court held:

Where the employer and employee have entered into a Form 21 agreement, stipulating the average weekly wages, and the Commission approves this agreement, the parties are bound to its terms absent a showing of error in the formation of the agreement. N.C.G.S. § 97-17 provides in pertinent part:

“No party to any agreement for compensation *approved by the Industrial Commission* shall thereafter be heard to deny the truth of the matters therein set forth, unless it shall be made to appear to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Industrial Commission may set aside such agreement.”

N.C.G.S. § 97-17 (1991). “Thus, where there is no finding that the agreement itself was obtained by fraud, misrepresentation, mutual mistake, or undue influence, the Full Commission may not set aside the agreement, once approved.” It is well settled that

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“an agreement for the payment of compensation when approved by the Commission is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal.”

McAninch, 347 N.C. at 132, 489 S.E.2d at 378-79 (citations omitted) (emphasis added). In the case before us, Plaintiff presents no evidence that any agreement existed between Plaintiff and Defendants concerning the rate of compensation, much less that an agreement existed that had been approved by the Commission. In fact, it was Plaintiff who requested, pursuant to Form 33, that a hearing be held on the issue of compensation. Plaintiff specifically contended in the Form 33 that the compensation rate he was receiving was “significantly lower than that to which he [wa]s entitled[.]” The Form 33 further stated: “I, [Plaintiff’s attorney], respectfully notify [the Commission] that [Plaintiff and Defendants] have failed to reach an agreement in regard to compensation[.]” This Form 33 was filed after Defendants had begun voluntarily compensating Plaintiff. Thus, having affirmatively denied the existence of any agreement between Plaintiff and Defendants concerning compensation, and having expressly challenged the amount of compensation Plaintiff was receiving from Defendants, Plaintiff may not now complain that the Commission held the hearing Plaintiff requested and considered the issue of compensation—the very issue for which Plaintiff requested the hearing. This argument is without merit.

IV.

[5] In Plaintiff’s next argument, he contends the Commission erred in “allowing a credit to Defendants, as well as [in failing] to consider estoppel.” We disagree.

We have already rejected Plaintiff’s estoppel argument, and Plaintiff fails to address the issue of estoppel in his fourth argument. Plaintiff fails to cite to the standard of review concerning the grant or denial of a credit for overpayment of compensation. “The decision of whether to grant a credit is within the sound discretion of the Commission. Such decision to grant or deny a credit will not be disturbed on appeal in the absence of an abuse of discretion.” *Loch*, 148 N.C. App. at 112-13, 557 S.E.2d at 187 (citation omitted). Plaintiff makes no argument that the Commission abused its discretion by awarding Defendants a credit for overpayment of compensation. We find no such abuse on the record before us. This argument is without merit.

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V.

[6] In his final argument, Plaintiff contends the Commission erred by allowing the admission of certain evidence. Plaintiff has failed to preserve this argument.

As in Plaintiff's previous argument, Plaintiff fails to cite to any standard of review. Plaintiff, in three sentences, argues that the Commission erred in admitting certain evidence. Plaintiff cites to no authority in this argument and, therefore, also fails to make any argument in his brief that the Commission erred based upon any proper application of the law. Plaintiff's bald and unsupported statements that the Commission erred do not present any proper argument for appellate review. Having failed to make a proper argument, and having failed to cite to any authority, Plaintiff has abandoned this argument. 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.

Chief Judge MARTIN and Judge ERVIN concur.

STATE OF NORTH CAROLINA v. VONZELL SPEIGHT

No. COA10-1467

(Filed 21 June 2011)

1. Confessions and Incriminating Statements— defendant's verbal statement after arrest—not prejudicial

The trial court did not err in a sexual offense, kidnapping, robbery with a dangerous weapon, burglary, communicating threats, and assault with a deadly weapon case by allowing a witness to testify to defendant's verbal statement made after defendant was arrested. Even if the statement was erroneously admitted, defendant failed to show that the exclusion of the statement could have changed the result of the case.

2. Indictment and Information— first-degree burglary—not fatally defective—sufficiently clear

An indictment charging defendant with first-degree burglary was not fatally defective or insufficient to support the trial court's

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imposition of a consecutive sentence. The indictment's stated felonious intent of "unlawful sexual acts" informed defendant of the charge against him with sufficient clarity to withstand dismissal and did not allow the jury to convict him on alternative theories of felonious intent.

3. Robbery— dangerous weapon—sufficient evidence—motion to dismiss properly denied

The trial court did not err in a robbery with a dangerous weapon case by denying defendant's motion to dismiss the charge. The State offered sufficient evidence that defendant took personal property from the victim by the use or threatened use of a knife.

4. Robbery— dangerous weapon—jury instruction—lesser-included offense—not warranted

The trial court did not err in a robbery with a dangerous weapon case by refusing to charge the jury on the lesser-included offense of common law robbery. All the evidence indicated that defendant removed property from the victim's apartment after she was awake and while her life was being threatened by defendant's use of a knife, a deadly weapon.

5. Sexual Offenses— first-degree—jury instruction—lesser-included offense—not warranted

The trial court did not err in a first-degree sexual offense case by denying defendant's request to charge the jury on the lesser-included offense of second-degree sexual offense. There was no evidence to support instruction on the lesser-included offense.

Appeal by defendant from judgment entered 15 July 2010 by Judge Kenneth C. Titus in Durham County Superior Court. Heard in the Court of Appeals 27 April 2011.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

William D. Spence for defendant-appellant.

BRYANT, Judge.

Because the admission of defendant's statement to police did not prejudice the jury's verdict, defendant is not entitled to a new trial. Because the indictment for first-degree burglary was not fatally defec-

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tive, we do not arrest judgment on defendant's conviction for that charge. Because there was substantial evidence to convict defendant of robbery with a dangerous weapon, the trial court properly denied defendant's motion to dismiss. And, because there was insufficient evidence to warrant offering the jury an instruction on the lesser included offense of second-degree sexual offense, the trial court properly denied defendant's request. Accordingly, we hold no error.

On 5 May 2008, defendant Vonzell Speight was indicted on charges of first-degree sexual offense, second-degree kidnapping, robbery with a dangerous weapon, first-degree burglary, communicating threats, and assault with a deadly weapon. A jury trial commenced in Durham County Superior Court on 12 July 2010. The evidence presented tended to show the following. On 16 April 2008, Catherine Lamas¹ lived in a one bedroom apartment on Dacian Street in Durham. She went to bed at 11:00 p.m. that night, and because there had been an attempted break-in at her complex earlier that week, she made sure her doors and windows were locked. At 4:40 a.m., Catherine awoke to find a man on top of her holding a knife to her throat. She attempted to fight him off, but he pressed her down onto the bed. While attempting to get the knife away from her throat, Catherine cut her palms. Though it was dark, her eyes adjusted, and Catherine could see the man clearly. He was not wearing a mask, and he leaned close to her face to whisper. He was an African-American male, 5'7" or 5'8", in his mid-to-late thirties, he was a little overweight and carried it in his stomach, and he had a little facial hair. He wore light colored blue jeans without a belt; he wore a grey Lee sweatshirt inside out, with a t-shirt under it; and his sneakers were white, had big tongues, fat laces, and were not well tied. The man told her to make no noise or she would be killed. Though she could feel the knife at her throat, Catherine began to talk. Over the next hour-and-a-half, Catherine convinced the man that she had no more cash in her apartment other than the \$7.00 or \$8.00 he took out of her purse before she woke up, and no valuables. After not finding any significant amounts of money and not seeing any valuables in the apartment, Catherine believed the man was getting upset. When she stated that he could take anything he wanted, he stated that he could take her. Catherine pleaded with him not to rape her and over the next thirty minutes negotiated with him about what acts she would or would not perform. She also encouraged him to put the knife down, which he did. Though still on top of her, restraining her, the man demanded that Catherine

1. A pseudonym has been used to protect the victim's identity.

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remove her clothes. Catherine pleaded with him not to hurt her. She reached for a cup of water she had nearby, took a drink, and handed the water to her assailant. When he took the cup, Catherine jumped from the bed and attempted to get to her front door; however, the man caught her by her hair, and using the knife, pressed her back onto the bed. He performed oral sex on her, inserting his tongue into her vagina. He then told her he would leave but that he had to tie her up. Catherine convinced him that she would not call the police and there was no need to tie her up. The man picked up a sports bra and used it to wipe off the knife and the door handle on the rear door. Catherine heard him exit the apartment and enter a back alley. After his exit, Catherine left the apartment through the front door and called the police. She was taken to a hospital where a rape kit was performed, and she spoke to a police investigator.

Police later found a knife and a blue sports bra in the alley behind Catherine's apartment. Catherine identified the knife as a medium sized knife from her kitchen that she used to dice vegetables. A crime scene investigator was able to take six latent fingerprints off of the cup next to Catherine's bed. The prints were submitted to a law enforcement database and the results indicated that defendant Vonzell Speight was a possible suspect.

On 24 April 2008, Jolanda Clayton, a Corporal with the Durham Police Department, aided in arresting defendant. Corporal Clayton testified over objection that after his arrest, defendant was told what he was charged with and he responded by stating, "Man, I'm a B and E guy."

A forensic DNA analyst, with the State Bureau of Investigation, admitted as an expert in the forensic analysis of DNA, compared the swabs taken from Catherine during the processing of her rape kit examination and blood samples taken from defendant and determined that defendant's DNA could not be excluded as a contributor to the mixture of bodily fluids collected.

At trial, Catherine identified defendant as the man who was in her apartment that night. Catherine further testified that she never gave defendant permission to enter her apartment or take her money or personal items.

The trial court instructed the jury on the charges of first-degree sexual offense, second-degree kidnapping, robbery with a dangerous weapon, first-degree burglary, communicating threats, and assault with a deadly weapon. The jury found defendant guilty on all charges.

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The trial court arrested judgment on the charge of second-degree kidnapping, and the State dismissed the charge of attaining the status of habitual felon. The trial court then entered judgment and commitment sentencing defendant to a term of 480 to 585 months for first-degree sexual offense and a term of 146 to 185 months for the consolidated offenses of robbery with a dangerous weapon, first-degree burglary, communicating threats, and assault with a deadly weapon. Both terms were to be served consecutively. Defendant appeals.

On appeal, defendant raises the following issues: Whether the trial court erred in (I & I.A.) allowing Corporal Clayton to testify to defendant's verbal statement made after his arrest; (II) failing to dismiss the charge of first-degree burglary on the basis of a fatally defective indictment; (III) failing to dismiss the charge of robbery with a dangerous weapon; and refusing to charge the jury with the lesser included offenses of (IV) common law robbery and (V) second-degree sex offense.

I

[1] Defendant first argues the trial court erred in allowing Corporal Clayton to testify that after defendant was arrested and informed of the charges against him, he stated, "Man, I'm a B and E guy." Defendant contends that it was error to allow the State to introduce evidence of defendant's bad character during its case-in-chief when the evidence served no purpose other than to show defendant's character and his disposition to commit criminal acts. We disagree.

We note that a warrant for defendant's arrest included the charge for first-degree burglary.

Common law burglary is defined as the breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein. *State v. Cooper*, 288 N.C. 496, 219 S.E. 2d 45 (1975). Burglary in the first degree occurs when the crime is committed while the dwelling house or sleeping apartment is actually occupied by any person. N.C.G.S. § 14-51 (1981).

State v. Williams, 314 N.C. 337, 355, 333 S.E.2d 708, 720 (1985).

During the State's case-in-chief, the prosecutor presented Durham police officer Corporal Clayton, who aided in arresting defendant. Corporal Clayton testified over objection that after his arrest, defendant was told of the charges against him and responded by stating, "Man, I'm a B and E guy." Under these circumstances, defendant's

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statement may be viewed as a statement against penal interest pursuant to N.C. Gen. Stat. § 8C-1, Rule 804(b)(3).²

However, even presuming it was error to admit defendant's statement to police in violation of the prohibition against the admission of "[e]vidence of a person's character or a trait of his character . . . for the purpose of proving that he acted in conformity therewith on a particular occasion[.]" N.C.R. Evid. 404(a), the admission that defendant was "a B and E guy" did not prejudice defendant and was not reversible error.

The jury heard Catherine's testimony recounting how she checked to make sure the windows and doors of her apartment were locked, how she awoke to find a man on top of her with a knife to her throat, and the near hour-and-a-half she spent in the presence of her assailant. Further, they heard Catherine identify defendant as her assailant; heard that based on fingerprint analysis defendant was a possible suspect; and that defendant's DNA could not be excluded from the mixture of fluids taken during Catherine's rape kit examination. Defendant has failed to show that the exclusion of his statement to police, that he was "a B and E guy," could have changed the result of his case. Accordingly, defendant's argument is overruled.

I.A.

Defendant further contends that the trial court's admission of Corporal Clayton's testimony amounted to plain error on the basis that it was substantially more prejudicial than probative in violation of our Rules of Evidence, Rule 403. However, as stated in I, *supra*, defendant has failed to establish that the admission of his statement to police, that he was "a B and E guy" was prejudicial. Therefore, such cannot amount to plain error. Accordingly, this argument is overruled.

II

[2] Defendant next argues that the indictment charging first-degree burglary was fatally defective and insufficient to support the trial court's imposition of a consecutive sentence. Defendant contends

2. N.C.G.S. § 8C-1, Rule 804(b)(3) (2009). "A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement."

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that the indictment and subsequent jury charge erroneously allowed the jury to convict defendant for first-degree burglary based on (A) an intent to commit a non-specific “unlawful sexual act” or “sexual offense” and (B) a theory of alternative underlying felonies: felony larceny; armed robbery; or “sexual offense.” We disagree.

Where an indictment “wholly fails to charge some offense . . . cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty[,]” the verdict of the jury is vulnerable to a motion to arrest judgment. *State v. Patterson*, 194 N.C. App. 608, 612, 671 S.E.2d 357, 360 (2009) (citation omitted); *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943) (citations omitted).

A

Defendant contends that the indictment for first-degree burglary was fatally defective because it asserted that defendant intended to commit “unlawful sexual acts” as the predicate felony.

Under North Carolina General Statutes, section 15A-924,

[a] criminal pleading must contain . . . [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant’s commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2009). In *State v. Worsley*, 336 N.C. 268, 443 S.E.2d 68 (1994), the defendant alleged that the indictment charging him with first-degree burglary was fatally defective because it failed to specify the felony he intended to commit when he broke into the victim’s apartment. *Id.* at 279, 443 S.E.2d at 73. Our Supreme Court held that the indictment satisfied the requirements of § 15A-924(a)(5).

As in [*State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985)], “the indictment here charges the offense . . . in a plain, intelligible, and explicit manner and contains sufficient allegations to enable the trial court to proceed to judgment and to bar a subsequent prosecution for the same offense.” *Freeman*, 314 N.C. at 436, 333 S.E.2d at 746. The indictment “also informs the defendant of the charge against him with sufficient certainty to enable him to pre-

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pare his defense.” *Id.* If the defendant in the case at bar was in fact “in need of further factual information,” he need only have moved for a bill of particulars pursuant to N.C.G.S. § 15A-925. *Freeman*, 314 N.C. at 436-37, 333 S.E.2d at 746.

Id. at 281, 443 S.E.2d at 74.

Here, the indictment’s stated felonious intent of “unlawful sexual acts” informs defendant of the charge against him with sufficient clarity to withstand dismissal. Defendant cites *State v. Cooper*, 288 N.C. 496, 219 S.E.2d 45 (1975), in support of his argument that the indictment is fatally defective; however, in *Worsley*, the Court specifically acknowledged *Cooper* and noted that it was decided prior to the enactment of § 15A9-24(a)(5). *Worsley*, 336 N.C. at 279, 443 S.E.2d at 73. Therefore, defendant’s argument is overruled.

B

Defendant also argues that the indictment and jury instruction allowed the jury to convict him on alternative theories of felonious intent: allowing for a non-unanimous verdict regarding the theory upon which the jury found defendant guilty.

In *State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982), our Supreme Court considered virtually the same argument as defendant raises in the instant case: whether the disjunctive use of “rape and/or first-degree sexual offense” in an indictment rendered it fatally defective.

[The] [d]efendant [Jordan] contends that the use of the disjunctive in describing the requisite intent for burglary created the possibility that less than all the jurors could agree which felony the defendant intended to commit although they might all agree that defendant did have the intent to commit one of the felonies and convict him of burglary.

Id. at 279, 287 S.E.2d at 831. The Court was not persuaded and overruled the argument. *Id.* For the reasons stated in *Jordan*, defendant’s argument is overruled.

III

[3] Next, defendant argues that the trial court erred in denying his motion to dismiss the charge of robbery with a dangerous weapon. Defendant contends the State “failed to offer sufficient substantial evidence that [defendant] took personal property from the victim by the use or threatened use of a knife.” We disagree.

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“Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted).

“Under N.C.G.S. § 14-87(a), robbery with a dangerous weapon is: ‘(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened.’” *State v. Olson*, 330 N.C. 557, 566, 411 S.E.2d 592, 597 (1992) (quoting *State v. Beaty*, 306 N.C. 491, 496, 293 S.E.2d 760, 764 (1982), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988)); see N.C.G.S. § 14-87 (1993). “‘Force or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense.’” *State v. Beaty*, 306 N.C. at 496, 293 S.E.2d at 764 (quoting *State v. Mull*, 224 N.C. 574, 576, 31 S.E.2d 764, 765 (1944)).

State v. Cummings, 346 N.C. 291, 325, 488 S.E.2d 550, 570 (1997).

Defendant cites *State v. Richardson*, 308 N.C. 470, 302 S.E.2d 799 (1983), *Powell*, 299 N.C. 95, 261 S.E.2d 114, and *State v. Dalton*, 122 N.C. App. 666, 471 S.E.2d 657 (1996), in support of his argument. However, we find these cases inapposite. In *Richardson*, our Supreme Court reversed the trial court’s denial of the defendant’s motion to dismiss the charge of robbery with a dangerous weapon. *Richardson*, 308 N.C. at 472, 302 S.E.2d at 801. The evidence indicated that the defendant attacked the victim with a club; the victim threw his duffel bag at the defendant with the hope of protecting himself and slowing his assailant down; but the victim never thought that the defendant wanted the bag or its contents. *Id.* at 474-

75, 302 at 802.

In *Powell*, the defendant had been convicted of first-degree murder, first-degree rape, and robbery with a dangerous weapon; however, in the light most favorable to the State, the evidence indicated that at the time the personal property was taken, the victim was no longer alive. As a result, there could be no inference that the defendant removed the items by use of a dangerous weapon. *Powell*, 299 N.C. at 102, 261 S.E.2d at 119. Our Supreme Court reversed the conviction for robbery with a dangerous weapon. *Id.*

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In *Dalton*, the defendant entered the residence of a woman who was asleep on a sofa. While the woman remained asleep, the defendant searched the residence and removed \$300.00 to \$400.00, jewelry, and other valuables. *Dalton*, 122 N.C. App. at 669, 471 S.E.2d at 659. The defendant then left the residence only to return. The woman awoke to find the defendant sitting on top of her, trying to remove her pants, and threatening her with a knife he found on the kitchen counter. *Id.* This Court reversed the defendant's conviction for robbery with a dangerous weapon because there was no evidence the victim was threatened with a dangerous weapon at the time the defendant removed the valuables from her home. *Id.* at 671-72, 471 S.E.2d at 661.

The facts in the instant case are clearly distinguishable. On 17 April 2008, Catherine awoke at approximately 4:40 a.m. to find defendant on top of her holding a knife to her throat. After struggling with him and cutting her palms as a result, she pleaded and negotiated with him for almost an hour and a half. During the confrontation, defendant acknowledged that he had already taken money from Catherine's purse. But, when defendant fled Catherine testified that he took a knife from her kitchen, that just before he left he took her sports bra, and that she never saw her purse again. These facts are sufficient to support a conclusion that defendant unlawfully took Catherine's property from her presence by the use or threatened use of a knife and thereby, Catherine's life was endangered. *See Cummings*, 346 N.C. at 325, 488 S.E.2d at 570. Accordingly, defendant's argument is overruled.

IV

[4] Next, defendant argues that the trial court erred in refusing to charge the jury on the lesser included offense of common law robbery. Defendant contends, as noted in Issue III, that because the evidence establishes Catherine's property was taken while she was asleep and no deadly weapon was used to facilitate the taking, the trial court erred in denying defendant's request for an instruction on the lesser included offense. We disagree.

A trial court must give instructions on all lesser-included offenses that are supported by the evidence, even in the absence of a special request for such an instruction; and the failure to so instruct constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense. *See State v. Montgomery*, 341 N.C. 553, 567, 461 S.E.2d 732, 739

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(1995); *State v. Whitaker*, 316 N.C. 515, 520, 342 S.E.2d 514, 518 (1986). The trial court may refrain from submitting the lesser offense to the jury only where the “evidence is clear and positive as to each element of the offense charged” and no evidence supports a lesser-included offense. [*State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985)].

State v. Lawrence, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000).

The critical difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened. *State v. Coats*, 301 N.C. 216, 270 S.E. 2d 422 (1980); *State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978). The use or threatened use of a dangerous weapon is not an essential element of common law robbery. *State v. Moore*, 279 N.C. 455, 183 S.E. 2d 546 (1971).

Peacock, 313 N.C. at 562-63, 330 S.E.2d at 195. All the evidence in the instant case indicates that defendant removed property from Catherine’s apartment after she was awake and while her life was being threatened by defendant’s use of a knife, a deadly weapon. As such, there was no evidence to support the instruction of a lesser included offense. Accordingly, defendant’s argument is overruled.

V

[5] Finally, defendant argues the trial court erred by denying his request to charge the jury on the lesser included offense of second-degree sexual offense. We disagree.

Under North Carolina General Statutes, section 14-27.4(a),

A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

...

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon

N.C. Gen. Stat. § 14-27.4(a)(2)(a.) (2009). Pertinent to this issue, second-degree sexual offense differs from first-degree sexual offense in

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that second-degree sexual offense lacks the element of the use of a deadly weapon. *See State v. Barnette*, 304 N.C. 447, 466, 284 S.E.2d 298, 309 (1981); *compare* N.C.G.S. § 14-27.4 and § 14-27.5 (2009).

Here, Catherine testified that when she jumped from the bed and attempted to get to her front door, defendant caught her by her hair, and using the knife, pressed her back onto the bed. There he performed oral sex on her, inserting his tongue into her vagina. On cross-examination, Catherine was asked where the knife was while defendant was performing oral sex on her. She responded, "It was in his possession." As there was no evidence to support the instruction of a lesser included offense, defendant's argument is overruled.

No error.

Judges HUNTER, Robert C., and McCULLOUGH concur.

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No. COA10-939

(Filed 21 June 2011)

1. Fraud— misrepresentation—justifiable reliance—sufficient allegation in complaint—sufficient factual support—motions for directed verdict and judgment notwithstanding verdict —properly denied

The trial court did not err in a negligent misrepresentation case by denying defendant's motions for directed verdict and judgment notwithstanding the verdict. The complaint sufficiently alleged justifiable reliance and there was factual support for the jury to infer that plaintiff justifiably relied on defendant's misrepresentations.

2. Unfair Trade Practices— in or affecting commerce—multiple companies—motions for directed verdict—judgment notwithstanding verdict—properly denied

The trial court did not err in an unfair and deceptive trade practices case by denying defendant's motions for directed verdict and judgment notwithstanding the verdict. Because there were

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multiple companies involved, including a North Carolina corporation, defendant's actions were "in or affecting commerce."

3. Appeal and Error— issue not addressed—invited error

Defendant's argument that the trial court erred by not submitting to the jury the issue of whether defendants' activities were egregious activities outside the scope of his employment was not addressed on appeal as any error was invited by defendant.

4. Jurisdiction— standing—negligent misrepresentation—unfair trade practices—no certificate of authority needed—personal jurisdiction over defendant existed

Plaintiff had standing to file a negligent misrepresentation and unfair trade practices lawsuit against defendant. Plaintiff was conducting business in interstate commerce and thus did not need a certificate of authority in North Carolina since personal jurisdiction existed over defendant because he was a resident of Mecklenburg County.

Appeal by Ung Chul Ahn from judgment entered 26 January 2010 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 January 2011.

Rayburn Copper & Durham, PA, by Ross R. Fulton, Daniel J. Finegan, and Nader S. Raja, for Plaintiff-appellee.

Baucom Claytor Benton Morgan & Wood, PA, by M. Heath Gilbert, Jr., for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Defendant Ung Chul Ahn appeals the judgment entered 26 January 2010 against him in the amount of \$1,022,041.00 for negligent misrepresentation and unfair or deceptive practices. For the reasons stated below, we affirm.

I. Factual and Procedural Background

On 10 July 2008, SongWooYarn Trading Company, Ltd. ("Songwooyarn") filed a Complaint against Sox Eleven, Inc. ("Sox Eleven") and Ung Chul Ahn ("Ahn") alleging, in part, breach of contract, negligent misrepresentation, and unfair or deceptive practices¹. Defendants Ahn and Sox Eleven timely filed an Answer denying these

1. The other allegations of the Complaint were either not submitted to the jury or not found by the jury and are not at issue in this appeal.

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allegations and a counterclaim, along with a Third-Party Complaint against Jae Cheol Song (“Song”) individually.² Defendants’ Answer included an affirmative defense that Plaintiff’s Complaint failed to state a claim under which relief can be granted.

On 4 November 2009, Defendant Ahn filed his Motion for Summary Judgment, which was denied. The trial began 14 December 2009. At trial, the evidence tended to show the following.

Songwooyarn is a South Korean company with its principal place of business in Seoul, South Korea. Songwooyarn sells socks and other spun yarns to wholesalers and distributors. Song is President and Chairman of the Board of Directors of Songwooyarn and owns more than ninety percent of its stock.

In 2002, Song and others formed Sox Eleven as a North Carolina corporation. Song served as President and Chairman of the Board of Directors of Sox Eleven and owned at least sixty percent of the stock of Sox Eleven. Sox Eleven was formed as an intermediary to sell socks to wholesalers in the United States, including a Tennessee company, Crescent Hosiery (“Crescent”).

Song hired Ahn to manage the daily affairs of Sox Eleven at its office in Charlotte. Ahn acted as translator in communications between Songwooyarn and Crescent, as no one at Songwooyarn, including Song, could read, write, or speak fluent English.

Sox Eleven arranged for Crescent purchase orders to be forwarded to Songwooyarn. Based on these orders, Songwooyarn shipped the socks directly to Crescent and billed Sox Eleven. Sox Eleven then billed Crescent and received payment from Crescent. When paid, Sox Eleven forwarded the invoiced amount, minus shipping and taxes, to Songwooyarn.

Songwooyarn wired a monthly payment to Sox Eleven for Ahn’s salary and operating expenses, including utilities. The initial payments were \$5000 per month, which was later increased to \$7000. Song testified that Ahn’s salary was to be taken out of these payments, with the remainder to be used for Sox Eleven expenses.

Song testified Ahn’s gross salary was \$3000 per month initially and was later raised to \$3500. Although Sox Eleven had its own bank

2. With Defendant Ahn’s consent, the Third-Party Complaint against Song was dismissed. Defendant Ahn’s counterclaim against Songwooyarn was submitted to the jury, but not found by the jury. Neither of these is at issue in this appeal.

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accounts, which had been jointly established by Ahn and Song, the payments from Songwooyarn were not wired into this account, but instead, at Ahn's request, were wired into an account held by Ahn's mother. In addition to his monthly salary, Ahn received commissions from Songwooyarn that were not a part of the monthly payments to Sox Eleven.

In Spring 2007, Songwooyarn did not receive payment from Sox Eleven for a shipment of socks sent to Crescent. In May 2007, Song visited the United States to review his business affairs. When Song attempted to inspect Sox Eleven's bank account, the bank did not allow him access, because Ahn had unilaterally removed Song's name from the Sox Eleven bank account.

Subsequently, Song fired Ahn verbally and confirmed the termination in an email on 4 June 2007. Songwooyarn never received payment in full for the Spring 2007 shipment of socks. In June 2007, Song filed Articles of Dissolution for Sox Eleven.

At the close of Plaintiff's evidence, Defendants moved for directed verdict, which was denied. Ahn testified that the entire payment from Songwooyarn to Sox Eleven was his salary. Ahn also testified that he removed Song's name from the Sox Eleven bank account after receiving tax advice and that he had explained this to Song. Defendants renewed their motion for directed verdict at the close of all the evidence. These motions were denied.

The judge instructed the jury on breach of contract, negligent misrepresentation, and unfair or deceptive practices. The jury found that Sox Eleven breached its contract for the sale and purchase of manufactured socks from Songwooyarn by nonperformance in the amount of \$164,318.32. That judgment has not been appealed. The jury found that Ahn engaged in negligent misrepresentation and awarded damages of \$1.00.

In addition to the jury instructions, the judge also submitted a series of special verdict interrogatories on unfair or deceptive practices to the jury. The questions and the jury's responses are as follows:

12. Was the defendant Kevin Ahn an independent contractor doing business with the Plaintiff or was the defendant Kevin Ahn an employee of the Plaintiff? (You will answer this issue no matter what answers have been given to previous issues.)

Answer: [Jury wrote:] Employee

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13. “Did the defendant do at least one of the following:

The defendant Ahn deceived the plaintiff by representing that payment received from Crescent would be paid by Sox Eleven to the Plaintiff.

Answer: [Jury wrote:]—

The defendant Ahn deceived the plaintiff about the use of the funds wire transferred from the plaintiff to defendant Ahn.

Answer: [Jury wrote:] Yes

14. “Was the defendant Kevin Ahn’s conduct in commerce or did it affect commerce?” (You will answer this issue only if you have answered either or both of the parts of Issue 13 “Yes” in favor of the Plaintiff.)

Answer: [Jury wrote:] Yes

15. “Was the defendant Ahn’s conduct a proximate cause of the injury to the plaintiff’s business?” (You will answer this issue only if you have answered Issue 14 “Yes,” in favor of the Plaintiff.)

Answer: [Jury wrote:] Yes

16. “In what amount has the business of the plaintiff been injured?” (You will answer this issue only if you have answered Issue 15 “Yes,” in favor of the Plaintiff.)

Answer: [Jury wrote:] \$340,680.00

Based upon these special interrogatories, the trial court trebled the damages found by the jury for unfair or deceptive practices to \$1,022,040.00 and ordered Ahn to pay \$135,981.25 in attorney’s fees. Defendants moved for judgment notwithstanding the verdict, which was denied.

Defendant Ahn appeals the denials of his motions for summary judgment, directed verdict, and judgment notwithstanding the verdict on negligent misrepresentation and unfair or deceptive practices.³ Ahn also appeals the trial court’s conclusion of law that his acts were unfair or deceptive.

3. We do not address Defendant Ahn’s argument as to the trial court’s denial of Defendants’ Motion for Summary Judgment, as “[i]mproper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury.” *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985).

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II. Standards of Review

Motions for directed verdict and judgment notwithstanding the verdict are examined to determine whether the evidence is sufficient for the case to be submitted to the jury. *See Nelson v. Novant Health Triad Region, L.L.C.*, 159 N.C. App. 440, 442, 583 S.E.2d 415, 417 (2003) (“The standard of review for a directed verdict is essentially the same as that for summary judgment. . . . whether there is sufficient evidence to sustain a jury verdict in the non-moving party’s favor, or to present a question for the jury.”); *Whitaker v. Akers*, 137 N.C. App. 274, 277, 527 S.E.2d 721, 724 (2000) (“On appeal our standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict; that is, whether the evidence was sufficient to go to the jury.” (citation omitted)). We review the trial court’s denial of these motions *de novo*. *Herring v. Food Lion, LLC*, 175 N.C. App. 22, 26, 623 S.E.2d 281, 284 (2005).

We review the trial court’s conclusion of law on unfair or deceptive practices *de novo*. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

III. Argument**A. Negligent Misrepresentation**

[1] Defendant contends Plaintiff’s claim for negligent misrepresentation lacks both an allegation in the Complaint and evidence at trial of essential facts. First, he contends that the Complaint lacks allegations that Plaintiff was denied the opportunity to investigate Ahn’s misrepresentation or that such misrepresentation could not have been discovered by reasonable diligence. Further, Defendant argues Plaintiff lacked evidentiary support to meet its burden of showing reasonable reliance at trial.

“The tort of negligent misrepresentation occurs when a party [1] justifiably relies [2] to his detriment [3] on information prepared without reasonable care [4] by one who owed the relying party a duty of care.” *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988). If the plaintiff “ ‘could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence.’ ” *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 59, 554 S.E.2d 840, 846 (2001) (quoting *Hudson-Cole Development Corp. v. Beemer*, 132 N.C. App. 341, 346, 511 S.E.2d 309, 313 (1999)).

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Here, the evidence supported either an employer-employee relationship (which the jury found) or an agency relationship. In either event, the relationship is a fiduciary relationship where special trust is placed in one. Even absent such a relationship, “[t]he law does not require a prudent man to deal with everyone as a rascal.” *Johnson v. Owens*, 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965) (quoting *Gray v. Jenkins*, 151 N.C. 80, 80, 65 S.E. 644, 645 (1909)). A plaintiff is not barred from recovery because he had a lesser opportunity to investigate representations made by someone with superior knowledge. See *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 438, 617 S.E.2d 664, 671 (2005).

The Complaint alleges, “Because the officers of SongWooYarn were not fluent in English, SongWooYarn reposed special trust in Ahn and relied on his communications on their behalf with the Third Party.” Songwooyarn could not discover a misrepresentation, as the only person Songwooyarn could communicate with who had the information needed was also the party making the misrepresentation. Following the general rule that “the complaint is to be liberally construed,” we find the Complaint sufficiently alleged justifiable reliance. *Meyer v. Walls*, 347 N.C. 97, 111-12, 489 S.E.2d 880, 888 (1997) (“[T]he trial court should not dismiss the complaint unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief.” (citations and internal quotation marks omitted)).

The question of whether reliance was justifiable is a jury question, “ ‘unless the facts are so clear as to permit only one conclusion.’ ” *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 225, 513 S.E.2d 320, 327 (1999) (quoting Restatement (Second) of Torts § 552 cmt. e).

Songwooyarn did not have the opportunity to investigate Ahn’s representations until Song traveled to N.C., and when Song discovered that he did not have access to the bank account, he fired Ahn. When Song became suspicious of Ahn’s activities, he did not know who to ask for more information. Song attempted to access the Sox Eleven bank account, but could not, since Ahn had removed his name from the account. Ahn now claims he would have produced the books and records for Sox Eleven if Songwooyarn had requested them. This claim is disingenuous in light of his actions. See *Kindred of N. Carolina, Inc. v. Bond*, 160 N.C. App. 90, 99, 584 S.E.2d 846, 852 (2003). Viewing the evidence in the light most favorable to Plaintiff,

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we find factual support for the jury to infer that Songwooyarn justifiably relied on Defendant Ahn's misrepresentations.

B. Unfair and Deceptive Practices**1. "In or Affecting Commerce"**

[2] Defendant Ahn argues that his activities were not "in or affecting commerce," and as such were not unfair or deceptive practices under the statute.

Whether an act is an unfair or deceptive practice is a question of law for the court. *Gray v. N. Carolina Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000). The jury finds the facts of the case, and the trial court, based on those findings, determines as a matter of law whether there were unfair or deceptive practices in or affecting commerce. *Id.* We review *de novo* the trial court's conclusion of law that Defendant Ahn engaged in unfair or deceptive practices in or affecting commerce.⁴

Section 75-1.1 of our General Statutes prohibits "unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1(a) (2009). "Commerce" is defined as including "all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b).

Our Supreme Court has found unfair or deceptive acts even where an employer-employee relationship exists if the activities of the defendant are in or affecting commerce. *See Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999). In *Sara Lee Corp.*, our Supreme Court found that the defendant-employee committed an unfair or deceptive act against the plaintiff-employer when he engaged in self-dealing by having the plaintiff purchase goods at a higher price from companies in which the defendant had an interest. *Id.* at 34, 519 S.E.2d at 312. In *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 710-11 (2001), our Supreme Court clarified that *Sara Lee Corp.* allowed for recovery where the employee's actions "(1) involved egregious activities outside the scope of his assigned employment

4. While the issue of whether the defendant's acts were in or affecting commerce, a question of law, was submitted to the jury in this case, this was not inappropriate. *Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 425, 344 S.E.2d 297, 300 (1986) ("The only such 'issue' answered by the jury was whether defendant's misrepresentations to plaintiff were conduct in commerce or affecting commerce, which was appropriate. The jury's answer to this issue in plaintiff's favor was unquestionably supported by the evidence.").

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duties, and (2) otherwise qualified as unfair or deceptive practices that were in or affecting commerce.”

We agree with Songwooyarn that in the present case, as in *Sara Lee*, Defendant Ahn engaged in self-dealing, and his status as an employee of Songwooyarn does not bar a claim against him for unfair or deceptive acts or practices. Although Songwooyarn and Sox Eleven had the same majority shareholder, they were distinct corporate entities. Songwooyarn is a Korean company located in South Korea. Sox Eleven was a North Carolina corporation. Sox Eleven was not organized as a subsidiary of Songwooyarn. Defendant Ahn received money from Songwooyarn that was to be used not only for his salary, but for the operating expenses of Sox Eleven. By misappropriating those funds, Defendant Ahn interrupted the commercial relationship between Songwooyarn and Sox Eleven. Because there are multiple companies, including a North Carolina corporation, involved, we conclude that Ahn’s actions were “in or affecting commerce” and constituted unfair or deceptive acts or practices.

2. Egregious Activities Outside the Scope of Employment

[3] Defendant Ahn next argues that the trial court erred by not submitting to the jury the issue of whether Defendant Ahn’s activities were egregious activities outside the scope of his employment. The trial court instructed the jury to determine whether Defendant Ahn was an employee of Songwooyarn, and then the judge determined whether Ahn’s acts were egregious and outside the scope of employment. Defendant may not raise this issue on appeal, as any error would be an invited error.

Defendant argued at trial that whether Defendant Ahn’s actions were outside the scope of his employment was a question of law for the court. The trial judge stated:

Well, for me a question is is it a matter of law for the Court to determine as to whether or not the employee’s activities were outside the scope of its assigned employment duties or is that for the jury to determine. . . . So in order to decide whether or not this one meets the Sara Lee test is that a matter of law for the Court or is that a matter for the jury?

In response to this question, Defendant answered, “I would argue it’s a matter of law for the Court.” Plaintiff argued that it was an issue for the jury, and Defendant again argued that it was a matter of law for the court. Although the parties jointly offered a special interroga-

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tory which would have submitted this issue to the jury, when that interrogatory was turned down by the trial court, Defendant said, “That sounds a lot better to me.”

“A party may not complain of action which he induced.” *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994). Defendant repeatedly argued at trial for the result which he now assigns as error.

C. Standing—Business Transaction and Choice of Law

[4] Defendant Ahn also argues that Songwooyarn did not have standing because (1) it was not registered to transact business in North Carolina and (2) there was no personal jurisdiction under section 17-5.4 of our General Statutes. We disagree.

Section 55-15-02 prohibits any foreign corporation transacting business in North Carolina from filing a lawsuit unless that foreign corporation has obtained a certificate of authority prior to trial. N.C. Gen. Stat. § 55-15-02(a) (2009). Defendant Ahn asserts that this provision precludes Songwooyarn’s claims, as Songwooyarn did not have a certificate of authority.

Section 55-15-01(b) provides a list of activities that are not considered “transacting business,” including “[s]oliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this State before becoming binding contracts” and “[t]ransacting business in interstate commerce.” N.C. Gen. Stat. § 55-15-01(b)(5)&(8) (2009). Although Songwooyarn contracted with Sox Eleven, a North Carolina corporation, all of its contracts were dependent on acceptance “without this State” by Crescent in Tennessee. Songwooyarn was conducting business in interstate commerce and thus did not need a certificate of authority in North Carolina.

Defendant Ahn also argues there was no personal jurisdiction because section 1-75.4(4) does not apply. We do not address this issue, as personal jurisdiction exists over Defendant Ahn because he was a resident of Mecklenburg County. *See* N.C. Gen. Stat. § 1-75.4(1) (2009) (granting personal jurisdiction “[i]n any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party . . . [i]s a natural person domiciled within this State”). There is personal jurisdiction over Ahn, a resident of this State.

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IV. Conclusion

We find no error in the trial court's rulings on negligent misrepresentation and unfair or deceptive practices, and conclude Defendant invited any alleged error regarding whether the jury should have decided if Defendant's actions were egregious and outside the scope of his employment.

Affirmed.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA v. JERRY LEE JONES

STATE OF NORTH CAROLINA v. TINA JONES

No. COA10-1202

(Filed 21 June 2011)

**1. Schools and Education— Compulsory Attendance Law—
motion to dismiss—properly denied**

The trial court did not err in a case involving the violation of the Compulsory Attendance Law by denying defendants' motions to dismiss the charge for insufficient evidence. The State presented substantial evidence of each element of the offense, and therefore, the court properly submitted the charge against each defendant to the jury.

**2. Schools and Education— Compulsory Attendance Law—
jury instruction—lack of good faith—not an element—not
error**

The trial court did not commit error or plain error in its jury instructions in a case involving the violation of the Compulsory Attendance Law. There is no element requiring proof of lack of a good faith effort.

Appeal by defendants from judgments entered 26 May 2011 by Judge Laura J. Bridges in Buncombe County Superior Court. Heard in the Court of Appeals 13 April 2011.

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Attorney General Roy Cooper, by Assistant-Attorney General Brian R. Berman, for the State.

Guy J. Loranger for defendant-appellant Jerry Lee Jones.

Peter Wood for defendant-appellant Tina Jones.

HUNTER, Robert C., Judge.

Defendants Jerry Lee Jones and Tina Jones appeal their convictions for failing to cause their daughter “P.J.” to attend school, in violation of North Carolina’s Compulsory Attendance Law (“CAL”), N.C. Gen. Stat. §§ 115C-378 to 383 (2009).¹ Defendants primarily contend that the trial court erred in denying their respective motions to dismiss the charge for insufficient evidence. We conclude, however, that the State presented substantial evidence of each element of the offense, and, therefore, the court properly submitted the charge against each defendant to the jury. Accordingly, we find no error.

Facts

The State’s evidence at trial tended to establish the following facts: Mr. and Mrs. Jones are the biological parents of P.J. At the start of the 2008-09 school year, P.J. was 14 years old and entered the 9th grade at North Buncombe High School in the Buncombe County school system. After her family moved, P.J. transferred in September 2008 to T.C. Roberson High School, which is also in the Buncombe County school system.

On 17 November 2008, Rob Weinkle, T.C. Roberson’s principal, sent defendants a letter notifying them that the school’s attendance records showed that P.J. had accumulated three or more unexcused absences (“three-day letter”). The letter also advised defendants that they were “responsible for [their] child’s school attendance” under CAL, that they may be “prosecuted in a criminal action if [their] child’s unlawful absences continue[d],” and that they “should contact [their] child’s counselor or administrator . . . to discuss this matter.” Mr. Weinkle mailed an identical letter on 2 February 2009, notifying defendants that P.J. had accumulated six or more unexcused absences (“six-day letter”).

On 3 February 2009, Mrs. Jones took P.J. to Access Family Services (“AFS”), a community support agency, for a clinical assess-

1. The juvenile’s initials are used throughout this opinion to protect the juvenile’s privacy.

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ment. The assessment, performed by J.C. Cagle, diagnosed P.J. with “[c]onduct disorder with adolescent onset and intermittent explosive disorder.” Lori Siemens, an AFS case manager, and Steven Luke, a mental health counselor, were assigned to work with P.J. and her family. Ms. Siemens was permitted to accompany P.J. to school on several occasions in order to observe her behavior and to help her “learn how to deal” with her anger and anxiety issues. Mr. Luke also discussed with a school administrator implementing a plan to “help [P.J.] cope in school[.]”

On 25 February 2009, after P.J. had accumulated 10 unexcused absences, Mr. Weinkle sent defendants a third letter informing them that they were in violation of CAL, that they could be prosecuted for the violation, and that a conference had been scheduled for 10 March 2009 to address P.J.’s lack of attendance (“10-day conference”). The 10-day conference was held on 13 March 2009 at T.C. Roberson; Mr. Jones, Mrs. Jones, P.J., and Ms. Siemens attended the conference as well as assistant principal Janet Greenhoe, drop-out specialist Jill Castelloe, at-risk counselor Anna Hubbell, and 9th grade counselor Natalie Anderson. During the conference, school administrators agreed to develop a new schedule for P.J., make accommodations for materials to be provided in her classrooms, set up a “time-out plan” for her, and recommend P.J. as a candidate for the “PASS program.” Ultimately, P.J. accumulated 21 unexcused absences during the 2008-09 school year.

After the 10-day conference, defendants were charged with failure to cause attendance based on complaints filed by Mr. Weinkle on 18 March 2009. Defendants were initially tried and convicted in Buncombe County District Court. On appeal to Buncombe County Superior Court, defendants’ cases were consolidated for a trial de novo. Defendants moved to dismiss their respective charges at trial and the court denied the motions. The jury found defendants guilty of violating the school attendance law and the trial court sentenced defendants each to 45 days in the Buncombe County jail, suspended the sentences, and imposed 18 months of supervised probation as well as a \$500.00 fine. Both defendants timely appeal to this Court.

I

[1] Defendants first contend that the trial court erred in denying their motions to dismiss the charge for insufficient evidence.² A defend-

2. As Mr. and Mrs. Jones present identical arguments on appeal, we address them together.

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ant's motion to dismiss should be denied if there is substantial evidence: (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of the offense. *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "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, 7879, 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 presented constitutes substantial evidence is a question of law for the court[.]" *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991), "which this Court reviews *de novo*," *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007).

Defendants were charged with failing to cause attendance under N.C. Gen. Stat. § 115C-378, which provides in pertinent part:

(e) The principal or the principal's designee shall notify the parent, guardian, or custodian of his or her child's excessive absences after the child has accumulated three unexcused absences in a school year. After not more than six unexcused absences, the principal or the principal's designee shall notify the parent, guardian, or custodian by mail that he or she may be in violation of the Compulsory Attendance Law and may be prosecuted if the absences cannot be justified under the established attendance policies of the State and local boards of education. Once the parents are notified, the school attendance counselor shall work with the child and the child's family to analyze the causes of the absences and determine steps, including adjustment of the school program or obtaining supplemental services, to eliminate the problem. The attendance counselor may request that a law enforcement officer accompany him or her if the attendance counselor believes that a home visit is necessary.

(f) After 10 accumulated unexcused absences in a school year, the principal or the principal's designee shall review any report or investigation prepared under G.S. 115C-381 and shall confer with the student and the student's parent, guardian, or custodian, if possible, to determine whether the parent, guardian, or custodian has received notification pursuant to this section and made a

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good faith effort to comply with the law. If the principal or the principal's designee determines that the parent, guardian, or custodian has not made a good faith effort to comply with the law, the principal shall notify the district attorney and the director of social services of the county where the child resides. If the principal or the principal's designee determines that the parent, guardian, or custodian has made a good faith effort to comply with the law, the principal may file a complaint with the juvenile court counselor pursuant to Chapter 7B of the General Statutes that the child is habitually absent from school without a valid excuse. Upon receiving notification by the principal or the principal's designee, the director of social services shall determine whether to undertake an investigation under G.S. 7B-302.

(g) Documentation that demonstrates that the parents, guardian, or custodian were notified and that the child has accumulated 10 absences which cannot be justified under the established attendance policies of the local board shall constitute prima facie evidence that the child's parent, guardian, or custodian is responsible for the absences.

N.C. Gen. Stat. § 115C-378(e)-(g).

This Court has held that "the procedures set forth in N.C. Gen. Stat. § 115C-378 requiring that the schools take certain steps prior to causing a warrant to be issued" establish the six "elements of the offense." *State v. Frady*, 195 N.C. App. 766, 769, 673 S.E.2d 751, 753 (2009). Thus, the elements of failure to cause attendance are: (1) that the defendant was a parent, guardian, or custodian of a school-age child; (2) that the child was enrolled in a North Carolina public school or an approved non-public school during the specified school year; (3) that the school's principal or the principal's designee notified the defendant of the child's absences from school after the child accumulated three unexcused absences during the specified school year; (4) that after not more than six unexcused absences, the defendant was notified by mail that he or she may be in violation of CAL and that he or she may be prosecuted if the absences cannot be justified under established school board policies; (5) that after the defendant has been notified, the school attendance counselor worked with or attempted to work with the child and the defendant to analyze the causes of the absences and determine steps to eliminate the problem; and (6) that during the specified school year, the child accumulated at least 10 unexcused absences, that the defendant was notified of the

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10 unexcused absences, and that the 10 unexcused absences cannot be justified under established school board policies. N.C. Gen. Stat. § 115C-378(e)-(f); *Fraday*, 195 N.C. App. at 768-69, 673 S.E.2d at 752-53.

Defendants argue that the State failed to present sufficient evidence of the fourth and fifth elements. With respect to the fourth element, defendants contend that P.J.'s school did not comply with N.C. Gen. Stat. § 115C-378(e)'s second notice requirement as "[t]he State's evidence showed that the school did not send the 'six-day letter' to P.J.'s home until after the child had already accumulated eight unexcused absences." The State argues that N.C. Gen. Stat. § 115C-378(e)'s notification-by-mail requirement applies only to notice of the parent's possible violation of and potential prosecution under CAL, not to notification of the child's sixth unexcused absence. We agree with the State's position.

The plain language of the statute provides in pertinent part: "After not more than six unexcused absences, the principal or the principal's designee shall notify the parent, guardian, or custodian by mail that *he or she may be in violation of the Compulsory Attendance Law and may be prosecuted if the absences cannot be justified* under the established attendance policies of the State and local boards of education." N.C. Gen. Stat. § 115C-378(e) (emphasis added). This provision does not mandate that the school provide written notice by mail of the child's sixth unexcused absence—it only requires the school to notify parents by mail on or before the accrual of their child's sixth unexcused absence that the parents may be in violation of CAL and may be prosecuted if the absences cannot be justified under established school board policies. The clear and unambiguous language of the statute does not support defendants' argument. *See In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978) ("When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.").

At trial, the trial court admitted the "three-day letter" from P.J.'s school, dated 17 November 2008, which states in pertinent part:

You are responsible for your child's school attendance. Under Part I of the North Carolina Compulsory Attendance Law (G.S. 115C-378) you may be prosecuted in a criminal action if your child's unlawful absences continue. The maximum penalty provided by this statute [sic] upon conviction may be a fine, imprisonment, or both, at the discretion of the Judge (G.S. 115C-378).

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Ms. Greenhoe, an assistant principal at T.C. Roberson, testified that the three-day letter was “generate[d]” on 17 November 2008, when P.J. accumulated her third unexcused absence, and mailed to defendants’ home. P.J.’s attendance summary, which also was admitted at trial, indicates that she accumulated her sixth unexcused absence on 15 December 2008—roughly a month after the three-day letter was mailed to defendants. This evidence, viewed in the light most favorable to the State, is sufficient to permit a reasonable inference that defendants received notification by mail through the 17 November 2008 three-day letter that they were in violation of CAL and could be prosecuted for the violation prior to P.J.’s accumulating her sixth unexcused absence on 15 December 2009. *See Frady*, 195 N.C. App. at 768-69, 673 S.E.2d at 753 (approving trial court’s jury instructions on elements of failure to cause attendance where instructions on fourth element required State to prove “that after not more than six unexcused absences, the defendant was further notified that she may be in violation of the North Carolina compulsory school attendance law.”).

In arguing that the State failed to present sufficient evidence to establish the fifth element, defendants claim that “the State’s evidence showed that the 10-day conference was . . . the first time that the school had participated in a dialogue with [defendants] about P.J.’s absences and made any attempt to eliminate the problem.” Defendants maintain that N.C. Gen. Stat. § 115C-378(e) and (f) require the State to show that the school worked with the child and the parents to analyze the causes of the child’s absences and determined steps to eliminate the problem *prior* to the 10-day conference.

N.C. Gen. Stat. § 115C-378(e) provides that the school attendance counselor, “[o]nce the parents are notified” that they may be prosecuted for violating CAL, “shall work with the child and the child’s family to analyze the causes of the absences and determine steps, including adjustment of the school program or obtaining supplemental services, to eliminate the problem.” N.C. Gen. Stat. § 115C-378(f), in turn, provides that after the child has accumulated 10 unexcused absences, the principal is required to review any reports or investigations prepared by the school’s social worker regarding the lack of attendance and is required to “confer with the student and the student’s parent, guardian, or custodian, if possible, to determine whether the parent, guardian, or custodian has received notification pursuant to this section and made a good faith effort to comply with the law.” Read together, N.C. Gen. Stat. § 115C-378(e) and (f) establish that the school is required to work with the child and the parents

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to eliminate the causes of the child's absences prior to the school's determination, based on any reports by the school's social worker and the conference with the child and the parents, as to whether the parents have made a good faith effort to comply with CAL. *See generally State v. White*, 180 Wis. 2d 203, 218, 509 N.W.2d 434, 439 (Wis. Ct. App. 1993) ("Before the person in control can be prosecuted [for violating compulsory attendance laws], there must be notice to the person in control [of the student], an opportunity for a meeting to resolve the problem, and other possible avenues leading to resolution.").

Viewed in the light most favorable to the State, the evidence at trial tends to show that P.J.'s school mailed to defendants a three-day letter on 17 November 2008 and a six-day letter on 2 February 2009, notifying defendants that they "should contact [P.J.]'s counselor or administrator . . . to discuss this matter" and that the school "would like to work with [them] to resolve this problem." The evidence also shows that the school allowed Ms. Siemens to accompany P.J. to class on multiple occasions for observation and treatment purposes. In addition, Ms. Greenhoe testified that school administrators, including the school's attendance counselor, called defendants on a "regular basis" to discuss P.J.'s attendance problems, but that they were not "getting the communication from [P.J.'s] parents to let [them] know what was going on . . ." Ms. Greenhoe also could not recall defendants ever calling her to explain "why [P.J.] wasn't coming to school[.]" Moreover, Mr. Luke, with AFS, testified that prior to the 10-day conference he talked with Mr. Morris, the assistant principal at T.C. Roberson assigned to work with P.J.'s grade level, and "recommend[ed] to the school" certain "accommodations" that would help P.J. "cope in th[e] classroom environment[.]" This evidence is sufficient to permit a reasonable jury to conclude that "after the [d]efendant[s] w[ere] notified, the school attendance counselor worked with or attempted to work with [P.J.] and the [d]efendant[s] to analyze causes of absences and determine steps to eliminate the problem" prior to the 10-day conference. *Fraday*, 195 N.C. App. at 768-69, 673 S.E.2d at 753. The trial court, therefore, properly denied defendants' respective motions to dismiss.

II

[2] Defendants' only other argument on appeal is that the trial court erred "by failing to instruct the jury that it needed to determine whether [defendants] had made a 'good faith effort' to comply with the compulsory school attendance law . . ." Defendants contend that because they did not request that the trial court's instructions include

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a “good faith effort element,” the court’s instructions regarding the elements of the offense should be reviewed for plain error. As the State points out, however, defendants submitted a proposed instruction on the elements of the offense based on *Fraday* and the trial court gave an instruction to the jury that is virtually identical to the one submitted by defendants. It is well established that a defendant who “causes” or “joins in causing” the trial court to “commit error is not in a position to repudiate his action and assign it as ground for a new trial.” *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971); N.C. Gen. Stat. § 15A-1443(c) (2009). Under the doctrine of invited error, “a party cannot complain of a charge given at his request, or which is in substance the same as one asked by him” *Sumner v. Sumner*, 227 N.C. 610, 613, 44 S.E.2d 40, 41 (1947) (internal citations omitted); see *State v. Cook*, 263 N.C. 730, 735, 140 S.E.2d 305, 310 (1965) (holding defendant could not complain on appeal that instruction was “inept or inadequate” as “it was in substance the language which defendant incorporated in his request for instructions to the jury”). Moreover, “a defendant who invites error . . . waive[s] his right to all appellate review concerning the invited error, including plain error review.” *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), *disc. review denied*, 355 N.C. 216, 560 S.E.2d 141-42 (2002).

In any event, this Court, in construing the prior version of CAL, N.C. Gen. Stat. § 115-166 (repealed 1981), held that “willfulness is not contained in G.S. 115-166 as an element of the offense, and we decline to engraft such an element on the statute[,]” noting that “[f]ew convictions, if any, could be obtained . . . if parents could merely assert justification for noncompliance in order to avoid criminal liability.” *State v. Vietto*, 38 N.C. App. 99, 102, 247 S.E.2d 298, 300 (1978), *rev’d on other grounds*, 297 N.C. 8, 252 S.E.2d 732 (1979); *accord State v. Chavis*, 45 N.C. App. 438, 443, 263 S.E.2d 356, 359 (“The offense defined by G.S. 115-166 clearly does not require any specific intent, and . . . willfulness is not an element of the offense.”), *disc. review denied*, 300 N.C. 377, 267 S.E.2d 679, *cert. denied*, 449 U.S. 1035, 66 L. Ed. 2d 496 (1980). As there is no element requiring proof of lack of a good faith effort to comply with CAL, the trial court did not commit error, much less plain error, by not instructing the jury on such an element.

No Error.

Judges BRYANT and McCULLOUGH concur.

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STATE OF NORTH CAROLINA v. TONY ALLEN HERRIN

No. COA10-1446

(Filed 21 June 2011)

1. Appeal and Error— preservation of issues—failure to object to instruction—failure to allege plain error

Where defendant in a prosecution for felonious malicious use of an explosive or incendiary device or material did not object at trial to the instruction that “gasoline is an incendiary material” or allege plain error, defendant failed to properly preserve the issue for appeal.

2. Judges— outburst of laughter—ill-advised—not prejudicial

The trial court did not commit prejudicial error in a felonious malicious use of an explosive or incendiary device or material case when the judge laughed in open court and in the presence of the jury upon hearing a witness’s testimony. Although the judge’s outburst may have been ill-advised, any resulting error was harmless and did not prejudice defendant so as to entitle him to a new trial.

3. Appeal and Error— appealability—issue not ripe

The trial court exceeded its statutory authority in a felonious malicious use of an explosive or incendiary device or material case by mandating that a later court must enter any subsequent sentence as consecutive only, rather than concurrent, if such a sentence was entered while defendant was still serving his sentence in the present case. However, because this issue was not a question ripe for review, the judgment was left undisturbed.

Appeal by defendant from judgment entered 20 May 2010 by Judge Eric L. Levinson in Gaston County Superior Court. Heard in the Court of Appeals 25 April 2011.

Roy Cooper, Attorney General, by Barry H. Bloch, Assistant Attorney General, for the State.

Michael E. Casterline, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Tony Allen Herrin appeals from a judgment entered upon a jury verdict finding him guilty of felonious malicious use of an

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explosive or incendiary device or material in violation of N.C.G.S. § 14-49(a).

The evidence presented at trial tended to show that, in the early evening hours of 19 July 2009, defendant was visiting with some of the other residents in his mobile home community in Gastonia, North Carolina, when Julie Davenport rode towards the group on her child-sized bicycle. Mrs. Davenport and her husband, Daniel Davenport, lived next-door to defendant in the mobile home community, and had been defendant's neighbors since he moved into the community three years prior. According to defendant, he had a good relationship with the Davenports, and testified that, earlier that day, at Mr. Davenport's request, defendant did some brake repair work on Mr. Davenport's vehicle, and then "went halfers [sic]" with Mr. Davenport on a "crack rock."

As Mrs. Davenport peddled her small bicycle toward the gathering of neighbors, defendant approached Mrs. Davenport, grabbed the bicycle, pulled it out from under her, and began "playing tug of war with [her] bicycle." Although defendant said he and Mrs. Davenport were "just pulling, playing around," as he claimed they did every day, Mrs. Davenport suggested that defendant was not being playful and that he "was cussing all the cuss words" at her as he tugged on her bicycle. When Mr. Davenport, who was outside of his mobile home at the time, saw this interaction between his wife and defendant, Mr. Davenport "started in that direction to assist [his] wife, because [he] knew she was in trouble." The struggle between defendant and Mrs. Davenport continued and, according to Mr. Davenport, as defendant tugged on the bicycle, he "kept dragging [Mrs. Davenport] towards the creek," which ran through a ditch that was in close proximity to their homes, until Mrs. Davenport "couldn't hold [her] strength anymore and [she] had to let [the bicycle] go." When Mrs. Davenport let go of the bicycle, defendant "fell back into the creek with the bicycle on top of him, and he hit a stump on this side of his head and made his head bleed." Defendant then emerged from the creek and climbed out of the ditch. By this time, Mr. Davenport had made his way over to defendant. Mrs. Davenport then took her bicycle and returned home. Although there is conflicting testimony about the exchange that followed between defendant and Mr. Davenport, the testifying witnesses appear to agree that, at some point during the exchange, Mr. Davenport put one or both of his hands around defendant's neck and, in response, defendant punched Mr. Davenport in the jaw. Mr. Davenport then left defendant and returned home.

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The Davenports testified that, shortly thereafter, they looked outside and saw defendant swinging a flatbladed shovel at a neighbor's dog and at the Davenports' cats in the yard between their home and defendant's home. Believing that defendant was trying to kill their cats, Mr. Davenport went outside and grabbed his shovel to confront defendant and Mrs. Davenport grabbed a steel or metal-tined rake and followed behind her husband. Although defendant and his witnesses testified that the Davenports were the first to arm themselves with yard tools before defendant approached them with his shovel in hand, all parties agree that, when the three met, they began "dueling with the shovels and rakes" for about ten minutes, with "shovels and rakes going everywhere."

During the course of the altercation, the three alternately wielded their gardening implements at each other "wildly," in what was described as a "full-fledged massacre." At one point, Mrs. Davenport swung the rake so that the metal tines went into [defendant's] arm and, when Mrs. Davenport "went to yank it out, [the tines] were stuck in defendant's arm, so the rake broke" and left "four big old holes" in defendant's arm, "pull[ing] the meat out of the holes." The Davenports then knocked the shovel out of defendant's hands. Shortly thereafter, Mr. Davenport said that defendant—who had been heard to say that he "would light people up" on several occasions—said he was going to "burn[] you all." Then, according to his own testimony, defendant took a few steps back to his house and grabbed a cut off aluminum Bud Lite can that was "full of gas" and also "had a little bit of two-cycle oil in it," which defendant had been using to start his car. "[B]ecause [he] knowed [sic] [he] had [gas in] there because [he] was working on [his] car there," defendant testified that he "slung that gas on [Mr. Davenport]" and "doused [Mr. Davenport] straight on in [his] face" and down his back. Then, defendant struck his lighter three times and Mr. Davenport "was, puff, on fire." A few seconds later, after defendant ignited the material he had thrown on Mr. Davenport, according to Mr. Davenport's testimony, defendant "ran like a bitch all the way, way down past his house." Mr. Davenport then jumped in the creek to put out the fire, was taken by ambulance to the hospital, and was then transferred to the Chapel Hill Burn Center, where he was treated and released two or three days later.

Defendant was indicted for maliciously injuring Mr. Davenport by using an explosive or incendiary device or material in violation of N.C.G.S. § 14-49(a). The matter was tried before a jury in Gaston County Superior Court. Defendant moved to dismiss the charge at the

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close of the State's evidence and at the close of all of the evidence, which the trial court denied. On 20 May 2010, the jury found defendant guilty and, on the same day, the trial court entered its judgment upon the jury's verdict and sentenced defendant to a minimum term of 133 months and a maximum term of 169 months imprisonment. In its order, the trial court included the following additional recommendation: "This sentence shall not and can not [sic] be served with any other sentence." Defendant gave timely written notice of appeal.

I.

[1] Defendant first contends the trial court erred by instructing the jury that "gasoline is an incendiary material," because defendant asserts that he had a "constitutional right" to have the jury determine "whether the gas mixture that he threw on Daniel Davenport was an incendiary material." However, our review of the record shows that, at trial, defendant did not object to this instruction on the grounds he now advances to this Court. Instead, defendant only requested that the trial court instruct the jury that gasoline is an incendiary material *or device*, in order to adhere more closely to the language of N.C.G.S. § 14-49(a), which provides that a person is guilty of the Class D felony of malicious use of an explosive or incendiary when he or she "willfully and maliciously injures another by the use of any explosive or incendiary *device or material*." N.C. Gen. Stat. § 14-49(a) (2009) (emphasis added). We do not find that defendant challenged this portion of the trial court's instruction on the basis of the arguments advanced in his brief. Moreover, defendant does not argue that, in the absence of an objection, the trial court committed plain error by instructing the jury that "gasoline is an incendiary material." Therefore, "[s]ince defendant did not object at trial or allege plain error, he has failed to properly preserve this issue for appeal." *See State v. Scott*, 343 N.C. 313, 332, 471 S.E.2d 605, 616 (1996). Accordingly, we overrule this issue on appeal.

II.

[2] Defendant next contends the trial court committed prejudicial error in violation of N.C.G.S. § 15A-1222 when the judge laughed in open court and in the presence of the jury upon hearing Mr. Davenport's testimony that defendant "ran like a bitch all the way, way down past his house." Although defendant failed to raise an objection to the judge's outburst at trial, "[t]he statutory prohibitions against expressions of opinion by the trial court contained in N.C.G.S.

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§ 15A-1222 and N.C.G.S. § 15A-1232 are mandatory.” See *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989). Thus, “[a] defendant’s failure to object to alleged expressions of opinion by the trial court in violation of those statutes does not preclude his raising the issue on appeal.” *Id.* Accordingly, contrary to the State’s suggestion, we need not confine our review of this issue to plain error, but, after considering the merits of defendant’s arguments, we conclude defendant suffered no prejudice as a result of the trial court’s injudicious conduct.

“Every person charged with crime . . . is entitled to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.” *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951). “The responsibility for enforcing this right necessarily rests upon the trial judge. He should conduct himself with the utmost caution in order that the right of the accused to a fair trial may not be nullified by any act of his.” *Id.* Thus, in accordance with N.C.G.S. §§ 15A-1222 and 15A-1232, the trial judge “must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury.” *Id.*; see also *State v. Herbin*, 298 N.C. 441, 446-47, 259 S.E.2d 263, 267 (1979) (“A trial judge cannot express an opinion on the evidence in the presence of the jury at any stage of the trial. [N.C.G.S. §§ 15A-1222 and 15A-1232] repealed and replaced [N.C.G.S. §] 1-180 effective 1 July 1978. The new provisions restate the substance of [N.C.G.S. §] 1-180 and the law remains essentially unchanged.” (citations omitted)).

N.C.G.S. § 15A-1222 provides that “[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury.” N.C. Gen. Stat. § 15A-1222 (2009). However, “[n]ot every indiscreet and improper remark by a trial judge is of such harmful effect as to require a new trial.” *State v. Whitted*, 38 N.C. App. 603, 606, 248 S.E.2d 442, 444 (1978). “[I]n a criminal case[,] it is only when the jury may reasonably infer from the evidence before it that the trial judge’s action intimated an opinion as to a factual issue, the defendant’s guilt, the weight of the evidence[,] or a witness’s credibility that prejudicial error results.” *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985); see also *State v. Sidbury*, 64 N.C. App. 177, 179, 306 S.E.2d 844, 845 (1983) (“[A] new trial may be awarded if the remarks go to the heart of the case.”). “In evaluating whether a judge’s comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized.” *State v. Larrimore*, 340 N.C. 119, 155,

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456 S.E.2d 789, 808 (1995). “This is so because ‘a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.’” *Carter*, 233 N.C. at 583, 65 S.E.2d at 11 (quoting *Towne v. Eisner*, 245 U.S. 418, 425, 62 L. Ed. 372, 376 (1918)). Therefore, “ [u]nless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless.” *Larrimore*, 340 N.C. at 155, 456 S.E.2d at 808 (quoting *State v. Perry*, 231 N.C. 467, 471, 57 S.E.2d 774, 777 (1950)). Moreover, “the burden of showing prejudice [is] upon the defendant.” *Blackstock*, 314 N.C. at 236, 333 S.E.2d at 248.

In the present case, defendant asserts as error the judge’s “inappropriate laughter” after Mr. Davenport testified that defendant “ran like a bitch all the way, way down past his house.” Defendant argues that the court’s reaction “can only be viewed as a comment on the evidence being presented,” and “effectively told the jury that they need not take this evidence seriously.” We do not agree.

After Mr. Davenport gave the testimony to which the trial judge reacted, the prosecutor admonished Mr. Davenport for his use of profanity. The judge then stated:

I’m sorry. I’m sorry. Just that terminology. I’m sorry, sir. I know that you’ve been waiting for the trial. It’s just the terminology.

. . . .

I’m sorry, I haven’t heard that term utilized. I’m sorry. I’m sorry, sir. It’s just the terminology.

After the prosecutor asked Mr. Davenport a few more questions, the judge instructed counsel to approach the bench and then instructed the bailiff to escort the jury from the courtroom, at which time the judge addressed the witness as follows:

Sir, there is nothing funny about the allegation, and I know that this is—it is that term set me off, and I needed a moment. But there is nothing funny about the allegation. I know that this is a grave case, but that term has just stuck with me, and I needed a moment. I think the jury needed a moment as well. So give me just a moment here. All right.

A few minutes later, the bailiff brought the jury back to the courtroom, at which time the judge made the following remarks to the jury:

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Okay, ladies and gentlemen, I appreciate you being back. Ladies and gentlemen, just as an aside, I've been on the bench since 1996, but I'm human just like the next person, and the terminology, one word the gentleman indicated obviously set me off for a moment. There's nothing—and I needed a moment simply to compose myself and have a moment to excuse you to the jury room, but I think we're ready to get started again. That happens rarely, but I needed a moment. . . .

In his brief, defendant recognizes that he has the burden of showing prejudice in violation of N.C.G.S. § 15A-1222. *See Blackstock*, 314 N.C. at 236, 333 S.E.2d at 248. We are not persuaded that defendant has met his burden to establish that the judge's outburst indicated an "opinion upon any issue to be decided by the jury or . . . indicate[d] in any manner his opinion as to the weight of the evidence or the credibility of any evidence properly before the jury." *See id.* Although the judge's outburst may have been illadvised and did not exemplify an undisturbed "atmosphere of judicial calm," *see Carter*, 233 N.C. at 583, 65 S.E.2d at 10, after considering the matter "in light of the factors and circumstances disclosed by the record," *see Blackstock*, 314 N.C. at 236, 333 S.E.2d at 248, we conclude that any resulting error was harmless and did not prejudice defendant so as to entitle him to a new trial.

III.

[3] Finally, defendant contends the trial court erred by "further recommend[ing]" that defendant's sentence "shall not and can not [sic] be served with any other sentence." Because the court's "recommend[ation]" did not affect the judgment in this case, but instead sought to bind a later court that might seek to impose another sentence against defendant during the 133 to 169-month term of imprisonment to which defendant is now subject, we believe that the trial court exceeded its statutory authority by mandating that a later court must enter any subsequent sentence as consecutive only, rather than concurrent, if such a sentence is entered while defendant is still serving his sentence in the present case. *See, e.g.,* N.C. Gen. Stat. § 15A-1344(d) (2009) (providing that an activated sentence upon a probation revocation "runs *concurrently* with any other period of probation, parole, or imprisonment to which the defendant is subject during that period *unless the revoking judge specifies that it is to run consecutively* with the other period" (emphasis added)). Nevertheless, "[t]he courts have no jurisdiction to determine mat-

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ters purely speculative, enter anticipatory judgments, . . . deal with theoretical problems, give advisory opinions, . . . provide for contingencies which may hereafter arise, or give abstract opinions.’ ” *In re Wright*, 137 N.C. App. 104, 111-12, 527 S.E.2d 70, 75 (2000) (alteration and omissions in original) (quoting *Little v. Wachovia Bank & Tr. Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960)). Here, although the record indicates that defendant was being held on a probation violation charge at the time of trial, the record does not disclose whether defendant is now subject to a sentence as a result of any proceedings arising out of the then-pending charge. Thus, if we were to vacate the portion of the judgment in the present case that seeks to impose upon later courts the restriction regarding sentencing described above, to do so would render this portion of our opinion advisory. Therefore, because this issue on appeal is “ ‘not a question ripe for review because it will arise, if at all, only if’ ” defendant is ordered to serve a consecutive sentence while still serving his sentence in the present case, *see State v. Coltrane*, 188 N.C. App. 498, 508, 656 S.E.2d 322, 329 (quoting *Simmons v. C.W. Myers Trading Post, Inc.*, 307 N.C. 122, 123, 296 S.E.2d 294, 295 (1982) (per curiam)), appeal dismissed and *disc. review denied*, 362 N.C. 476, 666 S.E.2d 760 (2008), we leave the judgment undisturbed.

No prejudicial error.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA v. JONATHAN HOWARD NORTON

No. COA10-1544

(Filed 21 June 2011)

1. Motor Vehicles— driving while impaired—appreciable impairment—sufficient evidence—motion to dismiss properly denied

The trial court did not err in a driving while impaired case by denying defendant’s motion to dismiss for insufficient evidence. Evidence that defendant consumed an impairing substance and then drove in a faulty manner was sufficient to show appreciable impairment.

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2. Witnesses—expert—testimony not outside scope of expertise—no error

The trial court did not err in a driving while impaired case by allowing a witness accepted as an expert forensic toxicologist to testify about the effects of cocaine on the body. As a trained expert in forensic toxicology with degrees in biology and chemistry, the witness was in a better position to have an opinion on the physiological effects of cocaine than the jury.

Appeal by Defendant from judgments entered 23 April 2010 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 23 May 2011.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender S. Hannah Demeritt, for Defendant.

STEPHENS, Judge.

Factual and Procedural Background

On 2 November 2009, Defendant Jonathan Howard Norton (“Norton”) was indicted on three counts of failing to remain at the scene of an accident involving property damage, two counts of assault with a deadly weapon against a government official, two counts of felony driving to elude arrest, and one count each of possession of drug paraphernalia, reckless driving to endanger, assault on a government official, resisting a public officer, speeding, driving while impaired, and attempted robbery with a dangerous weapon. Norton pled not guilty to all charges, and the case was tried before a jury at the 19 April 2010 Criminal Session of the Buncombe County Superior Court, the Honorable James U. Downs presiding.

The evidence presented at trial tended to show the following: At 6:45 p.m. on 15 September 2009, Asheville Police Department Officer Tracey Edmonds (“Officer Edmonds”) responded to a civil disturbance call at a motel in Asheville, North Carolina. Officer Edmonds observed Norton breaking the windows of a vehicle in the motel parking lot. When Officer Edmonds approached Norton, whom Officer Edmonds described as being “in a very angry and enraged state,” Norton got into the vehicle and exited the parking lot, driving on the wrong side of the road into oncoming traffic. Officer Edmonds then

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activated his blue lights and siren and attempted to pursue. Norton continued on the wrong side of the road, ran a red light at 60 to 70 miles per hour, and struck another vehicle. After losing sight of Norton, Officer Edmonds returned to the motel. While Officer Edmonds was at the motel conferring with another officer, Norton drove past and the officers attempted to stop his vehicle. Norton accelerated to 65 to 75 miles per hour in a 35-mile-per-hour zone and escaped again.

Several minutes later, Norton returned to the motel a third time and “did doughnuts in the middle of the road and ran head on into oncoming traffic.” He then “flipped gestures toward[] law enforcement, screamed profanities, tried to get [them] to pursue him, hollered, ‘Come on,’ and cuss words.” Norton then drove into oncoming lanes of traffic repeatedly, forcing other motorists to move out of his way to avoid collision with his vehicle. When officers pursued, Norton drove 40 to 45 miles per hour through a parking lot, entered a tunnel at a high rate of speed while driving on the wrong side of the road, ran several red lights, drove through a metal gate and onto a golf course, “cut[] doughnuts on the golf course,” drove through a fence in order to reenter the road, and attempted to run several oncoming motorists off the road by driving toward them on the wrong side of the road before officers broke off the pursuit.

At 9:30 that same night, police spotted Norton’s vehicle again and pursued him. During the chase, Norton reached speeds of 100 miles per hour, passed other cars on the emergency shoulder, changed lanes erratically, drove without his hands on the wheel, opened his door while driving and hung his limbs out of the car, and threw objects at the police pursuing him. After colliding with a patrol vehicle, Norton lost control of his vehicle and came to a stop on the side of the road. Norton then attempted to flee on foot. North Carolina State Highway Patrol Master Trooper Rocky Deitz (“Master Trooper Deitz”), who assisted in Norton’s arrest, testified that Norton appeared to be in a rage, had “superhuman strength,” and resisted arrest even after police shot him with a Taser. After Norton was arrested, he underwent a blood test, which revealed an alcohol concentration of 0.03 grams per 100 milliliters of blood and the presence of cocaine and a cocaine metabolite indicative of recent cocaine usage. The test did not indicate the concentration of cocaine or of the cocaine metabolite.

Sometime after his flight from Officer Edmonds and before his arrest, Norton struck a second civilian vehicle and left the scene of

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that accident. The driver of the other vehicle testified that Norton threatened her and that Norton smelled of alcohol.

Following the presentation of evidence, on 23 April 2010, the jury returned guilty verdicts on the following charges: two counts of failing to remain at the scene of an accident and one count each of assault with a deadly weapon on a government official, non-felonious speeding to elude arrest, possession of drug paraphernalia, felonious fleeing to elude arrest, reckless driving, speeding 100 miles per hour in a 60-mile-per-hour zone, and driving while impaired. The jury returned verdicts of not guilty on the charges of assault on a government official and resisting a public officer. The jury deadlocked on one count of assault with a deadly weapon on a government official and one count of failing to remain at the scene of an accident. Norton was sentenced to 21 to 26 months for assault with a deadly weapon on a government official, 10 to 12 months for felonious fleeing to elude arrest, 45 days for failure to remain at the scene of an accident, and one year for impaired driving. Norton filed notice of appeal to this Court on 3 May 2010 only for the charge of driving while impaired.

Discussion

[1] On appeal, Norton first argues that the trial court erred in denying his motion to dismiss on the ground that the evidence was insufficient to support the charge of driving while impaired. Such a motion presents a question of law and is reviewed *de novo* on appeal. *See State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993). The question for this Court is whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

To support a charge of driving while impaired, the State must prove that the defendant has “drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties.” *State v. Harrington*, 78 N.C. App.

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39, 45, 336 S.E.2d 852, 855 (1985). However, “the State need not show that the defendant [was] ‘drunk,’ *i.e.*, that his or her faculties [were] materially impaired.” *Id.* (emphasis in original). “[T]he fact that a motorist has been drinking, when considered in connection with faulty driving or other conduct indicating an impairment of physical and mental faculties, is sufficient *prima facie* to show a violation of [N.C. Gen. Stat. § 20-138.1].”¹ *State v. Coffey*, 189 N.C. App. 382, 387, 658 S.E.2d 73, 76 (2008) (internal quotation marks, ellipsis, and citations omitted). It follows that evidence of such faulty driving, along with evidence of consumption of *both* alcohol *and* cocaine, is likewise sufficient to show a violation of section 20-138.1.

In this case, Norton contends that the State did not offer any evidence to provide a factual basis for finding that he was impaired while driving his vehicle, but instead relied on Master Trooper Deitz’ “naked conclusion” that, in the trooper’s opinion, Norton “had consumed some impairing substance so as to appreciably impair his physical and mental abilities.” As an example of a case lacking sufficient evidence, Norton cites *State v. Hough*, 229 N.C. 532, 532, 50 S.E.2d 496, 497 (1948), in which an officer who arrived on the scene of a traffic accident 25 to 30 minutes after the accident occurred testified that he smelled “something on [the suspect’s] breath” and believed that the suspect was impaired. In that case, a second officer also believed that the suspect was impaired, but neither officer was able to say whether the impairment was a result of drinking or of the accident. *Id.*

This case presents an altogether different situation from *Hough* because the witnesses to Norton’s impairment observed his behavior as he drove, not sometime after. Multiple witnesses testified as to Norton’s faulty driving and other conduct supporting the conclusion that his mental faculties were impaired, including that he “had a very wild look on his face” and appeared to be in a state of rage; drove recklessly without regard for human life; drove in circles in the middle of a busy street and on a golf course; twice collided with other motorists; drove on the highway at speeds varying between 45 and 100 miles per hour; drove with the car door open and with his left leg and both hands “hanging out the door”; struck a patrol vehicle; and exhibited “superhuman” strength when officers attempted to apprehend him. Furthermore, whereas the evidence of alcohol consumption in *Hough* was weak, in this case, blood tests established Norton’s

1. A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance.” N.C. Gen. Stat. § 20-138.1 (2009).

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alcohol and cocaine use, and one witness testified that she smelled alcohol on Norton when he exited his car at a traffic light. This evidence was sufficient to permit the jury to determine that Norton drove while impaired.

Nevertheless, Norton argues that the evidence of cocaine and cocaine metabolites in his bloodstream was insufficient to establish that he was impaired because the tests did not indicate the blood concentrations of the substances. Norton also cites *State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869-70 (2002), for the proposition that reckless driving by itself is not proof of impairment. However, as already stated, evidence that a defendant consumed an impairing substance and then drove in a faulty manner is sufficient *prima facie* to show appreciable impairment. See *Coffey*, 189 N.C. App. at 387, 658 S.E.2d at 76. In this case, there is plenary independent evidence both that Norton drove recklessly and that he consumed alcohol and cocaine. This evidence was clearly sufficient to support the charge of driving while impaired. See *id.* Accordingly, Norton's argument that there was insufficient evidence to allow the driving while impaired charge to go to the jury is overruled.

[2] Norton next argues that the trial court erred in allowing a witness accepted as an expert forensic toxicologist to testify about the effects of cocaine on the body because this testimony was outside of the witness's area of expertise. The test for the admissibility of expert testimony under Rule 702 of the North Carolina Rules of Evidence requires, *inter alia*, that the witness be qualified as an expert within the area of testimony. *State v. Goode*, 341 N.C. 513, 529, 461 S.E.2d 631, 640 (1995).² By allowing the testimony, the trial judge implicitly ruled that the witness was qualified to testify on that subject. *State v. Perry*, 275 N.C. 565, 572, 169 S.E.2d 839, 844 (1969) ("In the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an expert, it is not essential that the record show an express finding on this matter, the finding, one way or the other, being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness.").

Initially, we note that because Norton did not object to the testimony at trial, we may review this issue only for plain error. N.C. R.

2. "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2010).

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App. P. 10(a)(4).³ Furthermore, the decision of a trial court to allow expert testimony is discretionary. *Goode*, 341 N.C. at 529, 461 S.E.2d at 640-41. Because our Supreme Court has held that discretionary decisions of the trial court are not subject to plain error review, *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000) (stating that the North Carolina Supreme Court “has not applied the plain error rule to issues which fall within the realm of the trial court’s discretion”), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001), we need not address Norton’s argument on this issue. Nevertheless, in the interest of ensuring that Norton had a fair trial, we address the merits of Norton’s argument.

As previously held by our Supreme Court, “[i]t is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession.” *Goode*, 341 N.C. at 529, 461 S.E.2d at 640 (citations omitted). Rather, “[i]t is enough that the expert witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.” *Id.* As a trained expert in forensic toxicology with degrees in biology and chemistry, the witness in this case was plainly in a better position to have an opinion on the physiological effects of cocaine than the jury.

Furthermore, under the plain error standard, a defendant has the burden of showing “that a different result probably would have been reached but for the error” or “that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.” *State v. Wilson*, — N.C. App. —, —, 691 S.E.2d 734, 738 (2010). The expert testimony on the effects of cocaine and alcohol on the body was not essential to the outcome of the trial as Norton’s conviction was supported by plenary evidence of faulty driving and other erratic behavior in combination with blood tests showing that he consumed

3. The plain error rule

is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to 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. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal brackets, quotation marks, ellipses, and emphasis omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

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cocaine and alcohol. As such, Norton is unable to meet the burden of showing “that a different result probably would have been reached but for” the testimony of the forensic toxicologist on the effects of cocaine. *Id.* Thus, we cannot say that there was error, much less plain error.

Based on the forgoing, we conclude that Norton received a fair trial, free of error.

NO ERROR.

Chief Judge MARTIN and Judge THIGPEN concur.

THERESA SHELF AND ROBERT SHELF, PETITIONERS v. WACHOVIA BANK, NA, AS THE TRUSTEE FOR THE BENEFIT OF TRAVIS GAMBRELL, BRYAN THOMPSON, AS PUBLIC ADMINISTRATOR FOR THE ESTATE OF TRAVIS GAMBRELL, TARA LARSON, IN HER OFFICIAL CAPACITY OF ACTING DIRECTOR OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES AND THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENTS

No. COA10-1510

(Filed 21 June 2011)

Jurisdiction— subject matter—trust—second superior court order impermissibly overruled first order

One superior court judge’s order in a trust case granting summary judgment in favor of one defendant impermissibly overruled another superior court judge’s order denying summary judgment on the same legal issue for the same defendant. The matter was remanded to superior court for further proceedings.

Appeal by Petitioners from order entered 15 April 2010 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 27 April 2011.

Egerton & Associates, PA, by Wendy Nolan and Lawrence Egerton, for Petitioners.

Attorney General Roy Cooper, by Assistant Attorney General Joel L. Johnson, for Respondent North Carolina Department of Health and Human Services.

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*Womble Carlyle Sandrige & Rice, PLLC, by Elizabeth K. Arias,
for Respondent Wachovia Bank, NA.*

STEPHENS, Judge.

Travis Gambrell (“Gambrell”) was the beneficiary of an irrevocable “special needs trust” created on 14 June 2002 pursuant to a court-approved settlement in a medical malpractice action brought on Gambrell’s behalf. Through the creation of the trust, Gambrell was eligible to receive governmental medical assistance, while also receiving distributions from the trust for his “extra and supplemental needs,” provided that, upon Gambrell’s death, “any state providing medical assistance to [] Gambrell shall receive all amounts remaining in the [t]rust up to an amount equal to the total medical assistance paid on behalf of [] Gambrell under any state plan.” The trust instrument named Respondent Wachovia Bank, NA (“Wachovia”) trustee and provided that during Gambrell’s lifetime, Wachovia could, in its sole discretion, distribute funds to pay for Gambrell’s “supplemental needs,” which distributions could include “[r]easonable payments to caregivers, including, caregivers who may be related by blood to [] Gambrell.” Throughout the life of the trust, Gambrell’s grandparents, Petitioners Theresa Shelf and Robert Shelf (collectively, the “Shelfs”), received monthly distributions from the trust as compensation for caregiving services provided to Gambrell. In addition to the caregiving services Gambrell received from the Shelfs, Gambrell also received during his lifetime approximately \$1.3 million worth of medical assistance from the State of North Carolina, via Respondent North Carolina Department of Health and Human Services, Division of Medical Assistance (“DHHS”). Gambrell died on 12 May 2008. At the time of Gambrell’s death, the value of the remaining assets in the trust was \$563,858 according to Wachovia.

On 5 February 2009, the Shelfs filed a petition with the Wake County Clerk of Superior Court, Estates Division, alleging that “the value of their caregiver services rendered to and expenditures made on behalf of [] Gambrell” “far exceeded” the amount of the trust distributions the Shelfs received for those services. The Shelfs contended that they were “entitled to an amount in excess of \$500,000” and petitioned the court to “determine the amount of money due to them” and to “enter an [o]rder for an appropriate amount of monetary compensation.”

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DHHS, as a named respondent in the petition—along with the acting director of DHHS, Wachovia, and the public administrator of Gambrell’s estate—responded to the Shelfs’ petition by filing a motion to dismiss on 9 March 2009. On 23 July 2009, following the filing of various other responsive pleadings and motions by the parties, a consent order was entered, in which the parties agreed to transfer the action to Wake County Superior Court.

On 26 August 2009, DHHS filed a motion for summary judgment, asserting that the Shelfs “ceased to have any entitlement to the [t]rust corpus” upon Gambrell’s death and that DHHS was entitled to judgment as a matter of law. The Shelfs filed their own motion for summary judgment on 2 September 2009. On 16 November 2009, Superior Court Judge Henry W. Hight, Jr., denied both motions.

On 7 January 2010, the Shelfs voluntarily dismissed their petition as to DHHS and the acting director of DHHS. Despite this dismissal, DHHS filed a 28 January 2010 motion to compel discovery, which was calendared for a 22 March 2010 hearing.

At the 22 March 2010 hearing before Superior Court Judge Kenneth C. Titus, DHHS filed a motion to intervene, which was granted by the trial court, and a claim for relief seeking a declaration that DHHS was entitled to “expeditious payment of the remainder of the trust assets.” Judge Titus also heard arguments at the hearing regarding DHHS’ 9 March 2009 motion to dismiss.

On 15 April 2010, Judge Titus entered an order in which he stated that “because[, at the hearing,] matters outside the pleadings were presented to and not excluded by the [c]ourt”—including the petition, the motion to dismiss, “the entire court file,” and “the prior motion for summary judgment”—DHHS’ motion to dismiss “shall be treated as a motion for summary judgment.” In the order, Judge Titus allowed DHHS’ converted motion for summary judgment and determined that, as a matter of law, the Shelfs “are entitled to no further distributions or payments from the assets of the [i]rrevocable [t]rust . . . for caregiving services rendered to [] Gambrell prior to his death.” On 10 May 2010, the Shelfs gave notice of appeal “from the Order Entering Summary Judgment entered on April 15, 2010.”

The first issue we address on appeal is whether Judge Titus’ order granting summary judgment in favor of DHHS impermissibly overruled Judge Hight’s order denying summary judgment for DHHS. Because this issue relates to jurisdiction and jurisdictional issues can

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be raised at any time, even by a court *sua sponte*, *Crook v. KRC Mgmt. Corp.*, — N.C. App. —, —, 697 S.E.2d 449, 453, *supersedeas denied, disc. review denied*, — N.C. —, 703 S.E.2d 442 (2010), this issue is properly before us despite the fact that the parties did not raise it on appeal.

Ordinarily, one superior court judge may not modify, overrule, or change the judgment of another superior court judge previously made in the same action. *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003). Accordingly, one trial judge may not reconsider and grant a motion for summary judgment previously denied by another judge. *Hastings v. Seegars Fence Co.*, 128 N.C. App. 166, 168, 493 S.E.2d 782, 784 (1997).¹ However, “[a] second motion for summary judgment may be considered by the trial court [] when it presents legal issues different from those raised in the earlier motion.” *Id.*

When questioned on this issue at oral argument, counsel for DHHS contended that Judge Titus’ summary judgment order did not improperly overrule Judge Hight’s order because the legal questions decided in the later motion for summary judgment were different from the questions decided in the earlier motion. We disagree.

DHHS’ motion for summary judgment states, *inter alia*, as follows:

1. There is no genuine issue of material fact and [DHHS] should be granted judgment in its favor as a matter of law as the [t]rust instrument in question explicitly requires payback to [DHHS] upon the death of [] Gambrell.

. . . .

5. [The Shelves] argue entitlement to the remaining Trust proceeds based on Section 1.4(a)(5) which allows “reasonable pay-

1. Although we acknowledge that Judge Titus was considering a motion to dismiss by DHHS rather than a second summary judgment motion, in determining whether one superior court judge impermissibly overruled another, the dispositive issue is not whether the forms or labels of the motions are the same, but rather it is whether the legal issues resolved by the trial judges were the same. *See, e.g., Madry v. Madry*, 106 N.C. App. 34, 38, 415 S.E.2d 74, 77 (1992) (reversing a trial court’s decision and noting that “[d]espite the fact that [the second judge’s] order is denominated a summary judgment, the legal issue decided by that judgment . . . was precisely the same issue decided to the contrary by [the first judge’s] earlier order denying defendant’s motion to amend”); *Adkins v. Stanly Cty. Bd. of Educ.*, — N.C. App. —, —, 692 S.E.2d 470, 473 (2010) (noting that “one judge may not reconsider the legal conclusions of another judge”).

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ments to caregivers, including, caregivers who may be related by blood to Travis Gambrell.” However, Section 1.4(a) only allows for such distributions “[d]uring the Lifetime of Travis Gambrell” as stated in the section heading.

6. [The Shelves] did, in fact, receive such compensation under the terms of the [t]rust during the lifetime of [] Gambrell in the form of \$3,000 per month during the life of the [t]rust. Upon the death of [] Gambrell, the [t]rustee ceased such payments to [the Shelves] pursuant to the explicit language of the [t]rust instrument.

7. [The Shelves] have not alleged any facts or circumstances which support[] a total disregard for explicit trust language.

8. Upon the death of [] Gambrell, Petitioners ceased to have any entitlement to the [t]rust corpus.

In comparison, the relevant grounds for dismissal argued by DHHS in their motion to dismiss are as follows:

20. [The Shelves] have not alleged facts which would indicate an entitlement to any of the [t]rust proceeds. [The Shelves] have merely cited trust language indicating that certain distributions could be made during the life of [] Gambrell, but have alleged no facts or cited any trust language which support a distribution to them following the death of [] Gambrell.

In our view, the issues raised by DHHS in the two motions are nearly identical: (1) from the motion for summary judgment: “[u]pon the death of [] Gambrell, [the Shelves] ceased to have any entitlement to the [t]rust corpus”; (2) from the motion to dismiss: the Shelves “have not alleged facts which would indicate an entitlement to any of the [t]rust proceeds” and “have alleged no facts or cited any trust language which support a distribution to them following the death of [] Gambrell.” Accordingly, despite DHHS’ contention to the contrary, it appears that the legal questions posed by DHHS in its motions were precisely the same, *i.e.*, whether the Shelves had any entitlement to distributions from the trust corpus following Gambrell’s death.²

Judge Hight denied DHHS’ motion for summary judgment, necessarily concluding that the Shelves are not precluded, as a matter of law,

2. Further, we find no support for DHHS’ contention in their memorandum in support of the motion for summary judgment, in which DHHS again argued for the conclusion that the Shelves “ceased to have any claim as caregivers” “[u]pon the death of [] Gambrell.”

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from receiving any trust distributions upon Gambrell's death. However, in the same case five months later, Judge Titus overruled Judge Hight and arrived at the opposite conclusion: that, as a matter of law, the Shelves are precluded from receiving distributions from the trust for services rendered to Gambrell prior to his death. Regardless of the accuracy of Judge Hight's initial conclusion, because Judge Titus' order impermissibly overrules Judge Hight's order, we must vacate Judge Titus' order granting summary judgment for DHHS. *Crook*,³ — N.C. App. at —, 697 S.E.2d at 453 (“If one trial judge enters an order that unlawfully overrules an order entered by another trial judge, such an order must be vacated”). As we have addressed the only order from which appeal was taken, we remand this matter to the superior court for further proceedings.

VACATED AND REMANDED.

Judges STEELMAN and HUNTER, ROBERT N., JR., concur.

3. We also note the serious questions raised by Judge Titus' consideration of DHHS' motion to dismiss filed prior to DHHS' dismissal from, and subsequent intervention into, the action. *Cf. Stocum v. Oakley*, 185 N.C. App. 56, 62, 648 S.E.2d 227, 232-33 (2007) (noting the general rule that “when a party has earlier taken a voluntary dismissal, refiling the action begins the case anew” and “[i]t is as if the [first] suit had never been filed” (internal quotation marks omitted)), *disc. review denied*, 362 N.C. 372, 662 S.E.2d 394 (2008). However, as we have already concluded that Judge Titus' order must be vacated because it impermissibly overrules Judge Hight's prior order, we need not discuss any alternate grounds for vacation.

COBB v. TOWN OF BLOWING ROCK

[213 N.C. App. 88 (2011)]

CHELSEA AMANDA BROOKE COBB BY AND THROUGH D. RODNEY KNIGHT, JR., HER GUARDIAN AD LITEM, AND ROBERT B. COBB, FATHER OF PLAINTIFF, INDIVIDUALLY, PLAINTIFFS v. TOWN OF BLOWING ROCK, A MUNICIPAL CORPORATION, AND CITY OF BLOWING ROCK, A MUNICIPAL CORPORATION, DEFENDANTS

No. COA09-1443

(Filed 5 July 2011)

1. Premises Liability— jury instructions—landowner’s duty to minor—requested instruction incorrect—no error

The trial court did not err in a negligence case by failing to give plaintiffs’ requested jury instructions regarding a landowner’s duty to a minor who is a lawful visitor as the instructions contained an incorrect statement of law.

2. Premises Liability— jury instructions—known or reasonably foreseeable characteristics of lawful visitors—failure to instruct—erroneous

The trial court erred in a negligence case by failing to instruct the jury to consider the known or reasonably foreseeable characteristics of lawful visitors when determining whether defendant had discharged its duty to exercise reasonable care in maintaining its property for the protection of plaintiff.

3. Premises Liability— jury instructions—known or reasonably foreseeable characteristics of lawful visitors—denial of motion for new trial—erroneous

The trial court erred in a negligence case by denying plaintiffs’ motion for a new trial. The trial court failed to instruct the jury to consider the known or reasonably foreseeable characteristics of lawful visitors when determining whether defendant discharged its duty to exercise reasonable care in maintaining its property for the protection of plaintiff.

Appeal by Plaintiffs from judgment entered 17 October 2008 and an order entered 30 March 2009 by Judge Anderson D. Cromer in Superior Court, Watauga County. Heard in the Court of Appeals 12 May 2010.

Brown Moore & Associates, PLLC, by R. Kent Brown, for Plaintiffs-appellants.

Clawson & Staubes, PLLC, by Andrew J. Santaniello and Michael J. Kitson, for Defendant-appellee.

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Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson, and Goldsmith, Goldsmith & Dews, P.A., by Frank Goldsmith, for amicus curiae North Carolina Advocates for Justice.

Cranfil Sumner & Hartzog LLP, by Kari R. Johnson, for amicus curiae NC Association of Defense Attorneys.

HUNTER, JR., Robert N., Judge.

This case requires us to determine whether, in a negligence case, the jury must be instructed to consider the known or reasonably foreseeable characteristics of lawful visitors when the plaintiff, who is a lawful visitor, is injured by a natural condition on the defendant's property. We hold the failure to give such an instruction is error. Therefore, we award Plaintiffs a new trial.

I. Factual and Procedural Background

On 28 August 2007, Chelsea Amanda Brooke Cobb, through her guardian *ad litem* D. Rodney Knight, Jr., and Chelsea's father, Robert B. Cobb, individually, (collectively referred to as "Plaintiffs"¹) filed a complaint against the Town of Blowing Rock² ("Defendant") alleging negligence. On 18 October 2007, Defendant filed an answer and a motion to dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(4) and (5). Evidence presented at trial tended to show that, on 9 August 2004, Ms. Cobb, age twelve, and a friend were playing in the area around Glen Burney Falls on New Years Creek, which is located on property owned by Defendant. Glen Burney Falls is the second of three waterfalls located on Defendant's property on New Years Creek, a naturally occurring stream whose depth varies according to season and rainfall, from barely covering the creek bed to several feet deep after a storm. Just above Glen Burney Falls, the creek is around ten to twelve feet wide. Defendant opened the property to the public for recreational activity and for viewing the three waterfalls located on the property. In doing so, Defendant constructed and maintained designated trails and platforms to view the waterfalls, including a wooden observation deck upstream from Glen

1. D. Rodney Knight, Jr. was listed as the guardian *ad litem* at the time of the judgment dismissing Plaintiff's case with prejudice. Andrea N. Capua was listed as the guardian *ad litem* at the time of the order denying Plaintiffs' motion for a new trial.

2. Plaintiffs also filed against the "City of Blowing Rock." However, Defendant denied there was a "City" and again on appeal states that "there is no, 'City of Blowing Rock' and this matter has proceeded against the Town of Blowing Rock." Therefore, we refer to Defendant in the singular.

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Burney Falls. On 9 August 2004, Ms. Cobb and her friend went to the overlook platform at Glen Burney Falls. Instead of staying on the designated trail, they exited the left side of the platform and attempted to cross New Years Creek just above Glen Burney Falls. However, Ms. Cobb slipped in the creek, began sliding downstream, and went over the waterfall. As a result, she suffered serious injuries.

There were no warnings located on the overlook platform or the trail regarding the dangers of trying to cross New Years Creek or of leaving the platform. At the beginning of the Glen Burney trail, the hiking trail that leads to the waterfalls, there was a sign with a map of the trails that warned visitors not to leave the designated marked trails. A cable had been extended between two trees across New Years Creek just above Glen Burney Falls at some time in the past, but prior to 9 August 2004, the cable had been moved or deteriorated and fallen down. In the past, a wooden board was affixed between the viewing platform at Glen Burney Falls and a tree to act as a barricade to keep visitors from leaving the left side of the platform and walking down to New Years Creek, but this board had been taken down prior to 9 August 2004. Only twelve days before Ms. Cobb's fall, a twenty-two-year-old man who was an experienced hiker and a twenty-four-year-old man who was an engineer slipped and fell in the same location; both were seriously injured. These men testified they did not realize how quickly and steeply the stream dropped down at this point.

After a trial, the jury found Ms. Cobb was not injured by the negligence of Defendant, and the trial court entered judgment dismissing Plaintiffs' complaint with prejudice. Plaintiffs filed a motion for a new trial pursuant to North Carolina Rule of Civil Procedure 59, which the trial court denied. On 14 April 2009, Plaintiffs filed written notice of appeal from the trial court's judgment and the denial of their motion for a new trial.

On appeal, Plaintiffs contend the trial court committed three errors pertaining to the jury instructions: (1) denying their requested jury instruction on a landowner's duty of care; (2) instructing the jury on a landowner's duty of care without addressing the import of Ms. Cobb's age; and (3) failing to provide the correct instructions in response to the jury's question regarding the consideration of age and the landowner's duty of care, thus misleading the jury and altering the outcome of the case. Plaintiffs also argue the trial court erred in denying their motion for a new trial.

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II. Jurisdiction

We have jurisdiction over Plaintiff's appeal of right. *See* N.C. Gen. Stat. § 7A-27(b) (2009) (stating appeal lies of right to this Court from final judgments of a superior court).

III. Analysis**A. Jury Instructions**

[1] Plaintiffs argue the trial court erred in failing to give their requested jury instructions, which they contend were a correct statement of the law regarding a landowner's duty to a minor who is a lawful visitor. Defendant counters that the trial court's instructions to the jury were a correct statement of the applicable law.

To prevail on this issue, the plaintiff must demonstrate that (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury.

Liborio v. King, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274 (2002) (citation omitted). "When a party aptly tenders a written request for a specific instruction which is correct in itself and supported by evidence, the failure of the court to give the instruction, at least in substance, is error." *Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 56, 607 S.E.2d 286, 291 (2005) (quoting *Faeber v. E.C.T. Corp.*, 16 N.C. App. 429, 430, 192 S.E.2d 1, 2 (1972)). The appellant bears the burden of demonstrating the jury was misled or that the verdict was affected by an omitted instruction. *Robinson v. Seaboard Sys. R.R.*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987). Accordingly, we first look to see whether Plaintiffs' "requested instruction was a correct statement of law." *See Liborio*, 150 N.C. App. at 534, 564 S.E.2d at 274.

The trial court gave the jury the following instructions regarding the duty of a landowner to a lawful visitor:

Issue Number 1; Was the minor plaintiff, Chelsea Cobb, injured by the negligence of the defendant? 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, that the defendant was negligent and that such negligence was a proximate cause of the plaintiff's injury.

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Negligence refers to a person's failure to follow a duty of conduct imposed by law. The law requires every owner to use ordinary care to keep the premises in a reasonably safe condition for lawful visitors who use them in a reasonable and ordinary manner. Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect himself and others from injury. A person's failure to use ordinary care is negligence.

. . . .

An owner is required to give adequate warning to lawful visitors of any hidden or concealed dangerous condition about which the owner knows or, in the exercise of ordinary care, should have known. A warning is adequate when, by placement, size and content, it would bring the existence of the dangerous condition to the attention of a reasonably prudent person. However, he does not have to warn about concealed conditions of which he has no knowledge and of which he could not have learned by reasonable inspection and supervision. He is held responsible for knowing of any condition which a reasonable inspection and supervision of the premises would reveal. He is also responsible for knowing of any hidden or concealed dangerous condition which his own conduct or that of his agents or employees has created

The owner is not required to warn of obvious dangers or conditions.

The instructions as given by the trial court were based upon portions of the pattern jury instructions. *See* N.C.P.I., Civ. 805.55 ("Duty of Owner to Lawful Visitor."). At trial, Plaintiffs requested that the following additions, indicated by italics, be added to the pattern jury instructions:

Negligence refers to a person or *entity's* failure to follow a duty of conduct imposed by law. The law requires every landowner to use ordinary care to keep the premises in a reasonably safe condition for lawful visitors who use them in a reasonable and ordinary manner. *What constitutes a reasonably safe condition of land depends upon the uses to which the owner invites the guests to make of the premises, and the uses which the owner should anticipate its guests will make of the premises. It also depends upon the known or reasonably foreseeable characteristics of the users of the premises. A landowner owes a higher level of care to a child who is unable to appreciate a potential of danger. In this context, ordinary care means that degree of care*

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which a reasonable and prudent person or entity would use under the same or similar circumstances to protect a child of the same or similar attributes as the plaintiff from injury. A person's failure to use ordinary care is negligence

. . . .

With respect to Plaintiff's first contention that Defendant failed to adequately warn of dangers associated with New Year's [sic] Creek, an owner is required to give adequate warning to lawful visitors of any hidden or concealed dangerous condition about which the owner knows or, in the exercise of ordinary care, should have known. A warning is adequate when, by placement, size and content, it would bring the existence of the dangerous condition to the attention of a reasonably prudent child of the same or similar attributes as the plaintiff. (Citations omitted).

First, Plaintiffs contend the trial court erred in failing to give their proffered instructions. This argument fails, however, because those instructions contained an incorrect statement of law: the reference to a "higher level of care."

Our Supreme Court has held that, "[t]o state a claim for common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006). " 'In the absence of a legal duty owed to the plaintiff by [the defendant], [the defendant] cannot be liable for negligence.' " *Id.* (alterations in original) (quoting *Cassell v. Collins*, 344 N.C. 160, 163, 472 S.E.2d 770, 772 (1996), *abrogated on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998)). Formerly, "the standard of care a real property owner or occupier owed to an entrant depended on whether the entrant was an invitee, licensee, or trespasser." *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 161, 516 S.E.2d 643, 645 (1999). Landowners owed invitees "a duty of ordinary care to maintain the premises in a safe condition and to warn of hidden dangers that had been or could have been discovered by reasonable inspection." *Mazzacco v. Purcell*, 303 N.C. 493, 498, 279 S.E.2d 583, 587 (1981) (*abrogated on other grounds by Nelson*, 349 N.C. 615, 507 S.E.2d 882). However, a landowner owed a licensee merely the duty "to refrain from doing the licensee willful injury and from wantonly and recklessly exposing him to danger." *McCurry v. Wilson*, 90 N.C. App. 642, 645, 369 S.E.2d 389, 392 (1988) (quoting *Pafford v. Construction Co.*, 217 N.C. 730, 736, 9 S.E.2d 408, 412 (1940)) (quota-

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tion marks omitted). Likewise, a landowner owed a trespasser a duty to refrain from the willful or wanton infliction of injury. *Howard v. Jackson*, 120 N.C. App. 243, 247, 461 S.E.2d 793, 797 (1995).

In *Nelson v. Freeland*, our Supreme Court eliminated “the distinction between licensees and invitees by requiring a standard of reasonable care toward all lawful visitors” and held that a landowner owes “the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.” 349 N.C. at 631–32, 507 S.E.2d at 892. In doing so, the Court explained it did “not hold that owners and occupiers of land are now insurers of their premises.” *Id.* at 632, 507 S.E.2d at 892. The Court retained the status of trespasser because it concluded “abandoning the status of trespasser may place an unfair burden on a landowner who has no reason to expect a trespasser’s presence.” *Id.* at 632, 507 S.E.2d at 892. This Court has commented on the holding in *Nelson*, clarifying that

the landowner now is required to exercise reasonable care to provide for the safety of all lawful visitors on his property, the same standard of care formerly required only to invitees. Whether the care provided is reasonable must be judged against the conduct of a reasonably prudent person under the circumstances.

Lorinovich, 134 N.C. App. at 161, 516 S.E.2d at 646. In other words, the present standard for all lawful visitors is the same as it was prior to *Nelson* for invitees. *See id.* *Nelson* thus abolished the distinction between “licensees” and “invitees” and applied the same standard to all lawful visitors. *Lorinovich*, 134 N.C. App. at 161, 516 S.E.2d at 646.

Our pre-*Nelson* decisions elevated the standard of care owed to licensee minors to the standard of care owed to invitees. Rather than owing licensee children a duty “to refrain from doing the licensee willful injury and from wantonly and recklessly exposing him to danger,” *McCurry*, 90 N.C. App. at 645, 369 S.E.2d at 392 (quoting *Pafford*, 217 N.C. at 736, 9 S.E.2d at 412) (quotation marks omitted), landowners instead owed children-licensees a higher duty. After *Nelson*, all lawful visitors are entitled to the higher of the two previous standards. In other words, to the extent children-licensees were owed the duty of reasonable care before *Nelson* by virtue of their age, they are now owed that standard by virtue of being a lawful visitor. As the same standard now applies to all lawful visitors, there is no support for an instruction regarding a “higher standard of care” with respect to children. Therefore, the trial court correctly refused to give the specific instruction requested by Plaintiffs.

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[2] Plaintiffs also contend the trial court erred because the instruction given by the court failed to encompass the substance of the law. While a trial court is encouraged to make use of the pattern jury instructions, doing so “does not obviate the trial judge’s duty to instruct [on] the law correctly.” *State v. Jordan*, 140 N.C. App. 594, 596, 537 S.E.2d 843, 845 (2000). The trial court refused to instruct the jury on how to consider Ms. Cobb’s age as part of the negligence analysis. Plaintiffs, citing *Hedrick v. Tigniere*, 267 N.C. 62, 147 S.E.2d 550 (1966), argue that a landowner’s duty to warn is dependent upon the age of the lawful visitor.

In *Hedrick*, the plaintiff, a minor-invitee, was injured during her dancing lessons when she slipped and fell on the dance floor. *Id.* at 63–64, 147 S.E.2d at 551. The plaintiff brought a claim for negligence against the owners of the dance school, and the trial court entered a judgment of nonsuit at the close of evidence. *Id.* On appeal, our Supreme Court noted the applicable standard that a landowner owed to an invitee:

The proprietor of a school operated for profit, like the proprietor of any other business establishment, owes to those whom he invites to enter and use his premises, for purposes connected with his business, a duty to use ordinary care to maintain the premises in a condition reasonably safe for the contemplated use and a duty to warn the invitee against dangers, which are known to or should have been discovered by the proprietor and which are not readily apparent to such observation as may reasonably be expected of such an invitee to such an establishment.

Id. at 65–66, 147 S.E.2d at 553. The Court also noted that what constitutes reasonable care will vary depending upon the nature of the landowner’s premises and the foreseeable characteristics of invitees:

What constitutes a reasonably safe condition of premises depends, of course, upon the uses which the proprietor invites his business guests to make of them and those which he should anticipate they will make. *It also depends upon the known or reasonably foreseeable characteristics of the invitees.* A condition reasonably safe for invitees upon an ice skating rink is far different from a condition reasonably safe upon the stairway of a rest home for the aged, or in the aisle between the counters and display racks of a store whose proprietor hopes his invitees’ attention will be attracted to the articles there displayed for sale. The rule of law is stated in the same words for all these situa-

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tions—the proprietor must use the care a reasonable man similarly situated would use to keep his premises in a condition safe for the foreseeable use by his invitee—but the standard varies from one type of establishment to another because different types of businesses and different types of activities involve different risks to the invitee and require different conditions and surroundings for their normal and proper conduct.

Id. at 67, 147 S.E.2d at 553–54 (emphasis added) (citations omitted). Here, Plaintiffs stress the *Hedrick Court* noted that the age of the invitee may be a factor in determining the landowner’s standard of care:

[t]he sufficiency of a warning to the invitee of the existence of a condition upon the premises will depend, in part, upon whether the proprietor should know that the invitee, *by reason of youth, old age or disability*, is incapable of understanding the danger and of taking precautions for his or her own safety under such conditions. A warning sufficient to alert an adult professional dancer to the condition of a dance floor may not be sufficient to absolve the proprietor from liability to a 13 year old pupil for a fall thereon.

Id. at 66, 147 S.E.2d at 553 (emphasis added) (citations omitted). The Court reasoned that, in order to determine whether appropriate care has been exercised, “it is proper to consider the nature of the property, the uses and purposes for which the property in question is primarily intended, and the particular circumstances of the case.” *Id.* at 67, 147 S.E.2d at 554 (citation omitted) (internal quotation marks omitted).

Though *Hedrick* was decided under the defunct invitee-licensee regime, the plaintiff in that case was an invitee, meaning she was entitled to the same standard of care as Ms. Cobb in this case. See *Lorinovich*, 134 N.C. App. at 161, 516 S.E.2d at 646 (“Thus the landowner now is required to exercise reasonable care to provide for the safety of all lawful visitors on his property, the same standard of care formerly required only to invitees.”). Accordingly, in addition to being sound, *Hedrick’s* rationale is highly persuasive. “Reasonably safe conditions” in a preschool would be different from those in a factory, bar, or other premises where youthful visitors would not reasonably be foreseeable. For example, the use of electrical socket covers might be reasonable in a nursery, but unreasonably burdensome in an electronics store. The same principle applies to natural conditions. It might be prudent to gate a public nature trail located adjacent to an elementary school to prevent wandering children, but that precaution

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might not be necessary if the trail is in a secluded area accessible only by motor vehicle.

Defendant argues *Hedrick* addressed a landowner's duty as to a minor-invitee injured by an artificial condition of the property, but because Ms. Cobb was injured by a natural condition of the land, the rule in *Hedrick* does not apply. In other words, Defendant asks us to endorse a bifurcated approach under which the foreseeable characteristics of lawful visitors are completely ignored when the visitor is injured by a natural condition, but accounted for when the visitor is injured by an artificial condition. When the Supreme Court rejected the trichotomy classification system in *Nelson*, it noted that one of the primary rationales behind keeping the trespasser-licensee-invitee trichotomy was the fear that plaintiff-friendly juries would impose unreasonable burdens on landowners. 349 N.C. at 624, 507 S.E.2d at 888. In rejecting this argument, the Court explained that "juries have properly applied negligence principles in all other areas of tort law, and there has been no indication that defendants in other areas have had unreasonable burdens placed upon them." *Id.* at 624–25, 507 S.E.2d at 888. We believe juries are equally capable of applying those principles here without unduly punishing landowners. Furthermore, the bright line approach has the potential to lead to illogical and unjust results.³ Under these circumstances, *Nelson* eschews the use of mechanistic, bright line rules and encourages us to place the reasonableness of a landowner's conduct in the hands of the fact finder. *See id.* at 631, 507 S.E.2d at 892 ("[T]he trichotomy is unjust and unfair because it usurps the jury's function either by allowing the judge to dismiss or decide the case or by forcing the jury to apply mechanical rules instead of focusing upon the pertinent issue of whether the landowner acted reasonably under the circumstances.").

Defendant and *amicus curiae* have not directed us to any decisions stating that the foreseeable characteristics of an invitee (under the old regime) or a lawful visitor (under the current one) have no bearing on the issue of reasonableness when the plaintiff is injured by a natural, as opposed to an artificial, condition. Rather, they rely on several decisions involving the attractive nuisance doctrine. *See, e.g., Fitch v. Selwyn Vill.*, 234 N.C. 632, 635, 68 S.E.2d 255, 257 (1951). The attractive nuisance doctrine raises the standard of care owed to *trespassing* children relative to that owed to non-child trespassers. *See*

3. For example, the amount of a minor plaintiff's prospective settlement or the odds of that child prevailing at trial could hinge on whether the source of injury was natural or artificial, not on whether the defendant was actually negligent.

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Broadway v. Blythe Indus., Inc., 313 N.C. 150, 153–54, 326 S.E.2d 266, 269–70 (1985) (discussing the doctrine at length). It does so because children, due to their immaturity, have a natural propensity to touch, manipulate, explore, and climb dangerous things that pique their curiosity. *See id.* at 153, 326 S.E.2d at 269. Therefore, the doctrine generally applies when a defendant maintains a dangerous artificial condition likely to attract child trespassers. *See id.*

The doctrine is generally inapplicable, however, when trespassing children are injured by *natural* conditions. *See Fitch*, 234 N.C. at 635–36, 68 S.E.2d at 257–58 (stating the general rule that the doctrine applies when the defendant maintains artificial, but not natural, bodies of water). This distinction can be explained by the rationale behind the doctrine: by maintaining an artificial condition that is unusually attractive to small children, the landowner impliedly invites the children onto its premises. *See* Robert S. Driscoll, *The Law of Premises Liability in America: Its Past, Present, and Some Considerations for Its Future*, 82 Notre Dame L. Rev. 881, 904 (2006) (stating that the doctrine rests on the proposition that the landowner, “by maintaining the instrumentality, impliedly invites the child onto his land, and hence owes him a duty of due care under the circumstances” (quoting Glenn Weissenberger et al., *The Law of Premises Liability* § 2.9, at 22 (3d ed. 2001))). When a child is a lawful visitor, the landowner either has invited the child onto the property or must accept responsibility for the child’s presence for some other policy reason. To the extent attractive nuisance case law has *any* bearing on this case, which is doubtful, the rationale behind the doctrine suggests landowners must take account of lawful visitors’ foreseeable characteristics.

Whether a natural condition is involved may inform the jury’s determination of what is reasonable under the circumstances, but it provides no basis for forcing the jury to ignore the known or foreseeable characteristics of lawful visitors. We hold that, regardless of whether the plaintiff, who is a lawful visitor, is injured by an artificial or natural condition, the jury must be instructed to consider the known or reasonably foreseeable characteristics of lawful visitors when determining whether the defendant has discharged its duty to exercise reasonable care in maintaining its property for the protection of the plaintiff. Here, the trial court erred in failing to instruct accordingly.

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B. Plaintiffs' Motion for a New Trial

[3] Plaintiffs also argue that, because the trial court's jury instructions were faulty, the court also erred by failing to grant their Rule 59 motion for a new trial.⁴ "Generally, a motion for new trial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed absent a manifest abuse of that discretion." *Jackson v. Carland*, 192 N.C. App. 432, 444, 665 S.E.2d 553, 560 (2008) (quoting *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000)). But where the motion hinges on a question of law or legal inference, we review the trial court's decision *de novo*. *Id.* at 444, 665 S.E.2d at 560–61. Here, Plaintiffs made a motion to the trial court for a new trial on the grounds that the trial court provided erroneous instructions to the jury.

We note the following exchanges between the trial court and the jury in the present case:

The Court: You asked the question. When considering an obvious danger for lawful visitors, how is the age of the lawful visitor factored in? I have given you the law on this issue.

You may now go back to the jury room to deliberate.

Juror: Can you repeat the law?

The Court: I gave it to you.

Juror: You gave us the entire law related to Issue No. 1 [regarding negligence]?

The Court: Yes sir, I told you all early on, remember. It is harder than you thought.

Thus, the issue addressed above—whether and how Ms. Cobb's age should be factored into the negligence calculus—confused the jury. In light of this confusion, we conclude it is likely that the jury was misled by the trial court's failure to instruct the jury on this point. Consequently, the instruction was erroneous, and the court's failure

4. In their complaint and in the "statement of the case" section of their brief on appeal, Plaintiffs state that Defendant has "waived governmental immunity by participating in the Interlocal Risk Financing Fund of North Carolina." In its answer, Defendant admitted that it participated "in the local risk financing fund administered by the North Carolina League of Municipalities." However, Defendant in the "statement of the case" section of its brief on appeal stated that it "has not waived sovereign immunity if applicable." As Defendant did not cross-appeal this issue regarding sovereign immunity and made no further argument in support of its contention on appeal, this issue is not properly before us. *See* N.C. R. App. P. 10(a).

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to grant a new trial was error. *See Jackson*, 192 N.C. App. at 444, 665 S.E.2d at 560–61 (granting a new trial where the trial court provided an incorrect instruction pertaining to a question of law).

New Trial.

Judge McGEE concurs.

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

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

As noted by the majority opinion, plaintiffs contend on appeal that the trial court committed three errors in the jury instructions: (1) denying plaintiffs' requested jury instruction on a landowner's duty of care; (2) instructing the jury on a landowner's duty of care without addressing the import of plaintiff Chelsea's age; and (3) failing to provide the correct instructions in response to the jury's question regarding consideration of age and the landowner's duty of care, thus misleading the jury and altering the outcome of the case. The majority holds that the trial court did not err by denying plaintiffs' requested jury instruction on a landowner's duty of care, because the requested instruction "contained an incorrect statement of law: the reference to a 'higher level of care[,]'" and I concur with the majority as to this issue. The trial court properly refused to give the instructions as requested by plaintiffs. However, I dissent as to the remaining two issues, as I believe that the substance of the second and third issues is the same as the first, and that the instructions as given by the trial court were a correct and complete statement of the law. I would therefore affirm the trial court's judgment and denial of plaintiffs' motion for a new trial.

Although the majority holds that the jury instructions as requested by plaintiffs are incorrect because they refer to a "higher level of care" applicable to plaintiff Chelsea based upon her age, the majority then goes on, in addressing the second issue, to hold that the trial court should have instructed the jury as to a higher standard of care, specifically that "the jury must be instructed to consider the known or reasonably foreseeable characteristics of lawful visitors when determining whether the defendant has discharged its duty to exercise reasonable care in maintaining its property for the protection of the plaintiff." I believe that this instruction, in this case, would

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give improper emphasis to the age of the plaintiff under existing case law and would create a “higher standard of care” in any case where a plaintiff has some sort of “characteristic” which may decrease that person’s ability to look out for her own safety, be it her youth, physical disability, mental disability, or any other characteristic which might be “reasonably foreseeable.” But our law already takes these factors into consideration in the determination of negligence in several ways.

First and foremost, a jury makes the determination of the standard of care required by a reasonable landowner by considering the totality of the circumstances of a particular case. These circumstances may include the location, the time of day, lighting conditions, type of facility, and even the foreseeable characteristics of lawful visitors. These are all factual determinations and evidence as to all of these factors is relevant in the determination of what is “reasonable.” For example, our Supreme Court in *Pulley v. Rex Hospital*, 326 N.C. 701, 392 S.E.2d 380 (1990) reversed summary judgment for the defendant based on a genuine issue of material fact where the plaintiff tripped and fell on an irregularity in the sidewalk leading to the emergency room entrance, at night, with inadequate lighting. The Court noted that

[v]iewed in sum, our prior cases merely establish that the facts must be viewed *in their totality* to determine if there are factors which make the existence of a defect in a sidewalk, in light of the surrounding conditions, a breach of the defendant’s duty and less than “obvious” to the plaintiff. Such factors may include the nature of the defect in the sidewalk, the lighting at the time of the accident, and whether any other reasonably foreseeable conditions existed which might have distracted the attention of one walking on the sidewalk. See *Frendlich v. Vaughan’s Foods*, 64 N.C. App. 332, 337, 307 S.E.2d 412, 415 (1983).

Id. at 706, 392 S.E.2d at 384. The Court also noted

that a reasonable juror, in considering whether the defendant breached its duty to the plaintiff and whether the plaintiff was exercising ordinary care in watching where she was walking, might consider a fault in a sidewalk leading into a hospital emergency room quite differently from an identical fault in an ordinary city sidewalk. A reasonable juror could believe that people entering emergency rooms are frequently and foreseeably very distracted from their ordinary behavior.

Id. at 708, 392 S.E.2d at 385. Although the *Pulley* court was considering a motion for summary judgment, the applicable law is the same

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for purposes of summary judgment and for jury instructions. I have no disagreement at all with the majority's reasoning that the "reasonably foreseeable characteristics" of lawful visitors are an important consideration in the jury's determination of reasonableness of a landowner's actions in maintaining a property in safe condition. But this is an *evidentiary* consideration and does not require a variation from the pattern jury instructions as given by the trial court. Although our Courts have addressed cases dealing with schools, day care centers, nursing homes, hospitals, and all sorts of locations where it is reasonably foreseeable that the lawful visitors to that location will have characteristics of age or impairment which may have an effect on the reasonable standard of care applicable to that facility, I have been unable to find a single North Carolina case which has included jury instructions as to negligence which focus upon the characteristics of visitors or characteristics of the property location. In certain cases, a higher standard of care may be imposed by a safety statute or regulation, *see Cooper v. Southern Pines*, 58 N.C. App. 170, 174, 293 S.E.2d 235, 237 (1982) (stating that N.C. Gen. Stat. § 160A-296 "create[s] an affirmative duty of care: A city shall have '[t]he duty to keep the public streets, sidewalks, alleys, and bridges . . . free from unnecessary obstructions.'"), and a jury is properly instructed according to that standard. But that is not the case here. In this case, evidence was presented as to all of these factors. At trial, plaintiff presented evidence of plaintiff Chelsea's age and inexperience, as opposed to the inability of even an experienced adult hiker to appreciate the risk presented by New Years Creek. There was evidence of defendant's past efforts to prevent people from leaving the platform, including the map sign and the wooden board affixed between the viewing platform and a tree, although defendant had allowed some of these safety precautions to deteriorate or be removed. There was evidence that shortly prior to plaintiff Chelsea's fall, two men were seriously injured in the same location, so that arguably defendant should have taken immediate action to prevent access to the creek or at the very least to post stern and specific warnings of the serious danger presented by the falls. The jury considered all of this evidence, as well as other evidence, in its totality, and made its determination using the pattern jury instructions as to negligence of a landowner which have been used by North Carolina's courts thousands of times. These jury instructions are a correct statement of the law.

Our law does provide for specific instructions as to standards of care and negligence to accommodate certain characteristics of those injured by negligence. In this case, plaintiff Chelsea's age was

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addressed specifically by the instruction as to contributory negligence. The jury was instructed to take her age into account as she is not held to an adult standard:

A child who is between seven and fourteen years of age is not required to exercise the same degree of care for the safety of others that is required of an adult. The law imposes a duty upon a child to exercise only that degree of care for the safety of others that a reasonably careful child of the same age, discretion, knowledge, experience and capacity ordinarily would exercise under the same or similar circumstances. The degree of care required varies with the child's age, discretion, knowledge, experience and capacity. A child's failure to exercise the required degree of care would be negligence[.]

Plaintiff Chelsea's age changed her own standard of care to look out for herself; it does not, in and of itself, change the defendant's standard of care toward reasonably foreseeable lawful visitors in general. In *Hoots v. Beeson*, 272 N.C. 644, 648-50, 159 S.E.2d 16, 1921 (1968), our Supreme Court examined many cases in which minor children of various ages were injured by the alleged negligence of tortfeasors. In *Hoots*, the issue was whether the correct jury instructions were given as to the contributory negligence of an 11 year old child. *Id.* at 645-46, 159 S.E.2d at 18. But in each case discussed, the child's age is relevant for purposes of the jury instructions only as to *contributory negligence*; I have found no North Carolina case regarding a jury instruction as to negligence which has specifically addressed the effect of the age of the persons who might foreseeably be injured by the tortfeasor's allegedly negligent act. Again, this is not to say that the characteristics of persons who might foreseeably be injured by a negligent act are not relevant; they are relevant to the jury's determination of what would constitute "reasonable care" in the particular circumstances as noted above. But including a specific instruction as to the "reasonably foreseeable characteristics" of the lawful visitor in this case places double emphasis on plaintiff Chelsea's age. She is presumed incapable of contributory negligence, and the majority also would require an instruction that the defendant must exercise a higher standard of care because it is "reasonably foreseeable" that children of age 12, as well as children of all ages from crawling babies on up may visit public recreational areas such as New Years Creek.

Plaintiffs relied heavily on *Hedrick v. Tignire*, 267 N.C. 62, 147 S.E.2d 550 (1966) as to its proposed jury instruction which the majority rejected as an incorrect statement of the law, but the majority also

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relies almost entirely upon *Hedrick* in creating its new rule that a jury must be instructed specifically on the “reasonably foreseeable characteristics” of the lawful visitor as part of the negligence instruction. I find *Hedrick* distinguishable. Plaintiffs, citing *Hedrick*, argue that a landowner’s duty to warn is dependent upon the age of the lawful visitor. *Hedrick* is discussed in depth in the majority opinion and I will not repeat the details of the case. However, in *Hedrick*, the Court affirmed the trial court’s judgment of non-suit, holding that there was no evidence that the defendant’s actions in waxing the floor were the proximate cause of the plaintiff’s injuries, the doctrine of *res ipsa loquitur* did not apply, and it was not negligent *per se* to wax and polish the dance floor. *Id.* at 67-68, 147 S.E.2d at 554.⁵ I also note that no jury instructions were involved in *Hedrick*, as the case never made it that far. Yet plaintiffs argue, and the majority agrees, that the rule in *Hedrick* should be applied here to support a specific jury instruction as to consideration of plaintiff Chelsea’s “reasonably foreseeable characteristics” in determining the standard of care. Defendant argues that *Hedrick* addressed a landowner’s duty as to a minor invitee injured by an artificial condition of the property, but because plaintiff Chelsea was injured by a natural condition of the land, the rule in *Hedrick* is not applicable.

The cases, other than *Hedrick*, cited by plaintiffs in support of their argument as to the heightened standard of care as to minors⁶ are no longer applicable after *Nelson v. Freeland*, 349 N.C. 615, 507

5. We note that in subsequent cases addressing the standard of care a landowner owes to a minor-invitee, who was injured by an artificial condition of the land, our Courts have not considered the invitee’s age in defining the landowner’s duty. See *Phillips v. Grand Union Co.*, 64 N.C. App. 373, 374-75, 307 S.E.2d 205, 206 (1983); *Mitchell v. K.W.D.S., Inc.*, 26 N.C. App. 409, 410, 412, 216 S.E.2d 408, 410-11, *cert. denied*, 288 N.C. 242, 217 S.E.2d 665 (1975); *Bray v. Great Atlantic & Pac. Tea Co.*, 3 N.C. App. 547, 549, 165 S.E.2d 346, 348 (1969). Even after *Nelson*, this Court has not applied an age-based duty based on *Hedrick* in cases that addressed the standard of care a land-owner owes to minor-lawful visitors. See *Thomas v. Weddle*, 167 N.C. App. 283, 605 S.E.2d 244 (2004); *Royal v. Armstrong*, 136 N.C. App. 465, 524 S.E.2d 600, *disc. rev. denied*, 351 N.C. 474, 543 S.E.2d 495 (2000)).

6. See *Yates v. J.W. Campbell Electric Corp.*, 95 N.C. App. 354, 359, 382 S.E.2d 860, 863 (1989) (holding that ‘in North Carolina . . . a landowner’s duty of care to a licensee is to refrain from willful or wanton negligence, and from doing any affirmative acts which result in increased danger to the licensee while he is on the premises’ but ‘a landowner owes a higher level of care to a young child who is unable to appreciate a potential danger even though he is a licensee.’); *Anderson v. Butler*, 284 N.C. 723, 729, 202 S.E.2d 585, 589 (1974) (holding that ‘[i]f the owner, while the licensee is upon the premises exercising due care for his own safety, is actively negligent in the management of his property or business, as a result of which the licensee is subjected to increased danger, the owner will be liable for injuries sustained as a result of such

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S.E.2d 882 (1998) because they address the increased duty for landowners as to minor-licensees, but the lesser status of licensee was eliminated by *Nelson*. *Id.* at 631-32, 507 S.E.2d at 892. The majority properly determines that since *Nelson*, only two standards of care exist, as to either a lawful visitor or a trespasser.

In contrast to *Hedrick*, this Court, in *Waltz v. Wake County Bd. of Educ.*, 104 N.C. App. 302, 409 S.E.2d 106 (1991), *disc. review denied*, 330 N.C. 618, 412 S.E.2d 96 (1992), addressed the plaintiffs' claim against a defendant board of education for injuries sustained by a minor-invitee as the result of an injury caused by a natural condition of the land. Although *Waltz* deals with a minor child injured by a natural condition of the land and is in this regard most similar to the case before us, the majority does not mention it. In *Waltz*, the plaintiffs filed a claim for negligence against the defendant school board for injuries sustained by the minor-plaintiff, an eight-year-old student in second grade, after he was injured by tripping on a tree-root in the school's playground. *Id.* at 302, 409 S.E.2d at 106. The trial court granted defendant's summary judgment motion, dismissing the plaintiffs' claim. *Id.* On appeal, this Court noted that "[a] student attending school is an invitee while on the property of that school." *Id.* at 304, 409 S.E.2d at 107 (citation omitted). The Court defined the defendant school board's duty:

A landlord owes a duty to an invitee to use reasonable care to keep the premises safe and to warn of hidden dangers, but he is not an insurer of the invitee's safety. (Citations omitted.) . . . These rules apply to a public school or board of education just as they apply to any other landlord, if the board of education has waived the defense of sovereign immunity (as defendant has done in the present case) by purchasing a liability insurance policy. . . .

Id. (citation omitted). This Court went on to hold that the plaintiffs had failed to show that the defendant had breached its duty, explaining that

"[r]ecovery has generally not been permitted for injuries suffered by children on school grounds as a result of common, permanent, or natural conditions existing thereon." 68 Am. Jur. 2d Schools

active or affirmative negligence[.] but "a higher measure of care is required when a duty is owed to young children" because "common experience tells us that a child may be too young and immature to observe the care necessary to his own preservation, and therefore, when a person comes in contact with such a child, if its youth and immaturity are obvious, he is chargeable with knowledge of that fact and he cannot indulge the presumption that the child will do what is necessary to avoid an impending danger.")

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§ 325 (1973). We do not go so far as to say that a school may never be liable for injury resulting from a natural condition. However, school officials simply cannot be expected to protect children from every natural condition they may encounter on a school yard or a playground. Falls and mishaps, though unfortunate, are a part of every schoolchild's life and are something that neither teachers nor parents can reasonably be expected to guarantee to prevent. Here, the school took reasonable steps to protect its students by placing sand underneath and around playground equipment. This did not serve to aggravate the natural condition of the roots. If anything, it served to mitigate it by cushioning the fall of students.

Id. at 304, 409 S.E.2d at 107-08. Although it was decided in the specific context of defining the duty a school board owed to the students attending its schools, *Waltz* is instructive because it addressed a defendant-landowner's duty to a minor-invitee injured by a natural condition of the land. In addition, *Waltz* addressed the duty of care owed by a public facility, a school, to young children. However, *Waltz* did not base its ruling as to the standard of care upon the age or other characteristics of the injured child, but noted that "[r]ecovery has generally not been permitted for injuries suffered by children on school grounds as a result of common, permanent, or natural conditions existing thereon." *Id.* at 304, 409 S.E.2d at 107. The *Waltz* decision regarding the duty owed to a minor-invitee was decided pre-*Nelson*, but as the majority noted "the present standard for all lawful visitors is the same as it was prior to *Nelson* for invitees." I recognize the difficulty of our current application of pre-*Nelson* cases, as *Nelson* abolished one aspect of premises liability law, the distinction between trespassers, licensees, and invitees, but kept the rest of the common law which had developed, including how standards of care may apply in different factual contexts. I have attempted to follow the precedents set by portions of the case law which were not changed by *Nelson*, and I believe that the majority has treated *Nelson* as abrogating portions of the common law which it did not. Thus I believe it is relevant that this case arises from an injury to a child from a common, permanent, natural condition of the land. I do not believe that this creates a "bifurcated approach" to the law of negligence as applied to natural versus manmade conditions, as noted by the majority, but simply recognizes the application of the general standard of "reasonable care" in different factual situations, in accord with our prior case law.

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As noted above, in *Hedrick*, the minor-plaintiff alleged that her injuries were caused by the defendant's dance floor, an artificial condition. 267 N.C. at 63-64, 147 S.E.2d at 552. In contrast, plaintiff Chelsea was injured on defendant's property when she fell down in New Years Creek and went over Glen Burney Falls, which are permanent, natural conditions of defendant's land. Accordingly, I agree with defendant that the facts here are distinguishable from *Hedrick*. *Hedrick* sets forth the general rule applicable as to conditions which have been created by the landowner- artificial conditions- on the landowner's premises:

The rule of law is stated in the same words for all these situations—the proprietor must use the care a reasonable man similarly situated would use to keep his premises in a condition safe for the foreseeable use by his invitee but the standard varies from one type of establishment to another because different types of businesses and different types of activities involve different risks to the invitee and require different conditions and surroundings for their normal and proper conduct.

267 N.C. at 67, 147 S.E.2d at 553-54.

Plaintiff goes too far one way in its arguments on the applicable standard of care, while defendant goes too far the other way. I believe the correct standard lies in the middle, and the trial court instructed the jury accordingly. Defendant argues that “when dealing with a natural condition that is open and obvious a landowner has no duty to take additional precautions for children using the property.” However, the cases that defendant cites in support of its argument are in the context of the attractive nuisance doctrine. *See Leonard v. Lowes Home Centers, Inc.*, 131 N.C. App. 304, 506 S.E.2d 291 (1998), *disc. review denied*, 350 N.C. 97, 528 S.E.2d 364 (1999); *McCombs v. City of Asheboro*, 6 N.C. App. 234, 170 S.E.2d 169 (1969); *Fitch v. Selwyn Village, Inc.*, 234 N.C. 632, 68 S.E.2d 255 (1951). The attractive nuisance doctrine operates as “an exception to the general rule regarding the liability of landowners for injuries sustained on the premises *by trespassers*.” *Lanier v. North Carolina State Highway Com.*, 31 N.C. App. 304, 310, 229 S.E.2d 321, 324 (1976) (emphasis added). Here, plaintiff Chelsea was not a trespasser; she was lawfully on defendant's property. Therefore, the cases cited by defendant in support of its argument that it owes no duty to take additional precautions in anticipation of minor lawful visitors as to natural conditions of the land are inapplicable. Other than *Waltz*, I find no relevant

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North Carolina cases that address a landowner's duty to a minor-lawful visitor injured by a natural condition of the land. However, as the attractive nuisance cases cited by defendant do address a landowner's duty to child-trespassers in the context of natural conditions of the land, I find them instructive in considering defendant's duty to a minor lawful-visitor who is injured by a natural condition on defendant's land.

In *Fitch*, the plaintiff's intestate, age two, lived with his parents in one of the defendant's apartments, which was located about 20 yards from Sugar Creek in Charlotte, North Carolina. 234 N.C. at 633, 68 S.E.2d at 256. The plaintiff's intestate wandered down to Sugar Creek and drowned. *Id.* The plaintiff brought a wrongful death action against the defendant apartment owner, alleging that

there was no fence or other obstruction to prevent small children from falling or climbing down the creek banks to the open waters of Sugar Creek; that defendant knew, or by the exercise of reasonable care could have known, that the banks and waters of Sugar Creek, as it passed over the apartment properties, was a common resort of children and constituted a condition which was inherently dangerous to small children.

Id. The trial court sustained the defendant's demurrer, dismissing the plaintiff's claims, and the plaintiff appealed. *Id.* at 634, 68 S.E.2d at 256-57. On appeal, the Court reasoned that

[i]t is a matter of common knowledge that streams of water are attractive to children, and that thousands of them flock to them during each year for the purpose of wading or swimming in their cool and refreshing waters, or to fish therein, notwithstanding the common dangers that may exist in such use of our natural streams.

Id. at 635, 68 S.E.2d at 257. The Court, in discussing a landowner's duty and the hazards which are inherent to a natural condition of the land, noted that

[t]he owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon; to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing; and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to

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common dangers, existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different; and such is the rule of the turntable cases, of the lumber pile cases, and others of a similar character.

If it should be conceded that a branch or creek is inherently dangerous to children of tender years, it must also be conceded that such streams cannot be easily guarded and rendered safe. A street is ordinarily an unsafe place for a child of tender years to play, but the location of a house near a street does not impose upon the landlord any obligation to protect the children of his tenant from injury caused by playing in such street. Streets, like streams, cannot be easily guarded and rendered inaccessible to children.

Id. at 635-36, 68 S.E.2d at 257-58. (citations and quotation marks omitted). The Court went on to hold that “the plaintiff’s complaint do[es] not make out a cause of action for actionable negligence against the defendant” and affirmed the trial court’s dismissal of the plaintiff’s complaint. *Id.* at 636, 68 S.E.2d at 258.

In *Leonard*, the minor plaintiff, age nine, “was seriously injured when she rode her bicycle down a dirt pathway on a steep slope from defendant’s property into the street and collided with a car.” 131 N.C. App. at 305, 506 S.E.2d at 292. The steep slope was “located partially upon defendant’s property, and was created when defendant graded its property for development as a store site in 1986.” *Id.* The minor plaintiff and her mother brought a claim on behalf of the minor plaintiff alleging that “the pathway on the steep slope is a dangerous condition subjecting defendant landowner to liability under the doctrine of attractive nuisance.” *Id.* At trial, a jury found the defendant negligent but also found the minor plaintiff to be contributorily negligent. *Id.* A judgment was entered dismissing the plaintiffs’ complaint with prejudice, and the plaintiff appealed. *Id.* On appeal, this Court reasoned that,

[a] danger which is not only obvious but natural, considering the instrumentality from which it arises, is not within the meaning of the attractive nuisance doctrine, for the reason that an owner or occupant is entitled to assume that the parents or guardians of a

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child will have warned him to avoid such a peril [B]odies of water and streets have generally been considered so natural, pervasive and obvious a danger, that landowners cannot be expected to protect young children from the dangers despite their allurements to children of tender years. *Hedgepath v. City of Durham*, 223 N.C. 822, 823, 28 S.E.2d 503, 504-05 (1944)[.]

Id. at 307-08, 506 S.E.2d at 293-94. The Court went on to hold that the downhill path was “a natural and obvious condition, creating no legal duty upon defendant to take precautions against harm to young children[,]” and affirmed the dismissal of the plaintiff’s complaint. *Id.* at 309-10, 506 S.E.2d at 294-95.⁷

Our courts have previously noted the burden of making natural features of the land safe, especially bodies of water, is particularly high. “[S]treams[] cannot be easily guarded and rendered inaccessible to children.” *Fitch*, 234 N.C. at 636, 68 S.E.2d at 258. I therefore disagree with the majority that there is no distinction in the caselaw as the application of the standard of “reasonable care” to artificial conditions as opposed to natural conditions of the land, and I would rely upon the case which has addressed natural conditions, *Waltz*.

The status of the minor-plaintiff as a lawful visitor and not a trespasser does not alter the hazards which are inherent to natural conditions, such as streams, waterfalls, or rivers, nor does her status minimize the difficulty in guarding and rendering such conditions safe, as noted by our Courts in *Fitch* and *Leonard*. Defendants do have a duty “to use ordinary care to keep the premises in a reasonably safe condition for lawful visitors who use them in a reasonable and ordinary manner.” See N.C.P.I.-Civ. 805.55 (2008). Because the ages of lawful minor visitors may vary from crawling babies to teenagers, the practical result of a “characteristic”-based jury instruction on the standard of care would be to require landowners to “babyproof” every inch of potentially dangerous natural features of land, including rivers, streams, and, for that matter, the shorelines of North Carolina’s sounds and the Atlantic Ocean. As the majority opinion adopts the broad language of the “reasonably foreseeable characteristics” of the lawful visitor, the instruction as approved could require

7. *McCombs v. City of Asheboro*, 6 N.C. App. 234, 170 S.E.2d 169 (1969), the second case cited by defendant in support of its argument, is not helpful to the analysis of a landowner’s duty as to natural conditions, as it addressed the defendant’s duty and the application of the attractive nuisance doctrine in the context of an injury caused by a manmade artificial condition—a ditch excavated by the defendant for placement of a sewer line.

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a landowner to attempt to make every inch of its property—since people do tend to wander off of marked trails—even natural conditions on the land, safe for every “foreseeable” lawful visitor despite his age or disabilities.⁸

Plaintiffs argue that their “requested instruction incorporates North Carolina jurisprudence concerning the negligence of minors between seven and fourteen years old” for purposes of contributory negligence of a minor. *See Hedrick*, 267 N.C. at 65, 147 S.E.2d at 552 (“The plaintiff, being only 13 years of age at the time of her fall, is presumed to have been incapable of contributory negligence. *Hutchens v. Southard*, 254 N.C. 428, 119 S.E.2d 205 [(1961)]; *Adams v. State Board of Education*, 248 N.C. 506, 103 S.E.2d 854 [(1958)]. Though this presumption is rebuttable, the burden of rebutting it is upon the defendants.”). Essentially, plaintiffs argue that both the standard of care owed by the landowner and the standard of care of the lawful visitor to watch out for her own safety should vary based upon the characteristics of the visitor. Neither plaintiffs nor the majority opinion have cited any cases which would support the proposition that the jury instructions as to both the duty of the landowner and the standard for contributory negligence should be based upon the age of the lawful visitor. The age of the minor lawful visitor is taken into consideration as to the issue of contributory negligence, *see Welch v. Jenkins*, 271 N.C. 138, 142, 155 S.E.2d 763, 766-67 (1967), and the jury here was instructed as to the presumption that a child of plaintiff Chelsea’s age is presumed to be incapable of contributory negligence. I find no support in the prior cases for plaintiffs’ argument that the same standards used as to children for purposes of

8. I also note that N.C.P.I. 805.69 (2008), CITY OR COUNTY NEGLIGENCE—DEFENSE OF CONTRIBUTORY NEGLIGENCE—HANDICAPPED PLAINTIFF, addresses contributory negligence as to a handicapped person. “A person traveling on a [street] [sidewalk] [alley] [bridge] [public way] has a duty to use ordinary care to protect *himself* from [injury] [damage]. *He* must use *his* senses to discover and to avoid such dangerous conditions as would be discovered and avoided by a reasonable person exercising ordinary care for *his* own safety under the same or similar circumstances. If one or more of a person’s senses is impaired because of blindness, deafness, or some other handicap, the law requires *him* to take more care and use more vigilant caution for his own safety on public ways in order to compensate for his handicap. Thus, in order to exercise ordinary care for *his* own safety, a person who is [blind] [deaf] [(name other handicap)] must exercise that degree of care which a reasonable person with the same or similar handicap would exercise under the same or similar circumstances.” (footnotes omitted). I note that there is no pattern jury instruction stating that the standard of care owed by the city or county is higher based upon the fact that the particular plaintiff is handicapped in some manner which made it more difficult for the plaintiff to perceive or respond to hazards.

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contributory negligence should be applied to determine the standard of care owed by the landowner.

Here, defendant had opened up the land on which Glen Burney Falls and New Years Creek were located to the public and had a reason to expect visitors of all ages would explore the property. Therefore, rather than hold that landowners owe no duty to take additional precautions for minor lawful-visitors as to natural conditions of the land, as defendant argues, or, as in *Fitch*, 234 N.C. at 635-36, 68 S.E.2d at 257-58, shift that duty entirely to the minor's parents, I would hold that for permanent, naturally occurring conditions, such as the stream and waterfall in question, landowners owe lawful visitors, including minors, the same duty established in *Nelson*, 349 N.C. at 631-32, 507 S.E.2d at 892: "the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." In addition, the landowner has a duty to give adequate warning to lawful visitors of "any hidden or concealed dangerous condition about which the owner knows or, in the exercise of ordinary care should have known." *James v. Wal-Mart Stores, Inc.*, 141 N.C. App. 721, 724, 543 S.E.2d 158, 160 (Edmunds, J., dissenting), *reversed per curiam*, 354 N.C. 210, 552 S.E.2d 140 (2001) (adopting J. Edmunds dissent). As defendant had opened up a portion of New Years Creek, Glen Burney Falls, and the surrounding property to the public and had made trails and built observation platforms to view the waterfalls, it owed its lawful visitors the duty to exercise reasonable care in the maintenance of the premises and to warn visitors of hidden or concealed dangers of which it was aware or should have been aware. Certainly these visitors might include both adults and children of all ages, but it is the jury's role to determine if the defendant's actions or omissions were consistent with the duty of "reasonable care" owed to all lawful visitors. Based upon the evidence presented and the jury instructions as given, the jury could have found that defendant failed to exercise reasonable care and that defendant was negligent in maintaining the premises or in failing to provide sufficient warning of the danger posed by Glen Burney Falls, but it did not. Because the jury instructions were correct, I believe that the jury's verdict should stand. As plaintiffs' requested instruction that "[a] landowner owes a higher level of care to a child who is unable to appreciate a potential of danger[.]" was not a correct statement of the law, *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274 (2002), plaintiffs failed to carry their burden, *Robinson v. Seaboard Sys. R.R., Inc.*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987), and I would find also that the

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pattern jury instruction as used by the trial court correctly and completely instructed the jury as to the applicable law. I also dissent as to the majority's holding that the trial court should have granted plaintiffs' motion for a new trial. Plaintiffs' only argument regarding their motion for a new trial is that "the trial court erred as a matter of law in the jury instructions. Therefore, Plaintiffs' Rule 59 motion should have been granted and a new trial awarded." Since I would hold that the trial court properly instructed the jury on the legal duty of a landowner as to a minor-lawful visitor injured on its premises, I would affirm the trial court's denial of plaintiffs' motion for a new trial.

The majority notes the jury's question "how is the age of the lawful visitor factored in?" and finds that the jury was "confused." The trial court had instructed the jury properly as to the determination of defendant's negligence and instructed the jury on the presumption that plaintiff Chelsea was incapable of contributory negligence because of her age—this is how the age of the lawful visitor factors in. The trial court was also right when it responded to the jury's question and told the jury, "It is harder than you thought." This is a hard case. It may seem to be a hardship upon the party injured to be without a remedy; however, this Court is admonished "not to be influenced . . . by any motions of hardships[,]” and to "look at hardships in the face rather than break down the rules of law[,]” as hard cases can be "apt to introduce bad law." *In re McDonald's Will*, 219 N.C. 209, 211, 13 S.E.2d 239, 240 (1941).

I would find no error in the trial court's instructions to the jury in regard to defendant's duty and affirm the trial court's denial of plaintiffs' motion for a new trial. I therefore respectfully concur in part and dissents in part.

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STATE OF NORTH CAROLINA v. RICKY DEAN NORMAN

No. COA10-1108

(Filed 5 July 2011)

1. Evidence— lay opinion—impairment at scene of accident

The trial court did not abuse its discretion in a prosecution for second-degree murder, driving while impaired, and other offenses by allowing a lay bystander at the scene to testify to his opinion that defendant was impaired. The conditions under which the witness observed defendant went to the weight rather than the admissibility of the testimony.

2. Evidence— prior arrests—not prejudicial

The defendant in a prosecution for second-degree murder, driving while impaired, and other offenses did not show that there was a reasonable possibility of a different result had evidence of prior arrests for possession of drug paraphernalia and resisting and delaying an officer not been admitted. Overwhelming evidence of defendant's guilt was presented at trial.

3. Witnesses— expert—no degree or certification—practical experience

The trial court did not err in a prosecution for second-degree murder, driving while impaired, and other offenses by qualifying a witness as an expert in forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and testing. Despite the witness's lack of a formal degree or certification, his extensive practical experience qualified him to testify as an expert.

4. Evidence— expert testimony—amount of cocaine in system—effect on driving—reliable methods

The trial court did not err in a prosecution for second-degree murder and other offenses by admitting expert testimony about the amount of cocaine in defendant's system and the effects of cocaine on the ability to drive. The witness's testimony that the level of cocaine in defendant's system would have been higher at the time of the collision, and his testimony as to the general effects of cocaine on a person's ability to drive, were supported by reliable methods.

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5. Homicide— second-degree murder—malice and proximate cause—sufficiency of evidence

There was sufficient evidence of malice and proximate cause in a second-degree murder prosecution arising from impaired driving where there was evidence that defendant had been drinking and was impaired; that he had ingested cocaine, which correlates to high-risk driving; that he was speeding; that he had prior convictions; and that his actions were a proximate cause of the victims' deaths. A left-hand turn by the victims was foreseeable, and, although the victims failed to yield the right-of-way to defendant, there was substantial evidence that defendant's speeding and driving while impaired were concurrent proximate causes.

6. Sentencing— personal bias—insistence on trial

The trial court did not abuse its discretion when sentencing defendant for second-degree murder and other offenses arising from impaired driving where defendant contended that the trial court impermissibly based defendant's sentence on the decision to contest the charges and on personal bias against defendant.

Appeal by Defendant from judgment entered 4 August 2009 by Judge Carl R. Fox in Superior Court, Wilkes County. Heard in the Court of Appeals 21 February 2011.

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

William D. Auman for Defendant.

McGEE, Judge.

Ricky Dean Norman (Defendant) was convicted on 4 August 2009 of two counts of second-degree murder, driving while impaired, failure to reduce speed to avoid an accident, and exceeding the posted speed. The trial court determined Defendant's prior conviction level to be III, and sentenced Defendant to two consecutive prison sentences of 200 months to 249 months, and a concurrent sentence of 12 months. Defendant appeals.

Factual Background

The evidence at trial tended to show the following. Shortly after 5:30 p.m. on 26 March 2007, Defendant was driving south on Old U.S. Highway 21 (Highway 21) in Elkin. Victims Harley and Helen Carter (the Carters) were driving east on Pleasant Ridge Road. Harley Carter

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attempted a left-hand turn onto Highway 21 from Pleasant Ridge Road. The front of Defendant's truck collided with the driver's side of the Carters' sedan. The Carters died at the crash site. Defendant was exceeding the posted speed limit of forty-five miles per hour, and the Carters failed to yield the right-of-way to Defendant.

David McCandless (Mr. McCandless), the State's accident reconstruction expert, testified that, at a distance of seventeen feet before impact, he calculated Defendant's speed to be approximately seventy-five miles per hour, and at the time of impact, to be approximately sixty miles per hour. Trooper Charles Olive (Trooper Olive) of the North Carolina Highway Patrol, an accident reconstruction expert, provided similar testimony regarding Defendant's speed at the time of impact. Trooper Olive testified that, in his opinion, based on the average person's perception-reaction time, had Defendant been traveling the posted speed limit, Defendant could have avoided the collision by veering to the right or by braking.

Toby Groce (Mr. Groce) testified that he was driving north on Highway 21 and turned left onto Pleasant Ridge Road less than two seconds before the collision. Mr. Groce observed Defendant's vehicle and saw that it was "definitely speeding," traveling about "fifty-two, fifty-five and above[.]" Mr. Groce estimated that, at the time Harley Carter began his left-hand turn onto Highway 21, Defendant was about 250 to 300 feet away from the intersection of Highway 21 and Pleasant Ridge Road. After hearing a collision, Mr. Groce stopped his vehicle and ran towards the accident. Mr. Groce detected a strong odor of alcohol emanating from Defendant at "a little over [an] arm's [length] distance" from Defendant. Based on the odor of alcohol and Defendant's behavior, Mr. Groce formed the opinion that Defendant was impaired.

Andrew Webb (Mr. Webb), Defendant's accident reconstruction expert, testified that he calculated Defendant's speed at the time Defendant braked in an attempt to avoid the collision, to be approximately sixty to sixty-five miles per hour prior. Mr. Webb determined that Defendant's speed, "just before impact[.]" was approximately fifty-nine miles per hour. Mr. Webb also determined that Defendant would have had between one-half and one and one-half seconds to react to the Carters' failure to yield the right-of-way.

Trooper Chris Anderson (Trooper Anderson), of the North Carolina Highway Patrol, testified that he responded to the call regarding the accident. Trooper Anderson reached the collision scene

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at 6:28 p.m. and was told by fire department responders that the Carters were deceased and that Defendant had been taken to Hugh Chatham Memorial Hospital (Chatham Memorial). Trooper Anderson smelled a strong odor of alcohol coming from Defendant's truck and he observed several open, empty beer cans inside Defendant's truck.

Trooper Anderson interviewed Defendant at Chatham Memorial at approximately 7:30 p.m. Based on the strong odor of alcohol on Defendant's breath, along with Defendant's appearance and behavior, Trooper Anderson formed the opinion that Defendant was "very noticeable[y]" impaired. Defendant told Trooper Anderson that he had consumed four beers between 1:30 p.m. and 3:00 p.m. that day, and that he had been traveling at "fifty to fifty-three miles per hour" on Highway 21. Defendant denied taking any prescription, or illegal, drugs that day.

Trooper Anderson charged Defendant with driving while impaired and asked that Defendant submit to a blood test, and Defendant consented. The blood test was administered at Chatham Memorial at 8:06 p.m. that evening and was later submitted to the State Bureau of Investigation (SBI) for analysis. The SBI's analysis of Defendant's blood sample revealed a blood alcohol level of 0.03. The SBI's analysis also revealed cocaine and cocaine metabolites in Defendant's blood sample. Trooper Anderson filled out an accident report which noted that the causes of the collision were Defendant's speeding, Defendant's impairment, and the Carters' failure to yield the right-of-way from a stop sign onto a roadway.

After treatment at Chatham Memorial, Defendant was transferred later that evening to Wake Forest University Baptist Medical Center (Baptist Hospital). A blood serum sample was taken from Defendant at Baptist Hospital at 8:49 p.m. that same evening.

Paul Glover (Mr. Glover) testified for the State "as an expert in the field[s] of forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing[,] and the effects of drugs on human performance and behavior." Mr. Glover testified that, based on the sample of Defendant's blood taken at Baptist Hospital, he determined Defendant's blood alcohol level to be 0.01. Dr. Andrew Mason (Dr. Mason) testified for Defendant as an expert in forensic toxicology. Dr. Mason testified that he used Defendant's same 8:49 p.m. blood sample and determined Defendant's blood alcohol level to be anywhere between 0.009 to 0.014. A urine sample taken from Defendant

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at Baptist Hospital that same evening tested positive for cocaine and cocaine metabolites.

Mr. Glover also testified that, based on the alcohol content of the two blood samples taken from Defendant shortly after the crash, he determined Defendant's blood alcohol level at the time of the collision to be 0.08. Mr. Glover also testified that the "half-life of cocaine is in the range of forty-five minutes to maybe an hour and a half." Based on the short half-life of cocaine and Baptist Hospital's report showing unmetabolized cocaine was present in Defendant's system, Mr. Glover determined that Defendant had recently used cocaine and that the concentration of cocaine in Defendant's system "would have been higher at the time of the crash." Mr. Glover further testified to the correlation between the effects of cocaine and "high-risk driving[.]"

Dr. Mason disagreed with the reliability and accuracy of Mr. Glover's methods in determining Defendant's blood alcohol level at the time of the collision. Dr. Mason agreed with Mr. Glover as to the average half-life of cocaine. Dr. Mason was of the opinion that Defendant had been exposed to cocaine within nine hours prior to the time Defendant's blood samples were taken. However, because a person can test positive for cocaine after the effects of the cocaine have worn off and because there was no quantitative measure of the amount of cocaine in Defendant's system, Dr. Mason testified there was no reliable method to determine whether Defendant was impaired by cocaine at the time of the collision.

Pam Stafford of the Wilkes County District Attorney's office testified that Defendant had been convicted of driving while impaired on four previous occasions. Trooper Robin Chandler (Trooper Chandler), a retired North Carolina Highway Patrol trooper; Trooper Steve Grizzell (Trooper Grizzell) of the North Carolina Highway Patrol; and Officer Ryan Preslar (Officer Preslar) of the Elkin Police Department, each testified regarding the circumstances of three of Defendant's prior driving while impaired arrests.

At the close of all the evidence, Defendant moved to dismiss. The trial court denied Defendant's motion. The jury convicted Defendant of all charges. Further facts will be introduced as required in the opinion.

I. Lay Opinion Testimony

[1] Defendant first argues that the trial court abused its discretion by allowing Mr. Groce, a lay witness, to testify that Defendant was impaired. We disagree.

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“[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion.” *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000) (citation omitted). “A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself.” N.C. Gen. Stat. § 8C-1, Rule 602 (2009). Lay witness “testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. Gen. Stat. § 8C-1, Rule 701 (2009).

“‘A lay witness is competent to testify whether or not in his opinion a person was drunk or sober on a given occasion on which he observed him.’” *State v. Strickland*, 321 N.C. 31, 37, 361 S.E.2d 882, 885 (1987) (citation omitted). “‘The conditions under which the witness observed the person, and the opportunity to observe him, go to the weight, not the admissibility, of the testimony.’” *Id.* (citation omitted). In *Strickland*, “[a witness] testified that he was with [the] defendant at [a] bootlegger’s house and saw [the] defendant take a drink.” *Id.* The *Strickland* Court held that “[s]ince [the witness] had the opportunity to observe [the] defendant, [the witness] was competent to give his opinion as to whether [the] defendant was intoxicated at that time.” *Id.*

Similarly, “a lay witness may state his opinion as to whether a person is under the influence of drugs when the witness has observed the person and such testimony is relevant to the issue being tried.” *State v. Lindley*, 23 N.C. App. 48, 50, 208 S.E.2d 203, 204 (1974) (citations omitted). In *Lindley*, our Court found no abuse of discretion where the trial court admitted lay witness testimony that the defendant was under the influence of drugs.

Asked by the solicitor to summarize upon what he based [his] opinion, the [witness] testified: “On the way [the defendant] drove his car, the way he walked, acted, talked. He was incoherent at times. His eyes were contracted. His pupils rather were contracted. He seemed to be in a daze, in a stupor.”

Lindley, 23 N.C. App. at 49, 208 S.E.2d at 204.

Mr. Groce testified that, after he heard the sound of the collision, he immediately parked his car and ran to the crash site. Mr. Groce

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detected a strong smell of alcohol on Defendant at “a little over [an] arm’s [length] distance” from Defendant. During *voir dire*, Mr. Groce said he formed the opinion that Defendant was impaired because of the strong smell of alcohol and because Defendant “was unable to maintain balance, was incoherent, was acting in an inebriated fashion,” and was disoriented. Therefore, Mr. Groce’s opinion was based on personal observation of Defendant immediately after the collision.

Defendant nevertheless contends that Mr. Groce’s opinion testimony was improperly admitted because Mr. Groce testified that Defendant never responded to Mr. Groce and that Mr. Groce was unaware of the exact nature of Defendant’s injuries. However, the conditions under which Mr. Groce observed Defendant “‘go to the weight, not the admissibility, of the testimony.’” *Strickland*, 321 N.C. at 37, 361 S.E.2d at 885 (citation omitted). The trial court did not abuse its discretion by allowing Mr. Groce to testify to his opinion that Defendant was impaired. Defendant’s argument is without merit.

II. Circumstances of Defendant’s Prior Driving While Impaired Arrests

[2] Defendant next argues that the trial court committed prejudicial error by admitting testimony regarding additional offenses with which Defendant had been charged in connection with Defendant’s prior driving while impaired arrests. We disagree.

Defendant concedes that his prior driving while impaired convictions were relevant for the purpose of proving malice. However, he argues that the circumstances surrounding the arrests were dissimilar from those of the present case and should have been excluded as irrelevant. Defendant further argues that, even if evidence of the specific circumstances of his prior driving while impaired arrests was somewhat relevant to prove malice, the evidence should have been excluded pursuant to N.C. Gen. Stat. § 8C-1, Rule 403 because any probative value of the evidence was substantially outweighed by the danger of unfair prejudice to Defendant.

Evidence is relevant if it has a “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).

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

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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). “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” N.C. Gen. Stat. § 8C-1, Rule 403 (2009).

Even where evidence is erroneously admitted because it is irrelevant or prejudicial, the defendant has the burden of showing that the error was not harmless, that “there [was] a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]”

State v. Hyman, 153 N.C. App. 396, 402, 570 S.E.2d 745, 749 (2002) (quoting N.C. Gen. Stat. § 15A-1443(a) (2002)).

In the present case, the State presented evidence of the specific circumstances surrounding three of Defendant’s prior driving while impaired arrests. Trooper Chandler testified that he arrested Defendant in 1995 for driving while impaired, reckless driving, and resisting and delaying an officer after Defendant fled from a highway checkpoint. Trooper Grizzell testified that he arrested Defendant in 2001 for driving while impaired after Defendant drove his truck into an embankment in a single-car accident. Officer Preslar testified that he arrested Defendant in 2006 for driving while impaired and possession of drug paraphernalia. Officer Preslar testified that he had observed two pipes in Defendant’s front seat and, after another officer found a wrapper beside Defendant’s truck that tested positive for cocaine, he determined that the two pipes were used to smoke cocaine.

Assuming, without deciding, that the trial court erroneously admitted evidence regarding Defendant’s previous arrests for possession of drug paraphernalia and resisting and delaying an officer, Defendant has not met his burden of showing “that the error was not harmless, that ‘there [was] a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]’ ” *Hyman*, 153 N.C. App. at 402, 570 S.E.2d at 749 (quoting N.C. Gen. Stat. § 15A-1443(a) (2002)).

Overwhelming evidence of Defendant’s guilt was presented at trial. Trooper Anderson testified that Defendant admitted to drinking four beers during the afternoon of the accident, and to speeding. Multiple witnesses described a strong odor of alcohol emanating

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from Defendant and they were of the opinion that Defendant was impaired. Mr. Glover testified that Defendant's blood alcohol level at the time of the collision was 0.08. Dr. Mason testified that Defendant's blood alcohol level at the time of the collision was between 0.05 and 0.094. Mr. McCandless testified that, at a distance of seventeen feet before impact, Defendant was driving approximately seventy-five miles per hour in a forty-five mile per hour zone. Mr. Webb testified that Defendant, prior to the time of Defendant's braking in an attempt to avoid the collision, was driving approximately sixty to sixty-five miles per hour. Moreover, the State presented undisputed evidence that Defendant had four prior driving while impaired convictions—evidence from which the jury could determine malice for the second-degree murder charges.

Defendant has therefore failed to show that there was a reasonable possibility, had the evidence of his prior arrests for possession of drug paraphernalia and resisting and delaying an officer not been admitted, a different result would have been reached at trial. Accordingly, even assuming *arguendo* that admission of the contested evidence was error, Defendant has failed to show that the admission of that evidence was prejudicial. Defendant's argument is without merit.

III. Qualification of Mr. Glover as an Expert Witness

[3] Defendant's third argument is that the trial court abused its discretion by qualifying Mr. Glover as an expert in the fields of forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior. We disagree.

Our Supreme Court has set forth "a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (citations omitted). At issue in Defendant's third argument is the second inquiry: whether Mr. Glover was properly qualified as an expert. "[A] trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Id.* at 458, 597 S.E.2d at 686 (citations omitted).

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2009), provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to

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understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.”

“It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession.” “It is enough that the expert witness ‘because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.’ ”

State v. Goode, 341 N.C. 513, 529, 461 S.E.2d 631, 640 (1995) (citations omitted). “As pertains to the sufficiency of an expert’s qualifications, we discern no qualitative difference between credentials based on formal, academic training and those acquired through practical experience.” *Howerton*, 358 N.C. at 462, 597 S.E.2d at 688.

Defendant contends that the improper qualification found by our Court in *Martin v. Benson*, 125 N.C. App. 330, 481 S.E.2d 292 (1997), *rev’d on other grounds*, 348 N.C. 684, 500 S.E.2d 664 (1998), supports his argument that Mr. Glover was improperly qualified as an expert. In *Martin*, our Court held that the trial court abused its discretion by qualifying a neuropsychologist to testify regarding expert issues of medical causation. *Id.* at 337, 481 S.E.2d at 296. *Martin*, however, is distinguishable from the present case because the *Martin* Court relied upon statutory definitions of psychology to reach the decision “that the practice of psychology does not include the diagnosis of medical causation.” *Id.* at 336-37, 481 S.E.2d at 295-96. Defendant has not presented any similar statutory definition of pharmacologist or physiologist which would affect the trial court’s discretion to qualify Mr. Glover as an expert in this case. *Martin* does not control our decision.

At trial, Mr. Glover testified that he was the head of the Forensic Test for Alcohol branch of the North Carolina Department of Health and Human Services. Mr. Glover oversaw the training of law enforcement officers on the operation of alcohol breath test instruments. He also oversaw training “for drug recognition experts” who “observ[ed] [the] effects of drugs in individuals.” Mr. Glover characterized the subject matter of his specialty as “scientific issues related to breath testing and blood testing for drugs and alcohol.” Mr. Glover holds a bachelor of science and a master’s degree in biology and is “certified as a chemical analyst on the breath test instruments [used] in [North Carolina.]” Mr. Glover attended a thirty-six hour course at Indiana University in 1998 regarding the effects of alcohol on the human body and “the various methods for determining alcohol concentrations.”

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Mr. Glover subsequently attended a twenty-eight hour course at Indiana University regarding “the effects of drugs on human psychomotor performance.”

Mr. Glover has published several works regarding his current occupation, including: “a study on the effects of interfering substances on breath alcohol testing” and a “presentation on the effects of heat on blood samples containing alcohol[.]” Notably, Mr. Glover has previously been qualified as an expert in forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior over 230 times in North Carolina. He has testified “in about seventy different counties[.]” in district court, superior court, and in federal court.

Despite Mr. Glover’s lack of a formal degree or certification in the fields of physiology and pharmacology, his extensive practical experience in these fields qualifies him to testify as an expert. *See Howerton*, 358 N.C. at 462, 597 S.E.2d at 688 (“[W]e discern no qualitative difference between credentials based on formal, academic training and those acquired through practical experience.”). At the very least, Mr. Glover was “ “in a better position to have an opinion on the subject[s] than [was] the trier of fact.” ’ ” *Goode*, 341 N.C. at 529, 461 S.E.2d at 640 (citation omitted). The trial court did not abuse its discretion by qualifying Mr. Glover as an expert. Defendant’s argument is without merit.

IV. Reliability of Mr. Glover’s Expert Opinion

[4] Defendant’s fourth argument is that the trial court abused its discretion by admitting Mr. Glover’s expert testimony regarding the relative amount of cocaine in Defendant’s system at the time of the collision and the effects of cocaine on an individual’s ability to drive, because the testimony was based upon unreliable methods. We disagree.

At issue in Defendant’s fourth argument is the first step of the three-step inquiry for expert testimony set out in *Howerton*: “Is the expert’s proffered method of proof sufficiently reliable as an area for expert testimony?” *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686 (citation omitted).

[R]eliability is . . . a preliminary, foundational inquiry into the basic methodological adequacy of an area of expert testimony. This assessment does not, however, go so far as to require the expert’s testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence. In this

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regard, we emphasize the fundamental distinction between the admissibility of evidence and its weight, the latter of which is a matter traditionally reserved for the jury.

Id. at 460, 597 S.E.2d at 687 (citation omitted). “[A] trial court’s ruling on the . . . admissibility of an expert’s opinion will not be reversed on appeal absent a showing of abuse of discretion.” *Id.* at 458, 597 S.E.2d at 686 (citations omitted).

Mr. Glover testified that he reviewed a report of a urine sample taken from Defendant at Baptist Hospital and that the report showed the presence of cocaine and cocaine metabolites. The evidence at trial tended to show that these substances were not given to Defendant as part of Defendant’s medical treatment. Mr. Glover testified that the “half-life of cocaine is in the range of forty-five minutes to maybe an hour and a half.” Mr. Glover explained that a half-life is measured by the amount of time “it take[s] for . . . the body to break down or reduce the concentration of a given drug by half.” Based on the short half-life of cocaine, and the Baptist Hospital report showing that unmetabolized cocaine was present in Defendant’s system, Mr. Glover determined that Defendant had recently used cocaine and that the concentration of cocaine in Defendant’s system “would have been higher at the time of the crash.” On cross-examination, Mr. Glover testified that there was no way, based upon the information he was given, to determine “the quantity of cocaine that was in [Defendant’s] system.”

Mr. Glover further testified as to the general effects of cocaine on a person’s ability to drive. He noted that there is a correlation between “high-risk driving, speeding, [and] sometimes fleeing . . . when cocaine is present in individuals.” Mr. Glover based this testimony on a study which “looked at crashes and behaviors and found [an] association or correlation between the presence of cocaine and high-risk driving.” Mr. Glover also testified that it was possible for cocaine to be detected in a person’s system even after the person was no longer impaired by the cocaine.

Thus, Mr. Glover’s testimony that the level of cocaine in Defendant’s system would have been higher at the time of the collision, and his testimony as to the general affects of cocaine on a person’s ability to drive, was supported by reliable methods. Notably, Defendant’s own expert corroborated Mr. Glover’s testimony both as to the half-life of cocaine and as to the existence of studies which show a correlation between the effects of cocaine and “high-risk” driving.

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Accordingly, the trial court did not abuse its discretion by admitting Mr. Glover's testimony regarding Defendant's use of cocaine on the day of the accident or the general effects of cocaine on a person's ability to drive. Defendant's argument is without merit.

*V. Motion to Dismiss Second-Degree Murder Charges for
Insufficient Evidence*

[5] Defendant's fifth argument is that the trial court erred by failing to dismiss his second-degree murder charges because the evidence, when viewed in the light most favorable to the State, was insufficient to show malice and proximate cause. We disagree.

"In ruling on a motion to dismiss, the trial court must view all of the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence." *State v. McAllister*, 138 N.C. App. 252, 259, 530 S.E.2d 859, 864 (2000) (citation omitted). "A motion to dismiss must be denied where substantial evidence exists of each essential element of the crime charged and of the defendant's identity as the perpetrator." *Id.* at 259-60, 530 S.E.2d at 864 (citation omitted). " 'Substantial evidence' is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 260, 530 S.E.2d at 864 (citation omitted).

" 'Second-degree murder is an unlawful killing with malice, but without premeditation and deliberation.' " *State v. Bethea*, 167 N.C. App. 215, 218, 605 S.E.2d 173, 176 (2004) (citation omitted). "The elements of second-degree murder are: '1. defendant killed the victim; 2. defendant acted intentionally and with malice; and 3. defendant's act was a proximate cause of the victim's death.' " *Id.* at 218, 605 S.E.2d at 177 (quoting *State v. Bostic*, 121 N.C. App. 90, 98, 465 S.E.2d 20, 24 (1995)). "Sufficient evidence of malice exists . . . where the defendant's acts show cruelty, recklessness of consequences, . . . or manifest a total disregard for human life." *McAllister*, 138 N.C. App. at 260, 530 S.E.2d at 864 (citations omitted).

The State need not show that the defendant intended to kill in order to establish malice for [second-degree] murder, but instead may meet its burden by showing that the defendant "had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind."

Id. (quoting *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000)).

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The State presented substantial evidence that, when viewed in the light most favorable to the State, supports a finding that Defendant acted with malice. Defendant admitted that he drank four beers prior to driving on the day of the collision. Mr. Glover calculated Defendant's blood alcohol level to be 0.08 at the time of the collision. Mr. Groce and Trooper Anderson both testified that, in their opinion, Defendant was impaired. The evidence at trial also tended to show that Defendant ingested cocaine within nine hours prior to the administration of Defendant's 8:49 p.m. blood sample, and that the effects of cocaine are correlated with high-risk driving. Defendant admitted that he was speeding at the time of the collision, and the State's experts calculated Defendant's speed to be approximately fifteen miles per hour over the posted speed at the time of the collision. The State also introduced evidence that Defendant had four prior driving while impaired convictions. Taken together and viewed in the light most favorable to the State, this is substantial evidence that Defendant acted with malice.

There is also substantial evidence that Defendant's actions were a proximate cause of the Carters' deaths.

Proximate cause is defined "as a cause: (1) which, in a natural and continuous sequence and unbroken by any new and independent cause, produces an injury; (2) without which the injury would not have occurred; and (3) from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed."

Bethea, 167 N.C. App. at 220, 605 S.E.2d at 178 (quoting *State v. Hall*, 60 N.C. App. 450, 454-55, 299 S.E.2d 680, 683 (1983)). "Accordingly, [a] defendant will be held criminally responsible for second-degree murder if his act caused or directly contributed to the victim's death." *Id.* (quoting *State v. Welch*, 135 N.C. App. 499, 502-03, 521 S.E.2d 266, 268 (1999)). "In order for negligence of another to insulate defendant from criminal liability, that negligence must be such as to break the causal chain of defendant's negligence; otherwise, defendant's culpable negligence remains a proximate cause, sufficient to find him criminally liable." *State v. Hollingsworth*, 77 N.C. App. 36, 39, 334 S.E.2d 463, 465 (1985) (citation omitted). "There may be more than one proximate cause and criminal responsibility arises when the act complained of caused or directly contributed to . . . the death." *Id.* (citation omitted).

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Defendant argues that two unforeseeable events proximately caused the Carters' deaths: (1) Mr. Groce's left-hand turn onto Pleasant Ridge Road, and (2) the Carters' failure to yield the right-of-way to Defendant. Defendant concludes that these unforeseeable events serve to break the causal chain between Defendant's actions and the Carters' deaths and thereby isolate Defendant from criminal liability. We are not persuaded. Initially, we note that Mr. Groce's left-hand turn onto Pleasant Ridge Road, which briefly blocked the Carters' car from Defendant's view as Defendant approached the site of the collision, was not unforeseeable and does not serve to isolate Defendant from liability.

As Defendant contends, the evidence at trial tended to show that the Carters' failure to yield the right-of-way to Defendant was a proximate cause of the collision. However, there was also substantial evidence that Defendant's actions of speeding and driving while impaired were concurrent proximate causes. The evidence tended to show that Defendant was between 250 and 300 feet from the site of the collision when the Carters began their turn onto Highway 21. From this evidence, the jury could determine that it was reasonably foreseeable that the Carters would pull out onto Highway 21 where the posted speed limit was forty-five miles per hour. The State's expert testified that, had Defendant been driving at the posted speed limit, Defendant could have avoided the collision by braking or by veering to the right. There was also substantial evidence that tended to show that Defendant was impaired at the time of the collision. Thus, when viewed in the light most favorable to the State, there was substantial evidence that Defendant's actions were concurrent proximate causes of the Carters' deaths and the trial court did not err by submitting the second-degree murder charges to the jury. Defendant's argument is without merit.

VI. Calculation of Defendant's Sentence

[6] Defendant's final argument is that the trial court abused its discretion by impermissibly basing Defendant's sentence on "[D]efendant's decision to contest the charges" and on personal bias against Defendant in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections Nineteen, Twenty-Three, and Twenty-Seven of the North Carolina Constitution. Defendant specifically contends that "[a]bsent . . . [D]efendant's colloquy with the trial court [prior to sentencing], his judgments may well have been concurrent as opposed to consecutive."

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“If an offender is convicted of more than one offense at the same time, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses.” N.C. Gen. Stat. § 15A-1340.15(b) (2009). However, N.C.G.S. § 15A-1340.15 gives discretion to the trial court and “does not prohibit the imposition of consecutive sentences.” N.C.G.S. § 15A-1340.15(a). “A sentence within statutory limits is ‘presumed to be regular.’” *State v. Peterson*, 154 N.C. App. 515, 517, 571 S.E.2d 883, 885 (2002) (quoting *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977)). “Where the record, however, reveals the trial court considered an improper matter in determining the severity of the sentence, the presumption of regularity is overcome.” *Id.* (citation omitted).

Defendant cites to *State v. Cannon*, 326 N.C. 37, 387 S.E.2d 450 (1990); *State v. Hueto*, 195 N.C. App. 67, 671 S.E.2d 62 (2009); *Peterson*, 154 N.C. App. 515, 571 S.E.2d 883; and *State v. Pavone*, 104 N.C. App. 442, 410 S.E.2d 1 (1991), in support of his argument. In *Cannon*, our Supreme Court found a violation of the defendants’ constitutional rights to trial by jury where, “[u]pon being advised that defendants demanded a jury trial, the trial judge told counsel in no uncertain terms that if defendants were convicted he would give them the maximum sentence.” *Cannon*, 326 N.C. at 38-39, 387 S.E.2d at 451. In *Hueto*, our Court found that the trial court considered an improper factor where the “trial court’s decision to impose eight consecutive sentences was partially based on [d]efendant’s decision to plead not guilty[.]” *Hueto*, 195 N.C. App. at 78, 671 S.E.2d at 69. In *Peterson*, our Court found that the trial court “improperly considered [d]efendant’s decision to exercise his right to a jury trial[.]” 154 N.C. App. at 518, 571 S.E.2d at 885, where

[a]t sentencing, the trial court stated [d]efendant “tried to be a con artist with the jury,” and he “rolled the dice in a high stakes game with the jury, and it’s very apparent that [he] lost that gamble.” Further, the court stated the evidence of guilt was “such that any rational person would never have rolled the dice and asked for a jury trial with such overwhelming evidence.”

Id. Similarly, in *Pavone*, our Court found that the “trial court improperly considered defendant’s . . . exercise of her constitutional right to a jury trial” where it stated that defendant was “‘in a different posture’” for sentencing because defendant did not plead guilty. *Pavone*, 104 N.C. App. at 446, 410 S.E.2d at 3.

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In the present case, the trial court sentenced Defendant to two consecutive prison sentences of 200 months to 249 months for second-degree murder, and a concurrent sentence of 12 months for driving while impaired. These sentences fall within the presumptive range for Defendant's prior conviction level of III and Defendant's classes of offense. *See* N.C. Gen. Stat. § 15A-1340.17 (2009) ("Punishment limits for each class of offense and prior record level."); N.C. Gen. Stat. § 14-17 (2009) (providing second-degree murder offense level); N.C. Gen. Stat. § 20-179 (2009) (providing punishment levels for driving while impaired). Because Defendant was sentenced within the presumptive range, Defendant's sentence is "presumed to be regular." *Peterson*, 154 N.C. App. at 517, 571 S.E.2d at 885 (quoting *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977)).

Defendant nevertheless contends that, as in *Cannon*, *Hueto*, *Peterson*, and *Pavone*, the trial court improperly considered Defendant's decision to contest the charges when sentencing Defendant. Unlike in those cases, however, the record in the present case does not give rise to the inference that the trial court considered Defendant's choice to exercise his constitutional right to a jury trial when sentencing Defendant. Defendant maintains that a pre-sentencing colloquy between the trial court and Defendant gives rise to the inference that the trial court, when sentencing Defendant, considered Defendant's decision to contest the charges. We disagree. During the colloquy the following exchanges occurred:

[DEFENDANT]: First of all, I was not impaired. I know on account of my record why I was convicted. That's the only thing. . . .

. . . .

THE COURT: But do you, do you think it's okay to drink four beers and then get into a car and drive?

[DEFENDANT]: Sure do.

. . . .

THE COURT: . . . Because you know what's wrong, the problem with the DWI law? Exactly what you just said, people trying to figure . . . how close they can get to the limit and still drive when they should be trying to figure out how to stay as far away from the limit if they're going to drive.

. . . .

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THE COURT: Mr. Norman, here's the problem, . . . With one, two, three, four, five prior DWIs if your mind is thinking that you should drink anything and drive it's messed up! It's messed up! If you think that it's okay after five DWIs to drink and drive anything out of your yard your mind is messed up, your reasoning is messed up! You're still thinking it's . . . okay. People [who] drink and drive and drive impaired always think it's okay.

. . . .

THE COURT: Even the people who blow thirty something still think they're okay. Now, I want you to be quiet because anything after, you say after this point is just going to cause me to raise the amount of time I give you in this case. . . . Mr. Norman, I'm tempted to give you the maximum sentence in this case but it's sort of counterproductive. You're fifty-five years old. I don't have to. If I give you thirty years you'll be eighty-five years old if you do the best you can do and you're in the minimum of sentences. If you get to the maximum, which is more up to two hundred forty-nine months, plus two hundred forty-nine months, you'll have to be one of the oldest people in North Carolina in order to get out. So I don't have to give you two twenty [-year sentences] back to back in order to do that. . . . I do believe that this accident happened . . . because the Carters pulled out of the intersection. But, the fact of the matter is . . . that you . . . make bad decisions that put yourself at risk and put other people at risk because you don't have an appreciation for alcohol and yourself and you still haven't learned and it's now been since 1973 that you keep experimenting and hoping that you're going to take this—well, since 1972—that you're willing to keep taking this chance. And the sad part is, just since 1990 you've been doing it more often rather than less often. And you stand up in court . . . and all you do by standing up in court is justify. And, let me tell you, that's appalling. You'd been a lot better off if you hadn't stood up and said one single solitary word, but you did. Sometimes you help yourself, sometimes you don't.

This colloquy raises the inference that the trial court took note of Defendant's insistence on his sobriety on the day of the collision and Defendant's insistence that driving after drinking four beers was "okay" despite Defendant's multiple driving while impaired convictions. However, the colloquy does not raise the inference that the trial court considered Defendant's choice not to plead guilty to the charges when sentencing Defendant.

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Defendant also argues that the presentencing colloquy between the trial court and Defendant raises the inference that the trial court decided to make Defendant's second-degree murder sentences run consecutively because of the trial court's personal bias against Defendant. Defendant has not presented any authority which supports his contention. Moreover, the record does not reveal that the trial court considered any improper sentencing factors when deciding to make Defendant's sentences run consecutively.

Thus, the trial court did not abuse its discretion when deciding Defendant's sentence. Defendant's final argument is without merit.

No Error.

Chief Judge MARTIN and Judge McCULLOUGH concur.

NEIL M. KIRKPATRICK AND CHERYL B. KIRKPATRICK, PLAINTIFFS v. TOWN OF NAGS
HEAD, A NORTH CAROLINA MUNICIPAL CORPORATION, DEFENDANT

No. COA10-309

(Filed 5 July 2011)

1. Appeal and Error— writ of certiorari—review of implicit determination by trial court

A writ of *certiorari* was granted by the Court of Appeals to allow appellate review of any implicit determination by the trial court concerning defendant's right to rely on a governmental immunity defense.

2. Immunity— governmental—closure of road

The extent to which particular municipal streets and roads are kept open for use by members of the public is a governmental function and governmental immunity is available to municipalities as a defense to damage claims arising from such discretionary road closure decisions. Governmental immunity is not available as a defense to claims arising from personal injuries or property damage sustained as a result of a defective condition in the maintenance of the street or road.

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3. Immunity— governmental—waiver by insurance—road closing

Defendant Town was entitled to rely on governmental immunity in a claim arising from the closing of a beach road following a storm and should have been granted summary judgment. Immunity was not waived by the Town's insurance policy because the policy covered occurrences resulting in damages for which the Town was liable. The storm was an act of God and thus was not conduct for which defendant was legally liable, and the decision not to repair the road was intentional with full knowledge of likely consequences, which also prevented coverage under the policy.

Appeal by defendant from order entered 7 December 2009 by Judge Walter H. Godwin in Dare County Superior Court. Heard in the Court of Appeals 13 October 2010.

The Brough Law Firm, by T.C. Morphis, Jr., and Robert E. Hornik, Jr., for Plaintiff-Appellee.

Hornthal, Riley, Ellis & Maland, L.L.P., by John D. Leidy, and Benjamin M. Gallop, for Defendant-Appellant.

ERVIN, Judge.

Defendant Town of Nags Head appeals from an order denying its motion for summary judgment predicated on governmental immunity grounds. On appeal, Defendant contends that the trial court erred by failing to conclude that it was immune from liability based upon the claims asserted against it by Plaintiffs Neil M. Kirkpatrick and Cheryl B. Kirkpatrick on governmental immunity grounds and that it had not waived governmental immunity by purchasing insurance. 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 erred by failing to enter summary judgment in favor of Defendant and that this case should be remanded to the Dare County Superior Court for the entry of judgment in favor of Defendant.

I. Factual Background

In 1983, Plaintiffs purchased a house and lot located at 9830 East Surfside Drive in Nags Head. At that time, Plaintiffs' property was located in the second row of houses and was separated from the Atlantic Ocean by a paved right-of-way known as Surfside Drive, a row of oceanfront homes, and a dune line. Over time, the dune line,

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the oceanfront homes, and the paved right-of-way were all washed away by the Atlantic Ocean.

In September 2003, Hurricane Isabel destroyed “[m]ost[,] if not all[,] of the paved surface of the Surfside Drive right-of-way in the vicinity of the Plaintiffs’ property.” After Hurricane Isabel, Defendant made a number of improvements in the area, including the installation of a protective berm and the creation of a gravel roadbed along the route of Surfside Drive. Both the berm and the gravel roadbed were washed away by a nor’easter in 2004.

The relevant section of Surfside Drive has not had a paved surface since September 2003, and no gravel roadbed has existed on that site since 2004. After the 2004 nor’easter, Defendant made a conscious decision to refrain from making any additional effort to rebuild, repair, or restore Surfside Drive. Furthermore, Defendant erected “permanent barricades” to prevent vehicles from traveling upon the affected portion of Surfside Drive. In the years following the 2004 nor’easter, the portion of Surfside Drive relevant to this appeal continued to erode. Although the record reflects some disagreement between the parties about the exact date upon which Surfside Drive completely disappeared into the Atlantic, the right-of-way no longer existed as of 2010.

Plaintiffs utilized the residence situated on their lot as a summer rental property.¹ Prior to its disappearance, Plaintiffs’ residence was accessed by way of Surfside Drive. According to Plaintiff Neil Kirkpatrick, “[a]fter the October 23, 2004 nor’easter, [Plaintiffs] were unable to access the House by vehicle because approximately the portion of Surfside Drive running in front of the Property had been washed away completely.” Plaintiff Neil Kirkpatrick further complained that Defendant “prohibited . . . driving over the open beach for nearly all of the time between the October 23, 2004 nor’easter and the present[,] . . . [and,] [b]eginning on November 16, 2004, [Defendant] formally prohibited all vehicular access in or out of the washed out portion of Surfside Drive.” Even so, Plaintiffs were sometimes able to access their home by driving on the beach or by parking in a public right-of-way near the property and walking to the house and were always able to reach their residence on foot. On 24 January 2007, Defendant informed Plaintiffs that their residence had become unsuitable for occupancy and that they could not reoccupy it until vehicular access had been restored.

1. Plaintiffs’ residence was destroyed by, and subsequently washed into, the Atlantic Ocean in November 2009.

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On 15 November 2007, Plaintiffs filed a complaint against Defendant Town of Nags Head alleging claims for inverse condemnation and negligence. In their complaint, Plaintiffs alleged that Defendant had an affirmative duty pursuant to N.C. Gen. Stat. § 160A-269(a) to keep public streets “in proper repair” and “free from unnecessary obstructions.” According to Plaintiffs, Defendant negligently failed to comply with this obligation by refraining from taking any action to maintain Surfside Drive after the 2004 nor’easter “washed out the improved road surface . . . completely.” In Plaintiffs’ view, Defendant’s negligence caused Plaintiffs to sustain “substantial costs, damage and harm.” More specifically, Plaintiffs alleged that Defendant’s conduct resulted in:

lost rental revenue in 2005, 2006 and 2007; . . . caused [Plaintiffs] to make significant expenditures trying to establish alternate access to the Property; . . . forced [Plaintiffs] to expend significant sums placing sandbags seaward of [their property] to protect it from erosion; and . . . forced [Plaintiffs] to undertake other expensive repairs.

In response to an interrogatory asking Plaintiffs to “[i]dentify as an ‘Act’ each instance that [they] suffered damage due to any act or failure to act on the part of the Defendant,” Plaintiffs stated that:

. . . The Plaintiffs were unable to rent out the Kirkpatrick Property in 2005, 2006, 2007 and 2008 because of a lack of access to the structure. Also, the Plaintiffs continue to pay taxes on the property, but effectively receive no services because there is no vehicle access to the Kirkpatrick Property[.]

Moreover, Plaintiff Neil Kirkpatrick has spent thousands of dollars installing sandbags to protect the Kirkpatrick Property. . . These bags are located just seaward of the house. Had the Town timely closed the Southern Portion of Surfside Drive, however, by State law the Plaintiffs would have taken title to part of the land underneath the right-of-way and could have placed the sandbags further from the house, thereby providing better protection to the house.

Also, the Plaintiffs have spent considerable sums repairing their house due [to] the effects of erosion and storms. . . . At this time, Plaintiffs have not determined specifically which repairs were necessitated or exacerbated by the inaction of the Town.

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Finally, the Plaintiffs have expended numerous hours working with neighboring property owners to establish a private access-way for the Kirkpatrick Property. Had the Town closed the Southern Portion of Surfside Drive, however, the Town would have then been obligated to either purchase or condemn an alternate accessway for the Kirkpatrick Property.

After an initial period of discovery, Plaintiffs filed a motion for partial summary judgment and Defendant filed a motion for summary judgment. The parties' motions were heard on 6 April 2009 before Judge Jerry R. Tillet. On 20 May 2009, Judge Tillet entered an order denying Plaintiffs' motion in its entirety, granting summary judgment in favor of Defendant with respect to Plaintiffs' inverse condemnation claim, and denying the remainder of Defendant's motion, which related to Plaintiffs' negligence claim, without prejudice "until it may be determined if defendant has waived its immunity by the purchase of liability insurance actually providing coverage for such claim."

After additional discovery, Defendant's renewed motion for summary judgment was heard before the trial court at the 16 November 2009 civil session of the Dare County Superior Court. On 7 December 2009, the trial court entered an order denying Defendant's motion, stating, in pertinent part, that:

. . . . Upon consideration of the arguments of counsel, written briefs, pleadings, and the discovery materials, affidavits and other materials submitted to the Court pursuant to N.C.R. Civ. Pro. 56, the Court finds that a genuine issue of material fact exists with regard to whether defendant has waived its immunity by the purchase of insurance providing liability coverage applicable to Plaintiffs' claim of negligence and that Defendant is not entitled to judgment as a matter of law on Plaintiffs' claim of negligence.

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

II. Legal Analysis

A. Standard of Review

The entry of summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c); *see also Johnson v. Beverly Hanks & Assoc.*, 328 N.C. 202, 207, 400 S.E.2d 38, 41 (1991)

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(stating that “[i]t is well settled that a party moving for summary judgment is entitled to such judgment if the party can show, through pleadings, depositions, and affidavits, that there is no genuine issue of material fact requiring a trial and that the party is entitled to judgment as a matter of law”) (citations omitted). “The party who moves for summary judgment has the initial burden to prove that there are no disputed factual issues[;]” however, “[o]nce the moving party has met this initial burden, the nonmoving party must produce a forecast of evidence demonstrating that he or she will be able to make out a prima facie case at trial.” *Johnson*, 328 N.C. at 207, 400 S.E.2d at 41 (citations omitted).

We review a trial court order granting or denying a summary judgment motion on a *de novo* basis, with our examination of the trial court’s order focused on “determin[ing] whether there is a ‘genuine issue of material fact’ and whether either party is ‘entitled to judgment as a matter of law.’” *Stone v. State*, 191 N.C. App. 402, 407, 664 S.E.2d 32, 36 (2008) (quoting *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007)), *disc. review denied and app. dismissed*, 363 N.C. 381, 680 S.E.2d 712 (2009). As part of that process, we view the evidence “in the light most favorable to the nonmoving party.” *Brown v. City of Winston-Salem*, 171 N.C. App. 266, 270, 614 S.E.2d 599, 602 (quoting *Moore v. Coachmen Industries*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 775 (1998)), *cert. denied*, 360 N.C. 60 (2005). We will now utilize this standard in reviewing the trial court’s decision to deny Defendant’s summary judgment motion. As a result of the fact that the parties have not identified any disputed issue of fact, the operative question before us in this case is whether Defendant was or was not entitled to the entry of summary judgment as a matter of law on governmental immunity grounds.

B. Substantive Legal Issues**1. Reviewability of Judge Tillett’s Order**

[1] The first issue that we must address is the extent, if any, to which any determination made in Judge Tillett’s order concerning the availability of governmental immunity to Defendant as a general proposition is properly before this Court in connection with Defendant’s appeal from the trial court’s order. Although both parties appear to agree that Judge Tillett’s order reflects an implicit determination that Defendant is entitled, at least in the abstract, to rely on a defense of governmental immunity in response to Plaintiffs’ claim, they differ over the extent to which we are entitled to revisit that determination

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in the course of deciding Defendant's appeal. On the one hand, Defendant contends that, since Plaintiffs never noted an appeal to this Court from Judge Tillett's order despite the fact that they had the right to do so at either the time Judge Tillett's order was initially entered or later, any implicit determination that Judge Tillett might have made concerning the availability of a governmental immunity defense to Defendant has become the law of the case and is binding on both the parties and this Court. On the other hand, Plaintiffs argue that their challenge to Judge Tillett's implicit determination is properly before this Court as an alternate ground for sustaining the trial court's order as authorized by N.C.R. App. P. 10(c) and N.C.R. App. P. 28(c). Although the mere fact that a party elected not to appeal an interlocutory order does not preclude that party from challenging the decision embodied in that interlocutory order at a later time, *Stanford v. Paris*, 364 N.C. 306, 312, 698 S.E.2d 37, 41 (2010) (holding that the "plaintiffs did not forfeit their right to appeal by not taking an immediate appeal of the interlocutory [] order"), and although the "law of the case" doctrine does not limit an appellate court's right to revisit an interlocutory order which has not been reviewed on appeal or otherwise become final, *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983) (stating that, "[o]nce an appellate court has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the same case" and that, "[a]t the trial level '[t]he well established rule in North Carolina is that no appeal lies from one Superior Court judge to another'" and that, "'ordinarily[,] one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action'") (citing *Tennessee-Carolina Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974); *Horton v. Redevelopment Commission of High Point*, 266 N.C. 725, 726, 147 S.E.2d 241, 243 (1966); *Bass v. Mooresville Mills*, 15 N.C. App. 206, 207-08, 189 S.E.2d 581, 582, *cert. denied*, 281 N.C. 755, 191 S.E.2d 353 (1972); and quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)), we need not definitively determine whether either principle governs this case. Although we are inclined to believe that Plaintiffs' argument that they are entitled to challenge any implicit determination embodied in Judge Tillett's order to the effect that a governmental immunity defense is generally available to Defendant in this case as an alternative basis for upholding the trial court's order authorized by N.C.R. App. P. 10(c) and N.C.R. App. P. 28(c) and to overlook their failure to list their challenge to Judge Tillett's implicit determination

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in the list of issues authorized by N.C.R. App. P. 10(c) utilizing our authority under N.C.R. App. P. 2 to the extent that it is necessary to do so, we need not make a final decision concerning the validity of Plaintiffs' argument given our decision to issue a writ of *certiorari* pursuant to N.C.R. App. P. 21(a)(1) so as to allow us to review any implicit determination that may have been made in the Tillett order concerning Defendant's right to rely on a governmental immunity defense as a general proposition. *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) (stating that "we conclude that Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner"). Any other result will have the inequitable effect of allowing Defendant to seek and potentially obtain a decision from this Court holding that it did not waive the defense of governmental immunity by purchasing insurance without affording Plaintiffs an opportunity, to which they are entitled at some stage in this litigation, to challenge Defendant's right to rely on governmental immunity as a general proposition. As a result, the fundamental question that we must resolve on appeal is the extent to which Defendant was entitled to rely on a governmental immunity defense in response to Plaintiffs' claims and, if so, whether Defendant waived any otherwise available governmental immunity defense by purchasing insurance.

2. General Availability of Governmental Immunity Defense

[2] The functions performed by a municipality, such as Defendant, are subject to classification as either proprietary or governmental in nature. *Britt v. Wilmington*, 236 N.C. 446, 450-51, 73 S.E.2d 289, 293 (1952); *Sisk v. City of Greensboro*, 183 N.C. App. 657, 659, 645 S.E.2d 176, 179, (stating that "[a]cts of municipalities can be divided into two categories: (1) governmental functions, that is, discretionary, political, legislative, or those public in nature performed for the public good; and (2) proprietary functions, that is, activities which are commercial or chiefly for the private advantage of the compact community") (citing *Evans v. Housing Auth. of City of Raleigh*, 359 N.C. 50, 54, 602 S.E.2d 668, 671 (2004), *disc. review denied*, 361 N.C. 569, 650 S.E.2d 813 (2007)). Governmental immunity shields municipalities from liability only when the "activity complained of is governmental[.]" *Sisk*, 183 N.C. App. at 659, 645 S.E.2d at 179 (citing *Evans*, 359 N.C. at 54, 602 S.E.2d at 671); *see also Jones v. City of Durham*, 183 N.C. App. 57, 64, 643 S.E.2d 631, 636 (2007). As a result, the initial question we must address in evaluating the validity of Defendant's govern-

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mental immunity defense is whether the harm of which Plaintiffs complain resulted from the performance of a proprietary or a governmental function.

According to N.C. Gen. Stat. § 160A-296(a), municipalities have a duty to, among various other things, “keep the public streets, sidewalks, alleys, and bridges open for travel and free from unnecessary obstructions.” Although the “[m]aintenance of [] public road[s] and] highway[s] is generally considered a governmental function[, an] ‘exception is made in respect to streets and sidewalks of a municipality.’” *Sisk*, 183 N.C. App. at 659, 645 S.E.2d at 179 (quoting *Millar v. Wilson*, 222 N.C. 340, 342, 23 S.E.2d 42, 44 (1942)). This exception to the general rule that street and road maintenance is a governmental function, which was initially created in a judicial decision and later codified in N.C. Gen. Stat. § 160A-296(a), “has been recognized and uniformly applied in this jurisdiction [so that] the maintenance of streets and sidewalks is [properly classified] as a ministerial or proprietary function.” *Millar*, 222 N.C. at 342, 23 S.E.2d at 44 (citing *Sandlin v. Wilmington*, 185 N.C. 257, 116 S.E. 733 (1923); *Graham v. Charlotte*, 186 N.C. 649, 120 S.E. 466 (1923); *Willis v. New Bern*, 191 N.C. 507, 132 S.E. 286 (1926); *Michaux v. Rocky Mount*, 193 N.C. 550, 137 S.E. 663 (1927); *Hamilton v. Rocky Mount*, 199 N.C. 504, 154 S.E. 844 (1930); and *Speas v. Greensboro*, 204 N.C. 239, 167 S.E. 807 (1933)).

The duty, as thus recognized, is positive. While the municipal authorities have discretion in selecting the means by which the traveling public is to be protected against a dangerous defect in the street, provided the means selected are adequate, there is no discretion as to the performance or nonperformance of the duty itself.

Id. Thus, a municipality has an obligation to protect individuals from injury resulting from defective street and roadway conditions without being allowed to avoid liability for negligently performing its street and road maintenance obligations by relying on a governmental immunity defense while retaining discretion over the manner in which streets and roads are actually maintained.

A review of the reported decisions of this Court and the Supreme Court reveals that no appellate court in this State has ever held that governmental immunity was not available in a civil action arising from municipal street maintenance issues outside the context of personal injury or property damage arising from an accident within or

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near the right-of-way and clearly attributable to an unsafe condition existing in the street or road in question. *Id.* at 343, 23 S.E.2d at 44-45 (holding that a municipality was not protected by governmental immunity from liability arising from a motor vehicle collision occurring on the roadway and related to the replacement of a protective traffic light by city-employee); *Willis*, 191 N.C. at 510-13, 132 S.E. at 289-90 (holding that a municipality was not protected by governmental immunity in a case in which a driver was killed after he drove off roadway and into deep water at a location where the municipality had failed to erect a barrier, rail, guard, light, or any device giving notice that the street terminated and that deep water lay beyond the end of the road); *McDonald v. Village of Pinehurst*, 91 N.C. App. 633, 634-35, 372 S.E.2d 733, 734 (1988) (holding that a municipality was not protected from liability on governmental immunity grounds in a case in which a motorist was injured as a result of the municipality's failure to keep the streets free of visual obstructions). Plaintiffs have not asserted any claims resembling those that have been held not to be subject to a governmental immunity defense in our reported decisions. Instead, Plaintiffs assert that they are entitled to recover damages resulting from various forms of economic injury that they attribute to Defendant's failure to reconstruct Surfside Drive after the 2004 nor'easter and its decision to barricade the route formerly traversed by Surfside Drive in the affected area. If we were to accept Plaintiffs' contentions and hold Defendant liable to Plaintiffs for economic injuries resulting from the making of such decisions, we would effectively be depriving a municipality, such as Defendant, of its discretion to determine the identity of the streets upon which travel should be allowed at all. Put another way, accepting Plaintiffs' argument would effectively require a municipality to compensate a landowner or other person adversely affected by a street or roadway closure decision for economic losses arising from the closure of the road in question. We do not believe that either the Supreme Court or the General Assembly intended such a result at the time that they initially established and later codified the exception to the general rule that street and road maintenance is a governmental function entitled to governmental immunity protection applicable to municipal thoroughfares. Given these factors and the well-established policy providing for the availability of governmental immunity in the absence of a clear statutory mandate to the contrary, *Hodges v. Charlotte*, 214 N.C. 737, 742, 200 S.E. 889, 892 (1939) (Barnhill, J., concurring) (stating that, "[t]he exception to the prevailing doctrine[,] . . . which imposes liability upon a city or town for damages resulting from the failure to

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exercise ordinary care in keeping its streets and sidewalks in a reasonably safe condition for the purposes for which they are intended[,] was created by judicial decision [and w]e should be careful not to enlarge or extend this exception without legislative sanction”), we conclude that the extent to which particular municipal streets and roads are kept open for use by members of the public, such as Plaintiffs, is a governmental function and that governmental immunity is available to municipalities as a defense to damage claims arising from such discretionary road closure decisions.

As a result, we hold that municipalities may exercise their discretion, while remaining subject to protection from liability by the doctrine of governmental immunity, in deciding which roads to keep open for vehicular traffic and which roads should not continue to be open for such travel. However, in the event that the municipality decides to allow travel on a particular street or road, governmental immunity is not available as a defense to any claim arising from personal injuries or property damage sustained as a result of a defective condition in the maintenance of that street or road. As a result of the fact that Plaintiffs have not alleged or forecast evidence tending to show the existence of any specific defect in Surfside Drive that caused the injuries of which they complain other than Defendant’s decision to refrain from conducting further maintenance on Surfside Drive and to close Surfside Drive to vehicular traffic in the area adjacent to Plaintiffs’ property, we conclude that Judge Tillett and the trial court correctly concluded that governmental immunity was, as a general proposition, available to Defendant as a defense to Plaintiffs’ claim and that the ultimate issue that we must resolve in order to decide this case is the extent, if any, to which the trial court correctly determined that Defendant was not entitled to summary judgment on governmental immunity grounds because of issues arising from its purchase of a general liability insurance policy.

3. Waiver of Governmental Immunity

[3] According to N.C. Gen. Stat. § 160A-485:

Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Participation in a local government risk pool pursuant to Article 23 of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section. Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability. No formal action other

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than the purchase of liability insurance shall be required to waive tort immunity, and no city shall be deemed to have waived its tort immunity by any action other than the purchase of liability insurance.

As a result, the critical question that we must address in order to determine whether Defendant waived the defense of governmental immunity in connection with Plaintiffs' claim is whether any relevant insurance policies would have covered their claim.

An insurance policy is, at bottom, a contract. For that reason, an insurance policy should be construed in accordance with the intentions of the parties. *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299-300, 524 S.E.2d 558, 563 (2000).

As with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued. 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. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder. Whereas, if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Id. (citation omitted). We will now utilize these well-established rules of contract and insurance policy construction to construe any insurance policies that might have provided coverage to Defendant relating to Plaintiffs' claim.

According to the information contained in the record, Defendant has purchased two different types of insurance coverage Employment Practices Liability Coverage (EPL) and Commercial General Liability Coverage (CGL). However, given the parties' agreement that the EPL policy has no application to the present dispute, we need not examine that policy. The same is not true, however, of the CGL pol-

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icy, given that Plaintiffs base their claim that Defendant has waived governmental immunity with respect to their claims upon the language of that policy.

The CGL policy provides, among other things, that:

SECTION I—COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of “bodily injury” or “property damage” to which this insurance applies[.]

. . . .

- b. This insurance applies to “bodily injury” and “property damage” only if:

- (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory[.]”

. . . .

SECTION V—DEFINITIONS

. . . .

15. **“Occurrence”** means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

According to the relevant policy language, coverage under the CGL policy is triggered by the existence of a “bodily injury” or “property damage” stemming from an “occurrence” for which the policy holder is “legally obligated to pay.” Thus, if Plaintiffs’ claim does not involve “bodily injury” or “property damage,” if any “bodily injury” or “property damage” implicated by Plaintiffs’ claim does not stem from an “occurrence,” or if Defendant is not legally obligated to pay for the resulting “bodily injury” or “property damage,” then Defendant has no coverage under the CGL policy applicable to Plaintiffs’ claim and has not waived the right to rely on a governmental immunity defense.

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As a result of the fact that an “occurrence” is a specifically defined term, we must resolve the issue before us utilizing the definition set out in the CGL policy. However, since “accident” as used in the definition of an “occurrence” is not a defined term, we must give that word its ordinary meaning. An accident “is generally considered to be an unplanned and unforeseen happening or event, usually with unfortunate consequences.” *Id.* at 302, 524 S.E.2d at 564 (citing *Merriam-Webster’s Collegiate Dictionary* 7 (10th ed. 1993), and *Black’s Law Dictionary* 15 (7th ed. 1999)). For example, a “sudden, unexpected leakage from [a] pressure vessel, causing release of a contaminant . . . comes within the ordinary meaning of the term ‘accident.’” *Id.*

In their brief, Plaintiffs treat the 2004 nor’easter as the “occurrence” that serves to render coverage under the CGL policy available to Defendant. The 2004 nor’easter clearly amounted to “an unplanned or unforeseen happening or event,” thus we have no difficulty in concluding that the 2004 nor’easter constituted an “occurrence” as that term is used in the CGL policy. The fact that the 2004 nor’easter is an “occurrence” for purposes of the CGL policy is not, however, dispositive of the coverage issue. Instead, as we have already noted, Section I(1)(a) of the CGL policy obligates the carrier to pay “those sums that the insured becomes legally obligated to pay as compensatory damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.” Thus, we must necessarily address the extent, if any, to which the “occurrence” must be an event that gives rise to legal liability on behalf of Defendant.

On appeal, Plaintiffs argue that there is nothing in the relevant policy language that requires that the “occurrence” be something for which Defendant is legally liable. According to Plaintiffs, such logic “confuses proving the elements of negligence with proving the existence of insurance coverage.” We are not, however, persuaded by this argument. Although Plaintiffs correctly state that “[n]othing in the CGL Form requires the occurrence to be an act or omission of [Defendant],” the relevant policy language makes it abundantly clear that any “occurrence” must constitute an act or omission that results in damages Defendant is “legally obligated to pay.” Thus, if Defendant is not liable to Plaintiffs for damages caused by the “occurrence” upon which Plaintiffs rely, no coverage is available to Defendant under the CGL policy.

The 2004 nor’easter was undoubtedly an “Act of God,” as that term has been defined by the Supreme Court. According to the Supreme Court:

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[An Act of God is] [a]n act occasioned exclusively by violence of nature without the interference of any human agency. It means a natural necessity proceeding from physical causes alone without the intervention of man. It is an act, event, happening, or occurrence, due to natural causes and inevitable accident, or disaster; a natural and inevitable necessity which implies entire exclusion of all human agency which operates without interference or aid from man and which results from natural causes and is in no sense attributable to human agency. It is an accident which could not have been occasioned by human agency but proceeded from physical causes alone.

Lea Co. v. N.C. Board of Transportation, 308 N.C. 603, 615-16, 304 S.E.2d 164, 173-74 (1983) (quoting *Black's Law Dictionary* 31 (5th rev. ed. 1979)). According to well-established North Carolina law, “a person is not liable for injuries or damages caused by an act which falls within the meaning of the term ‘act of God[.]’” *Insurance v. Storage Co.*, 267 N.C. 679, 687, 149 S.E.2d 27, 34 (1966) (quoting 1 Am. Jur. 2d, *Act of God* § 11). However, “‘one may be held liable for his own negligence even though it concurs with an act of God.’” *Id.* (quoting 1 Am. Jur. 2d, *Act of God* § 11).

Although Plaintiffs do not appear to deny that the 2004 nor'easter constituted an “Act of God,” they seem to contend that their injuries stemmed from negligence on the part of Defendant which concurred with the “Act of God.” We do not, however, believe that acceptance of this argument would affect the outcome. Coverage under the CGL policy is only available in the event that the “occurrence” constituted actionable conduct by Defendant, which is simply not the case in this instance. For that reason, even if Plaintiffs’ injuries resulted from any negligent conduct on the part of Defendant that concurred with the 2004 nor'easter, the fact that the “occurrence” and the conduct giving rise to Defendant’s liability were not one and the same event is determinative for coverage purposes. Thus, given that the “occurrence” upon which Plaintiffs rely did not involve any conduct for which Defendant is legally liable and given that such a connection between the “occurrence” and the claimant’s injuries is necessary in order for there to be coverage under the CGL policy, Defendant did not waive governmental immunity by purchasing that policy.

Alternatively, Plaintiffs contend that Defendant’s “act of not repairing Surfside Drive also constitutes an ‘occurrence.’” In this facet of their argument, Plaintiffs are attempting to establish that

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Defendant's own allegedly negligent acts constitute the necessary "occurrence." However, even under Plaintiffs' definition of an "occurrence" as any intentional act not "(1) intended to cause injury or damage, or (2) substantially certain to cause injury or damage[.]" *Henderson v. U.S. Fidelity & Guaranty Co.*, 124 N.C. App. 103, 110, 476 S.E.2d 459, 463-64 (1996), *aff'd*, 346 N.C. 741, 488 S.E.2d 234 (1997), Defendant's failure to repair Surfside Drive does not constitute an "occurrence." The undisputed evidence contained in the present record establishes that Defendant made a conscious, intentional decision not to repair or rebuild Surfside Drive after the 2004 nor'easter and to obstruct the ability of vehicular traffic to travel on that street. By all accounts, Defendant acted with full knowledge of the likely consequences of its actions. At the time that the decision was made to refrain from repairing Surfside Drive, "[t]he statements made by [Defendant's] own officials during public meetings demonstrate that [Defendant] . . . [knew] of the defects or absence of roadbed in the Southern Portion of Surfside Drive[.]" In addition, Plaintiffs assert that, as early as "November, 2004 [they] verbally requested that the Southern Portion of Surfside Drive Roadbed be repaired, but the Town declined to do so." Finally, the record reveals that Defendant's officials engaged in an ongoing debate with each other and with members of the public about the appropriate course of action to take with respect to conditions on and around Surfside Drive after the 2004 nor'easter. As a result, there is no basis for any conclusion other than that Defendant acted intentionally and with full knowledge of the potential consequences at the time that it decided to refrain from repairing Surfside Drive, a determination that prevents Defendant's conduct from constituting the "occurrence" necessary to support a finding of coverage under the CGL policy. Since the CGL policy did not provide Defendant with coverage for claims such as those advanced by Plaintiffs, the trial court erred by implicitly finding that there was a genuine issue of material fact as to whether Defendant had waived governmental immunity by purchasing insurance.

III. Conclusion

Thus, we conclude that there is no genuine issue of material fact concerning the extent to which Defendant is entitled to rely on a defense of governmental immunity in opposition to Plaintiffs' claim, that Defendant is entitled to judgment as a matter of law with respect to that defense, and that the trial court erred by reaching a contrary conclusion. As a result, the trial court's order should be, and hereby

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is, reversed and this case should be, and hereby is, remanded to the Dare County Superior Court with instructions that judgment be entered in favor of Defendant.

REVERSED AND REMANDED.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA v. ROBERT LEE EARL JOE

No. COA10-1037

(Filed 5 July 2011)

1. Police Officers— resist, delay, or obstruct an officer—consensual encounter—motion to dismiss properly granted

The trial court did not err in a resisting, delaying, or obstructing an officer (RDO) case by granting defendant's motions to suppress evidence and dismiss the charge. The State invited consideration of defendant's motion to dismiss the RDO charge on the merits and considering all the circumstances surrounding the police officer's encounter with defendant prior to his flight, a reasonable person would have felt at liberty to ignore the officer's presence and go about his business.

2. Drugs— possession of cocaine—resist, delay, or obstruct an officer—habitual felon—voluntary dismissal

The trial court did not err in a resisting, delaying, or obstructing an officer (RDO), felony possession of cocaine, and habitual felon case by dismissing the felony possession of cocaine charge and habitual felon indictment. The State voluntarily dismissed the possession of cocaine charge and the habitual felon indictment, and the State's argument that the dismissals were erroneous was overruled.

Appeal by the State from order entered 19 May 2010 by Judge Patrice A. Hinnant in Forsyth County Superior Court. Heard in the Court of Appeals 22 February 2011.

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Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for Defendant.

STEPHENS, Judge.

I. Procedural History

On 24 October 2008, the State charged Defendant Robert Lee Earl Joe with resisting, delaying, and obstructing Winston-Salem Police Officer J.E. Swaim and possession with the intent to sell and deliver cocaine. Defendant was subsequently indicted by a grand jury on these charges, as well as having attained habitual felon status.

On 31 March 2009, Defendant filed a motion to suppress all evidence seized in a search of Defendant after his arrest on 24 October 2008. Defendant alleged that Swaim was “without probable cause and/or lacked reasonable suspicion to order [] Defendant to stop/detain him.” Defendant also filed a motion to dismiss the charge of resist, delay, or obstruct (“RDO”).

The State called the matter for trial on 18 May 2010 before the Honorable Patrice A. Hinnant. Before the jury was impaneled, an evidentiary hearing was held on Defendant’s motions. The trial court orally granted Defendant’s motions on that date, whereupon the State dismissed the possession of cocaine charge and the habitual felon indictment. By written order entered 19 May 2010, the trial court dismissed the RDO charge, suppressed all evidence obtained as a result of Swaim’s stop or arrest of Defendant, and ordered that “all charges, inclusive of the habitual felon indictment[,] are hereby dismissed.”

From the trial court’s order, the State appeals.

II. Evidence

At the hearing on the motions to suppress and dismiss, the State offered the following evidence: Swaim testified that on the date of the incident at issue, he was a police officer on the street crimes unit of the Winston-Salem Police Department. That unit patrolled high crime areas and attempted to address prostitution, alcohol, and drug violations. Swaim had personally investigated more than 200 drug-related crimes and made over 100 drug-related arrests in the previous year. Swaim had also assisted other officers with narcotics investigations and been involved in surveillance operations for narcotics investigations.

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On the afternoon of 24 October 2008, Swaim was patrolling the Greenway Avenue Homes apartment complex, located at the intersection of Gilmer Avenue and Inverness Street. He had personally made “no less than 10 drug arrests” in that area, including one that month, and had assisted with “no less than 50 of those same type[s] of investigations in that area.” Swaim was aware of citizen complaints “mainly [for] illegal drugs” in the apartment complex.

Swaim and other officers were riding in an unmarked Ford van, commonly known as “the jump-out van.” Swaim was dressed in a black t-shirt with the word “Police” written in yellow, bold letters on the front and back, and was wearing his duty belt, pistol, radio, handcuffs, and badge.

At approximately 2:00 p.m., as the van drove down Inverness Street, Swaim saw a black male, later identified as Defendant, wearing a red shirt and a navy blue jacket with the hood over his head, standing alone at the corner of the apartment building on Inverness Street. The weather was cloudy, “chilly, and it was raining.”

When the van was approximately 50 feet from Defendant, Defendant “looked up.” His eyes “got big when he seen [sic] the van, and he immediately turned and walked behind the apartment building[.]” Swaim got out of the van and “walked behind the apartment building to, you know, engage in a consensual conversation” with Defendant. When Swaim got behind the building, he saw Defendant running away. Swaim yelled “police” several times in a loud voice to get Defendant to stop. However, Defendant kept running so Swaim began to chase him.

Swaim chased Defendant for about two or three city blocks and continued to yell “[p]olice, stop[.]” Swaim lost sight of Defendant for a short while, but when Swaim reached 30th Street, he saw Defendant sitting “with his back against a house beside the air conditioning unit, like he was trying to hide.” Defendant appeared to be “manipulating something to the left with his hand[.]” Swaim walked toward Defendant and ordered him to put his hands up, but Defendant did not comply. Swaim grabbed Defendant’s arm, put him “on his chest on the ground and handcuffed him[.]” and placed him under arrest for resisting a public officer. Swaim then checked the area around where Defendant had been seated and found a clear, plastic bag containing an off-white, rock-like substance that was consistent with crack cocaine.

Defendant introduced as exhibits a map of Winston-Salem and a list of 16 known drug locations in the city.

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*III. Discussion**A. Dismissal of the Resist, Delay, or Obstruct Charge*

[1] The State first argues that the trial court erred in dismissing the RDO charge because “there was probable cause to support that [D]efendant ignored [Swaim’s] lawful command to stop.” We disagree with the State’s argument.

At the outset, we note that, in its brief on appeal, the State asserts that “[t]here is simply no authority in Chapter 15A of the General Statutes that authorizes dismissal pre-trial when dismissal concerns the sufficiency of the evidence.” While we agree with this statement, in this case, the trial court’s consideration of Defendant’s motion to dismiss the RDO charge on the merits was invited error upon which the State cannot now attempt to seek relief.

The following exchange took place between the trial court, the State, and defense counsel when the proceedings in this case began:

THE COURT: Court is ready.

[THE STATE]: Your Honor, the [S]tate is calling the next matter for trial, which is the matter of Mr. Robert Joe, which begins on page 2 of our calendar at line 6 through line 7.

And at this point the defense—well, the defense and [S]tate have various motions, and the defense has filed several that I believe will require an evidentiary hearing.

And what I would propose would be to begin with a hearing in connection with the defense motion to suppress, which was filed March 31, 2009. And I believe the same evidence would support a discussion of the motion to dismiss the resisting public officer charge which was filed July 6, 2009.

[DEFENSE COUNSEL]: That’s correct, Your Honor.

[THE STATE]: There is another motion to suppress a confession, but I believe that involves a separate set of facts and that would be best addressed after we address these initial—

THE COURT: When was that one filed?

[THE STATE]: That one was filed June 30th, 2009. And then depending on how that goes, we have some other motions that are non evidentiary.

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THE COURT: Okay.

[THE STATE]: With your permission, I'd like to address that motion to suppress and motion to dismiss first.

[DEFENSE COUNSEL]: Your Honor, I would ask that we sequester the witnesses.

THE COURT: Allowed.

(WITNESSES LEAVE THE COURTROOM.)

[THE STATE]: And, Your Honor, in just a moment the [S]tate will call Officer Swaim for testimony in connection with these motions.

It is readily apparent that the State invited consideration of Defendant's motion to dismiss the RDO charge on the merits. Moreover, the State actively participated in the ensuing evidentiary hearing on Defendant's motion without any objection to the procedure used. Furthermore, on appeal, the State does not assert that it possesses additional evidence relevant to the RDO charge which it was denied the opportunity to present at the hearing. In light of these circumstances, we conclude that the trial court did not err in hearing Defendant's motion to dismiss.

The elements of the offense of resisting, delaying, or obstructing a public officer are:

- 1) that the victim was a public officer;
- 2) that the defendant 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 defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and
- 5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

State v. Dammons, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612 (citing N.C. Gen. Stat. § 142-23), *disc. review denied*, 357 N.C. 579, 589 S.E.2d 133 (2003), *cert. denied*, 541 U.S. 951, 158 L. Ed. 2d 382 (2004). "The third element of the offense presupposes lawful conduct of the officer in discharging or attempting to discharge a duty of his office." *State*

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v. Sinclair, 191 N.C. App. 485, 489, 663 S.E.2d 866, 870 (2008). While an individual's flight from a lawful investigatory stop "may provide probable cause to arrest an individual for violation of [N.C. Gen. Stat. §] 14-223[.]" *State v. Lynch*, 94 N.C. App. 330, 334, 380 S.E.2d 397, 399 (1989), an individual's flight from a consensual encounter or from an unlawful investigatory stop does not supply such probable cause. *See Sinclair*, 191 N.C. App. at 491, 663 S.E.2d at 871.

The Fourth Amendment to the Constitution of the United States guarantees "[t]he right of the people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *See State v. Milien*, 144 N.C. App. 335, 339, 548 S.E.2d 768, 771 (2001).

A mere consensual encounter with a police officer does not trigger Fourth Amendment protections. *INS v. Delgado*, 466 U.S. 210, 215, 80 L. Ed. 2d 247, 254 (1984). Thus, a police officer may approach an individual in public to ask him or her questions and even request consent to search his or her belongings, "so long as a reasonable person would understand that he or she could refuse to cooperate." *State v. Kincaid*, 147 N.C. App. 94, 100, 555 S.E.2d 294, 299 (2001) (citation and quotation marks omitted). Neither reasonable suspicion nor probable cause is required for a police officer to engage in a consensual encounter with an individual, *State v. Brooks*, 337 N.C. 132, 142, 446 S.E.2d 579, 585-86 (1994), and the individual is at liberty "to disregard the police and go about his business[.]" *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991) (citation and quotation marks omitted).

A "seizure" entitling an individual to the protections of the Fourth Amendment may be either a "stop" or an "arrest." *Terry v. Ohio*, 392 U.S. 1, 16, 20 L. Ed. 2d 889, 903 (1968). An investigatory "stop" is "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information[.]" *Adams v. Williams*, 407 U.S. 143, 146, 32 L. Ed. 2d 612, 617 (1972). An "investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.'" *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). To determine whether reasonable suspicion exists, a court "must consider 'the totality of the circumstances—the whole picture.'" *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)).

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The stop 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 only requirement is a minimal level of objective justification, something more than an “unparticularized suspicion or hunch.”

Id. at 441-42, 446 S.E.2d at 70 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)).

“ ‘When a law enforcement officer, by word or actions, indicates that an individual must remain in the officer’s presence . . . , the person is for all practical purposes under arrest if there is a substantial imposition of the officer’s will over the person’s liberty.’ ” *State v. Zuniga*, 312 N.C. 251, 260, 322 S.E.2d 140, 145 (1984) (quoting *State v. Sanders*, 295 N.C. 361, 376, 245 S.E.2d 674, 684 (1978)). An officer must have probable cause to effectuate a warrantless arrest. *State v. Mills*, 104 N.C. App. 724, 728, 411 S.E.2d 193, 195 (1991). “Probable cause exists where ‘the facts and circumstances within [the officers’] knowledge, and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.” *Id.* (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76, 93 L. Ed. 1879, 1890, *reh’g denied*, 338 U.S. 839, 94 L. Ed. 513 (1949)).

In *State v. Sinclair*, a police officer and another plain-clothes law enforcement agent observed *Sinclair* sitting in a chair “among six to ten other people” outside a bowling alley, which was “ ‘ a local hangout’ ” and a “known drug activity area.” *Sinclair*, 191 N.C. App. at 487, 663 S.E.2d at 869. The officer approached *Sinclair* and said, “ ‘[L]et me talk to you.’ ” *Id.* “[*Sinclair*] stood up out of his chair, took two steps toward [the officer], and said, ‘Oh, you want to search me again, huh?’ [Sinclair] did not sound irritated or agitated, ‘[j]ust normal.’ ” *Id.* The officer replied, “Yes, sir,” and continued walking toward *Sinclair*. *Id.* *Sinclair* “stopped ten or twelve feet from [the officer], ‘quickly shoved both of his hands in his front pockets and then removed them,’ . . . made his hands into fists and took a defensive stance.” *Id.* As the officer got closer, *Sinclair* said, “ ‘Nope. Got to go,’ and ‘took off running’ across an adjacent vacant lot.” *Id.* The officers chased *Sinclair* and soon after took him into custody. *Id.*

This Court concluded that, “considering all the circumstances surrounding the encounter prior to [*Sinclair*’s] flight, a reasonable person would have felt at liberty to ignore [the officer’s] presence and

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go about his business[,]” and that “[Sinclair’s] flight from a consensual encounter cannot be used as evidence that [Sinclair] was resisting, delaying, or obstructing [the officer] in the performance of his duties.” *Id.* at 491, 663 S.E.2d at 871. Accordingly, there was no evidence that Sinclair acted “ ‘unlawfully, that is . . . without justification or excuse[.]’ ” *id.* at 491, 663 S.E.2d at 871 (quoting *Dammons*, 159 N.C. App. at 294, 583 S.E.2d at 612), and this Court concluded that the trial court erred in denying Sinclair’s motion to dismiss the charge of resisting a public officer. *Id.*

This Court further determined that “even if [the officer] was attempting to effectuate an investigatory stop, there are insufficient ‘specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant[ed] [the] intrusion.’ ” *Id.* (quoting *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979)).

In *State v. Lynch*, plain-clothes officers who were on patrol in an unmarked police car observed Lynch on a street corner around 5:30 p.m. and “mistakenly believed” that Lynch was a person for whom they “had warrants to arrest . . . for sale or delivery of cocaine.” *Lynch*, 94 N.C. App. at 330-31, 380 S.E.2d at 397. Shortly thereafter, the officers stopped a vehicle that Lynch had entered and one of the officers “approached the car, identified himself as a police officer, and asked [Lynch] to identify himself. [Lynch] did not respond, jumped out of the car, and attempted to flee.” *Id.* at 331, 380 S.E.2d at 397. The officers apprehended Lynch and, after a brief struggle, took him into custody, initially arresting him for resisting public officers. *Id.*

This Court determined that, since the officers had “a reasonable basis to stop [Lynch] and require him to identify himself” to ascertain whether he was the named subject in their arrest warrants, “the officers were lawfully discharging a duty of their office.” *Id.* at 333, 380 S.E.2d at 399. Accordingly, based on the evidence of Lynch’s flight from a lawful investigatory stop and his brief struggle after his arrest, this Court upheld Lynch’s conviction under N.C. Gen. Stat. § 14-223. *Id.* at 334, 380 S.E.2d at 399.

The circumstances in the present case are analogous to those in *Sinclair* and distinguishable from those in *Lynch*. Here, Swaim approached the apartment complex at 2:00 on a rainy, chilly afternoon. Defendant was standing on the corner, dressed appropriately in a jacket with the hood over his head. There was no evidence that Swaim had had prior dealings with Defendant. Although Swaim

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described the apartment complex as a known drug area where he had made drug-related arrests in the past, Swaim had no specific information about drug activity at the complex on that date. When Defendant saw the jump-out van approaching, “his eyes got big” and he turned and walked behind the apartment building. Swaim got out of the van and walked behind the apartment to “engage in a consensual conversation” with Defendant.

When Swaim rounded the corner of the apartment building, he observed Defendant running. Swaim chased Defendant and yelled several times that he was a police officer. After chasing Defendant for several blocks, and losing sight of him for a brief period, Swaim found Defendant squatting beside an air conditioning unit, apparently manipulating something to the left with his hand. Swaim grabbed Defendant’s arm, put him in handcuffs, and placed him under arrest for resisting a public officer.

Considering all the circumstances surrounding the encounter prior to Defendant’s flight, we conclude that a reasonable person would have felt at liberty to ignore Swaim’s presence and go about his business. *See Sinclair*, 191 N.C. App. at 490, 663 S.E.2d at 871. At the time Defendant turned and walked behind the apartment building, Swaim was still inside the van, and a reasonable person would not have felt compelled to wait on the street corner in the rain to determine if an officer inside the van desired to talk with him. Furthermore, the State acknowledged that Swaim exited the van and rounded the corner of the apartment building not with the intent to effectuate an investigatory stop but, rather, to “engage in a consensual conversation” with Defendant.

As “Defendant’s flight from a consensual encounter cannot be used as evidence that Defendant was resisting, delaying, or obstructing [Swaim] in the performance of his duties[.]” *Sinclair*, 191 N.C. App. at 491, 663 S.E.2d at 871, there is no evidence that Defendant acted “unlawfully, that is . . . without justification or excuse.” *Dammons*, 159 N.C. App. at 294, 583 S.E.2d at 612. With the State’s acquiescence in the court’s consideration of Defendant’s motion as a pre-trial procedure, the trial court did not err in granting Defendant’s motion to dismiss the charge of resisting a public officer. The State’s argument is overruled.

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B. Dismissal of Possession of Cocaine Charge and Habitual Felon Indictment

[2] The State further argues that the trial court erred in dismissing the felony possession of cocaine charge and habitual felon indictment. Specifically, the State argues that even if the motions to suppress and to dismiss the RDO charge were properly granted, the trial court was without the authority to dismiss the felony possession of cocaine charge and habitual felon indictment. We disagree with the State's argument.

"The granting of a motion to suppress does not mandate a pretrial dismissal of the underlying indictments." *State v. Edwards*, 185 N.C. App. 701, 706, 649 S.E.2d 646, 650, *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007). Thus, where a motion to suppress has been granted, the State may elect to dismiss any or all charges or proceed to trial without the suppressed evidence and attempt to establish a *prima facie* case. *Id.* The State may dismiss charges

by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time. The clerk must record the dismissal entered by the prosecutor and note in the case file whether a jury has been impaneled or evidence has been introduced.

N.C. Gen. Stat. § 15A-931 (2009). If the State elects to proceed, a defendant may move to dismiss at the close of the State's evidence and renew his motion at the close of all evidence. N.C. Gen. Stat. § 15-173 (2005).

In this case, after hearing the evidence and the arguments of counsel on Defendant's motions to suppress and to dismiss the RDO charge, the following exchange took place between the trial court, the defense attorney, and the prosecutor:

THE COURT: Court is ready.

In marginally looking at the *Sinclair* case, the court will allow the defense motion.

[THE STATE]: Both motions, Your Honor?

THE COURT: Yes.

[DEFENSE COUNSEL]: Thank you, Your Honor.

[THE STATE]: Well, in that case, I believe that we are done. And as a result, I believe that the [S]tate would be unable to proceed

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with the case in chief, so I guess, procedurally, entering a dismissal by the court is the result of allowing these motions?

THE COURT: Okay.

[THE STATE]: Is that right?

THE COURT: I think that's right.

[THE STATE]: And then as a result of that, the [S]tate would not pursue the habitual felon indictment. And I'll provide the paperwork.

[DEFENSE COUNSEL]: Thank you, Madam D.A.

The State could have elected to pursue the possession of cocaine charge despite the suppression of the alleged cocaine. However, the State clearly announced in open court that it “would be unable to proceed with the case in chief” as a result of the trial court’s allowing Defendant’s motions and indicated its intention to dismiss the possession of cocaine charge. The State further announced that it “would not pursue the habitual felon indictment” and that it would “provide the paperwork.” Although the State was not required to dismiss the possession of cocaine charge or the habitual felon indictment, the State elected to do so “by entering an oral dismissal in open court before . . . the trial[.]” N.C. Gen. Stat. § 15A-931.

Citing *State v. Edwards, supra*, the State argues that the trial court “exceeded its authority in deciding that the State could not make its case at trial” and “invaded the province of the prosecution[.]” The State’s argument fails.

In *Edwards*, defendant was charged with four drugrelated offenses. Defendant filed a motion to suppress the evidence seized as the result of a search warrant executed on his residence. The trial court granted defendant’s motion to suppress and dismissed the indictments *ex mero motu*. *Edwards*, 185 N.C. App. at 702, 649 S.E.2d at 648.

Unlike in *Edwards* where the trial court presupposed the State’s inability to proceed to trial as a result of the suppression of the evidence, the State in this case affirmatively announced in open court that it could not make its case at trial as a result of the evidence being suppressed and indicated its intention to dismiss the possession of cocaine charge as well as the habitual felon indictment. The State’s argument is overruled.

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[209 N.C. App. 148 (2011)]

C. Motion to Suppress

The State further argues that the trial court erred in granting Defendant's motion to suppress. Because we are without jurisdiction to hear this issue, the State's argument is dismissed.

"The State may appeal an order by the superior court granting a motion to suppress as provided in [N.C. Gen. Stat. §] 15A-979." N.C. Gen. Stat. § 15A-1445 (2009). Pursuant to N.C. Gen. Stat. § 15A-979,

[a]n order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case.

N.C. Gen. Stat. § 15A-979(c) (2009).

In this case, after the trial court granted Defendant's motion to suppress, the State voluntarily dismissed the possession of cocaine charge and the habitual felon indictment. The State's subsequent appeal to this court, arguing that the dismissals were erroneous, has been overruled. *See supra*. As a dismissal by the State is "a simple and final dismissal which terminates the criminal proceedings under that indictment[.]" *State v. Lamb*, 321 N.C. 633, 641, 365 S.E.2d 600, 604 (1988), the criminal proceedings under the possession of cocaine and habitual felon indictments have been terminated. Because there is no longer any case which the suppressed evidence is "essential to[.]" this Court has no jurisdiction to review and decide the State's argument. Accordingly, the argument is dismissed.

AFFIRMED.

Judges HUNTER, ROBERT C. and ERVIN concur.

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[213 N.C. App. 160 (2011)]

STEVEN EARL ELLIOTT, PLAINTIFF v. ENKA-CANDLER FIRE AND RESCUE
DEPARTMENT, INC., DEFENDANT

No. COA10-1219

(Filed 5 July 2011)

1. Employer and Employee— employment agreement and extension—consideration by employee—giving up at will status

There was consideration in an employment agreement and its extension where a fire chief who was already in the job gave up his employment at will status and his right to leave at any time before the dates specified in the agreements.

2. Public Officers and Employees— fire chief—employment agreements—public purpose—balanced budget

A town's employment agreements with its fire chief served a public purpose in that the town was able to retain its fire chief for a significant period of time without fear that another municipality would lure him away. The contract did not call for payment regardless of whether the chief performed his public service duties, but for salary and benefits to continue only if defendant terminated plaintiff without cause. Furthermore, despite the statutory requirement that local budgets be balanced, there is no authority for the proposition that a municipality can evade payment of severance pay or breach of contract damages by simply not budgeting for them.

3. Public Officers and Employees— employment contract—terminated fire chief—summary judgment

Summary judgment was properly entered for plaintiff in an employment action against a town by a former fire chief where defendant did not show that the contract lacked consideration or violated public policy and defendant did not present any evidence that plaintiff was not performing his duties adequately under the agreements.

4. Civil Procedure— motion for relief or new trial—notice of summary judgment

The trial court did not abuse its discretion by denying defendant's motion for relief or for a new trial where plaintiff contended that it had not been provided with sufficient notice of defendant's motion for summary judgment.

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[213 N.C. App. 160 (2011)]

Appeal by defendant from judgment entered 13 May 2010 and order entered 26 May 2010 by Judge James L. Baker, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 23 February 2011.

The Bidwell Law Firm, by Paul Louis Bidwell and Jessica A. Waters, for plaintiff-appellee.

The Sutton Firm, P.A., by April Burt Sutton, for defendant-appellant.

GEER, Judge.

Defendant Enka-Candler Fire and Rescue Department, Inc. appeals from the trial court's grant of summary judgment to plaintiff Steven Earl Elliott, a former employee of defendant. Defendant had entered into a contract with plaintiff that provided for a specific term of employment and continued payment of salary and benefits if defendant terminated the contract prior to the end of the contract term. Defendant primarily argues on appeal that the contract between the parties is unenforceable as a matter of law because (1) there was no consideration flowing from plaintiff to defendant, and (2) the contract violated public policy. We disagree.

Plaintiff, who had been employed at will by defendant, relinquished his at-will status when he agreed to work for defendant for a definite term. In making this promise, plaintiff gave up the right to terminate his employment at any time. This detriment to plaintiff constituted consideration for defendant's promise.

Additionally, because this contract secured plaintiff's services as Fire Chief for a specified period at a specified rate, we conclude that the employment contract served a public purpose and did not otherwise violate public policy. Since the contract was enforceable and since defendant did not present any evidence that plaintiff breached the contract, the trial court properly granted summary judgment to plaintiff. We also find defendant's remaining arguments unpersuasive and, therefore, affirm.

Facts

Plaintiff began working as Fire Chief for defendant in 1996 as an at-will employee. On 20 July 2004, the parties entered into an Employment Agreement. The Employment Agreement stated that "the parties desire to provide for a contract that runs from June 1, 2004 through October 31, 2008, for the retention of [plaintiff] as the

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Chief of [defendant]” Under the terms of the Employment Agreement, plaintiff would remain Fire Chief with his current salary and benefits. The Employment Agreement further provided that in the event defendant terminated plaintiff’s employment, defendant would pay plaintiff the balance of his salary and provide all benefits through the end of the contract, as if plaintiff had remained a full-time employee.

Approximately two years later, on 17 April 2006, the parties executed an Extension Agreement. The Extension Agreement extended the termination date of the Employment Agreement from 31 October 2008 to 31 October 2013. All the other terms of the Employment Agreement were to remain in full force and effect under the Extension Agreement.

Defendant subsequently terminated plaintiff’s employment as Fire Chief on 3 March 2008. On 15 April 2009, plaintiff filed suit against defendant alleging breach of contract based on defendant’s failure to comply with the provisions of the Employment Agreement for payment of salary and benefits following termination. On 17 June 2009, defendant filed an answer and asserted several affirmative defenses, including unclean hands, accord and satisfaction, failure of consideration, and violation of public policy.

On 24 March 2010, defendant moved for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure. Plaintiff later filed his own motion for summary judgment on 6 April 2010. The trial court heard the motions on 10 May 2010. In an order entered 13 May 2010, the trial court determined that there were no genuine issues of material fact as to plaintiff’s claims against defendant, defendant’s affirmative defenses, or the amount of damages to which plaintiff was entitled. The court concluded that plaintiff was entitled to summary judgment as a matter of law and entered an order (1) denying defendant’s motion for summary judgment, (2) granting plaintiff’s motion for summary judgment, and (3) awarding plaintiff \$310,885.76 plus pre-judgment interest and costs.

On 14 May 2010, the day after summary judgment was entered, defendant filed, pursuant to Rules 59 and 60 of the Rules of Civil Procedure, a motion for relief from judgment or, in the alternative, to set aside the judgment and order a jury trial. The trial court entered an order denying defendant’s motion on 26 May 2010. Defendant timely appealed to this Court from both the summary judgment order and the order denying defendant’s motion for relief or a new trial.

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I

[1] Defendant first contends that the trial court erred in denying its motion and granting plaintiff's motion for summary judgment because the Employment and Extension Agreements are unenforceable for lack of consideration. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). When appropriate, summary judgment may be rendered against the moving party. *Id.*

"It is well established that in an action for breach of contract, [a party's] promise must be supported by consideration for it to be enforceable." *Labarre v. Duke Univ.*, 99 N.C. App. 563, 565, 393 S.E.2d 321, 323, *disc. review denied*, 327 N.C. 635, 399 S.E.2d 122 (1990). Consideration sufficient to support a contract consists of "any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee." *Lee v. Paragon Group Contractors, Inc.*, 78 N.C. App. 334, 337-38, 337 S.E.2d 132, 134 (1985) (quoting *Brenner v. School House, Ltd.*, 302 N.C. 207, 215, 274 S.E.2d 206, 212 (1981)), *disc. review denied*, 316 N.C. 195, 345 S.E.2d 383 (1986). "Consideration is the 'glue' that binds parties together, and a mere promise, without more, is unenforceable." *Id.* at 338, 337 S.E.2d at 134 (quoting *In re Foreclosure of Owen*, 62 N.C. App. 506, 509, 303 S.E.2d 351, 353 (1983)).

In this case, defendant first argues that there was no consideration flowing from plaintiff to defendant. Defendant points to the fact that plaintiff was working for defendant when the Employment and Extension Agreements were executed and that the Agreements provided for no change in plaintiff's duties, pay, or benefits.

Defendant, however, overlooks the critical fact that by entering into the Employment Agreement, plaintiff relinquished his status as an at-will employee. In North Carolina, "in the absence of an employment contract for a definite period, both employer *and employee* are generally free to terminate their association *at any time and without any reason.*" *Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 655, 412 S.E.2d 97, 99 (1991) (emphasis added), *cert. denied*, 331 N.C. 119, 415 S.E.2d 200 (1992). *See also Still v. Lance*, 279 N.C. 254, 259, 182 S.E.2d 403, 406 (1971) (holding that where employee's contract contained no provision concerning duration of employment or means by which it may be terminated, such contract was terminable at will of

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either party irrespective of quality of performance by other party); *Gravitte v. Mitsubishi Semiconductor Am., Inc.*, 109 N.C. App. 466, 472, 428 S.E.2d 254, 258 (“[T]he general rule is that, absent an employment contract for a definite period of time, *both employer and employee* are generally free to terminate their association at any time and without reason.” (emphasis added)), *disc. review denied*, 334 N.C. 163, 432 S.E.2d 360 (1993).

Here, the uncontradicted evidence shows that, by entering into the Employment and Extension Agreements, plaintiff promised to work for defendant through 2008 and then through 2013. In making this promise—which he was not required to make—plaintiff gave up his right to leave his employment with defendant at any time, for any or no reason, without notice to defendant.

Although when discussing at-will employment, courts more typically focus on the benefits to the employer, at-will status can be of significant value to an employee as well. For example, employees with especially desirable skills or excellent reputations may be highly sought after by other employers. An employer, by entering into a contract for a specific term with such an employee, ensures that no other employer will be able to lure that employee away for higher pay or better benefits. On the other hand, the employee, by entering into the contract, foregoes the opportunity to accept other more lucrative job offers. Thus, the promise by plaintiff, in this case, to forego at-will employment constituted consideration. *See Swenson v. Legacy Health Sys.*, 169 Or. App. 546, 552, 9 P.3d 145, 148 (2000) (“As a matter of law, the promise of an at-will employee to continue in an employer’s service for some specified future period of time constitutes consideration for an additional benefit promised by the employer.”).

In reaching this decision, we find the case of *Bennett v. Eastern Rebuilders, Inc.*, 52 N.C. App. 579, 279 S.E.2d 46 (1981), persuasive. In *Bennett*, the plaintiff was employed as a lead person on the defendant’s production line. *Id.* at 580, 279 S.E.2d at 48. Her position fell under a union contract giving her substantial job security. *Id.* The defendant persuaded the plaintiff to accept a promotion, which would result in the loss of her union protection and resulting job security, in exchange for the defendant’s promise that she would not be fired if she did not work out as a supervisor but would instead be demoted to her former position as a lead person. *Id.*

Although *Bennett* is to some extent factually opposite from this case—in that the plaintiff in *Bennett* gave up job security (through

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her union membership), whereas here plaintiff gave up his right to leave his employment—the rationale of *Bennett* is applicable. The Court in *Bennett* noted as a general matter that “an agreement between an employee and her employer concerning the manner in which her job could be terminated constitutes an enforceable agreement.” *Id.* at 581, 279 S.E.2d at 48. As for the question of consideration, the Court observed that “[a]mple consideration for defendant’s bargained for agreement to demote plaintiff rather than fire her may be found in her agreement to give up her union position and the job security that went with it.” *Id.* at 582, 279 S.E.2d at 49.

Thus, in *Bennett*, sufficient consideration was found when an employee gave up her union status and the rights that accompanied it. Here, plaintiff analogously gave up his at-will status and the rights arising from that status. Contrary to defendant’s argument that there was no consideration flowing from plaintiff, *Bennett* shows that plaintiff’s giving up his freedom to leave his position constituted ample consideration for the Employment and Extension Agreements.

Defendant’s reliance on *Franco v. Liposcience, Inc.*, 197 N.C. App. 59, 676 S.E.2d 500, *aff’d per curiam*, 363 N.C. 741, 686 S.E.2d 152 (2009), is misplaced. In *Franco*, the plaintiff was hired as an at-will employee. *Id.* at 63, 676 S.E.2d at 502. The plaintiff contended, however, that a letter from the defendant to the plaintiff formed a contract that precluded termination of his employment except for cause. *Id.*, 676 S.E.2d at 502-03. This Court held that although the letter contained evidence of consideration flowing from the defendant to the plaintiff, the letter “did not increase or diminish [the plaintiff’s] pay, duties, rights, or anything else that could be deemed consideration flowing from [the plaintiff] to [the defendant].” *Id.*, 676 S.E.2d at 503. The Court, therefore, affirmed the trial court’s grant of summary judgment to the defendant, noting that “mere continued employment by the employee is insufficient” to constitute consideration. *Id.*

Defendant overlooks the key distinction between *Franco* and this case. The decision in *Franco* was based on the lack of any evidence that the plaintiff gave something or gave up something in return for the defendant’s promise; he just continued working. Here, by contrast, the uncontradicted evidence showed plaintiff *did* give up something—his right to leave at any time before the dates specified in the Employment and Extension Agreements. Thus, *Franco* is inapplicable. The trial court, in this case, properly concluded that the Employment and Extension Agreements were supported by consideration.

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II

[2] Defendant also contends that the Employment and Extension Agreements are unenforceable because they violate North Carolina public policy. In support of this argument, defendant first points to a portion of Article V, Section 2 of the North Carolina Constitution:

(7) *Contracts*. The General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only.

Defendant claims that the “nature of the subject employment agreements contemplates payment to the plaintiff, a private individual, regardless of whether his public service duties are performed. To find the subject employment agreements enforceable directly contradicts the constitutional limitation on contracts ‘for the accomplishment of public purposes only.’” (Quoting N.C. Const. art. V, § 2.)

Our courts have established “[t]wo guiding principles . . . for determining that a particular undertaking by a municipality is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the particular municipality; and (2) the activity benefits the public generally, as opposed to special interests or persons[.]” *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989) (internal citation omitted).

With respect to the first prong, we note that the general duties of a Fire Chief include preserving and caring for fire apparatus, having charge of fighting and extinguishing fires and training the fire department, seeking out and having corrected all places and conditions dangerous to the safety of the city and its citizens from fire, and making annual reports to the council concerning these duties. N.C. Gen. Stat. § 160A-292 (2009). In view of these responsibilities, we hold that the employment and retention of a qualified Fire Chief to execute these duties does involve a reasonable connection with the convenience and necessity of a municipality.

We further hold, as to the second prong, that the employment of a Fire Chief benefits the public generally—not just the Fire Chief or special interests—because the Fire Chief is responsible for maintaining the “safety of the *city and its citizens* from fire.” *Id.* (emphasis added). By contracting to retain plaintiff for an extended period of time, defendant ensured that it would, for several years, have the service of a qualified Fire Chief without fear that the Fire Chief would leave

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defendant for a better opportunity. We, therefore, hold that the Employment and Extension Agreements in this case do serve a public purpose.

Defendant further argues that the public purpose requirement is violated when a governmental body pays a private individual regardless whether he performs his public service duties. If, however, plaintiff had failed to perform his duties under the Agreements and defendant was entitled to discharge him for cause, then he would not have been paid. *See Menzel v. Metrolina Anesthesia Assocs.*, 66 N.C. App. 53, 59, 310 S.E.2d 400, 403-04 (1984) (noting that where termination clause in parties' contract provided that defendant would pay plaintiff two months' severance pay if defendant terminated contract, plaintiff's breach of contract would not trigger severance pay provisions of contract). The effect of the Agreements is that only if defendant terminates plaintiff *without cause* will defendant then have to pay plaintiff salary and benefits through the end of the contract, effectively severance pay. Again, we emphasize that defendant's giving plaintiff job security and promising severance pay in the event that plaintiff was terminated without cause was in furtherance of a public benefit: defendant was able to retain a Fire Chief for a significant period of time without fear that another municipality would lure him away.

Defendant next points to N.C. Gen. Stat. § 159-8(a) (2009), which provides:

Each local government and public authority shall operate under an annual balanced budget ordinance adopted and administered in accordance with this Article. A budget ordinance is balanced when the sum of estimated net revenues and appropriated fund balances is equal to appropriations. . . . It is the intent of this Article that . . . all moneys received and expended by a local government or public authority should be included in the budget ordinance. Therefore, notwithstanding any other provision of law, no local government or public authority may expend any moneys, regardless of their source . . . , except in accordance with a budget ordinance

Defendant points to an affidavit of Donna Clark, the Buncombe County Finance Director, which defendant alleges shows that defendant "made no provisions in its budget for payment of salary and benefits to the plaintiff once he was no longer employed by the Defendant." Defendant cites no authority, however, for the proposition

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that a municipality can evade payment of severance pay or breach of contract damages by simply not budgeting for them. Nor do we know of any such authority.¹

Defendant further relies on *Leete v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995), to support its argument that the Employment and Extension Agreements violate public policy. In *Leete*, a group of taxpayers filed an action to enjoin the Warren County Board of Commissioners from following through on its decision to pay the County Manager, who had voluntarily resigned after nine years of service, six weeks of severance pay totaling \$5,073.12. *Id.* at 117-18, 462 S.E.2d at 477. The Supreme Court held that the severance payment violated Article I, Section 32 of the North Carolina Constitution, which provides that “[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.” 341 N.C. at 118, 462 S.E.2d at 477-78 (quoting N.C. Const. art. I, § 32).

The key distinction between *Leete* and this case is the existence of an enforceable contract for a public purpose. In *Leete*, the Court specifically noted that there was “no written employment contract” between the County and the County Manager, and, therefore, the severance pay the County Manager sought was “no more than a request for a gratuity, which the Board had no authority to pay.” *Id.* at 122, 462 S.E.2d at 480. Here, the Employment and Extension Agreements were valid written contracts entitling plaintiff to certain payments upon termination by defendant. See *Myers v. Town of Plymouth*, 135 N.C. App. 707, 712, 522 S.E.2d 122, 125 (1999) (observing that in *Leete*, Supreme Court left open possibility that written contract which required severance payment could be enforceable), *disc. review improvidently allowed*, 352 N.C. 670, 535 S.E.2d 355 (2000).

[3] In sum, since defendant has not shown that the contract lacked consideration or violated public policy, we hold that the trial court did not err in finding that the contract is enforceable. After the trial court determined that the contract was enforceable, it was up to defendant to present evidence that it was not liable for breaching the contract. Since defendant did not present any evidence that plaintiff was not performing his duties adequately under the Agreements—that plaintiff breached the contract and could be fired for cause—summary judgment was properly entered for plaintiff.

1. We note, in any event, that the affidavit only refers generally to a former employee of defendant; there is no actual mention of plaintiff anywhere in the affidavit.

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III

[4] Finally, defendant insists that it was not provided sufficient notice of plaintiff's motion for summary judgment and was, therefore, only prepared to argue the limited issue of contract enforceability at the summary judgment hearing. Defendant contends that the trial court's entry of summary judgment for plaintiff and denial of defendant's motion for relief or for a new trial amounted to a substantial miscarriage of justice.

We review a trial court's ruling on a motion under Rule 59 (new trial) or Rule 60 (relief from judgment) for abuse of discretion. *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006). "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." *Id.* (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

The record indicates that on 24 March 2010, defendant filed a motion for summary judgment and notice of hearing setting a calendar date for that motion of 12 April 2010. On 6 April 2010, plaintiff filed a motion for summary judgment and a notice of hearing calendaring plaintiff's motion for summary judgment for 10 May 2010. The same day, plaintiff filed a motion to continue the hearing on defendant's summary judgment motion, noting that the litigation paralegal assigned to the case was due to give birth immediately but was needed "to prepare a Memorandum in Support of/Opposition to Summary Judgment." The trial court granted plaintiff's motion for a continuance and ordered that the hearing on defendant's motion for summary judgment would be continued to 10 May 2010.

According to defendant, however, the only document that was ever served upon defense counsel was plaintiff's "Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and In Support of Summary Judgment for Plaintiff." Defendant claims that it was not served with plaintiff's motion for summary judgment or notice of hearing and that defense counsel "assumed" that plaintiff sought to obtain summary judgment under Rule 56(c) of the Rules of Civil Procedure, which provides that summary judgment may be rendered against the moving party when appropriate.

Further, defendant claims that plaintiff's motion for a continuance "bolstered" defendant's assumption and that defendant believed it would eventually receive a copy of plaintiff's motion for summary

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judgment and notice of hearing before the 10 May 2010 hearing date. Since defendant did not receive the notice or motion before 10 May 2010, however, defendant claims its counsel was only prepared to argue the issue of contract enforceability at the hearing. Defendant asserts that, at the summary judgment hearing, it alerted the trial court that defense counsel was “not prepared” for any issue other than the contract’s enforceability and requested that the ruling be limited to the issue of enforceability. The trial court, however, denied the request.

After the trial court entered judgment for plaintiff, defendant filed the motion for relief or for a new trial, setting out the above allegations. Following a hearing, the trial court entered an order on 26 May 2010 denying the motion.

The record in this case reveals that defendant’s 24 March 2010 motion for summary judgment stated that defendant “moves this Court pursuant to Rule 56 of the North Carolina Rules of Civil Procedure for a Summary Judgment on the Ground that there is no genuine issue as to any material fact as shown by the pleadings, written discovery exchanged between the parties, and deposition, and Movants are entitled to judgment as a matter of law.” The motion was not limited to any particular issue, contrary to defendant’s claim that it was raising only the narrow issue of contract enforceability.

Rule 56(c) allows the trial court to grant summary judgment to the non-moving party: “The judgment sought 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.” (Emphasis added.) Thus, under Rule 56(c), the trial court could have granted plaintiff summary judgment based on the materials presented by defendant, even without plaintiff’s motion. See *Westover Prods., Inc. v. Gateway Roofing, Inc.*, 94 N.C. App. 163, 166-67, 380 S.E.2d 375, 377 (1989) (applying Rule 56(c) in overruling property owner’s argument that trial court erred in granting roofing materials supplier’s oral motion for summary judgment, made at hearing on owner’s motion for summary judgment, because owner was given no opportunity to be heard on merits of motion, and because no materials were submitted by parties in support or opposition to motion).

Defendant admits that it received plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment and in Support of Summary Judgment for Plaintiff. Although defendant

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argues that it assumed that plaintiff was seeking summary judgment based on Rule 56(c) without filing a separate summary judgment motion, defendant does not explain why this distinction makes a difference. Nor does defendant explain why the Memorandum's notice that plaintiff was himself seeking summary judgment was inadequate notice, in light of Rule 56(c), in the absence of a separate motion for summary judgment—especially given defendant's broad motion for summary judgment.

Moreover, there is no indication in the record that defendant made any showing to the trial court of what evidence it would have presented had it had the additional notice of a motion by plaintiff for summary judgment. *See Ripellino v. N.C. Sch. Bds. Ass'n*, 158 N.C. App. 423, 427, 581 S.E.2d 88, 91 (2003) (holding trial court did not err in denying plaintiffs' motion for continuance of summary judgment hearing when they failed to show that new information relevant to limited issue presented in summary judgment hearing would be discovered), *cert. denied*, 358 N.C. 156, 592 S.E.2d 694 (2004). Accordingly, we hold that the trial court did not abuse its discretion in denying defendant's motion for relief or for a new trial.

Affirmed.

Judges BRYANT and ELMORE concur.

PAULA MCKELVEY MYERS AND TRAVIS MYERS, BY HIS GUARDIAN AD LITEM, BARBARA G. FOLSOM, PLAINTIFFS-APPELLEES V. JERRY K. MYERS AND DAVID T. MYERS, DEFENDANTS-APPELLANTS

No. COA10-1008

(Filed 5 July 2011)

1. Trusts—constructive trust—proceeds of retirement plans—consent order unambiguous

The trial court did not err in a case involving the imposition of a constructive trust on decedent's death benefits by denying defendants' motion to dismiss. Based on the plain language of decedent's retirement plans and the clear language of a 1994 consent order, the trial court did not err in concluding that decedent's retirement plans' proceeds were "death benefits" as set forth in the consent order.

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2. Laches— no knowledge of grounds for claim—motion to dismiss—denial proper

The trial court did not err in a case involving the imposition of a constructive trust on decedent's death benefits by denying defendant's motion to dismiss on the grounds of laches. Defendants failed to present any evidence that plaintiff had knowledge of the existence of the grounds for the claim.

3. Trusts— constructive trust—imposition proper

The trial court did not err in an action involving beneficiaries of decedent's death benefits by imposing a constructive trust upon the gross amounts plus interest that defendants received from decedent's retirement plans. There were circumstances making it inequitable for defendants to retain the proceeds against the claim of the beneficiary of the constructive trust.

Appeal by Defendants from order entered 22 April 2010 by Judge George A. Bedsworth in District Court, Forsyth County. Heard in the Court of Appeals 25 January 2011.

Craige Brawley Liipfert & Walker LLP, by Susan J. Ryan, for Plaintiffs-Appellees.

Hinshaw & Jacobs, LLP, by Robert D. Hinshaw, for Defendants-Appellants.

McGEE, Judge.

Paula McKelvey Myers (Paula) and Marvin Kermit Myers (Decedent) were married in 1991. The couple had one child together, Travis Myers (Travis). Decedent had two other sons from a previous marriage, Jerry K. Myers (Jerry) and David T. Myers (Tommy) (together, Defendants). Paula and Decedent divorced in 1995. A consent order was entered in District Court, Forsyth County, on 8 March 1994 (the 1994 consent order), concerning child support, custody, and other issues relating to Travis. In Paragraph 7 of the 1994 consent order, the trial court ordered the following:

That [Decedent] shall maintain his group life insurance coverage through his employment, and shall list the minor child, TRAVIS WILLIAM MYERS, as a beneficiary under any life insurance policies [Decedent] has through his employment. That at no time shall the minor child be listed as a beneficiary of less than thirty-three percent (33%) of any proceeds received under any life insurance pol-

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icy of [Decedent] in the event of the death of [Decedent]. That the minor child shall further be listed as a beneficiary of any other death benefits to which [Decedent] is entitled through his employment, and at no time shall the minor child be listed as a beneficiary of less than thirty-three percent (33%) of any death benefits of [Decedent] through his employment.

Decedent died on 3 May 2008. When Decedent died, he had a life insurance policy through his employer, R.J. Reynolds Tobacco Company (RJR). Decedent was also a participant in the Reynolds American Retirement Plan (the PEP plan) and the Capital Investment Plan (the CIP plan) (together, the plans). Decedent never designated Travis as a beneficiary of his life insurance policy, nor of the plans. When Decedent died before retirement, the benefits from the plans became payable to the named beneficiaries. Jerry and Tommy were named as beneficiaries of Decedent's life insurance policy and of the CIP plan. There was no named beneficiary of the PEP plan, but in the event one was not designated at the time of Decedent's death, the beneficiary of Decedent's life insurance policy would become the beneficiary of the PEP plan. Thus, Jerry and Tommy received benefits from the plans. However, they directed the insurance carrier to establish a trust for Travis with one-third of the life insurance proceeds and named Jerry as the trustee.

The life insurance policy and the plans are governed by the Employee Retirement and Income Securities Act (ERISA). The proceeds of the plans totaled \$399,822.73. Travis received none of the proceeds from the plans. Until Decedent's death, Paula never requested proof as to whether Travis was a named beneficiary of Decedent's life insurance policy, or of the plans.

The record on appeal contains a consent order entered 17 November 2009 (the 2009 consent order), in which the trial court made a finding of fact that Paula had filed motions to (1) show cause, (2) substitute a party, and (3) join parties. The 2009 consent order further stated that, in an order entered 1 July 2009, the trial court granted some of Paula's requested relief by "[s]ubstitut[ing] Jerry K. Myers, in his capacity as personal representative of the estate of Marvin Kermit Myers, as the defendant in this action," but "[d]eclined to rule on [Paula's] motion to show cause and motion for joinder of Travis [] as plaintiff[.]" and "[d]enied [Paula's] motion for joinder of [Jerry] and [Tommy] as defendants." Subsequently, Paula filed a "Motion to Reconsider the Court's denial of [Paula's] motion to join Jerry and Tommy as defendants." We note that copies of those

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motions and order referred to in the 2009 consent order are not specifically included in the record on appeal.

The 2009 consent order was entered in response to the motion to reconsider the denial of Paula's motion in the cause. The 2009 consent order "joined [Jerry and Tommy] as defendants in this action" and "joined [Travis] as a plaintiff in this action," represented by his appointed guardian ad litem, Barbara Folsom (together with Paula, Plaintiffs). The 2009 consent order dismissed Decedent's estate from the action, but retained jurisdiction over the estate for any purpose the trial court deemed necessary.

Plaintiffs filed a second motion in the cause on 22 December 2009 (the motion in the cause) and asked the trial court to enforce the 1994 consent order against Defendants. Plaintiffs sought thirty-three percent (33%) of the gross proceeds from the plans, plus interest, for Travis. Plaintiffs also asked that the proceeds be held in a constructive trust for Travis. Defendants filed a response to the motion in the cause on 26 January 2010, requesting that the motion in the cause be dismissed for failure to state a claim for relief.

The trial court entered an order determining Plaintiffs' motion in the cause and Defendants' motion to dismiss on 22 April 2010 (the 2010 order), concluding that the "language ' . . . death benefits to which [Decedent] is entitled through his employment,' is clear and unambiguous, and . . . did not create a latent ambiguity." The 2010 order further concluded that, though ERISA dictated that the benefits of the plans be paid to the named beneficiaries, once the benefits were paid out, the plans were no longer governed by ERISA but were subject to the 1994 consent order. Subsequently, the trial court ordered that a constructive trust be imposed for the benefit of Travis on a one-third interest of the total proceeds of the plans, and denied Defendants' motion to dismiss. Defendants appeal.

Defendants argue that the trial court erred in denying their motion to dismiss asserting the affirmative defense of laches, because Paula did not attempt to define "death benefits" before Decedent's death. Defendants also argue that the imposition of a constructive trust on the gross amounts received by Defendants was error and was not supported by evidence, findings of fact, conclusions of law, or existing law.

When the trial court sits without a jury . . . "the standard of review on appeal is whether there was competent evidence to support

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the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." The trial court's conclusions of law are reviewed de novo.

Shepard v. Bonita Vista Properties, L.P., 191 N.C. App. 614, 616, 66 664 S.E.2d 388, 390 (2008) (citations omitted).

I. Ambiguity

[1] Defendants first argue that the trial court erred in "finding that the term 'death benefits' as used in [the 1994 consent order] included the proceeds from" the plans. Defendants also contend that the trial court erred by concluding the term "death benefits" was clear and unambiguous and did not create a latent ambiguity, and should have been construed in favor of Defendants. Defendants argue that, because Decedent was not represented in the process of entering the 1994 consent order, any ambiguity should be construed against Paula, the drafting party.

Our Court has previously held that, "as a consent order is merely a court-approved contract, it is 'subject to the rules of contract interpretation.'" *Reaves v. Hayes*, 174 N.C. App. 341, 345, 620 S.E.2d 726, 729 (2005) (citation omitted). Our Court has also stated that, when a question arises regarding contract interpretation, " 'whether . . . the language of a contract is ambiguous or unambiguous is a question for the court to determine[.]' " *Anderson v. Anderson*, 145 N.C. App. 453, 458, 550 S.E.2d 266, 269 (2001) (citation omitted). "In making this determination, 'words are to be given their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible[.]' " *Id.* at 458, 550 S.E.2d at 269-70 (citation omitted). "An ambiguity exists in a contract when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations." *Register v. White*, 358 N.C. 691, 695, 599 S.E.2d 549, 553 (2004).

An ambiguity exists where the " 'language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties.'" Stated another way, an agreement is ambiguous if the " 'writing leaves it uncertain as to what the agreement was [.]' "

Holshouser v. Shaner Hotel Grp. Props. One, 134 N.C. App. 391, 397, 518 S.E.2d 17, 23 (1999), *aff'd*, 351 N.C. 330, 524 S.E.2d 568 (2000) (citations omitted).

Even if a term "seem[s] clear and unambiguous, a latent ambiguity exists if [its] meaning is less than certain when viewed in the context

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of all the surrounding circumstances.” *Alchemy Communications Corp. v. Preston Dev. Co.*, 148 N.C. App. 219, 224, 558 S.E.2d 231, 234 (2002). “A latent ambiguity may arise where the words of a written agreement are plain, but by reason of extraneous facts the definite and certain application of those words is found impracticable.” *Miller v. Green*, 183 N.C. 652, 654, 112 S.E. 417, 418 (1922). Our review of a trial court’s determination of whether a contract is ambiguous is *de novo*. *Holshouser*, 134 N.C. App. at 397, 518 S.E.2d at 23.

Defendants, quoting *Fox v. Office of Personnel Management*, 100 F.3d 141, 144 (Fed. Cir. 1996), contend that the term “death benefits” is ambiguous because “[a]t least one court, albeit in a different context, has held the term ‘death benefits’ to be ‘fatally ambiguous[.]’ as it could refer to a lump sum payment or a series of payments over time.” However, Defendants do not explain the context of the “fatal” ambiguity in *Fox*, nor do they explain how an opinion from the Court of Appeals for the Federal Circuit is relevant to our discussion of the 1994 consent order. See *Soderlund v. Kuch*, 143 N.C. App. 361, 370, 546 S.E.2d 632, 638 (2001) (“recogniz[ing] that ‘with the exception of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State’ ” (citation omitted)).

Defendants further argue that the term “death benefits” is ambiguous because it was not defined in the 1994 consent order, and “[n]either North Carolina case law, nor any other state’s case law, has defined the term[.]” Defendants argue that, because of the alleged ambiguity, Paula or the attorney who drafted the 1994 consent order should have been called to testify concerning the meaning of “death benefits[.]” Defendants allege that the failure of Paula and her attorney “to testify suggests that their testimony would be adverse to [Plaintiffs’] interests.” We are not persuaded by Defendants’ argument as to Plaintiffs’ reasons for not presenting testimony.

Finally, Defendants argue that “even assuming that a common definition of ‘death benefits’ exists at all, it is ambiguous whether or not the payments from [the PEP plan] at issue are considered death benefits within the meaning of the term.” We disagree. In the present case, the 1994 consent order contains the following provision:

That [Decedent] shall maintain his group life insurance coverage through his employment, and shall list [Travis] as a beneficiary under any life insurance policies [Decedent] has through his employment. That at no time shall the minor child be listed as a

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beneficiary of less than thirty-three percent (33%) of any proceeds received under any life insurance policy of [Decedent] in the event of the death of [Decedent]. That the minor child *shall further be listed* as a beneficiary of *any other death benefits to which [Decedent] is entitled through his employment*, and at no time shall the minor child be listed as a beneficiary of less than thirty-three percent (33%) of any death benefits of [Decedent] through his employment.

(Emphasis added). Thus, the 1994 consent order makes a clear distinction between the life insurance policy and “any other death benefits to which [Decedent] is entitled through his employment[.]” The 1994 consent order also lists “any other death benefits” in a separate sentence and specifies that Travis shall be listed as beneficiary of not less than thirty-three percent of both the life insurance proceeds and “any other death benefits.”

We note that, in arguing the term “death benefits” is ambiguous, Defendants do not suggest to this Court what meaning the term might have other than that posited by Plaintiffs. Defendants merely contend that the “death benefit” provisions of the plans are not to be considered “death benefits” under the 1994 consent order. However, pursuant to the 1994 consent order, Decedent was required to make Travis a beneficiary of both Decedent’s life insurance policy and “any other death benefits to which [Decedent was] entitled through his employment.” Reading the term “death benefits” in the context of the 1994 consent order, we are not persuaded that the “writing leaves it uncertain as to what the agreement was[.]” *Holshouser*, 134 N.C. App. at 397, 518 S.E.2d at 23 (citations omitted). Therefore, the term is not ambiguous and the trial court did not err in so concluding.

The summary plan description of the PEP plan contains the following provision, titled “Death Benefits (Prior to Receipt of Payment)[.]” which includes the following language:

If you are vested and you die before receiving any benefits, your benefit is payable to your spouse or, if you are not married, to your named beneficiary.

The PEP plan also contains the following provision: “If you are not married, your beneficiary is the same as is designated under your Company-paid life insurance plan unless you designate another person or entity as your beneficiary for this Plan.” Decedent did not name anyone a beneficiary for the PEP plan; thus, the PEP plan paid his death benefits to Defendants as the named beneficiaries of his

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life-insurance policy. We also note that the PEP plan “Pre-retirement death benefit application[,]” completed by Jerry, contains the following language:

I hereby certify that I am the beneficiary designated by the above-named Participant to receive part or all benefits due under the Plan in the event of his/her death. Absent any specific designation under the Plan, the designated beneficiary is the same as named for purposes of Company-provided life insurance. I understand that the only form of payment available for this death benefit is a lump-sum payment in full discharge of all entitlements under the Plan[.]

In light of the plain language of Decedent’s retirement plans and the clear language of the 1994 consent order, we find no reasonable interpretation of the phrase “any other death benefits to which [Decedent] is entitled through his employment[,]” which would not include the plans’ proceeds. We therefore hold that the trial court did not err in concluding that the plans’ proceeds were “death benefits” as set forth in the 1994 consent order.

Defendants argue that any ambiguity in the term “death benefits” should be construed against Paula because she was represented by an attorney who drafted the 1994 consent order. Our Court has held that “[w]hen the language in a contract is ambiguous, we view the practical result of the restriction by ‘construing the restriction strictly against its draftsman.’” *Electrical South, Inc. v. Lewis*, 96 N.C. App. 160, 167, 385 S.E.2d 352, 356 (1989) (citation omitted). Defendants contend that since Decedent was not represented by an attorney at the time the 1994 consent order was drafted, and because Paula’s attorney drafted the order, this rule of contract interpretation is applicable. However, this rule is only applicable when there is an actual instance of ambiguity. As we have already noted, there is no latent ambiguity in the term “death benefits.” Therefore, this rule of contract interpretation does not apply.

II. Laches

[2] Defendants argue that the trial court erred in denying their motion to dismiss on the grounds of the affirmative defense of laches.

To establish the affirmative defense of laches, our case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of each case;

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however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

MMR Holdings, LLC v. City of Charlotte, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001). “[T]he party who pleads [laches] has the burden of proof.” *Taylor v. N.C. Dept. of Transportation*, 86 N.C. App. 299, 304, 357 S.E.2d 439, 441 (1987) (citation omitted). Defendants argue that, because Paula never attempted to clarify the meaning of “death benefits” during Decedent’s life and because Decedent’s death resulted in a change of condition for Defendants, the defense of laches should bar Plaintiffs’ claim. We disagree.

The defense of laches will only bar a claim “when the claimant knew of the existence of the grounds for the claim.” *MMR Holdings LLC*, 148 N.C. App. at 210, 558 S.E.2d at 198. In the present case, no evidence was presented that showed Paula had any knowledge of, nor could have had any knowledge of, whether Decedent had complied with the 1994 consent order by naming Travis as a beneficiary, as she had no access to check the beneficiary designation. Because Defendants failed to present any evidence that Paula had knowledge of “the existence of the grounds for the claim[,]” they have not satisfied their burden of proof and the trial court did not err in denying Defendants’ motion to dismiss. *Id.*

III. Imposition of Constructive Trust

[3] Defendants next argue that the trial court erred in imposing a constructive trust upon the gross amounts plus interest that Defendants received from the plans because Defendants claim that there was no fraud on their part. Defendants contend that fraud on the part of the possessor of the object of the trust is a requirement to the imposition of constructive trusts. We disagree.

Our Supreme Court has held that fraud need not always be present to impose a constructive trust. *Roper v. Edwards*, 323 N.C. 461, 465, 373 S.E.2d 423, 425 (1988).

A constructive trust is imposed “to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or *some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.*”

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Id. (citation omitted, emphasis in original). “‘Inequitable conduct short of actual fraud will give rise to a constructive trust where retention of the property by the holder of the legal title would result in his unjust enrichment.’” *Id.* (citation omitted). “Fraud need not be shown if legal title has been obtained in violation of some duty owed to the one equitably entitled.” *Id.* (citation omitted).

Furthermore, a constructive trust may be imposed against anyone who “in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.” *Electric Co. v. Construction Co.*, 267 N.C. 714, 719, 148 S.E.2d 856, 860 (1966). All things considered, “if imposition of a constructive trust is appropriate on the facts, we need not determine whether actual fraud has been established.” *Roper*, 323 N.C. at 465, 373 S.E.2d at 425 (1988).

In the present case, Plaintiffs concede there was no fraud on the part of Defendants. However, we find there are “‘other circumstances making it inequitable for [Defendants] to retain [the proceeds] against the claim of the beneficiary of the constructive trust.’” *Id.* (emphasis omitted). Decedent’s failure to list Travis as a beneficiary under the plans, as required by the 1994 consent order, was inequitable conduct which has unjustly enriched Jerry and Tommy. Because Jerry and Tommy are in possession of Travis’ share of the death benefits as a result of Decedent’s inequitable failure to comply with the 1994 consent order, the trial court did not err in imposing a constructive trust in this case.

We affirm the order of the trial court.

Affirmed.

Judges BRYANT and BEASLEY concur.

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STATE OF NORTH CAROLINA v. SAMUEL WADE WHITE

No. COA10-1231

(Filed 5 July 2011)

**Criminal Law— guilty plea—reservation of right to appeal—
denial of motion to dismiss**

The trial court erred by accepting defendant's *Alford* plea where defendant attempted to reserve the right to appeal the denial of his motion to dismiss. A defendant who pleads guilty may not appeal the denial of a motion to dismiss, and the matter was remanded for further proceedings.

Judge STEELMAN dissenting.

Appeal by defendant from judgment entered 14 December 2009 by Judge A. Robinson Hassell in Chatham County Superior Court. Heard in the Court of Appeals 9 March 2011.

Attorney General Roy Cooper, by Assistant Attorney General Harriet F. Worley, for the State.

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

CALABRIA, Judge.

Samuel Wade White (“defendant”) appeals from a judgment entered upon his plea of guilty to three counts of selling marijuana, one count of delivering Percocet, one count of possession of a firearm by a felon, and one count of possessing nontax paid alcohol. We vacate and remand.

I. Background

Beginning in March 2008, Detective Anthony Rosser (“Det. Rosser”) of the Pittsboro Police Department conducted an undercover narcotics investigation involving a confidential informant and undercover officer Lesia McCollough (“Officer McCollough”). As part of this operation, law enforcement bought narcotics, illegal nontax paid alcohol, or both from defendant on six separate occasions between March 2008 and September 2008.

Based on these transactions, law enforcement obtained search warrants for two buildings owned by defendant, including defend-

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ant's home. When the warrant was executed, defendant came to the door with his hand in his pocket. Law enforcement searched defendant and found the pocket contained a loaded handgun. Many other firearms were also found during the search of the two buildings.

Defendant was arrested and indicted for (1) four counts each of (a) felonious sale of marijuana; (b) felonious delivery of marijuana; (c) possession with intent to manufacture, sell or deliver a Schedule IV controlled substance; and (d) possession of marijuana; (2) one count of felonious delivery and possession with intent to sell and deliver Percocet; (3) maintaining two dwellings for the purpose of keeping, storing and selling marijuana; and (4) two counts of possession of a firearm by a felon.

On 2 September 2009, defendant filed, *inter alia*, a motion to suppress the evidence against him and to dismiss the two possession of a firearm by a felon charges because N.C. Gen. Stat. § 14-415.1 (2009) was unconstitutional as applied to him.¹ After a hearing, these motions were denied. The trial court's order specifically held that "N.C.G.S. Sect. 14-415.1 is not an unconstitutional violation of Article I, Section 30 of the North Carolina Constitution as applied to defendant."

On 14 December 2009, pursuant to a plea agreement with the State, defendant entered an *Alford* plea to three counts of selling marijuana, one count of delivering Percocet, one count of possession of a weapon by a felon, and one count of possessing non-tax paid alcohol. As part of the plea agreement, defendant attempted to specifically reserve the right to appeal the denial of both his motion to suppress and motion to dismiss. The trial court sentenced defendant to a minimum of twelve months to a maximum of fifteen months in the North Carolina Department of Correction. That sentence was suspended and defendant was ordered to serve (1) thirty days in the Chatham County Jail; (2) ninety days of electronic house arrest; and (3) thirty-six months of supervised probation. Defendant appeals.

II. Right to Appeal

Defendant argues that the trial court erred by accepting defendant's plea when his plea arrangement attempted to reserve a right to appeal the denial of his motion to dismiss. We agree.

1. The record indicates that defendant filed multiple motions to dismiss and suppress, on different legal theories. However, the motion to dismiss and suppress which was the subject of the trial court's order being appealed in the instant case was not included in the record on appeal, although the State's response to this motion, the transcript of the hearing of the motion, and the trial court's order denying this motion are contained in the record.

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A. Defendant's Plea Arrangement

“In North Carolina, a defendant’s right to appeal in a criminal proceeding is purely a creation of state statute.” *State v. Jamerson*, 161 N.C. App. 527, 528, 588 S.E.2d 545, 546 (2003).

A defendant who pleads guilty has a right of appeal limited to the following:

1. Whether the sentence “is supported by the evidence.” This issue is appealable only if his minimum term of imprisonment does not fall within the presumptive range. N.C. Gen. Stat. § 15A-1444(a1) (2001);
2. Whether the sentence “results from an incorrect finding of the defendant’s prior record level under G.S. 15A-1340.14 or the defendant’s prior conviction level under G.S. 15A-1340.21.” N.C. Gen. Stat. § 15A-1444(a2)(1) (2001);
3. Whether the sentence “contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant’s class of offense and prior record or conviction level.” N.C. Gen. Stat. § 15A-1444(a2)(2) (2001);
4. Whether the sentence “contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant’s class of offense and prior record or conviction level.” N.C. Gen. Stat. § 15A-1444(a2)(3) (2001);
5. Whether the trial court improperly denied defendant’s motion to suppress. N.C. Gen. Stat. §§ 15A-979(b)(2001), 15A-1444(e) (2001);
6. Whether the trial court improperly denied defendant’s motion to withdraw his guilty plea. N.C. Gen. Stat. § 15A-1444(e).

Id. at 528-29, 588 S.E.2d at 546-47. Consequently, in the instant case, defendant’s guilty plea only provided him with the right to appeal the trial court’s denial of his motion to suppress. N.C. Gen. Stat. §§ 15A-979(b), -1444(e) (2009). Our statutes do not provide defendant with an appeal of right from the trial court’s denial of his motion to dismiss.

Where a defendant does not have an appeal of right, our statute provides for defendant to seek appellate review by a petition for writ of certiorari. N.C. Gen. Stat. § 15A-1444(e). However, our appellate rules limit our ability to grant petitions for writ of cer-

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tiorari to the following situations: (1) defendant lost his right to appeal by failing to take timely action; (2) the appeal is interlocutory; or (3) to review a trial court's denial of a motion for appropriate relief. N.C.R. App. P. 21(a)(1) (2003). In considering [A]ppellate Rule 21 and N.C. Gen. Stat. § 15A-1444, this Court has reasoned that since the appellate rules prevail over conflicting statutes, we are without authority to issue a writ of certiorari except as provided in [Appellate] Rule 21.

Jamerson, 161 N.C. App. at 529, 588 S.E.2d at 547. Defendant's appeal of the trial court's denial of his motion to dismiss in the instant case does not fall within any of the three categories that would allow this Court to issue a writ of *certiorari* to review that order. Thus, this Court does not possess jurisdiction to review, either by statute or by *certiorari*, the trial court's denial of defendant's motion to dismiss after defendant entered his guilty plea. Our authority is limited to reviewing only the denial of defendant's motion to suppress.

Defendant's predicament is identical to that of the defendant in *State v. Jones*, 161 N.C. App. 60, 588 S.E.2d 5 (2003), *rev'd in part on other grounds*, 358 N.C. 473, 598 S.E.2d 125 (2004). In *Jones*, the defendant pled guilty pursuant to a plea arrangement which purported to preserve his right to appeal a motion to suppress, a motion to dismiss, and a writ of *habeas corpus*. *Id.* at 63, 588 S.E.2d at 8. However, since the defendant only had an appeal of right from one of the three motions, the motion to suppress, the *Jones* Court had to determine "how to address defendant's appeal of right for the motion to suppress." *Id.* This Court held that, pursuant to our Supreme Court's decision in *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998), "a defendant who pleads guilty is 'entitled to receive the benefit of his bargain.'" *Jones*, 161 N.C. App. at 63, 588 S.E.2d at 8 (quoting *Wall*, 348 N.C. at 676, 502 S.E.2d at 588). Consequently, the *Jones* Court established the following procedure for when the terms of a defendant's plea bargain are not permitted by our statutes:

Where a defendant's bargain violates the law, the appellate court should vacate the judgment and remand the case to the trial court where defendant may withdraw his guilty plea and proceed to trial on the criminal charges . . . [or] withdraw his plea and attempt to negotiate another plea agreement that does not violate [State law]. Accordingly, since defendant bargained for review of [two] motions and our Court may review only one, we will not address the substantive issues raised by the motion to suppress.

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Rather, pursuant to *Wall*, we vacate the plea and remand the case to the trial court, placing defendant back in the position he was in before he struck his bargain: he may proceed to trial or attempt to negotiate another plea agreement.

Id. at 63, 588 S.E.2d at 89.

The reasoning of *Wall* and *Jones* was subsequently followed by *State v. Smith*, 193 N.C. App. 739, 668 S.E.2d 612 (2008), *disc. rev. denied*, 363 N.C. 588, 684 S.E.2d 37 (2009). In *Smith*, the defendant was attempting to appeal from both the denial of a motion to suppress and the denial of a motion to dismiss. *Id.* at 742, 668 S.E.2d at 614. Since it could not review the denial of the defendant's motion to dismiss, this Court vacated the defendant's guilty plea and remanded the case to the trial court for further proceedings. *Id.* at 743, 668 S.E.2d at 614-15.

The State contends that *Jones* and *Smith* are not controlling over the instant case, and that we are actually bound by *State v. Rinehart*, 195 N.C. App. 774, 673 S.E.2d 769 (2009). In *Rinehart*, the defendant pled guilty while attempting to reserve the right to appeal only motions to dismiss based on the Fifth and Sixth Amendments. *Id.* at 775, 673 S.E.2d at 770. Because there was no statute which provided for an appeal of a motion to dismiss after a guilty plea, this Court dismissed the defendant's appeal without prejudice to the defendant's right to file a motion for appropriate relief with the trial court. *Id.* at 777, 673 S.E.2d at 771. *Rinehart* distinguished *Smith* in the following footnote:

We are cognizant of the recent opinion in *State v. Smith*, 193 N.C. App. 739, 668 S.E.2d 612 (2008), where this Court, relying on *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998), vacated a judgment entered upon the defendant's guilty plea. However, we find *Wall* distinguishable from the facts of the present case because the State in *Wall* had, and exercised, its right to appeal from the judgment; in the present case, defendant has no right to appeal.

Id. at 776 n.1, 673 S.E.2d at 771 n.1.

However, *Rinehart* is distinguishable from the instant case and from *Jones* and *Smith*. The defendant in *Rinehart* appealed only from motions to dismiss; he did not additionally attempt to appeal from any order for which an appeal of right existed. Since the *Rinehart* defendant did not attempt to appeal from any order for which an appeal of right existed, his appeal was appropriately dis-

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missed. In contrast, the defendants in *Jones* and *Smith* pled guilty and attempted to reserve the right to appeal from both (1) orders denying a motion to suppress, from which a right of appeal existed; and (2) orders from which no right of appeal existed. The procedural posture of the instant case is indistinguishable from *Jones* and *Smith*.

“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Since the issue presented in the instant case is identical to the issues presented in *Jones* and *Smith*, we are required to follow their holdings and

not address the substantive issues raised by the motion to suppress. Rather, pursuant to *Wall*, we vacate the plea and remand the case to the trial court, placing defendant back in the position he was in before he struck his bargain: he may proceed to trial or attempt to negotiate another plea agreement.

Jones, 161 N.C. App. at 63, 588 S.E.2d at 89.

B. Record on Appeal

The dissent argues that we should, instead, dismiss defendant’s appeal in its entirety for his failure to include a copy of his written motion to dismiss and suppress in the record on appeal. The dissent is correct that, under N.C.R. App. P. 9(a)(3)(i) (2010), defendant was required to provide “copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal, unless they appear in the verbatim transcript of proceedings[,]” and he failed to do so. However, the dissent does not explain how defendant’s written motion to dismiss and suppress is necessary to understand the dispositive issue addressed by this Court in the instant case, the validity of defendant’s guilty plea.

In *State v. Alston*, the case cited by the dissent, the defendant attempted to appeal from, *inter alia*, the trial court’s denial of his written motion for a bill of particulars, which was not included in the record on appeal. 307 N.C. 321, 340-41, 298 S.E.2d 631, 644 (1983). In its order denying the defendant’s motion, the trial court only referred to the written motion by its labeled paragraphs, denying each paragraph based upon various legal theories. *Id.* at 341, 298 S.E.2d at 645. The *Alston* Court stated that “the defendant’s assignment of error

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amount[ed] to a request that this Court assume or speculate that the trial judge committed prejudicial error in his ruling,” and held it was not required to assume error by the trial court. *Id.* However, the Court did address the defendant’s remaining assignments of error for which there was a sufficient appellate record.² See *id.*

In the instant case, the parties do not dispute that defendant filed a motion to dismiss and suppress, which was denied by the trial court. Specifically, defendant moved to dismiss the two counts of possession of a firearm by a felon because N.C. Gen. Stat. § 14-415.1 (2009) was unconstitutional as applied to him. See N.C. Gen. Stat. § 15A-954(a)(1) (2009). Moreover, the record on appeal contains: (1) the State’s response to defendant’s motion, arguing that N.C. Gen. Stat. § 14-415.1 was constitutional as applied to defendant; (2) ninety-one pages of transcript from the hearing on defendant’s motion, in which defendant’s counsel explicitly argued that N.C. Gen. Stat. § 14-415.1 was unconstitutional as applied to defendant; and (3) the trial court’s order denying defendant’s motion, in which the trial court held that N.C. Gen. Stat. § 14-415.1 was constitutional as applied to defendant. Defendant’s transcript of plea, also contained in the record, explicitly stated that in exchange for his guilty plea, defendant “reserved and preserved his right to appeal the denial of his motion to dismiss” This information is all that is needed to review defendant’s argument that his guilty plea was in violation of State law. While a copy of defendant’s written motion to dismiss and suppress may have been necessary to review substantive arguments regarding the trial court’s denial of this motion, the content of that motion is not relevant to a review of the validity of defendant’s plea arrangement. The absence of the written version of this motion does not require us to assume or speculate that the trial court erred in accepting defendant’s plea. Consequently, we must reject the dissent’s argument that defendant’s appeal should be dismissed.

III. Conclusion

Defendant’s plea agreement explicitly attempted to “reserve[] and preserve[] his right to appeal the denial of his motion to dismiss” Our statutes do not permit a defendant who pleads guilty to appeal the denial of a motion to dismiss, and thus, this portion of defendant’s plea arrangement violates the law. As a result, defendant’s guilty plea

2. The *Alston* Court also reviewed, to the extent possible from the record, the denial of defendant’s motion for a bill of particulars, though the Court explicitly stated that it was “not compelled to do so[.]” 307 N.C. at 341, 298 S.E.2d at 645.

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is vacated and the instant case is remanded to the trial court for further proceedings consistent with this opinion.

Vacated and remanded.

Judge BEASLEY concurs.

Judge STEELMAN dissents by separate opinion.

STEELMAN, Judge dissenting.

I must respectfully dissent from the majority's opinion vacating defendant's *Alford* guilty plea and remanding the case to the trial court for further proceedings. Because defendant failed to include in the record on appeal all documents necessary to afford effective appellate review of the issues brought forward on appeal, this case must be dismissed.

I. "Motion to Dismiss and Suppress"

On appeal, defendant argues that his guilty plea must be vacated because it was given in exchange for an unenforceable bargain of preserving appellate review of his "motion to dismiss and suppress." However, defendant failed to include this dispositive motion in the record on appeal. The majority acknowledges the omission.

I would note that there is a "Motion to Dismiss and Suppress" included in the record that is based upon an alleged violation of an officer's territorial jurisdiction. However, the denial of this motion is not the basis of defendant's appeal. A review of the motion contained in the record reveals that while it is captioned as a "Motion to Dismiss and Suppress," it is actually only a motion to suppress.

Because defendant failed to include the motion appealed from in the record, I would hold that this Court is unable to ascertain the nature of the motion. Rule 9(a)(3) of the Rules of Appellate Procedure provides that in criminal appeals, the record shall contain "copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal, unless they appear in the verbatim transcript of proceedings" N.C.R. App. P. 9(a)(3)(i) (2010). It is well-established that the appellant has the burden to ensure that the record on appeal is complete. *See State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983) ("It is the appellant's duty and responsibility to see that the record is in proper form and complete." (citations

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omitted)). Our appellate courts will not assume error by the trial court when none appears on the record. *Id.* at 341, 298 S.E.2d at 644. What the majority opinion continues to be unable to grasp is that the “Motion to Dismiss and Suppress” contained in the record was actually nothing more than a motion to suppress. Given this fact, I refuse to presume that the motion that is the basis of this appeal is anything more than a motion to suppress. It is not the role of the appellate courts to presume matters not in the record to reach a desired result in a case. Defendant’s appeal should be dismissed.

MICHAEL GEORGE SMITH, PLAINTIFF V. GRADY LEE WHITE, DEFENDANT

No. COA10-1042

(Filed 5 July 2011)

1. Motor Vehicles— diminution of value—evidence of cost of repairs—improperly excluded—new trial properly granted

The trial court did not err in a vehicular accident case by setting aside the jury verdict and granting plaintiff a new trial on the issue of diminution in value of his motorcycle. The trial court properly concluded that evidence regarding the cost of repairs of plaintiff’s motorcycle should not have been excluded. The cost of the repairs was relevant; the admission of such evidence would not cause a jury to award double recovery; and plaintiff was entitled to a new trial on the issue of diminution in value.

2. Appeal and Error— Contributory negligence—jury found in plaintiff’s favor

Plaintiff’s argument in a negligence case that the trial court erred in submitting the issue of contributory negligence to the jury was dismissed as the jury found plaintiff not liable under a theory of contributory negligence and the trial court entered judgment in accordance with the jury verdict.

3. Trials— compromise verdict—motion for new trial—properly denied

The trial court did not err in a negligence case arising out of a vehicular accident by refusing to grant plaintiff’s motion for a new trial. A juror’s statements may not be used in determining

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whether a compromise verdict was delivered and the award may have indicated that the jury did compensate plaintiff some amount for his pain and suffering.

4. Costs— offer of judgment—exceeded jury award—properly awarded

The trial court did not abuse its discretion in a negligence case by awarding costs to defendant where defendant's offer of judgment to plaintiff exceeded plaintiff's jury award.

Appeal by plaintiff from judgment entered 21 January 2010 by Judge Yvonne Mims Evans in Cleveland County Superior Court. Heard in the Court of Appeals 25 January 2011.

The Law Offices of Jason E. Taylor, P.C., by Jason E. Taylor, for plaintiff-appellant.

McAngus, Goudelock & Courie, PLLC, by Heather G. Connor and Jeffrey B. Kuykendal, for defendant-appellee.

BRYANT, Judge.

Because the trial court's order awarding plaintiff a new trial due to an error at law occurring during trial was appropriate, we affirm. Where plaintiff prevails at trial on the issue of contributory negligence, plaintiff's appeal of this issue is dismissed. Because the trial court did not abuse its discretion in finding that the jury verdict, which benefitted plaintiff, was not a compromise verdict, we affirm the trial court's denial of plaintiff's motion for a new trial. Finally, where defendant was entitled to an award of costs under Rule 68(a), the trial court did not abuse its discretion in awarding costs to defendant.

Facts and Procedural History

Plaintiff and defendant were involved in an automobile accident on 19 September 2007. Plaintiff, who was driving a motorcycle, alleged that defendant made a left turn in front of him, causing the accident. Plaintiff suffered personal injuries as a result of this collision. Plaintiff's motorcycle was also damaged, requiring repairs.

Plaintiff brought suit against defendant on 2 April 2008 alleging that defendant's negligence caused the accident. On 22 May 2008, defendant answered, asserting as an affirmative defense that plaintiff's contributory negligence resulted in the collision. Plaintiff replied pleading that defendant had the last clear chance to avoid the accident.

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Defendant paid for the repairs to plaintiff's motorcycle. However, in a pretrial motion in limine, defendant sought to exclude evidence of the cost of repairs to the motorcycle. Over plaintiff's objection the trial court granted defendant's motion, ruling that only the damage to the motorcycle and the work necessary to repair it were relevant issues for the jury.

On 21 January 2009, the jury returned a verdict finding defendant negligent in causing the accident. Plaintiff was found not liable under the doctrine of contributory negligence. In addition, the jury found that plaintiff's motorcycle had not sustained a diminution in value.

On 1 February 2009, plaintiff filed a Rule 59 motion for a new trial. Plaintiff's motion alleged that the trial court committed an error of law by not allowing evidence of the cost of repair to go to the jury, that there was insufficient evidence to justify the verdict finding no diminution in value to the motorcycle, and that the verdict was contrary to law with respect to the issue of property damage.

On 26 February 2010, judgment was entered awarding plaintiff \$6,335.00 in medical costs. On 19 March 2010, an amended judgment was entered retaining plaintiff's award of medical costs and granting defendant recovery of costs from plaintiff in accord with Rule 68.

Also, on 19 March 2010, the trial court granted in part plaintiff's motion for a new trial only as to diminution in value. Plaintiff's motion on all other grounds was denied.

Plaintiff and defendant both appeal.

Defendant's Appeal

On appeal, defendant argues that (I) the trial court erred in granting plaintiff's Rule 59 motion for a new trial.

I.

[1] Defendant argues that the trial court erred in setting aside the jury verdict and granting plaintiff a new trial on the issue of diminution in value. We disagree.

According to Rule 59, a new trial may be granted for the reasons enumerated in the Rule. By using the word *may*, Rule 59 expressly grants the trial court the discretion to determine whether a new trial should be granted. Generally, therefore, the trial court's decision on a motion for a new trial under Rule 59 will not be dis-

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turbed on appeal, absent abuse of discretion. [This Court] recognize[s] a narrow exception to the general rule, applying a *de novo* standard of review to a motion for a new trial pursuant to Rule 59(a)(8), which is an error in law occurring at the trial and objected to by the party making the motion.

Kor Xiong v. Marks, 193 N.C. App. 644, 654, 668 S.E.2d 594, 601 (2008) (citing *Greene v. Royster*, 187 N.C. App. 71, 77-78, 652 S.E.2d 277, 282 (2007)); see also *Philco Finance Corp. v. Mitchell*, 26 N.C. App. 264, 266-67, 215 S.E.2d 823, 824-25 (1975). Because the trial court's decision to grant a new trial was based on an "error in law occurring at the trial and objected to by the party making the motion," we review the trial court's ruling *de novo*. See N.C. Gen. Stat. §1A-1, Rule 59(a)(8) (2011).

At trial in the instant case plaintiff claimed that his motorcycle suffered a diminution in value due to the accident, despite repairs to the motorcycle. Upon defendant's objection the trial court excluded evidence of the actual cost to repair plaintiff's motorcycle. After hearing post-trial motions by plaintiff and defendant the trial court, citing *U.S. Fidelity & Guaranty Co. v. P. & F. Motor Express, Inc.*, 220 N.C. 721, 18 S.E.2d 116 (1942), concluded that evidence regarding the cost of repairs should not have been excluded and granted plaintiff a new trial on the issue of diminution in value.

In *U.S. Fidelity* our Supreme Court granted the defendant a new trial after holding that the trial court erred in excluding evidence concerning the costs of repairing the plaintiff's vehicle. *Id.* Herein, we quote *Fidelity* at length because we agree, as did the trial court, that *Fidelity* is dispositive of this issue.

It is a well settled rule with us, and in other jurisdictions, that the measure of damage for injury to personal property is the difference between the market value of the property immediately before the injury and the market value immediately after the injury.

The authorities are in conflict upon whether the cost of repairing injured property is competent evidence of the difference between the market value before and after the injury. The authorities which have been brought to our attention are cases in which the repairs have been actually made and the amount paid therefor was sought to be shown in order to establish the difference in market value, and in these cases we find the weight of authority in favor of the admissibility of such evidence. However, in the

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case at bar the evidence offered was not of the actual cost paid for repairing, but of an estimate of the cost thereof. The estimate sought to be shown was that of the “foreman of the repair shop of the City Chevrolet Company,” who “examined the automobile . . . which was damaged . . . and made an estimate of the cost of repairing that car.” While evidence of such an estimate of the cost of repairs might not be as convincing as evidence of the cost of the actual repairs, we think this difference relates to the weight thereof rather than to its competency—and the weight of evidence is for the jury, while the admissibility of evidence is for the court. This thought was evidently in the mind of Justice Allen when he wrote: “The correct and safe rule is the difference between the value of the machine before and after its injury, and in estimating this difference it is proper for the jury to consider the cost and expenses of repairs . . .”

Id. at 722-23, 18 S.E.2d at 117 (internal citations omitted).

Defendant argues that the trial court erred in granting plaintiff’s motion for a new trial based on the prior exclusion of evidence of cost of repairs because defendant had already paid for the repairs. Defendant vainly attempts to distinguish *Fidelity* from the instant case because the defendant in *Fidelity* attempted to elicit testimony regarding the estimated cost of repair.

Defendant argues that because plaintiff’s repairs had been paid for prior to trial proceedings, *Fidelity* is not applicable. However, defendant fails to acknowledge that the *Fidelity* court, in discussing the conflict regarding whether cost of repair is competent evidence of market value of property before and after injury, found that “the weight of authority [is] in favor of the admissibility of such evidence.” *Id.* at 723, 18 S.E.2d at 117. Therefore, the issue before the *Fidelity* Court was whether evidence of estimated cost of repair, as opposed to actual cost of repair already paid, should be admitted. As to that issue, the Court stated even though “evidence of such an estimate of the cost of repairs might not be as convincing as evidence of the cost of the actual repairs, we think this difference relates to the weight thereof rather than to its competency.” *Id.* at 723, 18 S.E.2d at 117. The Court made clear that where repairs have been made and paid for, such evidence is admissible to show the measure of damages.

While the general rule is that the measure of damages in respect of an injured automobile is the difference in its value immediately before and immediately after the injury, this measure may be

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established by showing the reasonable cost of necessary repairs to restore it to its previous condition.

In determining the depreciation in value of a motor vehicle as the result of an injury, the jury may take into consideration the reasonable cost of the repairs made necessary thereby, and the reasonable market value of the vehicle as repaired.

Id. at 723-24, 18 S.E.2d at 117 (internal citations omitted).

Defendant argues in the alternative that, even if the cost of the repairs was relevant, admitting such evidence would permit a jury to award double recovery. *Citing Sprinkle v. N.C. Wildlife Res. Comm'n*, 165 N.C. App. 721, 600 S.E.2d 473, (2004), defendant emphasizes that our Court has held that a plaintiff may not recover already-received costs.

In *Sprinkle*, this Court held that the plaintiff received an impermissible double recovery when plaintiff was awarded damages for both diminution in value and damages for the cost of repair to his boat. However, *Sprinkle* does not preclude a trial court from admitting evidence of the cost of repair in determining damages. *Id.* at 727, 600 S.E.2d at 477 (“As to this [diminution in] value, the Court can consider cost of repair. . . . [S]uch cost would be some evidence to guide the jury in determining the difference in the market value of the [property] before and after the injury.”). Therefore, because the determination of damages for diminution in value of plaintiff’s motorcycle is for a jury to decide in a new trial, we find defendant’s alternative argument to be premature.

For these reasons we hold that the trial court did not err in granting plaintiff’s motion for a new trial.

Plaintiff’s Appeal

Plaintiff argues that the trial court erred (II) in submitting the issue of contributory negligence to the jury, (III) in denying plaintiff’s motion for a new trial due to the jury rendering a compromise verdict, and (IV) in awarding costs to defendant.

II.

[2] On appeal, plaintiff argues that the trial court erred in submitting the issue of contributory negligence to the jury.

We note that the jury found plaintiff not liable under a theory of contributory negligence and the trial court entered judgment in accordance with the jury verdict.

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“[An] [a]ppellant may not complain of alleged error in respect to an issue answered in his favor.” *Digsby v. Gregory*, 35 N.C. App. 59, 61-62, 240 S.E.2d 491, 493 (1978) (*overruled on other grounds by Unigard Carolina Ins. Co. v. Dickens*, 41 N.C. App. 184, 186, 254 S.E.2d 197, 198 (1979)). For a party to be aggrieved, he must have rights which were substantially affected by a judicial order. Where a party is not aggrieved by a judicial order entered, as in the present case, his appeal will be dismissed. *Gaskins v. Blount Fertilizer Co.*, 260 N.C. 191, 195, 132 S.E.2d 345, 347 (1963) (per curiam) (plaintiff was not allowed to enjoin a foreclosure order where plaintiff held no property rights in the property, and therefore could not be aggrieved by the court’s granting of a foreclosure sale). We therefore dismiss plaintiff’s appeal as to this issue.

III.

[3] Next, plaintiff argues the trial court erred in refusing to grant his motion for a new trial because the jury issued a compromise verdict. We disagree.

An appeal from a trial court’s denial of a motion for new trial because of an alleged compromise verdict is reviewed for an abuse of discretion. *Hughes v. Rivera-Ortiz*, 187 N.C. App. 214, 217-18, 653 S.E.2d 165, 168 (2007). The party seeking to establish the abuse of discretion bears the burden of showing that the verdict was a compromise. *Id.*

“A compromise verdict is one in which the jury answers the issues without regard to the pleadings, evidence, contentions of the parties or instructions of the court.” *Piedmont Triad Reg’l Water Auth. v. Lamb*, 150 N.C. App. 594, 597, 564 S.E.2d 71, 74 (2002). The dollar amount of the verdict alone is insufficient to set aside the verdict as being an unlawful compromise. *Id.* at 598, 564 S.E.2d at 74.

Plaintiff first argues that comments allegedly made by jurors after the trial concluded indicated a compromise verdict. However, a juror’s statements may not be used in determining whether a compromise verdict was delivered. *See* N.C. Gen. Stat. § 8C-1, Rule 606(b) (2011) (“Upon an inquiry into the validity of a verdict . . . a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations . . . Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.”). “[A]fter [the jurors’] verdict has been rendered and received by the court, and they have been discharged, jurors will not be allowed to attack or over-

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throw it, nor will evidence from them be received for such purpose.” *Craig v. Calloway*, 68 N.C. App. 143, 150, 314 S.E.2d 823, 827 (1984). “If any evidence is to be admitted to impeach, attack, or overthrow a verdict, it must come from a source other than from the jurors themselves.” *Id.* Accordingly, plaintiff cannot use juror comments as evidence supporting his motion for a new trial.

Second, plaintiff argues that, based on *Maness v. Bullins*, a compromise verdict was delivered because jurors awarded medical expenses but no damages for pain and suffering. *Maness v. Bullins*, 27 N.C. App. 214, 218 S.E.2d 507 (1975). In *Maness*, our Court affirmed the trial court’s decision to order a new trial after the jury awarded only medical damages. The minor plaintiff had suffered serious facial injuries. *Id.* at 214, 218 S.E.2d at 507-08. The jury verdict was found to be inconsistent with plaintiff’s “clear and convincing” proof of pain and suffering which the jury arbitrarily ignored. *Id.* at 216-17, 218 S.E.2d at 509.

The record in the instant case indicates that plaintiff suffered relatively minor injuries that did not require extensive hospitalization or treatment. In addition, from the jury verdict it is not clear, but it is entirely possible, that some amount of damages could have been intended for pain and suffering. Plaintiff presented evidence showing a total of \$5,457.47 in medical bills. Testimony by plaintiff concerning his pain and suffering was countered by defendant, who provided evidence contradicting some of plaintiff’s medical expenses. The jury awarded plaintiff \$6,350.00 in medical expenses. This award may indicate that the jury did compensate plaintiff some amount for his pain and suffering. On these facts, we must reject plaintiff’s argument as to a compromise verdict and affirm the trial court’s denial of plaintiff’s motion for a new trial on negligence.

IV.

[4] Plaintiff’s final argument on appeal is that the trial court erred in awarding costs to defendant where the damages awarded to plaintiff were inadequate as a matter of law. We disagree.

Our Court reviews a trial court’s taxing of costs under an abuse of discretion standard. *Vaden v. Dombrowski*, 187 N.C. App. 433, 437, 653 S.E.2d 543, 545. “An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.” *Id.* at 437, 653 S.E.2d at 545-46.

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On 13 February 2009, defendant made plaintiff an offer of judgment for the lump sum of \$10,001.00, pursuant to N.C. Gen. Stat. §1A1, Rule 68(a). Plaintiff did not accept defendant's offer of judgment. Defendant then filed a motion for costs on 26 January 2010. The trial court granted an award of costs to defendant, under Rule 68, in an amended judgment on 19 March 2010.

Under Rule 68(a),

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted within 10 days after its service shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

N.C. Gen Stat. §1A1, Rule 68(a) (2011). As defendant's offer to plaintiff exceeded plaintiff's jury award, the trial court properly awarded costs incurred after the offer to defendant, and there was no abuse of discretion.

Affirmed in part; dismissed in part.

Judges McGEE and BEASLEY concur.

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STATE OF NORTH CAROLINA v. DANIEL WAYNE CLEARY

No. COA10-1324

(Filed 5 July 2011)

Probation and Parole— rejection of negotiated plea—motion to continue denied—no abuse of discretion

The trial court did not abuse its discretion in a breaking and entering a vehicle, misdemeanor larceny, injury to personal property, possession of a firearm by a felon, and carrying a concealed gun case by denying defendant a continuance as to the probationary matters upon rejection of the negotiated plea arrangement. N.C.G.S. § 15A-1023(b) applies only to criminal prosecutions and not to probation revocation proceedings.

Appeal by Defendant from judgments entered 3 August 2010 by Judge W. Douglas Albright in Wilkes County Superior Court. Heard in the Court of Appeals 24 March 2011.

Roy Cooper, Attorney General, by Kathleen N. Bolton, Assistant Attorney General, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for Defendant.

THIGPEN, Judge.

The trial court rejected the transcript of plea of Daniel Wayne Cleary (“Defendant”), which had been signed by the prosecutor, the defense counsel, and Defendant. After rejecting the plea, the trial court then denied Defendant’s motion to continue the probationary matters. We must determine whether Defendant had the right to a continuance of the probationary matters pursuant to N.C. Gen. Stat. § 15A-1023(b) (2009). We conclude he did not and the trial court did not err by holding N.C. Gen. Stat. § 15A-1023(b) does not apply to probationary matters.

I: Factual and Procedural History

The evidence of record tends to show that on 14 January 2009, Defendant was sentenced to two consecutive 24 month periods of supervised probation after Defendant’s guilty plea to two class H felonies (08 CRS 54353).

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On 22 May 2010, while on probation, Defendant ingested ten valium pills; then, Defendant broke into and damaged several vehicles. Defendant also took various items from the vehicles, including, but not limited to, sunglasses, a radar detector, and jumper cables. At the time, Defendant was carrying a pistol in his waistband.

On 23, 24 and 27 May 2010, warrants for Defendant's arrest were issued on six counts of breaking and entering, one count of felonious larceny, two counts of misdemeanor larceny, three counts of injury to personal property, two counts of larceny after breaking and entering, one count of possession of a firearm by a felon, and one count of carrying a concealed weapon.

On 2 June 2010, two probation violation reports were filed against Defendant, alleging Defendant was in violation of curfew on 22 May 2010 and had not made all required payments. The violation report stated, "ON 5/22/10, THE DEFENDANT WAS CHARGED WITH 8 FELONIES WHILE IN VIOLATION OF CURFEW[.]" and Defendant's "ORIGINAL OBLIGATION WAS \$490. . . . THE AMOUNT PAID IS \$80[.]"

On 26 July 2010, Defendant was indicted on four counts of breaking and entering a vehicle, three counts of misdemeanor larceny, one count of injury to personal property, one count of possession of a firearm by a felon, and one count of carrying a concealed gun.

On 3 August 2010, Defendant and defense counsel signed waivers of indictments on bills of information charging nine additional charges arising out of the events of 22 May 2010, specifically, five additional counts of breaking and entering, two additional counts of misdemeanor larceny, and two additional counts of injury to personal property.

On 3 August 2010, the trial court conducted a hearing, at which the prosecutor presented the court with a transcript of plea signed by Defendant, defense counsel, and the prosecutor. The parties had agreed that Defendant would be continued on probation in 08 CRS 54353 and plead guilty to seventeen of the nineteen additional charges. Two of the injury to personal property charges would be dismissed, and the seventeen charges would be consolidated into one class G felony and one class I felony. Defendant would receive an intermediate sentence for the foregoing charges, to run consecutively, at the expiration of his probationary sentence in 08 CRS 54353. Defendant affirmed that he was "in fact guilty of each charge [to] which [he] pled guilty[.]"

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The trial court did not approve the plea arrangement and stated reasons for not doing so. Defense counsel then moved for a continuance to the next term of Superior Court on the ground that the trial court rejected the plea arrangement. The court denied the motion in part, stating, “[the] [p]robation matter will not be continued.”

Later the same day, after a brief recess, defense counsel presented a second plea transcript, but “specifically reserve[ed] the right to appeal the denial of the defendant’s motion to continue these cases and the probation cases in 08 CRS 54353 following the Court’s rejection of the Defendant’s original transcript of pleas[.]”

On 3 August 2010, the trial court entered judgments sentencing Defendant to two consecutive eight to ten months terms of incarceration, sixty months of supervised probation upon Defendant’s release from incarceration, and total restitution in the amount of \$994.50. From this judgment, Defendant appeals.

II: Standard of Review

Defendant’s sole argument on appeal is that the trial court erred by denying Defendant a continuance as to the probationary matters upon rejection of the negotiated plea arrangement. We disagree.

“Absent a specific statutory provision, a ruling by the trial court on a motion to continue is within the sound discretion of the trial court and reviewable upon appeal only for abuse of discretion.” *State v. Daniels*, 164 N.C. App. 558, 562, 596 S.E.2d 256, 258 (quotation omitted), *disc. review denied*, 359 N.C. 71, 604 S.E.2d 918 (2004).

III: N.C. Gen. Stat. § 15A-1023(b)

N.C. Gen. Stat. § 15A-1023(b) grants Defendant the right to a continuance when a trial court “refuse[s] to accept a defendant’s plea of guilty or no contest[.]” stating, in pertinent part, the following:

Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly. If the judge rejects the arrangement, he must so inform the parties, refuse to accept the defendant’s plea of *guilty or no contest*, and advise the defendant personally that neither the State nor the defendant is bound by the rejected arrangement. The judge must advise the parties of the reasons he rejected the arrangement and afford them an opportunity to modify the arrangement accordingly.

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Upon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court. . . . (Emphasis added)

N.C. Gen. Stat. § 15A-1023(b).

By virtue of the foregoing statutory language, “the legislature has clearly granted to the defendant . . . an absolute right [to a continuance] upon rejection of a proposed plea agreement at arraignment[.]” *State v. Tyndall*, 55 N.C. App. 57, 63, 284 S.E.2d 575, 578 (1981), when a trial court “refuse[s] to accept a defendant’s plea of guilty or no contest[.]” N.C. Gen. Stat. § 15A-1023(b). However, this appeal asks the unique and heretofore unaddressed question of whether N.C. Gen. Stat. § 15A-1023(b) also applies to cases in which the court refuses to accept a plea in the context of a probation revocation proceeding, in which a defendant either “admits” or “denies” the allegations contained in the probation violation report. *State v. McMahan*, 174 N.C. App. 586, 587, 621 S.E.2d 319, 320-21 (2005), *rev’d on other grounds*, 361 N.C. 420, 646 S.E.2d 112 (2007) (stating that the “[d]efendant *admitted* violating the terms of her probation but *denied* and *contested* the willfulness of the violations”) (Emphasis added).

IV: Probation Violation Hearings

A probation violation hearing is not a synonymous proceeding to a criminal prosecution. “In North Carolina, a probation revocation hearing is not a formal trial and, as such, due process does not require that the trial court personally examine a defendant regarding his admission that he violated his probation.” *State v. Sellers*, 185 N.C. App. 726, 727, 649 S.E.2d 656, 656 (2007) (Emphasis added); *see also State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967) (stating that a revocation of probation proceeding “is not a criminal prosecution” and no formal trial is required). However, due process does require the following at a hearing to consider a revocation of probation:

- (1) a written notice of the conditions allegedly violated;
- (2) a court hearing on the violation(s) including:
 - (a) a disclosure of the evidence against him, or,
 - (b) a waiver of the presentation of the State’s evidence by an incourt admission of the willful or without lawful excuse violation as contained in the written notice (or report) of violation,

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- (c) an opportunity to be heard in person and to present witnesses and evidence,
 - (d) the right to cross-examine adverse witnesses;
- (3) a written judgment by the judge which shall contain
- (a) findings of fact as to the evidence relied on,
 - (b) reasons for revoking probation.

State v. Sellers, 185 N.C. App. 726, 649 S.E.2d 656, 657 (2007). The foregoing notwithstanding, probation revocation proceedings are “often regarded as informal or summary” because “probation or suspension of sentence is an act of grace and not of right.” *Duncan*, 270 N.C. at 246, 154 S.E.2d at 57.

[Probation] was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable. Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain.

Burns v. United States, 287 U.S. 216, 220, 77 L. Ed. 266, 268-69, 53 S. Ct. 154, 155 (1932). “Upon a hearing of this character, the court is not bound by strict rules of evidence, and the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt.” *Duncan*, 270 N.C. at 245, 154 S.E.2d at 57. “[T]he rights of an offender in a proceeding to revoke his conditional liberty under probation or parole are not coextensive with the federal constitutional rights of one accused in a criminal prosecution.” *Id.*, 270 N.C. at 246, 154 S.E.2d at 58 (quotation omitted); *see also State v. Sparks*, 362 N.C. 181, 187, 657 S.E.2d 655, 659 (2008) (stating that “[t]he rights of an offender in a proceeding to revoke his conditional liberty . . . are not coextensive with the . . . constitutional rights of one on trial in a criminal prosecution” and “while an individual facing the possibility of probation revocation is entitled to certain procedural protections such as the right to appear before a judge, no formal trial is required and strict rules of evidence do not apply”) (quotation omitted). “While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice.” *State v. Robinson*, 248 N.C. 282, 286, 103 S.E.2d 376, 379 (1958).

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“It is a cardinal rule of statutory construction that the intent of the legislature controls the interpretation of statutes.” *State v. Williams*, 291 N.C. 442, 445, 230 S.E.2d 515, 517 (1976) (citation omitted). “[W]hen the language of a statute is clear and unambiguous there is no room for judicial construction and the court must give the statute its plain and definite meaning without superimposing provisions or limitations not contained within the statute.” *Id.*, 291 N.C. at 446, 230 S.E.2d at 517 (citation omitted). “Criminal statutes must be strictly construed.” *State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783, 119 S. Ct. 883 (1999).

V: Analysis

In the present case, the trial court unequivocally rejected the plea agreement to continue Defendant on probation. Defense counsel then moved for a continuance, arguing that N.C. Gen. Stat. § 15A-1023(b) required the trial court to grant Defendant a continuance to the next term of Superior Court. The trial court stated that N.C. Gen. Stat. § 15A-1023(b) did not apply to probation proceedings, and denied defense counsel’s motion to continue the hearing on Defendant’s probation violations. However, we note that the trial court did not reject the motion to continue the substantive charges; rather, the court stated, “[t]he substantive charges can go over” to a future court date. Thereafter, defense counsel elected not to continue the substantive charges, but presented a newly prepared transcript of plea with regard to both the substantive charges and the probation violation reports.

On appeal, Defendant contends that the circumstances of this case are such that Defendant was entitled to a continuance as a matter of right pursuant to N.C. Gen. Stat. § 15A-1023(b). Defendant argues this case is indistinguishable from *State v. Tyndall*, 55 N.C. App. 57, 284 S.E.2d 575. In *Tyndall*, the following occurred at arraignment:

The defendant and State . . . entered into a plea bargain arrangement on the morning defendant’s trial was to begin. Both parties have stipulated on appeal that prior to jury selection, the trial judge informed the parties he was rejecting the plea arrangement. Defendant’s attorney made an oral motion for a continuance, but it was denied.

Tyndall, 55 N.C. App. at 63, 284 S.E.2d at 578. The Court in *Tyndall* stated, “the legislature has clearly granted to the defendant such an absolute right [to a continuance] upon rejection of a proposed plea agreement at arraignment.” *Id.* The Court then concluded that the

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trial court committed prejudicial error by denying Defendant's motion to continue and granted Defendant a new trial.

Certainly, *Tyndall* stands for the legal proposition that in a criminal prosecution N.C. Gen. Stat. § 15A-1023(b) grants a defendant an absolute right to a continuance upon the rejection of a proposed plea agreement. However, *Tyndall* does not involve a hearing on a probation violation report and therefore is not controlling on the issue presented in this appeal. Therefore, we must determine whether N.C. Gen. Stat. § 15A-1023(b) applies to cases in which the court refuses to accept a plea in the context of a probation revocation proceeding, where a defendant either "admits" or "denies" the allegations contained in the probation violation report.

N.C. Gen. Stat. § 15A-1023(b) contains the language "defendant's plea of *guilty* or *no contest*["] (Emphasis added) which is language used in criminal prosecutions. In a hearing on a probation violation report, a defendant either "admits" or "denies" the allegations in the report. This Court's opinion in *Sellers* addressed the distinction our Court has made between cases involving "guilty or no contest" pleas and those involving probationary matters. In *Sellers*, this Court held that N.C. Gen. Stat. § 15A-1022, although a different statute than the one at issue here, but one that makes the same reference to pleas of "guilty or no contest," does not apply to a defendant's admission to violation of probation. *See Sellers*, 185 N.C. App. at 728-29, 649 S.E.2d at 657 (stating that "[u]nlike when a defendant pleads guilty, there is no requirement that the trial court personally examine a defendant regarding his admission that he violated his probation").

N.C. Gen. Stat. § 15A-1023(b) does not address the "admission" or "denial" of allegations in a probation violation report, but rather, speaks only of a defendant's plea of "guilty or no contest["] Because we are to "give the statute its plain and definite meaning["] *Williams*, 291 N.C. at 446, 230 S.E.2d at 517 (citation omitted), and because the nature of probation revocation proceedings is inherently different than that of criminal prosecutions, we believe the legislature intended that the statute apply only to criminal prosecutions and not to probation revocation proceedings. For the foregoing reasons, and in light of this Court's holding in *Sellers*, we conclude the trial court did not err by determining that N.C. Gen. Stat. § 15A-1023(b) does not require that the trial court continue a probationary matter.

NO ERROR.

Judges STROUD and HUNTER, JR. concur.

ORANGE CNTY. EX REL. CLAYTON v. HAMILTON

[213 N.C. App. 205 (2011)]

ORANGE COUNTY EX REL. DOROTHY CLAYTON (PATTISON), PLAINTIFF V.
JONATHAN LEE HAMILTON, DEFENDANT

No. COA11-113

(Filed 5 July 2011)

1. Judges— ex parte communication—proposed order

Use of a counsel's proposed order that was requested by the court as the final order did not constitute an improper *ex parte* communication.

2. Civil Procedure— order entered out of session—no objection at trial

The trial court did not improperly enter an order out of session. Entry of orders out of session is allowed by N.C.G.S. § 1A-1, Rule 6(c), and defendant did not object at trial.

3. Venue— motion for change—denied—use of permanent mailing address as legal address

The trial court did not abuse its discretion by denying a motion for a change of venue in a child support dispute where the original action began in Orange County, defendant was living with her father, she had moved a number of times, and resided in Wake County at the time of the motion. The trial court was within its discretion to determine that her permanent mailing address (Orange County) remained her legal address.

4. Child Custody and Support— support for children of later marriage—no change of circumstances or income

Child support payments for children of a later marriage did not evidence a substantial change in plaintiff's circumstances or income.

5. Child Custody and Support— health insurance—no increased cost—no credit

The trial court did not err in a child support dispute by not giving defendant credit for medical insurance purchased for the minor child. Defendant incurred no additional cost in covering the child on his wife's health insurance policy and defendant's coverage was unnecessary because plaintiff had been providing coverage.

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[213 N.C. App. 205 (2011)]

Appeal by Defendant from order dated 27 July 2010 and filed 11 August 2010 by Judge Joseph M. Buckner in Orange County District Court. Heard in the Court of Appeals 6 June 2011.

Leigh A. Peek, Esq., Counsel for Orange County Child Support Enforcement, for Plaintiff.

Jonathan Hamilton, pro se.

STEPHENS, Judge.

Procedural History

This matter arises out of a child support dispute between Defendant Jonathan Hamilton and Plaintiff Orange County *ex rel.* Dorothy Clayton Pattison (“Pattison”). Defendant and Pattison are the parents of a minor child born 12 November 2003 but were never married. On 22 March 2004, Defendant entered into a Voluntary Support Agreement to provide support for the child, agreeing to pay \$245.00 per month and to provide health insurance. In 2006, Defendant agreed to increase the payments to \$500.00 per month, plus \$100.00 per month to pay down an arrearage totaling \$4,400.00. In 2009, the Orange County Child Support Enforcement (“OCCSE”) office, on behalf of Pattison, sought another increase, based on the child’s increased needs and Defendant’s increased income. In November 2009, the court increased Defendant’s payments to \$711.00 per month plus \$25.00 per month toward an arrearage totaling \$1,100.00. In December 2009, the OCCSE filed a Notice of Income Withholding with Defendant’s employer. In April 2010, Defendant sought a downward modification of child support, a change of venue, and reinstatement of direct child support payments to avoid the consequences of his employer’s delayed payments to the State’s Centralized Collections office. The trial court heard the matter on 9 June 2010.¹

The trial court took oral testimony, and then asked Defendant and Plaintiff to submit written summaries and proposed orders on the child support modification request. On 11 June 2010, Defendant’s counsel submitted his letter and proposed order to the trial court, and copied the other counsel of record. On 16 June 2010, the OCCSE, through Plaintiff’s counsel, submitted a letter and proposed order to the trial court, also copying opposing counsel. The trial court signed

1. Plaintiff filed a Motion for Contempt, also heard at this hearing, alleging that Defendant had failed to make his child support payment for January, or pay medical expenses in arrears. The trial court found that Defendant had a delinquency in his payments, but the record did not show a pattern of nonpayment rising to the level of willful contempt.

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Plaintiff's proposed order on 27 July 2010 and filed the order on 11 August 2010. Defendant appealed to this Court.

After filing the agreed-upon Record on Appeal, Defendant sought to supplement the Record pursuant to Rule of Appellate Procedure 11(c), but the supplement was stricken by order of this Court after Plaintiff filed a Motion for Sanctions. Plaintiff later submitted a Rule 9(b)(5)(a) supplement, which included copies of the letters and proposed orders submitted to the trial court. Those letters and orders were absent from the Record on Appeal as originally submitted by Defendant. Defendant moved for sanctions on 16 May 2011. After careful review of Plaintiff's supplement and Defendant's motion, we agree with Plaintiff that the materials in Plaintiff's supplement are necessary for Plaintiff's response to arguments raised in Defendant's brief. Therefore, we deny Defendant's motion.

Discussion

On appeal, Defendant argues that the trial court's order was the fruit of *ex parte* communication with Plaintiff's counsel. He also argues that the trial court erred by entering the order out of session and by denying Defendant's request for change of venue. Finally, Defendant argues that the trial court's denial of his motion for downward modification of child support was not supported by the evidence. For the reasons discussed herein, we affirm the trial court's order.

Ex Parte Communication

[1] Defendant first argues that the trial court improperly considered *ex parte* communication with Plaintiff's counsel in using counsel's proposed order as the final order in the case and relying on counsel's argument to deny Defendant's request for change of venue. We disagree.

This Court has previously held that proposed orders submitted to the trial court are proper for the court to request, and consider. "Nothing in [N.C. Gen. Stat. § 1A-1, Rule 58] or common practice precludes the trial court from directing the prevailing party to draft an order on its behalf. Instead '[s]imilar procedures are routine in civil cases[.]'" *In re J.B.*, 172 N.C. App. 1, 25, 616 S.E.2d 264, 279 (2005) (citations omitted).

Defendant's efforts to paint Plaintiff's counsel's proposed order as improper *ex parte* communication also flies in the face of North Carolina State Bar Formal Ethics Opinion 13, which addresses "whether a lawyer [may] communicate in writing with a judge or other judicial official about a proceeding that is pending before the judge or judicial

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official[.]” *Dunn v. Canoy*, 180 N.C. App. 30, 45, 636 S.E.2d 243, 253 (2006) (citing N.C. St. B. 98 Formal Ethics Op. 13 (July 23, 1999), *disc. review denied*, 361 N.C. 351, 645 S.E.2d 766 (2007)). That opinion “acknowledges that a broad reading of the applicable ethics rules would permit ‘unlimited written communications’ so long as a copy is simultaneously provided to the other parties and the communication is not ‘prejudicial to the administration of justice.’” *Id.* The opinion goes on to note that “[t]o avoid the appearance of improper influence upon a tribunal, informal written communications with a judge . . . should be limited” to four types, including, *inter alia*, written communications, such as a proposed order or legal memo prepared pursuant to the court’s instructions, and written communications sent to the tribunal “with the consent of the opposing lawyer.” *Id.*

In the instant case, the allegedly improper *ex parte* communication was requested at the hearing by the trial court. It was also requested of both parties’ counsel. Although Defendant now claims that the trial court’s request for submission of proposed orders was made “over Defendant’s objection,” our review of the transcript indicates that although Defendant’s trial counsel remarked, “my client really hates the written thing [submitting the letter and proposed order],” he did not formally object.

Because our statutes and case law clearly allow for the common trial court practice of requesting parties to prepare orders, and because copies of the orders here were provided to Defendant via his trial counsel, we overrule Defendant’s argument.

Entry of Order Out of Session

[2] Defendant next argues that the trial court’s order was improperly entered out of session. We disagree.

Rule 6(c) of the North Carolina Rules of Civil Procedure provides:

The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a session of court. The continued existence or expiration of a session of court in no way affects the power of the court to do any act or take any proceeding, but no issue of fact shall be submitted to a jury out of session.

N.C. Gen. Stat. § 1A-1, Rule 6(c) (2009). In *Feibus & Co. v. Godley Constr. Co.*, our Supreme Court interpreted Rule 6(c) broadly when it affirmed a judge’s order, written out of term, at his home, outside the district. 301 N.C. 294, 305, 271 S.E.2d 385, 392 (1980). The Court explained that:

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Rule 6(c) of the Rules of Civil Procedure provides that the expiration of a session of court has no effect on the court's power 'to do any act or take any proceeding.' This rule clearly allows a written order to be signed out of term, especially when such an act merely documents a decision made and announced before the expiration of the term.

Id. (internal citation omitted).

Further, under Rule 58, the signing and entry of judgment out of term or session is expressly allowed "unless an express objection to such action was made on the record prior to the end of the term or session at which the matter was heard." N.C. Gen. Stat. § 1A-1, Rule 58 (2009). Here, no such objection was made by Defendant at trial and entry of the order out of session was proper. Accordingly, we overrule this argument.

Change of Venue

[3] Defendant also argues that the trial court abused its discretion in denying his motion for a change of venue. Specifically, he contends the trial court erred in "concluding that Defendant's legal residence was Orange County when the address where Ms. [Pattison] receives some of her mail does not establish her legal residence for purposes of determining proper venue in a child support enforcement case." We are not persuaded.

Rulings on motions for change of venue are "within the sound discretion of the trial judge and . . . not subject to reversal absent a manifest abuse of discretion." *Holland v. Gryder*, 54 N.C. App. 490, 491, 283 S.E.2d 792, 793 (1981).

In child support and custody cases, the original trial court "retains jurisdiction to the exclusion of all other courts and is the only proper court to bring an action for the modification of an order establishing custody and support." *Brooker v. Brooker*, 133 N.C. App. 285, 288, 515 S.E.2d 234, 237 (1999) (quoting *Tate v. Tate*, 9 N.C. App. 681, 682-83, 177 S.E.2d 455, 457 (1970)). In child support and custody cases, "[i]t is elementary law that the residence of the parties at the time of the institution of the action is controlling, and venue is not affected by a subsequent change of residence of the parties." *Bass v. Bass*, 43 N.C. App. 212, 215, 258 S.E.2d 391, 393 (1979).

Here, the original child custody and support action began in Orange County, where Pattison then resided with her father. She has since moved a number of times, and currently resides in Wake

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County, in the town of Wake Forest. The trial court was within its discretion to determine that Pattison's permanent mailing address remains her legal address. For these reasons, we overrule Defendant's argument regarding change of venue.

Denial of Motion for Downward Modification

[4] Finally, Defendant argues that the trial court's denial of his Motion for a Downward Modification of Child Support was not supported by the evidence. Contrary to the order, Defendant argues, there had been a substantial and material change of circumstances warranting a downward modification. In particular, Defendant argues that Pattison's income should have been calculated to include child support she receives for her three other children from a later marriage, and that the trial court erred in failing to give him credit for the cost of medical insurance coverage he carried for his child. We disagree.

We review a trial court's child support orders for abuse of discretion. *Holland v. Holland*, 169 N.C. App. 564, 567, 610 S.E.2d 231, 233 (2005) (internal citations omitted). "[A]n order of a court of this State for support 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." N.C. Gen. Stat. § 50-13.7(a) (2009). Modification of child support is a two-step process. "A trial court 'must first determine a substantial change of circumstances has taken place; only then does it proceed to apply the [North Carolina Child Support] Guidelines to calculate the applicable amount of support.'" *Armstrong v. Droessler*, 177 N.C. App. 673, 675, 630 S.E.2d 19, 21 (2006) (citing *McGee v. McGee*, 118 N.C. App. 19, 26, 453 S.E.2d 531, 536, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995)). The party seeking modification "assume(s) the burden of showing that circumstances (have) changed." *Crosby v. Crosby*, 272 N.C. 235, 237, 158 S.E.2d 77, 79 (1967). If the party seeking the modification fails to convince the court that there has indeed been a substantial change in circumstances since the last order, then the court has no authority to modify the order. *Lewis v. Lewis*, 181 N.C. App. 114, 120, 638 S.E.2d 628, 632 (2007).

Here, Defendant cites Pattison's child support payments for her three children from a later marriage as evidence of a substantial change in her income, or "circumstances." He relies on this Court's holding in *New Hanover Child Support Enforcement v. Rains* that "the [North Carolina Child Support] Guidelines do not exclude child support payments from income." 193 N.C. App. 208, 212, 666 S.E.2d 800, 803 (2008). However, Defendant's reliance on *Rains* is incom-

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plete and misleading. In *Rains*, the Court notes that child support “income” may be presumed to be “equal to the basic child support obligation” for the child or children for whom it is received, and therefore must be balanced against those expenses. *Id.* at 211, 666 S.E.2d at 802. Far from endorsing the use of child support as income, the Court in *Rains* went so far as to urge the Conference of Chief District Court Judges, which has authority over the Guidelines, to consider the route taken in the majority of other states, which have “excluded from income child support received for one child when determining the support obligations for another child.” *Id.* at 213, 666 S.E.2d at 803.² *See, e.g.*, Ga. Code Ann. § 19-6-15(f)(2) (2007).

[5] Defendant’s argument that the trial court erred in failing to give him credit for medical insurance coverage purchased for the minor child is similarly unpersuasive. Under North Carolina’s Child Support Guidelines, “[w]hen a child for whom support is being determined is covered by a family policy, only the health insurance premium actually attributable to that child is added. If this amount is not available or cannot be verified, the total cost of the premium is divided by the total number of persons covered by the policy.” N.C. Child Supp. Guidelines, AOC-A-162 Rev. 10/06, 4. Defendant argues that, per his original child support order in 2004, he has maintained insurance for the child at \$130 per month, a sum he believes should be deducted from his child support obligation. However, the trial court determined that Defendant had incurred no additional cost in covering the child on his wife’s health insurance policy, which also covered her son from a previous marriage. No documentation about the insurance, from either side, is included in the Record on Appeal. Moreover, the trial court found that Defendant’s insurance coverage of the child was “unnecessary” because Pattison had been providing coverage for the child on her Blue Cross policy.

In the end, both of Defendant’s arguments that a substantial change in circumstance has occurred fall short. Therefore, the order of the trial court is

AFFIRMED.

Chief Judge MARTIN and Judge THIGPEN concur.

2. The Conference appears to have taken the Court’s advice; the 2011 Child Support Guidelines specifically disallow consideration of “child support payments received on behalf of a child other than the child for whom support is being sought in the present action.” N.C. Child Supp. Guidelines, AOC-A-162 Rev. 01/11, 2.

SCHAEFER v. TOWN OF HILLSBOROUGH

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

BONNIE SCHAEFER AND ROBERT D. BEVAN, III, PETITIONERS v. TOWN OF HILLSBOROUGH, A NORTH CAROLINA MUNICIPALITY AND ITS BOARD OF ADJUSTMENT, RESPONDENT

No. COA10-968

(Filed 5 July 2011)

1. Zoning— conditional use permit—order on remand—properly carried out mandate

The superior court's order on remand directing the Board of Adjustment to issue the conditional use permit for which petitioners applied "without application of any new or different conditions" properly carried out the mandate of the Court of Appeals.

2. Costs— zoning proceeding—taxed against respondent—no abuse of discretion

The superior court did not abuse its discretion in taxing the cost of a zoning proceeding against respondent Town of Hillsborough. The superior court was acting in accordance with the judgment of the Court of Appeals in *Schaefer I* and the Rules of Appellate Procedure.

Appeal by respondent from judgment entered 1 March 2010 by Judge Abraham Penn Jones in Orange County Superior Court. Heard in the Court of Appeals 25 January 2011.

The Brough Law Firm, by Robert E. Hornik, Jr., for respondent-appellant.

Brown & Bunch, PLLC, by LeAnn Nease Brown and James R. Baker, for petitioner-appellees.

BRYANT, Judge.

Because this Court, in a prior appeal of this case, ordered that the matter be remanded "for entry of judgment directing the [Board of Adjustment] to issue the conditional use permit for which petitioners applied[,]” *Schaefer v. Hillsborough*, COA No. 08-796, slip op. at 12-13 (N.C. App. 4 August 2009), and, as a general rule, "an inferior court must follow the mandate of an appellate court in a case without variation or departure,” *In re R.A.H.*, 182 N.C. App. 52, 57, 641 S.E.2d 404, 407 (2007) (quoting *Condellone v. Condellone*, 137 N.C. App. 547, 551, 528 S.E.2d 639, 642 (2000)), the order of the Superior Court compelling the issuance of a conditional use permit without additional conditions is affirmed.

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

Bonnie Schaefer and Robert D. Bevan, III, (“petitioners”) own 2.74 acres of land located in the Historic District of Hillsborough, North Carolina (“the Property”). The Property is zoned R-20, Medium Intensity Residential, and this classification permits the development of single and two family residences. Additional zoning requirements limit the number of permitted dwelling units on the Property to 5.9 units. The petitioners wanted to construct five duplexes, or a total of ten dwelling units, on the Property. They submitted an application to the Hillsborough Board of Adjustment pursuant to the Town of Hillsborough Zoning Ordinance (“the Ordinance”) for a conditional use permit that would grant them a “density bonus,” permitting the petitioners to construct up to a maximum of eleven dwelling units. The application met each of the objective size and lot requirements of the Ordinance.

After two public hearings, the Board of Adjustment determined that the proposal did not conform “with the general plans for the physical development of the Town as embodied in these regulations or in the Comprehensive Plan” Specifically, the Order stated that the proposed development violated § 4.3(d) because (1) the proposed development was deemed to be out of character with the existing structures and uses of the area; and (2) the proposal would violate two goals of *Hillsborough’s Vision 2010 Plan*.

This is the second appeal of this matter to this Court. In an unpublished opinion filed 4 August 2009 (COA08-796) (hereinafter *Schaefer I*), this Court addressed whether the Orange County Superior Court erred in upholding, as a matter of law, the ruling of the Hillsborough Board of Adjustment which denied petitioners Bonnie Schaefer and Robert Bevan’s application for a conditional use permit. We held that the Superior Court “erred as a matter of law when [it] concluded that respondent provided an appropriate basis for the denial of the permit.” *Schaefer I*, at 12. The lower court’s ruling was reversed, and we remanded the matter “for entry of judgment directing the [Board of Adjustment] to issue the conditional use permit for which petitioners applied.” *Schaefer I*, at 12-13.

On remand, the Superior Court, on 1 March 2010, entered an order stating that the decision of the Town of Hillsborough municipality and its Board of Adjustment, denying petitioners’ application for a conditional use permit, was reversed and ordered the Board “to immediately issue the Conditional Use Permit for which Petitioners applied, without application of any new or different con-

SCHAEFER v. TOWN OF HILLSBOROUGH

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

ditions or ordinance requirements” Respondent Town of Hillsborough and its Board of Adjustment appeal.

[1] On appeal, respondent make four arguments raising the following two issues: (I) Whether the Board of Adjustment may impose conditions upon the conditional use permit it was ordered to issue; and (II) whether the lower court abused its discretion in taxing the cost of the proceeding against respondent Town of Hillsborough.

Standard of Review

This Court has stated that the task of a court reviewing a town board’s decision when the town board has acted as a quasi-judicial body includes:

- (1) Reviewing the record for errors in law,
- (2) Insuring that procedures specified by law in both statute and ordinance are followed,
- (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
- (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
- (5) Insuring that decisions are not arbitrary and capricious.

Robins v. Town of Hillsborough, 361 N.C. 193, 198, 639 S.E.2d 421, 424 (2007) (*Coastal Ready Mix Concrete Co. v. Bd. of Comm’rs.*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980)).

The initial decision of the Town of Hillsborough Board of Adjustment to deny petitioners a conditional use permit was determined by this Court in *Schaefer I* to be an unlawful exercise of legislative power. This Court remanded the matter to the Superior Court “for entry of a judgment directing the [Board of Adjustment] to issue the conditional use permit for which petitioners applied.” *Schaefer I*, No. COA08-796, slip op. at 10 (N.C. App. 4 August 2009). Respondent appeals from the Superior Court order on remand directing that respondent “issue the Conditional Use Permit for which Petitioners applied, *without application of any new or different conditions*”

“ ‘[T]he general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure.’ ” *In re R.A.H.*, 182 N.C. App. at 57, 641 S.E.2d at 407 (citation omitted).

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In our judicial system the Superior Court is a court subordinate to the [appellate level courts]. . . . No judgment other than that directed or permitted by the appellate court may be entered. ‘Otherwise, litigation would never be ended, and the [appellate level courts] of the state would be shorn of authority over inferior tribunals.’

D & W, Inc. v. City of Charlotte, 268 N.C. 720, 722-23, 152 S.E.2d 199, 202 (1966) (citations omitted).

The certified appellate decision is sent to the trial court which must then “direct the execution thereof to proceed.” N.C.G.S. § 1-298 (1983). There is no statutory authority to do otherwise. Though the action is remanded to the trial court for execution, this procedural step is merely for “clarity, continuity, and for the convenience of those who may examine the records thereafter—, but the efficacy of our mandate does not depend upon the entry of an order by the court below.” *D & W, Inc.*, at 723-24, 152 S.E.2d 203.

Severance v. Ford Motor Co., 105 N.C. App. 98, 100-01, 411 S.E.2d 618, 620 (1992).

As this Court, in *Schaefer I*, remanded the matter “for entry of judgment directing the [Board of Adjustment] to issue the conditional use permit for which petitioners applied[,]” rather than for further proceedings, the Superior Court order commanding the issuance of the conditional use permit “without application of any new or different conditions . . .” properly carries out the mandate of this Court. Therefore, the order is affirmed, and we need not further address respondent’s arguments presented in issue I.¹

II

[2] Respondent argues that the Superior Court abused its discretion by taxing it with the costs of the action. Respondent further contends that the Superior Court had no reason other than suspicion “that Respondent Appellant Town of Hillsborough had greater resources than Petitioners.” We disagree.

Pursuant to the North Carolina Rules of Appellate Procedure 35(a), “if a judgment is reversed, costs *shall* be taxed against the

1. We note respondent’s arguments regarding its authority, by statute and ordinance, to impose conditions upon approval of a conditional use permit. However, because this Court previously ordered respondent to issue the conditional use permit following respondents’ improper denial, and respondent thereafter issued the mandate with conditions, we will not consider respondent’s arguments.

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appellee unless otherwise ordered.” N.C. R. App. P. 35(a) (2008) (emphasis added). Further, Rule 35(c) states, “[a]ny costs of an appeal which are assessable in the trial tribunal shall upon receipt of the mandate be taxed as directed therein and may be collected by execution of the trial tribunal.” N.C. R. App. P. 35(c). In *Schaefer I*, this Court reversed the ruling of the lower court. On remand, the Superior Court ordered that the costs be taxed against the appellee, Town of Hillsborough. While “ ‘the general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure,’ ” the Superior Court was acting in accordance with the judgment of this Court in *Schaefer I* and our Rules of Appellate Procedures. *In re R.A.H.*, 182 N.C. App. at 57, 641 S.E.2d at 407 (citation omitted). Accordingly, the appellee in *Schaefer I*, Town of Hillsborough, was properly taxed with the costs. Therefore, we affirm the order of the Superior Court.

Affirmed.

Judges McGEE and BEASLEY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 JULY 2011)

ANCELMO v. OLIVER No. 10-1546	Greene (08CVS205)	Affirmed
GRIFFIN v. GRIFFIN No. 11-147	Forsyth (07CVD4010)	Vacated and Remanded
HOWARD v. FLOWERS No. 10-1561	Johnston (07CVD105)	Affirmed
IN RE CHURCH No. 10-1598	Ashe (07SPC162)	Reversed
IN RE D.L. No. 11-60	Caswell (10JA21)	Affirmed
IN RE H.D.H. No. 11-85	Wayne (09JT37-38)	Affirmed
IN RE J.C. No. 11-111	Mecklenburg (09J337)	Reversed and Remanded
IN RE J.W. No. 10-1496	Bertie (09J22)	Affirmed
IN RE K.B. No. 10-1556	Mecklenburg (04JT1160-1161)	Affirmed and Remanded
IN RE T.D-D. No. 10-1509	Buncombe (09JA79)	Reversed and Remanded
JOHNSON v. JOHNSON No. 11-41 (08CVS1532)	Edgecombe (08CVS1532)	Affirmed in part; vacated in part
REVOLUTIONARY CONCEPTS, INC. v. CLEMENTS WALKER PLLC No. 10-627	Mecklenburg (08CVS4333)	Dismissed
SARTORI v. CNTY. OF JACKSON No. 10-1137	Jackson (10CVS266)	Vacated and Remanded
SCHNEIDER v. N.C. DEPT OF TRANSP No. 10-1462	Indus. Comm. (TA-19424)	Affirmed
STATE v. BAILEY No. 11-37	Mecklenburg (07CRS211318)	No Prejudicial Error

STATE v. BAILEY No. 10-1492	Forsyth (08CRS59167)	No Error
STATE v. BALDWIN No. 10-1373	Mecklenburg (09CRS231622) (09CRS63690)	No Error
STATE v. BRATTON No. 10-1431	Catawba (09CRS1519)	No error in part; vacated in part
STATE v. CHAMBERS No. 10-1101	Rowan (07CRS55268-69) (07CRS7377)	No Error
STATE v. DURHAM No. 10-1107	Wake (08CRS74387-93)	No error in part; reversed in part.
STATE v. EDMISTEN No. 11-46	Watauga (09CRS50361)	No Error
STATE v. ELDER No. 10-1618	Mecklenburg (08CRS233259)	Remanded
STATE v. EMBLER No. 10-717	Buncombe (09CRS53794-99)	No Error
STATE v. FAISON No. 10-1236	Sampson (09CRS51895)	No error at trial, remanded in part.
STATE v. JACKSON No. 10-1550	Forsyth (08CRS51657-59)	No Error
STATE v. JOHNSON No. 10-1529	Guilford (10CRS71468)	Affirmed
STATE v. LAMB No. 11-89	Carteret (10CRS50104)	No Error
STATE v. LAWSON No. 10-1132	Rockingham (07CRS51873)	Dismissed in Part; No Error in Part
STATE v. MCKEVER No. 10-1436	Durham (06CRS58801) (07CRS12622)	Reversed
STATE v. MURRAY No. 10-1601	Cleveland (10CRS27) (10CRS968)	Affirmed in part, vacated in part and remanded

STATE v. NACKAB No. 10-1444	Cumberland (08CRS58541-42) (08CRS58563)	No Error
STATE v. PADGETT No. 10-1045	Forsyth (07CRS57365-66) (08CRS7143)	No Error
STATE v. RIDER No. 10-558	Buncombe (09CRS611) (09CRS613-614) (08CRS60879-80) (09CRS616-618)	No Error in Part; New Trial in Part; Remanded for Resentencing.
STATE v. SHEHAN No. 10-1174	Polk (07CRS51042) (09CRS116-119) (10CRS104)	09crs117 & 118 are dismissed. 07crs51042, 09crs116, 09crs119, & 10crs104 are affirmed
STATE v. STARNES No. 10-1543	Rowan (05CRS57271) (05CRS57274-75) (05CRS57523)	Affirmed
STATE v. WILSON No. 11-87	Person (09CRS50752)	No Error
STATE v. YATES No. 11-19	Watauga (08CRS51488)	Affirmed in part, remanded for resentencing in part.
STEPP v. AWAKENING HEART, P.A. No. 10-1118	Henderson (08CVS2135)	Dismissed
WILLIAMS v. WILLIAMS No. 10-530	Iredell (04CVD3190)	Affirmed

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D.G. II, LLC, PLAINTIFF v. CLIFFORD E. NIX AND JOHNSON BOAT WORKS,
DEFENDANTS

No. COA10-1458

(Filed 5 July 2011)

1. Appeal and Error— timeliness of appeal—party designated to prepare judgment failed to serve on other party

Defendants' motion to dismiss plaintiff's appeal as untimely in a breach of contract and unfair and deceptive trade practices case was denied. Since defendants were the party designated by the trial court to prepare the judgment and they never served plaintiff with a copy of the judgment, they were not in compliance with N.C.G.S. § 1A-1, Rules 58 and 59. Thus, plaintiff timely filed within the ninety days under Rule 59.

2. Appeal and Error— interlocutory orders and appeals—subject matter jurisdiction

The trial court had subject matter jurisdiction in a breach of contract and unfair and deceptive trade practices case after plaintiff appealed from a nonappealable interlocutory order that did not completely dispose of the case. Further action was required by the trial court to finally adjudicate the parties' claims.

3. Unfair Trade Practices— summary judgment—allegations not sufficiently egregious or aggravating

The trial court did not err by granting defendants' motion for partial summary judgment on plaintiff's claim for unfair and deceptive trade practices. While the facts supported plaintiff's claim for breach of contract, they were not sufficiently egregious or aggravating.

4. Damages and Remedies— jury's failure to award nominal damages—no prejudicial error

The trial court did not abuse its discretion in a breach of contract and unfair and deceptive trade practices case by denying plaintiff's motion for a new trial based on the jury's failure to follow the trial court's instruction to write a nominal amount in its verdict after declining to award plaintiff actual damages. The trial court's entry of the October 2009 order entitled plaintiff to recover nominal damages as a matter of law.

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[213 N.C. App. 220 (2011)]

Appeal by plaintiff in Dare County Superior Court from an order entered by Judge Alma L. Hinton on 2 October 2009, and Judge Jerry R. Tillett's judgment entered 7 May 2010 and his order entered 15 September 2010. Heard in the Court of Appeals 14 April 2011.

Vandeventer Black LLP, by Norman W. Shearin and Robert L. O'Donnell, for plaintiff-appellant.

C. Everett Thompson, II, for defendant-appellees.

CALABRIA, Judge.

D.G. II, LLC ("plaintiff"), appeals the trial court's 2 October 2009 order granting Clifford E. Nix's ("Nix") and Johnson Boat Works' ("JBW") (collectively, "defendants") motion for partial summary judgment against plaintiff on the issue of, *inter alia*, unfair and deceptive practices ("UDP"); the 7 May 2010 judgment denying additional damages for plaintiff; and the 15 September 2010 order denying plaintiff's motion for a new trial. We affirm.

I. BACKGROUND

On 11 May 2006, John Floyd ("Floyd") entered into a contract ("the contract") on plaintiff's behalf with defendants for the construction of a 57-foot sport fishing boat ("the boat") to be used in a charter-for-hire fishing business. Under the terms of the contract, plaintiff was required to pay a deposit in the amount of \$100,000.00 ("the deposit") to defendants, and to pay the balance of the purchase price of \$1,250,000.00 within five days of receipt of notice from defendants that the boat was completed. Furthermore, defendants agreed to build and deliver the boat in accordance with the specifications stated in the contract. The contract required defendants to transfer the boat's title and deliver possession of the boat to plaintiff on or before 31 July 2006. On 11 May 2006, plaintiff deposited \$100,000.00 with defendants.

Prior to 12 July 2006, defendants informed Floyd that the boat would not be completed until 7 September 2006 rather than 31 July 2006, "due primarily to the diversion of subcontractors to other boats under construction by competitors." As compensation for the delay, defendants proposed to include a "teak deck," worth approximately \$5,000.00, at no additional cost to plaintiff. Defendants also offered plaintiff the option to terminate the contract and recover its deposit in full. Plaintiff declined to terminate the contract and elected to proceed.

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On 14 July 2006, plaintiff delivered a letter to defendants explaining the reasons that defendants' delay in completing the boat until 7 September 2006 was "unacceptable" and "disastrous." Plaintiff had made "extensive plans to launch its charter business late in the 2006 season" since the "fishing season will be drawing to an end in the late summer or early fall of this year" Plaintiff also stated that the delay in delivery would prevent its participation "in the Pirate's Cove Tournament in mid-August . . ." and that "[i]t is hard to overstate the importance of participation in this tournament to [plaintiff's] business." Plaintiff reminded defendants that participation in the tournament was discussed at the time the parties signed the contract.

Plaintiff also proposed a counteroffer in the 14 July 2006 letter to defendants and offered defendants one of three options: (1) defendants would pay plaintiff consequential damages of \$100,750.00 and deliver the boat "at a mutually agreeable time" at the price and under the conditions provided for in the contract; (2) plaintiff would provide an irrevocable letter of credit for the balance of the purchase price owed on the boat on or before 2 August 2006, defendants would exercise the letter of credit when plaintiff took possession of the boat in April 2007, the boat would meet certain additional inspection and certification requirements, and defendants would pay plaintiff the captain's salary of more than \$4,000.00 per month plus employment expenses until 31 March 2007 or delivery of the boat; or (3) plaintiff would take delivery of the boat during the first week of October 2006 for the purchase price stated in the contract, along with eight additional specifications to be added to the boat, and payment of two months' captain's salary and expenses.

Prior to receiving a response to the 14 July 2006 letter, plaintiff notified defendants on 31 July 2006 that it was "ready, willing and able" to perform under the contract. However, defendants did not deliver the boat to plaintiff on 31 July 2006, or at any other time. On 3 August 2006, Floyd informed defendants again that plaintiff desired to have the boat.

On 9 August 2006, defendants informed plaintiff that Floyd "made direct threats toward [defendants] concerning litigation that he intends to file and the damages . . . he plans to seek. In other words, [defendants] believe that Mr. Floyd intends to file suit regardless of any proposal for completion of the boat." On 10 August 2006, defendants informed plaintiff, in writing, that defendants "will be terminating the contract based on [plaintiff's] anticipatory breach" On 11 August 2006, plaintiff sent a letter to defendants stating that the boat

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“must be completed and delivered no later than October 13, 2006” and proposed another counteroffer. Defendants did not respond to the proposal.

On 18 August 2006, defendants informed plaintiff that it was their “understanding” that plaintiff would not be purchasing the boat. Defendants mailed a draft of an agreement which would “terminate[] the relationship” between the parties, and offered to refund the deposit if plaintiff released all claims it may have had against defendants under the contract. Also on 18 August 2006, defendants signed a contract to sell the boat to another buyer named Christopher Schultz (“Schultz”) for \$1,475,000.00. The sale price to Schultz was \$125,000.00 more than the price of the boat stated in the contract between plaintiff and defendants.

On 6 September 2006, plaintiff filed a complaint against defendants in Dare County Superior Court, seeking, *inter alia*, specific performance of the contract, damages in an amount in excess of \$10,000.00, and a restraining order prohibiting defendants from “selling, assigning, or in any way encumbering, damaging or misusing” the boat. Plaintiff also filed an amended complaint, adding Schultz and the broker for the Schultz sale, MacGregor Yachts, Inc. (“MacGregor”), as defendants. Plaintiff asserted a claim of UDP against defendants and MacGregor and sought, *inter alia*, specific performance and damages for lost profits and income as a result of its inability to proceed with its business plan for the operation of a commercial sport fishing enterprise during the period from 1 August 2006 until 18 October 2006. Approximately one month later, Schultz requested that defendants return his deposit for the boat. Later, defendants entered into a second contract with Schultz to sell him the boat for \$1,400,000.00, which was \$50,000.00 more than the amount stated in the contract between plaintiff and defendants. Subsequently, the trial court granted Schultz’s and MacGregor’s motion to dismiss.

On 21 December 2006, plaintiff informed defendants that it desired to purchase the boat under the contract and “would drop all charges against [defendants].” Defendants answered and asserted counterclaims for, *inter alia*, breach of contract. On 28 March 2007, plaintiff again expressed interest in purchasing the boat and “resolving outstanding matters regarding various claims at a later date.” Plaintiff deposited the amount of \$1,250,000.00 in its attorney’s trust account and was prepared to close immediately and take possession of the boat. On 2 July 2007, plaintiff requested that defendants return the deposit, but defendants did not respond.

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On 1 September 2009, defendants moved for summary judgment, contending that there was no genuine issue of material fact and that they were entitled to judgment as a matter of law. On 4 September 2009, plaintiff moved for partial summary judgment “on the breach of contract cause of action” and, in the prayer for relief, asked the court to “hold open for further adjudication the remaining causes of action and damages.” In the 2 October 2009 order (“the October 2009 order”), the trial court granted plaintiff’s motion for partial summary judgment on its breach of contract claim and defendants’ motion for partial summary judgment on the UDP claim. The trial court also held open for further adjudication the issue of damages on plaintiff’s breach of contract claim.

On 30 November 2009, the trial court entered an order (“the November 2009 order”) awarding plaintiff damages against defendants, jointly and severally, in the amount of \$100,000.00, representing plaintiff’s deposit toward the purchase price of the boat, together with interest at the rate of eight percent from 10 August 2006 until paid. The trial court denied plaintiff’s motion for summary judgment regarding other damages.

On 27 April 2010, the jury was asked: “What amount of money damages is D.G. II, entitled to recover from the defendants?” The jury returned the verdict sheet with the answer to the amount of damages as a zero (“0”). On 7 May 2010, the trial court entered a judgment (“the May 2010 judgment”) reflecting the jury’s verdict that plaintiff was not entitled to any additional damages from defendants. The trial court also taxed “all costs of court” against defendants. Plaintiff served defendants with a copy of the judgment on 17 May 2010.

On 1 June 2010, plaintiff filed a motion for a new trial and served defendants with a copy. The trial court denied the motion on 15 September 2010 (“the September 2010 order”). Plaintiff filed notice of appeal on 23 September 2010 from the October 2009 order, the May 2010 judgment, and the September 2010 order.

II. INITIAL MATTERS**A. Motion to Dismiss Appeal**

[1] As an initial matter, defendants argue that this Court lacks jurisdiction to consider plaintiff’s appeal, and therefore it should be dismissed. More specifically, defendants claim that the time for filing plaintiff’s notice of appeal was not tolled when it filed a motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 (2009) (“Rule 59”). We disagree.

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Rule 3(c) of the North Carolina Rules of Appellate Procedure (“Appellate Rule 3”) requires a party to file a written notice of appeal within thirty days after entry of the judgment. N.C. R. App. P. 3 (2009). However, Appellate Rule 3(c)(3) provides, “if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion[.]” N.C. R. App. P. 3(c)(3) (2009).

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 58 (“Rule 58”),

a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5. If service is by mail, three days shall be added to the time periods prescribed by Rule 50(b), Rule 52(b), and Rule 59. All time periods within which a party may further act pursuant to Rule 50(b), Rule 52(b), or Rule 59 shall be tolled for the duration of any period of noncompliance with this service requirement, provided however that no time period under Rule 50(b), Rule 52(b), or Rule 59 shall be tolled longer than 90 days from the date the judgment is entered.

N.C. Gen. Stat. § 1A-1, Rule 58.

Rule 59(b) provides that “[a] motion for a new trial shall be served not later than 10 days after entry of the judgment.” N.C.G.S. § 1A-1, Rule 59(b) (1990). According to the clear language of Rule 58, the moving party is entitled to three additional days to file a motion for a new trial pursuant to Rule 59 if service of the judgment was made by mail. Therefore, the moving party is allowed a total of thirteen days from the date that the judgment is entered to serve by mail a motion for a new trial, rather than the ten-day period provided in Rule 59(b).

Stem v. Richardson, 350 N.C. 76, 78, 511 S.E.2d 1, 2 (1999). Defendants claim plaintiff was not entitled to the tolling in Rules 58 and 59(b) because the date defendants were served with a copy of the judgment was too late, and plaintiff was not entitled to the three-days’ tolling for service by mail. We disagree.

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In the instant case, the trial court directed defendants, as the prevailing party, to prepare the written judgment reflecting the court's oral judgment that was announced in open court. Defendants prepared and filed the judgment on 7 May 2010. However, defendants failed to serve plaintiff with a copy of the judgment. Plaintiff obtained a copy of the judgment from the file in the Dare County Courthouse and, on 17 May 2010, mailed a copy of the judgment along with a Certificate of Service to defendants. Defendants contend that plaintiff was the party who failed to comply with Rules 58 and 59 and Appellate Rule 3. Defendants are mistaken.

According to Rule 58, all time periods within which a party may further act pursuant to Rule 59 shall be tolled during any period of noncompliance with the service requirement. Therefore, 17 May 2010 is the earliest possible date for determining the timeliness of plaintiff's Motion for New Trial. However, since defendants, as the party designated by the trial court to prepare the judgment, never served plaintiff with a copy of the judgment, the ten-day period in which plaintiff was entitled to file its Motion for New Trial had not been triggered when it filed its motion on 1 June 2010.

If, *arguendo*, 17 May 2010 is used to determine whether plaintiff's Rule 59 motion was timely, then under Rule 59(b), plaintiff's motion would have been required to be served no later than 27 May 2010. However, Rule 58 provides an additional three days for service by mail. Therefore, by adding the three days, the motion would have been due on 30 May 2010. In the year 2010, 30 May was a Sunday, and 31 May was a holiday, Memorial Day. Therefore, based on that assumption, plaintiff's Rule 59 motion was required to be served—and was served—on 1 June 2010.

Nevertheless, even assuming *arguendo* plaintiff was not entitled to the ten-day and three-day tolling periods according to Rules 58 and 59, plaintiff's Rule 59 motion was still timely. Under Rule 58, all time periods within which a party may further act pursuant to Rule 59 are tolled for ninety days during any period of noncompliance with Rule 58's service requirement. Since the trial court designated defendants as the party to draft the 7 May 2010 judgment, defendants were required to follow both Rules 58 and 59. When defendants failed to serve plaintiff with a copy of the judgment, they were not in compliance with Rules 58 and 59. Therefore, plaintiff had ninety days to file its Rule 59 motion. Plaintiff's motion, which was filed on 1 June 2010, was well within this ninety-day period. Defendants' motion to dismiss plaintiff's appeal is denied.

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B. Subject Matter Jurisdiction

[2] Plaintiff argues that the trial court lacked the requisite subject matter jurisdiction to conduct the trial after plaintiff appealed the 2 October 2009 order. We disagree.

“[T]he question of subject matter jurisdiction may be raised at any time, even in the Supreme Court.” *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986); *see also* N.C. Gen. Stat. § 8C-1, Rule 12(h)(3) (2009). Therefore, plaintiff properly raised this defense on appeal. Accordingly, the threshold question is whether the trial court properly exercised subject matter jurisdiction over the case following plaintiff’s appeal of the 2 October 2009 order.

As a general rule, when an appeal is taken in a civil action, the trial court is divested of jurisdiction except to aid in certifying the correct record on appeal. *Machine Co. v. Dixon*, 260 N.C. 732, 133 S.E.2d 659 (1963). However, an attempted appeal from a nonappealable interlocutory order does not divest the trial court of jurisdiction. *Wheeler v. Thabit*, 261 N.C. 479, 481, 135 S.E.2d 10, 12 (1964). “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.” *Panos v. Timco Engine Ctr., Inc.*, — N.C. App. —, —, 677 S.E.2d 868, 872 (2009) (internal citations and quotation marks omitted). “There is generally no right to appeal an interlocutory order.” *N.C. Dept. of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995).

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

High Rock Lake Partners, LLC v. N.C. Dept. of Transp., — N.C. App. —, —, 693 S.E.2d 361, 366 (2010). If further action is required by the trial court to determine all of the parties’ claims against each other, an order is interlocutory. *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979). “A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal.” *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677

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(1993). “Such a prohibition promotes judicial economy by preventing fragmentary appeals.” *Id.*

In the instant case, the trial court granted defendants’ motion for summary judgment for plaintiff’s claim of UDP in the 2 October 2009 order. In the same order, the trial court also granted plaintiff’s motion for partial summary judgment on its breach of contract claim and ordered defendants to return the \$100,000.00 deposit. The trial court held open for further adjudication the issue of whether plaintiff was or may have been entitled to damages as a result of defendants’ breach of contract.

The trial court did not enter the 2 October 2009 partial summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) or certify that there was no just reason to delay the appeal. Furthermore, plaintiff would not be deprived of a substantial right absent appellate review prior to a final determination on the merits. Plaintiff initially appealed the 2 October 2009 order to this Court, and the case was docketed as COA10-660. On 9 July 2010, we granted defendants’ motion to dismiss the appeal, ruling that it should be dismissed “without prejudice to the parties’ right to appeal from the final judgment entered 7 May 2010.” At the time plaintiff appealed the 2 October 2009 order, the issue of damages regarding plaintiff’s breach of contract claim against defendants was pending before the trial court. Therefore, the 2 October 2009 order was a nonappealable interlocutory order because it did not completely dispose of the case and further action was required by the trial court to finally adjudicate the parties’ claims against each other. As a result, the trial court was not divested of jurisdiction to conduct the trial, and plaintiff’s issue on appeal is overruled.

III. SUMMARY JUDGMENT

[3] Plaintiff argues that the trial court erred by granting defendants’ motion for partial summary judgment on plaintiff’s claim for UDP. We disagree.

A. Standard of Review

“Summary judgment is appropriate when ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’ ” *One Beacon Ins. Co. v. United Mech. Corp.*, — N.C. App. —, —, 700 S.E.2d 121, 122 (2010) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009)). “When considering a motion for summary judgment,

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ment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.” *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). “We review a trial court’s order granting or denying summary judgment *de novo*. ‘Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment’ for that of the lower tribunal.” *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P’ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

We first note that on 27 April 2010, the jury returned a verdict finding that plaintiff was not entitled to any additional damages from defendants on its breach of contract claim. Based on the record before this Court, there are no further actions required by the trial court to determine the parties’ claims against each other. The jury verdict was a final determination as to damages. Therefore, at that point, the trial court’s order granting defendants’ motion for partial summary judgment became an appealable order.

B. Unfair and Deceptive Practices

The elements of a claim for unfair or deceptive [] practices in violation of N.C. Gen. Stat. § 75-1.1 (2003) are: (1) an unfair or deceptive act or practice or an unfair method of competition; (2) in or affecting commerce; (3) that proximately causes actual injury to the plaintiff or to his business. To prevail on a Chapter 75 claim, a plaintiff need not show fraud, bad faith, or actual deception. Instead, it is sufficient if a plaintiff shows that a defendant’s acts possessed the tendency or capacity to mislead or created the likelihood of deception. Although it is a question of fact whether the defendant performed the alleged acts, it is a question of law whether those facts constitute an unfair or deceptive [] practice.

RD&J Properties v. Lauralea-Dilton Enterprises, LLC, 165 N.C. App. 737, 748, 600 S.E.2d 492, 500-01 (2004) (internal citations omitted).

The parties dispute whether the contract for the boat affected commerce. The sale of a boat from a business engaged in the business of making and selling boats to another business engaged in a charter-for-hire sport fishing business is a “sale of goods” as defined by Chapter 25, Article 2, of our General Statutes (“the U.C.C.”). *See generally* N.C. Gen. Stat. § 25-2-101 (2009) *et seq.* “Chapter 75 is applicable to commercial transactions which are also regulated by the U.C.C.” *United Virginia Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 320, 339

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S.E.2d 90, 93 (1986). Therefore, the sale of a boat by those engaged in the business of selling boats affects commerce. *See, e.g., Rosenthal v. Perkins*, 42 N.C. App. 449, 454, 257 S.E.2d 63, 67 (1979) (sale of residential housing by those engaged in business of selling real estate is trade or commerce within the meaning of N.C. Gen. Stat. § 75-1.1.).

“Under [N.C. Gen. Stat. §] 75-1.1, an act or practice is unfair if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. An act or practice is deceptive if it has the capacity or tendency to deceive.” *Ace Chemical Corp. v. DSI Transports, Inc.*, 115 N.C. App. 237, 247, 446 S.E.2d 100, 106 (1994) (internal citations and quotations omitted). “Under section 75-1.1, a mere breach of contract does not constitute an unfair or deceptive act. Egregious or aggravating circumstances must be alleged before the provisions of the Act may take effect.” *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 794, 561 S.E.2d 905, 910-11 (2002) (citing *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992), and *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989)). *See also Watson Elec. Constr. Co. v. Summit Cos.*, 160 N.C. App. 647, 657, 587 S.E.2d 87, 95 (2003) (“[I]t is well recognized . . . that actions for unfair or deceptive [] practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under [N.C. Gen. Stat.] § 75-1.1.”) (citation and quotation omitted).

In the companion case to the instant case, — N.C. App. —, — S.E.2d — (2011) (COA 10-882), we affirmed the portion of the 2009 order granting plaintiff’s motion for partial summary judgment regarding its claim for breach of contract. In the 2009 order, the trial court granted plaintiff’s motion because defendants offered to refund plaintiff’s \$100,000.00 deposit on the condition that plaintiff release any claims against defendants. Plaintiff argues that defendants committed an unfair and deceptive practice when they retained the deposit after plaintiff refused to release its claims against defendants, and cites *Poor v. Hill*, 138 N.C. App. 19, 530 S.E.2d 838 (2000), to support its argument.

In *Poor*, the defendant real estate developer entered into contracts to sell three tracts of land to the plaintiffs, who paid the defendant earnest money for each lot. *Id.* at 22, 530 S.E.2d at 841. The contracts were conditioned upon, *inter alia*, the developer acquiring an “unclouded deed” from the property owner for each lot, and specified a closing date of 1 May 1994. *Id.* On 22 September 1994, the defendant sent a letter to the plaintiffs stating that the property owner “was pre-

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pared to issue the deeds.” *Id.* at 23, 530 S.E.2d at 841. However, the defendant also declared the plaintiffs in “default” for failing to close on 1 May 1994. *Id.* at 23, 530 S.E.2d at 841-42. The defendant claimed that he suffered damages since the lots were taken off the market, stated that the lots were re-listed at higher prices, and told the plaintiffs they could purchase the lots at the increased prices. *Id.* at 23, 530 S.E.2d at 842. However, unbeknownst to the plaintiffs, the defendant had already entered into a contract to sell one lot to a third party before he sent the 22 September 1994 letter. *Id.* at 24, 530 S.E.2d at 842.

Our Court stated, “Mr. Hill’s 22 September 1994 letter to plaintiffs had the capacity to mislead and was therefore deceptive for Chapter 75 purposes” because “[e]ven though Mr. Hill indicated therein that plaintiffs might purchase all three lots if they assented to an increased purchase price, the jury’s finding established that at least one lot had become subject to an unrelated contract to purchase by the date of the letter.” *Id.* at 29, 530 S.E.2d at 845 (internal citation omitted). However, our Court did not hold that retention of the plaintiffs’ earnest money alone was an “egregious or aggravating circumstance” sufficient to sustain a claim for UDP. Instead, the Poor Court held that the combination of the defendant’s letter, the increased sale prices, and the defendant’s contract to sell with a third party “as well as” his retention of the plaintiffs’ earnest money were “aggravating circumstances” necessary to sustain an action for UDP against the defendant. *Id.*

In the instant case, unlike the defendant in *Poor*, defendants never increased the sale price of the boat after they entered into the contract with plaintiff. Furthermore, defendants never represented to plaintiff that the boat was available for sale after entering into a contract to sell it to Schultz. Therefore, while the facts in the instant case clearly support plaintiff’s claim for breach of contract, they are not sufficiently “egregious or aggravating” to support a claim for UDP. Therefore, there was no genuine issue of material fact as to whether defendants engaged in an unfair or deceptive act, and defendants were entitled to judgment as a matter of law. The trial court properly granted defendants’ motion for summary judgment on plaintiff’s claim for UDP.

IV. NEW TRIAL

[4] Plaintiff argues that the trial court abused its discretion in denying plaintiff’s motion for a new trial “given the manifest disregard by the jury of the instructions of the trial court.” More specifically, plaintiff

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argues that the jury erred when it “disregarded the evidence” and awarded plaintiff no damages. We disagree.

This Court applies an abuse of discretion standard of review when reviewing the denial of a motion for new trial. *Garrison v. Garrison*, 87 N.C. App. 591, 594, 361 S.E.2d 921, 923 (1987). A trial court’s discretionary decision to deny or grant a new trial may be reversed on appeal “only when the record affirmatively demonstrates a manifest abuse of discretion.” *Id.* This Court must determine whether the verdict represents an injustice and is against the greater weight of the evidence. *See In re Will of Buck*, 350 N.C. 621, 516 S.E.2d 858 (1999). Because “the trial court has directly observed the evidence as it was presented and the attendant circumstances, as well as the demeanor and characteristics of the witnesses,” a trial court’s ruling on a motion for new trial is given great deference. *Id.* at 628, 516 S.E.2d at 863.

Kummer v. Lowry, 165 N.C. App. 261, 263, 598 S.E.2d 223, 225 (2004). “When rulings are committed to the sound discretion of the trial court[,] they will be accorded great deference and will not be set aside unless it can be shown that they were arbitrary and not the result of a reasoned decision.’ ” *Overton v. Purvis*, 162 N.C. App. 241, 245, 591 S.E.2d 18, 22 (2004) (quoting *Albritton v. Albritton*, 109 N.C. App. 36, 42, 426 S.E.2d 80, 84 (1993)).

Where the seller of goods fails to make delivery or repudiates, the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid, recover damages for nondelivery as provided in N.C. Gen. Stat. § 25-2-713 (2009). N.C. Gen. Stat. § 25-2-711 (2009). N.C. Gen. Stat. § 25-2-713 provides:

- (1) Subject to the provisions of this article with respect to proof of market price (G.S. 25-2-723), the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this article (G.S. 25-2-715), but less expenses saved in consequence of the seller’s breach.
- (2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

N.C. Gen. Stat. § 25-2-713 (2009).

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Generally, “[o]nce a cause of action is established, plaintiff is entitled to recover, as a matter of law, nominal damages, *which in turn support an award of punitive damages.*” *Hawkins v. Hawkins*, 331 N.C. 743, 745, 417 S.E.2d 447, 449 (1992) (quoting *Hawkins v. Hawkins*, 101 N.C. App. 529, 532, 400 S.E.2d 472, 474 (1991)) (emphasis added). “[T]he general rule is that the failure to award nominal damages is not alone ground for reversal of a judgment or for a new trial[.]” *Sweet v. Johnson*, 169 Cal. App. 2d 630, 633, 337 P.2d 499, 501 (1959). “It is generally recognized that an appellate court will not reverse a judgment merely for the purpose of permitting the recovery of nominal damages.” *Henson v. Prue*, 810 A.2d 912, 915 (D.C. App. 2002) (quoting 1 Matthew Bender, *Damages in Tort Actions* § 2.40, at 2.49 (2002)). “It is well settled that a failure to award nominal damages is not a sufficient basis for a reversal.” *Reese v. Haywood*, 235 Ark. 442, 360 S.W.2d 488 (1962), *overruled on other grounds by United Ins. Co. of Am. v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998); *accord, Lee v. Bergesen*, 58 Wn.2d 462, 364 P.2d 18, 21 (1961).

While nominal damages are awarded without proof of actual injury, they imply the smallest appreciable quantity . . . , with one dollar being the amount frequently awarded. The law, however, does not concern itself with trifles (*de minimis non curat lex*), and a judgment for plaintiff will not be reversed on appeal for a failure to award nominal damages, even though plaintiff is entitled to recover nominal damages as a matter of law.

Kraisinger v. Liggett, 3 Kan. App. 2d 235, 238, 592 P.2d 477, 480 (1979). In addition, an action for breach of contract sounding in damages is an action at law, and the costs are taxable under N.C. Gen. Stat. § 6-1. *Cotton Mills v. Knitting Co.*, 194 N.C. 80, 138 S.E. 428 (1927).

In *McLean v. Mechanic*, the plaintiff filed an action against the defendant for criminal conversation. 116 N.C. App. 271, 275, 447 S.E.2d 459, 461 (1994). The trial court instructed the jury that if it found that the defendant committed criminal conversation with the plaintiff’s wife, the jury could award the plaintiff nominal or compensatory damages. *Id.* The trial court further instructed on punitive damages and defined each type of damages for the jury. *Id.*

The jury returned a verdict (1) finding that defendant committed criminal conversation with [the plaintiff’s wife]; (2) awarding zero compensatory or nominal damages; and (3) awarding \$10,000.00 in punitive damages. The trial court set aside the puni-

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tive damages award based on a finding that no punitive damages could be awarded where the jury determined the plaintiff was not entitled to compensatory or nominal damages despite having been instructed as to those damages.

Id. This Court reversed, holding that since the plaintiff proved all of the elements of his case, he was entitled to nominal damages. *Id.* at 276, 447 S.E.2d at 461. We further held that the jury erred by failing to follow the trial court's instructions to award the plaintiff nominal damages, and that the nominal damages supported the jury's award of punitive damages. *Id.* at 276, 447 S.E.2d at 462.

In the instant case, the only issue at trial was the amount of damages, in addition to the deposit, that plaintiff was entitled to recover from defendants. The jury heard testimony from Nix, who stated that the appraised value of the boat was \$1,600,000.00, which was \$250,000.00 more than the price stated in defendants' contract with plaintiff. Plaintiff also introduced into evidence a marine survey appraisal prepared by David Jones ("Jones"). Jones also stated that the value of the boat was \$1,600,000.00.

Following the presentation of evidence, the trial court instructed the jury that it could "believe all, part or none of what any witness has said" The trial court also instructed the jury that it was "the sole judge" of the weight of the evidence and of the credibility of the witnesses. The trial court then instructed the jury on actual damages as follows:

Now the plaintiff may be entitled to recover actual damages in addition to technical damages. On this issue the burden of proof is on the plaintiff, D.G. II. That means that the plaintiff must prove to you by the greater weight of the evidence the amount of actual damages sustained as a result of the breach of the contract for failure to deliver the boat. Now a buyer may recover damages for the seller's failure to make delivery. To determine such damages you must first find the fair market price of the boat at the place where delivery was to have occurred and at the time the plaintiff learned of defendant's failure to make delivery. From that market price you must subtract the party's contract price. The difference is the plaintiff's damages for the defendant's failure to make delivery.

Now ladies and gentlemen, the fair market value of a property may be defined as the price which a willing buyer would pay to purchase the asset on the open market from a willing seller with neither party being under any compulsion to complete the transaction.

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The trial court then instructed the jury that if it failed to find by the greater weight of the evidence that plaintiff suffered actual damages, then “it would be your duty to write a nominal amount such as one dollar”

The jury, as trier of fact, was entitled to weigh the evidence, and evidently discounted the testimony of Nix and Jones regarding the market value of the boat. The jury determined that the fair market value of the boat was equal to the contract price, *i.e.*, \$1,350,000.00, because the jury returned a verdict finding that plaintiff was not entitled to any additional damages. However, the jury failed to follow the trial court’s instructions to “write a nominal amount” in its verdict after declining to award plaintiff actual damages. Therefore, the jury erred by failing to follow the trial court’s instructions. Nevertheless, unlike the plaintiff in McLean, an award of nominal damages to plaintiff in the instant case would not support an award of other relief, such as punitive damages.

In the October 2009 order, in the instant case, the trial court granted plaintiff’s motion for partial summary judgment on its breach of contract claim against defendants. In the November 2009 order, the trial court awarded plaintiff damages against defendants, jointly and severally, in the amount of \$100,000.00, with interest. Additionally, the trial court ordered, in its 7 May 2010 judgment, that plaintiff take nothing in addition to the November 2009 order, and also ordered “that all costs of court shall be taxed, jointly and severally, against defendants”

When the trial court entered the October 2009 order, which granted plaintiff’s motion for partial summary judgment on its breach of contract claim, plaintiff was entitled to recover nominal damages as a matter of law. However, the October 2009 order itself, not plaintiff’s right to recover nominal damages, supported the trial court’s 7 May 2010 judgment awarding costs because once the trial court granted plaintiff’s motion for partial summary judgment for breach of contract, plaintiff was entitled to court costs under N.C. Gen. Stat. § 6-1 (2009). *See Cotton Mills v. Knitting Co.*, 194 N.C. 80, 138 S.E. 428 (1927). Therefore, although the jury failed to award plaintiff nominal damages, it is not necessary to reverse the verdict or require a new trial. *See Sweet*, 169 Cal. App. 2d at 633, 337 P.2d at 501.

Theoretically, we could remand the case to the trial court with directions to award [plaintiff] nominal damages. Such a remand would, however, be symbolic only, and where “nominal damages

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only could be allowed . . . the failure to award such damages . . . is not a ground for reversal.”

Henson, 810 A.2d at 916 (quoting *Lee v. Dunbar*, 37 A.2d 178, 180 (D.C. 1944)). Plaintiff’s issue on appeal is overruled.

V. CONCLUSION

Defendants’ motion to dismiss plaintiff’s appeal is denied. The trial court’s orders granting defendants’ motion for partial summary judgment on plaintiff’s claim for UDP, denying plaintiff additional damages against defendants, and denying plaintiff’s motion for a new trial are affirmed.

Affirmed.

Judges ERVIN and THIGPEN concur.

COVENTRY WOODS NEIGHBORHOOD ASSOCIATION INC., A NORTH CAROLINA NON-PROFIT CORPORATION, JOHN F. BORDSEN AND WIFE, PATRICIA BRESINA, MARTHA L. MCAULAY, AND JOAN E. PROVOST, EVA COLE MATTHEWS, CHRIS JOHNSON AND WIFE, SHANNON JONES, REBECCA S. GARDNER, JOHN WHITE, RONALD MATTHEWS AND WIFE, EVELYN MATTHEWS, AND SHIRLEY JONES, AND THOMAS R. MYERS, PLAINTIFFS V. CITY OF CHARLOTTE, NORTH CAROLINA, A MUNICIPAL CORPORATION, CHARLOTTE-MECKLENBURG PLANNING COMMISSION, AN AGENCY OF THE CITY OF CHARLOTTE, AND INDEPENDENCE CAPITAL REALTY, LLC, A NORTH CAROLINA LIMITED LIABILITY CORPORATION, DEFENDANTS. AND COVENTRY WOODS NEIGHBORHOOD ASSOCIATION, INC., A NORTH CAROLINA NON-PROFIT CORPORATION, PETITIONER V. CITY OF CHARLOTTE, NORTH CAROLINA, A MUNICIPAL CORPORATION, CHARLOTTE ZONING BOARD OF ADJUSTMENT, AN AGENCY OF THE CITY OF CHARLOTTE, AND INDEPENDENCE CAPITAL REALTY, LLC, A NORTH CAROLINA LIMITED LIABILITY CORPORATION, RESPONDENTS

No. COA10-1551

(Filed 5 July 2011)

Pleadings— Rule 11 sanctions—failure to show principal purpose to harass or cause unnecessary delay

The trial court erred by imposing sanctions against plaintiffs under the improper purpose prong of N.C.G.S. § 1A-1, Rule 11. Based on the evidence in the record and viewed objectively under the totality of the circumstances, plaintiffs’ continued prosecution of their action and the language concerning project delay in their neighborhood association newsletter did not create a strong infer-

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ence that plaintiffs' principal purpose in filing their three actions was to harass or to cause unnecessary delay and disruption.

Appeal by plaintiffs/petitioner(s) and their counsel from judgment entered 3 August 2010 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 May 2011.

Kenneth T. Davies for plaintiffs/petitioner(s) appellants.

Kenneth T. Davies, pro se, appellant.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot and Matthew F. Tilley, for Independence Capital Realty, LLC, defendant/respondent appellee.

McCULLOUGH, Judge.

Plaintiffs/petitioner(s), Coventry Woods Neighborhood Association, Inc., John F. Bordsen, Patricia Bresina, Martha L. McAulay, Joan E. Provost, Eva Cole Matthews, Chris Johnson, Shannon Jones, Rebecca S. Gardner, John White, Ronald Matthews, Evelyn Matthews, Shirley Jones, and Thomas R. Myers (collectively, "plaintiffs/petitioner(s)"), and their counsel, Kenneth T. Davies (collectively, the "appellants") appeal from an amended order and judgment imposing sanctions under Rule 11 of the North Carolina Rules of Civil Procedure. After careful review, we reverse.

I. Background

This appeal concerns the imposition of sanctions by the trial court pursuant to Rule 11 for three successive actions filed by appellants, each against the Charlotte-Mecklenburg Planning Commission ("the Commission"), the City of Charlotte ("the City"), and Independence Capital Realty, LLC ("Independence").

The individual plaintiffs/petitioner(s) in each action are individuals who either own property located in or reside within the Coventry Woods subdivision or the Cedars East subdivision, both located in Charlotte, North Carolina. Plaintiff/petitioner Coventry Woods Neighborhood Association ("CWNA") is a North Carolina non-profit corporation representing the common interests of the property owners and residents of the Coventry Woods subdivision. Both the Coventry Woods and Cedars East subdivisions abut an approximately sixteen-acre tract of real property owned by Independence.

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On 14 February 2005, Independence submitted a new residential subdivision plan for its sixteen-acre tract to the City's planning staff for preliminary approval. The proposed subdivision plan, denominated Independence Woods, requested a "density bonus" that allowed up to 72 single-family homes to be built within the proposed subdivision, as opposed to the limit of 58 residences allowed in areas zoned R-4, the current zoning designation for Independence's sixteen-acre tract. Independence had previously petitioned the City to have the sixteen-acre tract rezoned from R-4 to R-12MF, which CWNA publicly opposed, but Independence's rezoning petition was denied by the Charlotte City Council. Planning staff granted preliminary approval of Independence's subdivision plan, including the density bonus, on 13 December 2006. Plaintiffs/petitioner(s) did not receive notice of the submission of Independence's subdivision plan to the Commission, nor did they receive notice of its preliminary approval at that time, as the Subdivision Ordinance of the City of Charlotte ("the Subdivision Ordinance") requires only that notice of preliminary subdivision approvals be given to the developer. However, the Subdivision Ordinance provides a ten-day period from the date of preliminary approval within which "aggrieved parties" can appeal the decision of the planning staff to the Commission.

On 5 January 2007, notice of the planning staff's preliminary approval of the Independence Woods subdivision plan was posted on the Commission's website. However, plaintiffs/petitioner(s) did not learn of the preliminary approval until early July 2007. Thereafter, plaintiffs/petitioner(s) filed a petition with the Charlotte Zoning Board of Adjustment ("ZBA") on 28 September 2007 challenging the planning staff's preliminary approval of Independence's subdivision plan without providing notice to plaintiffs/petitioner(s). Plaintiffs/petitioner(s) argued they are "aggrieved persons" under the Subdivision Ordinance because Independence Woods, as approved, would be a high-density development with the only means of ingress and egress through the neighborhoods of plaintiffs/petitioner(s), resulting in decreased property values and increased levels of noise, pollution, and traffic. The ZBA rejected plaintiffs/petitioner(s)' challenge, finding the Subdivision Ordinance did not require individual notice to be given to them. Plaintiffs/petitioner(s) also filed an appeal of the planning staff's decision to the Commission on 15 February 2008, which was denied as untimely pursuant to the Subdivision Ordinance.

Plaintiffs/petitioner(s) then commenced three separate actions in Mecklenburg County Superior Court, each raising constitutional chal-

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lenges to the Commission's actions and the relevant Subdivision Ordinance provisions. The first action, No. 08-CVS-3251, filed on 18 February 2008, sought a declaratory judgment that the Subdivision Ordinance was unconstitutional both facially and as applied and requested a preliminary injunction prohibiting Independence from further construction of Independence Woods. The factual background for this first action is more fully set forth in our prior opinion, *Coventry Woods Neighborhood Ass'n v. Charlotte*, — N.C. App. —, 688 S.E.2d 538 (2010) (hereinafter *Coventry Woods I*). The second action, No. 08-CVS-7582, filed on 3 April 2008, petitioned the trial court for review in the nature of *certiorari*, seeking to challenge the Commission's ruling that plaintiffs/petitioner(s)' appeal was untimely. The factual background for this second action is more fully set forth in our prior opinion, *Coventry Woods Neighborhood Ass'n v. Charlotte*, No. COA09-537 (N.C. Ct. App. Feb. 2, 2010) (hereinafter *Coventry Woods II*). The third action, No. 08-CVS-9821, filed on 25 April 2008, also petitioned the trial court in the nature of *certiorari*, seeking to challenge the ZBA's ruling that plaintiffs/petitioner(s) were not entitled to individual notice prior to the planning staffs' preliminary approval of the Independence Woods subdivision plan.

On 29 February 2008, shortly after commencing the first action, CWNA published a newsletter on its website entitled "CWNA Sues City Hall," announcing their action and seeking donations to cover litigation expenses. The newsletter states that CWNA was informed by its counsel, Kenneth Davies ("Davies"), that its case was "very strong" and that, as a result of the lawsuit, the financing and development of Independence Woods would likely be delayed, or "grind to a stop." The newsletter also states that CWNA's "Number One priority" is stopping the development of Independence Woods "once and for all" and that a "successful lawsuit will benefit all neighborhoods." As a result of the posting, Independence included a motion for sanctions pursuant to Rule 11 in its answers and counterclaims filed in response to each of appellants' actions.

On 6 August 2008, the trial court entered orders dismissing each of appellants' actions, holding that appellants had no statutory or constitutional right to individual notice and that appellants had failed to timely bring their claims. Appellants appealed the decision in their first action to this Court, which was affirmed on 2 February 2010. *Coventry Woods I*, — N.C. App. —, 688 S.E.2d 538. Appellants then appealed our decision in *Coventry Woods I* to our Supreme Court, which was dismissed for failure to present a substantial constitu-

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tional question on 14 April 2010. *Coventry Woods Neighborhood Ass'n v. Charlotte*, 364 N.C. 128, 695 S.E.2d 757 (2010). Appellants also appealed the trial court's decision in their second action to this Court, which was also affirmed on 2 February 2010. *Coventry Woods II*, No. COA09-537.

Following the trial court's dismissal of all three actions, Independence filed a consolidated motion under all three of appellants' actions renewing its motion for sanctions against appellants under Rule 11. After all of appellants' appeals were final, the trial court held two separate hearings on 25 May 2010 and 2 June 2010 to consider Independence's motion for sanctions.

Following those hearings, the trial court entered an order and judgment on 3 August 2010, concluding there was substantial evidence to show that appellants filed their three actions for an improper purpose and imposing sanctions on appellants in the sum of \$33,551.79. Appellants now appeal the imposition of sanctions to this Court.

II. Standard of review

"The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue." *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence.

Id.; see also *Johns v. Johns*, 195 N.C. App. 201, 206, 672 S.E.2d 34, 38 (2009). We "must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions" only if we make these three determinations in the affirmative. *Turner*, 325 N.C. at 165, 381 S.E.2d at 714.

III. Imposition of Rule 11 sanctions

We first address appellants' argument that the trial court erred in imposing sanctions against appellants under the improper purpose prong of Rule 11. Appellants argue there is insufficient evidence to support the trial court's conclusion "that [appellants'] actions were filed for an improper purpose." Because neither party raises any challenge to the trial court's conclusions regarding the factual and legal sufficiency prongs, we address only the improper purpose prong of Rule 11.

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Rule 11 of the North Carolina Rules of Civil Procedure provides, in relevant part:

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

N.C. Gen. Stat. § 1A-1, Rule 11 (2009). Accordingly, pursuant to Rule 11, “the signer certifies that three distinct things are true: the pleading is (1) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law (legal sufficiency); (2) well grounded in fact; and (3) not interposed for any improper purpose.” *Johns*, 195 N.C. App. at 206, 672 S.E.2d at 38 (quoting *Bumgardner v. Bumgardner*, 113 N.C. App. 314, 322, 438 S.E.2d 471, 476 (1994)). “A violation of any one of these requirements ‘mandates the imposition of sanctions under Rule 11.’” *Id.* (quoting *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365 (1994)). Our Supreme Court has held that “[t]he improper purpose prong of Rule 11 is separate and distinct from the factual and legal sufficiency requirements.” *Bryson v. Sullivan*, 330 N.C. 644, 663, 412 S.E.2d 327, 337 (1992). “Thus, even if a paper is well grounded in fact and law, it may still violate Rule 11 if it is served or filed for an improper purpose.” *Brooks v. Giesey*, 334 N.C. 303, 315, 432 S.E.2d 339, 345-46 (1993).

“An improper purpose is ‘any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.’” *Brown v. Hurley*, 124 N.C. App. 377, 382, 477 S.E.2d 234, 238 (1996) (omission in original) (quoting *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992)). “An objective standard is used to determine whether a paper has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose.” *Id.* (citing *Bryson*, 330 N.C. at 663, 412 S.E.2d at 337). “In this regard, the relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender’s objective behavior.” *Mack*, 107 N.C. App. at 93, 418 S.E.2d at 689. “In assessing that behavior, we look at ‘the totality of the circumstances.’” *Johns*, 195 N.C. App. at 212, 672 S.E.2d at 42 (quoting *Mack*, 107 N.C. App. at 94, 418 S.E.2d at 689). In addition, this Court has held that “the preponderance of the evidence quantum of proof should be utilized in determining whether a Rule 11 violation

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has occurred.” *Adams v. Bank United of Texas FSB*, 167 N.C. App. 395, 402, 606 S.E.2d 149, 154 (2004). “There must be a strong inference of improper purpose to support [the] imposition of sanctions.” *Kohler Co. v. McIvor*, 177 N.C. App. 396, 404, 628 S.E.2d 817, 824 (2006) (quoting *Bass v. Sides*, 120 N.C. App. 485, 488, 462 S.E.2d 838, 840 (1995)).

We note that our Supreme Court has stated, in the context of analyzing Rule 11 sanctions, that the “North Carolina Rules of Civil Procedure are, for the most part, verbatim recitations of the federal rules.” *Turner*, 325 N.C. at 164, 381 S.E.2d at 713. In addition, our Supreme Court added, “Decisions under the federal rules are thus pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules.” *Id.*; see also *Giesey*, 334 N.C. at 317, 432 S.E.2d at 347. According to our Supreme Court, “This holds true for N.C.G.S. § 1A-1, Rule 11(a).” *Giesey*, 334 N.C. at 317, 432 S.E.2d at 347. On this note, we find the following language persuasive under the circumstances of the present case:

[I]f a complaint is filed to vindicate rights in court, and also for some other purpose, a court should not sanction counsel for an intention that the court does not approve, so long as the added purpose is not undertaken in bad faith and is not so excessive as to eliminate a proper purpose. Thus, the purpose to vindicate rights in court must be central and sincere.

In re Kunstler, 914 F.2d 505, 518 (4th Cir. 1990); see also *Myers v. Sessoms & Rogers, P.A.*, No. 5:10-CV-166-D, 2011 WL 683914, at *2 (E.D.N.C. Feb. 17, 2011).

Additionally, while we acknowledge that the improper purpose inquiry is separate and distinct from the factual and legal sufficiency inquiries, *Bryson*, 330 N.C. at 663, 412 S.E.2d at 337, we agree that “whether or not a pleading has a foundation in fact or is well grounded in law will often influence the determination of the signer’s purpose.” *Kunstler*, 914 F.2d at 518. In fact, some examples of circumstances from which an improper purpose may be inferred, including those relied on by Independence in the present case, reflect this interplay:

[T]he filing of *meritless* papers by counsel who have extensive experience in the pertinent area of law, . . . filing suit with *no factual basis* for the purpose of fishing for some evidence of liability, . . . continuing to press an *obviously meritless* claim after being specifically advised of its meritlessness by a judge or magistrate[.]

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Mack, 107 N.C. App. at 93, 418 S.E.2d at 689 (internal quotation marks omitted) (emphasis added). Given the unusually sparse case law sanctioning the filing of an action which is found to be well grounded in law and fact solely on the basis that it was filed for an improper purpose, we believe the circumstances of such a case to be exceptional. *See, e.g., Turner*, 325 N.C. at 171, 381 S.E.2d at 717 (Improper purpose may be inferred from the noticing and taking of witness depositions six days before trial, the attendance of which would require extensive travel and interfere with opposing counsel's final trial preparations); *Cohen v. Virginia Elec. & Power Co.*, 788 F.2d 247, 249 (4th Cir. 1986) (A finding of improper purpose in violation of Rule 11 upheld where evidence established that plaintiff and his attorney had a preconceived plan to withdraw a motion, which was otherwise legally and factually supportable, if the opposing party indicated any resistance to the motion). "Rule 11 should not have the effect of chilling creative advocacy, and therefore, in determining compliance with Rule 11, courts should avoid hindsight and resolve all doubts in favor of the signer." *Johnson v. Harris*, 149 N.C. App. 928, 938, 563 S.E.2d 224, 230 (2002) (internal quotation marks and citations omitted).

In the present case, the trial court made the following Findings of Fact:

2. The plaintiffs filed these actions in March and April, 2008, many months after Independence's subdivision plans had been approved by the City in December 2006, and after Independence had spent more than \$1.2 million developing its property, notwithstanding the City's subdivision ordinance provided that any "appeals" from such approval must be filed "within ten days" thereafter.

3. At the time that these actions were filed, the plaintiffs published in their "Coventry Woods Neighborhood Association" newsletter and on its website an article which read, in part:

"CWNA Sues City Hall . . . the Coventry Woods Neighborhood Association has filed suit in North Carolina court, charging that the Charlotte Planning staff's approval of the Independence Woods Subdivision is in violation of due process. The suit was filed by CWNA attorney Kenneth Davies of Davies & Grist, the top real-estate firm in Charlotte. Davies says our case is very strong. . . . The filing of this suit, Davies says, will have the effect of putting . . . (Independence's) financing of Independence Woods

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on hold; Independence Woods will grind to a stop. The suit may take a year before it is heard in court. The Independence Woods issue has galvanized residents of Coventry Woods . . . CWNA membership is up 20 percent and we have received financial donations from members and friends. But litigation is expensive . . . The CWNA Board of Directors unanimously believes that stopping Independence Woods—once and for all—is the Number One priority of our organization . . . Your donation . . . will help stop this project once and for all . . .”

(Alteration in original.)

Based on these two findings of fact, in its Conclusion of Law No. 6, the trial court determined:

[T]here is substantial evidence, viewed from an objective perspective, that these actions were filed for an improper purpose. In this regard, the most damaging evidence is the page from the plaintiffs’ neighborhood association newsletter and website entitled “CWNA Sues City Hall,” quoted above under paragraph 3 of the findings of fact, stating the plaintiffs’ lawsuits “will have the effect of putting . . . (Independence’s) financing of Independence Woods on hold; Independence Woods will grind to a stop” and “[t]he suit may take a year before it is heard in court.” *The court concludes that this evidence—which neither the plaintiffs nor their counsel denied or refuted in any way—is sufficient to create a strong inference that these actions were filed for an improper purpose, specifically to harass Independence, make its Independence Woods development prohibitively expensive, interfere with or defeat its financing for that project, and to achieve through delay what could not be accomplished through those actions—the blocking or prevention of that development.*

(Alteration in original.) (Emphasis added.)¹ Thus, in concluding there existed “substantial evidence . . . sufficient to create a strong infer-

1. We emphasize this language in the trial court’s order because, although the trial court included such language in its Conclusions of Law, we find such language is actually a mixed finding of fact and conclusion of law. “Generally, ‘any determination requiring the exercise of judgment . . . or the application of legal principles . . . is more properly classified as a conclusion of law.’” *Lamm v. Lamm*, — N.C. App. —, —, 707 S.E.2d 658, 691 (2011) (quoting *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997)). Here, the trial court’s determination that the language quoted from CWNA’s newsletter was not “denied or refuted in any way” by “neither the plaintiffs nor their counsel” is a finding of fact regarding the evidence before the trial court, rather than a conclusion of law requiring the exercise of judgment or the application of legal principles. “Mislabeling of a finding of fact as a conclusion of law is inconse-

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ence that [appellants'] actions were filed for an improper purpose," it appears the trial court relied on its findings that appellants filed their actions many months after Independence Woods had been preliminarily approved by planning staff, that CWNA published in its newsletter the fact that litigation would delay the financing and development of Independence Woods, and that appellants did not deny or refute the statements concerning project delay published in CWNA's newsletter.

However, applying the aforementioned principles of Rule 11 to the present case, we find the trial court's Conclusion of Law No. 6, which is actually a mixed conclusion of law and finding of fact, is erroneous. First, the trial court's determination that the "most damaging evidence" quoted by the trial court from CWNA's newsletter was "neither . . . denied [n]or refuted in any way" by appellants is unsupported by the evidence in the record and is therefore an erroneous finding of fact. Despite the language quoted by the trial court in its Finding of Fact No. 3, the CWNA newsletter principally relied on by the trial court as evidence of improper purpose contains language negating any inferences that appellants commenced their actions for the principal purposes of harassment and unnecessary project delay. The CWNA newsletter discusses the issue prompting the litigation regarding Independence Woods, describing the planning staff's approval of Independence Woods as "a de facto rezoning." The record shows that prior to the planning staff's preliminary approval of the Independence Woods subdivision plan, which includes a "density bonus," Independence first sought to have its property rezoned to allow for the increased density. CWNA publicly opposed the rezoning application, and the Charlotte City Council voted not to rezone the property. Regarding its concerns with the planning staff's preliminary approval of the Independence Woods subdivision, the CWNA newsletter states:

City ordinances allow for a 10-day window in which subdivision approvals can be appealed. But no notice had been given us. More important for our case: There was no public record of this approval on the city's charmbeck.org Web site until several weeks after the 10-day window had come and gone. Our suit says this is a clear-cut, Catch-22 violation of the law.

quential if the remaining findings of fact support the conclusion of law." *Id.* However, the trial court's determination that the evidence is sufficient to create a strong inference that appellants filed their three actions for an improper purpose requires the exercise of judgment or the application of legal principles, and therefore is properly labeled a conclusion of law.

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Further, the newsletter concludes by stating, “A successful lawsuit will benefit all neighborhoods. When our suit is won, we all will have won.” These statements negate any inference that appellants’ principal purpose in filing their actions was an improper one.

Also before the trial court was the affidavit of CWNA president John Bordsen (“Bordsen”). In his affidavit, Bordsen stated that appellants’ purpose in filing the lawsuits “was to attempt to re-open the subdivision approval process so [plaintiffs/petitioner(s)] could be heard on the merits of [their] objections.” Bordsen continues, “We believe that our objections, if given due consideration by the Planning Commission, would result in the disapproval of the Independence Woods preliminary subdivision plan.” Bordsen admits that appellants “did anticipate that filing [plaintiffs/petitioner(s)] lawsuits would potentially put development on hold during the course of the lawsuit,” but clarifies that appellants “hope[d] to avoid a *fait accompli* wherein [appellants] would later win the case, but the subdivision would be built anyway.” Bordsen further states that appellants “discussed this matter with County Commissioner Dumont Clark and current Mayor Anthony Foxx, both attorneys. Based upon [appellants’] conversations with Dumont Clark, Anthony Foxx, and [appellants’] counsel, Kenneth T. Davies, [appellants] felt comfortable proceeding with [appellants’] cases.”

Further, in his deposition, Bordsen clarified that Davies had told appellants that the act of filing a lawsuit ordinarily has the effect of delaying a construction project. Bordsen also clarified that, while the newsletter stated that it may take a year before their lawsuit was heard in court, appellants “hoped it would happen beforehand.” Thus, the trial court was presented with ample evidence refuting any implication of improper purpose from the statements quoted in Finding of Fact No. 3. As such, the trial court’s finding of fact that appellants did not deny or refute the statements concerning project delay published in CWNA’s newsletter is erroneous and, therefore, cannot support its conclusion that such evidence was sufficient to create a strong inference that appellants filed their actions for an improper purpose.

In addition, it appears from the order imposing sanctions that the trial court was clearly focused on the language concerning project delay in CWNA’s newsletter. The language quoted by the trial court in its Finding of Fact No. 3 is principally relied on by the trial court as “the most damaging evidence” tending to show that appellants filed their three actions for the improper purposes of delay and harassment. Independence also primarily relies on that same language from

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CWNA's newsletter to carry its burden of showing that appellants filed their three actions for an improper purpose. However, as the language quoted by the trial court accurately reflects, an inherent byproduct to every valid lawsuit of such a nature as the present case is project delay. The statements highlighted by the trial court in the CWNA newsletter reflect this inevitable reality, as explained by Bordsen in both his affidavit and his deposition. In light of the trial court's conclusion that appellants' actions "could have been warranted by a 'good faith argument for the extension, modification or renewal of existing law,'" we fail to see how construction and financing delay under the circumstances of the present case is so exceptional such as to create a strong inference that this was appellants' principal purpose in filing its actions. *Kunstler*, 914 F.2d at 518. Thus, we find the trial court's Finding of Fact No. 3, encompassing such language, does not support the trial court's conclusion that such evidence is sufficient to create a strong inference that appellants filed their actions for an improper purpose. Accordingly, the trial court's findings are insufficient to support its conclusion that appellants filed their three actions for improper purposes.

Furthermore, in reviewing the evidence in the record, under the totality of the circumstances of this case, we find no evidence to support an award of sanctions on the bases asserted by Independence. Besides the statements from CWNA's newsletter, the only other evidence offered by Independence to support its argument that appellants' principal purpose in filing their three actions was an improper one was appellants' continued prosecution of their three actions. Independence appears to argue that in light of unfavorable responses from the Commission's planning staff and the trial court and the defenses raised by Independence in its answers to appellants' actions, appellants "should have, and must have, realized that their suit was meritless."

Although Independence repeatedly refers to appellants' actions as "frivolous," the trial court found that appellants' complaint for declaratory judgment and two petitions for review in the nature of *certiorari* "could have been warranted by a 'good faith argument for the extension, modification or renewal of existing law.'" Indeed, because the provisions of the Subdivision Ordinance foreclosed appellants' participation in the planning staff's approval of the Independence Woods subdivision plan, appellants' only redress was to turn to the courts to argue, in good faith, for the modification of the existing law. The record evidence shows that plaintiffs/peti-

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tioner(s) have a history of actively participating in administrative land use decisions affecting areas surrounding their neighborhoods. As such, the trial court “resolved the first two prongs of the rule in favor of the plaintiffs and their counsel.” While Independence is correct in its assertion that “failure to dismiss or further prosecution of the action may result in sanctions . . . under the improper purpose prong of [Rule 11],” *Bryson*, 330 N.C. at 658, 412 S.E.2d at 334, this Court has clarified that “[c]ase law clearly supports the fact that just because a plaintiff is eventually unsuccessful in her claim, does not mean the claim was inappropriate or unreasonable.” *Adams*, 167 N.C. App. at 403, 606 S.E.2d at 155 (alteration in original) (quoting *Harris*, 149 N.C. App. at 937, 563 S.E.2d at 229). Independence has offered no evidence showing how appellants’ continued prosecution of their claims was not for the central and sincere purpose of putting their legal arguments to the proper test, especially in light of the trial court’s conclusion that appellants’ three actions could have been warranted by a good faith argument for the modification of existing law.

Moreover, for purposes of Rule 11, Independence’s “subjective belief” that appellants filed their actions for the purpose of harassment, “as well as whether the offending conduct did, in fact, harass [Independence] is immaterial to the issue of whether [appellants’] conduct is sanctionable.” *Ward v. Jett Properties, LLC*, 191 N.C. App. 605, 609, 663 S.E.2d 862, 865 (2008); see also *Kohler*, 177 N.C. App. at 404-05, 628 S.E.2d at 824; *Kunstler*, 914 F.2d at 520 (holding that “a subjective hope by a plaintiff that a lawsuit will embarrass or upset a defendant” is not grounds for a Rule 11 sanction, “so long as there is evidence that a plaintiff’s central purpose in filing a complaint was to vindicate rights through the judicial process”). Therefore, based on the evidence in the record, when viewed objectively under the totality of the circumstances of the present case, we find appellants’ continued prosecution of its actions and the language concerning project delay in CWNA’s newsletter insufficient to create a strong inference that appellants’ principal purpose in filing their three actions was to harass Independence or to cause unnecessary delay and disruption to the Independence Woods development.

Accordingly, because our review of the record reveals no evidence to support an award of sanctions on the bases asserted by Independence, remand is not necessary in this case. *Blyth v. McCrary*, 184 N.C. App. 654, 664, 646 S.E.2d 813, 820 (2007). Consequently, because we find the trial court’s findings of fact are erroneous in part and do not support its conclusion to impose sanc-

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tions on appellants for filing their actions for improper purposes, the order of the trial court imposing sanctions on appellants based on the improper purpose prong of Rule 11 must be reversed. Because we reverse the trial court's order imposing sanctions on this basis, we need not address appellants' remaining arguments.

IV. Conclusion

The trial court's finding of fact that appellants did not deny or refute the statements concerning project delay published in CWNA's newsletter is not supported by the evidence in the record. In addition, the trial court's conclusion of law that there existed substantial evidence sufficient to create a strong inference of improper purpose relies on an erroneous finding of fact and is likewise unsupported by the remaining findings of fact, specifically the language quoted from CWNA's newsletter. To the contrary, when viewed objectively under the totality of the circumstances, we find the evidence in the record is insufficient to support the imposition of sanctions against appellants under the improper purpose prong of Rule 11. We therefore reverse the order of the trial court.

Reversed.

Judges HUNTER (Robert C.) and BRYANT concur.

STATE OF NORTH CAROLINA v. RASHAMELL Q. BILLINGER, DEFENDANT

No. COA10-1412

(Filed 5 July 2011)

1. Firearms and Other Weapons— possession of weapon of mass death and destruction—motion to dismiss—sufficiency of evidence—possession

The trial court did not err by denying defendant's motion to dismiss the charge of possession of a weapon of mass death and destruction based on alleged insufficient evidence of possession. The evidence was sufficient to support a reasonable inference that defendant owned and constructively possessed a sawed-off shotgun.

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2. Conspiracy— failure to allege essential element—agreement to commit unlawful act

The trial court erred by convicting defendant on the charge of conspiracy to commit robbery with a dangerous weapon. The State's failure to allege an essential element of the crime of conspiracy, the agreement to commit an unlawful act, rendered the indictment facially defective and deprived the trial court of jurisdiction to adjudicate the charge.

3. Damages and Remedies— restitution—no jurisdiction

The trial court's restitution award was vacated because there was no conspiracy conviction attached to it due to the trial court's lack of jurisdiction.

Appeal by defendant from judgments entered 21 April 2010 by Judge William R. Pittman in Hoke County Superior Court. Heard in the Court of Appeals 13 April 2011.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State.

Thomas R. Sallenger for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Rashamell Q. Billinger appeals his convictions for possession of a weapon of mass death and destruction and conspiracy to commit robbery with a dangerous weapon. After careful review, we find no error with respect to defendant's possession conviction, but conclude that the conspiracy indictment is facially defective, requiring vacating that conviction as well as the restitution award based on that conviction.

Facts

At trial, the State presented evidence tending to establish the following facts: Late in the afternoon on 26 June 2008, defendant, Kerry Braithwaite, Jonathan Jackson, and Jeveris McArn, along with others, met at Mr. Braithwaite's mother's house in Raeford, North Carolina. The men played basketball in the cul-de-sac and later played cards in the Braithwaites' garage. During the card game, Mr. Jackson complained about needing money to make his car payment. Defendant also indicated that he needed money.

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When the card game ended around 10:00 p.m., the four men got into Mr. Jackson's blue Dodge Charger, with Mr. Jackson driving, Mr. Braithwaite in the front passenger seat, Mr. McArn in the backseat behind Mr. Braithwaite, and defendant in the back behind Mr. Jackson. On the way to get something to eat, Mr. Jackson suggested robbing a nearby Hardees restaurant and defendant agreed. As they drove by the Hardees, however, they realized that the restaurant was closed and decided to go back to the Braithwaite residence. On the way back, defendant told Mr. Jackson to "drop him off" at the Food Lion grocery store near the Braithwaites' house, saying that "[h]e needed to find some money" and that he was going to try to rob the Food Lion or "something like that." When Mr. Jackson pulled into an alley between the grocery store and Mi Casita's, a Mexican restaurant, defendant got out of the car carrying a black pump action shotgun, owned by Mr. McArn. Defendant, who was wearing a black shirt, "baggy" blue pants, black Timberland boots, and a black bandana, "tucked" the shotgun into his pants so that it could not be seen and went behind the buildings.

Luis Alberto Reyes-Perez, a waiter at Mi Casita's, was leaving the restaurant through the alley behind the building, when he encountered an African-American male—later identified as defendant—wearing "Timber boots," baggy jeans, a black handkerchief over his face, and a black jacket with a hood over his head. Defendant "pulled out" a "dark"-looking weapon, roughly 24 inches long, that appeared to be a shotgun, pointed it at Mr. Reyes-Perez, and demanded his money. As Mr. Reyes-Perez was trying to take his money out of his apron, the gun discharged, hitting Mr. Reyes-Perez in his right arm. At that point, defendant "took off running" and Mr. Reyes-Perez climbed into his co-worker's van and was eventually taken to the hospital.

As the men in the Charger were driving by the front of the Food Lion, they thought they heard a gunshot and saw defendant running across a field behind Mi Casita's. Although Mr. Jackson did not want to pick up defendant, Mr. McArn told the other men that defendant had his shotgun and that they needed to "go pick him up." As they approached, defendant jumped into the backseat of the Charger with Mr. McArn's shotgun and the men drove back to Mr. Braithwaite's mother's house. Shortly after returning, defendant left the Braithwaite residence with several other people.

Captain John Kivett, with the Hoke County Sheriff's Department, responded to the reported shooting at Mi Casita's, and, while waiting for the K9 unit to arrive, he received another dispatch about shots

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being fired about two blocks away. Captain Kivett and two sheriff's deputies responded to the second dispatch, which resulted in their going to the Braithwaite residence, where they saw several people standing outside in the yard. While investigating the "shots-fired" call, Captain Kivett noticed an "unfired" shotgun shell laying in the yard. The deputies then searched the perimeter of the yard and found a black, pump action shotgun covered in a red "hoodie." Captain Kivett also searched Mr. Braithwaite's car, finding in plain view a blue-in-color single-shot shotgun in the rear floorboard.

Defendant was charged with attempted first-degree murder (08 CRS 51486), attempted robbery of Mr. Reyes-Perez with a dangerous weapon (08 CRS 51487); conspiracy to rob Mr. Reyes-Perez with a dangerous weapon (08 CRS 51487); possession of a weapon of mass death and destruction (08 CRS 51492); assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI") (08 CRS 51488); three counts of discharging a firearm into occupied property (08 CRS 51489-91); and, conspiracy to rob the Hardees with a dangerous weapon (09 CRS 945). Defendant pled not guilty and the case proceeded to trial, where, at the conclusion of all the evidence, defendant moved to dismiss all the charges against him. The State voluntarily dismissed two counts of discharging a weapon into occupied property and the trial court, after hearing arguments, dismissed the third count. The court, however, denied defendant's motion to dismiss the charges of attempted murder, AWDWIKISI, attempted armed robbery, possession of a weapon of mass death and destruction, conspiracy to rob Mr. Reyes-Perez, and conspiracy to rob the Hardees. The jury acquitted defendant of attempted murder, attempted armed robbery, AWDWIKISI, and conspiracy to rob the Hardees, but found defendant guilty of conspiracy to rob Mr. Reyes-Perez with a dangerous weapon and possession of a weapon of mass death and destruction. The trial court sentenced defendant to consecutive presumptive-range terms of 25 to 39 months imprisonment on the conspiracy charge and 16 to 20 months on the possession charge, suspended the sentence on the possession conviction, and imposed 36 months of supervised probation. The trial court also awarded \$46,059.00 in restitution in connection with the possession charge. Defendant timely appealed to this Court.

I

[1] Defendant argues that the trial court erred in denying his motion to dismiss the charge of possession of a weapon of mass death and destruction. In ruling on a defendant's motion to dismiss, the trial court must determine whether the State has presented substantial

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evidence (1) of each essential element of the offense and (2) of the defendant's being the perpetrator. *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "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 presented constitutes substantial evidence is a question of law for the court[.]" *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991), "which this Court reviews *de novo*," *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007).

N.C. Gen. Stat. § 14-288.8 (2009) makes it "unlawful for any person to manufacture, assemble, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any weapon of mass death and destruction[.]" which, pertinent to this case, includes "any shotgun with a barrel or barrels of less than 18 inches in length or an overall length of less than 26 inches . . ." N.C. Gen. Stat. § 14-288.8(a), (c)(3). In order to obtain a conviction for possession of a weapon of mass death and destruction, the State must prove two elements beyond a reasonable doubt: (1) that the weapon is a weapon of mass death and destruction and (2) that defendant knowingly possessed the weapon. *State v. Watterson*, 198 N.C. App. 500, 504-05, 679 S.E.2d 897, 900 (2009). Defendant does not challenge the sufficiency of the evidence with respect to whether the blue sawed-off shotgun constitutes a weapon of mass death and destruction,¹ but, rather, contends that the State failed to present sufficient evidence of possession.

Possession of a firearm may be actual or constructive. *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). A person has actual possession of a firearm 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 has constructive possession of a firearm when, although not having

1. This firearm, marked as State's Exhibit 13, was identified at trial as a "blue-in-color" Iver Johnson 12 gauge single-shot shotgun, with a barrel length of 18.25 inches and an overall length of 25.5 inches.

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actual possession, the person has the intent and capability to maintain control and dominion over the firearm. *State v. Taylor*, — N.C. App. —, —, 691 S.E.2d 755, 764 (2010).

The State, in its brief, argues that the evidence that defendant owned the blue sawed-off shotgun is sufficient to establish constructive possession. Although neither defendant nor the State cite any North Carolina appellate decision directly on point, and we have found none, it is a well-established principle of the law of possession in other jurisdictions that constructive possession may be established by evidence showing the defendant's ownership of the contraband. See, e.g., *United States v. Armstrong*, 187 F.3d 392, 396 (4th Cir. 1999) ("A person has constructive possession over contraband when he has ownership, dominion, or control over the contraband itself or over the premises or vehicle in which it was concealed."); *United States v. Hiebert*, 30 F.3d 1005, 1008 (8th Cir.) ("An individual constructively possesses a firearm if he owns it or has control or dominion over it."), cert. denied, 513 U.S. 1029, 130 L. Ed. 2d 516 (1994); *State v. Parfait*, 693 So.2d 1232, 1243 (La. Ct. App. 1997) ("In order for a person to constructively possess a drug, he must either own it or have dominion or control over it.").

At trial, defendant's cousin Rickey Hailey testified that defendant owned a "blue shotgun" and that he was with defendant when he purchased it from an "Indian guy" nicknamed "R2." Defendant's other cousin Maurice Jones similarly testified that defendant owned a "blue" shotgun that was "[m]aybe a foot long." Defendant's friend Kerry Braithwaite, when asked at trial to identify the "blue-in-color" shotgun found in the backseat of his car, responded: "That's Rashamell's sawed-off shotgun." This evidence is sufficient to support a reasonable inference that defendant owned, and, accordingly, constructively possessed, the blue sawed-off shotgun. The trial court, therefore, properly denied defendant's motion to dismiss the charge of possession of a weapon of mass death and destruction.

II

[2] In his second argument, defendant challenges the trial court's jurisdiction to enter judgment on the conspiracy conviction, arguing that the indictment was facially invalid. "North Carolina law has long provided that '[t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity.'" *State v.*

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Neville, 108 N.C. App. 330, 332, 423 S.E.2d 496, 497 (1992) (quoting *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966)). As a “[p]rerequisite to its validity, an indictment must allege every essential element of the criminal offense it purports to charge.” *State v. Courtney*, 248 N.C. 447, 451, 103 S.E.2d 861, 864 (1958); accord *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998) (explaining that an indictment is fatally defective “if it wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty” (citation and internal quotation marks omitted)). Because a challenge to the facial validity of an indictment implicates the trial court’s subject-matter jurisdiction to adjudicate the charge, an appellate court “review[s] the sufficiency of an indictment *de novo*.” *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009).

The State’s indictment attempts to charge defendant with conspiracy to commit robbery with a dangerous weapon. “A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means.” *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E.2d 521, 526 (1975). The “essence,” *State v. Medlin*, 86 N.C. App. 114, 121, 357 S.E.2d 174, 178 (1987), or “gist of the crime of conspiracy is the agreement itself[.]” *State v. Rozier*, 69 N.C. App. 38, 52, 316 S.E.2d 893, 902 (1984).

Here, the indictment charging defendant with conspiracy to commit robbery with a dangerous weapon reads in pertinent part:

AND THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 26th day of June, 2008, in the county named above the defendant named above unlawfully, willfully and feloniously did with Jevaris Charan McArn, Kerry Kurtis Braithwaite, and Jonathan Wilson Jackson to commit the felony of Robbery With a Dangerous Weapon, in violation of North Carolina General Statutes Section 14-87, against Luis Alberto Reyes-Perez. This act was in violation of North Carolina Common Law and North Carolina General Statutes 14-2.4.

As defendant points out, the State failed to include any “operative language” between the words “did” and “with” denoting a conspiracy or agreement. Thus, defendant maintains, because the indictment does not allege that he “agreed with or conspired with any other person” to commit the underlying offense, the indictment is “fatally defective” and the trial court lacked jurisdiction to enter judgment on the charge.

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With respect to the sufficiency of a conspiracy indictment's allegation of the requisite agreement between the defendant and another person, a leading national treatise explains:

The agreement to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means must be alleged in a conspiracy indictment.

The agreement, combination, or common purpose must be charged in appropriate language. A distinct and direct averment of this fact is necessary. An indictment which charges an agreement or combination by inference or implication only is defective.

15A C.J.S. *Conspiracy* § 147 (2011); see also 16 Am. Jur. 2d *Conspiracy* § 33 (2011) (“An indictment charging that a defendant conspired to commit an offense must allege that the defendant agreed with one or more persons to commit the offense. The conspiratorial agreement must be distinctly and directly alleged, inference and implication not being sufficient against a demurrer.”).

It is undisputed that the indictment in this case fails to allege an essential element of the crime of conspiracy—the agreement to commit an unlawful act. See *State v. Looney*, 294 N.C. 1, 11, 240 S.E.2d 612, 618 (1978) (“[T]he reaching of an agreement is an essential element of the offense of conspiracy.”); accord *State v. Aleem*, 49 N.C. App. 359, 362, 271 S.E.2d 575, 578 (1980) (“An agreement between the parties charged is an essential element of conspiracy.”). Without a “distinct and direct” allegation that defendant and at least one other person “agreed” to commit the underlying armed robbery, the indictment in this case fails to allege an essential element of the crime of conspiracy. See *Hamner v. United States*, 134 F.2d 592, 595 (5th Cir. 1943) (explaining that since conspiracy’s “essence lies in the agreement[,] [t]hat agreement must be distinctly and directly alleged” and “[i]nference and implication will not, on demurrer, suffice”); *United States v. Wupperman*, 215 F. 135, 136 (D.C.N.Y. 1914) (holding that “[t]he crime of ‘conspiracy’ is sufficiently charged if it be stated that two or more persons, naming them, conspired (*that is, agreed together*) to commit some offense” (emphasis added)). While “the verb ‘conspire’ is certainly the most appropriate to charge a conspiracy[,]” the use of other verbs, such as “combine,” “confederate,” or “agree,” are sufficient to denote the requisite meeting of the minds between the defendant and another person. *Wright v. United States*, 108 F. 805, 810 (5th Cir. 1901). Nonetheless, “the charge must be so stated as to show that a crime has been committed” *State v. Green*, 151 N.C. 729, 729, 66 S.E. 564, 565 (1909).

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The State nevertheless argues that the indictment's caption, which identifies the charge as "Conspiracy to Commit Robbery with a Dangerous Weapon," and the indictment's reference to the offense being committed in violation of N.C. Gen. Stat. § 14-2.4 (2009), which governs "[p]unishment for conspiracy to commit a felony," are sufficient to provide adequate notice to defendant and the trial court of the offense with which defendant was being charged. With respect to the caption, our Supreme Court has held that "[t]he caption of an indictment . . . is not a part of it and the designation therein of the offense sought to be charged can neither enlarge nor diminish the offense charged in the body of the instrument." *State v. Bennett*, 271 N.C. 423, 425, 156 S.E.2d 725, 726 (1967) (per curiam). And as for the indictment's reference to N.C. Gen. Stat. § 14-2.4, it is well established that "[m]erely charging in general terms a breach of [a] statute and referring to it in the indictment is not sufficient" to cure the failure to charge "the essentials of the offense" in a plain, intelligible, and explicit manner. *State v. Sossamon*, 259 N.C. 374, 376, 130 S.E.2d 638, 639 (1963) (quoting *State v. Ballangee*, 191 N.C. 700, 702, 132 S.E. 795, 795 (1926)). Accordingly, the State's failure to allege an essential element of the crime of conspiracy renders the indictment in this case facially defective and deprived the trial court of jurisdiction to adjudicate the charge. Defendant's conviction on this charge—08 CRS 51487—is vacated.²

III

[3] Defendant's final argument on appeal is that the trial court erred in ordering him to pay restitution in connection with his conviction for possessing a weapon of mass death and destruction. It is well established that "for an order of restitution to be valid, it must be related to the criminal act for which defendant was convicted, else the provision may run afoul of the constitutional provision prohibiting imprisonment for debt." *State v. Valladares*, 182 N.C. App. 525, 526, 642 S.E.2d 489, 491 (2007) (quoting *State v. Froneberger*, 81 N.C. App. 398, 404, 344 S.E.2d 344, 348 (1986)); N.C. Gen. Stat. § 15A-1343(d) (2009). In its brief, the State concedes that "the restitution ordered by the trial court had no factual connection with [defendant's] conviction for possession of a weapon of mass destruction," but argues that "the transcript indicates that the restitution charge was meant to be associated with the criminal conspiracy charge." Due to this "clerical

2. We note that our holding does not preclude the State from re-indicting defendant for conspiracy to commit robbery with a dangerous weapon. *State v. Ingram*, 20 N.C. App. 464, 466, 201 S.E.2d 532, 534 (1974).

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error,” the State urges this Court to remand the case for resentencing so that the trial court may award the restitution in connection with defendant’s conspiracy conviction. As we have vacated defendant’s conspiracy conviction due to the trial court’s lack of jurisdiction, there is no conspiracy conviction to which the restitution order may be attached. Consequently, we must also vacate the restitution award in this case: 08 CRS 51492.

No error in part; vacated in part.

Judges BRYANT and McCULLOUGH concur.

DEBRA MCKOY, AS ADMINISTRATRIX OF THE ESTATE OF ARTHUR G. MCKOY, DECEASED,
PLAINTIFF V. CHARLES R. BEASLEY, M.D., AND THE LUMBERTON MEDICAL
CLINIC, P.A., DEFENDANTS

No. COA09-1315

(Filed 5 July 2011)

1. Medical Malpractice— Rule 9(j) certification—amended complaint filed after statute of limitations expired

The trial court did not err by dismissing a wrongful death case based on medical negligence because plaintiff’s original complaint was devoid of any allegations complying with N.C.G.S. § 1A-1, Rule 9(j), and the defect could not be corrected by filing a second complaint after the expiration of the applicable statute of limitations.

2. Appeal and Error— preservation of issues—failure to raise constitutional issue at trial

Although plaintiff contended that the trial court erred in a wrongful death case by dismissing her amended complaint based on the unconstitutionality of N.C.G.S. § 1A-1, Rule 9(j), plaintiff waived this contention by failing to present any supporting argument.

Appeal by plaintiff from orders entered 24 June 2009 and 2 September 2009 by Judge W. Russell Duke, Jr. in Bladen County Superior Court. Cross assignment of error by defendants from order entered 14 July 2008 by Judge Douglas B. Sasser. Heard in the Court of Appeals 18 August 2010.

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Fuller & Barnes, LLP, by Trevor M. Fuller and Michael D. Barnes, for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by John W. Minier and Heather R. Wilson, for defendants-appellees.

McGuireWoods, LLP, by Claire A. Modlin, Monica E. Webb, and Matthew M. Calabria, Amicus Curiae for North Carolina Association of Defense Attorneys.

STEELMAN, Judge.

Where plaintiff's original complaint seeking damages for medical negligence was devoid of any allegations complying with Rule 9(j) of the Rules of Civil Procedure, this defect could not be corrected by filing a second complaint following dismissal of the first complaint. Where plaintiff failed to raise a constitutional challenge to the constitutionality of Rule 9(j) in her pleadings, and failed to adequately develop that argument before the trial court, that argument is dismissed.

I. Factual and Procedural Background

On 2 December 1998, Arthur G. McKoy ("McKoy") sought treatment at Southeastern Regional Medical Center for anemia, bloody diarrhea, and abdominal pain and weakness. McKoy was treated by physicians from defendant, The Lumberton Medical Clinic ("Lumberton"). On 4 December 1998, McKoy underwent the first of three colonoscopies, resulting in a diagnosis of ulcerative colitis. On 18 June 2000, McKoy presented to Dr. Khattak at the Southeastern Regional Medical Center experiencing blood in his rectum, loose bowels, and right upper quadrant pain. On 21 June 2000, McKoy underwent a second colonoscopy. The pathology report stated that, "[w]ith the presence of glandular atypia, treatment with repeat biopsy is recommended." No further colonoscopies were performed until 2005. In December 2000, McKoy was diagnosed with a chronic liver condition. In January 2003, Dr. Charles R. Beasley ("Beasley"), a partner in Lumberton, began treating McKoy for both conditions. Between January 2003 and April 2005 Beasley never scheduled or suggested that McKoy undergo a colonoscopy. On 7 April 2005, McKoy presented to Beasley with debilitating stomach cramps, nausea, and vomiting. On 13 April 2005, McKoy underwent a third colonoscopy, which revealed widely metastatic colon cancer. McKoy died from this condition on 30 April 2005.

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The Administratrix of McKoy's Estate ("plaintiff") first filed a wrongful death action on 7 April 2007 against Beasley, Lumberton, and two other defendants. On 18 February 2008, Judge Gregory Weeks entered an order dismissing the claims against Beasley for failure to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure.¹ This dismissal was without prejudice, and gave plaintiff leave to re-file the action against Beasley and Lumberton on or before 26 December 2007 in accordance with the provisions of Rule 41(b) of the North Carolina Rules of Civil Procedure. The order further stated: "[t]he Court expresses no opinion as to whether any re-filed action would be timely or untimely."²

The present action was filed on 20 December 2007. An amended complaint was filed on 20 March 2009.³ Plaintiff's original complaint was accompanied by a "Motion to Qualify Expert Witnesses Under Rules 9(j)(2) and 702(e)." This motion sought an order from the trial court allowing Dr. Thomas E. Parker and Dr. Christian D. Stone to testify as to whether defendants complied with the applicable standard of care. Both the original and the amended complaint contained allegations of compliance with Rule 9(j)(1) of the Rules of Civil Procedure and Rule 702 of the Rules of Evidence, and in the alternative of compliance pursuant to Rule 9(j)(2) of the Rules of Civil Procedure and Rule 702(e) of the Rules of Evidence. On 19 May 2008, defendants filed a motion seeking dismissal of plaintiff's complaint asserting that plaintiff failed to comply with Rule 9(j) of the Rules of Civil Procedure and that her claims were barred under the applicable statute of limitations. On 14 July 2008, Judge Sasser entered an order denying defendants' motion. This order, relying upon the case of *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000), held that although plaintiff's original complaint lacked an appropriate Rule 9(j) certification, that following the dismissal of the

1. Plaintiff appealed Judge Weeks' order dismissing her claims against the other two defendants based upon the applicable statutes of limitations and repose. This Court affirmed those dismissals in an unpublished opinion filed 17 March 2009. *McKoy v. Beasley*, No. COA08-369, 2009 N.C. App. LEXIS 271 (unpublished).

2. Judge Weeks heard this matter on 29 October 2007, announced his preliminary ruling on 7 November 2007, and verbally revised his ruling to the parties on 3 December 2007.

3. The primary import of these amendments was to make more specific allegations of negligence, and to assert that Beasley's conduct was grossly negligent, willful and wanton, and in reckless disregard of the health and safety of his patient. A claim for punitive damages was asserted. There was no material difference in the allegations pertaining to compliance with the provisions of Rule 9(j)(1) and (2) of the North Carolina Rules of Civil Procedure.

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case without prejudice by Judge Weeks, plaintiff was permitted to re-file her complaint, with the appropriate Rule 9(j) certification, and not have her action barred by the applicable statute of limitations.

Following extensive discovery, and the amendment of both plaintiff's complaint and defendants' answer, defendants filed a second motion to dismiss based upon: (1) failure to comply with the requirements of Rule 9(j) in that plaintiff could not reasonably have expected Dr. Parker to qualify as an expert witness; and (2) that no expert could be reasonably expected to satisfy the requirements of Rule 9(j) and Rule 702(e) of the Rules of Evidence.

On 26 May 2009, Judge Duke heard defendants' motion to dismiss. Plaintiff asserted that Judge Sasser had taken under advisement substantive issues pertaining to plaintiff's pre-suit compliance with Rule 9(j). Judge Duke, upon conferring with Judge Sasser, determined that Judge Sasser had not taken the matter under advisement, and had not in any way retained jurisdiction over the case. On 24 June 2009, Judge Duke filed an order dismissing plaintiff's amended complaint, with prejudice. This order held that: (1) Judge Sasser's order was limited to the facial compliance of plaintiff's complaint with respect to Rule 9(j), and did not consider plaintiff's motion to qualify experts under Rule 9(j)(2) and Rule 702(e); (2) plaintiff could not show an "appropriate pre-suit review," and has not shown "extraordinary circumstances" justifying departure from the requirements of Rule 9(j); and (3) the amended complaint does not allege that plaintiff complied with Rule 9(j) before filing the original complaint; plaintiff could not have reasonably expected Dr. Parker to qualify as an expert witness; plaintiff failed to demonstrate any "extraordinary circumstances" that would allow Dr. Parker or Dr. Stone to qualify under Rule 702(e).

On 13 July 2009, plaintiff filed notice of appeal.

On 29 June 2009, plaintiff filed a motion for reconsideration and relief from Judge Duke's order pursuant to Rules 59(e), 60(b)(1) and 60(b)(6) of the Rules of Civil Procedure. An amended motion was filed on 3 August 2009. In an order dated 2 September 2009, Judge Duke noted his lack of jurisdiction over the motions, and denied them. The order did note that he was inclined to deny them, had there been jurisdiction.

Plaintiff gave notice of appeal from this order on 15 September 2009. This appeal was consolidated with plaintiff's earlier appeal by order of this Court on 2 December 2009.

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II. Compliance with Rule 9(j)

[1] In her second argument, plaintiff contends that Judge Duke erred in dismissing her amended complaint for failure to comply with Rule 9(j) and the applicable statute of limitations. Defendants have cross assigned error to Judge Sasser’s order of 14 July 2008 which denied their previous motion to dismiss. These arguments involve the identical issue. We hold that Judge Duke’s order was correct, and that Judge Sasser’s order was in error.

A. Standard of Review

“Where there is no dispute over the relevant facts, a lower court’s interpretation of a statute of limitations is a conclusion of law that is reviewed *de novo* on appeal.” *Goetz v. N.C. Dep’t. of Health & Human Servcs.*, — N.C. App. —, —, 692 S.E.2d 395, 398 (2010) (citation omitted), *disc. review denied*, 364 N.C. 325, 700 S.E.2d 751 (2010). We also review the trial court’s ruling on Rule 9(j) compliance *de novo*. *Morris v. SE Orthopedics Sports Med. & Shoulder Ctr.*, 199 N.C. App. 425, 437, 681 S.E.2d 840, 848 (2009), *disc. review denied*, 363 N.C. 745, 688 S.E.2d 456 (2009).

B. Rule 9(j)(1) and (2)

In *Thigpen v. Ngo*, the North Carolina Supreme Court held that:

The legislature specifically drafted Rule 9(j) to govern the initiation of medical malpractice actions and to require physician review as a *condition for filing the action*. The legislature’s intent was to provide a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)’s *requirement of expert certification prior to the filing of a complaint*. Accordingly, permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature.

355 N.C. 198, 203-04, 558 S.E.2d 162, 166 (2002) (emphasis added); *accord Ford v. McCain*, 192 N.C. App. 667, 666 S.E.2d 153 (2008). “An amended complaint filed after the expiration of the statute of limitations cannot cure the omission if it does not specifically allege that the expert review occurred prior to the expiration of the statute of limitations.” *Ford*, 192 N.C. App. at 671, 666 S.E.2d at 156 (citation omitted).

The statute of limitations for a wrongful death claim is two years from the date of death. N.C. Gen. Stat. § 1-53(4) (2005). McKoy died

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on 30 April 2005. The original complaint in this action was filed on 20 December 2007, more than two years following 30 April 2005. As a result, plaintiff must rely upon the complaint filed in the previous action, which was dismissed by Judge Weeks without prejudice, in order to have timely filed her action for wrongful death. We have examined the complaint filed on 7 April 2007 in case 07 CVS 259. It is totally devoid of any allegations that indicate compliance with Rule 9(j) of the North Carolina Rules of Civil Procedure. Since the original complaint, that was filed within the two year limitations period was defective, the subsequent complaint must be dismissed.

This issue is controlled by the case of *Bass v. Durham Cty. Hosp. Corp.*, 158 N.C. App. 217, 580 S.E.2d 738 (2003), *rev'd per curiam for reasons stated in the dissent*, 358 N.C. 144, 592 S.E.2d 687 (2004). In *Bass* plaintiff filed a complaint on the last day of a 120 day extension, pursuant to Rule 9(j). The complaint did not contain a Rule 9(j) certification. This action was dismissed without prejudice and was refiled, this time containing the Rule 9(j) certification. The Supreme Court adopted Judge Tyson's dissent *per curiam*, which held:

A Rule 41(a) voluntary dismissal would salvage the action and provide another year for re-filing had plaintiff filed a complaint complying with Rule 9(j) before the limitations period expired. Plaintiff's complaint was untimely filed beyond the expiration of the applicable statute of limitations and the Rule 9(j) extension.

Bass, 158 N.C. App. at 225, 580 S.E.2d at 743.

Judge Weeks' order dismissing plaintiff's claims against defendants without prejudice was pursuant to Rule 41(b), and was the functional equivalent of plaintiff taking a voluntary dismissal under Rule 41(a)(1) for purposes of our analysis under Rule 9(j). Under the rationale of *Bass*, the defective original complaint cannot be rectified by a dismissal followed by a new complaint complying with Rule 9(j), where the second complaint is filed outside of the applicable statute of limitations.

We note that Judge Sasser's order was predicated upon the Supreme Court's decision of *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000). This was in error. Based upon the facts of the instant case, *Brisson* was overruled by the Supreme Court in *Bass*.

This case is distinguishable from *Ford v. McCain*, 192 N.C. App. 667, 666 S.E.2d 153, where the original complaint contained a Rule

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9(j) certification. That complaint was subsequently dismissed, and refiled, with the refiled complaint also containing a Rule 9(j) certification.

This argument is without merit.

III. Constitutionality of Rule 9(j)

[2] In her second argument, plaintiff contends that the trial court erred in dismissing her amended complaint because Rule 9(j) is unconstitutional, both on its face and as applied to plaintiff in this case. We disagree.

[A] constitutional question is addressed *only when* the issue is squarely presented upon an adequate factual record and only when resolution of the issue is necessary. To be properly addressed, a constitutional issue must be definitely drawn into focus by plaintiff's pleadings. If the factual record necessary for a constitutional inquiry is lacking, an appellate court should be especially mindful of the dangers inherent in the premature exercise of its jurisdiction.

Anderson v. Assimos, 356 N.C. 415, 416-17, 572 S.E.2d 101, 102 (2002) (citations and quotations omitted).

Plaintiff filed her original complaint in case 07 CVS 259. Subsequently she filed a complaint and an amended complaint in this action. None of these pleadings raise any constitutional challenges to Rule 9(j).

At the hearing before Judge Duke plaintiff argued that compliance with Rule 9(j) was unconstitutional. However, plaintiff failed to present any argument as to why Rule 9(j) was unconstitutional, and to support her contention filed with the court her brief from the 27 May 2008 motions hearing before Judge Sasser. The entirety of the argument addressing the constitutionality of Rule 9(j) in that brief stated:

For reasons set forth more fully in the accompanying memorandum attached hereto, [plaintiff] urges the Court to find that Rule 9(j) is unconstitutional on its face and as applied to her. [Plaintiff] specifically incorporates and adopts, as if fully set forth herein, the accompanying memorandum contending that Rule 9(j) is unconstitutional. Accordingly, [plaintiff] urges this Court to find Rule 9(j) unconstitutional.

The referenced memorandum is not attached to plaintiff's brief from the 27 May 2008 motions hearing that was submitted to this Court in the record on appeal and the supplements to the record on appeal.

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“Appellate review is based solely upon the record on appeal; it is the duty of the appellant[] to see that the record is complete.” *Carson v. Carson*, 177 N.C. App. 277, 279, 628 S.E.2d 439, 441 (2006) (quotation omitted). This Court will not engage in speculation as to what arguments may have been presented in the memorandum before Judge Sasser or Judge Duke. *County of Durham v. Roberts*, 145 N.C. App. 665, 671, 551 S.E.2d 494, 498 (2001) (citation omitted) (“It is well established that this Court can judicially know only what appears in the record.”). “It is not the role of this Court to fabricate and construct arguments not presented by the parties before it.” *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 398, 617 S.E.2d 306, 314 (2005) (citations omitted), *aff’d per curiam*, 360 N.C. 398, 627 S.E.2d 461 (2006).

“To be properly addressed, a constitutional issue must be definitely drawn into focus by plaintiff’s pleadings.” *Anderson*, 356 N.C. at 416, 572 S.E.2d at 102 (quotation omitted). In the instant case, the record is completely devoid of any argument or development of the factual record relating to the constitutional issue; therefore, we will not address it.

This argument is dismissed.

IV. Remaining Arguments

Because this case was properly dismissed for failure of plaintiff’s complaint in the first case to contain any allegations concerning Rule 9(j) compliance, we do not address plaintiff’s remaining arguments.

AFFIRMED.

Judges STEPHENS and HUNTER, JR., ROBERT N. concur.

IN RE A.N.L.

[213 N.C. App. 266 (2011)]

IN THE MATTER OF: A.N.L.

No. COA11-18

(Filed 5 July 2011)

1. Child Abuse, Dependency, and Neglect— guardian ad litem—full representation of child as required by statute

The trial court did not violate N.C.G.S. § 7B-601(a) in a child abuse and neglect case. The minor child was fully represented by a guardian *ad litem* (GAL) as contemplated by the statute, and the use of a properly appointed GAL program staff member to serve as the juvenile's GAL did not violate the statute.

2. Child Abuse, Dependency, and Neglect— findings of fact— sufficiency

The trial court did not err by adjudicating a minor child as an abused and neglected juvenile. Respondent mother's testimony supported the trial court's findings of fact, which in turn supported the adjudication.

Appeal by respondent-mother from order entered 4 October 2010 by Judge J. Thomas Davis in McDowell County District Court. Heard in the Court of Appeals 8 June 2011.

Hanna Frost Honeycutt, for petitioner-appellee McDowell County Department of Social Services.

Pamela Newell, for Guardian ad Litem.

Janet K. Ledbetter, for respondent-appellant mother.

CALABRIA, Judge.

Respondent-mother¹ appeals from the trial court's order adjudicating her minor child ("Autumn"²) an abused and neglected juvenile and continuing legal custody of Autumn with the McDowell County Department of Social Services ("DSS"). We affirm.

I. Background

On 8 August 2010, respondent-mother and her boyfriend were involved in a domestic altercation. Respondent-mother initially

1. Respondent-father did not appeal the trial court's order and is not a party to this appeal.

2. "Autumn" is a pseudonym used to protect the identity of the minor child.

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struck her boyfriend while she was holding Autumn, a one-month-old infant, in her arms. The boyfriend responded by hitting respondent-mother numerous times in the face and head, causing respondent-mother to fall down while still holding Autumn. Autumn was not injured in the fall.

Neighbors who overheard the incident called 911. When law enforcement officers arrived, respondent-mother did not tell them that her boyfriend had struck her. Respondent-mother continued to live with her boyfriend after the incident.

On 10 August 2010, DSS filed a petition alleging that Autumn was an abused, neglected, and dependent juvenile based upon the 8 August 2010 incident. On 11 August 2010, respondent-mother signed a memorandum of consent placing Autumn in the custody of DSS. DSS placed Autumn with respondent-mother's adoptive parents.

On 19 August 2010, the trial court entered an order appointing Guardian *ad Litem* Program staff member Charity Robinson ("Robinson") as guardian *ad litem* ("GAL") for Autumn. In the same appointment order, the trial court appointed Lee Taylor ("Taylor") as the GAL's attorney advocate.

An adjudication hearing was conducted on 23 September 2010 in McDowell County District Court. After hearing evidence, the trial court adjudicated Autumn as abused and neglected, but not dependent. The trial court then proceeded directly to a disposition hearing. The transcript of the adjudication and disposition hearing indicates that Taylor was present as the GAL attorney advocate and cross-examined witnesses during both portions of the proceedings. Taylor also concurred with DSS's adjudication and disposition recommendations for Autumn.

On 4 October 2010, the trial court entered a formal adjudication and disposition order, adjudicating Autumn an abused and neglected juvenile. In the disposition portion of its order, the trial court ordered Autumn to remain in DSS custody and ordered DSS to continue with reasonable efforts toward achieving the permanent plan of reunification. Respondent-mother appeals.

II. Autumn's GAL

[1] Respondent-mother argues that the trial court violated N.C. Gen. Stat. § 7B-601(a) by either (1) failing to appoint a valid GAL for Autumn; or (2) conducting the adjudication and disposition hearing

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without Autumn being adequately represented by her appointed GAL. We disagree.

A. Appointment of GAL

N.C. Gen. Stat. § 7B-601(a) governs the appointment and duties of a GAL for a juvenile in an abuse, neglect, and dependency hearing.³ It states, in relevant part: “[w]hen in a petition a juvenile is alleged to be abused or neglected, the court shall appoint a guardian ad litem to represent the juvenile . . .” N.C. Gen. Stat. § 7B-601(a) (2009). Since the DSS petition alleged that Autumn was abused and neglected, the trial court was required to appoint a GAL to represent Autumn in the abuse and neglect proceedings.

Respondent-mother first argues that the trial court’s order appointing Robinson as Autumn’s GAL was not valid because Robinson was a GAL Program staff member and could not also serve as an individual GAL. Respondent-mother contends, in her brief, that “the mandatory appointment of a Guardian *ad Litem* pursuant to N.C. Gen. Stat. § 7B-601(a) is not satisfied by staff members and administrators of a GAL program acting as substitute or ‘*de facto*’ guardians.” However, nothing in N.C. Gen. Stat. § 7B-601(a) precludes a trial court from appointing an employee of the GAL Program to serve individually as a juvenile’s GAL. The substantial number of these cases pending in our district courts makes it increasingly likely that volunteer GALs will not always be available for appointment in all cases. In such circumstances, it may be necessary for the trial court to appoint a staff member of the GAL Program to serve as an individual GAL. When a GAL Program staff member is formally appointed by the trial court to serve as an individual GAL and fulfills the duties of a GAL as required by N.C. Gen. Stat. § 7B-601(a), that staff member is acting as an actual GAL under the statute and cannot be considered a substitute or “*de facto*” guardian, as respondent-mother argues. Contrary to respondent-mother’s contention, the use of a properly appointed GAL Program staff member to serve as a juvenile’s GAL fully satisfies the requirements of N.C. Gen. Stat. § 7B-601. This argument is overruled.

B. Duties of GAL

Respondent-mother also contends that the trial court erred by conducting the adjudication and disposition hearing without Autumn’s GAL being present.

3. This statute also governs the duties of a juvenile’s GAL in a termination of parental rights proceeding. *See* N.C. Gen. Stat. § 7B-1108(b) (2009).

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Pursuant to N.C. Gen. Stat. § 7B-601(a),

[t]he duties of the guardian ad litem program shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the court at the dispositional hearing; to conduct follow-up investigations to insure that the orders of the court are being properly executed; to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

Id.

Although the statute does not specify which duties of the GAL program are to be performed by the individual GAL and which are the responsibility of the attorney advocate, the statute makes clear that the attorney advocate is to assist the non-lawyer GAL and thereby protect the legal rights of the minor in court proceedings. While the GAL could potentially facilitate settlement of disputed issues arising at a[n] [abuse and neglect] hearing, the investigation and observation of the needs of the children and identification of the resources available to meet those needs take place both before and after a dispositional hearing, meaning that those actions necessarily occur outside the courtroom. This recognition of separate in-court and out-of-court responsibilities for the nonlawyer GAL and the attorney advocate in no way diminishes the GAL volunteer's obligation to protect the best interests of the minor at all critical stages. Although the GAL's presence at the [abuse and neglect] hearing may be preferable, the language of the statute does not mandate the nonlawyer volunteer's attendance.

In re J.H.K. and J.D.K., — N.C. —, —, — S.E.2d —, — (2011). Ultimately, the GAL and the attorney advocate “work as a team” to represent the juvenile. *Id.*

In the instant case, the record indicates that Autumn was adequately represented by the GAL Program pursuant to N.C. Gen. Stat. § 7B-601(a). Taylor was present as the attorney advocate during both portions of the proceedings, and actively participated by questioning witnesses and offering recommendations for adjudication and dispo-

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sition. The content of Taylor's questions sufficiently demonstrated that the GAL Program had actively investigated the case prior to the hearing. Moreover, while the GAL Program did not submit a report into evidence, Taylor affirmatively stated to the trial court that a GAL report was not available only due to the newness of the case and assured the court that the GAL Program was actively "on it." In light of this record, we hold that the GAL Program satisfied its duties under N.C. Gen. Stat. § 7B-601(a) in the instant case. Respondent-mother's argument is overruled.

III. Abuse and Neglect

[2] Respondent-mother argues that the trial court erred by adjudicating Autumn as an abused and neglected juvenile. We disagree.

A proper review of a trial court's finding of [abuse and] neglect entails a determination of (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact. In a non-jury [abuse and] neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings. Our review of a trial court's conclusions of law is limited to whether they are supported by the findings of fact.

In re Pittman, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (2002) (internal quotations and citations omitted).

A. Findings of Fact

Respondent-mother first challenges the following findings of fact:

8. That on August 8, 2010, Respondent Mother hit . . . her live-in boyfriend, while the juvenile, who was a month old at the time, was in her arms. [Her boyfriend] hit Respondent Mother about her face and head while she was holding the juvenile. During the altercation, Respondent Mother dropped to the floor with the juvenile to protect herself and the juvenile, but [her boyfriend] continued to strike her.
9. That law enforcement responded on scene after an unknown person called 911. Respondent Mother denied that there had been a domestic altercation to law enforcement.
10. That Respondent Mother suffered injuries from the domestic altercation to include bruises and knots.

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11. That after DSS discovered the bruises on Respondent Mother's body, and learned the details of the domestic altercation between Respondent Mother and [her boyfriend], DSS created a safety plan to which Respondent Mother agreed. According to the safety plan, Respondent Mother and the juvenile would go live with Respondent Mother's parents in Charlotte, North Carolina.

12. That Respondent Mother initially left with the juvenile to stay with her family in Charlotte but demanded to return while on the way to Charlotte.

13. That Respondent Mother now lives in McDowell County while the juvenile resides with her parents in Charlotte. Respondent Mother is still welcome to stay with her parents in Charlotte; however, she reports she does not want to stay there because she does not get along with her mother.

14. That Respondent Mother does not have a job in McDowell County and testified that she has no ties to McDowell County currently.

15. That Respondent Mother denies being in contact with [her boyfriend] although she admits that his grandmother still drives her places.

However, respondent-mother's testimony during the adjudication hearing fully supported the trial court's challenged findings of fact, and therefore these findings are conclusive on appeal. *Pittman*, 149 N.C. App. at 764, 561 S.E.2d at 566.

B. Adjudication

Respondent-mother next contends that the trial court's findings do not support its determination that Autumn was an abused and neglected juvenile.

An abused juvenile is statutorily defined, in pertinent part, as:

Any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:

- a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means; [or]
- b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means[.]

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In re C.M. & M.H.M., 198 N.C. App. 53, 60, 678 S.E.2d 794, 798 (2009) (quoting N.C. Gen. Stat. § 7B-101(1)(a)&(b) (2007)).

The Juvenile Code defines a neglected juvenile as

[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of [the] law.

N.C. Gen. Stat. § 7B-101(15) (2009). “[T]he trial court [has] some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside” when adjudicating whether a juvenile is neglected. *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999). “In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent.” *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984).

In the instant case, respondent-mother, while holding one-month-old Autumn in her arms, initiated a physical altercation with her boyfriend that led to respondent-mother falling to the floor while being punched repeatedly. Although Autumn was not injured as a result of the altercation, respondent-mother suffered multiple knots and bruises. Ultimately, respondent-mother's decision to enter into a physical altercation while holding one-month-old Autumn created a substantial risk of serious physical injury to her, particularly when considering her extremely young age and overall helplessness. Thus, the trial court did not err in adjudicating Autumn as abused.

The trial court's findings also support its determination that Autumn was a neglected juvenile. In addition to the findings regarding the physical altercation, the trial court found that respondent-mother failed to report the incident to law enforcement when they were called to the scene to investigate. The trial court also found that respondent-mother was being treated for bipolar disorder, and that respondent-mother did not believe her treatment was working. Under these circumstances, the trial court did not err in adjudicating Autumn as neglected. This argument is overruled.

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IV. Conclusion

Autumn was fully represented by a GAL as contemplated by N.C. Gen. Stat. § 7B-601(a) during the abuse and neglect proceedings. Respondent-mother's testimony supported the trial court's findings of fact, and these findings supported the trial court's adjudication of Autumn as abused and neglected. The trial court's order is affirmed.

Affirmed.

Judges HUNTER, Robert C. and ELMORE concur.

IN THE MATTER OF: T.A.S.

No. COA10-275

(Filed 19 July 2011)

Search and Seizure— school-wide search—lacking individualized suspicion—search constitutionally unreasonable

The trial court erred in a possession of controlled substances case by denying the juvenile defendant's motion to suppress evidence obtained during a school-wide student search. Where the blanket search of the entire school lacked any individualized suspicion as to which students were responsible for the alleged infraction or any particularized reason to believe the contraband sought presented an imminent threat to school safety, the search of defendant's bra was constitutionally unreasonable.

Appeal by Juvenile from order entered 27 March 2009 by Judge Thomas V. Aldridge, Jr. in Brunswick County District Court. Heard in the Court of Appeals 15 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Lotta A. Crabtree, for the State.

Geeta Nadia Kapur for Juvenile.

BEASLEY, Judge.

T.A.S.¹ appeals the trial court's order denying her motion to suppress evidence obtained during a school-wide student search at the

1. The pseudonym T.A.S. is used to protect the identity of the juvenile.

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Brunswick County Academy (Academy) that extended from the students' personal effects and jackets to their pockets, shoes, and socks and finally beneath the girls' outer clothing. Following the trial court's ruling, T.A.S. admitted to the offenses while "preserving her right to appeal the denial of her motion to suppress." Where the blanket search of the entire school lacked any individualized suspicion as to which students were responsible for the alleged infraction or any particularized reason to believe the contraband sought presented an imminent threat to school safety, the search of T.A.S.'s bra was constitutionally unreasonable and we reverse the trial court's order denying her suppression motion.

I. Background

Charged with possession of a Schedule III substance and drug paraphernalia, T.A.S. filed a motion to suppress, which was heard on 20 February 2009. Sandra Robinson, the Academy's principal and the State's only witness, testified that the Academy is an alternative school in the Brunswick County School System. Many of its students are assigned there because of disciplinary infractions at traditional schools, including behavioral problems and substance abuse or weapons violations on campus. While T.A.S. was a student at the Academy in November 2008, the record does not indicate the basis for her attendance.

To enter the Academy, students must pass through a metal detector, at which time their book bags, purses, and coats are also searched. More thorough searches of their persons are frequently conducted, sometimes in response to information from other students but regularly without any "leads." On 5 November 2008, one of these more extensive searches was ordered after Ms. Robinson was informed by other students that pills of a type that "would cause kids to be unsafe" were currently coming into the school but had no further clues as to their nature or which students were responsible. The only details learned by administrators were that some of these students were hiding the pills in places not normally searched when they came through the metal detectors, like shoe tongues, socks, bras, and underwear.

After passing through the metal detectors that morning, all students were required to wait in the lunchroom to be brought one-by-one to a classroom to be searched, where they emptied their book bags, had their jackets thoroughly searched, removed their shoes, and emptied their pockets. A staff member whose sex is not specified in the record conducted the searches and patted down the students'

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socks. The girls were required to perform a “bra lift,” where they “pull their shirts out,” “shake them,” and “go underneath themselves with their thumb in the middle of their bra [to] pull it out.”² Other administrators and a resource officer, whose sexes are likewise unspecified, were also in the room, and a male law enforcement officer was present throughout—apparently regardless of the sex of the student being searched—solely to observe. During T.A.S.’s search, a white powder identified as Percocet and drug paraphernalia were found.

The trial court found “[t]here was no specific information regarding a particular student” and that a general search was nevertheless conducted “without any reasonable suspicion as to a particular student.” Nevertheless, it concluded that the search was reasonable under the circumstances based on companion findings that many Academy students are there because “of school policy violations regarding drugs and weapons”; pills, often prescribed to someone else, are found at the Academy two to three times every nine weeks; there is a “no penalty disclosure” policy in place during these searches; “[g]eneralized searches for weapons have been upheld because of special circumstances that permitted requiring male students to take off shoes, socks and empty pockets because of reports of weapons at school”; and “[n]o private parts were exposed” during the instant search. The trial court thus denied T.A.S.’s motion. We conclude, however, that at the point the Academy required T.A.S. to pull out her bra in searching her person for evidence of pills of an unknown nature and quantity, “the content of the suspicion failed to match the degree of intrusion,” *Safford Unified Sch. Dist. #1 v. Redding*, — U.S. —, —, 174 L. Ed. 2d 354, 359 (2009), and the search was accordingly unreasonable.

II. Discussion

Where T.A.S. does not challenge any of the trial court’s findings of fact in its order denying her motion to suppress, we must decide whether the findings support its conclusions of law, which we review *de novo*. “Under this standard, the legal significance of the findings of fact made by the trial court is a question of law for this Court to decide.” In re *J.D.B.*, 196 N.C. App. 234, 237, 674 S.E.2d 795, 798 (2009).

T.A.S. contends the intrusive search by school authorities violated her Fourth Amendment rights. We agree.

2. The record does not indicate whether the male students’ underwear was subject to the search or, if so, how the inspection thereof was conducted. In fact, Ms. Robinson’s testimony suggests that only the girls were subject to this more extensive search.

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We begin by reviewing the United States Supreme Court's treatment of public school searches under the Fourth Amendment—from articulating a special standard twenty-five years ago to its recent decision applying the established framework to more intrusive searches.

A. The Fourth Amendment and Student Searches

The Fourth Amendment functions “to safeguard the privacy and security of individuals against arbitrary invasions by government officials.” *Camara v. Mun. Court*, 387 U.S. 523, 528, 18 L. Ed. 2d 930, 935 (1967). While its prohibition against unreasonable searches and seizures generally requires a warrant based on probable cause, see U.S. Const. amend. IV, exceptions to the warrant requirement have surfaced, but such warrantless searches usually still require probable cause, see *New Jersey v. T.L.O.*, 469 U.S. 325, 340, 83 L. Ed. 2d 720, 734 (1985) (“Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon ‘probable cause’ to believe that a violation of the law has occurred.”). The Court, however, has carved out other exceptions that dispense with both the warrant and probable cause requirements. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53, 132 L. Ed. 2d 564, 574 (1995) (noting “the ultimate measure of the constitutionality of a governmental search” is reasonableness, which is not always dependent upon a warrant and probable cause if “‘special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable’”). Reasonableness thus “depends on the context within which a search takes place,” and while probable cause and a warrant may render a search reasonable, certain limited circumstances require neither. *T.L.O.*, 469 U.S. at 337, 340, 83 L. Ed. 2d at 731, 734. Public schools are one context where balancing government against private interests “suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause.” *Id.* at 341, 83 L. Ed. 2d at 734.

Although schoolchildren have legitimate expectations of privacy and public school officials are state actors subject to the Fourth Amendment, the Court in *T.L.O.* explained that “the special needs of the school environment require assessment of the legality of such searches against a standard less exacting than that of probable cause.” *Id.* at 333 n.2, 83 L. Ed. 2d at 728-29 n.2. Instead, the legality of a student search is governed by the reasonableness under the circumstances, which is a two-part inquiry: (1) was the action “justified

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at its inception”; and (2), was “the search, as actually conducted . . . reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* at 341, 83 L. Ed. 2d at 734 (emphasis added) (internal quotation marks and citations omitted).

Under ordinary circumstances, a search of a student by a teacher or other school official³ will be “justified at its inception” when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search *and not excessively intrusive in light of the age and sex of the student* and the nature of the infraction.

Id. at 341-42, 83 L. Ed. 2d at 734-35 (emphasis added). Under this test, the search of fourteen-year-old T.L.O.’s purse by the assistant principal was justified at its inception where a teacher had accused T.L.O. and another student of smoking in the restroom; the other student admitted the charge but T.L.O. denied it; a cursory search of T.L.O.’s purse revealed a pack of cigarettes and package of cigarette rolling papers, known to the administrator to implicate drug use; and marijuana was found upon a subsequent, more thorough search of T.L.O.’s purse. *Id.* at 328, 83 L. Ed. 2d at 726. Based on the facts, the Court did not decide if the reasonableness inquiry requires individualized suspicion. *See T.L.O.*, 469 U.S. at 342 n.8, 83 L. Ed. 2d at 735 n.8 (“Because the search of T.L.O.’s purse was based on an individualized suspicion that she had violated school rules,” the facts of the case did not require the Court to “consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion.”).

Where searching T.L.O.’s purse was clearly less intrusive than searching a student’s person, the Court likewise had no occasion to address the applicability of the “twofold inquiry” or the requisite level

3. The same standard applies here despite the presence of a law enforcement officer because, as found by the trial court, the search was conducted by school administrators and staff, and the school resource officer’s role was limited to observation, as he did not participate in the actual search. *See In re Murray*, 136 N.C. App. 648, 650, 525 S.E.2d 496, 498 (2000) (holding search was conducted by school official where school resource officer “did not search the bag himself” or “conduct any investigation on his own,” and therefore applying the *T.L.O.* reasonableness standard); *see also In re J.F.M. & T.J.B.*, 168 N.C. App. 143, 148, 607 S.E.2d 304, 307 (2005) (holding the *T.L.O.* standard governs school searches when school resource officers—who although employed by the local police department “are primarily responsible to the school district”—are acting “in conjunction with school officials”).

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of suspicion to a search involving, e.g., a pat-down, “bra-lift,” or removal of outer clothing. Recently, however, some lingering questions were resolved where the Court applied the *T.L.O.* framework to new facts in *Redding*—the strip search—and also sought to clarify the law. *See Redding*, — U.S. at —, 174 L. Ed. 2d at 366 (noting the lower courts’ “divergent conclusions” in applying *T.L.O.* to such searches). *Redding* evaluated the constitutionality of a student strip search under the same reasonableness test that was applied to *T.L.O.*’s purse despite the distinct nature of the two searches. But similar to *T.L.O.*, there was an individualized suspicion that thirteen-year-old Savana Redding was violating a school rule. *See id.* at —, 174 L. Ed. 2d at 362-63.⁴ In its analysis, the Court first discussed “the reliable knowledge element,” which is often assessed “by looking to the degree to which known facts imply prohibited conduct,” and explained that “the standards are fluid concepts that take their substantive content from the particular contexts.” *Id.* at —, 174 L. Ed. 2d at 361-62 (internal quotation marks and citation omitted). Distinct from the “fair probability” or “substantial chance” standards attendant to probable cause, “[t]he lesser standard for school searches could as readily be described as a moderate chance of finding evidence of wrongdoing.” *Id.* at —, 174 L. Ed. 2d at 362.

The Court then examined the facts upon which the assistant principal’s particularized suspicion was based and held that his search of Savana’s backpack and a female administrator’s search of her outer clothing—including her jacket, socks, and shoes—were justified. *Id.* at —, 174 L. Ed. 2d at 363. However, when the nurse subsequently required Savana to remove her clothes down to her underwear and directed her to “pull her bra out and to the side and shake it,” *id.* at —, 174 L. Ed. 2d at 360, “the content of the suspicion failed to match

4. Specifically, one week before the search, another student informed the assistant principal that “certain students were bringing drugs” to school and that he had gotten sick from pills “he got from a classmate.” On the day of the search, the student informant indicated that Marissa Glines had given him a prescription-strength ibuprofen and that students were planning to take the pills at lunchtime, and a search of Marissa’s pockets and wallet revealed several similar pills that she accused Savana of having given her. Savana admitted to the assistant principal that a planner containing various contraband items—including several knives, lighters, and a cigarette—was hers but said she had lent it to Marissa. Other reports confirmed Marissa and Savana’s friendship—such as school staff members’ identification of the two girls “as part of an unusually rowdy group” at a recent school dance where alcohol and cigarettes were found in the girls’ restroom—and were sufficient to connect them to the pills—where the same student informant had told the assistant principal that alcohol was being served at a party at Savana’s house before the dance. *Redding*, — U.S. at —, 174 L. Ed. 2d at 360, 362-63.

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the degree of intrusion,” *id.* at —, 174 L. Ed. 2d at 364, which subjected her private parts to some degree of exposure. Thus, while the search of Savana’s outer clothing and backpack was justified at its inception and not excessively intrusive—satisfying the two-pronged *T.L.O.* inquiry—the known “nature and limited threat” of the pain relievers sought, the absence of reasonable grounds “to suspect that large amounts of the drugs were being passed around,” and the lack of any indication “that Savana was hiding common painkillers in her underwear” rendered the strip search unreasonable. *Id.* at —, 174 L. Ed. 2d at 365. In reaching this conclusion, the Court explained that “the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts,” and “a reasonable search that extensive calls for suspicion that pays off.” *Id.* Simply put, “general background possibilities fall short,” as evidenced in *Redding*:

[W]hat was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable.

Id. The Court then announced a new standard, within the *T.L.O.* framework, for strip searches which, to be reasonable in scope, “require the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts.” *Id.*

Where *T.L.O.*’s reasonableness requirement did not address whether individualized suspicion is vital, *Redding* discussed the element only in reference to the additional strip search requirements—not with respect to the decision to search Savana in the first place—as there were already reasonable grounds to suspect her. *T.L.O.* made clear that exceptions to the individualized suspicion requirement “are generally appropriate *only where the privacy interests implicated by a search are minimal* and where other safeguards are available to assure that the individual’s reasonable expectation of privacy is not subject to the discretion of the official in the field.” *Id.*⁵ (emphasis

5. “With *T.L.O.* as the sole standard, the lower courts . . . struggled in relating its two-prong approach to the strip search context,” and even after *Redding*, the question lingers as to whether “individualized suspicion [is] a prerequisite for permissible strip searches.” Martin R. Gardner, *Strip Searching Students: The Supreme Court’s Latest*

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added) (internal quotation marks and citation omitted); *see also Foster v. Raspberry*, 652 F. Supp. 2d 1342, 1349 (M.D. Ga. 2009) (stating that, with “very limited exception,” school officials must have reasonable grounds to believe the particular student searched possesses the contraband for the search to be sound). Although the Court has thus not ruled “whether strip searches ever could possibly be justified in the absence of prior individualized suspicion of the student subjected to the search,” Gardner, *supra*, 80 Miss. L.J. at 976, we hold that inherent in the validity of any search that goes beyond a student’s outer clothing is a requirement that, at the very least, school officials suspect the particular student to be offending a school rule.

Our determination is consistent with the decisions of many other courts that strip searches of groups of students absent individualized suspicion were unreasonable. *See, e.g., Knisley v. Pike County Joint Vocational Sch. Dist.*, 604 F.3d 977 (6th Cir. 2010) (strip search of entire class for missing credit card); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598 (6th Cir. 2005) (strip search of entire class for stolen money); *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001) (strip search of 13 fifth graders for \$26); *Pendleton v. Fassett*, No. 08-227-C, 2009 WL 2849542 (W.D. Ky. Sept. 1, 2009) (search of 40 to 60 alternative school students based on general suspicion that someone on bus may have marijuana); *see also H.Y. ex rel. K.Y. v. Russell County Bd. of Educ.*, 490 F. Supp. 2d 1174 (M.D. Ala. 2007); *Carlson ex rel. Stuczynski v. Bremen High Sch. Dist.* 228, 423 F. Supp. 2d 823, 826-27 (N.D. Ill. 2006); *Rudolph ex rel. Williams v. Lowndes County Bd. of Educ.*, 242 F. Supp. 2d 1107, 1115-16, (M.D. Ala. 2003); *Bell v. Marseilles Elementary Sch.*, 160 F. Supp. 2d 883, 887-88 (N.D. Ill. 2001); *Konop ex rel. Konop v. Nw. Sch. Dist.*, 26 F. Supp. 2d 1189, 1206-07 (D.S.D. 1998); *Cales v. Howell Pub. Schs.*, 635 F. Supp. 454 (E.D. Mich. 1985); *Kennedy v. Dexter Consol. Schs.*, 10 P.3d 115, 120-22 (N.M. 2000).

B. The Suspicionless Search of T.A.S.

While certain aspects of the search here may have been reasonable based on the general suspicion that pills were coming into the school—possibly by concealment in some students’ undergarments—the search of T.A.S.’s bra, without individualized grounds for suspect-

Failure to Articulate a “Sufficiently Clear” Statement of Fourth Amendment Law, 80 Miss. L.J. 955, 964, 982 (2011). Gardner projects that “[g]iven the fact that school authorities historically have with some regularity conducted mass strip searches of students without individualized suspicion, it is probably only a matter of time before the Supreme Court will be required to address the issue.” *Id.* at 983 (footnote omitted).

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ing that she had the pills on her person, was excessively intrusive. Once the search extended to such intimate places, the generalized suspicion upon which the trial court relied was no longer sufficient to justify the heightened intrusion. Thus, in light of *T.L.O.* and *Redding*, the search was not reasonable under the circumstances.

As in *Redding*, Academy administrators “ma[d]e the quantum leap from outer clothes and backpacks,” *Redding*, — U.S. at —, 174 L. Ed. 2d at 365, by requiring each female student to do a “bra lift” by pulling out her shirt, shaking it, and going underneath her shirt to pull her bra away from her body. Before examining the (un)reasonableness thereof, we emphasize that any differences in the level of exposure from one strip search to another are not of kind, but degree. The fact that T.A.S. was not unclothed when required to perform the “bra lift” thus does not negate the *nature* of the search or render *Redding* inapplicable. While Ms. Robinson stated “[n]o body parts are seen” and the trial court found that “[n]o private parts were exposed,” the *Redding* Court declined to “define strip search and its Fourth Amendment consequences in a way that would guarantee litigation about who was looking and how much was seen.” *Id.* at —, 174 L. Ed. 2d at 364. To the contrary, *Redding* stressed that “[t]he very fact of Savana’s pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree.” *Id.* We thus examine the search of T.A.S. under the attendant circumstances in the context of a strip search. *See id.* (“The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it.”); *see also Amaechi v. West*, 237 F.3d 356, 365 & n.15 (4th Cir. 2001) (noting many statutes define strip search as having a “person remove or *arrange* some or all of his clothing so as to permit a visual inspection of the . . . female breasts, or undergarments of such person.” (emphasis added)); *State v. Battle*, — N.C. App. —, —, 688 S.E.2d 805, 810-11 (noting that neither the U.S. Supreme Court nor our Courts have defined “strip search” but citing *Redding* for the proposition that an officer’s requiring an adult driver “to pull the bottom of her bra away from her body and shake the bra” without “remov[ing] her shirt or lift[ing] it up” and to unzip and open her pants but not pull them down is fairly referred to as a strip search), *disc. review denied*, — N.C. —, 700 S.E.2d 926 (2010).

Here, the Academy’s blanket personal search was predicated on information from “students” and vague references to “pills.” Administrators learned that “pills were coming into the school” and

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that “[i]t was currently happening.” The record does not identify who the student informants were or, more importantly, indicate that school officials took any measures to assess their reliability. Moreover, the school had no particulars about the pills: there was no indication of the harm they presented or the quantity in circulation. As such, there was no specific ground to believe the pills were dangerous, illegal, or even against school policy—other than the vague notion that they “would cause kids to be unsafe” or that they were possessed in large quantities. Thus, at its very inception, the Academy’s search of its entire 134-member student body is undermined by the fact that the so-called “lead” acted upon was provided by “students.” These student informants also raised the possibility that the pills were being hidden in places that Academy officials did not generally check when students entered through the metal detectors, such as socks, tongues of shoes, and their underwear and bras. No postulation as to which students might be concealing pills in this manner was shared with the authorities, and the more intrusive search of all the Academy’s female students was thus based on an unparticularized suggestion that some students may be concealing such pills in their undergarments, which were subjected to exposure in front of officials of the opposite sex.

The *Redding* Court thoroughly discussed the facts known to the assistant principal—based on reports of staff members which corroborated the student informant’s allegations—that provided the grounds for conducting *any* search of Savana’s belongings or her person. While the individualized accusation was sufficient to conduct the less intrusive search of her outer clothing, no further intrusion was permissible where the assistant principal had failed to “ask Marissa any followup questions to determine whether there was any likelihood that Savana presently had the pills: neither asking when Marissa received the pills from Savana nor where Savana might be hiding them.” *Redding*, — U.S. at —, 174 L. Ed. 2d at 363. Moreover, the assistant principal “knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve.” *Id.* at —, 174 L. Ed. 2d at 364-65. In this case, the lack of information as to the nature of the pills cuts both ways. While the Academy clearly had no particularized basis for believing that the pills were dangerous because the school knew absolutely nothing about the kind of pills sought, it is also arguable that this same uncertainty presented a more expedient problem. However, especially with the lack of any other corroborating information, this circumstance demanded further investigation, if not

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before the school undertook to conduct a group search of pockets, shoes, and socks, unquestionably before intruding beneath the clothing of every student at the school.

In *Redding*, the Court suggests that school officials should make reasonable efforts to investigate allegations of misconduct before searching, especially if a more intrusive search is being contemplated. . . .

. . . *T.L.O.* demonstrated that the reasonable suspicion required to justify a school search may be evidenced by a good faith, common sense narrative explaining how a search was founded on the available information and a reasonable interpretation of this information rooted in professional judgment and experience. In *Redding*, the Court appears to be further emphasizing that school officials must also use good faith efforts to investigate prior to conducting a search, especially an intrusive search, in order to obtain relevant information that could more accurately guide or prevent an intrusive search, especially when this can be done with little cost, delay, or risk. In reasonably attempting to get answers to the relevant, fundamental questions of who, what, when, where, how, and why prior to a search, school officials are likely to be on much firmer constitutional ground than in searching without making prior good faith efforts to acquire readily obtainable information relevant to the contemplated search.

John Dayton & Anne Proffitt Dupre, *Searching for Guidance in Public School Search and Seizure Law: From T.L.O. to Redding*, 248 Educ. L. Rep. 19, 28-29 (2009). Another scholar agrees:

To permit any one of the vague indications that drugs are hidden in the undergarments to justify a strip search is unreasonable. For example, *a general practice among students of hiding pills in their underwear at the school should not suffice to warrant a strip search*. Next, it would be dangerous to allow school officials to base a strip search of a student on an incriminating statement by another student without making sure the statement has some level of credibility. Courts should require school officials to follow up on tips as much as reasonably possible to assure that they are reliable enough to warrant an intrusive strip search. Specifically, the credibility of the tip should be examined before strip searching. Finally, as happened in *Redding*, school officials sometimes obtain information about contraband one day, and the strip

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search is performed on another day. This situation raises concerns about the certainty that the contraband is located where a strip search would be necessary to uncover it. All of these factors represent obstacles school officials should overcome before they possess reasonable suspicion under the Fourth Amendment that a student is carrying drugs in his undergarments. Generic evidence suggesting drugs are located in a student's undergarments should not be enough for a strip search.

Timothy J. Petty, *Safford Unified School District v. Redding and School Strip Searches: Almost, but Not Quite There Yet*, 41 Seton Hall L. Rev. 427, 452-53 (2011) (footnotes omitted). Even in *Phaneuf v. Fraikin*, 448 F.3d 591 (2d Cir. 2006), which *did* involve individualized suspicion, a strip search violated the Fourth Amendment, even in light of the following facts: a fellow student's tip specifically accused Phaneuf of hiding marijuana "down her pants" during a bag check; Phaneuf had a history of disciplinary problems; her denial of the allegations was suspicious and suggested she was lying; and cigarettes were discovered in her purse. *Phaneuf*, 448 F.3d at 593-94. School officials even called her mother to conduct the strip search, but these facts were not enough to justify the search because no evidence showed that the student-informant was reliable in general, nothing corroborated the specific tip, and Phaneuf's past misbehavior did not involve drug use. *Id.* at 592-94.

As in *Redding* and *Phaneuf*, Academy officials failed to ask additional questions to determine the exigency of the situation. Rather than conduct intrusive bra-lifts, the school should have followed up with the student informants to ascertain the identity of the violators or inquired further to determine the nature of the substances. Moreover, while not expedient but to ensure Fourth Amendment protections along with the dignity and sanctity of T.A.S. and the other girls, T.A.S.'s parents could have been called before the bra-lift was conducted. These failures clearly weaken the argument that the search of T.A.S. was constitutional, as they indicate that *Redding's* additional factors appended to the "reasonableness-in-scope" prong of the *T.L.O.* standard when a search extends beneath the outer clothing—namely, "reasonable suspicion of danger or of resort to underwear"—were not met here. Still, it is the lack of any reason to suspect T.A.S. that is the fatal element here. The trial court, however, relied on "cases where special circumstances" eliminated the need for individualized suspicion and suspicionless searches were upheld, but, of the examples listed in its order, the only one relevant to the context here "involved random drug testing of student athletes."

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A decade after *T.L.O.*, the Supreme Court revisited the individualized suspicion question and held random, suspicionless drug testing of student athletes does not violate the Fourth Amendment's prohibition against unreasonable searches. *Vernonia*, 515 U.S. 646, 132 L. Ed. 2d 574. *Board of Education v. Earls*, 536 U.S. 822, 153 L. Ed. 2d 735 (2003), extended this holding to all students participating in extracurricular activities. It may at first appear that the realm of students' Fourth Amendment rights cases can be separated into two lines characterized by whether the search at issue was suspicion-based or not. It is crucial, however, to highlight the distinctions of the Court's suspicionless search holdings in order to assess the proper impact of these decisions on the case here. Moreover, with the advent of *Redding*, the Supreme Court's supplemental guidance as to more intrusive searches must be considered in any strip search case, regardless of the level of suspicion involved.

Contextually, the suspicionless urinalysis cases emphasize that the voluntary nature of participation in these activities allows for a higher intrusion of privacy. *See Vernonia*, 515 U.S. at 657, 132 L. Ed. 2d at 577 ("By choosing 'to go out for the team,' [school athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."); *see also Pacheco v. Hopmeier*, No. 09-cv-1207 BB/DJS, 2011 WL 907561, at *15 (D.N.M. Mar. 9, 2011) (applying *T.L.O.* to hold suspicionless unreasonable and rejecting as inapposite *Vernonia* and *Earls*, whose "rationale obviously distinguishes searches conducted on student participants in extracurricular activities from the general student body"); *State v. Gage R.*, 243 P.3d 453, 457 (N.M. Ct. App. 2010) (describing the "special needs" school cases as "a very limited exception to the reasonable suspicion requirement that permits searches of public school students" and finding it significant that "these cases involve obtaining consent through a threatened withholding of a benefit when consent is not given" such that "the 'special needs' doctrine has [no] application" to a search of a student's backpack). The voluntariness factor in the urinalysis context is clearly distinct from suspicionless personal searches of students participating only in the regular curriculum, as required by state law, during the academic part of the school day. Even if *Vernonia* can apply to searches of any student's person where government interests are compelling,⁶ the factual distinctions reveal

6. Some courts, particularly those of the 6th Circuit, have applied the *Vernonia* individualized suspicion analysis within the context of the *T.L.O.* reasonableness test to answer the second inquiry thereof, i.e., whether the scope of the search was reasonable. *See, e.g., Beard*, 402 F.3d at 604 ("In making this determination [that the scope

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that the search here does not belong in a class where generalized suspicion is sufficient.

The searches conducted without individualized suspicion in *Vernonia* and *Earls* passed muster pursuant to three factors: (1) the nature of the interest intruded upon and the student's legitimate expectation of privacy therein; (2) the character of the intrusion complained of; and (3) the nature and immediacy of the school's concern at and the efficacy of the means chosen to meet it. *Vernonia*, 515 U.S. 646, 132 L. Ed. 2d 564.

As discussed above, the lesser degree of privacy afforded students generally is further reduced by *voluntary* participation in an extracurricular activity such that "intrusions upon normal rights and privileges, including privacy" should be expected. *Id.* at 657, 132 L. Ed. 2d at 577. In this case, the trial court emphasized "the nature and selection of the student body" at an alternative school, but the record does not indicate whether *T.A.S.* was assigned to the Academy because of prior substance abuse or whether she had any past disciplinary problems involving drugs at all. Moreover, the makeup of the Academy's student population does not outweigh *T.A.S.*'s privacy interest against subjecting her unclothed body to exposure. Despite the trial court's finding that "[n]o private parts were exposed to support its order, the *Redding* Court declined to ascribe any significance to whether anyone saw anything and explained that the very act of students' pulling their underwear away from their bodies in the presence of school officials who could see the students necessarily exposed some degree of nakedness, and "reasonable societal expectations of personal privacy support the treatment of such a search as *categorically distinct*, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings." *Redding*, — U.S. at —, 174 L. Ed. 2d at 364 (emphasis added); *see also T.L.O.*, 469 U.S. at 337-38, 83 L. Ed. 2d at 740-41 ("A search of a child's person . . . is undoubtedly a severe violation of subjective expectations of privacy.").

T.A.S. thus clearly had a legitimate expectation of privacy beneath her outer clothing and had no reason to believe that her body would be subjected to exposure, especially when school officials had no basis for suspecting her. For, notwithstanding the fact that she attends an alternative school and is subjected to other, lesser intru-

of the search did not pass constitutional muster], we are guided by the Supreme Court's analysis in *Vernonia*, which sets forth the relevant criteria for evaluating searches performed in the absence of individual suspicion.").

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sions upon entry each day, “when the *categorically extreme intrusiveness* of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a *reasonable search that extensive calls for suspicion that it will pay off.*” *Redding*, — U.S. at —, 174 L. Ed. 2d at 365 (emphasis added). While attending an alternative school may compel the students to expect to be subjected to the inconvenience of passing through a metal detector or the moderate intrusiveness of having their backpacks searched each day, such does not demand an expectation that their underwear will be searched. *Redding’s* indication that strip searches are *sui generis*, intruding on a privacy interest distinct from all other types of searches, suggests that the suspicionless search rationale of *Vernonia* and the cases upon which it relies will not support a search of this kind, as “the content of the suspicion [will undoubtedly] fail[] to match the degree of intrusion.” *Id.* at —, 174 L. Ed. 2d at 364.

Moreover, in contrast to the minimal intrusion associated with urinalysis, the bra-lift at issue was degrading, demeaning, and highly intrusive. In collecting students’ urine samples: (i) no body parts were exposed and the conditions were nearly identical to using any public restroom; (ii) one official of the same gender as the students monitored the production of the sample; and (iii) the results of the search were “*not turned over to law enforcement authorities or used for any internal disciplinary function.*” *Vernonia*, 515 U.S. at 658, 132 L. Ed. 2d at 577-78. The process engaged in by the Academy was critically different: (i) school officials in the room with T.A.S. during the search could have positioned themselves to see her bra or breasts, *see Redding*, — U.S. at —, 174 L. Ed. 2d at 364; (ii) according to Ms. Robinson, there were not only “a couple of administrators” in the room with T.A.S. but also “the school resource officer” and a male official referred to as “Captain White” who runs the school’s alternative to suspension program, *see Thomas R. Hooks, A Rock, a Hard Place, and a Reasonable Suspicion: How the United States Supreme Court Stripped School Officials of the Authority to Keep Students Safe*, 71 La. L. Rev. 269, 296 (2010) (observing that courts generally interpret the requirement of *T.L.O.’s* permissibility-in-scope prong that the search not be excessively intrusive in light of the sex of the student to mean the school officials conducting the strip search “must be of the same sex as the student”); and (iii) the results of the search were indeed turned over to law enforcement authorities for use in the instant juvenile delinquency action, *see Pendleton*, 2009 WL 2849542, at *5 (citing *Doe ex rel. Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 355 (8th Cir.

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2004), where a suspicionless search of students' pockets and belongings "was 'qualitatively more severe than that in *Vernonia* and *Earls*' because the possibility existed that the police would bring criminal charges against [the student] as a result of items found during the search"). *Redding's* validation of Savana's account of the strip search as "embarrassing, frightening, and humiliating" as reasonable and the observation that "adolescent vulnerability intensifies the patent intrusiveness of the exposure" further suggest that the search extending beneath thirteen-year-old T.A.S.'s outer clothing was extremely more invasive than the searches in the drug-testing cases.

Finally, while deterring drug use by students is clearly an important governmental interest, *Vernonia*, 515 U.S. at 661, 132 L. Ed. 2d at 579, and possibly even more weighty at the Academy where many students have been in violation of the school district's substance abuse policy, "[t]he government's interest is 'diluted' when a school searches a group of students 'without reason to suspect that any particular student was responsible for the alleged' infraction." *Pendleton*, 2009 WL 2849542, at *5 (citation omitted); see also *Knisley*, 604 F.3d at 981 ("The lack of individualized suspicion and the search of the entire class further diminish the defendants' interest . . ."). Indeed, "without any individualized suspicion, 'the intrusiveness of the search of each individual is that much less likely to be successful.'" *Pendleton*, 2009 WL 2849542, at *5 (quoting *Beard*, 402 F.3d at 605). Here, despite the complete lack of any reasonable belief that any single student possessed any pills, the Academy searched all 134 of its students. Further, the school required all of the girls to perform the "bra lift" even if nothing revealed during the less intrusive part of the search suggested that the student was hiding contraband in her underwear. A search of the entire student body based on vague tips from unidentified students—where no follow-up investigation was made to determine who the actual perpetrators may be, how many students were estimated to be bringing pills into the school, or the nature and level of danger of the pills—was not an appropriate method of discovering the wrongdoers. See *Redding*, — U.S. at —, 174 L. Ed. 2d at 362 (holding the required knowledge under the reasonable suspicion standard is that a school administrator's search of each student must forecast "a moderate chance of finding evidence of wrongdoing").

As summarized by one scholar,

Application of these three factors to the student strip search reveals that such a search will only be reasonable when a school official possesses an individualized suspicion.

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First, the average student possesses a very legitimate expectation that he or she will not be subjected to a strip search. Second, it is nearly impossible to imagine a search more intrusive than one requiring a student to expose his or her naked body to a school official. As for the third factor, although schools do indeed have a compelling interest in deterring drug use and violence, when weighed against the students' interest in not being strip searched and the excessively intrusive nature of such searches, it may not be so compelling as to justify a blanket strip search of a group of children. The interest in preventing theft is even less compelling because of the absence of potential physical harm. Clearly, these three factors, especially the intrusive nature of these searches, weigh heavily in favor of a rule prohibiting the strip search of a student absent individualized suspicion.

Hooks, *supra*, at 305-06 (footnotes omitted). As applied here, it is indeed apparent that this case is distinct from the many decisions striking down group strip searches where the object of the search was stolen money or the theft other items. Where drugs are concerned, however, the overwhelming majority, if not all, of the rulings upholding searches that extended beneath the student's outer clothing involved an individualized suspicion that the particular student searched was responsible for the alleged violation.⁷ See, e.g., *Bridgman ex rel Bridgman v. New Trier High Sch. Dist. No. 203*, 128 F.3d 1146 (7th Cir. 1997) (student ordered to empty pockets and remove outer jersey, hat, shoes, and socks based on inappropriate behavior, bloodshot eyes, and dilated pupils suggesting marijuana use); *Cornfield ex rel. Lewis v. Consol. High Sch. Dist. No. 230*, 991

7. Where *T.L.O.* explicitly declined to equate schools with prison searches, see *T.L.O.*, 469 U.S. at 338-39, 83 L. Ed. 2d at 732-33 (“[I]t goes almost without saying that ‘[the] prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration[;] [w]e are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.’”), it is also noteworthy that the courts have overwhelmingly held that even prison officials must have reasonable, individualized suspicion before strip searching pre-trial detainees or arrestees who have not been convicted of the crime charged. See *Brewer v. Hayman*, No. Civ. No. 06-6294(DRD), 2009 WL 2139429, at *4 (D.N.J. Jul. 10, 2009) (unpublished) (cases cited); see also *Edgerly v. City & County of S.F.*, 599 F.3d 946, 958 (9th Cir. 2010) (citing *Redding* and noting: “Similarly, we have held in the border search context that requiring an arrestee to expose only his or her undergarments ‘tend[s] toward [a] strip search in that if conducted in public it can be said to result in embarrassment to one of reasonable sensibilities.’ We further held that, although it is ‘hardly feasible to enunciate a clear and simple standard for each possible degree of intrusiveness,’ such a search requires ‘suspicion . . . founded on facts specifically relating to the person to be searched, and [that] the search [be] no more intrusive than necessary to obtain the truth respecting the suspicious circumstances.’”).

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F.2d 1316 (7th Cir. 1993) (strip search of student suspected to be “crotching drugs” based observation of “unusual bulge” in crotch area seen by several school officials; student’s agitation when confronted with the suspicion; knowledge of his many prior incidents involving drugs; and student’s admission to teacher “that he was constantly thinking about drugs”); *Williams ex rel. Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991) (strip search for drugs where another student reported that Williams and another girl had vial containing white powder, follow-up investigation strengthened suspicions, vial discovered in purse of Williams’ companion); *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir. 1984) (reasonable to require male student to empty pockets and remove jacket, boots, and shirt where three administrators observed an exchange between him and another student believed to be drug transaction and principal smelled marijuana on his breath); *Widener v. Frye*, 809 F. Supp. 35 (S.D. Ohio 1992) (male student ordered to pull pants down and shorts up tight so anything concealed might be revealed where school authorities smelled marijuana on his person and he appeared sluggish).

While courts have given more latitude to school officials searching for drugs, the cases indicate that some level of individualized suspicion is required to venture beneath the outer clothing. And, after *Redding*, we are further instructed to implement a sliding-scale approach to the *T.L.O.* requirement that “the search *as actually conducted* [be] reasonably related in scope to the circumstances which justified the interference *in the first place*.” *T.L.O.*, 469 U.S. at 341, 83 L. Ed. 2d at 720 (emphasis added). Thus, individualized suspicion was required in each case where the Academy’s administrators made the “quantum leap” from the students’ jackets, socks, and shoes to their undergarments. Without more, the overly generalized and uncorroborated tip that unnamed “pills that would cause kids to be unsafe” were coming into the school, sometimes in students’ bras and underwear, was insufficient to validate a search of T.A.S.’s underwear. For, even in light of this information, the fact remains that there was no reason to suspect any of the students searched in the first place. Thus, proceeding to inspect T.A.S.’s bra was unreasonably excessive in scope, given that no additional facts, either known to the Academy prior to the less intrusive search of her belongings and outer clothing or discovered in the course thereof, could have caused officials to suspect *her in particular* or to believe that there were reasonable grounds for resorting to *her* underwear.

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In light of the foregoing, when any group search is conducted in the absence of individualized suspicion, even if the circumstances otherwise permit less invasive searches—ranging from personal effects and jackets, to pat-downs of the outer clothing, and even to searches of pockets, shoes, and socks—such a search that subjects the students’ undergarments or unclothed bodies to exposure is unconstitutional if school officials do not have reasonable grounds to believe the particular student possesses the item sought, unless the item is reasonably believed to be imminently dangerous. Although not at issue here, we can envision a clear exception to this rule if the object of the search seriously threatens the security and safety of the school and proceeding with a search lacking individualized suspicion could reasonably avoid immediate physical harm to those present on school grounds, such as when a dangerous weapon is involved and delaying the search is outweighed by the need to dispel the danger.⁸ See e.g., *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979 (8th Cir. 1996) (upholding search of pockets, jackets, shoes, and socks and, if metal detector sounded, some pat-downs, of all male sixth through twelfth graders after school bus driver informed principal about fresh cuts on bus seats and “that there was a gun at the school that morning,” concluding “the decision to undertake this generalized but minimally intrusive search for dangerous weapons was constitutionally reasonable” where principal “had two independent reasons to suspect that one or more weapons had been brought to school that morning”).⁹

8. Interestingly, the Brunswick County Board of Education Policy Manual seems to impose a similar rule under § 4342 governing “Student Searches,” but such was apparently not followed here:

If a frisk or “pat down” search of a student’s person is conducted, it must be conducted in private by a school official of the same gender and with an adult witness present, when feasible.

If the school official has reasonable grounds for suspecting that the student has on his or her person an item imminently dangerous to the student or to others, a more intrusive search of the student’s person may be conducted. Such a search may be conducted only in private by a school official of the same gender, with an adult witness of the same gender present, and only upon the prior approval of the superintendent or designee and to the extent so approved at the time, unless the health or safety of students will be endangered by the delay which might be caused by following these procedures.

9. In fact, *Thompson* appears to be the only case where a mass search conducted without any level individualized suspicion has been held constitutional and, importantly, did not involve a strip search. While the above-mentioned exception is clearly appropriate, “[i]n none of the cases [from *T.L.O.* to *Redding*] did school officials conduct strip searches to find weapons hidden in students’ underwear that might pose an imminent safety threat,” and it is also a bit more difficult to imagine a scenario where

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Academy officials in the case *sub judice*, however, had no reason to believe that the contraband at issue imperiled school safety.

We acknowledge that it is important to consider the role of school administrators, teachers, and school resource officers. Aside from providing education, schools have a legal obligation, acting in *loco parentis*, to serve as caretakers while students are at school and have a duty to keep the schools safe. It follows that if school administrators become aware that there are illegal substances or drugs in schools that they exercise diligence to eliminate their presence, set standards, and keep students safe. Still, school resource officers, who are law enforcement officers first, are charged with safekeeping, serving as quasi-councilors, confidantes, and mediators. Like all law enforcement officers, school resource officers in North Carolina always have the authority, and, depending on the criminal act, the obligation to charge anyone, including students who they allege broke the law. Thus, the trial court's finding that the Academy has a "no penalty disclosure" policy that a "student is given the opportunity at the time of the search to disclose whether or not they possess weapons or drugs," and may avoid repercussions by disclosing is of no consequence when the search is conducted in the presence of a resource officer and another law enforcement officer.

The school's role to educate and to act in *loco parentis* is further complicated by the reality that schools' actions are governmental in nature and, unlike parents against whom there are no 4th Amendment rights, can, by conducting searches outside acceptable parameters, abridge students' 4th Amendment rights. Balancing the Academy's interest in the safety of the school's population against the individual rights of its students, this case, involving only the most generalized and vague reasons to suspect any presence of harmful substances in circulation, was clearly not one where it could have been conceivable that resorting to such an intrusive search of every student without engaging in *any* follow-up investigation whatsoever would be constitutionally permissible. Accordingly, we hold the trial court erred in concluding the search of T.A.S. was reasonable. Thus, we reverse its order denying her motion to suppress the fruits of the unconstitutional search.

administrators could believe that students are concealing a dangerous weapon in their undergarments. Barry C. Feld, T.L.O. and Redding's *Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 Miss. L.J. 847, 941-42 & n.465 (2011).

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Reversed.

Judge HUNTER, JR. concurs in result with separate opinion.

Judge STEELMAN dissents.

HUNTER, JR., Robert N., Judge concurring in the result.

This case involves a motion made by a juvenile that invokes both the Fourth Amendment to the United States Constitution, which prohibits “unreasonable searches and seizures,” and article I, section 20 of the North Carolina Constitution, which prohibits general warrants. Article I, section 20 provides:

General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.

N.C. Const. art I, § 20.

Section 7B-2405 of our General Statutes grants a juvenile in a delinquency petition limited rights to contest the allegations of criminal conduct, including “[a]ll rights afforded adult offenders except the right to bail, the right of self-representation, and the right of trial by jury.” N.C. Gen. Stat. § 7B-2405(6) (2009). Clearly, the right to be free of unreasonable searches and seizures under both the state and federal constitutions is among these rights. The protection of these rights is secured when, as here, a juvenile files a motion to suppress to exclude illegally obtained evidence.

Although neither party has directed this Court to appellate decisions from this State on warrantless searches, I find the proper legal analysis of the facts of this case in our recent opinion in *Jones v. Graham Cnty. Bd. of Educ.*, 197 N.C. App. 279, 677 S.E.2d 171 (2009). See also *In re Stumbo*, 357 N.C. 279, 582 S.E.2d 255, 266 (2003) (Martin, J., concurring) (“[P]ermitting government actors ‘to search suspected places without evidence of the act committed’ . . . is tantamount to issuing a general warrant expressly prohibited by the North Carolina Constitution.” (quoting N.C. Const. art. I, § 20)).

Key in the *Jones* analysis is the weight to be given to the assertion by the government that a special need justifies the suspicionless search. Here, the State alleges a special need exists because of “the

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drug problem at the school and because the general student body is there as a result of school policy violations regarding drugs and weapons.” *Jones* requires that

[w]here the government alleges “special needs” in justification of a suspicionless search, “courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.” An important consideration in conducting the inquiry is whether there is “any indication of a concrete danger demanding departure from the Fourth Amendment’s” usual requirement of individualized suspicion. The purpose of the inquiry is “to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.”

Jones, 197 N.C. App. at 290–91, 677 S.E.2d at 179 (citations omitted).

The majority’s decision contains the analysis of federal law required by *Jones*, and I agree that *Safford Unified School Dist. No. 1 v. Redding*, — U.S. —, 129 S. Ct. 2633, 174 L. Ed. 2d 354 (2009), resolves this case.

Additionally, I would conclude the search at issue violates article I, section 20 of the North Carolina Constitution. My determination is based upon the difference in language between our Constitution and the United States Constitution. “‘Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens.’” *Jones*, 197 N.C. App. at 288, 677 S.E.2d at 177–78 (quoting *Corum v. Univ. of N. Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992)). As such, “the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution.” *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998), *quoted with approval in Jones*, 197 N.C. App. at 289, 677 S.E.2d at 178.

Where, as in this case, there is a close decision as to whether to allow a warrantless search, the language in our state constitution should tip the balance in favor of the privacy of the individual and against any warrantless searches by “any officer or other person,” such as school boards.

STEELMAN, Judge dissenting.

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Where TAS had a diminished privacy interest due to her attendance at an alternative school, the nature of the intrusion occasioned by the search in question was minimal, the governmental concern involved was important and immediate, and the search in question was an effective means of addressing that concern, the trial court did not err in denying TAS' motion to suppress. I must respectfully dissent.

I. Additional Facts

Additional facts should be noted. Students were sent to Brunswick County Academy ("the Academy") for violating the Brunswick County Code of Conduct, by engaging in violent behaviors and/or substance abuse. Pills, typically prescription medications, were discovered at the Academy two to three times within every nine week period. The Academy had a "no penalty disclosure" policy. If students voluntarily turned over items that were not allowed at the Academy, such as pills or weapons, then the student was not punished and law enforcement was not contacted. The Academy notified the student's parents, and the parents were required to pick up the contraband. Finally, the Academy's principal stated that during the search in question the girls' shirts remained down at all times, and no body parts were seen by the persons conducting the search.

II. Strip Search

At the heart of the majority opinion is the notion that TAS was subjected to a strip search by school authorities. This conclusion is not supported by the facts of this case.

I first note that on appeal, TAS does not challenge any of the trial court's findings of fact. The only arguments presented pertain to the trial court's conclusions of law. As such, the trial court's findings of fact are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). The search in question was described by the court in finding of fact eight:

each student was taken on an individual basis to another room in the school and the search was conducted. The search included shoes, book bags and coats. The school staff member or administration member conducting the search would pat down the socks. The girls were required to loosen their shirt tails and hook their thumbs under the bra and pull it out so that any contraband will fall out. No private parts were exposed.

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The majority equates this search to that conducted in the case of *Safford U. Sch. Dist. v. Redding*, 557 U.S. —, 174 L. Ed. 2d 354 (2009). That search was described as follows:

Romero and Schwallier directed Savana to remove her clothes down to her underwear, and then “pull out” her bra and the elastic band on her underpants. . . . The very fact of Savana’s pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.

Id. at —, 174 L. Ed. 2d at 364.

It is readily apparent that the only common factor between the search of TAS in the instant case and Savana in the *Safford* case is that each girl was required to pull out her bra. However, that is where any similarity ends. TAS was completely clothed throughout the search, while Savana was required to remove her clothing down to her bra and panties.

There is no statutory definition for “strip search” in the North Carolina General Statutes, and the appellate courts of North Carolina have not defined the term. Therefore, “we must give it that meaning generally recognized by lexicographers.” *Clinard v. White*, 129 N.C. 250, 251, 39 S.E. 960, 960 (1901). Black’s Law Dictionary defines strip search as “[a] search of a person conducted after that person’s clothes have been removed, the purpose [usually] being to find any contraband the person might be hiding.” Black’s Law Dictionary 1469 (9th ed. 2009). The search of TAS in this case was not a strip search. It is apparent from the opinion of the United State Supreme Court in *Safford* that what they found offensive was the exposure of the breasts and pelvic area of Savana, when there was no prior information that the drugs were hidden in those areas. In the instant case no clothes were removed, and no private parts were exposed. The instant case clearly did not involve a strip search.

III. Presence of Information as to Location of Drugs

The rationale of *Safford* is not applicable to the instant case. The Court held in *Safford* that “what was missing from the suspected facts that pointed to Savana was any indication of danger to the stu-

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dents from the power of the drugs or their quantity, and *any reason to suppose that Savana was carrying pills in her underwear.*" 557 U.S. at —, 174 L. Ed. 2d at 365 (emphasis added). In *Safford* there was no information that drugs were being concealed in the female student's bra; however, in the instant case school officials had been given specific information that pills were coming into the Academy hidden in the bras of female students. Further, the search in the instant case was much less intrusive than the one conducted in *Safford*. During the search in question no private parts were exposed, whereas in *Safford* the female student's breasts and pelvic area were exposed when she was searched.

The instant case is distinguishable from *Safford* based on the specific tip in the instant case that pills were coming into the school in the female students' bras, and the less intrusive nature of the search in the instant case.

IV. Suspicionless versus Suspicion-Based Searches

In *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 83 L. Ed. 2d 720, 734 (1985), the Supreme Court articulated a test for determining the reasonableness of a school search based on individualized suspicion. This test was applied in *Safford*. In *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564 (1995), the Supreme Court articulated the following test for determining the reasonableness of school searches not based upon individualized suspicion: (1) what is the nature of the privacy interest upon which the search intrudes? (2) what is the character of the intrusion that is complained of? and (3) what is the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it? The *Vernonia* test was applied to a suspicionless search in *Board of Education v. Earls*, 536 U.S. 822, 153 L. Ed. 2d 735 (2002). The Supreme Court has established two frameworks for evaluating the reasonableness of school searches. The first addresses searches based on individualized suspicion, and the second addresses suspicionless searches. Because individualized suspicion was lacking in the instant case, I would apply the test for reasonableness articulated in *Vernonia*.

V. Vernonia Test

a. Nature of the Privacy Interest

The Supreme Court has repeatedly recognized that schoolchildren possess a diminished expectation of privacy while in school due to

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the “schools’ custodial and tutelary responsibility for children.” *Vernonia*, 515 U.S. at 656, 132 L. Ed. 2d at 576; *see T.L.O.* 469 U.S. 325, 83 L. Ed. 2d 720; *Earls*, 536 U.S. 822, 153 L. Ed. 2d 735.

TAS had a diminished expectation of privacy as a student for whom the Academy had responsibility. *Vernonia*, 515 U.S. at 656, 132 L. Ed. 2d at 576. TAS’ expectation of privacy was further diminished by the fact that she was attending an alternative school for students who had previously violated the Brunswick County Code of Conduct. Due to the “at risk” nature of the student body, each day when entering the Academy every student was required to pass through a metal detector and have their book bags, purses, coats, and like items searched. TAS’ expectation of privacy was thus lowered by her attendance at an alternative school which more strictly monitored its student population, similar to adults working in a highly regulated industry. *See Skinner v. Railway Labor Exec. Assn.*, 489 U.S. 602, 627, 103 L. Ed. 2d 639, 666; *Vernonia*, 515 U.S. at 657, 132 L. Ed. 2d at 577.

b. Character of Intrusion

The search TAS was subjected to was only marginally more invasive than that to which she was subjected upon entering the Academy each morning. On 5 November 2008, TAS and the other female students of the Academy were asked to perform a bra lift to determine if they were hiding any pills in their bra. According to unchallenged finding of fact number eight “no private parts were exposed” during the search. TAS was fully aware that she would be subjected to a search upon entering the Academy, and the additional search that was conducted was only minimally more invasive.

Finally, the Academy had a “no penalty disclosure” policy in place. The trial court’s unchallenged finding of fact four held if students disclosed the possession of weapons or drugs there were no consequences. TAS could have avoided any criminal consequences of her possession of drugs by turning over the contraband she possessed. I would hold that the privacy interests implicated by the search were not significant, particularly in light of the trial court’s unchallenged findings of fact, which are binding upon appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

c. Nature, Immediacy, and Efficacy

i. Nature of the Governmental Concern

The Supreme Court has clearly established that deterring drug use by our Nation’s schoolchildren is an important governmental con-

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cern. *Vernonia*, 515 U.S. at 661-62, 132 L. Ed. 2d at 579-80. The nature of the governmental concern in the instant case is even greater than the general concern for deterring drug use by schoolchildren in that the students in the instant case attended an alternative school for students who had previously violated the code of conduct primarily as a result of substance abuse and/or violent behavior. The Academy students are even more vulnerable to the negative effects of drugs than typical schoolchildren.

ii. Immediacy of Governmental Concern

Evidence of an existing drug problem is not necessary to establish the immediacy of the governmental concern involved; however, it does help to “shore up an assertion of special need for a suspicionless general search program.” *Earls*, 536 U.S. at 835, 153 L. Ed. 2d at 748 (quotation omitted). There was evidence of drug use at the Academy. The principal of the Academy testified and the trial court found that drugs were intercepted at the Academy at least two or three times during each nine week grading period. I would hold that this, coupled with the “at risk” nature of the student body, provides evidence of the immediacy of the governmental concern at issue in the instant case.

iii. Efficacy of Means

The Supreme Court has “repeatedly refused to declare that only the ‘least intrusive’ search practicable can be reasonable under the Fourth Amendment.” *Vernonia*, 515 U.S. 663, 132 L. Ed. 2d at 581 (citation omitted). I would hold that the search in the instant case was effective at preventing and deterring drug use, particularly in light of the fact that the Supreme Court has made it clear that it will not engage in weighing arguments about least restrictive alternatives. *Id.* I would hold the trial court did not err in denying TAS’ motion.

VI. Concurrence

The concurring opinion concludes that the search in the instant case violates Article I, Section 20 of the North Carolina Constitution. While TAS raised arguments under the North Carolina Constitution in her motion to suppress, TAS failed to make any argument under Article I, Section 20 of the North Carolina Constitution at trial or in her brief to this Court; therefore, this issue is not properly before this Court. *State v. Ellis*, — N.C. App. —, —, 696 S.E.2d 536, 539 (2010); N.C. R. App. P. 28(a). “It is not the role of this Court to fabricate and construct arguments not presented by the parties before it.” *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 398, 617 S.E.2d

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306, 314 (2005) (citation omitted), *aff'd per curiam*, 360 N.C. 398, 627 S.E.2d 461 (2006).

VII. Conclusion

Pursuant to the analysis articulated in *Vernonia*, 515 U.S. 646, 132 L. Ed. 2d 564, I would hold that the trial court did not err in denying TAS' motion to suppress.

STATE OF NORTH CAROLINA v. LEE ROY ELLISON
STATE OF NORTH CAROLINA v. JAMES EDWARD TREADWAY

No. COA10-386
(Filed 19 July 2011)

**1. Search and Seizure— stop of vehicle—multiple factors—
informant's information**

The trial court did not commit plain error by denying defendant Ellison's motion to suppress drugs seized from his vehicle where defendant contended that officers stopped his truck based exclusively on insufficiently corroborated information received from an informant. The detective had ample justification for treating the information supplied by the informant as having been corroborated by subsequent events and the detective decided to stop Ellison's truck after considering a number of factors.

**2. Constitutional Law— effective assistance of counsel—fail-
ure to object—no prejudice**

The failure of trial counsel to object to the admission of challenged evidence at trial did not constitute ineffective assistance of counsel for defendant Ellison where Ellison did not make the required showing of prejudice.

3. Discovery— identity of informant—motion to reveal denied

The trial court did not err in a drugs prosecution by denying defendant Ellison's motion to require disclosure of an informant's identity. The detective had ample justification for stopping defendant Ellison and the denial of Ellison's request for disclosure of the informant's identity was fully consistent with N.C.G.S. § 15A-978(b).

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4. Drugs— trafficking—prescription opiates—entire weight of pills

The trial court did not err by denying defendant Ellison's motion to dismiss drug trafficking charges where defendant contended that he lacked adequate notice that possession of prescription Lorcet pills could result in being charged with trafficking in an opiate and being responsible for the entire weight of the pills.

5. Criminal Law— joinder of charges—other crimes

The trial court did not abuse its discretion by joining charges against both defendants for trial where defendant Treadway argued that this decision allowed the jury to consider evidence of other crimes introduced against defendant Ellison as evidence of Treadway's guilt. Treadway did not show that he was prejudiced by the admission of evidence concerning Ellison's 2003 drug-related activities.

6. Evidence— joined defendants—prior crimes or bad acts of one defendant—no prejudice

There was no plain error in a drugs prosecution against joined defendants where defendant Treadway argued that the trial court should not have admitted evidence about defendant Ellison's prior possession of prescription medications. Defendant Treadway was clearly not involved in the 2003 incident, the contested evidence was relevant to guilty knowledge, the trial court gave a limiting instruction, and Treadway did not meet his burden of showing that the outcome probably would have been different absent the challenged evidence.

7. Drugs— trafficking—evidence of possession—sufficient

The trial court did not err by denying defendant Treadway's motion to dismiss charges of trafficking in prescription drugs for insufficient evidence of possession. Defendant argued that the State's evidence was highly suspicious but did not suffice to permit a reasonable juror to conclude that he ever actually possessed or transported or sold any drugs; however, there was clear testimony that a witness gave prescription medications to Treadway and returned later for payment, and prescription drugs matching those described by the witness were found in the vehicle of Treadway's accomplice.

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8. Drugs— trafficking—prescription medications—opiates— statutes providing punishment

The trial court did not err by denying defendants' motions to dismiss charges of trafficking in opium and conspiracy to traffic in opium on the grounds that the medications at issue were not proscribed under N.C.G.S. § 90-95(h)(4). The General Assembly drafted N.C.G.S. § 90-95(h) for the purpose of punishing acts of drug trafficking in specific controlled substances at the level specified in N.C.G.S. § 90-95(h) regardless of the extent to which those same activities would also be subject to punishment under other provisions of N.C.G.S. § 90-05.

9. Evidence— trafficking in prescription drugs—evidence that drugs contained opium

The trial court did not abuse its discretion in a prosecution for trafficking in prescription drugs by admitting testimony from an SBI agent on rebuttal that dihydrocodeinone and hydrocodone contained opium.

10. Sentencing— clerical error—remanded

A prosecution for trafficking in prescription drugs was remanded for correction of a clerical error that had no impact upon the sentence.

Appeal by defendants from judgments entered 9 October 2009 by Judge Anderson D. Cromer in Ashe County Superior Court. Heard in the Court of Appeals 13 October 2010.

Attorney General Roy Cooper, by Assistant Attorney General Brandon L. Truman and Assistant Attorney General Robert D. Croom, for the State.

Megerian & Wells, by Jonathan L. Megerian and Franklin E. Wells, Jr., for Ellison.

Daniel F. Read, for Treadway.

ERVIN, Judge.

Defendants appeal from judgments entered by the trial court sentencing James Edward Treadway (Treadway) to a minimum term of 225 months and a maximum term of 279 months imprisonment in the custody of the North Carolina Department of Correction based on his convictions for trafficking in 28 grams or more of opium by posses-

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sion, trafficking in 28 grams or more of opium by delivery, and conspiring to traffic in 28 grams or more of opium by possession, and sentencing Lee Roy Ellison (Ellison) to a minimum term of 225 months and a maximum term of 279 months imprisonment in the custody of the North Carolina Department of Correction based on his convictions for trafficking in 28 grams or more of opium by possession, trafficking in 28 grams or more of opium by transportation, conspiring to traffic in 28 grams or more of opium by possession, and possession of a controlled substance.

On appeal, Treadway argues that the trial court erred in joining the Defendants' cases for trial, allowing the admission of evidence concerning Ellison's 2003 drug convictions, and denying his motion to dismiss for insufficiency of the evidence. In addition, Ellison argues that the trial court erred by denying his motion to suppress evidence and require disclosure of an informant's identity and his motion that the charges lodged against him be dismissed on constitutional grounds. Finally, both Defendants argue that the trial court erred by denying their motions to dismiss on the grounds that the conduct underlying their convictions was not covered by the statutory provisions applicable to drug trafficking and by permitting Special Agent Amanda Motsinger of the State Bureau of Investigation to present rebuttal testimony concerning the composition of the drugs in which Defendants allegedly trafficked. After careful consideration of Defendants' challenges to the trial court's judgments in light of the record and the applicable law, we conclude that no error of law occurred during the proceedings leading to the entry of the trial court's judgments and that Defendants are not entitled to any relief from those judgments on appeal.

I. Factual BackgroundA. Substantive Facts1. State's Evidence

In late July 2008, a confidential informant spoke with Detective Grady Price of the Ashe County Sheriff's Office and informed him of the existence of an ongoing arrangement between John Shaw and Defendants involving trading in prescription medications. According to the informant, Mr. Shaw, who possessed a valid prescription for hydrocodone, routinely sold that drug to Treadway, who, in turn, transferred it to Ellison. The informant described the transactions in question as recurring in nature, and stated that, typically, Mr. Shaw would fill his prescription for hydrocodone, drive to Treadway's resi-

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dence, deliver the hydrocodone to Treadway, and either remain at the residence or leave for a short period of time while Treadway drove to Ellison's place of business and effectuated the final transfer of the hydrocodone to Ellison. After delivering the hydrocodone to Ellison, Treadway would return to his residence and pay Mr. Shaw for the hydrocodone. The informant told Detective Price that this sequence of events represented a change from the parties' prior method of exchange, in which Ellison would join Mr. Shaw and Treadway at Treadway's residence for the purpose of conducting these transactions.

Based upon this information, Detective Price obtained a drug profile concerning Mr. Shaw from the CVS pharmacy at which Mr. Shaw generally had his prescriptions filled and learned that Mr. Shaw had been prescribed a substantial amount of hydrocodone and Xanax each month and that he had last filled his prescriptions on or about 6 July 2008. In response to a law enforcement request, a CVS employee notified Detective Price the next time Mr. Shaw called in to have these prescriptions filled and provided him with an approximate pickup time.

On 5 August 2008, Detective Price, along with two other law enforcement officers, placed the CVS store under surveillance and observed Mr. Shaw pull into the CVS parking lot, obtain his prescription medications at the pharmacy's drive-through window, and drive directly to Treadway's residence. The investigating officers watched Mr. Shaw enter and then depart from Treadway's residence. Shortly thereafter, Ellison arrived at and then departed from the same location. After Ellison left Treadway's residence, Detective Price stopped his truck and obtained Ellison's consent to a search of his vehicle. In the course of searching Defendant's vehicle, officers found two prescription pill bottles from which the labels had been removed. The pills contained in the bottles seized from Ellison's vehicle were sent to the State Bureau of Investigation for analysis.

Special Agent Motsinger, a forensic chemist, testified that the two bottles confiscated from Ellison's vehicle contained 90 hydrocodone¹ pills, which weighed a total of 75.3 grams, and 80 alprazolam² tablets, which weighed a total of 10 grams. In her rebuttal testimony, Special

1. Special Agent Motsinger testified that hydrocodone is a generic form of the name-brand drug Lorcet and stated on multiple occasions that hydrocodone and Lorcet contain the same drug.

2. Special Agent Motsinger testified at trial that alprazolam is a generic form of the name-brand drug Xanax, and specifically stated that alprazolam and Xanax are simply two names for the same drug.

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Agent Motsinger testified that both hydrocodone and dihydrocodeinone, which is a chemical compound in which hydrocodone is mixed with acetaminophen, were opium derivatives.

2. Ellison's Evidence

Ellison testified that he had obtained the Lorcet and Xanax seized at the time investigating officers stopped his truck on 5 August 2008 as a result of the fact that these medications had been prescribed for him by his physician. Ellison visited Treadway on 5 August 2008 in response to Treadway's request that Ellison make him a loan so that he could pay his electric bill. As a result, Ellison went to Treadway's residence and gave him \$100.00. Ellison denied any knowledge that Lorcet pills contained opium.

B. Procedural History

On 5 August 2008, warrants for arrest were issued charging Ellison with trafficking in 28 grams or more of opium by possession, trafficking in 28 grams or more of opium by transportation, conspiring with Treadway and Mr. Shaw to traffic in 28 grams or more of opium by possession, and possession of Xanax with the intent to sell or deliver. On 6 October 2008, the Ashe County grand jury returned bills of indictment charging Ellison with trafficking in 28 grams or more of opium by possession, trafficking in 28 grams or more of opium by transportation, conspiring with Treadway and Mr. Shaw to traffic in 28 grams or more of opium by possession, and possession of alprazolam with the intent to sell and deliver. On the same date, the Ashe County grand jury returned bills of indictment charging Treadway with trafficking in 28 grams or more of opium by possession, trafficking in 28 grams or more of opium by delivery, conspiring with Ellison and Mr. Shaw to traffic in 28 grams or more of opium by possession, and conspiring with Defendant Ellison and Mr. Shaw to deliver alprazolam. Prior to trial, Ellison filed motions seeking to have certain evidence seized as a result of the stopping of his vehicle suppressed and the identity of the informant disclosed and to have the trafficking charges dismissed on the grounds that convicting him for violating the trafficking statutes on the basis of the facts at issue here would violate his constitutionally protected rights to due process and to be free from cruel and unusual punishment. After hearing the evidence and arguments of counsel on 16 March 2009, Judge Edwin Wilson, Jr., denied Ellison's motions.

The charges against Defendants came on for trial before the trial court and a jury at the 5 October 2009 criminal session of the Ashe

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County Superior Court. On 9 October 2009, the jury returned verdicts convicting Treadway of trafficking in 28 grams or more of opium by possession, trafficking in 28 grams or more of opium by delivery, and conspiracy to traffic in 28 grams or more of opium by possession and convicting Ellison of trafficking in 28 grams or more of opium by possession, trafficking in 28 grams or more of opium by transportation, conspiracy to traffic in 28 grams or more of opium by possession, and possession of alprazolam. The trial court consolidated Ellison's convictions for judgment, sentenced him to a minimum term of 225 months and a maximum term of 279 months imprisonment in the custody of the North Carolina Department of Correction, and ordered him to pay a \$500,000.00 fine. Similarly, the trial court consolidated Treadway's convictions for judgment, sentenced him to a minimum term of 225 months and a maximum term of 279 months imprisonment in the custody of the North Carolina Department of Correction, and ordered him to pay a \$500,000.00 fine. Both Defendants noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

A. Ellison's Individual Arguments

1. Denial of Motion to Suppress and Disclose Informant's Identity

[1] On appeal, Ellison initially argues that the trial court erred by denying his motion to suppress evidence seized from his vehicle on 5 August 2008 and to have the identity of the informant who provided investigating officers with information concerning his alleged involvement in drug-related activities disclosed. More specifically, Ellison contends that the investigating officers stopped his truck based exclusively on insufficiently corroborated information received from an informant whose reliability had not been adequately established during the course of the investigation into Defendants' activities and that disclosure of the confidential informant's identity should have been required in order to permit him to adequately litigate his suppression motion. We disagree.

a. Validity of Investigative Detention

As a result of the fact that Ellison did not object to the admission of the evidence in question at trial, we review the denial of his suppression motion utilizing a "plain error" standard of review.³ "Plain

[2] 3. Ellison argues that the failure of his trial counsel to object to the admission of the challenged evidence at trial constituted ineffective assistance of counsel. Assuming that this argument is properly before us, we conclude that it lacks merit. In

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error is an error that is ‘so fundamental as to result in a miscarriage of justice or denial of a fair trial.’” *State v. Cunningham*, 188 N.C. App. 832, 835, 656 S.E.2d 697, 699 (2008) (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)). In order to establish “plain error,” Ellison is required to show “not only that there was error, but that absent the error, the jury probably would have reached a different result.” *Id.* (quoting *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12, *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498, 121 S. Ct. 582 (2000)).

In order to conduct a lawful investigatory detention, investigating officers must have a reasonable suspicion that criminal activity is in progress based on specific and articulable facts and reasonable inferences drawn from those facts. *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (stating that “[a]n investigatory stop must be justified by ‘a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity’”) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362, 99 S. Ct. 2637, 2641 (1979)). Information supplied by informants may help support a determination that an investigating officer had the reasonable suspicion necessary to justify an investigatory detention. *Adams v. Williams*, 407 U.S. 143, 147, 32 L. Ed. 2d 612, 617-18, 92 S. Ct. 1921, 1924 (1972). “It is well settled that ‘information given by one officer to another is reasonably reliable information’” for the purpose of supporting a search or seizure. *State v. Thomas*, 127 N.C. App. 431, 433, 492 S.E.2d 41, 42 (1997) (quoting *State v. Matthews*, 40 N.C. App. 41, 44, 251 S.E.2d 897, 900 (1979)). A careful review of the record demonstrates that, at the time he stopped Ellison’s vehicle, Detective Price had the reasonable suspicion required to justify that investigatory detention.

Detective Price decided to stop Ellison’s truck after considering a number of factors, including both information supplied by an informant and information developed in the course of his own investigative activities. The informant told Detective Price that Mr. Shaw had been prescribed hydrocodone and Xanax for a medical condition; that, after having his prescriptions filled, Mr. Shaw would immedi-

order to obtain relief on ineffective assistance of counsel grounds, Ellison must demonstrate both that he received deficient representation from his trial counsel and that there is a reasonable probability that the result at trial would have been different had he been properly represented. *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698, 104 S. Ct. 2052, 2068 (1984). As a result of the fact that Ellison has failed to establish that his suppression motion had merit, he has failed to make the required showing of prejudice, a fact that inexorably leads to the conclusion that his ineffectiveness claim lacks merit.

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ately take his medications to Treadway's residence, where he sold the medications to Treadway; and that Treadway subsequently sold some or all of the medications to Ellison. Subsequently, Detective Price learned in the course of investigating the validity of the informant's allegations that Mr. Shaw had a prescription for Lorcet and Xanax, observed Mr. Shaw fill these prescriptions, and followed Mr. Shaw from the pharmacy to Treadway's residence. At that point, Detective Price watched Mr. Shaw enter and then exit Treadway's residence. A few minutes later, Detective Price observed Ellison arrive at Treadway's residence. In addition to the information supplied by the informant and the result of his own investigation, Detective Price considered the activities occurring at Ellison's place of employment⁴, which were consistent with activities he had personally seen at other establishments at which drug-related activities occurred. According to Detective Price, his own observations and the results of an independent investigation were essentially consistent with the information provided to him by the informant.

The discrepancies between the information provided by the informant and the information that Detective Price obtained as the result of his own investigative activities should not obscure the fact that Detective Price's observations and the information supplied by the informant were generally consistent and that Detective Price had ample justification for treating the information supplied by the informant as having been corroborated by subsequent events. Moreover, despite the fact that Detective Price had not had any contact with the informant prior to this incident, one of Detective Price's co-workers, Sergeant Dennis Anders, had previously worked with the informant and found the informant to be reliable. According to Sergeant Anders, information provided by the informant on previous occasions had resulted in arrests. As a result of his conversations with Sergeant Anders and his own observations on 5 August 2008, Detective Price had a sufficient basis for assessing the informant's reliability. Based on the multitude of factors that contributed to Detective Price's decision to stop Ellison's truck, which consisted of considerably more than the information provided by the informant, we conclude that the trial court did not err, much less commit plain error, by denying Ellison's motion to suppress the evidence seized as a result of the 5 August 2008 stop of his vehicle.

4. These surveillance activities were conducted over the course of a six-day period and had been initiated in response to reports that drug-related activities were occurring at Ellison's place of employment.

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b. Disclosure of Informant's Identity

[3] In addition, the trial court did not err by denying Ellison's motion to require disclosure of the informant's identity. N.C. Gen. Stat. § 15A-978(b) provides, in pertinent part, that:

(b) In any proceeding on a motion to suppress evidence pursuant to this section in which the truthfulness of the testimony presented to establish probable cause is contested and the testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, the defendant is entitled to be informed of the informant's identity unless:

- (1) The evidence sought to be suppressed was seized by authority of a search warrant or incident to an arrest with warrant; or
- (2) There is corroboration of the informant's existence independent of the testimony in question.

As we explained in *State v. Bunn*, 36 N.C. App. 114, 116, 243 S.E.2d 189, 190, *disc. review denied*, 295 N.C. 261, 245 S.E.2d 778-79 (1978), the inquiry required by N.C. Gen. Stat. § 15A-978(b) relates to the informant's existence, not his or her reliability. Ellison has not contested the informant's existence either at trial or on appeal. In addition, the record contains ample evidence corroborating the informant's existence. In *Bunn*, we found that an informant's existence was sufficiently corroborated when a second officer other than the informant's primary contact testified to "such things as the [primary] officer's prediction to others of certain events of which he could not personally know, accompanied by a declaration that his informant has told him so." *Bunn*, 36 N.C. App. at 116, 243 S.E.2d at 190-91. In this case, Detective Diane Hale testified that Detective Price had told her about information that he had gained from a "tipster" regarding an illegal drug transaction and that she confirmed the truth of such information through her own investigation. As a result, given that Detective Price had ample justification for stopping Ellison and that the denial of Ellison's request for disclosure of the informant's identity was fully consistent with N.C. Gen. Stat. § 15A-978(b), we conclude that Ellison's first challenge to the trial court's judgment lacks merit.

2. Constitutional Challenges to the Trafficking Statutes

[4] Secondly, Ellison contends that the trial court erred by denying his motion to dismiss the trafficking charges on the grounds that a trafficking conviction stemming from the facts at issue would

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infringe upon his constitutional rights to due process and freedom from cruel and unusual punishment. In support of this argument, Defendant contends that he lacked adequate notice that “possession of prescription Lorcet pills could result in being charged with trafficking in an opiate and being responsible for the entire weight of the pills” and because punishment under the trafficking statutes on the basis of the facts contained in the present record would be grossly unfair given the relatively small amount of controlled substance contained in the medications involved in the trafficking charges before the trial court in this case. We disagree.

In *State v. McCracken*, 157 N.C. App. 524, 526, 579 S.E.2d 492, 494 (2003), the defendant argued that the “trial court should have allowed her motion to dismiss the trafficking charges [under N.C. Gen. Stat. § 90-95(h)(4)] because, of the 5.4 grams of Oxycontin sold[], only 1.6 grams consisted of the controlled substance oxycodone.” The defendant in *McCracken* contended that, “because the remaining ingredients in each tablet consisted of filler substances, their weight should not have counted toward the four grams or more charged in the indictment.” *Id.* The defendant attempted to differentiate the facts of her case from those at issue in *State v. Jones*, 85 N.C. App. 56, 68, 354 S.E.2d 251, 258 (stating that, “[c]learly, the legislature’s use of the word ‘mixture’ establishes that the total weight of the dosage units . . . is sufficient basis to charge a suspect with trafficking”), *disc. review denied*, 320 N.C. 173, 358 S.E.2d 62, *cert. denied*, 484 U.S. 969, 98 L. Ed. 2d 404, 108 S. Ct. 465 (1987), by arguing that “prescription medication in tablet form should be treated differently.” *McCracken*, 154 N.C. App. at 527, 579 S.E.2d at 494. On appeal, we rejected the defendant’s argument, concluding that “the language ‘or any mixture containing such substance’ presents a catch-all provision for any variation in form, weight, or quantity of the controlled substance and does not lead to the conclusion that the Legislature did not intend to include tablets within the definition of ‘mixture.’” *Id.* at 528, 579 S.E.2d at 495. As a result, *McCracken* clearly indicates that liability for trafficking cases involving prescription medications hinges upon the total weight of the pills or tablets in question instead of the weight of the controlled substance contained within those medications, depriving Ellison’s “lack of notice” argument of any merit.

Ellison’s “substantive unfairness” challenge to the application of the trafficking statutes to the facts of this case hinges upon the assertion that finding someone guilty of trafficking based upon the pos-

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session of a small amount of actual controlled substances would be “grossly disproportionate,” “exceedingly unusual,” and offend the “public sense of fair play.” We addressed a closely related argument advanced in connection with a challenge to a conviction for trafficking in cocaine in violation of N.C. Gen. Stat. § 90-95(h)(3) in *State v. Tyndall*, 55 N.C. App. 57, 60-61, 284 S.E.2d 575, 577 (1981), in which the defendant argued that construing the relevant statutory language so as to base the required weight determination on the total weight of a mixture containing a controlled substance as compared to the actual weight of the controlled substance contained in the mixture produced an unfair and illogical result. Although we expressed some sympathy for this argument, we ultimately rejected the defendant’s claim because:

Defendant . . . overlooks the purpose behind [N.C. Gen. Stat. §] 90-95(h)(3)(a) of deterring “trafficking” in controlled substances. Our legislature has determined that certain amounts of controlled substances and certain amounts of mixtures containing controlled substances indicate an intent to distribute on a large scale. Large scale distribution increases the number of people potentially harmed by use of drugs. The penalties for sales of such amounts, therefore, are harsher than those under [other statutes].

Id. Similarly, in *State v. Perry*, 316 N.C. 87, 101-02, 340 S.E.2d 450, 459 (1986), the Supreme Court stated, in the context of a challenge to the trafficking in heroin statute, that “the imposition of harsher penalties for the possession of a mixture of controlled substances with a larger mixture of lawful materials has a rational relation to a valid State objective, that is, the deterrence of large scale distribution of drugs.” See also *State v. Conway*, 194 N.C. App. 73, 82, 669 S.E.2d 40, 46 (2008) (stating that, “if the General Assembly had chosen to define the quantity of methamphetamine needed to constitute trafficking as 28 grams or more and added, as it did in other sections of the trafficking statute, the disjunctive clause ‘or any mixture containing such substance,’ the total weight of the liquid found with detectable amounts of methamphetamine would be sufficient to establish a violation of” the trafficking in methamphetamine statutes), *disc. review denied*, 363 N.C. 132, 673 S.E.2d 665 (2009). In view of the fact that the ultimate responsibility for determining the manner in which criminal offenses should be punished lies with the General Assembly and the fact that there is a rational basis for subjecting individuals involved in large scale distribution of mixtures containing controlled

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substances to more severe punishment, we conclude that the application of the trafficking statutes to the facts of this case does not violate the constitutional provisions upon which Ellison relies.

B. Treadway's Individual Arguments

1. Joinder of Defendants

[5] On appeal, Treadway argues that the trial court erred by granting the State's motion to join the charges against both Defendants for trial. On appeal, Treadway argues that the trial court's decision to join the cases against both Defendants for trial resulted in a situation in which the jury was allowed to consider "other crimes" evidence introduced against Ellison as evidence of his own guilt. We disagree.

Joinder of charges against multiple defendants for trial is governed by N.C. Gen. Stat. § 15A-926(b)(2), which provides that:

Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:

- a. When each of the defendants is charged with accountability for each offense; or
- b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:
 1. Were part of a common scheme or plan; or
 2. Were part of the same act or transaction; or
 3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

In cases in which "each defendant is sought to be held accountable for the same crime or crimes[,] "public policy strongly compels consolidation [of trials] as the rule rather than the exception." *State v. Nelson*, 298 N.C. 573, 586, 260 S.E.2d 629, 639 (1979), *cert. denied*, 446 U.S. 929, 64 L. Ed. 2d 282, 100 S. Ct. 1867 (1980)).

The decision to grant or deny a joinder motion is committed to the "sound discretion of the trial [court]" and will not be disturbed on appeal "[a]bsent a showing that [] defendant[s were] deprived of a fair trial by [the fact of] joinder." *State v. Paige*, 316 N.C. 630, 641, 343 S.E.2d 848, 855 (1986) (citing *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985) and quoting *Nelson*, 298 N.C. at 586, 260 S.E.2d at 640). "A

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defendant may be deprived of a fair trial where evidence harmful to the defendant is admitted which would not have been admitted in a severed trial.” *State v. Wilson*, 108 N.C. App. 575, 589, 424 S.E.2d 454, 462 (citing *State v. Lowery*, 318 N.C. 54, 61, 347 S.E.2d 729, 735 (1986)), *disc. review denied*, 333 N.C. 541, 429 S.E.2d 562-63 (1993). However, “[i]t is not uncommon where two defendants are joined for trial that some evidence will be admitted which is not admissible as against both defendants,” leading “[o]ur Courts [to] recognize[] that ‘limiting instructions ordinarily eliminate any risk that the jury might have considered evidence competent against one defendant as evidence against the other.’” *Id.* at 583, 424 S.E.2d at 458 (quoting *Paige*, 316 N.C. at 643, 343 S.E.2d at 857). As a result, the presentation of evidence admissible to prove the guilt of only one of multiple defendants whose guilt is being considered in the context of a joint trial will not, without more, render the joinder of multiple defendants for trial inappropriate.

If we were to agree with the defendant [] that the introduction of [evidence admissible against only one of the defendants joined for trial] required a severance of the defendants’ trials, we would in effect be ruling that co-defendants may not be joined for trial in this state. It would be unusual for all evidence at a joint trial to be admissible against both defendants, and we often rely on the common sense of the jury, aided by appropriate instructions of the trial judge, not to convict one defendant on the basis of evidence which relates only to the other.

Paige, 316 N.C. at 643, 343 S.E.2d at 856-57.

Although he argues in favor of a contrary result, Treadway has not shown that he was prejudiced by the admission of evidence concerning Ellison’s 2003 drug-related activities. Former Detective Christopher Miller testified that Ellison’s residence was searched by law enforcement officers in 2003, that “multiple prescription bottles” that did not belong to him or any occupant of the residence were discovered during the search, and that a bottle containing 59 prescription Xanax pills and bearing the name of a third party was seized from Ellison’s person. In addition, the State cross-examined Ellison in an attempt to confirm Detective Miller’s account of the 2003 incident. Although he admitted that he had been convicted of possessing marijuana with the intent to manufacture, sell, and deliver in 2004 based upon the 2003 incident in the course of cross-examination, Ellison answered the State’s inquiries in an evasive manner and never directly admitted to having engaged in any criminal activities involving pre-

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scription medications in 2003. The State's questioning clearly established that this 2004 conviction stemmed from the 2003 search. When asked on cross-examination if "Mr. Treadway was[] involved in [the 2003 incident] in any way," Detective Miller replied "No, sir." After allowing the admission of this evidence, to which Treadway never objected, the trial court gave an appropriate limiting instruction describing the purposes for which the jury was permitted to consider evidence concerning this 2003 incident in deciding the issues under consideration in this case.

At bottom, Treadway's challenge to the trial court's decision to allow the State's joinder motion consists of little more than an argument that, since Treadway "had nothing to do with [the 2003 incident,]" the admission of evidence concerning those events "prevented him from receiving a fair trial." As we read the controlling case law, however, Treadway must do more than merely establish that evidence which was inadmissible against him was admitted for use against Ellison. *Paige*, 316 N.C. at 642, 343 S.E.2d at 856-57. Instead, Treadway must demonstrate that he was actually prejudiced by the admission of the testimony in question. In view of the fact that the evidence in question involved an incident in which Treadway was clearly not involved and the fact that the trial court gave an appropriate limiting instruction relating to this evidence, we conclude that Treadway has simply failed to make the required showing of prejudice in this instance.

Although Treadway attempts to analogize the present case to *Wilson*, in which we held that the trial court erred by allowing joinder when one defendant was charged with several offenses in which the co-defendant was not involved, resulting in a situation in which the co-defendant had to "sit through the testimony of eleven witnesses and two and one-half days of trial before any evidence was received as against him," *Wilson*, 108 N.C. App. At 589, 424 S.E.2d at 462, we do not find this comparison persuasive. In *Wilson*, evidence admissible against only one of the two defendants was presented over the course of multiple days and through the testimony of numerous witnesses. The evidence concerning the 2003 incident presented at Treadway's trial was contained in a portion of the testimony provided by two witnesses, whose discussion of this particular issue lasted only a matter of minutes instead of hours or days. In view of the differences in the scope and duration between the evidence at issue in *Wilson* and the evidence at issue here, we are unable to conclude that *Wilson* necessitates a decision in Treadway's favor with respect to the joinder issue. As a result, we conclude that the trial

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court did not abuse its discretion by granting the State's motion to join the charges against both Defendants for trial.

2. Ellison's 2003 Drug-Possession Related Incident

[6] Secondly, Treadway argues that the trial court erred by allowing the admission of evidence concerning Ellison's possession of prescription medications in 2003 into evidence. According to Treadway, the challenged evidence was "irrelevant and its probative value was outweighed by its prejudicial effect." As a result of the fact that Treadway, unlike Ellison, did not object to the introduction of this evidence at trial, his challenge to the trial court's failure to exclude the evidence in question is subject to "plain error" review. As we have already noted, "plain error" is an error that is so significant that it results in the denial of a fair trial, or relates to something so basic, so prejudicial, so lacking in its elements that justice could not have been done. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Defendant is not entitled to relief on appeal based upon this contention.

"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." N.C. Gen. Stat. § 8C-1, Rule 404(b). However, evidence of other crimes, wrongs, or acts may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* Evidence is relevant if it tends "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. Thus, evidence that Ellison possessed prescription drugs in 2003 would be admissible in the event that it was relevant for some purpose other than showing his propensity to engage in unlawful conduct. *State v. Lofton*, 193 N.C. App. 364, 371, 667 S.E.2d 317, 322 (2008) (quoting *State v. Bagley*, 321 N.C. 201, 206-07, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912, 108 S. Ct. 1598 (1988)).

At trial, the trial court found that the challenged evidence was admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b) for the limited "purposes of [proving] motive, opportunity, intent, plan, knowledge, identity, absence of mistake, [and] absence of accident." In order to obtain a conviction for a trafficking offense, the State must prove that a defendant knowingly possessed or otherwise dealt with the controlled substance at issue in that case. *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985). Where, as here, " 'guilty knowledge is

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an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite guilty knowledge, even though the evidence reveals the commission of another offense by the accused.’” *Id.* at 406, 333 S.E.2d at 704 (quoting *State v. McClain*, 240 N.C. 171, 175, 81 S.E.2d 364, 367 (1954)). In *Weldon*, the Supreme Court upheld the admission of evidence in a trafficking case to the effect that controlled substances had been discovered at the defendant’s residence on two occasions other than the one underlying the charges for which the defendant was on trial. *Id.* at 411, 333 S.E.2d at 707. In rejecting the defendant’s challenge to the admission of this evidence, the Supreme Court found that the “challenged evidence [was] probative of defendant’s guilty knowledge in connection with the crime for which she was being tried[, insofar as] [t]he likelihood of defendant’s knowledge of the drugs at her premises increases as the instances of discovery of drugs there accumulate.” *Id.* at 406-07, 333 S.E.2d at 705-06. We find the facts of *Weldon* analogous to those at issue here and distinguishable from those in *State v. Carpenter*, 361 N.C. 382, 391-92, 646 S.E.2d 105, 112 (2007) (holding that the similarities between a cocaine sale in 1996 and an incident involving the possession of cocaine alleged to be intended for sale in 2004 were not sufficiently similar to permit the admission of evidence concerning the earlier incident during a trial addressing the issue of the defendant’s guilt of possession with intent to sell or deliver arising from the 2004 incident),⁵ upon which Treadway relies, and thus reject Treadway’s contention that the challenged evidence was only relevant “to show Ellison’s propensity for illegal drug possession.”⁶

5. Among other things, the time lapse at issue in *Carpenter* was materially greater than the one at issue here. In addition, the facts surrounding the 2003 incident, in which Ellison possessed medication bottles that had originally been prescribed for third parties, were much more similar to the facts relating to the charges for which Ellison was on trial than was the case with respect to the facts at issue in *Carpenter*. Finally, the State sought to obtain admission of the evidence at issue in *Carpenter* for the purpose of showing intent, while the evidence at issue here was admitted for a range of different purposes, including proof of guilty knowledge. As a result, we do not believe that the Supreme Court’s decision in *Carpenter* necessitates a determination that the admission of evidence concerning the 2003 incident violated the strictures of N.C. Gen. Stat. § 8C-1, Rule 404(b).

6. In seeking to persuade us of the merits of this contention, Treadway does little more than restate the arguments that he advanced in connection with his challenge to the trial court’s decision to join the charges against both Defendants for trial. Having already rejected that argument in the joinder context, we see no need to reiterate our reasons for rejecting that argument in detail again. We do, however, note that the record clearly established that Treadway was not involved in Ellison’s controlled-substance related activities in 2003 and that the trial court clearly instructed

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Having determined that the contested evidence was relevant for one of the purposes expressly authorized by N.C. Gen. Stat. § 8C-1, Rule 404(b), we now turn to the issue of whether the challenged evidence was subject to exclusion under N.C. Gen. Stat. § 8C-1, Rule 403, which provides that, even though relevant, “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Lofton*, 193 N.C. App. at 371, 667 S.E.2d at 322 (explaining that, “‘once a trial court has determined th[at] evidence is admissible under Rule 404(b), the court must still decide whether there exists a danger that unfair prejudice substantially outweighs the probative value of the evidence.’”) (quoting *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005)). “‘Whether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion.’” *State v. Cunningham*, 188 N.C. App. 832, 836-37, 656 S.E.2d 697, 700 (2008) (quoting *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995)). Assuming that we are entitled to consider this argument on the merits in a plain error context, *Id.* at 837, 656 S.E.2d at 700 (stating that “we do not apply plain error ‘to issues which fall within the realm of the trial court’s discretion’”) (quoting *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997, 121 S. Ct. 1131 (2001)), we find that the trial court did not abuse its discretion by admitting the challenged evidence given the fact that Treadway was clearly not involved in the 2003 incident, the fact that the challenged evidence was clearly relevant to the knowledge issue in Ellison’s case, and the fact that the trial court gave an adequate limiting instruction to the jury. As a result, we conclude that Treadway has failed to carry his burden of demonstrating that the trial court erred by admitting evidence concerning the 2003 incident involving Ellison or that, “absent the erroneous admission of the challenged evidence, the jury probably would not have reached its verdict of guilty.” *Id.* at 835, 656 S.E.2d at 699-700. Thus, we conclude that Treadway’s challenge to the admission of the challenged evidence lacks merit.

the jury concerning the purposes for which the challenged evidence was admissible, a set of facts that makes it difficult for us to see how any error that the trial court may have committed in admitting evidence concerning Ellison’s 2003 conduct could have prejudiced Treadway.

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3. Sufficiency of the Evidence

[7] Finally, Treadway contends that the trial court erred by denying his motion to dismiss for insufficiency of the evidence. In essence, Treadway contends that the record simply does not contain sufficient evidence to support a finding that he actually possessed the prescription medications at issue here. We disagree.

In order to survive a motion to dismiss predicated upon the alleged insufficiency of the evidence to support a finding of guilt, the State must elicit “substantial evidence of each essential element of the crime [charged] and that the defendant is the perpetrator.” *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998), *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548, 122 S. Ct. 628 (2001). Substantial evidence is sufficient 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 (citing *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899, *cert. denied*, 531 U.S. 994, 148 L. Ed. 2d 459, 121 S. Ct. 487 (2000)), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403, 123 S. Ct. 495 (2002). In determining whether the record contains substantial evidence of guilt, the trial court must consider the evidence in the light most favorable to the State and draw all reasonable inferences that may be made from the evidence in the State’s favor. *Id.* (citing *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001), *overruled on other grounds in State v. Allen*, 359 N.C. 425, 437, 615 S.E.2d 256 (2005), *disapproved of on other grounds in State v. Lasiter*, 361 N.C. 299, 306, 643 S.E.2d 909, 913 (2007)). We review the trial court’s ruling with respect to such a dismissal motion on a *de novo* basis. *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956).

According to Treadway, the evidence presented by the State, although “highly suspicious,” did not suffice to permit a reasonable juror to conclude that he “ever actually possessed or transported or sold any drugs.”⁷ However, during the course of his trial testimony, Mr. Shaw clearly stated that he gave prescription medications to Treadway on 5 August 2008:

Q. [O]n August 5th, what did you do with your—with the Lorcet and the Xanax on that date?

7. Treadway was neither charged with nor convicted of a crime involving the transportation of illicit drugs. As a result, we will treat his challenge to the sufficiency of the evidence to support his trafficking convictions as resting on allegations that the evidence did not suffice to show that he ever possessed and delivered the medications in question.

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A. I took them to Mr. Treadway's.

Q. Okay. And what did you do with them?

A. Gave them to [him].

Q. Okay. And how much did you give him?

A. I think it was—it was either 80 or 90 Lorcets, and I think maybe 90 Xanax.

Mr. Shaw claimed to have been selling Lorcet and Xanax to Treadway since the beginning of 2008. More specifically, Mr. Shaw testified that he would give his medications to Treadway at his residence; that he would leave; that he would return thirty minutes to an hour later for the purpose of collecting payment; and that he had seen Ellison approaching Treadway's residence on several occasions while waiting to return and collect his payment. On 5 August 2008, Mr. Shaw claimed to have transferred the medications to Treadway in their original pharmacy bottles; however, he removed the labels from these bottles prior to the exchange. Before he departed from Treadway's residence, Treadway told Mr. Shaw he would call "Roy," which Mr. Shaw understood to be a reference to Ellison. This evidence, combined with the discovery of prescription drugs matching those that Mr. Shaw gave to Treadway in Ellison's vehicle, provides ample support for a jury finding that Treadway possessed the Lorcet tablets and delivered them to Ellison. As a result, Treadway's challenge to the sufficiency of the evidence to support his trafficking convictions lacks merit.

C. Joint Arguments

1. Sufficiency of the Evidence

[8] In their briefs, Defendants argue that the trial court erred by denying their motions to dismiss the trafficking in opium and conspiracy to traffic in opium charges on the grounds that the medications at issue, which are Schedule III controlled substances, are not punishable under N.C. Gen. Stat. § 90-95(h)(4). We disagree.⁸

A proper resolution of this issue requires us to construe the relevant statutory provisions. "The principal goal of statutory construc-

8. The State contends that Ellison waived his right to challenge the sufficiency of the evidence to support his conviction because he failed to renew his dismissal motion after presenting evidence in his own defense. We need not determine the validity of the State's argument given the necessity for us to address this claim in connection with Treadway's appeal and given that we have found that it lacks substantive merit in that context.

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tion is to accomplish the legislative intent.” *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671, 119 S. Ct. 1576 (1999)). “The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish.” *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). “Individual expressions must be construed as 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)). We will attempt to construe the relevant statutory provisions utilizing these well-established rules of construction.

N.C. Gen. Stat. § 90-95(h)(4) provides that:

Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as “trafficking in opium or heroin” and if the quantity of such controlled substance or mixture involved:

. . . .

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months in the State’s prison and shall be fined not less than five hundred thousand dollars (§ 500,000).⁹

At trial, the State presented substantial evidence tending to show Defendants’ guilt of trafficking-related offenses. Special Agent Motsinger testified that a portion of the pills seized from Ellison’s vehicle contained a mixture of hydrocodone and acetaminophen; that hydrocodone is a derivative of opium; that a mixture consisting of hydrocodone combined with acetaminophen is called dihy-

9. According to N.C. Gen. Stat. § 90-95(i), “[t]he penalties provided in subsection (h) of this section shall also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section.”

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drocodeinone; and that dihydrocodeinone is a derivative of opium.¹⁰ Thus, the State clearly presented substantial evidence tending to show that the pills seized from Ellison consisted of a mixture that contained an opiate derivative. As a result of the fact that such an opiate derivative is exactly the sort of substance to which N.C. Gen. Stat. § 90-95(h)(4), when read literally, applies, we conclude that the record contained more than enough evidence to support a determination that Defendants' conduct was subject to the trafficking statutes.

Even so, Defendants argue that N.C. Gen. Stat. § 90-95(h)(4) does not apply in cases such as this one. At bottom, Defendants' argument rests on the claim that "the legislature never intended for [N.C. Gen. Stat.] § 90-95(h)(4) to address prescription medication, as [N.C. Gen. Stat. §] 90-95(d)(2) already addresses those violations." We do not find Defendants' logic persuasive.

N.C. Gen. Stat. § 90-95(d)(2) provides that:

(d) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(3) with respect to:

....

- (2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a Class 1 misdemeanor. If the controlled substance exceeds four tablets, capsules, or other dosage units or equivalent quantity of hydromorphone or if the quantity of the controlled substance, or combination of the controlled substances, exceeds one hundred tablets, capsules or other dosage units, or equivalent quantity, the violation shall be punishable as a Class I felony. If the controlled substance is methamphetamine, amphetamine, phencyclidine, or cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocanized

10. N.C. Gen. Stat. § 90-90(1)(a) explicitly treats hydrocodone as an "[o]pium or opiate, [or] a[] salt, compound, derivative, or preparation of opium and opiate."

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coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine), the violation shall be punishable as a Class I felony.

In seeking to persuade us of the merit of their position, Defendants emphasize that N.C. Gen. Stat. § 90-95(d)(2) contains language typically associated with the measurement of prescription drugs, as opposed to street drugs. According to Defendants, the presence of this language proves that the General Assembly intended that N.C. Gen. Stat. § 90-95(d)(2) govern criminal liability associated with prescription medications in lieu of N.C. Gen. Stat. § 90-95(h)(4). Defendants' logic is, however, unsound.

A fundamental problem with Defendants' argument is that N.C. Gen. Stat. § 90-95(d) clearly limits its application to situations not governed by N.C. Gen. Stat. § 90-95(h). That fact alone tends to establish that, to the extent that the provisions of N.C. Gen. Stat. § 90-95(d)(2) conflict with N.C. Gen. Stat. § 90-95(h)(4), the provisions of N.C. Gen. Stat. § 90-95(h)(4) control.

Moreover, the relevant statutory provisions do not, contrary to the implication of Defendants' argument, apply to identical factual situations. Simply put, the trafficking statutes apply to activities that N.C. Gen. Stat. § 90-95(d)(2) simply does not address. Although N.C. Gen. Stat. § 90-95(h)(4) penalizes the sale, manufacture, delivery, transportation, and possession of certain quantities of mixtures containing opiate derivatives, N.C. Gen. Stat. § 90-95(d)(2) only applies to violations of N.C. Gen. Stat. § 90-95(a)(3), the statutory provision that makes it illegal to "possess a controlled substance." Acceptance of Defendants' argument would mean, contrary to the plain language of N.C. Gen. Stat. § 90-95(h)(4), that the sale, manufacture, delivery, or transportation of prescription medications containing opiate derivatives would not be subject to any sort of separate punishment of the type contemplated by both the trafficking statutes and N.C. Gen. Stat. § 90-95(a)(1) (making "it . . . unlawful for any person[t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance").¹¹ As a result, given the complete absence of any language in N.C. Gen. Stat. § 90-95(d)(2) addressing

11. Interestingly, as is the case with N.C. Gen. Stat. § 90-95(d), which prescribes the punishments applicable to violations of N.C. Gen. Stat. § 90-95(a)(3), N.C. Gen. Stat. § 90-95(b), which sets out the penalties applicable to violations of N.C. Gen. Stat. § 90-95(a)(1), explicitly provides that it is subject to the provisions of N.C. Gen. Stat. § 90-95(h). This fact further undercuts Defendants' contention that the trafficking statutes do not apply to offenses involving prescription medications that contain opiate derivatives.

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the sale, manufacture, delivery, or transportation of prescription medication separate and apart from the act of possessing such substances, the effect of accepting Defendants' contention would be to hold that the only criminal penalties applicable to violations of law relating to such medications are those applicable to possession, a result that is plainly inconsistent with the remainder of N.C. Gen. Stat. § 90-95.

Finally, N.C. Gen. Stat. § 90-95(d)(2) and N.C. Gen. Stat. § 90-95(h)(4) are fundamentally different statutory punishment schemes. The penalty provisions applicable to non-trafficking offenses set out in N.C. Gen. Stat. § 90-95(b) and N.C. Gen. Stat. § 90-95(d) are organized around the controlled substance schedules enumerated in N.C. Gen. Stat. § 90-89 through N.C. Gen. Stat. § 90-94. Any sentence imposed upon an offender convicted of violating N.C. Gen. Stat. § 90-95(a)(1) and N.C. Gen. Stat. § 90-95(a)(3) must be based on the schedule in which the controlled substance at issue in that particular case is listed. Although hydrocodone is contained in Schedule II, N.C. Gen. Stat. § 90-90(1)(a), that substance, when combined with acetaminophen, becomes dihydrocodeinone, which is statutorily classified as a Schedule III substance.¹² N.C. Gen. Stat. § 90-91(d); *see generally State v. Eaton*, — N.C. App. —, 707 S.E.2d 642 (2011) (stating that “the substance found in defendant[’s] possession was a Schedule III substance, dihydrocodeinone, which is a form of hydrocodone”). For that reason, punishment for the manufacture, sale, delivery, possession with the intent to sell or deliver, or possession of dihydrocodeinone outside the trafficking context is governed by the statutory provisions applicable to Schedule III controlled substances. The penalty structure set out in N.C. Gen. Stat. § 90-95(h), on the other hand, applies to only a subset of the overall category of controlled substances, makes no reference to the schedules in which those substances are contained, and rests upon the weight of the substance at issue in the particular case under consideration rather than the applicable controlled substance schedule. Simply put, the controlled substance schedule to which a particular opiate derivative is assigned has nothing to do with the extent to which activities involving that substance are subject to punishment under the trafficking statutes. While Defendants view the disconnect between these two penalty structures as evidence of a legislative intent that the trafficking

12. The fact that hydrocodone is defined as a Schedule II controlled substance while dihydrocodeinone is not has no effect on the proper resolution of this issue given that the literal language of N.C. Gen. Stat. § 90-95(h)(4) clearly encompasses substances such as dihydrocodeinone.

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statutes be deemed inapplicable to prescription medications containing opiate derivatives,¹³ we have no trouble, given the clear precedence given to the trafficking statutes in N.C. Gen. Stat. § 90-95(b) and N.C. Gen. Stat. § 90-95(d), in concluding that the General Assembly drafted N.C. Gen. Stat. § 90-95(h) for the purpose of punishing acts of trafficking in specific controlled substances at the level specified in N.C. Gen. Stat. § 90-95(h) regardless of the extent to which those same activities would also be subject to punishment under other provisions of N.C. Gen. Stat. § 90-95 and that the result reached here, rather than contradicting the General Assembly's intent, is actually reflective of it. Although Defendants strenuously argue that acceptance of the approach embodied in our decision will result in the imposition of grossly disproportionate and unfair punishments for individuals involved in opium-based prescription drug activities compared to the punishments imposed upon individuals involved in other drug-related activities, that argument is more appropriately directed to the General Assembly, which is ultimately responsible for deciding the punishments applicable to all criminal offenses, than to this Court. As a result, the trial court did not err by refusing to dismiss the trafficking charges against Defendants on the grounds that the trafficking statutes did not apply to cases involving Schedule III controlled substances like those at issue here.¹⁴

2. Special Agent Motsinger's Rebuttal Testimony

[9] Finally, Defendants argue that the trial court erred by allowing Special Agent Motsinger to testify on rebuttal that dihydrocodeinone and hydrocodone contained opium. We disagree.

13. In advancing this argument, Defendants contend that treating prescription medications like hydrocodeinone as subject to the trafficking statutes could, depending on the nature of the mixture, render the penalty provisions of N.C. Gen. Stat. § 90-95(d)(2) meaningless. Although our decision may have the effect of subjecting certain defendants otherwise punishable pursuant to N.C. Gen. Stat. § 90-95(d)(2) to punishment under N.C. Gen. Stat. § 90-95(h)(4), the availability of both options stems from the fact that the relevant statutory language clearly creates the situation about which Defendants complain. As a result, since the best evidence of the General Assembly's intent is the language that it used and since the language of the relevant statutory provisions clearly demonstrates that some offenses that might otherwise be punishable pursuant to N.C. Gen. Stat. § 90-95(d)(2) are, instead, punishable pursuant to N.C. Gen. Stat. § 90-95(h)(4), we are not persuaded by Defendants' argument that our decision in this case will render N.C. Gen. Stat. § 90-95(d)(2) meaningless.

14. Although Defendants rely on the rule of lenity in support of their argument that the prescription medications at issue here are not subject to the trafficking statutes, that principle only applies to the construction of ambiguous statutes. *State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007). We do not, for the reasons discussed in the text, find any ambiguity in the relevant statutory provisions.

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After the presentation of Ellison's evidence, the State requested permission to recall Agent Motsinger in order to "clear up any issues that there [were] with regard to the dihydrocodeine, and also testify very specifically that—that it, in addition to hydrocodone are opiate derivatives." In response, Defendants urged the trial court to deny the State's request:

I would contend that there is no evidence been presented by Mr. Ellison to allow the State to offer rebuttal evidence. There is nothing Mr. Ellison testified to which would—could be rebutted by the SBI analyst. I understand it's in Your Honor's discretion, but I think, you know, to be rebuttal, there needs to be some evidence to rebut, and we would contend that any testimony that she—that he would offer to produce at this time would not be in the nature of rebuttal evidence, and I ask you to deny the request.

After hearing the arguments of counsel, the trial court permitted the State to recall Special Agent Motsinger, specifically noting that her rebuttal testimony would concern "a matter that wasn't brought out on the State's case in chief" and that it would "entertain a motion by the defendants to present additional evidence[.]"

N.C. Gen. Stat. § 15A-1226 provides that:

(a) Each party has the right to introduce rebuttal evidence concerning matters elicited in the evidence in chief of another party. The judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief or during a previous rebuttal, but if new evidence is allowed, the other party must be permitted further rebuttal.

(b) The judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict.

Defendants contend that the trial court erred by allowing the presentation of Special Agent Motsinger's rebuttal testimony because this testimony was offered for the sole purpose of curing the State's failure to present evidence concerning an element of the offenses with which Defendants had been charged during its case in chief. We do not find Defendants' argument persuasive.

In *State v. Quick*, 323 N.C. 675, 375 S.E.2d 156 (1989), the Supreme Court held that N.C. Gen. Stat. § 15A-1226 provides "clear authorization for a trial judge, within his discretion, to permit a party

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to introduce additional evidence at any time prior to the verdict” and allows the “judge [to] permit a party to offer new evidence which could have been offered in the party’s case in chief or during a previous rebuttal as long as the opposing party is permitted further rebuttal.” *Quick*, 323 N.C. at 681-82, 375 S.E.2d at 159 (citing *State v. Riggins*, 321 N.C. 107, 109, 361 S.E.2d 558, 559 (1987), and *State v. Lowery*, 318 N.C. 54, 70, 347 S.E.2d 729, 740 (1986)). The rationale underlying the Supreme Court’s holding in *Quick* is most clearly stated in *Lowery*:

The order of presentation of evidence at trial and the limitations on the right to present new evidence on rebuttal are designed primarily to ensure the orderly presentation of evidence. It is the trial judge’s duty to supervise and control the trial, including the manner and presentation of evidence, matters which are largely left to his discretion.

Lowery, 318 N.C. at 70, 347 S.E.2d at 740 (citing *State v. Harris*, 308 N.C. 159, 168, 301 S.E.2d 91, 97 (1983)). In light of *Quick* and *Lowery*, we are unable to find that the trial court abused its discretion by permitting the presentation of otherwise admissible evidence on rebuttal, particularly given the fact that the State lacked any basis for believing that Defendants disputed whether incidents involving dihydrocodeinone and hydrocodone were subject to punishment under the drug trafficking statutes before they made their dismissal motions at the close of the State’s evidence, the absence of any serious challenge to the accuracy of the information contained in Special Agent Motsinger’s rebuttal testimony, and the fact that the trial court provided Defendants with ample opportunity to rebut or otherwise respond to Special Agent Motsinger’s rebuttal testimony. As a result, the trial court did not err by admitting Special Agent Motsinger’s rebuttal testimony.

D. Clerical Error

[10] In reviewing the record, we have noted a discrepancy between the indictments and verdicts returned against Treadway and the judgment entered based upon those indictments and verdicts. Although the judgment reflected that Treadway had been convicted of “trafficking by transporting 28 [grams],” the grand jury charged Treadway with trafficking by delivery and the jury found him guilty of the same offense. However, since N.C. Gen. Stat. § 90-95(h)(4) punishes trafficking by transportation and trafficking by delivery in an identical manner, this error had no impact upon the sentence imposed upon Treadway and constituted a mere clerical error. “When, on appeal, a

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clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' ” *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999)); see also *State v. Taylor*, 156 N.C. App. 172, 177, 576 S.E.2d 114, 117-18 (2003) (defining clerical error as “ ‘an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination’ ”) (quoting *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000)). Thus, we conclude that this case should be remanded to the trial court for the limited purpose of correcting the clerical error contained in the trial court's judgment, so that the judgment will reflect the offense Treadway was convicted of committing.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendants received a fair trial that was free from prejudicial error and that all of Defendants' challenges to the trial court's judgments lack merit. As a result, we further conclude that Defendants are not entitled to any relief on appeal and that the trial court's judgments should remain undisturbed, with the limited exception that the judgment imposed upon Treadway should be remanded to the trial court for the correction of a clerical error.

NO ERROR; REMAND TO CORRECT CLERICAL ERROR.

Judges BRYANT and STEELMAN concur.

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BOBBY E. MCKINNON PLAINTIFF v. CV INDUSTRIES, INC. DEFENDANT

No. COA10-1105

(Filed 19 July 2011)

1. Contracts— severance benefits—no genuine issues of material fact—summary judgment proper

The trial court did not err in a breach of contract case by granting defendant's motion for summary judgment. Plaintiff was not entitled to Plan A benefits when he ceased continuous competition with defendant in 2001, and there were no genuine issues of material fact as to plaintiff's breach of contract claim. Since no breach of contract occurred, plaintiff was not entitled to specific performance.

2. Fraud— severance benefits—no genuine issues of material fact—summary judgment proper

The trial court did not err in a fraud case by granting defendant's motion for summary judgment. There were no genuine issues of material fact as to whether defendant engaged in fraud by denying plaintiff's claim for Plan A benefits.

3. Unfair Trade Practices— severance benefits—no genuine issues of material fact—summary judgment proper

The trial court did not err in an unfair trade practices claim by granting defendant's motion for summary judgment. The severance agreement did not violate principles of common law and there were no genuine issues of material fact regarding his unfair and deceptive trade practices claim.

Appeal by Plaintiff from summary judgment Order entered 3 June 2010 by Judge Ben F. Tennille in the North Carolina Business Court. Heard in the Court of Appeals 24 March 2011.

*C. Gary Triggs, P.A., by C. Gary Triggs, for Plaintiff-appellant.
Parker Poe Adams & Bernstein LLP, by William L. Rikard, Jr.,
and James C. Lesnett, Jr., for Defendant-appellee.*

HUNTER, JR., Robert N., Judge.

Bobby E. McKinnon ("Plaintiff") appeals from an Order granting Defendant's Motion for Summary Judgment pursuant to Rule 56 of

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the North Carolina Rules of Civil Procedure. Plaintiff argues the trial court erred in granting the Motion for Summary Judgment since genuine issues of material fact existed. We affirm the trial court's Order.

I. Factual and Procedural History

This dispute arises out of a disagreement over payment of severance benefits between Plaintiff and CV Industries, Inc. ("CVI"). Plaintiff, formerly President and CEO of CVI, entered into a severance agreement with CVI upon his resignation from the company to pursue a position at Joan Fabrics Corporation ("Joan Fabrics"), a competitor. Plaintiff alleges that by failing to pay his severance benefits, CVI breached its contract, engaged in fraud, and violated North Carolina unfair and deceptive trade practices statutes.

CVI acts as a holding company for Century Furniture, LLC ("Century") and Valdese Weavers, LLC ("Valdese"). CVI is an Employee Stock Ownership Plan (ESOP) company that permits employees of CVI to take an equity ownership interest in the company.¹ Century manufactures high-grade furniture, and Valdese manufactures mid to high quality jacquard fabric² for use by furniture manufacturers. Valdese also funded the textile research of Mr. Frank Land ("Land"), an inventor with a scientific background who was developing a fire-resistant yarn to be used in upholstery for furniture manufacturing.

Plaintiff became President of Valdese on 8 August 1978. Over the next two decades, Plaintiff served several managerial roles within CVI and its subsidiary companies. By 2000, Plaintiff was President and CEO of CVI. On 3 May 2000, Plaintiff notified CVI that he intended to resign in order to take a new job and acquire an ownership interest in Joan Fabrics and its affiliate Mastercraft Fabrics, Corp. ("Mastercraft"). Throughout the course of his employment with CVI, Plaintiff negotiated four employment agreements and incentive plans (Plans A, B, C, and D) in which he benefited. On 25 May 2000, after the announcement of Plaintiff's intended resignation, Plaintiff and CVI reached an agreement to modify these plans into a compre-

1. An "employee-stock-ownership plan" is "[a] type of profit-sharing plan that invests primarily in the employer's stock. Employee-stock-ownership plans receive special tax benefits and can borrow money to fund employee stock purchases, which makes them a useful corporate finance tool. *Black's Law Dictionary* 602-03 (9th ed. 2009).

2. "Jacquard" fabric is fabric produced on "an apparatus with perforated cards, fitted to a loom to facilitate the weaving of figured and brocaded fabrics." *The New Oxford American Dictionary* 899 (2d ed. 2005). The apparatus produces "an intricate variegated pattern." *Id.*

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hensive Severance Agreement. Plaintiff's resignation became effective on 16 June 2000.

Plan A of this Severance Agreement provided Plaintiff would receive shadow equity³ benefits once he disengaged from continuous competition with CVI, as long as CVI's ESOP stock price exceeded its 31 December 1999 price of \$9.90 per share. The Plan A benefits, comprising 145,280 units, were valued in excess of \$1,000,000 at the time Plaintiff filed his complaint. Under Plan B, CVI agreed to make fifteen annual payments of \$75,000 to Plaintiff beginning on 17 June 2000. Under Plan C, Plaintiff received annual payments of \$148,067 from CVI beginning on 17 June 2000. Under Plan D, CVI would make a one-time payment of \$300,000 to Plaintiff by 15 December 2000. Pursuant to the Severance Agreement, Plaintiff agreed not to acquire Land's patents or processes in producing fire-resistant yarn. Plaintiff also agreed not to solicit or employ any employee of CVI or its subsidiaries.

On 16 June 2000, Plaintiff began his employment with Joan Fabrics and Mastercraft. On 12 February 2001, Plaintiff resigned from his positions at Joan Fabrics and Mastercraft to become President and CEO of Doblin, a division of Mastercraft. He also assumed a management role in EBM Fabrics ("EBM") and Circa 1801 ("Circa"), affiliates of Joan Fabrics.

In October 2001, Valdese terminated funding of Land's research into fire-resistant yarn. Land soon contacted Plaintiff about the possibility of a joint business venture. Interested in this opportunity, Plaintiff requested a release from his Severance Agreement obligation prohibiting his business involvement with Land. CVI released Plaintiff from this requirement on 20 November 2001.

On 26 November 2001, Plaintiff resigned from Doblin, EBM, and Circa to pursue his business venture with Land. Together, they formed three companies: McKinnon-Land, LLC, which controlled the Alessandra Yarn patent; Basofil Fibers, LLC, which manufactured a key fiber for the making of Alessandra Yarn; and McKinnon-Land-Moran, LLC, which was a holding company for Basofil. Valdese, a CVI subsidiary, originally was a client of Basofil, but Valdese stopped purchasing Basofil fiber in August 2002 due to concerns over its quality.

3. "Shadow equity," also known as "phantom stock," is "the grant of a right to the appreciation in the corporation's stock, with a fixed exercise date and method of calculation. Since phantom stock does not dilute shareholder equity, this is a popular form of executive compensation." William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 2137.20 (2004).

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CVI hired outside auditing firm Deloitte & Touche, LLP (“Deloitte & Touche”) to examine its financial statements in March 2002. Upon review, Deloitte & Touche determined that CVI no longer needed to categorize Plaintiff’s Plan A benefits as a liability, since, after leaving Joan Fabrics, Plaintiff was no longer in continuous competition with CVI, and at that time CVI’s ESOP stock price had not exceeded its 31 December 1999 value. Acting on this advice, CVI no longer listed Plaintiff’s Plan A benefits as a liability on its financial statements as of 30 March 2002.

In August 2002, Valdese’s Executive Vice-President of Sales, Joe Feege, personally invested over \$840,000 in Basofil and became a member of the company. Valdese was aware of Feege’s investment in Basofil and did not object to it as a conflict of interest.

In October of 2006, Basofil faced restructuring due to a default on its financing agreement with an investor. Because of the restructuring, Plaintiff resigned from his position as CEO of Basofil on 1 November 2006. Despite his resignation, Plaintiff agreed to consult for Basofil for the next two years.

On 23 June 2008, Plaintiff contacted CVI to notify them of his withdrawal from continuous competition and to demand his Plan A benefits. At that time, CVI’s ESOP stock price had exceeded its 31 December 1999 value. Between 23 June 2008 and 10 October 2008, Plaintiff exchanged several communications with Richard Reese, Chief Financial Officer of CVI, discussing Plaintiff’s eligibility for the Plan A benefits. On 10 October 2008, Plaintiff received a letter from CVI stating that the company refused to pay the Plan A benefits. CVI alleged that Plaintiff ceased continuous competition with CVI when he resigned from Doblin, EBM, and Circa on 26 November 2001. CVI argued that since its ESOP stock price was below the 31 December 1999 value of \$9.90 at that time, it did not owe Plaintiff any benefits under the Severance Agreement.

On 11 March 2009, Plaintiff filed his complaint in Catawba County Superior Court, claiming breach of contract, specific performance, fraud, and unfair and deceptive trade practices. The matter was designated a mandatory complex business case and assigned to the Chief Special Superior Court Judge for Complex Business Cases, the Honorable Ben F. Tennille. On 1 March 2010, CVI filed a Motion for Summary Judgment, alleging there were no genuine issues of material fact regarding Plaintiff’s claims. The case came on for hearing during the 19 April 2010 session of the North Carolina Business Court, Judge

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Tennille presiding. CVI's Motion was granted on 3 June 2010. Plaintiff timely entered notice of appeal.

II. Jurisdiction and Standard of Review

This Court has jurisdiction to hear the instant appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). The trial court will grant summary judgment when a situation exists where there is no genuine dispute as to any material fact. *Volkman v. DP Associates*, 48 N.C. App. 155, 157, 268 S.E.2d 265, 267 (1980); N.C. Gen. Stat. § 1A-1, Rule 56(c).

The moving party bears the burden of proving that no genuine dispute of material fact exists. *Leake v. Sunbelt Ltd. of Raleigh*, 93 N.C. App. 199, 201, 377 S.E.2d 285, 287, *disc. rev. denied*, 324 N.C. 578, 381 S.E.2d 774 (1989). "A movant may meet its burden by showing either that: (1) an essential element of the non-movant's case is nonexistent; or (2) based upon discovery, the non-movant cannot produce evidence to support an essential element of its claim; or (3) the movant cannot surmount an affirmative defense which would bar the claim." *Moore v. City of Creedmoor*, 120 N.C. App. 27, 36, 460 S.E.2d 899, 904 (1995) (citing *Watts v. Cumberland Cnty. Hosp. Sys.*, 75 N.C. App. 1, 6, 330 S.E.2d 242, 247 (1985), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986)).

If the moving party meets these requirements, the burden then "shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003) (citation omitted). The non-moving party "may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2009).

When the trial court decides to grant or deny a Motion for Summary Judgment, all evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences should be drawn in the non-moving party's favor. *Best v. Duke Univ.*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (1994). A trial court's ruling on summary judgment receives *de novo* review. *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 247, 677 S.E.2d 465, 472 (2009) (citation omitted).

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III. Analysis

On appeal, Plaintiff contends the trial court erred by granting Defendant's Motion for Summary Judgment. Specifically, Plaintiff argues genuine issues of material fact exist regarding his breach of contract and specific performance claims because Plaintiff remained in continuous competition with Defendant pursuant to the terms of the Severance Agreement until his notification of withdrawal from continuous competition on 23 June 2008. Plaintiff also contends that he presented genuine issues of material fact regarding his fraud claim and his unfair and deceptive trade practices claim. We disagree.

A. Breach of Contract and Specific Performance

[1] First, Plaintiff argues there are genuine issues of material fact regarding his breach of contract and specific performance claims, and thus the trial court should not have granted Defendant's Motion for Summary Judgment for these claims. We do not agree.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 18, 26, 530 S.E.2d 838, 843 (2000) (citing *Jackson v. Carolina Hardware Co.*, 120 N.C. App. 870, 871, 463 S.E.2d 571, 572 (1995)). For a valid contract to exist there must be "a meeting of the minds as to all essential terms of the agreement." *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 168, 684 S.E.2d 41, 48 (2009).

"The remedy of specific performance is available to compel a party to do precisely what he ought to have done without being coerced by the court." *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981) (quotation marks and citation omitted). For a court to award specific performance, there must be a breach of a valid contract. *N.C. Med. Soc'y v. N.C. Bd. of Nursing*, 169 N.C. App. 1, 11, 610 S.E.2d 722, 727 (2005). Even if a breach of a valid contract exists, "[s]pecific performance will not be decreed unless the terms of the contract are so definite and certain that the acts to be performed can be ascertained and the court can determine whether or not the performance rendered is in accord with the contractual duty assumed." *Id.* at 11, 610 S.E.2d at 727-28 (quoting 12 *Corbin on Contracts* § 1174 (2002)).

Courts may enter summary judgment in contract disputes because they have the power to interpret the terms of contracts. *See Hodgin v. Brighton*, 196 N.C. App. 126, 128, 674 S.E.2d 444, 446 (2009) (interpreting the terms of a contract restricting the use of res-

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idential property when reviewing an Order granting partial summary judgment). “Where the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law; and the court . . . must construe the contract as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms.” *Id.* (citations omitted). However, “it is a fundamental rule of contract construction that the courts construe an ambiguous contract in a manner that gives effect to all of its provisions, if the court is reasonably able to do so.” *Johnston Cnty. v. R.N. Rouse & Co.*, 331 N.C. 88, 94, 414 S.E.2d 30, 34 (1992) (citations omitted).

The contract in question, the 25 May 2000 Severance Agreement, states that Plaintiff’s Plan A benefits will be suspended until he is no longer “employed by any other competitor of and is not engaged in competition with CVI or any of its subsidiaries.” If the value of CVI’s ESOP stock exceeds its 31 December 1999 value at the time Plaintiff ceases continuous competition, he will receive Plan A benefits.

Determination of the existence of a breach of contract in the present case thus hinges on the definition of “competition.” We draw from several sources to define this term. *Black’s Law Dictionary* defines “competition” as “[t]he struggle for commercial advantage; the effort or action of two or more commercial interests to obtain the same business from third parties.” *Black’s Law Dictionary* 322 (9th ed. 2009). *Black’s Law Dictionary* further delineates that “horizontal competition” is “[c]ompetition between a seller and its competitors,” and “vertical competition” is “[c]ompetition between participants at different levels of distribution, such as manufacturer and distributor.” *Id.* at 322-23.

The Fourth Circuit of the U.S. Court of Appeals has also addressed this issue, stating that “competition”

implies a struggle for advantage between two or more forces, each possessing in substantially similar if not identical degree, certain characteristics essential to the contest; and as used in political economy, is thus defined in Funk & Wagnalls’ dictionary: An independent endeavor of two or more persons to obtain the business patronage of a third by offering more advantageous terms as an inducement to secure trade.

Md. Undercoating Co. v. Payne, 603 F.2d 477, 482 (4th Cir. 1979) (quotation marks and citation omitted). Still, the same Court held that under its definition of “competition,” businesses did not have to solicit identical clientele if they were engaged in the same business in

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the same geographic region. *See id.* (“We do not conceive that in order to establish the fact of competition it is necessary to show that national banks and competing investors solicit the same customers for the same loans or investments.” (quotation marks and citation omitted)).

In the present case, we find the trial court did not err in granting Defendant’s Motion for Summary Judgment because there were no genuine issues of material fact relating to Plaintiff’s breach of contract claim. Plaintiff contends that CVI breached the Severance Agreement by failing to pay his Plan A benefits after his notice of withdrawal from continuous competition on 23 June 2008. Given the sources cited *supra*, we define “competition” as entailing more than mutual existence in a common industry or marketplace; rather, it requires an endeavor among business entities to seek out similar commercial transactions with a similar clientele. Under this definition, Plaintiff did not continuously engage in competition with CVI between the 25 May 2000 Severance Agreement and his 23 June 2008 claim for Plan A benefits, so CVI did not breach the Severance Agreement by refusing to pay Plaintiff’s Plan A benefits.

When Plaintiff first resigned his position at CVI and began working for Joan Fabrics and Mastercraft, he was still in competition with CVI. Indeed, the 25 May 2000 Severance Agreement acknowledged that “Joan Fabrics Corporation and/or Mastercraft Fabrics Corporation . . . may compete indirectly with one or more of CVI’s subsidiaries and does compete directly with one or more of CVI’s subsidiaries.” Because both Joan Fabrics and the subsidiaries of CVI produce fabric for sale to furniture manufacturers, they seek similar business transactions from the same category of clients, putting them in competition.

After Plaintiff resigned his position at Joan Fabrics and Mastercraft on 12 February 2001 to become President and CEO of Doblin, with management responsibility for Joan Fabrics affiliates EBM and Circa, he still engaged in continuous competition with CVI. Doblin, EBM, and Circa all produced jacquard fabric for sale to furniture manufacturers; similarly, CVI subsidiary Valdese produced jacquard fabric for sale to furniture manufacturers to use in upholstery.

Nevertheless, when Plaintiff resigned from Doblin, EBM, and Circa on 26 November 2001 to pursue a business opportunity with Land in developing flame-resistant yarn for use in fabric manufacturing, he ceased continuous competition with CVI. As we stated *supra*, mere business involvement in a common or related industry does not necessarily rise to the level of competition.

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Plaintiff and Land formed three separate companies; these companies produced Basofil fiber, a crucial component in Alessandra Yarn production, and licensed the rights to Alessandra Yarn. Thus, their clientele consisted of yarn manufacturers and fabric manufacturers. These clients then sold the completed fabrics to the manufacturers of finished goods such as furniture. CVI, on the other hand, produced jacquard fabric and finished furniture for sale to furniture manufacturers and consumers.

The evidence thus demonstrates that although Plaintiff's business venture with Land operated in a related industry to that of CVI, Plaintiff and CVI were not in competition as they did not seek to sell similar goods or provide similar services to similar clientele. In short, Plaintiff's clients were yarn manufacturers and fabric manufacturers, while CVI's clients were furniture manufacturers and consumers.

Additional circumstantial evidence supports our holding that Plaintiff was not in competition with CVI during his business involvement with Land. In August of 2002, an Executive Vice-President of Sales at CVI subsidiary Valdese invested over \$840,000 with Basofil, one of Plaintiff's companies. Valdese did not view this as a conflict of interest because it did not consider Basofil in competition with CVI. Additionally, when Deloitte & Touche investigated CVI's financial statements as an outside auditor in March 2002, it determined that Plan A liability no longer existed because Plaintiff was not in competition with CVI and the ESOP stock was below its 31 December 1999 price at the time.

On appeal, Plaintiff contends that even if he was not in continuous direct competition with CVI until 23 June 2008, he was still in continuous indirect competition. Plaintiff proposes we should adopt a bifurcated definition of "competition," emphasizing a distinction between "direct" and "indirect" competition. Plaintiff argues that

[d]irect competition, as anyone within the industry knows, is where your company competes directly with another company for a customer base on products that are the same or similar. Indirect competition is just as important and clearly acknowledged within the industry since in both in [sic] the fabric industry and the furniture industry, the producer is ultimately seeking to obtain a larger customer base within their respective markets both nationally and internationally.

Plaintiff maintains that when companies attempt to gain a portion of the same consumer's dollar, they may be in indirect competition even

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if they do not produce the same or similar products. In effect, Plaintiff offers a sweeping definition of “competition” encompassing the majority of participants in any given industry.

We decline to adopt such a broad understanding of “competition.” Under Plaintiff’s definition of “indirect competition,” “[w]henever a person seeks to buy a piece of cloth, flame resistant products, furniture or furniture related items, if you are in the textile business, flame resistant industry or furniture industry, you are seeking to obtain for your company a portion of that consumers [sic] dollars in that market.” Thus, according to Plaintiff’s argument, any producer of a material used in furniture manufacturing might be in competition with a furniture manufacturer or fabric manufacturer such as CVI—including timber companies and cotton producers. Plaintiff would seek to include almost every contributor to the furniture industry in his definition of “competition.” We find this definition unpersuasive and excessively broad.

Additionally, under Plaintiff’s expansive definition of “competition,” he may have still been in competition with CVI when he claimed his Plan A benefits on 23 June 2008. Plaintiff’s consulting agreement with Basofil extended until 1 November 2008, several months after his claim of Plan A benefits with CVI. Furthermore, in a series of interrogatories, Plaintiff acknowledged that between October 2007 and July 2008, he served as a consultant for Dalco, Inc., a fabric company, and from October 2008 through the time of trial, he served as a consultant for Keystone Weaving, an apparel fabrics manufacturer. Plaintiff also served as a consultant for Jacquard Fabrics, Inc. (“Jacquard Fabrics”) from May to June 2007 and October 2007 to October 2008. In this capacity, he advised the President and CEO of Jacquard Fabrics on the possible acquisition of Circa. Given these facts, under Plaintiff’s definition of “competition,” he would not yet have ceased competition with CVI when he made his 23 June 2008 claim for Plan A benefits.

Plaintiff also contends that he was in continuous competition with CVI due to his consulting for Metropolis Fabrics (“Metropolis”), a jacquard fabric manufacturer, from late 2002 until June 2008. Assuming *arguendo* that Metropolis was in competition with CVI, Plaintiff’s interactions with Metropolis did not rise to the level of employment as Plaintiff testified he did not have a formal employment contract with that company. Additionally, Plaintiff’s only compensation for the advice he provided Metropolis founder Richard

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Downing was an invitation to a golf tournament and Mr. Downing's personal gratitude.

Consequently, we conclude Plaintiff ceased continuous competition with CVI when he began his business venture with Land in 2001. Undisputed evidence demonstrates that the price of CVI's ESOP stock remained below its 31 December 1999 price until 31 December 2007. Thus, Plaintiff was not entitled to Plan A benefits when he ceased continuous competition with CVI in 2001, and there are no genuine issues of material fact as to Plaintiff's breach of contract claim. Since no breach of contract occurred, Plaintiff is not entitled to specific performance. *See N.C. Med. Soc'y*, 169 N.C. App. at 11, 610 S.E.2d at 727 (holding that for a court to award specific performance, there must be a breach of a valid contract).

B. Fraud

[2] Next, Plaintiff argues that there were genuine issues of material fact as to whether CVI engaged in fraud by denying his claim for Plan A benefits. We disagree.

To make a claim of fraud, Plaintiff must provide evidence of a "(1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, and (5) resulting in damage to the injured party." *Harrold v. Dowd*, 149 N.C. App. 777, 782, 561 S.E.2d 914, 918 (2002) (citation omitted). An unfulfilled promise is not actionable fraud, however, unless the promisor had no intention of carrying it out at the time of the promise, since this is a misrepresentation of a material fact. *Williams v. Williams*, 220 N.C. 806, 810-11, 18 S.E.2d 364, 366-67 (1942) (citations omitted).

In the present case, there are no genuine issues of material fact regarding Plaintiff's fraud claim. If Plaintiff had presented evidence that CVI entered into the Severance Agreement with "intent to deceive," his claim might survive summary judgment, but Plaintiff has presented no such evidence. Plaintiff contends that because CVI never paid the Plan A benefits it promised during contract formation, it had "intent to deceive" at the time the parties composed the Severance Agreement. However, absent specific evidence of CVI's intent to deceive during contract formation, "mere unfulfilled promises cannot be made the basis for an action of fraud." *Id.* at 810, 18 S.E.2d at 366 (citation omitted).

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Plaintiff further argues that even if no fraudulent intent existed at the time of the contract, Defendant engaged in fraud by failing to notify Plaintiff that it determined he was no longer eligible for Plan A benefits in March 2002. Nevertheless, North Carolina case law holds that fraudulent intent “must have existed in the defendant’s mind at the time he made the promise which induced the plaintiff” to enter into the agreement. *Hoyle v. Bagby*, 253 N.C. 778, 781, 117 S.E.2d 760, 762 (1961).

Plaintiff erroneously relies on *Childress v. Nordman*, 238 N.C. 708, 78 S.E.2d 757 (1953), to argue that CVI had a continuing duty to notify him if he became ineligible for Plan A benefits. *Childress* states that

[e]xcept where it may be regarded as continuing in character, the truth or falsity of a representation is generally to be determined as of the time when it was made, and subsequent changes in the condition of affairs cannot affect the liability of the person who made it. One who knows, however, that a statement true when made has become false has a duty to disclose the change in conditions.

Id. at 713, 78 S.E.2d at 761 (quotation marks and citation omitted). *Childress* stands for the proposition that a party must correct any statements it made at the time of contract formation that it later discovers were false. *Id.* In the present case, when the Severance Agreement was formed CVI promised to pay Plan A benefits to Plaintiff when he ceased continuous competition with CVI, if the ESOP stock price exceeded its 31 December 1999 value. CVI had no duty to notify Plaintiff of his subsequent ineligibility for Plan A benefits, because none of CVI’s statements at the time of contract formation later became false. Furthermore, at the time of contract formation, CVI made no representation that it would notify Plaintiff if he became ineligible for the Plan A benefits.

Additionally, CVI’s partial performance of the Severance Agreement through its payment of benefits pursuant to Plans B, C, and D serves as evidence of its intent to fulfill the provisions of the Severance Agreement when it was formed. See *Mesimer v. Stancil*, 52 N.C. App. 361, 363-64, 278 S.E.2d 530, 532 (1981) (describing how evidence of a defendant’s partial performance of his contract with a plaintiff is evidence against plaintiff’s fraud claim). Although Plaintiff contends these plans were separate agreements, the 25 May 2000 Severance Agreement incorporated the four previously separate severance plans into one comprehensive document. By paying benefits

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to Plaintiff pursuant to Plans B, C, and D, CVI engaged in partial performance of the Severance Agreement, evidencing lack of fraud.

Plaintiff has not presented evidence of fraudulent intent in the formation of the Severance Agreement. Consequently, we conclude that there is no genuine issue of material fact as to Plaintiff's fraud claim.

C. Unfair and Deceptive Trade Practices

[3] Plaintiff also argues there are genuine issues of material fact regarding his unfair and deceptive trade practices claim. We cannot agree.

Plaintiff alleges that fraud is an unfair and deceptive trade practice under section 75-1.1 of our General Statutes, which states, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2009). While an instance of fraud may qualify as an unfair method of competition under section 75-1.1, Plaintiff has presented no evidence to support his fraud claim. "To prevail on a claim of unfair and deceptive trade practices, a plaintiff must show: (1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby." *Carcano*, 200 N.C. App. at 171, 684 S.E.2d at 49 (quotation marks omitted) (quoting *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998)). "It is well recognized that actions for unfair or deceptive trade practices are distinct from actions for breach of contract." *Id.* (citation omitted). Additionally, Plaintiff must allege and prove egregious or aggravating circumstances to prevail on a claim of unfair and deceptive trade practices. *Business Cabling, Inc. v. Yokeley*, 182 N.C. App. 657, 663, 643 S.E.2d 63, 68 (2007) (citation omitted).

Furthermore, Plaintiff contends the Severance Agreement represents an unfair and deceptive trade practice because it restrains his ability to engage in future business ventures. Plaintiff, however, fails to allege how this restraint on trade violates common law as required by section 75-2. *See* N.C. Gen. Stat. § 75-2 (2009) ("Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of G.S. 75-1."). We conclude that the Severance Agreement in the present case does not violate common law principles. In a similar employment context, this Court has held covenants not to compete enforceable if they are "(1) in writing, (2) entered into at the time and as a part of the contract of employment,

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(3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy.” *Forrest Paschal Mach. Co. v. Milholen*, 27 N.C. App. 678, 685, 220 S.E.2d 190, 195 (1975) (quotation marks and citation omitted). As this case law indicates, contracts restraining trade are not *per se* prohibited. We find that this Severance Agreement, like covenants not to compete, does not violate principles of common law.

IV. Conclusion

We find no genuine issue of material fact regarding Plaintiff’s claims of breach of contract, specific performance, fraud, and unfair and deceptive trade practices. The trial court appropriately granted Defendant’s Motion for Summary Judgment and we affirm the trial court’s Order.

Affirmed.

Judges STROUD and THIGPEN concur.

WACHOVIA BANK NATIONAL ASSOCIATION, AND PRESERVE HOLDINGS, LLC, AS
SUBSTITUTED SUCCESSOR, PLAINTIFF V. SUPERIOR CONSTRUCTION CORPORATION,
GEORGE ROUNTREE, III, RECEIVER FOR INTRACOASTAL LIVING, LLC; WESTERN
SURETY COMPANY AND COASTAL SASH & DOOR, DEFENDANT

No. COA10-1158

(Filed 19 July 2011)

1. Liens— materialman’s lien—date of first furnishing—prior to date of deed of trust—partial lien waivers—ineffective to change date of first furnishing

The trial court erred in a lien case by granting plaintiff Preserve Holdings, LLC’s motion for judgment on the pleadings. As a result of the fact that defendant Superior Construction Corporation (Superior) first furnished labor and materials at The Preserve prior to the date upon which plaintiff Wachovia’s deed of trust was recorded, defendant Superior’s lien had priority over that of Wachovia. The partial lien waivers signed by defendant Superior did not effectively change the date of first furnishing of labor and materials from 22 April 2005 to 31 May 2005.

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Appeal by defendants from judgment entered 23 April 2010 by Judge John R. Jolly, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 February 2011.

Shumaker, Loop & Kendrick, LLP, by Frederick M. Thurman, Jr., Steele B. Windle, III, and Bonnie Keith Green for Defendant-Appellant Superior Construction Corporation.

Conner Gwyn Schenck, PLLC, by C. Hamilton Jarrett and Luke J. Farley, for Defendant-Appellant Western Surety Company.

Andresen & Arronte, PLLC, by Kenneth P. Andresen, for Defendant-Appellee Preserve Holdings, LLC.

Nexsen Pruet, PLLC, by Eric H. Biesecker, Richard W. Wilson, and David A. Luzum, for amicus curiae American Subcontractors Association, Inc., and American Association of the Carolinas.

ERVIN, Judge.

Defendants Superior Construction Corporation and Western Surety Company appeal from an order granting judgment on the pleadings in favor of Preserve Holdings, LLC, and determining that Preserve Holdings' lien arising from a deed of trust in favor of Wachovia Bank & Trust Co., N.A., had priority over Defendant Superior's contractor's lien. On appeal, Defendants argue that the trial court erred by granting judgment on the pleadings in favor of Preserve Holdings on the grounds that Defendant Superior's contractor's lien had priority over the lien created by the Wachovia deed of trust. After careful consideration of Defendants' challenges to the trial court's order in light of the record and the applicable law, we conclude that Defendants' arguments have merit, 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. Background

On 21 January 2005, Intracoastal Living, LLC, entered into a contract with Defendant Superior pursuant to which Defendant Superior, acting as general contractor, agreed to construct certain improvements on real estate owned by Intracoastal Living known as The Preserve at Oak Island. In return, Intracoastal Living agreed to pay \$19,300,000.00 to Defendant Superior for performing the necessary construction work. Defendant Superior first furnished labor and materials under the contract on 22 April 2005.

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In April 2005, Wachovia agreed to loan money to Intracoastal Living for the purpose of funding construction activities at The Preserve. On 19 May 2005, Intracoastal Living executed a construction loan agreement, a \$22,835,000.00 promissory note, and a properly recorded deed of trust in favor of Wachovia.

As construction proceeded, Defendant Superior submitted numerous applications for payment. The first two applications, which were dated 11 May 2005 and 9 June 2005, were accompanied by documents titled Partial Waiver of Lien. The two partial lien waivers contained identical language, differing only in the amount of the requested draw, the date through which Defendant Superior waived and released its lien rights, and the identity of the person signing on behalf of Defendant Superior. Both partial lien waivers provided that:

Whereas Superior Const. has been employed by [Intracoastal] LLC to furnish labor and/or materials for the project known as [The Preserve.]

Now, therefore, the undersigned, for and in consideration of the sum of \$[—,—.—] and other good and valuable consideration, the receipt whereof hereby acknowledged, do hereby waive, relinquish, surrender and release any and all lien, claim, or right to lien on the above said described project and premises, arising under and by virtue of the mechanic's lien laws of the State of North Carolina on account of any labor performed or the furnishing of any material to the above described project and premises up to and including the (day) ——— of (month) ———, (year) 2005. Upon receipt of this month's draw request of \$[—,—.—] [Superior Construction] will also waive and release any and all liens or claims, or right to lien on the above project as it relates to the stated draw request.

Defendant Superior last furnished labor and materials in connection with construction activities at The Preserve on 29 June 2007, at which point it stopped work at the project due to nonpayment.

On 25 September 2007, Defendant Superior filed a claim of lien applicable to The Preserve property in which it alleged that it first furnished labor and materials on 22 April 2005 and that Intracoastal Living owed it \$1,286,000.00 for construction work performed under the contract. On 23 October 2007, Wachovia filed a declaratory judgment action in which it sought a determination that the lien resulting from Wachovia's deed of trust had priority over the lien claimed by

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Defendant Superior. On 14 January 2008, Defendant Superior filed an answer in which it denied that Wachovia's lien had priority over Defendant Superior's lien.

On 24 July 2008, Defendant Western Surety Company sought leave to intervene. Defendant Western Surety's request to intervene was allowed on 24 November 2008. On 4 December 2008, Defendant Western Surety filed an answer denying the material allegations of Wachovia's complaint and asserting a crossclaim against Defendant Superior and the receiver for Intracoastal and Coastal Sash & Door, George Rountree, III, in which Defendant Western Surety sought a declaration concerning the priority of Defendant Western Surety's claim to the balance owed to Defendant Superior.¹ Intracoastal filed its answer to Defendant Western Surety's crossclaim on 9 January 2009.

On 15 September 2008, Preserve Holdings, LLC, filed a motion seeking to replace Plaintiff Wachovia as the plaintiff in this case.² Preserve Holdings' motion was granted on 15 October 2008. On 3 November 2008, Preserve Holdings filed a motion for judgment on the pleadings. On 12 February 2010, Defendant Superior filed a summary judgment motion. On 23 April 2010, the trial court granted Preserve Holdings' motion for judgment on the pleadings, stating, in pertinent part, that:

[47] . . . [T]he Waivers clearly provide that[,] in exchange for the consideration received, Superior did "waive, relinquish, surrender and release" "any and all liens, claims or rights to liens" it might have on the Project, arising under North Carolina law, on account of the work it performed up to and including May 31, 2005. The words of waiver are clear and not ambiguous. Further, the words "any and all" suggest there was no limitation on Superior's waiver of its rights. Moreover, the "on account of" language would exclude from the waiver what future rights Superior would gain upon future provisions of labor and material. Such an interpretation would not be inconsistent with the "any and all" language.

1. Western Surety issued a payment bond applicable to The Preserve project on 14 May 2005. As of the date of its answer and crossclaim, Defendant Western Surety had paid \$1,623,759.30 to persons that had supplied labor or materials to Defendant Superior in connection with construction activities at The Preserve. These payments formed the basis of Defendant Western Surety's claim to an interest in the funds owed to Defendant Superior.

2. Plaintiff Preserve Holdings purchased The Preserve from Wachovia at a foreclosure sale on 28 January 2008.

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[48] . . . [T]he language of the Waivers clearly and unambiguously expresses Superior's intent, and binding contractual agreement, to waive its existing lien rights, including those arising from its date of first furnishing of labor and materials on the Project, in exchange for the consideration provided by Wachovia, up to and including May 31, 2005.

[49] One effect of this contract is a change in Superior's Date of First Furnishing of labor and materials from a date preceding Wachovia's deed of trust to one after May 31, 2005, thus placing Superior's claims behind Wachovia's in priority. While such a result may seem harsh, the wording of the contract clearly demonstrates the parties' intent to achieve such a result. Superior cannot successfully rely upon the materialman's statute when it waived the statute's protections.

. . .

[50] Based upon the pleadings, the court CONCLUDES that [] the Wachovia deed of trust lien had priority over Superior's claim of lien; and that Plaintiff Preserve Holdings, LLC, as substituted Plaintiff in this action, is entitled to judgment in its favor upon the First Claim for Relief (Declaratory Judgment Regarding Lien Priority) in this matter.

(footnotes and citations omitted) Defendants noted an appeal to this Court from the trial court's order.³

II. Legal Analysis

A. Standard of Review

"A motion for judgment on the pleadings is authorized by Rule 12(c) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 12(c) [2009]. The rule's function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." Judgment on the pleadings is properly entered only if "all the material allegations of fact are admitted[,] . . . only questions of law remain" and no question of fact is left for jury determination.

3. The trial court's order expressly stated that its decision was "dispositive of all issues in this matter, including any issues raised by" Plaintiff Preserve Holdings' request for a determination of the amount due and "the crossclaim by [Defendant] Western [Surety] against the Receiver," so that "no action or ruling with regard to either" claim "is required." Thus, the trial court's order is a final judgment on the merits of all claims and subject to appellate review pursuant to N.C. Gen. Stat. § 7A-27(b) despite the fact that the trial court left certain issues unaddressed in its order.

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“In deciding such a motion, the trial court looks solely to the pleadings. The trial court can only consider facts properly pleaded and documents referred to or attached to the pleadings.” “This Court reviews *de novo* a trial court’s ruling on motions for judgment on the pleadings. Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court.”

N.C. Concrete Finishers v. N.C. Farm Bureau, — N.C. App. —, —, 688 S.E.2d 534, 535 (2010) (quoting *Garrett v. Winfree*, 120 N.C. App. 689, 691, 463 S.E.2d 411, 413 (1995), *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974), and *Reese v. Mecklenburg County*, — N.C. App. —, —, 685 S.E.2d 34, 37-38 (2009), *disc. review denied*, 364 N.C. 242, 698 S.E.2d 653 (2010)) (internal citations omitted). As a result, since neither party has argued that the trial court impermissibly resolved a disputed factual question, the only issue before this Court in connection with Defendants’ appeal is whether the trial court correctly decided that, given the information disclosed by the pleadings, Preserve Holdings was entitled to judgment in its favor as a matter of law.

B. Relative Lien Priority

[1] On appeal, Defendants argue that the trial court erred by granting Preserve Holdings’ motion for judgment on the pleadings on the grounds that Defendant “Superior[Construction’s] lien was effective as of 22 April 2005 and has priority over Wachovia’s deed of trust.” Defendants’ argument has merit.

N.C. Gen. Stat. § 44A-8 provides, in pertinent part, that:

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

Pursuant to N.C. Gen. Stat. § 44A-10, “[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.” “By virtue of this statute, a contractor’s lien for all labor and

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materials furnished pursuant to a contract is deemed prior to any liens or encumbrances attaching to the property subsequent to the date of the contractor's first furnishing of labor or materials to the construction site." *Connor Co. v. Spanish Inns*, 294 N.C. 661, 667, 242 S.E.2d 785, 789 (1978) (citing *Heating Co. v. Realty Co.*, 263 N.C. 641, 652-53, 140 S.E.2d 330, 338-39 (1965), and *Assurance Society v. Basnight*, 234 N.C. 347, 352, 67 S.E.2d 390, 394 (1951)). "The lien provided for by [N.C. Gen. Stat. §] 44A-8 is inchoate until perfected by compliance with [N.C. Gen. Stat. §§] 44A-11 and -12, and is lost if the steps required for its perfection are not taken in the manner and within the time prescribed by law. However, when a lien is validly perfected, and is subsequently enforced by bringing an action within the statutory period set forth in [N.C. Gen. Stat. §] 44A-13(a), the lien will be held to relate back and become effective from the date of the first furnishing of labor or materials under the contract, and will be deemed perfected as of that time." *Connor Co.*, 294 N.C. at 667, 242 S.E.2d at 789.

According to the parties' pleadings, the relevant events occurred in the following order:

1. 21 January 2005: Intracoastal Living and Defendant Superior entered into a contract, in which Intracoastal Living agreed to pay Defendant Superior \$19,300,000.00 for work performed on a construction project.
2. 22 April 2005: Defendant Superior first furnished labor and materials for the project.
3. 11 May 2005: Defendant Superior executed a partial lien waiver in which it waived any claim of lien "on account of any labor performed or the furnishing of any material . . . up to and including [30 April 2005]."
4. 19 May 2005: Intracoastal Living executed a construction loan agreement, a promissory note in the amount of \$22,835,000.00, and a deed of trust in favor of Wachovia.
5. 9 June 2005: Defendant Superior executed a partial lien waiver in which it waived any claim of lien "on account of any labor performed or the furnishing of any material . . . up to and including [31 May 2005]."
6. 25 September 2007: Defendant Superior filed a claim of lien on the property.

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According to this timeline, the accuracy of which has not been disputed on appeal, Defendant Superior first furnished labor and materials at The Preserve on 22 April 2005, approximately one month prior to the date upon which the deed of trust in favor of Wachovia was recorded. As a result of the fact that Defendant Superior first furnished labor and materials at The Preserve prior to the date upon which Wachovia's deed of trust was recorded, Defendant Superior's lien would ordinarily have priority over that of Wachovia. The only way in which Wachovia's deed of trust could be deemed to take priority over Defendant Superior's mechanics' lien is in the event that the partial lien waivers signed by Defendant Superior have the effect of subordinating its entire claim to those creditors with liens perfected prior to the date upon which Defendant Superior signed the second partial lien waiver. We do not believe that the partial lien waivers signed by Defendant Superior have that effect and conclude that the trial court erred by reaching a contrary conclusion.

As the trial court recognized, “[l]ien waivers are interpreted according to the principles applied to contracts in general[.]” *Cowper v. Watermark Marina of Wilmington*, 2009 Bankr. LEXIS 3896 *4 (U.S. Bank. Ct. E.D.N.C. 2009) (citing *Chemimetals Processing, Inc. v. Schrimmscher*, 140 N.C. App. 135, 138, 535 S.E.2d 594, 596 (2000) (stating that “[r]eleases are contractual in nature, and their interpretation is governed by the same rules governing the interpretation of contracts”) (citations omitted)). As a result, the ultimate issue which we must decide in order to resolve Defendants' challenge to the trial court's order is whether the relevant provisions of the partial lien waivers had the effect of subordinating Defendant Superior's lien to all other secured creditors with perfected liens as of the date of the second partial lien waiver or whether they merely released the labor and materials costs for which Defendant Superior had been reimbursed as of the date of the second partial lien waiver.

“Whenever a court is called upon to interpret a contract[,] its primary purpose is to ascertain the intention of the parties at the moment of its execution.” *Gilmore v. Garner*, 157 N.C. App. 664, 666, 580 S.E.2d 15, 18 (2003) (quoting *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973)). “The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.” *Electric Co. v. Insurance Co.* 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948). “If the plain language of a contract is clear, the intention of the parties is inferred from the

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words of the contract.” *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996). “[I]f the meaning of the [contract] is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.” *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 300, 524 S.E.2d 558, 563 (2000) (quoting *Woods v. Insurance Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978)). “An ambiguity exists in the event that the relevant contractual language is fairly and reasonably susceptible to multiple constructions.” *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993) (citing *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc., Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988)). “The trial court’s determination of whether the language in a contract is ambiguous is a question of law[.]” *Duke Energy Corp. v. Malcolm*, 178 N.C. App. 62, 65, 630 S.E.2d 693, 695 (citing *Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 553, 478 S.E.2d 518, 521 (1996), *disc. review denied*, 346 N.C. App. 275, 487 S.E.2d 538 (1997)), *aff’d*, 361 N.C. 111, 637 S.E.2d 538 (2006).

Although a party may certainly elect to forgo the protections of N.C. Gen. Stat. § 44A-7, *et. seq.*, including its right to have its lien treated as having taken effect from the date of first furnishing of labor or materials, by executing a lien waiver, *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 660, 403 S.E.2d 291, 297 (1991) (stating that “the use of lien waivers, used other than in anticipation of and in consideration for the awarding of a contract, may also minimize liability by contractors who deal with the owner”), the scope of the rights waived hinges upon a proper understanding of the relevant waiver language. As a result of the fact that, as the trial court concluded and both parties appear to agree, the language of the partial lien waivers is unambiguous, the only step we need to take in order to resolve the issues raised by Defendants’ appeal is to construe the relevant language.

Although the trial court concluded, consistently with Preserve Holdings’ argument, that the partial lien waivers signed by Defendant Superior effectively changed the date of first furnishing of labor and materials from 22 April 2005 to 31 May 2005, this argument misconstrues the literal language of the partial lien waivers, which state that Defendant Superior “do[es] hereby waive, relinquish, surrender and release any and all lien, claim, or right to lien on the above said described project and premises, arising under and by virtue of the

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mechanic's lien laws of the State of North Carolina on account of any labor performed or the furnishing of any material to the above described project and premises up to and including the [date specified in the partial lien waiver]." The critical language for the purpose of resolving the present dispute is the "on account of" provision, which clearly specifies the scope of the rights that Defendant Superior waived by signing the partial lien waivers. Thus, we must focus our inquiry on the meaning of the language providing that Defendant Superior waived "any and all" lien rights "on account of" the furnishing of labor or materials up to the date specified in the partial lien waiver.⁴

In *Rousey v. Jacoway*, 544 U.S. 320, 161 L. Ed. 2d 563, 125 S. Ct. 1561 (2005), the United States Supreme Court addressed the meaning of "on account of" in the context of construing bankruptcy exemptions for certain payments received "on account of illness, disability, death, age, or length of service." At that time, the United States Supreme Court stated that:

We turn first to the requirement that the payment be "on account of illness, disability, death, age, or length of service." We have interpreted the phrase "on account of" elsewhere within the Bankruptcy Code to mean "because of," thereby requiring a causal connection between the term that the phrase "on account of" modifies and the factor specified in the statute at issue. . . . This meaning comports with the common understanding of "on account of." *See, e.g.*, Random House Dictionary of the English Language 13 (2d ed. 1987) (listing as definitions "by reason of," "because of")[.]

Rousey, 544 U.S. at 326, 161 L. Ed. 2d at 571, 125 S. Ct. at 1566 (quoting *Bank of America Nat. Trust & Saving Ass'n. v. 203 North LaSalle Partnership*, 526 U.S. 434, 450-51, 143 L. Ed. 2d 607, 621, 119 S. Ct. 1141, 1420 (1999)). We find the United States Supreme Court's analysis of the meaning of the expression "on account of" to be per-

4. In its order, the trial court focused on the fact that Defendant Superior waived "any and all" of the rights that had accrued on account of the labor and material that had been furnished as of the relevant date, noting the unconditional nature of this language. The trial court's analysis overlooks, however, the fact that the rights waived necessarily had to arise from labor or materials supplied as of the relevant date. As a result, while we agree that Defendant Superior certainly waived "any and all" rights that might have existed "on account of" the furnishing of labor and materials as of the date of the second partial lien waiver, that fact does not determine the extent to which particular rights had been acquired "on account of" that furnishing of labor or materials.

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suasive and conclude that the plain meaning of a waiver of lien rights arising “on account of” labor performed before 31 May 2005 is that the only lien rights being waived are those arising “because of,” “as a result of,” or “on the basis of” work done prior to the relevant date. The language utilized in the partial lien waivers does not in any way refer to a waiver of Defendant Superior’s “place in line;” instead, it simply refers to a waiver of “any and all” lien rights applicable to specific payments. In essence, the partial lien waivers at issue in this case function as an acknowledgement that a payment for labor and materials expended through a certain date has been made and that Defendant Superior has no further lien rights in the furnishing of labor and materials reimbursed by those payments. Thus, we conclude that the partial lien waivers executed by Defendant Superior merely operated as a waiver of its right to claim a lien on amounts for which it had been paid in return for supplying labor and materials before 31 May 2005 relating back to 22 April 2005, the date upon which it first furnished labor and materials at The Preserve. *See Metropolitan Federal Bank v. A.J. Allen*, 477 N.W. 2d 668, 673-75 (Iowa 1991) (holding that a statutory lien waiver provision resulting in the waiver of “any and all lien or claim of, or rights to, lien . . . account of labor [or] services . . . furnished up to and including” the date of payment did not waive the priority of the contractor’s lien and that “[a]ny . . . lien rights . . . accruing subsequent to the issuance of the initial lien waiver documents relate back to the commencement of their work”); *Duckett v. Olson*, 699 P.2d 734, 736-37 (Utah 1985) (holding that a lien waiver provision releasing “all lien or right of lien now existing for work or labor performed or materials furnished on or before the date of” payment did not waive the contractor’s “lien or right of lien . . . for work or materials furnished at a date subsequent to” payment).

In seeking to persuade us to affirm the trial court’s decision, Preserve Holdings asserts, in essence, that this Court is bound by the trial court’s determination that “the language of the [partial lien w]aivers clearly and unambiguously expresses [Defendant] Superior’s intent, and binding contractual agreement, to waive its existing lien rights, including those arising from its date of first furnishing of labor and materials on the Project, in exchange for the consideration provided by Wachovia, up to and including May 31, 2005.” In support of this assertion, Preserve Holdings points to this Court’s statement that “[t]he trial court’s determination of original intent is a question of fact” and that “[i]ssues of fact resolved by the trial court in a declaratory judgment action are ‘conclusive on appeal if sup-

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ported by competent evidence in the record, even if there exists evidence to the contrary.’” *Bicket*, 124 N.C. App. at 552, 478 S.E.2d at 521 (quoting *Miesch v. Ocean Dunes Homeowners Assn.*, 120 N.C. App. 559, 562, 464 S.E.2d 64, 67 (1995), *disc. review denied*, 342 N.C. 657, 467 S.E.2d 717 (1996)). The fundamental problem with Preserve Holdings’ reliance on the quoted language from *Bicket* is that, in the present case, the trial court properly did not make any factual findings addressing the parties’ intent in deciding that Preserve Holdings’ motion for judgment on the pleadings should be granted. *See Erickson v. Starling*, 235 N.C. 643, 657, 71 S.E.2d 384, 394 (1952) (stating that, “[o]n a motion for judgment on the pleadings, the presiding judge should consider the pleadings, and nothing else” and “should not hear extrinsic evidence, or make findings of fact”) (citing *Johnson v. Insurance Co.*, 219 N.C. 445, 448, 14 S.E.2d 405, 406 (1941)) (other citation omitted). Instead, the trial court derived its view of the parties’ intent, which it expressly and properly labeled a conclusion rather than a finding, by examining the relevant portions of the partial lien waivers. As the result of the fact that the construction of unambiguous contractual language is clearly an issue of law for the Court, *Schenkel & Schultz, Inc. v. Hermon F. Fox & Assocs.*, 362 N.C. 269, 273, 658 S.E.2d 918, 921 (2008) (stating that “[a] contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law”) (citing *Lane*, 284 N.C. at 407, 410, 200 S.E.2d 622, 624 (1973)), we are not obligated to give any deference to the trial court’s conclusion concerning the intent of the parties as expressed in the relevant contractual language. Thus, the fact that the trial court reached a particular decision with respect to the manner in which the relevant language should be construed has no conclusive effect for purposes of appellate review.⁵ Having examined the relevant language on appeal, we conclude that the trial court erred by construing the partial lien waivers to effectively change the date of first furnishing and that the partial lien waivers merely precluded Defendant Superior from asserting a lien relating to the amounts

5. Even if the proper interpretation of the partial lien waivers is treated as a question of fact rather than a question of law subject to *de novo* review, the trial court’s determinations are entitled to deference on appeal only if adequately supported by the record. In this case, the only relevant material in the record concerning the parties’ intent consisted of the partial lien waivers themselves. As a result, ascertaining the parties’ intent ultimately comes down to an examination of the language of the partial lien waivers signed by Defendant Superior. Having carefully examined that language, we do not believe that it provides adequate support for the trial court’s decision. As a result, we do not believe that the extent to which one treats this issue as one of law or fact affects the outcome in this instance.

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already paid for work performed at The Preserve without having any further effect.

III. Conclusion

Therefore, for the reasons set forth above, we conclude that Defendant Superior's lien has priority over that created by Wachovia's deed of trust and that the trial court erred by concluding otherwise. 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 ROBERT C. HUNTER and STEPHENS concur.

SHARON POWERS AND CLAUDE W. POWERS, PLAINTIFFS V. BRANNON WAGNER AND
RADIYYA ALI, DEFENDANTS

No. COA10-689

(Filed 19 July 2011)

1. Jurisdiction— subject matter—child custody—home state— findings sufficient

The North Carolina trial court properly exercised jurisdiction over a child custody action where North Carolina was the "home state" of the child and no other jurisdiction had made an initial custody determination that deprived North Carolina courts of subject matter jurisdiction over the matter.

2. Child Custody and Support— protected status as parent— acted inconsistently—insufficient findings of fact

The trial court erred in a child custody case by failing to make the necessary findings of fact to support the conclusion that defendant acted inconsistently with her constitutionally protected status as the legal mother of the minor child.

Appeal by defendant Radiyya Ali from order entered 10 November 2009 by Judge Jimmy Love, Jr. in Johnston County District Court. Heard in the Court of Appeals 13 January 2011.

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*Mary McCullers Reece for plaintiffs-appellees.**Marcia Kaye Stewart for defendant-appellant Radiyya Ali.*

GEER, Judge.

Defendant Radiyya Ali appeals from an order granting permanent legal and physical custody of her child to plaintiffs Sharon and Claude W. Powers (“the Powerses”), her child’s paternal grandparents. She contends that the trial court made insufficient findings of fact to support (1) its conclusion that the court had subject matter jurisdiction and (2) its conclusion that she acted inconsistently with her constitutionally-protected right to parent. While the trial court properly concluded that it had subject matter jurisdiction over the proceedings, we hold that the trial court made insufficient findings of fact to support its conclusion of law that defendant Ali acted inconsistently with her constitutional right to parent. The trial court did not resolve the conflicting evidence regarding Ali’s intent when she allowed her child to live with and be cared for by the Powerses. Accordingly, we vacate the order and remand to the trial court to make further findings of fact in accordance with this opinion.

Facts

The trial court found the following facts. Ali, who is a resident of Broward County, Florida, gave birth to her son, “Scott,”¹ in Broward County on 6 June 2006. Defendant Brannon Wagner, who Ali dated for about nine months, is Scott’s father. Ali and Wagner separated before Scott was born. Ali has another child residing with her in Florida, who is not Wagner’s child.

Wagner did not become involved with his son until Scott was approximately four months old. Ali did not hear anything from Wagner after Scott’s birth until Ali contacted Wagner’s employer. At that point, Wagner began visiting Scott every other weekend. Sharon and Claude Powers, Wagner’s parents, first met Scott over Thanksgiving in 2006.

Ali allowed Scott to go alone to visit Ali’s grandmother in Trinidad for approximately two months from December 2006 through February 2007. Ali contends it is part of her West Indian culture to travel to visit relatives for three to four months at a time. In February 2007, Scott resumed residing with defendant Ali.

1. The pseudonym “Scott” is used throughout this opinion to protect the minor’s privacy and for ease of reading.

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Ali initiated a paternity and support action against Wagner through the State of Florida's Department of Revenue. Wagner, in turn, brought a custody action in Florida state court, but later dismissed that action. On 3 April 2007, a Final Administrative Paternity and Support Order was entered against Wagner ordering him to pay \$783.30 per month to Ali for the support of Scott. His payment of the court-ordered support was sporadic, and Ali subsequently had his wages garnished.

In June 2007, the Powerses went to Florida to visit Scott. During this visit, Ali asked plaintiffs if they would like to take Scott back to North Carolina with them since Scott had previously visited his maternal grandmother. He stayed with the Powerses for five weeks. Scott then returned to Florida and remained there with Ali for approximately two weeks before returning to North Carolina to stay with the Powerses on 15 August 2007. Ali provided a medical authorization letter to the Powerses so that Scott could receive any necessary medical treatment.

Ali contends that Scott was supposed to stay with Wagner's great-grandmother, Doris, in South Carolina for three months. According to Ali, Sharon Powers was concerned about Doris' health and wanted Scott to return to stay with her in North Carolina instead. The Powerses contend that Wagner asked if they wanted to keep the child because Scott had visited with the maternal grandmother and that they spoke with Ali and agreed to keep Scott due to her work schedule and lack of daycare.

Scott had ongoing problems with his ears after arriving in North Carolina. Sharon Powers would stay up with him during the night and also take Scott to the doctor. Sharon Powers notified both Ali and Wagner of Scott's doctor appointments. The pediatrician recommended that Scott have tubes inserted into his ears. This surgery was scheduled, and in January 2008, Ali was notified of the upcoming surgery. The surgery took place on 31 March 2008.

Ali did not travel to North Carolina for the surgery and did not visit Scott during his recovery. She contends the reason for this failure was twofold. First, she did not want to interrupt Scott's treatment, and secondly, Scott could not fly immediately after having the tubes inserted. In addition, in May 2008, Ali had surgery herself for pre-cancerous conditions. Ali contended that she needed six to eight weeks to recover from that surgery.

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On 6 June 2008, Ali visited Scott for his birthday at the Powerses' home. This trip was the first time Ali had been to see Scott in North Carolina since 15 August 2007. During this visit, she purchased a play set to be installed in the Powerses' backyard.

In September 2008, Scott was placed in his current daycare by the Powerses. Ali pays \$100.00 per week towards the daycare but keeps the remainder of the child support funds paid to her by Wagner. The Powerses pay for Scott's doctors' copays and prescription drug expenses. The Powerses take Scott to church on a regular basis.

Prior to November 2008, Ali was upset that Wagner would not provide her with his employer's contact information, which she claimed she needed in order to obtain insurance on her own policy for her other son, who is not Wagner's child. Ali then informed Sharon Powers that she was going to take Scott back to Florida.

Ali testified that she traveled to North Carolina one weekend in November 2008. She went to the Benson Police Department to obtain assistance in regaining possession of Scott, but the police department was closed. According to Ali, the Powerses were not at home when she went to their house, and she therefore returned to Florida without Scott. The Powerses were not aware that Ali was going to make this trip to North Carolina.

On 12 December 2008, the Powerses filed a complaint in Johnston County District Court seeking an emergency *ex parte* custody order and temporary and permanent custody of Scott. On 22 December 2008, the trial court entered an order granting the Powerses emergency *ex parte* custody. On 17 September 2009, the trial court entered a temporary custody order granting custody of Scott to the Powerses, but providing Ali with visitation two weeks per month. The order allowed Wagner whatever visitation he and the Powerses mutually agreed upon. Wagner had moved from Indiana to North Carolina on 4 March 2009 and was then living with the Powerses.

Over the two years that Scott had lived with the Powerses, Ali never took any legal action to regain custody of Scott. Prior to November 2008, Ali had never even attempted to take physical custody from the Powerses.

On 10 November 2009, the trial court entered a permanent custody order granting the Powerses primary legal and physical custody of Scott, ordering that Wagner have visitation with Scott as mutually

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agreed between the Powerses and himself, and providing for a structured visitation schedule for Ali. Ali timely appealed to this Court.

I

[1] Ali first contends that the trial court’s conclusion that it had subject matter jurisdiction over this matter was not supported by adequate findings of fact. “This Court’s determination of whether a trial court has subject matter jurisdiction is a question of law that is reviewed on appeal *de novo*.” *Kingston v. Lyon Constr., Inc.*, 207 N.C. App. 703, 707, 701 S.E.2d 348, 351-52 (2010). “In exercising jurisdiction over child custody matters, North Carolina requires the trial court to make specific findings of fact supporting its actions.” *Williams v. Williams*, 110 N.C. App. 406, 411, 430 S.E.2d 277, 281 (1993).

Under the Uniform Child-Custody Jurisdiction and Enforcement Act (“UCCJEA”), a North Carolina court has jurisdiction to make an initial child-custody determination if North Carolina is the “home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State[.]” N.C. Gen. Stat. § 50A-201(a)(1) (2009). The “home state” is the state where “a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding.” N.C. Gen. Stat. § 50A-102(7) (2009).

In support of her argument, Ali points to *In re J.B.*, 164 N.C. App. 394, 398, 595 S.E.2d 794, 797 (2004), in which this Court vacated and remanded because the trial court had failed to make sufficient findings of fact regarding subject matter jurisdiction. In *In re J.B.*, however, “the record [was] devoid of evidence from which [this Court] [might] ascertain whether or not the trial court possessed subject matter jurisdiction” *Id.*

Here, by contrast, the trial court made findings of fact that on 15 August 2007, Scott “came to North Carolina to stay with” the Powerses, and Ali never took any legal action after that date to regain custody of Scott. The Powerses placed Scott in daycare, took him to his doctor’s appointments, and paid for his medical expenses. These findings, which are unchallenged on appeal, are sufficient to establish that Scott resided in North Carolina with the Powerses, who were acting as parents, for at least six months prior to the filing of this cus-

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tody action. North Carolina was, therefore, Scott's home state for purposes of this proceeding, and the trial court had subject matter jurisdiction even though the trial court's findings did not expressly track the language in N.C. Gen. Stat. § 50A-102(7). We note that it is the better practice for the trial court to make an express finding about the child's home state.

Ali next contends that the trial court erred in concluding it had jurisdiction over this matter because Florida had already exercised jurisdiction. Under the Parental Kidnapping Prevention Act ("PKPA"), "[t]he appropriate authorities of every State shall enforce according to its terms, and shall not modify . . . any custody determination or visitation determination made consistently with the provisions of this section by a court of another State." 28 U.S.C. § 1738A(a) (2006).

"Once a State exercises jurisdiction consistently with the provisions of the Act, no other State may exercise concurrent jurisdiction over the custody dispute even if it would have been empowered to take jurisdiction in the first instance, and all States must accord full faith and credit to the first State's ensuing custody decree." *Thompson v. Thompson*, 484 U.S. 174, 177, 98 L. Ed. 2d 512, 518-19, 108 S. Ct. 513, 515 (1988) (internal citation omitted).

Here, a Florida tribunal entered a Paternity and Support Order on 3 April 2007 concluding that Wagner was the legal and biological father of Scott. The Florida order directed Wagner to pay child support to Ali, to provide health insurance for Scott, and to pay half of all medical expenses not covered by insurance. Ali contends that Florida, through this order, was exercising jurisdiction as to the issue of Scott's custody and that this order amounted to a child custody determination.

The definition of "[c]hild-custody determination," however, expressly excludes "an order relating to child support or other monetary obligation of an individual." N.C. Gen. Stat. § 50A-102(3). To qualify as a child custody determination, the order must instead provide "for the legal custody, physical custody, or visitation with respect to a child." *Id.*

Ali argues that the order "went beyond a mere support order" because it included as finding of fact number four that "Radiyya Ali, the Custodial Parent, has custody of the child, and the primary residence of the child is with the Custodial Parent." Yet, this finding of fact does not amount to an award of custody to Ali. The finding merely sets out the fact that Scott was living with Ali and, therefore, Wagner was required to pay child support to Ali.

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Because the Florida order did not provide for legal custody, physical custody, or visitation, it was not a child custody determination. The North Carolina trial court, therefore, properly exercised jurisdiction over this action because North Carolina is the “home state” of Scott, and no other jurisdiction had made an initial determination that deprived North Carolina courts of subject matter jurisdiction over this custody matter.

II

[2] Ali next contends that the trial court erred in concluding that she acted inconsistently with her constitutionally protected status as the legal mother of the minor child. “Our trial courts are vested with broad discretion in child custody matters.” *Miller v. Miller*, 201 N.C. App. 577, 578, 686 S.E.2d 909, 911 (2009) (quoting *Martin v. Martin*, 167 N.C. App. 365, 367, 605 S.E.2d 203, 204 (2004)). Even when the evidence is conflicting, the findings of fact in child custody and support matters are conclusive if they are supported by competent evidence. *Dixon v. Dixon*, 67 N.C. App. 73, 76, 312 S.E.2d 669, 672 (1984).

Here, the trial court concluded that “the Defendants have acted inconsistently with their constitutionally protected status as the biological parents of the minor child.” Our Supreme Court recently addressed the issue of when a parent has acted inconsistently with her constitutionally-protected right to parent in *Boseman v. Jarrell*, 364 N.C. 537, 539, 704 S.E.2d 494, 496 (2010). In *Boseman*, the parties, who were domestic partners, jointly decided to have a child and jointly raised the child with each woman acting as a parent. *Id.*, 704 S.E.2d at 496-97. Although the defendant was the biological mother, the parties attempted to obtain an adoption decree in Durham County so that the plaintiff would also be a legal parent of the child. *Id.* at 540, 704 S.E.2d at 497.

Subsequently, the parties separated, but the plaintiff continued to provide most of the child’s financial support. *Id.* at 541, 704 S.E.2d at 498. After the parties separated, the plaintiff sued for custody, while the defendant challenged the validity of the adoption decree. *Id.* The trial court upheld the adoption decree and granted the parties joint custody of the child. *Id.*

Although the Supreme Court concluded that the adoption was invalid, the Court affirmed the custody decision, concluding that “because defendant has acted inconsistently with her paramount parental status, the trial court did not err by employing the ‘best interest of the child’ standard to reach its custody decision.” *Id.* at 553, 704

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S.E.2d at 505. The Supreme Court first observed that “[a] parent has an ‘interest in the companionship, custody, care, and control of [his or her children that] is protected by the United States Constitution.’” *Id.* at 549, 704 S.E.2d at 502 (quoting *Price v. Howard*, 346 N.C. 68, 73, 484 S.E.2d 528, 531 (1997)). As long as a parent acts consistently with this interest, a custody dispute with a nonparent cannot be determined by use of the “best interest of the child” test. *Id.*, 704 S.E.2d at 503.

A natural parent need not be unfit or abandon or neglect her child in order to have “engaged in some other conduct inconsistent with her paramount parental status.” *Id.* at 550, 704 S.E.2d at 503. The Court pointed out that “under *Price*, when a parent brings a nonparent into the family unit, represents that the nonparent is a parent, and voluntarily gives custody of the child to the nonparent without creating an expectation that the relationship would be terminated, the parent has acted inconsistently with her paramount parental status.” *Id.* at 550-51, 704 S.E.2d at 503. The Court explained further that “if a parent cedes paramount decision-making authority, then, so long as he or she creates no expectation that the arrangement is for only a temporary period, that parent has acted inconsistently with his or her paramount parental status.” *Id.* at 552, 704 S.E.2d at 504.

The Court recognized that intent was a critical issue. It pointed out that in *Price*, although the biological mother had completely relinquished custody of her child for a period of time, the Supreme Court had remanded for further findings because “there remained a factual issue regarding whether the relinquishment was intended to be only temporary” *Boseman*, 364 N.C. at 552, 704 S.E.2d at 504.

Applying the same analysis ultimately adopted in *Boseman*, this Court explained the importance of the parent’s intent in *Estroff v. Chatterjee*, 190 N.C. App. 61, 70, 660 S.E.2d 73, 78-79 (2008) (internal citation omitted):

[T]he court’s focus must be on whether the legal parent has voluntarily chosen to create a family unit and to cede to the third party a sufficiently significant amount of parental responsibility and decision-making authority to create a *permanent parent-like relationship* with his or her child. The parent’s intentions regarding that relationship are necessarily relevant to that inquiry. By looking at both the legal parent’s conduct and his or her intentions, we ensure that the situation is not one in which the third party has assumed a parent-like status on his or her own without that being the goal of the legal parent.

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(Emphasis added.) Consequently, in deciding whether a parent has acted inconsistently with her constitutionally-protected right to parent, the trial court must “consider the legal parent’s intentions regarding the relationship between his or her child and the third party during the time that relationship was being formed and perpetuated.” *Id.* at 69, 660 S.E.2d at 78.

In *Estroff*, this Court upheld the trial court’s determination that the defendant, who—like the defendant in *Boseman*—gave birth while in a domestic partnership, had not acted inconsistently with her constitutionally paramount status as a parent. The trial court’s findings of fact had established that the defendant biological mother did not “choose to create a family unit with two parents, did not intend that [the plaintiff] would be a ‘*de facto* parent,’ *Price*, 346 N.C. at 83, 484 S.E.2d at 537, and did not allow [the plaintiff] to function fully as a parent. Instead, according to the trial court’s findings, [the defendant] saw [the plaintiff] as ‘a significant, loving adult caretaker but not as a parent.’ ” 190 N.C. App. at 74, 660 S.E.2d at 81. Ultimately, this Court held that “[t]he fact that a third party provides caretaking and financial support, engages in parent-like duties and responsibilities, and has a substantial bond with the children does not necessarily meet the requirements of *Price* and *Mason* [*v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008).]” *Id.*

Here, the trial court determined that defendant Ali and defendant Wagner “acted in a manner inconsistent with their constitutionally protected status as a parent in that they voluntarily relinquished custody of the minor child for a minimum of fifteen (15) months to the Plaintiffs.” Further, the trial court found “[t]hat since August 15, 2007, the Defendants have voluntarily allowed the Plaintiffs to function as parents in the day to day life of the minor child. That during said period, Defendants were able to care and provide for the minor child and chose not to do so.” Finally, the court found “[t]hat since August 15, 2007, the Defendants have fostered the forging of a parental bond between the Plaintiffs and the minor child.”

The finding that Ali voluntarily relinquished custody of Scott to the Powerses does not, however, address the requirement in *Boseman* (originally set out in *Price*) that the trial court determine whether “the relinquishment was intended to be only temporary” *Boseman*, 364 N.C. at 552, 704 S.E.2d at 504. Further, the findings that Ali allowed the Powerses to function on a day-to-day basis as parents and fostered the forging of a parental bond focuses only on Ali’s con-

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duct without also considering Ali's intentions at the time she allowed Scott to go to the Powerses.

With respect to Ali's intentions and whether her relinquishment was intended to be temporary or for an indefinite period, the trial court found only:

21. That the plaintiffs and defendant Ali differ in their accounts of why the child was returned on August 15, 2007 to the plaintiffs in North Carolina. Plaintiffs contend that Defendant Wagner called and asked if they wanted to keep the minor child since the maternal grandmother had a visit. That the Plaintiffs say they talked with Defendant Ali and agreed to keep the minor child due to Defendant Ali's employment schedule and lack of daycare. Defendant Ali contends the minor child was to stay [with] Defendant Wagner's great grandmother Doris in South Carolina for three months and that plaintiff Sharon Powers had concerns about Doris' health and wanted the minor child to instead return to North Carolina.

This finding simply sets out the parties' contentions without resolving the dispute between the parties.

"Where there is directly conflicting evidence on key issues, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show." *In re C.M.*, 183 N.C. App. 207, 212, 644 S.E.2d 588, 593 (2007) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 366 (2000)). The trial court was required to resolve the dispute in the evidence and make the findings required by *Boseman*, *Price*, and *Estroff*.

In this case, in addition to Ali's testimony, plaintiff Claude Powers was asked, "you say you knew all along that at some point she was coming to get her son?" He responded, "That's correct." Shortly thereafter, Mr. Powers acknowledged that "we knew that we were not keeping [Scott] for his entire lifetime."

On the other hand, our Supreme Court noted in *Price*:

[T]here are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody, such as under a foster-parent agreement or during a period of service in the military, a period of poor health, or a search for employment. However, to preserve the constitutional protection of parental interests

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in such a situation, the parent should notify the custodian upon relinquishment of custody that the relinquishment is temporary, and the parent should avoid conduct inconsistent with the protected parental interests. Such conduct would, of course, need to be viewed on a case-by-case basis, but may include failure to maintain personal contact with the child or failure to resume custody when able.

Price, 346 N.C. at 83-84, 484 S.E.2d at 537. While the record contains evidence related to the scenarios identified in *Price*, it was the responsibility of the trial court to make the necessary factual findings.

Without the necessary findings, there can be no determination that Ali acted inconsistently with her constitutional right to parent. The trial court, after concluding that Ali acted inconsistently with that right, then applied the “best interest of the child” standard and concluded that it was in Scott’s best interest for the Powerses to have permanent custody of him. This determination was premature.

“If a natural parent’s conduct has not been inconsistent with his or her constitutionally protected status, application of the ‘best interest of the child’ standard in a custody dispute with a nonparent would offend the Due Process Clause.” *Id.* at 79, 484 S.E.2d at 534. We, therefore, vacate the entire order and remand for further findings of fact consistent with *Boseman*, *Price*, and *Estroff*. Only if the trial court, after applying those decisions, again determines that Ali acted inconsistently with her constitutional right to parent may the trial court apply the best interest standard in deciding who should have custody of Scott.

Vacated and remanded.

Judges BRYANT and STEPHENS concur.

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[213 N.C. App. 364 (2011)]

PREMIER PLASTIC SURGERY CENTER, PLLC; GENESIS VENTURES, LLC; AND VICTOR S. FERRARI, M.D., F.A.C.S., PETITIONER-APPELLANTS v. THE BOARD OF ADJUSTMENT FOR THE TOWN OF MATTHEWS; AND THE TOWN OF MATTHEWS, RESPONDENT-APPELLEES

No. COA10-863

(Filed 19 July 2011)

1. Preservation of issues— failure to argue—issue abandoned

Petitioners in a zoning case abandoned their argument that the trial court erred by applying the wrong standard when reviewing the decision of the Board of Adjustment to deny petitioners' application for a variance. Petitioners failed to provide any reason or argument in support of their assertion.

2. Zoning— application for variance—erroneously denied

The trial court erred in a zoning case by finding that the Board of Adjustment had no authority to grant petitioner the requested variance. The trial court's reliance on *Donnelly*, 99 N.C. App. 702, was erroneous as petitioners' sign was not, as a matter of law, contrary to the zoning ordinance. Moreover, the variance petitioners sought was not a use variance but was an area variance.

3. Zoning— variance—denial of petition—findings of fact insufficient

The trial court erred in a zoning case by concluding that the Board of Adjustment made sufficient findings of fact to support its denial of petitioners' application for a variance. As the trial court erred in concluding the variance was directly contrary to the zoning ordinance, it also erred in concluding the Board had no duty to make sufficient findings. Furthermore, the Board's findings of fact lacked the specificity necessary for a reviewing court to determine whether the Board acted arbitrarily or committed errors of law.

4. Zoning— sign permit—vested rights not acquired—estoppel or laches inapplicable

The trial court did not err in a zoning case by concluding that petitioners did not acquire vested rights in a sign permit and that the Town of Matthews was not barred by estoppel or laches from revoking the permit. Petitioners did not appeal the Board of Adjustment's decision to deny petitioner's appeal of the revocation of the sign permit.

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[213 N.C. App. 364 (2011)]

Appeal by Petitioner from Judgment entered 21 January 2010 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 January 2011.

Essex Richards, P.A., by Norris A. Adams, II, attorney for Petitioner-appellants.

Cranford, Buckley, Schultze, Tomchin, Allen & Buie, P.A., by Charles R. Buckley, III, attorney for Respondent-appellees.

HUNTER, JR., Robert N., Judge.

Premier Plastic Surgery Center, PLLC, Genesis Ventures, LLC, and Victor S. Ferrari, M.D., F.A.C.S. (“Dr. Ferrari”) (collectively “Petitioners”) appeal the trial court’s 21 January 2010 Order affirming the decision of the Town of Matthews Board of Adjustment (“the Board”) to deny Petitioners’ application for a variance to the Town of Matthews’ sign ordinance. We reverse, in part, and remand, in part.

I. Factual and Procedural History

This dispute arises from Petitioners’ construction of a sign in front of Dr. Ferrari’s business, which is located in Matthews, North Carolina. Petitioners operate a medical facility at 1635 Matthews Township Parkway on one of four lots that are part of a multi-lot business development. When the lots were originally developed, all four lots shared one drive that permitted ingress and egress from Matthews Township Parkway. Later, a second drive was constructed between Petitioners’ building and the other buildings in the development. The development sits in a curve of Matthews Township Parkway and the two drives are separated by approximately 500 feet. At the first drive stands a monument-style sign providing signage for several of the tenants in the development. This sign, however, cannot accommodate the current number of tenants. Additionally, as a result of the curve in the parkway, it is difficult, if not impossible, to see the second drive from the first.

Petitioners testified that patients routinely have trouble locating the medical practice, drive past the entrance, and have to turn around in their attempt to find it. Dr. Ferrari claims that ninety percent of first-time patients experience this problem and are often up to thirty minutes late as a result. Because he performs surgeries on-site, Dr. Ferrari is concerned that paramedics would be similarly delayed if attempting to respond to a medical emergency that could arise during surgery.

Seeking to cure these problems, in late 2006, Dr. Ferrari's wife met with Town of Matthews staff to discuss the construction of a sign outside the medical practice, but was told a sign was not permitted. Petitioners subsequently hired a local sign company, Comco Signs, Inc. ("Comco"), to determine if they could put a sign on the front of the building. The vice-president of Comco, Randy Ulery, suggested Dr. Ferrari construct a monument sign, assured Dr. Ferrari that the Town of Matthews would allow it, and said he would look into the matter. On 4 April 2007, Charlie D. Butler, zoning inspector for the Mecklenburg County Land Use and Environmental Services Agency ("MCLUESA")—which administers permits for the Town of Matthews—issued a sign permit authorizing Comco to construct a sign outside Petitioners' business.

Approximately two and one half months later, in early June 2007, Comco constructed a monument sign in front of Petitioners' business in accordance with the permit at an expense of \$7,210. Zoning Inspector Butler was present the day of the sign's construction and helped determine its proper placement. Approximately one week after the sign was erected, however, MCLUESA notified Petitioners that the sign permit had been revoked stating the permit was issued in error because the sign violated section 153.144(A) of the Matthews Zoning Code.

Petitioners appealed the permit revocation to the Matthews Board of Adjustment. The Board denied the appeal at its 8 November 2007 meeting and notified Petitioners of their right to appeal the denial to superior court or to draft a text amendment to the zoning ordinance. Petitioners filed an application for a text amendment to the ordinance, which was denied by the Board at their 14 April 2008 meeting.

On 8 May 2008, Petitioners applied to the Board for a variance to section 153.144(A) of the Matthews Zoning Code that would allow the sign to remain in place. Following a hearing on the matter, the Board denied the variance by a vote of four to one, and notified Petitioners in writing on 11 July 2008.

On 8 August 2008, Petitioners filed a petition for *writ of certiorari* to the Mecklenburg County Superior Court pursuant to N.C. Gen. Stat. § 160A-388(e2) (2009). In their petition, Petitioners alleged, *inter alia*, the Board's decision to deny the variance was arbitrary, capricious, and contrary to statute and case law. The petition was granted on 23 September 2008 and the case came on for hearing during the 14 December 2009 session of the Mecklenburg County Superior

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Court, Judge James W. Morgan presiding. Judge Morgan affirmed the Board's denial of Petitioner's application for a variance in an Order entered 21 January 2010. In its Order the trial court concluded: that because the sign was expressly prohibited by section 153.144(A) of the Matthews Zoning Code, the Board had no authority to issue the requested variance; that Petitioners acquired no vested rights in the sign because the permit was illegal from its inception; that because the permit was revoked approximately one week after the sign was erected, the Town of Matthews was not barred by estoppel or laches from revoking the permit; that the Board had sufficient evidence on which to base its decision and did so with sufficient findings of fact; and that the Board had no duty to make findings of fact. Petitioners timely entered notice of appeal from this Order.

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"). "[T]his Court examines the trial court's order for error[s] of law by determining whether the superior court: (1) exercised the proper scope of review, and (2) correctly applied this scope of review." *Turik v. Town of Surf City*, 182 N.C. App. 427, 429, 642 S.E.2d 251, 253 (2007) (second alteration in original) (internal quotation marks omitted) (quoting *Tucker v. Mecklenburg Cnty. Zoning Bd. of Adjustment*, 148 N.C. App. 52, 55, 557 S.E.2d 631, 634 (2001)). If a petitioner appeals an administrative decision "on the basis of an error of law, the trial court applies *de novo* review; if the petitioner alleges the decision was arbitrary and capricious, or challenges the sufficiency of the evidence, the trial court applies the whole record test." *Blue Ridge Co. v. Town of Pineville*, 188 N.C. App. 466, 469, 655 S.E.2d 843, 845-46, *disc. review denied*, 362 N.C. 679, 669 S.E.2d 742 (2008). "[A]n appellate court's obligation to review a superior court order for errors of law can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court." *Capital Outdoor, Inc. v. Guilford Cnty. Bd. of Adjustment*, 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, J., dissenting) (citation omitted), *rev'd for reasons stated in the dissent*, 355 N.C. 269, 559 S.E.2d 547 (2002).

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III. Analysis

[1] Petitioners first allege the trial court erred by applying the wrong standard when reviewing the decision of the Board. Specifically, Petitioners contend the trial court applied the “whole record” test rather than *de novo* review. Petitioners, however, abandoned this issue by failing to provide any reason or argument in support of their assertion. See N.C. R. App. P. 28(b)(6) (2011) (“Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.”) Moreover, as stated above, we may properly resolve this dispute by addressing the dispositive issues before the Board and the trial court without determining the standard of review utilized below. See *Capital Outdoor, Inc.*, 146 N.C. App. at 392, 552 S.E.2d at 268. The dispositive issues presented in this dispute are whether the trial court erred in its interpretation of the sign ordinance and in its conclusion that the Board made sufficient findings of fact to support its denial of Petitioners’ request.

A. The Board’s Authority to Grant the Variance

[2] Plaintiff argues that the trial court erred, as a matter of law, in finding that the Board of Adjustment had no authority to grant Petitioner the requested variance. We agree.

The trial court’s Order affirming the Board’s decision to deny Petitioners’ application for a variance from the sign ordinance provides the following pertinent finding:

(a) The sign which is the subject of the variance application is expressly prohibited by Section 153.144(A) of the Matthews Zoning Code, in that the Record shows it to be an individual business sign within multi-tenant property. Therefore, the Board has no authority to grant a variance for the sign. “The requested variance would be directly contrary to the Zoning Ordinance and, therefore, the Board has no authority to grant [p]etitioner[']s request.” *Donnelly v. The Board of Adjustment of the Village of Pinehurst*, 99 N.C. App. 702, 394 S.E.2d 246 (1990).

As the trial court’s interpretation of the zoning ordinance presents a question of law, it is subject to *de novo* review. *Hayes v. Fowler*, 123 N.C. App. 400, 404, 473 S.E.2d 442, 444 (1996). We conclude the trial court erred in its reliance on *Donnelly*; our reading of that decision does not support the trial court’s conclusion.

At issue in *Donnelly* was the denial of the petitioner’s application for a variance that would permit him to maintain a privacy fence

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across the back of his commercial property in order to block the view of an adjacent highway. 99 N.C. App. 702, 704, 394 S.E.2d 246, 248. A city ordinance prohibited fences above a certain height, a height the petitioner's fence exceeded. *Id.* Only after erecting the fence did the petitioner seek a variance, which was denied by the inspector, by the Board of Adjustment, and by the superior court. *Id.*

On appeal, this Court affirmed the trial court's order, but did so after an analysis of the statutory factors required for the issuance of a variance. *Id.* at 708, 394 S.E.2d at 250. The *Donnelly* Court noted that in limited circumstances a board of adjustment may grant a variance to an ordinance as provided by section 160A-388 of our General Statutes, which states, in part:

When practical difficulties or unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the board of adjustment shall have the power, in passing on appeals, to vary or modify any of the regulations or provisions of the ordinance . . . so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.

Id. (emphasis added) (quoting N.C. Gen. Stat. § 160A-388(d)).

The *Donnelly* Court emphasized that while a board of adjustment has the power to grant a variance, its power is limited such that the variance may not violate the spirit of the ordinance; "the board is prohibited from authorizing a structure which conflicts with the general purpose of the ordinance." *Donnelly*, 99 N.C. App. 702, 708, 394 S.E.2d 246, 250. When the statute was "[r]ead as a whole," the Court interpreted the spirit of the ordinance as being to preserve the appearance of the town, specifically excluding tall privacy fences. *Id.* Thus, the *Donnelly* Court concluded, the requested variance would directly contradict the ordinance. *Id.* As such, the board of adjustment had no authority to grant the variance. *Id.*

In the present case, the section of the Matthews Zoning Code regulating signs begins with a statement of its purpose:

The purpose of this subchapter is intended to:

- (1) Establish standards for the erection, alteration and maintenance of signs that are appropriate to various zoning districts;
- (2) Allow for adequate and effective signs for communicating identification and other messages while preventing signs from dominating the visual appearance of the area in which they are located;

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- (3) Protect and enhance the view of properties from public rights-of-way;
- (4) *Avoid confusing or misleading a driver* or obstructing necessary vision for traffic safety;
- (5) Insure that permitted signs do not become a hazard or nuisance;
- (6) *Advance the economic stability*, preservation and enhancement of property values; and
- (7) Ensure and advance the positive visual impact and image of the town. *These regulations are designed to provide flexibility for individual needs of business identification* and for general communication opportunities.

Matthews Zoning Code § 153.140(A) (emphasis added) (R. at 44.).

Clearly, the statute is intended to protect the general appearance of commercial properties and prevent hazards and nuisances. When, “[r]ead as a whole”, as we are instructed to do by *Donnelly*, it is apparent the ordinance was also intended to provide means for adequate and effective signage, prevent driver confusion, and allow for flexibility to meet individual needs for business identification—the very problems of which Petitioners complain. *Id.* Given this statement of purpose, we cannot agree with the trial court that Petitioners’ sign is, as a matter of law, contrary to the zoning ordinance.

Respondents place great emphasis on section 153.144(A) of the Matthews Zoning Code, which prohibits more than one sign for multi-tenant properties. This does not, however, end the proper inquiry; to conclude otherwise would negate the purpose of a variance. The Board’s power to deviate from this mandate was expressly provided by our legislature upon the inclusion of section 160A-388 in our General Statutes. N.C. Gen. Stat. § 160A-388 (stating a board of adjustment “shall have the power to vary or modify any of the regulations or provisions” of an ordinance). Additionally, the Town of Matthews contemplated deviations from its zoning requirements by its inclusion of this delegated power in section 153.287(C)(1) of the Zoning Code: “The Board of Adjustment will hear and decide appeals on variances from the requirements of the chapter which relate to the establishment or extension of structures or uses of land.” Indeed, as our Supreme Court has stated, a board of adjustment’s “principal function [is] to issue variance permits so as to prevent injustice by a strict application of the ordinance.” *Application of REA Const. Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968). To summarily conclude that

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Petitioners' requested variance is directly contrary to the zoning ordinance suggests that no variances could ever be permitted, and leads this Court to conclude the proper analysis was not made by the trial court.

Respondents also emphasize the statutory mandate that “[n]o change in permitted uses may be authorized by variance.” N.C. Gen. Stat. § 160A-388(d). Likewise, Respondents cite to section 153.287 of the Matthews Zoning Code, which states, “The Board may not grant a variance which would allow the establishment of a use which is not otherwise permitted in the district.” Matthews Zoning Code § 153.287(C)(1). We conclude Respondents' argument misinterprets the statute's prohibition of a “use.”

An “area variance” is defined as “[a] variance permitting deviation from zoning requirements about construction and placement, but not from requirements about use.” *Black's Law Dictionary* 1692-93 (9th ed. 2009). Furthermore, “[a]n ‘area’ variance is one which does not involve a use prohibited by the zoning ordinance, and generally speaking, it involves no change in the essential character of the zoned district, nor does it seek to change the essential use of the land.” 83 Am. Jur. 2d, *Zoning and Planning* § 807 (footnotes omitted).

On the other hand, a “use variance” is “a variance permitting deviation from zoning requirements about use.” *Black's Law Dictionary* 1693 (9th ed. 2009). “A ‘use variance’ generally permits a land use other than the uses permitted in the particular zoning ordinance; it essentially is a license to use property in a way not permitted under an ordinance.” 83 Am. Jur. 2d, *Zoning and Planning* § 756 (footnotes omitted); see *Lee v. Bd. of Adjustment*, 226 N.C. 107, 112-13, 37 S.E.2d 128, 133 (1946) (reversing a board of adjustment's award of a permit for the construction of a business in a district zoned for residential use, stating the board effectively “rezoned” the lot and “amended the ordinance,” which it had no authority to do).

Despite Respondents' suggestion otherwise, we conclude the variance Petitioners seek is not a use variance, seeking permission for a nonconforming use, but is an area variance, by which they seek to deviate from the ordinance for construction and placement of their sign.

B. The Board's Findings of Fact

[3] Petitioners also argue the trial court erred in concluding the Board made sufficient findings of fact to support its denial of Petitioners' application for a variance. We agree.

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In its 21 January 2010 Order, the trial court summarily concluded the Board made sufficient findings to support its decision. Then, citing to *Donnelly*, the trial court reasoned that because the requested variance was directly contrary to the Ordinance, “the board of adjustment has no duty to make findings and conclusions on the merits of the request.” *Donnelly*, 99 N.C. App. at 708, 394 S.E.2d at 250. As we have determined the trial court erred in concluding the variance was directly contrary to the Ordinance, it also erred in concluding the Board had no duty to make sufficient findings. Consequently, we review the Board’s decision *de novo*. *Blue Ridge Co.*, 188 N.C. App. at 469, 655 S.E.2d at 845-46.

“Findings of fact are an important safeguard against arbitrary and capricious action by the Board of Adjustment because they establish a sufficient record upon which this Court can review the Board’s decision.” *Crist v. City of Jacksonville*, 131 N.C. App. 404, 405, 507 S.E.2d 899, 900 (1998). In making its findings of fact, the Board is required “to state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision.” *Deffet Rentals, Inc. v. City of Burlington*, 27 N.C. App. 361, 365, 219 S.E.2d 223, 226-27 (1975). Our review of the Board’s findings of fact leads us to conclude they are insufficient on several grounds.

The only record of the Board’s findings of fact is the minutes to the Board’s 10 July 2008 meeting. The minutes, introduced with the notation “Vice Chairman Lee discussed the findings of fact,” provide no indication these minutes were intended to be the sole record of the findings. Significantly, the Board’s discussion of the findings occurs *after* the Board members voted to deny Petitioners’ application for a variance. From these minutes, we discern eight findings of fact:

- [1.] If the property owner complied with the ordinance, he can secure a reasonable return from that property.
- [2.] The property sold because of the merits of the location.
- [3.] Signage is an issue for most retail in most Matthews locations. This is not a unique hardship.
- [4.] Also, this is not a result of unique circumstances or lay of the land. It was a known condition upon purchase.
- [5.] A variance would not be not in harmony or spirit of intent of the ordinance.

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[6.] It would not secure the health or welfare of the public. The previously mentioned 90/10 split of elective vs. emergency situations at this facility did not, in his opinion, sway his mind on public safety.

[7.] Any hardship is the result of the applicant's own actions: He said it was a difficult decision, but they purchased the land knowing the conditions.

[8.] Dr. Ferrari operated his practice for 9-10 months without the monument sign. That is an indication that he can enjoy a reasonable return on his property without having the sign in place.

The first, fourth, and fifth findings, presented with no reasoning, are conclusory statements and thus insufficient to support the Board's decision. *E.g., Shoney's of Enka, Inc. v. Bd. of Adjustment*, 119 N.C. App. 420, 421-22, 458 S.E.2d 510, 511 (1995) (“[W]e do not believe the Board may rely on findings of fact which are merely conclusory in form.”).

The second, third, seventh, and eighth findings are not supported by any evidence in the record, are mere conjecture, and cannot support the Board's decision. *See MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs*, 169 N.C. App. 809, 815, 610 S.E.2d 794, 798 (stating that speculative assertions and expressions of opinion cannot support a board of adjustment's findings), *disc. review denied*, 359 N.C. 634, 616 S.E.2d 539 (2005).

The sixth finding of fact (the variance “would not secure the health and welfare of the public”) is supported solely by the opinion of Vice Chairman Lee and provides no reasoning for how the Board came to this conclusion. As such it is not sufficient to support the Board's finding. *Id.* (stating that expressions of opinion cannot support a board of adjustment's findings).

We conclude the Board's findings of fact lack the specificity necessary for this Court “to determine whether the Board ha[s] acted arbitrarily or ha[s] committed errors of law.” *Shoney's*, 119 N.C. App. at 423, 458 S.E.2d at 512 (alterations in original) (quoting *Deffet Rentals*, 27 N.C. App. at 365, 219 S.E.2d at 227).

C. Vested Rights, Estoppel, and Laches

[4] Finally, Petitioners argue the trial court erred in concluding they did not acquire vested rights in the permit and that the Town of

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Matthews was not barred by estoppel or laches from revoking the permit. We disagree.

On 9 November 2007, the Board notified Dr. Ferrari that his appeal of the revocation of the sign permit had been denied. The written notification informed Dr. Ferrari that he had the right to appeal the Board's decision to superior court, or draft a text amendment to the ordinance. Petitioners did not appeal the Board's decision. Consequently, the Board's determination that the permit was issued in error and properly revoked is the law of the case and the parties are bound by the decision. *Martin Marietta Corp. v. Forsyth Cnty. Zoning Bd. of Adjustment*, 65 N.C. App. 316, 317, 309 S.E.2d 523, 524 (1983).

Provided the permit was issued in error, Petitioners cannot establish vested rights in reliance on the permit, and this argument is dismissed. See *Mecklenburg Cnty. 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.”); *Clark Stone Co. v. N.C. Dept. of Env't & Natural Res., Div. of Land Res.*, 164 N.C. App. 24, 40, 594 S.E.2d 832, 842, *appeal dismissed, disc. review denied*, 358 N.C. 731, 603 S.E.2d 878 (2004).

Similarly, because Petitioners did not appeal the Board's 9 November 2007 decision denying his appeal of MCLUESA's revocation of the sign permit, Petitioners are bound by the decision and cannot now assert the town was barred by estoppel or laches from revoking the permit. These arguments are without merit.

IV. Conclusion

In summary, we conclude the trial court erred in finding the Board had no authority to grant a variance for Petitioners' sign. We also conclude the trial court erred in finding the Board made sufficient findings of fact to support its decision. Therefore, the Order of the superior court affirming the Board's decision is reversed, in part, and the case is remanded, in part, to the superior court with instructions to further remand to the Town of Matthews Board of Adjustment for further proceedings consistent with this opinion.

Reversed, in part, and remanded, in part.

Judges CALABRIA and STROUD concur.

DANNY'S TOWING 2, INC. v. DEP'T OF CRIME CONTROL & PUB. SAFETY

[213 N.C. App. 375 (2011)]

DANNY'S TOWING 2, INC., DOYLE SUTTON D/B/A DOYLE'S GARAGE AND WRECKER, DONNIE SUTTON D/B/A SUTTON AUTOMOTIVE AND WRECKER SERVICE, BRENDA EDWARDS D/B/A B&H TOWING, RAMDOG ENTERPRISES, LLC, JAMES AUTREY D/B/A MOE BANDY, DOMESTIC AUTO, INC., HENRY GRASTY D/B/A GRASTY'S SERVICE CENTER, STEVE MILLER D/B/A RABBIT SKIN WRECKER, THOMAS SUTTON D/B/A ELK TOWING, AND CHRIS HIGEL D/B/A ANYTIME TOWING, PLAINTIFFS v. THE NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, AND ITS AGENT, NORTH CAROLINA HIGHWAY PATROL AND TROOP G, DISTRICT V, DEFENDANTS

No. COA10-1498

(Filed 19 July 2011)

1. Injunctions— State Highway Patrol's wrecker rotation program—bases of injunction not adequate

The trial court erred in an injunctive relief case by enjoining certain portions of the rules governing the North Carolina State Highway Patrol's wrecker rotation program as unenforceable. The order of injunction did not state the reasons for its issuance, beyond a bare statement that portions of the rules which the court did not enjoin were reasonable and enforceable as written.

2. Declaratory Judgments— North Carolina State Highway Patrol's wrecker rotation—declaration of parties' rights—incomplete

The trial court erred in a declaratory judgment case by failing to clearly declare the rights of the parties and effectively dispose of the dispute concerning the rules governing the North Carolina State Highway Patrol's wrecker rotation. Because the trial court failed to make a full and complete declaration, the matter was remanded.

Appeal by Defendants from order issued 14 July 2010 and entered 19 July 2010 by Judge C. Philip Ginn in Haywood County Superior Court. Heard in the Court of Appeals 6 June 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins and Assistant Attorney General Tamara Zmuda, for Defendants.

McLean Law Firm, P.A., by Russell L. McLean, III, for Plaintiffs.

STEPHENS, Judge.

DANNY'S TOWING 2, INC. v. DEP'T OF CRIME CONTROL & PUB. SAFETY

[213 N.C. App. 375 (2011)]

This appeal arises from a challenge to the latest version of the rules governing the North Carolina State Highway Patrol's wrecker rotation program, a voluntary program that uses private wreckers to tow disabled, seized, wrecked, and abandoned vehicles when a vehicle owner cannot or will not request a towing company. On 22 January 2009, Plaintiffs Danny's Towing 2, Inc., Doyle Sutton d/b/a Doyle's Garage and Wrecker, Donnie Sutton d/b/a Sutton Automotive and Wrecker Service, Brenda Edwards d/b/a B&H Towing, Ramdog Enterprises, LLC, James Autrey d/b/a Moe Bandy, Domestic Auto, Inc., Henry Grasty d/b/a Grasty's Service Center,¹ Steve Miller d/b/a Rabbit Skin Wrecker, Thomas Sutton d/b/a Elk Towing, and Chris Higel d/b/a Anytime Towing (collectively "Plaintiffs"), wrecker services in Haywood County, filed a complaint in Haywood County District Court for declaratory judgment and injunctive relief against Defendants the State Department of Crime Control and Public Safety ("the Department"), the North Carolina Highway Patrol, and three Patrol officers.² The complaint targeted the State's Wrecker Service Regulations, 14A NCAC 09H.0321(a) ("the rules"), published by the Department in December 2006 and approved by the N.C. Rules Review Commission in March 2007, with an effective date of 18 July 2008.

Plaintiffs' complaint sought relief in the form of a declaratory judgment on two questions: whether "the acts of the Defendants are arbitrary and capricious and violate [the] North Carolina Constitution" and whether the "methodology employed by the Defendants [in the wrecker rotation program] . . . is arbitrary and not consistent with the . . . rules." Plaintiffs also sought temporary, preliminary, and permanent injunctions of the rules.

In April 2009, the case was transferred from district to superior court. In June 2009, Defendants moved to dismiss and for partial summary judgment. In February 2010, the three named Highway Patrol officers were dismissed on the basis of public official immunity and Plaintiffs' claims for monetary damages were also dismissed; Defendants' motion was otherwise denied. Meanwhile, in the year and a half between the filing of the complaint and the order in this case, the North Carolina General Assembly passed a bill amending 14A NCAC 09H.0321(a), including, *inter alia*, a requirement that wreckers in the rotation program charge "reasonable prices." At a

1. This plaintiff is listed in the original complaint as d/b/a Grasty's Servicenter, while the trial court's order lists it as d/b/a Grasty's Service Center.

2. The rule amendments at issue in the complaint had been stayed by the trial court a month earlier, on 29 December 2008, in proceedings related to another case.

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hearing on 17 May 2010, the parties agreed that six paragraphs of the rules were at issue. The trial court later issued an order enjoining the State from enforcing parts of five of the challenged paragraphs: (1) the requirement that wrecker services have a “land-based telephone line”; (2) the regulation prohibiting a driver with a valid Commercial Drivers License from driving in the rotation until the State receives a certified copy of his driving record; (3) the prohibition against wrecker services acquiring storage liens on freight or wares they were required to remove from a towed vehicle; and (4) the automatic by-pass provision, which allows the State to put a wrecker service at the bottom of the rotation list if it fails to answer a call. Finally, the trial court enjoined the State from setting fees for wrecker services provided through the rotation program. This appeal followed entry of the trial court’s order.

Discussion

On appeal, Defendants make two arguments: that the trial court (I) exceeded its authority and jurisdiction under the Declaratory Judgment Act in reviewing the reasonableness of the rules rather than their legality and (II) erred in enjoining certain portions of the rules as unenforceable. As discussed below, we agree in part and conclude that this matter must be remanded for further proceedings.

At the start of the hearing, the trial court expressed confusion over the matters before it:

. . . I want to put on the record what we’re about. And I’m not sure I’ve got in front of me what we’re about on all of this. . . . So somebody needs to tell me what we’re going to . . . put on the record so if the Court of Appeals ever takes a look at this they can kind of figure out halfway what we’ve done.

The parties agreed that parts of six paragraphs of the rules were being challenged:³

Paragraph 2, under which “a wrecker service must have a full-time business office . . . that is staffed and open during normal business hours of 8:00 a.m. to 5:00 p.m., Monday through Friday.”

Paragraph 3, which requires wrecker services to maintain their own offices, including telephone lines, on their own indepen-

3. Plaintiffs originally challenged the version of the rules effective in 2008. In 2010, the rules were amended again to incorporate the new “reasonable fees” requirement passed by the General Assembly. The 2010 version of the rules was discussed at the hearing and referenced in the trial court’s order.

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dently insured property. Their equipment and facilities “may not be shared with or otherwise located on the property of another wrecker service”

Paragraph 10, which requires wrecker services to “charge reasonable fees for services rendered.” This paragraph allows the local Highway Patrol District Sergeant to approve price lists submitted to determine if they are “reasonable, consistent with fees charged by other Highway Patrol rotation wrecker services within the District and do not exceed the wrecker service’s charges for nonrotation service calls that provide the same service, labor, and conditions.”

Paragraph 22, which requires wrecker service owners to supply the Highway Patrol with certified copies of the driving records of all its drivers.

Paragraph 23, which requires the wrecker services to return personal property stored in or with a towed vehicle, “whether or not the towing, repair, or storage fee on the vehicle has been or will be paid.”

Paragraph 28, which provides that any wrecker service which does not respond to a call from the Highway Patrol shall be “automatically by-passed,” or placed at the bottom of the rotation call list.

Plaintiffs argued that the paragraphs in dispute were preempted by federal law, in that the State can only regulate “motor carriers of property” under the safety regulatory authority exception. In general, “[f]ederal preemption occurs when: (1) Congress enacts a statute that explicitly preempts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field.” *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1045-46 (9th Cir. 2000), *overruled on other grounds by City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 153 L. Ed. 2d 430 (2002). However, the relevant portion of the United States Code, 49 U.S.C. 14501(c)(1), only preempts state and local regulation related to price, route, or service of a motor carrier with respect to the transportation of property. 49 U.S.C. 14501(c)(1) (2009). It explicitly does not restrict “the safety regulatory authority of a State with respect to motor vehicles.” 49 U.S.C. 14501(c)(2)(A); *see also City of Columbus*, 536 U.S. at 442, 153 L. Ed. 2d at 446 (holding that rules which are “genuinely responsive to safety concerns” are exempted from preemption).

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Plaintiffs asserted that the challenged sections of the rules do not affect public safety and sought a declaration to that effect, as well as an injunction. Defendants argued that the rules *in toto* fall within the safety regulatory exception. The order subsequently entered by the trial court enjoined specific parts of five of the six paragraphs challenged:

Paragraph 3, “to the extent that it requires wrecker services to have a land-based telephone line.” It also enjoins application of Paragraph 3 “to the extent that it requires wrecker services to own in fee simple the property upon which its business or storage facilities are located.”

Paragraph 10, “to the extent that it allows the State to set fees.”

Paragraph 22, “to the extent that it prohibits a driver holding a valid Commercial Drivers License from operating a wrecker while waiting on a certified driving record from the Division of Motor Vehicles.”

Paragraph 23, “to the extent that it prohibits wrecker services from acquiring a storage lien over freight and/or wares that have been . . . removed from the [towed vehicle]” and stored by the wrecker service.

Paragraph 28’s automatic by-pass provision, “unless the activity of the wrecker service is unreasonable.”

Permanent Injunction

[1] We first note that the injunctive portion of the order does not set forth the reasons for its issuance as required by statute. Under N.C. Rule of Civil Procedure 65(d), “[e]very order granting an injunction . . . shall set forth the reasons for its issuance.” N.C. Gen. Stat. § 1A-1, Rule 65(d) (2010) (emphasis added). However, “an injunctive order which does not state the reasons for its issuance is merely irregular, not void.” *Poor Richard’s, Inc. v. Stone*, 86 N.C. App. 137, 139-40, 356 S.E.2d 828, 830 (1987), *rev’d on other grounds*, 322 N.C. 61, 366 S.E.2d 697 (1988). Such irregular orders are properly corrected by a motion made before the trial court and will not be corrected on appeal. *Schultz v. Ingram*, 38 N.C. App. 422, 426, 248 S.E.2d 345, 349 (1978). Accordingly, even an irregular order is binding until corrected. *Id.*

Here, the order does not state the reasons for its issuance, beyond a bare statement that portions of the rules which the court did not enjoin are “reasonable and enforceable as written.” Despite

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this failure to comply with our Rules of Civil Procedure, we consider the injunction on its merits and, for reasons which follow, we vacate in their entirety the injunctive terms of the trial court's order.

In *Ramey v. Easley*, a case considering the previous version of the wrecker rotation service rules, the plaintiff

was removed from the Wrecker Rotation Services List for failing to: (1) respond to at least 75% of the calls made to him by the Highway Patrol; (2) maintain a current Department of Transportation inspection sticker on his large wrecker; and (3) have proper cables installed on his wreckers.

. . . [The p]laintiff sought a declaratory judgment for the wrecker rotation regulations to be declared illegal. He assert[ed that] federal law preempt[ed] the Highway Patrol's ability to establish regulations for private wrecker companies to be included on its Wrecker Rotation Services List.

Ramey v. Easley, 178 N.C. App. 197, 198, 632 S.E.2d 178, 179 (2006). In that case, we held that

[i]n the interest of public safety, the Highway Patrol has delegated authority to promulgate regulations setting forth the requirements a private wrecker service must meet in order to be included and remain on the Highway Patrol's Wrecker Rotation Services List. N.C. Gen. Stat. § 20-184; N.C. Gen. Stat. § 20-188. The challenged regulations clearly relate to public highway safety. The trial court did not err in denying plaintiff's motion for partial summary judgment.

Id. at 201, 632 S.E.2d at 181. Specifically, we held that

[the] thirty-two conditions a private wrecker service must . . . comply with in order to be included and remain on the Wrecker Rotation Services List [such as] (1) maintain[ing] legally required lighting and other safety equipment to protect the public; (2) remov[ing] all debris from the highway prior to leaving the collision scene; (3) maintain[ing] a full-time office within the Rotation Wrecker Zone; (4) consistently respond[ing] to calls in a timely manner; (5) impos[ing] reasonable charges for work performed; [] (6) secur[ing] all personal property at the scene of a collision to the extent possible; [] (7) preserv[ing] personal property in a towed vehicle; (8) maintaining a specific type and amount of insurance coverage and equipment] and prohibit[ing] persons

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with convictions for certain crimes from being included on the rotation list . . . are “genuinely responsive to safety concerns.” *City of Columbus*, 536 U.S. at 442, 153 L. Ed. 2d at 446.

[Thus], the Highway Patrol’s [regulations] fall within the “safety regulatory authority” exception set forth in 49 U.S.C. 14501(c)(2)(A), and are not preempted by federal law.

Id. at 203-04, 632 S.E.2d at 182-83. Thus, this Court has already determined that wrecker service rotation rules requiring a timely response to calls and imposing reasonable fees fall into the public safety regulatory exception. Further, our review of the record indicates that Paragraph 23 in the 2010 version of the rules considered here is virtually identical to Paragraph 22 of the version considered and approved in *Ramey*. We are bound by *Ramey*, and, therefore, the trial court’s injunction as to Paragraphs 10 (reasonable fee requirement), 23 (return of personal property), and 28 (automatic by-pass provision) is vacated. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”).

Further, the order purports to enjoin Paragraph 3 to the extent it “requires wrecker services to have a land-based telephone line” and “to own in fee simple the property upon which its business or storage facilities are located.” However, Plaintiffs did not argue in their complaint, affidavits, or at the hearing that they were being subjected to such requirements. Indeed, our review reveals that Paragraph 3 of the rules contains neither the phrase “land-based” nor “fee simple.”⁴ We see no possible interpretation of Paragraph 3 (or Paragraph 2, the portion of the rules which actually requires someone at the wrecker service be able to accept telephone calls from the Patrol) which would require land-based, as opposed to cellular, telephones or ownership of a wrecker service’s premises in fee simple. Instead, Paragraph 3 is virtually identical to Paragraph 2 of the version of the rules considered and approved in *Ramey*, and we vacate this portion of the injunction as well.

4. Paragraph 3 states, in pertinent part: “Wrecker service facilities and equipment, including vehicles, office, telephone lines, office equipment and storage facilities may not be shared with or otherwise located on the property of another wrecker service and must be independently insured. Vehicles towed at the request of the Patrol must be placed in the storage owned and operated by the wrecker service on the rotation list.”

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Finally, we conclude that the trial court's injunction of Paragraph 22 "to the extent that it prohibits a driver holding a valid Commercial Drivers License from operating a wrecker while waiting on a certified driving record from the Division of Motor Vehicles" must be vacated because ensuring proper licensure is a matter "genuinely responsive to safety concerns." *City of Columbus*, 536 U.S. at 442, 153 L. Ed. 2d at 446.

Declaratory Judgment

[2] We next consider the order as a declaratory judgment. As noted above, the majority of the language in the order can only be construed as a permanent injunction. However, in paragraphs 2 through 8, the order's language enjoining specific portions of the challenged rules is followed by a "declaration" that "[a]ll other provisions of [the relevant rule section] are reasonable and enforceable as written."

"The Declaratory Judgment Act, [N.C. Gen. Stat. §] 1-253 *et seq.*, affords an appropriate procedure for alleviating uncertainty in the interpretation of written instruments. . . ." *Hejl v. Hood, Hargett & Associates, Inc.*, 196 N.C. App. 299, 302, 674 S.E.2d 425, 427 (2009) (citation omitted). Such declarations "may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." N.C. Gen. Stat. § 1-253 (2009). "The trial court's declaratory judgment need not be in any particular form so long as it actually decides the issues in controversy." *Poor Richard's, Inc.*, 86 N.C. App. at 139, 356 S.E.2d at 830 (citing 26 C.J.S. Declaratory Judgments, §§ 158, 161 (1956)). However, the trial court's judgment should clearly declare the rights of the parties and effectively dispose of the dispute. *Id.*; *see also* 26 C.J.S. Declaratory Judgments § 158, at 262 (2001) ("In awarding declaratory relief, the court generally should make a full and complete declaration . . .").

"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." *Cross v. Capital Transaction Grp., Inc.*, 191 N.C. App. 115, 117, 661 S.E.2d 778, 780 (2008) (citation and quotation marks omitted), *disc. review denied*, 363 N.C. 124, 672 S.E.2d 687 (2009). "However, the trial court's conclusions of law are reviewable *de novo*." *Id.* (quoting *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000)).

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Here, the trial court's order states that the parties have agreed that the only uncertainty to be alleviated is the "legality" of various portions of the rules. Our review of the hearing transcript affirms this assertion. Plaintiffs' arguments at the hearing were focused entirely on whether Defendants had the authority to enact the challenged portions of the rules pursuant to the safety regulatory authority exception. Plaintiffs sought a declaration that the challenged sections of the rules are federally preempted because they do not affect public safety, a legal determination. Thus, because there were no factual disputes and the trial court made no findings of fact, we review the order *de novo*.

We conclude that the trial court failed to clearly declare the rights of the parties and effectively dispose of the dispute by making "a full and complete declaration." Importantly, the order fails to directly address the questions raised by Plaintiffs in their complaint and at the declaratory judgment hearing: whether "the acts of [] Defendants are arbitrary and capricious and violate [the] North Carolina Constitution," whether the "methodology employed by [] Defendants [in the wrecker rotation program] . . . is arbitrary and not consistent with the . . . rules," and whether the challenged portions of the wrecker rotation rules are federally preempted because they are not related to public safety and, thus, fail to fall within the safety regulatory authority exception. As the trial court acknowledged in its order, these issues are questions of law, not fact.

As previously discussed, however, the order enjoins specific portions of the rules and then declares the remainder "reasonable and enforceable as written." While this construction might permit a logical inference that the enjoined portions are "unreasonable and unenforceable as written," this was not the issue before the trial court. Whether rules are "reasonable" does not resolve the question of whether they are federally preempted, a determination which requires an analysis of whether the challenged rules relate to public highway safety. *Ramey*, 178 N.C. App. at 202, 632 S.E.2d at 181-82. However, as discussed above, this Court's decision in *Ramey* precludes the trial court from reconsidering whether these portions of the rules are federally preempted. Moreover, the trial court's determination regarding the "reasonableness" of the rules also failed to resolve the question of whether they are being *implemented* in a manner that is arbitrary. Because the trial court failed to decide this issue in controversy, we remand for it to do so.

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Conclusion

In sum, we vacate the order to the extent it purports to enjoin portions of paragraphs 3, 10, 22, 23 and 28. On remand, the trial court may not revisit the question of federal preemption as to these or any other rules controlled by *Ramey*. Instead, on remand, the trial court shall decide the issue of whether Defendants are implementing and applying the wrecker rotation service rules in an arbitrary manner.

VACATED IN PART; REMANDED IN PART.

Chief Judge MARTIN and Judge THIGPEN concur.

STATE OF NORTH CAROLINA v. WAYNE CARROUTHERS

No. COA10-1470

(Filed 19 July 2011)

Search and Seizure—handcuffed defendant—special circumstance—safety-related detainment—stop not arrest—motion to suppress properly denied

The trial court did not err in a resisting a public officer, sale of cocaine, possession with intent to sell or deliver cocaine, and attaining habitual felon case by denying defendant's motion to suppress evidence obtained after he was placed in handcuffs by a law enforcement officer. The trial court properly concluded that a special circumstance justified handcuffing defendant and, thus, this safety-related detainment did not escalate the *Terry* stop into an arrest.

Appeal by Defendant from judgment entered 4 June 2010 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 April 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Marc Bernstein, for the State.

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

BEASLEY, Judge.

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Wayne Carrouthers (Defendant) appeals from the trial court's order denying his motion to suppress evidence obtained after he was placed in handcuffs by a law enforcement officer in the course of an investigative detention. We affirm.¹

On 29 October 2007, Defendant was indicted for resisting a public officer, sale of cocaine, possession with intent to sell or deliver cocaine, and attaining habitual felon status, all arising out of his arrest on 14 September 2007.

On 29 August 2008, Defendant moved to suppress evidence obtained by Agent Robert Huneycutt of the North Carolina Alcohol Law Enforcement Agency (ALE). In his motion, Defendant argued that when he was handcuffed during the stop, an illegal seizure occurred and the investigatory detention was converted to an arrest because a reasonable person would not have felt free to leave.² On 25 September 2008, the trial court initially agreed and granted Defendant's motion, concluding that Defendant "was under arrest" when he "was handcuffed by Agent Huneycutt" because "a reasonable person would not have felt free to leave."

The State appealed, and on 20 October 2009, this Court reversed the trial court's order due to its application of an incorrect standard in determining whether Defendant was under arrest at the time he was handcuffed. *State v. Carrouthers (Carrouthers I)*, 200 N.C. App. 415, 420, 683 S.E.2d 781, 784-85 (2009). Holding that the trial court was required to resolve "whether there existed special circumstances justifying the handcuffing of Defendant as the least intrusive means reasonably necessary to carry out the purpose of the investigatory stop," we remanded the case for further findings of fact on this question. *Id.* at 420, 683 S.E.2d at 785.

We include below a summary of the evidence discussed in *Carrouthers I* and a recitation of any additional facts relevant to the specific issue before the trial court on remand.

1. Defendant's surname is spelled differently in various court documents and orders filed in this matter. Although the case names in the opinions of this Court are to be derived from the last order or judgment of the trial court within the record—the judgment and commitment order in this case—and the subject judgment identifies Defendant as Wayne Carrothers, our previous opinion in this case is captioned *State v. Carrouthers*, 200 N.C. App. 415, 683 S.E.2d 781 (2009), and we maintain the same spelling here for consistency.

2. While Defendant's motion to suppress and the initial order entered thereon are not included in the record on appeal, they constitute the basis for an earlier appeal in this case and are part of the record in COA09-31.

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On 14 September 2007, Agent Huneycutt was conducting routine ALE surveillance at an Exxon on the Run convenience store in Charlotte, North Carolina where he had previously made several drug and alcohol arrests. Agent Huneycutt observed a vehicle occupied by three individuals pull into the convenience store lot and park approximately twenty feet away from him. Two females occupied the front seat, and a male later identified as Defendant sat in the back right passenger seat of the car.

Agent Huneycutt then observed an unknown male walk over to the right rear door of the vehicle, kneel down, and hold out his upturned palm towards Defendant. Defendant's arm moved three times as if he were counting something out from his left-front pants pocket and into the hand of the unknown male, who "clasped his fist" and walked away. Based on his law enforcement experience, Agent Huneycutt concluded that he had witnessed a hand-to-hand drug transaction between Defendant and the unknown male and then approached Defendant, who was outside of the vehicle at that point. Agent Huneycutt told Defendant what he had seen, and Defendant denied any wrongdoing, claiming that he merely handed a cigarette to the unknown male. Agent Huneycutt then frisked Defendant, though finding no weapons on Defendant's person, felt a lumpy item in Defendant's left-front pants pocket. Believing the item to be consistent with narcotics, Agent Huneycutt handcuffed Defendant "for officer safety" purposes "[b]ecause there [were] two other individuals in the vehicle." Defendant then admitted "that he had sold the individual a couple of rocks" and "had some stuff in his pocket." Agent Huneycutt recovered six individually packaged rocks of crack cocaine from Defendant's left pocket and placed Defendant under arrest.

On 26 February 2010, the trial court heard arguments of counsel as to the remanded issue. The trial court first entered a form order that same day, finding special circumstances did not exist "to justify the handcuffing of Defendant as the least intrusive means reasonably necessary to carry out the purpose of the investigatory stop" and reinstated the earlier suppression order. The trial court, however, later issued detailed findings of fact and conclusions of law denying Defendant's motion to suppress, thus reversing its earlier decision in a second order entered 1 March 2010.³ In this superseding order, the

3. Neither party challenges the trial court's reversal of its 26 February order, but we underscore that the judge was indeed entitled to modify her own order where court was still in session. *See State v. Mead*, 184 N.C. App. 306, 310, 646 S.E.2d 597, 600 (2007) ("[D]uring a session of the court a judgment is *in fieri* and the court has authority

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trial court concluded “Agent Huneycutt had a reasonably articulable suspicion that a crime was underway,” justifying the investigatory stop. Additionally, the officer “took steps necessary to protect his personal safety and to maintain the status quo during the stop.” The trial court reasoned that special circumstances justified Agent Huneycutt’s use of handcuffs in the course thereof, namely, “[t]he presence of two other people with Defendant in the vehicle[.]”

On 4 June 2010, Defendant entered an *Alford* plea to sale of cocaine and possession with intent to sell or deliver cocaine in exchange for the dismissal of resisting an officer and attaining habitual felon status, preserving his right to appeal the denial of his motion to suppress. The trial court sentenced Defendant to consecutive prison terms of 17 to 21 months for sale of cocaine and 7 to 9 months for possession with the intent to sell or deliver cocaine. Defendant gave oral notice of appeal.

In reviewing the trial court’s order on a motion to suppress, the scope of this Court’s review “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). When “the trial court’s findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal.” *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004). However, this Court will review the trial court’s conclusions of law *de novo* to verify that its ruling was correct. *State v. Mahaley*, 332 N.C. 583, 592-93, 423 S.E.2d 58, 64 (1992).

Defendant contends the trial court erroneously concluded that “the mere presence of two other people in the car, while [he] was standing outside the car, was a special circumstance that justified handcuffing [Defendant] as the least intrusive means reasonably necessary to carry out a stop to investigate a suspected nonviolent crime.”

“[T]he Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth [Amendment].” *Mapp v. Ohio*, 367 U.S. 643, 656, 6 L. Ed. 2d 1081, 1090 (1961); *see also State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994) (internal quotation marks and citations omitted)

in its sound discretion, prior to expiration of the session, to modify, amend or set aside the judgment.” (internal quotation marks omitted)).

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(The Fourth Amendment to the U.S. constitution, made applicable to the states through the Fourteenth Amendment's Due Process Clause, protects "against unreasonable searches and seizures" and "applies to seizures of the person, including brief investigatory detentions[.]"). As noted in *Carrouthers I*, there are generally two ways in which a person can be "seized" for Fourth Amendment purposes: (1) by arrest, which requires a showing of probable cause; or (2) by investigatory detention, which must rest on a reasonable, articulable suspicion of criminal activity. *Carrouthers I*, 200 N.C. App. at 419, 683 S.E.2d at 784 (citations omitted). On remand, the trial court addressed the second scenario, known as the "Terry stop," where a law enforcement officer is permitted to "initiate a brief stop and frisk of an individual if there are 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *State v. Barnard*, 362 N.C. 244, 249, 658 S.E.2d 643, 646 (2008) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 906 (1968)).

Still, a valid initial investigatory stop does not shield the officers' subsequent actions from scrutiny, *see Terry*, 392 U.S. at 19–20, 20 L. Ed. 2d at 905 (holding constitutional validity of further police activity hinges on whether it is "reasonably related in scope" to circumstances justifying interference in the first place); *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 (1983) ("[A]n investigatory detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."). The seizure may become a *de facto* arrest if an officer exceeds the scope of a permissible investigatory stop, *see State v. Milien*, 144 N.C. App. 335, 340, 548 S.E.2d 768, 772 (2001) ("Where the duration or nature of the intrusion exceeds the permissible scope, a court may determine that the seizure constituted a *de facto* arrest that must be justified by probable cause, even in the absence of a formal arrest." (citing *United States v. Sharpe*, 470 U.S. 675, 682, 84 L. Ed. 2d 605, 615 (1985))). While officers are "authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the [investigative] stop[.]" *United States v. Hensley*, 469 U.S. 221, 235, 83 L. Ed. 2d 604, 616 (1985), "[t]he characteristics of the investigatory stop, including its length, the methods used, and any search performed, should be the least intrusive means reasonably available to effectuate the purpose of the stop" in order to keep the detention within permissible bounds and prevent the same from becoming a *de facto* arrest. *Carrouthers I*, 200 N.C. App. at 419, 683 S.E.2d at 784 (internal quotation marks and citation omitted).

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To be sure, “[b]rief, even if complete, deprivations of a suspect’s liberty do not convert a stop and frisk into an arrest so long as the methods of restraint used are reasonable to the circumstances.” *United States v. Crittendon*, 883 F.2d 326, 329 (4th Cir. 1989). In fact, as this Court noted in *State v. Campbell*, 188 N.C. App. 701, 656 S.E.2d 721 (2008),

“the permissible scope of a *Terry* stop has expanded in the past few decades, allowing police officers to neutralize dangerous suspects during an investigative detention using measures of force such as placing handcuffs on suspects, placing the suspect in the back of police cruisers, drawing weapons, and other forms of force typically used during an arrest.”

Campbell, 188 N.C. App. at 709, 656 S.E.2d at 727 (quoting *Longshore v. State*, 924 A.2d 1129, 1142 (Md. 2007)); see also *United States v. Shareef*, 100 F.3d 1491, 1502 (10th Cir. 1996) (“[U]se of firearms, handcuffs, and other forceful techniques does not necessarily transform a *Terry* detention into a full custodial arrest—for which probable cause is required—when the circumstances reasonably warrant such measures.” (internal quotation marks and citation omitted)).

In *Campbell*, this Court addressed the use of handcuffs during a *Terry* stop and held that the officers’ handcuffing of the defendant was reasonable “to maintain the status quo” of the situation. *Campbell*, 188 N.C. App. at 708, 656 S.E.2d at 727 (internal quotation marks omitted). We cited cases from other jurisdictions for examples of instances during which “handcuffs were permitted in investigative detentions” in those circuits. See *Id.* (citing *United States v. Martinez*, 462 F.3d 903, 907 (8th Cir. 2006)). In *Martinez*, the Eighth Circuit held “that use of handcuffs can be a reasonable precaution during a *Terry* stop to protect [officers’] safety and maintain the status quo” and noted the Court’s earlier conclusion in *United States v. Miller*, 974 F.2d 953, 957 (8th Cir. 1992), “that cuffing of suspects during [a] *Terry* stop where suspects outnumbered officers and where officers were concerned for safety was reasonably necessary to achieve purposes of *Terry* stop.” *Martinez*, 462 F.3d at 907. Another court has observed various “[c]ircumstances in which handcuffing has been determined to be reasonably necessary for the detention,” including when:

- (1) the suspect is uncooperative;
- (2) the officer has information the suspect is currently armed;
- (3) the officer has information the suspect is about to commit a violent crime;
- (4) the detention

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closely follows a violent crime by a person matching the suspect's description and/or vehicle; (5) the suspect acts in a manner raising a reasonable possibility of danger or flight; or (6) the suspects outnumber the officers.

People v. Stier, 85 Cal. Rptr. 3d 77, 82 (Cal. Ct. App. 2008).

Here, based on the totality of the circumstances, Agent Huneycutt's placement of Defendant in handcuffs was likewise reasonable. The trial court's order contains several findings of fact particularly relevant to the question posed on remand, including the following:

5. Agent Huneycutt observed a teal Hyundai occupied by three people pull into the gas station and park facing away from the store at gas pumps located in front of and to the right of Agent Huneycutt's car.

....

12. Agent Huneycutt concluded, based on his training and experience, that what he observed [when Defendant appeared to be placing something into the hand of an unknown individual who was kneeling beside Defendant's passenger door] was a hand-to-hand drug transaction. He got out of his car, called Charlotte-Mecklenburg Police for back-up, and walked toward Mr. Carrouthers to investigate.

13. Before Agent Huneycutt got out of his car, the unknown individual immediately turned, clenched his fist, and walked away from the teal car.

....

18. In response to Agent Huneycutt's assertions, Mr. Carrouthers replied that he had given the unknown individual a cigarette.

19. Because Defendant wore baggy clothes, an oversized shirt and pants of a heavy fabric, Agent Huneycutt feared that he may have been concealing a weapon. He conducted a "Terry frisk" and felt what he believed to be a lumpy plastic bag in Mr. Carrouthers' pocket which was consistent with contraband.

20. No weapon was found on Mr. Carrouthers, but Agent Huneycutt handcuffed him for officer safety due to the presence of two other people in the Hyundai.

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Defendant does not challenge any of the trial court's findings. Thus, there is no dispute that Agent Huneycutt witnessed Defendant engage in a drug transaction or that he subsequently felt an item consistent with narcotics upon frisking Defendant, corroborating his suspicion that Defendant was involved in various drug crimes at the time. These circumstances presented a possible threat of physical violence—despite the fact that no weapon was discovered on Defendant's person during the pat down—as courts have often “encountered . . . links between drugs and violence.” *Richards v. Wisconsin*, 520 U.S. 385, 391 & n.2, 137 L. Ed. 2d 615, 622 & n.2 (1997) (“It is indisputable that felony drug investigations may frequently” pose “a threat of physical violence.”).

Moreover, it is indisputable that there were two other individuals in the car when Agent Huneycutt approached Defendant; Agent Huneycutt thus believed the situation warranted additional police assistance because he was outnumbered three to one when he placed Defendant in handcuffs. *See Miller*, 974 F.2d at 957 (holding officer's decision to handcuff two of six suspects during an investigatory stop because officers were outnumbered was reasonable); *see also Muehler v. Mena*, 544 U.S. 93, 100, 161 L. Ed. 2d 299, — (2005) (“[T]he need to detain multiple occupants made the use of handcuffs all the more reasonable.”); *Maryland v. Wilson*, 519 U.S. 408, 414, 137 L. Ed. 2d 41, — (1997) (“[D]anger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car.”). Several courts have held that a circumstance in which the suspects outnumber the officers is a factor that weighs in favor of the use of handcuffs during a temporary detention as reasonably necessary. *See, e.g., United States v. Maddox*, 388 F.3d 1356, 1367 (10th Cir. 2004); *Shareef*, 100 F.3d at 1507. Accordingly, it was reasonable for Agent Huneycutt to handcuff Defendant as a permissible safety measure after the frisk gave him further reason to believe a drug crime had just occurred and where he was outnumbered by the suspects, three to one, and backup had not yet arrived.

In light of the circumstances detailed above, the trial court properly concluded that the two individuals in the car constituted a special circumstance that justified handcuffing the Defendant. Thus, this safety-related detainment did not escalate the *Terry* stop into an arrest and we affirm the trial court's denial of Defendant's motion to suppress.

Affirmed.

Judges McGEE and STROUD concur.

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STATE OF NORTH CAROLINA v. ANTHONY JEROME LEE

No. COA10-1263

(Filed 19 July 2011)

1. Appeal and Error— selection—juror’s comments—issue not preserved—no prejudice

Defendant’s argument that the trial court erred in an armed robbery case by not declaring a mistrial on its own motion based upon statements made by a potential juror during jury selection was dismissed. The issue was not preserved at trial and was not subject to plain error review. Even assuming *arguendo* that defendant properly preserved this issue for appellate review, his argument failed because he was unable to demonstrate prejudice.

2. Robbery— armed robbery—jury instructions—doctrine of recent possession—sufficient evidence—instruction proper

The trial court did not err in an armed robbery case by instructing the jury, over defendant’s objection, on the doctrine of recent possession. The State presented sufficient evidence of defendant’s recent possession of stolen property.

3. Firearms and Other Weapons— possession of a weapon of mass destruction—sufficient evidence—motion to dismiss correctly denied

The trial court did not err in a possession of a weapon of mass death and destruction and possession of a firearm by a felon case by denying defendant’s motion to dismiss the charges for insufficient evidence. The evidence showed that defendant possessed a weapon on different days and in different locations and defendant could be charged with multiple possession offenses.

Appeal by defendant from judgments entered 9 October 2009 by Judge Marvin K. Blount, III in Wayne County Superior Court. Heard in the Court of Appeals 27 April 2011.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.

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STEELMAN, Judge.

Where the issue involving a potential juror's statements during jury selection was not preserved at trial, the issue is not properly before this court and is dismissed. Where evidence permitted a reasonable conclusion that defendant was in possession of stolen property soon after it was stolen, the trial court did not err in instructing the jury on the doctrine of recent possession. Where evidence shows that defendant possessed a firearm on separate dates and in separate locations, the trial court did not err in denying defendant's motion to dismiss multiple weapons possession charges.

I. Factual and Procedural Background

Defendant committed a series of armed robberies using substantially the same *modus operandi*. Most of the robberies, which occurred between 18 March 2008 and 24 April 2008, were at convenience stores. Defendant carried a sawed-off shotgun and was often wearing a hooded camouflage jacket, a black ski mask, and black gloves. He typically took cash and packs of "Newport" brand cigarettes.

Defendant was indicted for 12 counts of armed robbery, 9 counts of possession of a weapon of mass death and destruction, 2 counts of second degree kidnapping, 12 counts of possession of a firearm by a felon, and 4 counts of being an habitual felon. Defendant was tried before a jury at the 28 September 2009 session of Criminal Superior Court for Wayne County. All charges were submitted to the jury except the kidnapping charges, which were dismissed by the State, and the habitual felon charges, which were reserved for the second phase of the trial. Defendant was found guilty of 10 counts of armed robbery, 7 counts of possession of a weapon of mass death and destruction, and 10 counts of possession of a firearm by a felon. After the verdicts were returned, the State dismissed the 4 habitual felon counts. The trial court sentenced defendant to 6 consecutive terms of 117-150 months imprisonment.

Defendant appeals.

II. Failure to Declare a Mistrial *Ex Mero Motu*

[1] In his first argument, defendant contends that the trial court committed plain error by not declaring a mistrial on its own motion based upon statements made by a potential juror during jury selection. We disagree.

During the jury selection process, the State asked one of the potential jurors if the fact that he knew everyone in the courtroom

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through his part-time work as a sheriff's deputy would "affect his ability to hear the evidence and be fair to both sides." The potential juror responded, "I really can't say because I know some of Mr. Lee's record . . . I've dealt with him in district court." This juror was excused for cause.

Defendant asserts that the information about defendant's prior record, disclosed in the presence of the other jurors, improperly tainted the remainder of the jury, depriving him of his fundamental right to trial by an impartial jury. Admitting that he did not raise any objection before the trial court, defendant asks this Court to conduct plain error review of the trial court's decision not to grant a mistrial on its own motion.

Our Supreme Court has held that "plain error analysis applies only to instructions to the jury and evidentiary matters." *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578, *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000). Therefore, plain error review is not available for a trial court's failure to declare a mistrial on its own motion. *State v. Repogle*, 181 N.C. App. 579, 582, 640 S.E.2d 757, 760 (2007); *State v. McCall*, 162 N.C. App. 64, 70, 589 S.E.2d 896, 900 (2004); *State v. Peoples*, 167 N.C. App. 63, 69, 604 S.E.2d 321, 325 (2004); but see *State v. Hinton*, 155 N.C. App. 561, 563-65, 573 S.E.2d 609, 611-12 (2002) (applying a plain error analysis to a trial court's failure to declare a mistrial *ex mero motu*).

Because this issue was not preserved at trial and is not subject to plain error review, this issue is not properly before this Court and is dismissed.

Even assuming *arguendo* that defendant properly preserved this issue for appellate review, his argument fails because he is unable to demonstrate prejudice. Evidence of defendant's prior felony conviction was introduced to the jury as part of the State's evidence on the charge of possession of a firearm by a felon. The general statement made by a potential juror about defendant's "record" was not prejudicial to defendant because specific evidence of his record was subsequently introduced at trial.

This argument is dismissed.

III. Jury Instruction on Recent Possession Doctrine

[2] In his second argument, defendant contends that the trial court erred by instructing the jury, over defendant's objection, on the doctrine of recent possession. We disagree.

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A. Standard of Review

A trial court's decisions regarding jury instructions are subject to *de novo* review. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). A jury instruction is proper if it is based on "some reasonable view of the evidence." *State v. Garner*, 330 N.C. 273, 295, 410 S.E.2d 861, 874 (1991) (quotation omitted).

B. Analysis

Under the doctrine of recent possession, possession of recently stolen property raises a presumption that the possessor stole the property. *State v. Maines*, 301 N.C. 669, 673, 273 S.E.2d 289, 293 (1981). Although this doctrine is often applied in the context of larceny, it also applies to armed robbery. *State v. Bell*, 270 N.C. 25, 30, 153 S.E.2d 741, 746 (1967). In order to invoke the presumption that the possessor is guilty under the doctrine of recent possession, the State must prove that "(1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others . . . ; and (3) the possession was recently after the larceny[.]" *Maines*, 301 N.C. at 674, 273 S.E.2d at 293 (internal citations omitted).

Defendant argues that the State did not introduce sufficient evidence on the first two prongs of this test and that the trial court should not have instructed the jury on the doctrine of recent possession. We hold that the State's evidence can reasonably be viewed as showing that defendant was in possession of recently stolen property. The trial court did not err by giving this instruction.

The first prong of the "recent possession" test requires that the property be identified as stolen. *State v. Carter*, 122 N.C. App. 332, 338, 470 S.E.2d 74, 78 (1996). However, the property need not be unique to be identified. *Id.* at 338, 470 S.E.2d at 78. Non-unique property may be identified "by reference to characteristics other than its appearance: the assemblage or combination of items recovered, the quantity of items recovered, and the stamps and marks on items recovered." *State v. Holland*, 318 N.C. 602, 608, 350 S.E.2d 56, 60 (1986), overruled on other grounds by *State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987).

Defendant argues that the State failed to establish that the Newport cigarettes that the police found were stolen because the goods were not unique. The State may present either direct or circumstantial evidence to meet its burden. *State v. Jenkins*, 167 N.C.

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App. 696, 699, 606 S.E.2d 430, 432 (2005), *aff'd*, 359 N.C. 423, 611 S.E.2d 833 (2005). “[C]ircumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant.” *State v. Adcock*, 310 N.C. 1, 36, 310 S.E.2d 587, 607-08 (1984) (citing 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 15.02 (3d ed. 1977)). A court’s review of the sufficiency of the evidence is identical whether the evidence is circumstantial or direct. *State v. Garcia*, 358 N.C. 382, 413, 597 S.E.2d 724, 746 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). It is for the jury to weigh the evidence. *Thomas v. Morgan*, 262 N.C. 292, 295, 136 S.E.2d 700, 702 (1964). We hold that the State produced sufficient circumstantial evidence from which the jury could conclude that the Newport cigarettes found in defendant’s duffel bag were stolen.

First, the quantity and packaging of the cigarettes found in the duffel bag on the front porch of the residence where defendant was apprehended were the same as those stolen in the final convenience store robbery. Testimony of the clerk who was working at the Kangaroo store on Berkeley Boulevard, where the final armed robbery took place on 24 April 2008, established that the robber took two bags “packed to the bursting point” with Newport cigarettes. Another Kangaroo store clerk testified that the bags in which the cigarettes were found by the police were exactly the same as the bags used at all Kangaroo stores. The jury also had the opportunity to compare the bags of cigarettes taken at the time of the robbery with the bags found by the police, because the State introduced still photographs from a surveillance camera at the Kangaroo store that showed defendant with the bags of cigarettes.

Second, the cigarettes were identifiable because they were found with items directly connected to the robbery. The duffel bag in which the cigarettes were found also contained a sawed-off shotgun, a hooded woodland camouflage jacket, a gray hoody, and black knit gloves. These items matched descriptions of the robber’s weapon and clothing. Several of the witnesses actually identified the objects as the same as or similar to those used by the robber.

Despite the fact that the stolen goods were not unique, the State produced sufficient circumstantial evidence so that the jury could have concluded that the cigarettes found in the duffel bag were the same cigarettes that had been stolen from the Berkeley Boulevard Kangaroo store on 24 April 2008.

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The second prong of the test for application of the doctrine of recent possession requires that “the stolen goods were found in defendant’s custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant’s hands or on his person so long as he had the power and intent to control the goods.” *Maines*, 301 N.C. at 674, 273 S.E.2d at 293. A defendant who has the power and intent to control the property has constructive possession of it. *State v. Mewborn*, 200 N.C. App. 731, 736, 684 S.E.2d 535, 539 (2009). When a defendant does not have exclusive control of the premises where the property is found, the State must introduce other circumstantial evidence sufficient for the jury to find that the defendant had constructive possession. *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989).

Defendant argues that he did not have exclusive possession of the Newport cigarettes found by the police. Although defendant did not have actual possession of the duffel bag, or the cigarettes inside it, when they were discovered and did not have exclusive control over the premises on which the cigarettes were found, the State presented evidence from which the jury could find that defendant had constructive possession of the cigarettes. Defendant’s ex-girlfriend identified the duffel bag in question as belonging to defendant. Moreover, defendant’s DNA was found on two of the other items found in the bag, and his ex-girlfriend identified the camouflage jacket and gloves found in the bag as belonging to defendant. Other items found in the bag were also connected to the robbery by witness testimony identifying the items as the same as or similar to those used by the robber. This circumstantial evidence was sufficient for a reasonable jury to conclude that defendant had constructive possession of the Newport cigarettes found in the duffel bag. *See State v. Autry*, 101 N.C. App. 245, 252, 399 S.E.2d 357, 362 (1991) (holding that circumstantial evidence that cocaine was found on a table a few feet away from the defendant and that the defendant owned two other items on or near the table was sufficient to allow a reasonable jury to conclude that the defendant had constructive possession of the cocaine).

Because there was sufficient evidence of defendant’s recent possession of stolen property, the trial court did not err in instructing the jury on the doctrine of recent possession.

This argument is without merit.

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IV. Denial of Defendant's Motion to Dismiss

[3] In his third argument, defendant contends that the trial court erred by denying his motion to dismiss the charges for insufficient evidence. We disagree.

A. Standard of Review

The trial court's denial of a motion to dismiss for insufficient evidence is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). On consideration of a motion to dismiss, the court need only determine whether there is substantial evidence of each essential element of the offense charged and of the defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

B. Analysis

Defendant assigns error only to the trial court's denial of the motion to dismiss with respect to the charges of possession of a weapon of mass death and destruction and possession of a firearm by a felon. He argues that the evidence was insufficient to support multiple possession charges because the evidence tended to show that a single weapon was used, and did not show that the possession on each subsequent date of offense was a new and separate possession.

This Court recently considered the question of whether a defendant can be convicted of multiple firearm possession offenses when the same firearms were used to commit multiple substantive offenses. *State v. Wiggins*, — N.C. App. —, —, 707 S.E.2d 664, 669, *disc. review denied*, — N.C. —, 707 S.E.2d 242 (2011). In *Wiggins* there was evidence that a series of similar substantive crimes had all been committed with the same weapons within a two-hour period in a limited geographic area. *Id.* at —, 707 S.E.2d at 672. Based upon these facts, this Court determined that the defendant could only be convicted of one possession offense:

As a result, we conclude that Defendant's possession of a firearm during the sequence of events that included the murder of Mr. Walls and the assaults upon Mr. Hinton and Ms. Waters constituted a single possessory offense rather than three separate possessory offenses. The extent to which Defendant is guilty of single or multiple offenses hinges upon the extent to which the weapons in question were acquired and possessed at different times. The undisputed evidence presented at trial clearly establishes that the weapons at issue here came into Defendant's pos-

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session simultaneously and were utilized over the course of a two hour period within a relatively limited part of Kinston in connection with the commission of a series of similar offenses. In light of that set of facts, we conclude that the trial court properly entered judgment against Defendant based upon his conviction for possession of a firearm by a convicted felon in File No. 08 CRS 2527. However, we also conclude that the two possession-based judgments entered by the trial court in File Nos. 08 CRS 2525 and 2526 should be reversed

Id. at —, 707 S.E.2d at 672. However, as noted above, whether a defendant is guilty of a single offense or multiple offenses depends on the factual circumstances. *Id.* at —, 707 S.E.2d at 672. If the evidence shows that the defendant possessed a weapon on different days and in different locations, the holding from *Wiggins* is not controlling, and the defendant can be charged with multiple possession offenses.

In contrast to *Wiggins*, where the substantive offenses were committed in close geographic and temporal proximity, the offenses in the instant case were committed in nine different locations on ten different days over the course of a month. *See Id.* at —, 707 S.E.2d at 672. While the evidence tended to show that defendant used the same weapon during each armed robbery, the robberies all occurred on different days and in different locations. Because each possession of the weapon was separate in time and location, we hold that the trial court did not err in denying defendant's motion to dismiss the multiple weapons possession charges.

This argument is without merit.

NO ERROR.

Judges STEPHENS and HUNTER, JR. concur.

STATE v. MUNGO

[213 N.C. App. 400 (2011)]

STATE OF NORTH CAROLINA v. RONNIE NORVEL MUNGO, DEFENDANT

No. COA10-718

(Filed 19 July 2011)

1. Appeal and Error—no right of appeal—petition for certiorari—granted for one issue—denied for remaining issues

Defendant in a felonious breaking or entering, larceny after breaking or entering, safecracking, and habitual felon case failed to take timely action to preserve his right to appeal. Defendant's request to consider his brief as a petition for *certiorari* and allow review of the calculation of his prior record level was granted. As defendant had no right to appeal the remaining issues raised in his brief, defendant's request to review these by *certiorari* was denied.

2. Sentencing—prior record level—calculation not erroneous

The trial court did not err in a felonious breaking or entering, larceny after breaking or entering, safecracking, and habitual felon case in its calculation of defendant's prior record level.

Appeal by defendant from judgment entered on 8 February 2010 by Judge Yvonne Mims Evans in Superior Court, Mecklenburg County. Heard in the Court of Appeals 12 January 2011.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Larissa S. Williamson, for the State.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for defendant-appellant.

STROUD, Judge.

Defendant appeals on various grounds. For the following reasons, we find that the trial court did not err in calculating defendant's prior record level and dismiss defendant's other arguments on appeal.

I. Background

Defendant was indicted for felonious breaking or entering, larceny after breaking or entering, safecracking, and obtaining the status of habitual felon. Defendant pled guilty to all of the charges against him. During defendant's plea hearing the State provided a copy of defendant's Division of Criminal Information ("DCI") record to the trial court and asked that he be sentenced as "a Prior Record

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Level VI for habitual sentencing[.]” Defendant did not stipulate to his prior record level but also did not raise any objection to the prior record information, including his prior convictions, as presented by the State. Defendant did however disagree with the points calculated determining his prior record level, and after a lengthy discussion with both his attorney and the trial judge regarding how his points were calculated, the trial court agreed with the State and concluded that defendant had a prior record level of VI. The trial court sentenced defendant within the presumptive range to a minimum of 140 months and a maximum of 177 months imprisonment, with credit for 278 days of pretrial confinement. The trial court also recommended defendant pay \$798.35 in restitution.

On 16 February 2010, the trial court made appellate entries noting that defendant had given notice of appeal. However, the transcript of defendant’s plea does not indicate that defendant gave oral notice of appeal, and the record on appeal does not contain a written notice of appeal. Defendant’s brief states that his appeal is taken pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a1) and 15A-1444(a2), but also requests in the alternative that this Court treat his brief as a petition for certiorari pursuant to N.C. Gen. Stat. § 15A-1444(e).

II. Right to Appellate Review

[1] Defendant raises five issues in his brief, but before addressing the substance of defendant’s issues we must first determine whether defendant has a right to appeal or a corresponding right to review via a petition for certiorari as to each issue. Defendant contends that: (1) “there was insufficient evidence that . . . [defendant] understandingly and knowingly entered his plea[;]” (2) there was no admissible evidence to support the award of restitution; (3) his prior record level was calculated incorrectly; (4) he was denied effective assistance of counsel due to the trial court’s denial of his motion to continue in order to allow him time to retain counsel; and (5) his constitutional rights to a fair and impartial trial were denied by the trial court’s “inappropriate comments” about his prior record. (Original in all caps.)

N.C. Gen. Stat. § 7A-27(b) does not provide a route for appeals from guilty pleas, *see* N.C. Gen. Stat. § 7A-27(b) (2007), we thus turn to defendant’s next basis for appeal N.C. Gen. Stat. § 15A-1444. N.C. Gen. Stat. § 15A-1444 provides in pertinent part:

(a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a mat-

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ter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

(a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:

- (1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
- (2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
- (3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

. . . .

(d) Procedures for appeal to the appellate division are as provided in this Article, the rules of the appellate division, and Chapter 7A of the General Statutes. The appeal must be perfected and conducted in accordance with the requirements of those provisions.

(e) Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. . . .

. . . .

(g) Review by writ of certiorari is available when provided for by this Chapter, by other rules of law, or by rule of the appellate division.

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N.C. Gen. Stat. § 15A-1444 (2007).

Defendant has no right to appeal under N.C. Gen. Stat. § 15A-1444(a1), as his minimum sentence of imprisonment falls “within the presumptive range for the defendant’s prior record or conviction level and class of offense.” N.C. Gen. Stat. § 15A-1444(a1).

As to N.C. Gen. Stat. § 15A-1444(a2), this Court has noted that

[a] plain reading of this subsection indicates that the issues set out may be raised on appeal by any defendant who has pled guilty to a felony or misdemeanor in superior court. However, we believe the right to appeal granted by this subsection is not without limitations.

If a defendant who has pled guilty does not raise the specific issues enumerated in subsection (a2) and does not otherwise have a right to appeal, his appeal should be dismissed. Furthermore, if during plea negotiations the defendant essentially stipulated to matters that moot the issues he could have raised under subsection (a2), his appeal should be dismissed.

State v. Hamby, 129 N.C. App. 366, 369, 499 S.E.2d 195, 196 (1998).

Defendant has raised one issue regarding N.C. Gen. Stat. § 15A-1444(a2), particularly N.C. Gen. Stat. § 15A-1444(a2)(1); however, defendant has no right to appeal under N.C. Gen. Stat. § 15A-1444(a2) as to the other issues. Accordingly, as to all of defendant’s issues except the one regarding calculation of his prior record, appellate review could be only by certiorari, under N.C. Gen. Stat. § 15A-1444(e). *See* N.C. Gen. Stat. § 15A-1444(e).

Pursuant to N.C. Gen. Stat. § 15A-1444(g), we now consider our own rules regarding certiorari. *See* N.C. Gen. Stat. § 15A-1444(g). Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure governs when we may allow review by certiorari:

The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

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N.C.R. App. P. Rule 21(a)(1).

As noted above, defendant has a right to appeal only as to the calculation of his prior record level. *See generally* N.C. Gen. Stat. § 15A-1444(a2)(1). However, though the record contains appellate entries, it provides no written notice of appeal, and the transcript does not contain an oral notice of appeal. Accordingly, defendant has lost his right to appeal through his failure to comply with North Carolina Rule of Appellate Procedure 4 which requires either oral or written notice of appeal. *See* N.C.R. App. P. 4(a); *see also State v. Hughes*, — N.C. App. —, —, 707 S.E.2d 777, 778-79 (2011) (“[T]he fact that the record contains appellate entries does not, without more, suffice to show that Defendant properly appealed from the trial court’s judgment to this Court. Thus, since the record simply does not establish that Defendant ever gave notice of appeal from the trial court’s judgment as required by N.C.R. App. P. 4, we lack jurisdiction to consider Defendant’s appeal, which must, therefore, be dismissed.”). As defendant failed “to take timely action” to preserve his right to appeal, we grant defendant’s request to consider his brief as a petition for certiorari and allow review of the issue as to the calculation of his prior record level. *See* N.C.R. App. P. 21(a)(1). As to the remaining issues raised in defendant’s brief, defendant had no right to appeal from these issues, and we therefore deny defendant’s request to review these by certiorari. *See* N.C. Gen. Stat. § 15A-1444; N.C.R. App. P. 21(a)(1).

III. Prior Record Level

[2] Defendant argues that “the trial court erred in sentencing . . . [him] due to an error in the calculation of . . . [his] prior record level points.” (Original in all caps.) We review the calculation

of an offender’s prior record level [as] a conclusion of law that is subject to *de novo* review on appeal. It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court’s determination of a defendant’s prior record level to be preserved for appellate review.

State v. Bohler, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009), *disc. review denied*, — N.C. —, 691 S.E.2d 414 (2010).

N.C. Gen. Stat. § 15A-1340.14(f) provides:

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A prior conviction shall be proved by any of the following methods:

....

- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.

....

The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction. The original or a copy of the court records or a copy of the records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true. For purposes of this subsection, “a copy” includes a paper writing containing a reproduction of a record maintained electronically on a computer or other data processing equipment, and a document produced by a facsimile machine. The prosecutor shall make all feasible efforts to obtain and present to the court the offender’s full record. Evidence presented by either party at trial may be utilized to prove prior convictions.

N.C. Gen. Stat. § 15A-1340.14(f) (2007).

Defendant does not dispute that the DCI record as provided under N.C. Gen. Stat. § 15A-1340.14(f)(3) was submitted to the trial court or that the DCI record is inaccurate in any way. Accordingly, the State met its burden of proof under N.C. Gen. Stat. § 15A-1340.14(f)(3) as to defendant’s prior convictions. *See* N.C. Gen. Stat. § 15A-1340.14(f)(3).

Specifically, defendant argues that (1) “[b]y using the H felonies for the habitual felon indictment and the G felonies for the prior record level, the State increased . . . [defendant’s] prior record points by 12 instead of 8 record points[,]” and (2) “by using felonies for prior record point level calculations when convictions obtained the same week were used for habitual felon sentence enhancement, the State has violated the spirit of N.C. Gen. Stat. § 14-7.6 (2009).” However, as

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to the two directly aforementioned issues defendant also notes, respectively that (1)

this Court [in *State v. Cates*, 154 N.C. App. 737, 573 S.E.2d 208 (2002), *disc. review denied*, 356 N.C. 682, 577 S.E.2d 897, *cert. denied*, 540 U.S. 846, 157 L.Ed. 2d 84 (2003),] has previously determined that the legislature did not limit a prosecutor's discretion in choosing which prior felony convictions should be used for habitual felon calculations rather than prior record calculations, but nonetheless [defendant] requests this Court review this issue again in light of the prejudice to . . . [defendant] in this case[,]

and (2) “[c]ounsel acknowledges this Court’s holding otherwise in *State v. Truesdale*, 123 N.C. App. 639, 473 S.E.2d 670 (1996), but respectively requests that this Court review the issue again in light of the substantial prejudice it creates for . . . [defendant’s] sentencing purposes.” In other words, defendant acknowledges that his arguments are contrary to case law, but asks that we reconsider his issues in light of his particular circumstances. We remind defendant that we are bound by our prior decisions. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”). Accordingly, this argument is overruled.

IV. Conclusion

For the reasons stated above, the trial court did not err in its calculation of defendant’s prior record level and defendant’s appeal as to any other issues arising out of his plea is dismissed.

NO ERROR IN PART; DISMISSED IN PART.

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

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WILLEM PAUL VANWIJK PLAINTIFF v. PROFESSIONAL NURSING SERVICES, INC.,
DEFENDANT

No. COA10-1586

(Filed 19 July 2011)

Jurisdiction— subject matter— administrative hearing—failure to exhaust administrative remedies—motion to dismiss properly granted

The trial court did not err in a negligence and negligence *per se* case by granting defendant's motion to dismiss for lack of subject matter jurisdiction. Plaintiff failed to exhaust his administrative remedies by not requesting an administrative hearing to contest the decision of the North Carolina Criminal Justice Education and Training Standards Commission.

Appeal by plaintiff from order entered 22 March 2010 by Judge Arnold O. Jones, II, in Wayne County Superior Court. Heard in the Court of Appeals 7 June 2011.

The Leon Law Firm, P.C., by Mary-Ann Leon, for plaintiff-appellant.

Smith Moore Leatherwood, LLP, by George J. Oliver and Elizabeth Brooks Scherer, for defendant-appellee.

McCULLOUGH, Judge.

Willem Paul Vanwijk ("plaintiff") initially filed a complaint against Professional Nursing Services, Inc. ("defendant"), alleging common law negligence and negligence *per se*. Plaintiff subsequently amended his complaint to include a claim for breach of contract, but voluntarily dismissed the claim. The trial court dismissed plaintiff's claims of negligence and negligence *per se* for lack of subject matter jurisdiction and plaintiff appeals.

I. Background

Plaintiff served as a police officer with the Goldsboro Police Department for over twelve years. On 7 November 2005, plaintiff was subjected to a random drug test, as allowed pursuant to Department rules. Plaintiff reported to defendant's facility to provide the requisite urine sample. Defendant is a North Carolina corporation, which regularly provides controlled substance examination services to the City

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of Goldsboro. Defendant collects urine samples, transports them to its approved testing laboratory, Baptist Medical Center (“Baptist Health”), and reports results through its medical officer. Baptist Health provides the collection kits and chain-of-custody paperwork used by defendant in the sample taking process.

Upon receiving plaintiff’s urine sample, defendant’s employee, Janice Gurley, poured the sample into a single vial, sealed it, covered it with a tamper-evident label, and placed it in an individualized collection bag along with the chain-of-custody paperwork. Plaintiff immediately reported to his supervisor that there were irregularities with the taking of his drug test. Plaintiff had taken four previous drug tests while employed with the Goldsboro Police Department and each time the collector used a split-sample method, meaning that plaintiff’s original urine sample was separated into two vials instead of a single vial. Plaintiff told his supervisor the discrepancies were that his name was not on the employee list in Gurley’s possession, he was shown two, rather than three, collection containers, and his sample was poured into a single vial even though he initialed two tamper-evident labels.

Plaintiff’s sample was subsequently transported to Baptist Health for testing. Baptist Health only uses a small amount of the urine and retains the rest for twelve to thirteen months, in case of a need for further testing. Baptist Health conducted two different tests on plaintiff’s sample, with both being positive for marijuana use.

On 10 November 2005, Dr. Martin DeGraw, defendant’s certified medical review officer, notified plaintiff of his positive test results and then reported them to the Goldsboro Police Department. Plaintiff, in his deposition, stated that Dr. DeGraw did not ask plaintiff if there could be an alternative explanation for the positive result. Plaintiff subsequently talked to defendant’s Chief Operating Officer, Ronald Jennette, who according to plaintiff told him that the single-sample method was not the proper procedure for testing law enforcement officers. Mr. Jennette did tell plaintiff that he could have his sample retested, if desired.

Upon receipt of the positive result, the Goldsboro Police Department immediately suspended plaintiff pending an investigation and ultimately terminated plaintiff on 15 November 2005. The Police Chief advised plaintiff that he could challenge his termination before the City of Goldsboro’s Grievance Committee (“Grievance Committee”). Plaintiff consequently filed his grievance and had a hearing on 23 November 2005. Plaintiff argued at the hearing that,

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because his urine sample was not collected using the split-sample method, the Police Department should disregard the positive test result. Plaintiff had taken another drug test, administered by a separate laboratory upon learning of his positive test results, which produced a negative result. Plaintiff attempted to present the negative result to the Police Department, but it was taken days after his positive result. Again, defendant informed plaintiff of his right to have the original sample retested with a third party, but yet again plaintiff declined.

On 29 November 2005, the Grievance Committee upheld plaintiff's termination. On the same day, the North Carolina Criminal Justice Education and Training Standards Commission ("Commission") notified plaintiff in a letter sent by certified mail that it had determined that plaintiff's drug test was valid and that his law enforcement certification was effectively suspended for five years. Also in the letter, the Commission advised plaintiff of his right to request a formal administrative hearing before the Office of Administrative Hearings within thirty days for the purpose of challenging the Commission's findings. During litigation the parties learned that the letter was returned "unclaimed" even though it was sent by certified mail to plaintiff's proper address. Plaintiff claimed that he did not deliberately refuse receipt of the letter and in the alternative acknowledged that his attorney from the Grievance Committee hearing advised him of the Commission's decision and the thirty-day appeal period. Plaintiff never appealed the Commission's decision.

Plaintiff ultimately filed this complaint against defendant, arguing that the single-sample method was unlawful and may have contaminated his urine and that defendant committed other negligent acts. Defendant initially made a Motion to Dismiss, under Rule 12(b)(6) of the Rules of Civil Procedure, along with motions for summary judgment, which were denied. Defendant also filed a Motion to Dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, which the trial court granted. Plaintiff appeals.

II. Analysis

The dispositive issue raised on appeal is whether the trial court erred in granting defendant's motion for lack of subject matter jurisdiction. In making its motion for lack of subject matter jurisdiction, defendant argued that plaintiff failed to exhaust all available administrative remedies. Plaintiff contends that the trial court erred by applying the North Carolina Administrative Procedures Act ("NCAPA")

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to a dispute between nongovernmental parties. *See* N.C. Gen. Stat. § 150B *et seq.* (2009). We affirm.

Subject matter jurisdiction is a requirement for the use of judicial authority over any controversy and a motion to dismiss for lack of subject matter jurisdiction, under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, may be raised at any time. *See Hentz v. Asheville City Bd. of Educ.*, 189 N.C. App. 520, 522, 658 S.E.2d 520, 521-22 (2008). Where a plaintiff has failed to exhaust its administrative remedies, its action brought in the trial court may be dismissed for lack of subject matter jurisdiction. *Id.* at 522, 658 S.E.2d at 522.

“So long as the statutory procedures provide effective judicial review of an agency action, courts will require a party to exhaust those remedies.” *Flowers v. Blackbeard Sailing Club*, 115 N.C. App. 349, 352, 444 S.E.2d 636, 638 (1994).

This is especially true where a statute establishes, as here, a procedure whereby matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose. In such a case, the legislature has expressed an intention to give the administrative entity most concerned with a particular matter the first chance to discover and rectify error. Only after the appropriate agency has developed its own record and factual background upon which its decision must rest should the courts be available to review the sufficiency of its process. An earlier intercession may be both wasteful and unwarranted.

Presnell v. Pell, 298 N.C. 715, 721-22, 260 S.E.2d 611, 615 (1979).

Plaintiff would like for this Court to believe that the administrative exhaustion doctrine only applies to claims brought against administrative agencies and not to those brought against private parties that happen to stem from decisions of an administrative agency. Plaintiff attempts to distinguish two of the cases cited by defendant on the grounds that neither discusses whether a superior court would have jurisdiction to adjudicate a conflict between private parties that happens to arise from a controversy between an aggrieved person and an administrative agency. *See Ward v. New Hanover Cty.*, 175 N.C. App. 671, 625 S.E.2d 598 (2006); *Huang v. N.C. State University*, 107 N.C. App. 710, 421 S.E.2d 812 (1992). In addition, plaintiff argues that *Presnell*, also referenced by defendant, supports his contention because in that case a schoolteacher sued the school district for wrongful discharge and at the same time maintained a claim for the intentional tort of slander against the principal and other individuals.

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See Presnell, 298 N.C. 715, 260 S.E.2d 611. Plaintiff's interpretation is flawed though because the trial court dismissed the teacher's wrongful discharge claim against all parties for lack of subject matter jurisdiction in failing to exhaust all administrative remedies, but allowed the teacher to maintain her claim of slander against the principal as it did not involve the same issues the administrative review process would have addressed in reviewing her termination. *Id.* Similarly in our case, the administrative hearing would have addressed plaintiff's decertification and fully reviewed whether plaintiff's drug test was administered properly. The facts and issues that would have been litigated in the trial court under claims of negligence and negligence *per se* would have been the same facts and issues reviewed in the administrative hearing when determining whether plaintiff was rightfully terminated.

Moreover, defendant cites to other cases involving claims between private parties that were dismissed for failure to exhaust administrative remedies. The two other cases are more analogous to the case at hand in that both involved claims against private parties. *Leeuwenburg v. Waterway Investment Limited Partnership*, 115 N.C. App. 541, 445 S.E.2d 614 (1994); *Flowers*, 115 N.C. App. 349, 444 S.E.2d 636. In both cases, the superior courts dismissed plaintiffs' claims against the private party defendants for lack of subject matter jurisdiction stemming from a failure to exhaust administrative remedies because the plaintiffs did not appeal the permit applications with the proper administrative agency. *Id.* The permits gave defendants approval to build their piers across portions of plaintiffs' property, and therefore, the plaintiffs should have appealed the permit decision prior to bringing their private suits in superior court. *Id.*

The administrative remedies available to plaintiff are provided in the statutes and code governing the Commission, and state, "[a]ny person who desires to appeal the proposed denial, suspension, or revocation of any certification authorized to be issued by the Commission shall file a written appeal with the Commission not later than 30 days following notice of denial, suspension, or revocation." N.C. Gen. Stat. § 17C-11(b) (2009); *see* 12 N.C. Admin. Code § 9A.0107(e) (2011). Here, plaintiff filed a grievance with the Grievance Committee not long after being terminated from his employment as a Goldsboro police officer. The Grievance Committee held a hearing and upheld plaintiff's termination for the positive drug screen. On the same day, the Commission notified plaintiff by certified mail that it had determined that the drug test was properly administered and that plaintiff's law enforcement certification was

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being suspended for a period of five years. In the same letter, the Commission also informed plaintiff, in bold and capitalized letters, of his right to an administrative hearing upon filing of a notice with the Commission within thirty days.

Plaintiff never filed a notice for an administrative hearing pursuant to the Commission's letter or the regulations governing the Commission, but did file this private action against defendant three years later. The Commission had expertise to determine whether plaintiff was fit to perform his duties and determine whether the proper testing procedures were utilized. *See Flowers*, 115 N.C. App. at 353, 444 S.E.2d at 638. The process of requesting an administrative hearing acts as a form of judicial restraint and is equivalent to "a jurisdictional prerequisite when a party has effective administrative remedies." *Id.* at 353, 444 S.E.2d at 639.

"Furthermore, the policy of requiring exhaustion of administrative remedies does not require merely the initiation of the prescribed procedures, but that they should be pursued to their appropriate conclusion and final outcome before judicial review is sought." *Leeuwenburg*, 115 N.C. App. at 545, 445 S.E.2d at 617. Plaintiff initiated the process by filing a complaint with the Grievance Committee and receiving a decision from the Commission, but did not follow through by appealing the Commission's decision. Requesting an administrative hearing is an effective administrative remedy, but plaintiff failed to pursue this method within the mandated thirty days. Therefore, plaintiff waived his right to an administrative hearing and the superior court lacked subject matter jurisdiction as a result of plaintiff's failure to exhaust his administrative remedies.

In affirming defendant's Motion to Dismiss for lack of subject matter jurisdiction, the other issues on appeal become moot. Consequently, we decline to address the other issue of whether defendant should have been able to assert alternative bases at law on appeal.

III. Conclusions

Plaintiff failed to exhaust his administrative remedies by not requesting an administrative hearing to contest the decision of the Commission. Accordingly, we affirm the decision of the trial court in granting defendant's Motion to Dismiss for lack of subject matter jurisdiction.

Affirmed.

Judges McGEE and ERVIN concur.

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[213 N.C. App. 413 (2011)]

STATE OF NORTH CAROLINA v. DENNIS POPE

No. COA10-932

(Filed 19 July 2011)

1. Larceny— felonious larceny by employee—defendant not selectively prosecuted—dismissal erroneous

The trial court erred in a felonious larceny by employee case by dismissing the charges against defendant on the grounds that defendant was selectively prosecuted. The other employees who were not charged were not similarly situated to defendant, nor did they perform the same acts. Moreover, defendant failed to demonstrate that his prosecution, as opposed to the initial investigation by local officials, was politically motivated.

2. Larceny— felonious larceny by employee—entrapment-by-estoppel—dismissal erroneous

The trial court erred in a felonious larceny by employee case by dismissing the charges based on the theory of entrapment-by-estoppel. Defendant failed to offer evidence showing that he reasonably relied on explicit assurances by government officials of the legality of his actions.

Appeal by State from order entered 28 May 2010 by Judge Franklin F. Lanier in Harnett County Superior Court. Heard in the Court of Appeals 12 January 2011.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Ryan McKaig and Lee Tart Malone, for defendant-appellee.

STEELMAN, Judge.

Where a defendant did not demonstrate that he was singled out for prosecution, and has not demonstrated that his prosecution was improperly motivated, the trial court erred in dismissing the charges against him due to selective prosecution. Where a defendant has not adequately demonstrated that the government explicitly informed him that an illegal act was legal, the trial court erred in concluding that the government was estopped from prosecuting him.

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I. Factual and Procedural Background

Dennis Wayne Pope (“defendant”) was the Public Works Director for the Town of Coats. Public Works employees collected the town’s metal scrap, or “white goods.” These “white goods” included old appliances, which would be left alongside the road by town residents. Public Works employees would transport these goods to a vacant, unsecured lot. They would later sell them for cash, and submit the money to defendant. Previously, it had been the custom for defendant to submit these monies to a town official, such as the Town Manager or Town Clerk, who would put them into a fund to pay for various town functions, such as employee cookouts. Over time, defendant assumed more personal control over these funds.

In 2009, defendant instructed three employees to collect “white goods” and sell them. No receipts could be found indicating that any money had been remitted to the town that year.

Coats Police Chief Eddie Jagers (“Jagers”) conducted an investigation into these transactions. Due to concerns regarding the political overtones of the investigation, Jagers contacted the North Carolina State Bureau of Investigations (“SBI”), which assigned Special Agent Justin Heinrich (“Heinrich”) to the case. Jagers was concerned that the animosity between defendant, who had supported another mayoral candidate, and Mayor Marshall Miller, might influence a local investigation. Heinrich investigated the Department of Public Works, leading to defendant’s indictment for four counts of felonious larceny by employee.

On 12 March 2010, defendant filed a motion styled as “Motion for Relief from Selective Prosecution,” seeking dismissal of the charges. This motion alleged that there were three other employees of the Town of Coats who had also personally profited from the sale of “white goods” collected pursuant to their employment by the town. These employees had not been criminally charged. The motion also insinuated that the prosecution of defendant was politically motivated. On 28 May 2010, the trial court granted defendant’s motion and dismissed the charges, with prejudice.

The State appeals.

II. Grounds for Appellate Review

If a judgment or decision dismisses criminal charges, the State may appeal unless the rule against double jeopardy bars further pros-

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ecution. N.C. Gen. Stat. § 15A-1445(a)(1) (2010). In a criminal trial, jeopardy “does not attach until ‘a competent jury has been empaneled and sworn.’” *State v. Newman*, 186 N.C. App. 382, 386, 651 S.E.2d 584, 587 (2007), *disc. rev. denied*, 362 N.C. 478, 667 S.E.2d 234 (2008) (quoting *State v. Priddy*, 115 N.C. App. 547, 550, 445 S.E.2d 610, 613 (1994), *disc. rev. denied*, 337 N.C. 805, 449 S.E.2d 751 (1994)).

Since a jury had not yet been empaneled and sworn at the time of the pre-trial hearing, appellate review is not barred by double jeopardy in the instant case.

III. Standard of Review

When reviewing a trial court’s findings of fact, we are “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. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). By contrast, conclusions of law “drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.” *Id.* at 632, 669 S.E.2d at 294 (quoting *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)).

IV. Selective Prosecution

[1] In its first argument, the State claims that the trial court erred in dismissing the charges on the grounds that the defendant was selectively prosecuted. We agree.

The United States Supreme Court has stated that “[t]hrough the law itself be fair on its face . . . if it is applied and administered by public authority with . . . an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of justice is still within the prohibition of the Constitution.” *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 30 L. Ed. 220, 227 (1886).

In North Carolina, enforcement of a law is unconstitutional “when the selective enforcement is designed to discriminate against the persons prosecuted.” *State v. Howard*, 78 N.C. App. 262, 266, 337 S.E.2d 598, 601 (1985), *appeal dismissed and disc. rev. denied*, 316 N.C. 198, 341 S.E.2d 581-82 (1986) (citations omitted). When a defendant alleges that he has been selectively prosecuted, the defendant

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must establish discrimination by a “clear preponderance of proof.” *Id.* If he sustains this burden, he is entitled to dismissal. *Id.*

To demonstrate selective prosecution, the defendant must show two things; first, he must “make a *prima facie* showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not;” second, after doing so, he must “demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.” *Id.* at 266-67, 337 S.E.2d at 601-02 (citing *State v. Rogers*, 68 N.C. App. 358, 367, 315 S.E.2d 492, 500 (1984)).

At the pre-trial hearing, defendant argued that, because others similarly situated who had engaged in similar conduct had not been charged, he was being singled out for political reasons. He alleged that these other employees of the Town of Coats, who worked under defendant as Public Works Director and engaged in this conduct upon his direction, were not criminally charged. The trial court agreed.

However, the other employees who were not charged were not similarly situated to defendant, nor did they perform the same acts. Defendant had been the Public Works Director since 2004. The other three employees who were not charged were Public Works employees working under the supervision of defendant. None of these employees were in a position to oversee wholesale theft from the Town of Coats. It was the defendant alone who received the money from the sales of “white goods,” divided those monies up, failed to remit the monies to the town, kept a portion for himself and distributed the remainder to other employees. The trial court’s conclusion of law that others who were similarly situated were not charged was in error.

Even assuming, *arguendo*, that defendant successfully demonstrated selective prosecution, he also had the burden of showing that he was prosecuted in bad faith based upon impermissible considerations. Defendant asserts that he was prosecuted for political reasons.

In analyzing this element, it is important to distinguish between an investigation and a prosecution. While the initial investigation into defendant’s activities may or may not have been politically motivated, Jagers subsequently brought in the SBI, which was divorced from any local political considerations. It was the SBI’s investigation which resulted in defendant being charged.

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Ultimately, the District Attorney prosecutes criminal cases on behalf of the State of North Carolina. N.C. Gen. Stat. § 7A-61. The District Attorney is not an agent of the local government, such as the Town of Coats. Once the investigation of this case was turned over to the SBI and the District Attorney, it was no longer subject to the control of the local governmental entity.

Defendant asserts his prosecution resulted from his support for certain political candidates in the Town of Coats. However, defendant failed to demonstrate that his prosecution, as opposed to the initial investigation by local officials, was politically motivated. Defendant was required to show improper motivation by a “clear preponderance of proof.” *Howard*, 78 N.C. App. at 266, 337 S.E.2d at 601. He failed to meet this burden. The trial court erred in finding the prosecution to be politically motivated, and in concluding that defendant was the victim of selective prosecution.

V. Entrapment-by-Estoppel

[2] In its second argument, the State argues that the trial court erred in dismissing the charges based on the theory of entrapment-by-estoppel. We agree.

“A criminal defendant may assert an entrapment-by-estoppel defense when the government affirmatively assures him that certain conduct is lawful, the defendant thereafter engages in the conduct in reasonable reliance on those assurances, and a criminal prosecution based upon the conduct ensues.” *United States v. Aquino-Chacon*, 109 F.3d 936, 938-39 (4th Cir. 1997), *cert. denied* 522 U.S. 931, 139 L. Ed. 2d 260 (1997) (citing *Raley v. Ohio*, 360 U.S. 423, 438-39, 3 L. Ed. 2d 1344, 1355-56 (1959)). “In order to assert an entrapment-by-estoppel defense, [the defendant] must do more than merely show that the government made ‘vague or even contradictory’ statements. Rather, he must demonstrate that there was ‘active misleading’ in the sense that the government actually told him that the proscribed conduct was permissible.” *Aquino-Chacon*, 109 F.3d at 939 (citing *Raley*, 360 U.S. at 438-39, 3 L. Ed. 2d at 1355-56).

We first note that the theory of entrapment-by-estoppel is not to be found in defendant’s “Motion for Relief from Selective Prosecution,” nor was it raised during the hearing before the trial judge. While defense counsel did argue that the “white goods,” once placed in the abandoned lot where they were stored, had been abandoned by the town, this assertion did not suffice to raise an issue of entrapment-by-estoppel before the trial court.

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It appears that the trial court raised the matter of the entrapment-by-estoppel defense *ex mero motu* in its order. This issue is discussed in Findings of Fact 17, 18 and 19, where the trial court found that officials were aware of the practice of disposing of “white goods,” that these activities were condoned by express knowledge and by failure to proscribe them, and that without having been given notice to the contrary, Public Works Department employees reasonably relied on the tacit approval of the town in their actions. Based on these findings of fact, the trial court concluded that the Town of Coats was estopped from claiming ownership of the “white goods” which the defendant was accused of selling.

In an entrapment-by-estoppel defense, the burden is on the defendant to offer evidence showing that he reasonably relied on explicit assurances by government officials of the legality of his actions. Officials testified that they were aware that some “white goods” were sold, and that the money was deposited to a common pool. However, no evidence was offered to show that government officials expressly condoned defendant pocketing money from that fund.

Explicit permission is a requirement, established in *Aquino-Chacon*, without which entrapment-by-estoppel cannot be satisfied. Defendant did not offer sufficient evidence to meet this requirement. The trial court therefore erred in concluding that the town is estopped from claiming ownership of the “white goods.”

VI. Conclusion

We hold that the trial court erred in dismissing with prejudice the charges against the defendant.

REVERSED.

Judges ELMORE and ERVIN concur.

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[213 N.C. App. 419 (2011)]

STATE OF NORTH CAROLINA v. REGINALD BERNARD WINGATE

No. COA10-1385

(Filed 19 July 2011)

Sentencing— calculation of prior record level—stipulation to prior record level worksheet—sufficient evidence of prior convictions

The trial court did not err in a possession with intent to manufacture, sell, or deliver cocaine case in determining that defendant had a prior record level of V, based on 16 prior record points. Defendant's stipulation in the prior record level worksheet was sufficient proof of his prior convictions.

Appeal by defendant from judgment entered 17 May 2010 by Judge William David Lee in Lincoln County Superior Court. Heard in the Court of Appeals 27 April 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Kimberly P. Hoppin for defendant appellant.

HUNTER, Robert C., Judge.

Reginald Bernard Wingate ("defendant") appeals from a judgment entered upon his guilty plea to possession with intent to manufacture, sell, or deliver cocaine and having attained the status of a habitual felon. The trial court found defendant to have a prior record level of V, based on 16 prior record level points, and sentenced defendant as a habitual felon to a term of 121 to 155 months imprisonment. Defendant gave notice of appeal in open court.

Defendant's sole argument on appeal is that the trial court erred in determining his prior record level because the State failed to offer sufficient proof of his prior convictions and his stipulation to the prior convictions was invalid since the stipulation pertained to a matter of law. "The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions" N.C. Gen. Stat. § 15A-1340.14(a) (2009). The State bears the burden of proving a defendant's prior record level by a preponderance of the evidence, and may meet its burden through:

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- (1) *Stipulation of the parties.*
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f) (2009) (emphasis added).

While a stipulation by a defendant is sufficient to prove the existence of the defendant's prior convictions, which may be used to determine the defendant's prior record level for sentencing purposes, the trial court's assignment of defendant's prior record level is a question of law. *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007). " 'stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.' " *State v. Hanton*, 175 N.C. App. 250, 253, 623 S.E.2d 600, 603 (2006) (quoting *State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683, *disc. review denied*, 297 N.C. 179, 254 S.E.2d 38 (1979)).

Here, defendant stipulated that he was previously convicted in North Carolina of one count of conspiracy to sell or deliver cocaine and two counts of selling or delivering cocaine. Defendant stipulated that these convictions were Class G felonies. Defendant now contends that there was insufficient proof to establish whether he had previously been convicted of one count of conspiracy to *sell* cocaine and two counts of *selling* cocaine, which are Class G felonies, or whether he was convicted of one count of conspiracy to *deliver* cocaine and two counts of *delivery* of cocaine, which are Class H felonies. See N.C. Gen. Stat. §§ 90-90(1)(d), -95(b)(1), -98 (2009). Defendant asserts that whether he was convicted of delivering cocaine or whether he was convicted of selling cocaine was a question of law, not fact, and, therefore, his stipulation to the Class G felonies was invalid. We disagree and hold that, in this case, the class of felony for which defendant was previously convicted was a question of fact, to which defendant could stipulate, and was not a question of law requiring resolution by the trial court.

Our courts have repeatedly held that the accuracy of a prior conviction worksheet may be stipulated to pursuant to N.C. Gen. Stat. § 15A-1340.14(f)(1). See, e.g., *State v. Alexander*, 359 N.C. 824, 830, 616 S.E.2d 914, 918 (2005) ("[U]nder these circumstances,

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defense counsel's statement to the trial court constituted a stipulation of defendant's prior record level pursuant to N.C.G.S. § 15A-1340.14(f)(1). Thus, defendant's sentence was imposed based upon a proper finding of defendant's prior record level."); *State v. Massey*, 195 N.C. App. 423, 429, 672 S.E.2d 696, 699 (2009) ("[D]efendant stipulated to the accuracy of the prior conviction worksheet. Although this stipulation does not preclude our *de novo* appellate review of the trial court's calculation of defendant's prior record level, it is sufficient to satisfy the State's evidentiary burden of proof of this conviction."); *State v. Hurley*, 180 N.C. App. 680, 685, 637 S.E.2d 919, 923 (2006) (holding that conduct of defense counsel during sentencing amounted to a stipulation to defendant's prior convictions). The prior conviction worksheet expressly sets forth the class of offense to which a defendant stipulates and defendant in this case has not cited to any authority, nor have we found any, that requires the trial court to ascertain, as a matter of law, the class of each offense listed.

Defendant in the case at bar stipulated that the three convictions at issue were Class G felonies. The trial court could, therefore, rely on this factual stipulation in making its calculations and the State's burden of proof was met. N.C. Gen. Stat. § 15A-1340.14(f)(1). We note that defendant does not assert that he was, in fact, convicted of one count of conspiring to *deliver* cocaine and two counts of *delivering* cocaine, as opposed to one count of conspiring to *sell* cocaine and two counts of *selling* cocaine. In other words, defendant does not dispute the accuracy of his prior conviction level or his prior record level.

In sum, because defendant's stipulation in the prior record level worksheet is sufficient proof of his prior convictions, we hold that the trial court properly determined that defendant had a prior record level of V, based on 16 prior record points. Accordingly, we affirm the judgment of the trial court.

Affirmed.

Judges BRYANT and McCULLOUGH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 JULY 2011)

BOST CONSTR. CO. v. BLONDY No. 10-1014	Chatham (09CVS79)	Dismissed
CAIN v. INGERSOLL RAND No. 10-1203	Indus. Comm. (194512)	Affirmed in part, vacated in part, and remanded.
CHILDRESS v. CONCORD HOSPITALITY ASSOCS. No. 10-1019	Cabarrus (09CVS5351)	Affirmed in Part and Reversed in Part
DAVIS v. GREEN No. 10-894	Iredell (07CVS2959)	Affirmed
DERIAN v. DERIAN No. 10-1106	Orange (03CVD925)	Dismissed
EDMONDSON v. CITY OF ROCKY MOUNT No. 10-669	Nash (09CVS286)	Affirmed
ERIE INS. EXCH. v. WOODIES PAINTING, INC. No. 10-1311	Rowan (08CVS3978)	Affirmed
HARSTON v. TIPPETT No. 10-840	Wake (08CVS4631)	Affirmed
HERRIN v. HERRIN No. 10-1367	Gaston (09CVD6679)	Affirmed
IN RE ADOPTION OF S.K.N. No. 10-1515	Catawba (09SP714)	Vacated
IN RE B.E. No. 11-26	Chatham (03JT23) (03JT24)	Affirmed
IN RE C.L. No. 11-98	Yadkin (10J66-68)	Reversed
IN RE D.O.B. No. 10-1594	Durham (09JB227)	Affirmed; Remanded for correction of clerical error

IN RE FIFTH THIRD BANK No. 10-596	Mecklenburg (08CVS25531) (08CVS25533) (09CVS9191)	Dismissed
IN RE FIFTH THIRD BANK No. 10-1233	Mecklenburg (08CVS25531) (08CVS25533) (08CVS7804) (09CVS4521) (09CVS9191)	Dismissed
IN RE H.G. No. 10-1581	Yadkin (08J16-18)	Affirmed
IN RE J.D.S. No. 11-185	Richmond (09JB72)	Affirmed
IN RE L.N.H. No. 10-1619	Catawba (10JT55-56)	Affirmed
IN RE N.R.D. No. 11-158	Lee (08JT85)	Affirmed
IN RE R.L.T. No. 11-163	Sampson (06JT52)	Affirmed
IN RE T.L.L. No. 11-253	Durham (07J126)	Affirmed
IN RE W.G. No. 11-38	Mecklenburg (08JT757)	Affirmed
IN RE W.G.S. No. 11-196	Nash (10JT83)	Affirmed
JOHNSON v. SOUTHERN TIRE SALES & SERV., INC. No. 10-770	Indust. Comm. (689047)	Affirmed
JONES v. RUSSELL No. 10-1616	Wake (08CVD9460)	Affirmed
LEGGETT v. AAA COOPER TRANSP. No. 11-168	Indust. Comm. (600560)	Affirmed
MARTIN v. N.C. STATE UNIV. No. 10-404	Wake (09CVS7829)	Dismissed

MELVIN v. WACHOVIA BANK, N.A. No. 10-1115	Macon (10SP33)	Affirmed
MERRILL LYNCH COMMERCIAL FIN. CORP. v. RUSH INDUS., INC. No. 10-1443	Forsyth (09CVS3257)	Affirmed
RS&M APPRAISAL SERVS. INC. v. ALAMANCE CNTY. No. 10-1194	Alamance (09CVS1961)	Affirmed in Part; Dismissed in Part
SATORI v. PATTERSON No. 10-1514	Jackson (09CVD285)	Dismissed
SMITH v. SMITH No. 10-1420	Union (04CVD483)	Affirmed
STATE v. BAKER No. 10-1507	Wake (07CRS87923)	Affirmed
STATE v. BARNES No. 10-1295	Johnston (09CRS53341)	Reversed and vacated.
STATE v. COOK No. 11-74	Lincoln (07CRS1)	No Error
STATE v. DAVIS No. 10-1156	Mecklenburg (06CRS228742-43)	No Error
STATE v. DOWNEY No. 10-1413	Mecklenburg (09CRS216106) (09CRS216118) (09CRS42314)	Affirmed
STATE v. GONZALES No. 10-1577	Wake (08CRS87609)	No Error
STATE v. GRIER No. 10-1267	Gaston (08CRS12489) (08CRS60755)	No Error
STATE v. HUNT No. 10-1526	Robeson (06CRS56449)	No Error

STATE v. JOHNSON No. 10-1234	Wake (08CRS13271-73) (08CRS13275-76) (08CRS13674-79) (08CRS3839)	No error in part; vacated in part; remanded in part.
STATE v. LASALLE No. 11-27	Lincoln (09CRS52063) (09CRS5766)	Affirmed
STATE v. NELSON No. 10-1603	Rowan (07CRS52448)	No Error
STATE v. ORTIZ-ZAPE No. 10-1307	Mecklenburg (07CRS222314)	Reversed in part; Vacated
STATE v. PATTERSON No. 10-1240	Richmond (09CRS521-522)	Reversed
STATE v. PATTERSON No. 10-936	Durham (09CRS44052)	Vacated and Remanded
STATE v. RICHARDSON No. 10-1575	Robeson (09CRS51919)	No Error
STATE v. SLOAN No. 11-171	Vance (06CRS52575)	Affirmed
STATE v. SMITH No. 10-1386	Onslow (09CRS54419)	No Error
STATE v. WILLIAMS No. 11-73	Wayne (08CRS54059) (08CRS54068)	No prejudicial error
TRAVELERS INDEM. CO. v. TRIPLE S MKTG. GRP., INC. No. 10-862	Forsyth (06CVS5561)	Reversed
WILLIAMS v. CHANEY No. 11-164	Lincoln (08CVD1649)	Affirmed

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IN RE: APPEAL OF CIVIL PENALTY: DON LIEBES, GATE CITY BILLIARDS COUNTRY CLUB, APPELLANT v. GUILFORD COUNTY DEPARTMENT OF PUBLIC HEALTH, APPELLEE

No. COA10-979

(Filed 19 July 2011)

Constitutional Law— equal protection—rational basis— smoking ban—differential treatment of for-profit and non-profit private clubs

The trial court did not violate a private country club's equal protection rights by upholding two civil penalties against it for allowing smoking in its establishment. There was a rational basis for the legislature's differential treatment of for-profit and non-profit private clubs.

Appeal by Gate City from order entered 2 August 2010 by Judge Jan H. Samet in Guilford County District Court. Heard in the Court of Appeals 8 February 2011.

Smith, James, Rowlett & Cohen, LLP, by Seth R. Cohen and J. David James, for Appellant.

Guilford County Attorney J. Mark Payne, for Appellee.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene and Tobias S. Hampson, for Amici Curiae American Heart Association, American Lung Association, American Cancer Society and American Cancer Society Action Network, Americans for Non-Smokers' Rights, Tobacco Control Legal Consortium and Campaign for Tobacco-Free Kids.

BEASLEY, Judge.

Don Liebes, Gate City Billiards Country Club (Gate City) appeals a trial court order upholding two civil penalties for allowing smoking in its establishment and contends N.C. Gen. Stat. § 130A-496 (Smoking Ban or Act) unconstitutionally limits its definition of "private club" to nonprofit corporations. Specifically, Gate City argues that the statutory scheme exempting nonprofit private clubs but including for-profit private clubs within the ambit of the Smoking Ban violates its equal protection rights. Because there exists a rational basis for the legislature's differential treatment of for-profit and nonprofit private clubs, we affirm the order.

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Gate City Billiards Country Club (Gate City) is a commercial establishment that sells food and alcoholic beverages and is defined as a “private club” for retail permitting purposes under Chapter 18B of the North Carolina General Statutes, “Regulation of Alcoholic Beverages” (ABC Statute). *See* N.C. Gen. Stat. § 18B-1000(5) (2009). Gate City has billiard tables, which, according to its owner, Don Liebes, are the chief attraction for its clientele. Prior to the Smoking Ban, Gate City offered a smoking section to its patrons.

On 2 January 2010, “An Act to Prohibit Smoking in Certain Public Places and Certain Places of Employment” became effective.¹ Section 130A-496 thereunder prohibits smoking in restaurants and bars but exempts from its scope any “private club,”² *see* N.C. Gen. Stat. § 130A-496 (a), (b)(3) (2011), which the Act defines as

[a] country club or an organization that maintains selective members, is operated by the membership, does not provide food or lodging for pay to anyone who is not a member or a member’s guest, and is either incorporated as a nonprofit corporation in accordance with Chapter 55A of the General Statutes or is exempt from federal income tax under the Internal Revenue Code as defined in G.S. 105-130.2(1). For the purposes of this Article, private club includes country club.

N.C. Gen. Stat. § 130A-492(11) (2009). Because Gate City operates for a profit and is not a federally tax-exempt organization, it cannot claim private club status for purposes of this Smoking Ban exemption but nevertheless continued to allow smoking in its establishment.

By letter dated 3 March 2010, the Guilford County Department of Public Health (County) issued Liebes a \$200 administrative penalty for Gate City’s third Smoking Ban violation. Liebes received a fourth notice of violation dated 11 March 2010³ and another \$200 fine. Gate City appealed the penalties to the Guilford County Board of Health (Board), which held public hearings and issued two “Order[s] Upholding Civil Penalty” on 23 April and 2 June 2010, respectively.

1. Codified at N.C. Gen. Stat. § 130A-491, *et seq.*, the Act also amended Chapter 130A, Article 23, which already prohibited smoking in State government buildings and vehicles. *See* N.C. Gen. Stat. § 130A-493 (2009).

2. The other two exceptions include designated smoking guest rooms in certain lodging establishments and certain cigar bars. N.C. Gen. Stat. § 130A-496(b)(1)-(2).

3. This notice was misdated as 3 March, but the parties stipulated that the document should be corrected to reflect the actual date of 11 March 2010.

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Gate City appealed both decisions to the district court pursuant to N.C. Gen. Stat. § 130A-24(d) and alleged that the Smoking Ban's private club exemption—which does not include for-profit businesses that at the same time qualify as private clubs under the ABC Statute—is not rationally related to a legitimate state interest. Contending that this aspect of the Act violates equal protection both facially and as applied, Gate City sought reversal of the Board's orders and the issuance of a permanent injunction barring the County from enforcing N.C. Gen. Stat. § 130A-496 against Liebes and Gate City.

The district court consolidated the matters for hearing on 23 July 2010, and issued an order upholding the Board's decisions to uphold the civil penalties issued against Gate City. From this order, Gate City appeals, arguing that the Smoking Ban violates its "right to equal protection of the law under the United States and North Carolina Constitutions in that there is no rational basis for permitting smoking in nonprofit private clubs while prohibiting smoking in for-profit private clubs." We disagree.

"The Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution forbid North Carolina from denying any person the equal protection of the laws," and require that "all persons similarly situated be treated alike."

State v. Fowler, 197 N.C. App. 1, 26, 676 S.E.2d 523, 543-44 (2009) (internal citations omitted); see also *Richardson v. N.C. Dept. of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996) ("Our courts use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal protection analysis."). The Equal Protection Clauses function to restrain our state from engaging in activities "that either create classifications of persons or interfere with a legally recognized right." *Blankenship v. Bartlett*, 363 N.C. 518, 521, 681 S.E.2d 759, 762 (2009). Upon the challenge of a statute as violating equal protection, our courts must "first determine which of several tiers of scrutiny should be utilized" and then whether the statute "meets the relevant standard of review." *Department of Transp. v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001). Where "[t]he upper tier of equal protection analysis requiring strict scrutiny of a governmental classification applies only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class," we apply the lower tier or rational basis test if the statute

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neither classifies persons based on suspect characteristics nor impinges on the exercise of a fundamental right. *White v. Pate*, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983).

Neither Liebes nor his Gate City establishment, nor his patrons, comprise a suspect class. Moreover, smoking is not a fundamental right. See *Craig v. Buncombe Co. Bd. of Education*, 80 N.C. App. 683, 685, 343 S.E.2d 222, 223 (1986) (“The right to smoke in public places is not a protected right.”); see also *Roark & Hardee LP v. City of Austin*, 394 F. Supp. 2d 911, 918 (W.D. Tex. 2005) (“Of course it is clear that there is no constitutional right to smoke in a public place.”); *Batte-Holmgren v. Comm’r of Pub. Health*, 914 A.2d 996 (Conn. 2007) (prohibition against smoking in restaurants and other public places does not implicate a fundamental right). Nor do proprietors have a protected right to permit smoking by their patrons, regardless of whether the establishment is public or private. See, e.g., *Coal. for Equal Rights, Inc. v. Owens*, 458 F. Supp. 2d 1251, 1263 (D. Colo. 2006) (right of bar owners to allow smoking in their facilities is not fundamental), *aff’d*, 517 F.3d 1195 (10th Cir. 2008); *Players, Inc. v. City of New York*, 371 F. Supp. 2d 522, 542 (S.D.N.Y. 2005) (upholding smoking ban against private social club’s equal protection challenge, noting limitations on smoking do not infringe fundamental constitutional rights); *Am. Legion Post #149 v. Wash. State Dep’t of Health*, 192 P.3d 306, 322 (Wash. 2008) (“Because there is not a fundamental right to smoke, there is no privacy interest in smoking in a private facility.”); *Deer Park Inn v. Ohio Dep’t of Health*, 924 N.E.2d 898, 904 (Ohio Ct. App. 2009) (“The right to smoke is not a fundamental right, nor is the right to allow smoking in a public place of employment on private property.”). Thus, it is clear, as agreed by the parties, that the rational basis test applies here.

The pertinent inquiry under rational basis scrutiny is whether the “distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest.” *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). If the challenging party cannot prove that the statute bears no rational relationship to any legitimate government interest, the statute is valid. *Fowler*, 197 N.C. App. at 26, 676 S.E.2d at 544. “In assessing whether there is a legitimate government interest, ‘[i]t is not necessary for courts to determine the actual goal or purpose of the government action at issue; instead, any conceivable legitimate purpose is sufficient.’” *Standley v. Town of Woodfin*, 362 N.C. 328, 332, 661 S.E.2d 728, 731 (2008) (citation omitted). In fact,

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[r]ational basis review is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Rhyne v. K-Mart Corp., 358 N.C. 160, 180-81, 594 S.E.2d 1, 15 (2004) (citation omitted). “With regard to the contention that the legislation does not bear a rational relationship to the ends sought, it has been held that the relationship need not be a perfect one” *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 336 N.C. 657, 681-82, 446 S.E.2d 332, 346 (1994). Moreover, the governmental classification enjoys a presumption of validity such that the challenging party “has a tremendous burden in showing that the questioned legislation is unconstitutional,” as this lower tier of scrutiny is “so deferential” that “even if the government’s actual purpose in creating classifications is not rational, a court can uphold the regulation if the court can envision some rational basis for the classification.” *Huntington Props., LLC v. Currituck Cty.*, 153 N.C. App. 218, 231, 569 S.E.2d 695, 704 (2002).

Gate City emphasizes that it is not challenging the Act’s private clubs exception as unconstitutional; rather, it frames “[t]he narrow issue” as “whether there is a rational basis for distinguishing between for-profit and nonprofit private clubs” in the *definition* of private club. While this is a matter of first impression in our Courts, a Wisconsin court has addressed the identical question under a similar smoking ban exemption, articulating the same issue.

On its face, the ordinance does not independently classify for-profit and non-profit clubs. Instead, the ordinance distinguishes between restaurants and private clubs, with private clubs being defined as non-profit. Therefore, in the context of the ordinance’s classifications, [the club’s] argument is that there is no rational basis for defining private clubs as non-profit only.

City of Wausau v. Jusufi, 763 N.W.2d 201, 205 (Wis. Ct. App. 2008). Assuming private membership organizations that operate for a profit are situated similarly to non-profit private clubs with respect to the statutory scheme involved here, we must determine whether there is a rational basis for including one and exempting the other.

While our General Assembly’s stated intent in enacting the Smoking Ban was “to protect the health of individuals in public places and places of employment,” N.C. Gen. Stat. § 130A-491(b)

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(2009), the Act articulates no rationale for defining private clubs as only those that are non-profit or federally tax-exempt. Accordingly, the question for this Court is whether we can discern any plausible policy reason for the difference in treatment or whether Gate City has met its burden, which requires it “to negative every conceivable basis which might support it.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315, 124 L. Ed. 2d 211, 222 (1993); *cf. Jusufi*, 763 N.W.2d at 204 (“[W]hile the legislative body’s purpose in enacting the ordinance was to protect the public from secondhand smoke in restaurants, it is undisputed that no rationale was articulated for defining private clubs as non-profit clubs only. Thus, whether a rational basis exists for the ordinance’s classification scheme depends on whether we can construct one.”).

Gate City goes to great pains to point out that the private club status for which it qualifies under the ABC statute does not require the club to be a nonprofit organization, *see* N.C. Gen. Stat. § 18B-1000(5) (defining “private club” as “[a]n establishment that is organized and operated solely for a social, recreational, patriotic, or fraternal purpose and that is not open to the general public, but is open only to the members of the organization and their bona fide guests”), and argues that comparing the former with the definition of private club in the Smoking Ban shows “just how irrational the General Assembly’s classification of for-profit private clubs and nonprofit private clubs truly is.” Gate City calls it ironic that it “has been a ‘private club’ under the ABC Statute since it began doing business in December 2008” and notes:

It would appear, therefore, that the General Assembly actually went out of its way to penalize and discriminate against for-profit private clubs by specifically exempting only nonprofit private clubs from its reach, even though the ABC Statute, which was already on the books, did no such thing.

Gate City ignores, however, that it has never been a “private club” for purposes of our statutes regulating food and beverage facilities as long as it has been a for-profit entity. Article 8 of Chapter 130A provides sanitation requirements for various industries, and Part 6 thereunder addresses food and lodging establishments but exempts private clubs. *See* N.C. Gen. Stat. § 130A-250(5) (2009). A private club under the food and lodging sanitation statutes is

an organization that maintains selective members, is operated by the membership, does not provide food or lodging for pay to anyone who is not a member or a member’s guest, and is either incor-

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porated as a nonprofit corporation in accordance with Chapter 55A of the General Statutes or is exempt from federal income tax under the Internal Revenue Code as defined in G.S. 105-130.2(1).

N.C. Gen. Stat. § 130A-247(2) (2009). Thus, the Smoking Ban's definition of private club challenged here is nearly identical to the definition used in the regulation of food and beverage facilities from which Gate City is not exempt. The General Assembly therefore had before it at least two different statutory definitions of private club if it wanted to choose one "already on the books" in exempting private clubs from the Smoking Ban. In terms of practical purposes, it seems entirely more rational for the legislature to define private club in the Smoking Ban the same way the term is defined in another Article under the same Chapter—where both the sanitation and smoking ban laws appear in Chapter 130A for "Public Health"—rather than using the ABC Statute's definition under its permitting scheme—where that Article is primarily grounded in concerns over retail activity and commerce. Thus, the General Assembly did not, in fact, go "out of its way to penalize and discriminate against for-profit private clubs by specifically exempting only nonprofit private clubs from [the Smoking Ban's] reach." Rather, it adopted a definition that has been employed, as amended, since 1983, *see* 1983 N.C. Sess. Laws ch. 891, § 2 (adding N.C. Gen. Stat. § 130A-247, *et seq.* regulating sanitation in restaurants and hotels but exempting private clubs, defined as "an establishment which maintains selective members, is operated by the membership and is *not profit oriented*" (emphasis added)); was crafted after the enactment of § 18B-1000(5), *see* 1981 N.C. Sess. Laws ch. 412, § 2, and thus found the ABC Statute's private club definition inappropriate for use in the sanitation law; and is used in a context more closely associated with that involved in the Smoking Ban.

Even if the sanitation laws' definition of private club did not exist, the General Assembly's decision to include a nonprofit requirement in the Smoking Ban's definition instead of copying the ABC Statute was rational. Where "[d]efining the class of persons subject to a regulatory requirement . . . 'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, . . . the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.'" *Beach Commc'ns*, 508 U.S. at 315-16, 124 L. Ed. 2d at 223 (citation omitted). As the Wisconsin Court reasoned in *Jufusi*, "[t]he [statute's] method of distinguishing private clubs from other restaurants [and bars] seeks to protect the greatest

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number of restaurant [and bar] patrons [and employees], while preserving the right to associate in truly private clubs that are not open to the public.” *Jufusi*, 763 N.W.2d at 205.

While the Act in this case prohibits smoking in restaurants and bars, it defines restaurant, for example, as “[a] food and lodging establishment that prepares and serves drink or food as regulated by the Commission [for Public Health] pursuant to Part 6 of Article 8 of this Chapter.” N.C. Gen. Stat. § 130A-492(15); *see also* N.C. Gen. Stat. § 130A-247 (5) (“‘Establishment that prepares or serves food’ means a business or other entity that cooks, puts together, portions, sets out, or hands out food for human consumption.”). Thus, as the County notes, fraternal organizations that exist entirely for non-commercial purposes but may provide food and drink during their gatherings would be considered restaurants for the purposes of the Smoking Ban and could not allow their members to smoke if they were not otherwise exempted. Certainly, the General Assembly could have chosen not to excuse any establishments from the ambit of the Act and instead prohibited smoking in every place that fits the definition of a restaurant or bar. Still, it is entirely reasonable for the legislature to stop short of interfering with an individual’s choice to smoke and an organization’s freedom to allow or disallow smoking in a place that is genuinely closed to the general public but happens to serve food or drink as an incidental service to its members. The Act’s exemption for private clubs is therefore rationally related to its legitimate purpose of protecting the health of individuals in public places. Insofar as the General Assembly’s exemption for private clubs, apart from the manner in which the term is defined, is constitutional, Gate City agrees . . . or appears to.

However, Gate City’s argument that the definition of private club violates equal protection hinges, in large part, on the fact that the Act intends to protect the health of individuals by prohibiting smoking not only in public places but also in places of employment. *See* N.C. Gen. Stat. § 130A-491. Gate City contends that the fraternal organizations discussed by the County—such as Elks clubs, Moose lodges, and VFWs—are also places of employment because they hire employees to serve the food and alcohol that would otherwise bring them within the reach of the Smoking Ban, suggesting:

it is difficult to understand how the General Assembly, on one hand, could clearly set forth its governmental interest of protecting the health of individuals in places of employment, while on the

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other hand, specifically excluding nonprofit private clubs from the smoking ban. The General Assembly cannot have it both ways. It can include both groups, i.e., for-profit private clubs and nonprofit private clubs in the smoking ban, or it can exclude both types of private clubs. By treating the two types of private clubs differently, the General Assembly has failed to “link” the classification and the objective of the statute.

. . . .

Stated differently, what is the rational basis for treating employees of private nonprofit . . . clubs and fraternal organizations differently from employees of private, for-profit billiards clubs . . . given the intent of the General Assembly in protecting the health of individuals in places of employment[?]

This “all or nothing” argument is flawed in the sense that it admittedly has no impact on the “the narrow issue in this case,” as emphasized by Gate City, and that such reasoning contradicts the position Gate City simultaneously advocates.

Initially, Gate City’s proposition tends to subject any private club exception to scrutiny, since both nonprofit and for-profit clubs that serve food, drinks, or alcohol—including Gate City—tend to have employees. Gate City, however, explicitly leaves “for another day” the question of whether an exclusion for all private clubs, whether for or nonprofit, is rationally based. At the same time, Gate City specifically stated to this Court that it was not arguing that the private club exception was unconstitutional—and in fact shared its belief that a general exemption for private clubs meets the rational basis test—but was focusing only on the narrow issue of the private club definition. Thus, Gate City’s reliance on the employment aspect implicates the constitutionality of exempting private clubs at all, a question that is explicitly omitted from this appeal, not the distinction between for-profit and nonprofit private clubs in the definition of the term, and is inapplicable to the narrow question presented.

Moreover, Gate City’s identification of the “narrow issue” as “whether there is a rational basis to distinguish for-profit private clubs from nonprofit private clubs as it relates to the government’s interest in protecting the health of individuals *in places of employment*” neglects the other purpose of the Smoking Ban, which is to prohibit smoking in public places. *See* N.C. Gen. Stat. § 130A-491. The United States Supreme Court has made clear that “social and eco-

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conomic legislation is valid unless the varying treatment of different groups or persons is so unrelated to the achievement of *any combination of legitimate purposes* that [a court] can only conclude that the legislature's actions were irrational." *Hodel v. Indiana*, 452 U.S. 314, 332, 69 L. Ed. 2d 40, 56 (1981) (emphasis added) (internal quotation marks and citation omitted).

Thus, where one of the Act's undisputedly legitimate purposes is to ban smoking in public places, an exemption for establishments that may be characterized as "restaurants" or "bars" under the law, but are truly private organizations, is rationally related to this legislative goal, even if it does not further the other goal of banning smoking in places of employment. In fashioning a definition of private club that best represented the types of establishments it deemed appropriate for exemption from the Act, the General Assembly clearly had to draw the line somewhere.

"The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

Beach Commc'ns, 508 U.S. at 316, 124 L. Ed. 2d at 223 (citation omitted); see also *Dandridge v. Williams*, 397 U.S. 471, 485, 25 L. Ed. 2d 491, 501 (1970) ("In the area of . . . social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."). Where "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific," a classification with "some reasonable basis" does not violate equal protection "simply because [it] is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge*, 397 U.S. at 485, 25 L. Ed. at 502 (internal quotation marks and citations omitted). We observe several possible bases for the legislature's decision to limit its definition of private club to membership organizations that operate as non-profits.

In *Jusufi*, the Wisconsin Court raised one concern about a more expansive definition of private clubs that did not include the non-

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profit element, which our General Assembly may have shared. There, the circuit court concluded that “a rational basis existed for the ordinance’s classification and treatment of restaurants and private clubs” because it

requires all restaurants that are open to the public to be smoke free. Private clubs are, by their very nature, not open to the public, and do not present the same threat to public health. Limiting the exception to private clubs that are non-profit and have tax-exempt status is a reasonable means of keeping the number of places that qualify for the exception small, thereby protecting a greater percentage of the dining public; it also prevents restaurants that are open to the public from avoiding the reach of the ordinance by charging a nominal membership fee and declaring themselves to be private clubs.

Jusufi, 763 N.W.2d at 203-04. The Wisconsin Court of Appeals agreed with the lower court’s reasoning, noting that “[t]he ordinance’s method of distinguishing private clubs from other restaurants seeks to protect the greatest number of restaurant patrons, while preserving the right to associate in truly private clubs that are not open to the public.” *Id.* at 205. The Court further explained:

Absent the ordinance’s narrow definition of private clubs as non-profit organizations controlled by their members, ordinary for-profit restaurants seeking the public’s patronage would be able to avoid enforcement of the smoking ban by instituting a few formalities. Restaurants could create the illusion of private clubs by creating memberships with no meaningful membership criteria. The memberships would essentially be shams, with members having no control over, or stake in, the restaurant’s operations. As such, the restaurants could identify themselves as private clubs, while remaining open to the public.

Id. Where the club’s only hurdle was a one-dollar, one-time membership fee; its board of directors had no control over the club’s business; and, notwithstanding its charitable activities, was still a restaurant “effectively open to the public,” the court held the “restaurant’s customers are those the smoking ban is designed to protect.” *Id.* at 205-06. The facts of the case precisely justified the differential treatment of restaurants and private clubs, and the narrow definition of private clubs was germane to “the ordinance’s purpose of protecting the dining public from secondhand smoke,” thus satisfying the rational basis test. *Id.* at 206. It is conceivable that the North Carolina leg-

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islature recognized the same potential consequences of a broader definition of private club that was not limited to nonprofits.

It is further plausible that actual data convinced the General Assembly to draw the Smoking Ban exemptions narrowly, where problems with the ABC Statute's broader private club definition have been documented. For example, several contested cases in the Office of Administrative Hearings between the North Carolina Alcoholic Beverage Control Commission (NC ABC) and various ABC permit holders reveal that establishments with permits issued to them as private clubs often open themselves to the public despite the ABC Statute's prohibition of the same. *See, e.g., Kirkley v. NCABC*, No. 08 ABC 2629, 31 N.C. Admin. Dec. 248, 249 (Apr. 15, 2009) (concluding business that held temporary Mixed Beverage Private Club permit "was routinely open to the public" and "failed to maintain on the licensed premises membership applications and other paperwork required for a private club"); *NCABC v. Red Lion Manestream, Inc.*, No. 04 ABC 0695, 26 N.C. Admin. Dec. 509, 510 (July 20, 2004) (concluding permit holder "allowed [its] private club to be open to the general public in violation of ABC Commission Rule 4 NCAC 2S.0107(a)"); *C & C Entm't, Inc. v. NCABC*, 03 ABC 1037, 25 N.C. Admin. Dec. 659, 660 (Sept. 20, 2003) (concluding temporary permit holder allowed Carolina Live to be open to the general public by failing to limit the use of this private club to members and their guests in violation of 4 NCAC 2S .0107(a)"); *NCABC v. BLL Enters., Inc.*, 01 ABC 2207, 24 N.C. Admin. Dec. 388, 389 (May 7, 2002) (finding NCABC had previously suspended establishment's ABC permits for "allowing the licensed premises to be open to the general public by failing to limit the use of the private club to members and their guests").⁴

Moreover, on 31 July 2009, the General Assembly passed "An Act to Clarify the Authority of the ABC Commission to Adopt Rules Concerning Private Clubs," 2009 Sess. Laws ch. 381, which required the ABC Commission to "examine on a continuing basis the record of violations and noncompliance with Commission rules for ABC establishments operating as private clubs, and . . . report its findings to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee," *id.* § 2. Such legislation suggests that a certain practice has developed whereby ABC permits are obtained by establishments under the guise of operating as a private club while they simultaneously remain open to the public and fail to heed the ABC

4. Each of these administrative decisions is also available at <http://www.ncoah.com/hearings/decisions/>.

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Commission rules. It is thus entirely logical to believe that these compliance and enforcement problems were pervasive enough to deter the General Assembly from implementing a private club definition in the Smoking Ban context that was the same or similar to that of the ABC Statute. Rather than rely on a definition that has been proven to be subject to avoidance, the legislature reasonably imposed a more narrowly tailored definition of private clubs to effectuate the purpose of the exemption.

Several courts have employed the multi-factor framework set forth in *United States v. Lansdowne Swim Club*, 713 F. Supp. 785 (E.D. Pa. 1989), to determine whether a club is truly private or whether the so-called membership organization was actually open to the public at large. Included among the eight factors listed are: the genuine selectivity of the group's admitted members; the membership's control over the operations of the establishment; the use of facilities by non-members; the formalities observed, such as bylaws, meetings, and membership cards; and, pertinently, *whether the club is a profit or nonprofit organization*. *Lansdowne Swim Club*, 713 F. Supp. at 796-97 (emphasis added); *see also Daniel v. Paul*, 395 U.S. 298, 301-02, 23 L. Ed. 318, 323 (1969) (concluding that "a business operated for a profit with none of the attributes of self-government and member-ownership traditionally associated with private clubs" was not a private club and that the "'membership' device" of a twenty-five cent seasonal fee and membership card was "no more than a subterfuge designed to avoid coverage of the 1964 Act").

While *Lansdowne Swim Club* involved the private club exemption under Title II of the 1964 Civil Rights Act, *id.* at 795, several cases have relied on its discussion to analyze other private club exemptions under state or local laws, *see, e.g., Taverns for Tots, Inc. v. City of Toledo*, 307 F. Supp. 2d 933, 944 (holding organization would not qualify as private club under *Lansdowne's* factors and thus "does not meet any conventional definition of a 'private' club or association," nor was it a "bona fide not-for-profit corporation," precluding it from seeking an exemption under municipal anti-smoking ordinance); *People v. A Bus. or Buss. Located at 2896 W. 64th Ave.*, 989 P.2d 235, 238-39 (Colo. Ct. App. 1999) (holding nude spa house was not private club where only membership qualification was being a 21-year-old male willing to initial an application and pay membership fee; existing club members had no control over operation; formalities were not observed; and club was operated for a profit, such that "[t]he sole purpose of the purported conversion to a private club format appear[ed] to be for the avoidance of the county ordinances");

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Hendricks v. Commonwealth, 865 S.W.2d 332, 335 (Ky. 1993) (*Lansdowne* factors also indicated “the Society was established for the sole purpose of avoiding the requirements of a newly enacted city ordinance regarding nudity in a public place”).

Our General Assembly reasonably allowed for a private club exemption from the Smoking Ban. *See Plyler v. Doe*, 457 U.S. 202, 216, 72 L. Ed. 2d 786, 798-99 (1982) (“A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, *that accommodate competing concerns both public and private*, and that account for limitations on the practical ability of the State to remedy every ill.” (emphasis added)). It is likewise rational that it defined “private club” in such a way that incorporated several of the widely accepted factors used in determining whether a club is truly private or if an entity is merely cloaking itself as a membership organization as a subterfuge to avoid a certain law. Where an establishment’s for or nonprofit status may be more readily discernible than some of the other *Lansdowne* factors, which are susceptible to fact-intensive inquiries and an interpretation of those facts, the legislature could have chosen to include the nonprofit requirement to achieve a more objective enforcement process. Gate City has not negated any of these conceivable bases for the differential treatment of for-profit and nonprofit private clubs. *See Beach Commc’ns*, 508 U.S. at 315, 124 L. Ed. 2d at 222 (“[T]hose attacking the rationality of the legislative classification have the burden ‘to negate every conceivable basis which might support it.’” (citation omitted)). Nor has the billiards club presented any evidence of its own membership selection criteria, membership fee requirements, guest-use policy or organizational formalities, involvement of the membership in its operations, or otherwise suggest that it would qualify as a private club under factors similar to *Lansdowne* despite the fact that it operates for a profit. As such, we conclude that Gate City has failed to prove that the Smoking Ban’s private club definition, exempting nonprofit private clubs but not those that are for profit, unconstitutionally violates the Equal Protection Clauses, either facially or as applied to Gate City. Therefore, we affirm the trial court’s order upholding the Board’s decisions to uphold the two administrative penalties levied against Gate City for violations of the Smoking Ban.

Affirmed.

Judges McGEE and BRYANT concur.

LIPSCOMB v. MAYFLOWER VEHICLE SYS.

[213 N.C. App. 440 (2011)]

MARTIN LIPSCOMB, EMPLOYEE, PLAINTIFF v. MAYFLOWER VEHICLE SYSTEMS,
EMPLOYER, AND AIG CLAIM SERVICES, INC., CARRIER, DEFENDANTS

No. COA10-1415

(Filed 19 July 2011)

**1. Appeal and Error— appealability—writ of certiorari—
appellate rules violations**

In the interests of justice and under N.C. R. App. P. 2 and 21, the Court of Appeals elected to treat the record on appeal and briefs in a workers' compensation case as a petition for writ of *certiorari*. Although defendants failed to articulate grounds for appellate review as required by N.C. R. App. P. 28(b), the error was nonjurisdictional, and thus, did not require dismissal.

**2. Workers' Compensation— temporary partial disability—
amount of payments**

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff was entitled to temporary partial disability benefits in the amount of \$330 per month. The case was remanded for a determination of the weekly amount of plaintiff's payments.

**3. Workers' Compensation— authorized treating physician—
treatment appropriate and reasonably necessary**

The Industrial Commission did not abuse its discretion in a workers' compensation case by ordering defendants to provide medical compensation for plaintiff's treatment by his requested doctor. The treatment was appropriate and reasonably necessary to provide pain relief and improve plaintiff's function.

Appeal by defendants from order entered 16 April 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 May 2011.

Ferguson, Stein, Chambers, Gresham & Sumter, by Geraldine Sumter and Lareena J. Phillips, for plaintiff-appellee.

McAngus, Goudelock & Courie, P.L.L.C., by Jason C. McConnell and Viral V. Mehta, for defendant-appellants.

CALABRIA, Judge.

LIPSCOMB v. MAYFLOWER VEHICLE SYS.

[213 N.C. App. 440 (2011)]

Mayflower Vehicle Systems (“employer”) and AIG Claim Services, Inc. (“carrier”) (collectively, “defendants”) appeal the North Carolina Industrial Commission’s (“the Commission” or “the Full Commission”) Opinion and Award denying defendants’ motion for reconsideration. We reverse in part, vacate and remand in part, and affirm in part.

I. BACKGROUND

On 7 December 2004, plaintiff was working for employer as a “floater.” Plaintiff’s primary employment duties included working on different projects throughout employer’s plant, including assembling New York City garbage trucks along with other large trucks and cabins. Plaintiff’s additional job duties included bulk framing, part assembly, placing roofing on trucks, welding, Ecoat loading, options and drilling, and sealing cracks in cabs. Plaintiff’s job as a “floater” was a “heavy duty job” because he was required to regularly lift up to 75 pounds.

At 3:30 p.m. that day, plaintiff’s team leader asked him to move an LE cab to the next process. Plaintiff left a tow motor to adjust the wheels on the truck skid. After plaintiff adjusted the front wheels, he walked around the equipment in order to adjust the rear wheels. While plaintiff was walking, he slipped on an oil spill, fell on the concrete floor, and landed on his back. Plaintiff then notified his supervisor of the fall. As a result of the fall, plaintiff sustained a specific traumatic injury to his back and left knee.

On 8 December 2004, Dr. Timothy Sloand (“Dr. Sloand”) diagnosed plaintiff’s injuries as an acute lumbar sprain and left knee contusion, prescribed pain medication, and advised plaintiff to rest during the weekend. On 13 December 2004, Dr. Sloand released plaintiff to return to full duty work. Less than two weeks later, plaintiff returned to Dr. Sloand for treatment of back pain. On 17 January 2005, Dr. Sloand performed a lumbar MRI on plaintiff, which revealed a right para-median broad-based disc protrusion. On 26 January 2005, Dr. Sloand released plaintiff from care for his knee contusion and referred him to a neurosurgeon for further evaluation of his lumbar condition.

On 16 February 2005, defendants filed a Form 60 with the Commission, admitting plaintiff had a right to compensation for his injury. Defendants further admitted that, at the time of the injury, plaintiff’s average weekly wage was \$851.03, and agreed to pay plaintiff temporary total compensation in the amount of \$567.38 beginning 8 February 2005 and ending 2 September 2005.

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On 18 February 2005, plaintiff was referred for additional back treatment to Dr. William Hunter (“Dr. Hunter”), who diagnosed plaintiff with a herniated right disc at the L-5/S-1 region. Dr. Hunter prescribed physical therapy for plaintiff for the period from 28 February through 13 April 2005. Defendants subsequently approved medical treatment by Dr. Hunter as plaintiff’s authorized treating physician.

On 15 April 2005, plaintiff returned to Dr. Hunter for back pain. Dr. Hunter referred plaintiff to Dr. R. Scott Rash (“Dr. Rash”) for chiropractic treatment, and excused plaintiff from work for four weeks. Plaintiff sought treatment from Dr. Rash for the period from 31 May through 15 July 2005, without relief.

Plaintiff returned to Dr. Hunter on 31 August 2005 for pain in his lower back, hip, buttocks, and right leg. Dr. Hunter recommended that plaintiff choose either oral medication or therapeutic injections. Plaintiff chose medication, and Dr. Hunter prescribed Sterapred for 12 days and told plaintiff that he should undergo an epidural steroid injection in the L-5/S-1 region if his condition did not improve. Dr. Hunter also assigned plaintiff light duty work restrictions of no lifting greater than 30 pounds.

On 2 September 2005, Dr. Hunter noted that plaintiff’s condition had stabilized and that plaintiff had reached maximum medical improvement (“MMI”). Dr. Hunter assigned a 5 percent (5%) permanent partial impairment rating to plaintiff’s back. Also on that day, plaintiff began a “trial return to work” as a light duty assembler under Dr. Hunter’s orders. Plaintiff was to work four hours per day, progressing to full time, and was restricted to no lifting greater than 30 pounds. However, plaintiff continued to experience pain, even after employer placed him in a lighter duty position involving cab preparation. On 3 October 2005, Dr. Hunter released plaintiff to return to full duty work.

At Dr. Hunter’s recommendation, plaintiff received epidural steroid injections from Dr. Richard Park (“Dr. Park”) on 7 and 31 October 2005. However, the injections provided minimal relief. On 9 November 2005, plaintiff returned to Dr. Hunter, who ordered plaintiff to undergo a CT myelogram (“the exam”). Plaintiff underwent the exam on 18 November 2005, and it revealed an abnormality at the L-5/S-1 region centrally located paracentral to the right side. Dr. Hunter indicated that the exam also revealed a very mild bulge at L-3/4.

Plaintiff sought a second opinion from Dr. James Hoski (“Dr. Hoski”) on 24 January 2006. Dr. Hoski reviewed the CT myelogram

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and noted that it showed plaintiff had degenerative disc disease at L1-2 and right central disc protrusion at L-5/S-1. After performing a comprehensive examination of plaintiff, Dr. Hoski noted that plaintiff was a candidate for right L-5/S-1 micro lumbar discectomy. Dr. Hoski further noted that the goals of this surgery were to reduce plaintiff's leg pain and increase his level of function. Dr. Hoski then excused plaintiff from work until further notice.

On 28 February 2006, plaintiff returned to Dr. Hunter and told him the results of Dr. Hoski's second opinion. Dr. Hunter indicated that he would "leave it up to the second opinion physician to care for [plaintiff]." On 8 March 2006, plaintiff filed a motion with the Commission to approve Dr. Hoski as his authorized treating physician. Special Deputy Commissioner Elizabeth M. Maddox denied plaintiff's request on 19 July 2006.

Plaintiff returned to Dr. Hoski and indicated he wished to proceed with surgery. On 29 March 2006, plaintiff filed a request for medical leave with employer and asked for leave beginning 29 March 2006 until ten weeks after surgery. Plaintiff underwent surgery on 30 March 2006, and Dr. Hoski excused plaintiff from work for ten weeks. However, defendants did not authorize the surgery and denied payment for it.

Dr. Hoski referred plaintiff to physical therapy for the period of 23 May through 30 August 2006. On 30 May 2006, Dr. Hoski continued plaintiff's out-of-work status until 28 July 2006. On 28 July 2006, Dr. Hoski instructed plaintiff to remain out of work for an additional six weeks due to continuing mid-back pain.

Although plaintiff continued to experience lower back pain, the surgery decreased his leg pain. Plaintiff returned to Dr. Hoski for a follow-up visit on 15 September 2006. Dr. Hoski determined that plaintiff reached MMI and assigned a 10 percent (10%) permanent partial impairment rating to his back. Dr. Hoski also released plaintiff to return to medium duty work, with lifting restrictions of 10 pounds constantly, twenty-five pounds frequently, and up to 50 pounds occasionally.

Due to plaintiff's treatment by Dr. Hoski, he was unable to earn any wages in any employment from 24 January 2006, the date Dr. Hoski removed him from work, until 2 September 2006, when Dr. Hoski released him to return to work. Following the surgery, employer did not offer plaintiff any positions within his work restrictions or attempt to provide him with vocational rehabilitation.

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Plaintiff did not return to work with employer, and employer did not provide him with suitable employment that met the “medium demand level” restrictions.

In October 2005, plaintiff established a business named Lipscomb’s Used Cars. In his duties as the sole salesperson, plaintiff traveled to auctions, purchased cars, and resold them. He also assisted customers by financing the purchase of the cars he sold. On 5 November 2007, plaintiff filed a Form 90 with the Commission, indicating that he earned a total of \$11,740.72 working at Lipscomb’s Used Cars since 10 October 2005.

In February 2008, defendants employed John McGregor (“McGregor”), a vocational rehabilitation specialist, to assist plaintiff in finding suitable employment within his medium duty work restrictions. According to McGregor, plaintiff was “nice and very friendly,” had “a good personality . . . was willing to work hard,” and possessed the “skills, personality, and enthusiasm necessary for working as a car salesperson.” McGregor also stated that plaintiff would be “highly employable” at a new or used car lot. Furthermore, McGregor stated that, since plaintiff did not earn much money from his own car dealership, that he should consider working for another car dealer. However, plaintiff “refused to consider working for anyone else, stating that he preferred instead to work for himself.”

Defendants requested that plaintiff’s claim for additional compensation and payment for Dr. Hoski’s treatment be assigned for a hearing. On 26 May 2009, Deputy Commissioner Kim Ledford (“the Deputy Commissioner”) filed an Opinion and Award, concluding that Dr. Hoski’s medical treatment was appropriate and reasonably necessary to provide pain relief and improve plaintiff’s function, and granting plaintiff’s request to approve Dr. Hoski as his authorized treating physician. The Deputy Commissioner also ordered defendants to pay plaintiff’s medical expenses incurred as a result of his 7 December 2004 injury, including treatment rendered by Dr. Hoski. Furthermore, the Deputy Commissioner ordered defendants to pay plaintiff \$330.00 per week in compensation for “permanent partial impairment” beginning 3 September 2006. Defendants appealed to the Full Commission.

On 5 January 2010, the Commission filed an Opinion and Award (“the 5 January 2010 Opinion and Award”), reaching the same conclusions as the Deputy Commissioner and also ordering defendants to pay Dr. Hoski for plaintiff’s treatment, and to pay plaintiff \$330.00 per week in compensation for “permanent partial impairment” for the

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period beginning 3 September 2006. Defendants thereafter filed a Motion for Reconsideration of Award, arguing that the Full Commission “incorrectly calculated the amount of temporary partial disability owed” to plaintiff. The Full Commission denied defendants’ motion on 16 April 2010 (“the 16 April 2010 Order”). On 27 August 2010, defendants filed a Notice of Appeal, which stated that defendants “appeal[] the Full Commission’s Order Denying Defendants’ Motion for Reconsideration of the Opinion and Award for the Full Commission . . . filed on April 16, 2010[.]”

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 (2010).

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 Grp., 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).

III. INITIAL MATTERS

[1] As an initial matter, defendants’ notice of appeal states that the order they are appealing is “the Full Commission’s Order Denying Defendants’ Motion for Reconsideration of the Opinion and Award for the Full Commission . . . filed on April 16, 2010[.]” An examination of the record reveals that defendants originally filed a notice of

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appeal of the 5 January 2010 Opinion and Award on 2 February 2010. On 12 April 2010, the Commission filed an order granting defendants' request to withdraw their notice of appeal of the 5 January 2010 Opinion and Award. Defendants did not file a notice of appeal for the 5 January 2010 Opinion and Award. Therefore, defendants' purported appeal of the 5 January 2010 Opinion and Award is not properly before us.

North Carolina Rule of Appellate Procedure 21 states, in pertinent part, that a "writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1) (2010). According to N.C. R. App. P. 21:

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

N.C. R. App. P. 21(b), (c). Defendants have "not complied with the procedural provisions of N.C. App. P. 21, [] and ha[ve] not offered any explanation for [their] failure to do so." *Harbour Point Homeowners v. DJF Enterprises*, — N.C. App. —, —, 697 S.E.2d 439, 448 (2010) (internal citation omitted).

North Carolina Rule of Appellate Procedure 2 ("Rule 2") provides, in pertinent part:

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its *own* initiative[.]

N.C. R. App. P. 2 (2010). However, "Rule 2 must be applied cautiously . . . [and] 'relates to the residual power of our appellate courts to con-

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sider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances.’ ” *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (quoting *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999)).

Our Court has the authority, in the exercise of our discretion, to treat the record on appeal and briefs as a petition for writ of *certiorari* pursuant to N.C. R. App. P. 21, to grant the petition, and to review defendants’ challenge to the Commission’s 5 January 2010 Opinion and Award on the merits. *Harbour Point Homeowners*, — N.C. App. at —, 697 S.E.2d at 448.

Upon examination of the record in the instant case, including the 5 January 2010 Opinion and Award, defendants’ Motion for Reconsideration with their attached proposed order, and plaintiff’s response to defendants’ motion, along with the parties’ arguments in their briefs, we conclude that the issues involved in the appeal of the 16 April 2010 Order are inextricably intertwined with the 5 January 2010 Opinion and Award. Furthermore, our examination of the Commission’s 5 January 2010 order reveals that the Commission used an incorrect mathematical formula to award temporary partial disability benefits to plaintiff. Therefore, in the interests of justice and pursuant to Appellate Rules 2 and 21, we elect to exercise our discretion in the instant case to treat the record on appeal and briefs as a petition for writ of *certiorari* pursuant to N.C. R. App. P. 21 to review defendants’ challenge to the Commission’s 5 January 2010 Opinion and Award.

Additionally, we note that defendants failed to articulate grounds for appellate review in their appellate brief. North Carolina Rule of Appellate Procedure 28(b)(4) requires the appellant to set forth a statement of the grounds for appellate review, which “shall include a citation of the statute or statutes permitting appellate review.” N.C. R. App. P. 28(b)(4) (2010). Our Supreme Court has held Rule 28(b) to be a nonjurisdictional rule. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). Therefore, we will not dismiss defendants’ appeal because “[n]oncompliance with rules of this nature, while perhaps indicative of inartful appellate advocacy, does not ordinarily give rise to the harms associated with review of unpreserved issues or lack of jurisdiction.” *Id.* We caution defendants that further noncompliance with the Rules of Appellate Procedure subjects defendants to other penalties, including sanctions. See *Dillingham v. N.C. Dep’t of Human Res.*, 132 N.C.

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App. 704, 707, 513 S.E.2d 823, 825 (1999) (stating that “the Rules of Appellate Procedure are mandatory and a party’s failure to comply with them frustrates the review process and subjects the party to sanctions”).

Furthermore, defendants object to only Findings of Fact 25 and 37 in the Commission’s 5 January 2010 Opinion and Award. Findings of fact to which plaintiff does not object are binding. *Davis v. Harrah’s Cherokee Casino*, 362 N.C. 133, 139, 655 S.E.2d 392, 395 (2008).

IV. TEMPORARY PARTIAL DISABILITY BENEFITS

[2] Defendants argue that the Full Commission erred by incorrectly concluding that plaintiff was entitled to temporary partial disability benefits in the amount of \$330.00 per month. We agree.

N.C. Gen. Stat. § 97-30 (2010) states, in pertinent part:

[W]here the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 a week, and in no case shall the period covered by such compensation be greater than 300 weeks from the date of injury.

N.C. Gen. Stat. § 97-30 (2010). Therefore, the mathematical formula articulated in this statute is: $(A-B) \times .6667 = C$, where “A” represents the claimant’s average weekly wages before his work-related injury, “B” represents the claimant’s average weekly wages which he is able to earn after his work-related injury, and “C” represents the amount of compensation the employer shall pay to the claimant during the period of disability.

Under the Workers’ Compensation Act, the diminution of the power or capacity to earn is the measure of compensability. *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E.2d 865 (1943). The disability of an employee due to a work-related injury is to be measured by his capacity or incapacity to earn the wages he was receiving at the time of the injury; loss of earning capacity is the criterion. *Dail v. Kellex Corp.*, 233 N.C. 446, 64 S.E.2d 438 (1951). Compensation must be based upon the loss of wage-earning power rather than the amount actually received by the claimant. *Hill v. DuBose*, 234 N.C. 446, 67

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S.E.2d 371 (1951); *see also Evans v. Times Co.*, 246 N.C. 669, 100 S.E.2d 75 (1957).

In the 5 January 2010 Opinion and Award, the parties stipulated that plaintiff's average weekly wages before his work-related injury were \$851.03. Therefore, plaintiff had an average annual pre-injury income of \$44,253.56 ($\$851.03 \text{ per week} \times 52 \text{ weeks per year} = \$44,253.56$). After plaintiff was injured, he worked as a self-employed used car salesman and earned \$11,740.72 at his own used car dealership. McGregor, defendants' vocational rehabilitation specialist, testified that the U.S. national average salary for used car salespeople was \$29,931.00, while the average salary for used car salespeople in Rutherfordton was \$25,797.00.

In the 5 January 2010 Opinion and Award, the Commission relied more upon McGregor's testimony than plaintiff's in determining plaintiff's post-injury wage-earning capacity. The Commission further found that, by using McGregor's testimony regarding the lower of the two average salaries, plaintiff "suffered a diminution of his wage[-] earning capacity of approximately \$18,848 per year." However, in its Conclusions of Law, the Commission concluded that plaintiff "suffered a diminution in his wage[-]earning capacity of approximately \$18,438 per year, or \$354.57 per week." Since there is a difference of \$410.00 in the annual salary the Commission stated in its findings as compared to the annual salary stated in its conclusion, the findings do not support the conclusion.

Moreover, this Court cannot determine the origin of the numbers for the annual salary that the Commission used in its findings or its conclusion regarding plaintiff's diminution in wage-earning capacity. The unchallenged findings in the 5 January 2010 Opinion and Award state that plaintiff's average annual pre-injury income was \$44,253.56 ($\$851.03 \text{ per week} \times 52 \text{ weeks per year} = \$44,253.56$). If plaintiff suffered a diminution in his wage-earning capacity of \$18,848.00 per year, as the Commission stated in Finding 37, then his post-wage earning capacity would have to be \$25,405.56 ($\$44,253.56 - \$18,848.00 = \$25,405.56$). If plaintiff suffered a diminution in his wage-earning capacity of \$18,438.00 per year, as the Commission stated in Conclusion of Law 8, then his post-wage earning capacity would have to be \$25,815.56 ($\$44,253.56 - \$18,438.00 = \$25,815.56$). However, the Commission's order does not include in its findings or conclusions that plaintiff's post-wage earning capacity was either \$25,405.56 or \$25,815.56.

Nonetheless, if the Commission correctly applied the mathematical formula in N.C. Gen. Stat. § 97-30 to the first scenario (plaintiff's

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post-wage earning capacity of \$25,405.56), plaintiff's disability compensation would be: $(\$851.03 - (\$25,405.56/52 \text{ weeks})) \times .6667 = \241.65 per week. If the Commission correctly applied the statute to the second scenario (plaintiff's post-wage earning capacity of \$25,815.56), plaintiff's disability compensation would be: $(\$851.03 - (\$25,815.56/52 \text{ weeks})) \times .6667 = \236.40 per week.

When the Commission determined plaintiff's post-injury earning capacity, it placed greater weight on McGregor's testimony than plaintiff's. Assuming the Commission intended to accept McGregor's testimony that the average yearly salary for used car salespeople in Rutherfordton was \$25,797.00, and that the Commission intended to accept this amount as plaintiff's post-injury earning capacity, then plaintiff's weekly wage would be \$496.10 ($\$25,797.00/52 \text{ weeks}$). Therefore, if the Commission correctly applied the statute to this scenario (plaintiff's post-wage earning capacity of \$25,797.00), plaintiff's disability compensation would be: $(\$851.03 - (\$25,797/52 \text{ weeks})) \times .6667 = \236.63 per week.

Assuming the Commission intended to accept McGregor's testimony that the average yearly salary for used car salespeople nationwide was \$29,931.00, and that the Commission intended to accept this amount as plaintiff's post-injury earning capacity, then plaintiff's weekly wage would be \$575.60 ($\$29,931.00/52 \text{ weeks}$). Therefore, if the Commission correctly applied the statute to this scenario (plaintiff's post-wage earning capacity of \$29,931.00), plaintiff's disability compensation would be: $(\$851.03 - (\$29,931/52 \text{ weeks})) \times .6667 = \183.63 per week.

However, the Commission determined that plaintiff's temporary partial disability payments would be \$330.00 per week for 300 weeks. This amount is incorrect, regardless of which of the above scenarios the Commission decided to use. Since we cannot determine how the Commission mathematically determined the amount of plaintiff's temporary partial disability payments, the Commission's findings regarding this matter are not supported by competent evidence, and the Commission's conclusions are not supported by the findings. Therefore, the Commission erred by denying defendants' motion for reconsideration of the 5 January 2010 Opinion and Award. As a result, we must reverse the Commission's Opinion and Award denying defendants' motion for reconsideration. Furthermore, we vacate the portions of the Commission's 5 January 2010 Opinion and Award regarding this matter and remand it to the Commission for redetermination of plaintiff's temporary partial disability weekly payments.

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V. PAYMENT FOR MEDICAL COMPENSATION

[3] Defendants argue that the Full Commission erred by ordering them to provide medical compensation for plaintiff's treatment by Dr. Hoski. We disagree.

N.C. Gen. Stat. § 97-25 states, in pertinent part:

Medical compensation shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.

The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

...

[I]f he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission.

N.C. Gen. Stat. § 97-25 (2010). Under this statute, the Commission may order treatment or rehabilitative procedures that it determines, in its discretion, to be reasonably necessary to effect a cure or give relief for an injured employee. *Neal v. Carolina Management*, 130 N.C. App. 228, 502 S.E.2d 424 (1998), *rev'd on other grounds*, 350 N.C. 63, 510 S.E.2d 375 (1999). A claimant is required to obtain the Commission's approval within a reasonable time after he has selected a physician of his own choosing to assume treatment. *Schofield v. Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980), *superseded by statute on other grounds as stated in Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 472 S.E.2d 382 (1996). "[W]hat is reasonable is a question of fact to be determined in the light of the circumstances of each case." *Fontenot v. Ammons Springmoor Assocs.*, 176 N.C. App. 93, 99, 625 S.E.2d 862, 867 (2006).

If the claimant seeks approval within a reasonable time, if the Commission approves the claimant's choice, and if the treatment sought is to effectuate a cure or rehabilitation, then the employer has

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a statutory duty under this section to pay for the treatment. *Forrest v. Pitt County Bd. of Education*, 100 N.C. App. 119, 394 S.E.2d 659 (1990). The Commission does not have to preclude payments for a physician's services solely because approval for those services was not previously requested; under this statute, a claimant must only seek approval within a reasonable time not necessarily prior to the services or surgery rendered by the physician. *Id.*

The unambiguous language of N.C. Gen. Stat. § 97-25 leaves the approval of a physician within the discretion of the Commission, and its determination may only be reversed upon a finding of a manifest abuse of discretion. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 472 S.E.2d 382 (1996), *rev'd on other grounds*, *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 487 S.E.2d 746 (1997). The Commission did not abuse its discretion in finding that a four-month delay before the claimant sought authorization for a psychiatrist as a treating physician was reasonable. *Dicamillo v. Arvin Meritor, Inc.*, 183 N.C. App. 357, 644 S.E.2d 647 (2007). In addition, Rule 407(4) of the Workers' Compensation Rules of the North Carolina Industrial Commission ("Rule 407") states, in pertinent part, "The responsible employer or carrier/administrator shall pay the statements of medical compensation providers to whom the employee has been referred by the authorized treating physician, unless said physician has been requested to obtain authorization for referrals or tests" Workers' Compensation Rules of the North Carolina Industrial Commission, Rule 407(4) (2010).

On 24 January 2006, plaintiff sought a second opinion from Dr. Hoski. On 8 March 2006, less than two months later, plaintiff filed a motion to approve Dr. Hoski as his authorized treating physician. This evidence supports a finding that plaintiff filed his motion within a reasonable time after he selected Dr. Hoski to provide treatment. In addition, less than two months elapsed between the time plaintiff selected Dr. Hoski as his treating physician and the time plaintiff sought approval from the Commission. This is less than the time frame approved of by this Court in *Dicamillo*.

In addition, during Dr. Hunter's deposition, he was asked if it would be appropriate for plaintiff to undergo surgical intervention for treatment of his injury. Dr. Hunter testified, "I think it would be reasonable to proceed with it." Furthermore, after plaintiff sought a second opinion from Dr. Hoski, he returned to Dr. Hunter on 28 February 2006 and told him the results of Dr. Hoski's second opinion. Dr. Hunter indicated that he would "leave it up to the second opinion

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physician to care for [plaintiff].” Dr. Hunter testified at his deposition that he “thought it would be worthwhile for [plaintiff] to undergo a second opinion.” Therefore, this evidence shows that plaintiff complied with Rule 407.

Moreover, plaintiff completed all of the conservative treatment ordered by Dr. Hunter, including physical therapy, chiropractic treatment, medication, exercises, cortisone injections, epidural injections, and a CT myelogram. On 24 January 2006, Dr. Hoski reviewed the CT myelogram and noted that it demonstrated degenerative disc disease at L1-2 and right central disc protrusion at L-5/S-1. After performing a comprehensive examination, Dr. Hoski noted that plaintiff was a candidate for L-5/S-1 micro lumbar discectomy. Dr. Hoski noted that the goals of this surgery were to reduce plaintiff’s leg pain and increase his level of function.

Dr. Hoski performed surgery on plaintiff on 30 March 2006. He then referred plaintiff for physical therapy for the period from 23 May through 30 August 2006. While plaintiff continued to experience lower back pain, the surgery decreased his leg pain. Dr. Hoski testified at his deposition that his services were useful in lessening plaintiff’s impairment.

This evidence supports the Commission’s finding that Dr. Hoski’s treatment was beneficial in reducing plaintiff’s pain levels and lessening his impairment. This finding supports the Commission’s conclusion that Dr. Hoski’s treatment “was appropriate and reasonably necessary” to provide pain relief and improve plaintiff’s function. Therefore, the Commission did not abuse its discretion by granting plaintiff’s request to approve Dr. Hoski as his authorized treating physician, and by ordering defendants to pay plaintiff’s medical expenses incurred as a result of Dr. Hoski’s treatment. This issue on appeal is overruled.

VI. CONCLUSION

The Commission’s Opinion and Award denying defendants’ motion for reconsideration is reversed. The portions of the Commission’s 5 January 2010 Opinion and Award regarding the amount of plaintiff’s temporary partial disability payments are vacated and remanded to the Commission for redetermination. The remaining portions of the Commission’s 5 January 2010 Opinion and Award are affirmed.

Reversed in part, vacated and remanded in part, affirmed in part.

Judges ELMORE and STEELMAN concur.

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RICHARD STEINER AND WIFE TINA STEINER, PLAINTIFFS v. WINDROW ESTATES
HOME OWNERS ASSOCIATION, INC., DEFENDANT

No. COA10-865

(Filed 19 July 2011)

1. Animals— goats—restrictive covenants—household pets instead of livestock

The trial court did not err in a declaratory judgment action by granting summary judgment in favor of plaintiff based on its conclusion that plaintiff's two goats were household pets and not livestock under a neighborhood's restrictive covenants. The goats were kept for pleasure rather than for profit or utility.

2. Associations— restrictive covenants—nuisance—vague

A neighborhood's board of directors abused its discretion by determining that plaintiffs' goats were a nuisance. The neighborhood's restrictive covenants did not provide sufficient guidance or definitions to permit any sort of objective determination, and thus, were too vague.

Appeal by defendant from order entered 23 February 2010 by Judge Timothy M. Smith in District Court, Mecklenburg County. Heard in the Court of Appeals 14 December 2010.

Hamilton Moon Stephens Steele & Martin, PLLC, by M. Aaron Lay, for plaintiff-appellees.

Sellers, Hinshaw, Ayers, Dortch & Lyons, P.A., by Michelle Price Massingale, for defendant-appellant.

STROUD, Judge.

Defendant appeals a summary judgment order in a declaratory judgment action which determined that plaintiffs could keep the goats, Fred and Barney, on their property. For the following reasons, we affirm.

I. Background

On or about 8 May 2009, plaintiffs filed a declaratory judgment action pursuant to N.C. Gen. Stat. § 1-253 *et. seq.* seeking a declaration that certain restrictive covenants upon their real property ("Property") were not enforceable against them. Plaintiffs alleged

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that they owned Property in a subdivision known as Windrow Estates, which is subject to “certain restrictive covenants set forth in the Declaration of Covenants, Reservations, and Restrictions filed with the Mecklenburg County Register of Deeds in Deed Book 3601, Page 373 (“Restrictive Covenants”)” Plaintiffs further alleged that defendant

Windrow HOA[, defendant Windrow Estates Home Owners Association, Inc.,] is empowered to enforce the Restrictive Covenants and provide rules and regulations for common properties within Windrow Estates and assess each property owner for upkeep of said common properties.

6. Windrow Estates is an equestrian community and many property owners within the subdivision pasture and keep horses on their lots and have built stables for the same.

. . . .

8. On or about September 17, 2008, the Steiners purchased two male Nigerian Dwarf Goats as pets for themselves and their children and named them Fred and Barney (the “Pet Goats”).

. . . .

16. On or about April 15, 2009, the Executive Board of the Windrow HOA (the “Board”), following a hearing regarding the Pet Goats, informed the Steiners that the Board had determined that the Steiners, by keeping the Pet Goats on the Property, were in violation of the Restrictive Covenants, specifically numbers 6 and 9. . . .

17. Restrictive Covenant 6 states: “No offensive or noxious activity shall be carried on upon any lot, nor shall anything be done thereon tending to cause embarrassment, discomfort, annoyance, or nuisance to the neighborhood. There shall not be maintained any plants or animals, or device or thing of any sort whose normal activity or existence is in any way noxious, unsightly, unpleasant or of a nature as may diminish or destroy the enjoyment of other property in the neighborhood by the owners thereof; except horses and stables may be maintained, but every effort must be made to reduce the stable odors.”

18. Restrictive Covenant 9 states: “No animals, livestock or poultry of any kind shall be raised, bred or kept on any lot except that horses, dogs, cats or other pets may be kept provided they

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are not kept, bred, or maintained for any commercial purposes, unless allowed by Windrow Estates Property Owners' Association, and provided that such household pets do not attack horses or horsemen."

Plaintiffs requested a declaratory judgment declaring that plaintiffs,

by keeping the Pet Goats on the Property, are not in violation of the Restrictive Covenants, that the Pet Goats are within the meaning of the "pet" exception within the Restrictive Covenants, and that the Pet Goats' normal activity or existence is not noxious, unsightly, unpleasant or of a nature as may diminish or destroy the enjoyment of other property in Windrow Estates by the owners thereof[.]

On 6 July 2009, defendant answered plaintiffs' complaint and counterclaimed for a declaratory judgment declaring, *inter alia*,

that goats are not permitted to be kept on any Lot under the terms and conditions of the [Restrictive Covenants];

4. That the Court enter judgment declaring that "goats" are livestock;

....

6. That the Court enter judgment declaration [sic] that the Association was within its discretion in concluding that the maintaining of goats on Plaintiffs' property violates Paragraphs 6 and 9 of the [Restrictive Covenants].

On 21 August 2009, plaintiffs replied to defendant's counterclaim. On 27 January 2010, plaintiffs and defendant filed motions for summary judgment. On 23 February 2010, the trial court, *inter alia*, granted plaintiff's motion for summary judgment and permitted Fred and Barney "to be kept on plaintiffs' Lot within Windrow Estates." Defendant appeals.

II. Standard of Review

We first note that although this case is based upon action taken by the Board against plaintiffs pursuant to the Restrictive Covenants of Windrow Estates, it is not an appeal arising from the Board's decision, but rather is a declaratory judgment action, both as to plaintiffs' claim and defendant's counterclaim.

Summary judgment may be granted in a declaratory judgment proceeding where the pleadings, depositions, answers to inter-

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rogatories, 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 On appeal, this Court's standard of review involves a two-step determination of whether (1) the relevant evidence establishes the absence of a genuine issue as to any material fact, and (2) either party is entitled to judgment as a matter of law.

Prod. Sys., Inc. v. Amerisure Ins. Co., 167 N.C. App. 601, 604, 605 S.E.2d 663, 665 (2004) (citations and quotation marks omitted); *disc. review denied*, 359 N.C. 322, 611 S.E.2d 416 (2005).

III. Restrictive Covenants

Both plaintiffs and defendant argue that there is no issue of fact, but that they are entitled to judgment as a matter of law. Defendant argues that the trial court erred in concluding that (1) Fred and Barney are "household pets" pursuant to paragraph 9 of the Restrictive Covenants, and (2) the Board abused its discretion in determining Fred and Barney are a nuisance pursuant to paragraph 6 of the Restrictive Covenants.

We first review the principles that guide our analysis of restrictive covenants. The word covenant means a binding agreement or compact benefitting both covenanting parties. Covenants accompanying the purchase of real property are contracts which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property. Judicial enforcement of a covenant will occur as it would in an action for enforcement of any other valid contractual relationship. Thus, judicial enforcement of a restrictive covenant is appropriate at the summary judgment stage unless a material issue of fact exists as to the validity of the contract, the effect of the covenant on the unimpaired enjoyment of the estate, or the existence of a provision that is contrary to the public interest.

. . . .

[W]hile the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, such covenants are not favored by the law, and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land. The rule of strict construction is grounded in sound considerations of public policy: It

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is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent.

The law looks with disfavor upon covenants restricting the free use of property. As a consequence, the law declares that nothing can be read into a restrictive covenant enlarging its meaning beyond what its language plainly and unmistakably imports.

Covenants restricting the use of property are to be strictly construed against limitation on use, and will not be enforced unless clear and unambiguous. This is in accord with general principles of contract law, that the terms of a contract must be sufficiently definite that a court can enforce them. Accordingly, courts will not enforce restrictive covenants that are so vague that they do not provide guidance to the court.

. . . Unless the covenants set out a specialized meaning, the language of a restrictive covenant is interpreted by using its ordinary meaning.

Wein II, LLC v. Porter, 198 N.C. App. 472, 479-80, 683 S.E.2d 707, 712-13 (2009) (emphasis added) (citations, quotation marks, ellipses, and brackets omitted).

A. Paragraph 9 of the Restrictive Covenants

[1] Defendant first contends that the trial court erred in concluding Fred and Barney are “household pets” pursuant to paragraph 9 of the Restrictive Covenants. Regarding paragraph 9 of the Restrictive Covenants the trial court determined that

4. Plaintiffs’ Nigerian Dwarf goats respectively named Fred and Barney (“Nigerian Dwarfs”) are Plaintiffs’ household pets;
5. Plaintiffs’ Nigerian Dwarfs are not livestock;
6. Because the Nigerian Dwarfs are not livestock and are household pets, Plaintiffs, by keeping the Nigerian Dwarfs on their Lot, are not in violation of Paragraph 9 of the [Restrictive Covenants.]

Paragraph 9 of the Restrictive Covenants provides:

No animals, livestock or poultry of any kind shall be raised, bred or kept on any lot except that horses, dogs, cats or other

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pets may be kept provided they are not kept, bred, or maintained for any commercial purposes, unless allowed by Windrow Estates Property Owners' Association, and provided that such household pets do not attack horses or horsemen.

Defendant's arguments on appeal primarily focus on the meaning and interpretation of the words "livestock[.]" "pets[.]" and "household pets[.]" and the purpose and intent of the Restrictive Covenants. As the Restrictive Covenants do not define any of these words, we must use the "ordinary meaning" of the words. *See id.* at 480, 683 S.E.2d at 713. "Livestock" is defined as "animals kept or raised for use or pleasure; *esp* : farm animals kept for use and profit[.]" Merriam-Webster's Collegiate Dictionary 728 (11th ed. 2003). Merriam-Webster's Collegiate Dictionary defines a "pet," *inter alia*, as "a domesticated animal kept for pleasure rather than utility[.]"¹ *Id.* at 926. Thus, the distinguishing feature between "livestock" and a "pet" is that "livestock" is primarily "kept for use and profit" while a "pet" is "kept for pleasure[.]" *Id.* at 728, 926.

1. Livestock

Defendant contends that "[t]he [Restrictive Covenants] at issue ha[ve] a specific restriction on livestock, which includes goats."² Defendant then directs our attention to legal definitions of "livestock[.]" including the Matthews Town Ordinance. However, legal definitions of "livestock" are not controlling in our analysis; here, the Restrictive Covenants did not provide a definition of the word "livestock[.]" nor did the Restrictive Covenants refer to or incorporate any legal definitions such as the Matthews Town Ordinance, and thus we are bound by the "ordinary meaning" of the word. *See Wein, II*, at 480, 683 S.E.2d at 713. *Id.* If the drafters of the Restrictive Covenants intended to use the definition of "livestock" as provided by the Town of Matthews they could have simply drafted this into the Restrictive Covenants. "[N]othing can be read into a restrictive covenant enlarging its meaning beyond what its language plainly and unmistakably imports[.]" and therefore we consider the "ordinary meaning" of the word "livestock[.]" *Id.*

1. A "domestic animal" is "any of various animals (as the horse or sheep) domesticated so as to live and breed in a tame condition[.]" *Id.* at 371. There is no dispute that Fred and Barney are domesticated animals.

2. We do note the fact that a type of animal could under certain circumstances be classified as "livestock" does not necessarily bar the animal under paragraph 9 of the Restrictive Covenants. Paragraph 9 of the Restrictive Covenants essentially allows any animal which qualifies as a "household pet[.]" is "not kept, bred, or maintained for any commercial purposes," and does "not attack horses or horsemen."

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The facts regarding Fred and Barney and their relationship to plaintiffs are not disputed by defendant. Mrs. Tina Steiner's affidavit states as follows:

8. In 2008, I was diagnosed with melanoma, a form of skin cancer. I began undergoing treatment for the cancer. During this time, I was also being treated and under medical supervision for heart disease and was later diagnosed [with] asthma.

9. As a result of the stress emanating from these medical conditions and events in my personal life, as well as the advice of my physician, I decided to buy comfort pets to help me cope and aid in my recovery.

10. After much research, I decided to purchase Dwarf Nigerian Goats as comfort pets that could be kept in the same area as my horses and were known to adapt well and live in close confines with horses.

11. On or about September 17, 2008, Richard and I purchased two male Nigerian Dwarf Goats as pets for myself and our children from Peach Tree Farms ("Peach Tree") in Oakboro, North Carolina. Peach Tree Farms breeds and raises registered Nigerian Dwarf Goats for sale solely as pets.

12. My family and I named the two Nigerian Dwarfs Fred and Barney, respectively.

13. When we purchased Fred and Barney from Peach Tree, they had already been neutered and disbudded, i.e., their horns had been removed. As Fred and Barney have been neutered, they are unable to breed and, as males, they do not produce any milk. Moreover, there is no market for their meat in the United States. Fred and Barney do not, and cannot, serve any commercial purpose other than resale. We purchased Fred and Barney solely as pets and for our enjoyment.

....

15. Since bringing Fred and Barney home from Peach Tree, we have kept them on our Property. Fred and Barney primarily stay in the corralled area where we keep the horses.

....

17. Fred and Barney are treated much like our family's pet dogs and interact with our family in a very similar manner. Fred

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and Barney are very affectionate, gentle, and make great companions. Much like our family's dogs, Fred and Barney walk on a leash in our yard, sit in our laps, follow us around in their enclosure and in the yard, tug at our clothes to be petted or to jump in our arms, swing with us on our outdoor swing, retrieve their brush and bring it to us to be brushed, retrieve and bring back balls when thrown, travel in a dog carrier placed in our car when taken to the vet, play with my kids, beg for treats, and answer and come to us when we call their respective names of Fred or Barney.

18. Fred and Barney, together, while at our Property, slept in an "Igloo Dog House" of medium size that is placed within the stable of the Property. When it was cold at night, I took blankets and tucked them in and/or put coats on them to protect them from the cold air.

19. I regularly buy items from local pet stores for Fred and Barney, including their leashes, collars, brushes, treats, bedding, dog house, and medicines.

20. I have developed a love and bond with Fred and Barney that is as strong as or stronger than that which I have had with any other pet. Fred and Barney are always affectionate with me and appear excited to see me. They provide me comfort no matter how badly I feel or how much stress I am enduring at any given time. Fred and Barney have allowed me to better deal with my various medical conditions and the stresses that result from my health and personal challenges.

21. Fred and Barney are well behaved and interact well with people and other animals. Our friends, neighbors, and other children regularly petted and played with Fred and Barney when visiting our home. My children play with Fred and Barney and I have never had a concern about Fred or Barney harming my children. Fred and Barney have never caused harm or attempted to cause harm to our horses or any neighborhood pets, including the occasional wayward dog or passing horse.

Mrs. Steiner's affidavit demonstrates that she viewed and treated her goats as pets rather than as livestock. *See generally* Merriam-Webster's Collegiate Dictionary at 728, 926. Mrs. Steiner attested: Fred and Barney were purchased as "comfort pets[;]" have no "commercial purpose other than resale[;]" "Fred and Barney are treated much like [the] family's pet dogs and interact with [the] family in a very similar manner[;]" Mrs. Steiner has "a love and bond with Fred

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and Barney that is as strong as or stronger than that which [she] ha[s] had with any other pet.” Again, Fred and Barney’s relationship to plaintiffs is not disputed. There is thus no genuine issue of fact as to Fred and Barney’s relationship to plaintiffs. As it is undisputed that Fred and Barney were kept for pleasure rather than for profit or utility, they are pets and not livestock under paragraph 9 of the Restrictive Covenants. *See id.*

2. Household Pets

Defendant next contends that because “the goats are not kept in the house, but instead outside with [the] horses . . . [they] are not household pets.”³ We first note that the word “household” may be either a noun or an adjective; *see id.* at 602, here it is used as an adjective, modifying the word “pet.” While Merriam-Webster’s Collegiate Dictionary does not define “household pet,” it does define “household” as an adjective in pertinent part as “of or relating to a household : DOMESTIC[.]” *Id.* at 602. Thus, the adjective definition of “household” requires that one consider the noun definition of “household.” *See id.* “Household” as a noun is defined as “those who dwell under the same roof and compose a family; *also* : a social unit composed of those living together in the same dwelling[.]” *Id.* Therefore, when we put all of the relevant definitions together, we see that a “household pet” is “a domesticated animal kept for pleasure” “of or relating to a” “family . . . [or] social unit [who live] together in the same dwelling[.]” *See id.* at 602, 926.

Despite defendant’s argument, we do not find the fact that the goats do not literally live *inside* the house to be dispositive of the issue. First, the “ordinary meaning” of the adjective “household” requires that something be “of or relating to” the household, not actually inside of the house. *See Wein, II* at 480, 683 S.E.2d at 713; Merriam-Webster’s Collegiate Dictionary at 602. This definition is consistent with a practical and commonsense understanding of the term “household pet.” Many pet owners keep their dogs in a pen in the backyard and do not permit them into the house; many pet owners

3. Both plaintiffs and defendant cite to *Town of Atlantic Beach v. Young*, 58 N.C. App. 597, 293 S.E.2d 821 (1982), *rev’d and remanded*, 307 N.C. 422, 298 S.E.2d 686 (1983), for the definition of “household pet.” However, the “household pet” test both parties cite is in a Court of Appeals opinion which was reversed by the Supreme Court. *See id.*, 307 N.C. 422, 298 S.E.2d 686; *id.*, 58 N.C. App. at 599, 293 S.E.2d at 822-23. Though the Supreme Court did not explicitly overrule the test, it did overrule this Court on the “household pet” issue. *See id.*, 307 N.C. 422, 298 S.E.2d 686. Furthermore, the test enumerated in this Court’s decision uses a dictionary definition, and thus is practically the same analysis we are conducting here. *See id.*, 58 N.C. App. at 599, 293 S.E.2d at 822-23.

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have a cat which lives outside and may more often than not be found wandering in a neighbor's yard rather than its own, yet these animals are most certainly considered "household pets" by their respective owners. Fred and Barney "walk on a leash in [the Steiners'] yard[;]" follow [the Steiners] around in their enclosure and in the yard[;]" and sleep "in an 'Igloo Dog House' of medium size that is placed within the stable of the Property." Again, defendants do not challenge the facts as to Fred and Barney's living conditions and relationship to the plaintiffs. We conclude that there is no issue of material fact that Fred and Barney are "household pets" within the meaning of paragraph 9 of the Restrictive Covenants. Had the drafters of the Restrictive Covenants wished to limit the definition of "household pets" to animals more traditionally considered as pets, such as dogs and cats, they certainly may have done so; instead the Restrictive Covenants expands the variety of animals which may be considered as pets by allowing for "other pets[;]" which in this instance includes the goats Fred and Barney.

3. Purpose and Intent of the Restrictive Covenants

Lastly, as to paragraph 9 of the Restrictive Covenants, defendant contends that "[t]he [p]urpose and [i]ntent of the [Restrictive Covenants] is [l]imited to [t]wo [h]orses [a]nd an [e]questrian [c]ommunity, [n]ot a [f]arm."

Not only do[] the [Restrictive Covenants] contain a restriction on livestock and other outside animals, it also restricts the number of horses an Owner is permitted to have on the lot. When reading this limitation in conjunction with the nuisance provision in Paragraph 6 and the pet provision in Paragraph 9, the intent of the [Restrictive Covenants] is to limit the odors, as well as the numbers and types of pets in the community.⁴

Defendant further notes that "when reading the Restrictive Covenants as a whole, farm animals such as goats were not intended to be included in the 'household pet' exception."

Again,

while the intentions of the parties to restrictive covenants ordinarily control the construction of the covenants, such covenants are not favored by the law, and they will be strictly construed

4. We find defendant's argument regarding the "odors" produced by two very small goats somewhat perplexing, as very similar and arguably much larger "odors" would be produced by two horses, which are specifically allowed by the Restrictive Covenants.

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to the end that all ambiguities will be resolved in favor of the unrestrained use of land. . . . [T]he law declares that nothing can be read into a restrictive covenant enlarging its meaning beyond what its language plainly and unmistakably imports.

Covenants restricting the use of property are to be strictly construed against limitation on use, and will not be enforced unless clear and unambiguous.

See Wein, II at 480, 683 S.E.2d at 713.

Here, the Restrictive Covenants are so broad as to allow for virtually any animal which may be treated as a “household pet” to be kept on the homeowner’s property, so long as the animal is “not kept, bred, or maintained for any commercial purposes” and does “not attack horses or horsemen.”⁵ If the intent and purpose of the Restrictive Covenants was to prevent goats or other similar animals from being kept on the property, it certainly could have forbidden specific types of animals or provided specific definitions for material terms such as “household pets[.]” Instead, the Restrictive Covenants must be construed pursuant to the “ordinary meaning” of the words used, *id.*, and under this construction, Fred and Barney are plaintiffs’ household pets. *See Merriam-Webster’s Collegiate Dictionary* at 602, 926.

Furthermore, defendant has not demonstrated how Fred and Barney’s presence inhibits or contradicts the Restrictive Covenants’ stated purpose of “keeping with the intention of the developer to create an equestrian community[.]” “[E]questrian” is defined as “of, relating to, or featuring horseback riding[.]” Although there is no dispute that horses are specifically allowed by the Restrictive Covenants, and the presence of horses would make the community “equestrian[.]” this term alone does not exclude any other types of animals from the community. In fact, the only types of animals which appear to be categorically excluded by the Restrictive Covenants are those that are “kept, bred, or maintained for any commercial purposes” or may “attack horses or horsemen.” Accordingly, we conclude that pursuant to paragraph 9 of the Restrictive Covenants Fred and Barney are not livestock; they are household pets; and their presence on the Property does not inhibit or contradict the stated intent and purpose of the Restrictive Covenants to establish an “equestrian community[.]” Thus, the trial court did not err in granting summary judgment for

5. There is no allegation that Fred and Barney pose any danger to “horses or horsemen.” In fact, Mrs. Steiner’s affidavit states that she choose Dwarf Nigerian Goats because they “were known to adapt well and live in close confines with horses.”

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plaintiff as to this issue and declaring that Fred and Barney are household pets and are not livestock, and that as such plaintiffs had not violated paragraph 9 of the Restrictive Covenants. This argument is overruled.

B. Paragraph 6 of the Restrictive Covenants

[2] Defendant next contends that the “board of directors did not abuse its discretion when it determined that plaintiffs-appellees’ goats are a nuisance and therefore violate paragraph 6 of the [Restrictive Covenants.]” (Original in all caps.) As to paragraph 6 of the Restrictive Covenants the trial court determined:

7. The Board of Directors abused its discretion in determining that Plaintiffs’ Nigerian Dwarfs are a nuisance and prohibited under Paragraph 6 of the [Restrictive Covenants;]
8. Because Plaintiffs’ Nigerian Dwarfs are not a nuisance, Plaintiffs, by keeping the Nigerian Dwarfs on their Lot, are not in violation of Paragraph 6 of the [Restrictive Covenants.]

Paragraph 6 provides:

No offensive or noxious activity shall be carried on upon any lot, nor shall anything be done thereon tending to cause embarrassment, discomfort, annoyance, or nuisance to the neighborhood. *There shall not be maintained any plants or animals, or device or thing of any sort whose normal activity or existence is in any way noxious, dangerous, unsightly, unpleasant or of a nature as may diminish or destroy the enjoyment of other property in the neighborhood by the owners thereof;* except that horses and stables may be maintained, but every effort must be made to reduce stable odors.

(Emphasis added).

We again note the confusion raised by the unusual legal posture of this case as a declaratory judgment action which requested a review of the Board’s discretion and not actually a review of the action of the Board.⁶ Yet we need not address defendant’s contentions as we conclude that paragraph 6 of the Restrictive Covenants is void for vagueness. *See Property Owner’s Assoc. v. Seifart*, 48 N.C. App. 286, 297, 269 S.E.2d 178, 184 (1980) (affirming

6. Defendant’s counterclaim requested a judgment declaring “that the Association was within its discretion in concluding that the maintaining of goats on Plaintiffs’ property violates Paragraphs 6 and 9 of the [Restrictive Covenants].”

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the trial court's order granting summary judgment in favor of property owners rather than the property owner's association because the covenants provided "no sufficient basis for the court to decree enforcement of the assessments"). In fact,

there is little case law addressing the question of what language in a restrictive covenant is void for vagueness, and what language is not. It appears that we have not dealt with this void for vagueness question because our courts usually supply a definition for an undefined term in a covenant rather than void the entire covenant. Unless the covenants set out a specialized meaning, the language of a restrictive covenant is interpreted by using its ordinary meaning.

Wein, II, 198 N.C. App. at 480, 683 S.E.2d at 713 (citation, quotation marks, ellipses, and brackets omitted). We are thus left to consider the "ordinary meaning" of the words used by paragraph 6. *See id.*

Here, paragraph 6 of the Restrictive Covenants focuses on the subjective emotions or feelings of "embarrassment, discomfort, annoyance, or nuisance" experienced by "the neighborhood." The definition of things or activities proscribed by paragraph 6 of the Restrictive Covenants is expanded to cover that which "is in any way noxious, dangerous, unsightly, unpleasant or of a nature as may diminish or destroy the enjoyment of other property in the neighborhood by the owners thereof." We do not think it necessary here to cite specific dictionary definitions of the operative words: embarrassment, discomfort, annoyance, nuisance, noxious, unsightly, and unpleasant;⁷ each of these words describes a subjective and personal experience or feeling.⁸ Just as beauty is in the eye of the beholder, each of these terms can be defined only from the perspective of the beholder. *See generally Coates v. Cincinnati*, 402 U.S. 611, 614, 29 L. Ed. 2d 214, 217 (1971) ("Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, men of common intelligence must necessarily guess at its meaning." (citation and quotation marks omitted)). The Restrictive Covenants do not give

7. We exclude the word "dangerous" from this list of prohibitions from paragraph 6 of the Restrictive Covenants because "dangerous" may be objectively defined and is not based upon an emotion or feeling; however, there is no allegation that Fred and Barney are "dangerous[.]"

8. We also note that "nuisance" as used here must be construed using its "ordinary meaning" and not a legal definition. *See id.*

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sufficient guidance or definitions to the aforementioned terms to permit us to make any sort of legal determination as to what they mean or should mean to the Windrow Estates neighborhood. Under paragraph 6 of the Restrictive Covenants, the emotional reaction of annoyance of a property owner could be the basis for making an activity a violation of the covenants; as a practical matter, the Board could prohibit anything which might “annoy” even one resident of the subdivision, such as loud and rambunctious children playing in the yard; use of a noisy power mower to cut the grass; blinking Christmas lights; or any pet who may dig in a neighbor’s flowerbed, bark, leave footprints on a car, or visit the property of another property owner for any reason. Things and activities such as these have certainly at times caused “embarrassment, discomfort, [or] annoyance” to someone or have been viewed as “unsightly, unpleasant or of a nature as may diminish or destroy the enjoyment of other property[.]” Certain property owners in Windrow Estates consider Fred and Barney to be annoying, noxious, and unpleasant; plaintiffs consider them adorable and lovable. The Restrictive Covenants as written do not provide sufficient guidance or definitions to permit the Board, or a court, to make any sort of objective determination of who is right, and this is the essence of vagueness.

Defendant contends that plaintiffs have not properly raised the issue of vagueness on appeal. Although the trial court did not conclude that paragraph 6 of the Restrictive Covenants was void for vagueness and instead based its ruling upon a determination of an abuse of discretion by the Board,⁹ we may consider this argument because plaintiffs presented this issue as a ground for summary judgment before the trial court. This Court may consider all the evidence and arguments before the trial court in its *de novo* review of whether summary judgment is appropriate. See *Miller v. First Bank*, — N.C. App. —, —, 696 S.E.2d 824, 827 (2010). Although the trial court did not state that vagueness was part of the reason for its ruling, we may affirm the trial court’s ruling for any reason presented before it which is supported by the evidence and law. See generally *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (“If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.”). Accordingly, the trial court properly granted

9. We note that the “abuse of discretion” language in the trial court’s order is referring to a review of the Board’s determination that plaintiffs had violated paragraph 6 of the Restrictive Covenants, but as noted above, this is a declaratory judgment action and not a review of the Board’s prior action.

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summary judgment as to any issues regarding paragraph 6 of the Restrictive Covenants. This issue is overruled.

IV. Conclusion

In conclusion, we affirm the trial court's order granting summary judgment in favor of plaintiffs.

AFFIRMED.

Judges BRYANT and BEASLEY concur.

STATE OF NORTH CAROLINA v. JAYSON COLLINS PHILLPOTT

No. COA10-838

(Filed 19 July 2011)

1. Evidence— prior inconsistent statements—impeachment— statement not inconsistent

A statement given by defendant to a detective was not inconsistent with his trial testimony and the trial court did not err by introducing into evidence the statement on direct examination by the State. Reading the statement in context, the witness was stating that he knew of the person called Phillpott, not that he was personally acquainted with him, which was consistent with his testimony in court. The only issue on appeal is the consistency of the statement, not whether the State was surprised.

2. Jury— not in agreement—mistrial denied—no abuse of discretion

The trial court did not abuse its discretion by not declaring a mistrial even after one juror had indicated that nothing would change.

3. Homicide— first-degree murder—premeditation and deliberation— evidence sufficient

There was sufficient evidence of premeditation and deliberation in a first-degree murder prosecution where there was testimony from witnesses who did not hear provocation from the deceased; testimony from a witness at whom defendant pointed the gun after shooting the victim; and testimony from a doctor who noted that the victim had five gunshot wounds, four of which were to the head.

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Judge BEASLEY concurring.

Appeal by defendant from judgment entered on or about 19 November 2009 by Judge Cy A. Grant in Superior Court, Edgecombe County. Heard in the Court of Appeals 14 December 2010.

Attorney General Roy A. Cooper, III, by Richard L. Harrison, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for defendant-appellant.

STROUD, Judge.

Defendant was convicted of first degree murder. For the following reasons, we find no error.

I. Background

On 18 May 2009, defendant was indicted for first degree murder. On 16-19 November 2009, defendant was tried by a jury. At trial, the State's evidence tended to show that on the evening of 10 September 2008, Terron Barnes was at Shawan Jones's apartment with Mr. Jones and his wife, Allison Jones. Two other men, one of whom Mr. Barnes recognized as Akeem Davis, arrived at Mr. Jones's apartment. According to Mr. Barnes, Mr. Davis asked to purchase marijuana, and Mr. Jones left the room to get it; Mr. Barnes went to the bathroom and while there he heard gunshots. Ms. Jones testified that defendant was the shooter. Dr. William Russell Oliver, an expert in forensic pathology, testified Mr. Jones died from "[m]ultiple gunshot wounds to the head[.]" The jury found defendant guilty of first degree murder. Defendant had a prior record level of III and was sentenced to life imprisonment without parole. Defendant appeals.

II. Prior Inconsistent Statement

[1] During defendant's trial, on direct examination, Mr. Davis testified that defendant, the man sitting in the courtroom in front of him, was not the shooter. The State then called Detective Michael Lewis of the Rocky Mount Police Department to the stand. Detective Lewis read the following statement from Mr. Davis into evidence:

I was going to Shawan's house to get a shot of liquor.

As I walked in, the guy who shot Shawan walked in right before me. I wasn't with him. . . . The shooter started talking to Shawan. I then started talking to Allison, Shawan's wife.

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After that, I told Shawan what I wanted. Shawan told his wife to go get my order. I looked down and I heard four or five shots. I looked up and saw the shooter fire the gun.

After I heard the shots, I ran when I was locked up in Maryland. I heard the shooter's name was Phil[l]pott. I knew him from the streets as Pott. I had no association with him before that night.

I had seen him around Edgecombe Meadows. Phil[l]pott was 5'6 to 5'8, long dreads, chubby and stocky, brown skin. I can't remember the clothing. The gun was a chrome and black handgun. I had nothing to do with the shooting. I was there only to buy liquor.

Defendant objected both before and after the statement was read and made a motion to strike the statement; both objections were overruled and the motion was denied. After the ruling on the objections and the motion, Detective Lewis also testified that Mr. Davis had picked a photograph of the shooter out of a line-up.

Defendant now "contends that the trial court erred in overruling defendant's objections to the reading of his prior statement to the jury by Detective Lewis. Although Davis admitted giving the statement, it was inconsistent to his trial testimony and involved crucial material facts." After a thorough review of Mr. Davis's testimony we do not conclude that the statement read by Detective Lewis was an inconsistent statement.

Black's Law Dictionary defines a "prior inconsistent statement" as "[a] witness's earlier statement that conflicts with the witness's testimony at trial." Black's Law Dictionary 1539 (9th ed. 2009). Mr. Davis's statement, as read by Detective Lewis provided in pertinent part that Mr. Davis: "heard the shooter's name was Phil[l]pott. I knew him from the streets as Pott. I had no association with him before that night. I had seen him around Edgecombe Meadows. Phil[l]pott was 5'6 to 5'8, long dreads, chubby and stocky, brown skin."

During trial, Mr. Davis testified that he did not know the shooter and then the following dialogue took place:

Q. Now, in your statement that you gave to police, who did you say—who did you tell them shot Shawan Jones?

A. I told them I heard it was a guy named Pot.

Q. Why did you tell them that?

A. Pretty much I told them that because I thought it's what he wanted to hear. Because I was up in Maryland and I heard they were looking for a guy named Pot.

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Q. Is Jayson Phil[l]pott the person who shot Shawan Jones?

A. If that's supposed to be Jayson Phil[l]pott, No.

Q. And you didn't know who this guy was?

A. I ain't know him. I know of him. I heard his name.

Both to the police and at trial Mr. Davis stated that he had heard the shooter's name was "Pott" and that he had no prior association with him. The concurring opinion characterizes the evidence as follows:

In Davis' prior statement to Detective Lewis, he stated that he "knew [Defendant] from the streets as Pott[,][]" "had seen him around Edgecombe" and he further provided a physical description of Defendant. Davis had also told Detective Lewis that he knew that Defendant shot Shawan Jones because he "looked up and saw the shooter fire the gun" and the shooter walked in Shawan's house "right before [Davis]."

In contrast, on direct examination by the State, Davis denied that he knew Defendant and testified that he told Detective Lewis that the identity of the shooter was Defendant because "I thought it's what he wanted to hear." When asked, "[i]s Jayson Phil[l]pot the person who shot Shawan Jones?" Davis replied, "[i]f that's supposed to be Jayson, Phil[l]pot, no[.]"[] Prosecutor asked Davis, "*[a]nd you didn't know who this guy was*" (emphasis added) and Davis replied "I ain't know him. I know of him. I heard his name."

We do not believe that this characterization of the evidence considers Mr. Davis's statements in the proper context.

Mr. Davis plainly stated to the police that he "heard the shooter's name was Phil[l]pott. I knew him from the streets as Pott. I had no association with him before that night." The concurrence uses Mr. Davis's word "knew" as connoting a personal knowledge of Phillipott. But upon reading the entire statement in context, Mr. Davis is stating that he "knew of" the person called Phillipott, not that he was personally acquainted with him; hence the following sentence that "I had no association with him before that night." Mr. Davis is consistent with this statement on the stand when he was asked, "And you didn't know who this guy was?" and responded, "I ain't know him. I know of him. I heard his name." (Emphasis added.) Both Mr. Davis's statement, read as a whole, and his testimony make it clear that while Mr. Davis was aware of a person named Phillipott who lived in the area, he was

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not personally acquainted with that person. Our reading of Mr. Davis's testimony is further clarified in the transcript upon further direct examination:

Q. . . . Now, do you recall speaking to Detective Rick Miller on Saturday.

A. Yeah, I talked to him.

Q. What did you tell him about your statement?

A. I told him the statement was true.

Q. So what's changed between Saturday and today?

A. I mean, nothing's changed. The statement is still the same. I mean, that's what happened. I came in to buy a shot of liquor. Somebody walked in in front of him [sic]. And I told Shawan to give me a shot of liquor. He told Allison to go get it. She got it. Next thing I know I seen shots fired off.

Q. Doesn't your statement also say that the shooter—the shooter's name was Phil[l]pott. Isn't that what you say in your statement?

A. In the statement, it say I heard the shooter's name was Phil[l]pott.

Q. Do you know Jayson Phil[l]pott?

A. Huh-Uh (No.) I mean, I ain't know it was Phil[l]pott. Actually, I say I heard the first name was Pot.

Q. Are you friends with him?

A. I told you I know of him.

(Emphasis added.)

Mr. Davis's statement said that he "saw the shooter" and that he "heard the shooter's name was Phillipott[.]" (Emphasis added.) Mr. Davis's statement to the police plainly provides that he was an eye-witness who saw the shooter and that he later heard that the person who was the shooter was Phillipott. In other words, Mr. Davis's statement was not that he saw the shooter, and it was defendant; his testimony was that he saw the shooter and that he later heard that the shooter's name was Phillipott, a person whom he knew of, although he was not personally acquainted with him. In summary, both Mr. Davis's statement to the police and trial testimony are consistent in stating

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that (1) he saw the shooter, but he was not with him, and (2) he was told that the shooter was someone named Phillipott, whom he did not know personally but of whom he was aware. Other portions of Mr. Davis's testimony conform to our determination that the statement and the testimony were consistent:

On direct examination:

Q. Tell us—when you went over what happened when you walked in. Was anybody with you?

A. No, I weren't with nobody. Somebody walked in before I did.

. . . .

A. . . . the person that walked in right before me was talking to Shawan then. Next thing I know shots fired off.

Q. Did you know who this person was?

A. No, I ain't know him.

Q. You didn't know him from around the neighborhood at all?

A. I mean

THE COURT: Keep your voice up, sir.

A. No, sir.

. . . .

Q. And do you see that person in the courtroom today? The person who shot Shawan Jones.

A. No, sir.

Q. You don't see him in the courtroom today.

A. Huh-Uh (No.) Huh-Uh (No.)

THE COURT: Keep your voice up.

A. No, sir.

THE COURT: What did you say?

A. No, sir.

. . . .

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Q. And you're saying today you don't see the person who shot Shawan Jones.

A. No, sir.

...

Q. Now, you said you didn't know Jayson Phil[l]pott, right?

A. I told you I knew of him.

As Mr. Davis's statement to the police and his trial testimony are consistent, the inconsistency arises because Mr. Davis failed to identify defendant in the courtroom as the shooter, even though he had picked defendant's photograph out of a photo line-up. Yet this argument fails as it was not preserved for appeal; defendant failed to object to the admission of the photo line-up into evidence and/or Detective Lewis's testimony identifying the photograph which Mr. Davis chose. *See* N.C.R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."). The only issue on appeal is whether defendant's statement to the police is inconsistent with his testimony at trial; we have concluded that it is not. While the concurrence may be correct in concluding that the State was surprised, the surprise came when Mr. Davis failed to identify defendant in the courtroom as the same person he had picked in the photo line-up. We are considering only Mr. Davis's statement to the police, and as we conclude that Mr. Davis's statement to the police and his trial testimony were consistent, defendant's argument regarding a prior inconsistent statement is without merit.¹

III. Jury Deliberations

[2] At the end of defendant's case the jury began deliberating at 10:40 a.m., went to lunch from 12:35 p.m. to 1:35 p.m., asked a question at 4:10 p.m., and then at 5:15 p.m., the following dialogue took place:

1. We need not consider whether defendant's statement to the police, which was consistent with his trial testimony, should have been read to the jury because defendant makes no argument regarding this issue, but instead focuses solely on the inconsistency of the statement Mr. Davis provided to the police and his trial testimony. *See* N.C.R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs.")

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THE COURT: Mr. Daughtridge, I'm assuming that the jury has not reached a verdict, is that correct?

MR. DAUGHTRIDGE: That's correct.

THE COURT: All right. I'm going to give the jury two options and these are the only two. Option 1 would be to continue to deliberate this evening with a view towards reaching a verdict or option 2 taking a recess at this time and returning in the morning. Do you want to go back at this time or do you think you pretty much know what you what to do as you sit here[?]

MR. DAUGHTRIDGE: Go on.

THE COURT: Is that the general consensus?

JUROR No. 10: It's not going to change so.

THE COURT: Well, no, you only have two options, stay later or come back in the morning. Do you want to go back to the jury room and then come back and tell me[?]

MR. DAUGHTRIDGE: Yes, we can.

THE COURT: All right. Return to the jury room and then come back and let me know what your decision is. Thank you. Any objection to anything I said from the State?

THE STATE: No, sir.

THE COURT: From the defense.

MR. TUCKER: No, sir, your Honor.

THE COURT: Mr. Daughtridge, what is the decision of the jury?

MR. DAUGHTRIDGE: We'll come back tomorrow.

When the trial resumed the next day, defendant made a motion for a mistrial

based on the fact that the jury deliberated yesterday from about 10:30, 10:45 until about ten (sic) yesterday. And upon inquiry from the court as to whether they wanted to continue deliberations either last night or this morning one of the jurors even stated that I believe it was number 10 that [to] continue deliberations, in her words, wouldn't change anything. So I would ask the court to consider at this time, based on the length of the deliberations yes-

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terday and that statement that I hope is gathered in the record that the court would declare a mistrial.

The trial court denied defendant's motion for a mistrial, and upon continuing deliberations the jury reached a verdict in fifty-five minutes.

On appeal, defendant contends that "the trial court erred in refusing to declare a mistrial and allowing the jury to go home and return the next day to continue deliberating after the jury had deliberated nearly 7 hours and, upon inquiry, Juror #10 stated that to continue would not change anything." (Original in all caps.) Defendant argues that the jury was coerced into reaching a verdict and that the facts indict that "these juror(s) surrender[ed] their honest convictions as to the weight and effect of the evidence to conform with the opinion of the fellow jurors for the mere purpose of returning a verdict."

Defendant relies upon N.C. Gen. Stat. § 15A-1235(d) for its argument that there should have been a mistrial. N.C. Gen. Stat. § 15A-1235 provides that "[i]f it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury." N.C. Gen. Stat. § 15A-1235(d) (2009).

"The action of the judge in declaring or failing to declare a mistrial under N.C. Gen. Stat. § 15A-1235 is reviewable only in case of gross abuse of discretion. Our review must take into account the totality of the circumstances." *State v. Rasmussen*, 158 N.C. App. 544, 556, 582 S.E.2d 44, 53 (citation, quotation marks, and brackets omitted), *disc. review denied*, 357 N.C. 581, 589 S.E.2d 362 (2003). N.C. Gen. Stat. § 15A-1235(d) "does not mandate the declaration of a mistrial; it merely permits it." *State v. Darden*, 48 N.C. App. 128, 133, 268 S.E.2d 225, 228 (1980). Furthermore,

[o]ur courts . . . have not adopted a bright-line rule setting an outside time-limit on jury deliberations, or a rule that deliberations for a certain length of time, in relation to the length of time spent by the State presenting its evidence, is too long.

Our Supreme Court has held that a jury's failure to reach a verdict due to deadlock is manifest necessity justifying declaration of a mistrial. Nonetheless, the Court has upheld decisions by trial courts to continue deliberations despite jury indications that it was at a standstill, hopelessly deadlocked.

State v. Baldwin, 141 N.C. App. 596, 608, 540 S.E.2d 815, 823-24 (2000) (citations, quotations marks, and brackets omitted). In *State v. Osorio*, the

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[d]efendant contend[ed] that at the time the *jury announced they were deadlocked after deliberating nine hours over three days* that the trial court should have declared a mistrial because the instruction given at that time led the jurors to believe they had to reach a verdict before they would be allowed to go home.

196 N.C. App. 458, 463, 675 S.E.2d 144, 147 (2009) (emphasis added). This Court concluded that defendant's argument was meritless noting that

our prior cases indicate that the amount of time that the jury deliberated in the case at bar was not so long as to be coercive in nature. *See State v. Jones*, 47 N.C. App. 554, 562, 268 S.E.2d 6, 11 (1980) (stating a two-day period is not an "unreasonable" period under N.C. Gen. Stat. § 15A-1235); *see also State v. Beaver*, 322 N.C. 462, 465, 368 S.E.2d 607, 609 (1988) (holding that there was no coercion by the trial court where the jury deliberated all day Friday and all day Saturday). Without any other evidence of coercion or error on the part of the trial court, defendant's contention that the duration of the deliberations alone is enough to warrant a mistrial is without merit. The nine hours of deliberation is not itself indicative of coercive conduct, and when viewing the totality of the circumstances, the trial judge did not abuse his discretion in instructing the jurors pursuant to N.C. Gen. Stat. § 15A-1235.

Id. at 465-66, 675 S.E.2d at 148; *see also Baldwin*, 141 N.C. App. at 608-09, 540 S.E.2d at 824 (determining that the trial court did not err in refusing to declare a mistrial after approximately ten and one-half hours from the beginning of deliberations until the jury reached a verdict and with the jurors statements that they had "been at a[n] . . . impasse for several hours" and "[t]here is no way" some of the jurors could "ever change their mind"); *Darden*, 48 N.C. App. at 133, 268 S.E.2d at 228 (determining that "[e]ven assuming that the response of the jury foreman after one hour and thirty-four minutes of deliberation the first day and twenty-five additional minutes the second day made it apparent to the judge that there was no reasonable possibility of agreement, the action of the judge in declaring or failing to declare a mistrial is reviewable only in case of gross abuse of discretion. [The d]efendant has failed to carry the burden of showing such abuse here" (quotation marks omitted)). In the present case, the jury deliberated approximately seven hours over the course of two days, even with the announcement from juror number 10 that nothing would "change[.]" we do not conclude that the trial court erred in refusing to declare a mistrial. *See Osorio*, 196 N.C. App. at 465-66, 675 S.E.2d

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at 148; *Baldwin*, 141 N.C. App. at 608-09, 540 S.E.2d at 824; *Darden*, 48 N.C. App. at 133, 268 S.E.2d at 228. This argument is overruled.

IV. Motion to Dismiss

[3] Lastly, defendant contends that “the trial court erred in denying defendant’s motion to dismiss and renewed motion to dismiss the first degree murder charge for insufficiency of the evidence, and in particular for insufficiency of the evidence of premeditation and deliberation.” (Original in all caps.)

The standard of review for a motion to dismiss is well known. A defendant’s motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant’s being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

State v. Johnson, — N.C. App. —, —, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

“The elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation.” *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000).

Malice, as it is ordinarily understood, means not only hatred, ill will, or spite, but also that condition of mind which prompts a person to take the life of another intentionally, without just cause, excuse, or justification, or to wantonly act in such a manner as to manifest depravity of mind, a heart devoid of a sense of social duty, and a callous disregard for human life.

Malice, in terms of hatred, ill will or spite, is generally referred to as express malice; whereas, implied malice originates from a condition of mind that prompts a person to intentionally inflict damage without just cause, excuse or justification. Furthermore, it is well-established that the intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice.

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State v. Bruton, 165 N.C. App. 801, 805-06, 600 S.E.2d 49, 53 (2004) (citations, quotation marks, and brackets omitted).

Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. Premeditation and deliberation can be inferred from many circumstances, some of which include:

(1) absence of provocation on the part of deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Wiggins, — N.C. App. —, —, 707 S.E.2d 664, 673 (citations and quotation marks omitted), *disc. review denied*, — N.C. —, —, 707 S.E.2d 242 (2011).

The State presented evidence that Ms. Jones saw defendant shoot Mr. Jones. Dr. Oliver testified that Mr. Jones died from “[m]ultiple gunshot wounds to the head.” Specific evidence of premeditation and deliberation was shown through the testimonies of both Ms. Jones and Mr. Barnes who heard no “provocation on [the] part of the deceased[;]” through the testimony of Ms. Jones that after shooting Mr. Jones defendant pointed the gun at her; and through the testimony of Dr. Oliver who noted that Mr. Jones had a total of five gunshot wounds, four of which were to the head. *See id.* Viewed in the light most favorable to the State, there was “substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant’s being the perpetrator of the charged offense.” *Johnson*, — N.C. App. —, —, 693 S.E.2d at 148. Accordingly, the trial court did not err in denying defendant’s motion to dismiss.

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V. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judge Bryant concurs.

Judge Beasley concurs with separate opinion.

BEASLEY, Judge concurring with separate opinion.

While I concur with the majority opinion that the trial court did not commit error, I believe that the trial court properly admitted Akeem Davis' statement to Detective Lewis as a prior inconsistent statement.

The trial court may permit the State to impeach its own witness when "the district attorney has been misled and surprised by [its] **witness**, whose testimony as to a material fact is contrary to what the **State** had a right to expect." *State v. McDonald*, 312 N.C. 264, 269, 321 S.E.2d 849, 852 (1984) (internal quotation marks omitted). "Surprise" means more than "mere disappointment"; in this context it is defined as "*taken unawares*." *State v. Smith*, 289 N.C. 143, 158, 221 S.E.2d 247, 256 (1976).

For the State to be allowed to impeach its own witness, it must abide by the following procedure. The State should move "to . . . impeach its own witness by proof of his prior inconsistent statements"; (2) the motion should be made as soon as the prosecutor is surprised; (3) the motion "is addressed to the sound discretion of the trial court"; (4) the preliminary questions of whether the prosecutor is surprised and misled as to the witness' expected testimony on a material fact is to be determined in a *voir dire* hearing in the absence of the jury; and (5) "[i]f the trial judge finds that the State should be allowed to offer prior inconsistent statements, his findings should also specify the extent to which such statements may be offered." *State v. Pope*, 287 N.C. 505, 512-13, 215 S.E.2d 139, 145 (1975); *State v. Cope*, 309 N.C. 47, 305 S.E.2d 676 (1983).

As with any impeachment, the admission of the prior inconsistent statement is not considered substantive evidence, but instead permitted to demonstrate the element of surprise to the State by its witness' unanticipated testimony. *State v. Woods*, 33 N.C. App. 252, 256, 234 S.E.2d 754, 757 (1977). Any statement offered to show that it is inconsistent with the witness' current testimony must have previously been given to a law enforcement officer or other person who represents the district attorney's office. *Id.*

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The State, in the case *sub judice*, followed the above procedure. Davis had informed the State prior to trial that his testimony would be consistent with his prior statement to Detective Lewis.

In Davis' prior statement to Detective Lewis, he stated that he "knew [Defendant] from the streets as Pott", "had seen him around Edgecombe" and he further provided a physical description of Defendant. Davis had also told Detective Lewis that he knew that Defendant shot Shawan Jones because he "looked up and saw the shooter fire the gun" and the shooter walked in Shawan's house "right before [Davis]."

In contrast, on direct examination by the State, Davis denied that he knew Defendant and testified that he told Detective Lewis that the identity of the shooter was Defendant because "I thought it's what he wanted to hear." When asked, "[i]s Jayson Phil[l]pot the person who shot Shawan Jones?" Davis replied, "[i]f that's supposed to be Jayson, Phil[l]pot, no". Prosecutor asked Davis, "[a]nd you didn't know who *this guy was*" (emphasis added) and Davis replied "I ain't know him. I know of him. I heard his name."

The trial court properly allowed the State to impeach its own witness as Davis' statements to Detective Lewis were not consistent with his testimony and the State was "taken unawares." Because I agree with the balance of the majority's analysis and believe that it reached the correct result, I concur in the majority's result only.

STATE OF NORTH CAROLINA v. VICTOR JEROME WADE, DEFENDANT

STATE OF NORTH CAROLINA v. RODERICK JERMAINE YOUNG, DEFENDANT

No. COA10-412

(Filed 19 July 2011)

1. Evidence— testimony—failure to show prejudicial error based on exclusion

The trial court did not abuse its discretion in an assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a convicted felon case by sustaining the State's objections and motions to strike and not allowing into evidence certain testimony from witnesses. Defendant failed to

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show a different result would have been reached at trial absent these alleged errors.

2. Evidence— prior inconsistent statements—impeachment— failure to show prejudicial error

The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a convicted felon case by permitting the prosecutor, over objection, to state before the jury the prosecutor's recollection of the alleged victim's testimony at a probable cause hearing where the victim denied recollection. Defendant failed to show any prejudicial error when the substantive information had already been introduced into evidence.

3. Evidence— testimony—exclusion—failure to show prejudicial error

The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a convicted felon case by sustaining the State's objection to testimony that the victim was favoring his back pocket like he was getting ready to whip out a gun and by sustaining the State's objection to testimony from the victim's girlfriend that she heard the victim saying he was going to get his gun. Defendant failed to show a different result would have been reached at trial absent these alleged errors.

4. Assault— deadly weapon with intent to kill inflicting serious injury—possession of firearm by convicted felon— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss the charges of assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a convicted felon. There was substantial evidence of each essential element of the offenses charged and of defendant Wade being one of the perpetrators of the offense.

5. Evidence— inconsistent statements—plain error review

The trial court did not err or commit plain error in an assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a convicted felon case by permitting the prosecutor to question the victim regarding his inconsistent statements at a probable cause hearing.

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6. Assault—deadly weapon with intent to kill inflicting serious injury—acquittal for attempted first-degree murder not inconsistent or mutually exclusive

The trial court did not err by accepting the verdict of assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) as to defendant Wade because the jury's acquittal of defendant for attempted first-degree murder and his conviction for AWDWIKISI were not inconsistent or mutually exclusive.

Appeal by defendants from judgments entered 24 July 2009 by Judge James W. Morgan in Superior Court, Cleveland County. Heard in the Court of Appeals on 11 October 2010.

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

Attorney General Roy A. Cooper, III, by Assistant Attorney General Dahr Joseph Tanoury, for the State.

Kevin P. Bradley, for defendant-appellant Young.

Daniel F. Read, for defendant-appellant Wade.

STROUD, Judge.

Victor Jerome Wade and Roderick Jermaine Young (referred to collectively as “defendants”) appeal from their individual convictions for assault with a deadly weapon with the intent to kill and inflicting serious injury and possession of a firearm by a convicted felon. For the following reasons, we find no prejudicial error in defendants’ trial.

I. Background

On 21 July 2008, defendant Wade was indicted on one count of attempted first-degree murder, one count of assault with a deadly weapon with the intent to kill and inflicting serious injury (“AWDWIKISI”), and possession of a firearm by a convicted felon. On 23 July 2008, defendant Young was also indicted on one count of attempted first-degree murder, AWDWIKISI, and possession of a firearm by a convicted felon. On 25 June 2009, the State filed a motion requesting that defendants be tried jointly, which was granted by the trial court on or about 20 July 2009. Defendants were tried jointly on these charges during the 20 July 2009 Criminal Session of Superior Court, Cleveland County.

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The State's evidence tended to show that on 1 May 2008 there was a party at a house on Mint Street in Shelby, North Carolina. At this party people were consuming and using various types of alcohol and drugs, including marijuana. While attending the party, Terrance Ross and his girlfriend Tessica Ussery began arguing and, at some point, Mr. Ross started choking Ms. Ussery. During this argument, defendants Wade and Young arrived at the party. Ms. Ussery noticed that defendant Wade was carrying a handgun in his waistband. Sometime thereafter, defendant Young became involved in the argument between Mr. Ross and Ms. Ussery. Defendant Young said to defendant Wade, "let me see the heat" and defendant Wade gave defendant Young the handgun. Defendant Young then shot Mr. Ross three times, hitting him in the right shoulder and in each of his legs. Ms. Ussery stated that she was standing beside defendant Young when he shot Mr. Ross the first time and that Mr. Ross did not have a gun at the time he was shot. Ms. Ussery left the house following the first shot and hid behind a car parked in the driveway of the house next door. Ms. Ussery then heard defendant Wade say from inside the house "see what that nigga got . . . shoot that nigger." She then heard a second gunshot. Ms. Ussery then heard defendant Wade say "shoot that nigger again[,]" followed by a third gunshot. Ms. Ussery then observed both defendants exit the house, get into a car, and drive away. When police arrived at the scene, Mr. Ross was in severe pain but would not cooperate with police. In corroboration of Ms. Ussery's testimony, Officer Danny Halloran of the Shelby Police Department testified that he interviewed Ms. Ussery in the early hours of 1 May 2008, and she told him that she had been arguing with Mr. Ross; defendants were at the house; she saw defendant Wade arrive at the house with a handgun; defendant Young "walk[ed] past her with a gun and [shot] the victim[;]" and defendants then left together. Defendants stipulated that they had each been convicted of a prior felony.

Although neither defendant Wade nor defendant Young testified at trial, defendants did present testimony from defense witnesses Omar McDowell and Kimberly Nicole Clark. Mr. McDowell testified that he was at the party at the house on Mint Street on 1 May 2008 doing and selling drugs. Mr. McDowell testified that Ms. Ussery had been using drugs and drinking alcohol, and he saw Mr. Ross "smack" Ms. Ussery after she asked defendant Wade "to go drop her off at somebody's house." Mr. McDowell said that Ms. Ussery then went outside. Mr. McDowell testified that he saw a handgun in Mr. Ross' right back pocket. Mr. McDowell then observed Mr. Ross pull out his

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gun; Mr. Ross and defendant Young then struggled for the gun; and shots were fired during the scuffle. Mr. McDowell heard three or four shots, but “didn’t see who had actually been shot[,]” because he left the house. Mr. McDowell called 911 and left the scene as he “had drugs on [him].” Ms. Clark testified that on 1 May 2008 she was using drugs at the house on Mint Street and she saw a handgun in Mr. Ross’ back pocket. Ms. Clark testified that she was in the “very back room” of the house and upon hearing someone saying something about a gun, she left the residence.

Mr. Ross, the victim, was called as a rebuttal witness by the State and he testified that he was currently incarcerated. Mr. Ross stated that he had been smoking marijuana on 1 May 2008, but he “wasn’t high.” Mr. Ross admitted that he had been arguing and physically fighting with his girlfriend, Ms. Ussery, when defendants arrived at the house. Mr. Ross stated that Ms. Ussery had a previous relationship with defendant Wade and, during the argument, she asked defendant Wade for a ride home. Mr. Ross stated that he then “flipped on” defendants and Ms. Ussery. Mr. Ross told defendants that he “felt like [he] was being disrespected” because Ms. Ussery asked them for a ride to their house. Ms. Ussery then tried to calm Mr. Ross down. Mr. Ross testified that while his back was turned to defendants he heard someone say “[g]ive me that[,]” and then “out of the corner of [his] eye[,]” Mr. Ross saw the flash from a gunshot and he was hit by a bullet in his left leg. Mr. Ross then pushed Ms. Ussery out of the way. Mr. Ross also remembered being shot in the shoulder as he was crawling on the floor. Mr. Ross testified that he did not know who shot him. Mr. Ross testified that he did not have a gun and denied pulling a gun on defendants.

On 24 July 2009, a jury found both defendants not guilty of attempted first-degree murder, but found both defendants guilty of AWDWIKISI and possession of a firearm by a felon. Defendant Wade was sentenced to a term of 107 to 138 months imprisonment for the AWDWIKISI conviction and to a term of 16 to 20 months imprisonment for the possession of a firearm by a felon conviction. Defendant Young was sentenced to a term of 116 to 149 months imprisonment for the AWDWIKISI conviction and a term of 13 to 16 months imprisonment for the possession of a firearm by a convicted felon conviction. Defendants gave notice of appeal in open court.

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II. Defendant Young's appeal

A. Error in sustaining the State's objections and motions to strike

[1] In his first argument, defendant Young contends that the trial court abused its discretion by sustaining the State's objections and motions to strike and not allowing into evidence certain testimony from State's witness Tessica Ussery and defense witnesses Omar McDowell and Kimberly Clark.

1. Standard of review

We have stated that “[e]ven where the trial court improperly excludes certain evidence, . . . a defendant is not entitled to a new trial unless he can establish prejudice as the result of this error.” *State v. Black*, 111 N.C. App. 284, 290, 432 S.E.2d 710, 715 (1993) (citation and quotation marks omitted). The test for prejudicial error is whether

there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

N.C. Gen. Stat. § 15A-1443(a) (2007).

2. Analysis

Specifically, defendant Young contends that it was error for the trial court to sustain the State's objection and motion to strike and not allow into evidence (1) testimony from Ms. Ussery, the victim's girlfriend, regarding her knowledge that the victim was a convicted felon; (2) testimony from Mr. McDowell regarding his observations of Ms. Ussery's "level of impairment on the night in question[;]" (3) Mr. McDowell's testimony that the alleged victim "was favoring his back pocket like he was getting ready to whip his gun out[;]" (4) Ms. Clark's testimony that defendants left the residence and the victim, owner of the house, and another man "left to go get a gun and to re-up[;]" and (5) Ms. Clark's testimony that she heard someone say "get my gun, get my gun, get my gun."

As to defendant Young's first argument regarding testimony from the victim's girlfriend Ms. Ussery, we note that counsel for defendant Wade, during cross-examination, asked Ms. Ussery the question, "And you were aware that [Mr. Ross, the victim] had been convicted of prior felonies?" The State objected to this question and the trial court sustained that objection. Defendant Young's counsel did not make

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any comment as to the trial court's ruling upon the State's objection in this instance and did not ask any questions on cross-examination related to Ms. Ussery's knowledge of Mr. Ross' convictions. North Carolina Rule of Appellate Procedure 10(b)(1) provides that, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context" and "obtain a ruling upon the party's request, objection or motion." As defendant Young did not raise a "request, objection or motion[.]" *see id.*, at trial, this argument is not properly before us.

As to defendant Young's arguments regarding the exclusion of testimony from defense witnesses Mr. McDowell and Ms. Clark, a thorough examination of the trial transcript reveals that most of the substance of the contended witness testimony was ultimately permitted into evidence. Defense counsel for Young and defense counsel for Wade were permitted to cross-examine Ms. Ussery, without objection, regarding her use of alcohol and drugs on the night in question. Mr. McDowell testified without objection that it was Mr. Ross that "pulled the gun[.]" not defendant Young. Ms. Clark testified without objection that the owner of the house, another man, and Mr. Ross, the victim, left and came back and Mr. Ross had a gun in his back pocket. Therefore, we cannot see how defendant Young was prejudiced by the trial court's sustaining the State's objections and motions to strike the witness testimony in these instances.

Even assuming *arguendo* that it was error for the trial court to sustain the State's objections to the above-cited testimony, there was overwhelming evidence that defendant Young, while acting in concert with defendant Wade, committed AWDWIKISI and was in possession of a firearm as a convicted felon. "Acting in concert means that the defendant is present at the scene of the crime and acts together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Graham*, 186 N.C. App. 182, 197, 650 S.E.2d 639, 649 (2007) (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 362 N.C. 477, 666 S.E.2d 765 (2008). The essential elements of the crime of AWDWIKISI pursuant to N.C. Gen. Stat. § 14-32(a) are A(1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death." *State v. Cain*, 79 N.C. App. 35, 46, 338 S.E.2d 898, 905, (citation omitted), *disc. review denied*, 316 N.C. 380, 342 S.E.2d 899 (1986). "[T]he State need only prove two elements to establish the crime of possession of a firearm by a felon:

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(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm.” *State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686, *disc. review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007); *see also* N.C. Gen. Stat. § 14-415.1(a) (2007). As to whether defendants were acting in concert, the State presented evidence that on 1 May 2008 defendants arrived together at the house located on Mint Street; Ms. Ussery heard defendant Young say to defendant Wade “let me see the heat” and Mr. Ross heard a similar statement just before he was shot; defendant Wade handed defendant Young the firearm; defendant Wade encouraged defendant Young to continue shooting Mr. Ross; and defendants fled the scene in the same car. As to AWDWIKISI, Ms. Ussery observed defendant Wade hand defendant Young the firearm; while standing next to defendant Young, Ms. Ussery observed defendant Young shoot Mr. Ross in the leg; then after she exited the house, she heard defendant Wade encouraging defendant Young to shoot Mr. Ross again, which was followed by the sound of two more gunshots. Officer Halloran corroborated Ms. Ussery’s testimony by stating that during his interview with her on the night in question, Ms. Ussery told him that defendant Young “walk[ed] past her with a gun” and shot Mr. Ross. Mr. Ross and Officer Roberts testified that Mr. Ross received three gunshot wounds, one in the shoulder and one in each leg. Mr. Ross’ testimony further supports Ms. Ussery’s observations, even though Mr. Ross could not identify either defendant as the person that shot him. Mr. Ross testified that while his back was turned to defendants he heard someone say “[g]ive me that” and then “out of the corner of [his] eye[,]” Mr. Ross saw the flash from a gunshot and felt the bullet hit his left leg. This testimony is similar to the testimony that Ms. Ussery gave regarding defendants’ statements before the shooting. It can also be inferred from Mr. Ross’ testimony that one of the defendants, acting in concert with the other defendant, shot him, as Mr. Ross had just confronted both defendants regarding Ms. Ussery’s request for a ride home. As to possession of a firearm by a felon, Ms. Ussery observed defendant Wade carrying a firearm and defendant Wade handed that firearm to defendant Young. Each defendant stipulated that he had been convicted of a prior felony. As there was no “reasonable possibility” had the testimony been admitted, that “a different result would have been reached at the trial[,]” defendant failed to meet his burden of showing prejudice. *See* N.C. Gen. Stat. § 15A-1443(a). Accordingly, defendant Young’s arguments are overruled.

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B. Testimony from a probable cause hearing

[2] Defendant Young next contends that the trial court “erred in permitting the prosecutor, over objection, to state before the jury the prosecutor’s recollection of the alleged victim’s testimony at a probable cause hearing regarding which the alleged victim denied recollection.” Defendant Young further argues that as there was no transcript of the probable cause hearing, the prosecutor’s questions amounted to unsworn testimony by the prosecutor as to what the victim said at that hearing. Defendant Young contends that allowing the prosecutor to “testify” amounted to prejudicial error.

After the State’s rebuttal witness Mr. Ross stated that he did not remember his testimony from the 12 June 2008 probable cause hearing, the trial court permitted the State to conduct a *voir dire* examination of Mr. Ross to refresh his recollection. Following the *voir dire*, the trial court limited the State’s impeachment of Mr. Ross as follows:

Okay, Let’s stop here. What originally started with [the State] ask[ing] [Mr. Ross] if he remembered what he said at probable cause. He says No. All right. That’s—now giving him information with the hopes of having him to recollect what he said.

Now, if [Mr. Ross] gives additional testimony inconsistent with what he said at probable cause [hearing], then you can ask him about what he said at probable cause. But I’m not going to let you go through litany to the jury. Because there has been no statements he’s given that are inconsistent.

The State then questioned Mr. Ross regarding what happened the night he was shot. Mr. Ross testified that while he was arguing with Ms. Ussery, he turned his back to defendants and then heard someone say “[g]ive me that” and then “out of the corner of [his] eye” Mr. Ross saw the flash from a gunshot and felt the bullet hit him in his left leg. Mr. Ross then remembered being shot in the shoulder as he was crawling on the floor. Mr. Ross testified that he did not know who shot him and he did not have a gun when he was shot. Following this testimony, the trial court, over defendant Young’s standing objection, permitted the State to impeach Mr. Ross regarding the following inconsistent statements he made at the 12 June 2008 probable cause hearing: that Mr. Ross saw defendant Young shoot him; that defendant Young got the gun from defendant Wade; that Mr. Ross was first hit in the left thigh and fell to the ground; that defendant Young hit him with the gun, defendant Young dropped the gun, and there was a struggle for the gun; that he tried to get up on his one leg but defendant Young shot his right thigh; that he heard someone walk up and

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shoot him in the shoulder; and that he heard some people leaving but defendant Wade came up to him and said “are you still alive?” In response to the State’s questions regarding his inconsistent testimony at the 12 June probable cause hearing, Mr. Ross consistently answered that he remembered “what happened that night” but he could not recall exactly what was said at the probable cause hearing.

N.C. Gen. Stat. § 8C-1, Rule 607 (2007), states that “[t]he credibility of a witness may be attacked by any party, including the party calling him.” “Prior statements by a defendant are a proper subject of inquiry by cross-examination.” *State v. Aguillo*, 322 N.C. 818, 824, 370 S.E.2d 676, 679 (1988). However, “(1) the scope of cross examination is subject to the discretion of the trial judge; and (2) the questions offered on cross examination must be asked in good faith.” *Id.* As stated above, an evidentiary error does not necessitate a new trial unless the erroneous admission was prejudicial. *Black*, 111 N.C. App. at 290, 432 S.E.2d at 715. We note that defendant Young makes no argument that the State’s impeachment was done in bad faith or that the State did not comply with the trial court’s limitations on the impeachment of Mr. Ross’ prior statements. Even assuming *arguendo* that it was error for the trial court to permit the State’s impeachment of Mr. Ross regarding inconsistent statements he made at the 12 June 2008 probable cause hearing, the admission of this evidence was not prejudicial error, as the substantive information regarding what happened on the night of 1 May 2008 contained in the questions had already been introduced into evidence by Ms. Ussery on direct examination. Therefore, we cannot say that there was a “reasonable possibility” that had the State not been permitted to impeach Mr. Ross regarding his prior inconsistent statements from the probable cause hearing, “a different result would have been reached at the trial[.]” *See* N.C. Gen. Stat. § 15A-1443(a). Also, as stated above, there was overwhelming evidence upon which the jury could convict defendant Young of AWDWIKISI and possession of a firearm by a felon. Accordingly, defendant failed to meet his burden of showing prejudice. *See id.* We overrule defendant Young’s second argument and find no prejudicial error in his trial.

III. Defendant Wade’s appeal

A. Error in sustaining the State’s objections

[3] Defendant Wade first contends that “the trial court erred in sustaining the State’s objection to testimony that Terrance Ross was favoring his back pocket like he was getting ready to whip his gun out, and in sustaining the State’s objection to testimony that [Kimberly] Clark heard [Mr.] Ross saying he was going to get his gun,

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and instructing the jury to disregard this evidence, as this went directly to the validity of the assertion of self-defense by the defendants” and was therefore prejudicial to his case. As noted above, an evidentiary error does not necessitate a new trial unless the erroneous admission was prejudicial. *Black*, 111 N.C. App. at 290, 432 S.E.2d at 715; N.C. Gen. Stat. § 15A-1443(a).

As stated above, Mr. McDowell was permitted to testify, without objection, that it was Mr. Ross who “pulled the gun[,]” not defendant Young. Ms. Clark testified without objection that the owner of the house, another man, and Mr. Ross, the victim, left and came back and Mr. Ross had a gun in his back pocket. Therefore, we cannot see how defendant Young was prejudiced by the trial court’s sustaining the State’s objections and motions to strike in these instances. Even assuming that it was error for the trial court to sustain the State’s objections, there was overwhelming evidence that defendant Wade, while acting in concert with defendant Young, committed AWDWIKISI and was in possession of a firearm as a convicted felon. The State’s evidence showed that defendants arrived together; defendant Wade handed defendant Young the handgun that defendant Young used to shoot Mr. Ross; defendant Wade encouraged defendant Young to continue shooting Mr. Ross; defendants fled the scene together in the same car; and both defendants stipulated that they had been convicted of a prior felony. There was no “reasonable possibility” that if the above-cited testimony had been admitted, “a different result would have been reached at the trial” and defendant Wade failed to meet his burden of showing prejudice. *See* N.C. Gen. Stat. § 15A-1443(a). Accordingly, defendant Wade’s arguments are overruled.

B. Denial of defendant’s motion to dismiss

[4] Defendant Wade next contends that the trial court erred in denying his motions to dismiss based on insufficiency of the evidence. Specifically, defendant Wade argues that Ms. Ussery and Mr. Ross’ testimony was not clear enough to determine who actually shot Mr. Ross. We have stated that “[t]he denial of a motion to dismiss for insufficient evidence is a question of law, . . . which this Court reviews *de novo*[,]” *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted). Additionally,

[w]hen 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

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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.

State v. Miller, 363 N.C. 96, 98 99, 678 S.E.2d 592, 594 (2009) (quotation marks and citations omitted). We note that Ms. Ussery testified that she saw defendant Wade hand defendant Young a handgun and, while standing next to defendant Young, she saw defendant Young shoot Mr. Ross. Even though Mr. Ross testified that he did not know who shot him, as his back was turned, “[a]ny contradictions or conflicts” in Ms. Ussery’s or Mr. Ross’ testimony “are resolved in favor of the State[.]” *See id.* Also considering the above analysis regarding the State’s evidence against defendants, we hold that there was “[s]ubstantial evidence of each essential element of the offense[s] charged” and of defendant Wade being one of “the perpetrator[s] of the offense.” *See id.* Accordingly, the trial court did not error in denying defendant Wade’s motion to dismiss and his argument is overruled.

C. Testimony from the probable cause hearing

[5] Defendant Wade next contends that the trial court committed error, or in the alternative plain error, in permitting the prosecutor to question Mr. Ross regarding his testimony at the probable cause hearing, as this questioning amounted to permitting the prosecutor “to place in front of the jury through his own words what Terrance Ross supposedly said at the probable cause hearing.”

As stated above, to properly preserve an issue for appellate review, a party must present to the trial court “a timely request, objection or motion stating the specific grounds for the ruling” and “obtain a ruling upon the party’s request, objection or motion.” N.C.R. App. P. 10(b)(1). However, North Carolina Rule of Appellate Procedure 10(c)(4) also provides that

[i]n criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(c)(4). “[P]lain error analysis applies only to jury instructions and evidentiary matters[.]” *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 40 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed.

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2d 795 (2003). For an appellate court to find plain error, it must first be convinced that, “absent the error, the jury would have reached a different verdict.” *State v. Reid*, 322 N.C. 309, 313, 367 S.E.2d 672, 674 (1988) (citation omitted). “[T]he defendant has the burden of showing that the error constituted plain error[.]” *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

Here, the record shows that counsel for defendant Wade made no objection to the prosecutor’s questions regarding statements made by Mr. Ross at the 12 June 2008 probable cause hearing. Accordingly, we apply a plain error analysis to defendant Wade’s argument. *See* N.C.R. App. P. 10(c)(4). But before a ruling can be plain error, it must be error. We have already addressed essentially the same argument by defendant Young above, and found no error as to the prosecutor’s questions to Mr. Ross regarding his inconsistent statements made at the probable cause hearing. In addition, we have already determined that the State presented overwhelming evidence upon which the jury could convict both defendants of AWDWIKISI and possession of a firearm by a felon. Accordingly, defendant Wade fails to carry his burden to show plain error and we overrule defendant Young’s argument.

D. Inconsistent verdict

[6] Defendant Wade next contends that “the trial court erred by accepting the verdict as to defendant Wade of guilty of assault with a deadly weapon with intent to kill inflicting serious injury, as the jury necessarily found no intent to kill when it acquitted [defendant Wade] of attempted first degree murder, of which the intent to kill was a necessary element, and therefore these verdicts are fatally inconsistent.”

Our Supreme Court has noted that:

In North Carolina jurisprudence, a distinction is drawn between verdicts that are merely inconsistent and those which are legally inconsistent *and* contradictory. *See State v. Meshaw*, 246 N.C. 205, 207 08, 98 S.E.2d 13, 15 (1957), *overruled in part on other grounds by State v. Speckman*, 326 N.C. 576, 580, 391 S.E.2d 165, 168 (1990). It is firmly established that when there is sufficient evidence to support a verdict, “mere inconsistency will not invalidate the verdict.” *State v. Davis*, 214 N.C. 787, 794, 1 S.E.2d 104, 108 (1939) (citing *State v. Sigmon*, 190 N.C. 684, 130 S.E. 854 (1925)). However, when a verdict is inconsistent and contradictory, a defendant is entitled to relief. *Meshaw*, 246 N.C. at 207-08, 98 S.E.2d at 15.

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State v. Mumford, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010). A verdict is inconsistent when there is “an apparent flaw in the jury’s logic [such as when] . . . a finding of guilt in the greater offense would establish guilt in the lesser offense.” *Id.* at 400, 699 S.E.2d at 915. “Verdicts are mutually exclusive when a verdict “purports to establish that the [defendant] is guilty of two separate and distinct criminal offenses, the nature of which is such that guilt of one necessarily excludes guilt of the other.” *Id.* (quoting *Meshaw*, 246 N.C. at 207, 98 S.E.2d at 15). “The elements of attempted first-degree murder are: (1) a specific intent to kill another; (2) an overt act calculated to carry out that intent, which goes beyond mere preparation; (3) malice, premeditation, and deliberation accompanying the act; and (4) failure to complete the intended killing.” *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004). As stated above, the elements of AWDWIKISI are: “(1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death.” *Cain*, 79 N.C. App. at 46, 338 S.E.2d at 905. The verdict here is not mutually exclusive as the “guilt of one [does not] necessarily exclude[] guilt of the other.” See *Mumford*, 364 N.C. at 400, 699 S.E.2d at 915. Even though attempted first-degree murder and AWDWIKISI have two like elements, (1) the intent to kill and (2) failure to kill the victim, the rest of the elements of each offense are different. Therefore, defendant Wade incorrectly assumes that the “jury necessarily found no intent to kill when it acquitted [defendant Wade] of attempted first degree murder[,]” as a jury could have found that defendants had the intent to kill but not the “malice, premeditation, and deliberation[,]” required for attempted first-degree murder and therefore acquitted them on that charge. See *Tirado*, 358 N.C. at 579, 599 S.E.2d at 534. But on the same facts, the jury could have found that defendants, while acting in concert, had the intent to kill, committed an assault with a deadly weapon, and inflicted a serious injury to Mr. Ross, so the jury found defendant Wade guilty of AWDWIKISI. Thus, defendant Wade’s acquittal for attempted first-degree murder and his conviction for AWDWIKISI were not inconsistent or mutually exclusive. Accordingly, defendant Wade’s argument is overruled.

IV. Conclusion

For the foregoing reasons, we find no prejudicial error in defendant Young’s and defendant Wade’s trial.

NO PREJUDICIAL ERROR.

Chief Judge MARTIN and Judge STEPHENS concur.

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MICHAEL STEPHENS v. SAMANTHA STEPHENS (NOW COLVILLE)

No. COA10-943

(Filed 19 July 2011)

1. Child Custody and Support— modification—substantial change in circumstances

The trial court did not err in a child custody modification case by concluding a substantial change in circumstances affected the welfare of the children. Even if the children have not yet been actually harmed by defendant's actions, the court does not have to wait until the substantial change causes harm.

2. Child Custody and Support—modification—best interests of child

The trial court did not abuse its discretion by concluding there was substantial evidence that modification of a previous child custody order was in the best interests of the children.

Appeal by Defendant from Judgment entered 19 January 2010 by Judge Robert W. Bryant, Jr., in Harnett County Domestic Relations Court. Heard in the Court of Appeals 9 February 2011.

Jones and Jones, P.L.L.C., by Cecil B. Jones for Plaintiff-appellee.

McLeod & Harrop, by Donald E. Harrop, Jr., for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Samantha Stephens ("Defendant") appeals from a Custody Order vesting primary custody of Defendant's two minor children with their Plaintiff-father. Defendant argues the trial court erred in granting Plaintiff's Motion to Modify Custody. We disagree and affirm the Order.

I. Factual and Procedural History

Michael Stevens ("Plaintiff") and Defendant married on 10 April 1998. During the marriage, Plaintiff and Defendant had two children. Plaintiff and Defendant separated on 9 November 2003 and divorced on 20 January 2005.

In October 2005, Plaintiff filed a Complaint for Child Custody. Plaintiff and Defendant reached an agreement regarding custody of

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the children, represented by a Consent Order filed 5 December 2006. The Consent Order affirmed that both parties “are fit and proper persons for the custodial roles assigned.” The Consent Order vested primary physical custody of the two children with the Defendant and secondary physical custody with the Plaintiff. The present case originates from the trial court’s 19 January 2010 Order modifying this original custody agreement.

After the divorce, Plaintiff married Lauren Ashley Dupree, with whom he now shares a son. Defendant married Billy Colville on 2 July 2005 and separated from Mr. Colville on 2 January 2009. At the time of the trial, Defendant was not yet divorced from Mr. Colville and was not eligible for divorce until January 2010. Defendant previously owned a home but lost the home due to foreclosure in February 2009. For the next several months, Defendant and the children lived in a rented residence in Harnett County. In August or early September 2009, Defendant and the children moved to Durham to live with her fiancé, Jason Ledbetter. Defendant informed Plaintiff of her intention to move to Durham prior to the actual move. She described it as a temporary move, and told Plaintiff she intended to ultimately move back to the Holly Springs/Fuquay-Varina area in Harnett County. Defendant and her children moved to Mr. Ledbetter’s home because of its larger square footage, which permits each child to have her own bedroom. Plaintiff objected to Defendant’s move to Durham, arguing that the long travel time to and from the children’s school would not be good for the children. At the time of appeal, Defendant still lived with Mr. Ledbetter at his home in Durham. Mr. Ledbetter made a formal offer to purchase a house in Fuquay-Varina, located approximately 30 minutes from the children’s school. Both the Defendant and Mr. Ledbetter acknowledged at trial that they chose a home in Fuquay-Varina rather than a home closer to the children’s school because the location was more convenient for Mr. Ledbetter’s work. At the time of the trial, Mr. Ledbetter had not yet purchased this house, but the closing was set for 22 December 2009.

Plaintiff lives in Harnett County and works at Coats-Erwin Middle School as a physical education teacher, athletic director, and coach of the basketball and baseball teams. Plaintiff’s wife owns her own hair salon business. He and his wife both have family in Harnett County. At the time of the trial, Defendant was unemployed.

Since the Custody Order, Plaintiff has regularly exercised his visitation rights and exercised visitation outside of the court-ordered times, upon agreement with Defendant. According to their teachers,

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both children are well-adjusted and perform well in school. The children have always attended Harnett County schools. Although they have an extensive record of tardiness and absences from school, they still receive high grades.

On 17 September 2009, Plaintiff filed a Motion to Modify Custody. In his Motion, Plaintiff alleged that there has been “[a] substantial change in circumstances” since the entry of the Consent Order. Plaintiff cited, among other things, that Defendant sought to “undermine [him] and alienate [him] from his minor children” and has shown “extreme hostility toward [him] and his present wife . . . in the presence of the minor children.” Plaintiff further alleged that Defendant routinely used visitation with the children as leverage, put the children in the middle of arguments between Plaintiff and Defendant, and sought to undermine the relationship of Plaintiff and Plaintiff’s wife with his children. A hearing on Plaintiff’s Motion was held in Harnett County Domestic Relations Court. On 19 January 2010 the trial court entered an Order granting Plaintiff’s request for a change of custody.

The trial court’s findings of fact describe Defendant’s ongoing course of conduct of hostility towards Plaintiff, which has been detrimental to the children’s emotional well-being.

This course of conduct was demonstrated by numerous text messages, emails and MySpace postings made by the Defendant to and about the Plaintiff and his current wife, which were derogatory, demeaning and profane. All of these writings were introduced into evidence and are incorporated by reference as if fully set forth herein in support of the findings contained within this Order.

[] The Court reviewed the aforementioned documentary evidence, which indicated the Defendant’s failure to give consideration to the Plaintiff’s input on decisions about the minor children, which affected their overall welfare.

The Order contained extensive illustrations of Defendant’s “extreme hostility,” which are described in detail below.

Based on its findings, the trial court concluded there was a substantial chance in circumstances that had impacted the welfare of the children and necessitated a modification of the 5 December 2006 Custody Order. Accordingly, the trial court determined it was in the best interest of the children to award primary physical custody of the children to the Plaintiff and secondary physical custody of the children to the Defendant. Defendant timely entered notice of appeal.

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II. Jurisdiction and Standard of Review

This Court has jurisdiction to hear the instant appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). “When reviewing a trial court’s decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court’s findings of fact to determine whether they are supported by substantial evidence.” *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citing *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998)). “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). Additionally, if the trial court’s findings of fact are supported by substantial evidence, the Court of Appeals must determine whether the facts support the conclusions of law. *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254 (citing *Pulliam*, 348 N.C. at 628, 501 S.E.2d at 904). The trial court is vested with broad discretion in child custody matters. *Id.* at 474, 586 S.E.2d at 253 (citing *Pulliam*, 348 N.C. at 624, 501 S.E.2d at 902). The trial court’s conclusions of law receive *de novo* review. *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000).

III. Analysis

On appeal, Defendant contends that the trial court erred in granting the Motion to Modify Custody. Specifically, Defendant argues there was no change in circumstances affecting the welfare of the children. Additionally, Defendant argues that a modification of the original custody order is not in the best interest of the children. We disagree.

In granting the Motion to Modify Custody, the trial court must have first appropriately concluded that there was a substantial change in circumstances and that the change affected the welfare of the minor child or children. N.C. Gen. Stat. § 50-13.7 (2009); *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254. It must then determine whether a modification of custody is within the best interests of the children. *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254. If we find substantial evidence supports these conclusions, we must affirm the trial court’s decision to modify an existing custody agreement absent a finding the trial court’s order was the product of a “manifest abuse of discretion.” *Metz v. Metz*, 138 N.C. App. 538, 541, 530 S.E.2d 79, 81 (2000).

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A. Substantial Change in Circumstances

[1] First, Defendant argues there is insufficient evidence showing a substantial change in circumstances that affected the welfare of her two children. We do not agree.

When a trial court modifies a custody order, the requisite change in circumstances cannot be “inconsequential” or “minor,” but rather must significantly affect the welfare of the children. *Pulliam*, 348 N.C. at 630, 501 S.E.2d at 905 (Orr, J., concurring). “By this, we mean that the changes are of the type which normally or usually affect a child’s well-being—not a change that either does not affect the child or only tangentially affects the child’s welfare.” *Id.* The trial court need not determine whether the effects of the substantial change in circumstances were adverse or beneficial, “but only that the substantial change affects the welfare of the child.” *Id.* at 630, 501 S.E.2d at 906.

Unless the effect of the change on the children is “self-evident,” the trial court must find sufficient evidence of a nexus between the change in circumstances and the welfare of the children. *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255-56. The moving party maintains the burden of proving a substantial change in circumstances exists that affects the welfare of the children. *Tucker v. Tucker*, 288 N.C. 81, 87, 216 S.E.2d 1, 5 (1975).

A substantial change in circumstances that affects the welfare of the children can occur when a parent demonstrates anger and hostility in front of the children and attempts to frustrate the relationship between the children and the other parent. *Correll v. Allen*, 94 N.C. App. 464, 471, 380 S.E.2d 580, 585 (1989). Additionally, although interference alone is not enough to merit a change in the custody order, “where ‘interference [with visitation] becomes so pervasive as to harm the child’s close relationship with the noncustodial parent,’ ” it may warrant a change in custody. *Shipman*, 357 N.C. at 479, 586 S.E.2d at 256 (quoting *Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986)) (alteration in original).

In the present case, as noted in finding of fact 7, the evidence displays “a substantial change in circumstances that [has] impacted the welfare of the minor children in such a manner that makes it appropriate for the Court to modify the previous Custody Order in this matter.” The trial court described in finding of fact 7(a) that “Defendant has engaged in a course of conduct that demonstrates hostility towards the Plaintiff that has occurred in front of the minor children and is

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otherwise detrimental for the minor children to know about as it relates to their ability to remain emotionally secure and bonded to both parties.” Since the entry of the original custody order, the record is replete with evidence that Defendant repeatedly sought to “deliberately [] belittle the [father] in the mind of his child,” *Woncik*, 82 N.C. App. at 249, 346 S.E.2d at 280, and commonly interfered with Plaintiff’s visitation. In fact, substantial evidence supports the trial court’s finding that “[t]he conduct engaged by the Defendant towards the Plaintiff and his present wife threatens to undermine and alienate the Plaintiff as well as the Plaintiff’s [sic] wife from the minor children without justification or provocation.” Several examples illustrate the nature of Defendant’s ongoing hostile conduct.

For instance, the trial court’s finding of fact 6(e) and (f) describe how on 7 May 2007, Plaintiff called the police after Defendant appeared at his residence and initiated a verbal altercation. Plaintiff testified that when the police officer, Officer Morris, arrived, Defendant had already left the scene, but was talking to Plaintiff on the telephone. Officer Morris testified that while on the phone Defendant accused Plaintiff’s wife of sexually abusing the children. The police report describes that Officer Morris “was left with the clear impression that the suspect [Defendant] was making false allegations about the abuse because of the victim’s relationship with Lauren Dupree.” Officer Morris notified a detective of the accusation, and told Defendant to come to the police station to make a formal report of the alleged abuse, but Defendant refused to do so. Defendant testified that she informed Officer Morris that she might report her allegation to the sheriff’s office rather than the local police department; nevertheless, she never made any such report. Officer Morris also testified that when “the adult or guardian of a victim . . . just, all of a sudden, changes their mind and says, ‘No, we’re not going to pursue this,’ and it’s in the heat of the moment kind of thing, it tends to lead me to believe . . . that [the] allegation didn’t exist to start with.” Following her accusations, Defendant texted Plaintiff a message stating, “Hee hee hee! U r a f[---]n idiot!” Additionally, Officer Morris testified that he heard Defendant tell the children that they could no longer visit Plaintiff’s house because it was not their home. At trial, Defendant acknowledged the facts of the incident but denied making an accusation of sexual abuse, despite Officer Morris’ testimony to the contrary.

In finding of fact 6(k), the trial court describes how in July 2007, Defendant “openly and publicly berated both the Plaintiff and his current wife and used profanity” at a Harnett Regional Theater

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Production involving one of the children. Plaintiff's wife testified that Defendant verbally accosted and cursed at her and Plaintiff in front of a crowd of people. Despite this harassment at his child's play, the trial court found "[n]either the Plaintiff nor his present wife responded to the Defendant but instead entered the theater to watch the minor child in her performance."

The trial court's finding of fact 6(r) describes how on 2 September 2007, after his visitation with his children, Plaintiff and his wife returned the children to Defendant's residence. Plaintiff testified that his wife remained in the car, while Plaintiff walked the children to Defendant's house. Defendant, in the presence of the children, confronted Plaintiff's wife, called her a "whore," and threatened to call the police if Plaintiff ever brought her on Defendant's property again. Plaintiff described a similar event on 5 September 2007, where after another visitation, Plaintiff returned the children to Defendant's home. Although Plaintiff's wife remained in the car parked on the public street, Defendant—again in the presence of the children—yelled obscenities at Plaintiff's wife and attempted to enter the car.

In finding of fact 6(h), the trial court describes an instance where in April 2008, Plaintiff began planning a vacation with his daughters to Disney World and asked Defendant if he could take the children on this trip. After learning of Plaintiff's vacation plans, Defendant took the children to Disney World a month before Plaintiff's scheduled trip. Upon her return, Defendant posted a message on her MySpace page that read "I TOOK THE GIRLS TO DISNEY WORLD . . . FIRST!!!" After Defendant's trip with the children, she texted the Plaintiff: "Careful . . . girls don't give a damn about going to disney, & I certainly dont owe you any favors!"

Plaintiff also testified that in May 2008, Defendant informed one of the children that Plaintiff's wife was pregnant. This was not true, and as a result Plaintiff had to explain the situation to his daughter when she inquired about the issue. Furthermore, Plaintiff described at trial how at the end of the summer of 2008, Defendant initiated an argument with Plaintiff in front of the children. In this instance, Defendant had allowed Plaintiff extra visitation time with the children. Defendant, during the visitation, informed Plaintiff that she wanted to pick up the children a day early to visit their grandmother. Upon hearing this, one child wanted to stay with Plaintiff rather than leave with Defendant. Plaintiff informed the child prior to Defendant's arrival that while she was always welcome at Plaintiff's house, she had to follow the decisions regarding visitation made by

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Plaintiff and Defendant. When Defendant arrived, she initiated an argument with Plaintiff in front of the children when the one child expressed that she wanted to stay with Plaintiff. Both children witnessed portions of the argument, and at least one child began to cry.

As described in finding of fact 6(v), Defendant's move to Durham from Harnett County also constitutes a substantial change in circumstances that affects the welfare of her children. Generally, North Carolina case law has held that although a change in residence is not a *per se* substantial change in circumstances justifying modification of a custody order, "[i]f . . . the relocation is detrimental to the child's welfare, the change in residence of the custodial parent is a substantial change in circumstances and supports a modification of custody." *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 79, 418 S.E.2d 675, 679 (1992), *overruled on other grounds*, *Pulliam*, 348 N.C. at 620, 501 S.E.2d at 900. In the present case, the trial court's finding of fact 6(x) notes that the children, who formerly lived nearby their school, now faced a fifty mile (one hour) drive each way to school every day. The trial court also found that although Defendant and Plaintiff had previously agreed to allow Plaintiff extra visitation with his children on some weeks, Defendant ended this extra visitation after her move to Durham. Plaintiff testified that he did not feel the long daily commute was beneficial for the children. Aside from the commute to and from school, the children would also face the same commute for extra-curricular activities in which they participate, including dance and cheerleading.

We conclude these events provide substantial evidence to support the trial court's determination that Defendant's actions have interfered with Plaintiff's visitation of his children and frustrated their relationship. In doing so, Defendant has demonstrated a "disregard for the best interests of the child[ren], warranting a change in custody." *Shipman*, 357 N.C. at 479, 586 S.E.2d at 256 (quoting *Woncik*, 82 N.C. App. at 248, 346 S.E.2d at 279).

Defendant counters this evidence by arguing that both children are well-adjusted and the conduct described by the trial court is no longer an "ongoing . . . course of conduct." Defendant notes the trial court made no findings of emotional or behavior problems with the children. In fact, the trial court noted in finding of fact 6(ww)–6(yy) that the children have loving relationships with their parents and their parents' significant others and are also performing well in school. Nevertheless, the trial court "need not wait for any adverse effects on the child to manifest themselves before the court can alter

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custody.” *Dreyer v. Smith*, 163 N.C. App. 155, 158, 592 S.E.2d 594, 596 (2004) (quoting *Evans v. Evans*, 138 N.C. App. 135, 140, 530 S.E.2d 576, 579 (2000)). “It is neither ‘necessary nor desirable to wait until the child is actually harmed to make a change’ in custody.” *Ramirez-Barker*, 107 N.C. App. at 78, 418 S.E.2d, at 679 (quoting *Domingues v. Johnson*, 323 Md. 486, 500, 593 A.2d 1133, 1139 (1991)). In the present case, even if the children have not yet been actually harmed by Defendant’s actions, the Court need not wait until the substantial change in circumstances causes such harm. The trial court thus did not err in determining that there was a substantial change in circumstances that affects the children.

B. Best Interest of the Children

[2] Defendant next argues that a modification of the previous custody order is not in the best interest of her children. We disagree.

“As long as there is competent evidence to support the trial court’s findings, its determination as to the child’s best interests cannot be upset absent a manifest abuse of discretion.” *Metz*, 138 N.C. App. at 541, 530 S.E.2d at 81. Under an abuse of discretion standard, we must “determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.” *Mark Group Int’l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 (2002). In the present case, Defendant has neither argued nor presented evidence that the trial court abused its discretion.

In determining the best interest of the children, neither party bears the burden of proof. *Pulliam*, 348 N.C. at 631, 501 S.E.2d at 906 (Orr, J., concurring) (citing *Ramirez-Barker*, 107 N.C. App. at 78, 418 S.E.2d at 679). Rather, “any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court.” *Id.* Indeed, “[t]he ‘best interest’ question is thus more inquisitorial in nature than adversarial,” *Ramirez-Barker*, 107 N.C. App. at 78, 418 S.E.2d at 679, and a lack of specificity of facts underlying the trial court’s decision could necessitate a reversal of the modification order. *Shipman*, 357 N.C. at 481, 586 S.E.2d at 257. As previously discussed, “trial courts are vested with broad discretion in child custody matters.” *Id.* at 474, 586 S.E.2d at 253 (citing *Pulliam*, 348 N.C. at 624, 501 S.E.2d at 903).

As described in finding of fact 8 of the present case, substantial evidence demonstrates that “it is in the best interest of the minor children that their primary care, custody and control be awarded to the Plaintiff with secondary care, custody and control being vested with

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the Defendant.” At trial, testimony was presented that Defendant has faced periods of depression where she did not properly take care of the children. Defendant’s ex-husband, Mr. Colville, testified that Defendant would sleep for extensive periods of time and sometimes neglected to feed the children.

As described in the trial court’s finding of fact 6(hh), “Defendant would often times fail to take one child to school of the other child was sick.” As Plaintiff testified, this resulted in a significant number of absences from school for both children.

Additionally, Mr. Colville testified that Defendant routinely skipped work and seldom reported her own absences to her work, reflecting a lack of stability that is not in the best interest of the children. The trial court noted in finding of fact 6(ii) that “Defendant was allowed to resign from her employment from Coats/Erwin Elementary School in light of the fact that she had, on occasion, failed to appear for work without notice or phone call to the school to justify her absences and that she was absent in excess of thirty (30) days of her employment during the 2008/2009 school year.” Defendant’s supervisor, Principal Howard, testified at trial that Defendant’s excessive unreported absences directly contributed to her resignation from Coats/Erwin Elementary School. Specifically, Principal Howard mentioned that between the beginning of 2008 and 3 April 2008, Defendant missed 45-and-a-half days of work, including three-and-a-half consecutive weeks between March and April of 2008 which led to her resignation. The trial court’s finding of fact 6(oo), supported by trial testimony, notes that at the time of the trial, Defendant was unemployed and not seeking employment.

Furthermore, Defendant’s numerous instances of vulgar communication and hostile interactions with Plaintiff in front of their children, described *supra*, directly reflect on Defendant’s emotional instability and volatility. Given the trial court’s “broad discretion in child custody matters,” *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253, we find this evidence to be “competent and relevant to a showing of the best interest” of these children. *Pulliam*, 348 N.C. at 631, 501 S.E.2d at 906 (Orr, J., concurring) (quoting *In re Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984)).

Plaintiff, on the other hand, has moved into a new home where the children have friends in the local neighborhood. As described in trial court’s findings of fact 6(uu), (vv), (ww) and (ccc) both Plaintiff and his wife have family in the area who help take care of the children,

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and the children generally have a strong loving relationship with Plaintiff, his wife, and their half-brother. At trial, Plaintiff's wife testified that her parents, sister, aunts, uncles, and Plaintiff's mother live nearby and take a role in helping to take care of Plaintiff's children.

The trial court's findings of fact 6(pp) through (rr) note that Plaintiff has maintained a job with the Harnett County School System throughout the duration of these proceedings and has, since the entry of the original Custody Order, obtained his Masters in School Administration. Plaintiff testified that he has maintained steady employment throughout the custody proceedings and has taken steps to advance his career. Additionally, neither "Plaintiff nor his present wife have any plans to relocate themselves away from the Harnett County area and have no plans to remove the children from the Coats School District where they have consistently attended." We conclude there was substantial evidence to support the trial court's conclusion that a modification of the previous custody order was in the best interest of the children.

IV. Conclusion

We conclude there was substantial evidence before the trial court to support its conclusion that there was a substantial change in circumstances that affected the welfare of the children. We also conclude the trial court did not abuse its discretion in concluding that a modification of the original custody order was in the children's best interest. Accordingly, we affirm the trial court's Order.

Affirmed.

Judges CALABRIA and STROUD concur.

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DONALD RAY STRICKLAND, ADMINISTRATOR OF THE ESTATE OF PEYTON BROOKS STRICKLAND, PLAINTIFF v. THE UNIVERSITY OF NORTH CAROLINA AT WILMINGTON AND THE UNIVERSITY OF NORTH CAROLINA AT WILMINGTON POLICE DEPARTMENT, DEFENDANTS

No. COA10-1589

(Filed 19 July 2011)

Police Officers— information given to other officers—negligence claim—public duty doctrine

The Industrial Commission did not err by denying defendants' motion for summary judgment on the issue of liability preclusion under the public duty doctrine where plaintiff alleged that the UNC-W police department negligently provided false, misleading, and irrelevant information to sheriff's department officers who were serving an arrest warrant and that this false information proximately caused the decedent's death. In all cases where the public duty doctrine has been held applicable, the breach of the alleged duty has involved the governmental entity's negligent control of an external injurious force or the effects of such a force. Here, the alleged breach was not a negligent action with respect to some external injurious force, but was itself the injurious force.

Appeal by Defendants from order entered 11 October 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 June 2011.

Comerford & Britt, L.L.P., by John Kenneth Moser and W. Thompson Comerford, Jr., for Plaintiff.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar, for Defendants.

STEPHENS, Judge.

On 1 December 2006, Peyton Brooks Strickland ("Strickland") was killed in his residence by a member of the New Hanover County Emergency Response Team (the "ERT"). The ERT was serving a warrant for Strickland's arrest when a member of the ERT mistook the noise of a battering ram hitting the door of Strickland's residence for the sound of gunfire and discharged his weapon through Strickland's front door, mortally wounding Strickland.

The ERT had been deployed to serve Strickland's arrest warrant by the New Hanover County Sheriff's Department ("Sheriff's Department") after the Sheriff's Department received a request from

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the University of North Carolina at Wilmington (“UNC-W”) police department for assistance in serving the warrant. The UNC-W police department had been investigating Strickland as a suspect in connection with a 17 November 2006 assault and theft on the UNC-W campus. Based on their investigations of the crime, of Strickland, and of others suspected to be involved in the crime, the UNC-W police department concluded that service of Strickland’s arrest warrant was a potentially dangerous matter that necessitated Sheriff’s Department assistance.

Following Strickland’s death, on 31 October 2008, Plaintiff Donald Ray Strickland (“Plaintiff”), Strickland’s father and the administrator of Strickland’s estate, filed with the North Carolina Industrial Commission an action under the North Carolina Tort Claims Act, asserting a claim for wrongful death against UNC-W and the UNC-W police department (“Defendants”).¹ In his complaint, Plaintiff alleged that UNC-W police department officers negligently provided false, misleading, and irrelevant information to Sheriff’s Department officers and ERT members in the process of securing ERT and Sheriff’s Department assistance in serving Strickland’s arrest warrant. Plaintiff further alleged that the provision of this false, misleading, and/or irrelevant information—including the allegedly false facts that Strickland was known to be armed and dangerous, that Strickland had been engaged in gang activity, and that Strickland had been involved in two previous assaults—proximately caused Strickland’s death by leading ERT members to believe that they were entering into what the ERT member who shot Strickland described as a “severely dangerous environment including heavily armed suspects with histories of intentional physical violence causing injuries to persons.”

On 5 February 2010, Defendants filed a motion for summary judgment, asserting that Plaintiff’s claim is barred by the public duty doctrine. The motion was heard on 19 February 2010 by Deputy Commissioner George T. Glenn II, who denied Defendants’ motion in

1. The Tort Claims Act provides, in relevant part, as follows:

The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina

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a 26 February 2010 order. Defendants appealed the order to the Full Commission, which affirmed the denial of summary judgment and remanded the case for a full evidentiary hearing. On 19 October 2010, Defendants appealed the Full Commission's order to this Court.²

The sole issue on this appeal is whether the public duty doctrine applies in this case to bar Plaintiff's claim. We conclude that it does not.

"The public duty doctrine is a [] rule of common law negligence that may limit tort liability, even when the State has waived sovereign immunity." *Myers v. McGrady*, 360 N.C. 460, 465, 628 S.E.2d 761, 766 (2006). "The rule provides that when a governmental entity owes a duty to the general public . . . individual plaintiffs may not enforce the duty in tort." *Id.* at 465-66, 628 S.E.2d at 766. This doctrine has often been described, simply and oxymoronically, as "duty to all, duty to none." Frank Swindell, Note, *Municipal Liability for Negligent Inspections in Sinning v. Clark—A "Hollow" Victory for the Public Duty Doctrine*, 18 Campbell L. Rev. 241, 247-49 (1996) (quoted in *Multiple Claimants v. N.C. Health and Human Servs., Div. of Facility & Detention Servs.*, 176 N.C. App. 278, 282-83, 626 S.E.2d 666, 669 (2006), *modified and aff'd*, 361 N.C. 372, 646 S.E.2d 356 (2007)). Despite the presumable simplicity of a doctrine susceptible to such succinct encapsulation, application of the public duty doctrine in the North Carolina courts, as well as in other jurisdictions, has become a particularly prickly issue. *Cf. Thompson v. Waters*, 351 N.C. 462, 464, 526 S.E.2d 650, 651-52 (2000) (noting that "[s]ome courts have criticized the [public duty] doctrine as speculative and the cause of legal confusion, tortured analyses, and inequitable results in practice." (citation and internal quotation marks omitted)). As such, we precede our discussion of the doctrine's application to this case with a brief discussion of the doctrine's history in this jurisdiction.

The classic example of the public duty doctrine's applicability—and, indeed, the fact pattern of the case in which our Supreme Court first recognized the validity of the doctrine—involves a negligence claim alleging a law enforcement agency's failure to protect a person from a third party's criminal act. *See Braswell v. Braswell*, 330 N.C. 363, 370, 410 S.E.2d 897, 901 (1991) (recognizing the public duty doctrine and applying it to a claim against a sheriff for negligent failure

2. Although the denial of a motion for summary judgment is an interlocutory order generally not immediately appealable, this Court has previously allowed immediate appeal of a summary judgment order declining to apply the public duty doctrine to bar a claim against a governmental entity based on the doctrine's interrelated effect on the existence of a governmental defendant's sovereign immunity. *Smith v. Jackson Cty. Bd. of Educ.*, 168 N.C. App. 452, 457-58, 608 S.E.2d 399, 405 (2005).

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to protect a murder victim from her murderer). In such a case, it is alleged, albeit unsuccessfully, that the law enforcement officer breached his duty to protect the victim and that that breach, or failure to protect, caused the victim's death. As there is no general "duty to protect" imposed on individual actors, *cf. Klassette v. Mecklenburg Cty. Area Mental Health*, 88 N.C. App. 495, 499, 364 S.E.2d 179, 182 (1988) (noting that "there exists in this state no general duty to aid individuals in distress"), the law enforcement officer's tort duty to protect allegedly arises from his (or, more accurately, his municipal employer's) overarching duty to furnish police protection to the public in general. *See Coleman v. Cooper*, 89 N.C. App. 188, 193, 366 S.E.2d 2, 6 (in reviewing a claim against a law enforcement agency for failure to protect, examining the "duty, if any, owed by the city, through its police department") (cited in *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901), *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988), *disapproved in part by Hunt v. N.C. Dept. of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998). However, the public duty doctrine provides that because a municipality and its agents furnishing police protection "act for the benefit of the public" and not for a specific individual, the duty to provide police protection is to the general public rather than to a specific individual and, therefore, "there is no liability for the failure to furnish police protection to specific individuals." *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901 (citing *Coleman*, 89 N.C. App. at 193, 366 S.E.2d at 6). Stated differently, while the law enforcement agency owes a "duty to protect" to the public at large, individual members of the public as plaintiffs generally may not enforce that duty in tort. *Myers*, 360 N.C. at 465-66, 628 S.E.2d at 766. This limitation on a municipality's liability is subject to two exceptions:

(1) where there is a special relationship between the injured party and the police, for example, a state's witness or informant who has aided law enforcement officers; and (2) when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered.

Braswell, 330 N.C. at 371, 410 S.E.2d at 902 (internal quotation marks and citation omitted).

The justification for preventing an individual member of the public from enforcing the duty owed to the public as a whole, as stated by our Supreme Court in the police-protection context, is as follows:

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The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources . . . should be allocated and without predictable limits.

Braswell, 330 N.C. at 371, 410 S.E.2d at 901-02 (quoting *Riss v. City of New York*, 22 N.Y.2d 579, 581-82, 240 N.E.2d 860, 860-61, 293 N.Y.S.2d 897, 898 (1968)). Our Supreme Court in *Braswell* also “refuse[d] to judicially impose an overwhelming burden of liability for failure to prevent every criminal act” on law enforcement, again recognizing “the limited resources of law enforcement.” *Id.* at 370-71, 410 S.E.2d at 901.

Applying this same reasoning, our Courts have broadened this rule limiting a law enforcement agency’s liability for failure to protect to also limit (1) a state inspection agency’s liability for allegedly negligent inspections or allegedly negligent failure to inspect, *Stone v. N.C. Dept. of Labor*, 347 N.C. 473, 495 S.E.2d 711, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998); *Hunt*, 348 N.C. 192, 499 S.E.2d 747; (2) a state correction agency’s liability for allegedly negligent placement or supervision of a probationer, *Blaylock v. N.C. Dept. of Corr.—Div. of Cmty. Corr.*, 200 N.C. App. 541, 685 S.E.2d 140 (2009), *disc. review denied*, 363 N.C. 853, 693 S.E.2d 916 (2010); and (3) a state environmental agency’s liability for allegedly negligent management of a forest fire. *Myers*, 360 N.C. 460, 628 S.E.2d 761. In each of these cases, it was reasoned that the alleged duty was owed to the public in general and was therefore unenforceable in tort by an individual member of the general public. *Myers*, 360 N.C. at 468, 628 S.E.2d at 767 (stating that because the statutes that set forth the powers and duties of a state forest fire fighting agency “are designed to protect the citizens of North Carolina as a whole, [the agency] does not owe a specific duty to plaintiff or to third-party plaintiffs”); *Stone*, 347 N.C. at 483, 495 S.E.2d at 717 (“Although [the statute governing workplace inspections] imposes a duty upon defendants, that duty is for the benefit of the public, not individual claimants as here. Plaintiffs’ claims thus fall within the public duty doctrine . . .” (internal citation omitted)); *Hunt*, 348 N.C. at 198, 499 S.E.2d at 751 (applying the public duty doctrine to preclude a claim alleging negligent inspection of go-karts and stating that “[t]he Amusement Device Safety Act and the rules promulgated thereunder are for the ‘protec-

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tion of the public from exposure to such unsafe conditions' and do not create a duty to a specific individual"); *Blaylock*, 200 N.C. App. at 545-46, 685 S.E.2d at 143 (reasoning that the duty to supervise a probationer and prevent his criminal actions was owed to public in general and holding that the public duty doctrine applied to bar plaintiff's claim). In so limiting the State's liability, our Courts cited the necessary deference to legislative-executive resource-allocation and/or the specter of overwhelming liability as the justification(s) for their decisions. *Myers*, 360 N.C. at 468, 628 S.E.2d at 767 (refusing to "judicially impose overwhelming liability on [state fire fighting agencies] for failure to prevent personal injury resulting from forest fires," and observing that "[f]ire fighting decisions . . . concern the allocation of limited resources to address statewide needs"); *Stone*, 347 N.C. at 481, 495 S.E.2d at 716 (recognizing the limited resources of the defendant-inspection agency and refusing "to judicially impose an overwhelming burden of liability on [defendant-inspection agency] for failure to prevent every employer's negligence that results in injuries or deaths to employees"); *Hunt*, 348 N.C. at 199, 499 S.E.2d at 751 (noting that if the public duty doctrine did not apply, defendant-inspection agency "would become a virtual guarantor of the safety of every go-kart subject to its inspection, thereby, exposing it to an overwhelming burden of liability for failure to detect every code violation or defect" (internal quotation marks omitted)); *Blaylock*, 200 N.C. App. at 545, 685 S.E.2d at 143 (applying the public duty doctrine and acknowledging that the doctrine "recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act").

In this case, Defendants contend that the alleged duty owed to Strickland is actually one owed to the general public such that Plaintiff should be precluded from enforcing the duty in a negligence action against Defendants. Such a limitation on their liability, Defendants urge, would further the policy justifications generally offered in support of the public duty doctrine. We are unconvinced.

The duty that Plaintiff is attempting to enforce in this case is best characterized as a law enforcement officer's duty to provide accurate information (or not to negligently provide false and misleading information) during a criminal investigation. Unlike in those cases where the public duty doctrine has been applied, this alleged duty is not one that is owed to the public in general. Rather, the duty to provide accurate information clearly benefits a certain, identifiable segment of the general public, *i.e.*, subjects of criminal investigations. In such a case where the plaintiff is not attempting to enforce in tort a duty owed to

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the public in general, our Supreme Court has held the public duty doctrine to be inapplicable. *See Isenhour v. City of Charlotte*, 350 N.C. 601, 608, 517 S.E.2d 121, 126 (1999) (holding that because the municipality “has undertaken an affirmative, but limited, duty to protect certain children, at certain times, in certain places,” “[t]he rationale underlying the public duty doctrine is simply inapplicable”).

Furthermore, were we to generalize this duty as the duty to conduct non-negligent investigations, it still would not resemble the types of duties to the general public for which the public duty doctrine normally precludes liability. In all cases where the public duty doctrine has been held applicable, the breach of the alleged duty has involved the governmental entity’s negligent control of an external injurious force or of the effects of such a force.³ *See, e.g., Myers*, 360 N.C. 460, 628 S.E.2d 761 (negligent control of a forest fire not started by fire fighting agency); *Wood v. Guilford Cty.*, 355 N.C. 161, 558 S.E.2d 490 (2002) (failure to prevent third party’s criminal act on county property); *Stone*, 347 N.C. 473, 495 S.E.2d 711 (failure to ensure plant worker’s ability to escape plant fire not started by inspection agency); *Hunt*, 348 N.C. 192, 499 S.E.2d 747 (negligent inspection of amusement ride prior to ride’s malfunction, which was not caused by the inspection); *Braswell*, 330 N.C. 363, 410 S.E.2d 897 (failure to prevent a third party’s criminal act). In this case, however, the alleged breach is not a negligent action with respect to some external injurious force. Rather, the UNC-W police department’s act of negligently providing misleading and inaccurate information was itself the injurious force.

Conceptually related to this issue is Defendants’ argument that the public duty doctrine bars Plaintiff’s claim because UNC-W police officers did not fire the bullets that killed Strickland and, therefore, UNC-W police officers were not the “direct cause” of the harm. As noted previously by this Court, the public duty doctrine only precludes liability in situations where the alleged governmental tortfeasor is not the “direct cause” of the alleged injury. *See Moses v. Young*, 149 N.C. App. 613, 616, 561 S.E.2d 332, 334 (“An exhaustive review of the public duty doctrine as applied in North Carolina reveals no case in which the public duty doctrine has operated to shield a defendant from acts directly causing injury or death.”), *disc. review denied*, 356 N.C. 165, 568 S.E.2d 199 (2002); *see also Blaylock*, 200 N.C. App. at

3. We also note that section 143-299.1A of the Tort Claims Act, applicable to causes of action arising on or after 1 October 2008, provides that the public duty doctrine is only a defense for (1) law enforcement failure to protect from acts of third parties and acts of God, and (2) failure to perform health or safety inspections. N.C. Gen. Stat. § 143-299.1A (2009).

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547, 685 S.E.2d at 144 (finding public duty doctrine applicable where placement of a probationer in a home with minor children only “indirectly” resulted in the children being sexually assaulted); *Smith*, 168 N.C. App. at 460, 608 S.E.2d at 406 (finding the public duty doctrine inapplicable where a defendant’s “affirmative conduct” “directly” injured plaintiff). However, that the doctrine is only applicable where the government entity is not the “direct cause” of a plaintiff’s injury does not mean, as Defendants suggest, that a governmental entity is shielded from liability whenever the entity is not the last link in the chain of causation.⁴ Rather, it means that the public duty doctrine may shield a governmental entity from liability only where the entity was not the impetus for, *i.e.*, did not bring about, the injurious force. *See, e.g., Stone*, 347 N.C. 473, 495 S.E.2d 711 (negligent fire inspection did not bring about fire); *Hunt*, 348 N.C. 192, 499 S.E.2d 747 (negligent amusement ride inspection did not bring about ride malfunction); *Braswell*, 330 N.C. 363, 410 S.E.2d 897 (ignoring citizen’s complaints did not bring about criminal action); *Blaylock*, 200 N.C. App. 541, 685 S.E.2d 140 (placement of probationer in victim’s home did not bring about sexual assault); *see also Smith*, 168 N.C. App. at 460, 608 S.E.2d at 406 (“The public duty rule applies only to situations in which a plaintiff has been directly harmed by the conduct of a third person and only indirectly by a public employee’s dereliction of a duty—a duty imposed on him or her solely by his or her contract of employment—to interrupt or prevent the third person’s harmful activity.” (quoting 63C Am. Jur. 2d *Public Officers and Employees* § 248 (1997))).

In this case, although UNC-W police officers may not have been the last link in the chain of causation for Plaintiff’s injury, if the facts alleged by Plaintiff are taken to be true, as they must in the summary judgment context, *Cucina v. City of Jacksonville*, 138 N.C. App. 99, 101-02, 530 S.E.2d 353, 354, *disc. review denied*, 352 N.C. 588, 544 S.E.2d 778 (2000), the UNC-W police department was the impetus for

4. Indeed, this Court has held that the public duty doctrine only applies to duty and not causation, *Dreury v. N.C. Dept. of Transp.*, 168 N.C. App. 332, 337-38, 607 S.E.2d 342, 346-47, *disc. review denied*, 359 N.C. 410, 612 S.E.2d 318 (2005), and that the normal rules of negligence, including proximate cause, apply in the Tort Claims Act context. *Barney v. N.C. State Highway Comm’n*, 282 N.C. 278, 284, 192 S.E.2d 273, 277 (1972) (“Under the Tort Claims Act[,] negligence, contributory negligence and proximate cause . . . are to be determined under the same rules as those applicable to litigation between private individuals.” (quoting *MacFarlane v. Wildlife Res. Comm’n*, 244 N.C. 385, 93 S.E.2d 557 (1956))). Accordingly, in a case such as this, where the breach is the first link in a multi-link chain of causation (negligent provision of inaccurate information caused a high state of alarm, caused an ERT member to mistake a battering ram for a gunshot, caused the ERT member to fire his weapon, caused Strickland to die), liability is not precluded solely because the allegedly negligent act is not the last link in the chain of causation.

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the injurious force, *i.e.*, UNC-W police officers' negligent provision of inaccurate information *brought about* the ERT member's decision to fire his weapon through Strickland's front door. As it was the UNC-W police department's breach of its "affirmative, but limited," duty to Strickland that "directly caused" Strickland's death, we conclude that the public duty doctrine does not shield Defendants from liability for their actions in this case. *See Isenhour*, 350 N.C. at 608, 517 S.E.2d at 126 (holding that the public duty doctrine is inapplicable where plaintiff is alleging that the governmental defendant breached an "affirmative, but limited," duty owed to an "identifiable group"); *see also Moses*, 149 N.C. App. at 616, 561 S.E.2d at 334 (public duty doctrine inapplicable where governmental defendant's negligence was direct cause of plaintiff's injury).

In support of this conclusion, we note that extending the public duty doctrine to limit Defendants' liability in this case would not further the public policy justifications often cited in support of the doctrine. First, whereas a duty to protect from third-party criminal acts, enforceable in tort, could allow civil courts to impinge upon a municipality's power to decide how best to allocate its limited resources, there is no similar divestiture of discretionary, legislative-executive, resource-allocation power implicit in the imposition of liability here. Defendants have not argued that "after actively weighing the safety interests of the public," UNC-W police officers concluded that providing false and misleading information was a more efficient allocation of resources than providing accurate information. *See Moses*, 149 N.C. App. at 619, 561 S.E.2d at 335. Nor is there any evidence that conducting negligent investigations is part of any legislative or executive strategy in North Carolina. Because the UNC-W police department's actions in this case did not involve discretionary, resource-allocation decisions, there is no concern that allowing the alleged duty to be enforced in tort "would inevitably determine how the limited police resources . . . should be allocated," and, thus, this justification is not implicated. *Braswell*, 330 N.C. at 371, 410 S.E.2d at 901.

Likewise, holding state law enforcement agencies liable for negligent acts committed by officers *under the direct control* of those agencies does not raise the same specter of unlimited liability as holding law enforcement and inspection agencies liable for failing to prevent or mitigate all harmful acts by all third parties.

Finally, although not a traditional justification for the public duty doctrine's applicability, we note that imposition of liability in this case would not subject the UNC-W police officers to the "unreasonable, hindsight based standard of liability" discussed in *Lassiter v.*

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Cohn, 168 N.C. App. 310, 318, 607 S.E.2d 688, 693 (2005). In *Lassiter*, a police officer investigating a three-car collision on the side of a road during heavy traffic decided not to use flares or cones to redirect traffic around the scene of the accident or to require the vehicles involved in the accident to move further off the road. *Id.* While the officer was interviewing the plaintiff, who was involved in the car accident, both the officer and the plaintiff were struck by a passing car, severely injuring the plaintiff. *Id.* at 313, 607 S.E.2d at 690. This Court held that the public duty doctrine must recognize the “discretionary demands of a police officer fulfilling her general duties owed when responding to the many and synergistic elements of a traffic accident.” *Id.* at 318, 607 S.E.2d at 693. As such, this Court applied the public duty doctrine to preclude liability, stating that

[w]hile there are surely measures that [the officer] may have taken to decrease the threat of a potentially negligent third-party from hitting plaintiff, it is placing this unreasonable, hindsight based standard of liability upon a police officer when performing public duties which is exactly that which the public duty doctrine seeks to alleviate.

Id.

Unlike *Lassiter*, this case does not involve those “many and synergistic elements” that would have required UNC-W police officers to make the rushed, discretionary determination to provide the ERT and sheriff’s officers with inaccurate and misleading information. While we recognize the UNC-W police department’s interest in efficiently concluding investigations and in protecting officers participating in those investigations, these interests bear more on the yet-unresolved issues of the existence and breach of the duty alleged by Plaintiff. At this stage in the proceedings, this Court is limited to a determination of whether the alleged duty, assuming its existence, is one that is owed to the public in general such that the public duty doctrine should apply to preclude Defendants’ liability. We conclude that it is not.

Based on the foregoing, we hold that the Industrial Commission did not err in denying Defendants’ motion for summary judgment on the issue of liability preclusion under the public duty doctrine. Therefore, the order of the Industrial Commission is

AFFIRMED.

Chief Judge MARTIN and Judge THIGPEN concur.

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SANDRA YOST, AS TRUSTEE AND BENEFICIARY OF THE RESEARCH CENTER TRUST AND CATHERINE CALDWELL, VICKIE KING, AND LESLEE KULBA, AS TRUSTEES OF THE RESEARCH CENTER TRUST, PLAINTIFFS, DYNAMIC SYSTEMS, INC., INTERVENOR PLAINTIFF V. ROBIN YOST AND SUSAN YOST, INDIVIDUALLY AND IN THEIR CAPACITIES AS TRUSTEES AND TRUST PROTECTORS OF THE RESEARCH CENTER TRUST, DEFENDANTS

No. COA10-957

(Filed 19 July 2011)

1. Appeal and Error— interlocutory orders and appeals— partial summary judgment—certified for immediate appeal

An immediate appeal was allowed from a partial summary judgment order where the trial court properly certified the case for immediate appeal.

2. Trusts— enforcement of trust provisions—standing—corporation owned by trust

A corporation that was owned by a trust did not have standing to sue the trustees to enforce trust provisions concerning successor trustees where it was not the beneficiary of the trust.

3. Trusts— successor trustees—former trustees— standing

Former trustees had standing to bring an action concerning the trust provisions for successor trustees, despite the rule that only beneficiaries and co-trustees have standing to sue to enforce a trust, where a part of the controversy was whether defendants wrongly prevented plaintiffs from renewing their trusteeships.

4. Trusts— successor trustees—trust provisions

The trial court did not err in interpreting a trust provision concerning successor trustees and in granting a motion for partial summary judgment. The plain language of the trust provision supported the trial court's interpretation, which was consistent with the purposes of the trust. The matter was remanded for removal of certain language from the court's order that reached too far and was not supported by the agreement.

Appeal by plaintiffs and intervenor plaintiff from order entered 25 May 2010 by Judge Laura J. Bridges in Buncombe County Superior Court. Heard in the Court of Appeals 26 January 2011.

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Roberts & Stevens, P.A., by Dennis L. Martin, Jr., and Ann-Patton Hornthal, for plaintiffs.

Patla, Straus, Robinson & Moore, by Richard S. Daniels, for intervenor plaintiff.

William E. Loose for defendants.

ELMORE, Judge.

Sandra Yost, Catherine Caldwell, Vickie King, and Leslee Kulba (together, plaintiffs) and Dynamic Systems, Inc. (DSI) (intervenor plaintiff), appeal from an order for partial summary judgment granted in favor of Robin Yost and Susan Yost (together, defendants). After careful consideration, we affirm the order of the trial court in part and reverse and remand it in part.

I. Background

On 3 March 2005, Charles A. Yost executed a trust agreement establishing the Research Center Trust (Trust), which is the subject of this dispute. Plaintiff Sandra Yost was Charles Yost's wife, defendant Robin Yost is Charles Yost's son, and defendant Susan Yost is Charles Yost's daughter. Charles Yost died shortly after creating the Trust, on 29 March 2005.

At issue here is the process for electing successor trustees under the trust agreement. Article V of the Trust Agreement sets out the process by which trustees and successor trustees are appointed and elected. Article V states, in relevant part:

At all times, the Trustees should make every effort to have nine Trustees while any of my family members is serving as a Trustee, and to have seven Trustees while none of my family members is serving as a Trustee. After my incapacity or death, that group of Trustees shall be composed, and shall elect their own successors, as follows:

A. My wife, SANDRA T. YOST, and my son, ROBIN W. YOST, and my daughter, SUSAN Y. CARSWELL [now Yost], shall each be a Trustee as long as each, respectively, is living and not incapacitated. At least two Trustees shall be officers or directors of Dynamic Systems, Inc., or its corporate successor, as the business that provides the financial support for the trust purposes. At least two Trustees shall be members of the scientific community, not necessarily local, who are independent of the business and

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the Yost family and who have an active interest and participation in research and experimentation.

B. Except for the three family members named above, each Trustee shall serve for a term of three years. If a Trustee ceases to serve for any reason prior to the expiration of his or her term, then a successor shall be elected to serve until the expiration of such predecessor Trustee's term. Trustees may serve multiple and consecutive terms without limitation, if so elected, for as long as they are willing and able to uphold the purposes of the trust.

C. Successor Trustees shall be nominated by any then-serving Trustee, and must be approved by at least two-thirds of the then-serving Trustees (excluding any Trustees who are then-serving but whose terms will be ending and whose successors are being selected). It shall be the responsibility of the Trustees to locate, interview, and approve successor Trustees within a period of not longer than six months after a vacancy occurs.

Before his death, Charles Yost appointed nine trustees, including Sandra, Robin, and Susan Yost. As the two representatives of DSI, Charles Yost appointed plaintiff Caldwell and Mimi Chang. As the other four directors, Charles Yost appointed plaintiff Leslee Kulba, Richard Hull, Yusef Fahmy, and Charles Tolley. On 28 July 2006, Tolley stepped down and Rebecca Bruce replaced him. On 20 April 2007, Chang stepped down and plaintiff King replaced her.

On 8 December 2006, defendant Robin Yost gave notice of his resignation as a trustee. In his letter, he wrote, "I do not feel my role as a trustee furthers the business of the trust. Also as I see potential conflict of interest by being both a trustee and beneficiary." However, on 10 December 2007, defendant Robin Yost gave notice of his return as a trustee.

On 25 January 2008, the trustees held their annual meeting, and all nine trustees attended, including defendant Robin Yost, who was reinstated as a trustee at the beginning of the meeting. In addition, John Kelso, Charles Yost's attorney and one of three designated trust protectors, also attended. The terms of the six non-Yost-family trustees would expire in March 2008, so the nomination and approval of successor trustees was on the agenda for the annual meeting. However, the trustees never approved successor trustees because defendants introduced amendments to the trust agreement that

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would significantly alter the number and makeup of the board of trustees,¹ disrupting the meeting.

On 12 November 2008, plaintiffs Sandra Yost, Caldwell, King, and Kulba sued defendants, seeking a temporary restraining order and preliminary injunction to prevent defendants from acting as trustees and trust protectors during the pendency of the action, a declaratory judgment voiding any actions taken by defendants as trustees or trust protectors since 25 January 2008, and an amendment to the trust agreement. The complaint also alleged that defendants had breached their fiduciary duties under the trust agreement and had committed constructive fraud.

On 16 January 2009, defendants answered, alleging three affirmative defenses, including standing. Defendants alleged that plaintiffs Caldwell, King, and Kulba lacked standing to bring any action regarding the Trust because their terms had expired in March 2008. Defendants also counterclaimed, seeking a declaratory judgment construing the language in the trust agreement with respect to the selection of successor trustees for the Trust.

On 18 March 2009, DSI moved to intervene as a plaintiff. On 4 May 2009, the trial court allowed DSI's motion, and DSI became an intervenor plaintiff. On 9 May 2009, DSI filed its own complaint against defendants. Like the original plaintiffs, DSI sought an injunction and declaratory judgment as well as amendment of the trust agreement. In addition, DSI sought the removal of defendants as trust protectors and an affirmation or reinstatement of the six non-family trustees until successor trustees have been nominated and approved.

On 19 February 2010, defendants moved for partial summary judgment. Defendants sought a summary judgment declaring "[t]he meaning of the language of Article V. C. [*sic*] [of the trust agreement] with respect to the selection of successor trustees," and who the current trustees are. Plaintiffs also moved for partial summary judgment.

On 25 May 2010, following a hearing, the trial court entered an order granting partial summary judgment in favor of defendants. The trial court defined the issues before it as follows:

- (i) the interpretation of Article V.C. of the Research Center Trust (hereinafter the "Trust") regarding which trustees were entitled

1. Pursuant to Section Two of Article XI of the trust agreement, defendants, as two of the three trust protectors, "have the power to . . . amend th[e] trust agreement in any manner they deem reasonably necessary to fulfill the trust purposes." Whether the proposed amendments were proper is not currently before this Court.

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to approve successor trustees of the Trust; (ii) who the current trustees are of the Trust with the right to approve successor trustees; and (iii) whether any genuine issue of material fact exists with respect to whether, as a result of alleged breaches of fiduciary and trustee duties by the Defendants, any of the non-family trustees who were serving in January 2008 are currently entitled to act in any capacity or for any purpose as trustees of the trust[.]

The trial court “determined from the four corners of the Trust document that Article V.C. intends that the three Yost family member trustees (Sandra Yost, Robin Yost and Susan Yost) were the only trustees who were intended to ever be able to approve successor trustees.” The court also “determined that, as a necessary result of the foregoing ruling, the three Yost family member trustees . . . are the current trustees . . . of the Trust with the right to approve successor trustees.” Finally, the trial court determined that it was unnecessary to reach the third issue. The trial court decreed “[t]hat Article V.C. of the Trust shall be interpreted to mean that the three Yost family member trustees are the only trustees who are ever able to approve successor trustees.” The trial court also ordered the Yost family member trustees to “first nominate and approve successors for all of the six non-family trustee positions, and those nine trustees shall thereafter be entitled to engage in other Trust business[.]”

Later that day, plaintiffs moved to stay the effect of the order of partial summary judgment, which the trial court denied. Plaintiffs appealed. This Court granted a petition for writ of supersedeas, staying the order of partial summary judgment pending the outcome of this appeal.

II. Interlocutory Appeal

[1] As a preliminary matter, we note that the order of partial summary judgment is interlocutory, and, ordinarily, there is no right of appeal from an interlocutory order. *CBP Resources of N.C., Inc. v. Mountaire Farms, Inc.*, 134 N.C. App. 169, 170, 517 S.E.2d 151, 153 (1999). However, an interlocutory order may be immediately appealed “(1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C. R. Civ. P. 54(b) or (2) if the trial court’s decision deprives the appellant of a substantial right which would be lost absent immediate review.” *Id.* at 171, 517 S.E.2d at 153 (quotations and citations omitted). Here, the trial court properly certified

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the case for immediate appeal. Accordingly, we review the merits of plaintiffs' appeal.

III. Arguments**A. Standing**

[2] Defendants argue that intervenor plaintiff DSI and plaintiffs Caldwell, King, and Kulba lack standing to bring claims against them. See *Forsyth County Bd. of Social Services v. Division of Social Services*, 317 N.C. 689, 692, 346 S.E.2d 414, 416 (1986) (“[Q]uestions of subject matter jurisdiction may properly be raised at any point[.]”). As this is another preliminary legal issue, we resolve it before addressing the substance of plaintiffs' appeal.

Defendants argue that DSI lacks standing to prosecute the four causes of action alleged in its complaint because DSI has no injury to redress against the Trust or its trustees. This presents the unusual situation of trust property suing the trustees. This Court has followed the rule set out in the Restatement and other jurisdictions that “only beneficiaries have standing to sue to enforce a trust.” *Scott v. United Carolina Bank*, 130 N.C. App. 426, 433, 503 S.E.2d 149, 154 (1998) (citations omitted); see *Restatement (Second) of Trusts*, § 200 (“No one except a beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust or to enjoin redress for a breach of trust.”). “A beneficiary is one for whose benefit a trust directly and specifically provides. A person who incidentally benefits from the performance of the trust, but who is not a beneficiary of the trust, cannot maintain a suit to enforce the trust.” *Scott*, 130 N.C. App. at 432, 503 S.E.2d at 153-54 (quoting and citing *Restatement (Second) of Trusts*, § 126 and § 200, cmt. e). Here, the trust agreement names four trust beneficiaries: Sandra Yost, Robin Yost, Susan Yost, and Sunlight Foundation, Inc. DSI is not named as a beneficiary. Accordingly, DSI does not have standing to sue the trustees to enforce the Trust, which is the essence of DSI's complaint and the basis for this appeal. Accordingly, we do not consider intervenor plaintiff DSI's arguments on appeal.

[3] Defendants argue that plaintiffs Caldwell, King, and Kulba lack standing because they are no longer trustees—their terms having expired automatically in March 2008. An exception to the rule above, that only a beneficiary can sue to enforce a trust, is that one co-trustee has standing to sue another co-trustee “to compel him to perform his duties under the trust, or to enjoin him from committing a breach of trust, or to compel him to redress a breach of trust com-

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mitted by him.” *Id.*, § 200, cmt. e. Although this rule is found only in the *Restatement*, not in our caselaw, “our Supreme Court has recognized the *Restatement (Second) of Trusts* as persuasive authority.” *Slaughter v. Swicegood*, 162 N.C. App. 457, 465, 591 S.E.2d 577, 583 (2004) (citing *Fortune v. First Union Nat. Bank*, 323 N.C. 146, 149, 371 S.E.2d 483, 484 (1988)). In addition, the official comment to N.C. Gen. Stat. § 36C-10-1001, “Remedies for breach of trust,” states that “[b]eneficiaries and cotrustees have standing to bring a petition to remedy a breach of trust.” N.C. Gen. Stat. § 36C-10-1001, cmt. (2009). Again, the essence of these plaintiffs’ complaint is that defendants breached their duties as trustees and violated the trust agreement, so, as co-trustees, they would have standing to sue their fellow trustees to enforce the Trust. Defendants argue that, because these plaintiffs’ terms automatically terminated in March 2008, they are no longer cotrustees and thus have no standing. However, whether defendants wrongly prevented plaintiffs from renewing their trusteeships is part of the current controversy. Holding that that these plaintiffs lack standing because their terms ended in March 2008 presumes the answer to the question before us on appeal. Accordingly, we conclude that plaintiffs Caldwell, King, and Kulba have standing to maintain this appeal.

B. Grant of Defendants’ Motion for Partial Summary Judgment

[4] Plaintiffs argue that the trial court erred by granting defendants’ motion for partial summary judgment because the trial court misinterpreted Article V.C. of the trust agreement. We disagree.

We review an order of partial summary judgment *de novo*. *DeRossett v. Duke Energy Carolinas, LLC*, — N.C. App. —, —, 698 S.E.2d 455, 458 (2010). 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 [a] party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009).

When reviewing a trial court’s allowance of a summary judgment motion, we consider whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Evidence presented by the parties is viewed in the light most favorable to the non-movant.

Davenport v. Cent. Carolina Bank & Trust Co., 161 N.C. App. 666, 671, 589 S.E.2d 367, 370 (2003) (citing *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003)).

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“In construing the terms of a trust, our responsibility is to ascertain the intent of the settlor and to carry out that intent . . . deriving the settlor’s intent from the language and purpose of the trust, construing the document as a whole.” *Id.* at 672, 589 S.E.2d 370 (quotations and citation omitted).

In determining the intent of a trustor the court is not limited to a determination of what is meant by a particular phrase or word. A trust indenture is but the expression of a settlor’s intention reduced to writing, and it is often necessary to go to the “four corners” of the instrument in order to gather a full understanding of his intent. That intent is determined by the language he chooses to convey his thoughts, the purposes he seeks to accomplish, and the situation of the other parties to or benefited by the trust.

Davison v. Duke Univ., 282 N.C. 676, 707, 194 S.E.2d 761, 780 (1973) (quotations and citations omitted).

Here, the section of the trust agreement at issue, V.C., states that “Successor Trustees shall be nominated by any then-serving Trustee, and must be approved by at least two-thirds of the then-serving Trustees (excluding any *Trustees* who are then-serving but whose terms will be ending and whose successors are being selected).” (Emphasis added.) Plaintiffs argue that this language means that trustees whose terms are expiring participate in the approval of successor trustees for every open trustee position except their own. In other words, if there are nine trustees and six of their terms are expiring, two-thirds of eight of the trustees must approve the successor trustee for the ninth trustee’s position. The trial court’s interpretation, however, is that all trustees whose terms are expiring cannot participate in the approval of successor trustees. In the scenario above, only two-thirds of the three trustees whose terms are not expiring need to approve each successor trustee. The plain language of this section supports the trial court’s interpretation. The use of the plural “Trustees” rather than the singular “Trustee” in the parenthetical encompasses all trustees whose terms are ending, not just one trustee whose term is ending and whose successor is being voted on.

The purposes of the Trust, as set out in the trust agreement, are not inconsistent with the trial court’s interpretation of Section V.C. Article IV of the Trust sets out the purposes of the Trust. The text of Article IV follows in its entirety:

Following is a statement of the purposes for which this trust has been created. I intend that the Trustees shall administer the

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trust in furtherance of these purposes, and that any disagreement regarding the trust administration or interpretation shall be resolved by reference to this statement of the trust purposes.

A. **Yost Family.** To provide for the welfare of my wife and children during their lifetimes by providing them with the right to reside on the property in Madison County that has heretofore been owned by my wife and me, and within reasonable limitations to use such property to pursue their personal interests; and to provide them with support to ensure adequate healthcare and a reasonable standard of living similar to the standard that they presently enjoy.

B. **Research.** To enable the nonprofit scientific and educational activities of the Sunlight Foundation, Inc., independent of any profit-motivated or political bias; and within or outside of the Foundation to encourage continuous and continual research efforts, provided that no efforts or assets shall be for imposing or destructive purposes. In particular, the trust should encourage individual research in the natural and physical sciences, in all phases, including study, conjecture, experimentation, observation, analysis, evaluation, and the pursuit of knowledge and understanding, provided that the motive for all of the foregoing is compatible with natural ecological balances and peaceful human coexistence.

C. **Business.** To continue and develop the operation of Dynamic Systems, Inc. (“DSI”) and Electric Spacecraft, Inc. (“ESI”) as profitable businesses primarily as a means of supporting the other trust purposes described in this Article; and to ensure good wages, benefits, and working conditions for the employees of those businesses; and to uphold and even improve the business’ high standards for quality products, customer service, and integrity in business practices.

D. **Continuation of Purposes.** To manage the property, stock, and other trust assets in a way that will allow this trust and its purposes to continue intact into the future, throughout and beyond the lifetimes of my wife and children; and to ensure that people and organizations involved with the trust, either as Trustees or contributors or otherwise, understand and share the educational and research goals described herein.

Nothing in the articulated purposes of the Trust contradicts our plain language reading of Section V.C. It is, however, evident from the artic-

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ulated purposes that Charles Yost intended to provide for his family and that the continued operation and development of DSI was a “means of supporting the other trust purposes,” including providing for the Yost family. The practical effect of our interpretation of Section V.C. is that only the three Yost trustees can approve successor trustees. Plaintiffs argue that giving the Yost family so much control over the Trust violates Charles Yost’s intent, but it is apparent to us that Charles Yost intended to keep his family deeply involved with the Trust.

The paramount importance of the Yost family to Charles Yost, as grantor, is evident throughout the trust agreement: Sandra, Robin, and Susan Yost are trustees for the duration of their lifetimes; the Yosts cannot be removed as trustees; the Yosts are three of the four named beneficiaries of the Trust; although the Yost trustees “shall have no special voting rights, . . . it is [Charles Yost’s] intent that all Trustees shall give special consideration to the requests and concerns of the Yost family, consistent with the trust’s stated purposes”; in the event of the Trust’s failure, seventy-five percent of the trust property will be distributed to the three Yosts; and Robin and Susan Yost were appointed to be two of the three trust protectors, meaning they had the power to amend the trust agreement.

It is possible for the three Yost trustees to stagger their appointments of successor trustees so that their terms do not all expire at the same time, which would resolve the practical objection raised by plaintiffs. It also appears possible for the trust protectors to amend the trust agreement to change Section V.C. or to establish staggered terms for trustees.

Accordingly, with one caveat, we agree with the trial court’s interpretation of the trust agreement. That caveat is the trial court’s statement that Sandra, Robin, and Susan Yost “were the only trustees who were intended to ever be able to approve successor trustees.” This statement reaches too far and is not supported by the trust agreement. Charles Yost specifically intended the Trust to survive his wife and children, and declaring that his wife and children are “the only trustees who were intended to ever be able to approve successor trustees” is not consistent with this specific intention. Moreover, as explained above, it is possible for other trustees to approve successor trustees by staggering terms or amending the trust agreement or when replacing a trustee who departs before the end of his or her term.

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Therefore, we affirm the order in part and reverse in part, remanding for the sole purpose of removing the language from paragraphs three and eight of the order stating that only the three Yost family member trustees can approve successor trustees.

C. Denial of Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs also argue that the trial court erred by denying their motion for partial summary judgment, in which they asked the trial court to declare that non-Yost-family trustees can approve successor trustees. For the reasons stated above in III.C., this argument fails.

IV. Conclusion

We affirm the order of partial summary judgment in part, reversing and remanding for the sole purpose of removing the language from paragraphs three and eight of the order stating that only the three Yost-family-member trustees can approve successor trustees.

Affirmed in part; reversed and remanded in part.

Judges STEELMAN and ERVIN concur.

STATE OF NORTH CAROLINA v. TOBY LEONARD

No. COA10-1387

(Filed 19 July 2011)

1. Motor Vehicles—felonious serious injury by motor vehicle—proximate cause of injury—not exclusive

The trial court did not err by denying defendant's motion to dismiss the charge of felonious serious injury by motor vehicle where defendant contended that there was insufficient evidence that impaired driving was the proximate cause of the injury. Impaired driving need not be the only proximate cause of the victim's injury for the defendant to be found criminally liable.

2. Indictment and Information—felonious operation of motor vehicle to elude arrest—reckless driving as aggravating factor—information sufficient

The body of an indictment for felonious operation of a motor vehicle to elude arrest with reckless driving as an aggravating

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factor was sufficient to provide defendant with enough information to prepare a defense.

3. Constitutional Law— right to confrontation— no objection at trial on constitutional grounds— no plain error

There was no plain error where defendant objected to an affidavit at trial but not on Confrontation Clause grounds. Even assuming that the affidavit violated defendant's right to confrontation, there was ample evidence to find the two aggravating factors needed to enhance the charge from a misdemeanor to a felony. The exclusion of the affidavit would not have altered the jury's verdict.

Appeal by defendant from judgments entered 11 June 2010 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 11 April 2011.

Roy Cooper, Attorney General, by Kimberley A. D'Arruda, Assistant Attorney General, for the State.

Robert W. Ewing, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was indicted for one count of Driving While Impaired, one count of Assault with a Deadly Weapon Inflicting Serious Injury, one count of Felonious Serious Injury By Motor Vehicle, one count of Felonious Operation of a Motor Vehicle to Elude Arrest, one count of Misdemeanor Hit and Run, and having attained habitual felon status.

The evidence at trial tended to show that at approximately 10:00 p.m. on 16 January 2009, defendant was at his home drinking alcohol. At some point during the evening, he went to his girlfriend's mother's apartment and a physical altercation occurred between defendant and his girlfriend's family. Police were called and the family attempted to hold defendant down until they arrived. Defendant, however, broke loose, got into his vehicle, and ran his vehicle into his girlfriend's vehicle before he "zoomed" out of the parking lot.

Raleigh Police Officer A.B. Smith was responding to the 911 call about the altercation, when he observed a vehicle, later determined to be driven by defendant, coming through an intersection dragging its bumper. Having heard that the incident to which he was responding involved two vehicles "ramming" each other, Officer Smith suspected that the vehicle might have been involved in the altercation and he

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began to follow it. Officer Smith activated his blue lights and defendant slowed and began to pull to the right. However, defendant then pulled back to the left and maintained a consistent speed. Officer Smith activated his siren. Defendant then accelerated rapidly and proceeded through a red traffic light at an intersection at approximately 55 miles per hour. The posted speed limit was 35 miles per hour.

At the same time, David Jones was driving north through the same intersection with passengers Danielle Bowder and Mario Smith. Defendant crashed his vehicle into the driver's side back seat of Mr. Jones' vehicle. After the vehicles came to a rest, defendant fled the scene of the accident on foot. Officer Smith pursued defendant and took him into custody at a Food Lion grocery store approximately 35 yards away from the accident.

Officer T.D. Hurst responded to Officer Smith's radio call after the collision. At the scene, he observed that defendant was having difficulty standing, was unsteady on his feet, and smelled strongly of alcohol. Defendant also vomited on the side of the police vehicle and the vomit smelled strongly of alcohol. Once placed inside the back-seat of the police vehicle, defendant fell asleep. Officer Hurst testified to his opinion that defendant "had consumed a sufficient quantity of an impairing substance so as to appreciably inhibit his mental and physical capacities." Defendant's blood alcohol concentration was measured at .10, to which he later stipulated at trial.

Both defendant's and Mr. Jones' vehicles were badly damaged in the collision. Mr. Jones, Mr. Smith, and defendant were transported to the hospital. Mr. Jones was diagnosed with a contusion to his face, laceration on his left forearm, and a left shoulder sprain. He was discharged with pain medication, anti-inflammatory medication, and muscle relaxants. Mr. Smith was diagnosed with a left clavicle fracture, a left C-7 transverse process fracture, and a small renal contusion. He spent one day at the hospital and was prescribed pain medication and ongoing physical therapy.

At trial, the State introduced, over objection, letters sent from the North Carolina Division of Motor Vehicles to defendant notifying him that his license was revoked. The State also introduced an affidavit written by an employee at the North Carolina Department of Motor Vehicles ("DMV") stating that the originals of the notification letters were "deposited by [her] in the United States mail on the mail date of the attached order in an envelope, postage paid, addressed as appears thereon, which address is shown by the records of the Division as the address of the person named on the document."

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At the close of the State's evidence, defendant moved to dismiss all charges. The trial court allowed the motion to dismiss the charges of Assault with a Deadly Weapon Inflicting Serious Injury, but denied the motion as to the remaining charges. Defendant did not present any evidence and renewed his motions to dismiss. The motions were denied. The jury returned verdicts finding defendant guilty of one count of Driving While Impaired, one count of Felonious Serious Injury By Motor Vehicle, one count of Felonious Operation of a Motor Vehicle to Elude Arrest, and one count of Misdemeanor Hit and Run. Defendant then entered a plea of guilty to having attained habitual felon status. The trial court arrested judgment on the Driving While Impaired conviction due to defendant's conviction of Felonious Serious Injury by Motor Vehicle. The court consolidated all of the offenses for judgment and sentenced defendant to a minimum of 136 months and a maximum of 173 months in the custody of the North Carolina Department of Correction. Defendant appeals.

Defendant challenges his convictions on a number of grounds. He first argues that the trial court erred by denying his motion to dismiss the charge of Felonious Serious Injury by Motor Vehicle. He also challenges the enhancement of his conviction for Operation of a Motor Vehicle to Elude Arrest from a misdemeanor to a Class H felony. We find no error.

I.

[1] Defendant first contends the trial court erred in denying his motion to dismiss the charge of Felonious Serious Injury By Motor Vehicle. We disagree.

Upon a defendant's motion for dismissal, the trial court must determine whether there is substantial evidence of each essential element of the offense charged. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). If substantial evidence is present, the motion to dismiss is properly denied. *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984). "The evidence is to be considered in the light most favorable to the State and the State is entitled to every reasonable inference that might be drawn therefrom." *State v. Jackson*, 75 N.C. App. 294, 297, 330 S.E.2d 668, 669 (1985) (citing *State v. Witherspoon*, 293 N.C. 321, 237 S.E.2d 822 (1977)).

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To establish the offense of Felonious Serious Injury by Motor Vehicle, the State must prove that the defendant (1) unintentionally caused serious injury to another, (2) was engaged in the offense of impaired driving under N.C.G.S. § 20-138.1 or N.C.G.S. § 20-138.2, and (3) the commission of the offense under subdivision (2) was the proximate cause of the serious injury. N.C. Gen. Stat. § 20-141.4(a3) (2009).

Defendant does not challenge that he unintentionally caused serious injury to Mr. Smith or that he violated N.C.G.S. § 20-138.1. Rather, defendant contends there was insufficient evidence as to the third element. He argues that his own willful action in attempting to elude arrest was the proximate cause of Mr. Smith's injuries and not his impaired driving. We disagree.

Proximate cause is a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. Foreseeability is an essential element of proximate cause. This does not mean that the defendant must have foreseen the injury in the exact form in which it occurred, but that, in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.

State v. Powell, 336 N.C. 762, 771-72, 446 S.E.2d 26, 31 (1994) (citations omitted) (quoting *Williams v. Boulterice*, 268 N.C. 62, 68, 149 S.E.2d 590, 594 (1966)).

Defendant's violation of N.C.G.S. § 20-138.1, which prohibits drivers from operating motor vehicles while under the influence of impairing substances, need not be the only proximate cause of a victim's injury in order for defendant to be found criminally liable; a showing that defendant's action of driving while under the influence was one of the proximate causes is sufficient. *See State v. Hollingsworth*, 77 N.C. App. 36, 39, 334 S.E.2d 463, 465 (1985). Therefore, even if defendant's willful attempt to elude arrest was a cause of Mr. Smith's injury, defendant's driving under the influence could also be a proximate cause.

Here, looking at the evidence in the light most favorable to the State, with all reasonable inferences drawn in the State's favor, *see Jackson*, 75 N.C. App at 297, 330 S.E.2d at 669, there was substantial evidence to support a finding that defendant's impaired state was a

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proximate cause of Mr. Smith's serious injury. A man of ordinary prudence could have foreseen an accident resulting from drinking and driving. The jury could reasonably find from the evidence that defendant was consuming alcohol on the evening of 16 January 2009, that he then got into an altercation with his girlfriend and her family, got into his vehicle, drove it into his girlfriend's car, refused to pull over for the police, drove the car faster than the speed limit, and proceeded through a red traffic light and collided with the victim's vehicle. Both Officers Smith and Hurst testified that defendant appeared impaired. Officer Hurst testified that defendant had a strong odor of alcohol, vomited, and had difficulty standing. At trial, defendant stipulated to a blood alcohol concentration of .10, which is over the legal driving limit. *See* N.C. Gen. Stat. § 20-138.1 (2009) (defining the offense of impaired driving as driving "[a]fter having consumed sufficient alcohol that [a person] has, at any relevant time after the driving, an alcohol concentration of 0.08 or more"). Therefore, we hold there was evidence upon which the jury could find that the defendant's intoxication was a proximate cause of Mr. Smith's injuries; and thus, the trial court properly denied defendant's motion to dismiss based on insufficiency of the evidence.

II.

[2] Defendant next challenges his conviction for Felonious Operation of a Motor Vehicle to Elude Arrest. It is a Class 1 misdemeanor "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). However, the offense is elevated to a Class H felony when at least two of eight different aggravating factors are present. N.C. Gen. Stat. § 20-141.5(b). Those aggravating factors include:

- (1) Speeding in excess of 15 miles per hour over the legal speed limit.
- (2) Gross impairment of the person's faculties while driving due to:
 - a. Consumption of an impairing substance; or
 - b. A blood alcohol concentration of 0.14 or more within a relevant time after the driving.
- (3) Reckless driving as proscribed by G.S. 20-140.

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- (4) Negligent driving leading to an accident causing:
 - a. Property damage in excess of one thousand dollars (\$1,000); or
 - b. Personal injury.
- (5) Driving when the person's drivers license is revoked.
- (6) Driving in excess of the posted speed limit, during the days and hours when the posted limit is in effect, on school property or in an area designated as a school zone pursuant to G.S. 20-141.1, or in a highway work zone as defined in G.S. 20-141(j2).
- (7) Passing a stopped school bus as proscribed by G.S. 20-217.
- (8) Driving with a child under 12 years of age in the vehicle.

Id.

Defendant does not challenge that at least one aggravating factor was present; the jury found him guilty of Felonious Serious Injury of Mario Smith by Motor Vehicle. *See* N.C. Gen. Stat. § 20-141.5(b)(4). Rather, he argues that the indictment was facially invalid as it failed to sufficiently allege the presence of another aggravating factor, reckless driving, *see* N.C.G.S. § 20-141.5(b)(3), in that the indictment does not specify the manner in which he recklessly drove. He also argues that the State, when presenting evidence that he had been notified of his driver's license revocation, in order to prove a third aggravating factor, Driving While License Revoked, *see* N.C.G.S. § 20-141.5(b)(5), violated his constitutional rights under the Confrontation Clause.

A.

Indictments must “express the charge against the defendant in a plain, intelligible, and explicit manner,” N.C. Gen. Stat. § 15-153 (2009), and “must allege all of the essential elements of the crime sought to be charged.” *State v. Westbrook*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996) (citing *State v. Courtney*, 248 N.C. 447, 451, 103 S.E.2d 861, 864 (1958)).

The purpose of an indictment is at least twofold: First, to make clear the offense charged so that the investigation may be confined to that offense, that proper procedure may be followed, and applicable law invoked; second, to put the defendant on reasonable notice so as to enable him to make his defense.

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State v. Gregory, 223 N.C. 415, 420, 27 S.E.2d 140, 143 (1943). “When these purposes are served, the functions of the indictment are not so impaired by the omission of subordinate details”—in this case, specifically, how defendant was driving recklessly—“as to necessitate an abruption of the judicial investigation in which, if it is allowed to proceed, the questioned condition may be made clear and the rights of the accused protected by the application of legal standards.” *Id.*

The indictment at issue states in its entirety:

The jurors for the State upon their oath present that on or about the [sic] January 16, 2009, in Wake County, the defendant named above unlawfully, willfully, and feloniously did operate a motor vehicle on a public street or highway, Calvary Dr, Raleigh, NC while fleeing and attempting to elude a law enforcement officer, A.B. Smith, an officer with the Raleigh Police Department, who was in the lawful performance of his duties, to wit: performing a traffic stop. At the time of the violation four (4) statutory aggravating factors were present to wit: (1) the defendant was driving recklessly in violation of N.C.G.S. 20-140, (2) the defendant was driving while the defendant’s driver’s license was revoked, (3) negligent driving leading to an accident causing property damage in excess of \$1,000.00 and (4) negligent driving leading to an accident causing personal injury. The defendant’s actions were in violation of N.C.G.S. 20-141.5(b).

Defendant’s indictment tracks the relevant language of the Felony Speeding to Elude Arrest statute and lists the essential elements of the offense. *See State v. Penley*, 277 N.C. 704, 707-08, 178 S.E.2d 490, 492 (1971) (“An indictment for a statutory offense is sufficient, as a general rule, when it charges the offense in the language of the statute.”) (citing *State v. Hord*, 264 N.C. 149, 157, 141 S.E.2d 241, 246 (1965); *State v. Sossamon*, 259 N.C. 374, 376, 130 S.E.2d 638, 639 (1963); *State v. Wells*, 259 N.C. 173, 176, 130 S.E.2d 299, 302 (1963)). The body of the indictment provided defendant with enough information to prepare a defense for the offense of Felony Speeding to Elude Arrest with Reckless Driving as an aggravating factor. Accordingly, this issue on appeal is without merit.

B.

[3] In order to prove another aggravating factor, driving while his license was revoked, *see* N.C. Gen. Stat. 20-141.5(b)(5), the State must

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prove that defendant had knowledge of his license suspension or revocation. *See State v. Funchess*, 141 N.C. App. 302, 310-11, 540 S.E.2d 435, 440 (2000). Defendant argues that the trial court violated his constitutional rights under the Confrontation Clause when it allowed testimony and the admission of an affidavit from an employee at the DMV establishing that notice had been sent informing him that his license was revoked.

However, “[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.” N.C.R. App. P. 10(a)(1). “Constitutional issues, which are not raised and ruled upon at trial, will not be considered for the first time on appeal.” *State v. Ellis*, — N.C. App. —, —, 696 S.E.2d 536, 539 (2010) (citing *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001)).

Defendant did object to the DMV employee’s affidavit at trial, but the context does not, as defendant urges us to conclude, indicate that his objections were based upon constitutional grounds. The following exchange took place at trial:

Q. Officer Smith, are you familiar with the process of, as a law enforcement officer investigating the status of an individual’s driver’s license, whether or not they’re eligible for a licensed revoked or whatnot?

A. I am.

MR. SIMMONS: Can we approach, Judge?

THE COURT: Sure.

(A bench conference was held which was not reported)

THE COURT: The Defendant, through counsel, objects to the documents that you made reference to.

You may mark them.

Objection is overruled.

....

MR. WALLER: Officer Smith, I’m approaching you with what has been marked for the identification as State’s Exhibit 5. Take a look at these documents and tell me if you recognize those in

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terms of your experience with investigating the status of individual's license.

A. This looks like a notification from the Division of Motor Vehicles addressed to Mr. Leonard.

. . . .

Q. Okay. And anything about those documents appear out of the ordinary based on your normal course of business as a police officer?

A. No, they don't.

. . . .

MR. WALLER: Your Honor, I'd ask to introduce State's Exhibits 5 and 6 as certified public documents.

MR. SIMMONS: Objection, Your Honor.

THE COURT: Let me see it.

Objection overruled. Let the items be received.

As such, because the record does not affirmatively disclose that defendant objected to the documents on constitutional grounds, we will only review for plain error. "We reverse for plain error only in the most exceptional cases . . . and only when we are convinced that the error was either a fundamental one resulting in a miscarriage of justice or one that would have altered the jury's verdict." *State v. Locklear*, 363 N.C. 438, 449, 681 S.E.2d 293, 303 (2009) (citing *State v. Garcell*, 363 N.C. 10, 35-36, 678 S.E.2d 618, 634-35, *cert. denied*, — U.S. —, 175 L. Ed. 2d 362 (2009)). Even assuming, without deciding, that the DMV employee's affidavit violated defendant's right to confrontation, no miscarriage of justice occurred here and the exclusion of the affidavit would not have altered the jury's verdict. The jury had ample evidence before it to find two aggravating factors were present so as to enhance defendant's Driving to Elude Arrest conviction to a Class H felony. N.C. Gen. Stat. § 20-141.5(b).

In its closing argument, the State urged the jurors to consider the following three statutory aggravating factors: reckless driving, negligent driving leading to an accident causing personal injury, or driving when the defendant's drivers license is revoked. N.C. Gen. Stat. § 20-141.5(b). The jury only had to find that "two or more" of those three factors were present in order to elevate the offense to a Class H felony. *Id.*

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Ample evidence was presented to support a jury's finding that defendant's negligent driving led to an accident causing personal injury—in fact, the jury found defendant guilty of Felonious Serious Injury of Mario Smith by Motor Vehicle. Additionally, at trial, testimony was offered supporting a finding that defendant drove recklessly. As he was fleeing from Officer Smith in a 35-mile-per-hour speed zone, he approached a red traffic light, further accelerated to a speed of approximately 55 miles per hour, and drove illegally through the intersection.

This evidence is sufficient to support a finding that at least two aggravating factors were present. Therefore, any error which may or may not have resulted from the State's introduction of the DMV employee's affidavit clearly did not result in prejudice to defendant.

No Error.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA v. ALVARO RAFAEL CASTILLO

No. COA10-814

(Filed 19 July 2011)

1. Criminal Law— jury instruction—insanity defense

The trial court did not commit plain error in a first-degree murder and assault case by failing to instruct the jury that the insanity defense applied if defendant believed due to mental illness that his conduct was morally right. Defendant failed to request a special instruction or show that absent the alleged error, the jury probably would have reached a different result.

2. Criminal Law— prosecutor's argument—mental illness—failure to intervene ex mero motu

The trial court did not err in a first-degree murder and assault case by failing to intervene *ex mero motu* during the State's closing argument regarding defendant's mental illness in light of the wide latitude accorded counsel in closing argument and the substantial and largely unchallenged evidence.

Appeal by Defendant from judgments entered 21 August 2009 by Judge R. Allen Baddour, Jr. in Superior Court, Orange County. Heard in the Court of Appeals 8 February 2011.

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Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell and Assistant Attorney General Derrick C. Mertz, for the State.

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

McGEE, Judge.

Alvaro Rafael Castillo (Defendant) was found guilty by a jury on 21 August 2009 of first-degree murder, discharging a weapon on educational property, discharge of a weapon into occupied property, two counts of assault with a deadly weapon with intent to kill, two counts of possession of a firearm on educational property, and three counts of possession of a weapon of mass destruction. The trial court arrested judgment on the three counts of possession of a weapon of mass destruction and one count of possession of a weapon on educational property. Defendant was sentenced to life imprisonment without the possibility of parole for first-degree murder. The trial court imposed a consolidated sentence of twenty-five to thirty-nine months in prison, to run consecutively to Defendant's life sentence, for: one count of assault with a deadly weapon with intent to kill, discharging a firearm on educational property, discharging a firearm into occupied property, and one count of possession of a weapon on educational property. The trial court also imposed a sentence of twenty-five to thirty-nine months in prison to run consecutively with the above sentences, for the remaining count of assault with a deadly weapon with intent to kill. Defendant appeals.

I. Facts

The facts of this case are tragic and largely undisputed. Defendant shot and killed his father in their family home in Orange County on 30 August 2006. Defendant then drove to Orange High School (the school) in Hillsborough. Defendant was armed with several homemade pipe bombs, smoke bombs, a sawed-off shotgun, and a rifle. After Defendant arrived at the school, he set off smoke bombs and discharged his rifle into the air. Defendant began to shoot at students who were standing outside of the school. Defendant continued shooting at students and at the façade of the school building until his rifle jammed. During the shooting, Defendant inflicted non-lethal injuries on two students. A school resource officer, London Ivey (Officer Ivey), along with Barry LeBlanc (Mr. LeBlanc), a teacher and former state trooper, approached Defendant when they realized

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Defendant's rifle had jammed. They ordered Defendant to put down his weapons. Defendant complied and was arrested by Officer Ivey.

The investigation into Defendant's actions on 30 August 2006 revealed that Defendant had attempted suicide earlier that year, on 20 April 2006. The evidence presented at trial by Defendant tended to show that he was a mentally unstable young man, who idolized the perpetrators of the Columbine High School shootings in Columbine, Colorado in 1999 (the Columbine shootings). Defendant presented testimony regarding a journal he kept that showed he intended to kill himself with a shotgun on the anniversary of the Columbine shootings.

Defendant's father interrupted Defendant's 20 April 2006 suicide attempt, and Defendant was hospitalized for seven days. Defendant received outpatient psychotherapy until 24 July 2006. At that time, a dispute arose between the two clinics that were treating Defendant. As a result, Defendant received no treatment from 24 July 2006 until the shootings.

After Defendant's suicide attempt, Defendant began planning a school shooting of his own to mirror the Columbine shootings. Defendant purchased a rifle and ammunition. From 18 June to 20 June 2006, Defendant traveled to Columbine High School with his mother and, during the trip, bought a black trench coat. Defendant's journal around this time began to contain references to "sacrifice of students, sacrifice of family." Defendant also wrote in his journal: "I might save some children from sin." At trial, Defendant presented testimony from experts, as well as from his journal, that suggested Defendant considered his father's murder a sacrifice.

Defendant stated to the officers who accompanied him to jail after the shootings that he "was going to save those kids from sex, drugs, pornography, and abusive people like [his] father in their lives[.]" When Defendant's mother was allowed to visit him in the Central Prison mental hospital after his arrest, she asked him if he had anything to confess. Defendant replied, "what do I have to confess about? I didn't do anything bad. I did the right thing."

Several experts testified at trial that Defendant was unable to distinguish between right and wrong when he shot his father and attacked students at the school. Dr. James Hilkey (Dr. Hilkey), a psychologist who treated Defendant, testified that Defendant believed God had given Defendant signs directing Defendant to behave as he did. Dr. Hilkey testified that Defendant came to believe that his failed suicide attempt was the result of divine intervention, and a signal that

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God wanted Defendant to end the suffering of other people by sacrificing people. Dr. Hilkey testified that Defendant knew that killing people by shooting them was legally wrong, but that Defendant believed it was morally right.

However, there was also evidence presented at trial that Defendant had a troubled relationship with his father. Dr. Nicole Wolfe (Dr. Wolfe), a psychiatrist at Dorothea Dix Hospital, testified that Defendant was severely mentally ill on 30 August 2006. However, Dr. Wolfe opined that Defendant “was capable of distinguishing between right and wrong at that time.” Dr. Wolfe testified that Defendant carried out the school shootings because Defendant sought notoriety and “the people that he was imitating were his idols. He idolized Eric Harris and Dylan Klebold[,]” the shooters involved in the Columbine shootings.

In brief, Defendant presented evidence that he: (1) was a very troubled young man, (2) suffered from untreated or poorly treated mental disorders, (3) harbored anger for the world in which he lived, and (4) considered that world to be sinful and offensive. The issue in dispute was not whether Defendant was troubled or had mental disorders, but rather, exactly what the nature of Defendant’s disorders were, and whether the disorders affected Defendant such that he was unable to distinguish right from wrong when he carried out his plans on 30 August 2006.

II. Jury Instructions

[1] Defendant first argues that “the trial court committed plain error by failing to instruct the jury that the insanity defense applies if a defendant believed due to mental illness that his conduct was morally right.” We disagree. Defendant did not request a special instruction at trial; therefore, this argument is limited to plain error review. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

We note that the trial court instructed the jury pursuant to the pattern jury instructions for the insanity defense. During the charge conference, Defendant did not request an instruction on the meaning of “wrong” in the context of whether he was able to distinguish right from wrong in his actions on 30 August 2006. Defendant did orally request a special instruction to inform the jury “about what’s going to happen if they do render a verdict of not guilty by reason of insanity[,]” and that would result in Defendant’s being committed to a mental institution. The trial court provided those instructions to the jury in conformity with Defendant’s request.

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Our Supreme Court has summarized the insanity defense as follows:

In North Carolina, in order for a defendant to be exempt from criminal responsibility for an act by reason of insanity, he must prove to the satisfaction of the jury that at the time of the act, he was laboring under such a defect of reason caused by disease or a deficiency of the mind that he was incapable of knowing the nature and quality of his act or, if he did know the nature and quality of his act, that he was incapable of distinguishing between right and wrong in relation to the act.

State v. Ingle, 336 N.C. 617, 630, 445 S.E.2d 880, 886 (1994) (citations omitted). In the present case, the trial court gave the following instruction on the insanity defense, which substantially tracks the language in the Pattern Jury Instructions, N.C.P.I.—Crim. 304.10.

When there is evidence which tends to show that the defendant was legally insane at the time of the alleged offense, you will consider this evidence only if you find that the State has proved beyond a reasonable doubt each of the things about which I have already instructed you. Even if the State does prove each of these things beyond a reasonable doubt, the defendant would nevertheless be not guilty if he was legally insane at the time of the alleged offense. I instruct you that sanity or soundness of mind is the natural and normal condition of people. Therefore, everyone is presumed sane until the contrary is made to appear.

The test of insanity as a defense is whether the defendant at the time of the alleged offense was laboring under such a defect of reason from disease or deficiency of the mind, as to be incapable of knowing the nature and quality of the act or if he did know this, whether he was by reason of such defect of reason, incapable of distinguishing between right and wrong in relation to that act. This defense consists of two things: First, the defendant must have been suffering from a disease or defect of his mind at the time of the alleged offense; second, this disease or defect must have so impaired his mental capacity that he either did not know the nature and quality of the act as he was committing it, or, if he did, that he did not know that this act was wrong.

On the other hand, it need not be shown that the defendant lacked mental capacity with respect to all matters. A person may be sane on every subject but one and yet, if his mental disease or defect with respect to that one subject renders him unable to

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know the nature and quality of the act or to know that the act with which he was charged was wrong, he is not guilty by reason of insanity. Since sanity or soundness of mind is the natural and normal condition of people, everyone is presumed to be sane until the contrary is made to appear. This means that the defendant has the burden of proof on the issue of sanity—of insanity. However, unlike the State, which must prove all the other elements of the crime beyond a reasonable doubt, the defendant need only prove his insanity to your satisfaction; that is, the evidence taken as a whole must satisfy you not beyond a reasonable doubt but simply to your satisfaction that the defendant was insane at the time of the alleged offense.

In making this determination, you must consider all of the evidence before you which has any tendency to throw any light on the mental condition of the defendant, including lay testimony reciting irrational or rational behavior of the defendant before, during or after the alleged offense; opinion testimony by lay and expert witnesses or other evidence admitted. None of these things are conclusive, but all are circumstances to be considered by you in reaching your decision. If you are not satisfied as to the insanity of the defendant, the defendant is presumed to be sane; and you would find the defendant guilty.

Defendant argues that the term “wrong” as used in our State’s body of law governing the defense of insanity means “moral wrong” and not “legal wrong” or “illegality.” Defendant contends that, despite his failure to request a special instruction on the issue, the trial court committed plain error by failing to instruct the jury that the “insanity defense would apply if [Defendant] believed that his conduct was morally right, even if he understood that it was legally wrong.” However, assuming, without deciding, that Defendant was entitled to a special instruction on the meaning of the term “wrong,” we conclude that the trial court’s failure to provide such an instruction was not plain error.

In adopting the plain error rule for North Carolina, our Supreme Court noted the following:

The adoption of the “plain error” rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant’s failure to object at trial. To hold so would negate Rule 10(b)(2) which is not the intent or purpose of the “plain error” rule. The purpose of Rule 10(b)(2) is to encourage

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the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. Indeed, even when the “plain error” rule is applied, “[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.”

In deciding whether a defect in the jury instruction constitutes “plain error,” the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury’s finding of guilt.

State v. Odom, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378-79 (1983) (citations omitted). “ ‘In order to prevail under a plain error analysis, defendant must establish . . . that “absent the error, the jury probably would have reached a different result.” ’ ” *State v. Cummings*, 352 N.C. 600, 616, 536 S.E.2d 36, 49 (2000) (citations omitted).

Defendant states that “there was uncontested evidence that [Defendant] knew that his acts were legally wrong.” However, Defendant asserts “that there was also uncontested evidence that . . . he believed that God wanted him to kill his father and [the] students.” Defendant also asserts that “[i]t is highly probable that the jurors would have found [Defendant] not guilty by reason of insanity if the trial court had instructed them that ‘wrong’ means ‘morally wrong.’ ”

Reviewing the theories of the case presented by the State and Defendant during trial, we find the issue of whether Defendant was able to distinguish moral right and wrong was clearly presented. For example, during his closing argument concerning insanity, Defendant’s counsel argued as follows:

The fact that someone knows something is wrong legally or is against the law doesn’t mean that they don’t appreciate or know that it is morally wrong.

In other words, a person can commit an act that they know is against the law; but if they believe because they feel they are responding to a higher power, a higher calling, if they feel that that is the right thing to do, then the fact that they know it’s against the law doesn’t mean that that person can’t be insane. So I think we need to—there has been a lot of talk about, well, you know, he spent this effort, you know. He went out there and he—he sawed this gun off, and he knew that was against law. Well, yeah. He knew it was against the law.

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Did he know that killing people or shooting at people was against the law? We are not contending, and that's not part of—and has never been—a part of this defense, that he didn't know that it was against the law. But still—because of his mental illness and his delusional thinking, he felt convinced that this was the right thing to do.

Likewise, the State argued that the jury was to consider Defendant's actions and knowledge of legality and illegality to determine "whether [Defendant] was, by reason of such defect of reason, incapable of distinguishing between right and wrong." The State suggested that Defendant's knowledge of legality and illegality was "some evidence that [he] can work through the process of right and wrong that we might call moral right and wrong." While Defendant contends there was uncontested evidence that he believed God commanded him to kill, the State argued that Defendant's actions suggested otherwise and that Defendant was, instead, motivated by the same notoriety generated by the Columbine shootings.

Based on the theories involved in the present case, the question presented to the jury was whether, despite Defendant's knowledge that his intended actions were illegal, he took those actions under a delusion that he was doing so at God's command, thereby rendering him unable to distinguish between right and wrong. Thus, the theories presented to the jury directed the jury to focus on whether Defendant could distinguish right and wrong, not legality and illegality. Had the jury been given the instruction Defendant now advocates, the jury would have been required to determine the same issue: whether Defendant was under a delusion that God commanded him to kill his father and carry out a school shooting at Orange High School. We hold that, on these facts, the "wrongness" about which the jury was directed and instructed throughout the trial was clear; therefore, Defendant has not shown "that 'absent the [assumed] error, the jury probably would have reached a different result.'" *Cummings*, 352 N.C. at 616, 536 S.E.2d at 49 (citations omitted). Absent a request from Defendant for a special jury instruction about the particular definition of wrong, the trial court did not commit plain error in failing to provide an unrequested instruction on the definition of wrong.

III. Closing Arguments

[2] Defendant next argues that the trial court erred in overruling his objection to a statement made by the State during its closing argument. However, in reviewing the transcript, we do not find that Defendant actually made any objection, nor that he obtained a ruling.

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We first note that Defendant filed notice of appeal on 24 August 2009. Therefore, this appeal is subject to the version of the Rules of Appellate Procedure in effect on 24 August 2009. The Rules of Appellate Procedure were revised, effective 1 October 2009. We therefore apply the prior 2009 version of the rules. *See* N.C.R. App. P. 10. N.C. Rule of Appellate Procedure 10(b)(1) (2009) provided:

In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such question that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error presented on appeal.

In the present case, the State's closing argument contained the following:

The issue is: Does the mental illness rise to the level of insanity or did the mental illness rise to the level that it affected specific intent? And that's the diminished capacity argument that you are going to hear about. So that's something you really haven't heard a lot about until now, but you will have to consider that as to the first degree murder and the assaults because those have elements of specific intent in them.

But—so the defense in his case, they are faced with the dilemma. You know what the defendant has been thinking about. You know about all these plans. You know about all these preparations. So a factual defense just isn't going to work. So where do you go next? Well, obviously because the defendant did have mental illness the next place to go is—

[Defense Counsel]: Your Honor, may we approach?

The Court: Yes.

(A bench conference was held off the record and out of the hearing of the jury)

[The State]: So anyway, so the defense—they have got a dilemma here. You are not going to have a factual defense in this case. It's going to come down to a mental health defense of some type.

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Defendant contends that we may infer that he actually made an objection during this time; he further contends that “[a]lthough the trial court did not announce its ruling about the objection after the bench conference, the [State’s] immediate repetition of [its] argument made it clear that the court had overruled the objection.” However, Defendant cites no authority for his contention that we may infer a ruling. We find no reason to infer from the transcript that Defendant, when his attorney asked to approach the bench, made an objection during the exchange quoted above. Moreover, even had Defendant made an objection, the record does not reflect a ruling thereon.

“Where there is no objection, ‘the standard of review to determine whether the trial court should have intervened *ex mero motu* is whether the allegedly improper argument was so prejudicial and grossly improper as to interfere with defendant’s right to a fair trial.’ ” *State v. Gaines*, 345 N.C. 647, 673, 483 S.E.2d 396, 412 (1997) (citation omitted). In light of the “wide latitude accorded counsel in closing argument” and the substantial and largely unchallenged evidence presented in this case, “we cannot conclude that the argument at issue meets this test.” *Id.* at 673-74, 483 S.E.2d at 412 (citation omitted). Defendant’s argument is therefore overruled.

No error.

Judges BRYANT and BEASLEY concur.

STATE OF NORTH CAROLINA v. RONALD D. STANLEY

NO. COA10-1352

(Filed 19 July 2011)

1. Criminal Law —restraints during trial—no abuse of discretion

The trial court did not abuse its discretion by not removing defendant's handcuffs during trial. The trial court considered the proper factors, including defendant’s past record, and reasoned that incarceration for crimes such as second-degree murder and kidnapping raised concerns for safety in the courtroom.

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2. Criminal Law— restraints during trial—no limiting instruction—no abuse of discretion

There was no prejudicial error in a prosecution for possessing controlled substances in a prison where the trial court did not give a limiting instruction regarding defendant's courtroom restraints. Even if the instruction had been given, it was not reasonably possible that a different result would have been reached at trial.

3. Evidence— hearsay—explanation of subsequent conduct

Testimony from a correctional officer about a captain's statements about defendant explained the officer's subsequent conduct and were not hearsay.

Appeal by Defendant from judgment entered 8 June 2010 by Judge Paul L. Jones in Greene County Superior Court. Heard in the Court of Appeals 27 April 2011.

Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett-Baker, for the State.

Geoffrey W. Hosford, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Ronald D. Stanley ("Defendant") appeals from a jury verdict finding him guilty of possession of a controlled substance on the premises of a penal institution. Defendant raises two issues on appeal. First, Defendant argues the trial court erred in not removing Defendant's handcuff restraints during his trial, and also erred in failing to give an instruction to the jury to not consider the restraints in determining Defendant's guilt or innocence; thus, the restraints prejudiced the jury, denying him a fair trial. Second, Defendant argues the trial court erred in admitting certain hearsay evidence. We find no error.

I. Factual and Procedural History

On 8 March 2010, Defendant was indicted for possession of a controlled substance on the premises of a penal institution. At the trial court proceeding on 7 June 2010, Defendant pleaded not guilty. The State's evidence at trial tended to show the following:

On 28 September 2009, Sergeant Steven Byrd ("Sergeant Byrd") was employed as a correctional officer at Eastern Correctional Institution, a medium custody facility in Greene County.

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On the afternoon of 28 September 2009, Sergeant Byrd received a phone call from his supervisor, Captain Bobby Summers (“Captain Summers”) of the Department of Correction. Captain Summers asked Sergeant Byrd if he knew where Defendant was located. Sergeant Byrd replied that Defendant was probably on job assignment in the kitchen. Captain Summers asked Sergeant Byrd to search Defendant, because Captain Summers had received a tip that Defendant may have had some type of controlled substance or a cell phone. Sergeant Byrd went to find Defendant in the kitchen, but located him in the adjoining dining hall. Officer Kelvin Glover (“Officer Glover”), a fellow correctional officer, came to assist Sergeant Byrd and met him in the dining hall. Defendant was wearing a white t-shirt, white pants, work boots, and a “crown” (a crown is a hat worn by Rastafarians to symbolize their religion). Sergeant Byrd and Officer Glover walked Defendant back to Defendant’s individual cell.

At Defendant’s cell, Sergeant Byrd began to search Defendant. Sergeant Byrd started with Defendant’s head. Defendant was asked to remove his crown and Sergeant Byrd searched the brim and headband. Sergeant Byrd worked his fingers around the headband until he felt a hard object and removed an object wrapped in cellophane through a hole in the headband. Sergeant Byrd did not know what the object was, but knew that Defendant was trying to conceal it by holding it in the headband of his crown.

The small object was forwarded to the North Carolina State Bureau of Investigation (“SBI”). Genard Patrick (“Patrick”), a forensic drug chemist with the SBI, tested the object and determined it to be .1 grams of crack cocaine.¹

After finding the cocaine in Defendant’s crown, Sergeant Byrd then asked Defendant to remove his “durag” (a head covering holding together his dreadlocks) and to shake his dreadlocks. As Defendant was shaking his dreadlocks, a burnt object wrapped in a piece of toilet paper fell onto the floor. The burnt object was described by Patrick as a partially consumed hand-rolled cigar containing brown and charred plant material. Patrick did not test the burnt object.

Sergeant Byrd continued with a search of Defendant’s cell, where he found stamps in excess of the amount permitted, gambling sheets, and an additional crown that Defendant was not wearing. Sergeant

1. There is some evidentiary discrepancy regarding how the object was wrapped when it arrived for testing at the SBI. However, the chain of custody and the SBI test findings are not at issue on appeal.

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Byrd searched the second crown in the same way he searched the first crown. During this search, Sergeant Byrd felt a flat, hard object in the headband. Sergeant Byrd did not see a hole in the crown that would allow him to remove the object and did not want to damage the crown due to its religious nature, so he handed the crown to Defendant to remove the object. Defendant took the crown, removed the hard object, and placed it in his hand. When Sergeant Byrd asked Defendant to hand the object to him, Defendant threw the object in his mouth. There was a small scuffle, and Officer Glover called a Code 4 disturbance.

At the beginning of Defendant's trial for possession of a controlled substance in prison, as the jury entered the courtroom, Defendant's counsel requested Defendant's handcuffs be removed. The trial judge denied the request. After jury venire was complete, and out of the presence of the jury, the trial judge explained that he denied the request because Defendant was too dangerous to be unsecured without handcuffs. He stated that he was concerned with the safety of the general public and court officials.

At the close of the State's evidence, Defendant moved to dismiss the charges against him. The trial court denied Defendant's motion to dismiss. Defendant did not offer any evidence, and renewed his motion to dismiss the charges; the trial court, again, denied the motion.

On 8 June 2010 a jury found Defendant guilty of possession of a controlled substance in a penal institution or local confinement facility. Defendant was sentenced to 12-15 months imprisonment to be served at the expiration of the sentence he was presently obligated to serve for previous convictions of kidnapping and second-degree murder.

II. Jurisdiction and Standard of Review

As Defendant appeals from the final judgment of a superior court, this Court has jurisdiction to hear the appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2009).

We review the trial court's decision of whether to place Defendant in physical restraints for abuse of discretion. *State v. Forrest*, 168 N.C. App. 614, 620-21, 609 S.E.2d 241, 245 (2005); *State v. Tolley*, 290 N.C. 349, 369, 226 S.E.2d 353, 369 (1976). A review for abuse of discretion requires the reviewing court to determine whether the decision of the trial court is manifestly unsupported by reason, or so arbitrary that it cannot be the result of a reasoned decision. *State v. Locklear*, 331 N.C. 239, 248, 415 S.E.2d 726, 732 (1992).

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We review for prejudicial error the trial court's decision not to provide a limiting instruction to "instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt" as required by N.C. Gen Stat. § 15A-1031 (2009). *See Tolley*, 290 N.C. at 373, 226 S.E.2d at 372-73; *State v. Simpson*, 153 N.C. App. 807, 809-10, 571 S.E.2d 274, 275-76 (2002) (finding no prejudicial error when the trial court failed to provide an instruction to the jury to disregard defendant's shackles when determining the issue of guilt); *State v. Thomas*, 134 N.C. App. 560, 570, 518 S.E.2d 222, 229 (1999); *State v. Wright*, 82 N.C. App. 450, 452, 346 S.E.2d 510, 511 (1986) (holding new trials are granted only for errors that are prejudicial). This Court considers whether there was a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial. *Glenn v. City of Raleigh*, 248 N.C. 378, 383, 103 S.E.2d 482, 487 (1958).

We review the trial court's decision to admit Sergeant Byrd's testimony concerning Captain Summers' out of court statements *de novo*, because Defendant properly objected to the admission of this evidence at trial. *State v. Wilkerson*, 363 N.C. 382, 434, 683 S.E.2d 174, 205 (2009) (holding the admissibility of evidence at trial is a question of law and is reviewed *de novo*). This Court, under a *de novo* standard of review, considers the matter anew and freely substitutes its own judgment for that of the trial court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

III. Analysis

[1] On appeal, Defendant contends the trial court abused its discretion by failing to remove Defendant's handcuff restraints during his trial because it denied Defendant any means of communication with his counsel. Defendant further contends the trial court committed prejudicial error by not providing a limiting instruction to the jury to not consider the restraints in determining Defendant's guilt or innocence. We disagree.

Our Supreme Court has stated that shackling of a defendant should be avoided because (1) it may interfere with the defendant's thought process or ability to communicate with counsel; (2) it may interfere with the dignity of the trial process; and (3) it is likely to create a prejudice in the minds of the jurors "suggesting that the defendant is an obviously bad and dangerous person whose guilt is a foregone conclusion." *Tolley*, 290 N.C. at 366, 226 S.E.2d at 367.

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Tolley teaches us that compelling a defendant to stand trial while shackled can be prejudicial and thus infringes upon the presumption of innocence and interferes with whether a fair decision can be made on the question of guilt or innocence. *Id.* However, our Supreme Court has also noted that “[t]o say, as a general rule, that [a] trial in shackles is inherently prejudicial is not to conclude, however, that every such trial is fundamentally unfair.” *Id.* at 367, 226 S.E.2d at 367. “A trial judge may order a defendant or witness subjected to physical restraint in the courtroom when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant’s escape, or provide for the safety of persons.” N.C. Gen. Stat. § 15A-1031 (2009); *State v. Holmes*, 355 N.C. 719, 729, 565 S.E.2d 154, 162 (2002) (finding restraints reasonably necessary to maintain order when defendant’s behavior was disruptive and assaultive).

A trial court may consider, amongst other things, a number of material circumstances when exercising its discretion:

the seriousness of the present charge against the defendant; defendant’s temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

Tolley, 290 N.C. at 368, 226 S.E.2d at 368 (citations omitted).

The trial court ordered Defendant remain restrained throughout the duration of the trial because of “the custody level of Defendant, who [was] presently serving an active sentence for second-degree murder and kidnapping.” The Court deemed it “too dangerous to have the defendant unsecured without cuffs in the Court” and made the decision “based on the safety of the general public and court officials.” The trial court considered Defendant’s past record in its determination to restrain Defendant and reasoned that incarceration for crimes such as second-degree murder and kidnapping raises concerns for safety in the courtroom. The record tends to show the trial court properly considered factors allowed under both the statute and *Tolley*. We find the trial court did not abuse its discretion in failing to remove Defendant’s restraints.

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[2] The trial judge is required to take a number of actions if he orders a defendant restrained:

[H]e *must*: (1) Enter in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for his action; and (2) Give the restrained person an opportunity to object; and (3) *Unless the defendant or his attorney objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt.* If the restrained person controverts the stated reasons for restraint, the judge must conduct a hearing and make findings of fact.

N.C. Gen. Stat. § 15A-1031 (2009) (emphasis added). Applying the factors to the facts at hand it is clear (1) that the judge entered into the record the reasons Defendant was restrained while out of the presence of the jury and in the presence of Defendant and his counsel and (2) gave Defendant an opportunity to object. Under the third statutory requirement, the trial court was required to give a limiting instruction to the jury to disregard the restraints when weighing the evidence and determining the issue of guilt. No such instruction was requested by Defendant and none was given by the court. Defendant's only request was for the judge to instruct the jurors that it was not sufficient to find Defendant guilty in the present case based on the fact that he is currently in prison. In agreement with Defendant, the trial judge gave the following instruction:

Ladies and gentlemen, also in this case the defendant is in the North Carolina Department of Correction[] for some crime he may have committed in the past. You are not to hold that against him in any way. He does not forfeit his constitutional rights by virtue of the fact that he is a prisoner.

The trial court did not give the required instruction under N.C. Gen. Stat. § 15A-1031(3). However, in order for Defendant to receive a new trial, he must prove that this omission was prejudicial. In *Tolley* this same issue was raised. Our Supreme Court concluded no prejudicial error was committed.

[D]efendant's contention that the trial judge erred in failing to instruct the jury to disregard the fact that defendant had been restrained with shackles throughout his trial cannot be sustained. While such an instruction would have been advisable, we decline to hold that the trial judge committed prejudicial error in failing

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to give such an instruction on his own motion when none was requested by defendant. Defendant's failure to request appropriate cautionary instructions at trial had the effect, under the circumstances shown, of waiving as a basis for appeal the oversight of the trial judge now complained of.

Tolley, 290 N.C. at 371, 226 S.E.2d at 369-70 (internal citations omitted). While *Tolley* predates the passage of N.C. Gen. Stat. § 15A-1031(3), its teaching is applicable herein and we are bound by its holding. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Even if the judge had given the jury instruction regarding the restraints, it is not reasonably possible that a different result would have been reached at trial. *See Thomas*, 134 N.C. App. at 570, 518 S.E.2d at 229 (finding no prejudice when Defendant appeared before jury in shackles due to overwhelming evidence offered by the State to support the conviction). A forensic drug chemist with the SBI testified that the substance found on Defendant was crack cocaine, and two witnesses testified the cocaine was found on Defendant's person. Additionally, due to the nature of the charge, the jury was already aware Defendant was incarcerated. While the instruction given to the jury was not sufficient to comply with N.C. Gen. Stat. § 15A-1031, it did further ameliorate any prejudice to Defendant in regards to his status as a current prisoner. For these reasons, we find no prejudicial error by the trial court in not giving the statutorily required instruction, as we find no reasonable possibility that the instruction would have resulted in a different outcome. *Id.*

[3] The second issue Defendant raises is that the trial court erred in admitting hearsay testimony by Sergeant Byrd regarding statements Captain Summers made to him. Defendant further argues that even if the trial court properly admitted the statements as non-hearsay evidence, the court erred when it did not provide the jury with a limiting instruction. We find Sergeant Byrd's testimony was not hearsay, and therefore do not reach the question of a limiting instruction.

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.R. Evid. 801(c). Statements by someone other than a witness offered for a purpose other than the truth of the matter asserted are not considered hearsay and are admissible. *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990). Specifically, "statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made." *Id.*

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The following exchange occurred at trial:

[Prosecutor]: Around the four o'clock hour, did you receive any kind of orders from any of these superior officers?

Sergeant Byrd: Yes, sir.

[Prosecutor]: Okay. What order and from what officer did you receive it?

Sergeant Byrd: I received a call from Captain Summers at about 4:10 p.m. and he asked did I know who Inmate Ronald Stanley was and I said yes. He asked me did I know where he was at and I said he's probably at his job —

[Defense Counsel]: Objection to what Captain Summers said.

Sergeant Byrd:—assignment which is in the kitchen.

The Court: Hold on.

[Prosecutor]: Captain Summers is going to testify.

[Defense Counsel]: To the extent he's able to corroborate that, Your Honor. We would object at this time.

The Court: Okay. Overruled.

[Prosecutor]: And what was your direction from Captain Summers? What was he saying? You can answer the question.

Sergeant Byrd: He asked me did I know who Inmate Stanley was and I said yes I do. He asked me was he on the unit. I said no he's not, he's probably at his job assignment.

The record tends to show that Sergeant Byrd testified to Captain Summers' statements to explain why Sergeant Byrd sought out and performed a search of Defendant and his cell. Sergeant Byrd's testimony regarding Captain Summers' statement was used to explain Sergeant Byrd's subsequent conduct. Therefore, the statements were not offered for the truth of the matter asserted.

Because we determine Sergeant Byrd's statements were not hearsay, we do not address Defendant's argument regarding a limiting instruction.

IV. Conclusion

We conclude the trial court did not abuse its discretion in ordering Defendant be physically restrained during the trial. We find under these circumstances no prejudicial error where the trial court failed

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to provide a limiting instruction regarding the jury's consideration of the restraints when determining Defendant's guilt. Additionally, the trial court properly admitted Sergeant Byrd's testimony about Captain Summers' out of court statements for the purpose of explaining Sergeant Byrd's subsequent conduct.

No error.

Judges STEELMAN and STEPHENS concur.

WAYNE STREET MOBILE HOME PARK, LLC AND ALL OTHERS SIMILARLY SITUATED,
PLAINTIFF-APPELLANT V. NORTH BRUNSWICK SANITARY DISTRICT, DEFENDANT-
APPELLEE

No. COA10-1111

(Filed 19 July 2011)

1. Utilities— sanitary districts—collection of late fees

The trial court did not err by granting defendant's motion to dismiss a complaint challenging defendant's collection of late fees on the contention that sanitary districts are public utilities subject to the Utilities Commission's regulation of late charges. A 1950 case stated that sanitary districts are quasi-municipal corporations that are not under the control of the Utilities Commission as to services or rates, and a subsequent change in statutory language was not intended to include sanitary districts within the Commission's supervisory purview.

2. Attorney Fees— challenge to late fees—utilities

The trial court did not err by awarding attorney fees pursuant to N.C.G.S. § 6-21.5 based on plaintiff not raising justiciable issues of law and fact. Plaintiff's argument was without merit because it was predicated on sanitary districts being subject to the Utilities Commission's supervisory powers, which they are not.

Appeal by Plaintiff from orders entered 7 May 2010 by Judge Ola M. Lewis in Superior Court, Brunswick County. Heard in the Court of Appeals 21 February 2011.

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Robertson, Medlin & Bloss, PLLC, by John F. Bloss and Stephen E. Robertson, for Plaintiff-Appellant.

Hogue Hill Jones Nash & Lynch, LLP, by Anna J. Averitt, for Defendant-Appellee.

McGEE, Judge.

Wayne Street Mobile Home Park, LLC, (Plaintiff) is a North Carolina corporation operating a mobile home park located in Brunswick County, North Carolina. North Brunswick Sanitary District (Defendant), currently known as Brunswick Regional Water and Sewer District H2GO, is a sanitary district also operating in Brunswick County, and is in the business of treating and distributing water. Defendant's predecessor in interest was called Leland Sanitary District, created in 1976.

Plaintiff has been one of Defendant's customers since approximately 2003 and has purchased water from Defendant since that time. Plaintiff has been late in paying its water bill on six different occasions and has paid late fees, totaling \$256.08. The late fees charged were approximately ten percent of the total balance due for each bill.

Plaintiff filed a complaint on 4 January 2010 alleging that, pursuant to North Carolina Utilities Commission (N.C.U.C.) Rule R12-9(d), Defendant could not charge a late payment in excess of one percent of the balance due. Plaintiff further alleged that Defendant was a "public utility" as defined by N.C. Gen. Stat. § 62-3(23)(a) and, under N.C. Gen. Stat. § 62-110.5, was not exempt from regulation by the North Carolina Utilities Commission (the Commission). In its complaint, Plaintiff requested "[t]hat the [c]ourt determine that this action shall proceed as a class action[.]" Plaintiff's complaint also alleged unfair and deceptive trade practices by Defendant, and sought an injunction enjoining Defendant from charging excessive late fees.

Plaintiff's attorney stated in an affidavit that, prior to the filing of Plaintiff's complaint, he contacted William E. Grantmyre (Mr. Grantmyre), an attorney for the Public Staff of the Commission. Conversations and emails between Plaintiff's attorney and Mr. Grantmyre were documented in Mr. Grantmyre's affidavit and show that Plaintiff's attorney asked Mr. Grantmyre whether the Commission "regulated sanitary districts, and specifically, the North Brunswick Sanitary District." Mr. Grantmyre informed Plaintiff's

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attorney that, “to [his] knowledge the Commission did not regulate sanitary districts, but [he] was unable to explain to [Plaintiff’s attorney] why the Commission did not regulate sanitary districts.” Mr. Grantmyre and Plaintiff’s attorney discussed the definition of and exceptions to the term “public utility” as set out in N.C. Gen. Stat. § 62-3(23)(a)(2) and N.C. Gen. Stat. § 62-3(23)(d). Mr. Grantmyre and Plaintiff’s attorney also discussed that N.C. Gen. Stat. § 62-3(23)(d) did “not state a specific exception for sanitary districts[.]”

Mr. Grantmyre also informed Plaintiff’s attorney that “exemptions to Commission regulation were frequently granted through Commission orders and decisions pursuant to N.C. Gen. Stat. § 62-110.5.” Plaintiff’s attorney asked Mr. Grantmyre if there were any records available to indicate an exemption to North Brunswick Sanitary District. Mr. Grantmyre provided Plaintiff’s attorney with a copy of a “November 22, 1988, Docket No. W-279, Sub 19 Commission Order[.]” This order stated that “Leland Sanitary District is an ‘owner exempt from regulation.’” Plaintiff’s attorney was not satisfied with this order because the exemption language appeared in the factual recital portion of the order rather than in the decretal portion of the order. Plaintiff’s attorney asked Mr. Grantmyre for an original order exempting the Leland Sanitary District from regulation. Mr. Grantmyre was unable to find such an order.

After the filing of Plaintiff’s complaint, Defendant’s attorney informed Plaintiff’s attorney that sanitary districts were not regulated by the Commission and attempted to provide proof of this assertion. Prior to Defendant’s filing a motion to dismiss and a motion seeking attorneys’ fees and sanctions, Defendant’s attorney also gave Plaintiff’s attorney an opportunity to dismiss Plaintiff’s claim.

Defendant did file a motion to dismiss on 16 March 2010, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). In its motion, Defendant alleged that Plaintiff had failed to state a claim on which relief could be granted because Defendant was “a corporate and body politic of the State of North Carolina organized and existing pursuant to N.C.G.S. § 130A-47 *et seq.* and thus not regulated by the [] Commission.” Pursuant to N.C. Gen. Stat. § 6-21.5 and § 75-16.1, Defendant also filed a motion for attorneys’ fees and sanctions on 16 March 2010, for the same reasons stated in its motion to dismiss.

The trial court entered an order granting Defendant’s motion to dismiss on 7 May 2010, agreeing with Defendant’s reasoning and dismissing Plaintiff’s complaint “since all of Plaintiff’s contentions hinge

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on whether or not sanitary districts are regulated by the Utilities Commission[.]” The trial court also entered an order on 7 May 2010, granting Defendant’s motion for attorneys’ fees, again stating that Defendant was not regulated by the Commission. The trial court’s order granting Defendant’s motion for attorneys’ fees concluded that “there was a complete absence of a justiciable issue of either law or fact raised in [Plaintiff’s] complaint[.]” and awarded Defendant \$3,395.00 in attorneys’ fees, plus interest and the costs of the action. Plaintiff appeals.

Discussion

Plaintiff argues the trial court erred in granting Defendant’s motion to dismiss and Defendant’s motion for attorneys’ fees. Plaintiff contends its complaint stated a claim upon which relief can be granted and that, because Defendant is a “public utility” as defined by N.C. Gen. Stat. § 62-3(23)a and is not excepted or exempted from regulation by the Commission, Plaintiff did raise a justiciable issue. We disagree.

I. Motion to Dismiss

[1] Plaintiff argues the trial court erred in granting Defendant’s motion to dismiss because Plaintiff’s complaint “allege[d] that Defendant is a public utility, [and] is not exempt from regulation by the [Commission.]” Plaintiff contends that sanitary districts such as Defendant are “public utilities,” as defined by N.C. Gen. Stat. § 62-3(23)(a) and therefore are subject to regulation by the Commission. Assuming Plaintiff’s allegation is correct, Defendant would then be subject to the Commission’s regulation of late charges pursuant to N.C. Admin. Code tit. 4, r. 11.R12-9 which requires that “[n]o utility shall apply a late payment, interest, or finance charge to the balance in arrears at the rate of more than 1% per month.” N.C. Admin. Code tit. 4, r. 11.R12-9 (June 2010). Plaintiff claims that Defendant is not subject to an exception from regulation pursuant to N.C. Gen. Stat. § 62-3(23)(d). We disagree.

Our Court has held that the standard of review for an order granting a motion to dismiss pursuant to Rule 12(b)(6) is

whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint’s material factual allegations are taken as true. Dismissal is proper “when one of the following three conditions is satisfied: (1) the complaint on its

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face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." On appeal of a 12(b)(6) motion to dismiss, this Court "conducts a de novo review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct."

Burgin v. Owen, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428-29 (2007) (citations omitted). "A complaint may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim, or in the disclosure of some fact that will necessarily defeat the claim." *O'Neill v. Bank*, 40 N.C. App. 227, 232, 252 S.E.2d 231, 235 (1979).

In the present case, the trial court stated in its order granting Defendant's motion to dismiss that, "after reviewing the pleadings and receiving arguments of counsel," the trial court determined that Defendant was "not regulated by the [Commission]." In its arguments, Defendant relies heavily on *Paper Co. v. Sanitary District*, 232 N.C. 421, 61 S.E.2d 378 (1950), to assert that sanitary districts are not public utilities regulated by the Commission.

In *Paper Co.*, the plaintiff sought an injunction against a sanitary district to prevent it from ceasing to supply water to the plaintiff because of the demands of a prior contract with a third party. *Id.* In determining the validity of the contract between the sanitary district and the third party, our Supreme Court observed that sanitary districts are "quasi-municipal corporation[s], . . . which [are] not under the control or supervision of the North Carolina Utilities Commission as to services or rates." *Id.* at 428, 61 S.E.2d at 383. *Paper Co.* does not define a "quasi-municipal corporation," but our Supreme Court has held that quasi-municipal corporations are entities that governments use to "perform ancillary functions in government more easily and perfectly . . . because of their character, special personnel, skill and care." *Airport Authority v. Johnson*, 226 N.C. 1, 9, 36 S.E.2d 803, 809 (1946).

Plaintiff argues that *Paper Co.* is not controlling in the present case because *Paper Co.* was decided based upon the language of a statute that has now been repealed and superseded. As currently defined by N.C. Gen. Stat. § 62-3, a "public utility" is

a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:

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. . . .

2. Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation[.]

N.C. Gen. Stat. § 62-3(23)(a)(2) (2009). This statute further lists a number of exceptions including that “[t]he term ‘public utility,’ except as otherwise expressly provided in this Chapter, shall not include a municipality[.]” N.C.G.S. § 62-3(23)(d). “‘Municipality’ means any incorporated community, whether designated in its charter as a city, town, or village.” N.C.G.S. § 62-3(19).

In 1950, when *Paper Co.* was decided, N.C. Gen. Stat. § 62-65, entitled “Definitions,” made no mention of an exception for municipalities. Instead, the 1950 version of N.C. Gen. Stat. § 62-30 listed the supervisory powers of the Commission and stated that the

Utilities Commission shall have general supervision over rates charged and the service given, as follows, to wit:

. . . .

(3) By electric light, power, water, and gas companies, pipe lines originating in North Carolina for the transportation of petroleum products, and corporations, other than such as are *municipally owned or conducted*[.]

N.C. Gen. Stat. § 62-30 (1950) (emphasis added). The current version of the statute, N.C. Gen. Stat. § 62-32, is entitled: “Supervisory powers; rates and service” and does not include the same language. It merely states that: “Under the rules herein prescribed and subject to the limitations hereinafter set forth, the Commission shall have general supervision over the rates charged and service rendered by all public utilities in this State.” N.C. Gen. Stat. § 62-32 (2009). The language now defining and excepting “public utilities” is included in the current N.C.G.S. § 62-3(23).

Plaintiff contends that, while *Paper Co.* stated that sanitary districts are “*quasi*-municipal corporation[s], . . . which [are] not under the control or supervision of the North Carolina Utilities Commission as to services or rates,” *Paper Co.* is no longer binding. *Paper Co.*, 232 N.C. at 428, 61 S.E.2d at 383. Plaintiff argues that the determination in *Paper Co.* is based on the language “municipally owned or conducted,” which has been removed from the current statutes and replaced with the word “municipality.” N.C.G.S. § 62-30(3); compare N.C.G.S. § 62-3(23)(d). Therefore, Plaintiff argues that *Paper Co.* is no

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longer controlling given the current statutes, and that sanitary districts are no longer excepted from Commission regulation.

However, a closer reading of *Paper Co.* reveals that the Supreme Court makes no mention of the language “municipally owned or conducted” in its determination; nor does it assert that sanitary districts are “municipalities.” Instead, the Supreme Court explicitly stated in *Paper Co.* that sanitary districts are “quasi-municipal corporation[s], . . . which [are] not under the control or supervision of the North Carolina Utilities Commission as to services or rates.” *Paper Co.*, 232 N.C. at 428, 61 S.E.2d at 383.

Our Supreme Court has held that “[t]he cardinal rule of statutory construction is that legislative intent controls. In seeking to ascertain this intent, courts should consider the language of the statute, the spirit of the Act and what the statute seeks to accomplish.” *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 196, 347 S.E.2d 814, 817 (1986). When the exception in the statutes was changed from “municipally owned or conducted” to read only “municipality,” the exception was not altered so as to invalidate *Paper Co.* because the changed phrasing was not the dispositive language on which the decision in *Paper Co.* was based. Plaintiff has failed to show that the modification in the wording of the statute invalidates the *Paper Co.* decision. Contrary to Plaintiff’s assertion, we hold that the change in statutory language was not intended to include “quasi-municipal corporations” or sanitary districts within the Commission’s supervisory purview. Applying the factors for determining legislative intent outlined in *Derebery* to the case before us, there is no suggestion that the General Assembly intended to change the meaning of the statute to exclude sanitary districts. Therefore, *Paper Co.* continues to be valid and binding and sanitary districts are “not under the control or supervision of the North Carolina Utilities Commission as to services or rates.” *Paper Co.*, 232 N.C. at 428, 61 S.E.2d at 383. Thus, the trial court properly granted Defendant’s motion to dismiss in that Plaintiff failed to present a claim upon which relief could be granted because “the complaint on its face reveals that no law supports the plaintiff’s claim.” *Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 428-29.

II. Attorneys’ Fees

[2] Plaintiff next argues that the trial court erred in awarding attorneys’ fees pursuant to N.C. Gen. Stat. § 6-21.5, because Plaintiff’s complaint “raised justiciable issues of law and fact[.]” We disagree.

N.C. Gen. Stat. § 6-21.5 (2009) states that

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[i]n any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of any preliminary motion, such as . . . a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6) . . . is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award.

In reviewing an order granting a motion for attorneys' fees pursuant to N.C.G.S. § 6-21.5, "[t]he presence or absence of justiciable issues in pleadings is . . . a question of law that this Court reviews *de novo*." *Free Spirit Aviation v. Rutherford Airport*, — N.C. App. —, —, 696 S.E.2d 559, 563 (2010) (citation omitted). "The decision to award or deny attorney's fees under Section 6-21.5 is a matter left to the sound discretion of the trial court." *Persis Nova Constr., Inc. v. Edwards*, 195 N.C. App. 55, 67, 671 S.E.2d 23, 30 (2009). Therefore, we review the trial court's order granting attorneys' fees for abuse of discretion. *Id.* at 65, 671 S.E.2d at 29.

" 'A justiciable issue has been defined as an issue that is "real and present as opposed to imagined or fanciful." ' " *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991) (citations omitted). "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." *K & K Development Corp. v. Columbia Banking Fed. Savings & Loan*, 96 N.C. App. 474, 479, 386 S.E.2d 226, 229 (1989) (citation omitted).

Under this deferential review of the pleadings, a plaintiff must either: (1) "reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue;" or (2) be found to have "persisted in litigating the case after the point where [Plaintiff] should reasonably have become aware that [the] pleading [Plaintiff] filed no longer contained a justiciable issue."

Credigy Receivables, Inc. v. Whittington, — N.C. App. —, —, 689 S.E.2d 889, 895, *disc. review denied*, 364 N.C. 324, 700 S.E.2d 748 (2010) (citation omitted).

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Plaintiff argues that, because the trial court's order granting Defendant's motion to dismiss should be reversed, so should the award of attorneys' fees. As we have decided the trial court did not err in granting Defendant's motion to dismiss, Plaintiff's argument is without merit.

Plaintiff also argues that the award of attorneys' fees should be reversed because Plaintiff's complaint "certainly raises justiciable issues of law and fact." In support of this argument, Plaintiff cites discussions between its attorney and Defendant's attorney concerning the existence of an order exempting Defendant from the Commission's supervisory powers. Plaintiff contends that "[i]t is reasonable to assume if an Order and Decision exempting Defendant from regulation had been entered, either the [Commission] or Defendant would be able to locate it." Plaintiff further states that "if Defendant has not obtained such an exemption, it has charged and collected unlawful late fees and is liable to Plaintiff as a matter of law." We disagree. Plaintiff's argument misses the mark because it is predicated on a determination that sanitary districts are subject to the Commission's supervisory powers—a determination that we have rejected. Because we have held that Defendant, as a sanitary district, is not a "public utility" for the purposes of Commission regulation, Plaintiff's argument is without merit. *Paper Co.* has not been overruled, nor have the intervening statutory changes invalidated it. *Paper Co.* is therefore still binding and controlling law on this issue, and this Court finds that Plaintiff did not present a justiciable issue. Therefore, in light of the absence of a justiciable issue, the trial court did not abuse its discretion in awarding Defendant attorneys' fees.

Affirmed.

Chief Judge MARTIN and Judge McCULLOUGH concur.

ESTATE OF SYKES v. MARCACCIO

[213 N.C. App. 563 (2011)]

NANETTE HERBERT, ADMINISTRATOR OF THE ESTATE OF SHIRLEY L. SYKES, PLAINTIFF
v. KAY HARRISON MARCACCIO AND JOHN DOUGLAS MARCACCIO, DEFENDANTS

No. COA10-876

(Filed 19 July 2011)

**Arbitration and Mediation— motion to compel—waived by
delay and unnecessary expenditure**

An order denying a motion to compel arbitration was affirmed where the trial court properly concluded that plaintiff waived the right to arbitrate by waiting until the eve of a second trial to file the motion.

Appeal by plaintiff from order entered 15 March 2010 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 13 January 2011.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by F. Marshall Wall, for defendants-appellees.

Poyner Spruill LLP, by Timothy W. Wilson, for unnamed defendant-appellee North Carolina Farm Bureau Mutual Insurance Company, Inc.

GEER, Judge.

Plaintiff Nanette Herbert, in her capacity as administrator of the Estate of Shirley L. Sykes, appeals from an order denying her demand for arbitration and her motion to stay proceedings in an underinsured motorist (“UIM”) action. Plaintiff argues on appeal that the trial court erred in denying her demand for arbitration based on its conclusions (1) that her right to arbitration had not yet accrued, (2) that she had waived her right to demand arbitration, and (3) that she had used discovery procedures not available in arbitration. Based on our review of the record, we hold that the trial court’s conclusion that plaintiff waived her right to demand arbitration is supported by its findings of fact regarding the time period that elapsed prior to the filing of the demand, the proceedings that occurred in superior court during that time period, and the prejudice suffered by North Carolina Farm Bureau Mutual Insurance Company, Inc. (“Farm Bureau”). We, therefore, affirm.

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Facts

On 17 October 2004, Shirley L. Sykes (“Ms. Sykes”) was a passenger in a motor vehicle operated by her son, Raymond M. Sykes, Jr. (“Mr. Sykes”). They were involved in an accident at the intersection of Trinity Road and Edwards Mill Road in Raleigh, North Carolina with a vehicle owned by John Douglas Marcaccio and driven by Mr. Marcaccio’s wife, Kay Harrison Marcaccio (the “Marcaccios”).

At the time of the accident, the Marcaccios were insured under an automobile insurance policy issued by Liberty Mutual Insurance Company (“Liberty Mutual”), which provided liability coverage in the amount of \$250,000.00 per person. Mr. Sykes was insured under an automobile insurance policy issued by Farm Bureau which provided UIM in the amount of \$750,000.00 per person.

On 9 February 2007, Liberty Mutual tendered its policy limits of \$250,000.00 in a settlement offer to Ms. Sykes in full settlement of her claim. On 24 February 2007, Liberty Mutual notified Farm Bureau by letter of its liability coverage limit of \$250,000.00 in an effort to resolve the claim. Pursuant to N.C. Gen. Stat. § 20-279.21(b)(4), Farm Bureau had 30 days to advance payment of this limit in order to protect its subrogation rights. Farm Bureau advanced against Liberty Mutual’s tender by paying \$250,000.00 to Ms. Sykes on 1 March 2007, protecting its subrogation rights against the Marcaccios.

In consideration for this advance payment by Farm Bureau, Ms. Sykes promised:

to take, through any representative designated by [Farm Bureau], such action as may be necessary or appropriate to recover the damages suffered by [Ms. Sykes] from any person or persons, organization, association or corporation other than [Farm Bureau] who may be legally liable for said damages, and to hold any monies recovered from any such persons or organizations, including all monies received from Liberty Mutual and John Marcaccio in trust for [Farm Bureau] immediately upon recovery thereof

On 16 October 2007, Ms. Sykes filed suit against the Marcaccios seeking to recover for personal injuries resulting from the accident and demanding a trial by jury. Ms. Sykes was represented by her son, Mr. Sykes. On 17 December 2007, the Marcaccios filed a motion to change venue and an answer. The Marcaccios also asked that “all contested issues of fact be tried by a jury.” On 14 November 2007, the

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Marcaccios served written discovery on Ms. Sykes, including interrogatories, a request for production of documents, and a request for statement of monetary relief sought pursuant to N.C.R. Civ. P. 8. On 25 February 2008, a hearing was held regarding the motion to change venue. On 28 February 2008, the motion was granted and venue was changed from Halifax County to Nash County.

The Marcaccios filed a motion to compel on 16 May 2008 after Ms. Sykes failed to respond to written discovery. This motion was heard on 9 June 2008 in Nash County Superior Court, and a consent order was entered on 13 June 2008, allowing Ms. Sykes to respond to the discovery no later than 20 June 2008. On 15 August 2008, the Marcaccios filed a motion for sanctions alleging that Ms. Sykes had served only partial discovery responses. This motion was noticed twice for hearing but was never ruled upon.

On or about 30 September 2008, while the motion for sanctions was pending, Nanette Herbert filed a motion to intervene, a motion to stay, and a motion for a hearing on the competence of Ms. Sykes. In her motions, Ms. Herbert alleged “that there is a genuine, material, and substantial question as to whether Plaintiff was competent at the time of the filing of this action, as well as at the present time.” Ms. Herbert requested the appointment of a guardian if Ms. Sykes was determined to be incompetent. The motions also requested that all proceedings be stayed pending a competency hearing.

Ms. Herbert’s motions were heard 6 October 2008 and allowed in an order filed on 28 October 2008. In December 2008, Ms. Sykes died. Ms. Herbert was appointed as Administrator of Ms. Sykes’ estate.

On 23 June 2009, Mr. Sykes filed a motion to withdraw from representation of Ms. Sykes’ estate. The motion was allowed on 6 August 2009. On or about 9 July 2009, M. Greg Crumpler gave notice of appearance as counsel of record for plaintiff. On 8 October 2009, a consent order was filed substituting Nanette Herbert, in her capacity as administrator of Ms. Sykes’ estate, as the plaintiff in this action.

The case was originally scheduled for trial at the civil jury session for 15 June 2009, but was continued at the request of plaintiff. The case was next calendared for trial on 7 December 2009. On 30 November 2009, plaintiff filed a demand for arbitration and a motion to stay proceedings. The trial was then continued until 1 March 2010.

Ms. Herbert was deposed on 4 February 2010 in Rocky Mount, North Carolina. A hearing was held on 1 March 2010 on plaintiff’s

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demand for arbitration, and on 15 March 2010 an order was entered denying plaintiff's demand for arbitration. The trial court made the following conclusions of law.

1. Farm Bureau's advance against Liberty Mutual's tender of its liability coverage blocked the proposed settlement between Mrs. Sykes on the one hand, and the Marcaccios and/or their liability insurance carrier, Liberty Mutual, on the other.

2. There has been no exhaustion of Liberty Mutual's policy within the meaning of N.C. Gen. Stat. § 20-279.21(b)(4) or Farm Bureau's policy provisions regarding its underinsured motorist coverage available to Plaintiff herein, because Liberty Mutual has paid nothing to anyone.

3. Plaintiff has no right to demand arbitration under Farm Bureau's policy, because there has not been an exhaustion of Liberty Mutual's liability policy by payment of judgment or settlement, and as a consequence, Plaintiff is not yet entitled to recover from Farm Bureau.

4. In the alternative, and even if Mrs. Sykes did have the right to demand arbitration when Liberty Mutual tendered its coverage to her, then in that event Mrs. Sykes (the predecessor in interest to the Plaintiff in this litigation), thereafter waived the right to demand arbitration, by proceeding with this litigation in the Halifax County Superior Court and in this Court so far and in such a manner that Farm Bureau has been prejudiced. Specifically, Farm Bureau appeared herein as Unnamed Defendant and expended significant resources in doing so.

5. Further, Mrs. Sykes made use of judicial discovery procedures not available in arbitration when she failed to respond to the Marcaccios' written discovery requests, forcing the filing and hearing of a motion to compel and a motion for sanctions, ultimately producing those records only after being ordered to do so by the Court, and when she failed to respond to Farm Bureau's request for her complete medical records subsequent to the automobile accident at issue and from the ten years prior to that accident.

6. The Marcaccios have the constitutional right to have Plaintiff's damages against them assessed by a jury, but the Court concludes that under present North Carolina law, the Marcaccios' right to a trial by jury would be fully protected in the event that Plaintiff had a right to compel arbitration.

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Plaintiff appealed the order denying her demand for arbitration to this Court.

Discussion

Plaintiff makes two arguments regarding the 15 March 2010 order.¹ She first contends that under *Register v. White*, 358 N.C. 691, 698, 599 S.E.2d 549, 555 (2004), Liberty Mutual exhausted its policy limits when it tendered the limits of its policy in a settlement offer and that the trial court therefore erred in concluding she had no right yet to demand arbitration. Second, she argues the trial court erred in concluding that she waived her right to demand arbitration because Farm Bureau failed to show that it was prejudiced and because she did not take advantage of discovery methods not available in arbitration. Because we agree that plaintiff waived her right to demand arbitration, we do not address plaintiff's *Register* argument.

It is well established that arbitration may be waived because it is a right arising from contract. *Douglas v. McVicker*, 150 N.C. App. 705, 706, 564 S.E.2d 622, 623 (2002). Whether a party has waived this right is a question of fact, and the trial court's findings of fact are binding on appeal when supported by competent evidence. *Id.* " '[B]ecause of the strong public policy in North Carolina favoring arbitration, courts must closely scrutinize any allegation of waiver of such a favored right.' " *N.C. Farm Bureau Mut. Ins. Co. v. Sematoski*, 195 N.C. App. 304, 308, 672 S.E.2d 90, 93 (2009) (quoting *Cyclone Roofing Co. v. David M. La Fave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984)).

In *Servomation Corp. v. Hickory Constr. Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986), our Supreme Court noted that a party waives the right to compel arbitration if it acts inconsistently with arbitration, and the party opposing arbitration is prejudiced by those actions. The Supreme Court explained that "[a] party may be prejudiced by his adversary's delay in seeking arbitration if (1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration." *Id. Accord Cyclone Roofing Co.*, 312 N.C. at 229-30, 321 S.E.2d at 876-77 (finding similar actions may prejudice a party when opposing party delays in requesting arbitration). Filing of pleadings alone does not waive the right to compel arbitration. *Id.* at 230, 321 S.E.2d at 877.

1. As plaintiff acknowledges, the order denying arbitration is interlocutory. An order denying arbitration is, however, immediately appealable as it affects a substantial right. *Edwards v. Taylor*, 182 N.C. App. 722, 724, 643 S.E.2d 51, 53 (2007).

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Here, the trial court concluded that plaintiff waived her right of arbitration by proceeding with litigation “so far and in such a manner” that Farm Bureau was prejudiced by appearing as an unnamed defendant and expending “significant resources.” The court alternatively concluded that waiver occurred because plaintiff used judicial discovery procedures that are not available in arbitration, primarily by failing to respond to discovery.

We agree with plaintiff that the trial court erred in reaching the latter conclusion. Neither the findings of fact nor the record contain any indication that plaintiff sought discovery from either the Marcaccios or Farm Bureau. Responding to discovery requests promulgated by an opposing party—or, in this case, failing to respond to discovery requests—does not constitute making use of discovery not available in arbitration.

As for the trial court’s conclusion that Farm Bureau was prejudiced by plaintiff’s delay in demanding arbitration by having to expend significant resources to defend the suit, plaintiff contends that “there is no record evidence to support the finding or conclusion” that Farm Bureau expended significant resources in this matter. We disagree.

This Court has consistently held that when considering whether a delay in requesting arbitration resulted in significant expense for the party opposing arbitration, the trial court must make findings (1) whether the expenses occurred after the right to arbitration accrued, and (2) whether the expenses could have been avoided through an earlier demand for arbitration. *See Culbertson v. REO Props. Corp.*, 194 N.C. App. 793, 798-99, 670 S.E.2d 316, 320 (2009) (remanding for failure to make findings whether expenses could have been avoided if earlier arbitration request made and whether expenses were incurred after the right to request arbitration accrued). *See also McCrary v. Byrd*, 148 N.C. App. 630, 639-40, 559 S.E.2d 821, 827 (2002) (remanding matter where there was no finding whether legal fees resulted from delay in arbitration or whether they were incurred prior to demand for arbitration), *disc. review denied and cert. denied*, 356 N.C. 674, 577 S.E.2d 625 (2003); *Miller Bldg. Corp. v. Coastline Assocs. Ltd. P’ship*, 105 N.C. App. 58, 63, 411 S.E.2d 420, 423 (1992) (“In order to constitute prejudice, plaintiff would have had to expend funds because of defendants’ delay in demanding arbitration.”); *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 261, 401 S.E.2d 822, 826-27 (1991) (affirming trial court’s finding of prejudice where defendants spent more than \$10,000.00 in legal fees they would

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not have incurred had arbitration been demanded earlier, and where plaintiff took advantage of discovery not available in arbitration).

Plaintiff contends that the right to demand arbitration accrued on 24 February 2007. Eight months later, Mr. Sykes filed suit on his mother's behalf, requesting a jury trial, necessarily including a jury determination of damages—the issue that plaintiff now seeks to arbitrate. At that time, Mr. Sykes discussed with Farm Bureau's counsel his intent to proceed through a jury trial, including talking about the details of prosecuting the action.

Over the next two years, following the filing of the lawsuit with its jury demand, Mr. Sykes, his mother, and plaintiff did not give any indication that they had changed their minds about proceeding with a jury trial. During that two-year period, the Marcaccios filed multiple motions requiring two separate hearings, and plaintiff filed three motions requiring another hearing. Farm Bureau's counsel attended each hearing. In addition, plaintiff twice obtained a continuance of the trial. None of this time or the related costs would have been expended in an arbitration. It was only on the eve of the second trial date that plaintiff finally demanded arbitration.

Additionally, Timothy W. Wilson, who represents Farm Bureau in this matter, submitted an affidavit to the trial court stating:

Farm Bureau took significant steps in this litigation to its detriment and expended a significant amount of money on the litigation, through appearance by the undersigned at numerous hearings in both Halifax County Superior Court and Nash County Superior Court, on multiple motions filed by multiple parties.

While Wilson did not quantify the expenses, the trial court's specific findings regarding what occurred during the superior court proceedings and the Wilson affidavit are sufficient to support the ultimate finding that Farm Bureau expended "significant resources," sufficient to constitute prejudice. We can conclude without specific dollar amounts that attendance by counsel at multiple hearings and defense of a litigation over a two-year period (with the case being twice calendared for trial as well as other hearings) involves "significant resources." As our Supreme Court has stated, "[J]ustice does not require that courts profess to be more ignorant than the rest of mankind." *State v. Vick*, 213 N.C. 235, 238, 195 S.E. 779, 781 (1938).

In support of her argument that the trial court was required to make specific findings regarding how much money Farm Bureau

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spent, plaintiff relies on *Sullivan v. Bright*, 129 N.C. App. 84, 87, 497 S.E.2d 118, 120-21 (1998). In *Sullivan*, however, Farm Bureau, the plaintiff's UIM carrier, argued that it was prejudiced only because during the time the plaintiff delayed seeking arbitration, the plaintiff proceeded to take two depositions. *Id.* The trial court did not identify any other proceedings that would have entailed time and expense unnecessary in the event of an arbitration. This Court then concluded that the defendant may well have been required to attend those same depositions even in an arbitration proceeding. *Id.*, 497 S.E.2d at 121. Consequently, the trial court's order and the evidence did not identify any specific expense that would not have been incurred but for the belated demand for arbitration.

Here, we have specific legal proceedings over a two-year period that entailed legal expenses and effort that would have been unnecessary had a demand for arbitration been made earlier. This case is factually similar to *Big Valley Home Ctr., Inc. v. Mullican*, 774 So.2d 558, 562 (Ala. 2000), in which the plaintiff filed a complaint on 24 October 1996, and one of the defendants waited for more than two years before filing a motion to compel arbitration. During that time, the co-defendant had answered the complaint, the plaintiff was deposed, the trial was continued five times, two judges were recused, and a settlement offer was made to the plaintiff. *Id.* The Alabama Supreme Court held that the plaintiff's attorneys "had invested time and money preparing for a trial on the merits. Had [the co-defendant] desired to arbitrate, then it had ample time and opportunity before the eve of trial for it to seek to do so." *Id.* The Court, therefore, held that the trial court properly found that the co-defendant had waived its right to arbitration. *Id.*

We find the reasoning in *Big Valley* persuasive. We hold that the trial court properly concluded that plaintiff waived the right to arbitrate by waiting until the eve of the second trial date to file a motion to compel arbitration, causing Farm Bureau, over more than two years, to prepare for and attend three court hearings and engage in other defense activities, resulting in an expenditure of resources (including time and expense) that would have been unnecessary had plaintiff moved to compel arbitration earlier.

While the better practice would be for the carrier to provide specific information about the time and expense incurred and for the trial court to make findings of fact based on that information, the findings of fact in this case are minimally sufficient to establish waiver. We hold that the trial court's conclusion of law that Farm

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Bureau was prejudiced by the delay because it was required to spend a significant amount of resources to defend the suit is supported by competent findings of fact.² We, therefore, affirm the order denying the motion to compel arbitration.

Affirmed.

Judges STEELMAN and STEPHENS concur.

STATE OF NORTH CAROLINA v. DORSEY TODD SORROW

No. COA10-1335

(Filed 19 July 2011)

Constitutional Law—right to counsel—pro se representation—required inquiries

The trial court erred by permitting defendant to waive counsel and proceed *pro se* at a probation revocation hearing where the court advised defendant of his right to counsel, but did not conduct a thorough inquiry that showed that defendant understood the consequences of his decision and that he comprehended the nature of the charges, the proceeding, and the range of possible punishments.

Appeal by defendant from judgment entered 9 August 2010 by Judge Laura J. Bridges in McDowell County Superior Court. Heard in the Court of Appeals 9 June 2011.

Attorney General Roy Cooper, by Assistant Attorney General Tracy C. Curtner, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

CALABRIA, Judge.

Dorsey Todd Sorrow (“defendant”) appeals a judgment entered upon the trial court’s revocation of his probation and activating his suspended sentence. Because the trial court failed to comply with N.C. Gen. Stat. § 15A-1242, we vacate and remand for a new probation revocation hearing.

2. Farm Bureau also contends that valuable evidence was lost due to plaintiff’s delay in demanding arbitration. The trial court did not rely upon this basis in its decision and, therefore, we do not address this contention.

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I. BACKGROUND

On 8 May 2008, defendant pled guilty to malicious conduct by a prisoner and resisting a public officer. The trial court consolidated the offenses for judgment and sentenced defendant to a minimum term of twenty months to a maximum term of twenty-four months in the custody of the North Carolina Department of Correction. The trial court suspended the sentence and placed defendant on supervised probation for thirty-six months.

On 13 November 2009, defendant's probation officer, Officer E. L. Robinson ("Officer Robinson"), filed a violation report alleging defendant violated the terms and conditions of his probation. On 4 February 2010, the trial court entered an order finding that defendant violated the terms of his probation. However, the trial court did not revoke defendant's probation. On 2 June 2010, the trial court entered an amended order extending defendant's probation for twelve months and ordering defendant to complete Recovery Ventures, a twenty-four month residential treatment program.

On 16 June 2010, Officer Robinson filed a second violation report alleging defendant violated the conditions of his probation in that he was terminated from Recovery Ventures for repeated rule violations. On 28 June 2010, defendant signed a "Waiver of Counsel" form, AOC-CR-227, but the trial court did not certify it.

Defendant's probation revocation hearing was heard before the 9 August 2010 Criminal Session of McDowell County Superior Court. At the start of the proceeding, the trial court engaged in a brief colloquy with defendant regarding his desire to proceed *pro se*. After the colloquy, the trial court allowed defendant to represent himself at the hearing.

The State then asked defendant whether he admitted or denied the alleged probation violation, and defendant admitted the violation. Defendant then signed a second "Waiver of Counsel" form, AOC-CR-227, which was identical to the one he signed on 28 June 2010, and the trial court certified defendant's waiver. The trial court subsequently found that defendant willfully violated a condition of his probation, revoked his probation, and activated his suspended sentence. Defendant appeals.

II. WAIVER OF COUNSEL

Defendant's sole argument on appeal is that the trial court erred by permitting him to waive counsel and proceed *pro se* at a probation

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revocation hearing without first satisfying the requirements of N.C. Gen. Stat. § 15A-1242. We agree.

The United States and North Carolina Constitutions guarantee the right to the assistance of counsel to criminal defendants. U.S. Const. amends. VI, XIV; N.C. Const. art. I, §§ 19, 23. Furthermore, in North Carolina, a defendant has a statutory right to the assistance of counsel at a probation revocation hearing. N.C. Gen. Stat. § 15A-1345(e) (2009). “Inherent to that right to assistance of counsel is the right to refuse the assistance of counsel and proceed *pro se*.” *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) (citations omitted). “However, [b]efore allowing a defendant to waive in-court representation by counsel . . . the trial court must insure that constitutional and statutory standards are satisfied.” *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (quoting *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992)). “Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court, to satisfy constitutional standards, must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel.” *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476 (citations omitted). “[T]he 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).

In order to determine whether a defendant’s waiver meets this constitutional standard, the trial court must conduct a thorough inquiry, and perfunctory questioning is not sufficient. *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476. “A trial court’s inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242.” *Moore*, 362 N.C. at 322, 661 S.E.2d at 724 (citation omitted). The trial court’s inquiry under N.C. Gen. Stat. § 15A-1242 “is mandatory and failure to conduct such an inquiry is prejudicial error.” *State v. Pruitt*, 322 N.C. 600, 603, 369 S.E.2d 590, 592 (1988). Pursuant to N.C. Gen. Stat. § 15A-1242, a defendant may be permitted to proceed *pro se* after the trial court makes a thorough inquiry and is satisfied that defendant:

- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and

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- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2009).

A waiver of counsel is ineffective at the probation revocation stage when the record fails to show that the defendant has knowingly and voluntarily waived the right; that is, after the trial court has made thorough inquiry and is satisfied that the defendant has been clearly advised of the right to counsel, that the defendant understands and appreciates the consequences of the decision to proceed *pro se*, and that the defendant comprehends the nature of the charges and proceedings and the range of possible punishments. When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, *unless the rest of the record indicates otherwise*.

State v. Warren, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986) (emphasis added). *See also State v. Hardy*, 78 N.C. App. 175, 179, 336 S.E.2d 661, 664 (1985); *State v. Wells*, 78 N.C. App. 769, 338 S.E.2d 573 (1986).

In *Warren*, the defendant argued that the trial court erred by allowing him to waive counsel and proceed *pro se* at his probation revocation hearing “because there is no record that the trial court informed him of the range of permissible punishment he could receive from the probation violations, [therefore] his waiver could not have been knowing and voluntary.” 82 N.C. App. at 87, 345 S.E.2d at 439. The defendant signed a written waiver similar to the one in the instant case, and the trial court certified the waiver. *Id.* at 87, 345 S.E.2d at 440. At the defendant’s probation revocation hearing, when the trial court asked him if he had anything to say, the defendant replied:

[Defendant]: Yes, sir. I just—I’m already doing time and I’d like to say that I’m guilty naturally by being sentenced. In other words, I automatically revoked my probation, but ask if any way possible, since this sentence is to be run consecutive—I lay myself on the mercy of the Court.

Id. at 88, 345 S.E.2d at 440. We held that the defendant’s statement “suggests that [the] defendant *did* comprehend the nature of the charges and proceedings and at least the maximum possible punishment.” *Id.* Therefore, our Court was “constrained to infer from the

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written, signed waiver and the court's certification thereof, that the dictates of G.S. Sec. 15A-1242 were followed. [The d]efendant has simply failed to show that the waiver he executed was not knowing and voluntary." *Id.*

In *State v. Whitfield*, the defendant argued that the trial court erred by allowing her to waive counsel and proceed *pro se* at her probation revocation hearing "without properly determining whether her waiver of the right to counsel was knowing, intelligent, and voluntary." 170 N.C. App. 618, 619, 613 S.E.2d 289, 290 (2005). During the probation revocation hearing, the trial court engaged in the following exchange with the defendant:

THE COURT: All right. Ms. Whitfield, do you understand that you have possibly 11 to 15 months hanging over your head?

DEFENDANT: Yes, ma'am.

THE COURT: You understand that?

DEFENDANT: Yes, ma'am.

THE COURT: If your probation is revoked, you may very well have your sentence activated, have to serve that time. You're entitled to have an attorney to represent you. Are you going to hire an attorney to represent you, represent yourself, or ask for a court appointed attorney[?] Of those three choices, which choice do you make?

DEFENDANT: Represent myself.

THE COURT: Put your left hand on the Bible and raise your right hand.

(The Defendant was sworn by the Court)

THE COURT: That is what you want to do, so help you God?

DEFENDANT: Yes, ma'am.

Id. at 621, 613 S.E.2d at 291. Our Court held that the trial court "followed all three requirements set forth in N.C. Gen. Stat. § 15A-1242" because the court "informed [the] defendant of the right of assistance of counsel, including the right to a court-appointed attorney if [the] defendant was entitled to one," and "made sure that [the] defendant understood that her probation could be revoked, that her sentences could be activated, and that she could serve eleven to fifteen months in prison." *Id.* "Cognizant of these facts, [the] defendant verbally gave

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a knowing, intelligent, and voluntary waiver of her right to counsel.” *Id.* “Later, [the] defendant signed a document indicating that she waived her right to counsel and wanted to appear on her own behalf. Therefore, we have no doubt that [the] defendant intended to and did in fact waive her right to counsel.” *Id.*

In the instant case, prior to the start of defendant’s probation revocation hearing, defendant signed a “Waiver of Counsel” form, AOC-CR-227, indicating that he waived his right to counsel. The waiver stated, in pertinent part:

I freely, voluntarily and knowingly declare that:

...

2. I waive my right to all assistance of counsel which includes my right to assigned counsel and my right to the assistance of counsel. In all respects, I desire to appear in my own behalf, which I understand I have the right to do.

At the probation revocation hearing, the following exchange occurred between the trial court and defendant:

THE COURT: Are you Mr. Sorrow?

THE DEFENDANT: Yes, ma’am.

THE COURT: Do you understand you have the right to have an attorney represent you in this matter?

THE DEFENDANT: Yes, ma’am.

THE COURT: You have signed a waiver saying you do not want a court-appointed attorney, but are you going to hire your own attorney or represent yourself?

THE DEFENDANT: I would like to represent myself at this point.

THE COURT: All right. Do you want to take care of this today?

THE DEFENDANT: Yes, ma’am. Yes, ma’am.

After defendant answered the court’s questions, the State asked defendant whether he admitted or denied the alleged probation violation, and defendant admitted the violation. Subsequently, defendant signed a second “Waiver of Counsel” form, AOC-CR-227, which was identical to the first waiver. The trial court certified the second waiver. This certification stated:

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I certify that the above named defendant has been fully informed in open court of the charges against him/her, the nature of and the statutory punishment for each charge, and the nature of the proceeding against the defendant and his/her right to have counsel assigned by the court and his/her right to have the assistance of counsel to represent him/her in this action; that the defendant comprehends the nature of the charges and proceedings and the range of punishments; that he/she understands and appreciates the consequences of his/her decision and that the defendant has voluntarily, knowingly and intelligently elected in open court to be tried in this action:

. . .

2. without the assistance of counsel, which includes the right to assigned counsel and the right to assistance of counsel.

Even though defendant executed two written waivers of counsel, one of which was certified by the trial court, these waivers are not presumed to have been knowing, intelligent, and voluntary because “the rest of the record indicates otherwise.” *Warren*, 82 N.C. App. at 89, 345 S.E.2d at 441. Although the transcript shows that the trial court advised defendant of his right to counsel for the probation revocation hearing, there is nothing in the record or the transcript indicating that the trial court conducted a thorough inquiry that showed that “defendant understands and appreciates the consequences of the decision to proceed *pro se*, and that the defendant comprehends the nature of the charges and proceedings and the range of possible punishments.” *Id.* See also *In re Watson*, — N.C. App. —, —, 706 S.E.2d 296, 303 (2011); *State v. Dunlap*, 318 N.C. 384, 389, 348 S.E.2d 801, 804 (1986).

“In omitting the second and third inquiries required by N.C. Gen. Stat. § 15A-1242, the trial court failed to determine whether [the] defendant’s waiver of his right to counsel was knowing, intelligent and voluntary.” *Evans*, 153 N.C. App. at 316, 569 S.E.2d at 675. Failure to conduct the mandatory inquiry under N.C. Gen. Stat. § 15A-1242 is prejudicial error. *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476. Accordingly, we vacate the judgment revoking defendant’s probation and remand for a new hearing.

Although the trial court was not required to follow a specific “checklist” of questions when conducting its inquiry into defendant’s waiver of counsel, trial courts should note our Supreme Court’s language in *Moore*:

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Although not determinative in our decision, we take this opportunity to provide additional guidance to the trial courts of this State in their efforts to comply with the “thorough inquiry” mandated by N.C.G.S. § 15A-1242. The University of North Carolina at Chapel Hill School of Government has published a fourteen-question checklist “designed to satisfy requirements of” N.C.G.S. § 15A-1242:

1. Are you able to hear and understand me?
2. Are you now under the influence of any alcoholic beverages, drugs, narcotics, or other pills?
3. How old are you?
4. Have you completed high school? college? If not, what is the last grade you completed?
5. Do you know how to read? write?
6. Do you suffer from any mental handicap? physical handicap?
7. Do you understand that you have the right to be represented by a lawyer?
8. Do you understand that you may request that a lawyer be appointed for you if you are unable to hire a lawyer; and one will be appointed if you cannot afford to pay for one?
9. Do you understand that, if you decide to represent yourself, you must follow the same rules of evidence and procedure that a lawyer appearing in this court must follow?
10. Do you understand that, if you decide to represent yourself, the court will not give you legal advice concerning defenses, jury instructions or other legal issues that may be raised in the trial?
11. Do you understand that I must act as an impartial judge in this case, that I will not be able to offer you legal advice, and that I must treat you just as I would treat a lawyer?
12. Do you understand that you are charged with —, and that if you are convicted of this (these) charge(s), you could be imprisoned for a maximum of — and that the minimum sentence is —? (Add fine or restitution if necessary.)
13. With all these things in mind, do you now wish to ask me any questions about what I have just said to you?

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14. Do you now waive your right to assistance of a lawyer, and voluntarily and intelligently decide to represent yourself in this case?

See 1 Super. Court Subcomm., Bench Book Comm. & N.C. Conf. of Super. Court Judges, *North Carolina Trial Judge's Bench Book* § II, ch. 6, at 12-13 (Inst. of Gov't, Chapel Hill, N.C., 3d ed. 1999) (italics omitted). While these specific questions are in no way required to satisfy the statute, they do illustrate the sort of "thorough inquiry" envisioned by the General Assembly when this statute was enacted and could provide useful guidance for trial courts when discharging their responsibilities under N.C.G.S. § 15A-1242.

Moore, 362 N.C. at 327-28, 661 S.E.2d at 727.

III. CONCLUSION

The trial court's order revoking defendant's probation and activating his suspended sentence is vacated and this matter is remanded for a new probation revocation hearing.

Vacated and remanded.

Judges ELMORE and STEELMAN concur.

TOWN OF APEX, PLAINTIFF v. ANN SLOAN WHITEHURST, INDIVIDUALLY, AS CO-EXECUTRIX OF THE ESTATE OF BEULAH CORBETT SLOAN AND AS TRUSTEE; ROBERTA SLOAN LITTLE; INDIVIDUALLY, AS CO-EXECUTRIX OF THE ESTATE OF BEULAH CORBETT SLOAN AND AS TRUSTEE; MEREDITH LYNN WHITEHURST; SHELLEY ANN WHITEHURST; STEPHEN B. LITTLE; DAVID K. WHITEHURST; AND WAKE COUNTY, DEFENDANTS

No. COA10-697

(Filed 19 July 2011)

1. Appeal and Error—interlocutory orders and appeals—substantial right—taking for public purpose—untimely appeal

Although defendants' appeal in a condemnation case regarding the issue of taking for a public purpose was from an interlocutory order that affected a substantial right, it was dismissed as untimely.

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2. Appeal and Error— interlocutory orders and appeals—substantial right—inverse condemnation—untimely appeal

Although defendants' counterclaim for inverse condemnation was from an interlocutory order that affected a substantial right, it was dismissed as untimely.

3. Appeal and Error— preservation of issues—failure to argue

Defendants failed to make any arguments regarding the 17 February 2010 order as required by N.C. R. App. P. 28(a), and thus, the issues were deemed abandoned.

Appeal by defendants from orders entered 10 February 2009 by Judge Ripley E. Rand, 19 November 2009 by Abraham Penn Jones, and 17 February 2010 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 30 November 2010.

Smith Moore Leatherwood LLP, by Marc C. Tucker, for the plaintiff-appellee.

Creech Law Firm, P.A., by Peter J. Sarda, for the defendant-appellants.

STROUD, Judge.

Defendants appeal three orders regarding the condemnation of their land. As defendants' appeal is untimely, we dismiss the appeal.

I. Background

Plaintiff, the Town of Apex ("Apex"), brought this condemnation action pursuant to "Article 9 of Chapter 136 of the North Carolina General Statutes"¹ because it was "necessary to condemn and appropriate" the property of defendants "for public use in the construction of a certain gravity sewer line project[.]" The parties were "unable to agree as to the purchase price of the property . . . appropriated[.]" and thus Apex requested the Court to determine "just compensation for the appropriation[.]"

1. Apex's brief notes that "[t]he Town has the option to exercise its condemnation power under N.C. Gen. Stat. § 40A-3 [App. pp. 4-9], which grants such authority to 'local public condemnors.' *Id.* See also N.C. Gen. Stat. § 40A-1(a) [App. p. 3]. By virtue of an amendment to its charter in 1987 by the General Assembly, S.L. 1987-70 [App. p. 23], codified as amended as § 6.5 of the Apex Town Charter [App. p. 22], the Town may also exercise such power under Chapter 136, Article 9. The Town instituted this action under Chapter 136. (R p 12). Defendant-appellants have not challenged the Town's authority to proceed under Chapter 136."

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On or about 25 July 2008, defendants moved to dismiss Apex's complaint, answered Apex's complaint, and counterclaimed for a declaration that Apex's taking would result "in a total taking of the property and that an inverse condemnation ha[d] occurred."² Defendants claimed the taking would "destroy the use and effect of the entire property" because

[t]he Plaintiff's efforts to plant sewer lines across the Defendants['] property will harvest an artificial, barren ridge across the Defendant[s'] otherwise pristine forest and thus destroy the natural effect of a Sylvan refuge and thus damage the natural effect of the entire tract.

4. Because the plans of the Plaintiff to take only a portion of the Defendants' property will result in an un-desired subdivision of an otherwise untouched forest, the Plaintiff's actions will result in a total taking of the Defendants['] property.

Defendants requested "damages for taking the entire property." On or about 21 August 2008, Apex answered defendants' counterclaim, moved to dismiss defendants' counterclaim, "requested a hearing to determine all issues other than just compensation[.]" and argued that defendants' counterclaim was barred by laches.

On 21 October 2008, defendants filed an amended motion for summary judgment based on "whether this condemnation action is for a public purpose." On 10 February 2009, the trial court entered an order allowing Apex's motion for summary judgment³ and denying defendant's motion for summary judgment because Apex's "intended use of the property at issue satisfies both the 'public use' and the 'public benefit' tests[.]" On 19 November 2009, the trial court granted Apex's motion to dismiss defendants' counterclaim.

2. We note that defendants' counterclaim for inverse condemnation was not filed in accordance with N.C. Gen. Stat. § 136-111, as defendants failed to allege a claim under N.C. Gen. Stat. § 136-111 or to file a memorandum of action and would be subject to dismissal for this reason alone. *See generally Cape Fear Pub. Util. Auth. v. Costa*, — N.C. App. —, 697 S.E.2d 338, 342 (2010) ("Although [the] Defendant alleged in his counterclaim that he 'specifically pleads the law of Inverse Condemnation,' he completely failed to comply with the requirements of N.C. Gen. Stat. § 40A-51, both in the allegations of the counterclaim and by his failure to file a memorandum of action. . . . Defendant's counterclaim for inverse condemnation was thus subject to dismissal for its failure to comply with N.C. Gen. Stat. § 40A-51." (brackets omitted)). However, we do not address defendants' appeal regarding their counterclaim for inverse condemnation as we conclude that it was untimely.

3. Apex made an oral motion for summary judgment before the trial court at the hearing on defendants' motion for summary judgment.

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On 22 June 2010, Apex filed a “MOTION FOR DETERMINATION OF ISSUES OTHER THAN DAMAGES” pursuant to N.C. Gen. Stat. § 136-108 (“motion for determination”) requesting the trial court to determine:

- a. Whether or not the Town of Apex’s easement, as set forth in its Complaint, constitutes a taking of the entire tract; and
- b. Whether or not the jury shall hear and determine the claims for compensation made by the Defendants because of the taking.

On 17 February 2010, after a hearing regarding Apex’s motion for determination, the trial court determined that Apex had “condemned an easement constituting a partial taking[;]” thus rejecting defendants’ claim that the easement would in effect take the entire property as alleged by defendants’ dismissed counterclaim for inverse condemnation. Defendants appeal the 10 February 2009 order, the 19 November 2009 order, and the 17 February 2010 order.

II. 10 February 2009 Order

[1] Defendants’ first two arguments are that Apex’s condemnation was actually for private use, not public use. The trial court’s initial determination that the condemnation was for public use was made in the 10 February 2009 order.

According to *Progress Energy Carolinas, Inc. v. Strickland*,

[w]e first consider whether [the] appeal in this case is an interlocutory appeal requiring dismissal. A ruling is interlocutory if it does not determine the issues but directs some further proceeding preliminary to final decree.

181 N.C. App. 610, 612, 640 S.E.2d 856, 858 (2007) (citation and quotation marks omitted). Here, the 10 February 2009 order determined that the purpose of the taking was for public use and left all other issues regarding the condemnation proceeding pending; accordingly, the 10 February 2009 order was interlocutory. *See id.*

There is generally no right to appeal an interlocutory order. However, a party may appeal an interlocutory order that affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment. The Supreme Court recognized in *N.C. State Highway Comm’n v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967) that orders from a condemnation hearing concerning title and area taken are vital preliminary issues that must be immediately appealed pur-

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suant to N.C.G.S. § 1-277, which permits interlocutory appeals of determinations affecting substantial rights.

The Supreme Court defined the concept of vital preliminary issues in two eminent domain cases, *Nuckles* and *Rowe*. The issue before the Court in *Nuckles* was which tracts the State Highway Commission was taking by eminent domain. When considering whether this was a vital preliminary issue, the Court noted:

Obviously, it would be an exercise in futility to have the jury assess damages to tracts 1, 2, 3, and 4 if plaintiff were condemning only tracts A and B, and the verdict would be set aside on appeal for errors committed by the judge in determining the issues other than damages.

By contrast, in *Rowe* the landowners appealed the issue of the unification of four of their tracts through condemnation. The Court noted: Defendants contest only the unification of the four remaining tracts, not what parcel of land is being taken or to whom that land belongs. Thus, we hold that the trial court's interlocutory order does not affect any substantial right of these defendants. The Court went on to limit the *Nuckles* holding to questions of title and area taken.

Applying this vital preliminary issue analysis to the case before us, the order is immediately appealable if it decided questions of title or area taken.

Id. at 612-13, 640 S.E.2d at 858-59 (citation, quotation marks, and ellipses omitted).

We are unaware of any prior North Carolina case which has considered whether the issue of the purpose of a taking is a vital or non-vital "preliminary issue[.]"⁴ *Id.* While *Progress Energy Carolinas* notes that *Rowe* limited *Nuckles* "to questions of title and area taken[.]" we note "questions of title and area taken" are possible only after a taking has occurred. *See id.* In other words, once a condemnor files a condemnation action which creates a taking, the trial court must consider the extent of the taking, including issues such as the title and the specific area involved, before a jury may determine com-

4. This case is distinguishable from *DeHart v. N.C. Dep't. of Transp.*, 195 N.C. App. 417, 420, 672 S.E.2d 721, 723 (2009) which provided that "[t]he sole question was whether there was any taking at all" because in *Dehart* "[t]he parties reached a compromise settlement with regard to DOT's taking[.]" *See id.* at 418, 672 S.E.2d at 722. Accordingly in *Dehart*, the parties had previously agreed that there had been a taking. *See id.* The issue actually addressed in *Dehart* was the DOT's alleged failure to comply with the compromise settlement. *See id.*, 195 N.C. App. 417, 672 S.E.2d 721.

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compensation for the taking. We are confronted here with the preliminary issue of whether a taking has even occurred, since Apex has no power to condemn property for a private purpose or use.

“[T]aking” under the power of eminent domain may be defined as entering upon private property for more than a momentary period, and, under warrant or color of legal authority, *devoting it to a public use*, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.

Penn. v. Coastal Corp., 231 N.C. 481, 484, 57 S.E.2d 817, 819 (1950) (emphasis added) (citation and quotation marks omitted). By its very definition, a “taking” can only occur if an entity with the power of eminent domain appropriates property which is to be devoted “to a public use[.]” *Id.*

[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future “use by the public” is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example

. . . [T]he City would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party. Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.

Kelo v. New London, 545 U.S. 469, 477-78, 162 L. Ed. 2d 439, 450 (2005) (footnote omitted). If Apex attempted to condemn the defendants’ property for a private use, then the use would be improper and Apex would have no authority to take the property under the power of eminent domain, thus ending the inquiry. *See id.* But if Apex condemned defendants’ property for public use, this would be an appropriate exercise of its power of eminent domain, and thus a “taking,” *see id.*, so that other issues, such as title or area taken, could then be addressed in order to determine the extent of the taking before compensation is considered. Accordingly, whether Apex is appropriating the property for private or public use is of vital importance as it determines whether Apex may exercise its power of eminent domain. *See id.*

As we have concluded that the determination of whether a taking is for a public purpose is an inquiry of vital importance in condemna-

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tion cases, such questions affect a substantial right and are immediately appealable. See *Progress Energy Carolinas*, 181 N.C. App. at 612-13, 640 S.E.2d at 858. As such, appeal must be filed within 30 days of entry of the order which determines the purpose of the taking. See N.C.R. App. P. 3(c)(1).

In civil actions and special proceedings, a party must file and serve a notice of appeal:

- (1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure[.]

Id.

The “Certificate of Service” signed by the Deputy Clerk of Superior Court, Nancy H. Vann, states that a copy of the 10 February 2009 order was deposited in the mail on 11 February 2009. Defendants did not file a notice of appeal from the 10 February 2009 order until 2 March 2010; accordingly, defendants’ appeal is untimely, see *id.*, and thus we dismiss any review of the 10 February 2009 order. See *Concrete Mach. Co. v. City of Hickory*, 134 N.C. App. 91, 96-97, 517 S.E.2d 155, 158-59 (1999) (noting defendant was “precluded from raising . . . issue on appeal” because defendant failed to appeal within 30 days of interlocutory order which determined that a taking had occurred and affected a substantial right); see also *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197-98, 657 S.E.2d 361, 365 (2008) (explaining that failure to comply with Rule 3 of the North Carolina Rules of Appellate Procedure results in a jurisdictional default which requires this Court to dismiss the appeal and even precludes review pursuant to North Carolina Rule of Appellate Procedure 2).

III. 19 November 2009 Order

[2] Although we have dismissed defendants’ appeal as to the issue of taking for a public purpose, the 19 November 2009 order raises a different issue. Defendants’ next two arguments are that the trial court erred in dismissing their counterclaim for inverse condemnation which was based upon defendants’ allegation that the taking of the sewer easement created a total taking of the defendants’ property. The 19 November 2009 order is also interlocutory as it does not dispose of all of the issues before the trial court. *Progress Energy Carolinas*, 181 N.C. App. at 612, 640 S.E.2d at 858.

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The question of whether the taking was total or partial is a vital issue as it deals with the extent of the taking, *i.e.*, the “area taken[.]” *Id.*, 181 N.C. App. at 613, 640 S.E.2d at 858-59; compare *Dept of Transp. v. Mahaffey*, 137 N.C. App. 511, 515-16, 528 S.E.2d 381, 384 (2000) (determining that where the defendants’ inverse condemnation claim was based upon the issue of whether “they had . . . been offered just compensation for the alleged taking of their property” . . . it “did not relate to title or area taken[, and] . . . thus, [the defendants] are not barred from raising these issues in this appeal” (quotation marks omitted)). As defendants’ appeal relates to the “area taken[.]” the 19 November 2009 order was also immediately appealable. See *Progress Energy Carolinas*, 181 N.C. App. at 613, 640 S.E.2d at 859. “[I]t would be an exercise in futility[.]” *Highway Comm’n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967), for a jury to consider evidence as to the value of the taking of only a 30 foot wide sewer easement crossing the defendants’ real property instead of evidence as to the value of the taking of the entire tract of approximately 48 acres, if in fact Apex had appropriated the entire tract.

The “Certificate of Service” for the 19 November 2009 order, also signed by the Deputy Clerk of Superior Court, Nancy H. Vann, states that a copy of the order was deposited in the mail on 19 November 2009. Defendant’s notice of appeal was not filed until 2 March 2010. Accordingly, defendant’s appeal as to the 19 November 2009 order is untimely, see N.C.R. App. P. 3(c)(1) and we must dismiss it. See *Dogwood Dev. & Mgmt. Co.*, 362 N.C. at 197-98, 657 S.E.2d 361, 365.

IV. 17 February 2010 Order

[3] Defendants failed to make any arguments regarding the 17 February 2010 order. Accordingly, we will not review this 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.”)

V. Conclusion

As defendants failed to make a timely appeal, we dismiss this appeal.

DISMISSED.

Judges BRYANT and BEASLEY concur in result only.

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WILLIAM I. NORMAN, PLAINTIFF v. FOOD LION, LLC/DELHAIZE AMERICA, INC., AND
RISK MANAGEMENT SERVICES, INC., SERVICING AGENT DEFENDANTS

No. COA10-1175

(Filed 19 July 2011)

**Workers' Compensation— penalty for late payment—award
not due until all appeals exhausted or waiver**

The Industrial Commission erred in a workers' compensation case by assessing a ten percent penalty against defendants for their alleged late payment of an award for temporary total disability. N.C.G.S. §§ 97-18(e) and 97-86 provide that payment of an award does not become due until all appeals are exhausted or a party waives the right to appeal.

Appeal by Defendants from the Order of the full Commission of the North Carolina Industrial Commission filed 2 July 2010. Heard in the Court of Appeals 9 February 2011.

Doran, Shelby, Pethel and Hudson, P.A., by David A. Shelby, for Plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Joel K. Turner, Shelley W. Coleman, and M. Duane Jones, for Defendant-appellants.

HUNTER, JR., Robert N., Judge.

Food Lion, LLC/Delhaize America, Inc., and Risk Management Services, Inc. ("Defendants") appeal from the Industrial Commission's 2 July 2010 Order assessing a ten percent penalty against Defendants for their late payment of the Deputy Commissioner's 27 April 2010 Award for Temporary Total Disability ("TTD") compensation to William I. Norman ("Plaintiff"). Defendants argue N.C. Gen. Stat. §§ 97-18(e) and 97-86 of the Workers' Compensation Act should be read together to find that payment of an award of the Industrial Commission does not become due until all appeals are exhausted or a party waives the right to appeal. We agree and reverse the Opinion and Award of the full Commission.

I. Factual and Procedural Background

On 5 November 2008, Plaintiff suffered an injury while working in Defendant Food Lion's distribution facility. The circumstances underlying Plaintiff's injury are not pertinent to this appeal. After receiving

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notice of Plaintiff's injury, Defendants contested the compensability of the injury and filed a Form 61 with the Industrial Commission, denying Plaintiff's claim.

On 20 October 2009, Deputy Commissioner Robert W. Rideout Jr. issued an Opinion and Award granting TTD benefits to Plaintiff. Defendants appealed the Award to the full Commission, which affirmed the Deputy Commissioner's award of TTD benefits on 27 April 2010. Defendants did not appeal this decision and paid the award to Plaintiff on 2 June 2010.

On 4 June 2010, Plaintiff filed a motion with the full Commission seeking a ten percent late payment penalty provided by N.C. Gen. Stat. § 97-18(g) for Defendant's failure to timely pay Plaintiff's TTD benefits pursuant to the Deputy Commissioner's 20 October 2009 Opinion and Award. *Plaintiff cited Roberts v. Dixie News, Inc.*, 189 N.C. App. 495, 658 S.E.2d 684 (2008), for the proposition that an award of a deputy commissioner is not automatically stayed by an appeal from the award to the full Commission. Because Defendants did not file a request for stay of the Deputy Commissioner's Opinion and Award pending appeal, Plaintiff argued, Defendants' payment of TTD benefits was late and the ten percent late payment penalty prescribed by N.C. Gen. Stat. § 97-18(g) was owed to Plaintiff.

On 2 July 2010, the full Commission, citing *Roberts*, entered an Order granting Plaintiff's Motion and assessed a ten percent late payment penalty against Defendants. Defendants appeal from this Order.

II. Jurisdiction and Standard of Review

Our standard of review for an appeal from an opinion and award of the full Commission is limited to the consideration of two issues: (1) whether the Industrial Commission's findings of fact are supported by competent evidence; and (2) whether its conclusions of law are supported by the findings of fact. *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000) (citation omitted). "Findings of fact are supported by competent evidence, and therefore conclusive on appeal, '[if] the record contains any evidence tending to support the finding.'" *Lewis v. N.C. Dep't of Corr.*, 167 N.C. App. 560, 564, 606 S.E.2d 199, 202 (2004) (alteration in original) (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)). We review the Industrial Commission's conclusions of law *de novo*. *Lewis v. Sonoco Prods. Co.*, 137 N.C. App. 61, 68, 526 S.E.2d 671, 675 (2000). Furthermore, "[w]hen the Commission acts under a misapprehension of the law, the award must be set aside and the case

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remanded for a new determination using the correct legal standard.’ ” *Davis v. City of New Bern*, 189 N.C. App. 723, 726, 659 S.E.2d 53, 56 (2008) (alteration in original) (quoting *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987)).

III. Analysis

Defendants argue that the full Commission erred in awarding Plaintiff a ten percent late payment penalty for their alleged late payment of Plaintiff’s TTD benefits. Defendants argue that, pursuant to N.C. Gen. Stat. §§ 97-18 and 97-86, payment of workers’ compensation benefits under an award of the Industrial Commission does not become due until all appeals are exhausted or a party waives the right to appeal. As Defendants timely appealed the Deputy Commissioner’s award to the full Commission, and subsequently paid Plaintiff’s TTD benefits pursuant to the full Commission’s decision, their payment of Plaintiff’s compensation was timely. We agree.

Section 97-18 of our General Statutes establishes when workers’ compensation benefits must be paid. N.C. Gen. Stat. § 97-18 (2009). Subsection 97-18(e) provides that “[t]he first installment of compensation payable under the terms of an award by the Commission, or under the terms of a judgment of the court upon an appeal from such an award, shall become due 10 days from the day following expiration of the time for appeal from the award.” *Id.* § 97-18(e). Subsection 97-18(g) provides that “[i]f any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof,” absent a showing by the employer of circumstances beyond the employer’s control that prevented timely payment. *Id.* § 97-18(g).

Furthermore, our workers’ compensation statutes provide that either party may appeal an award from the Deputy Commissioner to the full Commission and from the full Commission to the Court of Appeals. Specifically, section 97-85 provides that a deputy commissioner’s decision can be appealed within 15 days of the date when notice of the award is provided. *Id.* § 97-85. Additionally, an award of the full Commission may be appealed to the Court of Appeals “within 30 days from the date of such award or within 30 days after receipt of notice” of the award. *Id.* § 97-86. Pursuant to these sections, Defendants correctly assert that Plaintiff’s compensation did not become due until after the time to appeal the decision of the full Commission had expired.

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Deputy Commissioner Rideout issued his Opinion and Award on 20 October 2009. Within the 15-day time period prescribed by section 97-85, Defendants gave timely notice of appeal from the Deputy Commissioner's Opinion and Award to the full Commission on 21 October 2009. Subsequently, the full Commission issued its Opinion and Award on 27 April 2010. Pursuant to section 97-86, Defendants then had 30 days to appeal the decision of the full Commission to the Court of Appeals. Furthermore, pursuant to section 97-18(e), the first installment of Plaintiff's compensation would not become due until "10 days from the day following expiration of the time for appeal from the award," or 6 June 2010, which is 40 days after the date of the full Commission's Award. N.C. Gen. Stat. § 97-18(e). Defendants did not appeal the Award and timely paid Plaintiff on 2 June 2010.

Plaintiff cites *Roberts* in support of his argument that the full Commission did not err in assessing the ten percent late penalty against Defendants. In *Roberts*, the plaintiff-employee argued that a deputy commissioner's opinion and award is not a final, enforceable award, but should be stayed during an appeal. *Roberts*, 189 N.C. App. at 500, 658 S.E.2d at 687. Rejecting that argument, this Court noted that while section 97-86 provides that an appeal from a decision of the Commission to the Court of Appeals acts as a "*supersedeas* to maintain the status quo as between the parties," the Court found no case law to suggest "the same holds true for an appeal of a decision of a deputy commissioner to the Full Commission." *Id.* (citing N.C. Gen. Stat. § 97-86 (2007); *compare* N.C. Gen. Stat. § 97-86 (2009) (providing for appeal from decision of the full Commission to the Court of Appeals and stating that an appeal shall operate as a *supersedeas*), with N.C. Gen. Stat. § 97-85 (2009) (providing for the full Commission's review of an award with no mention of a *supersedeas*).

Plaintiff argues that because this Court concluded in *Roberts* that an appeal from the deputy commissioner's opinion and award to the full Commission does not act as *supersedeas*, Defendants were required to abide by the 27 April 2010 Award and pay Plaintiff accordingly. Because Defendants did not pay Plaintiff until the full Commission affirmed the Deputy Commissioner's Award, Plaintiff contends the payments were late and a ten percent late penalty pursuant to section 97-18(g) was appropriate. N.C. Gen. Stat. § 97-18(g). Plaintiff's argument, however, relies on a misinterpretation of our statutes and case law.

Roberts was procedurally and substantively distinct from the present case. It did not address, and does not control, when the initial

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payment of an award of the Commission becomes due. *Roberts*, 189 N.C. App. at 500-01, 658 S.E.2d at 687. Rather, the *Roberts* Court addressed whether the employer, who had admitted compensability of the employee's injury and began payment of compensation, was justified in relying on a deputy commissioner's decision regarding the *termination* of benefits during the pendency of the employee's appeal. *Id.* at 501, 658 S.E.2d at 687. When the plaintiff-employee in *Roberts* sustained a second injury while working for a different employer, the defendant-employer sought to terminate the employee's compensation pursuant to section 97-18.1. *Id.*; N.C. Gen. Stat. § 97-18.1(b) (2009) (stating "[a]n employer may terminate payment of compensation for total disability . . . when the employee has returned to work for the same or a different employer" pending approval by the Commission). Following a hearing on the matter, the Deputy Commissioner issued an opinion and award authorizing the employer to cease payment of compensation. *Roberts*, 189 N.C. App. at 501, 658 S.E.2d at 687. The *Roberts* Court concluded the employer was therefore not required to resume payments during the employee's appeal and a late payment penalty was not appropriate. *Id.*; *but cf. Fonville v. Gen. Motors Corp.*, 200 N.C. App. 267, 273, 683 S.E.2d 445, 449 (2009) (concluding employer was liable for late payment penalty where employer, after admitting compensability of injury, unilaterally suspended payments without following statutory procedures for termination of compensation).

Significantly, *Roberts* did not interpret section 97-18, which controls when payment of workers' compensation benefits are due. N.C. Gen. Stat. § 97-18. Furthermore, we find nothing in *Roberts* that contradicts section 97-18(e), which explicitly states that an *initial* payment of benefits pursuant to an award of the Commission is not payable until after the time for appeal has expired. N.C. Gen. Stat. § 97-18(e) (stating "[t]he first installment of compensation payable under the terms of an award . . . shall become due 10 days from the day following expiration of the time for appeal" or one day after notice of a party's waiver of appeal). Implicitly, this language provides for a stay of a deputy commissioner's award when appealed before the first installment is paid. It follows that when an employer has been ordered to pay compensation pursuant to an award, but maintains an appeal, payment will not become due until the party waives the right to appeal, or all appeals have been exhausted.

We find support for this conclusion in *Morales-Rodriguez v. Carolina Quality Exteriors, Inc.*, — N.C. App. —, —, 698 S.E.2d

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91, 95 (2010), in which this Court addressed when payment under an award becomes due during an appeal from an opinion and award of the Commission. In *Morales-Rodriguez*, the employer initially denied liability for compensation of the employee's injury, the deputy commissioner awarded benefits to the employee, and the employer appealed. *Id.* at —, —, 698 S.E.2d at 93, 95. The full Commission awarded the employee TTD benefits, assessed a ten percent late penalty against the employer for late payment of compensation, and the employer appealed to this Court. *Id.* at —, 698 S.E.2d at 95.

Addressing the employer's argument that the Commission erred in awarding the late penalty, we noted that section 97-18(e) provides that an award becomes due ten days after the time to appeal the full Commission's Opinion and Award. *Id.* (quoting N.C. Gen. Stat. § 97-18(e)). Further, we cited section 97-85, which provides a party 15 days to appeal the Deputy Commissioner's award to the full Commission, and section 97-86, which provides a party 30 days to appeal the full Commission's award to this Court. *Id.* (citing N.C. Gen. Stat. §§ 97-85 to -86). We then concluded that because the employer had timely appealed the Deputy Commission's award and timely appealed the full Commission's award "no payment had become due at the time of the Full Commission's Opinion and Award." *Id.* The full Commission erred in assessing the employer with the late penalty provided by section 97-18(g). *Morales-Rodriguez*, — N.C. App. at —, 698 S.E.2d at 95 (citing N.C. Gen. Stat. § 97-18(g)).

Lastly, our conclusion that Plaintiff's reliance on *Roberts* is misplaced is further supported by our General Assembly's inclusion of section 97-86.2 in the Workers' Compensation Act. Section 97-86.2 provides that

[i]n any workers' compensation case in which an order is issued either granting or denying an award to the employee *and where there is an appeal resulting in an ultimate award to the employee*, the insurance carrier or employer shall pay interest on the final award or unpaid portion thereof from the date of the initial hearing on the claim, until paid at the legal rate of interest provided in G.S. 24-1.

N.C. Gen. Stat. § 97-86.2 (emphasis added). This statute necessarily anticipates a defendant would not pay an award issued by a deputy commissioner when the award is appealed to the full Commission, as interest accrues from the date of the initial hearing before the deputy commissioner. *Id.* Plaintiff's interpretation of *Roberts* as requiring

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immediate payment of a deputy commissioner's award despite the award being appealed would impermissibly render section 97-86.2 unnecessary.

IV. Conclusion

In summary, we conclude *Roberts* does not control when an employer must initiate payment of a worker's compensation award, and *Morales-Rodriguez* established that an award is not due during the pendency of an appeal. In the present case, Defendants contested the compensability of Plaintiff's injury and timely appealed the Deputy Commissioner's Award to the full Commission. Thus, as in *Morales-Rodriguez*, no payment was due prior to the 27 April 2010 Opinion and Award of the full Commission. Because Defendants paid the Award to Plaintiff on 2 June 2010—within 10 days after the 30 days permitted to appeal the decision to this Court—Defendants complied with N.C. Gen. Stat. §§ 97-18(e) and 97-86. Their payment was timely and the full Commission erred in assessing Defendants with a late payment penalty. The full Commission's 27 April 2010 Opinion and Award is

Reversed.

Judges CALABRIA and STROUD concur.

KAYLOR B. ROBINSON; BRENDA M. BELL; DANNY MCGEE; JIMMY MCGEE;
WILLIAM DAMEWOOD; NANCY MCGEE; MAZZLE MEMORY; MARTHA WHITED;
AND MARY BROWN, PLAINTIFFS V. FOREST CREEK LIMITED PARTNERSHIP;
THORTON VENTURES, LLC AND URBAN PIPELINE, INC., DEFENDANTS

No. COA11-118

(Filed 19 July 2011)

Cemeteries—grave desecration—summary judgment

The trial court did not err in a grave desecration case by granting summary judgment in favor of defendants. There was no evidence showing that defendants graded the property on which the gravesite is located or in some other way desecrated the gravesite.

Appeal by Plaintiffs from order entered 16 July 2010 by Judge Lucy Noble Inman in Orange County Superior Court. Heard in the Court of Appeals 23 May 2011.

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[213 N.C. App. 593 (2011)]

Law Office of Robert B. Jervis, P.C., by Robert B. Jervis, for Plaintiffs.

Pinto Coates Kyre & Brown, PLLC, by Deborah J. Bowers and David L. Brown, for Defendants.

STEPHENS, Judge.

Factual and Procedural Background

In 1919, John R. Magee and his wife Mollie W. Magee were interred in a small burial ground located on a large tract of land in Wake County. The land was later sold in separate parcels, but was recombined when a member of the Wadford family purchased the entire tract in the mid-1940s. The Wadford family owned the entire tract until 1999, when they sold approximately 80 acres of the tract to Thorton Ventures, LLC (“Thorton Ventures”). Thorton Ventures combined the tract purchased from the Wadford family with a small, neighboring tract and separated that combined tract into nine lots to be developed for residential use. In 2001, Thorton Ventures sold two of the lots, Lot 3 and Lot 4, to Forest Creek Limited Partnership (“Forest Creek”); Forest Creek developed an apartment complex on its two lots. Thorton Ventures developed single-family homes on several of the remaining lots.

In 2005, Kaylor B. Robinson (“Robinson”), a great-granddaughter of John R. Magee who had recently begun a quest to ascertain the whereabouts or resting places of her extant and deceased relatives, learned of John R. and Mollie W. Magee’s interment in the property formerly owned by the Wadford family. Robinson, along with Brenda M. Bell (“Bell”), a granddaughter of John R. Magee, petitioned the Wake County Clerk of Superior Court for an order “allowing [Robinson and Bell] and their designees to enter the property of [Forest Creek] to discover, restore, maintain, and visit a grave site reasonably believed to be located on such property.” Pursuant to a consent order entered in that action, Robinson and Bell were granted access to Forest Creek’s property “for the purpose of discovering the exact location of the grave of [Robinson’s and Bell’s] ancestor John R. Magee.” With help from an archaeologist, Robinson and Bell ultimately located on Lot 4 what appeared to be the remains of at least two adults; there were no gravestones marking the location where the remains were discovered.

Because Robinson had received information that John R. and Mollie W. Magee were buried below two gravestones bearing their

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names and that the burial ground was surrounded by a wrought-iron gate, which was still upright as late as 1999, Robinson, along with Bell and eight other grandchildren of John R. Magee (collectively, "Plaintiffs"), instituted the present action against Forest Creek in Orange County Superior Court, seeking (1) preliminary and permanent injunctions prohibiting Forest Creek from preventing Plaintiffs from accessing, maintaining and installing grave markers on the grave sites; (2) recovery of expenses incurred in locating and obtaining access to the grave site; and (3) actual and punitive damages for Forest Creek's desecration of the grave sites by removing the grave-stones above, and fence around, the burial site. With the consent of the parties, the special proceeding in Wake County was transferred to Orange County Superior Court and consolidated with the present action. Plaintiffs later amended their complaint to include desecration claims against Thorton Ventures and Urban Pipeline, Inc. ("Urban Pipeline"), whose predecessor Carolina Construction and Grading, Inc. ("Carolina Construction") was responsible for the grading on several of the lots developed by Thorton Ventures. According to the Record on Appeal, "Plaintiffs resolved all of their claims against Forest Creek and they are no longer parties to this case," leaving Plaintiffs' desecration claims against Thorton Ventures and Urban Pipeline as the only remaining claims in this action.¹

On 10 June 2010, Thorton Ventures and Urban Pipeline (collectively, "Defendants") filed a motion for summary judgment. The motion was heard on 14 July 2010 before the Honorable Lucy Noble Inman in Orange County Superior Court. Following the hearing, the trial court granted summary judgment for Defendants in an order entered 16 July 2010. On 5 August 2010, Plaintiffs gave notice of appeal to this Court.

Discussion

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."

1. Prior to settlement of the Forest Creek claims, Thorton Ventures, Urban Pipeline, and Forest Creek all filed motions to dismiss portions of Plaintiffs' claims. The trial court (1) dismissed the desecration claims against Forest Creek, Thorton Ventures, and Urban Pipeline only as to Plaintiff Robinson; and (2) based on the terms of the consent order previously entered in the special proceeding action, ordered that Plaintiffs "are barred from seeking to reestablish any permanent cemetery . . . on [] Forest Creek's property as a portion of their remedy in this action."

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N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). “The showing required for summary judgment may be accomplished by proving an essential element of the opposing party’s claim does not exist . . . or by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim.” *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citation omitted).

In this case, Plaintiffs are asserting a claim for grave desecration. In *King v. Smith*, 236 N.C. 170, 72 S.E.2d 425 (1952), our Supreme Court acknowledged a plaintiff’s cause of action “to recover damages for the wrongful desecration of the graves of plaintiffs’ ancestors” “in violation of [N.C. Gen. Stat. §] 65-15.” *Id.* at 170, 72 S.E.2d at 425. Although section 65-15 was repealed in 1971, that same year the provisions of section 65-15 were transferred to section 65-13, which was amended by the same session law that repealed section 65-15. Act of July 8, 1971, ch. 797, secs. 1-2, 1971 N.C. Sess. Laws 1035, 1035-37. In 2007, the legislature repealed section 65-13, but enacted section 65-106, which was identical to the newly-repealed section 65-13. Act of June 27, 2007, ch. 118, secs. 1, 4, 2007 N.C. Sess. Laws 188, 190-93. The provisions of current section 65-106 are substantially similar to those of section 65-15 that were effective when our Supreme Court decided *King*. Compare N.C. Gen. Stat. § 65-106 (2009); N.C. Gen. Stat. § 65-15 (1951). As such, we conclude that the civil cause of action “to recover damages for wrongful desecration of the graves of [a plaintiff’s] ancestors” as acknowledged in *King* is still a viable action in this State.² See *King*, 236 N.C. at 170, 72 S.E.2d at 425.

We note, however, that neither *King*, nor section 65-106, nor any other case decided in North Carolina, delineates the elements of a civil cause of action for wrongful desecration of a gravesite.

2. In their amended complaint, Plaintiffs allege that Defendants graded the property on which the gravesite is located “in violation of the provisions of [N.C. Gen. Stat. §] 14-149,” a criminal statute. As correctly noted by Defendants, a civil cause of action is not necessarily created by a violation of a criminal statute. See, e.g., *Gillikin v. Springle*, 254 N.C. 240, 243, 118 S.E.2d 611, 614 (1961) (holding that while “[p]erjured testimony and the subornation of perjured testimony are criminal offenses,” “neither are torts supporting a civil action for damages.”). Nevertheless, the fact that Plaintiffs mislabeled their cause of action as one arising under a criminal grave desecration statute is not fatal to Plaintiffs’ claim. As Plaintiffs’ complaint gives sufficient notice of the wrong alleged—*i.e.*, desecration by grading over the gravesite—Plaintiffs’ incorrect choice of legal theory does not warrant summary judgment so long as Plaintiffs’ allegations “are sufficient to state a claim under some legal theory.” See *Mims v. Mims*, 305 N.C. 41, 61, 286 S.E.2d 779, 792 (1982) (holding that in the summary judgment context, plaintiff’s incorrect legal theory is not fatal to his claim when the allegations in the complaint “give sufficient notice of the wrong complained of” and “are sufficient to state a claim under some legal theory”). We address the sufficiency of Plaintiffs’ allegations as a civil grave desecration claim *infra*.

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Nevertheless, without contemplating all the elements that may be required for a successful desecration claim, we think it obvious that one essential element of such a claim must be that the defendant engaged in some act of desecration. See *Rodman v. Mish*, 269 N.C. 613, 615, 153 S.E.2d 136, 138 (1967) (quoting “130 A.L.R. 259” and recognizing that “the heirs of a decedent at whose grave a monument has been erected, or the person who rightfully erected it, could recover damages from one who *wrongfully injured or removed it*” (emphasis added)); *King*, 236 N.C. at 170-71, 72 S.E.2d at 425-26 (stating that allegations that defendant “destroyed said graves and exposed the remains of their said ancestors by *leveling off the hill* on which the graveyard was located” were “sufficient to constitute a cause of action for the wrongful desecration of the graves” (emphasis added)); *Perry v. Cullipher*, 69 N.C. App. 761, 763, 318 S.E.2d 354, 356 (1984) (“The gravamen of an action for the desecration of a grave is . . . for mental suffering for the *disturbance of the final resting place for a loved one.*” (emphasis added)); see also *Hairston v. General Pipeline Constr., Inc.*, 704 S.E.2d 663, 673 (W. Va. 2010) (listing as an element of a common law cause of action for grave desecration that “the defendant proximately caused, either directly or indirectly, *defacement, damage, or other mistreatment of the physical area of the decedent’s grave site or common areas of the cemetery* in a manner that a reasonable person knows will outrage the sensibilities of others” (emphasis added)).

In this case, Plaintiffs allege in their amended complaint that “Plaintiffs are informed and believe that” Defendants “desecrated the grave sites during the grading portion of Defendants’ development.” Plaintiffs’ only support for this allegation of desecration is Robinson’s deposition testimony that on 7 April 2008, she spoke with Tom Beebe (“Beebe”), a part owner of both Thorton Ventures and Urban Pipeline’s predecessor Carolina Construction, who told Robinson that he “personally graded everything” “[o]n the left-hand side” or north side of Thorton Road.³ Plaintiffs contend that this statement by Beebe creates a genuine issue of material fact as to Defendants’

3. The exhibits on appeal show that Thorton Road is an east-west road that intersects United States Highway One in Wake County. Thornton Commons Drive intersects Thorton Road twice and forms a semi-circle, or “horseshoe shape,” on the north side (or “left-hand side” if one is travelling east from Highway One) of Thorton Road. The land inside Thorton Commons Drive is divided into four lots that roughly constitute four quadrants in the horseshoe. The southeast and southwest quadrants, labeled Lot 6 and Lot 7, respectively, abut the north side of Thorton Road and were developed by Thorton Ventures. Lot 4, which constitutes the northwest quadrant, was sold to Forest Creek in 2001; Lot 4, the lot on which the gravesite is located, does not abut Thorton Road.

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alleged desecration of the gravesite. We disagree. Certainly the existence of conduct by Defendants constituting grave desecration is a material fact. However, to maintain a genuine issue as to that fact, Plaintiffs must forecast substantial evidence of the existence of that fact. *Dobson*, 352 N.C. at 83, 530 S.E.2d at 835 (“A ‘genuine issue’ is one that can be maintained by substantial evidence.”). This Plaintiffs have not done. In our view, Beebe’s alleged statement, taken as true, does not serve as substantial evidence that Beebe, on behalf of one or both Defendants, graded the land where the gravesite is located.

Beebe’s statement that he graded the land on the “left-hand side” or north side of Thorton Road logically refers only to the land actually on the north side of Thorton Road and not to all land north of Thorton Road. As discussed above, the gravesite is located in Lot 4 (the northwest quadrant of the Thorton Commons Drive horseshoe), which is *north* of Thorton Road, but which does not abut *the north side* of Thorton Road. Between Lot 4 and Thorton Road is Lot 6, the southwest quadrant of the Thorton Commons Drive horseshoe, which was developed by Thorton Ventures.

This interpretation is substantially corroborated by Beebe’s own deposition testimony, in which Beebe asserted that (1) Thorton Ventures owned Lot 6 and Lot 7 (the southern quadrants of the Thorton Commons Drive horseshoe) and “hired someone to do the grading there”; (2) Lot 4 was sold to Forest Creek and Thorton Ventures “did not do any of the grading on [Lot] 4”; and (3) the grading on Lot 4 was done by Jones Brothers, a subcontractor working for Forest Creek’s contractor. Furthermore, Lynn Craig, a part-owner of Carolina Construction, testified in his deposition that Jones Brothers, not Carolina Construction, did the grading for the apartment complex on Lot 3 and Lot 4.

The entirety of the evidence in this case, including Beebe’s alleged statement that he graded the property on the “left-hand side” of Thorton Road, leads to the conclusion that Lot 4 was graded by a company hired indirectly by Forest Creek, the owner of Lot 4, and not by Defendants. With no evidence showing that Defendants graded the property on which the gravesite is located, or any evidence showing that Defendants desecrated the gravesite in some other way, we must conclude that Plaintiffs have failed to present substantial evidence showing a genuine issue as to the material fact of Defendants’ alleged desecration. Because an act of desecration by Defendants is an essential element of Plaintiffs’ claim, and because Plaintiffs have failed to

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raise a genuine issue as to the existence of that material fact, we conclude that the trial court properly granted summary judgment for Defendants. Accordingly, the order of the trial court is

AFFIRMED.

Chief Judge MARTIN and Judge THIGPEN concur.

STATE OF NORTH CAROLINA v. JIMMY WAYNE BANKS

No. COA10-935

(Filed 19 July 2011)

1. Motor Vehicles— felonious operation of motor vehicle to elude arrest—disjunctive jury instruction

The trial court's disjunctive jury instruction in a felonious operation of a motor vehicle to elude arrest case did not constitute error. While the jury may not have been unanimous as to which aggravating factors were present, it was unanimous in finding that defendant was guilty of felonious operation of a motor vehicle to elude arrest.

2. Motor Vehicles— felonious operation of motor vehicle to elude arrest—jury instruction—failure to define reckless driving

The trial court did not commit plain error in a felonious operation of a motor vehicle to elude arrest case by declining to define the N.C.G.S. § 20-141.5(b) aggravating factor of reckless driving in the jury instruction. Defendant failed to cite to any legal authority which specifically required this definition, the trial court properly charged the jury with the pattern jury instruction, and there was substantial evidence showing that defendant was guilty.

3. Sentencing— aggravating factors—negligent driving—motion to dismiss—reckless driving—driving with license revoked

The trial court did not commit prejudicial error in a felonious operation of a motor vehicle to elude arrest case by denying defendant's motion to dismiss the aggravating factor of negligent

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driving. The State was only required to present sufficient evidence of two of the factors, and defendant did not challenge the sufficiency of the evidence of the two aggravating factors of reckless driving or driving with a revoked driver's license.

Appeal by defendant from judgment entered 10 March 2010 by Judge James G. Bell in Superior Court, Johnston County. Heard in the Court of Appeals 26 January 2011.

Attorney General, Roy A. Cooper, III, by Vanessa N. Totten, Assistant Attorney General, for the State.

Peter Wood, for defendant-appellant.

STROUD, Judge.

Jimmy Wayne Banks (“defendant”) appeals from his conviction for felonious operation of a motor vehicle to elude arrest. For the following reasons, we find no error in defendant's trial.

On 2 November 2009, defendant was indicted for felony operation of a motor vehicle to elude arrest. Defendant was tried on this charge at the 8 March 2010 Criminal Session of Superior Court, Johnston County. At trial, the State's evidence tended to show that on 15 April 2009 Officer David Hildreth of the Johnston County Sheriff's Department observed defendant driving with a white left taillight instead of a red taillight, as required by North Carolina law. Officer Hildreth turned his patrol car around and followed defendant. When the two vehicles reached an intersection, defendant suddenly changed from the middle lane, which was not a turning lane, to the right turn lane. Defendant then stopped for about thirty seconds, even though the stop light at the intersection was showing a green arrow for his lane. After defendant turned right at the intersection, Officer Hildreth turned on his blue lights and siren to initiate a stop of defendant's vehicle. Officer Hildreth followed defendant as he made an immediate right turn into a parking lot located at the corner of the intersection. When Officer Hildreth exited his vehicle to approach the stopped vehicle, defendant suddenly drove away.

Officer Hildreth followed as defendant circled the parking lot by exiting the lot, without stopping, onto one road and then re-entering the lot from an entrance on the other road. Officer Hildreth testified that at one point defendant was driving on the left side of the road in the opposing traffic lanes. He estimated that defendant was going thirty to thirty-five miles per hour through the parking lot and that

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there was a person in the parking lot during the chase. After exiting the parking lot for the final time, defendant drove through a red stop-light at thirty to forty miles per hour. Then, at a sharp turn further down the road, defendant lost control of the vehicle. It swerved onto the left side of the road, into oncoming traffic, and flipped over before coming to a stop. Officer Hildreth arrested defendant at the scene. The State presented evidence that at the time of the incident defendant was driving while his license was revoked and that the damage to defendant's car was in excess of \$1,000. Defendant did not present any evidence at trial.

The trial court instructed the jury on both misdemeanor and felony operation of a motor vehicle to elude arrest. On 9 March 2009, the jury found defendant guilty of felonious operation of a motor vehicle to elude arrest. Subsequent to trial, defendant pled guilty to attaining the status of habitual felon on 10 March 2010 and pursuant to that plea agreement, the trial court entered judgment, sentencing defendant to a term of of 80 to 105 months imprisonment. Defendant gave notice of appeal in open court.

Defendant contends the trial court failed to properly instruct the jury in two respects: (1) by giving a disjunctive jury instruction which allowed the jury to return a felony conviction without a unanimous verdict; and (2) by declining to define the aggravating factor of reckless driving in the jury instruction. Defendant argues for a plain error analysis of his disjunctive jury instruction argument. We have noted that generally a "defendant's failure to object to an alleged error of the trial court precludes the defendant from raising the error on appeal" but

"[w]here, however, the error violates [a] defendant's right to a trial by a jury of twelve, [a] defendant's failure to object is not fatal to his right to raise the question on appeal." *Id.*; see also *State v. Brewer*, 171 N.C. App. 686, 691, 615 S.E.2d 360, 363 (2005) (quoting *State v. Wiggins*, 161 N.C. App. 583, 592, 589 S.E.2d 402, 409 (2003), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 34 (2004)), *disc. review denied*, 360 N.C. 484, 632 S.E.2d 493 (2006) (stating that "[v]iolations of constitutional rights, such as the right to a unanimous verdict . . . are not waived by the failure to object at trial and may be raised for the first time on appeal.'").

State v. Johnson, 183 N.C. App. 576, 582, 646 S.E.2d 123, 127 (2007). Accordingly, defendant's argument is properly before us.

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[1] In addressing the substance of defendant's argument, we note that a violation of N.C. Gen. Stat. § 20-141.5 is enhanced from a Class 1 misdemeanor to a Class H felony when at least two of the eight aggravating factors listed in subsection (b) are present:

(a) 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. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.

(b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.

(1) Speeding in excess of 15 miles per hour over the legal speed limit.

(2) Gross impairment of the person's faculties while driving due to:

a. Consumption of an impairing substance; or

b. A blood alcohol concentration of 0.14 or more within a relevant time after the driving.

(3) Reckless driving as proscribed by G.S. 20-140.

(4) Negligent driving leading to an accident causing:

a. Property damage in excess of one thousand dollars (\$ 1,000); or

b. Personal injury.

(5) Driving when the person's drivers license is revoked.

(6) Driving in excess of the posted speed limit, during the days and hours when the posted limit is in effect, on school property or in an area designated as a school zone pursuant to G.S. 20-141.1, or in a highway work zone as defined in G.S. 20-141(j2).

(7) Passing a stopped school bus as proscribed by G.S. 20-217.

(8) Driving with a child under 12 years of age in the vehicle.

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N.C. Gen. Stat. § 20-141.5 (2009). As noted above, the trial court instructed the jury on both misdemeanor and felony operation of a motor vehicle to elude arrest, stating that in order to find defendant guilty of the felony, the jury had to find at least two of the aggravating factors listed in N.C. Gen. Stat. § 20-141.5, specifically: reckless driving; negligent driving leading to an accident causing property damage in excess of \$1,000; and driving while defendant's driver's license was revoked. Defendant asserts that the trial court erred by giving an instruction which allowed the jury to return a felony conviction if it found that at least two of the three aggravating factors submitted were present. He argues that the trial court should have instead required the jury to be unanimous as to which aggravating factors were present before it could return a felony conviction.

A disjunctive jury instruction is fatally ambiguous when it is "impossible to determine whether the jury unanimously found that the defendant committed one particular offense." *State v. Bell*, 359 N.C. 1, 29, 603 S.E.2d 93, 112-13 (2004) (citation and quotation marks omitted), *cert denied*, 544 U.S. 1052, 161 L. Ed. 2d 1094 (2005). However, "if the trial court merely instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied." *Id.* at 30, 603 S.E.2d at 113 (citation, emphasis, and quotation marks omitted). In *State v. Funchess*, 141 N.C. App. 302, 540 S.E.2d 435 (2000), we considered whether a disjunctive jury instruction on the aggravating factors of N.C. Gen. Stat. § 20-141.5 violated the North Carolina Constitution's requirement that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." *Id.* at 307, 540 S.E.2d at 438 (quoting N.C. Const. Art. I, § 24). Specifically, the defendant in *Funchess* argued "that the jury should have been required to agree on which of those eight particular factors [of N.C. Gen. Stat. § 20-141.5(b)] were present in his case." *Id.* In rejecting the defendant's argument, we concluded that in that context, a disjunctive jury instruction was acceptable because the aggravating factors are "not separate offenses . . . but are merely alternate ways of enhancing the punishment." *Id.* at 309, 540 S.E.2d at 439. We explained that the jury had still unanimously convicted defendant of "a single wrong: attempting to flee in a motor vehicle from a law enforcement officer in the lawful performance of his duties," even though it may not have been unanimous as to which aggravating factors were present during the offense. *Id.* In applying *Funchess*, to the present case, we note that while the jury may not have been unani-

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mous as to which aggravating factors were present, it was unanimous in finding that defendant was guilty of felonious operation of a motor vehicle to elude arrest. Therefore, we conclude that the trial court's disjunctive jury instruction did not constitute error.

[2] Defendant also contends that the trial court committed plain error by declining to define the N.C. Gen. Stat. § 20-141.5(b) aggravating factor of reckless driving in the jury instruction. He asserts that, even though he was not specifically charged with the offense of reckless driving under N.C. Gen. Stat. § 20-140, the trial court was obligated to include the definition from that statute in the jury instruction. Because defendant's argument does not specifically raise any claim of a violation of his constitutional rights and he did not object to the jury instructions at trial, we review for plain error. *See* N.C.R. App. P. 10(a)(4). In order to constitute plain error, an error must be "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

We considered defendant's argument in *State v. Wood*, 174 N.C. App. 790, 622 S.E.2d 120 (2005). The defendant in *Wood* argued that the trial court erred by not defining certain aggravating factors, including reckless driving, in the jury instruction for the charge of felony operation of a motor vehicle to elude arrest. *Id.* at 793-94, 622 S.E.2d at 122-23. In concluding that the defendant "failed to meet her burden under plain error review to warrant a new trial", we noted that the "[d]efendant fail[ed] to cite to any case law or statute which require[d] the trial court to define the [aggravating factors] during its jury instruction[;]" "the trial court properly charged the jury using the language of the pattern jury instruction which stated it had to find at least two of the three aggravating factors set out in the bill of indictment were present in order to convict defendant of felonious speeding to elude arrest[;]" and "substantial evidence was presented which tended to show" that the defendant was guilty of felonious operation of a motor vehicle to elude arrest. *Id.* at 794, 622 S.E.2d at 123. Similarly, here (1) defendant cites to no legal authority which specifically requires a trial judge to include the statutory definition of reckless driving from N.C. Gen. Stat. § 20-140 in an instruction for felony operation of a motor vehicle to elude arrest under N.C. Gen. Stat. § 20-141.5; (2) the trial court properly charged the jury using the language of the pattern jury instruction, N.C.P.I. Crim. 270.54A; and (3) there was substantial evidence showing that defendant was guilty of felonious operation of a motor vehicle to elude arrest, as defendant,

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in his attempt to flee from Officer Hildreth, was driving in the opposing lane of traffic and ran a red light. Evidence was also presented that defendant caused more than \$1,000 damage to his vehicle and was driving with a revoked driver's license. Therefore, pursuant to this Court's holding in *Wood*, we overrule defendant's contention that the trial court's instruction constituted plain error.

[3] Defendant's final issue on appeal is that the trial court committed prejudicial error when it denied his motion to dismiss the aggravating factor of negligent driving for insufficiency of the evidence. We have stated that

[e]vidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding of each essential element of the offense charged, and of defendant[] being the perpetrator of such offense.

State v. Bagley, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations, quotation marks, and brackets omitted). Defendant contends damage to his own property is outside the scope of negligent driving as contemplated by N.C. Gen. Stat. § 20-141.5(b)(4)(a) and, as that was the only damage caused during the incident, that aggravating factor should not have been presented to the jury. Nevertheless, in order to survive a motion to dismiss a felony charge under this statute for insufficiency of evidence, the State need not present sufficient evidence of every aggravating factor in the instruction; it need only present sufficient evidence of two of the factors. *State v. Graves*, — N.C. App. —, —, 690 S.E.2d 545, 547-48 (2010), *cert. denied*, — N.C. —, 707 S.E.2d 233 (2011). Defendant does not challenge the sufficiency of the evidence of the remaining two aggravating factors, reckless driving or driving with a revoked driver's license, and the record indicates there was substantial evidence of both. Therefore, we decline to address the merits of defendant's argument and overrule this issue on appeal. Accordingly, we find no error in defendant's trial.

NO ERROR.

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

BRAUN v. TRUST DEV. GRP., LLC

[213 N.C. App. 606 (2011)]

TODD BRAUN, PLAINTIFF v. TRUST DEVELOPMENT GROUP, LLC, AND PURSUIT
DEVELOPMENT GROUP TWO, LLC, DEFENDANTS

No. COA10-1479

(Filed 19 July 2011)

1. Appeal and Error— interlocutory orders and appeals—disqualification of counsel

Although an order granting a motion to disqualify counsel was interlocutory, it affected a substantial right and was addressed on appeal.

2. Attorneys— motion to disqualify—necessary witnesses

The trial court did not abuse its discretion by granting defendants' motion to disqualify plaintiff's attorneys where those attorneys were necessary witnesses on a contested issue.

Appeal by plaintiff from order entered 18 August 2010 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 April 2011.

Bray & Long, PLLC, by William P. Bray and Jeffrey A. Long, for plaintiff-appellant.

Smith Parsons, PLLC, by Steven L. Smith, for defendants-appellees.

HUNTER, Robert C., Judge.

Todd Braun ("plaintiff") appeals from the trial court's 18 August 2010 order disqualifying plaintiff's counsel. After careful review, we affirm.

Background

On 3 September 2008, plaintiff entered into two contractual agreements with defendant Trust Development Group, LLC ("Trust")—a residential lease agreement and a purchase agreement. Pursuant to the terms of these agreements, plaintiff was to rent a condominium owned by Trust in Charlotte, North Carolina and then purchase the condominium within 18 months. Plaintiff provided a \$140,000.00 deposit upon execution of the purchase agreement.

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On 9 November 2009, plaintiff, through his attorneys at the Bray Law Firm, sent a letter to James M. Donnelly at Trust, stating that plaintiff no longer intended to purchase the condominium due to Trust's alleged breach of the lease and purchase agreements. Specifically, plaintiff claimed that Trust had not completed some areas of the condominium as it previously agreed to do, such as the rooftop terrace. Plaintiff requested that his rent be reduced and that Trust return his deposit, which it refused to do.

On 18 December 2009, plaintiff filed a complaint against Trust alleging, *inter alia*, breach of the lease and purchase agreements. Plaintiff sought return of the \$140,000.00 deposit. On 26 January 2010, plaintiff amended his complaint and added defendant Pursuit Development Group Two, LLC ("Pursuit Development") who purchased Trust's interest in the condominium.¹ On 1 February 2010, defendants filed an answer and counterclaim alleging, *inter alia*, that plaintiff had damaged the condominium and breached the lease agreement by failing to pay his rent, utilities, and pro rata share of the real estate taxes on the condominium. Defendants further alleged that plaintiff's "default under the Lease is deemed a default under the Purchase Agreement" Defendants sought specific performance of the purchase agreement.

On 15 March 2010, the parties signed a settlement agreement, which provided that plaintiff would purchase the condominium at the price stated in the purchase agreement by 30 April 2010. Defendants agreed to provide, *inter alia*, architectural plans and construction permits pertaining to the rooftop terrace by 26 April 2010. The settlement agreement provided that it would be deemed null and void if plaintiff failed to purchase the condominium by 30 April 2010 or if defendants failed to provide the documentation related to the rooftop terrace.

After the settlement agreement was signed and prior to 30 April 2010, plaintiff's attorneys, William P. Bray ("Mr. Bray") and Jeffrey A. Long ("Mr. Long"), communicated with defendants' counsel, Jackson N. Steele ("Mr. Steele") and Adam W. Foodman ("Mr. Foodman"), on numerous occasions via telephone and email concerning plaintiff's financing difficulties. Plaintiff's attorneys acknowledged that there was no financing contingency in the settlement agreement and requested an extension of the 30 April 2010 deadline; however, it appears from the record that no agreement was reached prior to 30 April 2010.

1. Trust and Pursuit are collectively referred to as "defendants."

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Plaintiff did not close on 30 April 2010, but on that date, Mr. Long sent Mr. Steele a letter stating that defendants had not complied with the settlement agreement because they did not provide plaintiff with the documents pertaining to the rooftop terrace. Plaintiff claimed that this “material breach” rendered the settlement agreement null and void. On 7 June 2010, the trial court, upon consent of the parties, entered an order allowing plaintiff to amend his complaint. On that same day, plaintiff filed an amended complaint stating that defendants had violated the settlement agreement. Plaintiff again sought the return of his \$140,000.00 deposit.

On 14 June 2010, defendants filed a consent order for substitution of counsel in which they substituted Steven L. Smith for Mr. Steele. On 25 June 2010, defendants filed an amended answer and counterclaim alleging, *inter alia*, that plaintiff “anticipatorily repudiated” the settlement agreement when his counsel stated that plaintiff “could not finance the closing of the real estate purchase on April 30, 2010,” thereby “excusing” defendants of the duty to provide the documents pertaining to the rooftop terrace.

On 1 July 2010, defendants filed a motion to disqualify plaintiff’s counsel. Defendants claimed that “[t]he testimony of Jeffrey A. Long and William P. Bray relate to a contested issue of Plaintiff’s anticipatory repudiation of the Settlement Agreement” because Mr. Bray and Mr. Long communicated to defendants’ attorneys on multiple occasions that plaintiff would be unable to close on the 30 April 2010 deadline. Defendants asserted that they intended to call Mr. Bray and Mr. Long as witnesses at trial. On 18 August 2010, the trial court granted defendants’ motion to disqualify plaintiff’s counsel, determining that, *inter alia*: (1) “Mr. Bray and Mr. Long are likely to be necessary witnesses to explain their communication and conduct with Mr. Steele and Mr. Foodman[,]” and (2) “Mr. Bray and Mr. Long are likely to be necessary witnesses to lay a foundation for their written and electronic communications with opposing counsel.” Plaintiff timely appealed from this order.

Interlocutory Nature of Appeal

[1] Plaintiff appeals from an interlocutory order of the trial court. Our courts have consistently held “‘that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment.’” *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207,

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240 S.E.2d 338, 343 (1978) (quoting *Consumers Power v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974)). “Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment.” *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990).

Our Supreme Court has held that an order granting a motion to disqualify counsel affects a substantial right because it

has immediate and irreparable consequences for both the disqualified attorney and the individual who hired the attorney. The attorney is irreparably deprived of exercising his right to represent a client. The client, likewise, is irreparably deprived of exercising the right to be represented by counsel of the client’s choice. Neither deprivation can be adequately redressed by a later appeal of a final judgment adverse to the client.

Travco Hotels, Inc. v. Piedmont Natural Gas Co., Inc., 332 N.C. 288, 293, 420 S.E.2d 426, 429 (1992); accord *Goldston*, 326 N.C. at 727, 392 S.E.2d at 737. Based on the reasoning espoused by our Supreme Court, we will address the merits of plaintiff’s interlocutory appeal as a substantial right is affected.

Discussion

[2] The sole issue on appeal is whether the trial court erred in granting defendants’ motion to disqualify plaintiff’s attorneys. “Decisions regarding whether to disqualify counsel are within the discretion of the trial judge and, absent an abuse of discretion, a trial judge’s ruling on a motion to disqualify will not be disturbed on appeal.” *Travco*, 332 N.C. at 295, 420 S.E.2d at 430.

Rule 3.7 of the North Carolina Rules of Professional Conduct states:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.

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Rules of Prof. Conduct Rule 3.7(a) (2009); *see Cunningham v. Sams*, 161 N.C. App. 295, 297-98, 588 S.E.2d 484, 486-87 (2003) (citing Rule 3.7 as the basis for disqualifying trial counsel).

Plaintiff in this case does not specifically argue that any of the three exceptions to Rule 3.7 applies. Plaintiff argues that (1) his attorneys should not have been disqualified because there was no basis for defendants' anticipatory repudiation defense, and (2) the testimony of his attorneys at trial would be barred by Rule 408 of the North Carolina Rules of Evidence because the communications were attempts to settle a dispute. Although plaintiff spends a significant portion of his brief arguing the merits of his claim for breach of the settlement agreement and refuting defendants' claim of anticipatory repudiation, it is not the task of this Court to consider whether any of the claims involved have merit, nor was it the task of the trial court. Likewise, whether the attorneys' testimony is barred by Rule 408 as an attempt to settle a dispute is not a matter for our consideration. Evidentiary matters are properly brought forth at trial or in a motion *in limine*.² Our task is limited to determining whether the trial court abused its discretion in applying the canons of Rule 3.7. If plaintiff's attorneys are likely to be necessary witnesses on a contested issue, then they were properly disqualified pursuant to Rule 3.7.

The trial court in this case determined that Mr. Bray and Mr. Long were necessary witnesses on the issue of plaintiff's alleged anticipatory repudiation, a contested matter in this case. The trial court then continued the trial for a minimum of 90 days and ordered plaintiff to obtain new counsel within 30 days. We find no abuse of discretion in the trial court's determination.

Defendants' chief defense to plaintiff's claim that defendants breached the settlement agreement is anticipatory repudiation. This defense is based solely on the communications between plaintiff's and defendants' counsel. Defendants argue that the communications reveal that plaintiff never intended to close on the condominium on 30 April 2010, and, therefore, they were not required to provide the documents related to the rooftop terrace. As the trial court stated, the testimony of plaintiff's counsel is essential "to lay a foundation for their written and electronic communications with opposing counsel[,] to "explain" those communications, and to "explain their knowledge concerning the loan being sought by Plaintiff to purchase the property" We see no abuse of discretion in the trial court's reasoning.

2. The trial court did not rule on the admissibility of the attorneys' testimony at trial.

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In sum, we hold that plaintiff's attorneys are necessary witnesses in this case on a contested issue. Consequently, we hold that the trial court did not err in granting defendants' motion to disqualify.

Affirmed.

Judges BRYANT and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. DONALD O'NEAL FLOYD

No. COA10-1098

(Filed 19 July 2011)

Probation and Parole— activation of sentence—failure to show willful violation by failing to pay costs

The trial court's judgment revoking defendant's probation and activating his suspended sentence for failure to register as a sex offender was vacated. The trial court failed to make findings of fact that showed it considered defendant's evidence before concluding he willfully violated his probation by failing to pay the cost of his sexual abuse treatment program. Under revised N.C.G.S. § 15A-1344(a), a court may only revoke probation if a defendant commits a criminal offense or absconds.

Appeal by defendant from judgment entered 18 March 2010 by Judge Laura J. Bridges in Buncombe County Superior Court. Heard in the Court of Appeals 23 February 2011.

Faith S. Bushnaq for defendant.

Attorney General Roy Cooper, by Special Deputy Attorney General Ted R. Williams, for the State.

ELMORE, Judge.

Donald O. Floyd (defendant) appeals from a judgment revoking probation and activating his suspended sentence. After careful consideration, we vacate the judgment.

On 2 April 2007, defendant pled guilty to failing to register as a sex offender. He had a prior record level of 2, and the trial court imposed an intermediate punishment of fifteen to eighteen months' imprisonment, suspended subject to thirty-six months of supervised

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probation. The trial court imposed several special conditions of probation, including special condition number 5, which required that defendant “[p]articipate in a sexual abuse treatment program approved by the supervising officer and complete the same to the full satisfaction of the treatment provider. . . . Program participation is defined as attendance at all meetings, prompt payment of fees, . . . and progress toward reasonable treatment goals.” Defendant was also ordered to pay the clerk \$750.50 in court costs and fines. Pursuant to the judgment, the Division of Community Corrections ordered defendant to pay \$54.00 per month to the Clerk of Superior Court, beginning on 2 June 2007 and continuing until he had remitted a total amount of \$750.50.

On 14 January 2010, defendant’s probation officer filed a violation report, alleging that defendant had willfully violated two conditions of his probation by failing to pay anything towards his court costs and fines or his monthly probation supervision fee. Defendant was in arrears of \$1,680.50. On 4 February 2010, defendant filed an affidavit of indigency, listing one dependent and a monthly income of \$200.00 from food stamps. On 15 February 2010, defendant’s probation officer filed another violation report. This report alleged that defendant willfully violated special condition number 5 of his probation by failing to participate in a sexual abuse treatment program.

On 18 March 2010, the trial court held a hearing on the two probation violation reports. Defendant and his probation officer, Todd Carter, testified. Carter testified that defendant had complied with all of the conditions of his probation except the monetary conditions. Defendant had attended twenty-seven of thirty sexual abuse treatment program classes, but had been barred from completing the program in October 2009 because he was behind in his payments for the program. It appears that defendant’s balance was approximately \$2,200.00 at the time of the hearing. Carter’s opinion was that defendant would complete the treatment program if he could pay for it.

When defendant was originally sentenced to probation, he was employed. However, he was laid off from that job. Later, he worked for a plumbing company. He worked there for ten or eleven months, until he was electrocuted on the job. Defendant suffered injuries and was out of work for a month as a result. Defendant also suffers from sciatica and bulging discs. Though the exact chronology of defendant’s employment history is unclear from the record, it appears that defendant only worked for a few weeks between 15 February 2008 and the hearing date. Defendant testified that he made \$10.00 per

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hour at the plumbing job, and he worked up to forty hours per week. Carter testified that he knew that defendant had looked for other jobs and “interviewed at several different places, but nothing came of it.” As of the hearing date, defendant had a job lined up as a driver for an airport car service. However, he had not actually begun working for the car service because the owner wanted to wait until after defendant’s hearing. Defendant explained, “He’s just kind of iffy about putting me on with me ending up in prison and him being short a driver.”

At the end of the hearing, the trial court found and concluded that defendant had willfully and without valid excuse violated the conditions of his probation before the expiration of the term of the probationary period. It revoked defendant’s probation and sentenced him to fifteen to eighteen months’ imprisonment. In the written judgment, the trial court found as fact that defendant had violated the condition set forth in the 15 February 2010 violation report. The judgment made no reference to the alleged violations contained in the 14 January 2010 violation report.

On appeal, defendant argues that he did not willfully violate special condition of probation number 5, as alleged in the 15 February 2010 violation report, which required him to participate in a sexual abuse treatment program. Without question, defendant satisfied all participation requirements except for the prompt payment of fees. Defendant argues that his nonpayment of the fees was not willful because he was unemployed following his electrocution, living on food stamps, and had, in good faith, attempted to obtain employment as demonstrated by securing the driving job shortly before his probation was revoked. We agree.

Probation revocation hearings are governed by N.C. Gen. Stat. § 15A-1345, which states, in relevant part:

Before revoking or extending probation, the court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. The notice, unless waived by the probationer, must be given at least 24 hours before the hearing. At the hearing, evidence against the probationer must be disclosed to him, and the probationer may appear and speak in his own behalf, may present relevant information, and may confront and cross-examine adverse witnesses

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unless the court finds good cause for not allowing confrontation. The probationer is entitled to be represented by counsel at the hearing and, if indigent, to have counsel appointed. Formal rules of evidence do not apply at the hearing, but the record or recollection of evidence or testimony introduced at the preliminary hearing on probation violation are inadmissible as evidence at the revocation hearing. When the violation alleged is the nonpayment of fine or costs, the issues and procedures at the hearing include those specified in G.S. 15A-1364 for response to nonpayment of fine.

N.C. Gen. Stat. § 15A-1345(e) (2009). Section 15A-1364 states, in relevant part, that, “unless the defendant shows inability to comply and that his nonpayment was not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment, the court may order the suspended sentence, if any, activated[.]” N.C. Gen. Stat. § 15A-1364(b) (2009). As explained in the official commentary, section 15A-1364 was “intended to respond to the demands of *Tate v. Short*, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1970), holding unconstitutional the imprisonment of a defendant who does not pay his fine because he is unable to.” N.C. Gen. Stat. § 15A-1364, cmt. (2009). Although the violation alleged in this case stemmed from a requirement that defendant attend a treatment program, the alleged violation itself was that defendant failed to pay the costs of the treatment program. Accordingly, we apply section 15A-1364.

A proceeding to revoke probation [is] often regarded as informal or summary, and the court is not bound by strict rules of evidence. An alleged violation by a defendant of a condition upon which his sentence is suspended need not be proven beyond a reasonable doubt. All that is required is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended. The findings of the judge, if supported by competent evidence, and his judgment based thereon are not reviewable on appeal, unless there is a manifest abuse of discretion.

Our Courts have continuously held that a suspended sentence may not be activated for failure to comply with a term of probation unless the defendant’s failure to comply is willful or without lawful excuse. [T]he burden of proof is upon the State to show that the defendant has violated one of the conditions of his probation.

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State v. Tennant, 141 N.C. App. 524, 526-27, 540 S.E.2d 807, 808 (2000) (quotations and citations omitted; alterations in original). However,

[i]n a probation revocation proceeding based upon [a] defendant's failure to pay a fine or restitution which was a condition of his probation[,] the burden is upon the defendant to "offer evidence of his inability to pay money according to the terms of the [probationary] judgment." *State v. Williamson*, 61 N.C. App. 531, 534, 301 S.E. 2d 423, 426 (1983); *see also* G.S. 15A-1345(e) and 15A-1364(b). . . . If [the] defendant fails to offer evidence of his inability to pay money in accordance with the terms of the probationary judgment, "then the evidence which establishes that [the] defendant has failed to make payments as required by the terms of the judgment is sufficient within itself to justify a finding by the judge that [the] defendant's failure to comply was without lawful excuse." *Id.*

State v. Jones, 78 N.C. App. 507, 509, 337 S.E.2d 195, 197 (1985). But, if "a defendant does put on evidence of his inability to pay, . . . he is entitled to have his evidence considered and evaluated by the trial court," and the trial court must "make findings of fact which clearly show that he did consider and did evaluate the defendant's evidence." *Id.* (quotations and citations omitted).

This Court has explained that, although trial judges have discretion in probation proceedings, that discretion "implies conscientious judgment, not arbitrary or willful action. It takes account of the law and the particular circumstances of the case, and is directed by the reason and conscience of the judge as to a just result." *State v. Hill*, 132 N.C. App. 209, 212, 510 S.E.2d 413, 415 (1999) (quoting *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967)). Thus, "fairness dictates that in some instances a defendant's probation should not be revoked because of circumstances beyond his control." *Id.*

Here, defendant presented evidence of his inability to pay the costs of his treatment program. He offered an affidavit of indigency, pledging that his sole income was \$200.00 in food stamps each month. He also testified that he had been unemployed since 2008, and that he had been electrocuted at his last job, which affected his ability to work. He and his probation officer both testified that he had searched for work, but that he had been unable to secure a job until *just before the probation revocation hearing*, which job he lost when he was incarcerated. His probation officer also testified that he believed that defendant would complete the treatment program if he could pay for

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it. The trial court made no finding of fact that defendant had no lawful excuse for his violation. *See id.* at 213, 154 S.E.2d at 415 (vacating and remanding a judgment revoking probation for failure to pay restitution after “the trial court failed to find as fact that [the] defendant did not have a lawful excuse for his violation”). Although a trial judge has considerable discretion in probation revocation hearings, it is not clear here that the trial court considered and evaluated defendant’s evidence or that the result was just.

Accordingly, we hold that the trial court erred by failing to make findings of fact that clearly show that the trial court did consider and did evaluate defendant’s evidence before concluding that defendant had willfully violated his probation by failing to pay the cost of his sexual abuse treatment program. We vacate the judgment below and remand for further proceedings.

As a final note, we observe that the General Assembly has passed “The Justice Reinvestment Act of 2011,” which will modify N.C. Gen. Stat. § 15A-1344 to eliminate a trial court’s ability to revoke probation when a defendant fails to pay a fee, fine, or cost. 2011 N.C. Sess. Laws 192, § 4. Under the revised § 15A-1344(a), a court may only revoke probation if the defendant commits a criminal offense or absconds. *Id.*, § 4.(b). The session law adds a new subsection to § 15A-1344 that allows a court to impose a ninety-day period of confinement for a probation violation other than committing a criminal offense or absconding. *Id.*, § 4.(c) (adding § 15A-1344(d2)). These revisions will apply to all probation violations occurring after 1 December 2011. *Id.*, § 4.(d).

Vacated and remanded.

Judges BRYANT and GEER concur.

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[213 N.C. App. 617 (2011)]

STATE OF NORTH CAROLINA v. CHARLES NATHANIEL BROWN, DEFENDANT

No. COA10-920

(Filed 19 July 2011)

Constitutional Law— effective assistance of counsel—no motion to suppress—evidence admissible

Defendant was not deprived of effective assistance of counsel where his attorney did not move to suppress evidence discovered as a result of a stop by law enforcement officers. Although defendant argued on appeal that the stop was unlawful, the totality of the circumstances established that the officers had reasonable suspicion to conduct an investigatory stop.

On certiorari allowed 31 December 2009 to review judgment entered on or about 23 February 2009 by Judge Arnold O. Jones, II, in Superior Court, Wayne County. Heard in the Court of Appeals 24 February 2011.

Attorney General, Roy A. Cooper, III, by Scott K. Beaver, Assistant Attorney General, for the State.

Richard E. Jester, for defendant-appellant.

STROUD, Judge.

Charles Nathaniel Brown (“defendant”) appeals from his conviction for carrying a concealed weapon, possession of a firearm by a convicted felon, and attaining the status of habitual felon. For the following reasons, we find no error in defendant’s trial.

On 6 October 2008, defendant was indicted on charges of carrying a concealed weapon, possession of a firearm by a convicted felon, and attaining the status of habitual felon. Defendant was tried on the charges at the 16 February 2009 Criminal Session of Superior Court, Wayne County. The State’s evidence presented at trial tended to show that on 11 January 2008, Officer James Serlick and Corporal Jeremy Sutton of the Goldsboro Police Department were on a special gang patrol in Goldsboro, North Carolina. At approximately 10 p.m., the officers observed a house that had a lot of foot traffic and vehicle traffic. Officer Serlick parked their vehicle in a church parking lot next to the house. They observed the house from about 50 yards away; there was a street light about 100 feet away. The officers were in an unmarked car and were wearing chains that displayed their

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badges. Officer Serlick was wearing a T-shirt that was plainly marked "Police." The officers observed defendant walk from the rear of the house to the front of their vehicle. Before defendant reached the driver's side door, Corporal Sutton and Officer Serlick got out of their vehicle. Defendant displayed several signs of nervousness and asked the officers for a cigarette. Officer Serlick asked defendant to place his hands on the car; defendant was also asked if he had a weapon on him. When defendant responded "yes[.]" Officer Serlick told him not to make any sudden movements. Officer Serlick then searched defendant and discovered a .45 caliber pistol in front of his waistband. Defendant was then placed under arrest. The State also presented evidence tending to show that defendant had been convicted of a number of felonies in the past. Defendant did not present any evidence at trial.

On 20 February 2009, the jury found defendant guilty of carrying a concealed weapon and possession of a firearm by a convicted felon. The trial court then conducted a second trial upon the habitual felon indictment, and the jury found defendant guilty of obtaining the status of habitual felon. The trial court entered judgment upon those verdicts and sentenced defendant to a term of 116 to 149 months imprisonment. Defendant filed a petition for writ of *certiorari* with this Court on 11 December 2009. Defendant's petition was allowed on 31 December 2009.

Defendant's sole argument on appeal is that his counsel at trial was ineffective in not moving to suppress evidence discovered as a result of the unlawful stop of his person by the officers, because the officers had no legally sufficient reason to stop and question him.

North Carolina has adopted the federal standard for ineffective assistance of counsel; this standard consists of a two-part test. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985).

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

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Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). Accordingly, we must determine whether defendant's counsel's failure to raise a motion to suppress evidence discovered as a result of the seizure of defendant's person amounted to ineffective assistance of counsel. *See id.*

Specifically, defendant contends that a motion to suppress should have been made by his trial counsel, as the State failed to present sufficient "specific and articulable facts" that would give the officers a reasonable suspicion that defendant was involved in criminal activity to justify the officers' stop of defendant and the resulting search of his person on the day in question. Defendant concludes that because the investigatory stop of him was unlawful, his trial counsel's failure to make a motion to suppress any evidence obtained as a result of that stop amounted to ineffective assistance of counsel and he should receive a new trial.

Our Supreme Court has stated that "the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *State v. Styles*, 362 N.C. 412, 423-24, 665 S.E.2d 438, 445 (2008) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)). This Court has further noted that

"Reasonable suspicion" requires that "[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). All the State is required to show is a "minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.'" *Id.* at 442, 446 S.E.2d at 70 (quoting *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)). A court must consider the totality of the circumstances in determining whether the officer possessed a reasonable and articulable suspicion to make an investigatory stop. *Id.* at 441, 446 S.E.2d at 70.

State v. Barnard, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007), affirmed by, 362 N.C. 244, 658 S.E.2d 643 (2008). "Reasonable suspicion is a 'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.'" *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)).

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Factors to consider in determining whether a reasonable suspicion that the defendant was involved in criminal activity to justify an investigatory stop of the defendant include the officer's knowledge of "an area's propensity toward criminal activity[.]" *State v. Clyburn*, 120 N.C. App. 377, 381, 462 S.E.2d 538, 541 (1995). Also, "nervousness [of defendant] is an appropriate factor to consider when determining whether a basis for a reasonable suspicion exists." *State v. McClendon*, 350 N.C. 630, 638, 517 S.E.2d 128, 134 (1999). This Court has considered 9:40 p.m. to be a late hour when determining whether there was a reasonable suspicion of criminal activity. *State v. Tillett*, 50 N.C. App. 520, 524, 274 S.E.2d 361, 364, *appeal dismissed*, 302 N.C. 633, 280 S.E.2d 448 (1981).

Here, the totality of the circumstances establishes that the officers had reasonable suspicion to conduct an investigatory stop of defendant. First, we note that the officers did not initially approach defendant; instead, the defendant approached the officers' car. Corporal Sutton testified that when defendant approached his vehicle he feared for his safety and that he wanted to get out of the car when defendant approached so that he would have a better defensive position if something happened. In fact, if defendant had not approached the officers, it appears unlikely that they would have had any interaction with him at all. In addition to defendant's approach to the officers' car, the area of the stop was known to the officers as being one prone to criminal activity and Corporal Sutton had made several drug arrests in the area. Corporal Sutton testified that he had previously made drug arrests in front of the house from which defendant came. In fact, the officers were at the location because they had noticed a lot of traffic on foot and in cars around the house. When defendant realized the individuals in the vehicle were police officers his "demeanor changed" and he appeared to the officer to be very nervous. Officer Serlick testified that defendant started to sweat, began stuttering, and would not talk very loud. The hour was late, and there was little light available for the officers to see defendant's actions. Therefore, viewed under the totality of the circumstances, a reasonable and cautious officer guided by his experience and training could form a reasonable suspicion that defendant was involved in criminal conduct. *See Barnard*, 184 N.C. App. at 29, 645 S.E.2d at 783. Accordingly, the officers acted lawfully when they made this brief investigative stop of defendant.¹

1. In his brief and reply brief, defendant also contends, in response to the State's argument on appeal that the officers did not seize defendant, that he was seized when the officer told him to put his hands on the hood of the car. However, this argument is

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After considering the evidence according to *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693, we hold that defendant was not prejudiced by the failure of his counsel to move to suppress the evidence of the seizure and find no error in defendant's trial.

NO ERROR.

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

STATE OF NORTH CAROLINA v. HEATHER MARIE STEPHENSON

No. COA10-1319

(Filed 19 July 2011)

1. Probation and Parole— activation of sentence—credit for time served

The trial court did not err in a probation revocation hearing by failing to give defendant credit against her active sentence for the time she spent at a faith-based rehabilitation program because it was not affiliated with or operated by either a State or local government agency as required by N.C.G.S. § 15-196.1.

2. Probation and Parole— probation revocation—findings of fact—willful and without valid excuse—drug addiction

The trial court did not abuse its discretion in a probation revocation hearing by allegedly failing to make proper findings that defendant violated the terms of her probation willfully and without valid excuse. Defendant offered no support for her assertion that drug addiction made her noncompliance with the terms of probation not willful or otherwise lawfully excused.

Appeal by defendant from judgment entered 1 July 2010 by Judge Eric L. Levinson in Gaston County Superior Court. Heard in the Court of Appeals 23 March 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

John T. Hall for defendant.

moot as we have already found that the officers had a reasonable suspicion to conduct a seizure of defendant's person.

STATE v. STEPHENSON

[213 N.C. App. 621 (2011)]

ELMORE, Judge.

On 4 November 2008, Heather Marie Stephenson (defendant) pled guilty to attempting to traffic in opiates and to forgery, and was sentenced to nineteen to twenty-three months' imprisonment. This sentence was suspended and defendant was placed on supervised probation for thirty-six months. The terms of defendant's probation included enrolling in and completing the Potter's House drug treatment program in Gaston County.

On 14 June 2010, a violation report alleged that defendant violated the terms of her probation by failing to complete the Potter's House program after being discharged for testing positive for cocaine, methadone, opiates, and oxycodone. After a hearing on 1 July 2010, the trial court revoked defendant's probation and activated her suspended sentence. Defendant was also given a pre-trial confinement credit of fifty-four days. Defendant now appeals.

[1] Defendant first argues that the trial court erred by failing to give defendant credit for the time she spent at Potter's House. She argues that she was entitled to credit against her active sentence under N.C. Gen. Stat. § 15-196.1. We disagree.

General Statute § 15-196.1 provides as follows:

The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post release supervision revocation hearing; Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject.

N.C. Gen. Stat. § 15-196.1 (2009).

"The language of section 15-196.1 manifests the legislature's intention that a defendant be credited with all time defendant was in custody and not at liberty as the result of the charge." *State v. Farris*, 336 N.C. 552, 556, 444 S.E.2d 182, 185 (1994). Our Supreme Court addressed section 15-196.1's application to rehabilitation programs in *State v. Hearst*, 356 N.C. 132, 567 S.E.2d 124 (2002). In *Hearst*, the

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defendant attended the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT) as a special condition of his probation. 356 N.C. at 133, 567 S.E.2d at 126. IMPACT is a residential drug rehabilitation facility operated by the Department of Correction. *Id.* at 135, 567 S.E.2d at 127. The Supreme Court held that the defendant was entitled to a credit against his suspended sentence for the time the defendant was in IMPACT. *Id.* at 141, 567 S.E.2d at 130. The Court focused its analysis on whether the “defendant’s time in IMPACT constitute[d] confinement under N.C.G.S. § 15-196.1[,]” and concluded that the “defendant was ‘in custody and not at liberty’ and therefore was ‘in confinement’ while at IMPACT.” *Id.* at 138, 567 S.E.2d at 128 (citing *Farris*, 336 N.C. at 556, 444 S.E.2d at 185).

Similarly, in *State v. Lutz*, this Court concluded that a defendant was entitled to credit for time spent in the DART-Cherry substance abuse program because he was “in confinement and not at liberty at DART-Cherry.” 177 N.C. App. 140, 144, 628 S.E.2d 34, 36 (2006). This Court’s analysis also focused on the conditions at DART-Cherry and whether they met the definition of “confinement.” *Id.* at 143, 628 S.E.2d at 36.

However, although the conditions at Potter’s House were not so different from those at IMPACT or DART-Cherry, the key difference between those programs and Potter’s House is that both IMPACT and DART-Cherry were operated by the Department of Correction. The analysis in *Hearst* and *Lutz* focused on the word “confinement” in the statute, rather than the phrase “in any State or local correctional, mental or other institution,” because both defendants were in a State institution, so that portion of the statute was not at issue in either case.

Like the trial court in this case, we conclude that “in any State or local correctional, mental or other institution” means an institution operated by State or local government. This reading is consistent with both the plain language of the statute and *Hearst* and *Lutz*. With respect to § 15-196.1, the words “State or local” modify “correctional, mental or other institution,” with “other institution” meaning an institution that is neither correctional nor mental. In our opinion, “other institution” does not mean an institution that is not a “State or local” institution.

We conclude that Potter’s House, which was an independent Christian faith-based rehabilitation program and not affiliated with or operated by either a State or local government agency, does not qualify as a “State or local correctional, mental or other institution” under

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§ 15-196.1. Accordingly, we conclude that the trial court properly declined to give defendant credit against her active sentence for the days she spent at Potter's House.

[2] Defendant also argues that the trial court erred by abusing its discretion when it failed to make complete proper findings that defendant violated the terms of her probation "willfully and without valid excuse." Defendant contends that the trial court abused its discretion because the transcript does not show that the trial judge found that defendant's violations were done willfully or without valid excuse. We disagree.

We review a trial court's decision to revoke probation only for "manifest abuse of discretion." *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000). To revoke a defendant's probation, the trial court need only find that the defendant has "willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967). "Additionally, once the State has presented competent evidence establishing a defendant's failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms." *State v. Terry*, 149 N.C. App. 434, 437-38, 562 S.E.2d 537, 540 (2002) (citation omitted). "If the trial court is then reasonably satisfied that the defendant has violated a condition upon which a prior sentence was suspended, it may within its sound discretion revoke the probation." *Id.* at 438, 562 S.E.2d at 540 (citation omitted).

Here, defendant contends that sufficient evidence was presented in the record to show that she was unable to comply with the conditions of her probation and satisfactorily complete the drug treatment program at Potter's House because she is an addict. However, defendant offers no support for her assertion that drug addiction makes her noncompliance with the terms of probation not willful or is otherwise a lawful excuse. We addressed this issue in an unpublished opinion, concluding that the "[d]efendant's explanation [that] he was addicted to drugs is not a lawful excuse for his probation violation." *State v. Green*, No. COA 04-1403, 2005 N.C. App. LEXIS 1241, *4 (filed 5 July 2005) (unpublished). We apply the same rule here and conclude that defendant's explanation that she was addicted to drugs was not a lawful excuse for her probation violation.

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We also conclude that the trial court's findings sufficiently show that defendant violated her probation "willfully and without valid excuse." The probation violation report alleged that defendant violated the condition that she enroll and complete the Potter's House program when she was discharged from the program for testing positive for cocaine, methadone, opiates, and oxycodone. At the 1 July 2010 hearing for this probation violation report, defendant admitted to the alleged violation. Under the "Findings" heading in the judgment, the trial court found that defendant was charged with having violated a specific condition of her probation; that defendant waived a violation hearing and admitted she violated a condition of her probation; and that each violation is, in and of itself, a sufficient basis upon which the trial court should revoke probation and activate the suspended sentence. Therefore, the trial court made proper findings to support revoking defendant's probation.

Accordingly, the trial court was within its discretion to find the violations to be willful and without lawful excuse, and we reject defendant's argument that the trial judge erred by activating her suspended sentence. We affirm the judgment of the trial court.

Affirmed.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA v. KIM ANTONIO GRIFFIN

No. COA10-1274

(Filed 19 July 2011)

**1. False Pretense— obtaining property by false pretenses—
motion to dismiss—sufficiency of evidence—circumstantial
evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of obtaining property by false pretenses. Every hypothesis of innocence need not be ruled out in order to conclude that the circumstantial evidence was sufficient for a reasonable person to infer that defendant was the person who used the stolen credit card shortly after he stole it.

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2. Indictment and Information— habitual felon—notice

The trial court had subject matter jurisdiction over a habitual felon indictment. The indictment was sufficient to give defendant notice of the basis of the habitual felon indictment when it referenced the case number, date, and county of a prior conviction.

Appeal by defendant from judgment entered 27 May 2010 by Judge W. Erwin Spainhour in Forsyth County Superior Court. Heard in the Court of Appeals 13 April 2011.

Attorney General Roy Cooper, by Assistant Attorney General Richard A. Graham, for the State.

Leslie C. Rawls, for defendant-appellant.

STEELMAN, Judge.

Where the State presented circumstantial evidence that defendant obtained property by false pretense, the trial court did not err in denying defendant's motion to dismiss for insufficiency of the evidence. Where the indictment for habitual felon was sufficient to provide defendant with notice of the offense charged, the trial court had subject matter jurisdiction.

I. Factual and Procedural Background

On 15 January 2009 around 9:00 a.m., defendant went to Allied Roofing in Kernersville and asked the office manager, Kathryn Beckham, for a job application. 30 to 45 minutes after defendant left, Ms. Beckham noticed that her purse was missing. A surveillance video showed defendant taking Ms. Beckham's purse from behind her desk at 9:06, while she had left her office for a moment. The purse contained 8 to 10 personal and business credit cards, 2 debit cards, 500 dollars worth of jewelry, and some cash. That same day, at 9:30 a.m., one of Ms. Beckham's credit cards was used to purchase a computer for \$371.49 at a Wal-mart 3.4 miles away from Allied Roofing. Ms. Beckham testified that the credit card used at Wal-mart belonged to her, that she did not use the credit card on 15 January 2009, and that she did not authorize anyone else to use it.

On 6 July 2009, defendant was indicted for the felonies of larceny from the person and obtaining property by false pretense arising out of these events. Defendant was also indicted for being an habitual felon. On 27 May 2010, a jury found defendant guilty of misdemeanor larceny and obtaining property by false pretense. Defendant pled

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guilty to being an habitual felon and also the unrelated charges of attempted obtaining property by false pretense, possession of a stolen motor vehicle, and felony fleeing to elude arrest. Pursuant to the plea agreement, all charges were to be consolidated into one judgment for a Class C Felony. The trial court found defendant to be a level VI for felony structured sentencing, and sentenced defendant to an active term of 150 to 189 months imprisonment from the presumptive range of sentences.

Defendant appeals.

II. Denial of Defendant's Motion to Dismiss

[1] In his first argument, defendant contends that the trial court erred when it denied defendant's motion to dismiss the charge of obtaining property by false pretense based upon the insufficiency of the evidence. We disagree.

A. Standard of Review

Denial of a motion to dismiss is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). A motion to dismiss is properly denied if there is substantial evidence of each element of the offense charged and of the defendant's being the perpetrator of the offense. *State v. Williams*, 363 N.C. 689, 705-06, 686 S.E.2d 493, 504 (2009), *cert. denied*, — U.S. —, 178 L. Ed. 2d 90 (2010). Substantial evidence is evidence that a reasonable person might consider sufficient to support a conclusion. *Id.* at 706, 686 S.E.2d at 504.

When considering the sufficiency of the evidence, “the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.” *Id.* at 705, 686 S.E.2d at 504 (quoting *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004)). Moreover, a court's review of the sufficiency of the evidence is the same whether the evidence is circumstantial or direct. *State v. Garcia*, 358 N.C. 382, 413, 597 S.E.2d 724, 746 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). “Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *State v. Taylor*, 337 N.C. 597, 604, 447 S.E.2d 360, 365 (1994) (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)). It is for the jury to weigh the evidence. *Thomas v. Morgan*, 262 N.C. 292, 295, 136 S.E.2d 700, 702 (1964).

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B. Analysis

Defendant argues that the State failed to establish that he was the perpetrator of the crime of obtaining property by false pretense. We hold that there was sufficient circumstantial evidence to permit a reasonable person to conclude that defendant was the perpetrator.

First, the surveillance video established that defendant took a purse containing Ms. Beckham's credit card at 9:06 a.m. Second, that credit card was used at 9:30 a.m. to purchase a laptop computer at Wal-mart, located only 3.4 miles from the scene of the theft. Third, the State presented evidence under Rule 404(b) of the North Carolina Rules of Evidence showing that defendant was involved in a similar crime.¹ Defendant speculates that it is possible that another person could have used the credit card. However, we need not rule out every hypothesis of innocence to conclude that the circumstantial evidence is sufficient for a reasonable person to infer that defendant was the person who used the stolen credit card shortly after he stole it. *See Taylor*, 337 N.C. at 604, 447 S.E.2d at 365.

This argument is without merit.

III. Habitual Felon Indictment

[2] In his second argument, defendant contends that the trial court lacked subject matter jurisdiction over the habitual felon indictment because the indictment did not set forth the correct offense name of the third alleged offense. We disagree.

A. Standard of Review

Questions of subject matter jurisdiction may be raised for the first time on appeal. *State v. Frink*, 177 N.C. App. 144, 147, 627 S.E.2d 472, 473 (2006). The trial court does not acquire subject matter jurisdiction over an indictment when it is fatally defective. *Frink*, 177 N.C. App. at 146, 627 S.E.2d at 473. The sufficiency of an indictment is reviewed *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009) *appeal dismissed, disc. review denied*, 363 N.C. 586, 683 S.E.2d 215 (2009).

B. Analysis

An indictment is not facially invalid as long as it clearly sets forth the elements of the offense charged so that a person of common

1. Defendant does not challenge the admission of the Rule 404(b) evidence on appeal.

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understanding would be notified of the charges against him. *McKoy*, 196 N.C. App. at 656, 675 S.E.2d at 411. A judgment based on an allegedly invalid indictment “should not be set aside based on hyper-technical arguments.” *Id.* at 653-54, 675 S.E.2d at 409 (holding that the use of the victim’s initials in the indictment was sufficient to notify the defendant that he was charged with committing a crime against “another person”); *See State v. Bell*, 311 N.C. 131, 138, 316 S.E.2d 611, 615 (1984) (holding that indictments for rape were sufficient although they did not specifically state that the victims were females, especially because the defendant’s argument gave no indication of how he was prejudiced by the omission).

Defendant claims that the habitual felon indictment in the instant case was defective. The indictment describing one of his prior felony convictions used the phrase “Possess Stolen Motor Vehicle,” rather than the word “possession,” which is the word used in the statute defining the offense. N.C. Gen. Stat. § 20-106. We hold that defendant’s argument is “hyper-technical” in nature. The indictment was sufficient to notify defendant of the elements of the offense charged. Stating that a defendant *possessed* a stolen vehicle conveys exactly the same meaning as saying that a defendant *was in possession of* a stolen vehicle. Therefore, the indictment was sufficient to give defendant notice of the basis of the habitual felon indictment. Moreover, the indictment also referenced the case number, date, and county of the prior conviction. This additional information would be sufficient to allow a person of common understanding to comprehend which felony conviction was being referenced even if the language describing the offense had been unclear.

This argument is without merit.

NO ERROR.

Judges STEPHENS and HUNTER, ROBERT N. JR. concur.

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[213 N.C. App. 630 (2011)]

STATE OF NORTH CAROLINA v. PATRICK LEE WHITLEY

No. COA10-1283

(Filed 19 July 2011)

1. Appeal and Error— preservation of issues—failure to make motion to dismiss at end of evidence

The issue of whether the trial court erred by not dismissing a charge for insufficient evidence was not addressed on appeal where defendant did not make a motion to dismiss at the close of all the evidence.

2. Evidence— prior inconsistent statements—not prejudicial

Defendant’s argument that introduction of a prior inconsistent statement was prejudicial was overruled. There was no possibility of a different result without testimony about a witness’s previous statement.

3. Burglary and Unlawful Breaking or Entering— attempted— instructions—failure to define larceny

Following precedent, there was no error where the trial court failed to define “larceny” in the instructions in an attempted breaking or entering prosecution.

Appeal by defendant from judgment entered on or about 14 May 2010 by Judge Robert F. Johnson in Superior Court, Durham County. Heard in the Court of Appeals on 24 March 2011.

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

Bryan Gates, for defendant-appellant.

STROUD, Judge.

Defendant appeals his conviction for attempted felonious breaking or entering. For the following reasons, we find no error.

I. Background

The State’s evidence tended to show that around 11:00 a.m. on 30 September 2009, Ms. Ana Lopez was in her home when she heard a noise coming from her bedroom window. Ms. Lopez looked out of the window and saw a black man wearing a black shirt and jeans with a white cloth on his head and “puffs[] or pigtails.” Ms. Lopez hit the

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wall or window to scare the man outside, and he ran away. Ms. Lopez called the police.

Deputy Wesley Brown of the Durham County Sheriff's Office and Officer James Muehlbach of the City of Durham Police Department responded to Ms. Lopez's call; Ms. Lopez described the suspect as a black male wearing a black shirt, jeans, and a "do-rag" with "two puffy ponytails." Officer Muehlbach recognized the description as similar to that of defendant, with whom he had previously interacted. Deputy Brown went to Ms. Lopez's residence. Officer Muehlbach proceeded to defendant's residence. Officer Muehlbach found defendant at his home wearing jeans and a white shirt with "two big puffy ponytails[.]" Officer Muehlbach searched defendant and found a white do-rag and latex gloves in defendant's pocket. Ms. Lopez identified defendant as the man outside her window.

Defendant was indicted for attempted felonious breaking or entering, attempted larceny after breaking or entering, and obtaining the status of habitual felon. The trial court dismissed the charge of attempted larceny after breaking or entering. The jury found defendant guilty of attempted felonious breaking or entering. Defendant pled guilty to obtaining the status of habitual felon. Defendant was determined to have a prior record level of VI and was sentenced for both convictions to 113 to 145 months imprisonment. Defendant appeals.

II. Motion to Dismiss

[1] Defendant first argues that the trial court failed to grant his motion to dismiss based upon insufficiency of the evidence. However, defendant failed to make a motion to dismiss at the close of all of the evidence, and as such we will not address this issue. *State v. Richardson*, 341 N.C. 658, 677, 462 S.E.2d 492, 504 (1995) ("Rule 10(b)(3) provides that a defendant who fails to make a motion to dismiss at the close of all the evidence may not attack on appeal the sufficiency of the evidence at trial."). This argument is overruled.

III. Prior Inconsistent Statement

[2] During defendant's trial, Mr. Leslie Griffin testified that on the morning of 30 September 2009, he saw defendant walking in defendant's neighborhood, Bunn Terrace, with another man. Officer Muehlbach then testified Mr. Griffin had previously told him that he saw defendant in his own neighborhood; however, Mr. Griffin did not mention the other man. Defendant objected to Officer Muehlbach's testimony, but this was overruled. Defendant contends that the intro-

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duction of Mr. Griffin's prior inconsistent statement was prejudicial because it undermined defendant's alibi. We disagree.

The State presented evidence that Ms. Lopez saw defendant outside of her window unit air conditioner attempting to break into her home. Both Mr. Griffin and Officer Muehlbach testified that Mr. Griffin had seen defendant in his own neighborhood on 30 September 2009. We do not conclude that without Officer Muehlbach's testimony regarding Mr. Griffin's previous statement, "there is a reasonable possibility that a different result would have been reached" in light of Ms. Lopez's eyewitness testimony. *State v. Hurst*, 127 N.C. App. 54, 61, 487 S.E.2d 846, 852 ("[T]o obtain reversal based on any error in the trial court's ruling, the defendant must show prejudicial error. The test for prejudicial error is whether there is a reasonable possibility that a different result would have been reached at trial had the error not been committed." (citation and quotation marks omitted)), *disc. review denied and appeal dismissed*, 347 N.C. 406, 494 S.E.2d 427 (1997), *cert denied*, 523 U.S. 1031, 140 L. Ed. 2d 486 (1998). As defendant has failed to show the prejudicial effect of Officer Muehlbach's testimony regarding what Mr. Griffin had previously said, we overrule this argument.

IV. Jury Instructions

[3] Lastly, defendant contends that the trial court erred in failing to define the term "larceny" for the jury. However, this Court has previously determined that "larceny" is a word of "common usage and meaning to the general public[.]" and thus it is not error for the trial court to not define it in the jury instructions. *State v. Chambers*, 52 N.C. App. 713, 721, 280 S.E.2d 175, 180 (1981). While we disagree that the legal term "larceny" is commonly understood by the general public, we are bound by precedent; *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), and thus this issue is overruled.

V. Conclusion

For the forgoing reasons, we find no error.

NO ERROR.

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

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ANIMALS

Goats—restrictive covenants—household pets instead of livestock—The trial court did not err in a declaratory judgment action by granting summary judgment in favor of plaintiff based on its conclusion that plaintiff's two goats were household pets and not livestock under a neighborhood's restrictive covenants. The goats were kept for pleasure rather than for profit or utility. **Steiner v. Windrow Estates Home Owners Ass'n, Inc., 454**

APPEAL AND ERROR

Appealability—issue not ripe—The trial court exceeded its statutory authority in a felonious malicious use of an explosive or incendiary device or material case by mandating that a later court must enter any subsequent sentence as consecutive only, rather than concurrent, if such a sentence was entered while defendant was still serving his sentence in the present case. However, because this issue was not a question ripe for review, the judgment was left undisturbed. **State v. Herrin, 68.**

Appealability—writ of certiorari—appellate rules violations—In the interests of justice and under N.C. R. App. P. 2 and 21, the Court of Appeals elected to treat the record on appeal and briefs in a workers' compensation case as a petition for writ of *certiorari*. Although defendants failed to articulate grounds for appellate review as required by N.C. R. App. P. 28(b), the error was nonjurisdictional, and thus, did not require dismissal. **Lipscomb v. Mayflower Vehicle Sys., 440.**

Interlocutory orders and appeals—disqualification of counsel—Although an order granting a motion to disqualify counsel was interlocutory, it affected a substantial right and was addressed on appeal. **Braun v. Trust Dev. Grp., LLC, 606.**

Interlocutory orders and appeals—partial summary judgment—certified for immediate appeal—An immediate appeal was allowed from a partial summary judgment order where the trial court properly certified the case for immediate appeal. **Yost v. Yost, 516.**

Interlocutory orders and appeals—subject matter jurisdiction—The trial court had subject matter jurisdiction in a breach of contract and unfair and deceptive trade practices case after plaintiff appealed from a nonappealable interlocutory order that did not completely dispose of the case. Further action was required by the trial court to finally adjudicate the parties' claims. **D.G. II, LLC v. Nix, 220.**

Interlocutory orders and appeals—substantial right—inverse condemnation—untimely appeal—Although defendants' counterclaim for inverse condemnation was from an interlocutory order that affected a substantial right, it was dismissed as untimely. **Town of Apex v. Whitehurst, 579.**

Interlocutory orders and appeals—substantial right—taking for public purpose—untimely appeal—Although defendants' appeal in a condemnation case regarding the issue of taking for a public purpose was from an interlocutory order that affected a substantial right, it was dismissed as untimely. **Town of Apex v. Whitehurst, 579.**

Issue not addressed—estoppel—statute of limitations—Plaintiffs' argument in a construction case that defendant should have been estopped from asserting the statute of limitations as a bar to plaintiffs' claims was not addressed

APPEAL AND ERROR—Continued

in light of the Court of Appeals' conclusion that the trial court erred in granting summary judgment with respect to plaintiffs' breach of contract and warranty claims. **Williams v. Houses of Distinction, Inc., 1.**

Issue not addressed—invited error—Defendant's argument that the trial court erred by not submitting to the jury the issue of whether defendants' activities were egregious activities outside the scope of his employment was not addressed on appeal as any error was invited by defendant. **Songwooyarn Trading Co., Ltd. v. Sox Eleven, Inc., 49.**

No right of appeal—petition for certiorari—granted for one issue—denied for remaining issues—Defendant in a felonious breaking or entering, larceny after breaking or entering, safecracking, and habitual felon case failed to take timely action to preserve his right to appeal. Defendant's request to consider his brief as a petition for *certiorari* and allow review of the calculation of his prior record level was granted. As defendant had no right to appeal the remaining issues raised in his brief, defendant's request to review these by *certiorari* was denied. **State v. Mungo, 400.**

Preservation of issues—failure to argue—Defendants failed to make any arguments regarding the 17 February 2010 order as required by N.C. R. App. P. 28(a), and thus, the issues were deemed abandoned. **Town of Apex v. Whitehurst, 579.**

Preservation of issues—failure to argue—issue abandoned—Petitioners in a zoning case abandoned their argument that the trial court erred by applying the wrong standard when reviewing the decision of the Board of Adjustment to deny petitioners' application for a variance. Petitioners failed to provide any reason or argument in support of their assertion. **Premier Plastic Surgery Cntr., PLLC v. Bd. of Adjust. for the Town of Matthews, 364.**

Preservation of issues—failure to cite authority—Plaintiff failed to cite to any authority on appeal and thus failed to preserve for appellate review the argument that the Industrial Commission erred in a workers' compensation case by allowing the admission of certain evidence. **Thompson v. STS Holdings, Inc., 26.**

Preservation of issues—failure to make motion to dismiss at end of evidence—The issue of whether the trial court erred by not dismissing a charge for insufficient evidence was not addressed on appeal where defendant did not make a motion to dismiss at the close of all the evidence. **State v. Whitley, 630.**

Preservation of issues—failure to object to instruction—failure to allege plain error—Where defendant in a prosecution for felonious malicious use of an explosive or incendiary device or material did not object at trial to the instruction that "gasoline is an incendiary material" or allege plain error, defendant failed to properly preserve the issue for appeal. **State v. Herrin, 68.**

Preservation of issues—failure to raise constitutional issue at trial—Although plaintiff contended that the trial court erred in a wrongful death case by dismissing her amended complaint based on the unconstitutionality of N.C.G.S. § 1A-1, Rule 9(j), plaintiff waived this contention by failing to present any supporting argument. **McKoy v. Beasley, 258.**

APPEAL AND ERROR—Continued

Selection—juror’s comments—issue not preserved—no prejudice—Defendant’s argument that the trial court erred in an armed robbery case by not declaring a mistrial on its own motion based upon statements made by a potential juror during jury selection was dismissed. The issue was not preserved at trial and was not subject to plain error review. Even assuming *arguendo* that defendant properly preserved this issue for appellate review, his argument failed because he was unable to demonstrate prejudice. **State v. Lee, 392.**

Timeliness of appeal—party designated to prepare judgment failed to serve on other party—Defendants’ motion to dismiss plaintiff’s appeal as untimely in a breach of contract and unfair and deceptive trade practices case was denied. Since defendants were the party designated by the trial court to prepare the judgment and they never served plaintiff with a copy of the judgment, they were not in compliance with N.C.G.S. § 1A-1, Rules 58 and 59. Thus, plaintiff timely filed within the ninety days under Rule 59. **D.G. II, LLC v. Nix, 220.**

Writ of certiorari—review of implicit determination by trial court—A writ of *certiorari* was granted by the Court of Appeals to allow appellate review of any implicit determination by the trial court concerning defendant’s right to rely on a governmental immunity defense. **Kirkpatrick v. Town of Nags Head, 132.**

ARBITRATION AND MEDIATION

Denial of motion to dismiss proper—neither respondent personally affected—no argument—jurisdiction lacking—The trial court did not err in a dispute concerning an arbitration agreement by denying respondent Hall’s and O’Connor’s motion to dismiss for lack of personal jurisdiction and because they were not parties to the arbitration. Neither Hall nor O’Connor were personally affected in their individual capacities by the trial court’s judgment and no argument was made that they were not, in fact, respondent Rapidz’s Director and Alternate Director at the relevant times, or that jurisdiction over Rapidz was lacking. **Canadian Am. Assoc. of Prof’l. Baseball, Inc. v. Ottawa Rapidz, 15.**

Failure to move to modify or vacate arbitration award—confirmation of arbitration award proper—The trial court did not err in a dispute concerning an arbitration agreement by granting a motion filed by petitioner Canadian American Association of Professional Baseball, Ltd. to confirm an award in an arbitration proceeding. Respondents failed to move to vacate or modify the award based on the alleged irregularity in the form of the award or pursuant to any other statutory grounds. **Canadian Am. Assoc. of Prof’l. Baseball, Inc. v. Ottawa Rapidz, 15.**

Motion to compel—waived by delay and unnecessary expenditure—An order denying a motion to compel arbitration was affirmed where the trial court properly concluded that plaintiff waived the right to arbitrate by waiting until the eve of a second trial to file the motion to compel. **Estate of Sykes v. Marcaccio, 563.**

ASSAULT

Deadly weapon with intent to kill inflicting serious injury—acquittal for attempted first-degree murder not inconsistent or mutually exclusive—The trial court did not err by accepting the verdict of assault with a deadly

ASSAULT—Continued

weapon with intent to kill inflicting serious injury (AWDWIKISI) as to defendant Wade because the jury's acquittal of defendant for attempted first-degree murder and his conviction for AWDWIKISI were not inconsistent or mutually exclusive. **State v. Wade, 481.**

Deadly weapon with intent to kill inflicting serious injury—possession of firearm by convicted felon—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motions to dismiss the charges of assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a convicted felon. There was substantial evidence of each essential element of the offenses charged and of defendant Wade being one of the perpetrators of the offense. **State v. Wade, 481.**

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Restrictive covenants—nuisance—vague—A neighborhood's board of directors abused its discretion by determining that plaintiffs' goats were a nuisance. The neighborhood's restrictive covenants did not provide sufficient guidance or definitions to permit any sort of objective determination, and thus, were too vague. **Steiner v. Windrow Estates Home Owners Ass'n, Inc., 454.**

ATTORNEY FEES

Challenge to late fees—utilities—The trial court did not err by awarding attorney fees pursuant to N.C.G.S. § 6-21.5 based on plaintiff not raising justiciable issues of law and fact. Plaintiff's argument was without merit because it was predicated on sanitary districts being subject to the Utilities Commission's supervisory powers, which they are not. **Wayne St. Mobile Home Park, LLC v. N. Brunswick Sanitary Dist., 554.**

ATTORNEYS

Motion to disqualify—necessary witnesses—The trial court did not abuse its discretion by granting defendants' motion to disqualify plaintiff's attorneys where those attorneys were necessary witnesses on a contested issue. **Braun v. Trust Dev. Grp., LLC, 606.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Attempted—instructions—failure to define larceny—Following precedent, there was no error where the trial court failed to define "larceny" in the instructions in an attempted breaking or entering prosecution. **State v. Whitley, 630.**

CEMETERIES

Grave desecration—summary judgment—The trial court did not err in a grave desecration case by granting summary judgment in favor of defendants. There was no evidence showing that defendants graded the property on which the gravesite is located or in some other way desecrated the gravesite. **Robinson v. Forest Creek Ltd. P'ship, 593.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Findings of fact—sufficiency—The trial court did not err by adjudicating a minor child as an abused and neglected juvenile. Respondent mother's testimony supported the trial court's findings of fact, which in turn supported the adjudication. **In re A.N.L., 266.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Guardian ad litem—full representation of child as required by statute—The trial court did not violate N.C.G.S. §7B-601(a) in a child abuse and neglect case. The minor child was fully represented by a guardian *ad litem* (GAL) as contemplated by the statute, and the use of a properly appointed GAL program staff member to serve as the juvenile's GAL did not violate the statute. **In re A.N.L., 266.**

CHILD CUSTODY AND SUPPORT

Health insurance—no increased cost—no credit—The trial court did not err in a child support dispute by not giving defendant credit for medical insurance purchased for the minor child. Defendant incurred no additional cost in covering the child on his wife's health insurance policy and defendant's coverage was unnecessary because plaintiff had been providing coverage. **Orange Cnty. ex rel. Clayton v. Hamilton, 205.**

Modification—best interests of child—The trial court did not abuse its discretion by concluding there was substantial evidence that modification of a previous child custody order was in the best interests of the children. **Stephens v. Stephens, 495.**

Modification—substantial change in circumstances—The trial court did not err in a child custody modification case by concluding a substantial change in circumstances affected the welfare of the children. Even if the children have not yet been actually harmed by defendant's actions, the court does not have to wait until the substantial change causes harm. **Stephens v. Stephens, 495.**

Protected status as parent—acted inconsistently with—insufficient findings of fact—The trial court erred in a child custody case by failing to make the necessary findings of fact to support the conclusion that defendant acted inconsistently with her constitutionally protected status as the legal mother of the minor child. **Powers v. Wagner, 353.**

Support for children of later marriage—no change of circumstances or income—Child support payments for children of a later marriage did not evidence a substantial change in plaintiff's circumstances or income. **Orange Cnty. ex rel. Clayton v. Hamilton, 205.**

CIVIL PROCEDURE

Motion for relief or new trial—notice of summary judgment—The trial court did not abuse its discretion by denying defendant's motion for relief or for a new trial where plaintiff contended that it had not been provided with sufficient notice of defendant's motion for summary judgment. **Elliot v. Enka-Candler Fire & Rescue Dep't, Inc., 160.**

Order entered out of session—no objection at trial—The trial court did not improperly enter an order out of session. Entry of orders out of session is allowed by N.C.G.S. § 1A-1, Rule 6(c), and defendant did not object at trial. **Orange Cnty. ex rel. Clayton v. Hamilton, 205.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Defendant's verbal statement after arrest—not prejudicial—The trial court did not err in a sexual offense, kidnapping, robbery with a dangerous weapon,

CONFESSIONS AND INCRIMINATING STATEMENTS—Continued

burglary, communicating threats, and assault with a deadly weapon case by allowing a witness to testify to defendant's verbal statement made after defendant was arrested. Even if the statement was erroneously admitted, defendant failed to show that the exclusion of the statement could have changed the result of the case. **State v. Speight, 38.**

CONSPIRACY

Failure to allege essential element—agreement to commit unlawful act—The trial court erred by convicting defendant on the charge of conspiracy to commit robbery with a dangerous weapon. The State's failure to allege an essential element of the crime of conspiracy, the agreement to commit an unlawful act, rendered the indictment facially defective and deprived the trial court of jurisdiction to adjudicate the charge. **State v. Billinger, 249.**

CONSTITUTIONAL LAW

Effective assistance of counsel—failure to object—no prejudice—The failure of trial counsel to object to the admission of challenged evidence at trial did not constitute ineffective assistance of counsel for defendant Ellison where Ellison did not make the required showing of prejudice. **State v. Ellison, 300.**

Effective assistance of counsel—no motion to suppress—evidence admissible—Defendant was not deprived of effective assistance of counsel where his attorney did not move to suppress evidence discovered as a result of a stop by law enforcement officers. Although defendant argued on appeal that the stop was unlawful, the totality of the circumstances established that the officers had reasonable suspicion to conduct an investigatory stop. **State v. Brown, 617.**

Equal protection—rational basis—smoking ban differential treatment of for-profit and nonprofit private clubs—The trial court did not violate a private country club's equal protection rights by upholding two civil penalties against it for allowing smoking in its establishment. There was a rational basis for the legislature's differential treatment of for-profit and nonprofit private clubs. **Liebes v. Guilford Cnty. Dep't of Pub. Health, 426.**

Right to confrontation—no objection at trial on constitutional grounds—no plain error—There was no plain error where defendant objected to an affidavit at trial but not on Confrontation Clause grounds. Even assuming that the affidavit violated defendant's right to confrontation, there was ample evidence to find the two aggravating factors needed to enhance the charge from a misdemeanor to a felony. The exclusion of the affidavit would not have altered the jury's verdict. **State v. Leonard, 526.**

Right to counsel—pro se representation—required inquiries—The trial court erred by permitting defendant to waive counsel and proceed *pro se* at a probation revocation hearing where the court advised defendant of his right to counsel, but did not conduct a thorough inquiry that showed that defendant understood the consequences of his decision and that he comprehended the nature of the charges, the proceeding, and the range of possible punishments. **State v. Sorrow, 571.**

CONSTRUCTION CLAIMS

Breach of contract—breach of warranty—statute of limitations—date statute began to run in dispute—summary judgment erroneous—The trial court erred in a breach of contract and breach of warranty claims action by granting summary judgment in favor of defendant based on the plea of the statute of limitations. The point in time at which the construction defects in question became or should have become apparent to plaintiffs was genuinely in dispute between the parties, so that the date upon which the statute of limitations began to run should have been decided by a jury at trial rather than by the court as a matter of law. **Williams v. Houses of Distinction, Inc., 1.**

CONTRACTS

Severance benefits—no genuine issues of material fact—summary judgment proper—The trial court did not err in a breach of contract case by granting defendant's motion for summary judgment. Plaintiff was not entitled to Plan A benefits when he ceased continuous competition with defendant in 2001, and there were no genuine issues of material fact as to plaintiff's breach of contract claim. Since no breach of contract occurred, plaintiff was not entitled to specific performance. **McKinnon v. CV Indus., Inc., 328.**

COSTS

Offer of judgment—exceeded jury award—properly awarded—The trial court did not abuse its discretion in a negligence case by awarding costs to defendant where defendant's offer of judgment to plaintiff exceeded plaintiff's jury award. **Smith v. White, 189.**

Zoning proceeding—taxed against respondent—no abuse of discretion—The superior court did not abuse its discretion in taxing the cost of a zoning proceeding against respondent Town of Hillsborough. The superior court was acting in accordance with the judgment of the Court of Appeals in *Shaefer I* and the Rules of Appellate Procedure. **Shaefer v. Town of Hillsborough, 212.**

CRIMINAL LAW

Guilty plea—reservation of right to appeal—denial of motion to dismiss—The trial court erred by accepting defendant's *Alford* plea where defendant attempted to reserve the right to appeal the denial of his motion to dismiss. A defendant who pleads guilty may not appeal the denial of a motion to dismiss, and the matter was remanded for further proceedings. **State v. White, 181.**

Joinder of charges—other crimes—The trial court did not abuse its discretion by joining charges against both defendants for trial where defendant Treadway argued that this decision allowed the jury to consider evidence of other crimes introduced against defendant Elliston as evidence of Treadway's guilt. Treadway did not show that he was prejudiced by the admission of evidence concerning Elliston's 2003 drug-related activities. **State v. Ellison, 300.**

Jury instruction—insanity defense—The trial court did not commit plain error in a first-degree murder and assault case by failing to instruct the jury that the insanity defense applied if defendant believed due to mental illness that his conduct was morally right. Defendant failed to request a special instruction or show that absent the alleged error, the jury probably would have reached a different result. **State v. Castillo, 536.**

CRIMINAL LAW—Continued

Prosecutor's argument—mental illness—failure to intervene ex mero motu—The trial court did not err in a first-degree murder and assault case by failing to intervene *ex mero motu* during the State's closing argument regarding defendant's mental illness in light of the wide latitude accorded counsel in closing argument and the substantial and largely unchallenged evidence. **State v. Castillo, 536.**

Restraints during trial—no abuse of discretion—The trial court did not abuse its discretion by not removing defendant's handcuffs during trial. The trial court considered the proper factors, including defendant's past record, and reasoned that incarceration for crimes such as second-degree murder and kidnapping raised concerns for safety in the courtroom. **State v. Stanley, 545.**

Restraints during trial—no limiting instruction—no abuse of discretion—There was no prejudicial error in a prosecution for possessing controlled substances in a prison where the trial court did not give a limiting instruction regarding defendant's courtroom restraints. Even if the instruction had been given, it was not reasonably possible that a different result would have been reached at trial. **State v. Stanley, 545.**

DAMAGES AND REMEDIES

Jury's failure to award nominal damages—no prejudicial error—The trial court did not abuse its discretion in a breach of contract and unfair and deceptive trade practices case by denying plaintiff's motion for a new trial based on the jury's failure to follow the trial court's instruction to write a nominal amount in its verdict after declining to award plaintiff actual damages. The trial court's entry of the October 2009 order entitled plaintiff to recover nominal damages as a matter of law. **D.G. II, LLC v. Nix, 220.**

Restitution—no jurisdiction—The trial court's restitution award was vacated because there was no conspiracy conviction attached to it due to the trial court's lack of jurisdiction. **State v. Billinger, 249.**

DECLARATORY JUDGMENTS

North Carolina State Highway Patrol's wrecker rotation—declaration of parties' rights—incomplete—The trial court erred in a declaratory judgment case by failing to clearly declare the rights of the parties and effectively dispose of the dispute concerning the rules governing the North Carolina State Highway Patrol's wrecker rotation. Because the trial court failed to make a full and complete declaration, the matter was remanded. **Danny's Towing 2, Inc. v. N.C. Dep't of Crime Control & Pub. Safety, 375.**

DISCOVERY

Identity of informant—motion to reveal denied—The trial court did not err in a drugs prosecution by denying defendant Ellison's motion to require disclosure of an informant's identity. The detective had ample justification for stopping defendant Ellison and the denial of Ellison's request for disclosure of the informant's identity was fully consistent with N.C.G.S. § 15A-978(b). **State v. Ellison, 300.**

DRUGS

Possession of cocaine—resist, delay, or obstruct an officer—habitual felon—voluntary dismissal—The trial court did not err in a resisting, delaying, or obstructing an officer (RDO), felony possession of cocaine, and habitual felon case by dismissing the felony possession of cocaine charge and habitual felon indictment. The State voluntarily dismissed the possession of cocaine charge and the habitual felon indictment and the State's argument that the dismissals were erroneous was overruled. **State v. Joe, 148.**

Trafficking—evidence of possession—sufficient—The trial court did not err by denying defendant Treadway's motion to dismiss charges of trafficking in prescription drugs for insufficient evidence of possession. Defendant argued that the State's evidence was highly suspicious but did not suffice to permit a reasonable juror to conclude that he ever actually possessed or transported or sold any drugs; however, there was clear testimony that a witness gave prescription medications to Treadway and returned later for payment, and prescription drugs matching those described by the witness were found in the vehicle of Treadway's accomplice. **State v. Ellison, 300.**

Trafficking—prescription medications—opiates—statutes providing punishment—The trial court did not err by denying defendants' motions to dismiss charges of trafficking in opium and conspiracy to traffic in opium on the grounds that the medications at issue were not proscribed under N.C.G.S. § 90-95(h)(4). The General Assembly drafted N.C.G.S. § 90-95(h) for the purpose of punishing acts of drug trafficking in specific controlled substances at the level specified in N.C.G.S. § 90-95(h) regardless of the extent to which those same activities would also be subject to punishment under other provisions of N.C.G.S. § 90-05. **State v. Ellison, 300.**

Trafficking—prescription opiates—entire weight of pills—The trial court did not err by denying defendant Ellison's motion to dismiss drug trafficking charges where defendant contended that he lacked adequate notice that possession of prescription Lorcet pills could result in being charged with trafficking in an opiate and being responsible for the entire weight of the pills. **State v. Ellison, 300.**

EMPLOYER AND EMPLOYEE

Employment agreement and extension—consideration by employee—giving up at will status—There was consideration in an employment agreement and its extension where a fire chief who was already in the job gave up his employment at will status and his right to leave at any time before the dates specified in the agreements. **Elliot v. Enka-Candler Fire & Rescue Dep't, Inc., 160.**

EVIDENCE

Expert testimony—amount of cocaine in system—effect on driving—reliable methods—The trial court did not err in a prosecution for second-degree murder and other offenses by admitting expert testimony about the amount of cocaine in defendant's system and the effects of cocaine on the ability to drive. The witness's testimony that the level of cocaine in defendant's system would have been higher at the time of the collision, and his testimony as to the general effects of cocaine on a person's ability to drive, were supported by reliable methods. **State v. Norman, 114.**

EVIDENCE—Continued

Hearsay—explanation of subsequent conduct—Testimony from a correctional officer about a captain's statements about defendant explained the officer's subsequent conduct and were not hearsay. **State v. Stanley, 545.**

Inconsistent statements—plain error review—The trial court did not err or commit plain error in an assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a convicted felon case by permitting the prosecutor to question the victim regarding his inconsistent statements at a probable cause hearing. **State v. Wade, 481.**

Joined defendants—prior crimes or bad acts of one defendant—no prejudice—There was no plain error in a drugs prosecution against joined defendants where defendant Treadway argued that the trial court should not have admitted evidence about defendant Ellison's prior possession of prescription medications. Defendant Treadway was clearly not involved in the 2003 incident, the contested evidence was relevant to guilty knowledge, the trial court gave a limiting instruction, and Treadway did not meet his burden of showing that the outcome probably would have been different absent the challenged evidence. **State v. Ellison, 300.**

Lay opinion—impairment at scene of accident—The trial court did not abuse its discretion in a prosecution for second-degree murder, driving while impaired, and other offenses by allowing a lay bystander at the scene to testify to his opinion that defendant was impaired. The conditions under which the witness observed defendant go to the weight rather than the admissibility of the testimony. **State v. Norman, 114.**

Prior arrests—not prejudicial—The defendant in a prosecution for second-degree murder, driving while impaired, and other offenses did not show that there was a reasonable possibility of a different result had evidence of prior arrests for possession of drug paraphernalia and resisting and delaying an officer not been admitted. Overwhelming evidence of defendant's guilt was presented at trial. **State v. Norman, 114.**

Prior inconsistent statement—impeachment—statement not inconsistent—A statement given by defendant to a detective was not inconsistent with his trial testimony and the trial court did not err by introducing into evidence the statement on direct examination by the State. Reading the statement in context, the witness was stating that he knew of the person called Phillipott, not that he was personally acquainted with him, which was consistent with his testimony in court. The only issue on appeal is the consistency of the statement, not whether the State was surprised. **State v. Phillipott, 468.**

Prior inconsistent statement—not prejudicial—Defendant's argument that introduction of a prior inconsistent statement was prejudicial was overruled. There was no possibility of a different result without testimony about a witness's previous statement. **State v. Whitley, 630.**

Prior inconsistent statements—impeachment—failure to show prejudicial error—The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a convicted felon case by permitting the prosecutor, over objection, to state before the jury the prosecutor's recollection of the alleged victim's testimony at a probable cause

EVIDENCE—Continued

hearing where the victim denied recollection. Defendant failed to show any prejudicial error when the substantive information had already been introduced into evidence. **State v. Wade, 481.**

Testimony—exclusion—failure to show prejudicial error—The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a convicted felon case by sustaining the State's objection to testimony that the victim was favoring his back pocket like he was getting ready to whip out a gun and by sustaining the State's objection to testimony from the victim's girlfriend that she heard the victim saying he was going to get his gun. Defendant failed to show a different result would have been reached at trial absent these alleged errors. **State v. Wade, 481.**

Testimony—failure to show prejudicial error based on exclusion—The trial court did not abuse its discretion in an assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a convicted felon case by sustaining the State's objections and motions to strike and not allowing into evidence certain testimony from witnesses. Defendant failed to show a different result would have been reached at trial absent these alleged errors. **State v. Wade, 481.**

Trafficking in prescription drugs—evidence that drugs contained opium—The trial court did not abuse its discretion in a prosecution for trafficking in prescription drugs by admitting testimony from an SBI agent on rebuttal that dihydrocodeinone and hydrocodone contained opium. **State v. Ellison, 300.**

FALSE PRETENSE

Obtaining property by false pretenses—motion to dismiss—sufficiency of evidence—circumstantial evidence—The trial court did not err by denying defendant's motion to dismiss the charge of obtaining property by false pretenses. Every hypothesis of innocence need not be ruled out in order to conclude that the circumstantial evidence was sufficient for a reasonable person to infer that defendant was the person who used the stolen credit card shortly after he stole it. **State v. Griffin, 625.**

FIREARMS AND OTHER WEAPONS

Possession of weapon of mass death and destruction—motion to dismiss—sufficiency of evidence—possession—The trial court did not err by denying defendant's motion to dismiss the charge of possession of a weapon of mass death and destruction based on alleged insufficient evidence of possession. The evidence was sufficient to support a reasonable inference that defendant owned and constructively possessed a sawed-off shotgun. **State v. Billinger, 249**

Possession of a weapon of mass destruction—sufficient evidence—motion to dismiss correctly denied—The trial court did not err in a possession of a weapon of mass death and destruction and possession of a firearm by a felon case by denying defendant's motion to dismiss the charges for insufficient evidence. The evidence showed that defendant possessed a weapon on different days and in different locations and defendant could be charged with multiple possession offenses. **State v. Lee, 392.**

FRAUD

Misrepresentation—justifiable reliance—sufficient allegation in complaint—sufficient factual support—motions for directed verdict and judgment notwithstanding verdict—properly denied—The trial court did not err in a negligent misrepresentation case by denying defendant's motions for directed verdict and judgment notwithstanding the verdict. The complaint sufficiently alleged justifiable reliance and there was factual support for the jury to infer that plaintiff justifiably relied on defendant's misrepresentations. **Songwooyarn Trading Co., Ltd. v. Sox Eleven, Inc., 49.**

Severance benefits—no genuine issues of material fact—summary judgment proper—The trial court did not err in a fraud case by granting defendant's motion for summary judgment. There were no genuine issues of material fact as to whether defendant engaged in fraud by denying plaintiff's claim for Plan A benefits. **McKinnon v. CV Indus., Inc., 328.**

HOMICIDE

First-degree murder—premeditation and deliberation—evidence sufficient—There was sufficient evidence of premeditation and deliberation in a first-degree murder prosecution where there was testimony from witnesses who did not hear provocation from the deceased; testimony from a witness at whom defendant pointed the gun after shooting the victim; and testimony from a doctor who noted that the victim had five gunshot wounds, four of which were to the head. **State v. Phillipott, 468.**

Second-degree murder—malice and proximate cause—sufficiency of evidence—There was sufficient evidence of malice and proximate cause in a second-degree murder prosecution arising from impaired driving where there was evidence that defendant had been drinking and was impaired; that he had ingested cocaine, which correlates to high-risk driving; that defendant was speeding; that he had prior convictions; and that his actions were a proximate cause of the victims' deaths. A left-hand turn by the victims was foreseeable, and, although the victims failed to yield the right-of-way to defendant, there was substantial evidence that defendant's speeding and driving while impaired were concurrent proximate causes. **State v. Norman, 114.**

IMMUNITY

Governmental—closure of road—The extent to which particular municipal streets and roads are kept open for use by members of the public is a governmental function and governmental immunity is available to municipalities as a defense to damage claims arising from such discretionary road closure decisions. Governmental immunity is not available as a defense to claims arising from personal injuries or property damage sustained as a result of a defective condition in the maintenance of the street or road. **Kirkpatrick v. Town of Nags Head, 132.**

Governmental—waiver by insurance—road closing—Defendant Town was entitled to rely on governmental immunity in a claim arising from the closing of a beach road following a storm and should have been granted summary judgment. Immunity was not waived by the Town's insurance policy because the policy covered occurrences resulting in damages for which the Town was liable. The storm was an act of God and thus not conduct for which defendant was legally liable, and the decision not to repair the road was intentional with full knowl-

edge of likely consequences, which also prevents coverage under the policy. **Kirkpatrick v. Town of Nags Head, 132.**

INDICTMENT AND INFORMATION

Felonious operation of motor vehicle to elude arrest—reckless driving as aggravating factor—information sufficient—The body of an indictment for felonious operation of a motor vehicle to elude arrest with reckless driving as an aggravating factor was sufficient to provide defendant with enough information to prepare a defense. **State v. Leonard, 526.**

First-degree burglary—not fatally defective—sufficiently clear—An indictment charging defendant with first-degree burglary was not fatally defective or insufficient to support the trial court's imposition of a consecutive sentence. The indictment's stated felonious intent of "unlawful sexual acts" informed defendant of the charge against him with sufficient clarity to withstand dismissal and did not allow the jury to convict him on alternative theories of felonious intent. **State v. Speight, 38.**

Habitual felon—notice—The trial court had subject matter jurisdiction over a habitual felon indictment. The indictment was sufficient to give defendant notice of the basis of the habitual felon indictment when it referenced the case number, date, and county of a prior conviction. **State v. Griffin, 625.**

INJUNCTIONS

State Highway Patrol's wrecker rotation program—bases of injunction not adequate—The trial court erred in an injunctive relief case by enjoining certain portions of the rules governing the North Carolina State Highway Patrol's wrecker rotation program as unenforceable. The order of injunction did not state the reasons for its issuance, beyond a bare statement that portions of the rules which the court did not enjoin were reasonable and enforceable as written. **Danny's Towing 2, Inc. v. N.C. Dep't of Crime Control & Pub. Safety, 375.**

JUDGES

Ex parte communication—proposed order—Use of a counsel's proposed order that was requested by the court as the final order did not constitute an improper *ex parte* communication. **Orange Cnty. ex rel. Clayton v. Hamilton, 205.**

Outburst of laughter—ill-advised—not prejudicial—The trial court did not commit prejudicial error in a felonious malicious use of an explosive or incendiary device or material case when the judge laughed in open court and in the presence of the jury upon hearing a witness's testimony. Although the judge's outburst may have been ill-advised, any resulting error was harmless and did not prejudice defendant so as to entitle him to a new trial. **State v. Herrin, 68.**

JURISDICTION

Standing—negligent misrepresentation—unfair trade practices—no certificate of authority needed—personal jurisdiction over defendant existed—Plaintiff had standing to file a negligent misrepresentation and unfair trade practices lawsuit against defendant. Plaintiff was conducting business in interstate commerce and thus did not need a certificate of authority in North Carolina since personal jurisdiction existed over defendant because he was a res-

ident of Mecklenburg County. **Songwooyarn Trading Co., Ltd. v. Sox Eleven, Inc.**, 49.

JURISDICTION—Continued

Subject matter—administrative hearing—failure to exhaust administrative remedies—motion to dismiss properly granted—The trial court did not err in a negligence and negligence *per se* case by granting defendant's motion to dismiss for lack of subject matter jurisdiction. Plaintiff failed to exhaust his administrative remedies by not requesting an administrative hearing to contest the decision of the North Carolina Criminal Justice Education and Training Standards Commission. **Vanwijk v. Prof'l Nursing Servs., Inc.**, 407.

Subject matter—child custody—home state—findings sufficient—The North Carolina trial court properly exercised jurisdiction over a child custody action where North Carolina was the “home state” of the child and no other jurisdiction had made an initial custody determination that deprived North Carolina courts of subject matter jurisdiction over the matter. **Powers v. Wagner**, 353.

Subject matter—trust—second superior court order impermissibly overruled first order—One superior court judge's order in a trust case granting summary judgment in favor of one defendant impermissibly overruled another superior court judge's order denying summary judgment on the same legal issue for the same defendant. The matter was remanded to superior court for further proceedings. **Shelf v. Wachovia Bank, NA**, 82.

JURY

Not in agreement—mistrial denied—no abuse of discretion—The trial court did not abuse its discretion by not declaring a mistrial even after one juror had indicated that nothing would change. **State v. Phillpott**, 468.

LACHES

No knowledge of grounds for claim—motion to dismiss—denial proper—The trial court did not err in a case involving the imposition of a constructive trust on decedent's death benefits by denying defendant's motion to dismiss on the grounds of laches. Defendants failed to present any evidence that plaintiff had knowledge of the existence of the grounds for the claim. **Myers v. Myers**, 171.

LARCENY

Felonious larceny by employee—defendant not selectively prosecuted—dismissal erroneous—The trial court erred in a felonious larceny by employee case by dismissing the charges against defendant on the grounds that defendant was selectively prosecuted. The other employees who were not charged were not similarly situated to defendant, nor did they perform the same acts. Moreover, defendant failed to demonstrate that his prosecution, as opposed to the initial investigation by local officials, was politically motivated. **State v. Pope**, 413.

Felonious larceny by employee—entrapment-by-estoppel—dismissal erroneous—The trial court erred in a felonious larceny by employee case by dismissing the charges based on the theory of entrapment-by-estoppel. Defendant

failed to offer evidence showing that he reasonably relied on explicit assurances by government officials of the legality of his actions. **State v. Pope, 413.**

LIENS

Materialman's lien—date of first furnishing—prior to date of deed of trust—partial lien waivers—ineffective to change date of first furnishing—The trial court erred in a lien case by granting plaintiff Preserve Holdings, LLC's motion for judgment on the pleadings. As a result of the fact that defendant Superior Construction Corporation (Superior) first furnished labor and materials at The Preserve prior to the date upon which plaintiff Wachovia's deed of trust was recorded, defendant Superior's lien had priority over that of Wachovia. The partial lien waivers signed by defendant Superior did not effectively change the date of first furnishing of labor and materials from 22 April 2005 to 31 May 2005. **Wachovia Bank Nat'l Ass'n. v. Superior Constr. Corp., 341.**

MEDICAL MALPRACTICE

Rule 9(j) certification—amended complaint filed after statute of limitations expired—The trial court did not err by dismissing a wrongful death case based on medical negligence because plaintiff's original complaint was devoid of any allegations complying with N.C.G.S. § 1A-1, Rule 9(j), and the defect could not be corrected by filing a second complaint after the expiration of the applicable statute of limitations. **McKoy v. Beasley, 258.**

MOTOR VEHICLES

Diminution of value—evidence of cost of repairs—improperly excluded—new trial properly granted—The trial court did not err in a vehicular accident case by setting aside the jury verdict and granting plaintiff a new trial on the issue of diminution in value of his motorcycle. The trial court properly concluded that evidence regarding the cost of repairs of plaintiff's motorcycle should not have been excluded. The cost of the repairs was relevant; the admission of such evidence would not cause a jury to award double recovery; and plaintiff was entitled to a new trial on the issue of diminution in value. **Smith v. White, 189.**

Driving while impaired—appreciable impairment—sufficient evidence—motion to dismiss properly denied—The trial court did not err in a driving while impaired case by denying defendant's motion to dismiss for insufficient evidence. Evidence that defendant consumed an impairing substance and then drove in a faulty manner was sufficient to show appreciable impairment. **State v. Norton, 75.**

Felonious operation of motor vehicle to elude arrest—disjunctive jury instruction—The trial court's disjunctive jury instruction in a felonious operation of a motor vehicle to elude arrest case did not constitute error. While the jury may not have been unanimous as to which aggravating factors were present, it was unanimous in finding that defendant was guilty of felonious operation of a motor vehicle to elude arrest. **State v. Banks, 599.**

Felonious operation of motor vehicle to elude arrest—jury instruction—failure to define reckless driving—The trial court did not commit plain error in a felonious operation of a motor vehicle to elude arrest case by declining to define the N.C.G.S. § 20-141.5(b) aggravating factor of reckless driving in the jury instruction. Defendant failed to cite to any legal authority which specifically required this definition, the trial court properly charged the jury with the pattern

jury instruction, and there was substantial evidence showing that defendant was guilty. **State v. Banks, 599.**

MOTOR VEHICLES

Felonious serious injury by motor vehicle—proximate cause of injury—not exclusive—The trial court did not err by denying defendant's motion to dismiss the charge of felonious serious injury by motor vehicle where defendant contended that there was insufficient evidence that impaired driving was the proximate cause of the injury. Impaired driving need not be the only proximate cause of the victim's injury for the defendant to be found criminally liable. **State v. Leonard, 526.**

NEGLIGENCE

Contractual obligations—exceptions inapplicable—summary judgment proper—The trial court did not err in a negligence action by granting summary judgment in favor of defendant with respect to its negligence claims. Plaintiffs' negligence-based claims stemmed from defendant's allegedly deficient performance of its contractual obligations to plaintiffs and none of the *Ports Authority* exceptions were applicable. **Williams v. Houses of Distinction, Inc., 1.**

Contributory negligence—jury found in plaintiff's favor—Plaintiff's argument in a negligence case that the trial court erred in submitting the issue of contributory negligence to the jury was dismissed as the jury found plaintiff not liable under a theory of contributory negligence and the trial court entered judgment in accordance with the jury verdict. **Smith v. White, 189.**

PLEADINGS

Rule 11 sanctions—failure to show principal purpose to harass or cause unnecessary delay—The trial court erred by imposing sanctions against plaintiffs under the improper purpose prong of N.C.G.S. § 1A-1, Rule 11. Based on the evidence in the record and viewed objectively under the totality of the circumstances, plaintiffs' continued prosecution of their action and the language concerning project delay in their neighborhood association newsletter did not create a strong inference that plaintiffs' principal purpose in filing their three actions was to harass or to cause unnecessary delay and disruption. **Coventry Woods Neighborhood Ass'n Inc. v. City of Charlotte, 236.**

POLICE OFFICERS

Information given to other officers—negligence claim—public duty doctrine—The Industrial Commission did not err by denying defendants' motion for summary judgment on the issue of liability preclusion under the public duty doctrine where plaintiff alleged that the UNC-W police department negligently provided false, misleading, and irrelevant information to sheriff's department officers who were serving an arrest warrant and that this false information proximately caused the decedent's death. In all cases where the public duty doctrine has been held applicable, the breach of the alleged duty has involved the governmental entity's negligent control of an external injurious force or the effects of such a force. Here, the alleged breach was not a negligent action with respect to some external injurious force, but was itself the injurious force. **Strickland v. Univ. of N.C. at Wilmington, 506.**

Resist, delay, or obstruct an officer—consensual encounter—motion to

dismiss properly granted—The trial court did not err in a resisting, delaying, or obstructing an officer (RDO) case by granting defendant's motions to suppress evidence and dismiss the charge. The State invited consideration of defendant's

POLICE OFFICERS—Continued

motion to dismiss the RDO charge on the merits and considering all the circumstances surrounding the police officer's encounter with defendant prior to his flight, a reasonable person would have felt at liberty to ignore the officer's presence and go about his business. **State v. Joe, 148.**

PREMISES LIABILITY

Jury instructions—known or reasonably foreseeable characteristics of lawful visitors—denial of motion for new trial—erroneous—The trial court erred in a negligence case by denying plaintiffs' motion for a new trial. The trial court failed to instruct the jury to consider the known or reasonably foreseeable characteristics of lawful visitors when determining whether defendant discharged its duty to exercise reasonable care in maintaining its property for the protection of plaintiff. **Cobb v. Town of Blowing Rock, 88.**

Jury instructions—known or reasonably foreseeable characteristics of lawful visitors—failure to instruct—erroneous—The trial court erred in a negligence case by failing to instruct the jury to consider the known or reasonably foreseeable characteristics of lawful visitors when determining whether defendant had discharged its duty to exercise reasonable care in maintaining its property for the protection of plaintiff. **Cobb v. Town of Blowing Rock, 88.**

Jury instructions—landowner's duty to minor—requested instruction incorrect—no error—The trial court did not err in a negligence case by failing to give plaintiffs' requested jury instructions regarding a landowner's duty to a minor who is a lawful visitor as the instructions contained an incorrect statement of law. **Cobb v. Town of Blowing Rock, 88.**

PROBATION AND PAROLE

Activation of sentence—credit for time served—The trial court did not err in a probation revocation hearing by failing to give defendant credit against her active sentence for the time she spent at a faith-based rehabilitation program because it was not affiliated with or operated by either a State or local government agency as required by N.C.G.S. § 15-196.1. **State v. Stephenson, 621.**

Activation of sentence—failure to show willful violation by failing to pay costs—The trial court's judgment revoking defendant's probation and activating his suspended sentence for failure to register as a sex offender was vacated. The trial court failed to make findings of fact that showed it considered defendant's evidence before concluding he willfully violated his probation by failing to pay the cost of his sexual abuse treatment program. Under revised N.C.G.S. § 15A-1344(a), a court may only revoke probation if a defendant commits a criminal offense or absconds. **State v. Floyd, 611.**

Probation revocation—findings of fact—willful and without valid excuse—drug addiction—The trial court did not abuse its discretion in a probation revocation hearing by allegedly failing to make proper findings that defendant violated the terms of her probation willfully and without valid excuse.

Defendant offered no support for her assertion that drug addiction made her noncompliance with the terms of probation not willful or otherwise lawfully excused. **State v. Stephenson, 621.**

PROBATION AND PAROLE—Continued

Rejection of negotiated plea—motion to continue denied—no abuse of discretion—The trial court did not abuse its discretion in a breaking and entering a vehicle, misdemeanor larceny, injury to personal property, possession of a firearm by a felon, and carrying a concealed gun case by denying defendant a continuance as to the probationary matters upon rejection of the negotiated plea arrangement. N.C.G.S. § 15A-1023(b) applies only to criminal prosecutions and not to probation revocation proceedings. **State v. Cleary, 198.**

PUBLIC OFFICERS AND EMPLOYEES

Employment contract—terminated fire chief—summary judgment—Summary judgment was properly entered for plaintiff in an employment action against a town by a former fire chief where defendant did not show that the contract lacked consideration or violated public policy and defendant did not present any evidence that plaintiff was not performing his duties adequately under the agreements. **Elliot v. Enka-Candler Fire & Rescue Dep't, Inc., 160.**

Fire chief—employment agreements—public purpose—balanced budget—A town's employment agreements with its fire chief served a public purpose in that the town was able to retain its fire chief for a significant period of time without fear that another municipality would lure him away. The contract did not call for payment regardless of whether the chief performed his public service duties, but for salary and benefits to continue only if defendant terminated plaintiff without cause. Furthermore, despite the statutory requirement that local budgets be balanced, there is no authority for the proposition that a municipality can evade payment of severance pay or breach of contract damages by simply not budgeting for them. **Elliot v. Enka-Candler Fire & Rescue Dep't, Inc., 160.**

ROBBERY

Armed robbery—jury instructions—doctrine of recent possession—sufficient evidence—instruction proper—The trial court did not err in an armed robbery case by instructing the jury, over defendant's objection, on the doctrine of recent possession. The State presented sufficient evidence of defendant's recent possession of stolen property. **State v. Lee, 392.**

Dangerous weapon—jury instruction—lesser-included offense—not warranted—The trial court did not err in a robbery with a dangerous weapon case by refusing to charge the jury on the lesser-included offense of common law robbery. All the evidence indicated that defendant removed property from the victim's apartment after she was awake and while her life was being threatened by defendant's use of a knife, a deadly weapon. **State v. Speight, 38.**

Dangerous weapon—sufficient evidence—motion to dismiss properly denied—The trial court did not err in a robbery with a dangerous weapon case by denying defendant's motion to dismiss the charge. The State offered sufficient evidence that defendant took personal property from the victim by the use or threatened use of a knife. **State v. Speight, 38.**

SCHOOLS AND EDUCATION

Compulsory Attendance Law—jury instruction—lack of good faith—not an element—no error—The trial court did not commit error or plain error in its jury instructions in a case involving the violation of the Compulsory Attendance

SCHOOLS AND EDUCATION—Continued

Law. There is no element requiring proof of lack of a good faith effort. **State v. Jones, 59.**

Compulsory Attendance Law—motion to dismiss—properly denied—The trial court did not err in a case involving the violation of the Compulsory Attendance Law by denying defendants' motions to dismiss the charge for insufficient evidence. The State presented substantial evidence of each element of the offense, and therefore, the court properly submitted the charge against each defendant to the jury. **State v. Jones, 59.**

SEARCH AND SEIZURE

Handcuffed defendant—special circumstance—safety-related detainment—stop not arrest—motion to suppress properly denied—The trial court did not err in a resisting a public officer, sale of cocaine, possession with intent to sell or deliver cocaine, and attaining habitual felon case by denying defendant's motion to suppress evidence obtained after he was placed in handcuffs by a law enforcement officer. The trial court properly concluded that a special circumstance justified handcuffing defendant and, thus, this safety-related detainment did not escalate the *Terry* stop into an arrest. **State v. Carrouters, 384.**

School-wide search—lacking individualized suspicion—search constitutionally unreasonable—The trial court erred in a possession of controlled substances case by denying the juvenile defendant's motion to suppress evidence obtained during a school-wide student search. Where the blanket search of the entire school lacked any individualized suspicion as to which students were responsible for the alleged infraction or any particularized reason to believe the contraband sought presented an imminent threat to school safety, the search of defendant's bra was constitutionally unreasonable. **In re T.A.S., 273.**

Stop of vehicle—multiple factors—informant's information—The trial court did not commit plain error by denying defendant Ellison's motion to suppress drugs seized from his vehicle where defendant contended that officers stopped his truck based exclusively on insufficiently corroborated information received from an informant. The detective had ample justification for treating the information supplied by the informant as having been corroborated by subsequent events and the detective decided to stop Ellison's truck after considering a number of factors. **State v. Ellison, 300.**

SENTENCING

Aggravating factors—negligent driving—motion to dismiss—reckless driving—driving with license revoked—The trial court did not commit prejudicial error in a felonious operation of a motor vehicle to elude arrest case by denying defendant's motion to dismiss the aggravating factor of negligent driving. The State was only required to present sufficient evidence of two of the factors, and defendant did not challenge the sufficiency of the evidence of the two aggravating factors of reckless driving or driving with a revoked driver's license. **State v. Banks, 599.**

Calculation of prior record level—stipulation to prior record level worksheet—sufficient evidence of prior convictions—The trial court did not err in a possession with intent to manufacture, sell, or deliver cocaine case in deter-

SENTENCING—Continued

mining that defendant had a prior record level of V, based on 16 prior record points. Defendant's stipulation in the prior record level worksheet was sufficient proof of his prior convictions. **State v. Wingate, 419.**

Clerical error—remanded—A prosecution for trafficking in prescription drugs was remanded for correction of a clerical error that had no impact upon the sentence. **State v. Ellison, 300.**

Personal bias—insistence on trial—The trial court did not abuse its discretion when sentencing defendant for second-degree murder and other offenses arising from impaired driving where defendant contended that the trial court impermissibly based defendant's sentence on the decision to contest the charges and on personal bias against defendant. **State v. Norman, 114.**

Prior record level—calculation not erroneous—The trial court did not err in a felonious breaking or entering, larceny after breaking or entering, safecracking, and habitual felon case in its calculation of defendant's prior record level. **State v. Mungo, 400.**

SEXUAL OFFENSES

First-degree—jury instruction—lesser-included offense—not warranted—The trial court did not err in a first-degree sexual offense case by denying defendant's request to charge the jury on the lesser-included offense of second-degree sexual offense. There was no evidence to support instruction on the lesser-included offense. **State v. Speight, 38.**

TRIALS

Compromise verdict—motion for new trial—properly denied—The trial court did not err in a negligence case arising out of a vehicular accident by refusing to grant plaintiff's motion for a new trial. A juror's statements may not be used in determining whether a compromise verdict was delivered and the award may have indicated that the jury did compensate plaintiff some amount for his pain and suffering. **Smith v. White, 189.**

TRUSTS

Constructive trust—imposition proper—The trial court did not err in an action involving beneficiaries of decedent's death benefits by imposing a constructive trust upon the gross amounts plus interest that defendants received from decedent's retirement plans. There were circumstances making it inequitable for defendants to retain the proceeds against the claim of the beneficiary of the constructive trust. **Myers v. Myers, 171.**

Constructive trust—proceeds of retirement plans—consent order unambiguous—The trial court did not err in a case involving the imposition of a constructive trust on decedent's death benefits by denying defendants' motion to dismiss. Based on the plain language of decedent's retirement plans and the clear language of a 1994 consent order, the trial court did not err in concluding that decedent's retirement plans' proceeds were "death benefits" as set forth in the

consent order. **Myers v. Myers**, 171.

Enforcement of trust provisions—standing—corporation owned by trust—A corporation that was owned by a trust did not have standing to sue the

TRUSTS—Continued

trustees to enforce trust provisions concerning successor trustees where it was not the beneficiary of the trust. **Yost v. Yost**, 516.

Successor trustees—former trustees—standing—Former trustees had standing to bring an action concerning the trust provisions for successor trustees, despite the rule that only beneficiaries and co-trustees have standing to sue to enforce a trust, where a part of the controversy was whether defendants wrongly prevented plaintiffs from renewing their trusteeships. **Yost v. Yost**, 516.

Successor trustees—trust provisions—The trial court did not err in interpreting a trust provision concerning successor trustees and in granting a motion for partial summary judgment. The plain language of the trust provision supported the trial court's interpretation, which was consistent with the purposes of the trust. The matter was remanded for removal of certain language from the court's order that reached too far and was not supported by the agreement. **Yost v. Yost**, 516.

UNFAIR TRADE PRACTICES

In or affecting commerce—multiple companies—motions for directed verdict—judgment notwithstanding verdict—properly denied—The trial court did not err in an unfair and deceptive trade practices case by denying defendant's motions for directed verdict and judgment notwithstanding the verdict. Because there were multiple companies involved, including a North Carolina corporation, defendant's actions were "in or affecting commerce." **Songwooyarn Trading Co., Ltd. v. Sox Eleven, Inc.**, 49.

Severance benefits—no genuine issues of material fact—summary judgment proper—The trial court did not err in an unfair trade practices claim by granting defendant's motion for summary judgment. The severance agreement did not violate principles of common law and there were no genuine issues of material fact regarding his unfair and deceptive trade practices claim. **McKinnon v. CV Indus. Inc.**, 328.

Summary judgment—allegations not sufficiently egregious or aggravating—The trial court did not err by granting defendants' motion for partial summary judgment on plaintiff's claim for unfair and deceptive trade practices. While the facts supported plaintiff's claim for breach of contract, they were not sufficiently egregious or aggravating. **D.G. II, LLC v. Nix**, 220.

UTILITIES

Sanitary districts—collection of late fees—The trial court did not err by granting defendant's motion to dismiss a complaint challenging defendant's collection of late fees on the contention that sanitary districts are public utilities subject to the Utilities Commission's regulation of late charges. A 1950 case stated that sanitary districts are quasi-municipal corporations that are not under the control of the Utilities Commission as to services or rates, and a subsequent change in statutory language was not intended to include sanitary districts within the Commission's supervisory purview. **Wayne St. Mobile Home Park, LLC v. N. Brunswick Sanitary Dist.**, 554.

VENUE

Motion for change—denied—use of permanent mailing address as legal address—The trial court did not abuse its discretion by denying a motion for a

VENUE—Continued

change of venue in a child support dispute where the original action began in Orange County, where defendant was living with her father, she moved a number of times, and resided in Wake County at the time of the motion. The trial court was within its discretion to determine that her permanent mailing address (Orange County) remained her legal address. **Orange Cnty. ex rel. Clayton v. Hamilton, 205.**

WITNESSES

Expert—no degree or certification—practical experience—The trial court did not err in a prosecution for second-degree murder, driving while impaired, and other offenses by qualifying a witness as an expert in forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and testing. Despite the witness's lack of a formal degree or certification, his extensive practical experience qualified him to testify as an expert. **State v. Norman, 114.**

Expert—testimony not outside scope of expertise—no error—The trial court did not err in a driving while impaired case by allowing a witness accepted as an expert forensic toxicologist to testify about the effects of cocaine on the body. As a trained expert in forensic toxicology with degrees in biology and chemistry, the witness was in a better position to have an opinion on the physiological effects of cocaine than the jury. **State v. Norton, 75.**

WORKERS' COMPENSATION

Authorized treating physician—treatment appropriate and reasonably necessary—The Industrial Commission did not abuse its discretion in a workers' compensation case by ordering defendants to provide medical compensation for plaintiff's treatment by his requested doctor. The treatment was appropriate and reasonably necessary to provide pain relief and improve plaintiff's function. **Lipscomb v. Mayflower Vehicle Sys., 440.**

Calculation of compensation rate—exclusion of per diem, travel pay, and wage advances proper—The Industrial Commission did not err in a workers' compensation case in excluding per diem, travel pay, and wage advances from the calculation of plaintiff's earnings while working for defendant. Competent evidence existed in the record to support the Commission's findings of fact that those items were not advanced to plaintiff in lieu of wages. **Thompson v. STS Holdings, Inc., 26.**

Calculation of compensation rate—fifth method—proper calculation—The Industrial Commission did not err in a workers' compensation case by calculating wages earned by plaintiff while in the employ of defendant in a fifty-two week period, then dividing that amount by fifty-two in order to obtain plaintiff's average weekly wage pursuant to the fifth method enumerated in N.C.G.S. § 97-2. **Thompson v. STS Holdings, Inc., 26.**

Calculation of compensation rate—fifth method—proper method—The Industrial Commission did not err in a workers' compensation case in calculating

plaintiff's compensation rate pursuant to the fifth method enumerated in N.C.G.S. § 97-2. Plaintiff agreed that method one was not the appropriate method by which to calculate his average weekly wage and there was sufficient evidence before the Commission to support its findings that methods two, three, and four would not lead to fair and just results. **Thompson v. STS Holdings, Inc., 26.**

WORKERS' COMPENSATION—Continued

Credit for overpayment of compensation—no error—The Industrial Commission did not err in a workers' compensation case in allowing a credit to defendants for overpayment of compensation, as well as in failing to consider estoppel. The Court of Appeals had already rejected plaintiff's estoppel argument and plaintiff made no argument that the Commission abused its discretion by awarding defendants a credit. **Thompson v. STS Holdings, Inc., 26.**

Penalty for late payment—award not due until all appeals exhausted or waiver—The Industrial Commission erred in a workers' compensation case by assessing a ten percent penalty against defendants for their alleged late payment of an award for temporary total disability. N.C.G.S. §§ 97-18(e) and 97-86 provide that payment of an award does not become due until all appeals are exhausted or a party waives the right to appeal. **Norman v. Food Lion, 587.**

Reduction in compensation—equitable estoppel not considered—no error—The Industrial Commission did not err in a workers' compensation case by failing to consider equitable estoppel as a means of preventing defendant from requesting that the Commission reduce the amount of compensation defendant was providing plaintiff. Plaintiff affirmatively denied the existence of any agreement between plaintiff and defendant concerning compensation, and expressly challenged the amount of compensation plaintiff was receiving from defendant. **Thompson v. STS Holdings, Inc., 26.**

Temporary partial disability—amount of payments—The Industrial Commission erred in a workers' compensation case by concluding that plaintiff was entitled to temporary partial disability benefits in the amount of \$330 per month. The case was remanded for a determination of the weekly amount of plaintiff's payments. **Lipscomb v. Mayflower Vehicle Sys., 440.**

ZONING

Application for variance—erroneously denied—The trial court erred in a zoning case by finding that the Board of Adjustment had no authority to grant petitioner the requested variance. The trial court's reliance on *Donnelly*, 99 N.C. App. 702, was erroneous as petitioners' sign was not, as a matter of law, contrary to the zoning ordinance. Moreover, the variance petitioners sought was not a use variance but was an area variance. **Premier Plastic Surgery Cntr., PLLC v. Bd. of Adjust. for Town of Matthews, 364.**

Conditional use permit—order on remand—properly carried out mandate—The superior court's order on remand directing the Board of Adjustment to issue the conditional use permit for which petitioners applied "without application of any new or different conditions" properly carried out the mandate of the Court of Appeals. **Shaefer v. Town of Hillsborough, 212.**

Sign permit—vested rights not acquired—estoppel or laches inapplica-

ble—The trial court did not err in a zoning case by concluding that petitioners did not acquire vested rights in a sign permit and that the Town of Matthews was not barred by estoppel or laches from revoking the permit. Petitioners did not appeal the Board of Adjustment's decision to deny petitioner's appeal of the revocation of the sign permit. **Premier Plastic Surgery Cntr., PLLC v. Bd. of Adjust. for Town of Matthews, 364.**

ZONING—Continued

Variance—denial of petition—findings of fact insufficient—The trial court erred in a zoning case by concluding that the Board of Adjustment made suffi-