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CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SUGAR CREEK CHARTER SCHOOL, INC., ET AL., PLAINTIFFS V. STATE OF NORTH CAROLINA, ET AL., DEFENDANTS

No. COA10-965

(Filed 2 August 2011)

1. Schools and Education—charter schools—capital funds

The pertinent statutory provisions clearly preclude charter schools from seeking access to the capital outlay funds maintained in the counties in which they operate.

2. Schools and Education—sound basic education—non-traditional public schools—funding

The North Carolina Constitution merely requires that all North Carolina students have access to a sound basic education and does not preclude the creation of schools or other education programs with attributes or funding options different from traditional public schools. Plaintiff charter schools were not entitled to access their county's capital outlay fund.

3. Constitutional Law—general and uniform school system—charter schools—funding

Charter schools were not entitled to access counties' capital outlay funds by North Carolina Constitutional provisions concerning a general and uniform system of public schools. Charter schools are public schools but differ from traditional public schools in significant respects. There is no basis for constitutional concern arising from the use of differing funding mecha-

nisms to support different types of public schools that are subject to different statutory provisions.

4. Constitutional Law— charter schools—uniform laws

There was no "general law" issue under N.C. Const. art. XIV, § 3 in a charter schools funding case. The statutory provisions governing elementary and secondary education are applied uniformly throughout North Carolina, and nothing in this constitutional provision in any way limits the General Assembly's authority to create and provide funding mechanisms for optional schools that differ from those applicable to traditional public schools.

5. Schools and Education— charter schools—funding

Constitutional provisions concerning the exclusive use of monies for public schools and the use of local revenues to supplement public school programs did not apply in a case concerning charter school funding. Plaintiffs did not assert that funds intended for public schools were used for another purpose, and the generalized provision authorizing the use of local funds did not address the criteria that the General Assembly must utilize in making funding decisions or preclude the General Assembly from adopting specific provisions authorizing different funding systems for traditional public schools and charter schools.

Appeal by plaintiffs from order entered 4 June 2010 by Judge Forrest Donald Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 February 2011.

North Carolina Institute for Constitutional Law, by Jason Kay and Robert F. Orr, for Plaintiff-Appellants, Sugar Creek Charter School, Inc.; The Community Charter School; The Metrolina Regional Scholars' Academy, Inc.; Rocky Mount Preparatory School, Inc.; Socrates Academy, Inc.; Thomas Jefferson Classical Academy; and Union Academy; Deborah Hopkins, individually and as guardian ad litem of Sloane Hopkins, Killian Hopkins, and Skylar Hopkins; Gilbert Bailey, individually and as guardian ad litem of Virginia L. Bailey; Cheryl Drake-Bowers, individually and as guardian ad litem of Annika Bowers; James Barnhill and Sharon Barnhill, individually and as guardians ad litem of Austin Barnhill and James Cody Barnhill; Angela Hale, individually and as guardian ad litem of Mathew Perry, Zachary Perry, and Dustin Lee; Kay Crickmore and David Crickmore, individually and as guardians

ad litem of Emily Crickmore, Rebecca Crickmore, Rachel Crickmore, and Katherine Crickmore; Pansy Flanagan, individually and as guardian ad litem of William L. Overton; William E. Davis, III and Aphrodite Davis, individually and as guardians ad litem of Eliana M. Davis; Shawn L. Jones, individually and as guardian ad litem of Katherine Jones; Patricia Seguine and Daniel Seguine, individually and as guardians ad litem of Courtney Seguine, Carter Seguine, and Jonah Seguine; Tawanda D. Blount, individually and as guardian ad litem of Bryson Blount; Todd Bennett and Wendy Bennett, individually and as guardians ad litem of Hannah Bennett, Victoria Bennett, and Olivia Bennett; James Smith and Susan Soule-Smith, individually and as guardians ad litem of Evan Smith and Molly Smith; Lynn Kroeger and Ken Kroeger, individually and as guardians ad litem of Peter Kroeger, Christina Kroeger, and Joseph Kroeger; Todd Havican, individually and as guardian ad litem of Kaitlyn Havican and Kelsey Havican; Ron L. Brown, individually and as guardian ad litem of Victoria A. Brown and Daniel S. Brown.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for the State.

Teague Campbell Dennis & Gorham, L.L.P., by George W. Dennis III, J. Matthew Little, and John L. Kubis, Jr., for Appellees County of Mecklenburg, County of Union, County of Nash, County of Halifax, County of Edgecombe, County of Rutherford, and County of Cleveland.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jill R. Wilson, Robert J. King III, and Julia C. Ambrose, for Appellees Charlotte-Mecklenburg County Board of Education, Union County Board of Education, Nash-Rocky Mount Board of Education, Halifax County Board of Education, Edgecombe County Board of Education, Rutherford County Board of Education and Cleveland County Board of Education.

ERVIN, Judge.

Plaintiffs appeal from an order dismissing their declaratory judgment action for failure to state a claim for which relief can be granted. After careful consideration of Plaintiffs' challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Background

The present case arises from a dispute over the extent to which a charter school may apply for funds from the capital outlay fund of the county in which the charter school is located. Plaintiffs are charter schools, charter school students, and the parents of charter school students. Defendants are the State of North Carolina, various North Carolina counties in which charter schools are located, and the boards of education that have been established in those counties.

In their amended complaint, Plaintiffs alleged that "they receive disparate and discriminatory treatment in North Carolina by and through a discriminatory funding practice permitted and enforced by the Defendants" and that they were "being denied the opportunity to receive from counties or local school administrative units capital funding freely granted to traditional public schools." The claims asserted in Plaintiffs' amended complaint rest, at least in part, on N.C. Const. art. IX, § 2(1), which requires the General Assembly to establish a "general and uniform system of public schools;" N.C. Const. art. I, § 19; and the Fourteenth Amendment to the United States Constitution.[1] According to Plaintiffs:

> The present interpretation and enforcement scheme of the Defendants, which deprives charter schools and charter school students of the opportunity to be uniformly considered for expenditures from the capital outlay fund by the counties or local administrative units, detrimentally and unconstitutionally affects the rights of the Plaintiffs to the equal opportunity for a sound basic education in that the discriminatory funding scheme deprives, depletes, or redirects the funding resources of charter schools that are necessary to provide students with the capital facilities sufficient to offer an equal opportunity for a sound basic education.[2]

Based upon these allegations, Plaintiffs sought a declaration that: (1) "the charter school funding statutes are facially unconstitutional or unconstitutional to the extent they are applied to prohibit"

1. As a result of the fact that Plaintiffs have not advanced any arguments resting on alleged violations of the United States Constitution in their brief before this Court, the present opinion focuses exclusively on Plaintiffs' contentions regarding the extent, if any, to which charter schools are entitled to capital outlay funds as a matter of North Carolina statutory and constitutional law.

2. Plaintiffs do not claim on appeal to have been deprived of access to a sound basic education or that existing North Carolina school funding statutes violate their right to the equal protection of the laws guaranteed by the state and federal constitutions.

Defendants from "extending to the Plaintiffs the opportunity to be uniformly considered for expenditures from the capital outlay fund" or that (2) the charter school funding statutes, "consistent with the North Carolina Constitution and other statutory provisions," either "permit" or "must permit" Plaintiffs to have the "opportunity to be uniformly considered for expenditures from the capital outlay fund by the County Defendants."

All Defendants sought dismissal of Plaintiffs' amended complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). After hearing argument concerning Defendants' dismissal motion, the trial court entered an order dismissing Plaintiffs' amended complaint on 4 June 2010. Plaintiffs noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

The standard of review utilized in reviewing orders granting dismissal motions made pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), is well established:

> The standard of review of an order allowing a Rule 12(b)(6) motion is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]" "The complaint should be liberally construed, and the 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." We evaluate all facts alleged and permissible inferences therefrom in the light most favorable to plaintiff.

Goodman v. Holmes & McLaurin. Attorneys at Law, 192 N.C. App. 467, 473, 665 S.E.2d 526, 531 (2008) (quoting *Bowman v. Alan Vester Ford Lincoln Mercury*, 151 N.C. App. 603, 606, 566 S.E.2d 818, 821 (2002), and *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 184 N.C. App. 613, 618, 646 S.E.2d 790, 795 (2007) (internal quotation omitted), *aff'd in part and reversed in part on other grounds*, 362 N.C. 431, 666 S.E.2d 107 (2008), and citing *Stephenson v. Town of Garner*, 136 N.C. App. 444, 447, 524 S.E.2d 608, 611, *disc. review denied*, 352 N.C. 156, 544 S.E.2d 243 (2000)). We will now utilize this standard of review to evaluate Plaintiffs' challenges to the trial court's order.

B. Analysis of Plaintiff's Claims

1. Statutory Construction Issues

[1] The initial issue that we must address is whether a charter school has a legal right to apply for funding from the capital outlay fund maintained by the board of education in the county where the charter school is located. Based upon our analysis of the relevant statutory provisions, we conclude that charter schools are not entitled to request such funding.[3]

N.C. Gen. Stat. § 115C-238.29A "authorize[s] a system of charter schools to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently of existing schools[.]" Although charter schools are undoubtedly public schools, they are exempt from the obligation to comply with many of the statutory provisions that govern the operation of traditional public schools, according to N.C. Gen. Stat. § 115C-238.29E, which provides, in pertinent part, that:

> (a) A charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located. . . .
>
> (b) A charter school shall be operated by a private nonprofit corporation that shall have received federal tax-exempt status[.]
>
> (c) A charter school shall operate under the written charter signed by the entity to which it is accountable under subsection (a) of this section and the applicant. . . .
>
> (d) The board of directors of the charter school shall decide matters related to the operation of the school, including budgeting, curriculum, and operating procedures.
>
> . . .
>
> (f) Except as provided in this Part and pursuant to the provisions of its charter, a charter school is exempt from statutes and rules applicable to a local board of education or local school administrative unit.

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3. In their brief, Plaintiffs argue that Defendants have erroneously relied on an opinion of the Attorney General in denying Plaintiffs access to capital outlay funding on statutory grounds. We need not consider the merits of the Attorney General's opinion in order to resolve this case, and do not do so except to the extent that the issues addressed in this case are similar to those addressed in the relevant Attorney General's opinion.

The structure of public school budgeting and financial accounting is outlined in the "School Budget and Fiscal Control Act," which appears in Chapter 115C, Article 31, of the North Carolina General Statutes. N.C. Gen. Stat. § 115C-426, which is entitled "Uniform Budget Format," specifies the required funding categories and provides, in pertinent part, that

> (a) The State Board of Education, in cooperation with the Local Government Commission, shall cause to be prepared and promulgated a standard budget format for use by local school administrative units throughout the State.
>
> . . . .
>
> (c) The uniform budget format shall require the following funds:
>
> (1) The State Public School Fund.
>
> (2) The local current expense fund.
>
> (3) The capital outlay fund.
>
> In addition, other funds may be recovered to account for trust funds, federal grants restricted as to use, and special programs. Each local school administrative unit shall maintain those funds shown in the uniform budget format that are applicable to its operations.
>
> (d) The State Public School Fund shall include appropriations for the current operating expenses of the public school system from moneys made available to the local school administrative unit by the State Board of Education.
>
> (e) The local current expense fund shall include appropriations sufficient, when added to appropriations from the State Public School Fund, for the current operating expense of the public school system[.] . . . These appropriations shall be funded by revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7 of the Constitution, moneys made available to the local school administrative unit by the board of county commissioners, supplemental taxes[,] . . . State money disbursed directly to the local school administrative unit, and other moneys made available . . . to the local school administrative unit for the current operating expenses of the public school system.

(f) The capital outlay fund shall include appropriations for:

(1) The acquisition of real property for school purposes, including but not limited to school sites, playgrounds, athletic fields, administrative headquarters, and garages.

(2) The acquisition, construction, reconstruction, enlargement, renovation, or replacement of buildings and other structures[.]

(3) The acquisition or replacement of furniture and furnishings, instructional apparatus, data-processing equipment, business machines, and similar items of furnishings and equipment.

(4) The acquisition of school buses as additions to the fleet.

(5) The acquisition of activity buses and other motor vehicles.

(6) Such other objects of expenditure as may be assigned to the capital outlay fund by the uniform budget format.

The cost of acquiring or constructing a new building, or reconstructing, enlarging, or renovating an existing building, shall include the cost of all real property and interests in real property, and all plants, works, appurtenances, structures, facilities, furnishings, machinery, and equipment necessary or useful in connection therewith; financing charges; the cost of plans, specifications, studies, reports, and surveys; legal expenses; and all other costs necessary or incidental to the construction, reconstruction, enlargement, or renovation.

No contract for the purchase of a site shall be executed nor any funds expended therefor without the approval of the board of county commissioners as to the amount to be spent for the site[.] . . . Appropriations in the capital outlay fund shall be funded by revenues made available for capital outlay purposes by the State Board of Education and the board of county commissioners, supplemental taxes[,] . . . the proceeds of the sale of capital assets, the proceeds of claims against fire and casualty insurance policies, and other sources.

(g) Other funds shall include appropriations for such purposes funded from such sources as may be prescribed by the uniform budget format.

Like other public schools, charter schools must comply with the procedural requirements specified in the statutory provisions governing the budget format. *Francine Delany New School for Children, Inc. v. Asheville City Bd. of Educ.*, 150 N.C. App. 338, 346, 563 S.E.2d 92, 97 (2002), *disc. review denied*, 356 N.C. 670, 577 S.E.2d 117 (2003) (stating that "[t]he Legislature clearly intended for charter schools to be treated as public schools subject to the uniform budget format."). However, the provisions of N.C. Gen. Stat. § 115C-426, which are procedural in nature, do not address the substantive right of charter schools to seek funding from one or more of the categories enumerated in the budget format statutes. Instead, the resolution of that issue is governed by N.C. Gen. Stat. § 115C-238.29H, which provides, in pertinent part, that:

> (a) The State Board of Education shall allocate to each charter school:
>
> (1) An amount equal to the average per pupil allocation for average daily membership from the local school administrative unit allotments in which the charter school is located for each child attending the charter school[.] . . .
>
> . . . .
>
> (a1) Funds allocated by the State Board of Education may be used to enter into operational and financing leases for real property or mobile classroom units for use as school facilities for charter schools[.] . . . However, State funds shall not be used to obtain any other interest in real property or mobile classroom units. No indebtedness of any kind incurred or created by the charter school shall constitute an indebtedness of the State or its political subdivisions, and no indebtedness of the charter school shall involve or be secured by the faith, credit, or taxing power of the State or its political subdivisions. Every contract or lease into which a charter school enters shall include the previous sentence. The school also may own land and buildings it obtains through non-State sources.
>
> (b) If a student attends a charter school, the local school administrative unit in which the child resides shall transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year[.]

Thus, N.C. Gen. Stat. § 115C-238.29H expressly provides that charter schools are entitled to funds from just two of the three primary sources of local funding for schools set out in the uniform budget format—the local current expense appropriation and the local school administrative unit allotment. "In *Francine Delany New Sch. for Children, Inc. v. Asheville City Bd. of Educ.*, 150 N.C. App. 338 [, 346,] 563 S.E.2d 92[, 98] (2002), *disc. review denied*, 356 N.C. 670, 577 S.E.2d 117 (2003), this Court held that the phrase 'local current expense appropriation' in the Charter School Funding Statute, N.C. Gen. Stat. § 115C-238.29H(b), is synonymous with the phrase 'local current expense fund' in the School Budget and Fiscal Control Act, N.C. Gen. Stat. § 115C-426(e). Thus, the Charter Schools are entitled to an amount equal to the per pupil amount of all money contained in the local current expense fund." *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 188 N.C. App. 454, 460, 655 S.E.2d 850, 854, *disc. review denied*, 362 N.C. 481, 667 S.E.2d 460 (2008) (*Sugar Creek I*).

"It is well settled that statutes dealing with the same subject matter must be construed in *pari materia*, 'as together constituting one law.' " *Williams v. Alexander County Bd. of Educ.*, 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1998) (quoting *Williams v. Williams*, 299 N.C. 174, 180-81, 261 S.E.2d 849, 854 (1980)). As we noted above, N.C. Gen. Stat. § 115C-426 identifies three primary sources for the support of public schools: the local current expense fund, the State Public School Fund, and the capital outlay fund. N.C. Gen. Stat. § 115C-238.29H specifically provides that charter schools are entitled to receive funding from just two of these three funds. " 'In ascertaining the intent of the legislature, the presumption is that it acted with full knowledge of prior and existing laws.' Further, '[o]ne of the long-standing rules of [statutory] interpretation and construction in this state is *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another.' Applying such principle here, because the language of [N.C. Gen. Stat. § 115C-238.29H] specifically references only [the local current expense fund,] that language cannot be construed as a reference to another [fund, the capital outlay fund] not specifically mentioned, especially when the drafters were presumed to have been aware of that other [fund]." *Bowles Automotive v. Div. of Motor Vehicles*, N.C. App. ——, ——, 690 S.E.2d 728, 737 (quoting *Williams v. Alexander County*, 128 N.C. App. at 603, 495 S.E.2d at 408, and *Mangum v. Raleigh Bd. of Adjust.*, 196 N.C. App. 249, 255, 674 S.E.2d 742, 747 (2009), and citing *Hunt v. Reinsurance Facility*, 302 N.C. 274, 290, 275 S.E.2d 399, 407 (1981)), *disc. review denied*, 364 N.C.

324, 700 S.E.2d 746 (2010). Thus, by specifically stating that charter schools are entitled to funding from the State allotment and the local current expense fund, the General Assembly intended to preclude charter schools from having access to county capital outlay funds. As a result, we conclude that, since "a county has no power to appropriate funds unless authorized to do so by the General Assembly," *Hughey v. Cloninger*, 297 N.C. 86, 88, 253 S.E.2d 898, 900 (1979), and since there is no statutory provision authorizing charter schools to receive monies from county capital outlay funds, the relevant statutory provisions do not allow charter schools access to county capital outlay funds.

In addition, other statutory provisions governing the operation of charter schools support our conclusion that the General Assembly intended for charter schools to be responsible for providing any needed physical facilities using their own resources. N.C. Gen. Stat. § 115C-238.29B(13) requires an application for authorization to establish a charter school to include "[i]nformation regarding the facilities to be used by the school and the manner in which administrative services of the school are to be provided." In addition, N.C. Gen. Stat. § 115C-238.29D(c) provides that the North Carolina "State Board of Education may authorize a school before the applicant has secured its space, equipment, facilities, and personnel if the applicant indicates the authority is necessary for it to raise working capital." The fact that an applicant for authority to establish a charter school must explain the manner in which it will obtain the necessary facilities as part of its application and that the State Board of Education is authorized to approve an application if the charter school does not have the necessary facilities in hand further suggests that the applicant is responsible for procuring the necessary facilities available on its own.

Our conclusion that charter schools are not entitled to seek assistance from the relevant county's capital outlay fund is also consistent with other differences between the statutory provisions governing the manner in which traditional public schools and charter schools obtain needed facilities. For example, N.C. Gen. Stat. § 115C-517 allows local boards of education to "acquire suitable sites for schoolhouses or other school facilities" and states that "condemnation proceedings to acquire same may be instituted by such board under the provisions of Chapter 40A of the General Statutes." A number of statutory provisions address in detail the construction and maintenance of buildings utilized by traditional public schools. For example, N.C. Gen. Stat. § 115C-521 provides, among other things, that:

(a) It shall be the duty of local boards of education to provide classroom facilities adequate to meet the requirements of G.S. 115C-47(10) and 115C-301. . . .

(b) It shall be the duty of the boards of education of the several local school [districts] . . . to make provisions for the public school term by providing adequate school buildings equipped with suitable school furniture and apparatus. . . .

(c) The building of all new school buildings and the repairing of all old school buildings shall be under the control and direction of, and by contract with, the board of education for which the building and repairing is done. If a board of education is considering building a new school building to replace an existing school building, the board shall not invest any construction money in the new building unless it submits to the State Superintendent and the State Superintendent submits to the North Carolina Historical Commission an analysis that compares the costs and feasibility of building the new building and of renovating the existing building and that clearly indicates the desirability of building the new building. No board of education shall invest any money in any new building until it has (i) developed plans based upon a consideration of the State Board's facilities guidelines, (ii) submit ted these plans to the State Board for its review and comments, and (iii) reviewed the plans based upon a consideration of the comments it receives from the State Board. No local board of education shall contract for more money than is made available for the erection of a new building. . . . All contracts for buildings shall be in writing and all buildings shall be inspected, received, and approved by the local superintendent and the architect before full payment is made therefor. . . . In the design and construction of new school buildings and in the renovation of existing school buildings . . . the local board of education shall participate in the planning and review process of the Energy Guidelines for School Design and Construction that are developed and maintained by the Department of Public Instruction and shall adopt local energy-use goals for building design and operation[.] . . . In the design and construction of new school facilities and in the repair and renovation of existing school facilities, the local board of education shall consider the placement and design of windows to use the climate of North Carolina for both light and ventilation in case of power shortages. A local board shall also consider the installation of solar energy systems in the school facilities whenever practicable. . . .

> (c1) No local board of education shall apply for a certificate of occupancy for any new middle or high school building until the plans for the science laboratory areas of the building have been reviewed and approved to meet accepted safety standards for school science laboratories and related preparation rooms and stockrooms. The review and approval of the plans may be done by the State Board of Education or by any other entity that is licensed or authorized by the State Board to do so.
>
> (d) Local boards of education shall make no contract for the erection of any school building unless the site upon which it is located is owned in fee simple by the board . . . .

In addition, the construction of traditional public schools is subject to the extensive set of statutory requirements applicable to public contracts set out in N.C. Gen. Stat. § Chapter 143, Article 8. On the other hand, N.C. Gen. Stat. § 115C-238.29E(e), which addresses the capital needs of charter schools, provides that:

> (e) A charter school's specific location shall not be prescribed or limited by a local board or other authority except a zoning authority. The school may lease space from a local board of education or as is otherwise lawful in the local school administrative unit in which the charter school is located. If a charter school leases space from a sectarian organization, the charter school classes and students shall be physically separated from any parochial students, and there shall be no religious artifacts, symbols, iconography, or materials on display in the charter school's entrance, classrooms, or hallways. Furthermore, if a charter school leases space from a sectarian organization, the charter school shall not use the name of that organization in the name of the charter school.
>
> At the request of the charter school, the local board of education of the local school administrative unit in which the charter school will be located shall lease any available building or land to the charter school unless the board demonstrates that the lease is not economically or practically feasible or that the local board does not have adequate classroom space to meet its enrollment needs. Notwithstanding any other law, a local board of education may provide a school facility to a charter school free of charge; however, the charter school is responsible for the maintenance of and insurance for the school facility.

As a result, an examination of the relevant statutory provisions indicates that:

> 1. A charter school is owned by a private non-profit corporation, *see* N.C. Gen. Stat. § 115C-238.29E(b);
>
> 2. A charter school is operated pursuant to a charter, which by its own terms expires after ten years and which may be revoked if necessary, *see* N.C. Gen. Stat. § 115C-20D(d);
>
> 3. A charter school is free to locate anywhere, regardless of whether there is a need for another school in a given location, *see* N.C. Gen. Stat. § 115C-238.29E(e);
>
> 4. A charter school may be located in buildings owned or controlled by religious institutions, *see* N.C. Gen. Stat. § 115C-238.29E(e); and
>
> 5. A charter school is not subject to the numerous bidding, construction, and other strictures applicable to traditional public schools.

We conclude that these differences between the statutory provisions governing the operation of traditional public schools and charter schools, although not conclusive, are consistent with our determination that charter schools are not intended to operate in the same manner as traditional public schools, a fact that reinforces our conclusion that charter schools are not entitled to have access to a county's capital outlay fund.

On at least one prior occasion, this Court made a determination consistent with the one that we have found to be appropriate in this case. In *Sugar Creek I*, the plaintiffs sought access to local funds that were not held in the local current expense fund. In response to that request, this Court opined that charter schools were only entitled to receive local funding from the local current expense fund, stating that:

> In essence, the Charter Schools contend that all moneys made available to [the local board] by the Board [of county commissioners] are part of the current local expense fund, and thus must be apportioned *pro rata* between the [local public] schools and the Charter Schools before any of those moneys are diverted to other funds. This is inaccurate. . . . [The local board's] local current expense fund, capital outlay fund, and any other funds it establishes may all include money made available to [the local board] by the Board [of county commissioners.]

> Furthermore, pursuant to N.C. Gen. Stat. § 115C-431, "[i]f the board of education determines that the amount of money appropriated to the local current expense fund, or the capital outlay fund, or both, by the board of county commissioners is not sufficient[,]" then a meeting between the two boards must be held to discuss the matter. This statute explicitly contradicts the Charter Schools' contention that all the moneys made available to [the local board] by the Board [of county commissioners] are included in the local current expense fund.
>
> Finally, pursuant to N.C. Gen. Stat. § 115C-433(d), "[the local board] may amend the budget to transfer money to or from the capital outlay fund to or from any other fund . . ." This statute contemplates transferring local appropriations to and from the capital outlay fund, to or from any number of other funds, not just the local current expense fund. . . . Thus, contrary to the Charter Schools' contention, not all appropriations from the Board [of county commissioners] to [the local board of education] are included in the current local expense fund and thus subject to apportionment under N.C. Gen. Stat. § 115C-238.29H(b). Since the Charter Schools are only entitled to a *pro rata* share of all money in the local current expense fund, the Charter Schools are therefore entitled to a *pro rata* share of the money made available to [the local school board] by the County Commissioners specifically for the current local expense fund.

Sugar Creek I, 188 N.C. App. at 461-62, 655 S.E.2d at 855-56 (emphasis added). Thus, in *Sugar Creek I*, this Court examined the statutes addressing public school funding, including the provisions of N.C. Gen. Stat. §§ 115C-426 and 115C-238.29H; reasoned that, in addition to the local current expense fund, a school system had a capital outlay fund and might also have certain other funds; and explicitly stated that, among the funds made available to a local school board by its board of county commissioners, "the Charter Schools are only entitled to a *pro rata* share of all money in the local current expense fund." As a result, if we were to hold that, in addition to having access to the local current expense fund, charter schools are entitled to funding from the local capital outlay fund, such a holding would conflict with our reasoning in *Sugar Creek I*.

Thus, for the reasons set forth above, we conclude that the pertinent statutory provisions clearly preclude charter schools from seeking access to the capital outlay funds maintained in the counties in which they operate. Although there are certainly similarities between the

ends sought to be served by both traditional public schools and charter schools, the statutory provisions applicable to each type of educational institution differ widely and clearly indicate that the capital needs of traditional public schools and charter schools should be met in different ways. As a result, we conclude that Plaintiffs' request that we interpret the relevant statutory provisions to provide charter schools with access to local capital outlay funds lacks merit.[4]

2. Constitutional Provisions

a. N.C. Const. art. IX, § 2(1)

[2] In addition, Plaintiffs argue that they are entitled to access to the relevant county's capital outlay fund in light of the "express provisions of the North Carolina Constitution." Plaintiffs' argument hinges primarily on N.C. Const. art. IX, § 2(1) (2011), which provides that:

> (1) The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

This constitutional provision is codified in N.C. Gen. Stat. § 115C-1, which states, in part, that "[a] general and uniform system of free public schools shall be provided throughout the State, wherein equal opportunities shall be provided for all students, in accordance with the provisions of Article IX of the Constitution of North Carolina." According to Plaintiffs, N.C. Const. art. IX, § 2(1) requires that charter schools have access to the same funding sources as traditional public schools, including the capital outlay fund. We are not persuaded by Plaintiffs' argument.

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4. In addition, Plaintiffs argue that various statutory provisions dealing with the uniform budget format authorize counties to appropriate capital outlay funds to charter schools. As we have already established, however, the statutory language creating the uniform budget format does not address the extent to which specific schools are entitled to obtain funding from any particular source. In addition, Plaintiffs cite various generalized statutory statements concerning the manner in which public schools should be funded. However, we have held in this case that N.C. Gen. Stat. § 115C-238.29H does not authorize charter schools to access capital outlay funds. "One canon of construction is that when one statute deals with a particular subject matter in detail, and another statute deals with the same subject matter in general and comprehensive terms, the more specific statute will be construed as controlling." *Piedmont Publishing Co. v. City of Winston-Salem*, 334 N.C. 595, 598, 434 S.E.2d 176, 177-78 (1993) (citing *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966)). As a result, we conclude that N.C. Gen. Stat. § 115C-238.29H, rather than the more general statutory provisions upon which Plaintiffs rely, is controlling in this instance.

The Supreme Court has clearly construed the education-related provisions of the North Carolina Constitution, including N.C. Const. art. IX, § 2(1), as follows:

> We conclude that Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools. For purposes of our Constitution, a "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Leandro v. State of North Carolina, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997). At no point in their amended complaint have Plaintiffs asserted that the State, or any of its subdivisions, has failed to provide them with the constitutionally-mandated access to a sound basic education. Instead, Plaintiffs contend that N.C. Const. art. IX, § 2(1) both mandates that the General Assembly, the State, and the various counties in North Carolina provide for a uniform system of public schools affording all children in grades K – 12 access to a sound basic education and also forbids the General Assembly from establishing any other educational programs or schools. In essence, Plaintiffs argue that:

> The Constitution requires the General Assembly to provide and fund through taxation a single class of general and uniform free public schools. . . . More specifically, under this provision of the Constitution, the State may not create a sub-class of second-class free public schools. Having directed the General Assembly in this specific matter, the Constitution's direction may not be ignored or gutted by the insertion of additional public school systems which do not have the same constitutional rights as others.

We do not believe that the constitutional provision upon which Plaintiffs rely is subject to such an interpretation.

At bottom, Plaintiffs' argument rests on the contention that "the North Carolina Constitution indicates that there is a single class of public schools[.]" Given that, in their view, only a "single class of public schools" is authorized by the constitution, Plaintiffs conclude that all public schools should be treated as traditional public schools for constitutional purposes. Plaintiffs' argument rests primarily on the doctrine *inclusio unius est exclusio alterius*, which we have discussed in connection with the statutory construction issues addressed earlier in this opinion. The interpretive principle upon which Plaintiffs rely does not, however, have any role in the proper construction of N.C. Const. art. IX, § 2(1).

"The standards of constitutional interpretation are well established. It is elementary that the Constitution is a limitation, not grant, of power." *Britt v. N.C. State Board of Education*, 86 N.C. App. 282, 286, 357 S.E.2d 432, 434 (citing *Mitchell v. Financing Authority*, 273 N.C. 137, 159 S.E.2d 745 (1968)), *disc. review denied*, 320 N.C. 790, 361 N.C. 71 (1987). "All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989) (citations omitted).

> "[U]nder the doctrine of *expressio unius est exclusio alterius*, the expression of specific disqualifications implies the exclusion of any other disqualifications." This doctrine is a commonly used tool of statutory construction, but . . . we have found no North Carolina case in which this doctrine has been used to interpret our Constitution. Perhaps this dearth of authority can be attributed to the fact that this doctrine flies directly in the face of one of the underlying principles of North Carolina constitutional law.

Baker v. Martin, 330 N.C. 331, 337, 410 S.E.2d 887, 891 (1991) (quoting *Baker v. Martin*, 330 N.C. at 343, 410 S.E.2d at 896 (Mitchell, J., dissenting)).[5] Thus, we are unable to infer from the existence of the constitutional mandate requiring the establishment of a general and uni-

5. Plaintiffs argue that the Supreme Court "appl[ied] the maxim '*inclusio unius est exclusio alterius* (inclusion of one is exclusion of another') in interpreting the North Carolina Constitution" in *In re Spivey*, 345 N.C. 404, 412, 480 S.E.2d 693, 697 (1997), and that "*In re Spivey* implemented and qualified the reasoning of *Baker v. Martin*: the legislature is limited when the 'Constitution expressly or by necessary

form school system sufficient to provide all North Carolina children with access to a sound basic education the existence of a constitutional prohibition on the establishment of additional educational programs that are intended to supplement the statutory provisions effectuating this basic constitutional requirement. Aside from their reliance on the doctrine of *inclusio unius est exclusio alterius*, Plaintiffs cite no authority for their position that, by mandating the establishment of a uniform system of public schools, N.C. Const. art. IX, § 2(1) implicitly bans the establishment of any additional schools or educational programs. After careful study, we conclude that N.C. Const. art. IX, § 2(1) merely requires that all North Carolina students have access to a sound basic education and does not preclude the creation of schools or other educational programs with attributes or funding options different from those associated with traditional public schools.[6] Thus, we conclude that N.C. Const. art. IX, § 2(1) does not implicitly prohibit the establishment of public schools in addition to the traditional public schools that have been established in order to comply with this basic constitutional mandate.

b. "General and Uniform" System of Free Public Schools

[3] In addition, Plaintiffs argue that the reference in N.C. Const. art. IX, § 2(1) to a "general and uniform" system of public schools affords them access to counties' capital outlay funds. In support of this assertion, Plaintiffs reason that: (1) charter schools, which are indisputably public schools, are necessarily part of the constitutionally-mandated "general and uniform system of free public schools" and that, (2) given their status as a component of the uniform system of public schools, they are entitled to funding identical to that available to other schools in the uniform public school system. As a result,

implication restricts the actions of the legislative branch.' " (quoting *Baker*, 330 N,C. at 338-39, 410 S.E.2d at 891-92). After reviewing *Spivey*, we conclude that it does not utilize *inclusio unius est exclusio alterius* to construe a constitutional provision to hold that one grant of authority impliedly excluded another. As a result, nothing in *Spivey* affects the outcome in this case.

6. The General Assembly has created a number of other schools or educational programs that, while properly categorized as public schools, have such differing attributes and funding mechanisms, including:

1. Alternative learning programs or alternative schools, *see* N.C. Gen. Stat. § 115C-105.47A;

2. Adult education programs, *see* N.C. Gen. Stat. § 115C-231;

3. Summer schools, *see* N.C. Gen. Stat. § 115C-233;

4. Extended services programs, *see* § 115C-238.31;

Plaintiffs devoted a considerable portion of their brief to an attempt to demonstrate that charter schools are encompassed within the "general and uniform system of free public schools." Defendants, on the other hand, just as vigorously deny that charter schools are part of the uniform public school system. We need not resolve this issue, however, given that such a determination is not necessary in order for us to properly decide the issues raised by Plaintiffs' appeal.

Although charter schools are public schools, they differ from traditional public schools, as we have already noted, in some significant respects. Charter schools (1) have greater freedom to devise their own educational programs, (2) are entitled to a share of the local current expense fund just like traditional public schools, (3) have the responsibility for providing facilities within which to conduct their operations using their own resources, and (4) are not subject to the same building design rules as those applicable to traditional schools. Thus, charter schools and traditional schools are similar in some respects and different in others.

A charter school might be considered legally to be either (1) a component of the uniform system of public schools, created in addition to those schools required to provide access to a sound basic education and subject to different statutory guidelines and funding options than traditional public schools, or (2) as an optional educational program created outside of and in addition to the uniform system of public schools. As discussed above, we conclude that N.C. Const. art. IX, § 2(1) does not forbid the State from establishing additional schools or educational programs to supplement those traditionally utilized to effectuate the constitutional mandate to provide access to a sound basic education. In view of the differences between charter schools and traditional public schools, we see no basis for constitutional concern arising from the use of differing funding mech-

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5. Cooperative innovative high school programs, *see* § 115C-238.50;

6. The North Carolina School for the Deaf, Eastern North Carolina School for the Deaf, Governor Morehead School for the Blind, Early Intervention Services—Preschool, and Governor Morehead Preschool programs, all of which provide educational programs for specific targeted populations; and

7. A "Virtual High School" employing computer-based education, *see* N.C. Gen. Stat. §§ 115C-81, and 238.50;

The curriculum, funding, and other features of these programs differ from those utilized in or available to traditional public schools. In the event that we were to find that Plaintiffs' constitutional argument had merit, the statutes governing the operation of all of these educational institutions, facilities and programs would be subject to a constitutional challenge as well.

anisms to support different types of public schools that are subject to different statutory provisions. Thus, since the funding mechanisms that the General Assembly has authorized for both traditional public schools and charter schools are constitutional regardless of whether charter schools are or are not components of the uniform public school system, we see no reason to decide whether charter schools are or are not parts of the general and uniform public school system.[7]

c. N.C. Const. art. XIV, § 3

[4] Next, Plaintiffs argue that depriving them of access to counties' capital outlay funds violates the provisions of N.C. Const. art. XIV, § 3, which provides, in pertinent part, that:

> Whenever the General Assembly is directed or authorized by this Constitution to enact general laws, or general laws uniformly applicable throughout the State, or general laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws[.] . . . General laws may be enacted for classes defined by population or other criteria. General laws uniformly applicable throughout the State shall be made applicable without classification or exception in every unit of local government of like kind, such as every county, or every city and town, but need not be made applicable in every unit of local government in the State. General laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, shall be made applicable without classification or exception in every unit of local government, or in every local court district, as the case may be. The General Assembly may at any time repeal any special, local, or private act.

As its language suggests, N.C. Const. art. XIV, § 3 addresses the distinction between general laws, which are applicable throughout the State, and local laws, which are only applicable in specified localities.

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7. Plaintiffs cite various decisions, such as *City of Greensboro v. Hodgin*, 106 N.C. 182, 11 S.E. 586 (1890); *Commissioners v. Board of Education*, 163 N.C. 404, 79 S.E. 886 (1913); and *School District v. Alamance County*, 211 N.C. 213, 189 S.E. 873 (1937), in support of their "uniformity" argument. Each of these decisions addresses funding practices that undermined the uniformity of funding for traditional public schools. The Supreme Court never held in any of these cases that the General Assembly is prohibited from establishing optional educational programs whose requirements, regulation, and funding sources differ from those associated with traditional public schools.

See, e.g., Adam v. Det. of N.E.R. and Everett v. Dept. of N.E.R., 295 N.C. 683, 249 S.E.2d 402 (1978) (discussing the distinction between general laws and local acts). We do not believe that there is any "general law" issue in this case, since the statutory provisions governing elementary and secondary education are applied uniformly throughout North Carolina. In addition, nothing in N.C. Const. art. XIV, § 3 in any way limits the General Assembly's authority to create and provide funding mechanisms for optional schools that differ from those applicable to traditional public schools. As a result, Plaintiffs' argument in reliance on N.C. Const. art. XIV, § 3 lacks merit.

d. Other Constitutional Provisions

[5] Finally, we conclude that Plaintiffs' remaining constitutional arguments lack merit as well. Plaintiffs assert that the North Carolina "Constitution authorizes the State and counties to provide funding to public charter schools for capital needs."[8] As support for this argument, Plaintiffs rely on N.C. Const. art. IX, § 7, which provides that monies set aside for education shall be used "exclusively" for that purpose and that the "clear proceeds" of fines and forfeitures must be used "exclusively" for support of public schools. However, Plaintiffs have not asserted that funds intended to support public schools have been used for some other purpose. *See Cauble v. City of Asheville*, 66 N.C. App. 537, 544, 311 S.E.2d 889, 894 (1984), *aff'd*, 314 N.C. 598, 336 S.E.2d 59 (1985) (stating that the "manifest purpose" of N.C. Const. art. IX, § 7 is "to set aside property and revenue to support the public school system and prevent the diversion of such property and revenue to other purposes"). As a result, N.C. Const. art. IX, § 7 has no bearing on the proper resolution of this case.

In addition, Plaintiffs cite N.C. Const. art. IX, § 2(2), which provides that local school boards "may use local revenues to add to or supplement any public school or post-secondary school program." Although this generalized provision authorizes the use of local funds for education-related purposes, it does not address the criteria that the General Assembly must utilize in making funding decisions or preclude the General Assembly from adopting specific statutory provisions authorizing different funding systems for traditional public

8. The issue before the Court in this case is whether relevant statutory and constitutional provisions require counties to give charter schools access to their capital outlay fund, not whether a statutory provision to that effect would be constitutional. As a result of the fact that the General Assembly has not, for the reasons set forth above, afforded charter schools access to the counties' capital outlay funds, we express no opinion as to the manner in which that issue should be resolved.

schools and charter schools such as those at issue here. Therefore, N.C. Const. art. IX, § 2(2) has no bearing on the proper resolution of Plaintiffs' challenge to the trial court's dismissal order. As a result, neither of Plaintiffs' final constitutional challenges to the existing funding statutes applicable to charter schools has any merit.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court did not err by concluding that Plaintiffs' amended complaint failed to state a claim for which relief could be granted and granting Defendants' dismissal motion. At bottom, the issue that we have been asked to resolve in this case is one that must be decided by legislative action instead of a judicial decision. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges ELMORE and THIGPEN concur.

KEITH RUSHING AND WIFE, HAZEL S. RUSHING, PLAINTIFFS v. CLEGG ALDRIDGE AND WIFE, EVA E. ALDRIDGE, DEFENDANTS

No. COA10-1059

(Filed 2 August 2011)

1. Adverse Possession— referee's report—confirmed without jury—issues of fact

The evidence was sufficient to go to the jury on a claim of adverse possession and the trial court erred by confirming a referee's report without submitting the issues to a jury where there were material issues of fact as to exclusive possession and hostility.

2. Adverse Possession— issues of fact—exclusivity—hostility

The trial court did not err by denying defendants' motion for summary judgment in an adverse possession claim where material issues of fact existed as to exclusivity and hostility.

Appeal by defendants from order entered 29 March 2006 by Judge Larry G. Ford, order entered 25 January 2010 by Judge Kevin M. Bridges, and order entered 21 May 2010 by Judge Vance B. Long in

Davidson County Superior Court. Heard in the Court of Appeals 27 January 2011.

Kluttz, Reamer, Hayes, Randolph, Adkins, & Carter, L.L.P., by Glenn S. Hayes, for plaintiffs-appellees.

Biesecker, Tripp, Sink & Fritts, L.L.P., by Joe E. Biesecker and Christopher A. Raines, for defendants-appellants.

GEER, Judge.

This appeal arises out of an action for adverse possession brought by plaintiffs Keith Rushing and Hazel S. Rushing against defendants Clegg Aldridge and Eva E. Aldridge. The Aldridges appeal from the trial court's compulsory order of reference, the order denying their motion for summary judgment and confirming the report of the referee, and the order granting partial summary judgment to the Rushings.

During the proceedings below, the trial court determined that the case involved a complicated boundary issue and that a personal view of the property might be required. The court, therefore, entered a compulsory order of reference pursuant to Rule 53(a)(2) of the Rules of Civil Procedure, requiring that the adverse possession issues be decided by a referee. The referee ultimately filed a report concluding that the Rushings had acquired a portion of the Aldridges' property by adverse possession.

We agree with the Aldridges that the trial court erred in confirming the referee's report. Because the Aldridges preserved their right to a jury trial and because the evidence before the referee indicated that the Aldridges had presented sufficient evidence to send the issue of adverse possession to a jury, the Aldridges retained the right to a jury trial. The trial court did not err, however, in denying the Aldridges' motion for summary judgment, as the Rushings also presented sufficient evidence to send their claim to a jury. Accordingly, we affirm in part and reverse and remand in part for a jury trial on the Rushings' claim for adverse possession.

Rule 53 and the Reference Procedure

At the outset, a general explanation of Rule 53 and references to referees is necessary to an understanding of this case. Rule 53(a) provides that (1) upon consent of the parties, (2) upon application of one of the parties, or (3) upon its own motion, a trial court may order that a referee determine issues of fact raised by the pleadings and evidence. *Brown v. E. H. Clement Co.*, 217 N.C. 47, 54, 6 S.E.2d 842, 847 (1940).

Any or all of the issues in an action may be referred (except in certain actions related to the termination of a marriage) if the parties consent in writing to a reference. N.C.R. Civ. P. 53(a)(1). If the parties do not consent to a reference, the trial court, upon application of one party or on its own motion, may compel a reference in only four types of cases: (a) where the trial of an issue requires the examination of a long or complicated account; (b) where the taking of an account is necessary for the information of the court before judgment or for carrying a judgment or order into effect; (c) where the case involves a complicated question of boundary, or requires a personal view of the premises; or (d) where a question of fact arises outside the pleadings, upon motion or otherwise, at any stage of the action. N.C.R. Civ. P. 53(a)(2). As our Supreme Court has explained, references serve the "useful purpose" of "aid[ing] and simplify[ing] the work which would otherwise fall upon the court and jury, and often expedit[ing] the litigation and sav[ing] the parties from trouble and expensive trials, and . . . saving in time to witnesses and attorneys." *Jones v. Beaman*, 117 N.C. 259, 261, 23 S.E. 248, 249 (1895).

Rule 53 does not require that the referee conduct a hearing, examine witnesses, receive evidence, or make findings of fact unless the order of reference so directs. *Godwin v. Clark*, *Godwin*, *Harris & Li*, *P.A.*, *40 N.C. App. 710*, *713*, *253 S.E.2d 598*, *601*, *appeal dismissed and disc. review denied*, 297 N.C. 698, 259 S.E.2d 295 (1979). However, any witness testimony during the referee proceedings "must be reduced to writing by the referee, or by someone acting under his direction and shall be filed in the cause and constitute a part of the record." N.C.R. Civ. P. 53(f)(3).

Following a reference, the referee is required to prepare a report on the matters submitted to him and to include a decision as to those matters in his report. N.C.R. Civ. P. 53(g)(1). If the trial court has required the referee to make findings of fact and conclusions of law, the referee must include them separately in the report. *Id.* The referee must file the report with the clerk of court for the court in which the action is pending and, unless otherwise directed by the order of reference, must also file a transcript of the proceedings and of any evidence and original exhibits. *Id.*

When the reference occurs by consent of the parties, the parties waive the right to a subsequent jury trial with respect to any of the issues within the scope of the reference. N.C.R. Civ. P. 53(b)(1). When, however, the reference is compulsory, a party may preserve his

right to a jury trial, notwithstanding the referee's report, by taking the following steps:

a. Objecting to the order of compulsory reference at the time it is made, *and*

b. By filing specific exceptions to particular findings of fact made by the referee within 30 days after the referee files his report with the clerk of the court in which the action is pending, *and*

c. By formulating appropriate issues based upon the exceptions taken and demanding a jury trial upon such issues. Such issues shall be tendered at the same time the exceptions to the referee's report are filed. If there is a trial by jury upon any issue referred, the trial shall be only upon the evidence taken before the referee.

N.C.R. Civ. P. 53(b)(2) (emphasis added). The objecting party will then be entitled to a jury trial on the specified issues unless the evidence presented to the referee would entitle one of the parties to a directed verdict. *Dockery v. Hocutt*, 357 N.C. 210, 217, 581 S.E.2d 431, 436 (2003) ("[F]ollowing a compulsory reference, the test to determine a demand for jury trial is the same as that for a motion for directed verdict . . . .").

Rule 53(g)(2) does not, however, differentiate between a reference by consent and compulsory reference when setting out what actions the trial court may take following the filing of the referee's report. The rule provides that the trial court "after hearing may adopt, modify or reject the report in whole or in part, render judgment, or may remand the proceedings to the referee with instructions." N.C.R. Civ. P. 53(g)(2). Nonetheless, our Supreme Court has clarified that

in the context of a compulsory reference the trial court cannot adopt in full a referee's report containing findings of fact requiring assessment of witnesses' credibility. The trial court must, however, evaluate the evidence to determine if, taken in the light most favorable to the party demanding jury trial, the evidence is sufficient to support that party's claim. If the evidence is insufficient as a matter of law to support the party's claim, the trial court may modify the report by striking the offending findings of fact and making its own conclusions, may adopt the report in part exclusive of those findings of fact and make its own conclusions, or may reject the report and then enter judgment.

Dockery, 357 N.C. at 219-20, 581 S.E.2d at 437-38.

Facts

Hazel S. Rushing is the record owner of Lot 40 on Lake Shore Drive in the Badin Lake Estates subdivision in Davidson County. Ms. Rushing is married to Keith Rushing. Clegg Aldridge is the record owner of Lot 39, the lot adjacent to Lot 40 to the north. Mr. Aldridge is married to Eva E. Aldridge. Both lots are lakefront properties, abutting Badin Lake to the west and facing Lake Shore Drive to the east.

After the Rushings acquired Lot 40, Mr. Rushing hired Jack Richie to survey the lot so that Mr. Rushing could know the lot's exact boundaries and decide where to position the house he planned to build. Subsequently, sometime in the mid to late 1970s, Mr. Rushing erected a split-rail fence one foot south of what he believed to be the boundary line between Lots 39 and 40, based on the Richie survey. The fence was positioned north of a pre-existing boat ramp on the lakeshore and a pre-existing roadway leading from Lake Shore Drive to the boat ramp. Over the years, the Aldridges and others used the boat ramp and the boat ramp roadway even though it was south of the fence the Rushings had built. At some point prior to 2001, the Rushings' fence rotted and disappeared.

A dispute arose between the Rushings and Aldridges sometime between 2001 and 2003 when the Aldridges undertook construction of a new, larger lake house on Lot 39. Restrictive covenants called for a 10-foot setback between the Aldridge house and the Rushing-Aldridge property line. The Aldridges hired Jones and Wall to survey the property in 2001. Jones and Wall identified the true boundary between Lots 39 and 40 and indicated that the line marked by the fence that had been installed years ago by the Rushings was in fact on the Aldridges' property. The distance between the Aldridge house and the Rushing fence line was less than 10 feet, but there is more than 10 feet between the Aldridge house and the property line identified by the Jones and Wall survey.

In 2003, the Aldridges installed their own fence along the Jones and Wall line. At some point after the Jones and Wall survey, the Rushings hired Thomas Fields to conduct another survey. The Fields survey was consistent with the Richie survey.

On 6 October 2003, the Rushings commenced an action seeking a determination of the boundary line between their property and the Aldridges' property, a declaration that the Rushings acquired owner-

ship of a portion of the Aldridges' property by adverse possession, and damages for trespass. According to the Rushings, until the Aldridges installed a fence in 2003, the Rushings exclusively maintained the area south of their fence line, even after the fence rotted. The Aldridges filed an answer and counterclaim alleging that the Rushings were trespassing and seeking "a court order that [the Rushings] not trespass on [the Aldridges'] land any more." The Aldridges insist that they knew the disputed property was theirs all along, but they had never openly objected to the Rushings' fence being on their land because it did not interfere with their use of the boat ramp roadway and because the fence looked good.

On 20 March 2006, the matter came on for hearing. The pretrial conference had been conducted, and the parties had nearly completed jury selection when the trial court *sua sponte* decided to order a reference because the case involved a complicated boundary issue and might require a personal view of the premises. Accordingly, pursuant to Rule 53(a)(2)(c), the court entered a compulsory order of reference and appointed a referee "to view the premises which are the subject of this action and to resolve all issues raised by the pleadings with respect to the complicated issues involving the claims to the common boundary between the parties . . . ." Both sides objected to the compulsory order of reference at the time it was made.

Subsequently, the referee conducted evidentiary hearings on the boundary line and adverse possession issues and bifurcated the damages issues. On 18 February 2009, the referee filed his report containing 97 findings of fact and nine conclusions of law. The referee concluded that the Rushings had acquired a portion of the Aldridges' property by adverse possession and, as a result, the Aldridges had trespassed and violated the setback provisions of the subdivision's restrictive covenants. On 17 April 2009, the Aldridges filed exceptions to the report and requested a jury trial. The Aldridges also filed a motion for summary judgment on 17 April 2009, and the Rushings filed a motion to confirm the referee's report on 24 June 2009.

Following a hearing, the trial court entered an order on 25 January 2010 denying the Aldridges' motion for summary judgment and confirming the referee's report with the exception of a single finding of fact, which stated that both parties mistakenly believed the true boundary line between their respective properties to be along the fence line determined by Mr. Rushing between 1975 and 1977. The trial court ordered that a trial proceed on damages.

The Rushings later moved for summary judgment or partial summary judgment on damages. By order entered 21 May 2010, the trial court granted partial summary judgment to the Rushings, establishing that the Rushings are entitled to fee simple title to a certain portion of the property. The Rushings subsequently voluntarily dismissed their remaining damages claim. The Aldridges timely filed notice of appeal to this Court.

Discussion

I. Preservation of Jury Trial Right

[1] We first address the Aldridges' contention that the trial court erred in confirming the referee's report. Although *Brown v. Broadhurst*, 197 N.C. 738, 150 S.E. 355 (1929), long predates the current Rules of Civil Procedure, Rule 53 essentially codified the preexisting procedure described in *Brown*.

Brown involved a dispute between the supplier of construction materials, the plaintiff, and the defendant building contractor and defendant lot owner. *Id.* at 738, 150 S.E. at 355. The trial court referred one of the issues, a request for an accounting between the lot owner and contractor, to a referee. *Id.* at 739, 150 S.E. at 355. The lot owner objected and demanded a jury trial as to the accounting. *Id.*

After the referee filed his report, the lot owner filed exceptions to the report, tendered issues to be tried by the jury, and demanded a jury trial. *Id.* The trial court denied the lot owner's request for a jury trial, overruled all the exceptions to the referee's report, and entered judgment confirming the report. *Id.* The lot owner appealed from the judgment confirming the report. *Id.*

On appeal, the Supreme Court held:

> We think it was error for the trial court to confirm the report of the referee at the August Term, without first submitting an appropriate issue to the jury, as the defendant had duly preserved her right to have the controverted matter determined in this way. The appealing defendant objected and excepted to the order of reference at the time it was made, and, on the coming in of the report, she filed exceptions thereto in apt time, properly tendered an appropriate issue and demanded a jury trial on the issue tendered and raised by the pleadings. This preserved her right to have the matter submitted to a jury.

Id. The Court went on to order a new trial. *Id.* at 740, 150 S.E. at 356.

Here, as in *Brown*, the trial court confirmed the report of the referee without submitting the issues to a jury, even though the Aldridges duly preserved their right to a jury trial pursuant to the requirements of Rule 53(b)(2)(a)-(c). Under *Dockery*, 357 N.C. at 217, 581 S.E.2d at 436, unless the evidence presented to the referee was such that a directed verdict in favor of the Rushings was proper, the Aldridges were entitled to a jury trial. *See also Solon Lodge No. 9 Knights of Pythias Co. v. Ionic Lodge Free Ancient & Accepted Masons No. 72 Co.*, 245 N.C. 281, 289, 95 S.E.2d 921, 927 (1957) (holding that referee's report does not deprive party of constitutional right to jury trial on issues of fact raised by pleadings and by party's exceptions to referee's findings of fact).

In order to determine whether the Aldridges are entitled to a jury trial on the issue of adverse possession, we must first decide whether the evidence before the referee was sufficient to raise an issue of fact. The standard of review, as with a motion for a directed verdict, is

> "whether the evidence is sufficient to go to the jury. In passing upon such motion the court must consider the evidence in the light most favorable to the non-movant. That is, the evidence in favor of the non-movant must be deemed true, all conflicts in the evidence must be resolved in his favor and he is entitled to the benefit of every inference reasonably to be drawn in his favor. It is only when the evidence is insufficient to support a verdict in the non-movant's favor that the motion should be granted."

Ligon v. Strickland, 176 N.C. App. 132, 135-36, 625 S.E.2d 824, 828 (2006) (quoting *Dockery*, 357 N.C. at 216-17, 581 S.E.2d at 436). This Court upholds the denial of a directed verdict if there is more than a scintilla of evidence to support each element of the non-movant's prima facie case. *Id.* at 136, 625 S.E.2d at 828.

Accordingly, in this case, we review the evidence in the light most favorable to the Aldridges, with all evidence in favor of the Aldridges deemed true, all conflicts in the evidence resolved in the Aldridges' favor, and giving the Aldridges the benefit of every inference reasonably to be drawn in their favor. *Id.* at 135-36, 625 S.E.2d at 828. Applying the directed verdict standard of review, *id.* at 136, 625 S.E.2d at 828, it is only when the evidence is insufficient to support a verdict in the Aldridges' favor that the referee's report may be confirmed.

In North Carolina, to acquire title to land by adverse possession, the claimant must "show actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period . . . under known and visible lines and boundaries." *Merrick v. Peterson*, 143 N.C. App. 656, 663, 548 S.E.2d 171, 176, *disc. review denied*, 354 N.C. 364, 556 S.E.2d 572 (2001). Only two of those elements are at issue in this case: exclusivity and hostility.

A. Exclusivity

"Exclusivity" requires that " 'other people . . . not make similar use of the land during the required statutory period.' " *Jernigan v. Herring*, 179 N.C. App. 390, 394, 633 S.E.2d 874, 878 (2006) (quoting *McManus v. Kluttz*, 165 N.C. App. 564, 574, 599 S.E.2d 438, 446 (2004)), *disc. review denied sub nom. Jernigan v. Rayfield*, 361 N.C. 355, 645 S.E.2d 770 (2007). In this case, there was evidence that in the 1970s, the Rushings erected a fence on the north side of the boat ramp roadway, and that both the fence and the boat ramp roadway were on the Aldridges' land. There was also evidence that over the years, the Aldridges and others used the boat ramp roadway, as did the Rushings.

According to the Aldridges, they did not ask permission to use the boat ramp roadway, and neither the Rushings nor the fence interfered with the Aldridges' or others' use of the roadway or the ramp. In addition, the Aldridges point to evidence that they claim shows the parties shared a garden on both sides of the fence primarily after 1991: Mr. Rushing testified that Mr. Aldridge "had some ['garden stuff'] on each side of that boundary" and that they "used it together."

Viewed in the light most favorable to the Aldridges, this evidence created a material issue of fact as to whether the Rushings' possession of the disputed land was exclusive. *See State v. Brooks*, 275 N.C. 175, 183, 166 S.E.2d 70, 75 (1969) (noting that "one cannot gain title by adverse possession to unenclosed land by using it for grazing where others made similar use of the land during the statutory period, even without his consent, since his possession is not exclusive"). The Rushings were thus not entitled to a directed verdict on the issue of exclusivity.

B. Hostility

With respect to "hostility," this Court has explained:

> The hostility requirement "does not import ill will or animosity but only that the one in possession of the lands claims the exclu-

> sive right thereto." *State v. Brooks*, 275 N.C. 175, 180, 166 S.E.2d 70, 73 (1969). " 'A "hostile" use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right.' " *Daniel v. Wray*, 158 N.C. App. 161, 172, 580 S.E.2d 711, 719 (2003) (quoting *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966)). The hostility element may be satisfied by a showing that "a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto[.]" *Walls v. Grohman*, 315 N.C. 239, 249, 337 S.E.2d 556, 562 (1985). However, the hostility requirement is not met if the possessor's use of the disputed land is permissive. *See*, *e.g.*, *New Covenant Worship Ctr. v. Wright*, 166 N.C. App. 96, 104, 601 S.E.2d 245, 251-52 (2004) (finding hostility requirement not satisfied because the possessor's use of the disputed property was permissive); *McManus v. Kluttz*, 165 N.C. App. 564, 573-74, 599 S.E.2d 438, 446 (2004) (finding hostility requirement satisfied because the possessor's use of the disputed property was not permissive).

Jones v. Miles, 189 N.C. App. 289, 292-93, 658 S.E.2d 23, 26 (2008).

In this case, as to hostility, the Aldridges contend that they allowed the Rushings to make use of the land because they were being neighborly. They also point to evidence that the Rushings knew they were only using the land pursuant to the Aldridges' permission—the Rushings moved their vehicles off the boat ramp roadway when the Aldridges wanted to use the roadway, and, at some point, Mr. Rushing killed a sweet gum tree located on the south side of the fence in the disputed area and offered to the Aldridges that he remove it at his own expense.

Given this evidence, which could be viewed as tending to show that the Rushings recognized that they used the land with the Aldridges' permission and treated the Aldridges as the true owners, we conclude that the Rushings were not entitled to a directed verdict on the issue of hostility. *See New Covenant Worship Ctr.*, 166 N.C. App. at 104, 601 S.E.2d at 251-52 (holding ministry's alleged adverse possession of chapel property was not hostile, as ministry acknowledged continuing right of purported land owner by asking for and receiving consent from her to remove pews from chapel building); *Orange Grocery Co. v. CPHC Investors*, 63 N.C. App. 136, 139, 304 S.E.2d 259, 261 (1983) (holding plaintiff showed no evidence of claim of hostile use where, although plaintiff paved parking lot and

encroached 12 inches onto defendant's lot, this action did not suffice to put defendant on notice of any adverse use, and, moreover, public used disputed section of land as driveway).[1]

We hold that since the Aldridges preserved their right to a jury trial and the evidence, viewed in the light most favorable to the Aldridges, was sufficient to go to the jury on the claim of adverse possession, the trial court erred in confirming the referee's report. Because we reach this conclusion, we need not address the Aldridges' arguments regarding the sufficiency of the evidence to support certain findings made by the referee.

II. The Aldridges' Motion for Summary Judgment

[2] The Aldridges further contend that not only did the trial court err in confirming the referee's report, but the trial court should have granted the Aldridges' motion for summary judgment on the question of adverse possession. "On a motion for summary judgment, defendants as movants would have had the burden to show that plaintiff[s] could not adduce evidence of an essential element of [their] claim and that no genuine issue of material fact existed, thereby entitling defendants to judgment as a matter of law." *Dockery*, 357 N.C. at 216, 581 S.E.2d at 435. The Aldridges again challenge only two of the elements of adverse possession: exclusivity and hostility.

A. Exclusivity

We first consider whether the Rushings presented sufficient evidence of the element of exclusivity to defeat the Aldridges' motion for summary judgment. There was evidence that the Rushings believed they owned the disputed land, were acting as if they owned it, and were the ones giving permission to others to enter the land and use the boat ramp roadway. As for the use of the boat ramp roadway, Mr. Rushing testified that the Aldridges "got permission" to use the ramp; the Rushings would "move [their] cars and *let them* come in." (Emphasis added.) Although he indicated that the Aldridges would not ask permission if the Rushings were not home, he also said, "Well, we were neighbors. There was no question about them using the boat

1. Although *Orange Grocery* involved an action for prescriptive easement, the analysis is applicable because of the similarity between the elements required for adverse possession and a prescriptive easement. For example, both *Warmack v. Cooke*, 71 N.C. App. 548, 552, 322 S.E.2d 804, 807 (1984), *disc. review denied*, 313 N.C. 515, 329 S.E.2d 401 (1985), a prescriptive easement case, and *Jones*, 189 N.C. App. at 292, 658 S.E.2d at 26 cite the same Supreme Court case, *Dulin*, 266 N.C. at 261, 145 S.E.2d at 875, for the definition of a hostile use.

ramp." He further indicated "yeah," the Aldridges had the "privilege"of using the ramp when they were not there.

In addition, although the Aldridges have pointed to evidence related to shared gardening, viewing the evidence in the light most favorable to the Rushings suggests that the Aldridges did not actually share the disputed land for gardening purposes: Mr. Rushing testified that the Aldridges gardened on the north side of the fence, and the Rushings gardened on the south side.

As this Court has explained, exclusive possession is denoted " 'by the exercise of acts of dominion over the land, in making the ordinary use . . . , such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser.' " *Jernigan*, 179 N.C. App. at 394, 633 S.E.2d at 878 (quoting *New Covenant Worship Ctr.*, 166 N.C. App. at 103-04, 601 S.E.2d at 251). Thus, the exclusion element "contemplates the exclusive use of the ordinary functions of the type of land at issue, given its present state." *Id.*

Taking this evidence together and viewing it in the light most favorable to the Rushings, we conclude that a material issue of fact existed as to the element of exclusivity. Although there was evidence that neighbors used the boat ramp roadway, the evidence also tended to show that the use was pursuant to the permission of the Rushings. The boat ramp evidence and the evidence that the Rushings gardened and maintained their side of the fence shows ordinary use of the land in the character of a true owner. *See Fed. Paper Bd. Co. v. Hartsfield*, 87 N.C. App. 667, 673, 362 S.E.2d 169, 172 (1987) (holding it was for jury to decide whether acts shown by evidence constituted adverse possession when evidence showed that plaintiff had kept lines as marked by previous survey, had cut timber, and had replanted seedlings, but, on other hand, defendants knew boundaries of land claimed by them, and they continued to go on land and cut timber). *See also Lancaster v. Maple St. Homeowners Ass'n*, 156 N.C. App. 429, 439-40, 577 S.E.2d 365, 373-74 (noting that "[e]ven if some evidence was presented that the 'general public' had used the land, there is evidence to the contrary"; evidence that, *inter alia*, claimants put private parking signs on property, asked people to leave property, and invited guests onto property was "sufficient indicia of exclusivity for the jury to determine whether the [claimants] claimed . . . exclusively against the true owners"), *appeal dismissed and disc. review denied in part*, 357 N.C. 251, 582 S.E.2d 272, *aff'd per curiam in part*, 357

N.C. 571, 597 S.E.2d 672 (2003); *Warmack*, 71 N.C. App. at 553-54, 322 S.E.2d at 808-09 (holding neighborly relations would not necessarily bar claim for adverse possession; persons claiming area adversely are not compelled to bar all other persons at all times from traversing property in dispute).

We are not persuaded by the cases the Aldridges rely upon to show the Rushings' possession was non-exclusive. *See Brooks*, 275 N.C. at 183, 166 S.E.2d at 75 (holding that one cannot gain title by adverse possession to *unenclosed* land by using it for grazing where others made similar use of land during statutory period, even without consent, since possession is not exclusive); *Hayes v. Rogers*, 155 N.C. App. 220, 573 S.E.2d 775, 2002 WL 31895016, *3, 2002 N.C. App. LEXIS 2621, *7-8 (Dec. 31, 2002) (unpublished) (holding, where evidence only showed that claimant planted tree in early 1970s and performed yard maintenance to part of strip including area around tree, and where true owners also performed yard maintenance in strip, that there was no evidence that claimant's actions "were actual, open, hostile, or continuous"), *appeal dismissed and disc. review denied*, 357 N.C. 164, 579 S.E.2d 578 (2003). In contrast to *Brooks*, the Rushings enclosed the disputed land with a fence, and there was evidence that they allowed others to enter the land not freely, but with permission. And, in contrast to *Hayes*, which is unpublished and therefore not controlling, there was evidence that the Aldridges did not perform any maintenance on the south side of the fence. The trial court, we conclude, did not err in denying the Aldridges' motion for summary judgment on the ground that the Rushings failed to produce sufficient evidence of exclusivity.

B. Hostility

With respect to hostility, the evidence showed the Rushings erected a fence across the Aldridges' land in the 1970s, north of the actual boundary line separating lots 39 and 40, based on the property line identified in a survey conducted for Mr. Rushing. Mr. Rushing testified in his deposition that he never verbally told the Aldridges that he was claiming the land because he "didn't have to, [he] had a fence there" and "everybody respected that as the property line." He also testified at the hearing that he gave "permission" for the Aldridges and others to use the ramp.

Viewed in the light most favorable to the Rushings, this evidence—that the Rushings mistakenly believed the land was theirs, that they erected the fence without asking for the Aldridges' permis-

sion, that the fence marked what they believed to be the boundary line and showed others what that boundary line was, and that they gave permission for others to use the land on their side of the fence—was sufficient to create an issue of fact for the jury as to the element of hostility. *See Jone*s, 189 N.C. App. at 292-93, 658 S.E.2d at 26 (holding hostility element may be satisfied by showing landowner, acting under mistake as to true boundary line, takes possession of land believing it to be his own and claims title to it); *Lancaster*, 156 N.C. App. at 438, 577 S.E.2d at 372 (holding that element of hostility was properly submitted to jury when evidence showed claimants felt disputed property was theirs, used property as their own and believed they had right to use it, never asked permission to use land or make improvements, and installed posts to keep people from parking on property).

Although the Aldridges argue the presumption of permissive use, this presumption is not relevant in this case given the evidence that the Rushings were acting under a mistake as to the true boundary. *See Walls*, 315 N.C. at 249, 337 S.E.2d at 562 (holding hostility element may be satisfied by showing that landowner, acting under mistake as to true boundary between his property and that of another, takes possession of land believing it to be his own and claims title thereto).

The Aldridges also insist that the Rushings failed to manifest their intent to claim the land, and point out that an adverse possessor's "secret[] intent is not enough because the true owner must be put on "actual or constructive notice of the possessor's hostile intent." *Jones*, 189 N.C. App. at 293, 294, 658 S.E.2d at 26, 27. In *Jones*, the Court held there was insufficient evidence of hostility when the undisputed evidence showed the claimants' possession was hostile for 11 years, but afterward, the owners gave the claimants permission to use the land. *Id.* at 295, 658 S.E.2d at 27-28. After that time, there was no indication that the claimants ever expressly rejected the grant of permission or otherwise took affirmative steps to put the owners back on actual or constructive notice that the claimants intended to continue to possess the disputed tract in a manner hostile to the interests of the owners. *Id.* The Court went on to note that after several years of permissively using the land, the claimants "first *manifested their hostile intent* around July 2004 *when they erected a fence around the disputed tract.*" *Id.*, 658 S.E.2d at 28 (emphasis added).

Jones indicates that the erection of a fence may be a sufficient manifestation of hostile intent. Indeed, in arguing that "[a] fence

could be erected for any number of reasons," the Aldridges implicitly acknowledge that a jury could find that one reason for the fence was the Rushings' intent to " 'manifest and give notice that the use [of the land within the fence was] being made under claim of right.' " *Id.* at 292, 658 S.E.2d at 26 (quoting *Daniel*, 158 N.C. App. at 172, 580 S.E.2d at 719). *See also Lake Drive Corp. v. Portner*, 108 N.C. App. 100, 103, 422 S.E.2d 452, 454 (1992) ("The requirement that possession be 'hostile' simply connotes that claimant asserts exclusive right to occupy the land."). The Aldridges do not point to any evidence that, after the Rushings manifested their hostile intent by erecting a fence, the Aldridges gave the Rushings permission to use the land, which would, under *Jones*, have required the Rushings to reject that permission or put the Aldridges back on notice that they were nonetheless still continuing to claim the land.

The Aldridges further contend that both the Rushings' and the Aldridges' actions established neighborliness rather than hostility by the Rushings. *Warmack*, however, indicates that even where there is evidence of neighborliness, that evidence will not necessarily defeat a claim for adverse possession where there is other evidence of hostility. *See* 71 N.C. App. at 553-54, 322 S.E.2d at 808-09 (explaining that where neighbors used path from time to time, claimants did not fail to show hostility; Court rejected argument that "persons claiming an area adversely and hostile are compelled to bar all other persons at all times from traversing the property in dispute" because "[i]f such were the case, neighborly relationships would be destroyed"). In light of *Warmack*, we conclude that because the Rushings presented other evidence of hostility, evidence of neighborliness on the part of both parties did not preclude the claim from being heard by the jury.

The Aldridges' reliance on *Atlantic Coast Line Railroad Co. v. Town of Ahoskie*, 202 N.C. 585, 163 S.E. 565 (1932), is misplaced. The Aldridges contend that under *Atlantic Coast Line*, the Rushings' use of the disputed land was a mere neighborly accommodation. In that case, the Court held that there was insufficient evidence that the defendant town adversely possessed property owned by the plaintiff railroad company:

> Neighborly conduct either on the part of a person or corporation ought not to be so construed as to take their property, unless it has such probative force as to show adverse user [sic] for twenty years. Much of defendant's evidence is in the nature of omissions by plaintiff railroad company in not being unneighborly and chasing trespassers off its property. The fact that this was not done,

> cannot be held for acquiescence or adverse user [sic] on the part of defendants.

Id. at 592, 163 S.E. at 568. Thus, in *Atlantic Coast Line*, the Court indicated that the railroad company's failure to chase trespassers (members of the public or town) off the property was not sufficient to show that the town's claim was adverse.

In pointing out that the Rushings, in this case, did not chase people off the disputed property, the Aldridges misconstrue *Atlantic Coast Line*. The Aldridges assert that the Rushings' neighborliness, as a matter of law, defeats the element of hostility. *Atlantic Coast Line*, however, merely shows that the Aldridges' failure to order the Rushings to remove the fence and dig up their gardens could not be relied upon by the Rushings to support their adverse possession. *Atlantic Coast Line* does not establish as a matter of law that because the Aldridges did not object to the fence and because the Rushings did not object to the Aldridges using the boat ramp or boat ramp roadway, the Rushings did not engage in hostile use of the land.

In any event, as we have already determined, there was evidence that the Rushings installed the fence with the mistaken belief that it marked the true property line, and, in addition, the installation of the fence manifested their hostile intent, putting the Aldridges on notice of their claim of right. We, therefore, cannot conclude that the trial court erred in denying the Aldridges' motion for summary judgment on the ground that the Rushings failed to produce sufficient evidence of hostility.

Conclusion

We affirm the trial court's denial of the Aldridges' motion for summary judgment. Because material issues of fact exist and because the Aldridges properly preserved their right to a trial by jury, the trial court erred in confirming the referee's report. We hold that the Aldridges are entitled to a jury trial to resolve the factual issues. Therefore, we reverse and remand this case to the trial court for a jury trial on the issue of adverse possession.

Affirmed in part; reversed and remanded in part.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. DENNIS LEE BEST

No. COA10-1264

(Filed 2 August 2011)

1. Firearms and Other Weapons—carrying concealed weapon—possession of firearm by convicted felon—sufficient evidence

The trial court did not err in a carrying a concealed weapon and possession of a firearm by a convicted felon case by denying defendant's motion to dismiss the charges against him. The State presented sufficient evidence of all the elements of the offenses, including that defendant possessed the firearm discovered in the van.

2. Constitutional Law—effective assistance of counsel—untimely motion to suppress—no prejudice shown

Defendant did not receive ineffective assistance of counsel in a concealed weapon and possession of a firearm by a felon case. Although defense counsel failed to move to suppress evidence in a timely manner, defendant failed to show the prejudice necessary for him to obtain relief on the basis of this claim.

3. Sentencing—prior record level calculation—prior felony not double-counted

The trial court did not erroneously calculate defendant's prior record level in a carrying a concealed weapon and possession of a firearm by a convicted felon case. The trial court did not err by using defendant's 1988 felonious breaking or entering conviction for the purposes of both supporting the possession of a firearm by a felon charge and calculating his prior record level.

Appeal by defendant from judgment entered 23 April 2010 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 8 March 2011.

Attorney General Roy Cooper, by Assistant Attorney General Ward Zimmerman, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for Defendant-Appellant.

ERVIN, Judge.

Defendant Dennis Lee Best appeals from a judgment entered by the trial court sentencing him to a minimum term of 107 months and a maximum term of 138 months imprisonment in the custody of the North Carolina Department of Correction based upon his convictions for carrying a concealed weapon and possession of a firearm by a convicted felon and his plea of guilty to having attained the status of an habitual felon. On appeal, Defendant contends that the evidence was not sufficient to support his convictions for possession of a firearm by a convicted felon and carrying a concealed weapon, that he received constitutionally deficient representation from his trial counsel, and that the trial court erred in calculating his prior record level for sentencing purposes. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that Defendant's challenges to the trial court's judgment lack merit and that those judgments should remain undisturbed.

I. Background

A. Substantive Facts

1. State's Evidence

Officer Thomas Poelling of the Wilmington Police Department testified that, shortly after midnight on 21 December 2006, he was on routine patrol. At that time, Officer Poelling noticed Defendant's van, which was one of the few vehicles on the road at that time of day, because the van was being driven slowly, travelling a meandering route, and did not appear to be heading toward any apparent destination. After Officer Poelling observed that the light above the vehicle's license plate was not operating, he stopped the van for the purpose of issuing a citation to the driver and directed Defendant to get out of the van. At the time that he stopped Defendant's van, Officer Poelling discovered that there were two passengers, who were later identified as Michelle Bollinger and Willie Parker, in the van.

About a minute after Officer Poelling stopped Defendant's van, Detective Victor Baughman arrived to provide backup. Detective Baughman went to the side of the van and spoke with Mr. Parker, who had exited the van and was walking away. After instructing Mr. Parker not to leave the area, Detective Baughman looked into the vehicle and saw three to five open cans of beer and a plastic bag containing a white powder that resembled cocaine. Detective Baughman informed Officer Poelling that he had found cocaine and open beer

containers in the van; at that point, all three occupants of the van were placed in handcuffs.

Ultimately, field testing revealed that the substance that Detective Baughman had observed in Defendant's van was not cocaine. However, once Detective Baughman announced that he had discovered beer cans and cocaine in the van, Officer Poelling came over for the purpose of examining the interior of the vehicle, which smelled of alcohol. In the course of looking into the van, Officer Poelling observed several open beer cans "in plain view." Officer Poelling testified that, as he retrieved the beer cans:

> A: . . . . When I looked down, as I retrieved one of the beer cans that was open, I noticed the handle and hammer and also the rear of the cylinder of what I knew to be a revolver.
>
> Q: And where was that?
>
> A: Between the seats, the front passenger and the front driver's seat. And it was partially concealed with just—like I described before, just those areas of the gun exposed and it was mixed with clothing and other articles.

After discovering the loaded firearm, which was identified as a "Smith & Wesson .38 Special revolver," and securing it in his patrol vehicle, Officer Poelling questioned the occupants of the van about the gun.

At first, Defendant denied owning the revolver. However, "on the second occasion, [Defendant] explained that it was, in fact, his and [said that] everybody else had one, so he needed one to[o.]" When Officer Poelling asked Defendant if he was a convicted felon, Defendant replied in the affirmative. At that point, based on "[Defendant's] own admission, [Officer Poelling] decided to charge him with carrying [a] concealed weapon, [and] possession of [a] firearm by a convicted felon," so Defendant "was arrested, transported to the station, [and] processed[.]"

Mr. Parker, who had been friends with Defendant for a long time, was with Defendant on 21 December 2006. On that occasion, Defendant and Mr. Parker were driving in the van to an establishment known as Linda's Lounge, where they planned to play pool. After they picked up Ms. Bollinger, who was going to the same place, the group was stopped by law enforcement officers before reaching Linda's Lounge. Although Mr. Parker initially denied having seen Defendant with a gun on 21 December 2006, the prosecutor reminded Mr. Parker

of a statement that he had made to Detective Chris Mayo of the Wilmington Police Department in which Mr. Parker had admitted seeing Defendant with a gun. At that point, Mr. Parker testified that:

> Q: And when did you see Mr. Best with that gun?
>
> . . .
>
> A: Well, it was when we—we decided to go to Linda's Lounge. There used to be a lot of stuff going on. They used to just jump on him and stuff and fight you. But I never seen—[Defendant] always been a quiet person. He never started nothing. But once you go to Linda's Lounge, you need something.
>
> Q: So had you seen Mr. Best with this gun in the past?
>
> A: No, not—no, I haven't not in the past.
>
> Q: Did you see it on him that night?
>
> A: I saw it earlier that day.
>
> Q: When did you see it, sir?
>
> A: About, maybe about 3:00.
>
> Q: In the afternoon?
>
> A: Yes.
>
> Q: And who had the gun?
>
> A: Mr. Best.
>
> Q: Where did he have it?
>
> A: In his back pocket.

In addition, Mr. Parker testified that there were several beer cans in the van and that, at the time that Officer Poelling stopped the van, Defendant asked Mr. Parker to retrieve a beer can from the floor and put it in a cup holder.

Defendant's sister, Trixie Bass, testified that, although the van was titled to her, she had "sold" it to her brother, Lacey Bass, who, in turn, traded it to Defendant for another vehicle. Ms. Bass did not own a gun and had not seen Defendant in possession of a gun. Lacey Bass corroborated Ms. Bass' testimony concerning the ownership of the van and denied having ever owned a firearm himself or having seen Defendant in possession of a gun.

Detective Mayo, who had interviewed Mr. Parker, testified that:

> Q: And then did you ask [Mr. Parker] about the gun that was in the car?
>
> A.: Yes, ma'am, I did. He stated that he had seen that firearm earlier in the day. He stated that he knew Mr. Best to always—was the exact word he used and I put it in quotation marks in my handwritten report and also my typed report. That he always carried the .38 caliber pistol and that Parker stated Mr. Best normally carried the gun in his right rear pocket, like he described this morning. And he made the motion of how—to us on his steps, how he put it in his pocket (indicating).
>
> He said he had seen Mr. Best in possession of the pistol on December 21st, 2006 and that Mr. Best had placed the pistol on the floor next to the seat earlier in the day.

A copy of a judgment showing Defendant's conviction for felonious breaking and entering on 9 May 1988 was admitted into evidence as well.

2. Defendant's Evidence

Defendant testified that he had traded his truck to Mr. Bass in exchange for Ms. Bass' van about ten days before he was stopped by Officer Poelling. In addition to being one of his friends, Mr. Parker had worked for Defendant as a painter on an intermittent basis.

On 21 December 2006, Defendant and Mr. Parker worked on a painting job until around 5:00 p.m. After work, the two of them visited Mr. Parker's house, then went to Defendant's mother's house before returning to Mr. Parker's residence, where they sat in the van in Mr. Parker's driveway for three or four hours, until approximately 11:30 p.m. Although Mr. Parker drank several beers during this three or four hour period, Defendant did not consume any alcoholic beverages during this interval.

At that point, Defendant and Mr. Parker decided to go to Linda's Lounge in order to play pool. On the way to Linda's Lounge, they saw Ms. Bollinger, who was also planning to go to Linda's Lounge, and gave her a ride. However, the van was stopped by law enforcement officers before the group arrived at Linda's Lounge. Defendant conceded that "there could have been a problem with" the license plate light and explained that the powder discovered in the van was baking soda, which he used on camping trips and as toothpaste and a cleanser.

Defendant denied owning or possessing the revolver found in the van and testified that he had never seen the firearm before, that he did not know who owned it, and that he had not told Officer Poelling that the weapon was his. Defendant also denied that there were any beer cans in the van. Defendant did not see Mr. Parker or Ms. Bollinger with a gun on 21 December 2006. Moreover, Defendant had never seen his brother or sister in possession of a firearm. However, six or seven other people had ridden in the van during the week prior to the date upon which he was stopped by Officer Poelling.

B. Procedural History

On 21 December 2006, a warrant for arrest charging Defendant with possession of a firearm by a convicted felon and carrying a concealed weapon was issued. On 29 January 2007, the New Hanover County grand jury returned bills of indictment charging Defendant with carrying a concealed weapon, possession of a firearm by a convicted felon, and having attained the status of an habitual felon. The charges against Defendant came on for trial before the trial court and a jury at the 19 April 2010 criminal session of the New Hanover County Superior Court. After the presentation of the evidence, the arguments of counsel, and the trial court's instructions, the jury returned verdicts convicting Defendant of carrying a concealed weapon and possession of a firearm by a convicted felon on 23 April 2010. On the same date, Defendant entered a plea of guilty to having attained the status of an habitual felon. At the ensuing sentencing hearing, the trial court found that Defendant had accumulated nine prior record points and should be sentenced as a Level IV offender. Based upon these determinations, the trial court consolidated Defendant's convictions for judgment and sentenced Defendant to a minimum term of 107 months and a maximum term of 138 months imprisonment in the custody of the North Carolina Department of Correction. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Sufficiency of the Evidence

[1] On appeal, Defendant initially argues that the trial court erred by denying his motion to dismiss the charges against him on the grounds that the State failed to adduce sufficient evidence that he actually or constructively possessed the firearm discovered in the van. Defendant's argument lacks merit.

When reviewing a challenge to the denial of a defendant's motion to dismiss for insufficiency of the evidence, this Court determines "whether the State presented 'substantial evidence in support of each element of the charged offense." *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005). " 'Substantial evidence' is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (quoting *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005)). "In this determination, all evidence is considered 'in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.' " *Id.* (citation omitted). "The defendant's evidence, unless favorable to the State, is not to be taken into consideration," *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971), except that, "when it is consistent with the State's evidence, the defendant's evidence 'may be used to explain or clarify that offered by the State.' " *State v. Denny*, 361 N.C. 662, 665, 652 S.E.2d 212, 213 (2007) (quoting *Jones*, 280 N.C. at 66, 184 S.E.2d at 866 (citation omitted)). A " 'substantial evidence' inquiry examines the sufficiency of the evidence presented but not its weight," which remains a matter for the jury. *McNeil*, 359 N.C. at 804, 617 S.E.2d at 274 (citation omitted). Thus, "if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Id.* (citation omitted).

N.C. Gen. Stat. § 14-415.1(a) provides, in pertinent part, that "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm[.]" "Thus, the State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686, *disc. review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007). Similarly, N.C. Gen. Stat. § 14-269(a1) provides, in pertinent part, that "[i]t shall be unlawful for any person willfully and intentionally to carry concealed about his person any pistol or gun[.]" Thus, "[a]s to the charge of carrying a concealed weapon, the elements of the offense are: '(1) The accused must be off his own premises; (2) he must carry a deadly weapon; [and] (3) the weapon must be concealed about his person.' " *State v. Gayton*, 185 N.C. App. 122, 127, 648 S.E.2d 275, 279 (2007) (quoting *State v. Williamson*, 238 N.C. 652, 654, 78 S.E.2d 763, 765

(1953)). "The State must prove that the weapon is concealed 'not necessarily on the person of the accused, but in such position as gives him ready access to it.' " *State v. Soles*, 191 N.C. App. 241, 244, 662 S.E.2d 564, 566 (2008) (quoting *State v. Gainey*, 273 N.C. 620, 622, 160 S.E.2d 685, 686 (1968)). As a result, a finding of guilt of both of the offenses with which Defendant was charged effectively required proof that he possessed a firearm.

Defendant does not dispute that the .38 caliber revolver was a firearm or that the firearm was found in "such [a concealed] position as g[ave] him ready access to it." In addition, Defendant does not deny that he had previously been convicted of committing a felony. As a result, his challenge to the sufficiency of the evidence to support his convictions hinges on "whether there was sufficient evidence of *his* possession of the firearm that Officer Poelling testified he had found in the van." We conclude that the record contained sufficient evidence to permit the jury to reasonably answer this question in the affirmative.

" 'In a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials.' Proof of nonexclusive, constructive possession is sufficient. Constructive possession exists when the defendant, 'while not having actual possession, . . . has the intent and capability to maintain control and dominion over' the [contraband]." *McNeil* at 809, 617 S.E.2d at 277 (quoting *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986), and *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)). " 'Where [contraband is] found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.' 'However, unless the person has exclusive possession of the place where the [contraband is] found, the State must show other incriminating circumstances before constructive possession may be inferred.' " *Id.* at 809-10, 359 S.E.2d at 277 (quoting *State v. Butler*, 356 N.C. 141, 146, 567 S.E.2d 137, 140 (2002) (internal citation omitted), and *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989)).

The undisputed evidence tends to show that, in a transaction involving his siblings, Defendant had borrowed or traded his truck for the van which he was driving at the time that he was stopped by Officer Poelling. As a result, the firearm was found in a vehicle that was under Defendant's control. "In car cases, not only is ownership sufficient, but

> [a]n inference of constructive possession can also arise from evidence which tends to show that a defendant was the custodian of the vehicle where the controlled substance was found. In fact, the courts in this State have held consistently that the "driver of a borrowed car, like the owner of the car, has the power to control the contents of the car." Moreover, power to control the automobile where a controlled substance was found is sufficient, in and of itself, to give rise to the inference of knowledge and possession sufficient to go to the jury.

State v. Hudson, ___ N.C. App ___, ___, 696 S.E.2d 577, 583 (2010) (quoting *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 886 (1984) (internal citations omitted)), *disc. review denied*, 364 N.C. 619, 705 S.E.2d 360 (2010). Although the fact that the revolver was found in a van driven by Defendant, standing alone, might be sufficient to permit a reasonable inference that Defendant possessed the firearm in question, the State presented additional evidence which tended to show that Defendant possessed the revolver as well.

As we have already indicated, the firearm was found on the floor next to the driver's seat, which placed it in close proximity to Defendant, who was driving the van at the time that it was stopped. In addition, Officer Poelling testified that Defendant admitted that he owned the gun and that, since "everybody else had one, . . . he needed one too." This admission was corroborated by Mr. Parker, who testified that he had seen Defendant in possession of the weapon that afternoon, and specifically remembered that Defendant had been carrying the gun in his pants pocket and later placed it on the van floor. Mr. Parker's testimony concerning this subject was, in turn, corroborated by Detective Mayo's account of his interview with Mr. Parker. As a result, we conclude that the evidence pertaining to the location in which the firearm was discovered, coupled with Defendant's admission and the testimony of Mr. Parker and Detective Mayo, is more than sufficient to support Defendant's convictions for carrying a concealed weapon and possession of a firearm by a convicted felon.

B. Ineffective Assistance of Counsel

[2] Secondly, Defendant argues that he received ineffective assistance of counsel because his attorney "first raised a motion to suppress at the conclusion of the State's case-in-chief." "In order to obtain relief on the basis of an ineffective assistance of counsel claim, Defendant is required to demonstrate that his trial counsel's performance was deficient and that this deficient performance "prej-

udiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984). The United States Supreme Court has enunciated a two-part test for use in determining if a defendant is entitled to relief on the basis of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687, 80 L. E. 2d at 693, 104 S. Ct. at 2064. The Supreme Court adopted the *Strickland* test for use in evaluating similar claims asserted under the North Carolina Constitution in *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985):

> The first element requires a showing that counsel made serious errors; and the latter requires a showing that, even if counsel made an unreasonable error, "there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings."

State v. Banks, ___j N.C. App. ___, ___, 706 S.E.2d 807, 821 (2011) (citing *Braswell*, 312 N.C. at 562, 324 S.E.2d at 248). We do not believe that Defendant is entitled to relief from his convictions on the basis of this contention.

At the close of the State's evidence, Defendant moved to suppress the evidence found as a result of the stopping of Defendant's van. At that point, the following colloquy occurred:

> THE COURT: What says Defendant at the close of the State's case?
>
> [DEF. COUN.]: Your Honor, first, I would make a Motion to Suppress and to strike any evidence that came in after the stop in this matter as I would contend there wasn't reasonable suspicion for the stop.
>
> THE COURT: You want to be heard any further?
>
> [DEF. COUN.]: No, Your Honor.

THE COURT: What says the State?

[PROSECUTOR]: Judge, I think we're past that point. I mean, the appropriate time to make that motion is prior to trial.

THE COURT: I agree. Respectfully denied.

Although Defendant contends on appeal that his trial counsel provided him with deficient representation by failing to move to suppress the evidence obtained as a result of Officer Poelling's decision to stop his van on 21 December 2006 in a timely manner, we do not believe that Defendant has made the showing of prejudice necessary for him to obtain relief on the basis of this claim.

The belated oral suppression motion that Defendant made in the trial court was based exclusively on the assertion that "there wasn't reasonable suspicion for the stop." On appeal, however, Defendant concedes that, "once Officer Poelling noticed 'an inoperable light—just above the license plate' . . . , he had probable cause to stop [the van] for the traffic infraction." Instead, Defendant argues that

> [Officer Poelling] had no authority at all to detain Mr. Best and his passengers beyond the time necessary to address the traffic infraction which was the only cause to stop the van. . . . Officer Poelling's testimony showed that, in fact, he detained [Defendant] beyond the original purpose of the stop when one of the other officers announced that they had found what appeared to be cocaine. . . . But with the field test of the substance returning a negative result . . ., that justification for further restraint of [Defendant's] liberty dissolved, and he should have been released at that point.

In advancing this argument, Defendant overlooks the presence of evidence tending to show that, (1) in addition to finding a bag of white powder that he reasonably believed to be cocaine, Detective Baughman saw several open beer cans in plain view inside the van; (2) Detective Baughman immediately informed Officer Poelling about the presence of the white powder and the beer cans; and, (3) when Officer Poelling reached into the van to retrieve the beer cans, he discovered a loaded .38 caliber revolver on the floor of the van between the passenger and driver's seats. All of these events occurred during a relatively brief period of time and constituted reasonable investigative steps taken on the basis of constantly changing information. As a result, despite the fact that the white powder was determined to be something other than cocaine before the end of Officer Poelling's

investigative activities, we conclude that the initial traffic stop was not unlawfully prolonged and that, even if Defendant had filed a timely pretrial suppression motion, neither the argument that he advanced at trial nor the argument that he has advanced on appeal would justify the suppression of the evidence seized as a result of that traffic stop. As a result, this argument lacks merit.

C. Calculation of Defendant's Prior Record Level

[3] Finally, Defendant argues that the trial court erred in calculating his prior record level by assigning two prior record level points for a prior felonious breaking or entering conviction on the grounds that this offense "was the predicate felony used to prove his status as a felon who was prohibited from possessing a firearm." We do not find Defendant's argument persuasive.

The record clearly reveals that the trial court calculated Defendant's prior offense level on the basis of a determination that Defendant had accumulated nine prior record points, four of which stemmed from prior convictions for two Class H or Class I felonies and five of which stemmed from misdemeanor convictions. The habitual felon indictment returned against Defendant alleged that:

> On or about 3-18-1990, [Defendant] did commit the felony of First Degree Burglary §14-51, and that on or about 9-4-1990, [Defendant] was convicted of the felony of First Degree Burglary §14-51, case # 90CRS6077 in the Superior Court of New Hanover County, North Carolina;
>
> On or about 2-15-1988, [Defendant] did commit the felony of Possession of Burglary Tools §14-55, and that on or about 5-9-1988, [Defendant] was convicted of the felony of Possession of Burglary Tools §14-55, case # 88CRS 2781, in the Superior Court of New Hanover County, North Carolina;
>
> On or about 7-27-1985, [Defendant] did commit the felony of Breaking and/or Entering §14-54(A), and that on or about 1-3-1986, [Defendant] was convicted of the felony of Breaking and/or Entering §14-54(A), case # 85CRS 17468, in the Superior Court of New Hanover County, North Carolina.

The indictment charging Defendant with possession of a firearm by a convicted felon alleged that:

> THE JURORS FOR THE STATE UPON THEIR OATH present that on or about the date of the offense shown above and in the

> county named above the defendant named above unlawfully, willfully and feloniously did possess a .38 Caliber Smith & Wesson Revolver, which is a firearm. The defendant had previously been convicted of the felony of Breaking and Entering which was punishable as a class H felony. This felony was committed on 2/15/88 and the defendant pled guilty to the felony on 5/9/88 in New Hanover County Superior Court, Wilmington, North Carolina and was sentenced to 3 years confinement. . . .

At the sentencing hearing, Defendant stipulated to the accuracy of a prior record worksheet, which, in addition to the felonies specified in the habitual felon and possession of a firearm by a felon indictments, indicated that Defendant had also been convicted of felonious breaking or entering, a Class H offense, in New Hanover County on 4 October 1983. As a result, the only way in which the trial court could have concluded that Defendant had been convicted of two Class H felonies for purposes of determining Defendant's prior record level without running afoul of N.C. Gen. Stat. § 14-7.6 (providing that, "[i\n determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used") was to include both the 1983 conviction for felonious breaking or entering, which was not mentioned in either the habitual felon or possession of a firearm by a felon indictments, and the 1988 felonious breaking or entering conviction, which the State utilized in support of the possession of a firearm by a felon charge, in making that calculation.

On appeal, Defendant argues that the trial court erred by using his 1988 felonious breaking or entering conviction for the purpose of both supporting the possession of a firearm by a felon charge and calculating his prior record level. In support of this argument, Defendant places principal reliance on our decision in *State v. Gentry*, 135 N.C. App. 107, 519 S.E.2d 68 (1999), in which we held that the limitations applicable to the sentencing of habitual felons applied to defendants convicted of habitual impaired driving in violation of N.C. Gen. Stat. § 20-138.5, which this Court has described as "a separate felony offense" rather than "solely a punishment enhancement status," *State v. Priddy*, 115 N.C. App. 547, 549, 445 S.E.2d 610, 612, *disc. review denied*, 337 N.C. 805, 449 S.E.2d 751 (1994), so that a prior impaired driving conviction used to establish the defendant's guilt of habitual impaired driving could not be included in the calculation of the defendant's prior record points.

> [O]ur legislature recognized the basic unfairness and constitutional restrictions on using the same convictions both to elevate

> a defendant's sentencing status to that of an habitual felon, and then to increase his sentencing level. We believe it is reasonable to conclude that that same legislature did not intend that the convictions which elevate a misdemeanor driving while impaired conviction to the status of the felony of habitual driving while impaired, would then again be used to increase the sentencing level of the defendant.
>
> The State argues that being an habitual felon is a status, while felony driving while impaired is a substantive offense. We do not find that the distinction requires a different result. In both instances, a defendant commits a violation of our criminal laws, has committed three offenses of the same class within the past seven years, and has his punishment sharply increased as a result of the consideration of those prior offenses. We find the distinction urged by the State to be one without a difference. Further, whatever doubt there may be must be resolved in favor of the defendant. It is basic learning that criminal laws must be strictly construed and any ambiguities resolved in favor of the defendant.

Gentry, 135 N.C. App at 111, 519 S.E.2d at 70-71 (citing *State v. Pinyatello*, 272 N.C. 312, 314, 158 S.E.2d 596, 597 (1968), and *State v. Scoggin*, 236 N.C. 1, 10, 72 S.E.2d 97, 103 (1952)). A careful analysis of this Court's decisions since *Gentry* demonstrates, however, that this Court has been unwilling to apply the logic utilized in *Gentry* to cases involving convictions for possession of a firearm by a convicted felon.

As we noted in discussing Defendant's challenge to the sufficiency of the evidence to support his convictions, N.C. Gen. Stat. § 14-415.1(a) makes it "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm," with "every person [convicted of] violating the provisions of this section [subject to punishment] as a Class G felon." N.C. Gen. Stat. § 14-415.1(a). In *Wood*, 185 N.C. App. at 236, 647 S.E.2d at 686-87 (citing *Priddy*, 115 N.C. App. at 549, 445 S.E.2d at 612 (other citations omitted)), we noted that, "while N.C. Gen. Stat. § 14-415.1 has characteristics of a recidivist statute, a plain reading of the statute shows it creates . . . a substantive offense to which the Sixth Amendment right to a jury trial applies, and not a sentencing requirement aimed at reducing recidivism." As a result, like habitual impaired driving, possession of a firearm by a felon is a separate substantive felony offense. That fact does not, according to a careful analysis of this

Court's decisions, mean that the approach adopted in *Gentry* in the habitual impaired driving context is equally applicable to cases in which a defendant has been convicted of felonious possession of a firearm by a felon.

Although this Court has not addressed the exact issue raised by the trial court's sentencing decision in this case, we have touched on it several times. In *State v. Harrison*, 165 N.C. App. 332, 335, 598 S.E.2d 261, 262, *disc. review denied*, 359 N.C. 72, 604 S.E.2d 922 (2004), we rejected the defendant's challenge, in reliance on *Gentry*, to the trial court's decision to utilize the second degree rape conviction which led to the requirement that the defendant register as a sex offender for the purpose of calculating his prior record level following the defendant's conviction for failing to register by stating, among other things, that the situation at issue in that case was analogous to "a conviction for the offense of possession of a firearm by a felon" and noting that a defendant could be convicted of both that offense and found to have attained habitual felon status using the same predicate felony. (citing *State v. Glasco*, 160 N.C. App. 150, 160, 585 S.E.2d 257, 264, *disc. review denied*, 357 N.C. 580, 589 S.E.2d 356 (2003)). Similarly, in *State v. Goodwin*, 190 N.C. App. 570, 661 S.E.2d 46 (2008), *disc. review denied*, 363 N.C. 133, 675 S.E.2d 664 (2009), *cert. denied*, 364 N.C. 437, 702 S.E.2d 499 (2010), this Court held that both a possession of a firearm by a felon conviction and the conviction for the felony underlying the defendant's conviction for that offense could be utilized to calculate the prior record level of a defendant convicted of second degree murder and attempted first degree murder, rejecting an argument to the contrary advanced by the defendant in reliance on *Gentry* by noting that "[p]ossesion of a firearm by a felon is a separate substantive offense from the defendant's prior felony upon which his status as a felon was based." Finally, this Court has rejected the position taken by Defendant in this case in two unpublished decisions. *State v. Nicholson*, 182 N.C. App. 766, 643 S.E.2d. 83, *disc. review denied*, 361 N.C. 701, 653 S.E.2d 154 (2007) (holding that the trial court did not err by utilizing the same conviction used to establish the defendant's guilt of possession of a firearm by a felon in calculating his prior record for that conviction); *State v. Moore*, 2011 N.C. App. Lexis 1353 *3-4 (2007) (holding that the trial court did not err by utilizing the same conviction used to establish the defendant's guilt of possession of a firearm by a felon in calculating his prior record level for that conviction). Although the logic of each of these decisions is somewhat different and although both of the reported decisions deal with distinguishable factual situations, all of them

refuse to apply *Gentry* on the essential basis that *Gentry* involved a true instance of "double-counting," so that "[t]he defendant's sentence for his current DWI was first enhanced from a misdemeanor to a felony and then was enhanced a second time by those same prior convictions when they were counted as part of his prior record level." *State v. Hyder*, 175 N.C. App. 576, 580, 625 S.E.2d 125, 128 (2006). As a result, given that the mere possession of a firearm, unlike driving while impaired, is not a criminal offense, the sort of "double-counting" condemned in *Gentry*, in which an act already declared to constitute a criminal offense is punished more severely based on the defendant's prior record, simply does not occur when the same conviction is utilized to both establish the defendant's guilt of the underlying offense and to calculate his prior record level utilized in sentencing him for that offense. Thus, given the factual situation at issue in this case, we conclude that Defendant's final challenge to the trial court's judgment lacks merit as well.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant had a fair trial, free from prejudicial error, and that none of Defendant's challenges to the trial court's judgment have merit. As a result, the trial court's judgment should remain undisturbed.

NO ERROR.

Judges ROBERT C. HUNTER and STEPHENS concur.

ANDREW S. KHOMYAK, BY AND THROUGH HIS GUARDIAN AD LITEM, CAROLYN J. KHOMYAK, AND CAROLYN J. KHOMYAK, INDIVIDUALLY, PLAINTIFFS V. JAMES M. MEEK, M.D.; NOVANT MEDICAL GROUP, INC. D/B/A CARMEL OBSTETRICS AND GYNECOLOGY, DEFENDANTS

No. COA10-1597

(Filed 2 August 2011)

Costs—medical negligence—mandatory costs—N.C.G.S. § 7A-305(d)

The trial court erred in a medical negligence case by granting defendants' motion for costs in the amount of $1000. Because the Court of Appeals was bound by its decisions in *Springs v. City of*

Charlotte and Priest v. Safety-Kleen Sys., Inc., the trial court must award those costs which are mandatory under N.C.G.S. § 7A-305(d). The matter was remanded to the trial court for reconsideration of defendants' motion for costs consistent with the mandates in *Springs*.

Appeal by defendants from order entered 27 September 2010 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 May 2011.

Price, Smith, Hargett, Petho & Anderson, by Wm. Benjamin Smith, for plaintiff appellees.

Shumaker, Loop & Kendrick, LLP, by Scott M. Stevenson, Stacy H. Stevenson, and Christian H. Staples, for defendant appellants.

McCULLOUGH, Judge.

James M. Meek, M.D., and Novant Medical Group, Inc., d/b/a Carmel Obstetrics and Gynecology (collectively, "defendants"), appeal from an order granting their motion for costs in the amount of $1,000.00. Defendants contend the trial court abused its discretion in not awarding defendants the full amount of their costs following a jury verdict in their favor at trial. After a careful and thorough review, we must reverse and remand for reconsideration.

I. Background

On 8 August 2006, at approximately 10:00 p.m., plaintiff Carolyn Khomyak ("plaintiff") was admitted to Carolinas Medical Center in Pineville, North Carolina, with the onset of labor for the birth of her son, plaintiff Andrew Khomyak ("Andrew"). Plaintiff's labor and delivery was managed by her obstetrician, defendant James M. Meek, M.D. ("Dr. Meek"). During the course of delivery, Andrew experienced shoulder dystocia, an obstetrical emergency that occurs when the infant's shoulder becomes stuck behind the mother's pelvic bone, thereby preventing a spontaneous vaginal delivery. As a result, Andrew suffered nerve damage in his upper body and right arm.

Plaintiff, both individually and as guardian ad litem for Andrew, filed a complaint against Dr. Meek and his medical practice, Novant Medical Group, Inc., d/b/a Carmel Obstetrics and Gynecology on 23 May 2008. Plaintiff alleged that defendants' actions and/or omissions during delivery in light of Andrew's shoulder dystocia fell below the applicable standard of care, causing injury and damages to both

plaintiff and Andrew as a result. Defendants filed an answer denying the negligence allegations on 1 August 2008. The case was tried before a jury for approximately two weeks, beginning on 28 June 2010 and concluding on 8 July 2010. At the close of trial, the jury returned a verdict in favor of defendants finding no negligence, and judgment was entered accordingly on 20 July 2010.

On 21 July 2010, following entry of judgment in their favor, defendants filed a motion for costs pursuant to N.C. Gen. Stat. §§ 6-20 and 7A-305(d) (2009), seeking to recover costs in the total amount of $15,598.96. In support of their motion for costs, defendants submitted a bill of costs, as well as copies of the billing statements reflecting those costs. The bill of costs included mediation fees in the amount of $82.00, expert witness fees in the total amount of $8,000, and deposition expenses in the total amount of $7,516.96. The trial court heard arguments on defendants' motion for costs on 9 August 2010. Following the hearing, the trial court, "in its discretion and pursuant to N.C.G.S. § 6-20 and N.C.G.S. § 7A-305," granted defendants' motion for costs in the amount of $1,000.00. The trial court entered its order reflecting its ruling on 27 September 2010. Defendants appeal, seeking to recover an award of costs in the full amount of $15,598.96.

II. Standard of Review

The sole issue on appeal concerns the taxing of costs pursuant to N.C. Gen. Stat. §§ 6-20 and 7A-305(d). We first note this Court's earlier observation that "[p]rior decisions by this [C]ourt have been inconsistent as to the proper standard of review for appeals concerning taxing costs." *Vaden v. Dombrowski*, 187 N.C. App. 433, 437, 653 S.E.2d 543, 545 (2007). Many panels of this Court have reviewed a trial court's decision to grant or deny costs to the prevailing party under an abuse of discretion standard as a result of the language of N.C. Gen. Stat. § 6-20, which leaves the taxing of costs in the discretion of the trial court. *See Priest v. Safety-Kleen Sys., Inc.*, 191 N.C. App. 341, 343, 663 S.E.2d 351, 352 (2008); *Vaden*, 187 N.C. App. at 437, 653 S.E.2d at 545; *Overton v. Purvis*, 162 N.C. App. 241, 249, 591 S.E.2d 18, 24 (2004). Other panels have reviewed a trial court's order taxing costs under a *de novo* standard of review, finding that a trial court's interpretation of the statutory framework applicable to the taxation of costs is a question of law. *See Morgan v. Steiner*, 173 N.C. App. 577, 579, 619 S.E.2d 516, 518 (2005); *Cosentino v. Weeks*, 160 N.C. App. 511, 513, 586 S.E.2d 787, 788 (2003).

However, most recently, in *Peters v. Pennington*, ___ N.C. App.___, 707 S.E.2d 724 (2011), we believe the panel properly clarified the standard of review applicable to the taxing of costs by applying a combination of the two standards: "Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal. The reasonableness and necessity of costs is reviewed for abuse of discretion." *Id.* at ___, 707 S.E.2d at 741 (citing *Jarrell v. Charlotte-Mecklenburg Hosp. Auth.*, ___ N.C. App.___, ___, 698 S.E.2d 190, 191 (2010)). Accordingly, we review *de novo* any questions regarding the trial court's interpretation of the statutory framework applicable in each case. Where the applicable statutes afford the trial court discretion in awarding costs, we review the trial court's determinations for an abuse of discretion.

Here, the trial court correctly determined that §§ 6-20 and 7A-305(d) are the applicable statutes governing the taxing of costs in the present case. As discussed herein, because we believe the proper statutory interpretation of section 6-20 affords the trial court the discretion to award those costs specifically enumerated under section 7A-305(d) or elsewhere in our statutes, the trial court's award of costs in the present case, we believe, should be reviewed for an abuse of discretion. However, because of certain recent holdings that will be discussed herein, the trial court is afforded no discretion in determining whether or not to award those costs enumerated under section 7A-305(d), and therefore, the trial court must impose the costs requested by defendant in the present case.

III. Taxing of Costs

Defendants first contend that in granting or denying a motion for costs pursuant to N.C. Gen. Stat. § 6-20, a trial court is required to assess as costs those items specifically enumerated under N.C. Gen. Stat. § 7A-305(d). Defendants argue that, in determining an award of costs, a trial court only has discretionary authority to award costs where an allowance of costs is not otherwise mandated by the General Statutes. Defendants maintain that those costs listed under section 7A-305(d) are such mandatory costs, and therefore, the trial court has no discretion to deny those costs when all statutory requirements for an award of those costs are met. Defendants cite this Court's recent decision in *Springs v. City of Charlotte*, ___ N.C. App. ___, 704 S.E.2d 319 (2011), in support of their contention that such statutory interpretation is the proper one.

Defendants are correct that this Court's holding in *Springs* is controlling in the present case. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Nevertheless, our review of this issue has revealed troublingly divergent and irreconcilable interpretations of the statutes at issue in the present case. While we acknowledge that we are bound by the *Springs* decision, our review of the case law and statutory language at issue would lead us to a different result than that required by the holding in *Springs*, were we not bound by that decision. Therefore, we first examine this Court's prior holdings leading to the situation with which we are now confronted in this case.

A. Prior law

Prior to 2007, N.C. Gen. Stat. § 6-20 was construed to confer two separate kinds of discretion: (1) "the discretion to determine whether costs should be awarded in a particular civil action," and (2) "the discretion to award non-statutory common law costs," or those costs not specifically delineated in section 7A-305(d). *Cosentino v. Weeks*, 160 N.C. App. 511, 517, 586 S.E.2d 787, 790 (2003). Over the years, our case law took varied approaches in addressing issues concerning the second kind of discretion—the discretion to determine whether a particular type of expense may be taxed as a cost. *See Department of Transp. v. Charlotte Area Mfd. Housing, Inc.*, 160 N.C. App. 461, 466-69, 586 S.E.2d 780, 783-85 (2003) (describing the varied approaches taken by this Court in addressing what expenses may be taxed as costs); *see generally* James Edwin Griffin, III, *Murky Water: What Really is Taxed as Court Costs in North Carolina?*, 32 Campbell L. Rev. 127 (2009) (explaining the split of authority from this Court on the issue of what may be taxed as costs—statutorily enumerated costs versus "common law" costs). Some opinions provided the trial court discretion to assess not only those "statutory" costs enumerated under section 7A-305(d), but also "common law" costs, or costs which were traditionally allowed at common law. *See Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 734, 596 S.E.2d 891, 894-95 (2004); *Morgan v. Steiner*, 173 N.C. App. 577, 581, 619 S.E.2d 516, 519 (2005). Other opinions provided that the trial court could only assess those costs enumerated by statute. *See Charlotte Area*, 160 N.C. App. at 470, 586 S.E.2d at 785 (citing *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972));

Smith v. Cregan, 178 N.C. App. 519, 526, 632 S.E.2d 206, 211 (2006). The General Assembly resolved the dispute by amending sections 6-20 and 7A-305(d) in 2007 to allow only those costs specifically authorized by statute, thereby eliminating any perceived discretion to tax "common law" costs. *See Pennington*, ___ N.C. App. at ___, 707 S.E.2d at 741 ("When [sections 6-20 and 7A-305(d) are] read together, it is clear that costs require statutory authorization and that section 7A-305 or any other statute may authorize costs.").

Also prior to amendment by the Legislature in 2007, the issue presented in the present case concerning the first kind of discretion, the discretion to determine whether costs enumerated under section 7A-305(d) must be awarded in a particular civil action under section 6-20, was definitively resolved in this Court's 2006 opinion in *Smith v. Cregan*, 178 N.C. App. 519, 632 S.E.2d 206 (2006), which elaborated extensively on the statutory construction of sections 6-20 and 7A-305. *Smith*, like the present case, involved a medical negligence action in which the jury returned a verdict in favor of the defendants. *Id.* at 520, 632 S.E.2d at 207. Thereafter, the defendants filed a motion for costs to recover expert witness fees, which was denied by the trial court " 'in . . . exercise of the [court]'s discretion.' " *Id.* (alterations in original).

On appeal, *Smith* explicitly addressed "whether the General Statutes always require [a statutorily enumerated cost under section 7A-305(d)] to be awarded to a prevailing party in a negligence action." *Id.* at 521, 632 S.E.2d at 208. The opinion in *Smith* begins by explaining that section 6-1 requires the awarding of costs to the prevailing party " 'as provided in Chapter 7A and this Chapter [6 of the General Statutes].' " *Id.* (alteration in original) (quoting N.C. Gen. Stat. § 6-1). The pertinent provisions under Chapter 6 are sections 6-18, 6-19, and 6-20. *Id.* While sections 6-18 and 6-19 provide for a mandatory award of costs to the prevailing party in certain types of actions as described in those sections, section 6-20 provides that "the decision to award costs in other types of cases is consigned to the discretion of the trial court." *Id.* at 522, 632 S.E.2d at 208. Thus, *Smith* reasons, "[s]ection 7A-305(d) lists those items which are 'assessable or recoverable' in accordance with sections 6-18, 6-19, and 6-20," concluding, "The plain language of section 7A-305(d) makes the items it sets forth 'assessable or recoverable.' Accordingly, nothing in section 7A-305 requires a trial court to exercise its discretion under section 6-20 to award the items listed in section 7A-305(d)." *Id.* at 523, 525, 632 S.E.2d at 209, 210. After dissecting the language of the relevant statutory sections, *Smith* holds that those costs enumerated in section 7A-305(d) are discretionary in a negligence action:

> The present case involves a negligence action. Negligence cases are not listed among the types of actions in which costs must be awarded to a prevailing party pursuant to either section 6-18 or section 6-19. Therefore, the trial court's costs ruling was governed by section 6-20, and costs could "be allowed or not, in the discretion of the court."

Id. at 524, 632 S.E.2d at 210 (quoting N.C. Gen. Stat. § 6-20). Although the defendants in *Smith*, like the defendants in the present case, argued that section 6-1 converts section 6-20 into a "compulsory provision" with respect to those costs enumerated under section 7A-305(d), this Court's decision explicitly holds that, for actions governed under section 6-20, such as negligence actions like the present case, the trial court has the discretion to determine whether or not to award costs to the prevailing party, and if the trial court chooses to exercise that discretion, then the trial court is confined to those costs expressly enumerated under section 7A-305(d) or any other statute. *Smith*, 178 N.C. App. at 524-25, 632 S.E.2d at 210; *see also Charlotte Area*, 160 N.C. App. at 469, 586 S.E.2d at 785 ("Section 6-20 is located in Chapter 6, the first section of which reads '[t]o the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and this Chapter.' N.C.G.S. § 6-1. Thus, the term 'costs' in N.C.G.S. 6-20 refers to 'costs' as delineated in N.C.G.S. § 7A-305(d). . . . Furthermore, the language of N.C.G.S. § 6-20 states that '[i]n other actions, costs may be allowed or not, in the discretion of the court. . . .' By referring to 'other actions,' section 6-20 apparently grants a trial judge discretion to determine whether or not costs should be taxed to a party in an action not specified in sections 6-18 and 6-19. Thus, *the discretion granted is the discretion to allow costs*, not the discretion to judicially create costs." (emphasis added)); *Cosentino*, 160 N.C. App. at 518-19, 586 S.E.2d at 791 ("[T]he language of N.C.G.S. § 6-20 *does not compel a trial court to award any costs*. N.C.G.S. § 6-20 says 'costs may be allowed or not, in the discretion of the court[.]' Notably, this statute contains the words 'may' and 'discretion.' 'Nothing else appearing, the legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning.' *Wood v. Stevens* & Co., 297 N.C. 636, 643, 256 S.E.2d 692, 697 (1979). 'Ordinarily when the word "may" is used in a statute, it will be construed as permissive and not mandatory.' *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978)." (emphasis added)). We note that our opinion in *Smith* has never been overturned by our Supreme Court, and because that decision addresses the precise circumstances of the present case, *Smith* should be controlling here.

However, this Court's 2008 decision in *Priest v. Safety-Kleen Sys., Inc.*, 191 N.C. App. 341, 663 S.E.2d 351 (2008), disagrees with *Smith's* holding that the trial court may deny costs listed in section 7A-305(d) in its discretion. Like *Smith*, *Priest* involved a negligence action arising out of a motor vehicle accident. *Id.* at 342, 663 S.E.2d at 352. Following a jury verdict in favor of the plaintiffs, the plaintiffs filed a motion for costs, which was denied by the trial court in "the exercise of its discretion." *Id.* On appeal, this Court reversed the trial court's order denying costs, holding that "costs enumerated in N.C. Gen. Stat. § 7A-305(d) *must* be awarded to the prevailing party." *Id.* at 346, 663 S.E.2d at 354. In so holding, *Priest* distinguishes and declines to follow this Court's prior opinion in *Smith*: "Although *Smith's* statutory analysis leading to this conclusion [that costs enumerated in section 7A-305(d) are discretionary, not mandatory] is sound, the greater weight of authority from this Court is that costs enumerated in N.C. Gen. Stat. § 7A-305(d) *must* be awarded to the prevailing party." *Priest*, 191 N.C. App. at 346, 663 S.E.2d at 354. However, the "greater weight of authority" cited by *Priest* to support its holding included this Court's opinions in *Miller v. Forsyth Mem'l Hosp., Inc.*, 173 N.C. App. 385, 618 S.E.2d 838 (2005), and *Morgan v. Steiner*, 173 N.C. App. 577, 619 S.E.2d 516 (2005), applying the three-step analysis enumerated in this Court's prior opinion in *Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 596 S.E.2d 891 (2004).

First, we note this Court's 2004 decision in *Lord* addressed the taxation of costs under Rule 41(d) of the North Carolina Rules of Civil Procedure, which provides: "A plaintiff who [voluntarily] dismisses an action or claim under section (a) of this rule *shall* be taxed with the costs of the action unless the action was brought in forma pauperis." N.C. Gen. Stat. § 1A-1, Rule 41(d) (2009) (emphasis added). In *Lord*, the plaintiffs, recent home purchasers, took a voluntary dismissal of their action alleging negligent construction and breach of implied warranty of workmanlike construction against the home builder. *Id.* at 731-32, 596 S.E.2d at 893. Three lumber companies, brought into the action by the home builder as third-party defendants, then moved for costs to be assessed against the plaintiffs pursuant to Rule 41(d), and the trial court denied the motion, in its discretion. *Id.* at 732, 596 S.E.2d at 893. On appeal, this Court noted that pursuant to the provisions of Rule 41(d), "the awarding of costs is mandatory." *Id.* After restating that point, *Lord* considers "what costs, if any, [the] third party defendants were entitled to recover," addressing the statutory versus "common law" costs conundrum. *Id.* at 734, 596 S.E.2d at

894. Then, *Lord* establishes a three-step analysis to be used in "analyzing whether costs are properly assessed under Rule 41(d)," *id.*:

> First, if the costs are items provided as costs under N.C. Gen. Stat. § 7A-305, then the trial court is required to assess these items as costs. Second, for items not costs under N.C. Gen. Stat. § 7A-305, it must be determined if they are "common law costs" under the rationale of *Charlotte Area*. Third, as to "common law costs" we must determine if the trial court abused its discretion in awarding or denying these costs under N.C. Gen. Stat. § 6-20.

Id. at 734, 596 S.E.2d at 895.[1] In accordance with our prior opinion in *Cosentino*, *Lord* holds that, because a trial court is required to assess costs against the plaintiff pursuant to Rule 41(d), then those costs enumerated under the provisions of § 7A-305 are mandatory, and not discretionary, with the trial court. *Id.* at 734, 596 S.E.2d at 894; *Cosentino*, 160 N.C. App. at 518, 586 S.E.2d at 790 ("[W]here Rule 41(d) applies, the first kind of N.C.G.S. § 6-20 discretion, *the discretion to award costs*, is inapplicable because Rule 41(d) mandates that costs 'shall be awarded.' " (emphasis added)). Notably, our decision in *Lord* was decided in the context of Rule 41(d) of the North Carolina Rules of Civil Procedure, which, as stated in *Cosentino*, divests the trial court of discretion under section 6-20 to determine whether or not to award costs. *Id.* at 732, 596 S.E.2d at 893; *Cosentino*, 160 N.C. App. at 518, 586 S.E.2d at 790. Moreover, the three-step analysis established in *Lord* addressed the issue of what costs—statutory or "common law" costs—can be taxed by the trial court in the exercise of its discretion, rather than the issue of whether the trial court has the discretion in the first instance to determine whether to award any of those costs.

Similarly, our 2005 decision in *Morgan* addressed the taxation of costs under Rule 68 of the North Carolina Rules of Civil Procedure. *Morgan*, 173 N.C. App. at 579, 619 S.E.2d at 518. As is the case with Rule 41(d) in *Lord*, the provisions of Rule 68 require a plaintiff to pay the costs incurred by the defendant after an offer of judgment made at least ten days before trial is rejected by the plaintiff if the judgment finally obtained by the plaintiff is less favorable than the offer of judgment. N.C. Gen. Stat. § 1A-1, Rule 68 (2009); *Morgan*, 173 N.C. App. at 579-80, 619 S.E.2d at 518. In *Morgan*, which involved a medical negligence action, the defendants had extended an offer of judgment to

1. We note that despite the implication in *Lord's* three-step analysis, *Charlotte Area* concluded that "common law costs" may not be awarded. *Charlotte Area*, 160 N.C. App. at 470, 586 S.E.2d at 785.

the plaintiff fourteen days before trial pursuant to the provisions of Rule 68; the plaintiff rejected the defendants' offer of judgment, and the jury returned a verdict in favor of the defendants following trial. *Id.* at 579, 619 S.E.2d at 518. The defendants subsequently filed a motion for costs, which was granted in part and denied in part by the trial court. *Id.* On appeal, this Court employed the three-step analysis described in *Lord* to determine whether the items awarded as costs by the trial court were proper. *Morgan*, 173 N.C. App. at 581, 619 S.E.2d at 519. Accordingly, *Morgan*, read in its entirety, holds that, because a trial court is required to assess costs against the plaintiff pursuant to the provisions of Rule 68, then those costs enumerated under the provisions of § 7A-305 are mandatory, and not discretionary, with the trial court, in accordance with our holding in *Lord*. *Id.* at 579-81, 619 S.E.2d at 518-19. Thus, in attempting to distinguish *Smith* by the "greater weight of authority," *Priest* relied on two distinguishable cases—*Lord* and *Morgan*—in which specific rules of civil procedure, rather than section 6-20, determined both the issue and the outcome.

Second, we note this Court's 2005 decision in *Miller* is inconsistent with earlier decisions concerning the issue at hand. *Miller* involved a medical negligence action in which the jury returned a verdict for the defendants, who thereafter filed a motion for costs, which was denied in part by the trial court as to deposition costs, mediation costs, expert witness fees, and exhibit costs. *Id.* at 386-87, 618 S.E.2d at 840. The defendants cross-appealed "from the trial court's denial of their motion to tax costs following a favorable jury verdict." *Id.* at 391, 618 S.E.2d at 843. Citing *Lord*, this Court held, "In analyzing whether the trial court properly denied defendants' motion for cost[s] we must undertake a three-step analysis." *Id.* As enunciated in *Lord*, *Miller* reiterates that the first step in that analysis requires the trial court to assess an item as costs if the item is one enumerated in section 7A-305(d). *Id.* Accordingly, *Miller* found the trial court erred in failing to assess mediation costs in favor of the defendants, since mediation fees are an enumerated item under section 7A-305(d). *Id.* at 392, 618 S.E.2d at 843. However, in reaching that holding, *Miller* incorrectly applied *Lord's* analysis, as *Lord's* holding was decided under the context of Rule 41(d) imposing mandatory costs, rather than under the discretionary provisions of section 6-20 applicable to negligence actions resulting in a jury verdict. Nonetheless, to the extent *Miller* incorrectly applied the law, our subsequent 2006 opinion in *Smith* explicitly clarified the law on the taxing of costs under

section 6-20 in a negligence action. Consequently, given its reliance on *Lord*, *Morgan*, and *Miller*, *Priest* was inconsistent with this Court's prior authority.

However, relying on our previous opinion in *Priest*, this Court issued our decision in *Springs* in January of this year. *Springs* involved a negligence action arising out of a motor vehicle accident. *Id.* at ___, 704 S.E.2d at 321. Following a jury verdict in favor of the plaintiff, the plaintiff filed a motion to tax costs against the defendants, which the trial court granted. *Id.* at ___, 704 S.E.2d at 322. In evaluating the trial court's award of costs, this Court held that those costs enumerated in section 7A-305(d) are mandatory costs that *must* be awarded by the trial court to the prevailing party: "If a cost is set forth in N.C. Gen. Stat. § 7A-305(d), ' "the trial court *is required to assess the item as costs.*" ' " *Id.* at ___, 704 S.E.2d at 328 (quoting *Priest*, 191 N.C. App. at 343, 663 S.E.2d at 353 (quoting *Miller*, 173 N.C. App. at 391, 618 S.E.2d at 843)). In addition, after elaborating on the "established principles of statutory construction," *Springs* further holds that the trial court has discretion to award other costs that are specifically authorized by statutes other than section 7A-305(d), such as "travel expenses for experts as provided under N.C. Gen. Stat. § 7A-314(b)" and "expert fees for an expert witness' time in attendance at trial even when not testifying" under N.C. Gen. Stat. § 7A-314(d). *Id.* In March of this year, this Court's opinion in *Peters v. Pennington*, ___ N.C. App. ___, 707 S.E.2d 724 (2011), relies on *Springs* and *Priest*, and again holds, "If a category of costs is set forth in section 7A-305(d), ' "the trial court *is required to assess the item as costs.*" ' " *Id.* at ——, 707 S.E.2d at 741 (quoting *Springs*, ___ N.C. App. at ___, 704 S.E.2d at 328 (quoting *Priest*, 191 N.C. App. at 343, 663 S.E.2d at 353)). Although *Springs* follows this Court's precedent in *Priest*, we find such an interpretation of sections 6-20 and 7A-305(d) effectively divests the trial court of a significant amount of the discretion given to the trial court by the plain language of those statutes.

As our holdings in *Charlotte Area*, *Cosentino*, and especially *Smith* explain, a close reading of the statutory language reveals the interplay between the relevant statutes. Pursuant to N.C. Gen. Stat. § 6-1 (2009), "To the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and *this* Chapter [6]." *Id.* (emphasis added). Within Chapter 6, sections 6-18, 6-19, and 6-20 govern whether an award of costs is appropriate. Sections 6-18 and 6-19 enumerate certain types of cases for which an award of costs is mandatory to prevailing plaintiffs or prevailing defendants, respectively. In

addition, section 6-20 allows costs to the prevailing party "in the discretion of the court . . . subject to the limitations on assessable or recoverable costs set forth in G.S. 7A-305(d)." N.C. Gen. Stat. § 6-20.

N.C. Gen. Stat. § 7A-305(d) provides a "complete and exclusive" list of expenses which "are assessable or recoverable" under section 6-20. N.C. Gen. Stat. § 7A-305(d). As explained previously, these two sections were amended by the Legislature in 2007 in order to address the disagreement in this Court's opinions as to whether section 6-20 provided the trial court with the discretion to award those costs not specifically authorized by any statute.[2] After the General Assembly amended the statutory language in 2007, section 6-20 now reads:

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

N.C. Gen. Stat. § 6-20 (2009). Noticeably absent is any obligatory language *requiring* the trial court to assess those costs listed under section 7A-305(d). Rather, the plain language simply limits a trial court's discretion to award only those costs specifically provided for under section 7A-305(d) or elsewhere in the General Statutes. Similarly, under section 7A-305(d), the Legislature provides only that the list of costs enumerated in that section is "complete and exclusive" and "constitute[s] a limit on the trial court's discretion to tax costs pursuant to G.S. 6-20." N.C. Gen. Stat. § 7A-305(d). Given our conflicting case law interpreting section 6-20 as providing the two kinds of discretion discussed in *Cosentino*, the Legislature's evident purpose in amending the statute was only to eliminate the divergent path in our case law which allowed assessment of "common law" costs in addition to statutorily enumerated costs. *See Pennington*, ___ N.C. App. at ___, 707 S.E.2d at 741 (stating that "the General Assembly's 2007 amendment to N.C. Gen. Stat. § 6-20 resolved the dispute [as to what may be taxed as costs]"). Before the 2007 amendment, our decisions in cases addressing section 6-20, with the exception of *Miller*, are consistent in holding, either directly or impliedly, that section 6-20

2. Even *Priest* recognizes that following the 2007 amendment, the three-step analysis established in *Lord* "will likely be defunct," *Priest*, 191 N.C. App. at 343 n.1, 663 S.E.2d at 352 n.1, as that analysis was established in the context of whether a trial court may award "common law costs" in addition to statutory costs. *Lord*, 164 N.C. App. at 734, 596 S.E.2d at 894-95.

vests the trial court with discretion to determine *whether* to grant any costs to a prevailing party in an action not governed by sections 6-18 or 6-19, or a rule of civil procedure which provides for a mandatory awarding of costs. *See Charlotte Area*, 160 N.C. App. at 469, 586 S.E.2d at 784-85 (holding that "the language of N.C.G.S. § 6-20 states that '[i]n other actions, costs may be allowed or not, in the discretion of the court. . . .' By referring to 'other actions,' section 6-20 apparently grants a trial judge *discretion to determine whether or not costs should be taxed* to a party in an action not specified in sections 6-18 and 6-19" (emphasis added)); *Cosentino*, 160 N.C. App. at 518-19, 586 S.E.2d at 791 ("[T]he language of N.C.G.S. § 6-20 *does not compel* a trial court to award any costs." (emphasis added)); *Overton v. Purvis*, 162 N.C. App. 241, 249-50, 591 S.E.2d 18, 24-25 (2004) (holding that "G.S. § 6-20 allows the trial court to assess 'costs' in its discretion," and that " '[w]hile the decision to tax costs is not reviewable absent an abuse of discretion, the discretion to award costs is strictly limited by our statutes' "); *Handex of the Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 13, 607 S.E.2d 25, 32 (2005) (stating, "In short, the trial court does not have discretion to award costs under N.C. Gen. Stat. § 6-20 which are not otherwise enumerated in the exhaustive list set out in N.C. Gen. Stat. § 7A-305(d)[,]" thereby impliedly holding the trial court has discretion to award or not those costs under section 7A-305(d), citing *Charlotte Area*); *Oakes v. Wooten*, 173 N.C. App. 506, 518-19, 620 S.E.2d 39, 48 (2005) (applying the holdings of *Charlotte Area* and *Handex* and impliedly holding that the trial court has discretion to award costs, but, in the exercise of that discretion, may only award those costs expressly enumerated in section 7A-305(d)); *Smith*, 178 N.C. App. at 524-25, 632 S.E.2d at 210 (holding, "Negligence cases are not listed among the types of actions in which costs must be awarded to a prevailing party pursuant to either section 6-18 or section 6-19. Therefore, the trial court's costs ruling was governed by section 6-20, and costs could 'be allowed or not, in the discretion of the court[,]' " and noting "nothing in section 7A-305 requires a trial court to exercise its discretion under section 6-20 to award the items listed in section 7A-305(d).").

It is clear from the wording of the statutes that the Legislature intended section 6-20 to have continued viability. However, if we are to construe the statutes as mandated by our holdings in *Priest* and *Springs*, the viability of section 6-20 will be severely diminished, as the trial court will be required to assess the items enumerated as costs under section 7A-305(d) whenever a prevailing party files a

motion for costs, thereby effectively eliminating much of the discretion provided by section 6-20. Such a reading is not consistent with our rules of statutory construction. *See Cosentino*, 160 N.C. App. at 518-19, 586 S.E.2d at 791 (" 'Nothing else appearing, the legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning.' *Wood v. Stevens & Co.*, 297 N.C. 636, 643, 256 S.E.2d 692, 697 (1979). 'Ordinarily when the word "may" is used in a statute, it will be construed as permissive and not mandatory.' *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978)."); *Smith*, 178 N.C. App. at 525, 632 S.E.2d at 210 (" 'Statutes dealing with the same subject matter must be construed *in para materia*, and harmonized, if possible, to give effect to each.' When the language of a statute is clear and unambiguous, the court must give it its plain and definite meaning." (quoting *Lutz v. Board of Education*, 282 N.C. 208, 219, 192 S.E.2d 463, 471 (1972) (citation omitted))). Accordingly, were we writing on a clean slate, unbound by our recent holdings in *Priest* and *Springs*, we would affirm the decision of the trial court in exercising its discretion whether to award costs to the prevailing party in the present case based on our statutory analysis and the consistent holdings in our case law prior to the *Priest* decision. However, because we are bound by the recent precedent established in *Priest* and *Springs* on this issue, we apply those holdings to the circumstances of the present case.

B. Application to the present case

Defendants argue the trial court erred in not awarding the full amount of their costs related to deposition expenses and expert witness fees. Specifically, defendants argue the trial court was required under N.C. Gen. Stat. § 7A-305(d)(10) to award their reasonable and necessary expenses for stenographic and videographic assistance in the taking of depositions and the costs of transcripts in the total amount of $7,516.96. Defendants also argue the trial court was required under N.C. Gen. Stat. § 7A-305(d)(11) to award their reasonable and necessary expert witness fees for the actual time spent by three experts testifying at trial in the total amount of $8,000.

As discussed at length above, according to our recent decisions, "If a cost is set forth in N.C. Gen. Stat. § 7A-305(d), ' "the trial court *is required to assess the item as costs.*" ' " *Springs*, ___ N.C. App. at ___, 704 S.E.2d at 328 (quoting *Priest*, 191 N.C. App. at 343, 663 S.E.2d at 353 (quoting *Miller*, 173 N.C. App. at 391, 618 S.E.2d at 843)). Accordingly, N.C. Gen. Stat. § 7A-305(d)(10) requires the trial court to assess "[r]easonable and necessary expenses for stenographic and

videographic assistance directly related to the taking of depositions and for the cost of deposition transcripts." *Id.* Also, under N.C. Gen. Stat. § 7A-305(d)(11), the trial court is required to assess "[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings." *Id.* The trial court is to consider, in its discretion, whether the costs requested under N.C. Gen. Stat. § 7A-305(d)(10) and (11) are "reasonable and necessary." *Pennington*, ___ N.C. App. at ___, 707 S.E.2d at 741.

Furthermore, as defendants contend with respect to their requested expert witness fees, pursuant to our holding in *Springs*, the trial court also may consider in its discretion whether to award "expert fees for an expert witness' time in attendance at trial even when not testifying" and "travel expenses for experts" according to the provisions of N.C. Gen. Stat. § 7A-314 (2009). *Springs*, ___ N.C. App. at ___, 704 S.E.2d at 328. From the record, we are unable to determine whether the trial court properly considered the mandatory costs as required by *Springs*. We must, therefore, reverse the trial court's award of costs in the amount of $1,000 and remand for reconsideration "in light of the controlling statutes" as interpreted by this Court in *Springs*.

IV. Conclusion

Because we are bound by this Court's recent decisions in *Springs* and *Priest*, we hold the trial court must award those costs which are mandatory under N.C. Gen. Stat. § 7A-305(d). Therefore, we must remand to the trial court for reconsideration of defendants' motion for costs consistent with the mandates of our opinion in *Springs*.

We reiterate that were we not bound by the decisions in *Priest* and *Springs*, we would affirm the trial court's decision in awarding costs in its discretion under N.C. Gen. Stat. § 6-20 pursuant to this Court's decisions prior to *Priest*. Unfortunately, this panel cannot correct the troublingly divergent path that recent decisions of this Court have followed on this issue. We emphasize the reality that only our Supreme Court can correct this problem, described by this Court as "a lack of uniformity" in *Vaden*, 187 N.C. App. at 438, 653 S.E.2d at 546, and a "confusing topic" in *Priest*, 191 N.C. App. at 346, 663 S.E.2d at 354.

Reversed and remanded.

Judge ERVIN concurs.

Judge McGEE concurs in the result only.

TAMIDA WYNN, EMPLOYEE, PLAINTIFF v. UNITED HEALTH SERVICES/TWO RIVERS HEALTH—TRENT CAMPUS, EMPLOYER AND THE PHOENIX INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA10-991

(Filed 2 August 2011)

1. **Workers' Compensation—refusal to accept suitable employment—pre-maximum medical improvement**

   The Industrial Commission did not err by not terminating plaintiff's workers' compensation insurance where defendants alleged that she had unjustifiably refused to accept suitable employment. Defendant contended that there should be a different, more lenient standard for determining whether plaintiff refused suitable employment where plaintiff had not reached maximum medical improvement. This approach does not accurately reflect existing North Carolina law.

2. **Workers' Compensation—reasonable search for employment—continuing to seek better position after hiring**

   The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff engaged in a reasonable search for employment. Although defendants argued from cross-examination testimony that plaintiff did not do so, that testimony could plausibly be construed to mean that plaintiff did not continue to seek an even better position after leaving defendant and obtaining another job.

3. **Workers' Compensation—testimony of rehabilitation specialist—not relied upon by Commission**

   The Industrial Commission did not err in a workers' compensation case by not relying on testimony from defendants' rehabilitation specialist that plaintiff could have obtained higher post-injury earnings. Fact finding is the Commission's function, and there was ample evidentiary support for not crediting the testimony.

Appeal by defendants from an Opinion and Award entered 7 April 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 January 2011.

Scudder & Hedrick, PLLC, by Samuel A. Scudder, for Plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Dalton B. Green, for Defendant-appellants.

ERVIN, Judge.

Defendants Two Rivers Healthcare and The Phoenix Insurance Company appeal from an order entered by the Industrial Commission awarding Plaintiff Tamida Wynn medical and disability benefits. On appeal, Defendants argue that the Commission utilized an incorrect legal standard in evaluating the suitability of a job offered to the claimant and failed to properly evaluate the evidence relating to Plaintiff's disability. After careful consideration of Defendants' challenges to the Commission's order in light of the record and the applicable law, we conclude that Defendants' arguments lack merit and that the Commission's order should be affirmed.

I. Factual Background

A. Substantive Facts

Plaintiff was born in 1975 and resides in New Bern. Plaintiff began working as a certified nursing assistant (CNA) for Defendant Two Rivers on 27 June 2006.

On 1 August 2008, Plaintiff suffered a compensable injury to her left knee. At the time of her injury, Plaintiff earned $10.50 per hour. Plaintiff had seven children, whose ages at the time of her injury ranged from fourteen to just over one. In order to avoid incurring child care expenses, Plaintiff had been working for Defendant Two Rivers from 3:00 p.m. until 11:00 p.m. on Mondays and Fridays and from 7:00 a.m. to 3:00 p.m. on Saturdays and Sundays, a schedule that allowed Plaintiff's older children to watch the younger children while Plaintiff was at work.

In the aftermath of her injury, Plaintiff was treated by Dr. Mark Wertman, an orthopedist, who diagnosed her as having sustained a traumatic ACL sprain with intrasubstance edema and Type 2 signal in the meniscus of her knee. In October 2008, Dr. Wertman allowed Plaintiff to return to work subject to the restriction that she not engage in any kneeling, squatting, or lifting of objects weighing over 40 pounds.

After Dr. Wertman imposed these work restrictions, Defendant Two Rivers offered Plaintiff a job which Defendant classified as a

"light duty CNA" position. The duties performed by occupants of the light duty CNA position included folding laundry, rolling silverware inside napkins, pushing meal carts, sweeping floors, taking out the trash, and providing grooming services for patients. The light duty CNA position paid only $6.50 per hour, an amount which was thirty-nine percent (39%) less than Plaintiff's normal salary, and was not a job that Defendant Two Rivers made available to applicants drawn from the general public. Instead, the light duty CNA job was a temporary position that offered no prospects for advancement and was reserved for employees who had suffered a compensable injury, were under light duty restrictions, and had not yet reached maximum medical improvement (MMI). The light duty CNA position was only available on the 7:00 a.m. to 3:00 p.m. shift, a schedule which was incompatible with Plaintiff's child care arrangements.

Plaintiff worked as a light duty CNA on Saturday, 8 November and Sunday, 9 November 2008. As she left work on 9 November 2008, Plaintiff wrote a note to her supervisor explaining that she could not work the Tuesday and Thursday day shifts during the upcoming week because she had been unable to find child care. As a result, Plaintiff did not report for work as scheduled on Tuesday, 11 November or Thursday, 13 November 2008. When Plaintiff returned to work on Saturday, 15 November 2008, her supervisor informed Plaintiff that, if she could not work the day shift schedule, she no longer had employment.

After her termination, Plaintiff immediately began looking for other employment that she could perform consistently with the restrictions imposed by Dr. Wertman. Within two weeks, Plaintiff obtained a data entry position with Jackson Hewitt Tax Service and began working for Jackson Hewitt on 27 November 2008. The data entry position at Jackson Hewitt paid $8.50 per hour. As of the date of the hearing held before the deputy commissioner on 18 March 2009, Plaintiff continued to occupy this data entry position, working about 16 to 25 hours per week under a schedule that accommodated her child care needs. At that time, Plaintiff was still under the care of Dr. Wertman, had not reached MMI, and was still subject to the work restrictions that Dr. Wertman had imposed in October 2008.

After terminating Plaintiff's employment, Defendant Two Rivers drafted a letter to Plaintiff on 17 November 2008 offering her the light duty CNA job; directing her to report for work on the day shift on Wednesday, 26 November 2008; and stating that, if Plaintiff did not appear for work at the specified time, Defendant Two Rivers would assume that she had resigned. Although it had Plaintiff's correct mailing

address, Defendant Two Rivers mailed the 17 November 2008 letter to an outdated address. After the 17 November 2008 letter was returned as undeliverable, it was re-sent. Plaintiff finally received the 17 November 2008 letter on 9 December 2008. By that time, Plaintiff had obtained her part-time position with Jackson Hewitt.

B. Procedural History

The parties stipulated that Plaintiff suffered a compensable injury to her left knee on 1 August 2008; that Defendants acknowledged the compensability of Plaintiff's injury by filing an Industrial Commission Form 60 on 28 August 2008; and that Defendants paid workers' compensation benefits to Plaintiff from 2 August 2008 through 8 November 2008. After Plaintiff returned to work for two days in November 2008, Defendants sought to terminate these benefit payments by filing an Industrial Commission Form 28T on 12 November 2008. On 2 December 2008, Plaintiff filed an Industrial Commission Form 33 requesting a hearing with respect to the disability payment issue. In their response to Plaintiff's filing, Defendants asserted that Plaintiff was not entitled to disability benefits because she had "constructively refused suitable employment."

A hearing concerning the disability benefit issue was conducted before Industrial Commission Deputy Commissioner Robert J. Harris on 18 March 2009. On 16 September 2009, Deputy Commissioner Harris entered an order in which he concluded that Plaintiff was entitled to receive disability and medical payment benefits. Defendants appealed Deputy Commissioner Harris' order to the Commission. On 7 April 2010, the Commission, by means of an order issued by Commissioner Christopher Scott with the concurrence of Commissioner Laura K. Mavretic and over a dissent by Commissioner Dianne C. Sellers,[1] affirmed Deputy Commissioner Harris' decision subject to "minor modifications." Defendants noted an appeal to this Court from the Commission's decision.

II. Legal Analysis

A. Standard of Review

"The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court. . . . Under the Workers' Compensation Act, '[t]he Commission is the sole judge of the credibility of the witnesses

1. In her concurrence, Commissioner Sellers urged adoption of the legal theory upon which Defendants have relied before this Court.

and the weight to be given their testimony.' 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. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citing *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000), and *Adams v. AVX Corp.*, 349 N.C. 676, 681-82, 509 S.E.2d 411, 414 (1998), and quoting *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). "[F]indings of fact which are left unchallenged by the parties on appeal are 'presumed to be supported by competent evidence' and are, thus 'conclusively established on appeal.' " *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (quoting *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003)). The "Commission's conclusions of law are[, however,] reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted). As a result, "[w]hen the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballinger v. ITT Grinnell Industrial Piping*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987). We will now review Defendants' challenges to the Commission's order utilizing the applicable standard of review.

B. "Suitable Employment"

[1] In their first challenge to the Commission's decision, Defendants argue that the Commission erroneously refused to terminate Plaintiff's workers' compensation benefits because she unjustifiably refused to accept suitable employment. In seeking to persuade us of the merits of this position, Defendants argue that the Commission erred by applying "the suitability standard for permanent post-MMI employment to the temporary pre-MMI CNA position." We do not find Defendant's argument persuasive.

In the workers' compensation context, "[t]he term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9).

> The employee seeking compensation under the Act bears "the burden of proving the existence of [her] disability and its extent." In order to support a conclusion of disability, whether temporary or permanent, the Commission must find that the employee has shown: "(1) that [she] was incapable after her injury of earning the same wages she had earned before her injury in the same employment, (2) that [she] was incapable after her injury of earning the same wages she had earned before her injury in any other employment, and (3) that [her] incapacity to earn was caused by [her] injury."

Clark v. Wal-Mart, 360 N.C. 41, 43-44, 619 S.E.2d 491, 493 (2005) (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 378 (1986), and *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982)).

A claimant otherwise entitled to receive workers' compensation benefits may have her benefits suspended or terminated pursuant to N.C. Gen. Stat. § 97-32, which states that, "[i]f an injured employee refuses employment procured for him suitable to his capacity[,] he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." "The burden is on the employer to show that an employee refused suitable employment. Once the employer makes this showing, the burden shifts to the employee to show that the refusal was justified." *Munns v. Precision Franchising, Inc.*, 196 N.C. App. 315, 317, 674 S.E.2d 430, 433 (2009) (citing *Gordon v. City of Durham*, 153 N.C. App. 782, 787, 571 S.E.2d 48, 51 (2002), and *Moore v. Concrete Supply Co.*, 149 N.C. App. 381, 389-90, 561 S.E.2d 315, 320 (2002)). As a result, the ultimate issue that must be resolved in order to properly apply N.C. Gen. Stat. § 97-32 is a determination of the extent, if any, to which a particular position constitutes "suitable employment."

According to Rule III(G) of the N.C. Industrial Commission Rules for the Utilization of Rehabilitation Professionals in Workers' Compensation Claims:

> "[s]uitable employment" means employment in the local labor market or self-employment which is reasonably attainable and which offers an opportunity to restore the worker as soon as possible and as nearly as practicable to pre-injury wage, while giving due consideration to the worker's qualifications (age, education, work experience, physical and mental capacities), impairment,

> vocational interests, and aptitudes. No one factor shall be considered solely in determining suitable employment."

Consistently with the Commission's Rules, "[o]ur appellate decisions have defined 'suitable' employment to be any job that a claimant 'is capable of performing considering his age, education, physical limitations, vocational skills, and experience.' " *Shah v. Howard Johnson*, 140 N.C. App. 58, 68, 535 S.E.2d 577, 583 (2000) (quoting *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994)). A "suitable" position must both accurately reflect the claimant's ability to earn wages in the open market and not constitute "make-work:"

> [T]he employer may not rebut the presumption of continuing disability by showing that the employee is capable of earning preinjury wages in a temporary position, or by creating a position within the employer's own company which is "not ordinarily available in the competitive job market," because such positions do not accurately reflect the employee's capacity to earn wages. "The Workers' Compensation Act does not permit [defendants] to avoid [their] duty to pay compensation by offering an injured employee employment which the employee under normally prevailing market conditions could find nowhere else and which [defendants] could terminate at will or . . . for reasons beyond [their] control."

Stamey v. Self-Insurance Guar. Ass'n, 131 N.C. App. 662, 666, 507 S.E.2d 596, 599 (1998) (citing *Daughtry v. Metric Construction Co.*, 115 N.C. App. 354, 358, 446 S.E.2d 590, 593, *disc. review denied*, 338 N.C. 515, 452 S.E.2d 808 (1994), and quoting *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 438-39, 342 S.E.2d 798, 806 (1986)); *see also Saums v. Raleigh Community Hospital*, 346 N.C. 760, 765, 487 S.E.2d 746, 750 (1997) (upholding the Commission's finding that an employee had not refused "suitable employment" because there was "no evidence that employers, other than defendant, would hire plaintiff to do a similar job at a comparable wage"), and *Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 362, 489 S.E.2d 445, 447 (1997) (stating that "the employer must come forward with evidence that others would hire the employee to do a similar job at a comparable wage").

In its order, the Commission concluded, in pertinent part, that:

> 1. . . . . The transitional pre-MMI light duty CNA position that Defendant-Employer offered Plaintiff in November 2008 did not constitute suitable employment. The position paid significantly less than Plaintiff's pre-injury job, and by its definition as a tem-

porary position, it held no opportunity for advancement. Finally, the position clearly was modified to accommodate Plaintiff's work restrictions and was thus make work.

2. An employee's refusal to accept a temporary modified position that is make work is reasonable. . . . Because the proffered job offered by Defendant-Employer was make work, and not available in the competitive job market, Plaintiff was justified in refusing the employment by failing to appear for the day shifts on Tuesday, November 11 and Thursday, November 13, 2008.

3. Defendants have failed to show that Plaintiff unjustifiably refused suitable employment, constructively or otherwise and, as such, are not entitled to have suspended Plaintiff's compensation on those grounds. N.C. Gen. Stat. §97-32.

In challenging these determinations on appeal, Defendants assert that, because Plaintiff had not reached MMI at the time they offered her the light duty CNA position, the Commission should have applied a different, more lenient, standard for the purpose of determining whether Plaintiff refused suitable employment and that the Commission erroneously "assum[ed] that the stringent requirements of 'suitability' set forth in *Peoples* and The Rules for the Utilization of Rehabilitation Professionals apply equally to both permanent employment offered after the employee reaches [MMI] and to temporary light-duty employment offered prior to [MMI]."[2]

MMI is "the point at which an injury has stabilized." *Cross v. Falk Integrated Techs., Inc.*, 190 N.C. App. 274, 282, 661 S.E.2d 249, 255 (2008) (citing *Carpenter v. Industrial Piping Co.*, 73 N.C. App. 309, 311, 326 S.E.2d 328, 330 (1985)). In *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 13-14, 562 S.E.2d 434, 443 (2002), *aff'd*, 357 N.C. 44, 577 S.E.2d 620 (2003), this Court "concluded that the primary significance of the concept of MMI is to delineate a crucial point in time only within the context of a claim for scheduled benefits under N.C. Gen. Stat. § 97-31, and that the concept of MMI does not have any direct bearing upon an employee's right to continue to receive temporary disability benefits once the employee has established a loss of wage-earning capacity pursuant to N.C. Gen. Stat. § 97-29 or § 97-30."

2. According to Defendants, the only factors that should be considered in determining whether a light duty position offered to a claimant prior to MMI constitutes suitable employment are whether the position is a "legitimate" one and whether the duties assigned to the position are consistent with the claimant's physical and mental limitations.

In addition, we have also held that "a finding of [MMI] is not the equivalent of a finding that the employee is able to earn the same wage earned prior to injury." *Collins v. Speedway Motor Sports Corp.*, 165 N.C. App. 113, 120, 598 S.E.2d 185, 190-91 (2004) (citation omitted).

As a general proposition, the extent to which a particular claimant has attained MMI is not relevant to his or her entitlement to receive workers' compensation benefits. The Supreme Court "has stated repeatedly that the term 'disability' is not simply a medical question, but includes an assessment of other vocational factors, including age, education, and training. [MMI], which does not include these other aspects of disability as defined by the Workers' Compensation Act, therefore cannot by itself establish a resumption of wage earning capacity." *Russos v. Wheaton Indus.*, 145 N.C. App. 164, 168, 551 S.E.2d 456, 459 (2001), (citing *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683-84, and *Little v. Food Service*, 33 N.C. App. 742, 743, 236 S.E.2d 801, 802 (1977), *rev'd on other grounds*, 295 N.C. 527, 246 S.E.2d 743 (1978)), *disc. review denied*, 355 N.C. 214, 560 S.E.2d 135 (2002).

According to well-established North Carolina law, since the extent to which a claimant has attained MMI is not determinative of her right to disability benefits, her disability benefits may be terminated before she reaches MMI in the event that he or she has the ability to earn the same wages that she earned before the compensable injury occurred. As this Court stated in *Cross*, "[w]hile an employee may seek a determination of her entitlement to permanent disability benefits under N.C. Gen. Stat. §§ 97-29 or 97-30, or scheduled benefits under N.C. Gen. Stat. § 97-31 only after reaching [MMI], temporary disability benefits may be terminated before an employee reaches [MMI] if that employee is capable of earning the same wages as prior to injury, and thus, unable to prove disability." *Cross*, 190 N.C. App. at 282, 661 S.E.2d at 255 (citing *Effingham v. Kroger Co.*, 149 N.C. App. 105, 114, 561 S.E.2d 287, 294 (2002)). On the other hand, a claimant may continue to receive disability after reaching MMI in the event that she remains unable to earn the same wages that she earned prior to sustaining an employment-related injury. *See, e.g.*, *Foster v. U.S. Airways, Inc.*, 149 N.C. App. 913, 918-19, 563 S.E.2d 235, 239-40 (2002) (expressing disagreement with defendant's argument "that the Commission erred in reinstating plaintiff's award of temporary disability after plaintiff reached MMI" on the grounds that, in *Saums*, "our Supreme Court . . . affirmed the Commission's award of temporary total disability benefits entered after the employee had reached MMI"), *disc. review denied*, 356 N.C. 299, 570 S.E.2d 505 (2002).

Thus, MMI "as a purely medical determination occurs when the employee's physical recovery has reached its peak," so that the extent to which an "employee has reached [MMI] is not necessarily a 'crucial fact upon which the question of plaintiff's right to compensation depends.' " *Walker v. Lake Rim Lawn & Garden*, 155 N.C. App. 709, 717-18, 575 S.E.2d 764, 769 (citing *Carpenter*, 73 N.C. App. at 311, 326 S.E.2d at 330 (1985), *Knight*, 149 N.C. App. at 14, 562 S.E.2d at 443 and *Russos*, 145 N.C. App. at 167-68, 551 S.E.2d at 459, and quoting *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977)), *disc. review denied*, 357 N.C. 67, 575 S.E.2d 674 (2003).

The decisions of the Supreme Court and this Court, which have consistently used the same standard to address disability-related claims regardless of whether those claims arose before or after MMI, make no mention of utilizing different standards for making such determinations depending upon whether the claimant is still in the healing period. *See, e.g.*, *Walker*, 155 N.C. App. at 717-18, 575 S.E.2d at 769 (utilizing N.C. Gen. Stat. § 97-32 to evaluate the defendant's assertion that the plaintiff had refused suitable employment despite the fact that the plaintiff had not reached MMI), and *Bailey v. Western Staff Servs.*, 151 N.C. App. 356, 363-64, 566 S.E.2d 509, 514 (2002) (evaluating the suitability of a job offered to the claimant prior to MMI utilizing the same standard applied in other cases). In fact, we have not found any reported decision of this Court or the Supreme Court that adopts the approach advocated by Defendants for use in determining the suitability of employment offered to claimants who had not yet reached MMI.[3] As a result, we find no support in our published workers' compensation jurisprudence for the "different standard" approach advocated by Defendants and believe that the approach adopted by the Commission in this case is consistent with existing North Carolina law.

Although various policy-related justifications can be cited in support of the approach advocated by Defendants, we believe that the extent to which the "different standard" test should be adopted is a question for the General Assembly rather than for this Court. In reaching this conclusion, we note that adoption of the "different standard" approach would require us to answer questions such as (1) At what point after the date of a compensable injury should the pre-MMI

3. In their brief, Defendants contend that "[i]n *Russo v. Food Lion*, [187 N.C. App. 509, 653 S.E.2d 255 (2007) (unpublished opinion),] the . . . Court of Appeals held that the suitability requirements of *Peoples v. Cone Mills* do not apply to situations in which the employee has not reached [MMI]." According to Defendants

standard be applied? (2) Does the applicability of the pre-MMI standard depend upon the duration of the healing period or the degree of injury? (3) How "unsuitable" can proffered employment be before a claimant is entitled to reject the proffered position without risking the loss of his or her workers' compensation benefits? and (4) Would the utilization of the "different standard" approach result in situations in which an employee who has not attained MMI would be required to accept a position which she is entitled to reject after reaching MMI? " 'Weighing these and other public policy considerations is the province of our General Assembly, not this Court[.]' " *Andrews v. Haygood*, 362 N.C. 599, 604-05, 669 S.E.2d 310, 314 (2008) (quoting *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008), and citing *Wayne County Citizens Assn. v. Wayne County Bd. of Comrs*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991) (other citation omitted). As a result, for all of these reasons, we conclude that the Commission did not err by applying the generally-accepted definition of "suitable employment" in evaluating the Plaintiff's right to reject the "light duty CNA" position at issue in this case.

In urging us to reach a different result, Defendants analyze each of the factors relied upon by the Commission in concluding that the light duty CNA position was not "suitable." Defendants' discussion of this set of issues is, however, predicated on the assumption that the Commission should have utilized the "different standard" approach.[4] Given our decision to refrain from adopting that argument, we con-

> The Court held [in *Russo*] that employment prior to [MMI] is intended to be temporary rather than permanent, because the employee is still in the healing period. . . . Accordingly, because light duty pre-MMI employment is by its nature, temporary, the concerns behind the requirement that employment be "suitable" per *Peoples* (i.e., the concern that the employee will be placed in employment that does not accurately reflect his earning capacity) do not exist prior to MMI.

As Defendants acknowledge, *Russo's* status as an unpublished opinion deprives it of precedential effect. In addition, our review of *Russo* indicates that, although noting that the claimant had not reached MMI, the opinion does not engage in the sort of detailed analysis which Defendants deem appropriate. In addition, *Russo* does not cite or discuss either *Walker* or *Bailey*. Moreover, this case is factually distinguishable from *Russo* in that the physicians responsible for treating the plaintiff in *Russo* opined that acceptance of the job at issue there would provide therapeutic benefits for the plaintiff. Defendants have not pointed to any such evidence in the present record. Finally, we are aware of at least one unpublished post-*Russo* decision that utilized the traditional "suitability" standard in a pre-MMI context. *Shupe v. City of Charlotte*, —— N.C. App. ——, 697 S.E.2d 525 (2010), *disc. review denied*, 364 N.C. 435, 702 S.E.2d 490 (2010). As a result, for all of these reasons, we conclude that *Russo* does not control the outcome in this case.

4. Although there are suggestions to the contrary at a couple of points in Defendants' brief, we do not believe that Defendants have contended before this Court that the

clude that Defendants' specific challenges to the Commission's decision lack merit.

In their brief, Defendants contend that the disparity between the pre-injury compensation that Plaintiff earned in her regular CNA job and the compensation rate applicable to the temporary light duty position "would not render the employment unsuitable" because "it is not required that the employment pay the same or greater wages than the pre-injury employment." Although the existence of a wage disparity does not, in and of itself, necessarily compel a conclusion that the light duty CNA position at issue here was "unsuitable," "[t]he disparity between pre-injury and post-injury wages is one factor which may be considered in determining the suitability of post-injury employment" under traditional "suitability" analysis. *Foster*, 149 N.C. App. at 921, 563 S.E.2d at 241 (citing *Dixon v. City of Durham*, 128 N.C. App. 501, 504, 495 S.E.2d 380, 383 (1998)). The light duty CNA position which Plaintiff rejected paid 39% less than Plaintiff's usual wage rate. Defendants have not cited any decision of the Supreme Court or this Court holding that a proffered job was "suitable" in the face of a nearly 40% reduction in the claimant's rate of compensation, and we know of none. We see nothing impermissible about the manner in which the Commission considered the disparity between Plaintiff's pre-injury wage rate and the compensation that she would have received had she accepted the light duty CNA position.

Similarly, Defendants argue that the fact that the light duty CNA position was temporary rather than permanent did not support the Commission's determination that Plaintiff had not been offered "suitable" employment. Defendants' argument to this effect clearly assumes the appropriateness of the "different standard" approach to the resolution of "suitability" issues rather than the approach that the Commission actually utilized. Defendants have not cited any authority suggesting that the temporary nature of the light duty CNA position is irrelevant to a proper "suitability" inquiry, and we know of none. As a result, Defendants' challenge to the Commission's reliance on the temporary nature of the light duty CNA position is, in reality, nothing more than a reiteration of their argument in support the "different standard" approach which we have declined to accept elsewhere in this opinion.

Commission erred by failing to find that Plaintiff refused "suitable" employment as that term is construed in *Peoples* and its progeny. As a result, we will not address the extent to which the Commission properly applied the traditional "suitability" standard in this case.

Similarly, Defendants argue that "the modification of the CNA job to accommodate Plaintiff's temporary physical restrictions was minimal" and that the " 'light duty CNA' position is not so heavily modified as to render it make work, especially considering the fact that the job is temporary pre-MMI employment." However, Defendants stated in the 17 November 2008 letter that occupants of the light duty CNA position would be required to perform such tasks as folding laundry and pillow cases, pushing meal carts, sweeping and mopping floors, emptying trash containers, and assisting patients with personal care issues, such as trimming their nails. Although some of these duties may also be performed by individuals occupying regular CNA positions, it is not clear from the record that this is true of the duties assigned to occupants of the light duty CNA position considered in their entirety. Simply put, Defendants have not cited anything in the record listing the duties normally performed by a CNA compared to the duties assigned to occupants of the light duty CNA position, rendering it impossible for us to determine the extent to which the duties assigned to the two positions differ. As a result, Defendants' challenge to the Commission's handling of the "job modification" issue is, in essence, a reiteration of their support for the "different standard" approach which we have declined to adopt.

Finally, Defendants challenge the Commission's determination that Defendants had failed to show that Plaintiff refused suitable employment and that Plaintiff's decision to refuse the light duty CNA position was reasonable. Once again, however, these arguments assume the validity of the "different standard" approach advocated by Defendants. Thus, since all of Defendants' specific challenges to the Commission's decision assume the appropriateness of this "different standard" approach and since we have concluded that this approach does not accurately reflect existing North Carolina law, we conclude that Defendants' challenge to the Commission's "suitability" determination lacks merit.

D. Reasonable Search for Employment

[2] Secondly, Defendants argue that the Commission erred by concluding that Plaintiff engaged in a reasonable search for employment between 10 November 2006, when she stopped working for Defendant Two Rivers, and 26 November 2006, when Plaintiff obtained employment with Jackson Hewitt. Once again, we are not persuaded by Defendants' argument.

In its order, the Commission found as a fact that:

> Plaintiff went back to work on Saturday, November 15, 2008 and saw that she was not on the schedule. Plaintiff then contacted [her supervisor,] Ms. Cook, who told Plaintiff that if she could not work the transitional duty schedule, she was terminated. Plaintiff understood that she was terminated and immediately began looking for work elsewhere within her restrictions.

This finding is fully consistent with Plaintiff's testimony that she sought other employment after losing her job with Defendant Two Rivers and adequately supports the Commission's determination that "Plaintiff is entitled to temporary total disability benefits . . . from November 10 through November 26, 2008, during which time she engaged in reasonable efforts to look for work within her restrictions but was unable to find it."

In challenging this aspect of the Commission's order, Defendants emphasize a portion of Plaintiff's testimony on cross-examination. After eliciting testimony from Plaintiff to the effect that she had learned about the Jackson Hewitt position from a friend, Defendants asked if Plaintiff had looked for other positions or had tried to find a job that paid more than Jackson Hewitt and obtained a negative response. Based upon this testimony, Defendants argue that Plaintiff did not engage in a reasonable search for employment. However, the testimony in question can be plausibly construed to mean that Plaintiff did not continue to seek even better alternate employment after obtaining the Jackson Hewitt position. As we have already noted, "[u]nder our Workers' Compensation Act, 'the Commission is the fact finding body' " with the Commission serving as " 'the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Deese*, 352 N.C. at 115, 530 S.E.2d at 552 (quoting *Brewer v. Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962), and *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274 (1965)). For that reason, the Commission had ample authority to resolve this issue based on Plaintiff's description of her job search on direct examination and a different interpretation of her testimony on cross-examination than that advocated by Defendants. As a result, Defendants are not entitled to relief from the Commission's order based upon this argument.

E. Evidence of Plaintiff's Partial Disability

[3] Finally, Defendants argue that the Commission erred by failing to conclude that Defendants had successfully rebutted the presumption of disability arising from the fact that Plaintiff obtained alternate

employment at a lower wage rate than she had received during her pre-injury employment with Defendant Two Rivers. Once again, we do not find Defendants' argument persuasive.

The undisputed record evidence established that, after leaving her employment with Defendant Two Rivers, Plaintiff obtained new employment with Jackson Hewitt at a lower wage rate. As Defendants appear to concede, a workers' compensation claimant may establish disability through "the production of evidence that [s]he has obtained other employment at a wage less than that earned prior to the injury." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted). "Such evidence, while not dispositive of disability, shifts the burden to the employer to establish that the employee could have obtained higher earnings." *Larramore v. Richardson Sports, Ltd. Partners*, 141 N.C. App. 250, 259-60, 540 S.E.2d 768, 773 (2000) (citing *Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 130, 532 S.E.2d 583, 588 (2000)), *aff'd*, 353 N.C. 520, 546 S.E.2d 87 (2001). In an effort to persuade us that Plaintiff "could have obtained higher earnings," Defendants argue that the testimony of Robert E. Manning, Jr., their rehabilitation specialist, established that Plaintiff's job at Jackson Hewitt did not accurately reflect her earning ability and that Plaintiff was obligated to elicit evidence that rebutted Mr. Manning's testimony.

In its order, the Commission found, in pertinent part, that:

> 14. [Mr.] Manning [] is a vocational rehabilitation specialist whom Defendants hired in this case. As of March 2009, he located seven entry level positions with employers in the New Bern area. Each of these positions was as a cashier in a retail operation or a teller at a bank. Mr. Manning believed that all of the positions comported with Plaintiff's work restrictions. He further opined that the entry level pay in any of these positions would be about $8.00 per hour but that, with "determination and persistence," Plaintiff could get back to her pre-injury average weekly wage in any of the positions.
>
> 15. Mr. Manning also noted that any of the positions he located would require a criminal background check and that each position involved the handling of money. Notably, Plaintiff has a record of seven worthless check charges dating back to 1998, with five convictions and two deferred prosecutions based on the payment of restitution. Six of these charges pre-dated Plaintiff's employment with Defendant-Employer, and the seventh occurred during said employment.

16. Mr. Manning never met with Plaintiff or spoke with her. He also could not say for certain that the positions he found as of March 2009 had been available in November 2008.

As these findings clearly indicate, the Commission considered Mr. Manning's testimony and did not find it persuasive. Given that the fact-finding function in workers' compensation cases is assigned to the Commission rather than the appellate courts and given that the Commission's reasons for failing to credit Mr. Manning's testimony have ample evidentiary support, we conclude that the Commission did not err either by not relying on Mr. Manning's testimony or requiring Plaintiff to rebut it. As a result, Defendants' final challenge to the Commission's order lacks merit.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the Commission did not err in awarding disability and medical benefits to Plaintiff. As a result, the Commission's order should be, and hereby is, affirmed.

AFFIRMED.

Judges ELMORE and STEELMAN concur.

STATE OF NORTH CAROLINA v. TRACEY HARLAN JARVIS

No. COA11-31

(Filed 2 August 2011)

1. Satellite-Based Monitoring—clerical error—remanded for correction

A satellite-based monitoring order was remanded for correction of a clerical error where the transcript of the hearing reflected the judge saying that the conviction (indecent liberties) was not an aggravated offense while the order found that the offense was aggravated.

2. Satellite-Based Monitoring—subject matter jurisdiction—statutory provisions

The trial court properly exercised subject matter jurisdiction in ordering satellite-based monitoring (SBM) despite defendant's

contention that the State failed to file a written pleading providing notice of the basis for the SBM. The General Assembly has devised a separate procedure for determining eligibility for SBM and clearly granted the superior courts subject matter jurisdiction to conduct these determinations pursuant to specific statutory procedures.

3. Satellite-Based Monitoring—notice—no constitutional violation

There was no constitutional due process violation in ordering defendant to enroll in satellite-based monitoring (SBM) without providing notice of the grounds where defendant was placed on probation with a condition that he be incarcerated for 120 days. His eligibility for SBM was determined by N.C.G.S. § 14-208.40A, not N.C.G.S. § 14-208.40b, and neither the Department of Correction nor the trial court was responsible for any type of notice about eligibility for SBM.

4. Satellite-Based Monitoring—indecent liberties—physical, mental, or sexual abuse of minor

The trial court did not err when ordering an indecent liberties defendant to submit to satellite-based monitoring by finding that defendant's conviction involved the physical, mental, or sexual abuse of a minor.

5. Satellite-Based Monitoring—low risk—highest level of monitoring

The trial court did not err when ordering defendant to submit to satellite-based monitoring by determining that defendant required the highest possible level of supervision and monitoring, even though the risk assessment classified defendant as a low risk for reoffending. However, it was not clear whether the trial court found that defendant's *Alford* plea itself showed a lack of remorse or whether defendant's actions showed a lack of remorse and the case was remanded for additional findings.

6. Satellite-Based Monitoring—double jeopardy and cruel and unusual punishment—no violation

There was no violation of defendant's right to be free from double jeopardy and cruel and unusual punishment in ordering that defendant submit to satellite-based monitoring.

Appeal by defendant from judgment entered 16 July 2010 by Judge John L. Holshouser, Jr., in Rowan County Superior Court. Heard in the Court of Appeals 26 May 2011.

Attorney General Roy Cooper, by Assistant Attorney General Peter A. Regulski, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

CALABRIA, Judge.

Tracey Harlan Jarvis ("defendant") appeals the trial court's order requiring him to enroll in satellite-based monitoring ("SBM") for a period of ten years. We vacate and remand the trial court's order.

I. BACKGROUND

"Cayla" and "Kasey,"[1] defendant's daughter (collectively, "the girls"), were the same age and played softball together.[2] Defendant, a close friend of Cayla's family for more than eight years, was also the girls' softball coach. Cayla's mother would frequently drop her off at defendant's home because of Cayla's relationship with Kasey, and the girls would spend the night together at defendant's home.

During the summer and fall of 2006, Cayla began spending time at defendant's home when Kasey was not present. On 5 January 2007, defendant and Cayla "were just messing around, sitting on the couch watching a movie" when Cayla "reached over and kissed" defendant. Defendant told Cayla that it "wasn't right" and that if there were "physical relations" between them, he would "probably end up in jail."

Approximately one week later, defendant and Cayla were watching a movie at defendant's home when she "kissed him [and] started touching him." Cayla then performed oral sex on defendant. Defendant "stopped her" and told her they "couldn't do that." Cayla replied that she "understood." Approximately one week after this incident, defendant and Cayla were in defendant's bed, fully clothed. Cayla began kissing defendant, "and she took off part of her clothes." Cayla then performed oral sex on him, and defendant did not stop her.

On the afternoon of 6 May 2007, defendant and Cayla were at defendant's home when she performed oral sex on him, and then

1. We use pseudonyms to protect the identity of the victim and for ease of reading.

2. The parties do not dispute that Cayla was under the age of sixteen at the time of the offenses. Therefore, we will not identify her age in order to further protect her identity.

engaged in intercourse. The next day, 7 May 2007, Cayla's mother called defendant around noon and told him that an unnamed student at Cayla's school "told them something." The school then called Cayla's mother and told her to come to the school "right away." Defendant assumed the unnamed student was Kasey.

Cayla's mother contacted defendant and asked him if he "had any idea what was going on." Defendant replied in the negative. He subsequently called Cayla's mother several times, but she did not answer. Defendant then spoke to Cayla about turning himself into law enforcement. Cayla told him "not to do it," but defendant "felt like this was the right thing to do."

On 7 May 2007, defendant voluntarily drove to the China Grove Police Department, where he spoke with Detective Linda Porter ("Detective Porter") of the Rowan County Sheriff's Department ("RCSD"). Detective Porter read defendant his *Miranda* rights, and defendant signed a form waiving his rights. He then admitted that he performed oral sex on Cayla "three or four times," that she performed oral sex on him "about eight or more [times]," and that they also engaged in intercourse.

Defendant, who was thirty-nine years old at the time, was indicted on four counts of statutory sex offense of a person at least six years younger than defendant pursuant to N.C. Gen. Stat. § 14-27.7A(a). On 16 July 2010, in Rowan County Superior Court, defendant entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), to four counts of taking indecent liberties with a child. The trial court sentenced defendant on each count to a minimum term of thirteen months to a maximum term of sixteen months in the custody of the North Carolina Department of Correction ("NCDOC"), and ordered defendant to serve all sentences consecutively. The trial court then suspended the sentences. Defendant was given a split sentence. He was placed on supervised probation for a period of thirty-six months and, as a special condition of probation, defendant was ordered to serve two consecutive active terms of 120 days in the custody of the NCDOC.

After entering judgment, the trial court determined defendant's eligibility for SBM, including whether defendant's conviction was a reportable conviction. A reportable conviction, as defined by N.C. Gen. Stat. § 14-208.6(4), means "[a] final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses . . . ." The court found that defendant's convic-

tion for taking indecent liberties with a child was a reportable conviction because it was a "sexually violent offense" under N.C. Gen. Stat. § 14-208.6(5). Since defendant was placed on probation, the trial court placed certain mandatory special conditions for sex offenders who have been convicted of a reportable conviction. The trial court ordered that, as part of defendant's special conditions for reportable offenses, defendant had to "abide [by] all conditions of the sex offender control program."

The trial court also found that defendant had not been classified as a sexually violent predator or a recidivist, but determined that defendant's conviction was an aggravated offense under N.C. Gen. Stat. § 14-208.6(1a); that defendant's conviction involved "the physical, mental, or sexual abuse of a minor;" and that, based on the NCDOC's risk assessment and additional findings, defendant required the highest possible level of supervision and monitoring. The trial court then ordered defendant to enroll in SBM for a period of ten years. Defendant appeals.

II. INITIAL MATTER

[1] As an initial matter, in the trial court's SBM order, the court found that defendant's offense was an "aggravated offense." However, our Court has held that the offense of indecent liberties can never be an aggravated offense. *State v. Davison*, ___ N.C. App. ___, ___, 689 S.E.2d 510, 517 (2009), *disc. review denied*, ___ N.C. ___, 703 S.E.2d 738 (2010). Although defendant does not argue that the trial court erred on this matter, "[w]e note *ex mero motu* that the judgments as entered contain a clerical error." *State v. Barber*, 9 N.C. App. 210, 212, 175 S.E.2d 611, 613 (1970). The transcript of defendant's SBM hearing reflects that the SBM order contained a clerical error:

> THE COURT: And that the conviction is not an aggravated offense.
>
> [The State]: The State agrees with that.

(emphasis added). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' " *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (internal quotations and citation omitted). Therefore, we remand this matter to the trial court for correction of this clerical error.

III. JURISDICTION

[2] Defendant argues that the trial court lacked subject matter jurisdiction to order him to enroll in SBM because the State failed to file a written pleading providing notice regarding the basis for SBM, and therefore did not invoke the jurisdiction of the court. We disagree.

In the instant case, defendant did not raise the issue of subject matter jurisdiction before the trial court. "However, a defendant may properly raise this issue at any time, even for the first time on appeal." *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007).

"A trial court must have subject matter jurisdiction over a case in order to act in that case." *Id.* "Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question. [] Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (internal citation omitted).

> Jurisdiction is "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." Black's Law Dictionary 869 (8th ed. 2004). The court must have subject matter jurisdiction, or "[j]urisdiction over the nature of the case and the type of relief sought," in order to decide a case. *Id.* at 870. "A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964).
>
> The General Assembly "within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State." *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982).

State v. Wooten, 194 N.C. App. 524, 527, 669 S.E.2d 749, 750 (2008).

"The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article[.]" N.C. Gen. Stat. § 7A-271(a) (2010); *see also State v. Corbett*,

191 N.C. App. 1, 13, 661 S.E.2d 759, 767 (2008) ("[S]uperior courts have exclusive, original jurisdiction over "all criminal actions not assigned to the district court division," including felony criminal actions.") (Elmore, J., dissenting). The North Carolina General Statutes confer power upon the superior court pursuant to N.C. Gen. Stat. § 14-208.40A, which sets out the procedures to be employed by the sentencing court, to categorize those convicted of reportable offenses and to determine eligibility of such newly convicted persons for enrollment in SBM when the trial court imposes a suspended sentence. N.C. Gen. Stat. § 14-208.40A (2010). After an offender has been convicted of a reportable offense as defined by N.C. Gen. Stat. § 14-208.6(4), the State

> shall present to the court any evidence that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor. The district attorney shall have no discretion to withhold any evidence required to be submitted to the court pursuant to this subsection.

N.C. Gen. Stat. § 14-208.40A(a). The defendant then has the opportunity to present evidence to refute the State's evidence.

Id.

After the parties present evidence,

> the court shall determine whether the offender's conviction places the offender in one of the categories described in G.S. 14-208.40(a), and if so, shall make a finding of fact of that determination, specifying whether (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor.

N.C. Gen. Stat. § 14-208.40A(b).

> If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that the offense is not an aggravated offense or a violation of G.S. 14-27.2A or G.S. 14-27.4A and the offender is not a recidivist, the court shall order that the [NCDOC] do a risk assessment of

> the offender. The [NCDOC] shall have a minimum of 30 days, but not more than 60 days, to complete the risk assessment of the offender and report the results to the court.

N.C. Gen. Stat. § 14-208.40A(d).

> Upon receipt of a risk assessment from the [NCDOC] pursuant to subsection (d) of this section, the court shall determine whether, based on the [NCDOC's] risk assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court.

N.C. Gen. Stat. § 14-208.40A(e). Therefore, our General Assembly devised a separate procedure for determining eligibility for SBM and clearly granted the Superior Courts subject matter jurisdiction to conduct these determinations pursuant to specific statutory procedures.

In the instant case, the Superior Court had jurisdiction over defendant's *Alford* plea to four felony counts of taking indecent liberties with a minor, pursuant to N.C. Gen. Stat. § 7A-271(a). The trial court then sentenced defendant immediately following the entry of his *Alford* plea. Since defendant received a suspended sentence, the court determined defendant's eligibility for SBM.

The court determined that defendant was convicted of a reportable offense. The State then presented evidence in the form of testimony by Detective Porter and Cayla's mother to show that defendant's offense "involved the physical, mental, or sexual abuse of a minor." N.C. Gen. Stat. § 14-208.40A(a). The State also submitted, without objection, a "STATIC-99," an assessment prepared by the NCDOC which indicated that defendant presented a "low risk for re-offending." Defendant had the opportunity to present evidence to refute the State's evidence, but did not present any evidence. The trial court then determined that defendant's offense "involved the physical, mental, or sexual abuse of a minor." N.C. Gen. Stat. § 14-208.40A(b). The trial court then considered the STATIC-99 and the testimony of the witnesses, determined that defendant required the highest possible level of monitoring, and ordered that defendant be subjected to SBM for a period of ten years. N.C. Gen. Stat. § 14-208.40A(e). These facts show that the trial court properly exercised subject matter jurisdiction pursuant to N.C. Gen. Stat. § 14-208.40A

and followed the proper hearing procedures in assessing defendant's eligibility for SBM. Defendant's issue on appeal is overruled.

IV. DUE PROCESS

[3] Defendant argues that the trial court erred by ordering him to enroll in SBM without providing any notice of the ground upon which the State sought to subject him to SBM, in violation of his constitutional due process guarantees. We disagree.

In cases where a defendant has been newly convicted of a reportable conviction, placed on probation and, as a condition of probation, was incarcerated, N.C. Gen. Stat. § 14-208.40A applies. N.C. Gen. Stat. § 14-208.40B(b) requires that if an offender falls into one of the categories described in N.C. Gen. Stat. § 14-208.40(a), the NCDOC must provide him notice of the hearing date and the NCDOC's determination with respect to N.C. Gen. Stat. § 14-208.40(a). N.C. Gen. Stat. § 14-208.40B(b) (2010). The notice provisions found in N.C. Gen. Stat. § 14-208.40B(b) are merely notice provisions to protect the due process rights of offenders who are not currently incarcerated. *Wooten*, 194 N.C. App. at 528, 669 S.E.2d at 751. However, the instant case is not governed by N.C. Gen. Stat. § 14-208.40B, but by N.C. Gen. Stat. § 14-208.40A, because defendant was placed on probation and, as a condition of probation, was incarcerated for 120 days.

"According to N.C.G.S. § 14-208.6(5), the offense of taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1 is defined as a 'sexually violent offense,' which is a reportable conviction under N.C.G.S. § 14-208.6(4)." *State v. May*, ___ N.C. App. ___, ___, 700 S.E.2d 42, 44 (2010). When defendant entered an *Alford* plea to four counts of taking indecent liberties with a minor, he was newly convicted of a reportable conviction. The district attorney requested that the trial court consider SBM during the sentencing phase. The trial court was required to make findings regarding whether defendant was eligible for enrollment in SBM. Therefore, N.C. Gen. Stat. § 14-208.40A was the applicable statute for determining defendant's eligibility for enrollment in SBM and the time period of his enrollment.

Since defendant was placed on probation and, as a condition of his probation, was incarcerated for 120 days, his eligibility for SBM was determined by the trial court pursuant to N.C. Gen. Stat. § 14-208.40A, not N.C. Gen. Stat. § 14-208.40B. Therefore, neither the NCDOC nor the trial court was responsible for any type of notice regarding defendant's eligibility.

N.C. Gen. Stat. § 14-208.40A requires that an offender convicted of a reportable conviction has the opportunity to be heard during the sentencing phase. After the State presents evidence necessary to prove that the defendant qualifies for SBM enrollment, then the defendant has the opportunity to present evidence to refute the State's evidence. N.C. Gen. Stat. § 14-208.40A(a). Based on the presentation of all the evidence at this hearing, the trial court determines whether defendant's conviction renders him eligible for SBM enrollment, and the period of time for his enrollment. N.C. Gen. Stat. § 14-208.40A(b).

In the instant case, the trial court accepted defendant's *Alford* plea and entered judgment for defendant's convictions for four counts of taking indecent liberties with a child. Pursuant to N.C. Gen. Stat. § 14-208.40A, the trial court sentenced defendant for the convictions and determined the effect of the convictions on his eligibility for SBM. During this portion of the proceeding, the State presented testimony from Detective Porter and Cayla's mother, and heard arguments of counsel. Defendant had the opportunity to present evidence to refute the State's evidence but did not present any evidence. Therefore, the trial court properly followed the procedures in N.C. Gen. Stat. § 14-208.40A, and did not violate defendant's constitutional due process rights. Defendant's issue on appeal is overruled.

V. ABUSE OF A MINOR

[4] Defendant argues that the trial court erred by determining that his conviction for indecent liberties involved the physical, mental, or sexual abuse of a minor because, by its elements, indecent liberties does not require any abuse of a minor. We disagree.

"[S]ince the offense of solicitation to take an indecent liberty with a minor inherently 'involves' the 'physical, mental, or sexual abuse of a minor,' we conclude that the trial court did not err by concluding that [d]efendant was subject to enrollment in SBM pursuant to N.C. Gen. Stat. § 14-208.40(a)(2)." *State v. Cowan*, ___ N.C. App. ___, ___, 700 S.E.2d 239, 247 (2010).[3] Therefore, defendant's issue on appeal is overruled.

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3. *Cf. State v. Williams*, —— N.C. App. ——, ——, 700 S.E.2d 774, 776 (2010) ("Defendant's conviction [for taking indecent liberties with a child] did not involve abuse of a minor, as that phrase is defined in Article 27A of Chapter 14, such that the trial court should not have found that Defendant's conviction 'did involve the physical, mental, or sexual abuse of a minor.' ").

VI. LEVEL OF SUPERVISION AND MONITORING

[5] Defendant argues that the trial court erred by determining that he required the highest possible level of supervision and monitoring although the NCDOC risk assessment classified him as a low risk for reoffending, and the trial court's additional findings did not support a conclusion that defendant, who had no previous criminal record, was a high risk for reoffending. We agree.

A. Standard of Review

> On appeal from an SBM order, "we review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found."

State v. Green, ___ N.C. App. ___, ___, 710 S.E.2d 292, 294 (2011) (quoting *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (citation and internal quotation marks omitted)). "The trial court's 'findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *Kilby*, 198 N.C. App. at 366, 679 S.E.2d at 432 (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000)).

B. Facts of Defendant's Offenses

Defendant contends that the trial court erred by considering the facts of his offenses when it determined that he required the highest possible level of supervision and monitoring.

"This Court has previously held that a DOC risk assessment of 'moderate,' without more, is insufficient to support the finding that a defendant requires the highest possible level of supervision and monitoring." *Green*, ___ N.C. App. at ___, 710 S.E.2d at 294 (italics omitted) (quoting *Kilby*, 198 N.C. App. at 369-70, 679 S.E.2d at 434). However if the NCDOC determines that a defendant is a "moderate" risk to reoffend, but the trial court determines he requires the highest possible level of supervision and monitoring, the trial court is required to make additional findings based on competent record evidence to support its findings. *Id* at ___, 710 S.E.2d at 294 (citing *State v. Morrow*, 200 N.C. App. 123, 130-34, 683 S.E.2d 754, 760-62 (2009), *aff'd per curiam*, 364 N.C. 424, 700 S.E.2d 224 (2010)). Furthermore, in *Green*, our Court held that "the trial court may properly consider evidence of the factual context of a defendant's conviction[s] when making additional findings as to the level of supervision required of a

defendant convicted of an offense involving the physical, mental, or sexual abuse of a minor." *Id.* at ___, 710 S.E.2d at 295. Therefore, defendant's argument that the trial court improperly considered the facts of his offenses when it concluded that he required the highest level of supervision and monitoring is overruled.

C. Findings of Fact

In the instant case, the State submitted the "STATIC-99," which indicated that defendant presented a "low risk for re-offending." The State then presented the testimony of Detective Porter and Cayla's mother. (T pp. 22-37) After entering judgment, the trial court made the following additional findings of fact:

1. That the defendant took advantage of his position of trust noting that the victim looked upon him as a father figure.

2. That the defendant took advantage of the victim's vulnerability when at the time the victim had a strained relationship with her father and looked to the defendant for support and comfort.

3. That the court notes the defendant's Alford plea indicated no remorse. That the defendant did not take responsibility for his actions. That by means of Alford plea, the defendant did what was in his best interest.

4. That the offenses occurred when other children were present in the defendant's home.

The testimony of Detective Porter and Cayla's mother was competent evidence to support the trial court's first two findings of fact. However, the State did not present any evidence to support the fourth finding. Therefore, it is unsupported by competent evidence and does not support the trial court's conclusion that defendant "require[d] the highest possible level of supervision and monitoring."

Defendant argues that the trial court punished him for entering an *Alford* plea when it required him to submit to the highest possible level of supervision and monitoring. Since this is an issue of first impression for our Court, we turn to other jurisdictions for guidance.

In *State v. Knight*, the defendant entered an *Alford* plea to charges of one count of third-degree sexual abuse, one count of lascivious acts with a child, and four counts of sexual exploitation of a minor, for his actions with underage teen girls. 701 N.W.2d 83, 84 (Iowa 2005). At the defendant's sentencing hearing, the State intro-

duced evidence of the circumstances surrounding the crimes. *Id.* at 85. At the hearing, the trial court stated:

> "And as I listen to [you], your comments indicate one thing and that is a lack of remorse. You have done an excellent job pointing out certain factors which are important to the Court's sentence, but other than your admission of guilt—which is perhaps a sign of remorse. At least you admitted that you were guilty of three offenses. There's no apology. There's no sign of remorse here whatsoever."

Id. at 86. The trial court then sentenced the defendant to consecutive terms of incarceration, citing as one of its reasons, "Third, as I've indicated, there has been no remorse shown by you." *Id.*

On appeal, the defendant argued that the trial court used his " '*Alford* plea and refusal to admit guilt or express remorse to enhance his sentence.' " *Id.* The Iowa Supreme Court noted:

> It is apparent from the judge's comments that the judge did not know that [the defendant] had entered an *Alford* plea, as the court referenced [his] "admission of guilt" as "perhaps a sign of remorse." (The sentencing judge had not presided at the plea hearing.) In addition, the court commented, "At least you admitted that you were guilty of three offenses." Clearly, the court did not consider the defendant's *Alford* plea or his refusal to admit guilt as a sentencing factor, as the court mistakenly believed the defendant had admitted his guilt earlier when he entered a guilty plea.
>
> We also disagree with the defendant . . . that the sentencing court penalized [him] for not apologizing. In reading the court's comments in their entirety, it is clear the court was concerned with the defendant's lack of remorse and mentioned an apology as simply one way in which the defendant could have expressed remorse.

Id. The court then held that "a defendant's lack of remorse may be considered even when the defendant professes his innocence by entry of an *Alford* plea." *Id.* at 89. *See also Smith v. Commonwealth*, 27 Va. App. 357, 363, 499 S.E.2d 11, 14 (1998) ("[A] trial court may consider a defendant's lack of remorse at sentencing, even when the defendant has chosen to enter an *Alford* plea.").

> Although an *Alford* plea allows a defendant to plead guilty amid assertions of innocence, it does not require a court to accept those assertions. The sentencing court may, of necessity, con-

> sider a broad range of information, including the evidence of the crime, the defendant's criminal history and the demeanor of the defendant, *including the presence or absence of remorse*. Such considerations play an important role in the court's determination of the rehabilitative potential of the defendant.

State v. Howry, 127 Idaho 94, 96, 896 P.2d 1002, 1004 (1995) (emphasis added). *See also* Bryan H. Ward, *A Plea Best Not Taken: Why Criminal Defendants Should Avoid the Alford Plea*, 68 MO. L. REV. 913 (2003) (discussing the effects of *Alford* pleas at sentencing). "Persons plead guilty for many reasons—pangs of conscience, *remorse*, desire to get the ordeal over with, a hope for leniency and other innumerable reasons, including a natural and deliberate choice of attempting to avoid a worse fate and to forestall the prosecution of additional charges." *Ford v. United States*, 418 F.2d 855, 859 (8th Cir. 1969) (emphasis added).

In the instant case, at defendant's sentencing hearing, Detective Porter testified as follows:

> Q. [the State]. And did you have an opportunity to talk to [defendant]?
>
> A. [Detective Porter]. I did.
>
> Q. When was it that you had an opportunity to talk to the defendant?
>
> A. May the 7th, 2007.
>
> Q. How did it come to be that the two of you were in each other's presence?
>
> A. [He] had gone to the China Grove police department to turn himself in. He said he thought we were looking for him.
>
> Q. Okay. Were you looking for him?
>
> A. We were going to, not right at that minute. We were actually already working on the case, and we were going to get to that. But since he came to us, we just went ahead and went with that.
>
> Q. All right. And why were you looking for the defendant?
>
> A. Because we were investigating him for the sex offense with [Cayla].

Q. Where did you first meet the defendant?

A. China Grove police department.

Q. And do you know how the defendant arrived at the police department?

A. I think he drove his self [sic] there.

Q. He wasn't escorted by law enforcement there?

A. No. He went to turn his self [sic] in.

Q. Do you know what he said to you when you first made contact with him?

A. I have a statement.

Detective Porter then read defendant's statement in open court. On cross-examination, Detective Porter testified as follows:

Q. [Defendant's counsel]. Okay. As far as [defendant] is concerned on sentencing for this matter, he basically drove himself and forced people to talk to him. And this was a man that was remorseful and trying to give a confession; correct?

A. He knew we were looking for him or going to be looking for him, and he turned his self [sic] in. That's correct.

When the court heard arguments from counsel regarding SBM, the State told the court:

> Number three, his Alford plea, Your Honor. Despite the fact that he confessed to [Detective] Porter, his attorneys want to stand up and tell you how remorseful he is, he didn't even plead guilty. He pled Alford, that it was in his best interest. It shows lack of remorse, despite what his attorneys said, another reason why he should be monitored.

After a brief recess, the court stated, "You were correct in saying that the Alford plea shows no remorse." The court then concluded that defendant required the highest possible level of monitoring. The court then stated, "The Court notes specifically the Alford plea as being one in which the defendant indicated no remorse whatsoever for anything that he did, that he simply accepted responsibility for an offense which he believed to be in his best interest."

Based upon these facts, it is unclear to this Court whether the trial court found that defendant's *Alford* plea *itself* showed a lack of

remorse, or whether defendant's *actions* showed a lack of remorse. While we have not found any authority holding that the former is permissible,[4] the latter is allowed under the rationale of *Knight*, *Smith*, and *Howry*. Therefore, the trial court's finding regarding defendant's lack of remorse is unsupported by competent evidence and does not support the court's conclusion that defendant required the highest possible level of supervision and monitoring.

Since only two of the trial court's findings are supported by competent evidence "which *could* support findings of fact which *could* lead to a conclusion that 'the defendant requires the highest possible level of supervision and monitoring,' . . . it would be proper to remand this case to the trial court to consider the evidence and make additional findings[.]" *Kilby*, 198 N.C. App. at 370, 679 S.E.2d at 434 (emphases added). Therefore, on remand the trial court may consider evidence regarding whether defendant's actions showed remorse, and must determine whether its findings support a conclusion that defendant "requires the highest possible level of supervision and monitoring."

VII. CONSTITUTIONAL ARGUMENTS AGAINST SBM

[6] Defendant argues that ordering him to submit to SBM violated his constitutional rights to be free from double jeopardy and free from cruel and unusual punishment. We disagree.

In *State v. Bowditch*, our Supreme Court rejected a defendant's argument that requiring him to enroll in SBM violated his constitutional right to be free from double jeopardy. 364 N.C. 335, 700 S.E.2d 1, *stay denied*, ___ N.C. ___, 703 S.E.2d 151 (2010). Similarly, in *State v. Wagoner*, ___ N.C. App. ___, 683 S.E.2d 391 (2009), *aff'd per curiam*, 364 N.C. 422, 700 S.E.2d 222 (2010), our courts rejected a defendant's argument that requiring him to enroll in SBM violated the Eighth Amendment's prohibition against cruel and unusual punishment. To accept defendant's arguments in the instant case, "we would have to overrule our Supreme Court which we do not have the power to do." *State v. Porter*, 48 N.C. App. 565, 570, 269 S.E.2d 266, 269 (1980).

VIII. CONCLUSION

The trial court's order requiring defendant to enroll in SBM for a period of ten years is vacated and remanded.

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4. *But see State v. Williams*, 937 S.W.2d 330, 334 (Mo. App. 1996) (when plea agreement is reached with a defendant who initially agrees to plead guilty, but who subsequently agrees to a plea agreement pursuant to *Alford*, such action "eliminates any showing of remorse or taking of responsibility by the appellant").

Vacated and remanded.

Judge ELMORE concurs.

Judge STEELMAN concurs in the result.

RHONDA E. HOLDEN, PLAINTIFF-APPELLANT v. JOHN ALAN HOLDEN, DEFENDANT-APPELLEE

No. COA10-1096

(Filed 2 August 2011)

1. Divorce—consent order—construction of—judicial authority

The trial court acted within its authority by construing the provisions of a consent order concerning the marital residence of a divorced couple at the request of the parties. The parties may, by agreement, properly petition the trial court for a determination of the meaning of disputed terms in a consent order without the requirement that one or both of the parties first be found in contempt. However, the court is without authority to order specific performance pursuant to a consent order in cases such as this, and, to the extent that the trial court required specific performance, those portions of its order were vacated.

2. Divorce—property retained—interest

The trial court did not err by determining that plaintiff owed interest on an amount due for property retained during a divorce.

3. Divorce—consent order—interpretation—erroneous findings—holding not affected

The trial court did not err in findings made when interpreting a consent order entered into as a part of a divorce settlement where any errors were *de minimis* and did not affect the holding.

Appeal by Plaintiff from order entered 16 March 2010 by Judge Jerry A. Jolly in District Court, Brunswick County. Heard in the Court of Appeals 7 March 2011.

Pennington & Smith, PLLC, by Ralph S. Pennington and Kristy J. Jackson, for Plaintiff-Appellant.

The Del Re´ Law Firm, PLLC, by Benedict J. Del Re´ Jr., for Defendant-Appellee.

McGEE, Judge.

Plaintiff and Defendant were married on 12 May 1995, separated on 28 December 2001, and divorced on 8 January 2003. No children were born of their marriage. Plaintiff filed a complaint for post-separation support, alimony, equitable distribution, and attorneys' fees on 4 September 2002. Defendant answered Plaintiff's complaint on 18 September 2002, and counterclaimed for divorce and equitable distribution. Plaintiff and Defendant entered into a consent agreement (the agreement). At the request of the parties, the trial court entered the agreement as a consent order (the consent order) on 8 January 2003. The consent order was amended by order filed 21 January 2003 (the amended consent order). However, the amended consent order was not signed by Plaintiff, Defendant, or their respective attorneys. Plaintiff filed a "Motion Pursuant to Rule 60 of the North Carolina Rule[s] of Civil Procedure" on 1 April 2003, requesting that both the consent order and the amended consent order be set aside. The trial court entered an order on 16 July 2003 (the 16 July 2003 order), ruling that the consent order represented the "intention of the parties as signed by their choice and agreement" and was therefore valid, but that the amended consent order was void.

Relevant to this appeal, the consent order gave Plaintiff a "66.66% undivided interest in the marital residence" and further stated that Plaintiff would be "responsible for 66.66% of the Principal . . ., monthly insurance, and . . . taxes for the [marital] residence accrued beginning January 1, 2003 and thereafter until the [marital] residence is sold." Defendant received a "33.33% undivided interest in the marital residence" and responsibility for a corresponding share of the principal, insurance, and taxes, also beginning 1 January 2003. Plaintiff was given "physical possession of the marital residence and [responsibility] for the maintenance and upkeep." These terms regarding the marital residence were to be effective until 8 June 2008, at which time the parties could agree to sell the marital residence, Plaintiff could purchase Defendant's interest in the marital residence, or they could seek partition.

Plaintiff and Defendant also agreed to a division of personal property, and a list setting out the division was incorporated into the consent order. The consent order specifically stated that Defendant should have "the property and furniture given to him from his parents and all personal property listed and/or purchased from any corporate or business interest of Defendant." Section 16 of the consent order contained the following: "The parties will have as their respective debts and hold the other parties harmless from same as follows[.]" Section 16 then listed "Plaintiff's Debts" and "Defendant's Debts" as sub-sections. The following was listed under "Plaintiff's Debts" as being Plaintiff's responsibility:

> F. 66.66% of the acquisition costs and payment of the amortization on a $100,000.00 Equity Line to be obtained by the parties and to be secured by the marital residence.
>
> G. 66.66% of the principal balance and associated interest on the marital residence mortgage.

The following was listed under "Defendant's Debts" as being Defendant's responsibility:

> H. 33.33% of the acquisition costs and payment of the principal amortization on a $100,000.00 Equity Line to be obtained by the parties and to be secured by the marital residence.

Section 17 of the consent order stated:

> The parties agree that either party can prepay any obligation set forth, joint or otherwise. That said prepayment will enure to the benefit of the payor. That at any time, either party can make a lump sum payment on any debt (Vehicle, House, or Equity Line) and receive the full principal reduction as a reduction pro-rata in any payments due to either party or by either party. That if Defendant pays the sum representing 1/3 of the current balance due on the Home Loan or Equity Loan in advance then his duty to make any payment will cease.

The consent order further mandated that Plaintiff and Defendant would file separate tax returns for the 2002 tax year. Handwritten on the consent order was an addition that stated:

> Within 10 days of today's date [8 January 2003], the parties agree to acquire a $100,000 line of equity against the marital residence. At that time, [] Plaintiff will pay Defendant $16,000 for her share of the personal property she has retained.

This handwritten addition was written by Plaintiff's attorney at the time. Section 26 of the consent order stated: "That all payments and obligations will be paid timely when due [and] any failure to make payments timely will result in the breach of this agreement." The consent order included the determination that, "[b]ased upon the . . . findings of fact and conclusions of law, and the stipulations and consents of the parties, . . . that both the parties are satisfied with the services of their respective counsels." The consent order further stated that

> the parties to this action have agreed that they understand the terms of this consent agreement, that those terms were explained to them by their respective attorneys; that this agreement was the result of arms length negotiation and that neither party was coerced or made additional promises to enter into this agreement against their will that this agreement is signed today by their conscious choice and agreement. That neither party has signed this agreement based upon promises that are not contained in this agreement.

Plaintiff appealed the 16 July 2003 order in which the trial court ruled that the consent order was valid and represented the intentions of Plaintiff and Defendant. Plaintiff's appeal was decided by our Court by an unpublished opinion filed 15 February 2005. *Holden v. Holden*, 168 N.C. App. 595, 608 S.E.2d 415, 2005 N.C. App. LEXIS 357 (2005) (*Holden I*). In *Holden I*, our Court affirmed the 16 July 2003 order, thereby affirming that the consent order was binding on Plaintiff and Defendant.

On 2 February 2006, pursuant to N.C. Gen. Stat § 1A-1, Rule 60(b)(4)-(5), Plaintiff moved to set aside portions of the consent order and, pursuant to N.C. Gen. Stat § 1A-1, Rule 70, to enforce portions of the consent order. In her motion, Plaintiff stated:

> Pursuant to N.C.G.S. § 1A-1, Rule 60(b)(4)-(5) (2006), [Plaintiff] respectfully moves [the trial court] to set aside or otherwise relieve her from the effect of several provisions of the Consent Order previously entered in the above-captioned case on January 8, 2003. [Plaintiff] concurrently moves [the trial court] to enforce several other portions of the Consent Order pursuant to N.C.G.S. § 1A-1, Rule 70 (2006).

Though Plaintiff's motion was filed in 2006, it apparently was not noticed for hearing until sometime in 2009. In Plaintiff's request for relief pursuant to Rule 70, she requested that the trial court "direct

that [Defendant]—through a person appointed by [the trial court]—sell his interest in the Former Marital Home to [Plaintiff] according to the terms" Plaintiff had set forth in a letter dated 23 November 2005.

Defendant filed a response to Plaintiff's motion on 1 September 2009, and also moved for "Specific Performance of Agreement & . . . for Order to Show Cause for Contempt" at that same time. Defendant moved the trial court "for an Order compelling [] Plaintiff to comply with the terms of the [consent order] and to specifically enforce the [consent order.]"

In Defendant's 1 September 2009 pleadings, he contended, *inter alia*, that Plaintiff had breached the consent order by: (1) refusing to allow Defendant to collect personal property from the marital residence, (2) refusing to allow Defendant to collect corporate property, (3) improperly using half of Defendant's tax overpayment credit on her 2002 tax return, and (4) abusing the equity line by using one hundred percent of the $100,000.00 equity line, when Plaintiff was only entitled to two-thirds of the equity line. Defendant prayed that the trial court

> enter an Order to show Cause why [] Plaintiff should not be held in Contempt of the Prior Order of the [trial court]; . . . [f]or specific performance of the terms and conditions of the order and that any sum due Defendant be paid to Defendant by Order of the [trial court] or allowed as an offset or credit against any Equity in the marital residence. . . . [And] that [] Plaintiff be held in Civil Contempt.

At an 8 December 2009 hearing, the trial court heard some of the issues brought forward in the parties' motions. The trial court entered an "Order on Plaintiff's Motion to Set Aside and Defendant's Motion for Specific Performance and Motion for Order of Show Cause for Contempt" on 22 January 2010. Neither party appealed the trial court's 22 January 2010 order. A hearing was conducted on 8 January 2010 that addressed Defendant's counterclaims. At the 8 January 2010 hearing, the parties agreed, and Plaintiff stipulated to the trial court, that the marital residence would be listed for sale. Defendant's attorney stated:

> [M]y motion was brought as a motion for an order to show cause as opposed to coming to the court *ex parte* and getting an order to show cause, so the Court's . . . . [A]ny ruling this Court makes will [have] been basically that this is an order to show cause now.

> The parties have agreed and stipulated that any amounts that the Court feel is owed under this agreement to get offset from the [sale of the marital residence]. Do you [Plaintiff] stipulate to that?

Plaintiff's counsel answered: "Yes, your Honor, we stipulate that it'll be from the sales price." Defendant's attorney then stated that Plaintiff had stipulated to the fact that, pursuant to the consent order, Plaintiff still owed Defendant $16,000.00 for payment for Defendant's property that Plaintiff and Defendant had agreed Plaintiff would keep. Plaintiff's counsel responded: "We recognize, your Honor, that's . . . the amount that's owed and, yes, when everything's said and done that that amount shall be offset from the sale proceeds." In her closing statement, Plaintiff's attorney reiterated that "as we stipulated at the onset of this matter we know that we owe the $16,000 and we would ask this Court to include in its Order that the payment of that $16,000 come from [Plaintiff's] portion of the sales proceeds from the sale of [the marital residence]."

An affidavit by Jason C. Disbrow (Mr. Disbrow), who was Plaintiff's attorney at the time the consent order was entered, was admitted at the hearing. In Mr. Disbrow's affidavit, he affirmed that Plaintiff and Defendant had reached an agreement, and had stated the terms of their agreement to him and to Defendant's attorney. Mr. Disbrow took notes at the meeting and, in his affidavit, stated that Plaintiff and Defendant had agreed that they "would take out a $100,000 equity line within ten (10) days with [Plaintiff] getting two-third[s] (2/3) and [Defendant] getting one-third (1/3)." At the hearing, Plaintiff contended that this portion of Mr. Disbrow's affidavit was incorrect.

The trial court entered its order from the 8 January 2010 hearing on 16 March 2010. The 16 March 2010 order stated "on Plaintiff's[1] Motion in the Cause and based upon the record, evidence and arguments of counsel, and stipulations of the parties, the Court makes the following Findings of Fact:"

> 4. That the parties Stipulated in open Court this day, that the [marital residence] be listed and sold for fair market value[.]
>
> 5. That the Parties stipulated in open Court that any ruling of the court for monies owed would not result in an Order to Show

1. Though the order states "on Plaintiff's Motion in the Cause," we assume this is because Plaintiff initiated the action now on appeal. The order clearly addresses Defendant's motion in the cause, included in Defendant's response to Plaintiff's motion.

Cause but would be reflected as a credit against the party owing said sums from that party's share of gross sale proceeds of the marital residence.

6. That the Parties stipulated in open Court that [] Plaintiff owes to Defendant the sum of $16,000.00 with the issue of interest being reserved for the court's ruling.

7. That pursuant to the terms and conditions of the [consent order], that within ten days of January 8, 2003, the parties agreed to acquire a $100,000 Line [of] Equity against the marital residence. At that time [] Plaintiff would pay to [] Defendant the sum of $16,000.00 for certain personal property she was retaining.

8. That it was the intent of the parties to get a loan for $100,000 so [] Plaintiff could pay [] Defendant with [] Plaintiff getting 2/3's of the loan proceeds and [] Defendant getting 1/3 of the loan proceeds.

9. That the repayment obligations were then set forth in the balance of the [consent order] with each paying for their respective share of acquiring the loan and repaying the loan.

10. That after the parties arranged for the Equity Line at the bank, [] Plaintiff withdrew the full sum of $100,000 from the Equity Line, with [] Defendant drawing no sums from that account.

11. That [] Plaintiff paid the full Equity Line payment for a period of time until Plaintiff refused to continue making the payment and [] Defendant was required to pay 1/3 of the repayment obligation and then, by agreement, continued to pay $500.00 per month.

12. That [] Defendant did not receive any money under the Equity Line Loan and has made payments on said equity line through October 29, 2009 in the sum of $34,879.06.

13. That [] Plaintiff is responsible for the repayment of the full Equity Line Debt and to retire said debt from her proceeds from the marital residence upon sale of said residence.

14. That pursuant to Paragraph 19 of the [consent order] Plaintiff could not make any additional claims against the property of [] Defendant after the entry of [the consent order].

15. That for the tax year 2001, [] Defendant paid estimated taxes for his tax liability then paid the sum of $67,000 for Federal Taxes

and $25,000 for N.C. State Taxes as estimated tax along with an extension in the Fall of 2002 from his separate and borrowed funds.

16. That said payments resulted in overpayments of $40,713.00. The overpayment was not from overpayment of estimated taxes made during the marriage but from separate funds post separation.

17. That for the tax year 2002, [] Plaintiff took one half of Defendant's tax overpayment credit on her 2002 taxes in the sum of $20,362.00, being one half of the $40,723.00 which was the property of [] Defendant.

18. That [] Defendant is entitled to reimbursement for the sum of $20,362.00 from [] Plaintiff from [] her part of the gross sales proceeds of the marital residence.

19. That [] Defendant has requested in this proceeding the return of his personal and corporate property per the [consent order].

20. That [] Defendant identified his remaining personal property being listed on the Addendum to the [consent order] and the corporate exercise and gym equipment and what items he had already received (grandfather's clock, father's dressers).

21. That [] Defendant identified the majority of his personal property being located at the marital residence as of 30 days ago during an appraisal inspection.

Based upon these findings of fact, the trial court concluded in relevant part:

1. That the parties are properly before this Court and this court has personal and subject matter jurisdiction.

2. That [] Defendant is entitled to specific performance of the [consent order].

3. That the parties are capable of complying with the [consent order].

The trial court then ruled in its order: (1) that Defendant was entitled to specific performance of the consent order; (2) that the marital residence would be listed for sale; (3) that upon sale of the marital residence Plaintiff would receive two-thirds of the net proceeds, and Defendant would receive one-third of the net proceeds; (4) that

Plaintiff would pay from her proceeds two-thirds of the remaining first mortgage on the marital residence, and all of the balance due on the home equity loan; (5) that Plaintiff would pay Defendant $16,000.00, plus interest accrued from 18 January 2003; (6) that Plaintiff would reimburse Defendant $20,362.00 for the improper use of Defendant's 2001 tax credit; and (7) that Plaintiff would reimburse Defendant $34,879.06 for payments Defendant had made for Plaintiff's use of the home equity loan through 29 October 2009 and any additional monies needed to reimburse Defendant for additional payments made on the home equity loan after 29 October 2009. The trial court also ordered that Plaintiff allow Defendant to retrieve his personal property from the marital residence after Defendant gave Plaintiff ten day's notice. Plaintiff appeals from the 16 March 2010 order of the trial court.

I.

[1] Plaintiff argues that the trial court erred by ordering her to specifically perform her obligations under the consent order. We agree in part.

The record is clear that Plaintiff and Defendant came before the trial court for resolution of disputes arising from the consent order. Plaintiff initiated the present action through her filing of motions for partial relief from some of the terms of the consent order, and partial specific performance of other terms of the consent order. Defendant moved for specific performance of certain terms of the consent order, and for Plaintiff to show cause why she should not be held in contempt for violating terms of the consent order. When the matter came before the trial court, Plaintiff and Defendant stipulated that, rather than proceeding with a traditional contempt hearing that could potentially result in Plaintiff's incarceration and a contempt order requiring her to perform pursuant to the terms of the consent order, that the hearing proceed without the threat of contempt and contempt sanctions hanging over Plaintiff. Instead, the parties agreed to proceed by presenting evidence to the trial court concerning the provisions of the consent order, and also agreed to abide by the decision of the trial court concerning interpretation of the provisions of the consent order and the trial court's determination of Plaintiff's and Defendant's obligations under the consent order.

The parties stipulated that any monies owed by one party to the other pursuant to the consent order would be satisfied from the owing party's proceeds from the sale of the marital residence. The trial court did what was asked of it by the parties, including Plaintiff.

The trial court, however, reached a result contrary to Plaintiff's wishes. Plaintiff, represented by the same firm on appeal that represented her at the hearing, now argues that the trial court committed error by following the procedure Plaintiff asked it to follow. Plaintiff makes the peculiar assertion that the trial court should have found her in contempt before requiring her to abide by the terms of the consent order—even though Plaintiff made an agreement at the hearing that protected her from a possible contempt order. Plaintiff's conduct in this matter is troublesome.

Plaintiff and Defendant entered into an agreement providing for the division of their property. "It is well-settled in North Carolina that compromises and settlements of controversies between parties are favored by our courts." *State ex rel. Howes v. Ormond Oil & Gas Co.*, 128 N.C. App. 130, 136, 493 S.E.2d 793, 796 (1997) (citations omitted). Had the parties not presented their agreement to the trial court for entry as a consent order, one or both parties could have filed an action for breach of contract and specific performance of the contract, or filed an action for a declaratory judgment to allow the trial court to determine the terms of the agreement. However, because Plaintiff and Defendant requested that the trial court enter their agreement as a consent order, contract remedies and an action for declaratory judgment are no longer available to them pursuant to *Walters v. Walters*, 307 N.C. 381, 298 S.E. 2d 338 (1983), and its progeny.

> Once approved by the court as a judgment of the court a separation agreement loses its contractual nature. *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E. 2d 338, 342 (1983); *Henderson v. Henderson*, 307 N.C. 401, 407, 298 S.E. 2d 345, 350 (1983). *See Doub v. Doub*, 313 N.C. 169, 326 S.E. 2d 259 (1985). Therefore, on remand, should the trial court again enter an order of specific performance for payments which at the time the order was entered were future payments due plaintiff, that order shall affect only those payments due before the date of incorporation of the separation agreement into the divorce decree.

Cavenaugh v. Cavenaugh, 317 N.C. 652, 659, 347 S.E.2d 19, 24 (1986); *see also Fucito v. Francis*, 175 N.C. App. 144, 622 S.E.2d 660 (2005) (declaratory judgment not available when consent agreement has become an order of the court in divorce action). Plaintiff and Defendant disagreed as to the meaning of certain terms of the consent order. Because of the entry of the agreement as a consent order of the trial court, a legal fiction now exists that the agreement reached between Plaintiff and Defendant is not an agreement

between Plaintiff and Defendant, but solely a ruling of the trial court. Even though the trial court did not make an independent determination concerning the reasonableness of the agreement, the terms of the agreement, or what the terms of the agreement meant, we are constrained to treat the agreement as if it were an order whose terms were decided by the trial court instead of reached by agreement of the parties.

This legal fiction resulted in our Court stating in *Fucito*, that we "hold that the trial court has the authority [in a contempt proceeding in a divorce action] to construe or interpret an ambiguous consent judgment. When doing so, however, it is appropriate to consider normal rules of interpreting or construing *contracts*." *Fucito*, 175 N.C. App. at 150, 622 S.E.2d at 664 (citation omitted); *see also Fucito v. Francis*, 2007 N.C. App. LEXIS 1438 (July 3, 2007) (unpublished opinion) (*Fucito II*). Therefore, the trial court, in clarifying the terms of what is deemed its own order, must apply the rules of contract interpretation, for a document that has ceased to be a contract, including, if necessary, determining the intent of the parties. The trial court is, therefore, not authorized to simply state what the terms of "its" order actually mean.

Following *Walters*, a party to a consent order like the one before us may move for the trial court to exercise its contempt powers to enforce that consent order. Contempt, however, may only be found upon a showing that the party in noncompliance with the consent order acted willfully, and was capable of complying with the consent order. *Cavenaugh*, 317 N.C. at 660, 347 S.E.2d at 25 (citations omitted). If the relevant terms of the consent order are determined to be ambiguous, a finding of contempt will generally not be proper, as it is difficult for one to willfully refuse to comply with a term one does not understand. It is unclear from prior opinions concerning consent orders like the one before us what remedy exists when the parties disagree with the meaning of the terms of a consent order, or what remedy exists for the enforcement of a consent order if contempt cannot be, or is not, proven.

In the present case, Defendant filed a contempt motion to show cause. Pursuant to *Fucito*, the trial court had the authority to construe the consent order pursuant to its contempt powers. Plaintiff argues, however, that the trial court did not conduct a contempt hearing, and that the trial court's order is devoid of evidence that the trial court entered the order on contempt grounds. It is clear from the

record why the trial court did not enter an order holding Plaintiff in contempt—assuming the trial court would have found Plaintiff in contempt—because Plaintiff and Defendant stipulated that, as an alternative to a determination of Plaintiff's contempt, they would abide by the determination of the trial court concerning the disputed terms of the consent order. Plaintiff and Defendant further stipulated—using the proceeds from the sale of the marital residence.

We believe, on the facts before us, that the trial court was acting within its authority in construing the consent order at the request of Plaintiff and Defendant. To hold otherwise would lead to needless inefficiencies; diminution of the authority of trial courts to enforce their own judgments, and of the powers of the parties to make agreements; and confusion concerning what remedy, if any, is available to parties in the position of Plaintiff and Defendant to establish certainty concerning their obligations under consent orders.

In *Pitts v. Broyhill*, 88 N.C. App. 651, 364 S.E.2d 738 (1988), this Court held that the parties, formerly husband and wife, by agreement could enter into a valid contract that effectively vacated a term of their separation agreement that had previously been incorporated into their divorce decree. If parties may alter a consent order by agreement, and without the participation of the trial court, we believe parties may, by agreement, properly petition the trial court for a determination of the meaning of disputed terms in a consent order without the requirement that one or both of the parties first be found in contempt. Our holding is in accordance with public policy which encourages the parties to decide issues by agreement when possible, encourages civility in contested proceedings, and seeks efficient resolution of contested issues.

Defendant agreed to relinquish his right to pursue his contempt motion against Plaintiff in this particular action. This was a benefit to Plaintiff. Plaintiff and Defendant agreed that the trial court would construe the contested terms of the consent order, and that the determination of the trial court would be binding. The trial court proceeded as requested by Plaintiff and Defendant. Plaintiff may not now complain that the trial court did what Plaintiff asked it to do simply because she does not like the outcome. By agreement of the parties, the consent order now stands as construed by the trial court. Those portions of the consent order not contested by the parties, and for which the trial court made no determination, remain in force as originally submitted by the parties and entered by the trial court on 8 January 2003.

The trial court is without authority to order specific performance pursuant to a consent order in cases like the one before us. *Cavenaugh*, 317 N.C. at 659, 347 S.E.2d at 24. To the extent the trial court required specific performance of the terms of the consent order, those portions of the 16 March 2010 order are vacated. This holding, however, has little effect in the present case. As the consent order is an order of the court, Plaintiff and Defendant are required to comply with the terms of the consent order. Plaintiff and Defendant retain the right to move in the cause for contempt, or pursue any other available remedy, should Plaintiff or Defendant fail to comply with the terms of the consent order. By agreement and stipulation of the parties, the terms of the consent order as construed by the 16 March 2010 order shall be satisfied from the proceeds of the sale of the marital residence.

The terms of the consent order concerning Defendant's personal property cannot be satisfied pursuant to the sale of the marital residence, and the trial court was without authority to grant specific performance of the consent order. Therefore, should Plaintiff fail to comply with these terms of the consent order, Defendant will have to seek enforcement as allowed by law.

II.

[2] Plaintiff further argues that the trial court erred by determining that she owed interest on the $16,000.00 she owed Defendant for Defendant's property that she retained. The consent order clearly states that Plaintiff was to pay Defendant $16,000.00 by 18 January 2003. Plaintiff stipulated that she had not paid as required pursuant to the consent order, and further stipulated that she owed Defendant $16,000.00. According to an uncontested finding of fact in the 16 March 2010 order, "the Parties stipulated in open Court that Plaintiff owes to Defendant the sum of $16,000.00 with the issue of interest being reserved for the court's ruling." The trial court made its ruling, granting interest "at the legal rate from January 18, 2003[.]" This ruling is supported by the evidence, findings of fact, and conclusions of law. Having stipulated that the trial court should make that determination, Plaintiff cannot now argue that the trial court erred by doing so.

III.

[3] Plaintiff also argues that the trial court erred in making certain findings of fact and conclusions of law.

> It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there

> was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Shear v. Stevens Building Co., 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citations omitted). We have reviewed Plaintiff's arguments concerning this issue. We hold that any factual errors in the findings of fact are *de minimis*, and do not affect our holdings above. In all relevant respects, the trial court's findings of fact are supported by competent evidence and thus are binding on appeal. *Id.* The trial court's conclusion of law that "Defendant is entitled to specific performance of the [consent order]" is in error, and we vacate that portion of the 16 March 2010 order. Plaintiff's additional arguments concerning the conclusions of law are without merit.

We affirm the 16 March 2010 order as a valid determination of the contested issues before the trial court by the consent and stipulation of both Plaintiff and Defendant. The consent order now includes both the consent order entered 8 January 2003 and the decisions of the trial court concerning the contested terms of the consent order as memorialized in the 16 March 2010 order. By agreement and the stipulation of the parties, monies owed to Defendant from Plaintiff shall be satisfied out of Plaintiff's proceeds from the sale of the marital residence. As with any proper order of the trial court, the parties are bound by it, and required to comply unless relieved of their obligations by law. Because the trial court lacked subject matter jurisdiction to order specific performance, those portions of the order requiring specific performance are vacated. The parties are free to pursue any remedies allowed by law should either party fail to comply with the consent order.

Affirmed in part, vacated in part.

Chief Judge MARTIN and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA v. MELVIN CHARLES KING

No. COA10-1237

(Filed 2 August 2011)

1. Evidence—motion in limine—motion to suppress—definitions

A pretrial motion to suppress is a type of motion in *limine*; a motion to suppress denotes the type of motion, while a motion in *limine* denotes the timing of the motion.

2. Evidence—recovered memory—evidence suppressed—Rule 403

The trial court did not abuse its discretion by granting defendant's motion to suppress evidence of a recovered memory where the trial court concluded that the proposed evidence and expert opinion had become so attenuated that they lacked probative value under N.C.G.S. § 8C-1, Rule 403, even if the test for admissibility was technically met. Although *Barrett v. Hyldburg*, 127 N.C. App. 95, requires expert testimony for repressed memory evidence to be admitted, the trial court must still perform its gatekeeping function.

HUNTER, ROBERT C., Judge, dissenting.

Appeal by the State from order entered 23 April 2010 by Judge John O. Craig, III in Moore County Superior Court. Heard in the Court of Appeals 13 April 2011.

Attorney General Roy Cooper, by Asst. A. G. Anne M. Middleton, for the State-appellant.

VanCamp, Meacham & Neuman, PLLC, by Patrick Mincey and Eddie Meacham, for defendant-appellee.

BRYANT, Judge.

Where the trial court concluded, pursuant to N.C. Gen. Stat. § 8C-1, Rule 403, that the probative value of the evidence sought to be admitted—expert testimony regarding repressed memory—was outweighed by the prejudicial effect of the evidence, confusion of issues, or misleading the jury, we find no abuse of discretion and affirm the trial court's grant of defendant's motion to suppress.

Facts and Procedural History

On 12 September 2005, Melvin Charles King (defendant) was indicted for first degree rape. On 21 September 2009, defendant was indicted for felony child abuse based on a sexual act upon a child, incest, and indecent liberties with a child. Defendant's indictments were all based on an allegation that defendant had engaged in sexual intercourse with his daughter on 10 March 1996.

Prior to trial, on 28 January 2010, defendant filed a "motion to suppress evidence of repressed memory, recovered memory, traumatic amnesia, dissociative amnesia, psychogenic amnesia, and other synonymous terminology" pursuant to N.C. Gen. Stat. 15A-977. Defendant's motion stated that based on discovery provided by the State, he expected the State to call expert witnesses who would testify "as to scientific reasons about why the alleged victim failed to report the alleged crime for nine years." The motion argued, in pertinent part, the following:

> 9. There are extreme problems surrounding the existence of dissociative amnesia and determining the existence of repressed memory which, if admitted as expert evidence, would unfairly prejudice the Defendant at trial.
>
> 10. Theoretical processes such as "repressed memory," "recovered memory," "traumatic amnesia," "dissociative amnesia," "psychogenic amnesia" are highly unreliable, are subject to unknown error rates, and are clearly not able to assist the trial court, and are likely to mislead the legal system.
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> . . .
>
> 15. Currently, there is no credible scientific evidence, no general acceptance in the relevant scientific community, and no known error rates for any of these four extraordinary claims.
>
> 16. Accordingly, any testimony about the alleged victim's dissociative memory should be excluded at trial because it fails the first element of the *Howerton* test for admissible scientific evidence. [*Howerton v. Arai Helmet, Ltc.*, 358 N.C. 440, 597 S.E.2d 674 (2004).]

A pretrial hearing on defendant's motion to suppress was held on 12 and 13 April 2010. During the pretrial hearing, the State produced as its expert witness, Dr. James Chu, and defendant produced as its expert witness, Dr. Harrison G. Pope, Jr. Both expert witnesses testi-

fied regarding whether repressed memory was generally accepted in the scientific community. Dr. Chu testified that in his practice, he had seen numerous patients with repressed memories and that the concept of repressed memory was greatly debated between scientists, including researchers and clinicians. He believed that "a clinician's training, perspective, and experience [were] crucial when evaluating repressed memory because clinicians regularly see a wide variety of patients who have recovered memories where researchers only have access to a very narrow group of patients." Dr. Pope testified that the theory of repressed memory was not valid and "remains merely a hypothesis because it has not been accepted by the general scientific community."

On 23 April 2010, the trial court entered an order granting defendant's motion to suppress. The trial court found the following, in pertinent part:

> In considering reliability of a novel scientific method or theory, Howerton[1] instructs the trial court initially to consider other jurisdictions' treatment of the theory. 358 N.C. at 459, 597 S.E.2d 687. In the case of repressed memory, the case law provided by both the State and Defendant indicates various jurisdictions with very different evidentiary standards have both admitted and excluded repressed memory evidence.
>
> . . .
>
> Accordingly, this court, pursuant to the instruction of Howerton, has considered the pertinent authority in other jurisdictions but concludes the weight of that consideration is insufficient to persuade the court of the reliability and relevance of repressed memory theory compared to other considerations Howerton requires the court to make.
>
> . . .
>
> The existence of this significant split in the general scientific community prevents the court from concluding that the theory of

1. In *Howerton*, our Supreme Court relied on *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), to establish the framework for determining the admissibility of expert testimony under N.C. Gen. Stat. § 8C-1, Rule 702 instead of adopting the standard adopted by federal courts in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993). The Supreme Court "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*, 358 N.C. at 458, 597 S.E.2d at 686 (internal citations omitted).

repressed memory is generally accepted in the relevant scientific community. A theory cannot be "deeply controversial" and "accepted" at the same time. The court finds that the skepticism among major professional organizations and leading scientists regarding repressed memory demonstrates that there is a significant dispute between experts that goes against a finding of general acceptance.

. . .

Howerton does not go so far as to require the expert testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence. Even though great debate continues amongst the relevant scientific community, the court concludes the theory of repressed memory may still be generally accepted enough to satisfy Howerton's reliability element. Accordingly, the court's application of Howerton's three elements cannot be satisfied by merely considering other jurisdictions' treatment and the relevant scientific community's acceptance of the theory alone. Instead, the court must continue to analyze repressed memory theory under Howerton by determining whether the proposed evidence is relevant.

. . .

Howerton explains trial courts have "wide latitude of discretion when making a determination about the admissibility of expert testimony." 348 N.C. at 458, 597 S.E.2d 686 (quoting State v. Bullard, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984) (quotations omitted). The trial court must always be satisfied that the expert's testimony is relevant. Id. (citing State v. Goode, 341 N.C. 513, 529[,] 461 S.E.2d 631, 641 (1995)).

. . .

In addition to the foregoing principles of reliability under Rule 702, the court has inherent authority to limit the admissibility of all evidence, including expert testimony, under North Carolina Rule of Evidence 403.

. . .

[T]he court is troubled by the probative value of repressed memory theory and methodology, due to three specific flaws revealed in the hearing. First . . . [a]ccording to Dr. Chu, the clinician's primary goal is to treat the patient and not to determine the truth of

> the memory the patient describes, or to determine the validity of the memory. . . . Second, Dr. Chu testified that the core issue of reliability depends on the therapist who examines the patient. The court finds it to be problematic that the therapist's evaluation of the validity of the recovered memory depends on what kind of notes the therapist takes, whether the therapist asks suggestive questions, and most importantly, how much training and what quality of training the therapist possesses. The court finds these subjective characteristics of the individual therapist diagnosing the repressed memory are not reliable safeguards for determining and assuring the veracity of the repressed memory. . . . Finally, the court finds the uncertain authenticity of recovered memories is one of the many ways making the use of recovered memories fraught with problems of potential misapplication.
>
> . . .
>
> [E]ven if the three-prong Howerton test is technically met, the proposed evidence and expert opinion have become so attenuated that they lack probative value under Rule 403.

The trial court concluded that even though the evidence of repressed memory was relevant, its probative value was outweighed by other considerations and therefore, would not be admitted. It stated the following:

> [T]he State met its burden of proof to satisfy the third prong of the Howerton test that repressed memory is relevant evidence. However, in its discretion, the court concludes the probative value of the evidence concerning repressed memory theory that the State seeks to admit is outweighed by the prejudicial effect of the evidence, confusion of issues, or misleading the jury, pursuant to N.C.G.S. § 8C-1, Rule 403.

From the 23 April 2010 order granting defendant's motion to suppress, the State appeals.

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[1] As a preliminary matter, we note that the State filed a petition for writ of certiorari, stating that although defendant filed a motion to suppress pursuant to N.C. Gen. Stat. § 15A-977, titled "Motion to suppress evidence in superior court[,]" and the trial granted the motion pursuant to N.C. Gen. Stat. § 15A-977, the State was "concerned that defendant's motion might simply have been a motion in limine to exclude expert witness testimony rather than a true motion to suppress."

A pretrial motion to suppress is a type of motion in limine. *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000). Further, a motion in limine is "[a] pretrial request that certain inadmissible evidence not be referred to or offered at trial"; a motion to suppress is "[a] request that the court prohibit the introduction of illegally obtained evidence at a criminal trial." *Black's Law Dictionary* 1038-9 (8th ed. 2004).

> Article 53 of Chapter 15A deals with a specific type of a motion *in limine* and that is the motion *in limine* to suppress evidence. Two situations are specified in which the motion to suppress *mus*t be made *in limine*. The motion to suppress must be made before trial (*in limine*) when the Constitution of the United States or the Constitution of the State of North Carolina requires that the evidence be excluded and when there has been a substantial violation of Chapter 15A. . . . The fact that it is a motion to suppress denotes the type of motion that has been made. The fact that it is also a motion *in limine* denotes the *timing* of the motion regardless of its type.

State v. Tate, 300 N.C. 180, 182, 265 S.E.2d 223, 225 (1980). Defendant's motion "was, by definition, both of these things because it was a motion before trial (*in limine*) to suppress." *Id.* at 184, 265 S.E.2d at 226.

> When the motion to suppress *must* be and is made *in limine* or can be and is made *in limine*, then the defendant can appeal if the motion is denied and he enters a plea of guilty, G.S. 15A-979(b), and the State can appeal if the motion is granted, G.S. 15A-1445 (which refers to G.S. 15A-979).

Id. at 183, 265 S.E.2d at 226. Therefore, because, pursuant to N.C.G.S. § 15A-1445(b) and § 15A-979, the State's appeal is properly before us as a matter of right, we dismiss the State's petition for writ of certiorari.[2]

[2] In its sole issue brought forth on appeal, the State argues that because this Court has previously held that evidence of delayed recall of traumatic events is required to be accompanied by expert witness testimony capable of explaining the phenomenon of repressed memory in order to assist the jury, the trial court in the instant case,

2. Although defendant's motion to suppress was made and granted pursuant to G.S. 15A-977, the analysis as set forth in *Tate* is equally applicable to a motion to suppress pursuant to G.S. 15A-979.

abused its discretion in granting defendant's motion to suppress expert testimony regarding repressed memory. We disagree.

"The exclusion of evidence under the Rule 403 balancing test lies within the trial court's sound discretion and will only be disturbed 'where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Jacobs*, 363 N.C. 815, 823, 689 S.E.2d 859, 864 (2010) (citation omitted). An "[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010) (citation omitted).

The trial court concluded that although the repressed memory evidence was relevant, "the probative value of the evidence concerning repressed memory theory that the State seeks to admit is outweighed by the prejudicial effect of the evidence, confusion of issues, or misleading the jury, pursuant to N.C.G.S. § 8C-1, Rule 403." The State argues that in light of our holding in *Barrett v. Hyldburg*, 127 N.C. App. 95, 487 S.E.2d 803 (1997), the trial court's ruling in the instant case constitutes an abuse of discretion. We disagree.

In *Barrett* our court noted:

> The trial court's order regarding defendant's motion *in limine* essentially contained two determinations: 1) plaintiff's testimony as to her allegedly repressed memories was precluded absent accompanying expert testimony explaining to the jury the phenomenon of memory repression, and 2) expert testimony regarding repressed memory would be excluded because of the lack of scientific assurance of the reliability of repressed memory as an indicator of what has actually transpired in the past.

Id. at 99, 487 S.E.2d at 806. Because the *Barrett* plaintiff's brief on appeal addressed only the first determination by the trial court, our court did not reach the second determination whereby the trial court actually excluded expert testimony. Our Court of Appeals acknowledged as much when it stated:

> In conclusion, we affirm the trial court's decision that plaintiff may not proceed with evidence of her alleged repressed memories of childhood sexual abuse without accompanying expert testimony on the phenomenon of memory repression, and remand the case for further proceedings. We are cognizant the trial court's order purports to exclude such testimony at trial as scientifically

> unreliable, but reiterate that a motion *in limine* decision is one which a trial court may change when the evidence is offered at trial. Such further ruling *and* a final judgment on plaintiff's cause of action are due before this case again comes to our Court for review.

Id. at 101, 487 S.E.2d at 807 (internal citations and quotation marks omitted).

Therefore, in *Barrett*, the trial court had already made a pretrial ruling that the expert testimony regarding repressed memory was unreliable and would be excluded because of the lack of scientific assurance of its reliability. Yet this issue, clearly noted by our Court of Appeals and the question that is squarely before us today, was not presented to and thus not decided by the *Barrett* Court.

We agree with the state that *Barrett* held that repressed memory testimony "must be accompanied by expert testimony on the subject of memory repression so as to afford the jury a basis upon which to understand the phenomenon and evaluate the reliability of testimony derived from such memories." *Id.* at 101, 487 S.E.2d at 806. Nevertheless, it seems clear that *Barrett* stood for the proposition that ***if*** *evidence of repressed memories is received, it must be accompanied by expert testimony* because it "transcends human experience." (emphasis added). Further, it seems clear that the *Barrett* court recognized that the trial court must still perform its gatekeeping function. If we were to adopt the State's view of the applicability of *Barrett* to the instant case, we would be constrained to hold that a trial court has no discretion where repressed memory testimony is at issue and that a trial court is required to allow expert testimony as a matter of law based on *Barrett*. Such a holding would totally obviate the trial court's gatekeeping function and remove its discretion to weigh the admissibility of evidence under Rule 403. We cannot and will not entertain such a view. To do so would run afoul of well-settled principles of our law governing the admissibility of expert testimony. "[A] trial court has inherent authority to limit the admissibility of all evidence, *including expert testimony*, under [Rule 403]." *Howerton*, 358 N.C. at 462, 597 S.E.2d at 689. *See State v. Mackey*, 352 N.C. 650, 657, 535 S.E.2d 555, 559 (2000) (even relevant expert evidence may properly be excluded under Rule 403 "if its probative value is outweighed by the danger that it would confuse the issues before the court or mislead the jury.")

While the Supreme Court in *Howerton* may have relaxed what was once a more rigid approach to the qualification and admissibility

of expert testimony, respect for the gatekeeping functions inherent in the trial courts was maintained. *See e.g. Crocker v. Roethling*, 363 N.C. 140, 149, 675 S.E.2d 625, 632 (2009) (where, upon determining that it was unclear whether the expert whose testimony had been excluded by the trial court, had the requisite expertise to testify to the subject at hand (medical malpractice), the case was remanded to the trial court with instructions to conduct a voir dire on the admissibility of the proposed expert opinion testimony).

Further, while it did not set forth the clearest mandate, the Supreme Court in *Crocker* emphasized that trial courts must decide preliminary questions regarding the qualifications of experts to testify or regarding the admissibility of expert opinion. *Crocker*, 363 N.C. at 144, 675 S.E.2d at 629. Analogizing *Crocker* to our instant case, we find that the trial court conducted in essence two preliminary assessments: the qualifications of the experts, i.e. their competency to testify; and the admissibility of their expert testimony, separate and apart from the qualifications. The trial court decided based on *Howerton*, that the experts were competent to testify to the subject matter but that their expert opinions would have to be excluded as too prejudicial, too confusing, and potentially misleading to the jury. In any event, it is clear the trial court's preliminary assessments of the experts are to be reviewed under an abuse of discretion standard. *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686.

Therefore, the question before us, whether the trial court abused its discretion in excluding repressed memory evidence as prejudicial, confusing or misleading under Rule 403, was not before the *Barrett* court. In the instant case, the trial court granted defendant's motion to suppress, excluding expert testimony regarding repressed memory under Rule 403, deeming the probative value of the evidence to be outweighed by its prejudicial effect.

The record before us fails to demonstrate that the trial court abused its discretion. A careful review of the record shows that the trial court made detailed and specific findings of fact regarding repressed memory evidence following a two day-hearing. After recognizing that the test for determining the reliability of a new scientific method of proof was controlled by the North Carolina Supreme Court in *Howerton*, the trial court considered authority from other jurisdictions. The trial court also considered the expert testimony that was produced during the two-day pre-trial hearing and found that "there [was] a significant dispute between experts that goes against a find-

ing of general acceptance." The trial court found the following to be problematic: (1) That when a patient undertakes therapy and repressed memory becomes a possible explanation for why a "patient suddenly remembers long-forgotten events," the "primary goal is to treat the patient and not to determine the truth of the memory the patient describes, or to determine the validity of the memory."; (2) That the therapists' evaluation of the validity and reliability of the recovered memory depends on such factors as what kind of notes the therapist takes, whether suggestive questions are asked and the quality and quantity of training the individual therapist possesses; and (3) That there are numerous alternate possible explanations for recovered memories that justify a patient's behavior such as "pseudo-memory, distorted memory, confabulation, and self-suggestion[.]"

The trial court concluded that "even if the three-prong Howerton test [was] technically met, the proposed evidence and expert opinion have become so attenuated that they lack probative value under Rule 403." Further, the trial court concluded that "the scientific aura surrounding repressed memory theory and an expert who would testify about it might become so firmly established in the minds of potential jurors that they may assign undue credibility to repressed memory evidence." The record fully supports the trial court's very thoughtful consideration of defendant's motion to suppress. As such, we hold that the trial court's grant of defendant's motion to suppress was not arbitrary, but was supported by reason and was in fact "the result of a [well-] reasoned decision." *Jacobs*, 363 N.C. at 823, 689 S.E.2d at 864. Accordingly, the trial court's decision is affirmed.

Affirmed.

Judge McCULLOUGH concurs.

Judge HUNTER, Robert C. dissents.

HUNTER, Robert C., Judge, dissenting.

After careful review, I must respectfully dissent from the majority opinion in this case because I disagree with the majority's determination that the trial court did not abuse its discretion in granting defendant's motion to suppress the evidence pursuant to Rule 403 of the North Carolina Rules of Evidence. The trial court abused its discretion when it determined that the expert testimony concerning the victim's repressed memories was admissible under Rule 702 and satisfied the

test set out in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004), but still excluded the evidence under Rule 403 because the court was "troubled by the probative value of repressed memory theory and methodology."

Though not controlling, this Court's decision in *Barrett v. Hyldburg*, 127 N.C. App. 95, 487 S.E.2d 803 (1997), is instructive. There, the trial court excluded the testimony of the victim regarding her repressed memories and issued an order containing two determinations:

> 1) plaintiff's testimony as to her allegedly repressed memories was precluded absent accompanying expert testimony explaining to the jury the phenomenon of memory repression, and 2) expert testimony regarding repressed memory would be excluded because of the lack of scientific assurance of the reliability of repressed memory as an indicator of what has actually transpired in the past.

Id. at 99, 487 S.E.2d at 806. On appeal, this Court only addressed the first determination and held: "[W]e affirm the trial court's decision that plaintiff may not proceed with evidence of her alleged repressed memories of childhood sexual abuse without accompanying expert testimony on the phenomenon of memory repression[.]" *Id.* at 101, 487 S.E.2d at 807. Consequently, any victim, including the victim in the present case, is not permitted to testify about her repressed memories unless there is expert testimony to provide "the jury a basis to understand the phenomenon and evaluate the reliability of testimony derived from such memories." *Id.* at 101, 487 S.E.2d at 806.

While not explicitly set forth, *Barrett* indicates that repressed memory testimony *may* be admissible if *reliable* expert testimony is presented to explain the science behind retrieval of suppressed memories. The trial court judge in this case foreclosed any possibility that the victim's testimony could be presented despite the fact that the accompanying expert testimony was deemed reliable and relevant. He based this decision on his subjective apprehension regarding the science behind memory repression and not on the underlying facts of the case. This logic would lead to the exclusion of *all* memory repression testimony by a victim, who must have accompanying expert testimony, despite the reliability of the expert testimony. As stated in *Howerton*, 358 N.C. at 461, 597 S.E.2d at 688, "once the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy con-

cerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility."

Defendant and the majority opinion take the position that reversing this case would be tantamount to removing the trial court's gatekeeping function and discretion to invoke Rule 403 in these matters. That is not the case. Determining that the expert testimony is reliable and relevant does not mean that it is automatically admissible and all 403 safeguards are removed; however, the trial court should not be permitted to arbitrarily invoke Rule 403 because the trial court judge is "troubled" by the existence of controversy surrounding the science involved. Here, the trial court did not even consider the underlying facts of the case, including the victim's memories, claims of abuse, and the medical evidence that potentially supports her claims.

Based on the foregoing, this case should be reversed and remanded because the trial court abused its discretion by arbitrarily excluding the expert witnesses' testimony pursuant to Rule 403. Consequently, I must dissent from the majority's opinion.

JERMAINE PARSON, PLAINTIFF v. OASIS LEGAL FINANCE, LLC, JEFF BALOUN, AND GARY CHODES, DEFENDANTS

No. COA10-1414

(Filed 2 August 2011)

1. Contracts—meeting of minds—last essential act—Illinois

The trial court erred in a usury, violation of the Consumer Finance Act, and unfair and deceptive trade practices case by finding the contract between the parties was entered into in North Carolina. The last act essential to establishing a meeting of the minds and affirming the mutual assent of both parties to the terms of the agreement was the signing of the agreement by defendant's representative in Illinois.

2. Contacts—formum selection clause—choice of laws—enforcement not unreasonable and unfair

The trial court erred in a usury, violation of the Consumer Finance Act, and unfair and deceptive trade practices case by finding the enforcement of the forum selection clause in the contract between the parties would be unreasonable and unfair.

Appeal by defendants from order entered 26 July 2010 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 27 April 2011.

Robertson Medlin & Bloss, P.L.L.C., by John F. Bloss, and Barron & Berry, L.L.P., by Frederick L. Berry, Esq., for plaintiff-appellee.

Brooks Pierce McLendon Humphrey & Leonard, L.L.P., by Robert J. King, III, and Clint S. Morse, for defendant-appellants.

BRYANT, Judge.

Where the last act essential to a meeting of the minds was a signature made in Illinois, the contract was not entered into in North Carolina. Further, where the enforcement of the forum selection clause would not be unfair and unreasonable, we reverse the trial court's order and remand.

On 18 February 2010, in Guilford County Superior Court, plaintiff Jermaine Parson filed suit as a class action against Oasis Legal Finance, L.L.C. (Oasis), Jeff Baloun (Baloun), and Gary Chodes (Chodes) alleging the following causes of action: usury, violation of the consumer finance act, unfair and deceptive trade practices, constructive trust, declaratory judgment, rescission / restitution, maintenance, champerty, and injunction.[1]

The allegations as set forth in the complaint, as well as answers to plaintiff's interrogatories and statements made during a deposition, indicate that on 27 October 2007, plaintiff was injured by a motor vehicle while he was crossing the street. Plaintiff retained Joseph A. Williams, P.A., as legal representative for an ensuing action against the vehicle driver. On 15 January 2008, plaintiff entered into an agreement with Oasis for an advance of funds to pay for plaintiff's legal representation. In exchange, plaintiff agreed that, in the event he recovered compensation for his personal injuries, he would repay the amount advanced by Oasis plus an additional sum determined by the length of time the advance had been outstanding.

Oasis was organized under the laws of the state of Delaware with its offices located in Illinois. Baloun, an Oasis officer and manager,

1. While plaintiff filed a class action complaint, the record contains no indication that the trial court certified the class.

held the title of Director of Legal Funding. Chodes, another officer and manager, held the title of Chief Executive Officer. Both Baloun and Chodes reside in Illinois.

On 15 January 2008, plaintiff and Joseph A. Williams, P.A., received from Oasis an unsigned agreement for the advancement of $3,000.00. Plaintiff and a representative from Joseph A. Williams, P.A., signed the purchase agreement and faxed it back to Oasis the same day. On 16 January 2008, plaintiff received a check for $2,972.00.[2] The record includes documentation that plaintiff entered into another purchase agreement with Oasis on 18 February 2008 in exchange for an advance of $750.00. Both agreements contained a governing law clause stating that "all lawsuits, disputes, claims, or proceedings arising out of or relating to this Purchase Agreement . . . shall be governed, construed and enforced in accordance with the laws of the State of North Carolina." Also, both agreements contained a forum selection clause stating "[t]he Parties hereby irrevocably and unconditionally consent . . . and agree not to commence any such lawsuit, dispute, claim or other proceeding except in the Circuit Court of Cook County, Illinois.

In June 2009, plaintiff settled the underlying action for $30,000.00. Under the terms of the 15 January 2008 purchase agreement, if the repayment occurred between 15 April 2009 and 14 July 2009, the total amount due would be $7,500.00. Under the terms of the February purchase agreement, if the repayment occurred between 18 May 2009 and 17 August 2009, the amount due would be $1,875.00. However, pursuant to a letter issued by Oasis to Joseph A. Williams, Esq., "Oasis [would] agree to accept as payment in full fees of 15.9%, plus return of the original amount funded. Therefore, the amount due and owing is $4,575.48 . . . ." On 15 June 2009, plaintiff's attorney disbursed to Oasis $4,575.78. Plaintiff thereafter filed his claims in superior court in Guilford County, North Carolina.

On 23 April 2010, defendants filed a motion to dismiss plaintiff's claims alleging improper venue pursuant to Rule 12(b)(3). On 26 July 2010, the trial court entered an order denying defendant's motion to dismiss.[3] Defendants appeal.

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2. Plaintiff's requested $3,000.00 was reduced by $28.00 to pay for overnight shipping.

3. Subsequent to the 26 July 2010 entry of the trial court's order denying defendant's motion to dismiss for improper venue pursuant to Rule 12(b)(3), plaintiff, on 12

On appeal, defendants argue the trial court erred in finding (I) the Purchase Agreement was entered into in North Carolina; and (II) that enforcing the forum selection clause would be unreasonable and unfair.

Initially, we note that "[a]lthough a denial of a motion to dismiss is an interlocutory order, where the issue pertains to applying a forum selection clause, our case law establishes that [a] defendant may nevertheless immediately appeal the order because to hold otherwise would deprive him of a substantial right." *Hickox v. R&G Group Int'l, Inc.*, 161 N.C. App. 510, 511, 588 S.E.2d 566, 567 (2003) (citation omitted); *see also* N.C. Gen. Stat. § 7A-27(d) (2009).

I

[1] Defendants first ask that we determine whether the trial court erred in finding the Purchase Agreement was entered into in North Carolina. Contrary to the trial court's conclusion that the contract was entered into on 16 January 2008 when plaintiff received his check, defendant contends the contract was "entered into" when an Oasis representative counter-signed the agreement in Illinois. We agree in part.

Because the disposition of forum selection matters is highly fact-specific, "[w]e employ the abuse-of-discretion standard to review a trial court's decision concerning clauses on venue selection." *Mark Group Int'l, Inc. v. Still*, 151 N.C. App. 565, 566, 566 S.E.2d 160, 161 (2002).

"The essence of any contract is the mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds." *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980) (citation omitted). "Mutual assent is normally established by an offer by one party and an acceptance by the other, which offer and acceptance are essential elements of a contract." *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 912 (1998) (citation omitted). The moment of mutual assent may differ from the time the contract is to be effective. Black's Law Dictionary defines "effective date" as "[t]he date on which a statute, contract, insurance policy, or other such instrument becomes enforceable or otherwise takes effect, which sometimes differs from the date on which it was enacted or signed."

August 2010, filed an amended complaint incorporating the February 2008 purchase agreement. As the trial court order from which defendants appealed directly addresses only the 15 January 2008 agreement, we limit our review to the subject of the order entered and mention the February agreement only for context.

Black's Law Dictionary 533 (7th ed. 1999). *E.g.*, *Rental Towel and Uniform Serv. v. Bynum Int'l, Inc.*, 304 N.C. 174, 282 S.E.2d 426 (where the last signature to the contract was acquired on 8 November 1978 but the contract was not effective until 11 December 1978), *rev'g* 51 N.C. App. 203, 281 S.E.2d 664 (1981).

> [I]t is a generally accepted principle that the test of the place of a contract is as to the place at which the last act was done by either of the parties essential to a meeting of minds. Until this act was done there was no contract, and upon its being done at a given place, the contract became existent at the place where the act was done. Until then there was no contract.

Bundy v. Commercial Credit Co., 200 N.C. 511, 515, 157 S.E.2d 860, 862 (1931). In *Szymczyk v. Signs Now Corp.*, 168 N.C. App. 182, 606 S.E.2d 728 (2005), the plaintiffs, a North Carolina couple, contested whether a forum selection clause within a franchise agreement entered into with the defendant, a Florida corporation, was enforceable. In response to an alleged violation of the agreement, the defendant filed a complaint and a demand for arbitration in Manatee County, Florida. *Id.* at 184, 606 S.E.2d at 731. A Wilson County Superior Court granted the plaintiffs an injunction against further proceedings in Florida. *Id.* On appeal from the Wilson County order, this Court considered whether the trial court was correct in enjoining the Florida action, specifically, whether North Carolina law applied to the forum selection clause. The Court acknowledged that pursuant to N.C. Gen. Stat. § 22B-3, North Carolina courts will not honor provisions in certain contracts—choice of law, forum selection—if found to be contrary to North Carolina public policy. The Court noted, however, that the consideration was limited to those contracts "entered into in North Carolina." *Id.* at 186-87, 606 S.E.2d at 732 (citing *Key Motorsports v. Speedvision Network, L.L.C.*, 40 F. Supp. 2d 344 (M.D.N.C. 1999)). Ultimately concluding that North Carolina law did not apply to the interpretation of the forum selection clause, the *Szymczyk* Court, citing the test articulated in *Bundy*, held that the last act essential to the formation of the contract was a signing that took place in Florida, and thus, the contract was entered into in Florida. *Id.* at 187, 606 S.E.2d at 733. *See also*, *e.g. Map Supply, Inc. v. Integrated Inventory Solutions, Inc.*, 2008 N.C. App. LEXIS 1008 (COA07-733) (heard 12 December 2007) (unpublished) (holding that despite a discussion and verbal agreement which occurred in North Carolina, the final signature necessary to the contract was procured in Michigan; therefore, the contract was formed in Michigan).

Here, in its findings of fact, the trial court noted that the agreement contained the following language, "[t]his Agreement shall not be effective until the Purchase Price is paid to the Seller" and that plaintiff received his advance in North Carolina. The trial court then concluded that the agreement was entered into in North Carolina. We hold otherwise.

The record indicates that Oasis advertised "5 Easy Steps to Funding," which included (1) "Complete the ATTORNEY EXPRESS FUNDING application" (a one page overview of the applicant's underlying pending legal case); (2) "Oasis reviews [the applicant's application for funding and the underlying] case the same day"; (3) "[the applicant] completes and faxes back the contract [Oasis] send[s]"; (4) "[the applicant's attorney] [s]ign[s] and fax[es] back the [Attorney] Acknowledgement [provided by Oasis]"; and (5) "Oasis wires the funds or sends a check to [the applicant]." An Oasis funding application requesting $3,000.00 on behalf of plaintiff was completed and faxed to Oasis on 15 January 2008. That same day, Oasis faxed to plaintiff an unsigned draft agreement for the advance of $3,000.00. The agreement labeled plaintiff as the "Seller" and Oasis as the "Purchaser" of the right to receive a portion of the proceeds recovered from plaintiff's pending legal action. Further, the agreement included information such as how plaintiff would like to receive his requested amount (by check or as requested by the purchaser); a schedule for repaying the advance; and a release allowing Oasis to receive a copy of plaintiff's credit report. Plaintiff, along with his attorney, signed the agreement and faxed it back to Oasis on the same day, 15 January 2008. An Oasis representative in Illinois then signed the agreement, and, on 15 January 2008, mailed to plaintiff a check for $2,972.00. Plaintiff received the check on 16 January 2008.

The last act essential to establishing a meeting of the minds and affirming the mutual assent of both parties to the terms of the agreement was the signing of the agreement by an Oasis representative.[4] As the signature of the Oasis representative was made in Illinois, the contract was formed in Illinois. *See Bundy*, 200 N.C. 511, 157 S.E.2d

4. We are cognizant of the trial court's reasoning that the effective date of the contract—when plaintiff received his advance in North Carolina—indicates the agreement was entered into in North Carolina. However, we note the cases setting out the difference between "contract formation" and "contract enforceability," *see Parker v. Glosson*, 182 N.C. App. 229, 641 S.E.2d 735 (2007), and other cases cited herein—*Szymczyk*, 168 N.C. App. 182, 606 S.E.2d 728, and *Key Motorsports*, 40 F. Supp. 2d 344 —which acknowledge contract formation as a seminal point wherein the agreement is entered.

860 (the test of the place of a contract is the place of the last act essential to a meeting of minds); *Szymczyk*, 168 N.C. App. 182, 606 S.E.2d 728. Accordingly, we hold that the trial court erred in its conclusion that the agreement between Oasis and plaintiff was entered into in North Carolina.

II

[2] Next, defendants argue that the trial court erred in finding the enforcement of the forum selection clause would be unreasonable and unfair. Defendants contend that plaintiff failed to meet the heavy burden required to show that enforcing the forum selection clause would be unreasonable and unfair; that it is not unreasonable and unfair for a court to apply the law or policy of another jurisdiction; and that the forum selection clause must be considered separate and apart from the contract. We agree.

This Court has previously held that forum selection clauses are to be reviewed under an abuse of discretion standard.[5] *Appliance Sales & Serv. v. Command Elecs. Corp.*, 115 N.C. App. 14, 21-22, 443 S.E.2d 784, 789 (1994) (citing *State v. Locklear*, 331 N.C. 239, 248, 415 S.E.2d 726, 732 (1992) ("The abuse of discretion standard of review is applied to situations, such as this, which require the exercise of judgment on the part of the trial court. The test for abuse of discretion requires the reviewing court to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." (citations omitted)); *cf. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 7, 32 L. Ed. 2d 513, 519 (1972) (abuse of discretion standard applicable to forum *non conveniens determination*).))); *see also Mark Group Int'l, Inc. v. Still*, 151 N.C. App. 565, 566 S.E.2d 160 (2002); *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 501 S.E.2d 353 (1998).

In *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 423 S.E.2d 780 (1992), *superceded in part by statute*, N.C. Gen. Stat. § 22B-3 (1993), our Supreme Court considered whether it was proper for a trial court to deny a defendant's motion to dismiss for improper venue made on the basis of a forum selection clause. For guidance, the Court looked to *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 32 L. Ed. 2d 513.

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5. Interpretation of a contract is generally governed by the law of the state wherein the contract is made. *See Szymczyk*, 168 N.C. App. 182, 606 S.E.2d 728; *Map Supply, Inc.*, 2008 N.C. App. LEXIS 1008 (COA07-733). However, in the instant case the parties specifically agreed that North Carolina would be governing law.

> In *Bremen*, the United States Supreme Court enunciated a standard for the enforceability of forum selection clauses. The Court held that forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." 407 U.S. at 10, 32 L. Ed. 2d at 520. The Court further held that the forum selection clause in the contract should be enforced "absent a strong showing that it should be set aside . . . [, a] show[ing] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.* at 15, 32 L. Ed. 2d at 523. Additionally, the Court held that a forum selection clause should be invalid if enforcement would "contravene a strong public policy of the forum in which suit is brought." *Id.*

Perkins, 333 N.C. at 144, 423 S.E.2d at 783.[6]

Under issue I, following the reasoning of *Szymcyk* as applied to our facts, we determined that the contract between plaintiff and Oasis was formed in Illinois. Further, the contract contains the following forum selection clause:

> 8.11 Governing Law and Forum. . . .
>
> **The Parties hereby irrevocably and unconditionally consent** to submit to the exclusive jurisdiction of the Circuit Court of Cook County, Illinois for any disputes, claims or other proceedings arising out of or relating to this Purchase Agreement or the relationships that result from this Purchase Agreement **and agree not to commence any such lawsuit, dispute, claim or other proceeding except in the Circuit Court of Cook County, Illinois.**

(Emphasis added). However, in addition to a forum selection clause, the contract contains a choice of law provision:

> 8.11 Governing Law and Forum. This Purchase Agreement, and all lawsuits, disputes, claims, or proceedings arising out of or relating to this Purchase Agreement or the relationships that

6. Although not directly applicable to the facts, before us, it is notable that subsequent to our Supreme Court's holding in *Perkins*, our General Assembly enacted General Statute, section 22B-3. "[A]ny provision in a contract *entered into in North Carolina* that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable." N.C. Gen. Stat. § 22B-3 (2009); *see also Szymczyk*, 168 N.C. App. at 187, 606 S.E.2d at 733 (holding that where the contract was entered into outside of North Carolina, § 22B-3 is inapplicable) (citing as persuasive the reasoning in *Key Motorsports*, 40 F. Supp. 2d 344).

> result from this Purchase Agreement, shall be governed, construed and **enforced in accordance with the laws of the State of North Carolina.**

(Emphasis added). Our Supreme Court has held that

> [a] plaintiff who executes a contract that designates a particular forum for the resolution of disputes and then files suit in another forum seeking to avoid enforcement of a forum selection clause carries a heavy burden and must demonstrate that the clause was the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable.

Perkins, 333 N.C. at 146, 423 S.E.2d at 784; *see also Sony Ericsson Mobile Communs. USA v. Agere Sys.*, 195 N.C. App. 577, 580, 672 S.E.2d 763, 766 (2009) ("to set aside such a clause, a party must show either that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in [a foreign venue] would be . . . inconvenient[,] that the challenging party would, for all practical purposes, be deprived of his or her day in court[.]"); *Bell Atl. Tricon Leasing Corp. v. Johnnie's Garbarge Serv.*, 113 N.C. App. 476, 480, 439 S.E.2d 221, 224 (1994) ("These cases indicate that generally, the courts of our State will enforce consent to jurisdiction clauses.").

Plaintiff does not argue that the forum selection clause was the product of fraud or unequal bargaining power, only that its enforcement would be unreasonable and unjust. The trial court made the following conclusions:

> 8. Requiring a citizen and resident of North Carolina to litigate a relatively small claim involving application of North Carolina public policy and consumer protection law in the Circuit Court of Cook County, Illinois, would be unreasonable and unfair.
>
> 9. In addition, enforcement of a forum selection clause in a contract which may itself ultimately be found to be void on public policy grounds would be unreasonable and unfair.

On appeal, plaintiff contends that it would be "unreasonable and unfair to require a North Carolina plaintiff of limited means to maintain a lawsuit relating to transactions in the principal amount of $3,750.00, governed by North Carolina law, in Cook County, Illinois."

In *Perkins*, the plaintiff, a certified public accountant, practicing in Raleigh, entered into a license and service agreement for a com-

puter software program. The forum selection clause contained in the contract to purchase the software, and applicable to the service agreements, stated, in pertinent part, that "[a]ny action relating to this Agreement shall only be instituted and prosecuted in courts in Los Angeles County, California. Customer/Licensee [plaintiff] specifically consents to such jurisdiction and to extraterritorial service of process." *Perkins*, 333 N.C. at 141, 423 S.E.2d at 781. The plaintiff paid $700.00 for the software. *Id.* at 141, 423 S.E.2d at 781. In Wake County District Court, the plaintiff filed claims for unfair and deceptive trade practices, breach of warranty of merchantability, breach of implied warranty of fitness, breach of express warranty, negligence, and breach of contract. *Id.* at 142, 423 S.E.2d at 781. The defendant, a California software corporation, filed a motion to dismiss relying on the forum selection clause. The matter was transferred to Wake County Superior Court where the defendant's motion was denied. *Id.* at 142, 423 S.E.2d at 781-82. On appeal, our Supreme Court reversed the Superior Court's ruling affirmed by the Court of Appeals. Noting the plaintiff's heavy burden to "demonstrate that the clause was the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable," the Court remanded the decision to this Court for further remand to the Superior Court "in order that [the] plaintiff here may have the opportunity to make such a showing that he meets the burden set forth herein." *Id.* at 146, 423 S.E.2d at 784; *compare*, *Dine-A-Mate*, *Inc.*, 129 N.C. App. 773, 501 S.E.2d 353 (holding that enforcement would have been unfair and unreasonable when the employee entered into the contract under threat of termination); *Appliance Sales & Serv.*, 115 N.C. App. 14, 443 S.E.2d 784 (holding that enforcement would be unfair and unreasonable where the defendant made representations that the plaintiff could bring suit in the civil courts of North Carolina); *Bell Atl. Tricon Leasing Corp.*, 113 N.C. App. 476, 439 S.E.2d 221 (holding that enforcement would be unreasonable and unfair where the contract was entered into with an unequal bargaining position and the defendant did not knowingly consent to the forum selection clause); *Dove Air*, *Inc. v. Bennett*, 226 F. Supp. 2d 771 (W.D.N.C. 2002) (holding that enforcement would be unreasonable and unfair where the contract itself showed unequal bargaining power and overreaching).

In 1993, our General Assembly enacted N.C.G.S. § 22B-3, establishing that "any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard

in another state is against public policy and is void and unenforceable." N.C.G.S. § 22B-3 (2009). While § 22B-3 clearly limits the holding in *Perkins*, the presumption of validity of forum selection clauses, i.e. the test requiring that a plaintiff seeking to avoid enforcement of a choice of governing law or forum clause entered into *outside* of North Carolina meet a "heavy burden and must demonstrate that the clause was the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable," remains applicable. *Perkins*, 333 N.C. at 146, 423 S.E.2d at 784; *see also Dine-A-Mate, Inc.*, 129 N.C. App. 773, 501 S.E.2d 353; *Strategic Outsourcing, Inc. v. Stacks*, 176 N.C. App. 247, 625 S.E.2d 800 (2006).

Plaintiff does not supply, and we do not find, precedent to support a situation where a forum selection clause is held to be unenforceable based solely on the potential value of the damages claimed. Moreover, neither the trial court's order nor plaintiff's arguments on appeal provide a basis for the determination that the amount to be litigated is too small an amount to litigate in Cook County, Illinois. The form agreement provided by Oasis required only that plaintiff fill in the requested contact and personal data information, and then assent to the proposed terms. Plaintiff then entered into this agreement with the benefit of counsel: Oasis required that plaintiff's attorney acknowledge the agreement by signature. The initial amount requested by plaintiff and advanced by Oasis was $3,000.00, with a maximum repayment amount of $10,500.00. As such, alleged damages arising from "disputes, claims or other proceedings arising out of or relating to this Purchase Agreement" would be within the scope of these amounts. Therefore, we do not agree that a claim for damages arising from this contract in Cook County, Illinois would be unreasonable and unfair. *Appliance Sales & Serv.*, 115 N.C. App. at 22, 443 S.E.2d at 789; *see also*, *M/S Bremen*, 407 U.S. at 16, 32 L. Ed. 2d at 524 ("Of course, where it can be said with reasonable assurance that at the time they entered the contract, the parties to a freely negotiated . . . agreement contemplated the claimed inconvenience, it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable."). As to the trial court's assertion that the "enforcement of a forum selection clause in a contract which may itself ultimately be found to be void on public policy grounds would be unreasonable and unfair," we note the validity of the contract at issue is to be determined by the forum. Here, the forum selection clause mandates Cook County, Illinois, as the exclusive venue for all disputes arising from the purchase agreement, while North Carolina law will be applied to govern the dispute, including the valid-

ity of the contract. Accordingly, we reverse the judgment of the trial court and remand to that court for the purpose of granting defendant's motion to dismiss for improper venue.

Reversed and remanded.

Judges HUNTER, Robert C., and McCULLOUGH concur.

IN THE MATTER OF: N.T.

No. COA10-1281

(Filed 2 August 2011)

Firearms and Other Weapons—assault by pointing a gun—air rifle

Juvenile adjudication and disposition orders were reversed where they were based on a finding of assault by pointing a gun in violation of N.C.G.S. § 14-34. That statute does not encompass imitation firearms, and the device in this case was an airsoft pump action imitation rifle. Devices which may not be pointed at another under the statute are limited to those fairly characterized as firearms.

Appeal by respondent from adjudication and disposition orders entered 8 July 2010 by Judge James L. Moore, Jr., in Onslow County District Court. Heard in the Court of Appeals 8 March 2011.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly L. Wierzel, for the State.

W. Michael Spivey for Defendant-appellant.

ERVIN, Judge.

Juvenile N.T. appeals from orders adjudicating him delinquent based upon the trial court's finding that he was responsible for committing an assault by pointing a gun in violation of N.C. Gen. Stat. § 14-34. On appeal, Juvenile argues that the device in question, an airsoft pump action imitation rifle, is not a "gun" as that term is used for purposes of N.C. Gen. Stat. § 14-34, so that the evidence presented to the trial court was insufficient to support a finding of responsibility. After careful consideration of Juvenile's challenge to the trial court's

orders in light of the record and the applicable law, we conclude that Juvenile's argument has merit and that the trial court's adjudication and disposition orders should be reversed.

I. Background

A. Substantive Facts

On 18 April 2010, Ms. S. was living on Lloyd Street in Holly Ridge, North Carolina, with her husband; J.S., their eight year old son; and C.S., their eleven year old daughter.[1] On that date, C.S. was riding her bike about seven to ten feet from Juvenile and another child, A.C., when she observed that they had a BB gun. As C.S. turned away from them in order to dismount her bike, her shoulder started stinging. C.S. saw "blood gushing out of it and [said that] it . . . was worse than a bee sting[,] it really hurt." According to J.S., A.C. pointed the gun and said, "let's try to shoot your sister." When J.S. refused, "[Juvenile] came up and pulled the trigger." Since A.C. had said that the gun was aimed at the bike, Juvenile thought the gun was pointed at the bike when "he pulled the trigger while the other child held the gun."

After C.S. was injured, J.S. ran inside and told Ms. S. that C.S. had "been shot[.]" When she saw her daughter, Ms. S. observed that C.S.'s right shoulder blade was injured and that her shirt was bloody. Although C.S. passed out on the bathroom floor, a paramedic summoned to examine C.S. concluded that she could wait until the next day to see a doctor.

After observing C.S., Ms. S. stepped outside and saw Juvenile running towards his home. Ms. S. followed him to that location and told Juvenile's mother about the incident. At Juvenile's house, Ms. S. saw ten year old A.C. holding a BB gun.

Ms. S. led A.C. home and told his mother what had happened. Subsequently, Juvenile's parents brought their child to Ms. S.'s house, where he apologized to C.S. and stated that, while A.C. had held and aimed the BB gun, he had pulled the trigger. On the following day, Ms. S. found the pellet that had injured C.S., which she described as a tiny plastic yellow pellet.

Detective Sergeant Darrin Jones of the Holly Ridge Police Department, who had been dispatched to investigate an incident in which "a child had been shot with a BB gun," interviewed Juvenile in

1. The children involved in this incident are identified by initials in order to preserve their privacy.

the presence of his father, after first informing Juvenile of his legal rights and obtaining a signed waiver of these rights. Juvenile told Sergeant Jones that he and A.C. were playing with a pellet gun; that A.C. "was going to shoot [J.S.]'s sister;" and that, while A.C. held the gun and pointed it towards the bicycle that C.S. was riding, Juvenile pulled the trigger.

B. Procedural History

On 3 May 2010, Sergeant Jones filed a juvenile petition with the Onslow County District Court alleging that Juvenile should be adjudicated delinquent for having violated N.C. Gen. Stat. § 14-34. The petition was approved for filing on 3 May 2010. On 8 July 2010, adjudication and disposition hearings were conducted before the trial court. At the conclusion of those proceedings, the trial court adjudicated Juvenile delinquent based upon findings that he was responsible for committing the offense alleged in the petition and determined that Juvenile was subject to the trial court's dispositional authority as a result of the fact that he had committed a serious offense as defined in N.C. Gen. Stat. § 7B-2508(a). In order to reach this conclusion, the trial court specifically determined that "the Pump Air Soft Gun [fell] within the definition of Gun herein" and that Juvenile was "a principal to the [] crime herein based upon the common law legal concept of 'Acting in Concert.' " At the conclusion of the dispositional hearing, the trial court ordered a Level 1 disposition, placing Juvenile on probation for six months subject to supervision by a court counselor. Juvenile noted an appeal to this Court from the trial court's adjudication and dispositional orders.

II. Legal Analysis

Juvenile was found responsible for committing an assault by pointing a gun. The object that Juvenile and A.C. utilized during the events that led to the trial court's determination was described in the petition and in the testimony received at the hearing as a "BB gun." However, after learning that the gun shot pellets made of plastic, rather than metal, the trial court requested clarification concerning the nature of the device at issue in this proceeding:

> COURT: Now just for my information what was the—was this an air soft gun?
>
> [DET.] JONES: It was a Crossley BB rifle, Your Honor . . . . A pump action.

COURT: Okay, okay. And did you ever view the pellet, Detective?

. . . .

[MS. S.:] It was yellow and it was plastic and it was about the size of not the writing end of a ball point pen but the top of it as I mentioned.

COURT: See that's what, that's what puzzled me about you know when she said yellow that. But see but it's supposedly a pump, I mean I guess they make them-

RAYNOR: Yep, Judge, I can tell you from having a fourteen year old they make pump air soft guns.

COURT: Okay, okay, so it's truly not a BB gun.

RAYNOR: Right. They make them in pumps they make in them CO-2 cartridges and they make them in-

COURT: In all different configurations.

RAYNOR: Yes sir.

Thus, the undisputed evidence reflects that Juvenile was adjudicated delinquent as the result of his involvement in the use of an airsoft gun from which plastic pellets were fired using a "pump action" mechanism.[2] On appeal, Juvenile argues that this device does not constitute a "gun" for purposes of N.C. Gen. Stat. § 14-34, which prohibits "point[ing] any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded[.]" Thus, the ultimate issue that we must resolve in order to determine the validity of Juvenile's challenge to the trial court's orders is the extent, if any, to which the device that Juvenile utilized was a "gun or pistol" as those terms are utilized in N.C. Gen. Stat. § 14-34.

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d

2. According to 15 U.S.C. § 5001(c), an airsoft gun is included within a category consisting of "any imitation of any original firearm which was manufactured, designed, and produced since 1898, including and limited to toy guns, water guns, replica nonguns, and air-soft guns firing nonmetallic projectiles." "[E]ach toy, look-alike, or imitation firearm shall have as an integral part, permanently affixed, a blaze orange plug inserted in the barrel of such toy, look-alike, or imitation firearm." 15 U.S.C. § 5001(b)(2).

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). "When construing an ambiguous criminal statute, we must apply the rule of lenity, which requires us to strictly construe the statute in favor of the defendant. 'However, this [rule] does not require that words be given their narrowest or most strained possible meaning. A criminal statute is still construed utilizing 'common sense' and legislative intent.' " *State v. Conway*, 194 N.C. App. 73, 79, 669 S.E.2d 40, 44 (2008) (citing *State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007) (internal quotation omitted) and quoting *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005)), *disc. rev. denied*, 363 N.C. 132, 673 S.E.2d 665 (2009). "Questions of statutory interpretation are questions of law, reviewed de novo on appeal." *State v. West*, ___ N.C. App. ___, ___, 689 S.E.2d 216, 221 (2010) (citing *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001), *cert. denied*, 535 U.S. 971, 152 L. Ed. 2d 381, 122 S. Ct. 1438 (2002)).

The issue raised by Juvenile's appeal is, at bottom, a definitional one. Although the parties appear to agree that an airsoft rifle of the type at issue here is not a "firearm"[3] or a "pistol," they disagree sharply about whether it is a "gun." Thus, our inquiry must, necessarily, focus on whether the airsoft rifle involved in the incident that led to Juvenile's adjudication as a delinquent is or is not a "gun."

The term "gun" is not defined in N.C. Gen. Stat. § 14-34 or in any other statutory provision that is directly or indirectly applicable to N.C. Gen. Stat. § 14-34. In addition, the parties have not cited any prior decision of the Supreme Court or this Court adopting any particular definition for use in construing N.C. Gen. Stat. § 14-34. Although the parties have expended substantial energy discussing the wording of various other statutory provisions, none of them either resolve the definitional issue presented for our consideration in this case or shed much light on its proper resolution.[4] As a result, we are

3. The parties also accept the definition of a "firearm" set forth in N.C. Gen. Stat. § 14-409.39(2) (providing that a "firearm" is "[a] handgun, shotgun, or rifle which propels a projectile by action of an explosion") as acceptable for purposes of this case.

4. A number of statutory provisions discussed in the parties' briefs do tend to differentiate between "BB guns, stun guns, air rifles, and air pistols," on the one hand, and a "gun, rifle, pistol or other firearm," on the other. N.C. Gen. Stat. §§ 14-269.2(b) and (d). Although this language might tend to suggest that a "gun" was included within the category of "firearms" for purposes of certain criminal statutes prohibiting the pos-

forced, of necessity, to utilize general principles of statutory construction in order to determine whether the device utilized by Juvenile in this case was or was not a "gun."

"Nothing else appearing, the legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning." *Wood v. Stevens & Co.*, 297 N.C. 636, 643, 256 S.E.2d 692, 697 (1979) (citing *In re Trucking Co.*, 281 N.C. 242, 252, 188 S.E.2d 452, 458 (1972) and *State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967), *cert. denied*, 390 U.S. 1028, 20 L. Ed. 2d 285, 88 S. Ct. 1418 (1968)). "In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute." *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000) (citing *Black v. Littlejohn*, 312 N.C. 626, 638, 325 S.E.2d 469, 478 (1985) and *State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970)). As a result, we will attempt to make the required definitional decision on the basis of these well-established principles of statutory construction.

According to H. Black, BLACK'S LAW DICTIONARY 836 (rev. 4th ed. 1968), a "gun" is "[a] firearm for throwing a projectile with gunpowder," "[a] portable firearm," or "[a] pistol or revolver." Similarly, a "gun" has been defined as "a weapon incorporating a metal tube from which bullets, shells, or other missiles are propelled by explosive force, typically making a characteristic sharp noise." *New Oxford American Dictionary* 724 (3d ed. 2010). These definitions, which generally tend to equate "guns" to "firearms" and emphasize the use of "explosive force" as compared to the use of some other motivating agent, such as air pressure, would seem to exclude an airsoft rifle like the one at issue here from the definition of a "gun." Such a result seems consistent with the manner in which the Supreme Court has, in admittedly different contexts, defined the term in question. For example, in *State v. Barnes*, 253 N.C. 711, 713-14, 117 S.E.2d 849, 850 (1961), in which a defendant charged with assault by pointing a gun in violation of N.C. Gen. Stat. § 14-34 argued that a "pistol" was not a "gun," the Supreme Court stated that:

> The word gun is a generic term and includes pistol. According to Webster's New International Dictionary, 2d. Ed., the word "gun" is

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session of weapons on the campuses of educational institutions, it is not clear to us that this language has any relation to the proper construction of N.C. Gen. Stat. § 14-34, which is located in an entirely different portion of Chapter 14 of the North Carolina General Statutes and which is obviously focused on a subset of the items listed in the various provisions contained in N.C. Gen. Stat. § 14-269.2.

> defined, "6. A revolver or pistol. Orig., Western U.S." In common usage the words "pistol" and "gun" are used interchangeably.

(citing *Muse v. Interstate Life & Accident Co.*, 45 Ga. App. 839, 840, 166 S.E. 219, 220 (1932), *State v. Christ*, 189 Iowa 474, 482, 177 N.W. 54, 57 (1920), and *State v. Barrington*, 198 Mo. 23, 109, 95 S.W. 235, 263 (1906)). Similarly, while addressing an argument advanced by the defendant in *State v. Banks and State v. Pauling*, 271 N.C. 583, 157 S.E.2d 145 (1967), to the effect that there was a material variance between the indictment charging the defendant with committing a robbery, which alleged the use of a "pistol," and the proof offered in support of that indictment at trial, which involved references to the use of a "gun," the Supreme Court, in reliance on *Barnes*, stated that:

> The word "gun" is a generic term including a variety of firearms ranging in size and shape from the largest cannon to the smallest pistol. It is a matter of common knowledge that in everyday speech, on television programs and elsewhere, a pistol is frequently called a "gun." [T]his is not a misuse of the term "gun" . . . .

Id. at 585, 157 S.E.2d at 146-47 (citing *Barnes*, 253 N.C. at 713-14, 117 S.E.2d at 850, BLACK'S LAW DICTIONARY, and Webster's New International Dictionary, 2d Ed.) (other citation omitted). Finally, in *State v. Faulkner*, 5 N.C. App. 113, 168 S.E.2d 9 (1969), in which the defendant was charged with robbery with a dangerous weapon and in which "State's witness Smith testified that the defendant Arthur Smith told him that defendant Donald Faulkner got a 'Roscoe' at a poolroom, and that Donald Faulkner told him that 'he pulled a gun out of his pocket and hit the woman on the head,' " this Court stated that:

> A pistol is sometimes referred to as a "Roscoe." A pistol is a "short firearm, intended to be aimed and fired from one hand." Black's Law Dictionary, Fourth Edition. A gun is a portable firearm and usually includes pistols, carbines, rifles, and shotguns.

Faulkner, 5 N.C. App. at 119, 168 S.E.2d at 13. As a result, consistently with the definitions contained in the dictionaries that we have consulted, the prior North Carolina appellate decisions have tended to treat the word "gun" as an informal synonym for "firearm."[5] We conclude, consistently with Juvenile's contention, that the term "gun" as

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5. We note that the Supreme Court of North Carolina "concluded in [*State v.*] *Alston*, [305 N.C. 647, 290 S.E. 2d 614 (1982),] that a BB rifle could not be a firearm or other dangerous weapon within the meaning of the armed robbery statute because it was incapable of endangering or threatening a person's life." *State v. Allen*, 317 N.C. 119, 123, 343 S.E.2d 893, 896 (1986).

used in N.C. Gen. Stat. § 14-34 encompasses devices ordinarily understood to be "firearms" and not other devices that fall outside that category.[6] Such a construction of N.C. Gen. Stat. § 14-34 is also consistent with the rule of lenity, which requires us to construe ambiguous criminal statutes to limit the reach of the criminal sanction in the absence of a valid reason to do otherwise.

In seeking to persuade us to reach a contrary result, the State contends that the word "gun" should be understood as a "broader" term that encompasses, in addition to firearms, other devices, including the airsoft gun in this case. The State does not, however, explain exactly what this "broader" definition would encompass or how such a definition should be applied to the facts of specific cases. Moreover, the State does not cite any authority defining "gun" in this manner or suggesting that the word "gun" is a "broader" term that encompasses, in addition to traditional firearms, other unspecified devices. The absence of any authority tending to establish that the word "gun" as used in N.C. Gen. Stat. § 14-34 encompasses devices other than "firearms" further supports our conclusion that the two are synonymous for purposes of the relevant statutory provision.[7]

As part of its argument in support of a decision affirming the trial court's orders, the State contends that a broad interpretation of the word "gun" as used in N.C. Gen. Stat. § 14-34 would facilitate implementation of the policy goals sought to be achieved by the enactment of that statutory provision. At least three obvious purposes are served by prohibiting an individual from pointing a firearm at another person: (1) preventing accidental injuries that may occur when a person "didn't know it was loaded"; (2) preventing the escalating violence that may occur after one person points a gun at another; and (3) preventing a person from being placed in fear of imminent death or serious bodily harm when another person points a gun at him or her.

6. Although the State argues that equating a "gun" with a "firearm" ignores the fact that the General Assembly used the term "firearm" in some statutory provisions and the word "gun" in others and that this fact suggests that the General Assembly believed that the two words meant different things, we do not find this logic particularly compelling given that the statutory provisions in question were enacted at different times, are intended to address different ills, and cannot be described as part of a systematic statutory scheme regulating the use and misuse of guns, firearms, or other weapons.

7. In its brief, the State argues that construing N.C. Gen. Stat. § 14-34 in the manner that we deem appropriate would deprive N.C. Gen. Stat. § 14-33(c)(1), which prohibits assaults committed with the use of a deadly weapon, of any independent meaning. We do not, however, believe that this argument has merit given that N.C. Gen. Stat. § 14-33(c)(1) applies to assaults committed with deadly weapons other than firearms and a broader category of assaults than the simple pointing of a firearm.

Admittedly, making it a criminal offense to point an imitation firearm at another might, under some circumstances, serve to effectuate the accomplishment of one or more of the goals outlined above.[8] However, the extent to which the pointing of a device other than one clearly specified in the relevant statutory language should constitute a criminal offense is a question for the General Assembly and not for this Court, particularly given the many policy-related questions that would need to be addressed and resolved before such situations were deemed punishable through the criminal justice system or correctable through the juvenile courts.[9] " 'It is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures.' Normally, questions regarding public policy are for legislative determination." *Cochrane v. City of Charlotte*, 148 N.C. App. 621, 628, 559 S.E.2d 260, 265 (quoting *State v. Arnold*, 147 N.C. App. 670, 673, 557 S.E.2d 119, 121 (2001), *aff'd*, 356 N.C. 291, 569 S.E.2d 648 (2002), and citing *Martin v. Housing Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970)), *disc. review denied*, 356 N.C. 160, 568 S.E.2d 189 (2002). As a result, although there are potential policy-related arguments that might suggest the appropriateness of an outcome consistent with the position advocated by the State in this case, the adoption of those arguments as a basis for construing N.C. Gen. Stat. § 14-34 in a manner that has little, if any, support in the relevant statutory language, would be inconsistent with the applicable rules of statutory construction, leaving us little option except to conclude that those arguments are more appropriately directed to the General Assembly than to this Court.

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8. The facts of this case reveal that the improper use of an airsoft gun can cause a painful injury. Moreover, the pointing of an airsoft gun that closely resembles an actual firearm might result in escalating violence or severely frighten the person at whom it was pointed. As a result, we recognize that a number of the purposes that motivated the enactment of N.C. Gen. Stat. § 14-34 might be served by adopting a construction of the relevant statutory language like that advocated by the State.

9. For example, we might reasonably assume that pointing a bright pink water gun would not be punishable as a misdemeanor under even the most expansive definition of a "gun" that would be consistent with the approach advocated by the State. However, there is nothing in the relevant statutory language that would permit a trial or appellate court to distinguish between the imitation firearms that would or would not be subject to the criminal sanction under such an interpretation of N.C. Gen. Stat. § 14-34. Although we can conceive of various criteria that might reasonably be applied for that purpose, such as limiting the reach of N.C. Gen. Stat. § 14-34 to imitation firearms that closely resemble actual firearms in appearance, to imitation firearms that shoot metal pellets, or to imitation firearms that have a specific minimum muzzle velocity, the absence of statutory language tending to support the validity of any of these limitations suggests that the extension of N.C. Gen. Stat. § 14-34 to imitation firearms is a task for the legislative rather than the judicial branch of government.

Thus, we conclude that the criminal offense penalized in N.C. Gen. Stat. § 14-34 does not encompass the pointing of an imitation firearm. Simply put, the literal language of N.C. Gen. Stat. § 14-34 is ambiguous. To the extent that we are able to derive any assistance from that statutory language using traditional principles of statutory construction, we believe that the devices which one is forbidden to point at another are limited to items fairly characterized as firearms, not a broader category of devices. In such circumstances, the rule of lenity suggests that we should interpret the existing statutory language narrowly, leaving any expansion of the scope of the existing statutory language to the political, rather than the judicial, branch of government. Needless to say, our conclusion that the airsoft pistol at issue here is not a "gun" for purposes of N.C. Gen. Stat. § 14-34 has no bearing on the issue of whether Juvenile might be subject to being found delinquent for assault with a deadly weapon inflicting serious injury in violation of N.C. Gen. Stat. § 14-32(b), assault with a deadly weapon or assault inflicting serious injury in violation of N.C. Gen. Stat. § 14-33(c)(1), or assault on a child under the age of twelve in violation of N.C. Gen. Stat. § 14-33(c)(3). As a result, we conclude that N.C. Gen. Stat. § 14-34 does not, as presently written, permit the imposition of criminal or juvenile sanctions upon an individual who points an airsoft gun or other imitation firearm at another person and that the trial court erred by finding Juvenile to be a delinquent juvenile on that basis.[10]

III. Conclusion

Thus, for the reasons discussed above, we conclude that the evidence presented at the adjudication hearing did not support the trial court's determination that Juvenile's acts would have constituted a violation of N.C. Gen. Stat. § 14-34 had they been committed by an adult and that Juvenile was subject to supervision on the grounds of delinquency. As a result, the trial court's adjudication and disposition orders should be, and hereby are, reversed.

REVERSED.

Judges ROBERT C. HUNTER and STEPHENS concur.

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10. As a result of our determination that N.C. Gen. Stat. § 14-34 does not render the pointing of an airsoft rifle like the one used here a criminal offense, we need not address Juvenile's remaining challenge to the sufficiency of the evidence to support his adjudication.

STATE OF NORTH CAROLINA v. SETH ANTHONY LUPEK

No. COA11-63

(Filed 2 August 2011)

Search and Seizure—search of home—general inquiry—no reasonable expectation of privacy—plain view doctrine applicable—motion to suppress properly denied

The trial court did not err in a manufacturing marijuana and maintaining a dwelling place for the purpose of storing or selling controlled substances case by denying defendant's motion to suppress evidence obtained as a result of a search at his home. The trial court's unchallenged findings established that the officer had a right to be on defendant's porch because he was conducting a general inquiry in a place where defendant had no reasonable expectation of privacy and defendant's argument that the plain view doctrine did not apply was overruled.

Appeal by defendant from judgment entered 2 September 2010 by Judge Carl R. Fox in Chatham County Superior Court. Heard in the Court of Appeals 25 May 2011.

Attorney General Roy Cooper, by Associate Attorney General Gayle L. Kemp, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant-appellant.

GEER, Judge.

Defendant Seth Anthony Lupek appeals from his convictions of manufacturing marijuana and maintaining a dwelling place for the purpose of storing or selling controlled substances. Defendant contends that the trial court erred in denying his motion to suppress evidence obtained as a result of a search at his home.

The investigating officer in this case was standing on defendant's front porch when he saw, through the open front door, a bong used for smoking marijuana. Defendant primarily argues that his motion to suppress should have been allowed because the officer did not have the right to be on the front porch. However, the trial court's findings, unchallenged on appeal, establish that the officer had a right to be on the porch because he was conducting a general inquiry in a place where defendant had no reasonable expectation of privacy. We also

find unpersuasive defendant's remaining arguments regarding application of the plain view doctrine to the officer's observation of the bong and, therefore, hold that the trial court did not err in denying defendant's motion to suppress.

Facts

On 19 January 2010, defendant was indicted for manufacturing marijuana, maintaining a dwelling place for the purpose of storing or selling controlled substances, felony possession of marijuana, and misdemeanor possession of drug paraphernalia. On 10 May 2010, defendant filed a motion to suppress items seized during a 24 September 2009 search of his home. The motion alleged in part that the evidence should be suppressed because the officer who discovered it had no legal right to enter defendant's residence where the evidence was discovered, and the evidence was not in the officer's plain view from a place where he had a right to be.

Following an evidentiary hearing, the trial court entered an order denying defendant's motion on 19 November 2010. In its order, the trial court made the following findings of fact. At approximately 5:00 p.m. on 24 September 2009, Deputy Paul Carroll of the Chatham County Sheriff's Department responded to a report of a dog's having been shot at White's Mobile Home Park. On his way to defendant's residence in the mobile home park, Deputy Carroll was stopped by defendant. Defendant told Deputy Carroll that his dog had just been shot by a neighbor, and he was going to pick up the dog from Animal Control. Defendant then left the mobile home park.

Deputy Carroll continued to defendant's residence and pulled into the driveway. Almost immediately, a woman exited the front door of the residence. She was very nervous, her hands were shaking, and she smelled strongly of burnt marijuana. Based on his training and experience, Deputy Carroll believed that the smell was consistent with someone having just smoked marijuana. The woman told Deputy Carroll that her name was Elizabeth Sweatt and that she did not live at the residence, but was staying there temporarily.

Deputy Carroll had received information that dogs had gotten loose and become aggressive with a neighbor who had then shot one of the dogs. Ms. Sweatt took Deputy Carroll to the rear of the trailer and showed him a hole in the side of defendant's home where the dogs had escaped.

Deputy Carroll completed his investigation concerning the dog shooting, but he noticed that Ms. Sweatt, who still smelled like burnt

marijuana, appeared to be extremely nervous. Deputy Carroll asked her why she was so nervous. At this point, his reason for remaining in the yard was Ms. Sweatt's nervous appearance and the smell of burnt marijuana. Ms. Sweatt told Deputy Carroll she had a nervous condition for which she took Xanax. Believing that Ms. Sweatt was nervous as a result of his presence and her use of marijuana, rather than a " 'nervous condition,' " Deputy Carroll asked Ms. Sweatt to produce a prescription for the Xanax. Ms. Sweatt informed him that her pills were not there, but were inside her car that her husband was driving at the time.

Deputy Carroll then asked Ms. Sweatt for identification. When conducting an investigation, Deputy Carroll always attempts to obtain identification from any witnesses. Ms. Sweatt did not verbally respond to his request, but she instead turned and went back around to the front door and opened the door. Deputy Carroll followed closely behind her, attempting to maintain visual contact and ensure she would not obtain a weapon from inside the home that could be used against him. He was approximately two steps or a foot to a foot and a half behind her when she opened the door.

Because Ms. Sweatt was short, Deputy Carroll could see over her head into the residence. Without entering the home, he saw directly across from the door an 18-inch glass bong used for smoking marijuana. He also smelled the odor of fresh marijuana and saw the back of a man's head in a recliner.

Ms. Sweatt attempted to shut the door, but Deputy Carroll still entered the residence. Deputy Carroll advised both Ms. Sweatt and the man, subsequently identified as Barry Beaver, to stay where they were and show him their hands. Deputy Carroll asked if they had any weapons and patted them down. He also searched the immediate area for any weapons that might be within their reach. Deputy Carroll then obtained identification from both Ms. Sweatt and Mr. Beaver. At this point, the odor of fresh marijuana was even stronger. Without venturing further into the residence, Deputy Carroll saw a salad bowl with fresh marijuana.

Ms. Sweatt denied knowledge of any marijuana in the residence and consented to a search of her bedroom at the rear of the trailer. The odor of fresh marijuana was very strong in that part of the trailer. Next to Ms. Sweatt's room was a closed door that Deputy Carroll opened to make sure no one else was in the trailer. Inside that room he found a "marijuana-growing operation" with marijuana plants.

After discovering the marijuana-growing operation, Deputy Carroll handcuffed Ms. Sweatt and placed her in his patrol car. Since Mr. Beaver was disabled and unable to walk, Deputy Carroll carried him outside in his wheelchair. Deputy Carroll then secured the residence and did not seize any items before contacting the Drug Unit and requesting that it respond and obtain a search warrant. Staff Sergeant Brandon Jones subsequently applied for a search warrant for defendant's residence. Later, defendant returned to the residence and was arrested.

Based on its findings of fact, the trial court concluded that Deputy Carroll was justified in being outside the front door of the trailer at the time he saw the bong and smelled fresh marijuana. The court determined that he had the legitimate and lawful purpose of investigating possible criminal activity after smelling marijuana on Ms. Sweatt's person and noticing that she was very nervous for no apparent reason. The court also concluded that Deputy Carroll had the right to ask for Ms. Sweatt's identification and to approach the door to inquire whether she was willing to answer questions. Furthermore, after seeing the marijuana in the salad bowl, Deputy Carroll had authority to enter the premises to effectuate an arrest, conduct a protective sweep of the area, and secure the residence to prevent the destruction of evidence.

On 2 September 2010, defendant pled guilty to manufacturing marijuana and maintaining a dwelling place for storage of controlled substances. Defendant reserved his right to appeal the denial of his motion to suppress. The trial court sentenced defendant to a mitigated-range term of three to four months imprisonment but suspended the sentence and ordered defendant to be placed on 24 months of supervised probation. Defendant timely appealed to this Court.

Discussion

The sole issue on appeal is whether the trial court erred in denying defendant's motion to suppress. "The scope of review of the denial of a motion to suppress is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231, 122 S. Ct. 1323 (2002).

Findings of fact not challenged on appeal—such as those in this case—are binding on this Court. *State v. Brown*, 199 N.C. App. 253, 256, 681 S.E.2d 460, 463 (2009). The trial court's conclusions of law, however, "must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997).

Defendant argues that Deputy Carroll's observation of the bong inside the home constituted an unconstitutional search, and, therefore, the bong and all subsequently discovered evidence should have been suppressed. The State contends that the "plain view" doctrine applied to the bong. In order for the plain view doctrine to apply, (1) the officer must have been in a place where he had a right to be when the evidence was discovered; (2) the evidence must have been discovered inadvertently; and (3) it must have been immediately apparent to the police that the items observed were evidence of a crime or contraband. *State v. Graves*, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999). The burden is on the State to establish all three prongs of the plain view doctrine. *Id.*

Defendant challenges the trial court's conclusion regarding the first prong: Deputy Carroll's right to be on the porch when he saw the bong and smelled the fresh marijuana. Defendant contends that the porch is part of the curtilage of his residence, that Deputy Carroll did not have the necessary probable cause to enter the curtilage, and that Deputy Carroll thus did not have a right to be just outside the front door of the trailer at the time he saw the bong and smelled the marijuana.

"The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself." *United States v. Dunn*, 480 U.S. 294, 300, 94 L. Ed. 2d 326, 334, 107 S. Ct. 1134, 1139 (1987). "[T]he curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life, and therefore has been considered part of home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180, 80 L. Ed. 2d 214, 225, 104 S. Ct. 1735, 1742 (1984) (internal citation and quotation marks omitted). "In North Carolina, 'curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings.' " *State v. Rhodes*, 151 N.C. App. 208, 214, 565 S.E.2d 266, 270, (quoting *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955)), *disc. review denied*, 356 N.C. 173, 569 S.E.2d 273 (2002).

Because an individual ordinarily possesses the highest expectation of privacy within the curtilage of his home, that area typically is "afforded the most stringent Fourth Amendment protection." *United States v. Martinez-Fuerte*, 428 U.S. 543, 561, 49 L. Ed. 2d 1116, 1130, 96 S. Ct. 3074, 3084 (1976). Thus, as with the home, probable cause is the appropriate standard for searches of the curtilage. *Oliver*, 466 U.S. at 178, 80 L. Ed. 2d at 224, 104 S. Ct. at 1741.

In North Carolina, however, no search of the curtilage occurs when an officer is in a place where the public is allowed to be, such as at the front door of a house. It is well established that "[e]ntrance [by law enforcement officers] onto private property for the purpose of a general inquiry or interview is proper." *State v. Prevette*, 43 N.C. App. 450, 455, 259 S.E.2d 595, 599-600 (1979), *appeal dismissed and disc. review denied*, 299 N.C. 124, 261 S.E.2d 925-26, *cert. denied*, 447 U.S. 906, 64 L. Ed. 2d 855, 100 S. Ct. 2988 (1980). Officers "are entitled to go to a door to inquire about a matter; they are not trespassers under these circumstances." *Id.*, 259 S.E.2d at 600. *See also State v. Stover*, 200 N.C. App. 506, 512, 685 S.E.2d 127, 132 (2009) (officers were properly at defendant's house to conduct " 'knock and talk' " after having received information from confidential informant that she had bought marijuana at house).

In *Prevette*, the Court upheld the denial of the defendants' motion to suppress marijuana that officers saw through defendants' screen door. The trial court found that the police had received an anonymous tip that a house near a dairy farm was full of marijuana, but that this tip was insufficient to obtain a search warrant. 43 N.C. App. at 452, 259 S.E.2d at 598. The officers decided to conduct a general inquiry and investigation of the area by determining whether the houses in that area were occupied and interviewing any occupants. *Id.* As the officers walked up to a house, one of the defendants ran from the back door and attempted to hide in a cornfield. *Id.* at 453, 259 S.E.2d at 598. He was apprehended and questioned by the officers at the front of the house. *Id.* The trial court found that the officers, while standing in the light of the front porch, could see through the screen door and observed marijuana on the floor and smelled marijuana inside. *Id.*

This Court held that "[i]t was not erroneous for the judge to conclude that the officers, standing on the porch of defendants' house, were lawfully at the scene." *Id.* at 455, 259 S.E.2d at 600. The trial court's findings properly supported its conclusion "that the officers,

while standing on the porch, 'viewed in plain view and smelled on the inside of the house what appeared to them to be marijuana.' " *Id.*

Defendant contends that *Prevette* is distinguishable from this case because the *Prevette* officers' inquiry was initiated as a result of an anonymous tip regarding the presence of drugs in the area. The anonymous tip was, however, simply the trigger for the officers going to the location to investigate—it was relevant only because it explained why an investigation was needed. Here, like the officers in *Prevette*, Deputy Carroll was not just randomly knocking on doors. Rather, Deputy Carroll was responding to a call regarding a dog shooting, defendant confirmed that his dog was shot by a neighbor, and Deputy Carroll went to defendant's residence to investigate that potential crime.

There is no meaningful distinction between this case and *Prevette*. In both cases, the officers were conducting a general investigation and inquiry regarding a call reporting a potential crime. Defendant argues that because the dog was shot in the yard, Deputy Carroll had no right to be on the front porch even if he did have a right to be in the yard. The trial court, however, found that at the time Deputy Carroll was on the front porch, he was attempting to obtain identification from a witness in his investigation of the dog shooting, and he was making an additional inquiry arising out of his observation of Ms. Sweatt's nervousness and the smell of burnt marijuana surrounding her. Because Deputy Carroll was still conducting an investigation and inquiry when he reached the front door, we hold that *Prevette* controls this appeal.

Defendant's additional claim that Deputy Carroll needed probable cause to follow Ms. Sweatt to the front door is inconsistent with *Prevette*. *See also Harbin v. City of Alexandria*, 712 F. Supp. 67, 72 (E.D. Va. 1989) (holding front porch is knowingly exposed to public; therefore, it is not subject of Fourth Amendment protection), *aff'd per curiam*, 908 F.2d 967 (4th Cir. 1990); *State v. Detlefson*, 335 So.2d 371, 372 (Fla. App. 1976) ("It cannot be said the defendant had a reasonable expectation of privacy in the front porch of his home where, presumably, delivery men and others were free to observe the plants thereon.").

Defendant repeatedly insists that Ms. Sweatt tried to shut the door on Deputy Carroll, indicating that "she did not want him coming up to the front door or accessing the interior of the trailer." The trial court, however, found that Ms. Sweatt tried to shut the door only

after Deputy Carroll was on the porch and had already seen the bong. That finding is binding on appeal.

Defendant points to *State v. Wooding*, 117 N.C. App. 109, 449 S.E.2d 760 (1994), as supporting his contention that Deputy Carroll's peering through the front door without a warrant violated his constitutional rights. In *Wooding*, however, the police officer was able to see into the hallway of the apartment only after walking onto a back porch, leaning over a couch, and looking through a three to four-inch opening in drawn curtains covering the window. *Id.* at 112-13, 449 S.E.2d at 761-62. Here, instead of going to a back porch and peeking in a closed window curtain, Deputy Carroll merely followed Ms. Sweatt to the front door because she appeared to be retrieving her identification in response to his request, and he only saw the bong inside because she opened the door.

We, therefore, conclude that the trial court's finding that Deputy Carroll was justified in being on the doorstep was not legally incorrect, as this front porch was a place where he had the right to be. Accordingly, the trial court did not err in applying the plain view doctrine. *See Kentucky v. King*, ___ U.S. ___, ___, 179 L. Ed. 2d 865, 876-77, 131 S. Ct. 1849, 1858 (2011) (explaining that so long as law enforcement officer lawfully arrives at spot from which observation is made, "it does not matter that the officer who makes the observation may have gone to the spot from which the evidence was seen with the hope of being able to view and seize the evidence").

Defendant further contends that even if Deputy Carroll was lawfully on the porch, the plain view doctrine should not apply because Deputy Carroll was only able to see inside the trailer because Ms. Sweatt opened the door "pursuant to his demand to see her identification." Defendant argues that had Deputy Carroll not, under color of his authority as a Deputy Sheriff, "ordered Ms. Sweat [sic] to produce identification," she never would have opened the front door of the house, and Deputy Carroll never would have been able to see the bong.

In support of his position, defendant cites four federal cases that are neither analogous nor persuasive. *See United States v. Conner*, 127 F.3d 663, 665 (8th Cir. 1997) (police knocked on motel room door three separate times and identified themselves each time; one officer shouted, " 'Open up' " in voice loud enough to be heard by motel resident two rooms away; officers were loud enough to awaken another guest and cause her to step out of her room under mistaken belief that police were knocking at her door); *United States v. Jerez*, 108

F.3d 684, 691-92 (7th Cir. 1997) (during night, officers took turns knocking on motel room door for three minutes, identified themselves as police, and commanded, " 'Open the door' "; officer knocked on room's only window for one-and-a-half to two minutes, loud enough that it could be heard from interior hallway on other side of room; officer shone his flashlight through small opening in window's drapes, illuminating defendant as he lay in bed); *United States v. Tovar-Rico*, 61 F.3d 1529, 1535 (11th Cir. 1995) (at least five officers knocked loudly at door, announced their identity as police officers through closed door, and requested permission to enter); *United States v. Winsor*, 846 F.2d 1569, 1571 (9th Cir. 1988) (two police officers and an FBI agent, with their guns drawn, knocked on door and announced, " 'Police. Open the door.' ").

In each of these cases, the police expressly demanded that the door be opened and used their identification as police officers to convince the defendants that they had no other choice. Here, by contrast, the court found that Deputy Carroll merely "asked" for Ms. Sweatt's identification. Deputy Carroll was within his right to do so. *See State v. Isenhour*, 194 N.C. App. 539, 542, 670 S.E.2d 264, 267 (2008) (noting even when police officers have no reason to suspect that person is engaged in criminal behavior, they may pose questions and ask for identification provided they do not induce cooperation by coercive means). *See also State v. Mayfield*, 10 Kan. App. 2d 175, 179, 694 P.2d 915, 918 (1985) (holding police officers, whom court concluded were authorized to request defendant's identification, were justified in following him into apartment without his invitation when he went to get it; thus, being in place where they had right to be, they were allowed, under plain view exception, to seize obvious contraband discovered through inadvertence). Moreover, Deputy Carroll asked for identification only once before Ms. Sweatt turned around and walked toward the front door. Deputy Carroll never verbally commanded that she go inside or "open the door." We, therefore, overrule defendant's argument that the plain view doctrine does not apply in this case.

Defendant makes no claim that even if the observation of the bong and the smelling of the marijuana was constitutional, the conduct following that discovery still violated his Fourth Amendment rights. Accordingly, the trial court did not err in denying defendant's motion to suppress.

Affirmed.

Judges BRYANT and BEASLEY concur.

STATE OF NORTH CAROLINA v. DANNY TOBUIS MANN, JR.

No. COA10-1186

(Filed 2 August 2011)

Satellite-Based Monitoring—indecent liberties with child—sexual activity by substitute parent—finding of aggravated offense erroneous

The trial court erred in an indecent liberties with a child and sexual activity by a substitute parent case by ordering defendant to register as a sex offender and enroll in satellite-based monitoring for his natural life. The trial court's finding that defendant committed an aggravated offense was erroneous and the trial court's consideration of the risk assessment before deciding whether defendant committed an aggravated offense was not harmless error.

Appeal by defendant from judgments entered 19 July 2010 by Judge Jack W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 9 March 2011.

Attorney General Roy Cooper, by Assistant Attorney General Peter A. Regulski, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for defendant-appellant.

GEER, Judge.

Defendant challenges an order requiring him to register as a sex offender and enroll in satellite-based monitoring ("SBM") for his natural life. We agree with defendant that the trial court erred in failing to follow the procedural framework set out in N.C. Gen. Stat. § 14-208.40A (2009). Accordingly, we must vacate the judgment and remand for further proceedings consistent with N.C. Gen. Stat. § 14-208.40A.

Facts

On 12 January 2010, defendant was indicted in 09 CRS 51183 for statutory rape, indecent liberties with a child, and felony child abuse by a sexual act. In 09 CRS 51184, defendant was indicted for contributing to the delinquency of a minor and sexual battery. On 19 July 2010, defendant entered into a plea agreement in which the State agreed to dismiss with prejudice the first degree rape charge in exchange for defendant's pleading guilty to the remaining charges.[1]

1. Ultimately, the State dismissed the felony child abuse charge as well as the first degree rape charge.

In accordance with this plea arrangement, on 19 July 2010, defendant was charged by a superceding information in 09 CRS 51183 with one count of indecent liberties with a child and one count of sexual activity by a substitute parent. On the same day, defendant pled guilty to the charges in the superceding information and to the charges in the indictment in 09 CRS 51184.

The State presented the following factual basis for the plea. Defendant lived with "Alice," her daughter "Mary," and Alice's other children between 1 August 2007 and 30 October 2008.[2] Mary was born 13 October 2004. While living with Alice and her children, defendant acted as a substitute parent when Alice was not present.

On 3 October 2008, Mary was playing with Barbie dolls in a sexual manner at her aunt's home. When Mary's aunt asked her about what she was doing, Mary disclosed that defendant had "put his thingy in her private part." Her aunt took her to the local emergency room where the emergency room doctor noted redness of the skin and a contusion to Mary's labia and hymen, findings that are unusual for a four-year-old girl.

On 6 February 2009, Mary was taken to the Teddy Bear Clinic. During her interview at the clinic, Mary reported that defendant had put his penis in her vagina when her mother was not at home. She was also examined by Dr. Michael Reickel who observed physical findings consistent with a penetrating genital injury. Dr. Reickel concluded that it was highly probable that Mary had suffered a prior sexual injury based on her history, a review of the emergency room records, her interview at the Teddy Bear Clinic, and his exam.

The trial court sentenced defendant to a presumptive-range term of 34 to 50 months imprisonment for the charge of sex offense in a parental role, a consecutive presumptive-range term of 21 to 26 months imprisonment for the indecent liberties charge, a consecutive term of 150 days for the sexual battery charge, and a consecutive term of 120 days for contributing to the delinquency of a minor. The trial court then turned to the issue of sex offender registration and SBM. Following a hearing on the two issues, the court entered Judicial Findings and Order for Sex Offenders—Active Punishment, AOC Form CR-615, Rev. 12/09, with respect to the sex offense in a parental role conviction.

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2. "Alice" and "Mary" are pseudonyms used to protect Mary's privacy and for ease of reading.

In the order, the trial court found that defendant had not been classified as a sexually violent predator and was not a recidivist, but that the offense committed was an aggravated offense. The trial court also found that the offense "did involve the physical, mental, or sexual abuse of a minor" and, based on the risk assessment performed by the Department of Correction, that defendant requires the highest possible level of supervision. Based on these findings, the trial court ordered that defendant, upon release from prison, register as a sex offender and enroll in SBM for the rest of his natural life. Defendant gave oral notice of appeal in open court.

Petition for Writ of Certiorari

Defendant petitions this Court for writ of certiorari because he failed to file written notice of appeal as required by *State v. Brooks*, ___ N.C. App. ___, ___, 693 S.E.2d 204, 206 (2010) (holding oral notice pursuant to N.C.R. App. P. 4(a)(1) insufficient to confer jurisdiction on this Court because SBM hearings involve a civil " 'regulatory scheme' " (quoting *State v. Bare*, 197 N.C. App. 461, 472, 677 S.E.2d 518, 527 (2009), *disc. review denied*, 364 N.C. 436, 702 S.E.2d 492 (2010)). The *Brooks* opinion was filed 18 May 2010 and defendant was sentenced two months later on 19 July 2010. Because *Brooks* was filed only two months before defendant's sentencing, we choose, in our discretion, to allow the petition for writ of certiorari.

Discussion

Defendant first contends the trial court erred by not following the procedural framework of N.C. Gen. Stat. § 14-208.40A. N.C. Gen. Stat. § 14-208.40A requires the trial court to first determine whether the defendant was found guilty of a reportable conviction, which includes "an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting." N.C. Gen. Stat. § 14-208.6(4)(a) (2009).

If the trial court finds the existence of a reportable conviction, then, under subsection (b) of the statute, N.C. Gen. Stat. § 14-208.40A(b), the court must make a finding whether defendant falls within any one of the following categories set out in N.C. Gen. Stat. § 14-208.40(a): "(i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor." If

the defendant falls within one of the first four categories, then, under subsection (c) of the statute, the trial court shall order SBM for life. N.C. Gen. Stat. § 14-208.40A(c).

If the trial court has determined that the defendant did not fall into categories (i) through (iv) of N.C. Gen. Stat. § 14-208.40A(b) but that he committed an offense involving the physical, mental, or sexual abuse of a minor, N.C. Gen. Stat. § 14-208.40A(b)(v), the court must, under subsection (d), order the Department of Correction to do a risk assessment of the defendant. N.C. Gen. Stat. § 14-208.40A(d). Once the trial court receives the risk assessment, subsection (e) requires that the court must determine, based on that assessment, whether the defendant requires the highest level of supervision and monitoring. N.C. Gen. Stat. § 14-208.40A(e). If the court determines that the defendant does require the highest level, then subsection (e) provides that the court must order the defendant to enroll in SBM "for a period of time to be specified by the court." *Id.*

Here, rather than following this procedure, the trial court stated during the hearing:

> We really have a couple of categories relevant to the cases here. One of them is whether this is an aggravated offense; the other deals with physical, mental, or sexual abuse of a minor. Let me jump to that one first. On the form it's number 5, but the Court is going to find that the offense did involve the physical, mental, or sexual abuse of a minor. And I have received a STATIC-99 form [the Department of Correction risk assessment] that's been prepared today, which was reflected in an ultimate score of 5, and based on the manner in which this form is interpreted, a score of 5 places the defendant in a moderate to high category for risk. And based on that, and based on all other matters brought before the Court, giving due consideration to the plea arrangement and the nature of the plea, the Court is going to find that [the offense] did involve physical, mental, or sexual abuse of a minor, and the Court's further going to find that this does require the highest possible level of supervision and monitoring.

The trial court then said that it was "[g]etting back to the one about aggravated offense" and that the court was "concerned about that one."

After hearing oral argument, the court announced it was

> going to find that this is an aggravated offense under that category 4, so based on that, as to the Court's ultimate disposition

> and order as to registration, the Court is going to require registration for the duration of [defendant's] natural life. And then as to satellite-based monitoring, upon release from the prison, defendant shall enroll in a satellite-based monitoring program for his natural life unless the monitoring program is terminated, pursuant to general statute 14-208.43.

Thus, the trial court addressed N.C. Gen. Stat. § 14-208.40A(b)(v) first and N.C. Gen. Stat. § 14-208.40A(i)-(iv) only secondarily.

This Court has held, however, that, after receiving evidence in a registration/SBM hearing, the trial court is required to *first* determine whether the defendant's conviction places him in one of the categories (i) through (iv) of N.C. Gen. Stat. § 14-208.40A(b) before determining that defendant falls under subsection (v). *State v. Davison*, 201 N.C. App. 354, 360, 689 S.E.2d 510, 514-15 (2009), *disc. review denied*, 364 N.C. 599, 703 S.E.2d 738 (2010). This Court explained in *Davison*, *id.*, 689 S.E.2d at 514, that this order of proceeding is mandated by N.C. Gen. Stat. § 14-208.40A(d), which provides that the Department of Correction shall be ordered to do a risk assessment only "[i]f the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that the offense is not an aggravated offense or a violation of G.S. 14-27.2A or G.S. 14-27.4A and the offender is not a recidivist . . . ." N.C. Gen. Stat. § 14-208.40A(d).

In *Davison*, just as in this case, the trial court waited to decide whether the defendant fell within categories (i) through (iv) of N.C. Gen. Stat. § 14-208.40A(b) until after it had a chance to review the risk assessment. 201 N.C. App. at 360-61, 689 S.E.2d at 515. This Court concluded that this order of proceeding demonstrated "the trial court's intent to make a determination under subsection (b) based on information obtained in the risk assessment." *Id.* at 361, 689 S.E.2d at 515.

This Court explained further:

> The statute does not provide that the trial court consider the result of a risk assessment in conjunction with the State's evidence at this point in the proceeding. The trial court erred by failing to follow the statutory framework provided by N.C.G.S. § 14-208.40A when it failed to properly make determinations pursuant to subsection (b). By failing to properly make these determinations, the court prematurely ordered the risk assessment and improperly considered sentencing pursuant to subsections (c) and (d) simultaneously.

Id. The Court then vacated the trial court's order and remanded for proceedings in accordance with N.C. Gen. Stat. § 14-208.40A. *Id.*

In this case, therefore, the trial court erred in considering the risk assessment before deciding whether defendant committed an aggravated offense. The State, however, contends that *State v. Williams*, ___ N.C. App. ___, ___ 700 S.E.2d 774, 776 (2010), establishes that any error was harmless. In *Williams*, the trial court found both that the defendant was a recidivist and that, based on the risk assessment, the defendant, who had committed an offense involving the physical, mental, or sexual abuse of a minor, required the highest possible level of supervision and monitoring. On appeal, this Court concluded that because the trial court correctly determined that defendant was a recidivist, the "findings entered in error [regarding the risk assessment] are not necessary to support the Order and are mere surplusage." *Id.* at ___, 700 S.E.2d at 777.

Here, in ordering lifetime registration and SBM, the trial court relied only on its finding that defendant committed an aggravated offense. The trial court expressly found that defendant had not been classified as a sexually violent predator and was not a recidivist, the only other bases for ordering lifetime registration and SBM. The State admits, however, that the trial court erred in finding that sex offense in a parental role was an aggravated offense.

An offense constitutes an "[a]ggravated offense" only when it "includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old." N.C. Gen. Stat. § 14-208.6(1a). In *Davison*, this Court held that when deciding whether a criminal offense is an aggravated offense, "the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction." 201 N.C. App. at 364, 689 S.E.2d at 517.

Defendant was convicted of violating N.C. Gen. Stat. § 14-27.7(a), which provides that a defendant who has assumed the position of a parent in the home of a minor victim is guilty of a Class E felony if he "engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home . . . ." "Proof of a 'sexual act' under G.S. 14-27.7 does not require, but may involve, penetration." *State v.*

Hoover, 89 N.C. App. 199, 208, 365 S.E.2d 920, 926, *cert. denied*, 323 N.C. 177, 373 S.E.2d 118 (1988).

Consequently, just as in *State v. Phillips*, ___ N.C. App. ___, ___, 691 S.E.2d 104, 107, *disc. review denied*, 364 N.C. 439, 702 S.E.2d 794 (2010), "without a review of 'the underlying factual scenario giving rise to the conviction,' which is prohibited under *Davison*, . . . , a trial court could not know whether an offender was convicted under N.C.G.S. § 14-318.4(a2) because he committed a sexual act involving penetration." The trial court, in this case, could not determine, based on the elements of the offense alone, that defendant had engaged in a sexual act involving penetration.

Therefore, under *Davison*, the trial court erred in finding that defendant committed an aggravated offense. In contrast to *Williams*, therefore, we cannot conclude that the trial court's failure to follow the proper statutory procedure was harmless. While the State urges that the evidence presented to the trial court establishes that defendant was a recidivist, the trial court expressly concluded otherwise. Because the trial court's deviation from the proper procedure may have affected its findings of fact, including its determination that defendant was not a recidivist, we believe that the proper approach is to vacate the trial court's order and remand for the trial court to comply with the procedure set out in N.C. Gen. Stat. § 14-208.40A, as clarified by *Davison*.

On remand, the trial court must first determine whether defendant is a recidivist. If not, the court must determine whether defendant committed an offense that involved the physical, mental, or sexual abuse of a minor and, if so, whether defendant requires the highest possible level of supervision and monitoring. Because we are remanding this matter to the trial court, we need not address defendant's remaining contention that the trial court erred by finding he required the highest possible level of supervision and monitoring.

Vacated and remanded.

Judges BRYANT and ELMORE concur.

BOARD OF DIRECTORS OF QUEENS TOWERS HOMEOWNERS' ASSOCIATION, INC., AND QUEENS TOWERS HOMEOWNERS' ASSOCIATION, INC., PLAINTIFFS, BERNADETTE ROSENSTADT, INITIAL TRUSTEE OF THE ROSENSTADT FAMILY TRUST; AND BRENDA BISHOP, DEFENDANTS

No. COA10-1190

(Filed 2 August 2011)

1. Associations—homeowners—condominium—individual balconies—repair—common area

The trial court correctly denied summary judgment for defendant-owners and correctly granted it for plaintiff homeowners' association in a declaratory judgment action to determine whether balconies were common areas for purposes of repair. As defined by the Declaration and the Unit Ownership Act, these balconies were not part of the unit because they were located on the exterior of the building, were not specified by the Declaration as accessory spaces within the units, and did not provide direct access to any common areas or thoroughfares.

2. Associations—homeowners—condominium balconies—limited common areas—awnings

The condominium balconies in this case were limited common areas where the balconies were not specified as part of the units but were accessible only through individual units by the unit owners. The Board was responsible for the administration and operation of the limited common areas and acted within its authority when it elected to install awnings and charge the unit owners.

3. Appeal and Error—cross-assignments of error—no longer used—proposed issues on alternative basis or separate cross appeal

The merits of cross-assignments of error were not considered on appeal because cross-assignments of error no longer exist. Appellees can instead denominate proposed issues on appeal as an alternative basis in law; however, the alleged error here did not deprive plaintiffs of an alternative basis in law for supporting the judgment. The alleged error should have been separately preserved and made the basis of a separate cross-appeal.

Appeal by defendants from judgment entered 28 May 2010 by Judge F. Lane Williamson in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 February 2011.

Sellers, Hinshaw, Ayers, Dortch & Lyons, P.A., by Michelle Price Massingale, for plaintiffs.

Myers Law Firm, PLLC, by R. Lee Myers and Matthew R. Myers, for defendants.

ELMORE, Judge.

Bernadette Rosenstadt, Initial Trustee of the Rosenstadt Family Trust, and Brenda Bishop (defendants) appeal from an order in favor of the Board of Directors of Queens Towers Homeowners Association and Queens Towers Homeowners Association, Inc. (plaintiffs), granting plaintiffs' motion for summary judgment and denying defendants' motion for summary judgment. After careful review, we find no error.

I. Background

The condominium development known as Queens Towers (condominium) was established on 2 January 1980 upon filing the "Declaration of Condominium for Queens Towers" (declaration). The Queens Towers Homeowners' Association (HOA) is a nonprofit corporation organized under the laws of the State of North Carolina and governed by a board of directors (board). The board is responsible for the administration of the condominium, including "[o]peration, care, upkeep and maintenance of the common areas and facilities." The owners of the condominium units are responsible for upkeep, maintenance, and repair of individual units. The condominium, HOA, and unit owners are subject to the terms of the declaration and HOA by-laws, as well as the Unit Ownership Act. The declaration describes the boundaries of the units, common areas, and limited common areas of the condominium.

Defendants Rosenstadt and Bishop are the record title owners of units 307 and 210, respectively. A balcony is attached to each unit for the use and benefit of the unit owner, and is accessible through a sliding glass door. In August 2008, the board voted to purchase and install awnings and skirts (awnings) outside the balconies adjacent to designated units, including those owned by defendants. Installation began in October 2008, and the board notified defendants of its intent to install the awnings. Defendants refused to allow installation.

Plaintiffs filed a complaint, seeking, *inter alia*, injunctive relief prohibiting defendants from denying access to the balconies. Defendants filed a counterclaim seeking an order that plaintiffs cease and desist from installing the awnings. Both parties filed motions for summary judgment. The trial court granted plaintiffs' motion for summary judgment and denied defendants' motion for summary judgment. The court further granted a stay in favor of defendants, pending the outcome of this appeal.

II. Discussion

A. Standard of review.

[1] Defendants contend that the trial court erred in granting summary judgment in favor of plaintiffs. We disagree.

The "standard of review of an appeal from summary judgment is de novo." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Id.* (quotations and citation omitted). "If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial." *Id.* (citation omitted). The judgment shall be granted if the evidence shows "that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009).

B. Unit Ownership Act, declaration, and by-laws.

By filing the declaration, the owner of Queens Towers submitted the condominium to the Unit Ownership Act (the Act). The Act strictly binds unit owners and the HOA (including the board) to the declaration and by-laws. "Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both[.]" N.C. Gen. Stat. § 47A-10 (2009).

This Court must determine whether the board possesses the authority to install awnings adjacent to defendants' balconies. This determination turns on whether the balcony is considered part of the unit, which falls under the discretion and control of the unit owner, or part of the common area or limited common area, which falls under the authority of the board. To accomplish this, we must look to the Act and the declaration, including its by-laws, to determine the proper classification.

The fundamental rules of construction require that the parties' intent be determined by reconciling all the terms of the instrument. *Callaham v. Arenson*, 239 N.C. 619, 625, 80 S.E.2d 619, 624 (1954). "[R]estrictive covenants clearly expressed may not be enlarged by implication or extended by construction. They must be given effect and enforced as written." *Id.* (citations omitted).

C. Unit.

The declaration defines a "unit" as:

> the space bounded by the undecorated and/or unfinished *interior* surfaces of its perimeter walls, load bearing walls, lowermost floors, uppermost ceilings, windows and window frames, doors and door frames. Each unit includes both portions of the building *within such boundaries*, and *the space so encompassed*, including without limitation the decorated surfaces, including paint, lacquer, varnish, wallpaper, paneling, tile, carpeting and any other finishing materials applied to *interior walls*, doors, floors and ceilings, and *interior surfaces* of permanent walls, *interior* non-load-bearing walls, windows, doors, floors and ceilings.

(Emphasis added.) The universal language used throughout the description is "interior." However, the balconies at issue are located on the *exterior* of the building and not within the boundaries of the interior surfaces and walls, as specified in the declaration.

The Act defines a unit as "an enclosed space consisting of one or more rooms," but defers to the declaration to incorporate additional discretionary features. N.C. Gen. Stat. § 47A-3(12) (2009). The Act specifies that "unit" include "accessory spaces and areas as may be described in the declaration, such as garage space, storage space, balcony, terrace or patio, *provided it has a direct exit to a thoroughfare or to a given common space leading to a thoroughfare.*" *Id.* (emphasis added).

First, the declaration does not specify any accessory spaces, such as balconies or terraces, to be included as part of the units. Second, the Act predicates accessory spaces on the existence of a "direct exit" to a common space or thoroughfare. Here, the balconies are only accessible through sliding glass doors located in the individual units and do not provide access to any other area of the property.

Defendants argue that the square footage of their units includes balconies, thereby incorporating balconies into the definition of "units." We find this argument to be without merit. There is no reference to area square footage in the definition of "unit" in either the Act or declaration. Therefore, square footage has no bearing on the definition of unit.

Defendants next contend that the by-laws provide for the unit owners to maintain and repair all portions of their units, including the balconies. Typically, an owner's association has the duty to maintain and repair all common areas. *See, e.g.*, *Carolina Forest Ass'n, Inc. v. White*, 198 N.C. App. 1, 3, 678 S.E.2d 725, 727 (2009) ("As is typical of many property owners associations . . . [the association] has responsibility for maintaining . . . common areas"). Although defendants correctly note the ambiguous nature of the "Maintenance and Repair" provision of the by-laws, the duty to maintain does not unilaterally define the property as a "unit" or "common area." Therefore, the duty to maintain and repair the balconies has no bearing on the definition of "unit."

We hold that balconies are not part of the units, as defined by the declaration and the Act because balconies are located on the exterior of the building, are not specified by the declaration as accessory spaces within the units, and do not provide direct access to any common areas or thoroughfares.

C. Common areas and limited common areas.

[2] The Act defines "common areas" to include "foundations, columns, girders, beams, supports, main walls, roofs . . . and [a]ll other parts of the property necessary or convenient to its existence, maintenance and safety, or normally in common use." N.C. Gen. Stat. § 47A-3(2) (2009). The Act qualifies this definition by stating, "unless otherwise provided in the declaration[.]" *Id.* The declaration provides that common areas shall retain the meaning set forth in the Act and further specifies that common areas consist of "property other than the units," as described above. Therefore, if balconies are not considered to be part of the units, then, by definition, they are considered to be common areas.

Both the Act and the declaration define "limited common areas" as common areas that are exclusively reserved for use by certain units. N.C. Gen. Stat. § 47A-3(7) (2009). The declaration further states that "[t]he board . . . is authorized to adopt rules for the use of the common areas and facilities, said rules to be furnished in writing to

the owners." In March 2008, the board published Rules and Regulations, which stated that "[b]alconies, which are legally considered limited common areas and are a major component of the exterior appearance of the building, are under the authority of the Board of Directors."

Because balconies are not specified as part of the units, they are considered part of the common area. The balconies in question are only accessible through sliding glass doors located in individual units. As such, the balconies can only be used by, and are reserved for, unit owners (and their guests) with such access. Further, the board circulated information regarding the categorization of balconies as "limited common areas" in the Rules and Regulations, published in March 2008. Taking into account all of the above factors, we find that the balconies in question fall squarely into the category of limited common areas.

D. Authority to install awnings.

Because balconies are categorized as limited common areas, the board is responsible for their administration and operation. "Whenever in the judgment of the board of directors the common areas . . . shall require additions, alterations or improvements, the board . . . shall proceed with such additions, alterations or improvements, and shall assess all unit owners for the costs thereof." The board properly voted to install awnings on certain balconies in order to enhance the overall appearance of the condominium and save energy. The board acted within the scope of its authority to elect to install the awnings, execute installation, and charge the costs of installation to the unit owners.

Because the board possesses the authority to install the awnings at issue, the unit owners do not have any right to deny access to the units to effectuate the installations. "The board . . . shall have the right to access to each unit to . . . maintain, repair or replace the common facilities contained therein." Powers and duties of the board include "[e]ntering any unit when necessary in connection with any maintenance or construction for which the board is responsible[.]" As a result, the trial court correctly denied defendants' motion for summary judgment in favor of plaintiffs.

III. Cross-Assignments of Error

[3] Plaintiffs also argue that the trial court abused its discretion by staying the case, thereby causing damage to the HOA. They have fash-

ioned this argument as a cross-assignment of error. This is problematic for several reasons. The first of these is that cross-assignments of error no longer exist under our Rules of Appellate Procedure; they disappeared along with assignments of error when the Rules were revised in 2009. Under the previous Rules, Rule 10(d) provided, in relevant part:

> Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.

N.C.R. App. P. 10(d) (2008). Under the revised Rules, appellees can instead denominate "Proposed Issues on Appeal as to an Alternative Basis in Law." N.C.R. App. P. 10(c) (2011). The new Rule 10(c) is similar to the old Rule 10(d) and reads, in relevant part:

> Without taking an appeal, an appellee may list proposed issues on appeal in the record on appeal based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an *alternative basis in law for supporting the judgment*, order, or other determination from which appeal has been taken.

N.C.R. App. P. 10(c) (2011) (emphasis added). Revised Rule 28(c), like former Rule 28(c), permits an appellee to "present issues on appeal based on any action or omission by the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C.R. App. P. 28(c) (2011); *see* N.C.R. App. P. 28(c) (2008).

Here, the alleged error by the trial court—its decision to stay the case pending appeal—has not deprived plaintiffs of an alternative basis in law for supporting the judgment. Had the trial court denied defendants' motion for stay, it would have had no effect on the judgment itself; it would only have permitted plaintiffs to install the awnings sooner. Instead, this alleged error should have been separately preserved and made the basis of a separate cross-appeal. *See Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 685 (2002) ("Whereas cross-assignments of error under Rule 10(d) are the proper procedure for presenting for review any action or omission of the trial court which deprives the appellee of an alternative basis in law for supporting the judgment, order, or other determination from

which appeal has been taken; the proper procedure for presenting alleged errors that purport to show that the judgment was erroneously entered and that an altogether different kind of judgment should have been entered is a cross-appeal."). Accordingly, we do not address the merits of plaintiffs' "cross-assignment of error."

IV. Conclusion

Defendants failed to establish the existence of a genuine issue of material fact for the court to resolve. Consequently, the trial court did not err in granting plaintiffs' motion for summary judgment and denying defendants' motion for summary judgment, and we affirm the trial court's order of summary judgment.

Affirmed.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA v. ROBERT MACK, JR.

No. COA10-1020

(Filed 2 August 2011)

Discovery—possession of cocaine—confidential informant—identity not disclosed—no error

The trial court did not violate defendant's rights under state law in a possession of controlled substances case by denying defendant's request for a confidential informant's identity to be revealed. The factors weighing against disclosure of the confidential informant's identity were more substantial than the factors supporting disclosure. Furthermore, defendant failed to preserve for appellate review his argument that the trial court violated his federal constitutional rights.

Appeal by defendant from a judgment entered on or about 28 April 2010 by Judge W. Osmond Smith, III in Superior Court, Caswell County. Heard in the Court of Appeals 24 March 2011.

Attorney General Roy A. Cooper, III, by Associate Attorney General Jonathan D. Shaw, for the State.

Peter Wood, for defendant-appellant.

STROUD, Judge.

Robert Mack, Jr. ("defendant") appeals from a conviction for possession of cocaine with intent to sell or deliver, arguing that the trial court erred by denying his motion to disclose the identity of the State's confidential informant. Because defendant failed to show that the circumstances of his case mandate disclosure of the confidential informant's identity, we find no error in defendant's trial.

I. Background

On 15 December 2009, defendant was indicted for possession of cocaine with intent to manufacture, sell, and deliver, and for selling cocaine, in violation of N.C. Gen. Stat. § 90-95(a)(1). Defendant was tried on these charges at the 26 April 2010 Criminal Session of Superior Court, Caswell County.

The State's evidence tended to show that on 26 August 2009, undercover officer Deputy Kim Starr ("Deputy Starr") with the Alamance County Sheriff's Department, while working with the Caswell County Sheriff's Department and a confidential informant ("CI"), conducted an undercover purchase of illegal drugs at defendant's house at 14048 N.C. Hwy 119 N., Semora, North Carolina. On the day in question, the CI introduced Deputy Starr to defendant, and defendant asked the CI whether Deputy Starr was "straight." The CI affirmed that Deputy Starr was "straight" and then walked a few feet away to talk with another person in the room while Deputy Starr and defendant carried on their conversation. They "haggl[ed]" over the price of the drugs, and Deputy Starr purchased $25.00 worth of crack cocaine from defendant. At a post-buy location following the undercover purchase, Deputy Starr was shown a picture of defendant, and identified defendant as the person from whom she had purchased drugs. At trial, Deputy Starr again identified defendant as the man who sold her the cocaine on the day in question. Defendant presented no evidence at trial.

On 28 April 2010, the jury found defendant guilty of possession of cocaine with intent to sell or deliver. The trial court sentenced defendant to a term of eight to ten months imprisonment for this conviction. The trial court declared a mistrial on the count of selling cocaine because the jury could not reach a unanimous verdict. Defendant gave oral notice of appeal in open court. Defendant's only argument on appeal is that "the trial court commit[ed] prejudicial error and violated [his] rights under the United States Constitution and State law when it denied [his] motion for the State to reveal the identity of the State's confidential informant."

II. Preliminary issues

Although not addressed by either party, the record before us presents issues as to whether defendant properly preserved his arguments for appellate review. As noted above, defendant raises a constitutional argument on appeal. However, "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473, (citation omitted), *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2005). A thorough search of the trial transcript reveals that defendant did not raise any constitutional issues at trial; thus, defendant did not preserve any constitutional issue for appellate review.

III. Motion to disclose

As to defendant's argument that the trial court violated his rights under State law, defendant properly preserved his appellate rights as to his motion to disclose the identity of the State's CI by raising it before the trial court and obtaining a ruling on his motion. *See* N.C.R. App. P. 10(b)(1). In addressing the substance of a claim that the trial court erred in denying his motion to disclose the CI's identity, we have previously stated that

> "In *Roviaro v. United States*, 353 U.S. 53, 1 L.Ed. 2d 639, (1957), the United States Supreme Court held it was error not to order the Government to reveal the name of an informant when it was alleged that the informant actually took part in the drug transaction for which the defendant was being tried. The Supreme Court recognized the State has the right to withhold the identity of persons who furnish information to law enforcement officers, but said this privilege is limited by the fundamental requirements of fairness." *State v. Leazer*, 337 N.C. 454, 459, 446 S.E.2d 54, 57 (1994). *Roviaro* held that "no fixed rule with respect to disclosure is justifiable. . . . Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro*, 353 U.S. at 62, 1 L.Ed. 2d at 646.
>
> "The privilege of nondisclosure, however, ordinarily applies where the informant is neither a participant in the offense, nor helps arrange its commission, but is a mere tipster who only supplies a lead to law enforcement officers." *State v. Grainger*, 60 N.C. App. 188, 190, 298 S.E.2d 203, 204 (1982) (citations omitted).

> Moreover, "[b]efore the courts should even begin the balancing of competing interests which *Roviaro* envisions, a defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances of his case mandate such disclosure." *State v. Watson*, 303 N.C. 533, 537, 279 S.E.2d 580, 582 (1981). . . .

State v. Stokley, 184 N.C. App. 336, 341-42, 646 S.E.2d 640, 644 (2007), *disc. review denied*, 362 N.C. 243, 660 S.E.2d 542 (2008). This Court has further stated that

> [t]wo factors weighing in favor of disclosure are (1) the informer was an actual participant in the crime compared to a mere informant, e.g., *Roviaro v. United States*, *supra*; *State v. Ketchie*, 286 N.C. 387, 211 S.E. 2d 207 (1975), and (2) the state's evidence and defendant's evidence contradict on material facts that the informant could clarify, *McLawhorn v. State of North Carolina*, 484 F.2d 1 (4th Cir. 1973); *State v. Orr*, 28 N.C. App. 317, 220 S.E.2d 848 (1976). Several factors vitiating against disclosure are whether the defendant admits culpability, offers no defense on the merits, or the evidence independent of the informer's testimony establishes the accused's guilt. *State v. Cameron*, [283 N.C. 191, 195, S.E.2d 481 (1973)].

State v. Newkirk, 73 N.C. App. 83, 86, 325 S.E.2d 518, 520-21 (1985).

Specifically, defendant contends that the CI's identity should have been revealed because (1) "[t]he confidential informant was a participant in the crime[,]" (2) the CI was material to defendant's case as Deputy Starr failed to make an unequivocal identification of defendant at trial, and (3) if the CI's identity were disclosed and defendant were to call the CI as a witness, the CI could testify that defendant is not the person he introduced Deputy Starr to on the day in question. (emphasis added).

A. Factors in favor of disclosure

As noted above, the first factor "in favor of disclosure[,]" *see id.*, is whether the CI was a participant in the crime. Even though our courts have not articulated a specific definition of when the informer is considered to be a participant in a crime, this Court has previously addressed similar arguments. In *State v. Johnson*, 81 N.C. App. 454, 344 S.E.2d 318 (1986), this Court reversed the trial court's denial of the defendant's motion to compel the State to disclose the CI's identity and granted the defendant a new trial. In addressing the issue of

whether the CI was a participant, the Court in *Johnson* concluded that the CI "participated in this drug sale and accepted [drugs] from defendant when the drug sale was consummated[,]" noting that "[t]he State's confidential informant's presence was required during every phase of [the undercover officer's] undercover investigation[,]" and nothing showed that the defendant would have been comfortable working with only the undercover officer. *Id.* at 458, 344 S.E.2d at 321. However, in *State v. Gilchrest*, 71 N.C. App. 180, 181, 321 S.E.2d 445, 447 (1984), *disc. review denied*, 313 N.C. 332, 327 S.E.2d 894 (1985), the CI introduced the undercover agent to the defendant; defendant got into the car with the CI and the undercover agent; and the undercover agent then purchased cocaine and marijuana from the defendant. This Court concluded that the CI was not a participant because his "only participation in the drug transaction concerned herein was to introduce the State's witness to the defendant and to remain in their presence while the illegal transactions occurred." *Id.* at 182, 321 S.E.2d at 447. Unlike *Johnson*, the CI here did not purchase drugs from defendant. But like *Gilchrest*, the CI merely introduced Deputy Starr to defendant, assured defendant that Deputy Starr was "straight," and then stood aside while Deputy Starr haggled with defendant regarding the price and then purchased drugs from defendant. Simply being present for the transaction, even after introducing the parties, did not make the CI a participant. *See Gilchrest*, 71 N.C. App. at 182, 321 S.E.2d at 447.

Another factor that weighs in favor of disclosure is if "the state's evidence and defendant's evidence contradict on material facts that the informant could clarify." *Newkirk*, 73 N.C. App. at 86, 325 S.E.2d at 520. However, at trial, defendant did not offer any evidence in his defense, let alone evidence that contradicted the State's evidence on material facts.

B. Factors against disclosure

Turning to the first factor "vitiating against disclosure[,]" *see id.*, we note that defendant did not make an admission of culpability. Looking to the second factor, we note that the only "defense on the merits" that defendant raised at trial was that he did not sell drugs to Deputy Starr on the day in question and Deputy Starr was mistaken in her identification of defendant as the person that she purchased drugs from on the day in question. As noted above, defendant raises the same arguments on appeal, arguing that the CI was material to defendant's case as Deputy Starr failed to make an unequivocal iden-

tification of defendant at trial, and if the CI's identity were disclosed and defendant were to call the CI as a witness, the CI could testify that defendant is not the person he introduced Deputy Starr to on the day in question. But from the record before us, it is not clear why the CI's testimony would be helpful for defendant's defense. Even though defendant argues in his brief that "he was not the person who sold the drugs to Deputy Starr[,]" he also speculates that the CI could "either corroborate or impeach the testimony of Deputy Starr[.]" Defendant did not testify at trial or offer any evidence at trial to support his theory. Also, Deputy Starr indicated that there were several people other than the CI at defendant's house on the day in question, so defendant could have presented testimony from another person who was present as to Deputy Starr's allegedly mistaken identification of defendant. As to defendant's claims that Deputy Starr "had difficulty recognizing the drug dealer as [defendant,]" the record is clear that Deputy Starr identified defendant at trial and on the day in question as the person that sold her the crack cocaine. Therefore, we cannot say that the CI was material to defendant's case.

The final factor weighing against disclosure is if "evidence independent of the informer's testimony establishes the accused's guilt." *Newkirk*, 73 N.C. App. at 86, 325 S.E.2d at 520-21. Here, defendant was convicted of possession of cocaine with intent to sell or deliver. The elements of this offense are "1) possession, 2) of a controlled substance, and 3) with intent to sell or deliver . . . ." *State v. Peoples*, 167 N.C. App. 63, 67, 604 S.E.2d 321, 324 (2004). "The crime of possession requires that the contraband be in the custody and control of the defendant and subject to his disposition." *Id.* (quotation marks and citation omitted).

Deputy Starr testified that she bought two rocks of crack cocaine from defendant on the day in question. Justin Sigmond, an analyst with the North Carolina State Bureau of Investigation's crime lab, confirmed that the items that Deputy Starr bought from defendant were crack cocaine. Deputy Starr positively identified defendant at trial as the person who sold her the crack cocaine on the day in question. Accordingly, there was "evidence independent of the informer's testimony [that] establishe[d] the accused's guilt." *See Newkirk*, 73 N.C. App. at 86, 325 S.E.2d at 520-21. As the factors weighing against disclosure of the CI's identity are more substantial than the factors supporting disclosure, we hold that the trial court did not err in denying defendant's request for the CI's identity.

As defendant failed to "make a sufficient showing that the particular circumstances of his case mandate" disclosure of the CI's identity, we need not balance the "competing interests which *Roviaro* envisions[.]" *See id.* Accordingly, we find no error in defendant's trial.

NO ERROR.

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

STATE OF NORTH CAROLINA v. MICHAEL DEAN DAVIS, JR.

No. COA10-1388

(Filed 2 August 2011)

1. Sexual Offenses—multiple counts—sufficiency of evidence—testimony of each act not present

The trial court did not err by denying defendants' motions to dismiss multiple counts of indecent liberties, first-degree statutory sex offense with a child under thirteen, and second-degree sex offense where the victim did not testify to each attack as a separate incident. The victim clearly described discrete instances of different types of sexual acts perpetrated upon him by defendant over a long period of time.

2. Jury—verdict—unanimity—multiple sexual acts against child

There was no danger of a lack of unanimity between jurors as to thirty-six verdicts of indecent liberties, first-degree statutory sex offense with a child under thirteen, and second-degree sex offense. The victim testified that he was forced to perform multiple sexual acts over a two year period and defendant was indicted for six counts of first-degree sex offense with a child under thirteen, six counts of second-degree sex offense, and twenty-four counts of indecent liberties.

Appeal by defendant from judgments entered 14 April 2010 by Judge John L. Holshouser in Iredell County Superior Court. Heard in the Court of Appeals 25 May 2011.

Attorney General Roy Cooper, by Assistant Attorney General Olga Vysotskaya, for the State.

Russell J. Hollers, III, for defendant-appellant.

BRYANT, Judge.

Because the evidence presented at trial was sufficient to withstand defendant's motions to dismiss, defendant's arguments are overruled, and we affirm the judgment of the trial court.

On 6 April 2009, defendant was indicted on twenty-four counts of indecent liberties with a child, six counts of first-degree statutory sex offense with a child under the age of thirteen, and six counts of second-degree sex offense.

At trial, evidence was presented that defendant lived alone with his son, Marvin[1], who was born in 1994, for the time during which Marvin attended the first through the eighth grades. Marvin testified that in 2005, during the fall of his sixth grade year, defendant called him into his bedroom and told him to rub defendant's penis. Marvin refused. Defendant threatened to "whoop" Marvin, and Marvin rubbed defendant's penis. Marvin testified that this would occur once a week on Friday, and it was rare that it would not happen. From 2006 to 2007, Marvin attended the seventh grade. He testified that during this time, beginning in September 2006, defendant required him to perform fellatio. With few exceptions, defendant forced Marvin to engage in this behavior once a week. Further, defendant would masturbate in front of Marvin every week and compelled Marvin to masturbate, also. Marvin testified that there were perhaps only three or four weeks that defendant did not engage Marvin in those sex acts. In the summer following his seventh grade year, Marvin went to stay with his mother and grandmother. Marvin testified that defendant informed him that if he disclosed their sexual relations to anyone, Marvin would suffer a car accident and burn to death. In December 2008, Marvin told his mother about defendant's sex acts.

Defendant moved to dismiss the charges at the end of the State's evidence and again at the end of all the evidence. Defendant's motions to dismiss were denied by the trial court. Thereafter, a jury found defendant guilty on all counts. The trial court entered judgment in accordance with the jury's verdict. Defendant's twenty-four convictions for indecent liberties with a child were consolidated to three sentences of 13 to 16 months active punishment, to be served con-

1. A pseudonym has been used to protect the identity of the sexual assault victim.

secutively. Defendant's convictions for six counts of first-degree statutory sex offense with a child were consolidated to two sentences of 192 to 240 months active punishment, to be served consecutively. And, defendant's convictions for six counts of second-degree sex offense were consolidated for an active punishment of 58 to 79 months. The trial court also ordered that upon release from prison, defendant was to submit to sex-offender registration and enroll in lifetime satellite-based monitoring. Defendant appeals from the trial court order denying his motions to dismiss.

[1] On appeal, defendant argues that because the trial court erred in denying his motions to dismiss, it subsequently erred in entering judgment on thirty-six offenses when the evidence supported entry of judgment on only two offenses. It is defendant's contention that Marvin did not testify to each sexual attack as a separate incident; therefore, the trial court's judgment should be vacated on all but one count of first-degree sex offense and one count of indecent liberties. We disagree.

> In considering a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense charged and substantial evidence that the defendant is the perpetrator. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). The evidence must be examined in the light most favorable to the state, and the state is entitled to every reasonable intendment and inference to be drawn therefrom. *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980). Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

State v. Rasor, 319 N.C. 577, 585, 356 S.E.2d 328, 333-34 (1987).

Defendant was indicted and tried by jury on multiple counts of first-degree sexual offense, second-degree sexual offense, and taking indecent liberties with a child.

> A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

N.C. Gen. Stat. § 14-27.4(a)(1) (2009). "A person is guilty of a sexual offense in the second degree if the person engages in a sexual act

with another person: (1) By force and against the will of the other person . . . ." N.C. Gen. Stat. § 14-27.5(a)(1) (2009).

> A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1(a) (2009).

Defendant argues that only two of the thirty-six verdicts by the jury should be upheld because Marvin's testimony did not describe in detail each and every act of the sexual offenses charged. Defendant's argument is very similar to the argument of the defendant in *State v. Wiggins*, 161 N.C. App. 583, 589 S.E.2d 402 (2003). We hold that *Wiggins* is essentially dispositive of defendant's appeal.

In *Wiggins*, the victim—seventeen at the time of trial—testified that the defendant, her father, had sexual intercourse and oral sex with her while she was between the ages of nine and fifteen years old. *Id.* at 586, 589 S.E.2d at 405. The victim testified that during those years the frequency with which the defendant engaged her in sexual acts increased from once or twice a month to four or five times a week. *Id.* The defendant was indicted for statutory rape and statutory sexual offense occurring between 1 May 1998 and 30 September 1998. He was found guilty of five counts of statutory rape and two counts of statutory sexual offense. On appeal, the defendant argued insufficiency of the evidence where the victim failed to testify to the specific dates on which "the alleged acts occurred." *Id.* at 590, 589 S.E.2d at 407. We held

> [a] child's uncertainty as to the time or particular day the offense charged was committed goes to the weight of the testimony rather than its admissibility, and nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed where there is sufficient evidence that the defendant committed each essential act of the offense.

Id. at 590, 589 S.E.2d at 407-08 (citing *State v. Brothers*, 151 N.C. App. 71, 81, 564 S.E.2d 603, 609 (2002)).

In the case sub judice, Marvin testified that defendant demanded he perform sexual acts at least once a week during the time Marvin was in the sixth and seventh grades, with only three or four weeks in which defendant did not commit sexual acts on or in the presence of Marvin. Marvin testified that during his sixth grade school year, defendant required that Marvin masturbate him once a week. In addition, with growing frequency over this time, defendant would make Marvin watch him masturbate, and make Marvin masturbate himself as well. Marvin testified that during his seventh grade school year, defendant made Marvin watch him masturbate but, also, made Marvin perform fellatio on him once a week. Upon arrest, defendant was charged with thirty-six counts of sexual acts—twenty-four counts of indecent liberties with a child, six counts of first-degree statutory sex offense with a child under the age of thirteen, and six counts of second-degree sex offense.

In his testimony, Marvin clearly described discrete instances of different types of sexual acts perpetrated upon him by defendant over a long period of time. Taking this evidence, in the light most favorable to the State, it was sufficient to withstand defendant's motion to dismiss the charges against him. *See id.*

[2] Defendant further argues that because the indictments do not distinguish the separate acts, there is a possibility the jury verdicts were not unanimous as to all of the convictions. We note the trial court was not presented with this argument.

Generally, a failure to object to an alleged error of the trial court precludes the defendant from raising the issue on appeal. However, "[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." *Id.* at 592, 589 S.E.2d at 409. We direct defendant's attention to *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006), in conjunction with *Wiggins*, 161 N.C. App. 583, 589 S.E.2d 402.

The defendant in *Lawrence* was indicted by short-form indictment and, in pertinent part, tried on five counts of first-degree statutory rape and three counts of taking indecent liberties with a child. *Lawrence*, 360 N.C. at 372, 627 S.E.2d at 611. The indictments charging defendant with five counts of first-degree statutory rape each listed the dates of offense as "May 1, 1999 thru December 6, 2000" and

gave indistinguishable descriptions of the act giving rise to the charge. *Id.* at 372-73, 627 S.E.2d at 612. The indictments charging defendant with three counts of taking indecent liberties with a child were likewise identical as to the dates of offense listed and the description of the act committed. *Id.* at 373, 627 S.E.2d at 611-12. Among the indictments for first-degree statutory rape, as well as those for taking indecent liberties with a child, the most substantial distinction was the case number assigned to each indictment. *Id.* at 373, 627 S.E.2d at 611-12. After hearing the evidence, a jury, in pertinent part, found the defendant guilty of five counts of first-degree statutory rape and three counts of taking indecent liberties with a child. *Id.* at 372, 627 S.E.2d at 611. On appeal, the defendant argued "the indictments lack[ed] [the] specific details [necessary] to link them to specific acts and incidents; thus, the court [could]not be sure that jurors unanimously agreed that the State . . . proved each element that support[ed] the crime charged in the indictment . . . ." *Id.* at 373, 627 S.E.2d at 612. As to the charges for taking indecent liberties with a child, our Supreme Court concluded that "a defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the indictments lacked specific details to identify the specific incidents." *Id.* at 375, 627 S.E.2d at 613.

In overruling the *Lawrence* defendant's argument challenging the unanimity of the jury's verdict on the five counts of first-degree statutory rape, the Court noted the facts and reasoning in *Wiggins*: "the victim testified that she had intercourse with [the] defendant multiple times a week for an extended period of time, but during her testimony she only specifically recounted four incidents of intercourse with defendant." *Id.* at 375, 627 S.E.2d at 613 (citing *Wiggins*, 161 N.C. App. at 586, 593, 589 S.E.2d at 405, 409). Given this testimony and noting that the *Wiggins* defendant was indicted on only two counts of statutory sexual offense and five counts of statutory rape, "there was no danger of a lack of unanimity between the jurors with respect to the verdict." *Id.*

Here, the victim testified that that he was forced to masturbate defendant and perform fellatio weekly over a two year period, with "perhaps only three or four weeks that defendant did not engage [the victim] in those sex acts." Defendant was indicted on six counts of first-degree statutory sex offense with a child under the age of thirteen, six counts of second-degree sex offense, and twenty-four counts

of indecent liberties with a child. Considering this testimony in light of the holdings in both *Lawrence* and *Wiggins* we find no danger of a lack of unanimity between jurors as to the thirty-six guilty verdicts. *See id.* Defendant's argument is overruled.

Finally, in light of our opinion finding no error in the trial court's denial of defendant's motions to dismiss, we need not further review defendant's request to vacate the trial court order requiring lifetime satellite-based monitoring.

No error.

Judges GEER and BEASLEY concur.

ROGER SCOTT HOOTS PETITIONER v. MIKE ROBERTSON, COMMISSIONER OF THE STATE OF NORTH CAROLINA, DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES, RESPONDENT

No. COA10-1119

(Filed 2 August 2011)

Motor Vehicles—driving while impaired—refusal to submit to chemical analysis—suspension of driving privileges proper

The trial court erred in reversing the suspension of petitioner's driving privileges by the Division of Motor Vehicles. There was evidence in the record supporting the finding that petitioner refused to submit to a chemical analysis and the trial court was bound by this finding. The affidavit of Trooper Campbell complied with the provisions of N.C.G.S. § 20-16.2(c1).

Appeal by Respondent from order entered 26 May 2010 by Judge Vance Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 13 April 2011.

No brief filed for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General John W. Congleton, for respondent.

STEELMAN, Judge.

Where there was evidence in the record supporting Hearing Officer Campbell's finding that petitioner's refusal to submit to a

chemical analysis occurred at 3:47 a.m. on 13 June 2009, the trial court was bound by this finding. The affidavit of Trooper Campbell complied with the provisions of N.C. Gen. Stat. § 20-16.2(c1) (2009) and the trial court erred in reversing the suspension of petitioner's driving privileges by the Division of Motor Vehicles.

I. Factual and Procedural Background

Early in the morning of 13 June 2009, Trooper R.O. Campbell (Trooper Campbell) of the North Carolina Highway Patrol observed a vehicle failing to maintain lane control on U.S. Highway 311. Suspecting that the driver was impaired, Trooper Campbell stopped the vehicle. Trooper Campbell then administered the Horizontal Gaze Nystagmus test and an Alco-sensor test to determine whether the driver, Roger Scott Hoots (petitioner), was driving while impaired. Both tests were positive and petitioner was arrested for driving while impaired. Trooper Campbell took petitioner to Archdale for administration of an Intoximeter test. Trooper Campbell advised petitioner of his rights, pursuant to N.C. Gen. Stat. § 20-16.2(a), and requested that he submit to a chemical analysis of his breath. After three attempts, petitioner failed to provide a valid breath sample to the Intoximeter. Trooper Campbell marked box fourteen on form DHHS 3907 (Affidavit and Revocation Report), indicating that petitioner had willfully refused to submit to a chemical analysis. This refusal was noted as occurring at 3:45 a.m. on form DHHS 4081 (Rights of Person Requested to Submit to a Chemical Analysis). The Intoximeter test ticket, DHHS 4082, however, registered petitioner's third failed attempt as occurring at 3:47 a.m.

Subsequently, a hearing was held before Hearing Officer G.M. Campbell (H.O. Campbell) to determine whether Hoots' license should be suspended for refusal to submit to a chemical analysis pursuant to N.C. Gen. Stat. § 20-16.2(d). Trooper Campbell testified that the refusal had occurred at 3:47 a.m., not 3:45 a.m., and that he had made an error in his paperwork.

H.O. Campbell found that the refusal took place at 3:47 a.m. and not 3:45 a.m.. He noted that the time was correctly recorded on form DHHS 4082, the "test ticket", which was attached to the affidavit. H.O. Campbell found that all the elements of N.C. Gen. Stat. § 20-16.2(c1) had been met and upheld the revocation of petitioner's license.

Petitioner filed a Petition for Review of Administrative Ruling in Randolph County Superior Court. Prior to hearing in Randolph

County, petitioner filed a Motion for Summary Judgment alleging that the Trooper's affidavit was not properly executed prior to revocation of his driver's license in violation of N.C. Gen. Stat. § 20-16.2(d). On 3 May 2010, the trial court granted this motion, concluding that the affidavit was not properly executed because "the time listed for the refusal on the affidavit was 3:45 a.m., two minutes prior to the time listed for the refusal on the Intoximeter test ticket."

Respondent appeals.

II. Analysis

Respondent contends the trial court erred in holding a clerical error on a law enforcement officer's affidavit under N.C. Gen. Stat. § 20-16.2(d) divests the division of motor vehicles of its authority to suspend the driving privileges of a person who has willfully refused to submit to a chemical analysis when charged with an implied consent offense, as is required by the statute, where the error does not involve an element of the offense of willful refusal. We agree.

A. Standard of Review

"The superior court review shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license." N.C. Gen. Stat. § 20-16.2(e). Questions of statutory interpretation of a provision of the Motor Vehicle Laws of North Carolina are questions of law and are reviewed *de novo* by this Court. *In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010).

B. Inconsistent Attachments to Trooper's Affidavit

N.C. Gen. Stat. § 20-16.2(c1) outlines the procedure for reporting results and refusals of chemical analysis tests to the Division of Motor Vehicles. N.C. Gen. Stat. § 20-16.2 (2009). The statute provides that when a person refuses to submit to a chemical analysis, the officer and chemical analyst should go before the proper official to execute an affidavit stating "[t]he results of any tests given or that the person willfully refused to submit to a chemical analysis." N.C. Gen. Stat. § 20-16.2(c1)(5). After receiving a "properly executed affidavit[,]" the Division must notify the person charged that their license to drive is revoked for twelve months. N.C. Gen. Stat. § 20-16.2(d).

Trooper Campbell's clerical error on form DHHS 4081 did not render the affidavit improperly executed. First, the Superior Court was

limited in its review of H.O. Campbell's decision to "whether there is sufficient evidence in the record to support [H.O. Campbell's] findings of fact and whether the conclusions of law are supported by the findings of fact and whether [H.O. Campbell] committed an error of law in revoking the license." N.C. Gen. Stat. § 20-16.2(e). Trooper Campbell's affidavit had two attachments, forms DHHS 4081 and 4082. Form 4081 showed the refusal took place at 3:45 a.m. form 4082 showed the refusal took place at 3:47 a.m. Trooper Campbell testified that he made an error in his paperwork. H.O. Campbell resolved the conflict between the two attachments, by ruling that the refusal occurred at 3:47 a.m. There was sufficient evidence in the record to support H.O. Campbell's finding that the refusal took place at 3:47 a.m. The Superior Court was bound by H.O. Campbell's finding that the refusal took place at 3:47 a.m. and erred by holding the affidavit was not properly executed.

Further, N.C. Gen. Stat. § 20-16.2(c1) requires that the affidavit of the charging officer state whether the person charged "willfully refused to submit to chemical analysis." N.C. Gen. Stat. § 20-16.2(c1)(5). Nowhere in the statute does it require that the time of refusal be set forth in the affidavit. All that is required is that the fact of the refusal be stated in the affidavit. *Id.* The statutory requirements were met by the affidavit, which stated that petitioner "willfully refused to submit to a chemical analysis."

Before the trial court, petitioner relied upon *Lee v. Gore* to support his argument that the affidavit was not "properly executed." *Lee v. Gore*, ___ N.C. App. ___, ___, 698 S.E.2d 179, 186 (2010), *writ of supersedeas granted*, ___ N.C. ___, ___, 702 S.E.2d 215 (2010), *temporary stay granted*, ___ N.C. ___, 702 S.E.2d 216 (2010). In *Lee*, the issue was whether the officer properly executed the affidavit. The officer did not check box fourteen on the Affidavit and Revocation Report to indicate that the driver willfully refused to submit to a chemical analysis. *Id.* at ___, 698 S.E.2d at 180-81. Thus, the affidavit in *Lee* did not meet the requirement of N.C. Gen. Stat. § 20-16.2(c1)(5) and was not properly executed. *Id.* at ___, 698 S.E.2d at 188.

In the instant case, box fourteen on the Affidavit and Revocation Report was checked, indicating petitioner willfully refused to submit to a chemical analysis. The affidavit was properly executed in accordance with N.C. Gen. Stat. § 20-16.2(c1) because the statute does not require that the affidavit state when the refusal took place, only that there was in fact a refusal. By virtue of a properly executed affidavit, the Division of Motor Vehicles was empowered to suspend the driving

privileges of petitioner. N.C. Gen. Stat. § 20-16.2(d). The trial court erred by granting summary judgment for petitioner due to the clerical error made on the DHHS 4081, and the order must be reversed and remanded to the Superior Court for disposition in accordance with this opinion.

REVERSED and REMANDED.

Judges STEPHENS and HUNTER, JR. concur.

STEPHANIE T. MARTIN, PLAINTIFF v. KILAUEA PROPERTIES, LLC, DEFENDANT

No. COA10-1146

(Filed 2 August 2011)

Landlord and Tenant—deck collapse—hazard not known to landlord

The trial court correctly granted summary judgment for defendant landlord in an action by a visitor of the tenant who was injured when a portion of a deck collapsed. No evidence of the defective condition existed when the apartment was leased; defendant had no knowledge of the potential hazard, created when the tenant's fiancé removed a planter; and the deck was not a common area for the two apartments in the building.

Appeal by plaintiff from judgment entered 1 June 2010 by Judge John E. Nobles, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 23 March 2011.

Pritchett & Burch, PLLC, by Lloyd C. Smith, Jr., and S. Adam Stallings, for plaintiff-appellant.

Johnson, Lambeth, & Brown, by Maynard M. Brown, for defendant-appellee.

BRYANT, Judge.

Where a landlord lacks knowledge of a hazardous condition created on his leased premises by his tenant, he cannot be held liable for harm caused to third parties by that condition. Therefore, we affirm the trial court's grant of defendant's motion for summary judgment.

Facts and Procedural History

On 19 January 2005, defendant, Kilauea Properties, Inc., purchased a residence at 400 Spartanburg Ave., Carolina Beach, New Hanover County. The property was divided into two apartments, with the second-floor apartment accessible only by a staircase which ended in a porch and deck that partially wrapped around the second-floor apartment. When defendant purchased the property both apartments were rented, and those rentals continued under defendant's ownership. Amy Wallace and her fiancé, Justin Marshall, resided in the first-floor apartment when defendant purchased the property. They later moved into the second-floor apartment when it became vacant six months later.

On 8 April 2006, plaintiff, a friend of Ms. Wallace's, went to Ms. Wallace's apartment to visit. Around 10:00 p.m., plaintiff went out onto the deck to smoke a cigarette. While walking around, plaintiff stepped into a corner of the deck that previously held a planter box. That portion of the deck immediately gave way, causing plaintiff to fall to the ground below. Plaintiff suffered a neck fracture and lacerations to her arm.

Plaintiff filed a complaint on 24 November 2008, alleging that defendant was negligent in maintaining a leased residential property in an unsafe condition.[1] On 16 January 2009, defendant filed its answer denying plaintiff's allegations of negligence. Defendant also raised the issues of contributory negligence on behalf of plaintiff as well as insulated negligence.

On 28 April 2010, defendant filed for summary judgment pursuant to Rule 56. On 1 June 2010 the trial court granted defendant's motion for summary judgment. Plaintiff appeals.

On appeal, plaintiff argues that the trial court erred in granting summary judgment for defendant because there exist genuine issues of material fact. Specifically, plaintiff contends that, as a residential landlord, defendant failed to properly delegate to the tenant the sole responsibility to repair hazardous conditions and defects to its property and that defendant had a duty to protect third-parties from hazardous conditions on the property when such individuals were lawful visitors on the premise. We disagree.

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1. No claim was filed against the tenant, Amy Wallace.

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

Von Viczay v. Thoms, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000) (citation omitted). "[Our Court] review[s] a trial court's grant of summary judgment *de novo*." *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006) (citation omitted).

> It is well settled that summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c) (1990) (emphasis added). . . . It is only in exceptional negligence cases that summary judgment is appropriate.

Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP, 350 N.C. 214, 219-20, 513 S.E.2d 320, 324-25 (1999) (internal citations omitted).

> To establish a *prima facie* case of actionable negligence, a plaintiff must allege facts showing: (1) defendant owed plaintiff a duty of reasonable care; (2) defendant breached that duty; (3) defendant's breach was an actual and proximate cause of plaintiff's injury; and (4) plaintiff suffered damages as the result of defendant's breach.

Winters v. Lee, 115 N.C. App. 692, 694, 446 S.E.2d 123, 124 (1994) (citations omitted).

> [W]hen third parties are injured as the result of any defective condition in leased premises he may have recourse against the lessee, but not against the lessor. The liability may, however, be extended to the landlord or owner—(a) When he contracts to repair; (b) where he knowingly demises the premises in a ruinous condition or in a state of nuisance; (c) where he authorizes a wrong.

Wilson v. Dowtin, 215 N.C. 547, 550, 2 S.E.2d 576, 577 (1939) (citations omitted).

Plaintiff contends that, as a third-party, defendant owed her a duty to protect against hazardous conditions on the leased premises. Plaintiff argues that because the planter box on the deck existed

when defendant purchased the property, defendant had a duty to ensure the safety of that area.

North Carolina General Statutes section 42-42(a)(2) requires that a landlord shall "[m]ake all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." N.C. Gen. Stat. § 42-42(a)(2) (2009). This statutory duty to maintain the premises in habitable condition may be delegated to a tenant but does not relieve the landlord of his obligations under section 42-42. "The landlord is not released of his obligations under any part of this section by the tenant's explicit or implicit acceptance of the landlord's failure to provide premises complying with this section, whether done before the lease was made, when it was made, or after it was made . . . ." N.C. Gen. Stat. §42-42(b) (2009). However, even under §42-42(a)(4), "a landlord must have knowledge, actual or imputed, or be notified, of a hazard's existence before being held liable in tort." *DiOrio v. Penny*, 331 N.C. 726, 729, 417 S.E.2d 457, 459 (1992) (summary judgment was appropriate for defendant-landlord where plaintiff-tenant could not prove that defendant had knowledge of staircase being hazardous).

In the instant case plaintiff is a third-party to defendant's landlord-tenant relationship with Ms. Wallace.

> The general and basic rule is that when third parties are injured as the result of any defective condition in leased premises he may have recourse against the lessee, but not against the lessor. The liability may, however, be extended to the landlord . . . where he knowingly demises the premises in a ruinous condition . . . .

Boyer, 46 N.C. App. at 48, 264 S.E.2d at 366 (emphasis suppressed). Where a ruinous or hazardous condition does exist at the time a premise is leased, the landlord may be held liable only where the landlord knew or should have known of the defective condition and had reason to expect that the tenant would not realize it and where the tenant did not or could not have known of the risk. *Id.* at 50-51, 264 S.E.2d at 367-68 (citing Restatement (Second) of Prop. §17.1).

Here, no evidence of defective conditions existed at the time the apartment was leased. According to Wallace, the planter box contained dirt and a terra cotta pot, and was on an unused portion of the deck. This area of the deck was in this condition when defendant purchased the property, and while Wallace was a tenant. However, about one week prior to plaintiff's fall, Wallace's fiancé, Marshall, removed the dirt and pot from this area. After the dirt and pot were removed,

Wallace and Marshall discussed the "potential danger," yet neither notified defendant of the situation, nor did they warn plaintiff during her visit. Accordingly, as defendant had no knowledge of the planter area being potentially hazardous due to Mr. Marshall's alterations of it, defendant had no duty to protect plaintiff from such a risk.

Plaintiff also argues that the deck was a common area for which defendant owed a duty of maintenance.

An area which is utilized exclusively by one tenant, rather than by groups of tenants, is not deemed a common area. *Compare O'Neal v. Kellett*, 55 N.C. App. 225, 284 S.E.2d 707 (1981) (a common area of defendant's premises is one intended for use by all tenants residing there).

Here, defendant's rental property consisted of two apartments. The apartment on the second floor was accessible only by stairs, and plaintiff acknowledges that she did not use those stairs or deck area until Wallace moved from the first- to the second-floor apartment. In addition, Wallace testified that she held exclusive use of the deck, maintained the planter area, and placed furniture on the deck. As such, the deck was not intended as a common area but rather for the use of the second-floor tenant. Furthermore, as the hazardous nature of the planter area was not reported to defendant, defendant had no way of knowing about the risk until plaintiff fell. Accordingly, the trial court did not err in granting summary judgment to defendant. *See Boyer*, 46 N.C. App. at 48, 264 S.E.2d at 366.

Affirmed.

Judges ELMORE and GEER concur.

STATE OF NORTH CAROLINA v. CEDRIC GERRARD PARKER

No. COA10-672

(Filed 2 August 2011)

Appeal and Error—notice of appeal—open court—transcript not included in appeal—no jurisdiction

An appeal by an armed robbery defendant was dismissed for lack of jurisdiction where defendant stated in his brief that he gave notice of appeal in open court but did not include a copy of the transcript.

Appeal by defendant from judgment entered on or about 19 January 2010 by Judge William Z. Wood, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 16 November 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General E. Michael Heavner, for the State.

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

STROUD, Judge.

Defendant appeals from his conviction for robbery with a dangerous weapon. As defendant failed to satisfy the jurisdictional requirement of providing proper notice of appeal, we dismiss his appeal.

I. Background

On 15 June 2009, Cedric Gerrard Parker ("defendant") was indicted for robbery with a dangerous weapon and on 20 July 2009 for possession of a firearm by a felon. Defendant was also indicted on one count of first-degree kidnapping on 14 September 2009. The charges of possession of a firearm by a felon and robbery with a dangerous weapon were tried together before a jury at the 21 September 2009 Criminal Session of Superior Court, Forsyth County. On 23 September 2009, a jury convicted defendant of robbery with a firearm but acquitted defendant as to the possession of a firearm by a felon charge. On 2 October 2009, the trial court entered an order setting aside the jury verdict as being inconsistent and granting defendant a new trial. That order was stayed pending the State's petition for a writ of *certiorari* to this Court to review the 2 October 2009 order. This Court granted the State's request for *certiorari* and, by order without an opinion, overturned the trial court's 2 October 2009 order setting aside the verdict, vacated the trial court's order for a new trial, and remanded the case "for entry of judgment consistent with the verdict

returned by the jury." On remand, defendant pled guilty to second-degree kidnapping, on the condition that the second-degree kidnapping charge be consolidated with the robbery with a dangerous weapon conviction.[1] On the consolidated conviction of robbery with a dangerous weapon and second-degree kidnapping, the trial court sentenced defendant to a term of 105 to 135 months imprisonment.

II. Notice of Appeal

Defendant raises several substantive issues on appeal. However, the record before us raises an issue as to whether defendant gave proper notice of appeal and provided that notice to this Court. North Carolina Rule of Appellate Procedure 4(a), in pertinent part, states that

> [a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by
>
> (1) giving oral notice of appeal at trial, or
>
> (2) filing notice of appeal with the clerk of superior court . . . within fourteen days after entry of the judgment or order[.]

(emphasis added). "[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 321, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005). Additionally, N.C.R. App. P. 9(a) states that appellate review is based "solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9." Specifically, N.C.R. App. P. 9(a)(3), in pertinent part, states that "[t]he record on appeal in criminal actions shall contain: . . . . h. a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally[.]" First, we note that there is no written notice of appeal in the record on appeal. *See* N.C.R. App. P. 4(a). Even though, defendant states in his brief on appeal that "[i]n open court immediately after sentencing on January 19, 2010 the defendant gave notice of appeal to the North Carolina Court of Appeals[,]" defendant failed to include a copy of the transcript as required by N.C.R. App. P. 9(a)(3) showing

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1. On 6 October 2008, defendant was also indicted for one count of failure to register as a sex offender in violation of North Carolina General Statute § 14-208.11; as part of this plea agreement he also pled guilty of this charge, and, in a separate judgment, was sentenced to a term of 25 to 30 months imprisonment for this conviction. However, this conviction is not at issue in this appeal.

when he gave oral notice appeal in open court.[2] We also note that the record includes appellate entries entered 19 January 2010 "which indicate through boilerplate that defendant gave notice of appeal, [but] mere appellate entries are insufficient to preserve the right to appeal." *State v. Hughes*, ___ N.C. App. ___, ___, 707 S.E.2d 777, 778 (2011) (quoting *In re Me.B.*, *M.J.*, *Mo.B.*, 181 N.C. App. 597, 600, 640 S.E.2d 407, 409 (2007)); *State v. Blue*, 115 N.C. App. 108, 113, 443 S.E.2d 748, 751 (1994) (concluding that the defendant did not preserve his right to appeal where "[t]he record on appeal include[d] appellate entries . . . but contained no written notices of appeal as required by Rule 4 of the Rules of Appellate Procedure."). Without the trial transcript, we cannot make a determination as to whether defendant gave proper oral notice of appeal to this Court and can only guess as to whether this Court has jurisdiction to hear defendant's appeal. *See McCoy*, 171 N.C. App. at 638, 615 S.E.2d at 321; *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) ("A jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal . . . . Stated differently, a jurisdictional default brings a purported appeal to an end before it ever begins.").

It is well established that "[i]t is the appellant's duty and responsibility to see that the record is in proper form and complete." *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644-45 (1983) (citing N.C.R. App. P. 9 and *State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241 (1969), *death sentence vacated*, 403 U.S. 948, 29 L. Ed. 2d 859 (1971)). Even though the record indicates there was a trial transcript ordered by the clerk of court in Forsyth County, defendant provides no indication why the trial transcript was not included in the record on appeal. Therefore, we do not have jurisdiction to hear defendant's appeal as he failed to provide proper record of his notice of appeal. Accordingly, we dismiss defendant's appeal.

DISMISSED.

Judges BRYANT and BEASLEY concur.

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2. The only portion of the trial transcript included in the record on appeal is the portion where the trial court gave its charge to the jury.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 AUGUST 2011)

BEACHES WEST DEVS., LTD. v. N.C. EYE, EAR, NOSE & THROAT, P.A. No. 10-1545	Durham (09CVS5126)	Affirmed
BERTHELOT v. MOUNTAIN AREA HEALTH EDUC. CTR., INC. No. 10-1402	Ind. Comm. (693582) (764219)	Affirmed
CHURCH v. DECKER No. 11-25	Caldwell (01CVD1391)	Reversed and Remanded
GRAHAM v. KEITH No. 10-917	New Hanover (07CVD4129)	Affirmed
HOWE v. HOWE No. 10-1230	Caldwell (10CVD710)	Affirmed in Part and Reversed in Part
IN RE D.L.B. No. 11-132	Nash (08JT66) (08JT68-69)	Affirmed
IN RE D.W. No. 11-134	Orange (07JT120)	Affirmed
IN RE ESTATE OF REEDER No. 10-618	Alamance (09E325)	Reversed and Remanded
IN RE G.W.H. No. 11-186	Robeson (07JT408)	Affirmed
IN RE J.K.L. No. 10-1053	Mecklenburg (07JB926)	Vacated and remanded in part; affirmed in part
IN RE J.R.M. No. 11-211	Cumberland (06JT598-600)	Affirmed
IN RE J.Y. No. 11-166	Bertie (10JB13)	Vacated and Remanded
IN RE M.G. No. 11-136	Beaufort (09JA68-71)	Affirmed in part, remanded in part

IN RE T.E. No. 11-249	Johnston (10J65-66)	Affirmed
IN RE U.R.M. No. 11-421	Dare (08JT31)	Affirmed
MCCALL v. NORMAN No. 10-1612	Transylvania (09CVD22)	Vacated and Remanded
PHELPS v. STABILUS No. 10-1097	Indus. Comm. (563760)	Dismissed
PRICE v. MENTAL HEALTH ASS'N No. 10-1366	Indus. Comm. (582312)	Affirmed
STATE v. AVENT No. 10-1406	Wake (08CRS65787)	No Error
STATE v. AYERS No. 10-1596	Cleveland (08CRS3959) (08CRS54855)	No Error
STATE v. BURCH No. 10-1227	Guilford (07CRS106006)	Dismissed in part; no error in part
STATE v. CARR No. 10-1452	Pender (09CRS53226)	No Error
STATE v. CHERRY No. 10-988	Mecklenburg (09CRS246645-46) (09CRS82214)	No Error
STATE v. DAVIS No. 10-1441	Hertford (10CRS583) (10CRS584) (94CRS1723-24) (94CRS4560)	Vacated and Remanded
STATE v. DUNSTON No. 10-1490	Vance (08CRS54898)	No Error
STATE v. GAINES No. 10-1327	Mecklenburg (08CRS217103)	No Error
STATE v. HULSE No. 10-1417	Wayne (08CRS51023)	Affirmed; Motion for Appropriate Relief dismissed without prejudice.

STATE v. JOHNSON No. 10-1031	Guilford (08CRS107611) (08CRS107613) (08CRS107619)	No error in part; reversed in part.
STATE v. JOHNSON No. 10-1293	Pitt (09CRS60157)	Affirmed
STATE v. JOHNSON No. 11-56	Durham (07CRS52664-65) (08CRS12130-31)	No prejudicial error
STATE v. LEWIS No. 10-1538	Gaston (09CRS13835) (09CRS59367) (09CRS59368)	No Error
STATE v. MOORE No. 10-1383	Edgecombe (06CRS51988)	Affirmed
STATE v. PERRY No. 11-78	Rowan (07CRS50404-05) (07CRS50603)	No Error
STATE v. PRESLEY No. 11-29	Brunswick (09CRS50338)	No error. Remand for clerical error.
STATE v. RAMEY No. 10-1197	Forsyth (09CRS51314-15) (09CRS52891-92)	No error in part; remanded for resentencing in part.
STATE v. TRAMMELL No. 10-1606	Haywood (10CRS468) (10CRS732)	No Error in Part; Vacated and Remanded in Part.
STATE v. WILLIAMS No. 10-1482	Forsyth (09CRS3309) (09CRS52017)	No Error
STATE v. WOODARD No. 10-1078	Buncombe (10CRS239-242)	No Error
SYKES v. MOSS TRUCKING No. 08-1039-2	Indust. Comm. (IC106105)	Affirmed
VARUGHESE v. DEUTSCHE BANK NAT'L TRUST No. 11-133	Orange (09CVS1037)	Dismissed

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, PLAINTIFF-APPELLEE v. ROBERT M. TALFORD, DEFENDANT-APPELLANT

No. COA10-897

(Filed 2 August 2011)

1. Quantum Meruit—hospital charges—damages—material issue of fact—summary judgment improper

The trial court erred in an action to recover hospital fees in *quantum meruit* by granting summary judgment in favor of plaintiff hospital on the issue of damages. There was a material issue of fact concerning whether the charges plaintiff billed defendant were reasonable for the goods and services rendered.

2. Quantum Meruit—hospital charges—guaranty claim—summary judgment improper

The trial court erred in an action to recover hospital fees in *quantum meruit* by granting summary judgment in favor of plaintiff hospital on the issue of damages. Even if summary judgment in favor of plaintiff was improper on its implied contract claim, summary judgment was not proper based on plaintiff's guaranty claim.

Appeal by Defendant from order entered 1 April 2010 by Judge Timothy L. Patti in Superior Court, Mecklenburg County. Heard in the Court of Appeals 13 December 2010.

The McIntosh Law Firm, P.C., by Robert G. McIntosh, Regina Wheeler Swinea, and James C. Fuller, for Plaintiff-Appellee.

Robert M. Talford, Defendant-Appellant, pro se.

McGEE, Judge.

Robert M. Talford (Defendant) was admitted to a medical facility of The Charlotte Mecklenburg Hospital Authority (Plaintiff) on 5 November 2007 and was discharged on 8 November 2007. Plaintiff does business as Carolina HealthCare System. Plaintiff provided medical care to Defendant and subsequently billed Defendant $14,419.57 for services rendered. Defendant did not pay the $14,419.57 charged by Plaintiff. Plaintiff filed a complaint against Defendant and his wife, Miriam Talford (together, Defendants), on 15 October 2009. Plaintiff's complaint included claims for "implied contract and quantum meruit" and "guaranty of payment," and requested compensatory damages in

the amount of $14,419.57. Plaintiff also requested attorney's fees and asked that costs be taxed against Defendants. Defendants answered on 28 December 2009. Plaintiff voluntarily dismissed Miriam Talford from the action on 2 February 2010 and moved for summary judgment against Defendant on that same date. In an order entered 1 April 2010, the trial court granted Plaintiff's motion for summary judgment. Defendant appeals.

I.

[1] In Defendant's sole argument, he contends the trial court erred in granting summary judgment in favor of Plaintiff on the issue of damages. We agree.

> The North Carolina Rules of Civil Procedure provide that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The party moving for summary judgment has the burden of establishing the lack of any triable issue. The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial. All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion.

Collingwood v. G.E. Real Estate Equities, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted). "On appeal, an order allowing summary judgment is reviewed *de novo*." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) (citation omitted).

In the present case, Defendant argues that summary judgment was improper because there was a material issue of fact concerning whether the charges Plaintiff billed Defendant were reasonable for the goods and services rendered. Therefore, the trial court's grant of summary judgment on the issue of Defendant's liability stands and we consider only whether there was any genuine issue of material fact concerning the measure of damages awarded to Plaintiff. *See Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555 (1988). Although the

dissenting opinion concludes that the trial court granted summary judgment based upon a theory of direct breach of contract, the dissent agrees that, ultimately, the dispositive issue is whether the trial court properly granted summary judgment with respect to damages based upon *quantum meruit*, which is the only issue for analysis currently before us.

"Our cases hold that the measure of damages for unjust enrichment [implied contract or *quantum meruit*] is the reasonable value of the goods and services to the defendant." *Booe*, 322 N.C. at 570, 369 S.E.2d at 555 (citations omitted).

> [W]hen a physician renders professional services, the law implies a promise on the part of the patient who received the benefit of the services to pay what the services are reasonably worth, absent an agreement that the services were rendered gratuitously. Failure to agree on the amount of compensation entitles the physician to the reasonable value of his services, even where he ministers treatment to a person incapable of mutuality of assent.

Forsyth Co. Hospital Authority, Inc. v. Sales, 82 N.C. App. 265, 266, 346 S.E.2d 212, 214 (1986) (citations omitted). This implied promise by a patient to pay a *reasonable* charge for medical services "applies equally to hospitals [and] health care providers." *Id.* at 268, 346 S.E.2d at 215.

Plaintiff alleges in its complaint that: "The fair and reasonable value of the goods and services [provided by Plaintiff to Defendant during Defendant's hospital stay] . . . is not less than Fourteen Thousand Four Hundred Nineteen Dollars and 57/100 ($14,419.57)." Attached to Plaintiff's complaint as "Exhibit A" was a "Legal Account Balance Summary Sheet" indicating Plaintiff charged Defendant $14,419.57 for services rendered. This account balance sheet does not itemize the charges or state what services Plaintiff rendered to Defendant. Plaintiff filed affidavits stating that the unpaid charges it had billed Defendant amounted to $14,419.57, and that this amount was reasonable. "[A] bill for services rendered, standing alone, is insufficient to support an award of damages[;] [however,] it is some evidence of the value of one's services." *Environmental Landscape Design v. Shields*, 75 N.C. App. 304, 307, 330 S.E.2d 627, 629 (1985) (citations omitted).

In *Harrell v. Construction Co.*, 41 N.C. App. 593, 255 S.E.2d 280 (1979), our Court held that ledger sheets showing an account of work the plaintiff contended it had performed for the defendant was insuf-

ficient to prove the reasonable value of the services the plaintiff had performed for the defendant in a claim for *quantum meruit*. Our Court held that the defendant's motion for involuntary dismissal should have been granted and the case was remanded for a new trial because the ledger sheets alone were held insufficient to support the damages award granted to the plaintiff. *Id*. Our Court in *Harrell* stated:

> The measure of damages under an implied contract is the reasonable value of the services accepted and appropriated by the defendant. "The general rule is that when there is no agreement as to the amount of compensation to be paid for services, the person performing them is entitled to recover what they are reasonably worth, based on the time and labor expended, skill, knowledge and experience involved, and other attendant circumstances, rather than on the use to be made of the result or the benefit to the person for whom the services are rendered." "Damages are never presumed. The burden is always upon the complaining party to establish by evidence such facts as will furnish a basis for their assessment, according to some definite and legal rule." "The amount to be paid is not the value of the services to the recipient, nor should his financial condition be taken into consideration in determining the value of the services performed. Many factors serve to fix the market value of an article offered for sale. Supply, demand, and quality (which is synonymous with skill when the thing sold is personal services) are prime factors. The jury [here the trial judge], when called upon to fix the value, must base its decision on evidence relating to the value of the thing sold. Without some evidence to establish that fact, it cannot answer. To do so would be to speculate." Plaintiff did not offer evidence as to the reasonable value or market value of its services, but merely stated what it was charging for these services as shown on [the ledger sheets].

Id. at 595-96, 255 S.E.2d at 282 (citations omitted), *but see Booe*, 322 N.C. at 571, 369 S.E.2d at 556 ("The Court of Appeals has held that an invoice or bill alone is not sufficient evidence to support a jury award as to the reasonable value of services. *Harrell v. Construction Co*., 41 N.C. App. 593, 255 S.E.2d 280. We expressly declined to rule on that question in *Harrell v. Construction [Co.]*, 300 N.C. 353, 266 S.E.2d 626. It is not necessary for us to decide this question in this case because there is more evidence than the amount billed to the defendants."). Therefore, our Supreme Court has not decided whether a bill for services rendered, standing alone, can be sufficient to support an

award of damages for a claim of *quantum meruit*. We are bound by the decisions from our Court that have addressed this issue. Further, most of the cases relied upon by Plaintiff, Defendant, our majority opinion, and the dissent, involve determinations of whether *the grant or denial of motions for directed verdict* were proper, not whether *the grant or denial of motions for summary judgment were proper*. As we will discuss in detail below, this is a critical distinction.

II.

Plaintiff states in its complaint that the services it rendered to Defendant were "reasonable given that they are standard charges rendered to all patients receiving similar types of services, they are within industry norms for similar facilities providing similar services at similar levels of care, and they are compliant with various published billing and charging regulations and guidelines[.]" Plaintiff's Director of Revenue Management, Sunny Sain, and Plaintiff's Manager of Patient Financial Services, James D. Robinson, filed affidavits to this effect. Defendant filed an affidavit on 24 March 2010, stating in relevant part the following: (1) Plaintiff charged Defendant $18.40 for one tablet of Diltiazem, but Defendant obtained thirty tablets of Diltiazem from his pharmacy for $23.00; (2) Plaintiff charged Defendant $406.50 for one unit of Enoxaparin sodium, whereas the "cost for this item is $278.00 for ten units;" (3) Plaintiff charged Defendant $1.45 for one 1.0 mg folic acid tablet, but Defendant could obtain thirty 1.0 mg folic acid tablets from a pharmacy for $4.00; and (5) Plaintiff's charges to Defendant "exceed[ed] the charges made and paid by other patients in . . . [D]efendant's medical condition."

In *Forsyth Co.*, our Court affirmed the grant of summary judgment in favor of a hospital for costs billed to a patient for medical services rendered. In explaining its decision, our Court stated:

> [The patient] did not challenge the amount of the hospital bill as not indicative of the reasonable value of the medical services rendered; therefore, summary judgment in favor of [the plaintiff hospital] for the amount of the bill is
>
> Affirmed.

Forsyth Co., 82 N.C. App. at 269, 346 S.E.2d at 215. In the case before us, Defendant expressly challenged the hospital bill relied upon by Plaintiff. We hold that the trial court erred in granting summary judgment in favor of Plaintiff on the issue of damages because Plaintiff's evidence concerning damages consisted entirely of a "bill" stating

that Plaintiff was owed $14,419.57, along with affidavits from its own employees stating that that amount was reasonable. Defendant challenged the reasonableness of that amount and, in his affidavit, provided specific challenges to amounts Defendant claims he was charged by Plaintiff for services. Based on the standards of review, and prior opinions of this Court and our Supreme Court, we hold that there existed a material issue of fact concerning the reasonableness of the $14,419.57 Plaintiff claims it is owed. This issue should have been submitted to the trier of fact. *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 352-53, 595 S.E.2d 778, 781 (2004) (citations omitted). In our holding, however, we are *not* suggesting that the testimony of Plaintiff's employees, as forecast in Plaintiff's affidavits, would be incompetent evidence to present at trial, since that issue is not before us. *See Hospital v. Brown*, 50 N.C. App. 526, 530, 274 S.E.2d 277, 280 (1981). We reverse that portion of the trial court's order granting summary judgment in favor of Plaintiff on the issue of the value of the services rendered and remand for further proceedings.

III.

The dissent cites to *Environmental Landscape* and *Booe* in support of its determination that summary judgment in favor of Plaintiff was proper. The critical distinction between the present case and *Environmental Landscape* and *Booe* is that the present case *was decided on summary judgment.* The dissent contends that *Environmental Landscape* and *Booe* are directly applicable to its analysis because "this Court has clearly stated that" the standard of review for summary judgment and directed verdict are "essentially the same." The dissent relies on *Nelson v. Novant Health Triad Region*, 159 N.C. App. 440, 583 S.E.2d 415 (2003), for this proposition. Our Court in *Nelson* stated:

> The standard of review for a directed verdict is essentially the same as that for summary judgment. When considering a directed verdict on review, this Court must establish "whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991) (citations omitted).

Id. at 442, 583 S.E.2d 415, 417 (2003). Our Court in *Nelson* cites no authority for its statement that these standards of review are "essentially the same." Our Supreme Court in *Davis* did not state this principle.

Rather the *Davis* Court simply stated: "The rules governing motions for summary judgment are now familiar learning, and it would serve no useful purpose to repeat them here. A concise statement of the rules appears in *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 376 S.E.2d 425 (1989)." *Davis*, 330 N.C. at 319, 411 S.E.2d at 135 (citation omitted). The standard of review as stated in *Collingwood* is the standard we cite above at the beginning of our analysis. *Davis* then cites the standard of review for directed verdict:

> The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict [JNOV], the question is 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. Where the motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for directed verdict, this Court has required the use of the same standard of sufficiency of evidence in reviewing both motions.

Id. at 322-23, 411 S.E.2d at 138 (citations omitted). The standards of review for summary judgment and directed verdict are the same in the following respects: (1) they both involve a determination of whether, as a matter of law, the non-moving party has the right to proceed; and (2) they both require the trial court to make this determination considering the relevant documents for summary judgment—or evidence for directed verdict—*in the light most favorable to the non-moving party*. Perhaps most relevant to our analysis, in the present case, the trial court was required to consider the relevant documents in the light most favorable to *Defendant*. Conversely, in *Environmental Landscape* and *Booe* the trial courts were required to consider the evidence presented at trial in the light most favorable to *the plaintiffs* in those cases.

We do not believe trial courts make the same determination on summary judgment as they make on motions for directed verdicts. On summary judgment, the trial court must consider "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." *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427. At the summary judgment stage, neither party has had the opportunity to

present evidence, or cross-examine. The parties have merely provided a forecast of evidence which may or may not accurately reflect the evidence ultimately presented at trial. However, on a motion for directed verdict, the trial court has had the opportunity to hear testimony and consider evidence presented. The parties have had the opportunity to cross-examine witnesses. Therefore: "The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis*, 330 N.C. at 322, 411 S.E.2d at 138; *see also Goodwin v. Investors Life Ins. Co.*, 332 N.C. 326, 329, 419 S.E.2d 766, 767 (1992) ("It is fundamental law that a motion by a defendant for a directed verdict under N.C.G.S. § 1A-1, Rule 50(a) of the Rules of Civil Procedure tests the legal sufficiency of the *evidence* to take the case to the jury and support a verdict for the plaintiff.") (emphasis added).

We do not believe the language in *Nelson*, that these standards of review are "essentially" the same, stands for the proposition that a trial court treats a review of pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, at the summary judgment stage in exactly the same manner that it treats the review of actual evidence presented at trial for the purposes of a directed verdict or JNOV. Nor do we believe this statement in *Nelson* constitutes a holding. Our Court in *Nelson* cited the standards of review for *both* summary judgment and directed verdict, *Nelson*, 159 N.C. App. at 442, 583 S.E.2d at 417, and we do not find that the statement cited by the dissent was necessary to the outcome in *Nelson*. *Easton v. J.D. Denson Mowing*, 173 N.C. App. 439, 442, 620 S.E.2d 201, 202-03 (2005) (citation omitted).

Following the dissent's reasoning, in *every* instance that a trial court grants a directed verdict after hearing the evidence, the trial court could have (and perhaps should have) granted summary judgment, even though it only considered the documents provided for in N.C. Gen. Stat. § 1A-1, Rule 56. Further, following the reasoning of the dissent, the *denial* of a directed verdict for one party would mean that summary judgment could (or should) have been granted for the *other* party.

Plaintiff moved for summary judgment, requiring the trial court to consider the materials presented in the light most favorable to the non-moving party—Defendant. The trial court granted summary judgment in favor of Plaintiff. The holdings in *Environmental Landscape* and *Booe*, the cases upon which the dissent relies, were that the *evi-*

dence presented at trial, when considered in the light most favorable to the *non-moving* parties, was sufficient for the denial of the defendants' motions for directed verdicts. According to the dissent, because our Courts in *Environmental Landscape* and *Booe* held that the evidence was sufficient to go to the jury when considered in the light most favorable to *the plaintiffs*, the trial court in the present case properly granted summary judgment to Plaintiff even though it was required to consider the relevant documents in the light most favorable to *Defendant*.

We cannot agree that the "in the light most favorable to the non-moving party" requirement is insignificant to our review of this case as related to *Environmental Landscape* and *Booe*. Neither *Environmental Landscape* nor *Booe* suggests that, had the *plaintiffs* in those cases moved for directed verdicts on the issue of damages, the trial court would have been compelled to grant those motions. The holdings in those cases only stand for the proposition that the evidence presented at trial was sufficient to support the juries' determinations of damages, not that the proper amounts of damages had been established as a matter of law. Our holding in the case before us, consistent with *Environmental Landscape* and *Booe*, is that the issue of damages needed to be decided by a trier of fact. *See Feibus & Co. v. Construction Co.*, 301 N.C. 294, 304-05, 271 S.E.2d 385, 392 (1980) (discussing the difference between evidence sufficient to create a jury question and evidence requiring judgment as a matter of law); *Bird v. Bird*, 193 N.C. App. 123, 130-31, 668 S.E.2d 39, 44 (2008), *aff'd* 363 N.C. 774, 688 S.E.2d 420 (2010) ("[I]t is not the function of this Court, or the trial court for that matter, to weigh conflicting evidence of record. Rather, in cases such as this, when there are genuine issues of material fact that are legitimately called into question, summary judgment should be denied and the issue preserved for the [fact finder].") (citation omitted); *Environmental Landscape*, 75 N.C. App. at 306, 330 S.E.2d at 628 ("In short, if plaintiff alleged and proved acceptance of services and the value of those services, it was entitled to go to the jury on *quantum meruit*.") (citation omitted).

IV.

Though we find the above distinction dispositive, we also note that the facts in *Environmental Landscape* and *Booe* are distinguishable from the facts in the present case. In *Environmental Landscape*, there was evidence that a different landscaper actually charged the same hourly rate for the same type of work as that charged by the plaintiff. This independent corroboration of the reasonableness of

the amount of damages is not present in the case before us. In the present case, we have only affidavits from Plaintiff's employees stating that the amounts charged to Defendant were reasonable as they were the same as would be charged by other hospitals. We do not find that Plaintiff's own statements concerning the reasonableness of the charges carries the same weight as specific evidence that an independent third party did, in fact, charge the same rates. The dissent contends that it is inappropriate for us to consider the source of the evidence presented by Plaintiff, as it amounts to a credibility judgment. Although we agree with the dissent that making a credibility determination at this stage of the process would be improper, we are not making any credibility determination; rather, we are observing that it was improper for *the trial court* to make a credibility determination *on summary judgment*. We hold *only* that it is the province of the trier of fact at trial, not the trial court on summary judgment, to weigh the evidence and assess the credibility of the witnesses. Our Court has addressed credibility in reversing a damages award based upon *quantum meruit* following trial, and considered the lack of independent or objective evidence to support a plaintiff's claim for a specific amount of damages:

> The only evidence supporting the awarded amount of $22,500 is plaintiff's own estimate, upon inquiry by the court, of the reasonable value of the services rendered and not paid for. As defendant points out, there was no effort by either plaintiff or the court to cast this figure in terms of the type of work done or the number of hours worked or to correlate it to any community or industry standard. Even though the $22,500 figure may be, in plaintiff's words, "extremely reasonable," especially in view of $32,150 prayed for in the Complaint, the evidence supporting that figure is clearly inadequate.

Paxton v. O.P.F., Inc., 64 N.C. App. 130, 134, 306 S.E.2d 527, 530 (1983); *see also Hood v. Faulkner*, 47 N.C. App. 611, 617 (1980) (citation omitted) ("Nor is the plaintiff's opinion that the amount of his bill is reasonable sufficient to sustain an award for such sum."). In *Austin v. Enterprises, Inc.*, 45 N.C. App. 709, 264 S.E.2d 121 (1980), a case where liability was established under a theory of *quantum meruit*, our Court stated:

> The sole issue presented concerns the worth of the services, and the burden of proof on that issue rests on the plaintiff. The rule of law is settled in this State that the trial judge cannot direct a verdict for the party with the burden of proof when that party's

> "right to recover depends upon the credibility of his witnesses." This is true even though the evidence be uncontradicted.

Id. at 710, 264 S.E.2d at 121 (citations omitted).

> The only evidence of the value of plaintiff's services in this case was the testimony of one partner in the firm that he "felt" $16.00 an hour to be a "reasonable" fee. No *independent or objective evidence* of the reasonable value of such services was offered. Plaintiff's proof clearly depends completely upon the credibility of its witness. *Although the defendant offered no evidence respecting the reasonable value of the services rendered it, it did deny that their worth as determined by the plaintiff was reasonable.* Such is *sufficient to raise an issue of fact as to the reasonable value of the services, and that question is for the jury.*
>
> It follows that the court erred in directing a verdict for the plaintiff. Accordingly, the judgment appealed from is reversed, and the cause is remanded for a new trial.

Id. at 710-11, 264 S.E.2d at 122 (citations omitted) (emphasis added); *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999) ("[i]f there is any question as to the weight of evidence, summary judgment should be denied") (citation omitted). Defendant's affidavit included the following paragraphs:

> 5. That [P]laintiff's charges exceed the charges made and paid by other patients in . . . [D]efendant's medical condition;
>
> 6. That . . . [P]laintiff's charges are not reasonable for the medical care necessary to control . . . [D]efendant's medical condition.

Though the dissent correctly states that this portion of Defendant's affidavit was not supported by any evidence in the record that it was based upon Defendant's personal knowledge, pursuant to *Austin*, this portion of Defendant's affidavit was relevant as it expressly denied the reasonableness of the worth of the goods and services provided by Plaintiff. *Austin*, 45 N.C. App. at 710-11, 264 S.E.2d at 122 ("Plaintiff's proof clearly depends completely upon the credibility of its witness. *Although the defendant offered no evidence respecting the reasonable value of the services rendered it, it did deny that their worth as determined by the plaintiff was reasonable. Such is sufficient to raise an issue of fact as to the reasonable value of the services, and that question is for the jury.")* (emphasis added).

Our Supreme Court has carved out very narrow exceptions where credibility may be determined as a matter of law—none of which apply in the present case. *Bank v. Burnette*, 297 N.C. 524, 537-38, 256 S.E.2d 388, 396 (1979).

> [W]hile credibility is generally for the jury, courts set the outer limits of it by preliminarily determining whether the jury is at liberty to disbelieve the evidence presented by movant. Needless to say, the instances where credibility is manifest will be rare, and courts should exercise restraint in removing the issue of credibility from the jury.

Id. at 538, 256 S.E.2d at 396 (citations omitted); *see also Murdock v. Ratliff*, 310 N.C. 652, 659, 314 S.E.2d 518, 522 (1984) ("This Court has previously stated that a directed verdict may be granted in favor of the party with the burden of proof when the credibility of the movant's evidence is manifest as a matter of law. However, in order to justify granting a motion for a directed verdict in favor of the party with the burden of proof, the evidence must so clearly establish the fact in issue that no reasonable inferences to the contrary can be drawn.") (citations omitted); *Henry v. Knudsen*, ___ N.C. App. ___, ___, 692 S.E.2d 878, 882 (2010).

Plaintiff's affidavits averring that the amount it charged Defendant was consistent with what other hospitals charged and within the industry norms are not supported by any accompanying documentation in the record. The affidavits are simply statements made by Plaintiff's employees. Though these employees *may well be competent to testify at trial* concerning these matters, their credibility is an issue to be weighed and determined by the jury as finder of fact. *Population Planning Associates, Inc. v. Mews*, 65 N.C. App. 96, 99, 308 S.E.2d 739, 741 (1983) (citation omitted) ("the credibility of testimony is for the jury, not the trial judge"). Defendant contested the veracity of Plaintiff's complaint and affidavits concerning the reasonableness of the amount Plaintiff charged, and Defendant includes some specific examples of Plaintiff's alleged overcharging.

We do not believe the credibility of Plaintiff's employees, expressing their opinions that Plaintiff's charges were reasonable, is manifest as a matter of law. Therefore, granting summary judgment in favor of Plaintiff on the issue of damages was improper for this reason as well. *Ratliff*, 310 N.C. at 659, 314 S.E.2d at 522. The dissent, by contending that Plaintiff's allegations in its complaint and its affidavits suffice to establish the crucial element of reasonableness as a matter of law, is making a credibility determination.

The dissent, presented with no evidence beyond the affidavits of Plaintiff's employees, appears to state as fact that Plaintiff's charges are consistent with charges in other like facilities, and as fact that these charges are consistent with various regulations and guidelines. Our Court is *not* a fact-finding body, nor is it permitted to make determinations of credibility. The dissent further attempts to discard the credibility issue by stating: "Defendant never made any such credibility-related argument in his brief" and, therefore, "a decision to grant relief on this basis would be tantamount to 'creat[ing] an appeal for an appellant.' " We are to conduct a *de novo* review of the trial court's grant of summary judgment, and we make no credibility determination. The dissent cites *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976), in support of its conclusion that Plaintiff's affidavits were sufficient to support the grant of summary judgment in Plaintiff's, the moving party's, favor. We believe the language from *Kidd* immediately following that cited by the dissent is helpful:

> This is not a holding that the trial court is required to assign credibility to a party's affidavits merely because they are uncontradicted. To be entitled to summary judgment the movant must still succeed on the basis of his own materials. He must show that there are no genuine issues of fact; that there are no gaps in his proof; that no inferences inconsistent with his recovery arise from his evidence; and that there is no standard that must be applied to the facts by the jury. Further, if the affidavits seem inherently incredible; if the circumstances themselves are suspect; or if the need for cross-examination appears, the court is free to deny the summary judgment motion. Needless to say, the party with the burden of proof, who moves for summary judgment supported only by his own affidavits, will ordinarily not be able to meet these requirements and thus *will not be entitled to* summary judgment.

Id. at 370-71, 222 S.E.2d at 410 (emphasis added).

We also find *Booe* distinguishable. In *Booe*, our Supreme Court stated:

> The plaintiff's bookkeeper testified to the total billing to the defendants and to the amount paid and unpaid by the defendants. We hold that her testimony as to what was billed for the materials and labor and the evidence of a payment for a part of it at the billed rate is evidence *sufficient for the jury to find* the reasonable value to the defendants of the remaining goods and services for which bills were submitted and no payment was made.

Booe, 322 N.C. at 571, 369 S.E.2d at 556 (emphasis added). Unlike the present case, the evidence presented *to the jury* in *Booe* included past bills that had been accepted and paid by the defendant. Because the defendant had accepted the reasonableness of the prior charges, by paying them without objection, our Supreme Court held that the evidence was sufficient for the *jury* to determine that similar unpaid charges were also reasonable.

The dissent seems to suggest that it is inappropriate for us to consider goods provided by Plaintiff to Defendant in determining whether the trial court properly granted Plaintiff's motion for summary judgment on the issue of the reasonableness of Plaintiff's claimed damages. The dissent suggests that because Plaintiff provides a service, it is inappropriate to consider the reasonableness of individual goods provided by Plaintiff. The dissent relies on a number of out-of-state opinions in support of this proposition. Our Supreme Court in *Booe* reasoned:

> [The] plaintiff furnished *material* and labor to the defendants for a substantial period without a contract and the defendants paid for it. This is some evidence of the value of the *goods* and labor furnished before the defendants stopped paying. The evidence was undisputed that the plaintiff furnished a substantial quantity of *materials* and labor after the last payment by the defendants. This was obviously of value. The plaintiff's bookkeeper testified to the total billing to the defendants and to the amount paid and unpaid by the defendants. We hold that her testimony as to what was billed for the *materials* and labor and the evidence of a payment for a part of it at the billed rate is evidence sufficient for the jury to find the reasonable value to the defendants of the remaining *goods* and services for which bills were submitted and no payment was made.

Id. at 571, 369 S.E.2d at 556 (emphasis added). The plaintiff in *Booe* was providing a service which also necessitated the provision of goods. We do not believe the reasonableness requirement is inapplicable to goods or materials just because they are provided in conjunction with a service. We disagree with the reasoning of the dissent, whereby a hospital could charge any amount for goods or materials, perhaps well in excess of the actual value of those goods or materials, and avoid the creation of an issue of material fact so long as it provided affidavits stating that its charges for the services it provided were reasonable and in accord with those charged by other hospitals.

V.

[2] Plaintiff argues that even if summary judgment in favor of Plaintiff was improper on its implied contract claim, summary judgment was still proper based on Plaintiff's guaranty claim. We disagree.

Although we held above that for Plaintiff's *quantum meruit* claim, liability was established and only the issue of damages remained, we address this argument because it presents additional issues. First, as shown below, if the "Payment Guaranty" section at issue is enforced as requested by Plaintiff, Defendant will be obligated to pay attorney's fees and costs, in addition to "*all charges* for services rendered[.]" Second, if we were to hold that the "Payment Guaranty" was enforceable, we would be confronted with the issue of whether the language, "*all charges* for services rendered[,]" (emphasis added), required Defendant to pay the total amount of the charges billed regardless of whether the charges could be found to be unreasonable in a *quantum meruit* analysis.

When Defendant was admitted to Plaintiff's medical facility, Defendant signed a "Request for Treatment and Authorization Form" that included a "Payment Guaranty" section. Pursuant to the payment guaranty section, Defendant agreed "to pay all charges for services rendered by [Plaintiff] . . . during [Defendant's] hospitalization or treatment." The payment guaranty section further stated that if Defendant failed to pay "all charges and [Plaintiff] . . . use[d] an attorney to collect unpaid charges, I [Defendant] agree to pay the reasonable cost of the attorney's services in addition to the unpaid charges." However,

> [a] guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in the case of the failure of another person who is liable in the first instance for such payment or performance. The guaranty creates an obligation that is independent of the obligation of the principal debtor. A guaranty is a collateral and independent undertaking creating a secondary liability. The creditor's cause of action against the guarantor ripens immediately upon the failure of the principal debtor to pay the debt at maturity.

Forsyth Co., 82 N.C. App. at 267, 346 S.E.2d at 214 (citations omitted); *see also Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 718, 338 S.E.2d 601, 602 (1986) ("A guaranty of payment is an absolute promise to pay the debt of another if the debt is not paid by the principal debtor.") (citation omitted). In the present case, Defendant himself signed the

"Request for Treatment and Authorization Form" that included a "Payment Guaranty" section. Therefore, no secondary obligation was ever created in a third party. Defendant is the principal debtor and the only debtor who could have assumed any liability pursuant to the "Payment Guaranty" section.

Plaintiff cites *Forsyth Co.* in support of its argument. However, as stated above in *Forsyth Co.*, the law requires a third party to guarantee payment in case of the default of the primary debtor. *Forsyth Co.*, 82 N.C. App. at 267, 346 S.E.2d at 214 (citations omitted). The factual situation in *Forsyth Co.*, unlike the factual situation in the present case, conforms to this requirement. Plaintiff has failed to make a valid guaranty claim. We note that Plaintiff's complaint included three "causes of action:" (1) "Implied Contract and Quantum Meruit," (2) "Guaranty of Payment," and (3) "Attorney's Fees." Plaintiff included no claim for breach of an express contract, and does not argue on appeal that its motion for summary judgment was properly granted based upon any breach of an express contract. This issue was not presented to the trial court for consideration. *See* N.C. Gen. Stat. § 1A-1, Rule 8 (2009); *Robinson v. Powell*, 348 N.C. 562, 566-67, 500 S.E.2d 714, 717 (1998) (citations omitted). In addition, as the dissent acknowledges, even if there was a valid claim for breach of an express contract presented to the trial court, because the "contract" did not specify the amount to be charged to Defendant, the outcome is still determined pursuant to a *quantum meruit* analysis.

Affirmed in part, reversed in part, and remanded.

Chief Judge MARTIN concurs.

Judge ERVIN dissents with a separate opinion.

ERVIN, Judge, dissenting.

Although I concur in the Court's determination that Defendant's failure to challenge the trial court's decision with respect to the issue of liability on appeal necessarily means that the only question before us is the appropriateness of the trial court's decision to enter judgment in favor of Plaintiff on the issue of damages, I am unable to join that portion of the Court's opinion that concludes that the trial court erred by granting summary judgment in favor of Plaintiff with respect to the damages issue. As a result, I join the Court in affirming the trial court's decision to grant summary judgment in favor of Plaintiff with

respect to the issue of liability, although I believe that Defendant's liability is predicated on an express contract rather than on a *quantum meruit* theory. However, I respectfully dissent from that portion of the Court's opinion that reverses the trial court's decision concerning the damages issue and would affirm the damages-related portion of the trial court's judgment as well.

I. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). In reviewing an order granting summary judgment, our task is to "determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law." *Coastal Plains Utils., Inc. v. New Hanover Cty.*, 166 N.C. App. 333, 340, 601 S.E.2d 915, 920 (2004) (citing *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, 276 S.E.2d 283 (1981)). "All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citing *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972)).

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e). " 'A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.' " *Merritt, Flebotte, Wilson, Webb & Caruso, PLLC v.*

Hemmings, 196 N.C. App. 600, 605, 676 S.E.2d 79, 83-84 (quoting *Page*, 281 N.C. at 705, 190 S.E.2d at 194), *disc. review denied*, 363 N.C. 655, 686 S.E.2d 518 (2009). A trial court's decision to grant a summary judgment motion is reviewed on a *de novo* basis. *Va. Electric & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

II. Substantive Legal Issues

A. Basis of Liability

As an examination of the record and briefs clearly establishes, the parties agree that Plaintiff provided medical services to Defendant and billed Defendant $14,419.57 for those services. In reaching the conclusion that Defendant had failed to challenge the trial court's liability decision on appeal and that the trial court's decision concerning the liability issue should be upheld on appeal for that reason, the Court, with the apparent support of Plaintiff, appears to assume that the trial court relied on a *quantum meruit* theory in order to reach that result. Although I agree with the Court that Defendant has not challenged the trial court's decision to find him liable to Plaintiff under any particular theory and that the trial court's finding of liability should be upheld for that reason, I do not agree with the Court's apparent understanding of the basis upon which the trial court decided the liability issue.

The Request for Treatment and Authorization Form that Plaintiff signed prior to receiving medical services from Plaintiff states, in pertinent part, that:

> PAYMENT GUARANTY. I (patient and/or responsible party/ies) agree to pay all charges for services rendered by the Hospital and my physicians or other providers during my hospitalization or treatment. This guaranty includes charges for services not covered by my insurance, regardless of the reason that insurance coverage is denied. If I fail to pay all charges and the Hospital or my physicians use an attorney to collect unpaid charges, I agree to pay the reasonable cost of the attorney's fees in addition to the unpaid charges.

In its order granting summary judgment in favor of Plaintiff, the trial court explicitly stated that:

> THIS MATTER coming on before the undersigned Superior Court Judge presiding upon motion of the Plaintiff pursuant to Rule 56 of the North Carolina Rules of Civil Procedure for an

> Order granting Summary Judgment as to the Defendant . . . and it appearing to the Court that there is no genuine issue as to any material fact and that the Plaintiff is entitled to Judgment as a matter of law;
>
> IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment is granted and the Plaintiff is entitled to Judgment against the Defendant . . . as follows:
>
> 1. The principal amount of Fourteen Thousand Four Hundred Nineteen Dollars and 57/100 ($14,419.57);
>
> 2. Interest at the legal rate from 2/8/2008, until paid in full;
>
> 3. Attorney fees in the amount of Two Thousand One Hundred Sixty Two Dollars and 94/100 ($2,162.94);
>
> 4. The costs in this action be taxed against the Defendant.

Although I can find no case holding that attorney's fees are recoverable in an action brought solely on the basis of a *quantum meruit* theory, Plaintiff contends that such relief is available in cases brought pursuant to certain express contracts pursuant to N.C. Gen. Stat. § 6-21.2. As a result of the fact that the trial court awarded Plaintiff attorney's fees in addition to compensatory damages, I believe that, instead of finding Defendant liable on the basis of a *quantum meruit* theory, the trial court made its liability determination in reliance on the language of the Payment Guaranty provision.[1]

In rejecting Plaintiff's contention that the Payment Guaranty provision provides an alternative basis for holding Defendant liable for its bill, the Court concludes that the relevant contractual language does not create a valid guaranty because "Defendant himself signed the 'Request for Treatment and Authorization Form' that included a 'Payment Guaranty' section," so that "no secondary obligation was ever created in a third party." A careful reading of the Payment Guaranty provision demonstrates, however, that, notwithstanding the introductory heading that makes reference to a "Payment Guaranty," this provision actually constitutes a direct promise made by Defendant to pay for the services that Plaintiff provided to him rather than a guaranty that Defendant would pay another person's bill. *See*

1. The Court concludes that the trial court lacked the authority to enter judgment in favor of Plaintiff on the basis of an express contract theory because Plaintiff never sought such relief in its complaint. I am unable to agree with this conclusion given that Plaintiff clearly alleged that it was entitled to recover damages on the basis of the Payment Guaranty provision in its complaint.

Forsyth Co. Hospital Authority, Inc., v. Sales, 82 N.C. App. 265, 268, 346 S.E.2d 212, 214 (stating that "the title is not necessarily controlling" and that "[t]he substance of the transaction controls"), *disc. review denied*, 318 N.C. App. 415, 349 S.E.2d 594 (1986). The Court's decision to treat the Payment Guaranty as an invalid guaranty provision, *Cowan v. Roberts*, 134 N.C. 415, 418, 46 S.E.2d 979, 980 (1904) (stating that "[a] guaranty is a promise to answer for some debt, or the performance of some duty, in the case of the failure of another person who is himself liable in the first instance [for] such payment or performance") (citing *Carpenter v. Wall*, 20 N.C. 279, 280 (1838)), strikes me as inconsistent with the document's literal language, which directly obligates Defendant to pay for the services which he received from Plaintiff rather than obligating Defendant to pay for services provided to another. As a result, I do not believe that the fact that the Payment Guaranty does not purport to render one person liable for the debt of another has any bearing on the extent, if any, to which Defendant is liable to Plaintiff on the basis of its provisions and cannot agree with the Court's conclusion to the contrary. Thus, given that the Payment Guaranty expressly provides for an award of attorney's fees, that the trial court awarded attorney's fees to Plaintiff in its judgment, and that such attorney's fees are not recoverable in an action brought on the basis of a *quantum meruit* theory,[2] I believe that the proper way to read the trial court's judgment is to understand it as resting on a decision to enforce the Payment Guaranty rather than on the doctrine of *quantum meruit*.

B. Measure of Damages

"It is a well[-]established principle that an express contract precludes an implied contract with reference to the same matter." *Concrete Co. v. Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962) (citations omitted). However, "[w]here there is an express agreement to pay, but the amount is not specified, the person performing the services is entitled to recover on the theory of quantum meruit." *Duffell v. Weeks*, 15 N.C. App. 569, 570-71, 190 S.E.2d 379, 381

2. Plaintiff contends in its brief that it is entitled to recover attorney's fees pursuant to N.C. Gen. Stat. § 6-21.2, which authorizes a successful litigant to collect attorney's fees in connection with the enforcement of "any note, conditional sale contract or other evidence of indebtedness." We need not decide whether Plaintiff is actually entitled to recover attorney's fees under the Payment Guaranty pursuant to N.C. Gen. Stat. § 6-21.2 in light of Defendant's complete failure to challenge this aspect of the trial court's judgment on appeal. *Viar v. N.C. Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (stating that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant").

(1972); *see also Turner v. Marsh Furniture Co.*, 217 N.C. 695, 697, 9 S.E.2d 379, 380 (1940) (stating that, "when there is no agreement as to the amount of compensation to be paid for services, the person performing them is entitled to recover what they are reasonably worth. . . ."). Although this Court has found that a contract for medical services between a hospital and a patient requiring the patient to pay " 'the regular rates and terms of the Hospital at the time of patient's discharge' " constitutes a sufficiently definite price term to support an award of damages in reliance on an express contract, *Shelton v. Duke Univ. Health Sys.*, 179 N.C. 120, 123-24, 633 S.E.2d 113, 115-16 (2006), *disc. review denied*, 361 N.C. 357, 643 S.E.2d 591 (2007), I am unable to conclude that a provision requiring Defendant to pay "all charges" is entitled to similar treatment. Thus, the ultimate issue before us on appeal is the correctness of the trial court's decision that there was no genuine issue of material fact with respect to the reasonable value of the services that Plaintiff provided Defendant and that Plaintiff was entitled to judgment as a matter of law on that question.[3]

"In order to recover in *quantum meruit*, a party must prove, in addition to the contract, the reasonable value of his services rendered thereunder." *Paxton v. O.P.F., Inc.*, 64 N.C. App. 130, 133, 306 S.E.2d 527, 530 (1983) (citing *Hood v. Faulkner*, 47 N.C. App. 611, 616, 267 S.E. 2d 704, 706-07 (1980), and *Harrell v. Construction Co.*, 41 N.C. App. 593, 595-96, 255 S.E.2d 280, 282 (1979), *aff'd*, 300 N.C. 353, 266 S.E.2d 626 (1980)).

> The general rule is that when there is no agreement as to the amount of compensation to be paid for services, the person performing them is entitled to recover what they are reasonably worth, based on the time and labor expended, skill, knowledge and experience involved, and other attendant circumstances, rather than on the use to be made of the result or the benefit to the person for whom the services are rendered.

Turner, 217 N.C. at 697, 9 S.E.2d at 380 (citations omitted). In challenging the trial court's decision to grant summary judgment in favor of Plaintiff on the issue of damages, Defendant attacks the sufficiency of the evidence that Plaintiff presented in an effort to establish the reasonableness of its charges for medical services.

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3. The distinction made in the text between an action brought under a *quantum meruit* theory and the use of *quantum meruit* principles to replace an indefinite price term in an express contract makes no practical difference for purposes of this case. In both instances, the measure of damages is the same: the reasonable value of the services provided to plaintiff by defendant.

In *Harrell*, 41 N.C. App. at 596, 255 S.E.2d at 282, this Court held that, where the "Plaintiff did not offer evidence as to the reasonable value or market value of its services, but merely stated what it was charging for these services as shown on plaintiff's [ledger sheets,]" the invoice, unaccompanied by any other evidence, did not suffice to establish that the plaintiff's bill was reasonable. *See also Paxton*, 64 N.C. App. at 134, 306 S.E.2d at 530 (holding that "a plaintiff must do more than simply allege an amount and its reasonableness" in order "to recover more than nominal damages"); *Hood*, 47 N.C. App. at 617, 267 S.E.2d at 707 (holding that the plaintiff's bill coupled with "the plaintiff's opinion that the amount of his bill is reasonable [is not] sufficient to sustain an award for such sum"). On the other hand, in *Environmental Landscape Design v. Shields*, 75 N.C. App. 304, 330 S.E.2d 627 (1985), a case in which the plaintiff sought payment for landscaping work, we noted that, "[b]esides plaintiff's bill, there was evidence in the present case that the landscaper who eventually landscaped defendants' property also charged $30.00 per hour" and held that "this evidence was sufficient to go to the jury on the issue of damages."[4] *Id.* at 307, 330 S.E.2d 629; *see also Booe v. Shadrick*, 322 N.C. 567, 571, 369 S.E.2d 554, 556 (1988) (holding that the testimony of the plaintiff's bookkeeper "as to what was billed for the materials and labor and the evidence of a payment for a part of it at the billed rate is evidence sufficient for the jury to find the reasonable value to the defendants of the remaining goods and services for which bills were submitted and no payment was made").[5] As a result, a critical

4. Although the Court attempts to distinguish this case from *Environmental Landscaping* on the grounds that the present case lacks "independent corroboration" evidence of prices charged by third parties for similar services, I do not find this argument persuasive. At bottom, the fact that rendered the plaintiff's evidence in *Environmental Landscaping* sufficient was the existence of evidence of what a service provider other than the plaintiff charged for similar services. Such evidence exists in this case in the form of testimony from Plaintiff's affiants concerning the consistency of the prices charged by Plaintiff with the prices charged by other, similar facilities and the guidelines and billing regulations promulgated by various programs such as Medicare. I do not believe, for reasons that are stated in more detail below, that the fact that the evidence in question was presented in the form of affidavits executed by Plaintiff's employees rather than in the form of evidence presented by a third party makes any material difference in the outcome given the absence of patent, as compared to latent, reasons for questioning the credibility of those affiants.

5. Although the Court emphasizes the obvious factual differences between the present case and *Booe*, it also cites *Booe* for the proposition that a defendant is entitled to defend against efforts to collect a combined bill for materials and services by presenting evidence that the materials in question were overpriced. I do not, however, find this argument convincing given that the evidence before the Court in *Booe* uniformly included combined prices for both labor and materials rather than for materials alone.

distinction between the decisions in which the evidence has been held sufficient or insufficient to establish the reasonable value of goods and services provided to a defendant is the extent to which the record does or does not contain evidence tending to show that the amount the plaintiff charged was similar to that charged by at least one other market participant or had been previously paid by the defendant without objection.[6]

In overturning the trial court's decision to grant summary judgment in favor of Plaintiff on the damages issue, the Court holds that "Plaintiff's evidence concerning damages consisted entirely of a 'bill' stating that Plaintiff was owed $14,419.57, along with affidavits from its own employees stating that that amount was reasonable;" that "Defendant challenged the reasonableness of that amount;" and, that, "in his affidavit, [Defendant] provided specific challenges to [the] amounts Defendant claims he was charged by Plaintiff for services." I do not read the Plaintiff's showing before the trial court at the summary judgment hearing as consisting solely of a bill coupled with a conclusory claim of reasonableness.

In its complaint, Plaintiff alleged that "[t]he fair and reasonable value of the goods and services referred to in paragraph 4 above, for which payment has not been received, is not less than Fourteen Thousand Four Hundred Nineteen Dollars and 57/100 ($14,419.57)" and that "[t]he charges listed for the services rendered as requested by the treating physician as medically necessary are reasonable given

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6. The Court questions the appropriateness of my reliance on certain of these cases because they were decided in a directed verdict, rather than in a summary judgment, context. However, this Court has clearly stated that "[t]he standard of review for a directed verdict is essentially the same as that for summary judgment." *Nelson v. Novant Health Triad Region*, 159 N.C. App. 440, 442, 583 S.E.2d 415, 417 (2003). Although the Court notes that there are obvious differences between the inquiries that must be conducted in the two contexts and contends that the distinction between the summary judgment and directed verdict contexts is critical to a proper resolution of this case, I believe that these assertions do not undermine the usefulness of the decisions that I have discussed in the text for purposes of resolving the present case. According to well-established North Carolina law, in the event that a party with the burden of proof seeking the entry of summary judgment in its favor "properly supports all the essentials of that claim with evidence, it falls to the opposing party to present contradictory evidence or to show by facts that the movant's evidence is insufficient or unreliable." *Blackwell v. Massey*, 69 N.C. App. 240, 243, 315 S.E.2d 350, 352 (1984). As a result, the extent to which Plaintiff's proof would be sufficient to avert the entry of a directed verdict in favor of Defendant is clearly relevant to the issue of whether its evidentiary forecast sufficed to require Defendant to show the existence of a genuine issue of material fact or risk having summary judgment entered in favor of Plaintiff.

that they are standard charges rendered to all patients receiving similar types of services, they are within industry norms for similar facilities providing similar services at similar levels of care, and they are compliant with various published billing and charging regulations and guidelines, including those of the Center for Medicare and Medicaid Services." Attached to Plaintiff's complaint was an "Affidavit and Verification," which stated that:

> Before the undersigned Notary Public, personally appeared James D. Robinson, who being duly sworn, says: That he is the Manager of Patient Financial Services, Legal Accounts for The Charlotte-Mecklenburg Hospital Authority, Plaintiff in this action and that as such, he makes this affidavit:
>
> He is personally familiar with the books, records and record-keeping system of Plaintiff and the entries were made in accordance with said systems; that the entries are part of the regular business records of the Plaintiff and represent the fair and reasonable value of the goods and services rendered; that the entries were made at or near the time of the transactions recorded; and that the account of [Defendant] is just and true as stated hereafter[.]
>
> Further, he verifies that he has read the foregoing Complaint and knows the contents thereof, and that said contents are true of his own knowledge, save and except for those matters and things stated therein upon information and belief, and as to such matters and things, he believes them to be true.

In addition, Plaintiff submitted several affidavits to the trial court in support of its request for summary judgment, including the affidavit of Sunny Sain, Plaintiff's Director of Revenue Management, in which Ms. Sain stated that:

> The undersigned, Sunny Sain, Director, Revenue Management being first duly sworn, deposes and states that the charges listed for the services rendered as requested by the treating physician are reasonable given that they are standard charges rendered to all patients receiving similar types of services, they are within industry norms for similar facilities providing similar services at similar levels of care, and they are compliant with various published billing and charging regulations and guidelines, including those of the Center for Medicare and Medicaid Services.

Although Defendant argues that Ms. Sain's affidavit "did not present any facts based upon personal knowledge that the fees charged were reasonable", we need not decide whether Ms. Sain's affidavit, taken in context, adequately establishes that the information contained in that document rested on her personal knowledge in light of her role as Plaintiff's Director of Revenue Management, *See Bird v. Bird*, 193 N.C. App. 123, 130, 668 S.E.2d 39, 43 (2008), *aff'd*, 363 N.C. 774, 688 S.E.2d 420 (2010) (holding that a private investigator's affidavit, when read in context, established that it was based on the requisite personal knowledge), *Hospital v. Brown*, 50 N.C. App. 526, 530, 274 S.E.2d 277, 280 (1981) (holding that an individual who "testified that he served as credit manager for plaintiff hospital for four years, was familiar with plaintiff's schedule of charges, was familiar with schedules of charges for hospital services approved by Blue Cross-Blue Shield and the Federal government, and was familiar with the procedures used by plaintiff in determining the amount owed by patients" "was competent to give his opinion as to the reasonableness of the charges made by plaintiff for the treatment and care of" the patient),[7] given that Mr. Robinson, in verifying the complaint, swore to essentially the same information as Ms. Sain and given that Defendant has not challenged the sufficiency of the evidence presented by Mr. Robinson. As a result, I believe that the record contains much more than a simple recitation of the amount of Plaintiff's bill and a conclusory claim that the amount of Plaintiff's bill was reasonable. Instead, I read the record as showing that Plaintiff has presented evidence to the effect that the amounts charged to Defendant were

> 1. Standard charges rendered to all patients receiving similar types of services.
>
> 2. Within industry norms for similar facilities providing similar services at similar levels of care.

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7. The Court notes that "we have only affidavits from Plaintiff's employees stating that the amounts charged to Defendant were the same as would be charged by other hospitals" and that "Plaintiff's own statements concerning the reasonableness of the charges [do not] carry the same weight as specific evidence that an independent third party did, in fact, charge the same rate." Although I cannot quarrel with the accuracy of the Court's statement that Plaintiff relied on information supplied by its own employees, I do not, for reasons to be discussed in more detail below, believe that the fact that Plaintiff employed these affiants provides any basis for overturning the trial court's decision to grant summary judgment with respect to the issue of damages in favor of Plaintiff and am concerned that the Court's reliance on this fact involves a credibility determination that is outside the scope of the issues that should be considered in ruling on a trial court order granting or denying a summary judgment motion.

> 3. Compliant with various published billing and charging regulations and guidelines, including those of the Center for Medicare and Medicaid Services.

Thus, unlike the Court,[8] I would hold that Plaintiff forecast sufficient evidence tending to show both the amount of the bill that it submitted to Defendant and that the amount of that bill was reasonable in light of prevailing market conditions,[9] thereby obligating Defendant to produce evidence of "specific facts showing that there is a genuine issue for trial."[10]

In attempting to respond to Plaintiff's evidence, Defendant submitted an affidavit upon which the Court relies, in part, to find that the record discloses the existence of a genuine issue of material fact sufficient to preclude an award of summary judgment with respect to the damages issue.[11] In his affidavit, Defendant stated:

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8. The difference of opinion that exists between the Court, on the one hand, and me, on the other, with respect to this issue is critical to a proper appreciation of our differing positions about the proper resolution of this case. Although both of us appear to understand the applicable standard as objective, rather than subjective, in nature, I believe that the additional references in Plaintiff's affidavits to the charges assessed against other patients, the consistency of Plaintiff's charges with those assessed for similar services in similar facilities, and the fact that Plaintiff's charges are consistent with "various published billing and charging regulations and guidelines" are sufficient to convert Plaintiff's evidence from a subjective claim of reasonableness to an objective description of applicable market conditions, thereby rendering this case distinguishable from decisions such as *Austin v. Enterprises, Inc.*, 45 N.C. App. 709, 710-11, 264 S.E.2d 121, 122 (1980); *Hood*; and *Paxton*.

9. Although the Court notes that the record does not contain an itemized bill detailing the services that Plaintiff provided to Defendant, it does not cite any authority for the proposition that the inclusion of such a bill in the record is a precondition for a finding of reasonableness, and I have not discovered any such authority in my own research. Thus, particularly given that the record clearly establishes that Defendant had access to such an itemized bill for use in preparing his defense, I do not believe that Plaintiff's failure to submit such a bill for the trial court's consideration at the time of the hearing on its summary judgment motion has any bearing on the proper resolution of this case.

10. I do not, of course, believe that the fact that Plaintiff made a *prima facie* showing on the damages issue entitles it to summary judgment in its favor. Instead, I simply believe that Plaintiff's success in making out such a case required Defendant to establish the existence of a genuine issue of material fact in order to preclude the entry of summary judgment in Plaintiff's favor.

11. The Court concludes, as I have previously indicated, that the fact that Plaintiff's affidavits were executed by its own employees results in the existence of a genuine issue of material fact sufficient to preclude the entry of summary judgment in Plaintiff's favor with respect to the damage issue for credibility-related reasons. I am not persuaded by this argument for two different reasons. First, since Defendant never

1. That I am the Defendant in the above-captioned matter;

2. That my hospital bill has a cost of $18.40 for one tablet of Diltiazem, and my prescription from CMC Pharmacy cost $23.00 for thirty (30) tablets;

3. That my hospital bill has a cost of $406.50 for one unit of Enoxaparin sodium, 120 mg syringe, and the cost for this item is $278.00 for ten units;

4. That my hospital bill has a cost of $1.45 per unit for a folic acid 1 mg tablet, and the cost at a local pharmacy is $4.00 for thirty 1 mg tablets;

5. That plaintiff's charges exceed the charges made and paid by other patients in the defendant's medical condition;

6. That the plaintiff's charges are not reasonable for the medical care necessary to control the defendant's medical condition.

The record provides absolutely no basis for inferring that the last two assertions contained in Defendant's affidavit were based on his personal knowledge, so the statements in question were not properly before the trial court at the time that it ruled on Plaintiff's summary judgment motion. *Nugent v. Beckham*, 37 N.C. App. 557, 560, 246 S.E.2d 541, 544 (1978) (noting that "[a]t no point does the affidavit in question affirmatively show that it was based on the personal knowledge of the affiant or that he was otherwise competent to testify to

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made any such credibility-related argument in his brief, a decision to grant relief on this basis would be tantamount to "creat[ing] an appeal for an appellant." *Viar*, 359 N.C. at 402, 610 S.E.2d at 361. Secondly, the Supreme Court has clearly stated that "summary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment or contradiction, and failed to utilize [N.C. Gen. Stat. § 1A-1,] Rule 56(f); and (3) when summary judgment is otherwise appropriate." *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 412 (1976). As a result of the fact that the only doubts that the Court has expressed about the credibility of Plaintiff's affiants arise from the identity of their employer, making these doubts latent, rather than patent, in nature; given the fact that the record is devoid of any reason to believe that the affiants have a personal stake in the outcome of this case; and given that the fact that I do not believe that the other bases for refusing to grant summary judgment in favor of the party with the burden of proof outlined in *Kidd* are present in this case, I do not believe that the trial court's order is subject to reversal on credibility-related grounds even if the Court were to reach this issue and disagree with the Court's apparent impression that granting summary judgment in favor of the party with the burden of proof in a case where the defendant has failed to forecast relevant evidence demonstrating the existence of a genuine issue of material fact is tantamount to making a determination that Plaintiff's affiants are credible.

the matters stated therein").[12] An examination of the information about which Defendant appears to have personal knowledge set out in Defendant's affidavit indicates that, in each instance, Defendant selected a medication that Plaintiff utilized in the course of providing medical services to him and compared the cost of purchasing that medication at retail to the amount that Plaintiff charged to Defendant relating to the same item.

On appeal, Defendant asserts, and the Court appears to agree, that these three cost differences demonstrate the existence of a genuine issue of material fact concerning the reasonable value of the services Defendant received from Plaintiff. I am unable to agree with this contention, since it rests upon a misapprehension of the relevant legal standard, which focuses upon the value of the services provided by Plaintiff rather than upon the cost of particular components of the services provided to Defendant if purchased under vastly different sets of circumstances. *See*, *e.g.*, *Doe v. HCA Health Services of Tennessee*, *Inc.*, 46 S.W.3d 191, 198-99 (2001) (stating that " 'reasonable value' " in cases involving "medical goods and services provided by a hospital to a patient" should be "determined by considering the hospital's internal factors as well as the similar charges of other hospitals in the community") (citing *Galloway v. Methodist Hospital*, *Inc.*, 658 N.E.2d 611, 614 (Ind. Ct. App. 1995), *Heartland Health System*, *Inc. v. Chamberlin*, 871 S.W.2d 8, 11 (Mo. Ct. App. 1993), *Victory Memorial Hospital v. Rice*, 143 Ill App. 3d 621, 625, 493 N.E.2d 117, 120, 97 Ill. Dec. 635, ___ (1986), and *Ellis Hospital v. Little*, 65 App. Div. 2d 644, 409 N.Y.S.2d 459, 461 (1978).

As the record clearly reflects, Plaintiff is not a retail establishment primarily engaged in the sale of medications, devices, or other supplies. Instead, Plaintiff is a provider of comprehensive medical services in a hospital environment. Simply put, Plaintiff did not merely sell Defendant specific medications; instead, Plaintiff provided these medications to Defendant as part of an overall package that also included nursing services, the use of hospital facilities, and similar items provided on a bundled rather than an unbundled basis. The fact that one could purchase certain medications in a retail estab-

12. Although the Court appears to assert, in reliance on *Austin*, that these generalized denials of reasonableness suffice to demonstrate the existence of a genuine issue of material fact, this argument overlooks the fact that the evidentiary forecast submitted on behalf of the plaintiff in *Austin* consisted of nothing more than a generalized assertion of reasonableness, 45 N.C. App. at 710-11, 264 S.E.2d 122, and the fact that, in order to avoid a grant of summary judgment, the defendant "must set forth specific facts showing there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e).

lishment more cheaply than the amount associated with the provision of that medication as administered in the course of rendering inpatient treatment in a hospital, as reflected on Plaintiff's bill, has no bearing on the issue of whether Plaintiff charged a reasonable amount for the medical care that it provided to Defendant given the applicable legal standard. As a result, since the information contained in Defendant's affidavit is simply not relevant to the issue of the reasonableness of the cost of the medical services that Defendant received from Plaintiff, I would hold that the information in question did not suffice to show the existence of a genuine issue of material fact concerning the reasonableness of Plaintiff's bill and would affirm the trial court's decision to grant summary judgment in favor of Plaintiff with respect to the damages issue as well.

III. Conclusion

Thus, for the reasons set forth above, I believe that Plaintiff forecast sufficient evidence concerning the reasonableness of the amount that it billed Defendant to require Defendant to show the existence of a genuine issue of material fact. In addition, I believe that the only factual information offered by Defendant in opposition to Plaintiff's showing was simply irrelevant to the issue that is actually before the Court in light of the applicable measure of damages. As a result, although I concur in the Court's decision to affirm the trial court's determination that Defendant is liable to Plaintiff, I differ from the Court in believing that the trial court's order should be affirmed in its entirety and respectfully dissent from the Court's decision to overturn the trial court's entry of summary judgment in favor of Defendant on the damages issue.[13]

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13. The Court argues that the effect of the analytical approach that I have used in this case is that, in every case in which a trial judge grants a directed verdict, summary judgment should have been granted, and that, in the event that a trial court denies summary judgment in favor of one party, it should necessarily grant summary judgment in favor of the other party. I do not believe that such an outcome is inherent in the approach I have taken, which I believe to be the one required by applicable North Carolina law. The first of these two propositions is not necessarily valid because issues of credibility may appear to exist at the time a summary judgment motion is decided but do not ultimately materialize at trial. Similarly, in the event that a trial judge denies a summary judgment motion filed by one party on the grounds that the record discloses the existence of one or more genuine issues of material fact, it would be equally inappropriate for summary judgment to be granted in favor of the other party. At bottom, as long as a party against whom summary judgment is sought presents or points to specific evidence in the record or specific patent difficulties with the credibility of the movant's evidence, it is not defenseless against an exorbitant claim for monetary damages.

RUFUS CAPPS, IV, PLAINTIFF v. SOUTHEASTERN CABLE AND COMPANION PROPERTY & CASUALTY, DEFENDANTS

No. COA10-505

(Filed 2 August 2011)

Workers' Compensation—independent contractor—employer-employee relationship

The Industrial Commission erred by dismissing plaintiff's workers' compensation benefits claim on the grounds that plaintiff worked for defendant company as a subcontractor instead of an employee. Defendant exerted the degree of control of plaintiff that was characteristic of an employer's control over an employee.

Appeal by plaintiff from Opinion and Award entered 8 March 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 1 November 2010.

West & Smith, LLP, by Stanley W. West, and Jay S. Gervasi, P.A., by Jay A. Gervasi, Jr., for Plaintiff-Appellant.

McAngus, Goudelock & Courie, P.L.L.C., by Laura Carter and Layla T. Santa Rosa, for Defendant-Appellees.

ERVIN, Judge.

Plaintiff Rufus Capps, IV, appeals from an order entered by the Industrial Commission dismissing his claim for workers' compensation benefits on the grounds that Plaintiff worked for Defendant Southeastern Cable as a subcontractor rather than an employee, thereby depriving the Commission of jurisdiction over Plaintiff's claim. On appeal, Plaintiff argues that the evidence established that he was Southeastern's employee and that his claim for workers' compensation benefits was, in fact, subject to the Commission's jurisdiction. After carefully considering Plaintiff's arguments in light of the record and the applicable law, we conclude that Plaintiff's argument has merit.

I. Factual Background

A. Substantive Facts

Time Warner, Inc., provides cable television and internet service. In 2007, Time Warner contracted with Southeastern to install cable TV and internet service for customers. Robert Hair, who owns

Southeastern, entered into agreements with eight to ten people, including Plaintiff, to perform the actual installation work. Southeastern treated the installers as independent subcontractors and required them to obtain workers' compensation insurance prior to starting work. Plaintiff obtained a "ghost" insurance policy that excluded him from its coverage.

After working for Southeastern for several weeks, Plaintiff fell while performing installation work, resulting in injuries to his left foot which the parties agree would be compensable in the event that Plaintiff were a Southeastern employee. Southeastern denied Plaintiff's claim on the grounds that Plaintiff was not an employee. Plaintiff, on the other hand, contends that he was a Southeastern employee.

B. Procedural History

On 14 November 2007, Plaintiff filed an amended Form 18, in which he sought workers' compensation benefits, and an amended Form 33, in which he requested that his claim be assigned for hearing. In response, Defendants asserted that Plaintiff was a subcontractor and that he was not entitled to receive workers' compensation benefits for that reason. On 17 November 2008, Deputy Commissioner Philip A. Baddour, III, conducted a hearing concerning Plaintiff's claim. On 29 July 2009, Deputy Commissioner Baddour issued an Opinion and Award concluding that Plaintiff was a Southeastern employee and awarding Plaintiff medical and disability benefits. Both Plaintiff and Defendants appealed Deputy Commissioner Baddour's order to the Commission. On 8 March 2010, the Commission, by means of an Opinion and Award issued by Commissioner Dianne C. Sellers with the concurrence of Commission Chair Pamela T. Young and Commissioner Staci Meyer, reversed Deputy Commissioner Baddour's order on the grounds that, since Plaintiff was an independent contractor, the Commission lacked jurisdiction over Plaintiff's claim. Plaintiff noted an appeal to this Court from the Commission's order.

II. Legal Analysis

A. Standard of Review

"To maintain a proceeding for workers' compensation, the claimant must have been an employee of the party from whom compensation is claimed. Thus, the existence of an employer-employee relationship at the time of the injury constitutes a jurisdictional fact. . . . 'The finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the

record to support such finding. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.' " *McCown v. Hines*, 353 N.C. 683, 686, 549 S.E.2d 175, 177 (2001) (citing *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988), and quoting *Lucas v. Stores*, 289 N.C. 212, 218, 221 S.E.2d 257, 261 (1976)). As a result, "when a party challenges the Commission's jurisdiction to hear a claim, the findings relating to jurisdiction are not conclusive and the reviewing court may consider all of the evidence in the record and make its own determination on jurisdiction." *Tilly v. High Point Sprinkler*, 143 N.C. App. 142, 146, 546 S.E.2d 404, 406 (2001) (citing *Craver v. Dixie Furniture Co.*, 115 N.C. App. 570, 577, 447 S.E.2d 789, 794 (1994)), *disc. review denied*, 353 N.C. 734, 552 S.E.2d 636 (2001). This Court makes determinations concerning jurisdictional facts based on the greater weight of the evidence. *Youngblood*, 321 N.C. at 384, 364 S.E.2d at 437. As is generally the case in connection with jurisdictional issues, "[t]he plaintiff bears the burden of proving each element of compensability . . . by 'a preponderance of the evidence.' " *Everett v. Well Care & Nursing Servs.*, 180 N.C. App. 314, 318, 636 S.E.2d 824, 827 (2006) (quoting *Holley v. ACTS, Inc.*, 357 N.C. 228, 231-32, 234, 581 S.E.2d 750, 752 (2003)). Thus, "the claimant bears the burden of proving the existence of an employer-employee relationship at the time of the accident." *McCown*, 353 N.C. at 686, 549 S.E.2d at 177 (citing *Lucas*, 289 N.C. at 218, 221 S.E.2d at 261).

Although Defendants acknowledge that this Court must make its own findings of jurisdictional facts, they argue that we "cannot reweigh the evidence regarding the credibility of the witnesses and must defer to the . . . [C]ommission's findings regarding credibility." However, as we have previously noted, "[i]n performing our task to review the record *de novo* and make jurisdictional findings independent of those made by the Commission, we are necessarily charged with the duty to assess the credibility of the witnesses and the weight to be given to their testimony, using the same tests as would be employed by any fact-finder in a judicial or quasi-judicial proceeding." *Morales-Rodriguez v. Carolina Quality*, —— N.C. App. ——, ——, 698 S.E.2d 91, 94 (2010). We are conscious of the fact that we have not had an opportunity to observe the demeanor of the witnesses. However, in that respect, we are in the same position as the Commission, which based its findings in this case on information contained in the written record rather than upon testimony provided by live witnesses.

> Whether the full Commission conducts a hearing or reviews a cold record, [N.C. Gen. Stat.] § 97-85 places the ultimate fact-finding function with the Commission—not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony. Consequently, in reversing the deputy commissioner's credibility findings, the full Commission is not required to demonstrate, as *Sanders [v. Broyhill Furniture Industries*, 124 N.C. App. 637, 641, 478 S.E.2d 223, 226 (1996),] states, "that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one." To the extent that *Sanders* is inconsistent with this opinion, it is overruled.

Adams v. AVX Corp., 349 N.C. 676, 681, 509 S.E.2d 411, 413-14 (1998) (quoting *Sanders*, 124 N.C. App. at 641, 478 S.E.2d at 226, *disc. rev. denied*, 346 N.C. 180, 486 S.E.2d 208 (1997), *overruled in part as stated*). In our credibility determination, we "consider the [tests enunciated in the] North Carolina pattern jury instructions, which" state that a credibility determination should rest upon the use of " 'the same tests of truthfulness which you apply in your everyday lives. . . .' " *In re Hayes*, 356 N.C. 389, 404-05, 584 S.E.2d 260, 270 (2002) (quoting N.C.P.I.-Civil 101.15 (1994). Finally, at least in this instance, we are not called upon to make many judgments as to the truthfulness of any witness. Although the Commission found that the testimony of one of Southeastern's witnesses was more credible than that of Plaintiff, we are not convinced that there is any significant credibility issue involved in this case. Instead, the proper resolution of the jurisdictional controversy at issue here hinges primarily upon the proper application of the law to essentially undisputed evidentiary facts.

Our determination of whether Plaintiff has demonstrated the existence of an employee-employer relationship begins with N.C. Gen. Stat. § 97-2(2), which provides that:

> The term "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written . . . whether lawfully or unlawfully employed[.]

As the Supreme Court has stated, "[t]his definition adds nothing to the common law meaning of the term 'employee.' " *Hicks v. Guilford County*, 267 N.C. 364, 367, 148 S.E.2d 240, 243 (1966) (citing *Hayes v.*

Elon College, 224 N.C. 11, 19, 29 S.E.2d 137, 142 (1944)). The Supreme Court stated in *Hayes* that:

> [T]he retention by the employer of the right to control and direct the manner in which the details of the work are to be executed and what the laborers shall do as the work progresses is decisive, and when this appears it is universally held that the relationship of master and servant or employer and employee is created. Conversely, when one who, exercising an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer except as to the result of the work, and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what laborers shall do as it progresses, is clearly an independent contractor. The vital test is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details.
>
> . . . .
>
> What, then, are the elements which ordinarily earmark a contract as one creating the relationship of employer and independent contractor? The cited cases and the authorities generally give weight and emphasis, amongst others, to the following: The person employed
>
> (a) is engaged in an independent business, calling, or occupation;
>
> (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work;
>
> (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis;
>
> (d) is not subject to discharge because he adopts one method of doing the work rather than another;
>
> (e) is not in the regular employ of the other contracting party;
>
> (f) is free to use such assistants as he may think proper;
>
> (g) has full control over such assistants; and
>
> (h) selects his own time.

Hayes, 224 N.C. at 15-16, 29 S.E.2d at 139-40. Put another way:

> The distinction between an independent contractor and a servant, employee, or agent has been clearly drawn in numerous recent cases. Tersely stated, the test which will determine the relationship between parties where work is being done by one which will advantage another is: Who is boss of the job?

Pressley v. Turner, 249 N.C. 102, 104, 105 S.E.2d 289, 292 (1958) (citing *Pearson v. Flooring Co.*, 247 N.C. 434, 442, 101 S.E.2d 301, 306 (1958), and *Hayes*, 224 N.C. at 15-16, 29 S.E.2d at 140 (other citations omitted). "No particular one of these factors is controlling in itself, and all the factors are not required. Rather, each factor must be considered along with all other circumstances to determine whether the claimant possessed the degree of independence necessary for classification as an independent contractor." *McCown*, 353 N.C. at 687, 549 S.E.2d at 178. Although the factors cited in *Hayes* necessarily play an important role in the proper resolution of this issue, nothing in that decision suggests that the factors delineated by the Supreme Court are the only relevant factors or that other facts should not be considered in the jurisdictional analysis. Against that background, we next address the record evidence relating to the jurisdictional issues, beginning with an analysis of the evidence relating to the *Hayes* factors.

B. Analysis of Evidence Regarding Plaintiff's Employment Status

1. Factors Cited in *Hayes*

a. Independent Business

Evidence that the claimant operated an independent business tends to support a conclusion that he or she was an independent contractor. *See*, *e.g.*, *Doud v. K & G Janitorial Service*, 69 N.C. App. 205, 212, 316 S.E.2d 664, 669 (noting that claimant "was the sole proprietor of K & G Janitorial Services, an independent business"), *disc. review denied*, 312 N.C. 492, 322 S.E.2d 554 (1984). At the hearing, Plaintiff testified that he did not operate an independent business, an assertion which is not directly contradicted in the record. Although Defendant provided Plaintiff with the tax forms that are appropriate for use by an independent contractor, required Plaintiff to obtain his own workers' compensation insurance, and informed him that he was being hired as a subcontractor rather than an employee, we do not give significant weight to this evidence since all that this evidence tends to show is the manner in which Defendant wished to have the relationship characterized. As the Supreme Court has previously noted, "the parties' own conclusion about their legal relationship is

not binding on the court." *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 584, 350 S.E.2d 83, 88 (1986) (citing *Lloyd v. Jenkins Context Co.*, 46 N.C. App. 817, 266 S.E. 2d 35 (1980), and *Rucker v. Hospital*, 285 N.C. 519, 206 S.E. 2d 196 (1974)).

In addition, the undisputed record evidence shows that, during the time that Plaintiff performed installation work for Defendant, he did not work for any other installation company. Although the Commission found that Plaintiff was subject to "no restrictions" with respect to his ability to work for other entities or customers, Defendant Hair testified that:

> Q. Okay. Do you have any restrictions on who the subcontractors can work for?
>
> A. No.
>
> Q. Okay. So they can work for another subcontractor or general subcontractor?
>
> A. There's a no-compete clause which you—refers to me. I can't compete with any other system. You know, I don't want to cause Time Warner any conflict. I have guys that can go out and lay bricks if they want to if they're done with their route. That's entirely up to them.
>
> Q. Okay. And they can go out and perform other cabling jobs if they want to, correct?
>
> A. Other what?
>
> Q. Other cabling jobs.
>
> A. Not for—not for a competition clause against Time Warner. They could—they could install satellite outlets for someone if they wanted to on their time.

Although Mr. Hair testified that, "as a subcontractor," Plaintiff could work for whomever he chose, Greg Adair, Southeastern's operations manager, testified that:

> Q. Is it possible to work for another company other than Southeastern Cable for these installers?
>
> A. These guys, a lot of them do side things, yeah. . . . There's guys who lay carpet, lay brick, do bundle siding and everything on the weekends they have off or nights, whatever.
>
> Q. Okay. What about additional cabling jobs, are they allowed—

A. If they do it if—as long as it's not a Time Warner work order[.]

As a result, the evidence suggests that Plaintiff did not operate his own cable installation business or have unlimited freedom to perform individual installation jobs for anyone who wished to hire him for that purpose.

b. Special Skill or Knowledge

Next, we consider the extent to which, in performing jobs for Southeastern, Plaintiff had "the independent use of his special skill, knowledge, or training in the execution of the work." Although the Commission did not make any findings relating to this fact, our analysis of the record suggests that (1) the type of cable installations performed by Plaintiff required some degree of "special skill, knowledge, or training" and that, (2) assuming Plaintiff was required to possess a special skill, he did not have the unfettered right to make "independent use" of that skill, knowledge, and training.

The only testimony pertaining to this factor was Plaintiff's testimony on cross-examination that:

Q. . . . [Y]ou indicate you've got fifteen years as data-line and cable-line experience, is that correct?

A. Yes, ma'am.

Q. Okay. Now, data-line and cable-line experience is a special skill, correct?

A. Yes, ma'am, I guess so.

Q. And it requires some type of specific knowledge, correct?

A. Yes, ma'am.

The record does not, however, contain any evidence concerning the degree of technical knowledge involved in cable installation work, how difficult it is to obtain the required skills, or how long the required educational process usually takes. Although the undisputed evidence in the record indicates that Southeastern trained Plaintiff for several weeks before he was allowed to perform cable installations, the record is completely devoid of any evidence concerning the extent, if any, to which the training Plaintiff received from Southeastern was sufficient to qualify an individual to perform cable installation work. We conclude that this brief cross-examination, unaccompanied by specific evidence, is insufficient to enable us to

assess the extent to which Plaintiff utilized special skill, knowledge and training in performing cable installation work.[1] In the absence of such evidence, we cannot assume that Plaintiff's job responsibilities can be fairly characterized as involving highly skilled work. *See*, *e.g.*, *Burgess v. NaCom Cable Co.*, 923 S.W.2d 450, 454 (Mo. App. E.D. 1996) (stating that "[t]he skill level of the [cable] installer is not particularly high, generally, especially since the techniques can be learned in less than three days and no later than thirty days"). Thus, the only inference that the record will allow us to draw concerning the skill level required of persons in Plaintiff's position was that the necessary cable installation work required some degree of special skill, knowledge, or training.

Assuming, for purposes of argument, that cable installation work involves the use of special skill, knowledge, or training, we also must consider whether Plaintiff engaged in the "independent use" of his knowledge and skills while performing cable installation work for Southeastern. The greater weight of the evidence fails to establish that Plaintiff had the freedom to exercise such independent judgment. Although Plaintiff had been employed in the cable installation field for fifteen years, Defendant required him to undergo a three week training course before he could be assigned to work on his own. Plaintiff testified that he was trained according to Southeastern's specifications and that one of Southeastern's "supervisors" "would show [him] how Time Warner wanted . . . each individual thing done." According to Mr. Adair, the training that Plaintiff received was necessary because Time Warner demanded that Southeastern's work be performed "exactly the way the manual

1. Compare, for example, *Santelices v. Cable Wiring*, 147 F. Supp. 2d 1313, 1320 (S.D. Fla. 2001), in which the record reflected that cable installation required "the ability to competently connect cables from a main feed outside into a home (to the television set and VCR), run cables in between walls, bury cable lines underground, and install converter boxes" and in which the claimant "testified that he also learned the more technical side of cable installation, including construction work with cable, underground fiber, splicing taps, and making new systems," that "he was required to demonstrate his special skill, his ability to satisfy TCI technical specifications in performing digital/cable work, by participating in a day-long digital cable installation training class at TCI under TCI's supervision," and that he "was required to pass a written exam and physically demonstrate his proficiency at digital cable installations," with *Parrilla v. Allcom Constr. & Installation Servs., LLC*, 2009 U.S. Dist. LEXIS 130421 (M.D. FL 2009), *motion denied* 688 F. Supp. 2d 1347 (2010) (stating that the "[p]laintiff's work did not require the application of particularly special, or difficult to acquire, skills" and that, "[a]lthough Plaintiff's work involved proper cable wiring, connecting and configuring Internet cable modems, the use of a cable meter, and answering customer's questions, . . . those skills could be acquired in as little as two weeks of on-the-job training").

says." In addition, Mr. Hair testified that, before a new installer was assigned work, an experienced installer would "take them out in the field and train them approximately three to five weeks, whatever it takes," and that the supervisor would "let [him] know if that individual is up and running." After receiving training for three weeks, Plaintiff worked independently for two weeks prior to the date on which he was injured. Although a subcontractor clearly must receive some level of direction prior to undertaking a particular job, the fact that Plaintiff was required to undergo three to five weeks of training before starting work seems more consistent with the degree of control to which an employee is subject than with the free exercise of independent judgment normally characteristic of work performed by an independent contractor.

In addition, the Commission found that Plaintiff provided his own tools. Under some circumstances, this fact might tend to show that the claimant exercised independent judgment, if he or she were at liberty to utilize the tools that he or she considered appropriate in order to perform the necessary work. However, the undisputed evidence shows that Southeastern required Plaintiff to use a particular set of tools, undercutting any inference that Plaintiff was free to exercise independent judgment in connection with the performance of his work. Plaintiff's testimony to this effect is bolstered by a document titled Southeastern Cable Tech Tool Requirements, which lists the tools that installers were required to use and states that, "if anything else is needed, contact your immediate supervisor only!" (emphasis in original) Mr. Hair agreed that cable installation technicians were required to use certain tools and testified that, if a technician lacked the required tools, "[he would] purchase them and take it from their check." For example, Mr. Hair provided Plaintiff with a meter costing $379.00, for which Plaintiff reimbursed Mr. Hair "[w]eekly, out of his check."

Finally, the undisputed evidence shows that, to a considerable extent, the manner in which installation jobs were to be performed was prescribed by Southeastern's contract with Time Warner. The record contains no evidence tending to show whether there was any scope for the exercise of discretion or independent judgment by cable installation technicians in light of these contractual terms. Thus, taking all of this information into consideration, we conclude that, while the evidence tends to show that Plaintiff's cable installation work involved some degree of special skills, knowledge, or training, the evidence does not support a conclusion that Plaintiff was

allowed to make appreciable "independent use" of such skills "in the execution of the work."

c. Payment Structure

Next, we consider whether Plaintiff performed "a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis." The undisputed evidence in the present record shows that, instead of negotiating individual installation prices, each cable installation technician received sixty percent of the fee paid to Defendant Southeastern by Time Warner. As a result, the record shows that Plaintiff was paid on a "piece work" basis, earning a set amount for each job he completed.

> " 'Payment on a time basis is a strong indication of the status of employment. Payment on a completed project basis is indicative of independent contractor status. Payment on a piece-work or commission basis is consistent with either status.' "

Juarez v. CC Servs., 434 F. Supp. 2d 755, 761 (2006) (quoting Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 61.06 (2005)). Thus, the manner in which Plaintiff was paid sheds little light on the jurisdictional issue that we must resolve in this case.

d. Whether Plaintiff was Subject to Discharge

Next, we consider whether Plaintiff was "subject to discharge because he adopts one method of doing the work rather than another." Although the Commission found that Defendant Hair testified that he "could not 'fire' the independent contractors as they were not employees of Southeastern Cable," we believe that the undisputed record evidence undercuts this assertion. In his testimony, Plaintiff asserted that he was subject to being fired. Mr. Hair testified that:

> Q. Okay. Have you ever fired or discharged a subcontractor?
>
> A. Yes.
>
> Q: How do you fire a subcontractor?
>
> A. I don't route them anymore.

Mr. Hair testified that he would "fire" a cable installation technician for "poor performance, not showing up for work, having someone having to pick up their route constantly, [and] not [being] dependable" and that, if someone "does shoddy workmanship, I just have to

let him go." Mr. Hair's testimony concerning this subject is consistent with the evidence tending to show that Time Warner had detailed specifications for the performance of installations, that Plaintiff had to undergo several weeks of training in order to perform his work consistently with Time Warner's requirements, and that Plaintiff was required to use specific tools in the performance of his work. As a result, we conclude that Southeastern did have what amounted to the right to fire Plaintiff, although the manner in which that right was exercised is not inconsistent with the manner in which the services of an unsatisfactory independent contractor would be terminated, precluding us from giving this factor much weight in the ultimate jurisdictional determination.

e. Whether Plaintiff was a Regular Employee of Defendant

Another factor listed in *Hayes* is the extent to which the claimant was "in the regular employ" of Defendant. Although this factor might be pertinent in cases in which an employee was hired to do additional work outside the context of his ordinary employment-related responsibilities, it has little relation to the proper resolution of the present inquiry. As a result, we do not find this factor particularly pertinent to the decision we are required to make in this case.

f. Plaintiff's Authority to Employ Assistants

Next, we consider whether Plaintiff was "free to use such assistants as he may think proper" and, if so, whether he had "full control over such assistants." Plaintiff testified that neither he nor any other individual performing cable installation work for Defendant ever hired any assistants. Although Mr. Hair admitted that none of the cable installation technicians had an assistant, he testified that, at least in theory, they were permitted to do so. However, the record tends to show that the hiring of assistants would not have been an economically sensible approach for Plaintiff to adopt and that any such assistants would have been subject to the same limitations concerning the necessity for training, the use of specified tools, and the need for compliance with Time Warner's standards as were imposed upon other cable installation technicians. As a result, while "Defendant ostensibly gave Plaintiff the option to hire others through his own company," "that option was illusory." *Parrilla*, 2009 U.S. Dist. LEXIS 77585 at 13.[2]

2. Although Defendants argue that Southeastern's cable installation technicians effectively utilized assistants when they procured assistance from other technicians on days when they got behind, we do not believe that this informal intra-technician

g. Southeastern's Control over Plaintiff's Schedule

As we have already noted, the analysis set out in *Hayes* includes consideration of the extent to which a technician was entitled to "select[] his own time" for work. Although the Commission found that Defendant "does not control the independent contractors' hours," we conclude that Southeastern did, in fact, exert significant control over Plaintiff's working hours.

According to the arrangements made between Time Warner and its end-user customers, installation jobs had to be performed within a specific time period, which typically involved a two hour window. As a result, individual cable installation technicians had to complete the work orders that had been assigned to them within this two hour interval. "This constituted a direct exercise of control. Where the worker himself selects the time of performance, contractorship is indicated. However, where the worker must conform to a particular schedule . . . the relationship is normally one of employment." *Youngblood*, 321 N.C. at 385, 364 S.E.2d at 438 (citing *Hayes*, 224 N.C. at 15-16, 29 S.E.2d at 140) (other citations omitted).

Plaintiff testified that, at the time he interviewed for the Southeastern position, he was told that the position involved full time employment, that he would work five days every week, and that he would be expected to work on Saturdays on some occasions. Mr. Hair conceded that Southeastern's technicians worked six days a week which was "part of the job Monday through Saturday." In addition, Plaintiff testified that:

> We would report to the office at 8:00, fill out the paperwork for the prior day's work orders, turn those in, and then [Defendant] would lay out that day's schedule, so you would go up, and he would have a, you know, list of work orders that had your name and tech number on it. You were to take that list.

Consistently with Plaintiff's testimony, Mr. Hair told the Commission that "[t]he work orders are printed, and we'll lay them out on the table, and we'll assign no more than five jobs based on what that individual is capable of doing." Plaintiff testified that he reported to the office every morning; Defendant did not dispute Plaintiff's claim that cable installation technicians were required to come to the office on

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"job swapping" represents the sort of "assistance" contemplated by the relevant portion of the *Hayes* decision. In addition, the record contains no evidence tending to show that Plaintiff would have had any control over the work performed pursuant to such an informal intra-technician job swap.

a daily basis, although he clarified Plaintiff's claim by stating that "[t]hey can come by in the afternoon and pick up work orders" instead of in the morning. Similarly, Mr. Adair testified that:

> Q. [The installers are] required to come in every day and get their—?
>
> A. They're required to come in if they want to make any money. That's correct.

Thus, the undisputed evidence shows that Plaintiff was required to report to Defendant's office on a daily basis to submit required reports and to receive each day's work assignments.[3]

In addition, Plaintiff testified that, upon completing his assigned installations, he "would call [his] supervisor and [the supervisor] would see if there was any other orders[.]" Defendant Hair, on the other hand, testified that, when an installer finished a job, he was required to "call Time Warner and code the job out upon completion;" that he had not personally asked the installers to call Southeastern upon completion of the day's assignments; and that he had "no clue" whether Plaintiff's supervisor had directed him to make such a call. Defendant Hair did, however, testify that he used a computer program to keep track of the progress made by individual cable installation technicians in completing their assigned work:

> A. We can look at the AS400 and find out exactly when our techs are finished with certain jobs . . . and can tell when they're leaving to go home.
>
> Q. [W]hat is the AS400?
>
> A. That's just a system . . . on the computer. . . . [W]e can actually look and see if someone's in a bind or . . . if they're doing well that day[.]

As a result, it is clear that Plaintiff was required to report to Defendant Southeastern concerning the day's job activities, with the

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3. We are not, for obvious reasons, convinced that the exact time of day at which the cable installation technicians came by the Southeastern office is particularly important. The important fact for purposes of our analysis, and which appears to be undisputed, is that Southeastern wanted the cable installation technicians to come by its office on a daily basis for work-related purposes.

exact manner in which such reports were submitted irrelevant to the ultimate issue that we must resolve in this case.[4]

In addition, Plaintiff also presented evidence tending to show that he had to submit a request to his supervisor if he wanted to take a day off and that he was "supposed to submit [this request] two weeks ahead of time." Plaintiff's assertion was corroborated by Exhibit 5, a document titled Southeastern Cable Request for Non-Paid Day(s) Off, a form with blank spaces for "Tech Name," "Date," "Requested Date(s) Off," "Immediate Supervisor," and "Approval," with the technician's supervisor having the option to check either "Yes" or "No" with respect to the request in question. The leave request form stated that it "MUST BE PRESENTED TO YOUR IMMEDIATE SUPERVISOR NO LESS THAN TWO (2) WEEKS PRIOR TO DATE REQUESTED" and that "UNGRANTED ABSENTEEISM WILL RESULT IN DISCIPLINARY ACTION" (use of all caps and emphasis in original). Aside from showing that Southeastern exercised control over Plaintiff's schedule, the document provides compelling evidence that Southeastern regarded the cable installation technicians as working under the authority of "supervisors" who had the power to grant or deny a request for time off, a picture which is dramatically different from the situation faced by a subcontractor who is free to tell the site boss that, for example, he "has to work on another job tomorrow but will be back the day after."

Furthermore, Plaintiff testified that the cable installation technicians were divided into two teams for the purpose of establishing "a weekend rotation, so A team would work, say, this Saturday and B team next Saturday[.]" Although Mr. Hair did not dispute the existence of these "teams," he claimed that the cable installation technicians had created them on their own and that the "supervisors" operated on an informal, rather than a formal, basis. Mr. Hair also denied that Southeastern controlled the working hours of the cable installation technicians. Instead, he claimed that the cable installation technicians were free to leave work each day as soon as they completed their last assigned task. Although Defendant Hair acknowledged the use of the leave form described in Plaintiff's testimony, he stated that "[w]e just done that because it got out of hand a couple of times. You'd have four or five guys wanting to get off at one time." When asked whether cable installation technicians had to give notice

4. Although Defendants emphasize that the cable installation technicians were required to contact Time Warner after completing work on a particular assignment, the record tends to show that, not surprisingly, Southeastern kept up with the progress of each technician's work as well.

before taking vacation time, Mr. Hair replied that, "[i]f we have fifty jobs scheduled on a weekly time frame, we've got to know that we've got . . . ten techs to do the job and five jobs apiece." According to Mr. Hair, the cable installation technicians were essentially providing "notification" that they were going to take a day off, not asking permission to do so.

Although the testimony provided by Plaintiff and Defendant Hair with respect to the leave issue was in conflict, Defendant Southeastern conceded the use of the leave request form. "It is a well-established rule that the intent of a party is to be ascertained by the words he chooses." *Franklin v. Faulkner*, 248 N.C. 656, 659, 104 S.E.2d 841, 843 (1958) (citations omitted). We conclude that, were the cable installation technicians merely providing "notice" that they intended to take time off, there would have been no need for the portion of the form that stated that the leave request or notification form "MUST BE PRESENTED TO YOUR IMMEDIATE SUPERVISOR NO LESS THAN TWO (2) WEEKS PRIOR TO DATE REQUESTED" and that "UNGRANTED ABSENTEEISM WILL RESULT IN DISCIPLINARY ACTION." As a result, given the full-time nature of the work required of cable installation technicians, the requirement that the necessary installation work be performed within a certain window, the fact that that Southeastern monitored the progress made by each technician, the fact that each technician needed to come to Southeastern's office each day, and the necessity for technicians to obtain authorization prior to taking time off, the record evidence tends to show that Plaintiff's schedule was, in large part, subject to Southeastern's control.

2. Other Evidence

As we have already discussed, *Hayes* did not suggest that the criteria listed in that decision were intended to be exclusive. We now examine a number of other factors that we believe to be relevant.

a. Organizational Structure

Plaintiff testified that his supervisor was Chris Carter, who also performed cable installation work for Defendant Southeastern. The record contains the following documents:

1. A document titled "Contact List" identifying Plaintiff as a member of the ten man "Installation Department" and naming Chris Carter and Tim Lewis as "Supervisors" of the Installation Department.

2. A document titled "Contacts," identifying Mr. Hair as Southeastern's owner, Chris Carter and Tim Lewis as "Field Supervisors," and Greg Adair as the "Warehouse Supervisor."

Mr. Hair testified that the "supervisors" named in these documents were technicians who helped ensure that all the jobs were completed in a timely fashion and that, if a supervisor worked on a job assigned to a technician, Mr. Hair might pay them "three or four hundred dollars" of his own money. In addition, Mr. Hair stated that the supervisors "would handle additional responsibilities" and that, when Plaintiff was injured, "[h]e called the supervisor, and the supervisor called me."

> Q. Well, there was a regular hierarchy in your business, [wasn't] there? There was you, and there were supervisors, and there were installers, weren't there?
>
> A. Right.
>
> Q. And the installers . . . answered to the supervisors, didn't they?
>
> A. Right.

As a result, Defendant Hair did not dispute the existence of these "supervisors." Thus, we conclude that this organizational structure, in which Plaintiff had a "supervisor," tends to militate against a determination that Plaintiff was an independent contractor.

b. Insurance Requirements

The record clearly establishes that Defendant Southeastern required Plaintiff to obtain an insurance policy that included a workers' compensation component before he began work. Plaintiff testified that, when he was hired, he was told "[he] had to have general liability insurance, workers' comp insurance and a vehicle." More particularly, Mr. Hair testified that cable installation technicians were "told explicitly that they've got to have coverage that takes care of themselves." Mr. Hair testified that cable installation technicians were required to have a certain amount of coverage, but denied steering them to any particular insurance agent. Defendant Hair admitted that he never asked any cable installation technicians whether he had workers' compensation coverage.

The undisputed evidence shows that the workers' compensation insurance that Plaintiff procured excluded Plaintiff from coverage, resulting in the issuance of a workers' compensation policy that did not provide any coverage for Plaintiff or anyone else. Despite this fact, Southeastern argues that it is "likely" that "[P]laintiff specifically sought a ghost policy." We do not, however, find the fact that Plaintiff

procured such a policy particularly relevant, since the undisputed evidence establishes that he procured insurance at Southeastern's insistence, making this fact merely a reaffirmation of Southeastern's position that Plaintiff was an independent contractor. "Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729, 91 L. Ed. 1772, 1778, 67 S. Ct. 1473, 1476 (1947).

c. Uniform and Vehicle Requirements

The undisputed record evidence establishes that Southeastern imposed requirements upon cable installation technicians, including Plaintiff, regarding the uniform he wore and the vehicle that he operated while on the job. According to Plaintiff, he was required to wear "Southeastern Cable work shirts that had a Southeastern Cable logo on one side, their name, and then [his] name on the other side." Mr. Hair confirmed Plaintiff's assertion, testifying that the cable installation technicians chose to procure uniforms from the "Santos" company and that the technicians paid $13.00 a week to have their uniforms laundered. In addition, Plaintiff was required to drive "a white vehicle" that was "newer than seven years" old and to affix a magnetic sign to its side that read "Southeastern Cable, Authorized Contractor for Time Warner." Aside from the fact that the imposition of these requirements suggests that Southeastern exerted control over Plaintiff's appearance, they also might convey the impression that Plaintiff was employed by Southeastern.

C. Discussion

In light of the undisputed record evidence and the considerations discussed above, we make the following findings of jurisdictional fact:

1. Plaintiff was required to train for three weeks with one of Southeastern's supervisors before being assigned jobs.

2. Plaintiff did not negotiate any of the terms of his individual job assignments, which were determined solely by Southeastern and Time Warner. The cable installation technicians, including Plaintiff, were all paid the same percentage of the fee negotiated by Southeastern and Time Warner for each job completed.

3. Plaintiff was required to drive a particular type of vehicle displaying a magnetic sign advertising Southeastern and to wear a uniform bearing Southeastern's name.

4. Plaintiff was required to use a specific set of tools. If Plaintiff did not have one of the tools on the list, Southeastern would provide Plaintiff with the required tool and deduct the cost of that tool from his pay.

5. Plaintiff was required to report in person to Southeastern's office on a daily basis to turn in paperwork and pick up his assignments.

6. Plaintiff was expected to work six days a week at jobs assigned by Southeastern.

7. Upon completion of his individual job assignments, Plaintiff was required to notify Time Warner, which would enter this information into a computer program that Southeastern accessed for the purpose of monitoring Plaintiff's progress during the course of the day.

8. Plaintiff's job assignment schedule depended upon the job assignments that Time Warner sent to Southeastern, was not subject to Plaintiff's control, and required him to complete each job within a particular two hour time period.

9. Plaintiff worked as part of a team of Southeastern technicians and reported to a supervisor.

Although these uncontradicted facts are arguably sufficient to establish that Plaintiff had an employer-employee relationship with Southeastern, we also make the following additional finding of jurisdictional fact in light of our resolution of various conflicts in the tone and tenor of the evidence:

> It is undisputed that Southeastern required Plaintiff to complete a "Leave Request" form if he wanted to take time off. In light of its contents, we find that this form was a request for time off and not simply notification; that Plaintiff was required to ask his "supervisor" two weeks in advance for a day off; and that the supervisor had the option of approving or denying the request.

Based on these findings, we conclude that Plaintiff was an employee rather than an independent contractor. The factors that lead us to this conclusion include the fact that Plaintiff did not and could not operate an independent cable installation business, the fact that most aspects of Plaintiff's work schedule were controlled by or dependent upon Southeastern, the fact that the manner in which Plaintiff performed his work was controlled by Southeastern, either directly or

through its contract with Time Warner, and the fact that Southeastern asserted supervisory authority over and the right to discipline Plaintiff. As was stated in a recent, thoughtful decision by the United States District Court for the Eastern District of Louisiana:

> [W]ith regard to DirecTV, Plaintiffs . . . allege that DirecTV controlled their daily routines. They allege that DirecTV set the rate of compensation for each job, monitored their performance, and ultimately controlled their receipt of wages. Moreover, they claim that DirecTV and JP&D conducted background checks and drug tests at facilities of their choice. Humphreys also alleges in his declaration that he was required to wear a DirecTV uniform, give clients DirecTV paperwork, and have a DirecTV logo on his vehicle. . . . The allegations of DirecTV's control over the technicians, including control of their compensation, work assignments, and uniforms, all tend to indicate that the plaintiffs were employees of DirecTV.

Lang v. DirecTV, Inc., 735 F. Supp. 2d 421, 433 (E.D. La. 2010), 2011 U.S. Dist. LEXIS 74674 (E. D. La. 2011) (denying defendants' motion to dismiss plaintiffs' claims).

In reaching this conclusion, we reject Defendant's contention that *Bowen v. Cra-Mac Cable Services*, 60 N.C. App. 241, 298 S.E.2d 760, *cert. denied*, 307 N.C. 696, 301 S.E.2d 388, (1983), requires us to reach a different outcome. First, *Bowen* did not address or resolve the issue of whether the claimant worked as an employee or a contractor, given that both parties treated the claimants as subcontractors, and instead focused our attention on whether, assuming that Plaintiff had independent contractor status, he might still be entitled to workers' compensation benefits on the basis of an estoppel theory. Secondly, there are a number of important factual distinctions between this case and *Bowen*, including the absence of any evidence that the claimant in *Bowen* had to obtain permission to take unpaid leave or that the defendant utilized a hierarchical structure with supervisors. As a result, we conclude that *Bowen* does not control the outcome of this case.

III. Conclusion

Thus, for the reasons discussed above, we conclude that the greater weight of the evidence shows that Southeastern exerted the degree of control of Plaintiff that is characteristic of an employer's control over an employee; that, at the time Plaintiff was injured, he

was a Southeastern employee; and that the Commission erred in reaching a contrary conclusion. As a result, we reverse the Commission's jurisdictional decision and remand this case to the Commission for further proceedings not inconsistent with this opinion.[5]

REVERSED AND REMANDED.

Chief Judge MARTIN and Judge McGEE concur.

BRIAN W. MEEHAN, PLAINTIFF v. AMERICAN MEDIA INTERNATIONAL, LLC; DNA SECURITY, INC.; AND RICHARD CLARK, DEFENDANTS

No. COA10-1091

(Filed 2 August 2011)

1. Employer and Employee—breach of employment—conduct grounds for termination—reasons not pretextual—summary judgment proper

The trial court did not err in a breach of employment contract case by granting defendants' motion for summary judgment. There were no genuine issues of material fact as to whether plaintiff engaged in conduct that met the employment agreement's grounds for termination and given the just cause for termination, defendant's reasons for plaintiff's discharge were not pretextual.

2. Employer and Employee—tortious interference with contract—no intentional inducement—summary judgment proper

The trial court did not err in a tortious interference with contract case by granting defendants' motion for summary judgment. Defendant DSI did not breach its contract with plaintiff because it had just cause for termination. Since there was no breach of

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5. Although Defendants argue that Plaintiff's claim is barred by N.C. Gen. Stat. § 97-19 on the grounds that, as an independent contractor, he was required to procure his own insurance, this aspect of Defendants' argument assumes that Plaintiff had a status which we have found that he did not, in fact, occupy. In addition, we are not persuaded that Plaintiff's decision to procure insurance operates to estop him from asserting that he should be treated as an employee given that he procured this insurance in light of Southeastern's decision to treat him as an independent contractor rather than an employee. Simply put, the fact that Plaintiff never asserted, independently of instructions that he received from Southeastern, that he was an independent contractor precludes us from reaching the conclusion that he was estopped from asserting employee, rather than independent contractor, status.

contract, plaintiff's claim failed. Additionally, as just cause for termination existed, defendants Clark and AMI had legal justification for discharging plaintiff.

3. Employer and Employee—employment contracts—Wage and Hour Act—terms ambiguous—genuine issues of material fact—summary judgment improper

The trial court erred in a North Carolina Wage and Hour Act claim by granting defendants' motion for summary judgment. The language of the employment contract was ambiguous and genuine issues of material fact existed as to which iteration of the Consumer Price Index should be used.

Appeal by Plaintiff from an Order entered 26 March 2010 by Judge J.B. Allen, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 10 March 2011.

Elliot Pishko Morgan, P.A., by Robert M. Elliot, for Plaintiff-appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Robert A. Sar, Gretchen W. Ewalt, and Phillip J. Strach, for Defendants-appellee.

HUNTER, JR., Robert N., Judge.

Brian W. Meehan ("Plaintiff") appeals from an Order granting Defendants' Motion for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. We affirm in part, and vacate and remand in part.

I. Facts and Procedural History

This case arises from a dispute between Plaintiff and his former employer, DNA Security, Inc. ("DSI"). In 2006, Plaintiff prepared a report analyzing DNA samples in connection with the Durham Police Department's investigation of 46 Duke University lacrosse players on sexual assault allegations (the "Duke Lacrosse Case"). The report obscured findings that exculpated the charged players, and in the controversy that followed, DSI terminated Plaintiff's employment. Plaintiff contends DSI did not have just cause for termination and filed the underlying action against DSI, American Media International, LLC ("AMI"), and Richard Clark ("Clark") (collectively "Defendants").

Plaintiff, who has a Ph.D. in Marine Science, is a scientist specializing in DNA analysis and testing. In 1998, Plaintiff established and incorporated DSI as a company providing DNA forensic analysis in North Carolina and began marketing its services to sheriffs, police departments, and district attorneys. In order to be recognized by police and prosecutorial authorities as a qualified testing lab, DSI had to obtain the "gold standard" of accreditation from the American Society of Crime Laboratory Directors ("ASCLD/LAB"). To meet ASCLD/LAB accrediting standards, DSI had to prepare and submit its procedures and protocols to ASCLD/LAB to assure ASCLD/LAB that DSI test results and reports would meet required standards of accuracy and reliability. DSI obtained ASCLD/LAB certification in 2003.

On 27 October 2004, Plaintiff, then the sole director, officer, and shareholder of DSI, and Clark, President of AMI, executed a stock purchase agreement under which AMI would purchase all the stock of DSI and Plaintiff would remain employed by DSI for seven years pursuant to a term sheet appended to the stock purchase agreement ("Employment Agreement").

The Employment Agreement contained four sections relevant to this appeal as follows:

> 5. Initial Salary: One Hundred Twenty Five Thousand Dollars ($125,000.00) per year payable in equal monthly installments.
>
> 6. Salary Adjustments: The salary shall be adjusted annually to, at least, reflect any percentage increase in the Consumer Price Index (all items) as calculated by the United States Bureau of Labor Statistics. There shall be no salary adjustment downward in any year in which the Consumer Price Index might decrease from the previous year.
>
> 7. Employment Position and Responsibilities: Employer shall engage and hire Employee for the position of Executive Director and Employee shall perform such duties as are customary by one holding such a position in a similar business or enterprise.
>
> . . . .
>
> 11. Termination of Employment:
>
> . . . .
>
> b. Employment shall terminate for just cause, including any violation of policies and procedures listed in the [DSI] employee handbook, or any terms of this agreement, or in the event the

> employee is convicted of a crime of moral turpitude or dishonesty. In any of these events of termination, [DSI] shall be obligated to pay Employee only such compensation as is due and payable through the date of termination.

At the time of the agreement, DSI had an employee handbook, referenced in Section 11(b) of the Employment Agreement, which provided standards of conduct that Defendants assert support a contractual basis for Plaintiff's termination. The relevant portion of this employee handbook reads as follows:

> 5.2 Rules of Conduct: . . . Although not all-inclusive, any of the following types of misconduct are considered unacceptable behavior and will result in disciplinary action up to and including immediate discharge.
>
> . . . .
>
> (17) Substandard performance on the job.
>
> . . . .
>
> The absence of any misconduct not listed above does not prevent its being considered a breach of our rules of conduct. If your appearance, performance, work habits, overall attitude, conduct, or demeanor become unsatisfactory in the judgment of the Company, based on violations either of the above or any other Company policies, rules or regulations, you may be subject to disciplinary action, up to and including dismissal.

From the execution of the stock purchase agreement until the time of the events described hereinafter, the parties' relationship appeared to be harmonious.

In the spring of 2006, the Durham Police Department requested DSI to conduct DNA analysis in connection with the Duke Lacrosse Case. After Plaintiff agreed to conduct the testing, the State obtained a Court Order dated 5 April 2006 from Judge Ronald L. Stephens ordering:

> the oral, anal, vaginal and underwear swabs taken from the victim's rape kit in this case, along with the 46 cheek swabbings taken from the group containing the suspects, be delivered to [DSI] . . . for the purpose of Y STR DNA analysis, and if any male positive results are found among the victim's swabs, to compare the DNA to the 46 cheek swabbings to determine if an identification can be made.

Over the next two months, DSI staff, supervised by Plaintiff, completed the requested analysis. The test results supported two conclusions: (1) there was no match between any of the specimens provided by the lacrosse players and the alleged victim; and (2) the alleged victim had recent sexual contact with multiple men who were not among the specimens provided.

Plaintiff, by affidavit, testified that in April 2006 he verbally conveyed both conclusions of the test results to District Attorney Mike Nifong ("Nifong") and subsequently authored and signed a written report to Nifong dated 12 May 2006 providing the results of the analysis (the "12 May 2006 Report"). Plaintiff admits he is responsible for the creation of the 12 May 2006 Report and the report was his work product.

While the 12 May 2006 Report can, in theory, be read to support the first conclusion of the analysis (that there was no match between any of the specimens provided by the accused and the accuser), the language used to convey both of Plaintiff's conclusions is vague. Instead of explicitly stating both conclusions, Plaintiff used the following opaque language in the 12 May 2006 Report: "Results of DNA analysis: Individual DNA profiles for non-probative evidence specimens and suspect reference specimens are being retained at DSI pending notification of the client. Three of the reference specimens are consistent with DNA profiles obtained from some evidence items and the analysis of these specimens is below." Specifically, Plaintiff's use of the phrase "non-probative" in the 12 May 2006 Report obscured the actual test results. Although the test results exonerate the lacrosse players, subsequent to the State's receipt of the 12 May 2006 Report, three of the 46 lacrosse players, Collin Finnerty, Reade Seligmann, and David Evans (collectively "the charged players"), were indicted by the State for first degree forcible rape, first degree sexual offense, and kidnapping.

In response to discovery motions, the State provided the results of the lab tests to the attorneys representing the charged players in October 2006. On 14 December 2006, Nifong informed Plaintiff that the attorneys representing the charged players made a motion that Plaintiff be tendered as a witness at a hearing scheduled for 15 December 2006. As the author of the 12 May 2006 Report, Plaintiff was encouraged by Nifong and Clark, then President of DSI, to testify as to the report's findings. Plaintiff was reluctant to testify at the hearing and cited that he would not be able to review the "volume of documents" needed for adequate trial preparation in time for his testimony.

Through Plaintiff's testimony at the 15 December 2006 hearing, it became clear that the 12 May 2006 Report was flawed. The following exchange between Plaintiff and an attorney for one of the charged players illustrates the central flaw of the report:

> Q. Let me direct your attention to what is exhibit Attachment No. 15 of Defendants' Exhibit No. 1. The bottom number is 3883.
>
> A. I'm there.
>
> Q. Does that appear to be the protocols for your lab—
>
> A. Yes.
>
> Q. —on how you run your lab?
>
> A. Yes.
>
> Q. Do you rely on those protocols routinely to maintain your accreditation with ASCLD/LAB?
>
> A. Yes.
>
> Q. I'd like to direct your attention to standards for reports. It says, No. 4, item reports shall include . . .
>
> A. I'm there.
>
> Q. Doesn't it say, Results for each DNA test?
>
> A. Yes.
>
> Q. You didn't include the results for each DNA test in your report dated May 12; is that correct?
>
> A. That's correct.
>
> Q. So you violated this protocol of your own lab?
>
> A. That's correct.
>
> Q. And you violated this protocol of your own lab because the district attorney told you to; is that correct?
>
> A. No. It's not just because the district attorney told me to. And, you know, I don't know a better way to say this. You know, we, we legitimately—and it may not hold any weight in your legal arena, but we were legitimately concerned about a report that could become explosive if it had overly detailed all those profiles from all those players in it, okay.

Now, so we agreed with Mr. Nifong that we would report just the stuff that matched so that it would, so the report was limited in its scope. However, it's not a—and by the letter of the law, by the letter of the wording of the standard, you're absolutely correct. It diverges from the letter of that standard, okay. But we do indicate on the report that there is additional information. We would be glad to provide this information if you would like.

But at this point on this report, it was limited. This, I don't have another explanation for it.

. . . .

I don't have a legal justification for it or a reason, okay. It was just trying to do the right thing. And that information is still available and it was available to you when we released the full documents.

. . . .

Q. Okay. Were [the prosecuting attorneys] aware that all the testing that you had done excluded Reade Seligmann with a hundred percent scientific certainty as of the date you wrote your report?

A. I believe so.

Q. Did you have a specific discussion with them about whether that information excluding Reade Seligmann should be included in the report?

A. Not with that specific name, No. We never mentioned that specific name.

Q. How about any defendant?

A. We never, I actually don't recall using any defendant's names. . . .

Q. Did your report set forth the results of all of the tests and examinations that you conducted in this case?

A. No. It was limited to only some results.

Q. Okay. And that was an intentional limitation arrived at between you and representatives of the State of North Carolina not to report on the results of all examinations and tests that you did in this case?

A. Yes.

Plaintiff's 15 December 2006 testimony regarding the incomplete 12 May 2006 Report created substantial adverse reactions to DSI in

the news media. The national television news program *60 Minutes* produced a segment on the Duke Lacrosse Case. DSI asked Plaintiff to appear on *60 Minutes* to answer questions from CBS correspondent Leslie Stahl. Plaintiff reluctantly agreed to do so. During the interview, Plaintiff made the following statements:

> [Leslie Stahl]: So . . . when you produced other reports if you have found information about other [suspects,] other people who aren't suspects, you would leave it out of the report? Have you done this before?
>
> [Plaintiff]: No. I . . . wouldn't leave it—we haven't done that before, and I wouldn't leave it out.
>
> . . . .
>
> [Leslie Stahl]: [D]id you just completely, totally, you, yourself, take it on yourself, all you, no influence from the District Attorney; and not put every single thing that a lot of other forensic specialists, who we've talked to, say should have been in that report?
>
> [Plaintiff]: It was an error by me.
>
> [Leslie Stahl]: Your error?
>
> [Plaintiff]: It was my error.
>
> [Leslie Stahl]: Not the District Attorney?
>
> [Plaintiff]: No, I'm the person that wrote that report, and—and the District [Attorney] at no time explicitly told me to include, to exclude in that report.

On 10 January 2007, prior to the airing of the *60 Minutes* interview on 11 February 2007, Plaintiff composed an amended laboratory report that corrected the errors in the 12 May 2006 Report. This 10 January 2007 report explicitly stated the DNA evidence provided by Nifong did not match any of the lacrosse players' DNA. After reviewing these events, on 25 July 2007 ASCLD/LAB issued a report confirming the validity of allegations made against DSI concerning its 12 May 2006 Report; ASCLD/LAB asserted DSI inappropriately characterized certain DNA samples as non-probative. ASCLD/LAB also noted that DSI had taken actions to correct the 12 May 2006 Report.

Following the broadcast of the *60 Minutes* interview and other public comments about DSI, Plaintiff's workload and DSI's revenues

declined. Defendants directly attribute this decline to Plaintiff's 12 May 2006 Report. Additionally, the charged players filed a civil action for damages against DSI and Plaintiff, which, according to the record, remains unresolved.

Unbeknownst to Plaintiff, DSI began looking for a new lab director to replace Plaintiff in the spring of 2007. While DSI was securing a replacement lab director, Plaintiff continued to serve as lab director and to testify in various legal proceedings relating to the Duke Lacrosse Case. Plaintiff was scheduled to receive a "milestone" payment of $160,000 in January 2008, if he remained employed until that date, pursuant to the terms of the Employment Agreement.

On 11 October 2007, Clark wrote a letter to Plaintiff terminating his employment for just cause pursuant to clause 11(b) of the Employment Agreement. The letter states, in part:

> While I know for certain that the allegations against you, the company and myself are completely false, your failure to adequately explain DSI's role in this case to the public and to the lacrosse families during the multiple times you have testified has directly lead to the dire situation the company currently faces. Based on our conversations, I also know that you fully understand and acknowledge that your poor communications have put you, DSI and myself in this ridiculous situation.
>
> This letter will serve as notice that DSI is terminating your employment immediately. Standing alone, your misstatement that you committed an alleged "big error" in the handling of the Duke Lacrosse case, as you characterized it on national television during a 60 Minutes interview, constitutes just cause for ending your employment as Executive Director of the lab pursuant to the Employment Agreement the company entered into with you in October of 2004. As we have discussed many times and you have consistently told me, there in fact was no "big error."

Some months after sending the letter, Defendants sent Plaintiff a check in the amount of $6,554.24, which Defendants contend was the amount due to Plaintiff pursuant to the Employment Agreement, including any salary adjustment due to a rise in the Consumer Price Index ("CPI"). Plaintiff disputes that this is the correct amount owed to him, alleging DSI improperly calculated the amount due under the CPI salary adjustment contract provisions. Plaintiff contends he is due $10,627 for CPI adjustments dating from January 2006.

Plaintiff filed claims for relief against Defendants on 11 August 2008 in Alamance County Superior Court. The Complaint alleges five claims for relief: breach of an employment contract against AMI and DSI, breach of the covenant of good faith and fair dealing against AMI and DSI, violation of the North Carolina Wage and Hour Act against AMI and DSI, tortious interference with contract against AMI and Clark, and conspiracy to engage in wrongful conduct against all of the defendants. Defendants' Answer denied the allegations and asserted 24 affirmative defenses. After thorough discovery, Defendants filed a Motion for Summary Judgment on 12 October 2009 and Plaintiff filed a Motion for Partial Summary Judgment on 9 March 2010 based upon his claim for violation of the North Carolina Wage and Hour Act. Both Motions were supported by extensive affidavits and depositions and were heard before Judge J.B. Allen on 15 March 2010. The trial court denied Plaintiff's Motion and granted Defendants' Motion for Summary Judgment, dismissing all of Plaintiff's claims with prejudice. Plaintiff timely appealed the Order.

II. Jurisdiction and Standard of Review

This Court has jurisdiction to hear the matter pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). We review the trial court's Order granting summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007).

The standard of review for a summary judgment motion is whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980), *cert. denied*, 276 S.E.2d 283 (1981). "In ruling on the motion, the court must consider the evidence in the light most favorable to the nonmovant, who is entitled to the benefit of all favorable inferences which may reasonably be drawn from the facts proffered." *Averitt v. Rozier*, 119 N.C. App. 216, 218, 458 S.E.2d 26, 28 (1995). Summary judgment may be properly shown by a party: " '(1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense.' " *Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 10, 652 S.E.2d 284, 292 (2007) (quoting *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003), *aff'd*, 358 N.C. 137, 591 S.E.2d 520 (2004), *reh'g denied*, 358 N.C. 381, 597 S.E.2d 129 (2004)).

III. Analysis

On appeal, Plaintiff raises three issues by which he contends the trial court erred in granting Defendants' Motion for Summary Judgment. First, Plaintiff argues that because Defendants have the burden of proof to show just cause for termination, summary judgment is inappropriate where there are disputed issues of material fact regarding Plaintiff's termination. Second, Plaintiff argues that because Defendants were able to calculate the amount of the final check to Plaintiff, their legal position that the CPI provisions are too indefinite to be enforced is compromised, making summary judgment inappropriate. Finally, Plaintiff contends the trial court erred in dismissing his claim for tortious interference with contract because there are disputed issues of fact as to the elements of this tort.

A. Just Cause for Termination

[1] Plaintiff argues there are genuine issues of material fact to be determined by the jury as to (1) whether the ground stated for Plaintiff's termination constituted just cause; and (2) whether the ground stated was the actual reason for Defendants' action or whether the stated reason was a pretext. We disagree.

In discussing just cause, our Supreme Court has advised that:

> "Just cause," like justice itself, is not susceptible of precise definition. It is a "'flexible concept, embodying notions of equity and fairness,' " that can only be determined upon an examination of the facts and circumstances of each individual case. Thus, not *every* violation of law gives rise to "just cause" for employee discipline.

N.C. Dept. of Env't and Natural Res. v. Carroll, 358 N.C. 649, 669, 599 S.E.2d 888, 900-01 (2004) (citations omitted). In *Carroll*, our Supreme Court adopted the approach established in *Sanders v. Parker Drilling Co.*, 911 F.2d 191 (9th Cir. 1990), for determining whether just cause for dismissal exists. *Carroll*, 358 N.C. at 665, 599 S.E.2d at 898. Courts must answer two separate questions: "(1) whether the employee engaged in the conduct the employer alleges; and (2) whether that conduct constitutes just cause for termination of employment." *Sanders*, 911 F.2d at 194 (citing H. Perritt, *Employment Dismissal Laws and Practice* 296 (1st ed. 1984)). *Carroll* informs us that the first question is a question of fact and the second question is a question of law. 358 N.C. at 665-66, 599 S.E.2d at 898. While *Carroll* addresses the termination of a public employee, it draws its legal rea-

soning from *Sanders*, a private employment case, and we thus view the legal reasoning in *Carroll* applicable in a private employment setting.

Our analysis of the issue of just cause depends substantially on our interpretation of relevant language in the Employment Agreement. " 'The controlling purpose of the court in construing a contract is to ascertain the intention of the parties as of the time the contract was made.' " *Hilliard v. Hilliard*, 146 N.C. App. 709, 714, 554 S.E.2d 374, 377–78 (2001) (quoting *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962)). " '[A] 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.' " *Atlantic & N.C.R. Co. v. Atlantic & N.C. Co.*, 147 N.C. 368, 382, 61 S.E. 185, 190 (1908) (emphasis added) (quoting Paige on Contracts, § 1112). " 'If the words employed are capable of more than one meaning, the meaning to be given is that which it is apparent the parties intended them to have.' " *Jones v. Casstevens*, 222 N.C. 411, 413, 23 S.E.2d 303, 305 (1942) (quoting *King v. Davis*, 190 N.C. 737, 741, 130 S.E. 707, 709–10 (1925)).

On 27 October 2004, both Plaintiff and Defendants willingly entered into the Employment Agreement. In the Employment Agreement, the contracting parties agreed that "any violation of policies and procedures listed in the [DSI] employee handbook, or any terms of this agreement" would be a ground for termination. The employee handbook states that "[s]ubstandard performance on the job" is a ground for termination and that "[i]f your appearance, performance, work habits, overall attitude, conduct, or demeanor become unsatisfactory in the judgment of the Company, based on violations either of the above or any other Company policies, rules or regulations, you may be subject to disciplinary action, up to and including dismissal." At trial, Plaintiff explicitly stated that he knowingly violated his company's protocol and procedures.

In accordance with the two-step analysis established in *Carroll*, we must initially determine whether Plaintiff engaged in the conduct alleged by his employer. As *Carroll* indicates, this is a question of fact. 358 N.C. at 665-66, 599 S.E.2d at 898. We conclude that there are no genuine issues of material fact as to whether Plaintiff engaged in conduct that meets the Employment Agreement's grounds for termination.

In reaching this conclusion, we initially examine the context of Plaintiff's omissions of material facts from the 12 May 2006 Report. DSI's success depended on the reliability of its reports and the credi-

bility and truthfulness of its employees. DSI was accredited and enjoyed a favorable business reputation in the law enforcement field largely based on work Plaintiff had undertaken to write a quality control manual and meet the professional scientific standards of ASCLD/LAB. Without Plaintiff's professional credentials, it is unlikely the company would have been accredited or enjoyed financial success. The business success of DSI was largely dependent on the credibility and truthfulness of its employees acting under the supervision of Plaintiff. DSI's business model depended on the reliability of the scientific research and its reports used by courts or law enforcement personnel for determining the probable guilt or likely innocence of those being tested. Plainly, Plaintiff and DSI were engaged in the business of providing professional expert witness testimony and supplying reliable DNA tests. It is within this factual context that we must consider Plaintiff's acts to determine whether Plaintiff engaged in the conduct alleged and whether or not Plaintiff's conduct constitutes just cause for discharge.

Plaintiff personally supervised and conducted DNA testing pursuant to a court order and personally prepared the 12 May 2006 Report. The instructions of the order were clear and precise. The 12 May 2006 Report prepared by Plaintiff obscured the findings of Plaintiff's analysis—that none of the tested lacrosse players' DNA matched the DNA from the specimens found on their accuser. The failure to clearly report these findings was an "error" on the part of Plaintiff. Additionally, despite ambiguity in Plaintiff's trial testimony, Plaintiff asserted on national television that he was not directed by Nifong to obscure these results and was at fault. We determine that by obscuring results in the 12 May 2006 Report, Plaintiff engaged in "substandard performance on the job" as defined by the DSI employee handbook and consequently met the Employment Agreement's grounds for termination.

Next, under the *Carroll* two-part test we must analyze whether Plaintiff's violation of the Employment Agreement constituted just cause for termination of employment as a matter of law. To show just cause, Defendants must prove either that Plaintiff failed to fulfill one or more of the explicit terms of his employment agreement, *McKnight v. Simpson's Beauty Supply, Inc.*, 86 N.C. App. 451, 452-53, 358 S.E.2d 107, 108-09 (1987); failed to serve his employer faithfully and diligently, *Wilson v. McClenny*, 262 N.C. 121, 131, 136 S.E.2d 569, 577 (1964); or failed to perform all the duties incident to his employment with that degree of diligence, care, and attention which an ordi-

nary person would exercise under the same or similar circumstances. *Id.*; *McKnight*, 86 N.C. App. at 453, 358 S.E.2d at 109.

We believe that if no specific contractual terms existed and the question was solely one of whether Defendant failed to serve his employer faithfully and diligently or failed to perform his duties with the degree of care that an ordinary person would exercise under the same or similar circumstances, this ambiguity would require jury resolution as to the issue of whether just cause for termination existed. However, since the Employment Agreement explicitly defines specific grounds for termination, this is simply a question of law, which a court may answer because it involves a construction of a written contract whose terms are not ambiguous. *Hodgin v. Brighton*, 196 N.C. App. 126, 128, 674 S.E.2d 444, 446 (2009) ("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.") (citation omitted). In the case at hand, we thus accept as a matter of law the definition of just cause provided in the Employment Agreement.

In support of his argument that a jury must find just cause as an issue of fact, Plaintiff erroneously relies on *Walker v. Goodson Farms, Inc.*, 90 N.C. App. 478, 369 S.E.2d 122 (1988). Plaintiff seems to argue that in *Walker* the jury defined just cause as an issue of fact because the jury determined whether the plaintiff's alcohol consumption interfered with his work. However, in *Walker* this Court defined just cause as a matter of law. *Id.* at 488, 369 S.E.2d at 127. The defendants urged this Court to "hold as a matter of law that habitual drinking of alcohol on an employer's premises during working hours constitutes 'just cause' for discharge." *Id.* The *Walker* Court rejected that proposition and instead held as a matter of law that an employee's use of alcohol constitutes just cause for termination of the employment contract "to the extent that it interfere[s] with the proper discharge of his duties." *Id.* (alteration in original) (quotation marks omitted) (quoting *Wilson*, 262 N.C. at 132, 136 S.E.2d at 577).

Although the *Walker* Court was clear that the determination of whether the employee engaged in the alleged conduct (using alcohol to the extent it interfered with his work) was a question of fact for the jury, it defined just cause as a matter of law. *Walker*, 90 N.C. App. at 482, 369 S.E.2d at 125. *Walker* thus comports with the two-part analysis of *Carroll* and *Sanders*. Because the second issue in *Walker*,

whether the plaintiff's alcohol consumption interfered with his work, was an issue of fact, the plaintiff was entitled to a jury trial. *Id.*

In the present case, because the parties' unambiguous language in the Employment Agreement states that grounds for termination include "any violation of policies and procedures listed in the [DSI] employee handbook," and the employee handbook includes "substandard performance on the job" as a ground for discharge, the trial court was justified in construing this language, as a matter law, to define just cause for termination. Plaintiff admits that his conduct was an "error" and hence "substandard"; his obfuscation of exculpatory evidence in the 12 May 2006 Report violated the protocol of his lab. This violation meets the specific language of the just cause provisions of Plaintiff's Employment Agreement, and we conclude this constitutes just cause for termination as a matter of law. Thus, there is no genuine issue of material fact as to whether just cause existed for Plaintiff's termination.

Plaintiff's next argument that the reasons for the discharge were pretextual is misplaced. Had Plaintiff continued his employment at DSI, he would have been entitled to a "milestone" payment in January 2008. Plaintiff claims Defendants terminated his employment to avoid this payment. On appeal, Plaintiff cites *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 618 S.E.2d 867 (2005) in support of his claim. However, in *Johnson*, there were material disputes of fact as to the alleged conduct of the employee that the employer cited as just cause for termination. *Id.* at 369-70, 618 S.E.2d at 870-71. In the present case, no such disputes exist, and DSI had just cause to terminate Plaintiff as a matter of law. Given this just cause for termination, we conclude DSI's reasons for Plaintiff's discharge were not pretextual.

Furthermore, equitable public policy reasons exist to support DSI's termination of Plaintiff. Related case law regarding at-will employment helps explain our position on this issue.

There are certain exceptions to the at-will employment rule, including public policy exceptions involving enforcement of statutes:

> First . . . parties can remove the at-will presumption by specifying a definite period of employment contractually. Second, federal and state statutes have created exceptions prohibiting employers from discharging employees based on impermissible considerations such as the employee's age, race, sex, religion, national origin, or disability, or in retaliation for filing certain claims against

> the employer. Finally, this Court has recognized a public-policy exception to the employment-at-will rule.

Kurtzman v. Applied Analytical Indus., Inc., 347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997) (citations omitted). Among the earliest cases setting forth a public policy exception is *Sides v. Duke Univ.*, 74 N.C. App. 331, 328 S.E.2d 818 (1985), *overruled in part*, *Kurtzman*, 347 N.C. at 333, 493 S.E.2d at 423. In sum, *Sides* stands for the proposition that refusal to testify falsely or incompletely does not constitute just cause for termination, as a matter of public policy. We assert the inverse proposition, that providing false or incomplete testimony may constitute just cause for termination, as a matter of public policy.

In the present case, Plaintiff's misconduct involves intentionally obscuring evidence and submitting an incomplete report in a court of law when clear explanation of the test results would have exculpated individuals wrongly charged. We believe public policy supports the conclusion that such misconduct is grounds for just cause termination of employment.

Upon *de novo* review, we conclude Plaintiff's admissions of error establish that Plaintiff engaged in violations of lab protocol constituting just cause for his discharge by Defendants. We see no evidence adduced by Plaintiff to overcome this defense and therefore, under the applicable standard of review, we hold Defendants were entitled to summary judgment on this first issue.

B. Tortious Interference

[2] Plaintiff also argues the trial court erred in granting Defendants' Motion for Summary Judgment regarding Plaintiff's claim for tortious interference with contract. We do not agree.

In a claim of tortious interference with contract, a plaintiff must establish:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

Sellers v. Morton, 191 N.C. App. 75, 81, 661 S.E.2d 915, 921 (2008) (citing *White v. Cross Sales & Eng'g Co.*, 177 N.C. App. 765, 768-69, 629 S.E.2d 898, 901 (2006)).

In the present case, Plaintiff alleges "1. A valid contract exist[ed] between [himself] and DSI; 2. Defendants Clark and AMI knew of the contract; 3. Clark and AMI intentionally induced DSI to breach its contract with [P]laintiff; 4. In doing so, Clark and AMI acted without legal justification; and 5. Plaintiff suffered damages."

We believe evidence supporting the third element of this tort is lacking from Plaintiff's claim. As we have discussed, DSI did not breach its contract with Plaintiff because it had just cause for termination. Since there was no breach of contract in this case, Plaintiff's claim fails. Additionally, given our determination that just cause for termination exists, Clark and AMI had legal justification for discharging Plaintiff.

Consequently, there are no genuine issues of material fact as to Plaintiff's claim of tortious interference with contract, and the trial court appropriately granted Defendants' Motion for Summary Judgment.

C. North Carolina Wage and Hour Act, CPI Adjustments

[3] Plaintiff next argues that the trial court erred in granting Defendants' Motion for Summary Judgment and denying Plaintiff's Motion for Partial Summary Judgment regarding Plaintiff's North Carolina Wage and Hour Act claim. We agree with Plaintiff that there are material issues of fact that preclude summary judgment on this issue.

The relevant North Carolina statute provides that:

> Every employer shall pay every employee all wages and tips accruing to the employee on the regular payday. Pay periods may be daily, weekly, bi-weekly, semi-monthly, or monthly. Wages based upon bonuses, commissions, or other forms of calculation may be paid as infrequently as annually if prescribed in advance.

N.C. Gen. Stat. § 95-25.6 (2009). In the Employment Agreement, Plaintiff and DSI specified that "[t]he salary shall be adjusted annually to, at least, reflect any percentage increase in the Consumer Price Index (all items) as calculated by the United States Bureau of Labor Statistics." Defendants claim this provision is too vague to be enforceable, since the Employment Agreement does not specify which specific CPI the parties intended to use.

When determining the intent of contracting parties, we look first to the language of the agreement. *Jackson v. Jackson*, 169 N.C. App. 46, 54, 610 S.E.2d 731, 736-37 (Hunter, J., dissenting) (citations omitted), *rev'd for reasons stated in dissent*, 360 N.C. 56, 620 S.E.2d 862-63 (2005). If the contract's plain language is clear, the intention of the parties can be inferred from the contract's words. *Id.* In that case, interpreting "the intention of the parties is a question of law. If the contract is ambiguous, however, interpretation is a question of fact, and resort to extrinsic evidence is necessary." *Speedway Motorsports Int'l Ltd. v. Bronwen Energy Trading, Ltd.*, ___ N.C. App. ___, ___, 707 S.E.2d 385, 391 (2011) (citations and quotation marks omitted).

In the present case, the language of the contract is ambiguous and genuine issues of material fact exist as to which iteration of the CPI should be used. The terms of the written contract and the fact that DSI sent Plaintiff a check for $6,554.24 convince us that Defendants had the ability to calculate the salary adjustment. We also find convincing Plaintiff's evidence, supported by expert testimony, that ambiguous provisions of the Employment Agreement regarding use of the CPI could be resolved by choosing a specific index. Because the CPI may have many different indices upon which to base salary adjustments, we conclude the parties are entitled to offer a formulation of the CPI they contend should be used to calculate Plaintiff's supplementary wage adjustments.

We thus vacate the trial court's Order granting Defendants' Motion for Summary Judgment on this claim and remand for a determination of the proper amount of salary due and whether additional costs and reasonable attorneys' fees are justified. *See* N.C. Gen. Stat. § 95-25.22(d) (2009) ("The court, in any action brought under [the Wage and Hour Act] may, in addition to any judgment awarded plaintiff, order costs and fees of the action and reasonable attorneys' fees to be paid by the defendant.")

IV. Conclusion

We conclude the resolution of the issue of just cause makes unnecessary our resolution of Plaintiff's other arguments on appeal. We affirm the award of summary judgment on all claims, except Plaintiff's Wage and Hour Act claim, which we vacate and remand to the trial court for further action.

Affirmed in part, vacated and remanded in part.

Judges BRYANT and STROUD concur.

IN THE MATTER OF: APPEAL OF BLUE RIDGE MALL LLC FROM THE DECISIONS OF THE HENDERSON COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE ASSESSMENTS OF REAL PROPERTY FOR TAX YEAR 2007

No. COA10-1487

(Filed 2 August 2011)

1. Taxation—valuation—rebuttable presumption of correctness

A *de novo* review revealed that the North Carolina Property Tax Commission did not err by concluding a taxpayer rebutted the presumption of correctness by producing competent, material, and substantial evidence tending to show the County used an arbitrary or illegal method of valuation, and the County's assessment substantially exceeded the true value in money of the property.

2. Taxation—capitalization rate—not arbitrary or capricious

A whole record review revealed that the North Carolina Property Tax Commission's use of a 10% capitalization rate was supported by the evidence and was not arbitrary or capricious.

3. Taxation—valuation—retention pond parcel

The North Carolina Property Tax Commission did not err by its valuation of a 5.15-acre retention pond parcel. The Commission assigned the same value as the County.

Appeal by Henderson County and Blue Ridge Mall LLC from final decision entered 18 June 2010 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 25 April 2011.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and Jamie S. Schwedler, for Henderson County-appellant.

Bell, Davis & Pitt, P.A., by John A. Cocklereece, Jr., D. Anderson Carmen, and Justin M. Hardy, for Blue Ridge Mall LLC-appellant.

North Carolina Association of County Commissioners, by Sharon Scudder, General Counsel, amicus curiae.

MARTIN, Chief Judge.

Blue Ridge Mall LLC (the taxpayer) and Henderson County (the County) appeal from the final decision of the North Carolina Property Tax Commission (the Commission), which valued the subject prop-

erty (the property) for the tax year 2007 at $9,461,476. The taxpayer's property consists of two parcels of land located at 1800 Four Seasons Boulevard in Hendersonville, North Carolina. One parcel, comprised of approximately 5.15 acres, is currently used as a retention pond and the other, comprised of approximately 24.19 acres, is improved with a commercial mall, the Blue Ridge Mall. Anchoring the south end of the Blue Ridge Mall is a Belk store. Belk owns the portion of the mall housing its store as well as the underlying land, and Belk's parcel physically separates the 5.15-acre parcel from the 24.19-acre parcel.

Effective 1 January 2007, the County appraised the market value of the 24.19-acre parcel at $11,696,700 and the 5.15-acre parcel at $201,900.[1] In response to interrogatories, the County stated that it had used the cost approach to value the property "as set forth in its schedule of values." The County stated that the land values in its schedule of values are based on comparable sales and that the building values in its schedule of values are based on "base costs, adjustments for various features and depreciation."

The taxpayer appealed the County's assessment to the Henderson County Board of Equalization and Review and the assessment was confirmed. The taxpayer appealed to the Commission, sitting as the State Board of Equalization and Review, and the matter was heard in December 2009.

Before the Commission, the taxpayer offered into evidence an appraisal report prepared by Paul G. Carter Jr., MAI SRA, a commercial real estate appraiser. Mr. Carter's report explained, "Income-producing properties are typically purchased by investors for the earnings that they are capable of producing." Because the income capitalization method "is by far the most applicable and reliable method of valuing multitenant [sic] income-producing properties like the subject," he used the income capitalization method in his valuation. Mr. Carter concluded that the property's market value as of 1 January 2007 was $7,735,000.

In June 2010, the Commission entered a final decision, making the following relevant findings:

> 5. Henderson County is required to value all property for *ad valorem* tax purposes at its true value in money, which is "market

1. The exhibits on appeal and the Commission's findings indicate the County subsequently amended the assessed value of the 24.19-acre tract, with a total final valuation of $11,496,600; the land was valued at $5,174,300 and the improvements at $6,322,300.

value." N.C. Gen. Stat. 105-283 . . . . Market value is defined in the statute as:

> "The price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used." Id.

6. An important factor in determining the subject property's market value is its highest and best use. The highest and best use of the subject property is its present use as an enclosed regional mall.

. . . .

8. The Commission recognizes that the [taxpayer's] appraiser[, Paul G. Carter, Jr. MAI, SRA,] prepared an appraisal report wherein he only used the income capitalization approach to estimate his opinion of value for the subject property. . . .

9. When relying upon the income capitalization approach, the [taxpayer's] appraiser reached an estimated opinion of value of $7,735,000 for the subject property, effective January 1, 2007. Mr. Carter arrived at his estimated opinion of value as follows:

> Stabilized net operating income (NOI) excluding real estate taxes:$993,455
>
> Divided by the tax-loaded overall capitalization rate: 0.12842

10. Of the sales information contained in his appraisal report, Mr. Carter relied upon the Mayberry Mall sale that occurred on December 28, 2007 to determine his overall capitalization rate of 12%. Mr. Carter made no adjustments to his overall capitalization rate due to the age of the Mayberry Mall property (The Mayberry Mall property is fifty percent (50%) older than the subject property) and the sale of this property occurred after the January 1, 2007 reappraisal date.

11. Of the three accepted appraisal approaches to value, namely the cost approach, comparable sales approach, and income capitalization approach, an appraiser should consider all three appraisal approaches to value as long as the income approach is given the greatest weight to determine the market

value for income-producing property. When arriving at the fair market value for the subject property, an appraiser may consider the cost approach or a combination of the three approaches to value the property, but the appraiser's reliance upon the income capitalization approach is most appropriate to determine the subject property's market value as of January 1, 2007.

12. Henderson County did not assess the subject property at its market value as of January 1, 2007 when it did not rely upon the income capitalization approach to value the property. As such, the most reliable appraisal method to determine the market value for the subject property is the income capitalization approach.

13. There are two methods under the income capitalization approach (direct capitalization or yield capitalization (discounted cash flow analysis) [sic] that are used in appraising income-producing properties. For purposes of this appeal, the direct capitalization method is most appropriate because it is the method commonly used by investors in the region where the subject property is located.

14. The direct capitalization method considers net operating income at only one point in time. As of January 1, 2007, the subject property's stabilized net operating income (NOI) excluding real estate taxes was $993,455. When considering all the evidence an overall capitalization rate of 10.5% is most appropriate to determine the market value of the subject property as of January 1, 2007. When the subject property's net operating income of $993,455 is divided by the overall capitalization rate of 10.5%, the total market value for the property subject to this appeal was $9,461,476 as of January 1, 2007; $201,900 for the retention pond parcel . . . and $9,259,576 for [the Blue Ridge Mall parcel].

(Footnotes omitted.) It then entered the following conclusions,

1. Ad valorem assessments are presumed to be correct. When assessments are attacked or challenged, an appellant is required to produce evidence that tends to show that the County relied on an illegal or arbitrary valuation method and that the assessment substantially exceeds true value of the property.

2. After the appellant produces such evidence as outlined above, the burden of going forward with the evidence and of persuasion that its methods would in fact produce true value then

rests with the County; and it is the Commission's duty to hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the County met its burden.

3. After considering all the evidence, the exhibits and all matters of record and after determining its weight and sufficiency and the credibility of witnesses, and appraising conflicting and circumstantial evidence, the Commission concludes that Henderson County did not properly assess the subject property at its market value and that the total valuation of the subject property was $9,461,476, as of January 1, 2007.

(Footnotes omitted). Accordingly, the Commission ordered that the County revise its tax records to reflect the Commission's findings and conclusions. The taxpayer and the County filed timely notices of appeal from the Commission's decision.

It is a "sound and a fundamental principle of law in this State that ad valorem tax assessments are presumed to be correct." *In re AMP Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975). However, a taxpayer may rebut this presumption by producing "competent, material and substantial evidence that tends to show that: (1) [e]ither the county tax supervisor used an arbitrary method of valuation; or (2) the county tax supervisor used an illegal method of valuation; and (3) the assessment substantially exceeded the true value in money of the property." *Id.* at 563, 215 S.E.2d at 762 (citing *Albemarle Elec. Membership Corp. v. Alexander*, 282 N.C. 402, 410, 192 S.E.2d 811, 816-17 (1972)) (emphasis omitted). In attempting to rebut the presumption of correctness, the burden upon the aggrieved taxpayer "is one of production and not persuasion." *In re IBM Credit Corp.*, 186 N.C. App. 223, 226, 650 S.E.2d 828, 830 (2007), *aff'd per curiam*, 362 N.C. 228, 657 S.E.2d 355 (2008). Once a taxpayer produces sufficient competent, material and substantial evidence to rebut the presumption of correctness, the burden of proof then shifts to the taxing authority and the taxing authority must demonstrate its methods produce true value. *In re S. Ry. Co.*, 313 N.C. 177, 182, 328 S.E.2d 235, 239 (1985).

N.C.G.S. § 105-345.2(b) provides that, in reviewing the Commission's final decision, this Court

may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceed-

ings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the Commission; or

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (2009).

[1] The County first contends the taxpayer failed to rebut the presumption of correctness by producing competent, material and substantial evidence tending to show the County used an arbitrary or illegal method of valuation and the County's assessment substantially exceeded the true value in money of the property. We disagree.

N.C.G.S. § 105-317 provides that,

(a) Whenever any real property is appraised it shall be the duty of the persons making appraisals:

(1) In determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; water privileges; dedication as a nature preserve; conservation or preservation agreements; mineral, quarry, or other valuable deposits; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value except growing crops of a seasonal or annual nature.

(2) In determining the true value of a building or other improvement, to consider at least its location; type of construction; age; replacement cost; cost; adaptability for residence, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value.

. . . .

(b) In preparation for each revaluation of real property required by G.S. 105-286, it shall be the duty of the assessor to see that:

(1) Uniform schedules of values, standards, and rules to be used in appraising real property at its true value and at its present-use value are prepared and are sufficiently detailed to enable those making appraisals to adhere to them in appraising real property.

N.C. Gen. Stat. § 105-317 (2009).

The County argues that because it used its 2007 schedule of values when it appraised the property, which was required by N.C.G.S. § 105-317, and because, after the County's initial appraisal, it visited the property and used the income and sales comparison methods to show that its initial assessment was correct, the taxpayer failed to overcome the presumption of correctness of the County's assessment. The County contends N.C.G.S. § 105-317 "require[s] County assessors to value land and buildings separately." The County also contends "it is not possible, as a practical matter, to undertake individual income approaches and sales comparison analyses for each . . . income-producing property during the initial mass appraisal."

N.C.G.S. § 105-317 requires that appraisers determine the "true value" of real property as those words are defined in N.C.G.S. § 105-283.

[T]he words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C. Gen. Stat. § 105-283 (2009). "An illegal appraisal method is one which will not result in 'true value' as that term is used in [N.C.G.S.] § [105-]283." *In re S. Ry. Co.*, 313 N.C. at 181, 328 S.E.2d at 239. Since " '[a]n illegal appraisal method is one which will not result in true value as that term is used in [N.C.G.S. § 105-283],' it follows that such method is also arbitrary." *In re Lane Co.*, 153 N.C. App. 119, 124, 571 S.E.2d 224, 227 (2002). In appraising the true value of real property, N.C.G.S. § 105-317 "has been interpreted as authorizing three methods of valuing real property: the cost approach, the comparable sales

approach, and the income approach." *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 648, 576 S.E.2d 316, 320 (2003). However, "the general statutes nowhere mandate that any particular method of valuation be used at all times and in all places." *Id.* "The statute contemplates that the assessors and the Commission will consider which factors [in N.C.G.S. § 105-317] apply to each specific piece of property in appraising its true value." *Id.* at 648-49, 576 S.E.2d at 321; *In re Ad Valorem Valuation*, 282 N.C. 71, 80-81, 191 S.E.2d 692, 698 (1972) ("Not every attribute specified in G.S. 105-295 is applicable to every piece of property in the county."). N.C.G.S. § 105-317 "expressly directs that consideration be given to the income producing ability of the property where appropriate. Obviously, this is an element which affects the sale of properties, the purpose of which is the production of income." *Id.* at 80, 191 S.E.2d at 698. "To conform to the statutory policy of equality in valuation of all types of properties, the statute requires the assessors to value all properties, real and personal, at the amount for which they, respectively, can be sold *in the customary manner in which they are sold*." *Id.* (emphasis added). "An important factor in determining the property's market value is its highest and best use." *In re Belk-Broome Co.*, 119 N.C. App. 470, 473, 458 S.E.2d 921, 923 (1995), *aff'd per curiam*, 342 N.C. 890, 467 S.E.2d 242 (1996). "It is generally accepted that the income approach is the most reliable method in reaching the market value of investment property." *Id.* at 474, 458 S.E.2d at 924.

The taxpayer offered into evidence Mr. Carter's appraisal report, which stated the following: "The highest and best use of the property, as improved, is to continue maintaining the subject's existing improvements as an enclosed shopping mall." The income capitalization approach "is by far the most applicable and reliable method of valuing multitenant [sic] income-producing properties like the subject." Typically, "commercial real estate investors and brokers use only the income capitalization approach to analyze existing regional malls, like the subject, because this valuation approach directly reflects their investment thinking." The sales comparison approach "is much less applicable and reliable for this type of property" and the cost approach "would be practically meaningless for valuing the subject."

Using the income capitalization method, Mr. Carter capitalized the property's estimated potential net operating income of $993,455 with a rate of 12.842% and valued the property at $7,735,000. In response to interrogatories, the County stated that it had initially appraised the property using the cost approach, valuing the land

based on comparable sales and the building based on base costs, adjustments for various features, and depreciation. Contrary to the County's arguments, the taxpayer offered competent, material and substantial evidence tending to show the County, by employing an appraisal method which did not result in the property's true value in money, used an illegal or arbitrary method of appraisal, and, that the method used resulted in an assessment that substantially exceeded the true value in money of the property. *See In re AMP Inc.*, 287 N.C. at 563, 215 S.E.2d at 762.

Furthermore, we note that, on at least two occasions, this Court has rejected the argument that reliance on a schedule of values precludes a taxpayer from overcoming the presumption of correctness of a property tax appraisal.

In *In re Lane Company*, 153 N.C. App. at 124-25, 571 S.E.2d at 227-28, in response to a county's "reli[ance] on its schedule of values to show the assessment [wa]s not arbitrary," we noted that, "[a]lthough the schedule of values shows an objective process in the county's valuation procedures as a whole, it does not prove that the valuation and assessment of the subject property was itself not arbitrary" and held that a "schedule of values standing alone does not support reversing the Commission's ruling that the valuation method employed by the county was arbitrary." Similarly, in *In re IBM Credit Corporation*, ___, N.C. App. ___, ___, 689 S.E.2d 487, 494 (2009), we recognized that, "if [the contention that the schedule used by all 100 counties produces true value] prevails, then tax appeals would simply be limited to determining whether or not the proper government schedule was employed" and noted that "[t]his is not what is contemplated in the burden shifting analysis required by this Court."

Thus, there is no merit to the County's argument that use of its schedule of values necessitates the conclusion that the taxpayer failed to rebut the presumption of correctness. *See id.; In re Lane Co.*, 153 N.C. App. at 125, 571 S.E.2d at 228.

There is also no merit to the County's reliance on *In re Allred*, 351 N.C. 1, 519 S.E.2d 52 (1999) in arguing that Mr. Carter's appraisal should have correlated to the County's schedule of values.

In *In re Allred*, our Supreme Court addressed a taxpayer's challenge to a property tax valuation made pursuant to N.C.G.S. § 105-287, during a year in which a general reappraisal was not made. *Id.* at 10, 519 S.E.2d at 57. In a year in which a general reappraisal is

not made, "[a]n increase or decrease in the appraised value of real property authorized by this section *shall be made in accordance with the schedules, standards, and rules used in the county's most recent general reappraisal*," N.C. Gen. Stat. § 105-287 (2009) (emphasis added), and, therefore, the Court held the county "had a statutory obligation to use its adopted schedules of values in making any adjustments to the valuation of petitioners' property which were permissible under section 105-287" and the Commission erred by relying on an independent appraiser's collateral determination of the property's value that did not correlate with the schedule of values. *In re Allred*, 351 N.C. at 10-11, 519 S.E.2d at 57-58.

However, the taxpayer in this case did not appeal from a valuation during a year in which a general reappraisal was not made, but instead appealed from the County's general reappraisal of its property pursuant to N.C.G.S. § 105-286. In satisfying its burden of going forward with evidence tending to show the County's valuation was arbitrary or illegal and substantially exceeded the true value in money of the property, the taxpayer was entitled to offer evidence as to the true value of the property through the report of an independent appraiser.

The County also contends, "[s]ince the Commission did not accept [the taxpayer's] appraisal of market value, the Commission in effect determined that the [taxpayer] had not rebutted the presumption of the assessment's correctness on the second issue as to value." However, to rebut the presumption of correctness, the taxpayer must only offer evidence *tending to show* that the County's assessment substantially exceeded the true value in money of the property. *See In re IBM Credit Corp.*, 186 N.C. App. at 226-27, 650 S.E.2d at 830-31. Mr. Carter's appraisal, valuing the property at $7,735,000, was competent, material and substantial evidence tending to show that the County's assessment was substantially in excess of the true value in money of the property. The County's arguments on this issue are overruled.

[2] Next, the County argues that, assuming the taxpayer satisfied its burden of production, the County satisfied its burden of persuasion that its methods produced true value. The County contends the Commission "did not accept the [taxpayer's] appraisal showing a lower value," contends "the remaining evidence . . . as to valuation came from [the] County," and contends there is no evidence in the record supporting a capitalization rate of 10.5%.

"The critical determination at the final stage of the burden shifting analysis is whether the tax appraisal methodology adopted by the

tax appraiser is the proper 'means' or methodology given the characteristics of the property under appraisal to produce a 'true value' or 'fair market value.' " *In re IBM Credit Corp.*, ___ N.C. App. at ___, 689 S.E.2d at 491 (quoting N.C. Gen. Stat. § 105-283). The burden-shifting analysis "requires the trier of fact to test the validity of the appraisal premises underlying the appraisal method used." *Id.* It is " 'the Commission's duty to hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the [County] met its burden.' " *Id.* (quoting *In re S. Ry. Co.*, 313 N.C. at 182, 328 S.E.2d at 239). "Our Supreme Court has said valuations fixed by the Commission shall be final and conclusive where no error of law or abuse of discretion is alleged." *In re Winston-Salem Joint Venture*, 144 N.C. App. 706, 715, 551 S.E.2d 450, 456 (2001) (internal quotation marks omitted).

Aside from its general assertion that there "is no evidence of record that supports the Commission's use of a 10.5% capitalization rate," the County does not contend the Commission made an error of law or abused its discretion in valuing the property. Instead, the County lists the evidence it offered and describes why that evidence supports an assessment of $11,496,600. It contends that, because the "County showed that its appraisal did produce true value, the Property Tax Commission exceeded its authority in reducing the appraised value" of the property. These assertions fail to recognize that it is "the Commission's duty to hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the [County] met its burden." *See In re S. Ry. Co.*, 313 N.C. at 182, 328 S.E.2d at 239. "The Commission has full authority, notwithstanding irregularities at the county level, to determine the valuation and enter it accordingly." *In re Winston-Salem Joint Venture*, 144 N.C. App. at 715, 551 S.E.2d at 556 (internal quotation marks omitted); *see also* N.C. Gen. Stat. § 105-290(3) (2009) ("On the basis of findings of fact and conclusions of law made after [a] hearing . . . [the] Commission shall enter an order (incorporating the findings and conclusions) reducing, increasing, or confirming the valuation or valuations appealed . . . .").

The Commission's decision demonstrates that it weighed the evidence and found that the income capitalization method should be used to determine the market value of the property, that the direct capitalization method was the most appropriate method, that an over-

all capitalization rate of 10.5% was most appropriate, and that, as of 1 January 2007, the value of the property was $9,461,476. The Commission therefore concluded the "County did not properly assess the subject property at its market value." The Commission had full authority to reduce the appraised value of the property and there is no merit to the County's suggestion to the contrary.

At this juncture, we consider the County's contention that no evidence supports the Commission's use of a 10.5% capitalization rate as well as the taxpayer's appeal, which similarly asserts the Commis-sion's use of a 10.5% capitalization rate is unsupported by the evidence and also, that the decision to use that rate was arbitrary or capricious.

After summarizing the process underlying Mr. Carter's estimated opinion of value, which divided the stabilized net operating income, excluding real estate taxes, of $993,455 by a tax-loaded overall capitalization rate of 12.842%, the Commission found that,

> 10. Of the sales information contained in his appraisal report, Mr. Carter relied upon the Mayberry Mall sale that occurred on December 28, 2007 to determine his overall capitalization rate of 12%. Mr. Carter made no adjustments to his overall capitalization rate due to the age of the Mayberry Mall property (The Mayberry Mall Property is fifty percent (50%) older than the subject property) and the sale of this property occurred after the January 1, 2007 reappraisal date.
>
> . . . .
>
> 14. The direct capitalization method considers net operating income at only one point in time. As of January 1, 2007, the subject property's stabilized net operating income (NOI) excluding real estate taxes was $993,455. When considering all the evidence an overall capitalization rate of 10.5% is most appropriate to determine the market value of the subject property as of January 1, 2007. When the subject property's net operating income of $993,455 is divided by the overall capitalization rate of 10.5%, the total market value for the property subject to this appeal was $9,461,476 as of January 1, 2007; $201,900 for the retention pond parcel . . . and $9,259,576 for [the mall parcel].

(Footnotes omitted.)

In determining whether the Commission's decision is supported by competent, material and substantial evidence or arbitrary or capri-

cious, we review the whole record. *In re Weaver Inv. Co.*, 165 N.C. App. 198, 201, 598 S.E.2d 591, 593 (2004). The whole-record test is not a tool of judicial intrusion. *Id.* "We may not substitute our judgment for that of the Commission even when reasonably conflicting views of the evidence exist." *Id.* "It is the responsibility of the Commission to determine the weight and credibility of the evidence presented." *In re Owens*, 144 N.C. App. 349, 352, 547 S.E.2d 827, 829, *appeal dismissed and disc. review denied*, 354 N.C. 361, 556 S.E.2d 575-76 (2001). "The [Commission]—unlike the courts—has the staff, the specialized knowledge and experience necessary to make informed decisions upon questions relating to the valuation and assessment of property." *King v. Baldwin*, 276 N.C. 316, 324, 172 S.E.2d 12, 17 (1970).

Mr. Carter's report details that, to estimate a normal overall capitalization rate of 12% for the property, he reviewed data from a large number of sales of regional malls located in the southeastern region of the United States between 2004 and 2007, searching for malls that were "fairly similar to the subject in age, building size, market size, types of anchor tenants, and remaining lease terms of anchor tenants." He selected the four "most similar malls for inclusion as comparables in [his] analysis," which were all located in North Carolina: Mayberry Mall in Mount Airy, Boone Mall in Boone, Twin Rivers Mall in New Bern, and Parkwood Mall in Wilson. The overall capitalization rates from the sales of those malls are 12.01%, 8.94%, 17.34%, and 12.37%, respectively. Mr. Carter's report states that he "gave Mayberry Mall the most weight."

The Commission's decision explains Mr. Carter's appraisal method, relates his specific computation under the direct method of income capitalization, and finds that, citing relevant pages in Mr. Carter's report, the Mayberry Mall, the comparable most heavily relied upon by Mr. Carter in his estimation of an overall capitalization rate of 12%, was sold after the appraisal date of the property and was 50% older than the property and that Mr. Carter made no adjustment to his overall capitalization rate due to the age of the Mayberry Mall. Following that finding, consistent with Mr. Carter's opinion, the Commission found that use of the income capitalization approach was most appropriate to value the property, citing relevant pages in Mr. Carter's report, found that the direct capitalization method was most appropriate "because it is the method commonly used by investors in the region where the subject property is located," and found that, "after considering all the evidence," 10.5% was the most appropriate capitalization rate.

Thus, the Commission's decision demonstrates that, although it adopted Mr. Carter's appraisal method, it made a downward adjustment to the capitalization rate employed by Mr. Carter after recognizing that, in estimating that rate, Mr. Carter had relied most heavily on the sale of a mall which was 50% older than the Blue Ridge Mall and had been sold after the appraisal date of the property here. Because "[t]he capitalized value of a given income stream varies directly with the amount of income and inversely with the capitalization rate," *see In re Owens*, 132 N.C. App. 281, 287, 511 S.E.2d 319, 323 (1999), the Commission's downward adjustment to the capitalization rate was reasonable. We further note that the capitalization rates from sales of malls "most comparable" in Mr. Carter's report ranged from 8.94% to 17.34%; thus, the Commission's capitalization rate of 10.5% was within the range of those rates.

Although the taxpayer and the County disagree as to the proper capitalization rate to employ, we do not believe that a mere disagreement demonstrates the Commission's rate was unsupported by the evidence or was arbitrary or capricious. Given the Commission's duty to exercise judgment and discretion, *see In re AMP Inc.*, 287 N.C. at 561, 215 S.E.2d at 761, the Commission was free to use the method proposed by Mr. Carter and to adjust the capitalization rate Mr. Carter proposed based on its finding that Mr. Carter had relied on a mall 50% older than the Blue Ridge Mall which had been sold after the appraisal date of the property. *See Albemarle Elec. Membership Corp.*, 282 N.C. at 408, 192 S.E.2d at 815 ("[T]he determination of the [capitalization] rate is a matter of judgment. We find nothing in the record which indicates that the Board departed from the 'zone of reason' or acted arbitrarily in adopting the 6% capitalization rate."). Based on our review of the whole record, we hold that the Commission's use of a 10.5% capitalization rate is supported by the evidence and that the Commission's decision is not arbitrary or capricious. *See In re Senseney*, 95 N.C. App. 407, 413, 382 S.E.2d 765, 768 (1989) (rejecting the county's argument that "since no witness testified to the $6.50 per square value, the value is not based on competent, material and substantial evidence" where the Commission's findings were "essentially based on the report of the county's witness" and merely "corrected what [the Commission] perceived as errors in the calculations of square feet and inclusions in the comparables sales data"); *In re Appeal of Westinghouse Elec. Corp.*, 93 N.C. App. 710, 716, 379 S.E.2d 37, 40 (1989) (holding the Commission did not err by employing the depreciation method proposed by some experts, but increasing the depreciated value of improvements to the property

based on the testimony of other experts who did not use that method, because the Commission "was free to accept as much of [the experts'] testimony as it found convincing"); *see also In re Stroh Brewery Co.*, 116 N.C. App. 178, 188, 447 S.E.2d 803, 808 (1994) ("Although the Commission agreed with [the taxpayer's expert] that the property was affected by functional and economic obsolescence, it was not then bound to accept [the expert's] percentage for such obsolescence and could arrive at its own percentage so long as supported by competent, material and substantial evidence."). *But see In re Owens*, 132 N.C. App. at 289-90, 511 S.E.2d at 324-25 (holding that, where the Commission's decision failed to include the capitalization rate it used and where the record lacked evidence of comparable sales or a capitalization rate for the direct capitalization method employed by the Commission, the Commission's findings were unsupported by competent, material and substantial evidence).

[3] The County's final argument is that the Commission erred in its valuation of the 5.15-acre retention pond parcel bordering the south end of the Blue Ridge Mall, which adjoins the parcel owned by Belk. The Commission determined that the property's total market value was $9,461,476, valuing the retention pond parcel at $201,900 and the mall parcel at $9,259,576. The County argues the Commission erred by using "the mall's income" to value this parcel. The County contends the Commission should have valued this parcel based on its separate land value and not with the mall property by the income capitalization method. The County contends the separate valuation of these parcels is required by N.C.G.S. § 105-317, which requires the person making appraisals, "[i]n determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location . . . ." *See* N.C. Gen. Stat. § 105-317(a)(1). However, we note that the Commission assigned the 5.15-acre parcel the same value the County had assigned it—$201,900. Furthermore, the County does not appear to have argued before the Commission that the 5.15-acre parcel should not be appraised with the 24.19-acre parcel. Even assuming this particular issue was before the Commission, we note that Mr. Carter's appraisal report, which served as the basis for the Commission's use of the income capitalization method of valuing the property in determining its true value pursuant to N.C.G.S. § 105-283, considered and appraised the 5.15-acre parcel and the 24.19-acre parcel together. Mr. Carter's report states that the 5.15-acre parcel "contains the stormwater detention pond that serves the entire mall." His report states that the "Detention

Pond Parcel is very irregular and long, but its shape is suitable for its current use." His report notes that the building and parking areas on the mall parcel "have a level to very gently sloping topography" and that "[t]he developed area is drained by an underground stormwater system that collects stormwater through catch basins in the parking lot and drains it toward the detention pond." His appraisal was competent, material and substantial evidence that the County's method of appraisal was arbitrary or illegal and substantially exceeded the true value in money of the property.

Affirmed.

Judges ELMORE and GEER concur.

DENNIS H. JOYNER, EXECUTOR OF THE ESTATE OF LEOLA H. JOYNER, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT

No. COA10-670

(Filed 2 August 2011)

1. Public Assistance—Medicaid—improper transfer or disposal of assets

The trial court erred by determining that decedent's execution of the pertinent deeds of trust did not constitute a transfer or disposal of assets in violation of 42 U.S.C. § 1396p(c)(1)(A) and N.C.G.S. § 108A-58.1(a) governing the operation of the Medicaid program.

2. Public Assistance—Medicaid—uncompensated transfer lump sum payment arrangement

The Department of Health and Human Services did not err by concluding that a transaction evidenced in and secured by a second note and deed of trust constituted an uncompensated transfer that terminated decedent's long-term care Medicaid benefits. The lump sum payment arrangement contemplated by the agreement did not reflect the fair market value of the services, if any, that decedent actually received pursuant to that contract.

3. Attorney Fees—substantial justification—plain meaning of statute

The trial erred by awarding attorney fees in favor of decedent's estate under N.C.G.S. § 6-19.1. Defendant agency's position did not lack substantial justification, and the argument advanced rested on the plain meaning of the relevant statutory provisions.

Appeal by respondent from order entered 7 January 2010 by Judge Walter H. Godwin, Jr., in Nash County Superior Court. Heard in the Court of Appeals 1 December 2010.

Attorney General Roy Cooper, by Assistant Attorney General Joel L. Johnson, for respondent-appellant.

Fields & Cooper, PLLC, by Mark E. Edwards, for petitioner-appellee.

ERVIN, Judge.

Respondent North Carolina Department of Health and Human Services appeals from an order overturning its decision to impose a transfer sanction upon Decedent Leola H. Joyner and finding that DHHS acted erroneously when it terminated Decedent's long-term care Medicaid benefits. On appeal, DHHS contends that the trial court erred by concluding that the execution of deeds of trust applicable to Ms. Joyner's residence did not constitute the "transfer" or "disposal" of an asset within the meaning of applicable provisions of federal law. As an alternative basis for upholding the result reached by the trial court, Respondent Dennis H. Joyner contends that, even if the execution of deeds of trust constituted the "transfer" or "disposition" of an asset, the transfers or dispositions at issue here were made for the required fair market value. After careful consideration of DHHS' challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be reversed and that this case should be remanded to the Nash County Superior Court for further proceedings not inconsistent with this opinion.

I. Factual and Procedural Background

On 1 March 2006, Ms. Joyner executed two promissory notes secured with two correlating deeds of trust executed in favor of her son, Mr. Joyner. The first note purported to reimburse Mr. Joyner for past expenditures that had been made on his mother's behalf in the amount of $68,000.00. The second note, in the amount of $88,615.80,

was executed for the purpose of compensating Mr. Joyner for personal services which he had agreed to render to his mother in the future under the terms of a personal services agreement signed on 1 March 2006. The amount set out in these two sets of notes and deeds of trust was sufficient to fully encumber Ms. Joyner's residence.

Ms. Joyner had been a Medicaid recipient since November 2005. On 26 June 2006, the Nash County Department of Social Services informed Ms. Joyner that her long-term care Medicaid benefits would terminate as a result of the 1 March 2006 notes and deeds of trust. According to DSS, the notes and deeds of trust executed on that occasion constituted uncompensated transfers of Ms. Joyner's assets.

Ms. Joyner appealed the denial of her long-term care benefits to a local DSS hearing officer. After failing to persuade the DSS hearing officer of the merits of her position, Ms. Joyner sought review by a state hearing officer. Ms. Joyner died on 30 January 2007 without having received a decision with respect to the issues raised by her appeal.

On 29 May 2007, Mr. Joyner was appointed executor of Ms. Joyner's estate. On 15 July 2008, the state hearing officer issued a tentative opinion upholding the denial of Ms. Joyner's claim. In her decision, the hearing officer treated both transactions as uncompensated transfers, finding that the amount associated with past expenditures evidenced in the first note and deed of trust was "not provided for in a written agreement at the time the services were rendered" and that the amount evidenced in the second note and deed of trust stemmed from an impermissible transfer for future services. Ms. Joyner's estate sought review of the state hearing officer's decision by the chief hearing officer. On 21 January 2009, the chief hearing officer issued an opinion affirming the hearing officer's decision to deny Ms. Joyner's claim for long-term care benefits. Ms. Joyner's estate appealed the final agency decision to the Nash County Superior Court.

The estate's appeal came on for hearing before the trial court at the 7 December 2009 civil session of the Nash County Superior Court. On 7 January 2010, the trial court entered an order reversing the final agency decision. In its order, the trial court concluded as a matter of law:

> 3. That 42 U.S.C. §1396p(c)(1)(A) provides that the "state [Medicaid] plan must provide that if an institutionalized individual . . . disposes of assets for less than fair market value . . . the individual is ineligible for medical assistance."

4. Substantial evidence in the record in this case shows that Leola H. Joyner did not dispose of or transfer any asset when she executed the notes and deeds of trust on March 1, 2006.

5. The Respondent's decision to impose a transfer sanction on Leola H. Joyner was in violation of federal law because there was, in fact, no transfer or disposal of any asset.

6. The Respondent acted erroneously when it terminated Leola H. Joyner's long-term care Medicaid.

7. That Respondent acted without substantial justification in pressing its claim against the Petitioner and there are no special circumstances that would make the award of attorney's fees unjust.

Based on these conclusions of law, the trial court ordered that (1) the final agency decision terminating Ms. Joyner's long-term care benefits should be reversed, (2) the estate should be reimbursed for expenses incurred as a result of this action, and (3) the estate should be awarded $3,300.00 in attorneys' fees. DHHS noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

"The Administrative Procedure Act [APA] governs the standard of review of an administrative agency's decision." *Elliot v. N.C. Dept. of Human Resources*, 115 N.C. App. 613, 616, 446 S.E.2d 809, 811 (1994), *aff'd*, 341 N.C. 191, 459 S.E.2d 273 (1995). According to N.C. Gen. Stat. § 150B-51(b), in reviewing the actions of an administrative agency:

> the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
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> (1) In violation of constitutional provisions;
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> (2) In excess of the statutory authority or jurisdiction of the agency;
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> (3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §§] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b). "When under the applicable version of the APA a petition for review of an agency decision is filed in superior court, the superior court acts as an appellate court; both this [C]ourt and the superior court must utilize the same standard of review." *D.B. v. Blue Ridge Ctr.*, 173 N.C. App. 401, 405, 619 S.E.2d 418, 422 (2005).[1]

"If it is alleged that an agency's decision was based on an error of law then a *de novo* review is required. A review of whether the agency decision is supported by the evidence, or is arbitrary or capricious, requires the court to employ the whole record test." *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990) (citation omitted), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment" in place of the court below. *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). "The whole record test generally requires examination of the entire record, including the evidence which detracts from the agency's decision." *D.B.*, 173 N.C. App. at 405, 619 S.E.2d at 422. "The 'whole record' test does not permit the reviewing court to substitute its judgment for the agency's as between two reasonably conflicting views; however, it does require the court to take into account both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached." *Watson v. N.C. Real Estate Comm.*, 87 N.C. App. 637, 639, 362 S.E.2d 294, 296 (1987) (citations and quotations omitted), *disc. review denied*, 321 N.C. 746, 365 S.E.2d 296 (1988). "Ultimately, the reviewing court must determine whether the administrative decision had a rational basis in the evidence." *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 531, 372 S.E.2d 887, 890 (1988) (citation omitted). We will now apply the

1. As a result of the complexity of the present record, it may be helpful to point out that the final agency decision challenged in the estate's request for judicial review simply adopted the findings and conclusions contained in the hearing officer's decision. As a result, the agency decision actually at issue before the trial court as a result of the estate's request for judicial review is the hearing officer's decision.

applicable standard of review to the issues that have been presented to us for review.

B. Substantive Legal Issues

1. Transfer of Assets

[1] On appeal, DHHS argues that the trial court erred by determining that Ms. Joyner had not impermissibly transferred or disposed of assets in violation of the relevant statutory provisions governing the operation of the Medicaid program. As a result of the fact that the first question raised by DHHS' challenge to the trial court's order involves the application of specific statutory provisions to undisputed facts, we review the first aspect of DHHS' challenge to the trial court's order utilizing a *de novo* standard of review. After carefully examining the arguments presented by the parties concerning the proper construction of the relevant statutory provisions, we conclude that the trial court erroneously determined that the transactions at issue here did not involve "transfers" or "dispositions" of Ms. Joyner's assets.

The transactions at issue here both involve the execution of a deed of trust for the purpose of securing an indebtedness evidenced by a note. "The deed of trust results in legal title to the property being in the trustee." *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 316, 344 S.E.2d 555, 559, *disc. review denied*, 318 N.C. 284, 348 S.E.2d 344 (1986). A "deed of trust is 'essentially a security' by which 'the legal title to real property is placed in one or more trustees, to secure the repayment of a sum of money or the performance of other conditions.' " *In re Foreclosure of Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 51, 535 S.E.2d 388, 393 (2000) (quoting BLACK'S LAW DICTIONARY 414 (6th ed. 1990)). Applying these well-established legal principles to the facts at issue in this case, we conclude that the transfer of the title to Ms. Joyner's residence for the purpose of securing the notes involved a transfer or disposition of one of Ms. Joyner's assets.[2] We now consider whether this transaction constituted a "disposal" or a "transfer" of an asset under the applicable Medicaid provisions.

42 U.S.C. § 1396p(c)(1)(A) provides that:

> In order to meet the requirements of this subsection for purposes of section 1396a(a)(18) of this title, the State plan must provide that if an institutionalized individual or the spouse of

2. The arguments advanced in the parties' briefs focus on the "transfer" or "disposition" issue rather than the issue of whether an "asset" was involved. As a result, we need not address or definitively resolve the question of whether the "transfers" or "dispositions" at issue here involved an "asset."

> such an individual . . . disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for services described in subparagraph (C)(i) . . . during the period beginning on the date specified in subparagraph (D) and equal to the number of months specified in subparagraph (E).

In compliance with this statutory provision, the General Assembly enacted N.C. Gen. Stat. § 108A-58.1, which provides that:

> Except as otherwise provided herein, an individual who is otherwise eligible to receive medical assistance under this Part is ineligible for Medicaid coverage and payment for the services specified in subsection (d) during the period specified in subsection (c) if the individual or the individual's spouse transfers an asset for less than fair market value on or after the "look-back date" specified in subsection (b).

As a result, the relevant federal statutory provision speaks to a "disposing of assets" while the relevant state statutory provision speaks to "transfers of assets."

In seeking to persuade us to uphold the trial court's order, Mr. Joyner argues that the use of the word "transfer" in N.C. Gen. Stat. § 108A-58.1(a) conflicts with the use of the word "dispose" in 42 U.S.C. § 1396p(c)(1)(A). According to Mr. Joyner, the relevant provisions of 42 U.S.C. § 1396p(c)(1)(A) control over the conflicting provisions of any state implementing statute, such as N.C. Gen. Stat. § 108A-58.1(a), so that the ultimate question before us is the extent, if any, to which Ms. Joyner "disposed" of an asset. In light of this analysis, Mr. Joyner further argues that the execution of a deed of trust does not constitute a "disposition." We disagree.

Admittedly, in the event of a conflict between federal and state Medicaid statutes, the federal statutes must be deemed controlling. N.C. Gen. Stat. § 108A-58.1(l)(1) (stating that "[t]his section shall be interpreted and administered consistently with governing federal law, including 42 U.S.C. § 1396p(c)"). A careful review of the relevant statutory provisions convinces us, however, that there is no conflict between 42 U.S.C. § 1396p(c)(1)(A) and N.C. Gen. Stat. § 108A-58.1.

As the title of 42 U.S.C. § 1396p indicates, this section of the United States Code addresses "Liens, adjustments and recoveries, and transfers of assets." 42 U.S.C. § 1396p. 42 U.S.C. § 1396p(c)(1)(A)

requires state Medicaid plans to satisfy 42 U.S.C. § 1396(a)(18), which provides that such state plans must "comply with the provisions of [42 U.S.C. §] 1396p [] with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trusts." 42 U.S.C. § 1396a(a)(18). 42 U.S.C. § 1396p(c), which specifies the period of Medicaid ineligibility, provides, in pertinent part, that:

> (D)(i) In the case of a transfer of assets made before February 8, 2006, the date specified in this subparagraph is the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other period of ineligibility under this subsection.
>
> (ii) In the case of a transfer of asset made on or after February 8, 2006, the date specified in this subparagraph is the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (C) based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection.
>
> (E)(i) With respect to an institutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall be equal to-
>
> (I) the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subparagraph (B)(i), divided by
>
> (II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application.
>
> (ii) With respect to a noninstitutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall not be greater than a number equal to-
>
> (I) the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subparagraph (B)(i), divided by

> (II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application.
>
> (iii) The number of months of ineligibility otherwise determined under clause (i) or (ii) with respect to the disposal of an asset shall be reduced-
>
> (I) in the case of periods of ineligibility determined under clause (i), by the number of months of ineligibility applicable to the individual under clause (ii) as a result of such disposal, and
>
> (II) in the case of periods of ineligibility determined under clause (ii), by the number of months of ineligibility applicable to the individual under clause (i) as a result of such disposal.
>
> (iv) A State shall not round down, or otherwise disregard any fractional period of ineligibility determined under clause (i) or (ii) with respect to the disposal of assets.

42 U.S.C. § 1396p(D-E). A careful reading of 42 U.S.C. § 1396p as a unified whole clearly indicates that Congress used the words "transfer" and "dispose" interchangeably. As a result of the fact that these two words are used as synonyms in the relevant statutory provisions, the fact that Congress did not delineate any situations in which a "disposition" and a "transfer" had different meanings, the fact that Congress did not specifically define either "transfer" or "disposition," and the fact that nothing in the context in which either word is used suggests the appropriateness of anything other than the ordinary meaning of either word, we are required to use the plain meanings of both words in construing the relevant statutory language. *Johnson v. United States*, 529 U.S. 694, 707, 146 L. Ed. 2d 727, 740, 120 S. Ct. 1795, 1804 (2000); *Wood v. Stevens & Co.*, 297 N.C. 636, 643, 256 S.E.2d 692, 697 (1979) (citing *In re Trucking Co.*, 281 N.C. 242, 252, 188 S.E.2d 452, 458 (1972) and *State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967), *cert. denied*, 390 U.S. 1028, 20 L. Ed. 2d 285, 88 S. Ct. 1418 (1968)).

A "transfer" is "[a]ny mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance." BLACK'S LAW DICTIONARY 1636 (9th ed. 2009). Similarly, the expression "dispose of" is defined in part as "to transfer into new hands or to the control of someone else." *Webster's Third New International*

Dictionary 654 (1966); *see also* BLACK'S LAW DICTIONARY 471 (6th ed. 1990) (defining "dispose of" in part as "to alienate or direct the ownership of property as disposition by will" and "to alienate, relinquish, part with, or get rid of"). As should be obvious, these definitions, like the relevant statutory provisions, treat "transfers" and "dispositions" as synonymous. In light of that understanding, which precludes any determination that the relevant provisions of federal and state law are in conflict with each other, we conclude that Ms. Joyner's transfer of the title to her residence through the execution of deeds of trust for the purpose of securing notes payable to Mr. Joyner constituted the "disposal" of an asset for purposes of 42 U.S.C. § 1396p and the "transfer" of an asset for purposes of N.C. Gen. Stat. § 108A-58.1 and that the trial court erred by concluding otherwise.[3]

2. Payment of Compensation

[2] As an alternative basis for upholding the trial court's order, Mr. Joyner argues that the transfers in question were supported by adequate compensation for purposes of 42 U.S.C. § 1396p and N.C. Gen. Stat. § 108A-58.1 (a). Although the trial court did not address the issue of whether either transfer was made for "fair market value" at any point in its order, we must still attempt to ascertain if we "can reasonably determine from the record whether [a party's] asserted grounds for challenging the agency's final decision warrant reversal or modification of that decision under the applicable provisions of N.C. [Gen. Stat.] § 150B-51(b)." *N.C. Dept. of Env't and Natural Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004). Thus, we turn to the issue of whether the asset transfers evidenced and secured by the notes and deeds of trust reflected the required "fair market value."

3. In his brief, Mr. Joyner argues, in reliance on *Shannonhouse v. Wolfe*, 191 N.C. 769, 774, 133 S.E. 93, 96 (1926) (holding that the power to "have entire control, disposal, and management of any and all property whether real or personal, which shall at any time be given or conveyed to [certain trustees] for the said community house or of the income or profits or furtherance of any of the activities of said community house" did not authorize "the execution of a mortgage upon the property for the purpose of building a house" on the grounds that "the mere naked power of sale implied in the word 'disposal' " "does not necessarily imply or delegate the power to mortgage"), that the term "dispose of" does not include anything short of a sale of the entire "bundle of rights" associated with ownership of a tract of real property. Aside from the fact that enforcing the notes and deeds of trust will, in time, result in transferring the entire value of Ms. Joyner's residence to Mr. Joyner, we believe that the decision in *Shannonhouse* was heavily influenced by the nature of the instrument under consideration in that case, which created a charitable trust. As a result, we do not believe that the word "dispose" has the limited meaning contended for by Mr. Joyner or that *Shannonhouse* controls the outcome in this case.

a. First Note and Deed of Trust

The first note and deed of trust relate to expenditures which Mr. Joyner had made on Ms. Joyner's behalf prior to the execution of the instruments in question. As the hearing officer's findings of fact reflect, the reimbursement of these expenditures was "not provided for in a written agreement at the time the services were rendered." Mr. Joyner contends, however, that the note and deed of trust evidencing and securing this $68,000.00 amount "were executed in fulfillment of the longstanding agreement between [Ms.] Joyner and [Mr.] Joyner" and that they should, for that reason, be deemed to support a determination that the transfer in question reflected the fair market value of services that Ms. Joyner actually received.

The principal authority upon which DHHS relied in concluding that the past expenditures upon which the first note and deed of trust are predicated did not suffice to support these instruments was the North Carolina Adult Medicaid Manual, which is an "internal instructional reference for DHHS employees in the application of DHHS policy and interpretation of the federal Medicaid requirements." *Martin v. N.C. Dept. of Health and Human Serv.*, 194 N.C. App. 716, 720, 670 S.E.2d 629, 633 (2009). As we read the relevant provisions of the Medicaid Manual, they clearly require "a written agreement for compensation at the time the care of service was received" under all circumstances involving the transfer of "cash or other assets to a family member, relative, or friend for care or services that were provided in the past." Medicaid Manual § 2240 XI.H.1. and 2.[4] Although the provisions of the Medicaid Manual are clearly entitled to some consideration in attempts to understand the rules and regulations governing eligibility for Medicaid benefits, *Cloninger v. N.C. Dept. of Health and Human Serv.*, ___ N.C. App. ___, ___, 691 S.E.2d 127, 130-31, *disc. review denied*, 364 N.C. 324, 700 S.E.2d 748 (2010); *Estate of Wilson v. Division of Soc. Servs.*, 200 N.C. App. 747, 750-53, 685 S.E.2d 135, 138-40 (2009), we have previously stated that the Medicaid Manual "merely explains the definitions that currently exist in federal and state statutes, rules and regulations" and that "[v]iolations of or failures to comply with the MAF [Medicaid] Manual [are] of no effect"

4. Although Mr. Joyner argues that this provision of the Medicaid Manual does not apply to the present case on the grounds that the record contains no indication that he ever provided services to Ms. Joyner on an uncompensated basis and that such evidence is a prerequisite to the effectiveness of the "written agreement" requirement, we need not decide which party has the better of this disagreement given our conclusion that the Medicaid Manual does not control the outcome in this case.

unless the act or omission in question amounts to a "failure to meet the requirements set out in the federal and state statutes and regulations[.]" *Okale v. N.C. Dept. of Health and Human Servs.*, 153 N.C. App. 475, 478-79, 570 S.E.2d 741, 743 (2002).[5] As a result, the mere fact that the "written agreement" requirement appears in the Medicaid Manual does not, without more, justify upholding DHHS' determination that the transfer associated with the first note and deed of trust was not supported by adequate compensation.

In addition to its reliance on the Medicaid Manual, DHHS points to the well-established legal principle that "[p]ast consideration or moral obligation is not adequate consideration to support a contract" and that "[s]ervices performed by one family member for another, within the unity of the family, are presumptively 'rendered in obedience to a moral obligation and without expectation of compensation.' " *Estate of Graham v. Morrison*, 156 N.C. App. 154, 159, 576 S.E.2d 355, 359 (2003) (citing *Jones v. Winstead*, 186 N.C. 536, 540, 120 S.E.2d 89, 90-91 (1923) and quoting *Jones v. Saunders*, 254 N.C. 644, 649, 119 S.E.2d 789, 793 (1961)). Although Mr. Joyner cites findings of fact by both the trial court and the hearing officer in support of his claim to have successfully rebutted the presumption that the expenditures that underlie the first note and deed of trust were provided on a gratuitous basis, we do not find this argument persuasive because the trial court was not, under the applicable standard of review, entitled to make factual findings and because the hearing officer's findings of fact do not directly address the extent to which Mr. Joyner rebutted the presumption that care and services provided to family members are rendered "in obedience to a moral obligation" and were, therefore rendered on the basis of an inappropriate legal standard. When a trial court "clearly heard the evidence and found the facts against [a party] under a misapprehension of the controlling law," "the factual findings may be set aside on the theory that the evidence should be considered in its true legal light." *A.M.E. Zion Church v. Union Chapel A.M.E. Zion Church*, 64 N.C. App. 391, 411-12, 308 S.E.2d 72, 85 (1983) (citing *Helms v. Rea*, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973), and *McGill v. Lumberton*, 215 N.C. 752, 744, 3 S.E.2d 324, 326 (1939)), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 649 (1984). As a result, since the agency never addressed the ultimate issue that must be resolved in connection with Mr. Joyner's challenge to DHHS' decision to treat the first note and deed of trust as an

5. DHHS has cited no authority in its brief tending to suggest that the legal status of the Medicaid Manual has changed since *Okale*, and we have not found any such authority in the course of our own research.

uncompensated transfer, this case must be remanded to the trial court for further remand to the agency for the entry of a new decision containing adequate findings of fact and conclusions of law relating to the issue of whether the expenditures evidenced and secured by the first note and deed of trust constituted uncompensated transfers, with the agency to make the necessary credibility determinations concerning the extent to which the parties had actually agreed that Mr. Joyner would be compensated for the expenditures that underlie the first note and deed of trust at or prior to the time at which those expenditures were made or whether the first note and deed of trust amounted to an after-the-fact attempt to circumvent the applicable rules against uncompensated asset transfer by Medicaid recipients on remand.[6]

b. Second Note and Deed of Trust

The second note and deed of trust relate to a lump sum payment that Ms. Joyner agreed to make to Mr. Joyner for services to be provided in the future. The nature and type of services that Mr. Joyner was to provide to Ms. Joyner, the hourly rate at which Mr. Joyner expected to be reimbursed for services provided to Ms. Joyner, and the number of personal service hours that the parties expected that Mr. Joyner would provide to Ms. Joyner were spelled out in the agreement. Instead of providing that payment would be made on a periodic basis as services were rendered, however, the agreement required the payment of a lump sum amount calculated using the specified hourly rate, the number of hours of care anticipated to be provided each week, and Ms. Joyner's life expectancy on the date upon which the agreement was executed. The agreement contained no provision for any sort of adjustment to the lump sum amount based on the date upon which Ms. Joyner died or any inability on the part of Mr. Joyner to provide the required services. Although both parties agree that the relevant provisions of federal and state law permit personal service agreements, they disagree sharply over the terms and conditions under which such agreements are permissible and whether the agreement at issue here falls in the permissible or impermissible category.

In concluding that the agreement evidenced by the second note and deed of trust resulted in an impermissible uncompensated trans-

6. In addition, while Mr. Joyner attempts to draw a distinction between the provision of care and the making of out-of-pocket expenditures, we agree with DHHS that both the provision of care and the making of out-of-pocket expenditures should be treated in the same manner for the purpose of applying the applicable uncompensated transfer rules.

fer, the agency relied on language contained in the Medicaid Manual specifically providing that "[t]ransfers for services to be provided in the future are unallowable because they have not been compensated" and that "[a] transfer for future compensation is sanctionable." Medicaid Manual VII.A. As we have previously noted, the Medicaid Manual, standing alone, does not have binding effect. However, unlike the "written agreement" requirement relating to payment for past services, we believe that the prohibition on anticipatory lump sum payments of the type at issue here represent a proper application of the statutory reference to "fair market value" and should be upheld.

Application of the "fair market value" concept, as that term is utilized in connection with contracts for personal services, implies consideration of the nature of the service received and the value of the service in question. *Turner v. Furniture Co.*, 217 N.C. 695, 697, 9 S.E.2d 379, 380 (1940) (stating that, in the event that there is "no agreement as to the value of services to be paid for services, the person performing them is entitled to recover what they are reasonably worth, based on the time and labor expended, skill, knowledge and experience involved, and other attendant circumstances"); *Environmental Landscape Design v. Shields*, 75 N.C. App. 304, 307, 330 S.E.2d 627, 629 (1985) (stating that "the reasonable value of services rendered is largely determined by the nature of the work and the customary rate of pay for such work in the community and at the time the work was performed"). Thus, the concept of fair market value as implied in the present context focuses on the actual work performed and the market value of that work.

As a practical matter, it is very difficult for us to see how a lump sum advance payment for future services could ever actually represent the fair market value of those services for purposes of 42 U.S.C. § 1396p(c)(1)(A) or N.C. Gen. Stat. § 108A-58.1(a). Simply put, there are too many contingencies that must be addressed and accounted for in order to determine whether such a lump sum amount actually reflected the market value of what was received. *See Bedell v. Commisioner*, 30 F.2d 622, 624 (2d Cir. 1929) (stating that "it is absurd to speak of a promise to [provide a service] in the future as having a 'market value,' fair or unfair"). For example, as we have already suggested, the recipient may not live as long as is anticipated in the calculation utilized to develop the lump sum payment or the provider might become unable to render all of the service called for in the agreement throughout the relevant period. As a result, we conclude that the lump sum payment arrangement contemplated by the

agreement underlying the second note and deed of trust simply did not reflect the fair market value of the services, if any, that Ms. Joyner actually received pursuant to that contract and that the hearing officer appropriately concluded that the transaction evidenced in and secured by the second note and deed of trust constituted an uncompensated transfer.[7]

3. Attorney's Fees

[3] Aside from challenging the trial court's decision on the merits, Respondent also argues that the trial court erred by awarding attorney's fees in favor of Ms. Joyner's estate pursuant to N.C. Gen. Stat. § 6-19.1. We agree.

In awarding attorney's fees to the estate, the trial court concluded that DHHS "acted without substantial justification in pressing its claim." However, an agency need not have been legally correct in order to avoid liability for attorney's fees. An award of attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1 is not appropriate in the event that the agency's position "was rational and legitimate to such degree that a reasonable person could find it satisfactory or justifiable in light of the circumstances then known to the agency." *Crowell Constructors v. State ex rel. Cobey*, 342 N.C. 838, 844, 467 S.E.2d 675, 679 (1996) (citing *Pierce v. Underwood*, 487 U.S. 552, 565, 101 L. Ed. 2d 490, 504, 108 S. Ct. 2541 (1988). As we have already noted, the argument advanced by DHHS rested on the plain meaning of the relevant statutory provisions. Even if we had declined to accept the interpretation of the statutory language at issue here advanced by DHHS, we would have reached the conclusion that the agency's refusal to acquiesce in Mr. Joyner's interpretation of the relevant statutory provisions rested on a reasonable view of the controlling legal authorities. As a result, we cannot agree with the trial court that DHHS' position lacked "substantial justification," *Daily Express, Inc. v. Beatty*, ___ N.C. App. ___, ___, 688 S.E.2d 791, 802 (2010) (reversing an attorney's fees

7. In his brief, Mr. Joyner argues that DHHS was prohibited from utilizing an approach to determining whether a particular transfer was uncompensated that was more restrictive than the rules applied in determining eligibility for the Supplemental Security Income (SSI) program, 42 U.S.C. § 1396a(a)(10)(C)(i)(III), and that the calculation of the lump sum amount specified in the agreement between Ms. Joyner and Mr. Joyner was calculated consistently with the Program Operations Manual System employed by that program. However, the rules upon which this aspect of Mr. Joyner's argument rely only apply to the determination of "income and resource eligibility." 42 U.S.C. § 1396a(r)(2)(B). As a result of the fact that the methodology utilized in connection with the imposition of a transfer sanction is not relevant to the determination of Medicaid "income and resource eligibility," this aspect of Mr. Joyner's argument lacks merit.

award even though the agency's legal position was ultimately determined to be incorrect because the agency's interpretation "had some level of support in both logic and the language enacted by the General Assembly"), and reverse its decision to award attorney's fees to Mr. Joyner.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by finding that the execution of the deeds of trust in question did not constitute a "transfer" or "disposal" of assets for purposes of 42 U.S.C. § 1396p(c)(1)(A) and N.C. Gen. Stat. § 108A-58.1(a), that further proceedings are necessary to determine whether the transactions evidenced in and secured by the first note and deed of trust reflected fair market value, that the agency correctly determined that the transaction evidenced in and secured by the second note and deed of trust constituted an uncompensated transfer, and that the trial court erred by awarding attorney's fees to Ms. Joyner's estate. 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 trial court for further remand to DHHS for the purpose of conducting additional proceedings not inconsistent with this opinion.[8]

REVERSED AND REMANDED.

Chief Judge MARTIN and Judge McGEE concur.

8. As a result of our decision to reverse the trial court's order and to remand this case for further proceedings at the agency level, we also reverse the trial court's determination that DHHS should "reimburse [Mr. Joyner] for the cost incurred for care from the date Nash DSS terminated long-term care Medicaid benefits to the date of [Ms.] Joyner's death[.]"

STATE OF NORTH CAROLINA v. BRYANT LAMONT BOYD

No. COA10-1072

(Filed 2 August 2011)

1. Kidnapping—second-degree—erroneous instruction—no evidence of removal

The trial court erred by including removal in its jury instruction for second-degree kidnapping. No evidence was presented at trial indicating defendant removed the victim from her living room. The State failed to meet its burden of demonstrating beyond a reasonable doubt that defendant's constitutional right to a unanimous jury verdict was not violated, and thus, defendant was entitled to a new trial on the kidnapping charges. Further, defendant's habitual felon conviction was vacated because it was formed partially based on the kidnapping conviction.

2. Sexual Offenses—sexual battery—instruction

The trial court did not err by allegedly instructing the jury on a theory of sexual battery not supported by the evidence. Defendant's argument went to the weight of the evidence and not its existence.

3. Burglary and Unlawful Breaking or Entering—first-degree burglary—failure to include "not guilty" final mandate

The trial court did not err by failing to include a "not guilty" final mandate in the jury's instruction on first-degree burglary. The jury was instructed explicitly that it could not return a guilty verdict should it have reasonable doubt as to any of the elements of first-degree burglary.

4. Criminal Law—prosecutor's argument—breaking into house

The trial court did not abuse its discretion by overruling defendant's objection and by failing to intervene *ex mero motu* in a portion of the State's closing argument regarding an assailant's entry into the victim's house for first-degree burglary. Counsel is typically given wide latitude in closing arguments.

5. Appeal and Error—appealability—mootness—shackles—conviction vacated

Although defendant contended that he was denied a fair trial by virtue of his visible shackling during the habitual felon phase

of a trial, this argument was not addressed because defendant's habitual felon conviction was vacated.

Appeal by Defendant from judgment entered 14 April 2010 by Judge Abraham P. Jones in Orange County Superior Court. Heard in the Court of Appeals 10 March 2011.

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott and Agency Legal Specialist Brian C. Tarr, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Bryant Lamont Boyd ("Defendant") appeals from his convictions for first degree burglary, second degree kidnapping, sexual battery, and attaining habitual felon status. Defendant alleges the trial court erred by (1) instructing the jury on a theory of second degree kidnapping that was not charged in the indictment or supported by evidence; (2) instructing the jury on a theory of sexual battery Defendant claims was unsupported by evidence; (3) deviating from the pattern jury instructions on the first degree burglary charge; (4) overruling Defendant's objection to, and failing to intervene *ex mero motu* during, the State's closing argument; (5) allowing Defendant to be shackled in view of the jury during the habitual felon stage of the trial; and (6) permitting the introduction of evidence in the habitual felon phase Defendant claims was irrelevant and impermissibly prejudicial. For the reasons set forth below, we find no error in issues two through four. We find error with the trial court's jury instructions on kidnapping and order Defendant's conviction vacated and remand for a new trial. As this kidnapping conviction was one of the predicate felonies at issue in Defendant's habitual felon conviction, we must vacate and remand that judgment as well. As a result, we do not reach the last two issues raised by Defendant on appeal.

I. Factual & Procedural History

The State's evidence tended to show the following. Pinky Shah moved to the United States from India in February 2008. In 2009, she and her husband moved into the Colony Apartments in Chapel Hill. On an April evening, Shah returned home after leaving work and went to bed. Shah did not testify as to whether she closed or locked the door, but she did tell police that she believed she locked the door.

According to her trial testimony, Shah was awoken around 3:00 a.m. by the noise of someone entering her apartment. She initially assumed it was her husband, whom she expected home late from work. After lying in bed for a period of about ten to fifteen minutes, she got up and walked towards the living room from the bedroom. Her bedroom opened directly into the living room; there was no hallway. Instead of finding her husband, she saw Defendant sitting on the couch. Shah had seen Defendant prior to that night on a few occasions, usually hanging around with some other men in front of a nearby apartment. She testified her husband would sometimes say hello and make small talk with these men.

Before she could say anything, Defendant rushed toward Shah, who was standing just outside the entrance to the doorway of her bedroom, and said, "Don't make a noise. I'm not here to hurt you." Defendant repeatedly asked Shah if they could talk in the bedroom, but she insisted they stay put. Defendant then said, "All right, we will talk [in the living room]." Defendant told Shah she would have to sit on his lap. Shah attempted to move towards the front door to leave, but Defendant blocked her movements and pushed her back. Defendant asserted, "No. Now that I'm here, I'm going to get something out of you."

Shah walked about ten feet from the area in front of the bedroom doorway to a chair in the living room. Defendant "made" her sit on his lap, according to Shah's testimony (it is unclear how Defendant forced her to cross the room before she sat on his lap). Defendant said, "I'm going [to] sit here and you [sic] going to sit on my lap and you going to give me a hand job." At some point Defendant stated, "If you don't want me to rape you, you will do this." Defendant unzipped his pants, grabbed Shah's hand, and forced her to touch his penis. Shah rubbed Defendant's penis for a long period of time while he attempted to grope her; eventually, he ejaculated on her hands and shirt. Shah testified that, at some point, Defendant must have been successful in his attempts to grope her. After this occurred, Defendant kept Shah pinned on his lap. Defendant made Shah write her phone number on a scrap of paper torn from an envelope, stating, "I hope it's the right number because I'm going to call you later today."

Defendant then left through the front door. As he was leaving, Defendant re-affixed the screen of the kitchen window, saying, "I'm going to put this screen back on for you and make sure no one else breaks into your apartment."

After Defendant left, Shah called her husband and her mother-in-law. Her mother-in-law advised her to call the police, but Shah did not call emergency services at that time. When Shah's husband returned to the apartment, he dialed 911, but Shah hung up on the dispatcher. The dispatcher called back, and Shah gave a statement of the event to police.

Chapel Hill Police arrived at the Shah residence later that morning to investigate. Shah told police about the incident and gave a description of the assailant. After obtaining this information, they developed Defendant as a suspect.

Officer David Britt of the Chapel Hill Police Department went to Defendant's apartment, which was in the same complex as Shah's. The door was answered by Regina Baldwin, Defendant's sister. As Officer Britt looked inside the apartment, he saw a pile of clothes that matched Shah's description of the clothes worn by the intruder. Defendant claimed the clothes as his, and permitted Officer Britt to take a picture of the garments. Officer Britt then left Defendant's apartment, and showed Shah the picture he had just taken. Shah stated the clothes could have been the ones she saw on the assailant, although she admitted it was dark during the incident.

When Officer Britt returned to Defendant's apartment, he overheard Baldwin telling Defendant "that a woman had been sexually assaulted in addition to the break-in." Defendant replied, "Yeah, I know." Baldwin asked Defendant how he knew, and Defendant indicated that he had heard Officer Britt tell Baldwin this fact. Officer Britt told Defendant that he had never said anything of that sort to Baldwin and asked Defendant how he knew of the sexual assault. Defendant walked over to a couch, sat down, looked at the floor and replied, "Nevermind. Just forget it."

Officer Britt asked for permission to search the home from Baldwin, who declined to consent. Another officer had everyone inside come out of the apartment in order to "freeze" the scene before applying for a search warrant. Defendant attempted to bring a coat with him that was on the floor. After being told to leave the coat, Defendant asked to pull a lighter out from the pocket. Instead of a lighter, an officer saw Defendant remove a scrap of paper from the pocket, which contained Shah's phone number. Finding this to be consistent with Shah's description of the events, the officers placed Defendant under arrest.

Defendant subsequently waived his *Miranda* rights and gave a statement in which he claimed to have called Shah earlier on 18

April—arguing the encounter was consensual. Police later found no record of any phone calls received by Shah of the time or length described by Defendant. Subsequently, police found in Shah's home the remainder of the envelope from which the paper containing her phone number was torn. Defendant did not put on any evidence. Defendant's counsel in closing argument acknowledged that Defendant had been untruthful with police, but maintained that the encounter on the night in question was consensual.

Defendant was convicted of first degree burglary, second degree kidnapping, and misdemeanor sexual battery. Defendant was later found to have attained habitual felon status and was sentenced to 121 to 155 months imprisonment. Defendant gave timely notice of appeal.

II. Jurisdiction

We have jurisdiction over Defendant's appeal of right. *See* N.C. Gen. Stat. § 15A-1444(a) (2009) ("A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered."); N.C. Gen. Stat. § 7A-27(b) (2009) (stating appeal shall be to this Court).

III. Analysis

Defendant raises several issues on appeal, which we address in turn.

A. Jury Instruction—Second Degree Kidnapping

[1] Defendant first argues the trial court erroneously instructed the jury with respect to the second degree kidnapping charge.[1] Specifically, Defendant contends the trial court erred by instructing the jury on a theory of second degree kidnapping that was (1) unsupported by the evidence presented at trial and (2) not charged in the indictment. We agree.

We turn first to Defendant's claim that the trial court erred by instructing on a theory of kidnapping that was not supported by the evidence presented at trial. At the conclusion of Defendant's trial, the jury was instructed it could convict Defendant if it found, beyond a reasonable doubt, that he "confined or restrained or removed a per-

1. The State incorrectly contends this issue is not properly before this Court because it was not set forth in Defendant's proposed issues on appeal. *See* N.C. R. App. P. 10(b) ("Proposed issues on appeal are to facilitate the preparation of the record on appeal and shall not limit the scope of the issues presented on appeal in an appellant's brief.").

son from one place to another." Defendant asserts that, as a result of this instruction, he was denied his state constitutional right to a unanimous jury verdict.

As a question of law, this Court reviews the sufficiency of jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Under *de novo* review, this Court "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) (internal quotation marks omitted) (citation omitted).

The Constitution of North Carolina provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. 1, § 24; *see also* N.C. Gen. Stat. § 15A-1237(b) (2009) (reiterating and codifying this right). Consequently, "jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the *crime charged*." *State v. Jordan*, 305 N.C. 274, 279, 287 S.E.2d 827, 831 (1982) (emphasis added). When a trial court "erroneously submits the case to the jury on alternative theories, one of which is not supported by the evidence," and "it cannot be discerned from the record upon which theory or theories the jury relied [on] in arriving at its verdict, the error entitles [the] defendant to a new trial." *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990).

No evidence was presented at trial indicating Defendant removed Shah from her living room.[2] According to Shah's testimony, Defendant initially insisted on moving to Shah's bedroom, but eventually agreed to stay in the living room.

The State argues that there was evidence of removal presented at Defendant's trial. In support of this assertion, the State points to two portions of Shah's testimony in which she describes Defendant forcing her to sit on his lap in a nearby chair. The State argues this constitutes sufficient evidence of removal, and therefore Defendant's argument is factually deficient. We find the State's argument unpersuasive. It is unclear how Defendant "forced" Shah to accompany him to the chair. And even assuming there is sufficient evidence of actual or constructive force, we conclude the asportation in this case was insufficient to constitute removal.

2. Defendant was not indicted for the "removal" element of kidnapping. "It is a well-established rule in [North Carolina] that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." *State v. Tucker*, 317 N.C. 532, 537–38, 346 S.E.2d 417, 420 (1986). However, we need not reach the question of whether this necessitates a new trial.

We acknowledge that there is no particular requirement that a defendant move a victim a certain distance in order to support a charge of kidnapping under a theory of removal, and our Supreme Court has specifically rejected the notion that removal must be "substantial." *See State v. Fulcher*, 294 N.C. 503, 522–23, 243 S.E.2d 338, 351 (1978) ("[I]t was clearly the intent of the Legislature to make resort to a tape measure . . . unnecessary in determining whether the crime of kidnapping has been committed."). Therefore, the State is correct in citing *State v. Owen*, 24 N.C. App. 598, 211 S.E.2d 830 (1975), for the proposition that moving a victim a short distance *could* constitute kidnapping in a proper case. This, however, is not such a case.

We do not discount the notion that evidence of removal could be present in a case where a victim was moved a distance equivalent to the space between where Shah was standing and the chair. However, we cannot conclude that the evidence presented at trial, or any fair inference stemming therefrom, suggests Shah was "removed" in this case. According to her own testimony, the entirety of Shah's encounter with Defendant occurred within the confines of her living room, and certainly evidence was presented as to Defendant confining and restraining her. Defendant attempted to talk Shah into accompanying him to the bedroom, but she refused. Interpreting Shah's testimony as supporting the assertion Defendant "removed" her is not plausible.

This conclusion is consistent with this Court's recent decisions in the home invasion context. We have recently held that a kidnapping victim may be "removed" from one area of their home to another. *See, e.g.*, *State v. Mangum*, 158 N.C. App. 187, 195, 580 S.E.2d 750, 755 (2003) (evidence tending to show a rape victim was forced down a hallway from one room to another was sufficient asportation to support a conviction for second-degree kidnapping); *State v. Blizzard*, 169 N.C. App. 285, 291, 610 S.E.2d 245, 250 (2005) ("[D]efendant's forcible movement of the victim from the front of her home to the bedroom was a sufficient asportation to support kidnapping . . . ."). But these cases are distinguishable from the matter at bar. Both *Mangum* and *Blizzard* involved a victim being "removed" from one section of their home to another. Here, however, Shah testified Defendant made her sit on his lap in a chair in the same room, merely a few feet from where she was standing. We hold that, under these facts, where the victim was moved a short distance of several feet, and was not transported from one room to another, the victim was not "removed" within the meaning of our kidnapping statute.

In the absence of any evidence of removal, the presence of the instruction regarding removal provided the jury an illegitimate mode of conviction. Since we cannot discern from the record whether all twelve jurors convicted Defendant on the instructed theories that were supported by evidence ("confinement or restraint"), we hold Defendant's right to a unanimous jury verdict was violated by virtue of the inclusion of the "removal" instruction.[3]

The State argues that, in light of Defendant's failure to object to the instruction at trial, Defendant is limited to plain error review. However, our courts have carved out an exception to the general rule that, "when a defendant fails to object to errors committed by the trial court during the trial, [the defendant] is precluded from raising the issue on appeal." *State v. Davis*, 188 N.C. App. 735, 739, 656 S.E.2d 632, 635 (2008). "A defendant's failure to object at trial to a possible violation of his right to a unanimous jury verdict does not waive his right to appeal on the issue, and it may be raised for the first time on appeal." *State v. Mueller*, 184 N.C. App. 553, 575, 647 S.E.2d 440, 456 (2007); *accord State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (stating that, despite the "general rule" that a "defendant's failure to object to alleged errors by the trial court operates to preclude raising the error on appeal," where the alleged "error violates defendant's right to a trial by a jury of twelve, defendant's failure to object is not fatal to his right to raise the question on appeal"). Therefore, Defendant's failure to object to the instruction at trial does not preclude this Court from reviewing the issue unbound by the constraints of plain error analysis. *See Davis*, 188 N.C. App. at 739, 656 S.E.2d at 635 (reviewing "defendant's unanimity argument despite the lack of any objection at trial").

Having determined this issue preserved, we must still consider whether Defendant is entitled to a new trial as a result of this error. Where an error implicates a defendant's right to a unanimous jury verdict under our Constitution, the State bears the burden of demonstrating beyond a reasonable doubt that the error was harmless. *State v. Nelson*, 341 N.C. 695, 700-01, 462 S.E.2d 225, 227-28 (1995). This is a heavy burden. "An error is harmless beyond a reasonable doubt if it

3. We note that the North Carolina Pattern Jury Instructions on second degree kidnapping contain brackets around each of these three theories. See N.C.P.I.-Crim. 210.30. These brackets are to indicate "[a]lternative words or phrases" and "only the appropriate word is to be used." *See* Committee on Pattern Jury Instructions, North Carolina Conference of Superior Court Judges & Institute of Government, University of North Carolina at Chapel Hill, Guide to the Use of This Book, in North Carolina Pattern Jury Instructions: Criminal Volume I, at xix (2010).

did not contribute to the defendant's conviction." *Id.* at 701, 462 S.E.2d at 228.

The State fails to make any argument on appeal that the presence of these instructions on "removal" was "harmless beyond a reasonable doubt." Consequently, the State has failed to meet its burden of persuasion. *See State v. Pinchback*, 140 N.C. App. 512, 520–21 & n.4, 537 S.E.2d 222, 227 & n.4 (2000) (holding that the State did not meet its burden of demonstrating that constitutional violation was harmless beyond a reasonable doubt where the State did not address the issue in its brief).

Accordingly, Defendant is entitled to a new trial on the kidnapping charges. Because this conviction formed part of the basis for Defendant's habitual felon conviction, we also vacate Defendant's habitual felon conviction. *See State v. Jones*, 157 N.C. App. 472, 479, 579 S.E.2d 408, 413 (2003) ("Since we hold that defendant is entitled to a new trial on the . . . charge[] which served as the 'substantive felony' underlying his conviction for having habitual felon status, defendant's habitual felon conviction must be vacated.").

B. Jury Instruction—Sexual Battery

[2] Defendant next alleges the trial court similarly erred in instructing the jury on a theory of sexual battery not supported by the evidence presented at trial. We disagree.

At trial, the court instructed the jury it could convict Defendant of sexual battery if it found he touched "the sexual organ, breasts, groin [or] buttock[s], of any person" or if he touched another person with his own "sexual organ, breasts, groin, or buttocks." Defendant claims no evidence was presented at trial suggesting he touched Shah's "sexual organ, breasts, groin, or buttocks." Echoing his kidnapping argument, Defendant contends the jury was instructed on a theory of the case unsupported by evidence, and therefore he is entitled to a new trial on this charge. We disagree.

At trial, Shah testified that Defendant attempted to touch her "everywhere," and that although she could not remember, "[t]here were times when he must have been successful" in attempting to touch her breasts and groin. She also testified that Defendant forced her to touch his penis. There was evidence presented sufficient to instruct the jury on both theories. Defendant's argument, to the extent he has any, goes to the weight of the evidence presented to the jury, not its existence. It is well settled that "[t]he weight of evidence

is always a question for the jury." *State v. Keath*, 83 N.C. 626, 628, (1880). We find no error.

C. Instruction—First Degree Burglary

[3] Defendant next alleges the trial court erred by "failing to include a not guilty final mandate" in the jury's instruction on first degree burglary, and as a result he is entitled to a new trial on that charge. We disagree.

During the charge conference, the trial court indicated without objection that it would instruct the jury on first degree burglary, with no lesser included offenses, in accordance with pattern jury instruction 214.10. *See* N.C.P.I.___ Crim. 214.10 (2008). However, the trial court did not utilize verbatim the language outlined in pattern instruction 214.10. Instead, the court appears to have instructed the jury using language that would have typically been followed by further instructions regarding lesser included offenses. However, no such lesser included instructions were given. Defendant argues this did not provide the jury with a "final not guilty mandate."

Defendant's trial counsel offered no objection with regard to this variance. Accordingly, the State argues this Court should adopt a plain error analysis in evaluating Defendant's claim. However, our Supreme Court has held that a defendant need not object to preserve the issue of a variance when the Defendant agreed to the use of a particular instruction. *See State v. Keel*, 333 N.C. 52, 56–57, 423 S.E.2d 458, 461 (1992) (holding that "[t]he State's request [to use the pattern instructions], approved by the defendant and agreed to by the trial court, satisfied the requirements . . . of the North Carolina Rules of Appellate Procedure and preserved this question for review on appeal" where the trial court varied from the agreed upon instructions). Once again, we review a trial court's decisions regarding jury instructions *de novo*. *Osorio*, 196 N.C. App. at 466, 675 S.E.2d at 149.

Instead of the final mandate provided by the pattern instructions, jurors heard the following:

> Now if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant broke into and entered an occupied dwelling house without the owner's or tenant's consent during the nighttime and that at that time intended to commit second degree kidnapping and/or second degree rape, it would be your duty to return a verdict of guilty of first degree burglary. If you do not so find or you have a reasonable doubt as

to one or more of these things, you will not return a verdict of guilty of first degree burglary."

Defendant argues he was prejudiced by the trial court's use of this instruction as opposed to the pattern instruction, which would have directed the jury "it would be your duty to return a verdict of not guilty" should they have reasonable doubt as to any element.

Defendant relies on *State v. McHone*, 174 N.C. App. 289, 620 S.E.2d 903 (2005), to support his assertion. In *McHone*, the trial court similarly failed to provide the jury with the preferred "not guilty" mandate in its instructions on first degree murder. *Id.* at 292-93, 620 S.E.2d at 906-07. During the jury charge, the court instructed the jury in a manner that seemed to infer their only choice was which theory (felony murder or malice) to choose in returning a guilty verdict. *Id.* at 297, 620 S.E.2d at 909 ("The instruction, then, in the absence of a final not guilty mandate, essentially pitted one theory of first degree murder against the other, and *impermissibly suggested* that the jury should find that the killing was perpetrated by defendant on the basis of at least one of the theories.") (emphasis in original). In addition, the verdict sheet provided to the jury did not contain a space or option for them to indicate a "not guilty" verdict. *Id.* at 298, 620 S.E.2d 909. This Court found plain error and vacated the defendant's sentence. *Id.* at 292, 620 S.E.2d at 906.

McHone is distinguishable from this case. Here, the jury was instructed explicitly that it could not return a guilty verdict should it have reasonable doubt as to any of the elements of first degree burglary. Unlike *McHone*, all of the verdict sheets given to the jury provided them the option of returning a not guilty verdict. The trial court polled the jury after having read the verdict and found the jury voted unanimously to convict on the burglary charge.

We acknowledge that "the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *State v. Tyson*, 195 N.C. App. 327, 335, 672 S.E.2d 700, 706 (2009). However, "[i]t is well established that 'the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct.' " *State v. Hornsby*, 152 N.C. App. 358, 367, 567 S.E.2d 449, 456 (2002) (quoting *State v. Boykin*, 310 N.C. 118, 125, 310 S.E.2d 315, 319 (1984)). The jury here was given a clear instruction, and there is nothing in the record to suggest jurors were confused as to the conditions under which they could return an acquittal.

Variance from the pattern instructions notwithstanding, we conclude Defendant was not prejudiced by the instructions given to the jury. Accordingly, we find no error.

D. The State's Closing Argument

[4] Defendant next alleges the trial court twice erred during the State's closing argument. First, Defendant argues the trial court abused its discretion in overruling his objection to a portion of the State's argument. Defendant also claims the court erred by not intervening *ex mero motu* during a subsequent portion of that same argument. We disagree.

Defendant objected to the following portions of the State's closing argument:

> So let's go back to first degree burglary. The first element was breaking and an entry by the defendant. We know he was there because he was in the apartment. Was there a break-in? Yes, he got into that front door. She left it open. She made a mistake that night.
>
> . . . .
>
> She said on her—in her testimony—maybe I forgot to leave the front door open [sic].

Defendant argues now, as he did then, that the evidence presented did not support either of these statements.

We review a trial court's decision to overrule an objection made during closing argument for an abuse of discretion. *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). In determining whether an abuse of discretion has occurred, we look first to whether the statements were improper, and then determine if they were "of such a magnitude that their inclusion prejudiced [the] defendant, and thus should have been excluded by the trial court." *Id.* We note that typically counsel is given wide latitude in closing argument, provided "the liberty of argument [does not] degenerate into license." *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 345 (1967). As a general proposition, "[a]rguments to a jury should be fair and based on the evidence or on that which may be properly inferred from the case." *Id.*

Upon review of the record, we cannot conclude the statements at issue were necessarily improper, let alone prejudicial. Admittedly, no one testified as to how the assailant that night entered the Shah residence. Frankly, no individual who testified could have had the knowl-

edge. However, Officer Britt testified Shah reported she had initially been awoken by what she thought was the sound of the front door opening, and Shah reiterated this fact in her own testimony. Therefore, one could infer that Defendant entered Shah's apartment through an unlocked front door, even in spite of the evidence presented of forced entry through the window. Without any explicit evidence of the method of entry, it was the State's prerogative to argue one theory over another, or both. Therefore, we conclude the trial court did not abuse its discretion in overruling Defendant's objection.

Defendant also claims the trial court erred by not intervening *ex mero motu* during the following portion of the State's argument:

> Just to be clear, a break-in is making any sort of an opening in a dwelling house that allows you entry. And that can be by busting out a window. That can be by walking through an open door. But it's anything that causes an opening in that dwelling. Opening an unlocked door for a house that[] ain't yours is a break-in."

Defendant argues this is a misstatement of the law, and that the trial court should have intervened, even absent an objection from Defendant's trial counsel. "The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107.

In North Carolina, the "breaking" element of burglary is defined as "any act of force, however slight, used to make an entrance 'through any usual or unusual place of ingress, whether open, partly open, or closed.' " *State v. Eldridge*, 83 N.C. App. 312, 314, 349 S.E.2d 881, 882-83 (1986) (quoting *State v. Jolly*, 297 N.C. 121, 127-28, 254 S.E.2d 1, 5-6 (1979)). The State's articulation of the law was not so "grossly improper" as to warrant reversal. Although perhaps imprecise, only the State's suggestion that "walking through an open door" constitutes breaking gives us pause. If by "open" the State meant "unlocked," then the statement is an accurate statement of the law. However, even if "open" can be construed as a synonym for "ajar," we cannot conclude such an isolated misstatement of the law was so "grossly improper as to warrant reversal," particularly in light of State's subsequent statement that a break-in is "anything that *causes* an opening in that dwelling." Accordingly, we find no error.

E. Shackling

[5] Defendant next argues he was denied a fair trial by virtue of his visible shackling during the habitual felon phase of the trial. We do not address this argument because we vacate Defendant's habitual felon conviction. On remand, the trial court should review our recent decision addressing shackling in *State v. Stanley*, No. COA10-1352, ___ N.C. App. ___, ___ S.E.2d ___ (July 19, 2011) (applying N.C. Gen. Stat. § 15A-1031 (2009)).

IV. Conclusion

We find no error with the trial court's instructions on the sexual battery and burglary charges. We find no error in the trial court's handling of the State's closing argument. We do, however, find error in Defendant's kidnapping conviction and grant him a new trial on that charge. Consequently, we also vacate Defendant's habitual felon conviction.

No error in part; new trial in part; vacated in part; remanded.

Judges STROUD and THIGPEN concur.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Plaintiff v. MATTHEW J. CROMARTIE, JR., Individually and as Co-trustee of The Matthew And Annie Lee Cromartie Trust; JOYCE GOODEN; ALEXANDER CROMARTIE and wife MARTHA CROMARTIE; MARGARET CROMARTIE; BERNARD BELL; FRANCENIA CROMARTIE HORNE; and KNOWN AND UNKNOWN, BORN AND UNBORN HEIRS OF MATTHEW J. CROMARTIE, SR., Defendants

No. COA10-709

(Filed 2 August 2011)

1. Eminent Domain—inverse condemnation—substantial compliance with statutory requirements

The trial court did not err by denying plaintiff Department of Transportation's motion to dismiss a counterclaim for inverse condemnation. Defendants may assert an inverse condemnation claim for a further taking during an ongoing condemnation proceeding. Further, defendants substantially complied with N.C.G.S. § 136-111.

2. Eminent Domain—inverse condemnation—sufficiency of findings of fact

The trial court erred by determining that plaintiff Department of Transportation had inversely condemned a .832-acre parcel. The trial court's factual findings had no competent basis in evidence, and thus, the order was reversed and remanded for further proceedings.

Appeal by plaintiff from orders entered 30 November 2009 and 2 December 2009 by Judge James F. Ammons, Jr., in Bladen County Superior Court. Heard in the Court of Appeals 12 January 2011.

Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett-Baker, for the Department of Transportation.

Johnson & Johnson, PLLC, by William L. Johnson, III, for defendants.

ELMORE, Judge.

The Department of Transportation (DOT or plaintiff) appeals an order denying its motion to dismiss plaintiffs' counterclaim for inverse condemnation and another ruling in summary judgment that plaintiff had inversely condemned defendants' land. After careful review, we affirm.

I. Background

In its 19 November 2008 complaint, DOT named Matthew J. Cromartie, Jr., Annie Lee Cromartie, Joyce Gooden, Alexander Cromartie, Martha Cromartie, Margaret Cromartie, Bernard Bell, Francenia Cromartie Horne, co-trustees of the Matthew and Annie Lee Cromartie Trust, and all heirs of Matthew J. Cromartie, Sr. (together, defendants), as those persons having an interest in the land at issue. The complaint stated that it was necessary to condemn or appropriate portions of a certain plot of land belonging to defendants: (1) to condemn a 1.80-acre tract located next to the NC 87 Bypass in Bladen County and (2) to take 3,639 square feet for a temporary slope easement. The land involved was part of a larger 9.47-acre tract; by the two takings, the remaining tract was divided into two parcels. One of the parcels was 6.85 acres, and the other was .832 acres. As required by N.C. Gen. Stat. § 136-103(d), DOT deposited with the clerk of superior court $41,600.00 as just compensation for the taking.

Only certain defendants filed answers; those who did filed amended answers and counterclaims on 8 October 2009, admitting the allegations in the complaint and alleging that DOT had inversely condemned the .832 acre parcel because DOT's actions significantly and permanently affected the value of the land. Defendants stated that "[t]he acreage is too small to be farmed or developed [and] [t]he shape is irregular which compounds its unusefulness." In addition, the answering defendants asserted that Steve Bell, who was not a named defendant, had an interest in the property.

Defendants tendered the affidavit of Bobby Dowless, a realtor from Dublin, North Carolina. Mr. Dowless stated that the best use of the .832-acre parcel is commercial development, but that the configuration of the lot made it unworkable and unmarketable as a commercial development property. Further, Mr. Dowless concluded that the parcel could not be combined with adjoining property because of zoning orders and that the damage to the .832 acre parcel was 100% of fair market value.

Defendants tendered two additional affidavits from Mr. Israel Cromartie and Mr. Dale Holland. Mr. Cromartie, a farmer who was not a party or owner, viewed the .832-acre parcel and opined that it was too small to be farmed. Mr. Holland, who holds a certification from the American Institute of Certified Planners (A.I.C.P.), opined that the injury to the parcel was substantial and permanent and applies to 100% of the .832-acre parcel. He further stated that "[t]he irregular shape and small size of the parcel left to Mr. Cromartie has the effect of substantially depriving defendants of all beneficial enjoyment[.]"

On 16 November 2009, the superior court heard defendants' motion for a hearing pursuant to N.C. Gen. Stat. § 136-108. On 30 November 2009, the court issued an order inversely condemning the .832-acre parcel. On 2 December 2009, the trial court issued an order denying DOT's motion to dismiss defendants' counterclaims. DOT appeals both orders. Further relevant facts are developed below.

II. Analysis

A. Denial of Plaintiff's Motion to Dismiss Counterclaim

[1] Plaintiff first argues that the trial court erred in denying its motion to dismiss the counterclaim for inverse condemnation. We disagree.

1. Standard of Review

As this Court has observed when considering a motion to dismiss:

> [t]he court must construe the complaint liberally and 'should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.' *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000). This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Leary v. N.C. Forest Products, Inc., 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

2. Substantive Law

N.C. Gen. Stat. § 136-108 provides in relevant part:

> After the filing of the plat, *the judge*, upon motion and 10 days' notice by either the Department of Transportation or the owner, *shall*, *either in or out of term*, *hear and determine any and all issues raised by the pleadings other than the issue of damages*, *including*, *but not limited to*, *if controverted*, *questions of necessary and proper parties*, *title to the land*, *interest taken*, *and area taken.*

N.C. Gen. Stat. § 136-108 (2009) (emphasis added).

N.C. Gen. Stat. § 136-111, the statute permitting the State to be sued for inverse condemnation, states in relevant part:

> Any person whose land or compensable interest therein has been taken by an intentional act or omission of the Department of Transportation and no complaint and declaration of taking has been filed by said Department of Transportation may . . . file a complaint in the superior court setting forth the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have estates or interests in the said real estate and if any such persons are under a legal disability, it must be so stated, together with a statement as to any encumbrances on said real estate; said complaint shall further allege with particularity the facts which constitute said taking together with the dates that they allegedly occurred; said complaint shall

> describe the property allegedly owned by said parties and shall describe the area and interests allegedly taken.

N.C. Gen. Stat. § 136-111 (2009).

In order to recover for inverse condemnation, a complainant must show:

> an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental; a taking has been defined as entering upon private property for more than a momentary period, and under warrant of color of legal authority, devoting it to 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.

Long v. City of Charlotte, 306 N.C. 187, 199, 293 S.E.2d 101, 109 (1982) (internal quotations omitted). "While the term 'actual interference' does not require actual physical invasion, actual dispossession or even a physical touching, the term does require that plaintiffs show interference with the use and enjoyment of their property substantial enough to reduce market value." *Twitty v. State*, 85 N.C. App. 42, 54, 354 S.E.2d 296, 304 (1987). "A reduction in market value, standing alone, does not constitute an 'actual interference with or disturbance of' plaintiffs' use and enjoyment of their property. *Long* requires an actual interference (the cause) substantial enough to reduce the market value of plaintiffs' property (the effect)." *Id.*

"Property owners may choose to bring a separate action for inverse condemnation pursuant to G.S. 136-111 when there is a further taking by the State after the initiation of the original condemnation action." *Lea Co. v. North Carolina Bd. of Transp.*, 308 N.C. 603, 633, 304 S.E.2d 164, 183 (1983). However, "principles of judicial economy dictate that the owners of the taken land may allege a further taking by inverse condemnation in the ongoing proceedings." *City of Greensboro v. Pearce*, 121 N.C. App. 582, 587-88, 468 S.E.2d 416, 420 (1996) (quoting *Department of Transportation v. Bragg*, 308 N.C. 367, 371 n.1, 302 S.E.2d 227, 230 n.1 (1983)).

3. Application

Here, plaintiff first contends that defendants had no right to sue DOT for inverse condemnation because N.C. Gen. Stat. § 136-111 specifically applies to instances where there is a taking but DOT does

not file a complaint and declaration of taking, and, in the present case, DOT filed a complaint and declaration of taking on 19 November 2008. Plaintiff did indeed file a complaint and declaration of taking; however, the .832-acre parcel in question was not part of the original condemnation action. Defendants asserted DOT took the .832-acre parcel in addition to the area condemned in the original condemnation action. As this Court has made clear, defendants may assert an inverse condemnation claim for a further taking during the ongoing proceedings. *See Pearce*, 121 N.C. App. at 587-88, 468 S.E.2d at 420. Therefore, defendants' assertion of a claim against DOT for inverse condemnation of the .832-acre parcel as a counterclaim within the original condemnation action was proper. We dismiss this claim of error.

Plaintiff next claims that defendants' claims should be dismissed because they have not complied with multiple provisions of N.C. Gen. Stat. § 136-111 governing defendants' right to bring an inverse condemnation claim so that their claim is barred by sovereign immunity. We disagree and address each of their procedural contentions in turn.

As to the requirements of N.C. Gen. Stat. § 136-111, plaintiff first complains that defendants' answer to the State's condemnation action in which they make a claim for inverse condemnation did not "allege with particularity the facts which constitute [the taking in question]" or "the dates they allegedly occurred" or the "property allegedly owned by said parties . . . and the area and interests allegedly taken." We disagree.

Looking to the record in this case, we find that defendants' answer in the case includes *inter alia*: assertions that the condemnation action identified in the State's plat attached as an exhibit to the complaint in the condemnation action has deprived them of all of the "bundle of rights" associated with the additional .832 acres for which they claim inverse condemnation, including limitation of access and impossibility of use for farming or development, due to "DOT's decision to split the land in a way and manner devoid of consideration to the Defendants." In short, defendants' answer alleges a total deprivation of all economic use of .832 acres, identified by reference to the State's own plat filed in an ongoing action. Such deprivation was expressly alleged to have occurred contemporaneously with the State's condemnation of another portion of the same tract—"It is admitted that Plaintiff has condemned the area depicted on the plat map attached to the complaint. Defendants are informed and believe additional area is condemned and the state should file additional

pleadings to condemn a certain [.832] acres." From our review of the record and, "construing the complaint liberally," *Leary*, 157 N.C. App. at 400, 580 S.E.2d at 4, the complaint alleges sufficient facts to both state a prima facie claim of inverse condemnation and satisfy the dictates of N.C. Gen. Stat. § 136-111.

Plaintiff further complains that defendants failed to file a memorandum of action contemporaneously with their complaint in accordance with N.C. Gen. Stat. § 136-111, which requires in relevant part the filing of a memorandum of action with the register of deeds' office in all relevant counties, which includes:

> (1) The names of those persons who the plaintiff is informed and believes may have or claim to have an interest in said lands and who are parties to said action;
>
> (2) A description of the entire tract or tracts affected by the alleged taking sufficient for the identification thereof.
>
> (3) A statement of the estate or interest in said land allegedly taken for public use; and
>
> (4) The date on which the plaintiff alleges the taking occurred, the date on which said action was instituted, the county in which it was instituted and such other reference thereto as may be necessary for the identification of said action.

N.C. Gen. Stat. § 136-111 (2009). In the present action, defendants filed a memorandum of action which included *inter alia*: as to the "the names of those persons who the plaintiff is informed and believes may have or claim to have an interest in said lands and who are parties to said action," the names of Matthew and Annie Cromartie; Alexander and Martha Cromartie; Bernard and Barbara Bell; and Steven Bell, who the document indicates owns an undivided interest in the property and has not filed an answer in the action; as to the "description of the entire tract or tracts affected by the alleged taking," a description of the property in question including its tract number and book and page number in the Bladen County registry; as to a "statement of the estate or interest in said land allegedly taken for public use," a statement that the parties have a fee simple interest in the property; and as to the "date on which the plaintiff alleges the taking occurred," "the later of [the date] of the filing of the lawsuit, November 19, 2008, or the last date of the construction of the site." Defendants' memorandum of action was substantively adequate. *See* N.C. Gen. Stat. § 136-111 (2009). Though plaintiffs also contend that

the memorandum of action in this case was defective because it was not filed contemporaneously with the complaint in this instance, we are not persuaded. As the land in controversy had already been noticed by plaintiff in relation to their initial condemnation action and the memorandum of action in this case was filed 9 November 2009, a week before the hearing in question, we are satisfied that all proper parties to the lawsuit were on notice of the controversy in question and that defendants were in substantial compliance with N.C. Gen. Stat § 136-111.

For the reasons above, we affirm the trial court's order denying DOT's motion to dismiss the counterclaim for inverse condemnation.

B. Determination that Plaintiff Inversely Condemned the .832 Acre Parcel

[2] Plaintiff also argues that the trial court erred in determining that DOT had inversely condemned the .832-acre parcel. We agree.

1. Standard of Review

"Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citations omitted). However, those findings of fact must be "supported by competent evidence." *Munchak Corp. v. Caldwell*, 301 N.C. 689, 273 S.E.2d 281 (1981) (citing *Woods-Hopkins Contracting Co. v. Ports Authority*, 284 N.C. 732, 202 S.E.2d 473 (1974), and *Cotton v. Cotton*, 269 N.C. 759, 153 S.E.2d 489 (1967)). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

2. Substantive Law

The Fifth Amendment to the United States Constitution provides, in pertinent part, "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. "[A]lthough the North Carolina Constitution does not contain an express provision prohibiting the taking of private property for public use without payment of just compensation, th[e] [North Carolina Supreme Court] has inferred such a provision as a fundamental right integral to the 'law of the land' clause in article 1, section 19 of our Constitution." *Finch v. City of Durham*, 325 N.C. 352, 362-63, 384 S.E.2d 8, 14 (1989) (citing *Long v. City of Charlotte*, 306 N.C. 187, 196, 293 S.E.2d 101, 107-08 (1982)).

"It is a well settled constitutional principle that actual physical occupation or even touching is not required to support a finding that a taking has occurred." *City of Greensboro v. Pearce*, 121 N.C. App. 582, 585, 468 S.E.2d 416, 418 (1996) (citing *Adams Outdoor Advertising v. N.C. Dept. of Transportation*, 112 N.C. App. 120, 122, 434 S.E.2d 666, 667 (1993)). "[T]here need only be a substantial interference with elemental rights growing out of the ownership of the property." *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E.2d 101, 109 (1982).

The United States Supreme Court has held that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking[]" regardless of the public ends to be achieved. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 120 L. Ed. 2d 798, 815 (1992) (emphasis in original).

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2009). Hearsay is not to be admitted into evidence, except as provided by statute or by the evidentiary rules. N.C. Gen. Stat. § 8C-1, Rule 802 (2009).

3. Application

We begin with plaintiff's assertion that the action in this case is improper because "the power to take private property is in every case limited to such and so much property as is necessary for the public use in question." *N.C. State Highway Comm'n v. Farm Equip. Co.*, 281 N.C. 459, 189 S.E.2d 272 (1972). Plaintiff further asserts that the trial court may not substitute its judgment for that of DOT and cites *State Highway Commission v. Greensboro City Board of Education*, 265 N.C. 35, 48, 143 S.E.2d 87, 97 (1965), for the proposition. We first note that in that case, the question was one of a trial court's order reversing the condemnation of property wherein the trial court made findings of fact regarding the proper plan for the proposed highway. *Id.* at 47; 143 S.E.2d at 97. Here, however, the trial court made no such findings, nor does the trial court in any way seek to substitute its opinion of what plaintiff should condemn for that of the plaintiff. The question here is what has already been taken by the condemnation in question, *i.e.*, the .832 acres. As such, comparison to that case is inapposite. Turning to the question of plaintiff's inability to take title to the land in question, we again find that the question is

not one of what plaintiff may take, but what it has already taken as a by-product of its properly exercised authority of eminent domain, the remedy for which when the burden on a parcel is total is inverse condemnation. *Long*, 306 N.C. at 199, 293 S.E.2d at 109.

The trial court made the following relevant findings of fact in its order of 30 November 2009, granting defendants' motion for a finding of inverse condemnation:

> 20. The .832 acres is controlled access along the Martin Luther King Drive and the Elizabethtown bypass. A fence is erected along Martin Luther King Drive. The .832 acres is affected by five corners.
>
> 21. Egress and ingress is only possible along the "old" Martin Luther King Drive which is now a dead end street. This is also the southern most line of the .832 acre parcel. Ingress and egress is extremely limited and substantially burdened by the configuration of the .832 acre parcel.
>
> 22. The Court finds that the .832 acre parcel is close to three commercial buildings: Elizabethtown Farm Bureau, Star Telephone, and Bladen Funeral Home. Elizabethtown Farm Bureau office is 7,495 square feet. The Star Telephone building is 7,360 square feet. The Bladen Funeral Home building is 10,000 square feet.
>
> 23. A commercial building of the foregoing sizes will not fit on the .832 acres and comply with the Elizabethtown zoning ordinance.
>
> 24. The .832 acres is zoned Bypass Commercial (BC). The adjacent property is owned by R&D properties, Inc. and is zoned Residential Agricultural (RA). Present zoning would not allow the .832 acre lot and the R&D tract to be combined in commercial use.
>
> 25. The Court finds that even if it were possible to build a 5872 square foot building on the lot as depicted in "Exhibit A" of the affidavit of Dale Holland, AICP, that it would not be economically desirable to build such a building due to the impossibility of situating parking closest to the bypass.
>
> 26. The irregular shape and small size of the parcel left to Defendants has the effect of substantially depriving Defendants of all beneficial enjoyment.

27. The right to develop the .832 acre parcel is substantially impaired.

28. The option to productively further subdivide the parcel is extremely limited given the irregular shape, extremely small size, and limited right of way access.

29. The requirement to make the parcel comply with the existing zoning ordinance results in substantial interference with use and enjoyment of the parcel.

30. The injury done to the .832 acre parcel is not minor or incidental; it is substantial and permanent.

31. The injury done applies to 100% of the parcel.

32. The present configuration of the lot has the unfortunate effect of significantly limiting Defendants' options for maximum utilization of the property.

33. The future possibility of development or subdividing the parcel is substantially impaired.

34. The Court finds that the property is not marketable due to extremely small size, irregular shape, restricted access, and design complications.

At the trial court's hearing of 16 November 2009, it heard arguments of counsel; the in-person testimony of Matthew Cromartie; affidavits of Israel Cromartie, a farmer; Bobby Dowless, a realtor; and Dale Holland, a planner. The trial court also had before it the map and plats contained in the file and bench briefs of both plaintiffs and defendants.

Plaintiff is correct in asserting that the affidavits presented to the trial court were hearsay. *See* N.C. Gen. Stat. § 8C-1, Rule 801 (2009). As we have noted, hearsay may be admitted into evidence only as provided by statute or by the evidentiary rules. N.C. Gen. Stat. § 8C-1, Rule 801 (2009). Defendant, however, argues that the affidavits in question were properly admitted into evidence by the action of Rule 803(24). That rule of evidence allows for the admission of testimony if the statement is offered as evidence of a material fact, the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and the general purposes of these rules and the interest of justice will best be served by admission of the statement into evi-

dence. N.C. Gen. Stat. § 8C-1, Rule 803(24) (2009). The rule further requires that notice be given to the opposing party, "to provide the adverse party with a fair opportunity to prepare to meet the statement." N.C. Gen. Stat. § 8C-1, Rule 803(24) (2009). Our Supreme Court has mandated that when a trial judge is considering the admission of evidence under Rule 803(24) he must "have the record reflect that he is considering the admissibility of the statement pursuant to" N.C. Gen. Stat. § 8C-1, Rule 803(24), and "set out in the record his analysis of the admissibility of hearsay evidence pursuant to the requirements of [N.C. Gen. Stat. § 8C-1,] Rule 803(24)" so as to ensure that he "undertake[s] the serious consideration and careful determination contemplated by the drafters of the Evidence Code." *State v. Smith*, 315 N.C. 76, 92-97, 337 S.E.2d 833, 844-47 (1985). Not to do so, if "it is clear that the evidence was admitted pursuant to Rule 803(24), . . . must be held to be error." *Id.* at 97, 337 S.E.2d at 47.

A careful review of the record in this case shows no announcement of the admission of evidence under Rule 803(24) as required by *Smith* nor any consideration by the trial court of the substantive mandates of the Rule itself. As no other hearsay exception is conceptually applicable to the affidavits in question and the trial court did not seek to apply any, the admission of these affidavits could only have been by reliance on Rule 803(24) and, lacking the proper procedural safeguards, "must be held to be error." *Id.*

Aside from that objection to the admission of the affidavits in this case, we also do not believe that the information contained in the affidavits has "circumstantial degrees of trustworthiness" "equivalent" to those typical of other hearsay exceptions. N.C. Gen. Stat. § 8C-1, Rule 803(24) (2009). Although the Supreme Court indicated in *State v. Nichols*, that the trial judge should consider a number of factors in determining whether a hearsay statement possesses sufficient indicia of trustworthiness to be admitted under [N.C. Gen. Stat. § 8C-1, Rule 803(24)]," including "(1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth; and (3) whether the declarant recanted and (4) the reason, within the meaning of [N.C. Gen. Stat. § 8C-1, Rule 803(24)]," it also cautioned that "this list is not exclusive" and "other factors may be considered where appropriate." 321 N.C. 616, 624-25, 365 S.E.2d 561, 567-68 (1988) (citing *State v. McLaughlin*, 316 N.C. 175, 179, 340 S.E.2d 102, 105 (1986)). Although it is evident the affiants had personal knowledge of the information contained in their affidavits, we know nothing of their motivation to speak the truth or of the reasons for their failure

to testify at the hearing held before the trial court. Further, a great deal of the information contained in their affidavits is not corroborated by other admissible evidence, such as the information concerning the zoning regulations applicable to the .832 acre tract and the extent to which a commercial building could reasonably be constructed on the property. These deficiencies undermine the "trustworthiness" of the affidavits and we find that even had the proper procedure been followed, they would fail this requirement.

Further, we see no indication that the evidence presented through the use of these affidavits was "more probative on the point for which it was offered than any other evidence which the proponent can procure through reasonable efforts." N.C. Gen. Stat. § 8C-1, Rule 803(24) (2009). In this instance, the record is devoid of any indication that defendants made any effort to procure the attendance of the affiants at the hearing or provided any explanation for their inability to make the affiants available for cross-examination at that time. From our review of the record, we do not believe that defendants made "reasonable efforts" to procure further or other evidence in support of their case and so find that again, were these affidavits properly admitted procedurally, they would not have satisfied this requirement.

Though the preference of the appellate court is to "presume that the [trial] court disregard[ed] the incompetent evidence" and will "sustain" the trial court's findings if they are supported by competent evidence," *Caldwell*, 301 N.C. at 694, 273 S.E.2d at 285, we cannot do so in this case. From our careful review of the record, we see that the trial court specifically stated that it considered the contested affidavits in its decision. Aside from that fact, almost all of the trial court's findings, including those pertaining to the proximity between the .832 acre tract and various commercial buildings, the ability of the .832 acre tract to accommodate similar commercial structures, the economic undesirability of locating a commercial building on the .832 acre tract for parking-related reasons, and the ability of the current owners to make use of their .832 acre tract in light of the current zoning rules, are drawn exclusively from information contained in the challenged affidavits. As a result, we find that the factual findings of the trial court have no competent basis in evidence and, as a result that the conclusions of law drawn therefrom, having no factual underpinnings, are improper. The trial court's order determining the issue of inverse condemnation for the defendant in this case is reversed and remanded to the Bladen County Superior Court for further proceedings to determine the inverse condemnation issue.

III. Conclusion

For the foregoing reasons, we affirm the decision of the trial court with respect to its denial of plaintiff's motion to dismiss, reverse the trial court's order determining that an inverse condemnation has occurred in this case, and remand to the trial court for further proceedings on that issue.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges STEELMAN and ERVIN concur.

STATE OF NORTH CAROLINA v. ANTHONY McMILLAN

No. COA10-1419

(Filed 2 August 2011)

1. Indictment and Information—first-degree murder—short-form indictment proper

The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by refusing to dismiss the short-form first-degree murder indictment against defendant. The issue of short-form indictments has been repeatedly decided against defendants and the Court of Appeals was bound by this precedent.

2. Homicide—first-degree murder—second-degree murder—sufficient evidence—motion to dismiss properly denied

The trial court did not err in a murder case by denying defendant's motion to dismiss the charges of second-degree murder of one victim and first-degree felony murder of another. The State offered sufficient evidence to establish every element of these crimes.

3. Homicide—first-degree murder—jury instruction—voluntary manslaughter—no evidence to support instruction

The trial court erred in a first-degree murder case by refusing to charge the jury on the lesser-included offense of voluntary manslaughter as to each victim.

4. Appeal and Error—preservation of issues—failure to raise constitutional issue at trial—no constitutional violation

Defendant failed to preserve for appellate review his constitutional argument that the trial court erred in a first-degree murder case by allowing the State's expert forensic pathologist to testify about the autopsy of one of the victims and give her own opinion concerning the cause of death. Even if the issue had been preserved, the expert's testimony did not violate defendant's constitutional right of confrontation because the expert was actually present for the autopsy of the victim and testified as to her own independent opinion as to the cause of her death.

5. Evidence—mouth swabbing—photographs—belt and shoes—defendant's consent—motion to suppress properly denied

The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by denying defendant's motion to suppress certain evidence. The findings of fact supported the conclusion of law that defendant freely and voluntarily consented to the swabbing of his mouth, the photographs of his injuries, and the collection of his belt and shoes.

Appeal by defendant from judgments entered 11 December 2009 by Judge Thomas H. Lock in Cumberland County Superior Court. Heard in the Court of Appeals 27 April 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Danielle Marquis Elder, for the State.

William D. Spence, for defendant-appellant.

STEELMAN, Judge.

Evidence that defendant "had words" with one of the deceased was not sufficient to negate the malice supporting his conviction for second-degree murder, nor was it sufficient to require a jury instruction on voluntary manslaughter in the two murder cases. The temporal sequence of the taking and the use of a firearm did not negate defendant's conviction for armed robbery that was the basis of his first-degree felony murder conviction. Where constitutional arguments are not presented at trial, they are not preserved for appellate review. Where officers advised defendant that if he did not consent to giving oral swabs and surrendering certain items of clothing that they would detain him until they obtained a search warrant, this did not negate defendant's voluntary consent to the seizure of those items.

I. Factual and Procedural Background

The evidence presented at trial tended to show the following: On the evening of 14 August 2006, defendant shot and killed Marcus Robinson (Robinson) and Tammyln Rosario (Rosario) at Robinson's car wash business in Stedman, North Carolina. Employees arriving for work the next morning at approximately 7:15 a.m. observed that the front glass door had been shattered and the first floor lobby was littered with small denomination currency. The glass door appeared to have been broken from the inside with the glass pushed outward. Robinson and his girlfriend, Rosario, were found dead, lying in pools of blood on the second floor. Robinson was found lying on the landing, while Rosario was found sitting upright, propped against a door, with a jacket fashioned as a tourniquet around her leg and a cell phone in her hand.

An autopsy revealed that Robinson sustained a non-life threatening blunt force injury to the back of his head, leaving a tear in his scalp, as well as two fatal gunshot wounds to his upper left chest and abdomen, both inflicted from one to three feet away. Rosario sustained gunshot wounds believed to have been inflicted by the same bullet entering and exiting her right thigh and then grazing her left leg. Rosario bled to death from the injury to her right femoral artery and vein. This wound would not have been fatal had timely medical assistance been rendered. A loaded silver Smith & Wesson .22 caliber revolver was collected from inside a safe, located in a room on the second floor, in front of which there was a pool of blood. An employee testified that cash from the car wash was frequently stored in the safe.

Investigators identified defendant after determining that the last number dialed from Rosario's cell phone before she called 911 was to defendant's cell phone. At 7:32 p.m. on 15 August 2006, defendant voluntarily presented himself at the law enforcement center. At that time, investigators noticed that defendant had fresh cuts on his hand and legs, and his shoes and belt appeared to have blood on them. Defendant, who was not under arrest, signed a consent form, voluntarily relinquishing his shoes and belt to investigators, and agreeing to have his injuries photographed and to provide a DNA sample from an oral swab.

Police later interviewed Maurice McMillan (McMillan), defendant's cousin, who testified that he received a phone call from defendant on the night of the shootings. Defendant asked to meet with McMillan, and they met at the home of McMillan's grandfather.

McMillan testified that both he and defendant sold drugs and that defendant claimed to have shot one of his customers that night. Defendant told McMillan that he had "messed up," that he had "made a mistake" and "shot some people." Defendant stated that he had been "smoking [marijuana] with the people" and that he and the "dude . . . had some words or something." Defendant told McMillan that the man bent over a safe and defendant saw a gun in the safe. He then shot the man with the gun from the safe, then shot a woman because he was scared.

McMillan also testified that defendant told him that he injured his hands on the door trying to break the glass to get out of the building. Defendant also claimed to have taken money, although McMillan denied ever seeing any of the stolen money. McMillan told defendant to take him to the place where the shooting had occurred. Defendant took him to a warehouse in Stedman. Defendant dropped McMillan off at the warehouse, but McMillan lost his nerve, did not enter the warehouse, and called defendant to pick him up. They returned to the residence of McMillan's grandfather, where defendant produced a gun from the trunk of his car. McMillan wiped down the gun and threw it into the Cape Fear River. Investigators later retrieved the gun. Defendant's fiancé testified that he did not return home until after midnight. She observed fresh cuts on his hands, which he advised he had sustained in a fight. She confirmed that defendant was selling drugs.

DNA analysis matched the DNA from a blood droplet located on the sidewalk outside of the car wash and from blood on the front glass door to defendant. Analysis of shell casings found on the second floor of the warehouse confirmed that they had been fired from the .357 Glock handgun retrieved from the Cape Fear River. The bullets retrieved from the wall behind Rosario's body and those retrieved from Robinson's body could not be definitively matched to the .357 Glock handgun.

Defendant was indicted on two counts of first-degree murder and two counts of robbery with a dangerous weapon as to Robinson and Rosario, respectively, on 29 January 2007. The State sought the death penalty for each murder charge. These cases were tried before Judge Lock at the 9 November 2009 session of Criminal Superior Court for Cumberland County. On 8 December 2009, the jury found defendant guilty of: (1) first-degree felony murder of Rosario; (2) second-degree murder of Robinson; and (3) robbery with a dangerous weapon as to Rosario. The jury found defendant not guilty of the robbery of

Robinson. On 11 December 2009, the jury unanimously recommended that defendant be sentenced to life in prison without parole for the murder of Rosario. Defendant was sentenced to life imprisonment without parole for the murder of Rosario and a consecutive term of 180 months minimum and 225 maximum for the murder of Robinson. The trial court arrested judgment as to the robbery conviction, since it constituted the basis for the first-degree felony murder conviction of Rosario.

Defendant appeals.

II. Refusal to Dismiss Short Form Indictment

[1] In his first argument, defendant contends that the trial court erred in refusing to dismiss the "short form" first-degree murder indictment (counts I and II) against defendant.

The issue of "short form" indictments has been repeatedly decided against defendant. *See State v. Jacobs*, 195 N.C. App. 599, 610-11, 673 S.E.2d 724, 730-31 (2009), *aff'd*, 363 N.C. 815, 689 S.E.2d 859 (2010); *State v. Avery*, 315 N.C. 1, 12-14, 337 S.E.2d 786, 792-93 (1985). We are bound by this precedent. Defendant acknowledges that this argument is made for preservation purposes only.

This argument is without merit.

III. Sufficiency of Evidence

[2] In his second and third arguments, defendant contends that the trial court erred in denying his motion to dismiss the charges of second-degree murder of Robinson and first-degree felony murder of Rosario because the State offered insufficient evidence to establish every element of these crimes. We disagree.

A. Standard of Review

In order to survive a motion to dismiss based on the sufficiency of the evidence, the court must determine that there is substantial evidence of each essential element of the offense charged and that defendant is the perpetrator of such offense. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (quotation omitted). The court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences to be drawn from the evidence. *Fritsch*, 351 N.C. at 378-39, 526 S.E.2d at 455.

B. Second-Degree Murder of Robinson

Defendant contends that the trial court erred in denying his motion to dismiss the charge of second-degree murder as to Robinson at the close of the State's evidence because the State's evidence was insufficient to establish every element of that crime. In particular, defendant contends that there was evidence of a heat of passion killing on sudden provocation, negating the presumption of malice allowed by the trial court because a deadly weapon was used. Defendant bases this argument solely on the evidence offered by McMillan's testimony, that "[defendant] was up there smoking reefer with the people and him and the dude . . . had some words or something . . . ," claiming this testimony offers evidence of a sudden quarrel and therefore a killing in the heat of passion.

Second-degree murder is the unlawful killing of another human being with malice, but without premeditation and deliberation. *State v. Phipps*, 331 N.C. 427, 457-58, 418 S.E.2d 178, 194 (1992). Malice is implied from a killing with a deadly weapon. *State v. McCoy*, 320 N.C. 581, 587, 359 S.E.2d 764, 768 (1987); *State v. Patterson*, 297 N.C. 247, 253, 254 S.E.2d 604, 609 (1979). "When the killing with a deadly weapon is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree." *State v. Gordon*, 241 N.C. 356, 358, 85 S.E.2d 322, 323 (1955). To give rise to these presumptions, it is not necessary to prove intent to kill; instead, it is sufficient if the weapon was used intentionally and proximately caused the resulting death. *Id.* at 358, 85 S.E.2d at 324. Evidence of self-defense or proof of adequate provocation can negate the presumption of malice. *McCoy*, 320 N.C. at 587, 359 S.E.2d at 768. Mere words are not sufficient provocation. *State v. McCray*, 312 N.C. 519, 534, 324 S.E.2d 606, 616 (1985) (holding that taunts from fellow prison inmates did "not constitute sufficient provocation to raise a 'sudden heat of passion' which can rob the crime of malice and reduce it to manslaughter.").

The State presented evidence at trial that defendant intentionally used a deadly weapon to inflict wounds upon Robinson, which were the proximate cause of his death. Defendant recounted these events to McMillan, stating that he "shot some people"—specifically that he shot the man after seeing a gun in the open safe. The State offered additional evidence that defendant had fresh cuts on his hands and legs the day after the shootings, and the DNA collected from blood found on the glass door and sidewalk in front of the glass matched

defendant's DNA. Analysis confirmed that the spent shell casings discovered on the second floor of the warehouse had been fired from the .357 Glock handgun retrieved from the Cape Fear River. This weapon was identified by McMillan as being given to him by defendant. Cell phone records confirmed a series of cell phone calls were made in the course of the evening, documenting McMillan's multiple trips to and from Stedman that night.

The State presented substantial evidence that defendant killed Robinson with a deadly weapon. Therefore, the jury was allowed to infer that the killing was unlawful and that it was done with malice. Defendant's statement, that he and the deceased "had words or something," did not provide evidence of provocation sufficient to negate the malice presumed from defendant's use of a deadly weapon. *See McCray*, 312 N.C. at 533, 324 S.E.2d at 616.

There was sufficient evidence presented for the charge of second-degree murder of Robinson to be submitted to the jury.

This argument is without merit.

C. First-Degree Murder of Rosario

Defendant also contends that the trial court erred in denying his motion to dismiss the charge of first-degree murder of Rosario at the close of the State's evidence for insufficiency of the evidence. Defendant contends that the State failed to show beyond a reasonable doubt that defendant committed the crime of robbery with a dangerous weapon and that his conviction for first-degree felony murder must be set aside. Specifically, defendant contends that the evidence was insufficient to support defendant's conviction for armed robbery since the subject of the armed robbery, the .357 Glock handgun, was used in the commission of the murder and there was no evidence as to when in the course of events defendant took it. Defendant contends that he was not armed when he took the .357 Glock handgun. Instead, the very weapon he was convicted of stealing was identical to the instrument used to threaten or endanger the life of Rosario.

Felony murder is defined in N.C. Gen. Stat. § 14-17 and has two elements: (1) that the murder took place during the commission of (2) any of the felonies listed in the statute, including robbery with a deadly weapon. *State v. Bunch*, 363 N.C. 841, 846-47, 689 S.E.2d 866, 870 (2010). If the killing occurs during the perpetration of one of the listed felonies, it is first-degree murder even if the death was not intended. *State v. Abraham*, 338 N.C. 315, 330, 451 S.E.2d 131, 138 (1994).

Robbery with a dangerous weapon is the unlawful taking or attempt to take personal property from the person or in the presence of another, by use or threatened use of a firearm or other dangerous weapon, whereby the life of a person is endangered or threatened. N.C. Gen. Stat. § 14-87(a) (2009). Armed robbery is a continuous transaction such that "the temporal order of the threat or use of a dangerous weapon and the taking is immaterial." *State v. Olson*, 330 N.C. 557, 566, 411 S.E.2d 592, 597 (1992) (citation omitted). There is "no reason why the use of a weapon stolen from the victim cannot also be a part of the continuing transaction of the armed robbery." *State v. Maness*, 363 N.C. 261, 283-84, 677 S.E.2d 796, 810 (2009) (holding that it is permissible to convict for robbery with a dangerous weapon when the object taken is also the firearm used to perpetrate the offense), *cert. denied*, ___ U.S. ___, 176 L. Ed. 2d 568 (2010).

Under applicable North Carolina cases, the temporal sequence of events is not significant. The State's evidence indicated that defendant did not arrive at the car wash office with a weapon, but during the course of the evening obtained Rosario's .357 Glock handgun and used it to shoot both victims. He then fled with the weapon. The State produced sufficient evidence that defendant's taking and use of the weapon were part of a continuous transaction, such that it was proper to convict defendant of the armed robbery of the same instrument used to commit the robbery. Defendant possessed and used the weapon, and endangered the lives of other people with such weapon, while unlawfully taking personal property from another, thus establishing all of the requisite elements of armed robbery. The State presented sufficient evidence to establish that defendant shot and killed Rosario in the course of the robbery of Rosario's .357 Glock handgun.

This argument is without merit.

IV. Denial of Defendant's Request to Charge the Jury on the Lesser Offense Voluntary Manslaughter

[3] In his fourth argument, defendant contends that the trial court erred in refusing to charge the jury on the lesser-included offense of voluntary manslaughter as to each victim. We disagree.

Voluntary manslaughter is distinguished from first and second-degree murder by the absence of malice. *State v. Wilkerson*, 295 N.C. 559, 577-78, 247 S.E.2d 905, 915 (1978). Malice is presumed from the use of a deadly weapon. *See Gordon*, 241 N.C. at 358, 85 S.E.2d at 323. Evidence of adequate provocation has to be present in order to rebut the presumption of malice. *State v. Owens*, 65 N.C. App. 107, 110, 308

S.E.2d 494, 497 (1983) ("The law requires a showing of strong provocation before it will grant a defendant who is charged with second-degree murder a jury instruction on the lesser-included offense of voluntary manslaughter. For example, mere insulting words do not constitute sufficient provocation." (citation omitted)). A defendant is entitled to a jury instruction on the lesser offense only if the evidence would permit the jury to find defendant guilty of the lesser-included offense. *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841 (citation omitted), *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). When the State has presented positive evidence of the greater charges and there is no real evidence negating those elements, an instruction on the lesser offense is not appropriate. *State v. Thibodeaux*, 352 N.C. 570, 582, 532 S.E.2d 797, 806 (2000), *cert. denied*, 531 U.S. 1155, 148 L. Ed. 2d 976 (2001).

In the instant case, malice was presumed by virtue of defendant's use of a deadly weapon. There was no positive evidence of adequate provocation that would have supported submission of voluntary manslaughter to the jury. The only evidence presented, that defendant and "the dude" were "having words or something," was insufficient provocation to negate malice. *McCray*, 312 N.C. at 533, 324 S.E.2d at 616; *Owens*, 65 N.C. App. at 110, 308 S.E.2d at 397. The trial court correctly denied defendant's request to charge the jury on the lesser-included offense of voluntary manslaughter.

This argument is without merit.

V. Admission of Pathologist's Testimony

[4] In his fifth argument, defendant contends that the trial court committed plain error in allowing the State's expert forensic pathologist, Dr. Deborah Radisch, to testify about the autopsy of Rosario and give her own opinion concerning the cause of death in violation of his constitutional right of confrontation under the Sixth and Fourteenth Amendments to the United States Constitution. We disagree.

Constitutional error cannot be asserted for the first time on appeal, *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005), not even for plain error, *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578 ("plain error analysis applies only to instructions to the jury and evidentiary matters."), *cert denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000). Because defendant did not raise this constitutional issue at trial, he failed to preserve it for appellate review and it is waived. *Chapman*, 359 N.C. at 366, 611 S.E.2d at 822. We decline

defendant's invitation to apply Rule 2 of the Rules of Appellate Procedure to properly bring this issue before the Court.

Even assuming *arguendo* that this issue was properly preserved for appellate review, there was no error. The Confrontation Clause prohibits the introduction of testimony by an expert witness based solely upon the reports of a non-testifying analyst. *State v. Locklear*, 363 N.C. 438, 451-52, 681 S.E.2d 293, 304-05 (2009) (applying the analysis of the United States Supreme Court cases of *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), and *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 174 L. Ed. 2d 314 (2009)).[1] However, because Dr. Radisch was actually present for the autopsy of Rosario and testified as to her own independent opinion as to the cause of her death, *Locklear* is not controlling in this case. Rather, the instant case is controlled by *State v. Blue*, ___ N.C. App. ___, 699 S.E.2d 661 (2010). In *Blue*, Dr. Trobbiani performed the autopsy, along with Dr. Butts. Dr. Trobbiani did not testify at trial. Dr. Butts testified based on his observations. This was held not to violate the strictures of *Crawford*. Defendant, Blue, had a full opportunity to confront and cross-examine Dr. Butts concerning his observations and opinions.

The instant case is virtually identical to *Blue*. Dr. Radisch was present during the autopsy of Rosario and testified to her own, independent conclusions as to the cause of death. Dr. Radisch was not simply recounting the findings of Dr. Gardner in that doctor's autopsy report. Defendant had a full opportunity to confront and cross-examine Dr. Radisch concerning her observations and opinions.

This analysis is consistent with the most recent Confrontation Clause case from the United States Supreme Court, *Bullcoming v. New Mexico*, ___ U.S. ___, 180 L. Ed. 2d 610 (2011). In that case, the defendant's conviction was reversed where the person who analyzed the defendant's blood sample did not testify, but his test results were admitted through another analyst who had no connection to the test. The Supreme Court held that the results of the testing were testimonial and therefore subject to the guarantees of the Confrontation Clause. Justice Sotomayor's concurring opinion made it clear that the case would have been different had the other analyst witnessed the test or rendered an independent opinion. *Bullcoming*, ___ U.S. ___, ___, 180 L. Ed. 2d 610, 629 (2011) (Sotomayor, J., concurring).

1. Although the Supreme Court held in *Locklear* that the admission of the expert testimony was in error, that defendant failed to show prejudice arising from the error.

The presence of both of these factors in the instant case distinguish it from *Bullcoming*.

This argument is without merit.

VI. Voluntary Surrender of Physical Evidence

[5] In his sixth argument, defendant contends that the trial court erred in concluding as a matter of law that defendant freely and voluntarily consented to the swabbing of his mouth, the photographs of his injuries, and the collection of his belt and shoes, and therefore erred in denying his motion to suppress that evidence. We disagree.

A. Standard of Review

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (June 16, 2011) (No. 423A10). Findings of fact are presumed to be supported by competent evidence and are binding on appeal unless properly challenged. *State v. Jacobs*, 162 N.C. App. 251, 254, 590 S.E.2d 437, 440 (2004). A defendant must specify how the findings are inadequate and which findings are not supported by the evidence; a general contention that findings are not supported by evidence is insufficient for appellate review. *State v. Steen*, 352 N.C. 227, 238, 536 S.E.2d 1, 8 (2000), *cert. denied*, 531 U.S. 1167, 147 L. E. 2d 997 (2001). The trial court's conclusions of law are reviewable *de novo*. *Biber*, ___ N.C. at ___, ___ S.E.2d at ___.

B. Analysis

Defendant contends that he did not freely and voluntarily give his consent for the evidence gathered during an interview at the Cumberland County Sheriff's Department, including an oral swab, photographs of his injuries, and collection of his belt and shoes. He specifically contends that his consent to the oral swab was the result of deceptive practices by the detectives, but acknowledges the photographs and the taking of his belt and shoes may have been proper.

Evidence obtained through voluntary consent without a search warrant is constitutionally permissible as long as the consent is given without coercion. *State v. Smith*, 346 N.C. 794, 799, 488 S.E.2d 210, 213 (1997). "[T]he question whether a consent to a search [is] in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all

the circumstances." *State v. Kuegel*, 195 N.C. App. 310, 315, 672 S.E.2d 97, 100 (2009) (*quoting Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 862-63 (1973)), *disc. review denied*, 363 N.C. 378, 679 S.E.2d 396 (2009). "As a general rule, it is not duress to threaten to do what one has a legal right to do. Nor is it duress to threaten to take any measure authorized by law and the circumstances of the case." *State v. Paschal*, 35 N.C. App. 239, 241, 241 S.E.2d 92, 94 (1978) (citation omitted); *see also State v. Sokolowski*, 344 N.C. 428, 433, 474 S.E.2d 333, 336 (1996) (holding no coercion where eight officers obtained consent after disarming defendant and asking to enter his house); *Kuegel*, 195 N.C. App. at 316, 672 S.E.2d at 101 (holding no coercion where the defendant was told that if he did not grant consent, the officers would get a search warrant). Invoking the right to silence and refusing to answer questions during an interrogation without counsel present does not invalidate a consensual search. *State v. Cummings*, 188 N.C. App. 598, 602-03, 656 S.E.2d 329, 332, *disc. review denied*, 362 N.C. 364, 661 S.E.2d 743 (2008).

In the instant case, defendant does not contend that the trial court's findings of fact are unsupported by the evidence, but rather contends that the findings of fact do not support the conclusions of law. The findings of fact indicate that defendant voluntarily went to the Sheriff's Department with his uncle. Detective Trotter informed defendant that "he was not under arrest" and that he was under "investigative detention." Defendant asserted "that he didn't want to do anything without a lawyer and he didn't want to talk with anyone[,]" but gave consent for the detective to collect an oral swab, take photographs of his injuries, and take into evidence certain items of clothing. It was permissible for the officers to inform defendant that he "could either consent . . . or the officers would detain him until they could prepare and execute a search warrant for the collection of those items." *See Paschal*, 35 N.C. App. at 241, 241 S.E.2d at 94. This conduct was not deceptive or unlawfully coercive. The officers truthfully represented that "the preparation and service of the search warrant might take four or five hours[,]" which they reasonably believed they had sufficient probable cause to obtain, given the fresh cuts on defendant's hands and legs, and blood spots on his shoes and belt. *See id.*

We hold that the findings of fact support the trial court's conclusion of law that "[d]efendant freely and voluntarily consented to the swabbing of his mouth, the photographs of his injuries, and the collection of his belt and shoes." The officers obtained the evidence with defendant's consent.

This argument is without merit.

NO ERROR.

Judges STEPHENS and HUNTER, Jr., ROBERT N. concur.

DALE RONALD STUNZI, PLAINTIFF v. MEDLIN MOTORS, INC., DEFENDANT

No. COA10-954

(Filed 2 August 2011)

1. Appeal and Error—preservation of issues—failure to argue—personal jurisdiction

Defendant abandoned its defense of lack of personal jurisdiction on appeal based on its failure to make any argument that this would have been an alternative basis for the trial court's dismissal of the action.

2. Statutes of Limitation and Repose—expiration—lemon motor vehicle—fraud or misrepresentation should have been discovered

The trial court did not err by granting defendant's motion to dismiss plaintiff's claims with prejudice arising from plaintiff's purchase of a motor vehicle from defendant. Plaintiff reasonably should have discovered any fraud or misrepresentation by defendant as to the status of the car as a "lemon" on 16 August 2004, and the pertinent statutes of limitation had all expired before commencement of this action.

Appeal by plaintiff from judgment entered 15 April 2010 by Judge Kenneth C. Titus in Superior Court, Wake County. Heard in the Court of Appeals 26 January 2011.

The Norris Law Firm, PLLC, by J. Matthew Norris, for plaintiff-appellant.

Patterson Dilthey, LLP, by Christopher Derrenbacher, for defendant-appellee.

STROUD, Judge.

On 3 November 2009, Dale Ronald Stunzi ("plaintiff") filed a complaint against defendants Medlin Motors, Inc. ("Medlin") and Western Surety Company[1] alleging claims of breach of the North Carolina New Vehicles Warranties Act, violation of the Truth in Lending Act, breach of the duty of good faith, unfair and deceptive trade practices, breach of contract, fraud, and punitive damages, all arising from plaintiff's purchase of a 2003 Hyundai Tiburon motor vehicle from Medlin on or about 7 August 2004. Plaintiff appeals from the trial court's order dismissing all of his claims against Medlin. Because plaintiff's claims were all barred by the applicable statutes of limitation, we affirm.

I. Factual and procedural background

Plaintiff's claims arise out of his purchase of a 2003 Hyundai Tiburon ("car" or "vehicle") from Medlin on or about 7 August 2004. Plaintiff alleges that he visited Medlin's dealership in Rocky Mount, North Carolina to look at the car. "After briefly examining" the car and "taking it for a short test drive," plaintiff and "Medlin entered into a sales agreement" in which plaintiff agreed to purchase the car for $15,400.00. Plaintiff does not allege the car's price as originally advertised or even what he believed the purchase price at the time of the purchase, but alleges that the cash price was not $15,400.00 "but rather approximately $10,490.00." Plaintiff further alleges that this difference in price was based upon plaintiff's trade-in of his 1998 Saturn vehicle, for which he was "allegedly allowed a trade in value of $4,910.00, which Defendant alleged equaled the payoff amount of $4,910.00." Plaintiff claimed that Medlin "without informing Plaintiff, increased the cash price of the Vehicle to $15,400.00 to cover up the negative equity payoff amount of Plaintiff's trade-in vehicle in order to obtain financing" for the car. Plaintiff alleged that he was not informed of this and that he either would have refused to purchase the car or would have negotiated for a lower price if he had known. Plaintiff and Medlin then "entered into a retail installment sales contract (RISC) for the purchase of the Vehicle according to the terms discussed and agreed upon in the Bill of Sale."

About a week after plaintiff took possession of the car, a "dealership representative" for Medlin called plaintiff and said "that he had a paper for [plaintiff] to sign indicating that some work had been done to the Vehicle." Plaintiff alleged that "[t]he representative never

1. Plaintiff filed a voluntary dismissal of his claims against Western Surety Company on 4 February 2010, so Medlin is the only remaining party defendant.

told Plaintiff at that time or any time thereafter that the Vehicle was a lemon."[2] Plaintiff met the dealership representative as requested

> in North Raleigh on or about August 16, 2004 . . . . [Plaintiff] signed the paper and asked if there was a copy for him to keep, to which the representative answered "No". The representative did not explain to Plaintiff what the paper meant and never gave Plaintiff a copy.

In or about March 2009, plaintiff made his last payment on the car and "received the title in the mail from his lienholder . . . . On the title document [plaintiff] discovered that the Vehicle had been branded a lemon." Plaintiff alleges that Medlin "willfully withheld this information from Plaintiff in order to induce Plaintiff into purchasing the Vehicle" and "misrepresented the nature of the document Plaintiff signed after the sale of the Vehicle."

Medlin filed motions to dismiss and an answer on or about 29 January 2010. In its first motion to dismiss, the first defense raised by Medlin was lack of personal jurisdiction over Medlin because Medlin was not served with the summons and complaint. Medlin alleged that "Plaintiff has failed to serve Defendant Medlin Motors, Inc. with proper process and service of process under Rule 4 of the North Carolina Rules of Civil Procedure. Consequently, plaintiff's action fails for lack of jurisdiction over the person, insufficiency of process and insufficiency of service of process." The second defense raised by Medlin, in its second motion to dismiss, was the statute of limitations. Medlin alleged that each of plaintiff's claims should be dismissed as the action was not commenced prior to the expiration of the applicable statute of limitations: one year for the Truth in Lending claim; three years for the unfair and deceptive trade practices claim; and three years for the fraud claim.[3] Medlin also raised several other affirmative defenses and responded to the allegations of the complaint.

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2. By "lemon," we assume that plaintiff means not a small yellow citrus fruit, but instead a car which did not conform to express warranties and was returned to the manufacturer as described in N.C. Gen. Stat. § 20-351.3(d) (2009), as such vehicles are commonly referred to as "lemons." Our courts have commonly referred to North Carolina's New Motor Vehicles Warranties Act, N.C. Gen. Stat. §§ 20-351 through—351.11 as "the Lemon Law[.]" *Buford v. General Motors Corp.*, 339 N.C. 396, 399, 451 S.E.2d 293, 294 (1994) (quotation marks omitted).

3. Medlin raised statute of limitations defenses as to plaintiff's other claims as well, but as plaintiff concedes on appeal that these claims were properly dismissed, we will not address them. We also note that the statute of limitations for the unfair or deceptive trade practices claims is four years under N.C. Gen. Stat. § 75-16.2 (2009), not three years, as alleged by defendant.

Medlin's motion to dismiss was heard on 22 March 2010, and, on 12 April 2010; the trial court entered an order dismissing plaintiff's claims with prejudice. Plaintiff filed timely notice of appeal from this order.

II. Motion to dismiss

A. Standard of review

> We review the trial court's ruling on a motion to dismiss *de novo*.
>
> On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Nucor Corp. v. Prudential Equity Group, LLC, 189 N.C. App. 731, 735, 659 S.E.2d 483, 486 (2008) (citation omitted). Our Supreme Court has further stated that

> [d]ismissal under Rule 12(b) (6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wood v. Guilford County, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

B. Personal jurisdiction

[1] Although neither party's brief addresses Medlin's motion to dismiss for lack of service of process, we first note that the record on appeal does not include any indication whatsoever that Medlin was ever served with the summons and complaint.

> In order for a court to obtain personal jurisdiction over a defendant, a summons must be issued and service of process secured by one of the statutorily specified methods. *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996); N.C. Gen. Stat. § 1A-1, Rule 4(j) (2003). If a party fails to obtain valid service of process,

> "a court does not acquire personal jurisdiction over the defendant and the action must be dismissed." *Bentley v. Watauga Bldg. Supply, Inc.*, 145 N.C. App. 460, 462, 549 S.E.2d 924, 925 (2001).

Draughon v. Harnett County Bd. of Educ., 166 N.C. App. 449, 451, 602 S.E.2d 717, 718 (2004). Medlin filed an answer but raised the lack of service as its first affirmative defense, thus preserving the defense.

> To preserve the defenses of insufficiency of service, service of process, and lack of personal jurisdiction, the defendant must assert them in either a motion filed prior to any responsive pleading or include them in his answer or other responsive pleading permitted by the Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 12(h)(1) (2003); *Ryals v. Hall-Lane Moving and Storage Co.*, 122 N.C. App. 242, 247-48, 468 S.E.2d 600, 604, *disc. review denied*, 343 N.C. 514, 472 S.E.2d 19 (1996). If a defendant makes a general appearance in conjunction with or after a responsive pleading challenging jurisdiction pursuant to Rule 12(b), his right to challenge personal jurisdiction is preserved. *Id.* at 247-48, 468 S.E.2d at 604[.]

Id. at 452, 602 S.E.2d at 719.

Yet, the defense of lack of personal jurisdiction can be waived. *See In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009) ("Deficiencies regarding the manner in which a court obtains jurisdiction over a party, including those relating to a summons, are waivable and must be raised in a timely manner. N.C.G.S. § 1A-1, Rule 12(h) (1) (2007). Generally, such deficiencies can be cured. Even without a summons, a court may properly obtain personal jurisdiction over a party who consents or makes a general appearance, for example, by filing an answer or appearing at a hearing without objecting to personal jurisdiction. *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) ("Jurisdiction of the court over the person of a defendant is obtained by service of process, voluntary appearance, or consent." (citation omitted)).). Although it appears that Medlin preserved the defense for purposes of the trial court's consideration of the motion to dismiss, Medlin did not preserve this argument for purposes of this appeal. As our record does not include a transcript of the hearing on the motion to dismiss, we do not know if Medlin argued lack of personal jurisdiction as a potential basis for the trial court's dismissal of the action. Although the wording of the order of dismissal implies that the trial court probably dismissed the claims not for failure of service but instead based upon the statutes

of limitation,[4] it does not necessarily exclude lack of service as a reason for dismissal. However, Medlin has not made any argument on appeal regarding a lack of personal jurisdiction. Under Rule 28(a) of the North Carolina Rules of Appellate Procedure,

> [t]he function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.

N.C.R. App. P. 28(a). In addition, Medlin, as appellee, had the right to raise an argument that the trial court should have granted its motion to dismiss based on lack of service of process without taking an appeal, but Medlin made no such argument. *See* N.C.R. App. P. 28(c) ("Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.") Thus, Medlin has abandoned its defense of lack of personal jurisdiction on appeal by its failure to make any argument that this would have been an alternative basis for the trial court's dismissal of the action.

C. Expiration of the statutes of limitation

[2] Both parties have argued the statute of limitations as the basis for dismissal of plaintiff's claims and from the order it appears most likely that this was the sole basis of the trial court's ruling. Our record includes a document entitled "Pennsylvania Disclosure of Nonconformity" ("disclosure form") which notes at the top:

> **"IMPORTANT: THIS VEHICLE WAS REPURCHASED BY THE MANUFACTURER BECAUSE IT DID NOT CONFORM TO THE MANUFACTURER'S EXPRESS WARRANTY AND THE NONCONFORMITY WAS NOT CURED WITHIN A REASONABLE TIME AS PROVIDED BY PENNSYLVANIA LAW."**

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4. The order states that the Court considered the complaint, the motions to dismiss, and "the disclosure form referenced in paragraphs 24-26, 29, 37, 38, 44(b), 48(b), and 59(b)" in addition to the law and arguments of counsel and dismissed the claims pursuant to North Carolina General Statutes § 1A-1, Rule 12(b)(6).

(Emphasis in original). The disclosure form identifies the car as a 2003 Hyundai Tiburon, Vehicle Identification Number KMHHN65F43U036786 and states that

> All necessary repairs and adjustments have been made and the vehicle meets acceptable operating standards. The vehicle was alleged to have the following nonconformities:
>
> 1. Multiple fuel repairs/fuel odor in vehicle.

The disclosure form was signed on 13 August 2004 by an agent of Medlin and by plaintiff on 16 August 2004. The record does not reveal how the disclosure form was provided to the trial court, but it is in our record and plaintiff acknowledges in his brief that the trial court considered it at the hearing on the motion to dismiss. In fact, plaintiff's first issue in his brief is that the "trial court's consideration of an unauthenticated and disputed document at the hearing on the motion to dismiss converted the motion to dismiss into one for summary judgment." Both of the parties' briefs acknowledge that the disclosure form was presented to the trial court at the hearing. Yet just as the record does not reveal any details about how the disclosure form was presented to the trial court, it also does not reveal any objection by plaintiff to the trial court's consideration of the disclosure form. *See* N.C.R. App. P. 10(a) (stating that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired [and]. . . . the complaining party [must] obtain a ruling upon the party's request, objection, or motion . . . ."); *Hicks v. Alford*, 156 N.C. App. 384, 389-90, 576 S.E.2d 410, 414 (2003) (stating that "[i]t is the duty of the appellant to ensure that the record is complete . . . . An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." (citations and quotation marks omitted)). Plaintiff argues that the trial court's consideration of the disclosure form converted the hearing into a summary judgment hearing and that under N.C. Gen. Stat. § 1A-1, Rule 56, plaintiff should have been given "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." N.C. Gen. Stat. § 1A-1, 12(b) (2009).

Defendant argues that the disclosure form is not the type of additional information which would convert the hearing into a summary judgment hearing, as the plaintiff's own complaint refers repeatedly to the disclosure form. *See Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001) ("[T]his Court has stated that

a trial court's consideration of a contract which is the subject matter of an action does not expand the scope of a Rule 12(b)(6) hearing and does not create justifiable surprise in the nonmoving party. *See Coley v. Bank*, 41 N.C. App. 121, 126, 254 S.E.2d 217, 220 (1979). This Court has further held that when ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant." *See Robertson v. Boyd*, 88 N.C. App. 437, 441, 363 S.E.2d 672, 675 (1988)."). In addition, defendant argues that plaintiff waived his right to continuance and an opportunity to present additional material, as the record does not show that he raised any objection to consideration of the disclosure or that he requested continuance based upon presentation of the disclosure form. We agree that even if consideration of the disclosure form would have converted the hearing into a summary judgment hearing, plaintiff's argument fails as plaintiff did not object to its consideration or request continuance. *See Raintree Homeowners Ass'n, Inc. v. Raintree Corp.*, 62 N.C. App. 668, 674, 303 S.E.2d 579, 582 (noting that "Plaintiffs did not request a continuance or additional time to produce evidence. Plaintiffs having participated in the hearing on the motion for summary judgment, without such objection or request for continuance, thereby waived any right to procedural notice with respect to the hearing. It was not an abuse of discretion for the trial court to consider defendant's affidavits and grant defendant's motion for summary judgment. The affidavits were properly before the court and plaintiff's contention is without merit."), *disc. review denied*, 309 N.C. 462, 307 S.E.2d 366 (1983).

Thus, whether because the disclosure form was properly considered on the motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), as a document repeatedly referred to by the complaint, or whether the hearing was converted to a summary judgment hearing and plaintiff waived his right to present additional material by his failure to object, the trial court properly considered the disclosure form.

Although plaintiff raises arguments regarding the merits of his various claims against Medlin, Medlin properly raised as a defense the statutes of limitation as to each claim in its answer. As this defense is dispositive, we will address it first. Our Supreme Court has noted that

> [a] statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim. *Hargett v. Holland*,

> 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994). Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired. *See Little v. Rose*, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974).

Horton v. Carolina Medicorp, Inc., 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996).

Since plaintiff purchased the car in 2004 and filed his complaint in 2009, five years later, the filing was clearly beyond the longest of the statutes of limitations applicable to the alleged claims, four years. *See* 15 U.S.C. § 1640(e) (2009); N.C. Gen. Stat. §§ 1-52 and 75-16.2 (2009). Plaintiff thus has the burden of demonstrating why the statutes of limitation had not expired. *See id.* Plaintiff argues that "the statute did not begin to run until [he] received his title from the lienholder and discovered the lemon title brand[]" in 2009. Plaintiff correctly notes that the statute of limitations "on a claim for fraud is three years from the 'discovery by the aggrieved party of the facts constituting the fraud or mistake,' N.C. Gen. Stat. § 1-52(9), or from when the fraud reasonably should have been discovered." Plaintiff also argues that the "[u]nfair trade practices claims are subject to a four year limitations period from the date of the accrual of the cause of action. N.C. Gen. Stat. § 75-16.2" and that this period also runs from the date of discovery or when the fraud should have been discovered.

Plaintiff's reliance on the discovery rule is misplaced. It is well-established that a person has a duty to read a document he signs.

> In this State it is held that one who signs a paper writing is under a duty to ascertain its contents, and in the absence of a showing that he was wilfully misled or misinformed by the defendant as to these contents, or that they were kept from him in fraudulent opposition to his request, he is held to have signed with full knowledge and assent as to what is therein contained . . . . If unable to read or write, he must ask that the paper be read to him or its meaning explained.

Williams v. Williams, 220 N.C. 806, 809-10, 18 S.E.2d 364, 366 (1942) (citations omitted).

Even construing the allegations of the complaint liberally in plaintiff's favor, there is no indication that he was incapable of reading or understanding the disclosure form, that he was not permitted to read it, that he was not shown the entire document, or any other facts which might indicate that Medlin prevented him from knowing the contents of the disclosure form when he signed it in 2004. Plaintiff alleges that before signing the disclosure form, the representative told him that the paper he needed plaintiff to sign "indicat[ed] that some work had been done to the Vehicle[,]" but this is correct; the disclosure form did in fact indicate that the car had "[m]ultiple fuel repairs/fuel odor in vehicle." Plaintiff alleges that the representative did not "explain to Plaintiff what the paper meant", but plaintiff does not allege why the representative would have needed to explain the disclosure form or that plaintiff asked any questions about the form. The one-page disclosure form itself reveals the information which plaintiff claims was fraudulently withheld from him in bold, capitalized type at the very top of the form, so plaintiff cannot even claim that the relevant information was obscured in small type or hidden within a long document.

> [W]hen the party relying on the false or misleading representation 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. Moreover, where the facts are insufficient as a matter of law to constitute reasonable reliance on the part of the complaining party, the complaint is properly dismissed under Rule 12(b)(6).

Hudson-Cole Development Corp. v. Beemer, 132 N.C. App. 341, 346, 511 S.E.2d 309, 313 (1999) (citations omitted). Even accepting as true plaintiff's allegations that defendant should have provided the disclosure as to the car's status as a "lemon" prior to the sale or that defendant fraudulently misrepresented the condition or status of the car as a "lemon," plaintiff's own complaint reveals that defendant did provide the required disclosure shortly after the sale, and he does not allege or argue that the disclosure form was inadequate in any way. Thus, plaintiff's complaint discloses the facts which "necessarily defeat[] the plaintiff's claim." *See Wood*, 355 N.C. at 166, 558 S.E.2d at 494. Plaintiff reasonably should have discovered any fraud or misrepresentation by defendant as to the status of the car as a "lemon" on 16 August 2004, and the statutes of limitation as to each claim he has asserted began to run on 16 August 2004. All of the claims were

brought outside of their applicable statutes of limitation, and the trial court properly granted defendant's motion to dismiss on this basis.

For the foregoing reasons, the trial court's order dismissing plaintiff's complaint with prejudice is affirmed.

AFFIRM.

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

IN RE: C.I.M., G.H.M., L.P.M., AND R.D.A.M., MINOR JUVENILES

No. COA11-223

(Filed 2 August 2011)

1. Termination of Parental Rights—grounds—willful abandonment

The trial court did not err by determining that grounds existed for terminating respondent father's parental rights based on willful abandonment under N.C.G.S. § 7B-1111(a).

2. Termination of Parental Rights—best interests of child—abuse of discretion standard

The trial court did not abuse its discretion by concluding that termination of respondent father's parental rights was in the best interests of the juveniles.

Appeal by respondent from order entered 10 November 2010 by Judge J. Thomas Davis in McDowell County District Court. Heard in the Court of Appeals 5 July 2011.

Hanna Frost Honeycutt for petitioner-appellee.

Levine & Stuart, by James E. Tanner III, for respondent-appellant father.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for guardian ad litem.

HUNTER, Robert C., Judge.

Respondent-father Christopher M. appeals the trial court's order terminating his parental rights with respect to his four children,

C.I.M. ("Carl"), G.H.M. ("Gary"), L.P.M. ("Lyle"), and R.D.A.M. ("Renee").[1] After careful review, we affirm.

Facts

Respondent-father and respondent-mother Ashley W. are the biological parents of the four juveniles. McDowell County Department of Social Services ("DSS") first became involved with the family in 2002, when DSS received a referral stating that respondent-mother, who was 17 years old at the time, was living with respondent-father, who was 33, and that she had just given birth to Carl. After respondent-mother moved out of the house, DSS closed the case. Although DSS received a report in 2003 that respondent-mother had moved back in with respondent-father, the case was closed because respondent-mother turned 18 during the investigation.

In April 2008, DSS received a report of domestic violence between respondent-father and respondent-mother. After investigation, the family was found to be in need of services and in-home family preservation services were put in place to prevent removal of the juveniles. The case was closed after the family complied with the services.

In February 2009, DSS received a report of improper supervision, alleging that respondents had left the juveniles to be watched by another child of respondent-father's who previously had been caught performing a sexual act on Gary. The allegation was substantiated, the older child was removed from respondents' home, and the case was closed.

On 30 March 2009, respondent-father filed a complaint for a domestic violence protective order, alleging that respondent-mother had chased him and threatened to hit him with a pole. During DSS' investigation, respondents accused each other of committing acts of domestic violence. Respondent-father eventually dropped the complaint in May 2009. On 7 May 2009, respondent-father left the juveniles with their maternal grandmother while she was recovering from injuries sustained during an incident of domestic violence. When the DSS social worker visited the house on 9 May 2009, the grandmother indicated that respondent-father had not returned home, that she did not know how to get in contact with him, and that she could not take care of the juveniles as she was recovering from her injuries. The juveniles were moved to another family member's home for the night and subsequently placed in kinship placements.

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

On 22 May 2009, DSS filed petitions alleging that the juveniles were neglected and dependent juveniles due to their not having received proper care and supervision and their living in an environment injurious to their welfare. DSS further alleged with respect to Carl, who suffers from a medical condition similar to cerebral palsy, that he was not receiving proper medical care. In a consent order entered 8 October 2009, the juveniles were adjudicated as being dependent and neglected and DSS was granted custody of the juveniles. In addition, the trial court's order directed respondent-father to complete a GAIN assessment; to complete a psychological assessment; to go to anger management counseling; to submit to random drug screens; to attend parenting classes; and to pay child support.

In a permanency planning order entered 9 July 2010, the trial court found that respondent-father had failed to complete a GAIN assessment or psychological evaluation; failed to enter anger management counseling or parenting classes; and failed to submit to any random drug screens. The court also found that respondent-father had visited with the juveniles only four times since May 2009 and that two of the visits had been unsupervised by DSS, in violation of the 8 October 2009 consent order.

A week later, on 13 July 2010, DSS filed a termination of parental rights ("TPR") petition, alleging grounds existed for terminating respondents' parental rights with respect to the four juveniles under General Statute sections 7B-1111(a)(1) (neglect), 7B-1111(a)(2) (willfully leaving juvenile in foster care), 7B-1111(a)(3) (willfully failing to pay reasonable portion of juvenile's care), 7B-1111(a)(6) (incapacity to provide proper care or supervision), and 7B-1111(a)(7) (willful abandonment). After conducting a hearing on the TPR petition, the trial court entered an order on 10 November 2010 in which the court determined that grounds for terminating respondents' parental rights existed under sections 7B-1111(a)(1), 7B-1111(a)(2), 7B-1111(a)(3), and 7B-1111(a)(7), but not under section 7B-1111(a)(6). The trial court further concluded that termination of respondents' parental rights was in the best interests of the juveniles, and, consequently, terminated their parental rights with respect to Carl, Gary, Lyle, and Renee. Respondent-father timely appealed to this Court.[2]

2. Respondent-mother did not appeal from the trial court's order terminating her parental rights with respect the juveniles, and, therefore, she is not a party to this appeal.

I

[1] Respondent-father first contends that the trial court erred in determining that grounds existed for terminating his parental rights under N.C. Gen. Stat. § 7B-1111(a) (2009). "The standard for appellate review of the trial court's conclusion that grounds exist for termination of parental rights is whether the trial [court]'s findings of fact are supported by clear, cogent, and convincing evidence, and whether these findings support its conclusions of law." *In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 174, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). Findings of fact supported by competent evidence are binding on appeal, despite evidence in the record that might support a contrary finding. *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984).

Here, the trial court concluded that a basis for termination existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), which provides that parental rights may be terminated when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the [TPR] petition or motion . . . ." For purposes of Chapter 7B cases, " '[a]bandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.' " *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986)). Our courts have consistently held that " 'if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.' " *In re J.D.L.*, 199 N.C. App. 182, 189-90, 681 S.E.2d 485, 491 (2009) (quoting *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962)).

With respect to willful abandonment, the trial court found in this case that respondent-father had failed to attend child and family team meetings or assist in the development of a case plan; that he had not visited with his children since 2009; that he had not communicated with the children since 2009; and that he failed to pay child support from January through July 2009 although he had some money to provide child support. Based on these findings, the trial court concluded that "pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), . . . Respondent Father willfully abandoned the juveniles for more than six months preceding the filing of the petition in that . . . [he] withheld [his] pres-

ence, love and care and ha[s] willfully neglected to provide support and maintenance for the juveniles."

The trial court's findings are based on and supported by the testimony of DSS social worker, Veronica Long, who stated that respondent-father did not maintain contact with DSS. She testified that she sent respondent-father 11 letters, made seven phone calls, sent five text messages, but only talked to respondent-father four times. When she talked to respondent-father he would indicate that he would come to DSS to discuss his case plan, but he never followed through. Ms. Long further testified that respondent-father did not attend the visitation with the children supervised by DSS. She stated that she asked respondent-father about visiting the children on four different occasions, that he agreed to visit the children, but that he did not show up for any of the visits. When respondent-father indicated he did not have transportation, Ms. Long offered to pick him up. When she arrived at his residence, however, he was not home. Ms. Long stated that respondent-father never requested visitation with the children until after the filing of the TPR petition. Ms. Long also testified that respondent-father did not pay child support in the six months prior to filing of the petition.

Respondent-father, moreover, acknowledged in the termination proceedings that he did "not step[] up to the plate and do[] what [he] should have." He admitted that he last visited his children in December 2009 and that he did not ask about visiting the children prior to the filing of the TPR petition.

We conclude that this evidence supports the trial court's findings, which, in turn, support its conclusion of termination of parental rights based on willful abandonment. *See In re McLemore*, 139 N.C. App. 426, 428-31, 533 S.E.2d 508, 509-10 (2000). Although respondent-father challenges the other two grounds for terminating his parental rights found by the trial court, this Court has held that "where the trial court finds multiple grounds on which to base a termination of parental rights, and 'an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary [for the appellate court] to address the remaining grounds.' " *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005) (quoting *In re Clark*, 159 N.C. App. 75, 78 n.3, 582 S.E.2d 657, 659 n.3 (2003)), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006). We, therefore, do not address respondent-father's arguments regarding these grounds for termination.

II

[2] Respondent-father also contends that the trial court erred in concluding that termination of his parental rights was in the best interests of the juveniles. Once the trial court determines that one or more of the statutory grounds for termination exist, the court proceeds to the dispositional phase to determine whether the termination of parental rights is in the best interests of the juvenile. *In re Mills*, 152 N.C. App. 1, 7, 567 S.E.2d 166, 169-70 (2002), *cert. denied*, 356 N.C. 672, 577 S.E.2d 627 (2003); N.C. Gen. Stat. § 7B-1110 (2009). The trial court's determination that the termination of parental rights is in the best interests of the juvenile is reviewed for abuse of discretion, *In re E.M.*, ___ N.C. App. ___, ___, 692 S.E.2d 629, 630 (2010), *cert. denied*, ___ N.C. ___, 700 S.E.2d 749 (2010), meaning that the appellant must demonstrate that the court's ruling is "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

"The Juvenile Code sets out several factors the trial court must consider in determining whether termination of parental rights is in the best interest of the child," *In re S.C.H.*, 199 N.C. App. 658, 666, 682 S.E.2d 469, 474 (2009), *aff'd per curiam*, ___ N.C. ___, 689 S.E.2d 858 (2010):

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a)(1)-(6). The trial court's order indicates that it considered each of the enumerated factors:

> 47. That the juveniles, [Carl], [Gary], [Lyle], and [Renee], are eight, six, five, and three years old respectively.
>
> 48. That the situation of Respondent Mother and Respondent Father . . . demonstrates that said Respondents will not promote,

or will not be able to promote, the children's physical and emotional well-being.

. . . .

50. That the bond between the juveniles and Respondent Father is not significant due to the lack of visitation and failure of Respondent Father to provide any contact, love or affection for the juveniles.

51. That the minor children are in need of a permanent plan of care at the earliest possible age, and this can be accomplished only by severing the relationship of the juveniles to the Respondent Parents and by termination of the parental rights of Respondents.

52. That the juvenile, [Carl], has bonded with his grandfather, has a stable, loving relationship with his grandfather and has improved since being placed in the care of his grandfather. His grandfather is willing to adopt him.

53. That the juveniles, [Renee], [Lyle] and [Gary], have developed a bond with their foster parents, seek the assistance of their foster parents in meeting their needs and have done well since being placed in their care. This foster family is willing to adopt these juveniles.

54. That there is a high probability of adoption for these juveniles.

55. That it is in the juveniles' best interest that the parental rights of Respondents be terminated as the children are in a good and caring home, with placement providers who are willing to adopt them.

56. That adoption would provide permanence for the juveniles and would be in their best interests.

These findings demonstrate, contrary to respondent-father's position, that the trial court "duly consider[ed] the statutory factors applicable to the best interest determination." These findings, moreover, are supported by the juveniles' guardian *ad litem's* court report as well as the testimony of the guardian *ad litem*, Jodie Wood-Seay, and DSS social worker, Ms. Long. The trial court thus did not abuse its discretion in concluding that termination of respondent-father's parental

rights was in the best interests of the juveniles. *See J.D.L.*, 199 N.C. App. at 191-92, 681 S.E.2d at 491-92.

Respondent-father finally argues that the 2005 amendment to N.C. Gen. Stat. § 7B-1110, *see* Act to Amend the Juvenile Code to Expedite Outcomes for Children and Families Involved in Welfare Cases and Appeals, 2005 N.C. Sess. Laws 398, sec. 17, indicates that some of the grounds for termination enumerated in N.C. Gen. Stat. § 7B-1111(a) are "more worthy of termination of parental rights than others," and thus when determining whether termination of parental rights is in the best interests of the juvenile, the trial court must "consider[] not only each possible ground independently, but cumulatively and collectively." In effect, respondent-father argues, if any one of several grounds for termination found by the trial court is not upheld on appeal, then the case must be remanded to the trial court for reconsideration of whether termination of parental rights remains in the best interests of the juvenile, despite the appellate court's affirming an alternative basis for termination.

In addition to being directly contrary to the amendment's explicit purpose of "[e]xpedit[ing] outcomes" in Chapter 7B cases, respondent-father's argument is not supported by the change in the language of the statute. The prior version of N.C. Gen. Stat. § 7B-1110 dictated that if the trial court "determine[d] that any one or more of the conditions authorizing a termination of the parental rights of a parent exist[ed]," then the court was required to "issue an order terminating the parental rights of such parent with respect to the juvenile unless the court . . . further determine[d] that the best interests of the juvenile require that the parental rights of the parent not be terminated." N.C. Gen. Stat. § 7B-1110 (2003). In amending the statute so that termination of parental rights was no longer mandatory unless the juvenile's best interests required non-termination, the General Assembly simply directed trial courts, after finding that "one or more grounds for terminating a parent's rights exist," to "determine whether terminating the parent's rights is in the juvenile's best interest" in light of the "consider[ations]" set out in section (a) of the statute. Nothing in the current codification of N.C. Gen. Stat. § 7B-1110 suggests that the trial court is required to consider the "worth[iness]" of the grounds for termination found in the adjudication stage of the proceedings when making its discretionary decision in the dispositional phase. Thus, contrary to respondent-father's contention, the 2005 amendment to N.C. Gen. Stat. § 7B-1110 does not affect this Court's holding in *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990), and

similar cases, that "[a] finding of any one of the grounds enumerated [in N.C. Gen. Stat. § 7B-1111] will support a judge's order of termination." Respondent-father's argument is overruled.

Affirmed.

Judges STEELMAN and McCULLOUGH concur.

WATERS EDGE BUILDERS, LLC, PLAINTIFF v. OSCAR LONGA AND JENIFER LONGA, DEFENDANTS

No. COA10-1389

(Filed 2 August 2011)

1. Quantum Meruit—lien on real property—precluded absent express contract

The trial court erred by enforcing plaintiff's claim of lien when the trial court allowed plaintiff's recovery on the theory of *quantum meruit*. Absent an express contract or one implied-in-fact, plaintiff was precluded from placing a lien on real property.

2. Attorney Fees—prevailing party—reversal of holding

The trial court erred by granting plaintiff attorney fees under N.C.G.S. § 44A-35. Plaintiff was not the prevailing party within the meaning of the statute given the Court of Appeals' reversal of the trial court's order granting plaintiff a lien on defendant's real property.

3. Quantum Meruit—materials and services—inexact nature of costs—reasonableness

The trial court did not err by awarding plaintiff a recovery in the amount of $5,000.00 on the theory of *quantum meruit*. Given the evidence and the inexact nature of ascertaining a definite cost for the type of service provided, the value assessed by the trial court for materials and services was reasonable and supported by competent evidence.

4. Contracts—unilateral contract—no condition for making promise

The trial court did not err by failing to find that a unilateral contract existed between the parties. The evidence was not conclusive that a final agreement between the parties invited plaintiff to perform some act for making the promise to complete the construction of defendant's staircase for $9,000.

Appeal by defendants from order entered 11 August 2010 by Judge William A. Leavell, III, in Watauga County District Court. Heard in the Court of Appeals 23 March 2011.

Di Santi Watson Capua & Wilson, by Frank C. Wilson, III, for plaintiff-appellee.

Miller & Johnson, PLLC, by Nathan A. Miller, for defendant-appellants.

BRYANT, Judge.

Where a claim of lien cannot be premised upon a contract implied in law wherein the theory of recovery is quantum meruit, the trial court erred in granting plaintiff's claim of lien on defendant's property and awarding plaintiff attorney's fees on the basis of plaintiff's status as the prevailing party. Where the evidence is not conclusive that the final arrangement between the parties required plaintiff to perform some act indicating a promise to complete defendant's staircase for a cost of $9,000.00, the trial court was not compelled to find that the contractual relationship between the parties was unilateral.

Plaintiff Waters Edge Builders, LLC, was hired by defendant Oscar Longa to construct a staircase in a home he and his wife (collectively "defendants") were renovating in Watauga County. This matter arises from a disagreement regarding the final amount plaintiff was owed for the work. On 8 September 2008, plaintiff filed a claim of lien on defendants' real property which stated that labor or materials were last furnished upon the property on 13 August 2008. On 5 February 2009, plaintiff filed a complaint seeking recovery on the basis of breach of contract, mechanics and materialman's lien, and quantum meruit. On 1 April 2009, defendant answered plaintiff's complaint and counterclaimed on the basis of breach of contract, fraud, deceptive acts or practices affecting commerce, and action to quiet title. On 25 June 2010, defendants filed a motion to dismiss the claim of lien and for summary judgment as to the contract claim against

Jenifer Longa. On 8 July 2010, after considering the affidavits of the parties and the arguments of counsel presented in open court on 6 July 2010, the trial court denied defendants' motion to dismiss the claim of lien and motion for summary judgment. On 11 August 2010, the trial court entered its order awarding plaintiff $5,000.00 under the theory of quantum meruit and granting plaintiff a materialman's lien against defendants' property. Pursuant to the lien, the court ordered that defendants' property be sold in accordance with N.C. Gen. Stat. § 44A-13(b) to satisfy the lien. Further, the trial court concluded that there was an unreasonable refusal by defendants to fully resolve the matter, constituting bad faith. On this basis and in its discretion, the trial court awarded plaintiff $8,625.00 in attorney's fees. Defendants appeal.

On appeal, defendants raise four issues: did the trial court err (I) in enforcing plaintiff's claim of lien; (II) in granting plaintiff attorney's fees; (III) in awarding recovery on the theory of quantum meruit; and (IV) in concluding that no unilateral contract existed between the parties.

I

[1] Defendants first argue that the trial court erred in enforcing plaintiff's claim of lien when the trial court also found that there existed no express contract between the parties and allowed plaintiff's recovery on the theory of quantum meruit. Defendants contend that absent an express contract or one implied-in-fact, plaintiff is precluded from placing a lien on real property. We agree.

"The materialman's lien statute is remedial in that it seeks to protect the interests of those who supply labor and materials that improve the value of the owner's property." *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) (citations omitted). "A remedial statute must be construed broadly in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained." *Carolina Bldg. Servs.' Windows & Doors, Inc. v. Boardwalk, LLC*, 362 N.C. 262, 264, 658 S.E.2d 924, 926 (2008) (citation and internal quotations omitted). Under North Carolina General Statutes, section 44A-8,

> [a]ny person who performs or furnishes labor or professional design . . . 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.

N.C. Gen. Stat. § 44A-8 (2009) (emphasis added). "There are at least three variations of contract theory . . . : express contract, contract implied in fact, and contract implied in law. The first two theories are based on 'real' contracts, genuine agreements between the parties." *Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 645, 312 S.E.2d 215, 217 (1984). A contract implied-in-law is not based upon an actual agreement. *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 415 (1998). "[A]nd *quantum meruit* is not an appropriate remedy when there is an actual agreement between the parties." *Id.* "In order to prevent unjust enrichment, a plaintiff may recover in *quantum meruit* on an implied contract theory for the reasonable value of services rendered to and accepted by a defend- ant." *Horack v. S. Real Estate Co.*, 150 N.C. App. 305, 311, 563 S.E.2d 47, 52 (2002) (citation omitted).

Here, the trial court denied plaintiff's claim for breach of contract. Specifically, the trial court found that "Plaintiff failed to submit evidence sufficient to prove that there was a meeting of the minds as to the amount and manner in which Plaintiff was to be paid for work performed for Defendants and therefore Plaintiff failed to prove that there was an express contract between the parties." Instead, the trial court found that there were sufficient grounds to award plaintiff a recovery for the value of materials and labor under the theory of quantum meruit.

> [While] *quantum meruit* is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment. It operates as an equitable remedy based upon a quasi contract or a contract implied in law. A quasi contract or a contract implied in law is not a contract.

Gilchrist, 348 N.C. at 42, 497 S.E.2d at 414-15 (internal citations and quotations omitted). A contract implied-in-law is nothing more than a term of art used to express an equitable remedy used by the court to prevent unjust enrichment. To establish a valid claim of lien under section 44A-8, an enforceable contract must exist between the parties. As quantum meruit is not a theory based upon an actual agreement, it may not establish the contractual relationship necessary to form the basis for filing a claim of lien pursuant to N.C.G.S. § 44A-8. Accordingly, the trial court's order granting plaintiff a lien on defendants' real property is reversed.

II

[2] Next, defendants argues that the trial court erred in granting plaintiff attorney's fees pursuant to N.C. Gen. Stat. § 44A-35. For the reasons stated herein, we vacate the award.

"[T]he general rule in North Carolina is that a party may not recover its attorney's fees unless authorized by statute." *Martin Achitectural Prods. Inc. v. Meridian Constr. Co.*, 155 N.C. App. 176, 181, 574 S.E.2d 189, 192 (2002) (citations omitted). "The case law in North Carolina is clear that to overturn the trial judge's determination on the issue of attorneys' fees, the defendant must show an abuse of discretion." *Bruning & Federle Mfg. Co. v. Mills*, 185 N.C. App. 153, 155, 647 S.E.2d 672, 674 (2007) (citation and brackets omitted).

"In any suit brought or defended under the provisions of Article 2 or Article 3 of [Chapter 44A, Statutory Liens and Charges], the presiding judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party." N.C. Gen. Stat. § 44A-35 (2009).

In its order, the trial court awarded plaintiff attorney fees pursuant to N.C.G.S. § 44A-35, as the prevailing party. However, given our holding in issue I, plaintiff could not prevail within the meaning of § 44A-35. Accordingly, the trial court's award of attorney fees to plaintiff, as the prevailing party, pursuant to N.C.G.S. § 44A-35, is vacated.

III

[3] Next, defendants argue that the trial court erred in awarding plaintiff a recovery in the amount of $5,000.00 on the theory of quantum meruit as the trial court lacked competent evidence to arrive as such a figure. We disagree.

"In a non-jury trial, the trial court's findings of fact are conclusive on appeal if supported by competent evidence." *Olivetti Corp. v. Ames Business Sys., Inc.*, 319 N.C. 534, 541, 356 S.E.2d 578, 582 (1987) (citation omitted). Therefore, our task is limited to determining whether there was competent evidence from which the trial court could find that the amount plaintiff was entitled to recover under the theory of quantum meruit is $5,000.00. *See id.*

"Under a contract implied in law, the measure of recovery is *quantum meruit*, the reasonable value of materials and services rendered by the plaintiff that are accepted and appropriated by defend- ant." *Ellis Jones*, 66 N.C. App. at 647, 312 S.E.2d at 218 (citations omitted).

Randy Waters, member-manager for plaintiff, testified that he was the contractor constructing defendant's stairwell. He was first referred to defendants on 30 April 2008. Waters testified that defendant Oscar Longa selected solid oak and wrought iron spindles as the materials out of which to construct the staircase. In late June 2008, Oscar Longa requested that Waters provide him with an estimate. Waters estimated that the construction would cost $8,936.00.

On 28 July 2008, near the completion of the project, Waters sent to Oscar Longa an invoice for $13,830.14. Oscar had already paid Waters $4,788.00 and, on 8 August 2008, paid an additional $3,000.00. On 8 August, Waters met defendants at the residence. Waters testified that Oscar requested some changes be made the on the staircase landings for which Waters did additional work amounting to $1,304.85 between 8 and 14 August. Given the total invoice and subtracting the amounts previously paid ($4,788.00 and $3,000.00), defendants' amount outstanding was $7,346.99. In a telephone conversation occurring after 15 August 2008, Waters testified that Oscar Longa informed him that they had an agreed upon price of $9,000.00 and that defendants would not pay the outstanding balance. Waters subsequently received a check from Oscar Longa for $1,500.00.

At trial, on cross-examination, Waters acknowledged that some portions of the handrail system and corresponding treads would need to be replaced; however, in lieu of replacing the entire handrail system, some of the treads would, as a result, be disproportionately spaced.

Q. If it was determined, or if you had to do this, to replace the entire handrail system, uninstall it, fix the treads that are cut and reinstall the handrail system so you don't cut treads, how much would that cost in materials and man time?

A. I have no idea.

Q. Do you have an estimate?

A. No.

Q. $2,000?

A. (no audible response)

Q. More?

A. (no audible response)

MR. WILSON: Your Honor, he said he doesn't have an estimate.

THE COURT: Well, we're looking for a ballpark. Give us a ball park, if you can.

A. Well, you could certainly reuse all the spindles. You could reuse all the newel posts. You could reuse all the handrails. So you're really talking about treads. I think an oak tread's about $25.

Q. Do you know how many were cut?

A. A gallon of stain's, you know, $30. What, three? Three of them? Two? Three?

Q. Okay. What kind of man hours are we talking about?

A. I mean, I could do it by myself in a day.

In its order, the trial court made the following findings:

8. Plaintiff submitted evidence that the present balance due from Defendants for work performed on the Defendants' residence was $7,346.99.

9. Defendants submitted evidence that questioned whether some of the workmanship performed by the Plaintiff was in accordance with acceptable construction standards and practices.

10. The Court finds after considering all of the evidence including the testimony of the witnesses, the photographs and invoices introduced by Plaintiff that the balance of the value of material and labor furnished by the Plaintiff to the Defendants is $5,000.00.

Given the evidence and the inexact nature of ascertaining a definite cost for the type of service provided, the value as assessed by the trial court, for the materials and services rendered by plaintiff and accepted by defendants, was reasonable and supported by competent evidence. *See Ellis Jones*, 66 N.C. App. at 647, 312 S.E.2d at 218. Accordingly, defendants' argument is overruled.

IV

[4] Last, defendants argue that the trial court erred by failing to find that a unilateral contract existed between plaintiff and defendants. We disagree.

"A unilateral contract is formed when one party makes a promise and expressly or impliedly invites the other party to perform some act as a condition for making the promise binding on the promisor." *CIM*

Ins. Corp. v. Cascade Auto Glass, Inc., 190 N.C. App. 808, 811, 660 S.E.2d 907, 910 (2008) (citation omitted).

On 28 June 2008, defendant Oscar Longa sent plaintiff an email stating the following: "In regards to the cost of the finished product, labor, materials, installed and finished. . . . I need a total not to exceed price, would a total price of $9,000.00 work for you? If it does, let's get started." However, Waters testified that following defendant's email, he had a telephone conversation with defendant Oscar Longa. Following is an excerpt of his testimony:

Q. And what was discussed in that conversation?

A. Well, I think the previous e-mail where we were still discussing a design direction, and we discussed the $9,000 as a capped bid. And I—again, I don't work on capped bids. Everything I do is time and material. And the project and the design installation was going to strictly have to be engineered on the fly, and there's no way that I could ever have known what I was going to get into during the installation, not to mention we still didn't have a final selection of material picked out.

Q. And in the e-mail that Mr. Longa sent to you requesting a cap of $9,000, was he still discussing the selection of materials?

A. Yes.

Q. Had any of that been finalized yet?

A. No.

Q. After that discussion with Mr. Longa, did you then begin work?

A. Well, after he gave me assurances that he wanted me to install the system, he would pay me, he wanted to get his CO and wanted me to order the material, which I did.

As the evidence is not conclusive that the final arrangement between the parties invited plaintiff to perform some act as a condition for making the promise to complete the construction of defendants' staircase for $9,000.00, the trial court was not compelled to find that the contractual relationship between plaintiff and defendants was a unilateral one. *See id.* at 811, 660 S.E.2d at 910. Accordingly, defendants' argument is overruled.

We reverse the trial court's order granting plaintiff a claim of lien, and vacate the award of attorneys fees based thereon. We affirm the trial court's $5,000.00 award to plaintiff based on quantum meruit and its ruling of no unilateral contract.

Affirmed in part; reversed in part; and vacated in part.

Judges ELMORE and GEER concur.

IN THE MATTER OF: I.R.C.

No. COA11-97

(Filed 2 August 2011)

Termination of Parental Rights—cessation of reunification efforts—sufficiency of findings of fact

The trial court erred in a termination of parental rights case by failing to make sufficient findings of fact setting forth the basis for ceasing reunification efforts under N.C.G.S. § 7B-507(b). The case was remanded to the trial court for further proceedings.

Appeal by respondent from order entered 22 November 2010 by Judge David V. Byrd in Yadkin County District Court. Heard in the Court of Appeals 5 July 2011.

James N. Freeman, Jr., for petitioner-appellee Yadkin County Department of Social Services.

Murray C. Greason, III, for guardian ad litem.

J. Thomas Diepenbrock for respondent-appellant mother.

HUNTER, Robert C., Judge.

Respondent mother appeals from the trial court's 22 November 2010 modified order terminating her parental rights to the juvenile I.R.C. Respondent mother contends that the evidence does not support the trial court's conclusion that two grounds existed to terminate her parental rights, and that a prior permanency planning order contains insufficient findings of fact to support ceasing reunification efforts.[1] After careful review, we reverse the permanency planning order and remand this case to the trial court for further proceedings.

Background

On 2 September 2008, the Yadkin County Department of Social Services ("DSS") received a report alleging that the juvenile, who was about eight years old at the time, was neglected. The report alleged that respondent mother did not have stable housing and that she had left the juvenile to live in a friend's home for the summer. The report also alleged that the juvenile had inappropriately touched another child. DSS investigated and determined that respondent mother had been leaving the juvenile in "different residences with [respondent] mother staying elsewhere." The juvenile reported to DSS that she had slept in the same bed with respondent mother's stepfather in the past, and that he resided in their home.

On 3 September 2008, respondent mother entered into a safety plan in which she agreed to live with the juvenile. On 12 September 2008, however, DSS discovered respondent mother was only living with the juvenile during the week and taking the juvenile to a relative's home on the weekends. That living arrangement caused the juvenile to be late for school. On 19 September 2008, respondent mother entered into another safety plan in which she agreed to live with the juvenile full-time, and to not leave her alone with any other caregiver. The juvenile was also required to be in school on time, and not to sleep in the same bed with anyone but respondent mother.

On 30 September 2008, a social worker had difficulty making contact with respondent mother. Eventually, the social worker was able to contact the juvenile, and the juvenile said respondent mother had not been home since the previous night. Respondent mother left the juvenile home overnight with two men. DSS then filed a petition alleging that the juvenile was neglected and dependent, and obtained nonsecure custody of the juvenile on 1 October 2008.

On 10 November 2008, District Court Judge Jeanie R. Houston entered an order adjudicating the juvenile neglected and dependent. Respondent mother, who lived in Texas at the time and did not attend the adjudication hearing, was ordered to participate in a home study and comply with an out-of-home family services case plan. Respondent father could not be located to be served and did not participate in the hearing. Judge Houston ordered respondents to comply with the family services case plan designed by DSS, and ordered DSS to continue making reasonable efforts toward reunification with respondents.

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1. Respondent mother preserved her right to review of the permanency planning order by entering a written "Notice to Preserve Right to Appeal" on 19 February 2010.

On 14 December 2009, District Court Judge Michael D. Duncan entered a permanency planning order in which he found respondent mother had completed parenting classes, a substance abuse/mental health assessment, and psychological evaluation, but had been inconsistent about attending weekly therapy sessions and had not attended recommended Al-Anon meetings. Judge Duncan also found respondent mother was working at the time and taking advantage of her visitation opportunities, but respondent father was incarcerated and had not maintained communication with DSS. The juvenile remained in DSS custody, and the permanent plan remained reunification.

On 4 March 2010, Judge Houston entered another permanency planning order, and found that the juvenile was receiving nightly tutoring from her foster parents and attending weekly therapy sessions, and she had disclosed her father had sexually abused her. Judge Houston further found respondent mother had failed to attend her counseling sessions after 11 November 2009, failed to provide proof of attendance for six Al-Anon meetings, and admitted to taking prescription drugs that were not prescribed for her. Respondent father remained incarcerated and did not contact or support the juvenile. Judge Houston changed the permanent plan for the juvenile to adoption and ordered DSS to cease reunification efforts and file a petition to terminate respondents' parental rights within the next 60 days. Respondent mother filed a written "Notice to Preserve Right to Appeal" from the permanency planning order.

On 4 March 2010, DSS filed a motion to terminate respondents' parental rights. As to respondent mother, the motion alleged two grounds for termination: (1) respondent mother had neglected the juvenile pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2009); and (2) respondent mother had willfully left the juvenile in foster care for more than 12 months without making reasonable progress toward correcting the conditions that led to the removal of the juvenile from her care, pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). On 8 April 2010, respondent mother filed a written response to the motion.

The matter came on for hearing on 31 August 2010. At both the adjudication and disposition phases, DSS presented testimony from social worker Ginger Souther describing respondent mother's case history and her failure to comply with her family services plans. DSS also presented testimony from several other witnesses, including the juvenile's foster mother. Respondent mother testified on her own behalf at both phases of the hearing. Respondent father voluntarily relinquished his parental rights.

On 9 November 2010, the trial court entered an order terminating respondent mother's parental rights. On 22 November 2010, the trial court entered a modified termination order. Respondent mother gave timely written notice of appeal from the trial court's order terminating her parental rights.

Discussion

Respondent mother contends that, in the 4 March 2010 permanency planning order, Judge Houston failed to make sufficient findings of fact addressing N.C. Gen. Stat. § 7B-507(b) (2009). We agree and hold that the trial court's findings of fact do not support its conclusion of law that reunification efforts with respondent mother should cease.

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). "At the disposition stage, the trial court solely considers the best interests of the child. Nonetheless, facts found by the trial court are binding absent a showing of an abuse of discretion." *In re Pittman*, 149 N.C. App. 756, 766, 561 S.E.2d 560, 567 (citations and quotation makrs omitted), *appeal dismissed and disc. review denied*, 356 N.C. 163, 568 S.E.2d 609 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003).

N.C. Gen. Stat. § 7B-507(b) (emphasis added) provides that:

> In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease *if the court makes written findings of fact that:*
>
> (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time;
>
> (2) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101;

> (3) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent; or
>
> (4) A court of competent jurisdiction has determined that: the parent has committed murder or voluntary manslaughter of another child of the parent; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; or has committed a felony assault resulting in serious bodily injury to the child or another child of the parent.

"When a trial court is required to make findings of fact, it must make the findings of fact specially." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003). "The trial court may not simply recite allegations, but must through processes of logical reasoning from the evidentiary facts find the ultimate facts essential to support the conclusions of law." *Id.* (citation and quotation marks omitted).

Here, DSS claims that reunification efforts with respondent mother would be futile, and, therefore, the trial court properly concluded that reunification efforts with her should cease. In its order, the trial court made findings of fact addressing the reunification efforts already made by DSS and respondent mother's demonstrated failure to complete her case plan; however, at no point did the trial court link any of these findings to the two prongs set forth in N.C. Gen. Stat. § 7B-507(b)(1). The trial court did not ultimately find, as required by the statute, that: (1) attempted reunification efforts would be futile, or (2) reunification would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time. N.C. Gen. Stat. § 7B-507(b)(1). The case of *In re Weiler*, 158 N.C. App. 473, 581 S.E.2d 134 (2003), is on point. There, the trial court made findings concerning the respondent mother's " 'obstructionist attitude,' 'refusal to accept responsibility,' 'repetitive switching of jobs and residence,' and 'inconsistent behaviors.' " *Id.* at 479, 581 S.E.2d at 137. Still, "[t]he court found as fact neither that efforts toward reunification with [the] respondent [mother] would be futile nor that such efforts would be inconsistent with the juveniles' health, safety, and need for a permanent home." *Id.* at 478, 581 S.E.2d at 137. Consequently, this Court concluded that,

> in light of its failure to make the findings required by statute, the court's findings do not support its conclusions of law that efforts to reunify respondent with her children should cease and that the

> "appropriate permanent plan for the juveniles is pursuit of termination of parental rights and adoption."

Id. at 480, 581 S.E.2d at 138. We must reach the same conclusion here since the trial court failed entirely to make the required findings. *Id.*; *see also In re Everett*, 161 N.C. App. 475, 480, 588 S.E.2d 579, 583 (2003) (holding that even though the trial court made findings of fact regarding respondent's mental deficiencies, the trial court did not relate those findings to futility of reunification, and, therefore, the trial court "failed to comport with N.C. Gen. Stat. § 7B-507(b)"); *see generally In re J.N.S.*, ___ N.C. App. ___, ___,, 704 S.E.2d 511, 519 (2010) (reversing the trial court's dispositional order where the trial court merely incorporated DSS reports and failed to make the findings of fact required by N.C. Gen. Stat. § 7B-507(b)).

We recognize that since *Weiler*, this Court has upheld dispositional orders where the trial court made findings of fact that supported an ultimate conclusion of law by the trial court that reunification efforts would be futile or inconsistent with the juveniles health, safety, and need for a safe, permanent home. *See, e.g.*, *In re T.R.M.*, ___ N.C. App. ___, ___, 702 S.E.2d 108, 111 (2010) ("We conclude that the foregoing findings of fact support the trial court's conclusion that further reunification efforts were not required on the ground that reunification would be inconsistent with [the juvenile's] 'health, safety, and need for a safe, permanent home within a reasonable period of time[.]' " (quoting N.C. Gen. Stat. § 7B–507(b)(1))); *In re N.G.*, 186 N.C. App. 1, 11, 650 S.E.2d 45, 52 (2007) ("We further conclude that the finding supports the trial court's conclusion that reunification efforts would be futile."), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008); *see generally In re S.J.M.*, 184 N.C. App. 42, 645 S.E.2d 798 (2007) (upholding the trial court's order where the findings of fact supported the trial court's conclusion of law that reunification efforts would be futile). In other words, the trial court in those cases related the findings to a conclusion of law that specifically set forth the basis for ceasing reunification efforts under N.C. Gen. Stat. § 7B-507(b). The trial court in this case made no such conclusion. Had it done so, we would have affirmed the order based on the holding of *N.G.*

As it stands, the trial court recited allegations against respondent mother, but failed to link those allegations to the ultimate findings of fact required by the statute. This Court cannot simply infer from the findings that reunification efforts would be futile or inconsistent with the juvenile's health, safety, and need for a safe, permanent home where the trial court was required to make *ultimate* findings "spe-

cially" based on a "process[] of logical reasoning." *Harton*, 156 N.C. App. at 660, 577 S.E.2d at 337. We are, therefore, bound by the holding in *Weiler*, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), and must reverse the permanency planning order as well as the termination of parental rights order and remand this case to the trial court for further proceedings.

Reversed and Remanded.

Judges STEELMAN and McCULLOUGH concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, DUKE ENERGY CAROLINAS, LLC, GREENCO SOLUTIONS, INC., NORTH CAROLINA MUNICIPAL POWER AGENCY NUMBER 1, NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY, ELECTRICITIES OF NORTH CAROLINA, INC., PROGRESS ENERGY CAROLINAS, INC., AND THE PUBLIC STAFF OF THE NORTH CAROLINA UTILITIES COMMISSION v. ENVIRONMENTAL DEFENSE FUND AND NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION

No. COA11-142

(Filed 2 August 2011)

Utilities—renewable energy facilities—biomass resource—renewable energy source

The North Carolina Utilities Commission did not err by determining that wood derived from whole trees in primary harvest was a biomass resource, and thus, a renewable energy source within the meaning of N.C.G.S. 62-133.8(b) when it approved two thermal electric generating stations as renewable energy facilities.

Appeal by appellants from order entered 11 October 2010 by the North Carolina Utilities Commission. Heard in the Court of Appeals 9 June 2011.

K&L Gates LLP, by Kiran H. Mehta and Molly L. McIntosh, and Duke Energy Corporation In House Counsel, Charles Alexander Castle, for plaintiff-appellees.

Southern Environmental Law Center, by Derb S. Carter and Gudrun Thompson, for intervenor-appellant.

North Carolina Sustainable Energy Association, by Kurt J. Olson, and Michael D. Youth, for defendant-appellant.

STEELMAN, Judge.

Where N.C. Gen. Stat. § 62-133.8(a)(6) includes "biomass resource," among the list of resources qualifying as "renewable energy resources," the North Carolina Utilities Commission did not err in determining that wood derived from whole trees in primary harvest is a "biomass resource" and thus a "renewable energy resource" within the meaning of the statute.

I. Factual and Procedural Background

North Carolina's Renewable Energy and Energy Efficiency Portfolio Standard ("REPS"), N.C. Gen. Stat. § 62-133.8(b), requires electric public utilities to meet renewability and efficiency standards beginning in 2012. If a utility does not meet this requirement, the Commission can impose a penalty up to $1,000 for each violation. *See* N.C. Gen. Stat. § 62-310(a); *In re Rulemaking Proceeding to Implement Session Law 2007-397*, No. E-100, Sub 113, 2008 WL 619061, at *58-61 (N.C.U.C. Feb. 29, 2008) (determining that the Commission can enforce REPS under its general enforcement authority).

Any electric utility that wants to generate tradable Renewable Energy Certificates ("RECs"), which can be used to comply with REPS, must register its facility as a "renewable energy facility" with the North Carolina Utilities Commission ("Commission"). N.C. Gen. Stat. § 62-133.8(a)(6); 4 N.C. Admin. Code 11.R8-66(b) (2010). Facilities that generate electric power using a "renewable energy resource" are considered renewable energy facilities. N.C. Gen. Stat. § 62-133.8(a)(7). The statute defines "renewable energy resource" to include "a biomass resource, including agricultural waste, animal waste, wood waste, spent pulping liquors, combustible residues, combustible liquids, combustible gases, energy crops, or landfill methane." § 62-133.8(a).

On 1 March 2010 Duke Energy Carolinas, LLC ("Duke") applied to the Commission to register two of its thermal electric generating stations, Buck Steam Station ("Buck") and Lee Steam Station ("Lee"), as renewable energy facilities. Duke had conducted production trials at both stations in which a blend of wood chips and coal was used as fuel.

The Commission determined that wood derived from whole trees in primary harvest is a "biomass resource" and thus a "renewable energy resource" within the meaning of the statute and approved Duke's applications for the Buck and Lee stations.

II. N.C. Gen. Stat. § 62-133.8(a)

Appellants contend that the Commission erred in its conclusion that wood fuel from primary harvest whole trees is a "biomass resource" and thus a "renewable energy resource" within the meaning of N.C. Gen. Stat. § 62-133.8(a). We disagree.

A. Standard of Review

The procedure for appeals from final orders or decisions of the Utilities Commission is established by N.C. Gen. Stat. 62-94, *et seq*. The Court may reverse the Commission's decision if the appellants' rights have been prejudiced because the decision was affected by an error of law. N.C. Gen. Stat. § 62-94(b)(4). Questions of law are reviewed *de novo*. N.C. Gen. Stat. § 62-94(b) ("the court shall decide all relevant questions of law [and] interpret constitutional and statutory provisions").

B. Analysis

When construing a statute, the court looks first to its plain meaning, *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010), reading words that are not defined by the statute according to their plain meaning as long as it is reasonable to do so, *Woodson v. Rowland*, 329 N.C. 330, 338, 407 S.E.2d 222, 227 (1991). The court must give effect to the plain meaning as long as the statute is clear and unambiguous. *State v. Jackson*, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001).

The statute at issue in the instant case is not ambiguous because all wood fuel is encompassed by the meaning of the term "biomass." Since the statute does not specifically define "biomass," we look to its ordinary meaning. *The New Oxford American Dictionary* defines "biomass" as "organic matter used as fuel." *The New Oxford American Dictionary* 166 (Elizabeth J. Jewell et al. eds., 2d ed. 2005). A report produced by the North Carolina Biomass Council defines biomass as "any organic matter that is available on a renewable or recurring basis, including *agricultural crops and trees*, *wood and wood wastes and residues*, plants (including aquatic plants), grasses, residues, fibers, animal wastes, and segregated municipal waste." Ben Rich, North Carolina Biomass Council, *The North Carolina Biomass Roadmap: Recommendations for Fossil Fuel Displacement through Biomass Utilization* 4 (2007), http://www.ncsc.ncsu.edu/bioenergy/docs/NC_Biomass_Roadmap.pdf (emphasis added). The Commission applied the definition from *The Biomass Roadmap* in considering whether a particular type of fuel is

a "biomass resource." *See In re EPCOR USA North Carolina, LLC*, SP-165, Sub 3, 2009 WL 4906554, at *2 (N.C.U.C.).

All wood fuel is clearly encompassed by each of these definitions. Not only is wood listed as an example of a biomass in *The Biomass Roadmap*, wood is also organic and renewable, which are the criteria encompassed by the definitions. Therefore, wood fuel from primary harvest whole trees is a biomass resource within the meaning of the statute.

Appellants argue that not all biomass is a biomass resource within the meaning of the statute. Appellants advance two theories to support this argument. First, that the list of biomass resources provided in the statute is an exhaustive list; and second, that the doctrine of *ejusdem generis* limits the term "biomass resources" so that it only includes biomass material of the same type as the listed resources. The plain meaning of the statute does not support either theory.

First, the language of the statute indicates that the legislature did not intend to limit the term "biomass resources" to only include the resources listed in the statute. *The New Oxford American Dictionary* defines the word "including" to mean "containing as part of the whole being considered." *The New Oxford American Dictionary*, *supra* at 854. Similarly, *Black's Law Dictionary* explains, "The participle including typically indicates a partial list." *Black's Law Dictionary* 831 (9th ed. 2009). Both of these definitions suggest that a list introduced by the word "including" would be illustrative, rather than exhaustive. Moreover, our Supreme Court has indicated that use of the word "including" expresses legislative intent to list examples. *See N. Carolina Tpk. Auth. v. Pine Island, Inc.*, 265 N.C. 109, 120, 143 S.E.2d 319, 327 (1965). We hold that the list provided by the legislature is not an exhaustive list of all of the biomass materials included in the broad term "biomass resources."

Second, the term "biomass resources" is not limited by the doctrine of *ejusdem generis*.

> " '[T]he *ejusdem generis* rule is that where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.' "

State v. Lee, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970) (internal citations omitted).

North Carolina courts have followed this explanation of how the doctrine of *ejusdem generis* should be applied by employing the doctrine when a list of specific terms is *followed* by a general term. *See Liborio v. King*, 150 N.C. App. 531, 536-37, 564 S.E.2d 272, 276 (2002) (interpreting the term "misrepresentation" to be limited to knowing and intentional behavior, where the term followed the terms fraud and deception); *Smith v. Smith*, 314 N.C. 80, 87, 331 S.E.2d 682, 687 (1985) (interpreting a provision allowing the court to consider "[a]ny other factor which the court finds to be just and proper" to be limited to economic factors, where the provision followed eleven other provisions having to do with the economy of the marriage); *Lee*, 277 N.C. at 244, 176 S.E.2d at 774 (interpreting the phrase "or other like weapons" to be limited to automatic or semiautomatic weapons, where the phrase followed a specific list of automatic and semiautomatic weapons).

The provision at issue here does not fit the doctrine as described in *Lee* because the general phrase "biomass resources" precedes the list of specific examples.

This Court has on occasion applied the doctrine to a general term that *preceded* a list of specific terms. *See Knight v. Town of Knightdale*, 164 N.C. App. 766, 769-70, 596 S.E.2d 881, 884 (2004) (holding that a zoning ordinance which allows the town to consider "adverse effects expected from the development, including without limitation, stormwater, noise, odor, on and off-street parking, dust, light, smoke and vibration" only permits the town to consider adverse affects that are physical in nature). However, this Court construed the language in *Knight* narrowly because our Supreme Court has held that limitations and restrictions in zoning ordinances should be interpreted to include only what is clearly within their scope since such limitations interfere with common law property rights. *Id.* (citing *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjustment*, 334 N.C. 132, 138-39, 431 S.E.2d 183, 188 (1993)).

Even assuming arguendo that the doctrine of *ejusdem generis* can be applied when the general term precedes the specific, the rule would not apply in the instant case because the specific terms do not have a unifying characteristic. "The rule does not apply to restrict the operation of a general expression where the specific things enumerated have no common characteristic, and differ greatly from one

another." *State v. Fenner*, 263 N.C. 694, 698, 140 S.E.2d 349, 352 (1965). Appellants argue that the resources fall into one of two categories: waste or intentionally produced energy products. However, these categories do not meet the test established in *Fenner* because they are very different from each other. *See Id.* Moreover, we do not find any other characteristic that unifies all of the examples provided by the legislature.

Any resource that can be considered a biomass because it is organic and renewable is a biomass resource within the plain meaning of the statute. All wood fuel meets these criteria and thus is a "biomass resource" and a "renewable energy resource."

Appellants' arguments are without merit.

AFFIRMED.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA v. BONNIE LINDA FLAUGHER

No. COA10-1044

(Filed 16 August 2011)

1. Evidence—prior crimes or bad acts assault deadly weapon—absence of mistake—not unfairly prejudicial

The trial court did not commit plain error in an assault with a deadly weapon with intent to kill inflicting serious injury case by admitting evidence that defendant had previously assaulted the victim with a fork, injuring his hand. The evidence was properly admitted for the purpose of showing absence of accident or mistake and the probative value outweighed the danger of any unfair prejudice.

2. 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. There was substantial evidence of each essential element of the offense charged, and of defendant's being the perpetrator of such offense.

3. Crimes, Other—maiming without malice—sufficient evidence—motion to dismiss properly denied

The trial court did not err in a maiming without malice case by denying defendant's motion to dismiss the charge. There was substantial evidence of each of the elements of the offense, including that defendant intended to strike the victim's finger with the intent to disable him.

4. Jury—instructions—voluntary intoxication—insufficient evidence

The trial court did not err in a robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury case by refusing to instruct the jury on the issue of voluntary intoxication. Defendant did not produce sufficient evidence to show that at the time of the crimes, her mind was so completely intoxicated that she was utterly incapable of forming the necessary intent to commit the crimes.

5. Assault—deadly weapon inflicting serious injury—lesser-included offense—misdemeanor assault with deadly weapon—jury instruction not warranted

The trial court did not err in an assault with a deadly weapon inflicting serious injury case by refusing to instruct the jury on the lesser-included offense of misdemeanor assault with a deadly weapon. The evidence squarely showed serious injury and defendant did not address the intent to kill element.

6. Robbery—dangerous weapon—lesser-included offense—common law robbery—jury instruction not warranted

The trial court did not err in a robbery with a dangerous weapon case by refusing to charge the jury on common law robbery. The pickaxe used by defendant and the manner of its use were of such character as to admit but one conclusion—that it was a deadly weapon.

7. Robbery—dangerous weapon—pickaxe—jury instruction—no plain error

The trial court did not commit plain error in a robbery with a dangerous weapon case by instructing the jury that a pickaxe used by defendant was a deadly weapon. The pickaxe and the manner of its use were of such character as to admit but one conclusion—that it was a deadly weapon.

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

Defendant's argument that the trial court violated her right to be free from double jeopardy when it sentenced her for both maiming without malice and assault with a deadly weapon inflicting serious injury was not preserved for appellate review where defendant failed to raise the issue at trial.

Appeal by defendant from judgment entered 22 April 2010 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 23 February 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel D. Addison, for the State.

William D. Spence for defendant-appellant.

GEER, Judge.

Defendant Bonnie Linda Flaugher appeals from convictions of assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), robbery with a dangerous weapon, maiming without malice, and possession of a stolen motor vehicle. Defendant primarily argues that the trial court committed plain error in admitting evidence that defendant had previously assaulted the victim with a fork, injuring his hand. Defendant contends that because the district attorney voluntarily dismissed the charges when the victim denied that an assault occurred and because the evidence was not properly admitted under Rule 404(b), the trial court should have excluded the evidence.

The dismissal did not, however, amount to a judicial acquittal and, therefore, that dismissal did not preclude admission of the evidence. Further, evidence of the assault was relevant on the charge of maiming without malice based on the near severing of the victim's finger—it showed that defendant knew that if she continued to strike at defendant after he raised his hands, she could disfigure his hands or fingers. The evidence, therefore, would have permitted the jury to conclude that defendant did not accidentally disfigure the finger. Because we are not persuaded by defendant's remaining arguments, we hold that defendant received a trial free of prejudicial error.

Facts

The State's evidence tended to show the following facts. In early 2008, Larry Eugene Perry allowed defendant to live at his house because she was homeless and he felt sorry for her. He also allowed another woman, Melanie Graham, to live at the house—she had a driver's license and drove Mr. Perry and his brother to do tree and yard work.

On 2 March 2008, when Mr. Perry returned home from work, defendant asked him for a ride into town. Mr. Perry refused, explaining that he was tired, his head hurt, and he was going to bed. According to Mr. Perry, defendant "started ranting and raving and cussing." She went outside, and Mr. Perry locked the front door behind her. After defendant threw a flower pot through a window, Mr. Perry unlocked the door because he did not want defendant to break any more windows. Mr. Perry then went into his bedroom, which he shared with defendant, and went to sleep.

Mr. Perry later awoke when defendant started hitting him over the head with a pickaxe,[1] saying " 'I'll kill you, you son of a bitch.' "

1. In the transcript, the tool is alternately referred to as a pickaxe, grubbing hoe, or mattock.

She swung and hit him at least eight times. Instinctively, Mr. Perry put his hands up to cover his head and face. When he did so, defendant slashed his right finger with the pickaxe, leaving the finger hanging on by only a piece of skin.

At some point, Mr. Perry may have taken the pickaxe from defendant, but Mr. Perry was not certain because he was, in his words, "in a daze." Defendant looked at him and said, " 'Give me your wallet, give me your money, motherfucker.' " Mr. Perry gave her a wallet. After defendant said, " 'No, the other one too,' " Mr. Perry gave her a second wallet as well. She took $114.00, leaving one wallet on the floor and one just outside the bedroom door on the washing machine.

Defendant went down the hall and came back, jingling Mr. Perry's truck keys in her hand and told Mr. Perry that she was taking his truck. By that point, Ms. Graham had also come in the room. Ms. Graham and defendant left together in Mr. Perry's truck, with Ms. Graham driving.

Mr. Perry made his way to a neighbor's house, and the neighbor called 911. Emergency responders transported Mr. Perry to the hospital, where he had 53 staples put in his head to close the lacerations. His finger was also reattached after a seven-and-a-half-hour surgery, but it is now crooked and he can no longer use it. Mr. Perry described his injuries as very painful and testified that he never used to have headaches, but now he has headaches "all the time" and suffers from memory loss.

On 19 May 2008, defendant was indicted for AWDWIKISI, robbery with a dangerous weapon, larceny of a motor vehicle, maiming without malice, and possession of a stolen motor vehicle. Following the close of the State's evidence at trial, the trial court granted defendant's motion to dismiss the charge of larceny of a motor vehicle.

At trial, defendant testified on her own behalf. According to defendant, about three days before the attack, when Mr. Perry and Ms. Graham were out of town, she had placed the pickaxe in the bedroom because she heard dogs barking "like something or somebody was out there," and she was scared. She testified that on the day of the attack, she—and not Mr. Perry—went into the bedroom to lie down. She woke up to find her pants unbuttoned and unzipped and Mr. Perry's hand down her pants. Mr. Perry was only wearing underwear, and she thought he was going to rape her. She grabbed what she "thought was a bat, [she didn't] know what it was," and began swinging, trying to get Mr. Perry off her, although she testified that she was

not trying to kill him. After Ms. Graham came in and pulled Mr. Perry off defendant, the two women ran out and drove away in Mr. Perry's truck. Defendant testified that she never demanded Mr. Perry's wallets or keys.

The jury found defendant guilty of AWDWIKISI, robbery with a dangerous weapon, maiming without malice, and possession of a stolen motor vehicle. The trial court consolidated the convictions for sentencing and imposed one presumptive-range term of 100 to 129 months imprisonment. Defendant timely appealed to this Court.

I

[1] We first consider defendant's argument that the trial court erred, in violation of Rule 404(b) of the Rules of Evidence, in admitting testimony by Mr. Perry and Detective David Dombroski regarding a previous assault by defendant on Mr. Perry. Mr. Perry testified that on 4 January 2008, he cooked some steaks for himself and defendant. After he ate his steak, defendant, who had been drinking, "went into a rage" for no reason and said, " 'I'm going to beat you, I'm going to whip you, your brother's not here to defend you, I'm going to whip you.' " She jumped on him and tore his shirt off. Mr. Perry grabbed her and said, " 'What is wrong with you? What is wrong with you? Settle down, calm down.' "

Mr. Perry then let defendant go, at which point she grabbed a fork and ran at him to stick him in the chest. He grabbed her arms, and this time, when he did, the fork "got [him] in the finger," causing it to bleed. He believed that if he had not grabbed her with his hands, he would have been stuck in the chest with the fork. Mr. Perry then "threw her on the floor and held her."

After Mr. Perry let defendant go, defendant went outside and called the police. When the police arrived, they arrested defendant even though Mr. Perry told them he did not want her to be arrested. Defendant was charged with assault with a deadly weapon.

Detective Dombroski had responded to the 4 January 2008 incident at Mr. Perry's home. According to Detective Dombroski, Mr. Perry told him that he and defendant had been arguing over Mr. Perry's asking defendant to leave the house because she was intoxicated. Defendant had picked up a fork and come at Mr. Perry, who put his hand in front of his face, at which point she "punctured" his hand with the fork. Detective Dombroski was unable to obtain much information from defendant about the incident, other than that she was upset because Mr. Perry had locked her out.

At trial, outside the presence of the jury, defendant objected to this evidence before its admission on the ground that its sole purpose was to show propensity toward violence. Following a *voir dire* examination of Mr. Perry, the trial court allowed the evidence and instructed the jurors that they should consider it only for the purpose of showing absence of accident or mistake.

Defendant failed to object to the introduction of this evidence when it was actually admitted, but she contends that the issue was nonetheless preserved for review under *State v. Herrera*, 195 N.C. App. 181, 196-97, 672 S.E.2d 71, 81, *disc. review denied*, 363 N.C. 377 (2009), in which this Court held the following:

> [W]e do not believe that under the circumstances here, N.C.R. App. P. 10(b)(1) or North Carolina case law mandate that defendant had to re-object to this testimony in the jury's presence to preserve this issue when the court had already considered and overruled defendant's discovery violation objection during *voir dire*.
>
> . . . [D]efendant's objection was argued at trial, (albeit outside of the presence of the jury), and not pretrial. Because defendant raised his objections . . . at trial and obtained a ruling and standing objection on this issue, we believe he sufficiently preserved this issue for appellate review.

Subsequent to *Herrera*, however, our Supreme Court decided *State v. Ray*, 364 N.C. 272, 697 S.E.2d 319 (2010). In *Ray*, the State had already begun cross-examining the defendant when, outside the presence of the jury, it informed the trial court that it wanted to question the defendant regarding a prior assault for the purpose of proving motive and intent pursuant to Rule 404(b). *Id.* at 275, 697 S.E.2d at 321. The defendant objected at that time, outside the presence of the jury, but his counsel later failed to object when the evidence was introduced to the jury. *Id.* at 276, 697 S.E.2d at 321-22.

The Supreme Court in *Ray* held that "to preserve for appellate review a trial court's decision to admit testimony, 'objections to [that] testimony must be contemporaneous with the time such testimony is offered into evidence' and not made only during a hearing out of the jury's presence prior to the actual introduction of the testimony." *Id.* at 277, 697 S.E.2d at 322 (quoting *State v. Thibodeaux*, 352 N.C. 570, 581-82, 532 S.E.2d 797, 806 (2000), *cert. denied*, 531 U.S. 1155, 148 L. Ed. 2d 976, 121 S. Ct. 1106 (2001)). Consequently, the defendant had failed to preserve for appellate review the trial court's decision to admit evidence regarding the prior assault. *Id.*

Under *Ray*, therefore, defendant failed to preserve for appellate review her Rule 404(b) objection. Defendant, however, alternatively asks that we review for plain error. 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 *fundamenta*l error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the . . . mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513, 103 S. Ct. 381 (1982)). The first question in this analysis is whether the trial court committed any error at all.

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." This Court has described Rule 404(b) as a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990).

Here, the trial court properly admitted the fork evidence for the purpose of showing absence of accident or mistake. Defendant has contended, in connection with the charge of maiming without malice, that she never intended to purposefully strike Mr. Perry's finger with the pickaxe. Yet, defendant knew from the fork incident that she could end up stabbing Mr. Perry's hand or fingers if she swung at him with a weapon and he attempted to defend himself. The evidence was thus relevant to the question whether defendant intended to disable Mr. Perry or whether, as defendant argues, she accidentally struck his finger and did not intend to maim it. *See State v. Anderson*, 350 N.C.

152, 174, 513 S.E.2d 296, 310 (holding evidence that defendant previously punished her children through use of belt and biting was admitted for permissible purpose because it tended to establish, *inter alia*, absence of accident), *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326, 120 S. Ct. 417 (1999).

Defendant also argues, however, that this evidence should have been excluded because the assault charge arising out of the fork incident had already been dismissed by the district attorney's office at the request of Mr. Perry. At some point, after the fork incident, Mr. Perry informed the district attorney's office that he did not want to press charges. Mr. Perry also completed a victim impact statement for the district attorney's office. On that form, he wrote: "Bonnie did not assault me. I will explain this matter to you if you will call me. Bonnie does have an alcohol problem. I grabbed her wrist and got stuck on my little finger. I will explain." Mr. Perry testified at trial in this case, however, that defendant in fact did attack him. He explained that he denied the assault on the victim impact statement because he felt sorry for defendant and did not want her to go to jail.

In arguing that the dismissal and Mr. Perry's original denial of the assault required exclusion of evidence of the assault, defendant relies on *State v. Scott*, 331 N.C. 39, 413 S.E.2d 787 (1992), and *State v. Fluker*, 139 N.C. App. 768, 535 S.E.2d 68 (2000). In each of these cases, however, this Court held that evidence that a defendant committed a prior offense for which he has been *tried and acquitted* may not be admitted in a subsequent trial for a different offense when its probative value depends upon the proposition that the defendant in fact committed the prior crime. *Scott*, 331 N.C. at 42, 413 S.E.2d at 788 ("We conclude that evidence that defendant committed a prior alleged offense for which he has been tried and acquitted may not be admitted in a subsequent trial for a different offense when its probative value depends, as it did here, upon the proposition that defendant in fact committed the prior crime."); *Fluker*, 139 N.C. App. at 774, 535 S.E.2d at 72 (accord).

Here, defendant was never tried and acquitted of the fork assault. Although defendant argues that the holdings of *Scott* and *Fluker* should apply to dismissals by the prosecution as well as to acquittal, a dismissal does not fall within the reasoning of those two cases. The holdings hinged on the fact that the defendant in each case had been judicially acquitted and, therefore, was legally innocent of the prior charges. *Scott*, 331 N.C. at 43-44, 413 S.E.2d at 789; *Fluker*, 139 N.C.

App. at 774-75, 535 S.E.2d at 72-73. The district attorney's dismissal, even considering Mr. Perry's victim impact statement, did not result in defendant's being legally innocent of the prior assault charge.

In *State v. Goodwin*, 186 N.C. App. 638, 641, 652 S.E.2d 36, 38 (2007), the only other case cited by defendant, the trial court admitted testimony about two prior incidents which resulted in criminal charges that the State voluntarily dismissed. This Court held that the testimony was admitted in error because its sole purpose was to show the defendant's propensity to commit crimes similar to the one charged. *Id.* at 642, 652 S.E.2d at 39. The Court's holding was in no way based on the fact that the charges related to the prior incidents had been dismissed.

We, therefore, hold that the trial court did not err in admitting the evidence of defendant's prior assault on Mr. Perry. Defendant, however, further argues that the trial court should have excluded the evidence under Rule 403 of the Rules of Evidence. Under Rule 403, evidence otherwise admissible may nonetheless 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." " 'The exclusion of evidence under the Rule 403 balancing test lies within the trial court's sound discretion and will only be disturbed where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Register*, ___ N.C. App. ___, ___, 698 S.E.2d 464, 473 (2010) (quoting *State v. Jacobs*, 363 N.C. 815, 823, 689 S.E.2d 859, 864 (2010)).

Defendant's theory of the case was that she never intended to strike Mr. Perry's finger. We cannot conclude that the trial court unreasonably determined that the probative value of the evidence of the fork assault to the charge of maiming—showing that defendant knew that stabbing at Mr. Perry's face could result in injury to his hand—outweighed any *unfair* prejudice that might stem from the jury's learning that defendant had previously attacked Mr. Perry with a fork.

II

[2] Defendant next contends that the trial court erred in denying her motion to dismiss the charge of robbery with a dangerous weapon. We review a trial court's denial of a motion to dismiss de novo to determine "whether there is substantial evidence (1) of each essential

element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence is "evidence that a reasonable mind might find adequate to support a conclusion." *State v. Hargrave*, 198 N.C. App. 579, 588, 680 S.E.2d 254, 261 (2009).

The trial court must review 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. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252, 124 S. Ct. 2818 (2004). Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. *State v. Prush*, 185 N.C. App. 472, 478, 648 S.E.2d 556, 560 (2007).

The essential elements of robbery with a dangerous weapon are: (1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened. *State v. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 605, *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382, 124 S. Ct. 475 (2003). *See also* N.C. Gen. Stat. § 14-87(a) (2009). Defendant contends that the evidence in this case showed that "defendant's assault on Mr. Perry was not made to induce him to part with his money[;] rather the State's evidence shows her demand for money to be an afterthought." We disagree.

Our Supreme Court has repeatedly explained that "when the circumstances of the alleged armed robbery reveal defendant intended to permanently deprive the owner of his property and the taking was effectuated by the use of a dangerous weapon, it makes no difference whether the intent to steal was formulated before the use of force or after it, so long as the theft and the use or threat of force can be perceived by the jury as constituting a single transaction." *State v. Fields*, 315 N.C. 191, 203, 337 S.E.2d 518, 525 (1985). *See also State v. Green*, 321 N.C. 594, 605, 365 S.E.2d 587, 594 ("[P]rovided that the theft and the force are aspects of a single transaction, it is immaterial whether the intention to commit the theft was formed before or after force was used upon the victims."), *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235, 109 S. Ct. 247 (1988).

In *Fields*, the defendant similarly argued that he only took the victim's shotgun "as an afterthought." 315 N.C. at 201, 337 S.E.2d at 524. The evidence in that case showed that the victim had gone over

to the home of his neighbors, whom he knew to be away, after he observed the defendant and his companions enter the neighbors' property. *Id.* at 193, 337 S.E.2d at 520. The victim confronted the men while holding a shotgun and ordered them to get against their truck with their hands up. *Id.* They complied, but when the victim looked away, the defendant pulled out a pistol and shot the victim five times. *Id.* The defendant then grabbed the victim's shotgun and fled. *Id.*

In rejecting the defendant's "belated intent argument," the Supreme Court reasoned that the defendant's intent to deprive the victim of his gun "appear[ed] to be so joined in time and circumstances with his use of force against [the victim] that these elements appear inseparable." *Id.* at 202, 337 S.E.2d at 525. Moreover, the Court emphasized, "mixed motives do not negate actions that point undeniably to a taking inconsistent with the owner's possessory rights." *Id.*

Here, the evidence viewed in the light most favorable to the State indicates that defendant's attack on Mr. Perry and the taking of his wallets constituted a single, continuous transaction. Defendant struck Mr. Perry multiple times with the pickaxe, after which she immediately took his wallets and money. As in *Fields*, defendant's intent to take the wallets was "so joined in time and circumstances with [her] use of force against [the victim] that these elements appear inseparable." *Id.* Thus, even if defendant's initial motive was to hurt or kill Mr. Perry, the fact that she at some point later developed the motive to rob him is immaterial.

Defendant's reliance on *State v. Richardson*, 308 N.C. 470, 302 S.E.2d 799 (1983), and *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980), is misplaced. As our Supreme Court later explained in *State v. Hope*, 317 N.C. 302, 307, 345 S.E.2d 361, 364 (1986),

> the undisputed evidence in [*Richardson*] showed that as a result of an altercation between the victim and the defendant, the defendant struck the victim with a stick. The victim threw his duffle bag containing his wallet at the defendant solely in an effort to protect himself from further injury during their fight. The evidence conclusively showed that the defendant had no intent at that time to deprive the victim of his property and did not at that time "take" the property from him. It was only later after the victim had left the scene that the defendant went through the duffle bag and discovered the wallet. At that time, well after his use of a dangerous weapon, he first formed the intent to permanently deprive the owner of his property. We pointed out that a "defendant must

> have intended to permanently deprive the owner of his property *at the time the taking occurred* to be guilty of the offense of robbery." [Richardson,] 308 N.C. at 474, 302 S.E. 2d at 802.

The Court in *Hope* emphasized that in *Richardson*, the Court had indicated that the use of the dangerous weapon by the defendant was "entirely separate from and unrelated to the taking of the victim's property by the defendant because the 'defendant's initial threats were not made to *induce* [the victim] to part with his property.' " *Id.* (quoting *Richardson*, 308 N.C. at 477, 302 S.E.2d at 803).

In *Powell*, 299 N.C. at 102, 261 S.E.2d at 119, the Supreme Court concluded that the evidence failed to show "one continuous chain of events" where the arrangement of the victim's body and the physical evidence indicated that she was murdered during a rape. Even viewing the evidence in the light most favorable to the State, the Court could only say that the evidence indicated that the defendant took the objects as an afterthought once the victim had died. *Id.*

In contrast to *Richardson* and *Powell*, the evidence in this case, viewed in the light most favorable to the State, showed a single, continuous chain of events. This argument is not a basis for reversing the trial court's denial of defendant's motion to dismiss.

Defendant, however, further argues that the State's evidence "was not positive" that the pickaxe was in defendant's possession at the time she demanded Mr. Perry's money. Mr. Perry, she points out, testified that he might have taken the pickaxe away from defendant, although he was not sure because he was in a daze.

In rejecting a similar argument, this Court stressed in *State v. Lilly*, 32 N.C. App. 467, 469, 232 S.E.2d 495, 496-97, *cert. denied*, 292 N.C. 643, 235 S.E.2d 64 (1977), that "[n]umerous decisions by this Court have concluded that the exact time relationship, in armed robbery cases, between the violence and the actual taking is unimportant as long as there is one continuing transaction amounting to armed robbery with the elements of violence and of taking so joined in time and circumstances as to be inseparable." The defendant in *Lilly* had argued, like defendant here, that he could not be convicted of robbery with a dangerous weapon since the assault with a crowbar was over by the time the defendant had any intent to rob.

This Court, in holding that the motion to dismiss was properly denied, relied on the fact that "the defendant held a dangerous weapon in his hand at the time he assaulted the victim; that he still

had the weapon hanging from his arm at the time he went into the kitchen to take food from the refrigerator; and that it was no longer necessary for him to use or threaten to use the weapon at the time of the robbery since he had already injured and subdued the victim." *Id.* at 470, 232 S.E.2d at 497. The Court then held that "[v]iewing this evidence in the light most favorable to the State, as we are required to do, we conclude that there was sufficient evidence to submit the charge of armed robbery to the jury and that the trial court properly denied the defendant's motion for nonsuit as to that charge." *Id.*

In light of *Lilly*, we hold that the trial court properly denied the motion to dismiss in this case since defendant held the pickaxe at the time she assaulted Mr. Perry and that she had already overcome and injured Mr. Perry when she demanded his wallets and took his money. The pickaxe had already served its purpose in subduing Mr. Perry at the time she robbed him. As he testified, he handed defendant his wallets because "[s]he was beating me—She had beaten me in the head and I was in a daze. I couldn't do anything but just stand there." *See also State v. Speight*, ___, N.C. App. ___, ___, ___ S.E.2d ___, ___, 2011 N.C. App. LEXIS 1224, *14-17, 2011 WL 2448519, *5-6 (21 June 2011) (rejecting defendant's reliance on *Richardson*, *Powell* and *State v. Dalton*, 122 N.C. App. 669, 471 S.E.2d 657 (1996) where defendant, after holding victim at knifepoint, cutting her hands and sexually assaulting her, took victim's personal property just before leaving); *State v. Reid*, 5 N.C. App. 424, 427, 168 S.E.2d 511, 513 (1969) (rejecting defendant's argument that at moment robbery actually occurred he did not use or threaten to use dangerous weapons because argument ignored evidence that transactions occurred as one continuous course of events, and that at moment robbery occurred weapons were unnecessary since victim had been subdued).

III

[3] Defendant next argues that the trial court erred in denying her motion to dismiss the charge of maiming without malice. N.C. Gen. Stat. § 14-29 (2009) provides: "If any person shall, on purpose and unlawfully, but without malice aforethought, cut, or slit the nose, bite or cut off the nose, or a lip or an ear, or disable any limb or member of any other person, or castrate any other person, or cut off, maim or disfigure any of the privy members of any other person, with intent to kill, maim, disfigure, disable or render impotent such person, the person so offending shall be punished as a Class E felon." Defendant contends that the evidence failed to show that she intended to strike Mr. Perry's finger with the intent to disable him.

This Court has held, and defendant acknowledges, that the intent to maim or disfigure may be inferred from an act which does, in fact, disfigure the victim, unless the presumption is rebutted by evidence to the contrary. *State v. Beasley*, 3 N.C. App. 323, 330, 164 S.E.2d 742, 747 (1968). The near severing of Mr. Perry's finger triggered that presumption.

Defendant insists that the evidence rebutted the presumption, arguing that she was striking at Mr. Perry's head, not at his fingers, and it was Mr. Perry who, in his words, "put [his] hand up to stop the licks . . . to keep her from busting—killing [him]." The evidence showed, however, that defendant kept swinging even after Mr. Perry put his hands up to defend himself. There is no evidence to rebut the presumption that, while defendant was swinging at Mr. Perry's head *and* hands, she did not intend to maim or disfigure him. Moreover, she knew from the time she assaulted Mr. Perry with the fork that if he put his hands up and she kept swinging, she could easily injure his hand or fingers.

The evidence viewed in the light most favorable to the State shows that defendant could have stopped swinging, but instead she kept swinging knowing that she could strike his hand and fingers. In those moments, Mr. Perry's hands and fingers, along with his head, became the object of the assault. We, therefore, hold the trial court did not err in denying the motion to dismiss the maiming without malice charge.

IV

[4] Defendant next argues that the trial court erred in refusing to instruct the jury on the issue of voluntary intoxication. " 'Before the trial court will be required to instruct on voluntary intoxication, defendant must produce substantial evidence which would support a conclusion by the trial court that at the time of the crime for which he is being tried defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming [the requisite intent to commit the crime.] In the absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.' " *State v. Keitt*, 153 N.C. App. 671, 676-77, 571 S.E.2d 35, 39 (2002) (quoting *State v. Kornegay*, 149 N.C. App. 390, 395, 562 S.E.2d 541, 545 (2002)). " 'When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to the defendant.' " *Id.* at 677,

571 S.E.2d at 39 (quoting *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988)).

Our Supreme Court has emphasized that an instruction on voluntary intoxication is not required in every case in which a defendant claims that he committed a crime after consuming intoxicating beverages or controlled substances. *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992). Evidence of "mere intoxication" is not enough to meet a defendant's burden of production. *Mash*, 323 N.C. at 346, 372 S.E.2d at 536.

In *Baldwin*, the Court held that evidence that the defendant drank " 'about five or six' beers and consumed an indeterminate amount of marijuana and cocaine at some time earlier in the day" was insufficient to show that the defendant was so intoxicated that he was incapable of forming the necessary intent. 330 N.C. at 463, 412 S.E.2d at 41. *See also Kornegay*, 149 N.C. App. at 395-96, 562 S.E.2d at 545 (evidence that defendant was " 'drunk and high from smoking [cocaine]' and that he was 'coming down' from the night before" was insufficient).

Here, Mr. Perry testified that he "had seen [defendant] coming off of crack cocaine before," and on the day in question, he "believe[d] you know . . . . [a]ll nervous and everything." He also said that she "seemed intoxicated" when she was upset about his refusing to drive her into town. According to Mr. Perry, defendant and Ms. Graham "claimed that they were taking a bunch of Xanax that day." Ms. Graham testified that defendant was drinking in the afternoon prior to the attack. Defendant herself testified that she had drunk "[t]wo big beers" and had taken a Xanax. When asked whether the two beers would make her intoxicated, she answered, "I could feel it, yeah. I wasn't drunk, falling down drunk or anything." She also denied having smoked crack.

This evidence shows that defendant had drunk two beers and "could feel it," had taken Xanax, and may have smoked crack cocaine. However, defendant herself said she was not drunk and had not smoked crack. *See Baldwin*, 330 N.C. at 463, 412 S.E.2d at 41 (in determining defendant did not produce sufficient evidence to support instruction on voluntary intoxication, noting that "[w]hen questioned concerning his state of intoxication at the time he entered the victim's home, defendant replied, 'I wasn't high. I was coming down off of it' "). Viewing the evidence in the light most favorable to defendant, we conclude that she did not produce sufficient evidence to show that at

the time of the crimes, her mind was so completely intoxicated that she was utterly incapable of forming the necessary intent to commit the crimes.

V

[5] Defendant next contends that the trial court erred in refusing to instruct the jury on the lesser included offense of misdemeanor assault with a deadly weapon. The trial court did instruct on the lesser included offense of felony assault inflicting serious injury, but the jury found defendant guilty of the greater offense. Defendant argues that she was also entitled to an instruction on misdemeanor assault with a deadly weapon because a jury could find that Mr. Perry's injuries were not serious.

"A defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *State v. Tillery*, 186 N.C. App. 447, 450, 651 S.E.2d 291, 294 (2007) (internal quotation marks omitted). " '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.' " *Id.* (quoting *State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000)). The determining factor is the presence of evidence to support a conviction of the lesser included offense. *Id.*

This Court has held that the only difference in what the State must prove for the offense of misdemeanor assault with a deadly weapon and felony assault with a deadly weapon with intent to kill is the element of intent to kill. *State v. Riley*, 159 N.C. App. 546, 553-54, 583 S.E.2d 379, 385 (2003). Thus, by extension, the difference between misdemeanor assault with a deadly weapon and AWDWIKISI is (1) intent to kill and (2) infliction of serious injury.

In *Riley*, this Court held that "[w]here all the evidence tends to show a shooting with a deadly weapon with the intent to kill, the trial court does not err in refusing to submit the lesser included offense of assault with a deadly weapon." *Id.* at 554, 583 S.E.2d at 385. Accordingly, here, if all the evidence tended to show an intent to kill and infliction of serious injury, the trial court did not err in refusing to submit the charge of assault with a deadly weapon.

Defendant contends that because reasonable minds could disagree as to the seriousness of Mr. Perry's injuries, the trial court erred

in declining to instruct on the lesser offense. As this Court has explained,

> [T]he serious injury element of [N.C. Gen. Stat.] § 14-32 means a physical or bodily injury. The courts of this [S]tate have declined to define serious injury for purposes of assault prosecutions other than stating that the term means physical or bodily injury resulting from an assault, and that further definition seems neither wise nor desirable. Whether a serious injury has been inflicted is a factual determination within the province of the jury. Among the factors that have been deemed relevant in determining whether serious injury has been inflicted are: (1) pain and suffering; (2) loss of blood; (3) hospitalization; and (4) time lost from work.

State v. Walker, ___ N.C. App. ___, ___, 694 S.E.2d 484, 494-95 (2010) (internal citations and quotation marks omitted).

Given the evidence of Mr. Perry's severe pain, the blood in the house, the 53 staples used to close the lacerations to his head, the severed finger, the near severing of his finger, and the loss of the use of his finger, we conclude that all of the evidence clearly and positively tended to show a serious injury. Furthermore, defendant makes no argument in her brief regarding whether all the evidence clearly and positively had a tendency to support the element of intent to kill. Because the evidence squarely showed serious injury and defendant does not address the intent to kill element, we hold that the trial court did not err in declining to instruct on misdemeanor assault with a deadly weapon.

VI

[6] Defendant also argues that the trial court erred in refusing to charge the jury on common law robbery, a lesser included offense of robbery with a dangerous weapon. Common law robbery is "the felonious taking of money or goods of any value from the person of another or in his presence against his will, by violence or putting him in fear." *State v. McNeely*, 244 N.C. 737, 741, 94 S.E.2d 853, 856 (1956).

The difference between common law robbery and robbery with a dangerous weapon is the use of a dangerous weapon in the commission of the robbery. *State v. Ryder*, 196 N.C. App. 56, 65, 674 S.E.2d 805, 811 (2009). Where all the evidence supports the instruction on robbery with a dangerous weapon, and there is no evidence that the defendant engaged in an offense tantamount to common law robbery, an instruction on common law robbery is not required. *State v. Martin*, 29 N.C. App. 17, 19, 222 S.E.2d 718, 720 (1976).

Defendant contends that a reasonable juror could have found that the pickaxe was not used to commit the robbery. However, as noted above, the evidence clearly and positively showed one continuous transaction, and it showed that the pickaxe was used to accomplish the taking of the property regardless whether the taking was defendant's original intent. Thus, we hold the trial court did not err in declining to give the common law robbery instruction.

VII

[7] Defendant further contends that the trial court committed plain error in instructing the jury that a pickaxe is a deadly weapon. A dangerous or deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm. *State v. Torain*, 316 N.C. 111, 120, 340 S.E.2d 465, 470, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77, 107 S. Ct. 133 (1986).

"It has long been the law of this state that '[w]here the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . is one of law, and the Court must take the responsibility of so declaring.' " *Id.* at 119, 340 S.E.2d at 470 (emphasis omitted) (quoting *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924)). "Only 'where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce such results, its allegedly deadly character is one of fact to be determined by the jury.' " *Id.* at 120, 340 S.E.2d at 470 (quoting *State v. Joyner*, 295 N.C. 55, 64-65, 243 S.E.2d 367, 373 (1978)).

"There is no 'mechanical definition' for 'the distinction between a weapon which is deadly or dangerous per se and one which may or may not be deadly or dangerous depending upon the circumstances.' " *State v. Morgan*, 156 N.C. App. 523, 530, 577 S.E.2d 380, 386 (quoting *Torain*, 316 N.C. at 121, 340 S.E.2d at 471), *disc. review denied*, 357 N.C. 254, 583 S.E.2d 43 (2003). " '[T]he evidence in each case determines whether a certain kind of [weapon] is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death.' " *Id.* (quoting *Torain*, 316 N.C. at 121, 340 S.E.2d at 471).

In *Morgan*, the defendant approached one of the victims, Marshall, "from his 'blind side' " and struck him hard enough on the head with a wine bottle that it broke upon impact. *Id.* The blows caused cuts to Marshall's head requiring staples and stitches to close the wounds. *Id.* The defendant continued to strike both Marshall and

another victim, Morgan, with the broken bottle, cutting both in the head and face and Morgan on his arms, legs, and back. *Id.* Ultimately, the Court held that "the evidence amply supported the trial court's instruction that a broken wine bottle is a dangerous and deadly weapon as a matter of law because, 'in the circumstances of its use by defendant here, it was likely to produce death or great bodily harm.' " *Id.* (quoting *Torain*, 316 N.C. at 121-22, 340 S.E.2d at 471).

The facts of this case are similar to those of *Morgan*. Here, the evidence showed the pickaxe handle was about three feet long, and the pickaxe weighed nine or 10 pounds. Defendant swung the pickaxe approximately eight times, causing cuts to Mr. Perry's head that required 53 staples. She also slashed his middle finger, leaving it hanging only by a piece of skin. In view of these facts, we conclude that the pickaxe and the manner of its use were " 'of such character as to admit of but one conclusion' "—that it was a deadly weapon—and the trial court did not err in so instructing the jury. *Torain*, 316 N.C. at 119, 340 S.E.2d at 470 (quoting *Smith*, 187 N.C. at 470, 121 S.E at 737).

VIII

[8] Lastly, defendant argues that the trial court violated her right to be free from double jeopardy when it sentenced her for both maiming without malice and AWDWIKISI because, she claims, this amounted to multiple punishments for the same offense. Defendant admits that she did not raise this issue at trial but relies on *State v. Hargett*, 157 N.C. App. 90, 577 S.E.2d 703 (2003), for the proposition that this issue is nonetheless preserved for review. In *Hargett*, this Court held that the defendant was not required to have raised the double jeopardy issue below since it was a sentencing error. *Id.* at 92, 577 S.E.2d at 705.

Hargett, however, is inconsistent with numerous Supreme Court cases holding that a double jeopardy argument cannot be raised for the first time on appeal. *See, e.g.*, *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) ("To the extent defendant relies on constitutional double jeopardy principles, we agree that his argument is not preserved because [c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." (internal quotation marks omitted)); *State v. Madric*, 328 N.C. 223, 231, 400 S.E.2d 31, 36 (1991) ("The defendant candidly concedes . . . that he did not raise any double jeopardy issue at trial. Therefore, this issue has been waived."). Because we are bound to follow the Supreme Court, we hold that defendant's argument is not preserved.

Furthermore, although defendant asks us to exercise Rule 2, we decline in our discretion to do so.

No error.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. ALBERT GEORGE KHOURI, JR.

No. COA10-1030

(Filed 16 August 2011)

1. Sexual offenses—first-degree sexual offense—indecent liberties—date of offenses—insufficient evidence—motion to dismiss improperly denied

The trial court erred in a first-degree sexual offense and indecent liberties case by denying defendant's motion to dismiss for insufficient evidence. The State did not present sufficient evidence to show that the alleged sexual incidents occurred in 2000, as indicated on the indictment, and there was no indication in the record that the State made any attempt to amend the indictment to include the proper date range.

2. Sexual offenses—sexual offense of person who is 13, 14, or 15 years old—indecent liberties—sufficient evidence—motion to dismiss properly allowed

The trial court did not err in a statutory sexual offense of person who is 13, 14, or 15 years old and indecent liberties with a child case by denying defendant's motion to dismiss for insufficient evidence. There was substantial evidence that defendant committed sexual offenses against the victim and took indecent liberties with her even after he began having vaginal intercourse with her.

3. Evidence—prior crimes or bad acts—sexual offenses—common plan or scheme—temporal proximity

The trial court did not abuse its discretion in a sexual offenses case by admitting testimony pursuant to N.C.G.S. § 8C-1, Rules 404(b) and 403 regarding sexual contact between defendant and the prosecuting victim's cousin. There were sufficient similarities between the acts and the acts occurred within suffi-

cient temporal proximity to be admissible under Rule 404(b). Furthermore, the testimony was not more prejudicial than probative and was properly received for the purpose of showing a common plan or scheme.

4. Evidence—expert testimony—not commentary on victim's credibility—no plain error

The trial court did not commit plain error in a sexual offenses case by admitting testimony of an expert witness regarding the characteristics of sexually abused children. The witness's testimony did not go to the victim's credibility.

5. Evidence—Rape Shield Act—not implicated in two instances—testimony of victim's prior sexual activity properly excluded

The trial court did not err in a sexual offenses case by excluding testimony by defense witnesses that the victim had made inconsistent statements. The Rape Shield Act was not implicated in two of the rulings defendant objected to and the trial court properly excluded testimony under the Rape Shield Act concerning the possible paternity of the victim's child.

Appeal by defendant from judgments entered on or about 12 March 2010 by Judge Alan Z. Thornburg in Superior Court, Avery County. Heard in the Court of Appeals 9 February 2011.

Attorney General Roy A. Cooper, III, by Assistant Attorney General R. Kirk Randleman, for the State.

Appellate Defender Staples S. Hughes for defendant-appellant.[1]

STROUD, Judge.

Albert George Khouri, Jr. ("defendant") appeals from six judgments entered following jury verdicts finding him guilty of two counts of first-degree sexual offense, six counts of indecent liberties with a child, three counts of statutory rape, and three counts of statutory sexual offense. We conclude that one judgment should be vacated, but find no error in the remaining five judgments.

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1. Attorney Reita P. Pendry signed defendant's brief on appeal, but on 4 March 2011, this Court granted the Appellate Defender's motion to withdraw Ms. Pendry for health reasons and substitute the Appellate Defender as defendant's counsel.

I. Background

On 27 April 2009, defendant in six separate indictments was indicted on two counts of first-degree statutory sexual offense for engaging in sexual acts with T.B. ("Tina")[2], his granddaughter, in 2000 and 2001 when Tina was under age 13; six counts of indecent liberties with a child under the age of 16 for acts against Tina between 2000 and 2005; three counts of statutory rape of a person who is 13, 14, or 15 years of age for having vaginal intercourse with Tina between 2003 and 2005; and four counts of statutory sexual offense of a person who is 13, 14, or 15 years of age for engaging in sexual acts with Tina between 2002 and 2005. Defendant was tried on these charges at the 8 March 2010 Criminal Session of Superior Court, Avery County. The State's evidence tended to show that the victim, Tina was born on 30 March 1989 and was 20 years old at the time of trial. In the fall of 2000, after a dispute with her mother's boyfriend, Tina moved in with her grandparents, Carolyn Khouri and defendant. Not long after, in the spring of 2001, Tina went on a trip with her grandparents, and her great-grandmother to a casino in Pigeon Forge, Tennessee. At trial, Carolyn Khouri testified that the trip was actually to a motel and casino in Cherokee, North Carolina. Regardless of the location, while on the trip Tina's grandmother and great-grandmother were in the casino, when defendant started a conversation with Tina about boys and whether she allowed them to touch her private parts. Tina and defendant were alone in the bedroom and defendant began to touch Tina's vagina. After the touching, defendant and Tina, then got in a position where defendant had his mouth on Tina's vagina and his penis in her mouth. Following the sexual interaction, they took showers and joined her grandmother and great-grandmother for dinner.

After returning to her grandparents' house in Beech Mountain, North Carolina, Tina continued performing oral sex on defendant a few times a week. Each episode usually involved defendant giving Tina a certain look, going over to her, touching her vagina, receiving oral sex, and then ejaculating on her stomach. The incidents generally occurred in defendant's bedroom while her grandmother was at work. Defendant told Tina not to tell anyone about the events.

About a year later, when Tina was twelve, she told her aunt and uncle about the situation. They did not call the police or social ser-

2. We will refer to the victim T.B. by the pseudonym Tina, to protect the victim's identity and for ease of reading.

vices, but told Tina's father. Tina subsequently moved in with her father for a period of time.

Eventually, around the age of thirteen, Tina moved back in with her grandparents. Defendant resumed the sexual contact with Tina. He would touch her vagina, while she would "rub[] his penis" and perform oral sex on him. This happened more times than Tina could count.

Around the age of fourteen, Tina began her menstrual cycle and defendant began having unprotected vaginal intercourse with her. Tina testified that her relationship with defendant was mutual because she did not know any better and at times defendant told her that she was special. The intercourse started about two times a week, but progressed in frequency until it occurred up to twice a day. This persisted until Tina was eighteen years old. Tina again, never told anyone about what was going on.

During her junior year in high school, Tina met her boyfriend and future husband, William Bryant. Tina moved in with him sometime during her senior year. Soon thereafter, she discovered that she was pregnant and was unsure whether the father was defendant or her boyfriend. She discussed it with defendant and they decided she should have an abortion. Her grandparents took her to Greensboro to have the procedure. In December 2007, Tina and Bryant moved to Tampa, Florida. In August 2008, the two had a baby girl. Tina eventually told defendant that she forgave defendant, but if she ever heard of him touching another child then she would immediately report him to the police.

In 2009, Tina learned that defendant had been "inappropriately" touching his granddaughter, Tina's eleven year old cousin, J.K. ("Jane").[3] Tina made a report to law enforcement in March 2009 about her encounters with defendant. She told law enforcement that defendant was uncircumcised and had dark spots on his scrotum. Detectives executed a search warrant on defendant and took pictures showing the characteristics described by Tina. At trial, Jane testified that she visited with defendant in his home and he touched her private area three or four times. He would place his hand under her pants and rub her private parts while she was sitting on his lap in the living room. Defendant told her if she "felt uncomfortable or anything" about him rubbing her "to just tell him that [she] was too old for it." Jane testified that these incidents with defendant touching her happened while

3. A pseudonym.

other people were in the living room, watching television. She eventually told her mother about the incidents.

During trial the State presented several witnesses. Debra Moore, a clinical psychologist with a specialty in child sexual abuse, testified after reviewing Tina's statements and listening to her testify. Dr. Moore testified that Tina's statements and emotional responses were consistent with sexually abused children. Jennifer Campbell, a child protective investigator with the Hillsborough County Sheriff's Department in Tampa, Florida, testified that she interviewed Tina and Tina told her about the incidents with defendant. Detective Troy Cook with the Avery County Sheriff's Department testified that he received a copy of Tina's interview from Ms. Campbell, as well as a typed statement from Tina. Detective Cook performed the search warrant on defendant and subsequently arrested defendant.

Tina's aunt, Rene Khouri, formerly married to defendant's son, Robert Khouri, testified that Tina told her about the incidents and that she wanted to call the police. Rene eventually went to Tina's grandmother, Carolyn Khouri's office with Robert, Tina, and Stephen Khouri, to tell her about the accusation. They then went to defendant's workplace and confronted him, but he was "extremely defensive" and made "excuses[.]" Jane also told Rene about the incidents in which defendant touched her and at that point Rene called the police. Robert Khouri also testified that after hearing about the incidents with Tina he confronted defendant, who gave what appeared to him to be reasonable explanations for the accusations and caused Robert to question whether Tina was telling the truth. Defendant testified in his own defense, stating that he had never inappropriately touched Tina and did not engage in any "sex acts with [his] granddaughter [Tina]" or his granddaughter Jane.

On 12 March 2010, a jury found defendant guilty on all counts. The trial court sentenced defendant to six consecutive sentences totaling a minimum of 1296 months to a maximum of 1614 months of imprisonment. The trial court also ordered defendant to register as a sex offender and participate in satellite based monitoring for life. Defendant gave notice of appeal in open court. On appeal defendant argues that (1) the trial court error in denying his motions to dismiss for insufficiency of the evidence; (2) the trial court erred in admitting evidence of his alleged sexual conduct with Jane; (3) the trial court committed plain error in admitting the testimony of the psychologist; and (4) the trial court erred in limiting defendant's examination of certain defense witnesses.

II. Analysis

A. Sufficiency of the evidence

Defendant first contends that the trial court erred in denying his motions to dismiss. In support of his motions, defendant argues that the evidence presented by the State was insufficient to permit the jury to find guilt beyond a reasonable doubt. We agree in part.

A motion to dismiss for lack of sufficient evidence is reviewed by this Court to determine "whether the State presented substantial evidence in support of each element of the charged offense." *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005) (citation and quotation marks omitted). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. McNeill*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (citation and quotation marks omitted). In determining the sufficiency of the evidence, this Court views all evidence in the light most favorable to the State. *Id.* Even further, the inquiry explores the sufficiency of the evidence, but not its weight, which is a question for the jury. *Id.* Therefore, "if there is substantial evidence-whether direct, circumstantial, or both-to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Id.* (brackets, citations, and quotation marks omitted).

Defendant moved at the close of the State's evidence for the trial court to dismiss all the counts for insufficient evidence. The trial court denied the motion and defendant renewed his motion at the end of all evidence, which was again denied by the trial court. Each of the indictments against defendant includes a combination of two or three of the following charges: (1) first-degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4; (2) indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1; or (3) statutory rape or sexual offense of a person who is 13, 14, or 15 years old in violation of N.C. Gen. Stat. § 14-27.7A.

To convict a defendant of first-degree sexual offense under N.C. Gen. Stat. § 14-27.4, the State must prove that: "(1) the defendant engaged in a 'sexual act,' (2) the victim was at the time of the act [thirteen] years old or less, and (3) the defendant was at the time four or more years older than the victim." *State v. Ludlum*, 303 N.C. 666,

667, 281 S.E.2d 159, 160 (1981). For a conviction of indecent liberties with a child, the State must prove that:

> (1) the defendant was at least 16 years of age; (2) he was five years older than his victim; (3) he willfully took or attempted to take an indecent liberty with the victim; (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred; and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.

State v. Thaggard, 168 N.C. App. 263, 282, 608 S.E.2d 774, 786-87 (2005) (citations omitted); N.C. Gen. Stat. § 202.1(a). Finally, for the charges of statutory rape or sexual offense, the State must prove that "defendant engage[d] in vaginal intercourse or a sexual act with another person who [was] 13, 14, or 15 years old and the defendant [was] at least six years older than the person[.]" N.C. Gen. Stat. § 14-27.7A(a).

1. Sufficiency of the evidence for 09-CRS-290

[1] As to the first indictment, 09-CRS-290, for first-degree sexual offense and indecent liberties occurring between 30 March 2000 and 31 December 2000, defendant contends that the State did not present sufficient evidence of the crime and in the alternative Avery County did not have jurisdiction or venue over the matter. Defendant first argues that the State did not present sufficient evidence to show that the alleged sexual incidents occurred in 2000. At trial, the State presented evidence that the first sexual offense occurred while Tina was on vacation with her grandparents and great-grandmother in Pigeon Forge, Tennessee, in the spring of 2001. There is no evidence that the trip took place in 2000. Tina and Carolyn Khouri both testified that the trip took place in early 2001.

We have stated that "[t]he purpose of an indictment is to give a defendant notice of the crime for which he is being charged." *State v. Riffe*, 191 N.C. App. 86, 93, 661 S.E.2d 899, 905 (2008) (quotation marks and citation omitted). An indictment may be amended where the date of the crime is not an essential element of the offense. *State v. Whitman*, 179 N.C. App. 657, 665, 635 S.E.2d 906, 911 (2006). However, there is no indication in the record that the State made any attempt to amend indictment 09-CRS-290, to include the proper date range for the alleged crimes on the vacation to the casino, the judgment in 09-CRS-290, for first-degree sexual offense with a female under the age of 13 in violation of N.C. Gen. Stat. § 14-27.4, and indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1, between 30 March 2000 and 31 December 2000. Accordingly, these

charges must be vacated for lack of substantial evidence that the crimes occurred in 2000. As we have concluded that this judgment must be vacated, we need not address defendant's arguments as to jurisdiction or venue.

2. Sufficiency of the evidence for defendant's remaining charges

[2] Defendant also contends that the trial court erred in denying his motion to dismiss the four charges of statutory sexual offense of person who is 13, 14, or 15 years old and the four charges of indecent liberties with a child in 09-CRS-292, 09-CRS-293, 09-CRS-50288, and 09-CRS-50289 for insufficiency of the evidence. Defendant's main contention regarding these indictments is that allegedly Tina testified that around the age of fourteen, when the instances of vaginal intercourse began, all other incidents of touching or other sexual acts ceased, and as a result the additional charges of statutory sexual offense and indecent liberties, on top of the statutory rape charges, should be vacated for lack of substantial evidence. We disagree.

Defendant contends that according to Tina's testimony, once vaginal intercourse began, all other acts of touching or sexual conduct stopped, meaning that the elements of indecent liberties and statutory sexual offense were not met. The charge of indecent liberties is not a lesser included offense of statutory rape, as it does not require touching. *State v. Etheridge*, 319 N.C. 34, 50-51, 352 S.E.2d 673, 683 (1987). Our Supreme Court has held:

> A sexual encounter encompasses a number of independent but related actions, any and all of which may be undertaken for the purpose of arousal. Here the penetration of the victim, while perhaps defendant's ultimate goal, was not the only event in the sequence which could be found to have been performed for his gratification. While we do not care to speculate upon all possible motivations involved in human sexual behavior, we hold that the jury could properly infer that defendant ordered his children to undress, demanded that they assume submissive, sexually suggestive positions, and brandished his penis before them in their naked and helpless condition for the purpose of arousing or gratifying his sexual desire.

Id. at 49-50, 352 S.E.2d at 682-83.

A single act can warrant convictions for multiple, similar crimes, where the crimes are legally separate. *Id.* at 51, 352 S.E.2d at 683. Here, the State presented evidence that defendant initiated acts of

touching and oral sex with Tina around the ages of eleven or twelve and the acts occurred regularly following the initial occurrence. The State also presented evidence that defendant began having vaginal intercourse with Tina when she was around the age of fourteen. Tina did not testify that the instances of oral sex ceased once intercourse began, as defendant would have us believe, but merely testified as to the progression in the extent of sexual contact which occurred when she was 14; defendant added vaginal intercourse to the other sexual acts, which he had already routinely been committing upon her. Thus, the jury could reasonably infer that the sexual acts that began at the ages of eleven or twelve continued on occasion after the instances of vaginal intercourse began. Also, the jury could infer that defendant took indecent liberties with Tina in the scope of their many sexual encounters. Consequently, there was substantial evidence that defendant committed sexual offenses against Tina and took indecent liberties with her even after he began having vaginal intercourse with her. The trial court did not err in denying defendant's motions to dismiss in regards to judgments 09-CRS-291, 09-CRS-292, 09-CRS-293, 09-CRS-50288, and 09-CRS-50289.

B. Admission of evidence

[3] In his second argument, defendant contends that the trial court abused its discretion in admitting testimony pursuant to N.C. Gen. Stat. § 8C-1, Rules 404(b) and 403 regarding sexual contact between Jane and defendant. The State called Jane, Tina's cousin, to testify about the sexual contact to show defendant's common plan or scheme, but defendant argues that there was not enough of a connection between the alleged crimes to meet the requirements of Rule 404(b) and the testimony was more prejudicial than probative under Rule 403. Based on the following reasons, we disagree.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009) provides that

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

We have noted that "Rule 404(b) evidence, however, should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002).

Because of "the dangerous tendency of Rule 404(b) evidence to mislead and raise a legally spurious presumption of guilt . . . its admissibility should be subjected to strict scrutiny by the courts." *Id.* (citation, quotation marks, and brackets omitted). In subjecting Rule 404(b) evidence to strict scrutiny, we must assure that the evidence meets the two constraints of "similarity and temporal proximity." *State v. Bowman*, 188 N.C. App. 635, 640, 656 S.E.2d 638, 644 (2008) (citation and quotation marks omitted). It must also "be relevant to the currently alleged crime." *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2007); N.C. Gen. Stat. § 8C-1, Rules 401 & 402 (2009). Following a determination of the admissibility of evidence under Rule 404(b), the trial court must evaluate whether the possibility of unfair prejudice substantially outweighs the probative value of the evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 403 (2009). *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005). "That determination is within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision." *Id.* at 800-01, 611 S.E.2d at 209 (citation and quotation marks omitted).

Defendant's alleged touching of Jane could be considered relevant to the sexual acts at issue in Tina's case under Rule 401. *See* N.C. Gen. Stat. § 8C-1, Rule 401. "However, if the only relevancy is to show defendant's character or his disposition to commit an offense of the nature of the one charged, it is inadmissible under Rule 404(b)." *Carpenter*, 361 N.C. at 389, 646 S.E.2d at 110 (citations and quotation marks omitted). Accordingly, we must move to the Rule 404(b) analysis.

Defendant argues that there is not enough connection between the alleged crimes to pass Rule 404(b) analysis. Defendant notes that the "acts must be sufficiently similar as to logically establish a common plan or scheme to commit the offense charged, not merely to show the defendant's character or propensity to commit a like crime." *State v. Willis*, 136 N.C. App. 820, 823, 526 S.E.2d 191, 193 (2000) (citation omitted). Also, for the acts to be "similar" there must be "some unusual facts present or particularly similar acts[.]" *State v. Bush*, 164 N.C. App. 254, 261, 595 S.E.2d 715, 720 (2004) (citation omitted). But, we also noted that "[t]he similarities need not be unique and bizarre." *Stevenson*, 169 N.C. App. at 800, 611 S.E.2d at 209 (citation and quotation marks omitted).

Defendant's main contention is that the alleged similar acts are not sufficiently alike because the acts against Tina occurred in private while the acts against Jane occurred in plain view. Defendant's

argument points to one of the few distinctions among the several similarities in both Jane's and Tina's testimony: both incidents occurred while the victims were in the care of defendant, their grandfather; the victims were around the same age when defendant initiated his conduct; both occurred more than one time; and although, defendant's conduct with Jane did not occur over several years or escalate to oral sex or vaginal penetration like Tina, both initiated with defendant talking to them about whether they were old enough for him to touch their private parts and then defendant touching them. When analyzing 404(b) evidence, our Supreme Court "has been liberal in allowing evidence of similar sex offenses in trials on sexual crime charges." *State v. McCarty*, 326 N.C. 782, 785, 392 S.E.2d 359, 361 (1990) (citing *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987)). Therefore, under a liberal view of the evidence presented, the trial court did not err in finding sufficient similarities between the acts to be admissible under Rule 404(b).

Nevertheless, we must also address the issue of "temporal proximity." *Bowman*, 188 N.C. App. at 640, 656 S.E.2d at 644. The trial court specifically noted that the acts were not too remote in time from each other. Tina testified that the acts committed against her started in 2001 when she was eleven or twelve and continued until she was eighteen in 2007. Jane testified that the sexual acts committed against her occurred when she was around the ages of nine to ten, from 2007 until 2008. Also, at the time of trial it had only been nine years since the initial sexual acts by defendant to Tina. It appears that once the acts discontinued with Tina upon turning eighteen, defendant initiated new contact with Jane. We have stated that "[w]hen similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan." *State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989). Consequently, the sexual acts against Tina and Jane occurred within sufficient "temporal proximity" to be admissible under Rule 404(b).

Finally, defendant argues that the trial court's allowance of Jane's testimony was more prejudicial than probative under Rule 403, as "the jury would surely be swayed by the improper evidence of [Jane] to see [defendant] as a sexual deviant." However, the State argues that the trial court did not abuse its discretion in allowing Jane's testimony. Here, the trial court admitted Jane's testimony for the limited purpose of showing that defendant had a common plan or scheme. The trial court correctly gave the jury a limiting instruction at the

time of Jane's testimony and prior to jury deliberations. We also note that evidence regarding defendant's actions with Jane was presented to explain Tina's delay in reporting her own sexual abuse to the police. She had previously told defendant that she forgave him but that she would report his abuse if she ever learned that he had touched another child; she did report defendant's abuse after learning that he had begun sexually abusing Jane. As a result, we cannot find that the trial court abused its discretion in concluding that Jane's testimony was not more prejudicial than probative. Moreover, Jane's testimony did not violate Rule 404(b) and was properly received for the purpose of showing a common plan or scheme.

C. Expert testimony

[4] Defendant's third issue on appeal is whether or not the trial court erred in admitting testimony of an expert witness regarding the characteristics of sexually abused children. Defendant argues that the State's expert witness testified about the substance of Tina's statements to police and her demeanor on the stand, instead of the symptoms or behavioral problems identified in Tina. We disagree.

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, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(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. 2d 795 (2003). In analyzing under plain error review, a defendant is entitled to reversal "only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002). Defendant failed to object to the expert's testimony regarding the characteristics of sexually abused children; accordingly, we apply a plain error analysis to defendant's argument. *See* N.C.R. App. P. 10(c)(4).

At trial, the State called Dr. Debra Moore, a clinical psychologist with a specialty in child sexual abuse, to testify based on Tina's testimony and her review of Tina's statement. Dr. Moore had never met Tina prior to viewing her testimony at trial, but she had reviewed Tina's statement to police. Defendant does not argue that Dr. Moore was not qualified as an expert, but that Dr. Moore's testimony went to the credibility of Tina. An expert witness may not testify as to the credibility of a witness. *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986). Nonetheless, "an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002).

Defendant improperly attempts to rely on the decisions of, *State v. Delsanto*, 172 N.C. App. 42, 615 S.E.2d 870 (2005) and *Bush*, 164 N.C. App. 254, 595 S.E.2d 715 for the contention that an expert witness may not testify that a victim's statements and demeanor were consistent with child sexual abuse because that testimony would go to the credibility of the victim/witness. However, *Bush* and *Delsanto* stated that "[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *Delsanto*, 172 N.C. App. at 45, 615 S.E.2d at 872 (quoting *Bush*, 164 N.C. App. at 258, 595 S.E.2d at 718) (emphasis in original). Here, Dr. Moore did not testify that Tina was *in fact* sexually abused, but merely that she exhibited some classic signs of a sexually abused child. Dr. Moore testified, in relevant part:

> [T]he statements and my observation of her testimony today showed me that there—that there is a lot of confusing not in the details so much as just in her emotions. What I—what I noticed was that there were times when she appeared to be trying to hold back emotional display, lips quivering, those kinds of things and you know this is—making this sort of allegation if it is true and facing one's abuser is a very difficult and painful thing to do and sometimes what victims will do is sort of shut off emotions and become rather stoic looking as a defense, psychological defense against having to be in this situation. Just sort of turn it off momentarily and I witnessed that about her behavior on the stand.

Dr. Moore clearly notes in her testimony that she was not testifying that Tina was definitely sexually abused, but uses the language,

"this sort of allegation if it is true[,]" to show that these characteristics are typical of a sexually abused child. Dr. Moore's testimony did not go to Tina's credibility and therefore the trial court's allowance of Dr. Moore's testimony did not amount to plain error.

D. Objections to testimony of defense witnesses

[5] Defendant's final argument is that the trial court erred in excluding testimony by defense witnesses that Tina had made inconsistent statements about the questioned paternity of the child she aborted, about the identity of her abuser, and about her motivation in accusing defendant. Defendant argues that the State improperly used the Rape Shield Statute to prevent defense witnesses from testifying regarding certain topics, on more than one occasion. We disagree.

Defendant argues that on three occasions the trial court disallowed his line of questioning of defense witnesses based upon the Rape Shield Statute. The so-called "Rape Shield Statute" is codified under N.C. Gen. Stat. § 8C-1, Rule 412 and states, in pertinent part, "the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior . . . [i]s evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant[.]" N.C. Gen. Stat. § 8C-1, Rules 412(b)(2) (2009). However, the Rape Shield Statute does not preclude questions about prior inconsistent statements. *State v. Younger*, 306 N.C. 692, 697, 295 S.E.2d 453, 456 (1982).

1. Carolyn Khouri's testimony regarding "the great-grandfather"

The first testimony objected to by the State involved an exchange between defense counsel and Carolyn Khouri regarding what happened after several family members had confronted defendant with accusations of abusing Tina when she was about 12 years old. Tina went to stay with another family member for about a week and then returned to defendant's home. The line of questioning continued as follows:

> [DEFENSE COUNSEL:] And then did [TINA] return to your [sic] all's home?
>
> [CAROLYN KHOURI:] Uh-hum said she was sorry. She made a mistake. It was the great-grandfather—-the other grandfather that molested her and she told. . . [.]
>
> THE STATE: Objection, Your Honor.
>
> THE COURT: Sustained. Strike that. Ladies and gentlemen, don't consider that answer.

It is apparent from the context that the State objected to Ms. Khouri's response because it was unresponsive to the question. An opponent may not object to an answer just because it is unresponsive, but must make a "motion to strike the answer or its objectionable parts." *State v. Beam*, 45 N.C. App. 82, 84, 262 S.E.2d 350, 352 (1980). Even if the answer is objected to, the opponent, generally, must make a motion to strike. *Id.* Here, the trial court immediately sustained the State's objection and had the answer stricken. It appears that the trial court understood the State's objection, that the answer was unresponsive, and merely had the answer stricken before the State could make a motion. Consequently, the answer was correctly stricken as unresponsive and the Rape Shield Statute had no relevance to this ruling.

2. Chip Khouri's testimony regarding his brother's statement

Defendant next alleges that the trial court erred in sustaining an objection concerning Chip Khouri's testimony regarding what Tina said his brother, Tina's father, had told her. The pertinent testimony and trial court's ruling are as follows:

> [CHIP KHOURI:] . . . So according to [Tina] my brother said or [Tina] told me that my brother told her to make up these accusations and it would scare my father. . . [.]
>
> THE STATE: Objection, Your Honor.
>
> THE COURT: Sustained. Strike what the brother said.
>
> [DEFENSE COUNSEL:] Now, I'm asking you what [Tina] told you?
>
> [CHIP KHOURI:] That's what [Tina] told me. I'm not sure what the problem and I'm not sure what the problem is . . .
>
> THE COURT: Hold on.
>
> [DEFENSE COUNSEL:] May he testify about those things that [Tina] told him?
>
> THE STATE: No, sir, because he said [Tina] said her father said. Hearsay within hearsay at that point.
>
> [DEFENSE COUNSEL:] No, I think he said. . .
>
> [CHIP KHOURI:] May I reiterate?
>
> THE COURT: No, I'll sustain the objection as to what the father said. He can testify as to what [Tina] said.

> [DEFENSE COUNSEL:] But did [Tina] say unequivocally whether these accusations were true or false?
>
> [CHIP KHOURI:] False.

Again, the Rape Shield statute is not implicated in this objection. In context it appears that the State's objection was to an out-of-court statement by Tina's father, to which the State's objection was sustained as hearsay evidence in violation of Rule 802 of the North Carolina Rules of Evidence which did not fall within one of the prescribed exceptions. N.C. Gen. Stat. § 8C-1, Rule 802 (2009); *see* N.C. Gen. Stat. § 8C-1, Rules 801, 803, & 804 (2009). In addition, Chip was permitted to testify as to what Tina told him: that her accusations against defendant were false. Accordingly, this argument is overruled.

3. Carolyn Khouri's testimony regarding "Rory"

Finally, defendant argues that the trial court improperly applied the Rape Shield Statute to another line of questioning of Carolyn Khouri. In relevant part, Ms. Khouri testified regarding when she and defendant learned of Tina's pregnancy:

> [CAROLYN KHOURI:] . . . [Tina] was talking about—she was very upset. She had told me that she pregnant [sic]. I got upset. Then—and then [defendant] and I we, talked—we all three talked. She said she wanted to have an abortion. We didn't want her to have an abortion. Then she said she—she was—she says I can do what I want because she was eighteen (18) and I said you know that was true. She could but she told me that she didn't know if it was Rory's . . .
>
> THE STATE: Objection, Your Honor.
>
> [CAROLYN KHOURI:] Well.
>
> THE STATE: Your Honor, I specifically asked the defendant and his attorney to warn any witnesses that they may come forward with and this woman has been warned I know by the defense attorney and at this point . . .
>
> [CAROLYN KHOURI:] Should I say boyfriend?
>
> THE COURT: Hold on.
>
> THE STATE: Your Honor, I ask for it to be stricken.

Following the State's objection based on the Rape Shield Statute, the trial court had the jury leave the courtroom so that the parties could

discuss the issue and ultimately struck Ms. Khouri's answer, as quoted above, in ruling that the Rape Shield Statute prohibited her statement. Defendant did not make any offer of proof as to what Ms. Khouri's answer would have been beyond the testimony quoted above or any explanation of who "Rory" is. Defendant argues that this evidence should have been admitted because it was Rory, not defendant, who impregnated Tina when she was eighteen.

We first note that it is unclear who "Rory" is. This name is mentioned only three times in witness testimony in the trial transcript, here and in defendant's testimony, as discussed below. Defendant's brief implies that "Rory" was Tina's great-grandfather, but that is not apparent from the testimony. This could be based on Ms. Khouri's unresponsive answer, as discussed above that "It was the great-grandfather—the other grandfather that molested her . . . ." Defendant argues that "[i]t was clear from the content of the questions to the defense witnesses, and their partial responses, that they were prepared to testify that [Tina] had named a third candidate as the possible father of the aborted baby, that she had said her great grandfather and not [defendant] abused her, that she had said she was not telling the truth and explained why she accused [defendant]." On the other hand Tina testified that she had a previous boyfriend named Roy Duvell, who lived in Greensboro, which is similar to "Rory[,]" and as noted above, Ms. Khouri in her testimony responded to the State's objection by saying, "Should I say boyfriend?" In any event, defendant reads far too much into Ms. Khouri's answer which was stricken. Without an offer of proof, the most that we can assume for purposes of defendant's argument is that whoever "Rory" may be, he was a "third candidate as the possible father" of Tina's aborted baby.

The Rape Shield Statute does not exclude all evidence of a victim's sexual relations, but it does shield the victim's actual sexual history from being presented to the jury even if such evidence would be relevant. *State v. Thompson*, 139 N.C. App. 299, 309-10, 533 S.E.2d 834, 841-42 (2000).

> The Rape Victim Shield Statute is "nothing more . . . than a codification of this jurisdiction's rule of relevance as that rule specifically applies to the past sexual behavior of rape victims." *State v. Fortney*, 301 N.C. 31, 37, 269 S.E.2d 110, 113 (1980). The exceptions, G.S. 8-58.6(b) (1)-(4), merely "define those times when the prior sexual behavior of the complainant is relevant to issues raised in a rape trial. . . ." *Id.* at 42, 269 S.E.2d at 116.

State v. Baron, 58 N.C. App. 150, 153, 292 S.E.2d 741, 743 (1982). We review the trial court's rulings as to relevance with great deference.

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the 'abuse of discretion' standard which applies to rulings made pursuant to Rule 403.

State v. Tadeja, 191 N.C. App. 439, 444, 664 S.E.2d 402, 407 (2008) (citation omitted). We believe that the same deferential standard of review should apply to the trial court's determination of admissibility under Rule 412.

Tina had already testified that she was unsure whether her aborted child was fathered by defendant or Bryant. Defense counsel's line of questioning and Carolyn Khouri's answer attempted to show that Tina had sexual relations with a man other than defendant or Bryant. Introducing evidence that Tina had sexual relations with another man would not have shown that the alleged acts were not committed by defendant when evidence of Tina's sexual relations with her boyfriend had already been admitted. Additional evidence would have only unnecessarily humiliated and embarrassed Tina while having little probative value. *See State v. Ginyard*, 122 N.C. App. 25, 31, 468 S.E.2d 525, 529 (1996) (stating that "Rule 412 was promulgated to protect the witness from unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice that might result from evidence of sexual conduct which has little relevance to the case and has a low probative value." (citation and quotation marks omitted)). Consequently, the trial court did not err in sustaining the State's objection under the Rape Shield Statute.

We also note that defendant cannot show any prejudice from this ruling, as substantially the same evidence was admitted without objection during defendant's testimony. *See State v. Hageman*, 307 N.C. 1, 24, 296 S.E.2d 433, 446 (1982) (stating that "[i]t is well settled in this jurisdiction that no prejudice arises from the erroneous exclusion of evidence when the same or substantially the same testimony is subsequently admitted into evidence."). Defendant testified as follows:

[THE STATE:] Okay, so you never had any conversation about how the baby very possibly could be yours in your bedroom?

[DEFENDANT:] That it could be mine, no, ma'am.

[THE STATE:] It surprises you?

[DEFENDANT:] It does.

[THE STATE:] Okay, is this the first you've heard about it?

[DEFENDANT:] No, it's not the first. I've heard about it here for the first time but you have to understand she was concerned and when [TINA] is concerned I'm concerned.

[THE STATE:] Okay, so you don't remember her discussing anything about anything that had to do with you? Just about [William Bryant]?

[DEFENDANT:] About Will and Rory but other than that, no, ma'am.

Defendant has shown no prejudice as his own testimony was that Tina told him that Bryant and Rory were the possible fathers of her baby. Therefore, this argument is without merit.

III. Conclusion

Based on the foregoing reasons, we vacate judgment number 09-CRS-290 and otherwise find no error on behalf of the trial court.

VACATED IN PART; NO ERROR IN PART.

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

STATE OF NORTH CAROLINA v. JOSE GUADALUPE SALINAS

No. COA10-1563

(Filed 16 August 2011)

Search and Seizure—vehicular stop—erroneous standard applied—reversed and remanded

The trial court erred in a seatbelt violation and possession of drug paraphernalia case by ruling that the stop of defendant's car was unconstitutional. The trial court's order indicated it applied the wrong standard in determining that the stop was unconstitutional. The ruling was reversed and remanded to the trial court for reevaluation of the evidence presented at the hearing, pursuant to the correct standard.

Appeal by the State from order entered 29 September 2010 by Judge Patrice A. Hinnant in Superior Court, Rockingham County. Heard in the Court of Appeals 7 June 2011.

Attorney General Roy Cooper, by Assistant Attorney General Jess D. Mekeel, for the State.

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

McGEE, Judge.

The State's evidence tends to show that the Reidsville 911 center received an anonymous call at approximately 10:00 a.m. on 13 March 2009, reporting that a small white car (the vehicle) was being driven erratically in the vicinity of Way Street in Reidsville. The caller reported that the vehicle had pulled into a Food Lion parking lot on Way Street. Officer Daniel Velasquez (Officer Velasquez) and Officer Linwood Hampshire (Officer Hampshire) (together, the Officers) of the Reidsville Police Department were dispatched to investigate. At approximately 10:15 a.m., the Officers observed a small white car driving in the Food Lion parking lot. The vehicle began to exit the Food lion parking lot and the driver, later identified as Defendant, drove up onto a curb near the exit, backed up, pulled up to a stop sign, rolled back, then drove up to the stop sign again. When Defendant finally pulled out of the parking lot, he made a wide right-hand turn northbound onto Way Street, a four-lane road, and part of the vehicle

crossed the center line, encroaching on one of the southbound lanes of traffic.

The vehicle passed the Officers' cruiser traveling approximately fifteen miles per hour. Both Officers testified that Defendant was not wearing a seatbelt. The Officers then pulled behind Defendant, activated the blue lights on their vehicle, and initiated a stop. Based upon Defendant's physical appearance, conduct, and a strong odor of burnt marijuana, Officer Hampshire eventually searched the vehicle and discovered drug paraphernalia. Defendant was arrested and read his *Miranda* rights. Defendant was taken to the police station, then to a hospital where he had blood drawn. Defendant's behavior indicated he was impaired and he made incriminating statements to the Officers during this process. Defendant was cited for a seatbelt violation, and was also charged with possession of drug paraphernalia.

Defendant filed a motion to suppress on 23 November 2009. Along with Defendant's motion to suppress, he also filed an affidavit in support of his motion to suppress, in which he averred that he was wearing a seatbelt when he was stopped by the Officers. Defendant's motion was heard on 18 August 2010 and granted by the trial court by an order filed on 29 September 2010, in which the court ruled that the stop of Defendant's vehicle was unconstitutional, and that all evidence recovered based upon the stop be suppressed. The State appeals.

I.

The State contends in its first argument that the trial court erred in ruling that the stop was unconstitutional. Because we determine that the incorrect standard was applied in this matter, we agree.

At the hearing on Defendant's motion to suppress, the State articulated the correct standard for investigatory stops—reasonable suspicion. However, at times during the hearing, both the State and Defendant incorrectly spoke in terms of whether "probable cause" existed justifying the stop. In its order, the trial court concluded: "That there was insufficient evidence for probable cause to stop and arrest [Defendant]." "This Court has recently confirmed that 'reasonable suspicion is the necessary standard for traffic stops.' " *State v. Maready*, 362 N.C. 614, 618, 669 S.E.2d 564, 567 (2008) (citation omitted).

> "Reasonable suspicion is a 'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.' Only ' "some minimal level of objective justification" ' is required. This Court has determined that the rea-

> sonable suspicion standard requires that '[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.' Moreover, '[a] court must consider "the totality of the circumstances—the whole picture" in determining whether a reasonable suspicion' exists."

Id. (citing *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008) (citations omitted)). Because the trial court's order indicates it applied the wrong standard in determining that the stop was unconstitutional, we reverse and remand to the trial court for reevaluation of the evidence presented at the hearing, pursuant to the correct standard, and for entry of a new order granting or denying Defendant's motion to suppress, based upon application of the correct standard. *State v. McKinney*, 361 N.C. 53, 64-65, 637 S.E.2d 868, 876 (2006) (" '[W]e believe it is appropriate to hold that the conclusion should, in the first instance, be made by the trial court.' This rule recognizes the 'trial courts' "institutional advantages" over appellate courts in the "application of facts to fact-dependent legal standards." ' Thus, we decline to speculate as to the probable outcome in the instant case had the trial court [conducted its analysis pursuant to the correct standard]. We therefore should afford the trial court an opportunity to . . . [apply] the appropriate legal standard.").

The State argues that our Court should make a determination, based upon the evidence presented at the suppression hearing, that a reasonable suspicion justifying the stop existed as a matter of law. The State argues that the evidence at the hearing was uncontroverted. We disagree. *Id.*

This Court has addressed the argument by the State succinctly in an unpublished opinion that we find persuasive:

> [the d]efendant's argument is that since he was the only person who testified, and that since he testified that his actions were not willful, there was no evidence that his actions were willful. This argument misapprehends the role of the trial judge [sitting as the finder of fact]. The judge's role is to hear the evidence, determine the credibility of witnesses, and determine the weight to be given to the evidence presented. It is not to accept uncritically the testimony of witnesses, whether for the State or for the defendant. In this case, there are readily apparent inconsistencies in [the] defendant's testimony which cast serious doubt upon his credibility.

State v. Huntley, 189 N.C. App. 532, 659 S.E.2d 490, 2008 N.C. App. LEXIS 622, 4-5 (2008) (unpublished) (citation omitted); *State v. Watkins*, 120 N.C. App. 804, 808, 463 S.E.2d 802, 805 (1995); *see also State v. Icard*, 363 N.C. 303, 312, 677 S.E.2d 822, 828-29 (2009) (standard set forth in dissent by Justice Newby) (citations omitted); *State v. Darrow*, 83 N.C. App. 647, 649, 351 S.E.2d 138, 140 (1986) (issues of credibility are for the trial court to decide when sitting without a jury (citing *State v. Booker*, 309 N.C. 446, 306 S.E.2d 771 (1983))); *State v. Durham*, ___, N.C. App. ___, ___ S.E.2d ___, 2011 N.C. App. LEXIS 749, 7 (2011) (unpublished) ("[W]e defer to the trial court's assessment of [the officer's] credibility and its resolution of any inconsistencies in his testimony. Accordingly, we are bound by the trial court's finding [based upon that credibility determination]."). We find the reasoning in *Huntley* both sound and legally correct. Furthermore,

> an appellate court accords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred. As Justice Higgins stated, in *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934, 91 S. Ct. 2266, 29 L. Ed. 2d 715 (1971), the trial judge:
>
> sees the witnesses, observes [their] demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth. The appellate court is much less favored because it sees only a cold, written record. Hence the findings of the trial judge are, and properly should be, conclusive on appeal if they are supported by the evidence.

State v. Cooke, 306 N.C. 132, 134-35, 291 S.E.2d 618, 619-20 (1982). This duty of the trial court applies with equal force whether its weight and credibility determinations are made in favor of the State, or in favor of a defendant. "Where the [trial court's] findings of fact support [its] conclusions of law, such findings and conclusions are binding upon us on appeal." *State v. Wynne*, 329 N.C. 507, 522, 406 S.E.2d 812, 820 (1991) (citation omitted).

In the present case, the trial court found in its order that "there were large discrepancies between the testimony of Officer Velasquez and Officer Hampshire[.]" The discrepancies found by the trial court included whether Defendant had been given a physical dexterity test,

Defendant's attire, the description of the vehicle, the specific manner of Defendant's driving when pulling out of the Food Lion parking lot, Defendant's turning onto Way Street, Defendant's pulling over once the stop had been initiated, and Defendant's physical movements and condition after arrest. The trial court found that these discrepancies went to "credibility as to the basis of the stop of [Defendant] from the Court's point of view[.]" Based upon its credibility determination, the trial court stated:

> All the discrepancies in the testimony of the officers caused the Court to make the finding of fact: that [Defendant] did, in fact, have his seatbelt on as alleged in his affidavit; that the real basis for the stop of [Defendant] on this occasion was an unsubstantiated report from the police dispatcher.

At the hearing, the following colloquy occurred between the State and Officer Hampshire:

> Q. And why did you and Detective Velasquez decide to stop the vehicle?
>
> A. Based on his driving, trying to get out of the parking lot and get onto Way Street. I've seen numerous cars drive up and down that ramp without having to—driving onto the curb and roll back that far and take three lanes to turn. That was what we considered to be signs that he was impaired or that there was something wrong with him.
>
> Q. Was that the only reason?
>
> A. Yes, ma'am.

Officer Hampshire did not testify that the stop was based upon any observed seatbelt violation, or the anonymous tip relayed through dispatch. Officer Velasquez's testimony makes clear that he was an officer in training, and that Officer Hampshire was his training officer. Officer Velasquez testified that Officer Hampshire was the one making the decisions on 13 March 2009. Officer Hampshire is the officer who signed the citations for the seatbelt violation and for possession of drug paraphernalia on that date.

Because it was Officer Hampshire's decision to stop the vehicle, it was Officer Hampshire's stated justification for the stop that was at issue on Defendant's motion to suppress. The trial court clearly made credibility determinations at the hearing, and concluded that the testimony of the Officers concerning the basis for the stop was lacking

credibility. This credibility determination is the province of the trial court, not this Court on appeal. *Darrow*, 83 N.C. App. at 649, 351 S.E.2d at 140; *State v. McCord*, 158 N.C. App. 693, 697, 582 S.E.2d 33, 35-36 (2003). Although different inferences could have been drawn from the evidence, we are bound by the trial court's credibility determinations. *Id.*; *see also Watkins*, 120 N.C. App. at 808, 463 S.E.2d at 805 ("Although there was testimony which would support contrary findings than those made by the trial court, we are bound by the trial court's determinations of credibility and the weight to be afforded the testimony, absent an abuse of discretion. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619-20 (1982).").

The State argues that the testimony of Officers Hampshire and Velasquez constituted "uncontroverted evidence unequivocally" demonstrating the existence of a reasonable suspicion to stop Defendant's vehicle, because Defendant did not present evidence at the suppression hearing. The fact that Defendant did not present evidence at the hearing beyond his affidavit does not invalidate the trial court's credibility determinations, and the findings and conclusions that resulted therefrom.

The trial court, however, stated in its order that Officer Hampshire testified that his basis for the stop included the alleged seatbelt violation. The State argues that Defendant's affidavit was not competent evidence for the trial court to consider in finding that Defendant was wearing his seatbelt. In light of the trial court's role as the determiner of credibility, we do not believe this argument is relevant. We note, however, that our Court has apparently treated affidavits as evidence at suppression hearings. *See State v. Mahatha*, 157 N.C. App. 183, 190-97, 578 S.E.2d 617, 622-26 (2003); *State v. Moul*, 95 N.C. App. 644, 646, 383 S.E.2d 429, 431 (1989); *see also State v. Pittman*, 151 N.C. App. 750, 567 S.E.2d 466, 2002 N.C. App. LEXIS 2374, 12-13 (2002) (unpublished opinion).

The State further argues that the trial court erred in finding as fact "that the real basis for the stop of [Defendant] on this occasion was an unsubstantiated report from the police dispatcher." The State contends that the Officers' testimony provided sufficient evidence corroborating the anonymous caller's report of erratic driving. Because the trial court concluded that the Officers' testimony in this regard was lacking in credibility, we cannot hold that the Officers' testimony corroborated the anonymous report as a matter of law. In the present case, it is for the trial court to revisit the evidence pur-

suant to the reasonable suspicion standard and make its ruling on the constitutionality of the stop, including receiving any additional evidence it chooses to receive in the exercise of its discretion, making any necessary credibility determinations.

The dissent argues that we should determine, as a matter of law, that the trial court's findings of fact are sufficient for this Court to find that a reasonable suspicion existed to justify the Officers' stop of Defendant. The dissent relies upon *State v. Styles*, 362 N.C. 412, 665 S.E.2d 438 (2008), for the proposition that our Court may freely "determine if the actions of the police satisfied the appropriate legal standard[,]" noting in *Styles* that the "reasonable suspicion standard [was] applied even though the trial court reviewed for probable cause." However, *Styles* is not informative to the case before us. In *Styles*, the trial court ruled, and this Court affirmed, that probable cause *existed* to stop the defendant. The defendant's motion to suppress was *denied*. Our Supreme Court held that reasonable suspicion, not the heightened standard of probable cause, was the correct standard to apply. It then affirmed the denial of the motion to suppress by holding that the trial court's findings of fact supported its conclusion that the stop was legal—applying the *lesser* standard of reasonable suspicion. *Id*. *Styles* does not support the proposition that our Court may substitute its judgment for the trial court's when the trial court improperly applied the probable cause standard, *granted* Defendant's motion to suppress, did not make findings of fact that allow us to apply the correct legal standard on appeal, and on remand the trial court might make a different determination under the lesser reasonable suspicion standard.

The dissent suggests that the trial court found as fact that the anonymous caller provided a license plate number for the vehicle allegedly seen being driven erratically, and that Officer Hampshire based his decision to stop Defendant in part on determining that the license plate on Defendant's vehicle matched the one given by the anonymous caller. However, the trial court made no finding of fact concerning the license plate number and Defendant's license plate is not referenced in the 29 September 2010 order. Further, the suppression hearing transcript shows that neither of the Officers testified that Defendant's license plate number was checked against that allegedly given by the anonymous caller before the stop was initiated. The testimony of Officer Hampshire, cited by the dissent, regards alleged observations of a different officer who did not testify at the suppression hearing. Neither Officer Hampshire nor Officer Velasquez

testified that they observed the vehicle parked in the parking lot near the Food Lion.

The dissent correctly states that many of the findings of fact are not findings of fact as far as establishing the validity of the Officers' testimony. The dissent is incorrect, however, in stating that the trial court's findings of fact are improper. For example, under the "Findings of Fact" section in its order, the trial court states: "That the State called as its first witness Daniel Velasquez who was sworn and testified:[.]" The trial court then lists testimony from Officer Velasquez, such as, after the Officers stopped the vehicle, "the vehicle had pulled over to the far right, close to the curb." The trial court's order subsequently states: "That Officer Linwood Hampshire was sworn and testified as follows:[.]" Included in the trial court's findings concerning Officer Hampshire's testimony is that Defendant "stopped his vehicle in the middle of the travel lane several feet from the curb, not all the way over to the curb and this testimony was contrary to the statement of Officer Velasquez who had previously stated that [Defendant] did pull over next to the curb."

The trial court's findings of fact contain both findings as to what the Officers testified, which testimony was not adopted by the trial court as to content, and findings by the trial court concerning its evaluation of the Officers' testimony—e.g. Officer Hampshire's testimony "was contrary to the statement of Officer Velasquez[.]" It is apparent that the trial court did *not* intend to adopt as fact the substance of much of the Officers' testimony because the trial court made credibility determinations in which it questioned the validity of the Officers' testimony.

Following the trial court's findings as to what the Officers' testimony had been, the trial court stated: "That, at the conclusion of Officer Hampshire's testimony [which followed Officer Velasquez's testimony], the [trial court] found as fact:[.]" What follows are the findings of the trial court based upon its weighing of the evidence and its credibility determinations. These findings of fact clearly show the trial court did not adopt as its own findings the substantive testimony of the Officers concerning the facts surrounding the stop. Therefore, based upon the findings of fact made by the trial court, there is no support for the dissent's position that our Court should make a determination as a matter of law that a reasonable suspicion existed to support the stop of Defendant.

Further, as the trial court stated in its findings of fact, Officer Velasquez "testified that there was no reason to stop the vehicle and check it out at the time that the front wheels of the vehicle were up on the curb in the parking lot[.]" Officer Hampshire testified that the decision was made to stop Defendant after Defendant crossed the center lane while turning onto Way Street. The trial court found as fact that the Officers' testimony concerning Defendant's driving was inconsistent. The dissent contends that the discrepancies identified by the trial court were "trivial and immaterial" to the analysis. Identifying discrepancies, however, is not the limit of a trial court's function. The trial court is charged with determining the credibility of the witnesses themselves. If the trial court determines a witness is not credible, we cannot assume the testimony of that witness is factual, and cannot assume that the trial court determined any of the testimony was factual absent findings of fact clearly so stating. As the dissent points out, the trial court's findings *reciting* the testimony of the Officers do not constitute findings of fact supporting the *content* of that testimony.

The cases cited by the dissent in support of its argument did not involve adverse credibility determinations made by the trial court. All but one of the cases cited by the dissent involved appeals based upon the trial courts' *denial* of the defendants' motions to suppress. Appellate courts do not usurp the province of the trial court, weigh the evidence, and make our own credibility determinations based upon the cold record before us. There is nothing in the trial court's order permitting us to hold that the trial court's findings of fact established that the anonymous tip was sufficiently corroborated by the Officers and, therefore, that a reasonable suspicion existed justifying the investigatory stop.

Were we to so hold, we would be

> misapprehend[ing] the role of the trial judge [sitting as the finder of fact]. The judge's role is to hear the evidence, determine the credibility of witnesses, and determine the weight to be given to the evidence presented. It is not to accept uncritically the testimony of witnesses, whether for the State or for the defendant.

Huntley, 2008 N.C. App. LEXIS 622, 4-5; *Durham*, 2011 N.C. App. LEXIS 749, 7 ("[W]e defer to the trial court's assessment of [the officer's] credibility and its resolution of any inconsistencies in his testimony. Accordingly, we are bound by the trial court's finding [based

upon that credibility determination]."); *see also* other cases cited above. Upon remand the trial court will be free to clarify its findings and conclusions based upon the evidence before it, its weighing of that evidence, and its determinations of credibility.

In light of our holding above, we need not address the State's additional arguments.

Reversed and remanded.

Judge ERVIN concurs.

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

McCULLOUGH, Judge, concurring in part and dissenting in part:

The majority opinion holds that the trial court's order suppressing evidence seized by Reidsville Police Department officers from defendant must be reversed as the trial court applied a probable cause standard to the traffic stop at issue in this case. I concur with that part of the majority opinion.

The majority opinion then orders that the case be remanded to the lower court for a new suppression hearing where the proper legal standard of reasonable suspicion shall be applied. From this part of the majority opinion, I respectfully dissent, as I believe that this Court has the capability of reviewing the record to determine if the actions of the police satisfied the appropriate legal standard. *State v. Styles*, 362 N.C. 412, 665 S.E.2d 438 (2008) (reasonable suspicion standard applied even though the trial court reviewed for probable cause). As this Court is able to conduct a *de novo* review without remand, I believe we should address not only the traffic stop, but should also address a number of erroneous evidentiary rulings made by the lower court which may be repeated if the case is remanded for a new hearing.

I believe that a complete review of this case would be possible using the findings that the trial court seems to have made[1] to which we would apply the correct legal analysis so that the erroneous evi-

1. "That, at the conclusion of Officer Hampshire's testimony, the Court found as a fact:

v. That the defendant, by way of Affidavit in Support of Motion to Suppress, objected to the stop, search and arrest of the defendant, and maintained that he did have his seatbelt on."

dentiary rulings the trial judge made can be corrected expeditiously. The other "Findings of Fact" made by the lower court are not true "Findings" as most of the findings are merely recitations of testimony. *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984) (purported "finding" which merely states that the witness testified under oath is a recitation of testimony, not a finding of fact). While the trial court made some adverse credibility determinations based on discrepancies in the officer's testimony as to the clothing of defendant, the location of defendant's automobile after the stop was executed, and the proper make of the car, these were trivial and immaterial to the Fourth Amendment analysis, which the court is required to make.

From the findings that were made, it is apparent that the trial court found that an anonymous 911 caller reported following a car that was driving erratically and provided the license plate, color of the car and its current location, that being the Food Lion parking lot just off Way Street in Reidsville. The trial judge also seems to accept as fact that officers responded to the anonymous tip locating defendant's automobile in the parking lot identified by the caller, bearing the license plate provided by the caller, and of the general description and color of the auto described in the call. At the suppression hearing, Officer Hampshire testified as follows:

> Q. And what drew your attention to the Defendant?
>
> A. We originally received a 911 phone call from a cell phone caller that was following the vehicle. He said that the vehicle was driving erratically, wasn't able to stay in its lane. He originally described it as a small white car. That was the first call that went out. He was able—the—he was able to get closer to it, and eventually he did put out a—the dispatcher did put out a tag number for the vehicle. The tag number was YSE-6070. The caller advised that the vehicle had stopped and parked in the Food Lion parking lot. Several officers respond—went to that area. The car was found to be parked in that parking lot and it was—nobody was in the vehicle when it was originally found.

(Emphasis added.) The citations issued defendant and which were before the court identify defendant's vehicle as a 1996 Nissan bearing license number YSE-6070. Based on the record before the trial court, there can be no doubt that the automobile stopped by the police was the same vehicle described by the tipster.

The trial court concluded that the tip was "unsubstantiated." I disagree and believe that the facts as found provided reasonable sus-

picion regardless of whether defendant committed a traffic offense in the presence of the officers or otherwise drove erratically. If the trial judge applied the correct standard of reasonable suspicion under a totality of the circumstances test, then the court should have found that the anonymous tip was sufficiently corroborated by the officers to meet the reasonable suspicion standard. In *Alabama v. White*, 496 U.S. 325, 110 L. Ed. 2d 301 (1990), the Supreme Court upheld a traffic stop after an anonymous tipster correctly described the suspect vehicle's location, time of departure and destination. The Court upheld the right of the police to stop the vehicle prior to its reaching the described destination, finding that the tip was sufficiently corroborated to provide the reasonable suspicion required before such a traffic stop could be executed.

Numerous cases following *Alabama v. White* have applied the reasonable suspicion under the totality of the circumstances test to uphold traffic stops based on factual settings much like the one in the case at bar. In *U.S. v. Simmons*, 560 F.3d 98, 107-08 (2d Cir. 2009), *cert. denied*, ___ U.S. ___, 175 L. Ed. 2d 377 (2009), reasonable suspicion was found when defendant's location and description matched that provided by an anonymous 911 tip about an ongoing assault. A traffic stop was upheld by the Third Circuit when an anonymous tipster called 911 stating that they were following defendant's automobile, described the vehicle, the locale and his observation that the defendant was brandishing a gun, *U.S. v. Torres*, 534 F.3d 207, 211-12 (3d Cir. 2008). The Fourth Circuit upheld a traffic stop based on a 911 call where the caller reported firsthand observation of the defendant's driving and threats being made by the defendant. *U.S. v. Elston*, 479 F.3d 314, 318-19 (4th Cir. 2007). In *Elston* the court stated:

> It is well established that anonymous information can furnish grounds for a reasonable search or seizure if it exhibits sufficient indicia of reliability. *See J.L.*, 529 U.S. at 270; *United States v. Perkins*, 363 F.3d 317, 323 (4th Cir. 2004). Our decisions provide guidance on the factors that can indicate the reliability of anonymous information. We have recognized, for example, that an anonymous call is more likely to be reliable if it provides substantial detail about the individuals and the alleged criminal activity it describes; if it discloses the basis of the informant's knowledge; and, especially, if the informant indicates that her report is based on her contemporaneous personal observation of the call's subject.

The cases cited above are just a few examples of the numerous cases similar to the case *sub judice* which found the corroboration to be adequate to substantiate the tip under the reasonable suspicion standard. Here, as in the example cases, the caller claims to be providing firsthand observation of defendant's erratic driving; and the caller identified the location, general type of car (small), as well as the correct color and license plate. The trial court accepts the fact that the officers located the car in the described parking lot, and the fact that it was the same color, was a small car (Nissan), and bore the license plate described by the caller. Despite this detail of corroboration, the trial judge concluded the tip was "unsubstantiated," perhaps because she was applying a probable cause standard rather than reasonable suspicion, and thus failed to apply the teachings of *Alabama v. White* and its progeny. In any event, I would reverse without remand as I believe the trial judge's credibility determinations were superfluous.

Furthermore, I would address erroneous evidentiary rulings by the trial judge which were evidently made on the basis of the court's misunderstanding of the correct legal standard applicable to the facts of the case. In her conclusions of law the court stated:

1. That there was insufficient evidence for probable cause to stop and arrest the defendant.

2. That there was insufficient evidence to conduct a search of defendant's vehicle and that the search was in violation of the defendant's 4th Amendment rights.

3. That there was insufficient evidence to seize defendant's blood for testing and that there was no testimony that the defendant waived his rights with regard to blood testing.

BASED UPON the foregoing . . . CONCLUSIONS OF LAW, it is hereby

ORDERED ADJUDGED AND DECREED

1. That any evidence or statements received from the defendant by the law enforcement officers, Reidsville Police Department, on or about the 13th day of March, 2009, shall be suppressed and shall not be introduced as evidence at the defendant's trial.

First, as discussed above, based on *Alabama v. White*, *Elston* and other similar cases, I would find that there was reasonable suspicion to stop defendant's vehicle as the 911 tip had been adequately cor-

roborated as a matter of law. In her findings of fact the court noted that one of the officers testified that he smelled the odor of burnt marijuana emanating from defendant's automobile as he approached the car. This fact was undisputed, and the testimony was received without objection. The trial court erroneously concluded that the officers had no authority to search defendant's automobile, even though case law in this state has long provided probable cause to search a vehicle based on the odor of marijuana (or other drugs with distinctive odors). *See State v. Greenwood*, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981). An evidentiary ruling is reviewed for abuse of discretion; however, a ruling which is based on an erroneous understanding of the law constitutes an abuse of discretion as a matter of law. *Hines v. Wal-Mart*, 191 N.C. App. 390, 663 S.E.2d 337 (2008), *disc. review denied*, 363 N.C. 126, 673 S.E.2d 131 (2009).

Next, the trial court sustained objections to the officer's routine questioning of defendant during the traffic stop before he was taken into custody. It has long been the law that traffic stops do not trigger the need for *Miranda* warnings. At this point, defendant had exited his automobile and was answering questions related to the stop prior to the search of the vehicle. Once the search was conducted and items of drug paraphernalia in violation of N.C. Gen. Stat. § 90-113.22(a) (2009) were discovered, defendant was formally arrested. During argument on the motion to suppress, the Assistant District Attorney attempted to cite the correct case law to the trial court, who cut the prosecutor off and refused to listen as she cited the controlling law. The colloquy was as follows:

[THE PROSECUTOR]: Your Honor, I would ask the Court to review the case of Herkimer [sic] versus McCarty. That's a U.S. Supreme Court [case], Your Honor, citation 468 U.S. 420, which states, Your Honor: An Ohio law enforcement officer saw the defendant's car—

THE COURT: Now, what is this for?

[THE PROSECUTOR]: This is for—

THE COURT: Something else?

[THE PROSECUTOR]: —his objection.

THE COURT: I've already ruled.

> [THE PROSECUTOR]: Your Honor, this could be for the objection for whether he's had his Miranda rights read to him.
>
> THE COURT: But I've ruled.

The Assistant District Attorney was attempting to call the court's attention to the case of *Berkemer v. McCarty*, 468 U.S. 420, 82 L. Ed. 2d 317 (1984), the leading Supreme Court case which holds that routine questioning during a traffic stop does not implicate *Miranda* and warnings are not required. *Accord*, *U.S. v. Rusher*, 966 F.2d 868 (4th Cir. 1992); *State v. Sutton*, 167 N.C. App. 242, 249, 605 S.E.2d 483, 487 (2004); *disc. review denied and appeal dismissed*, 359 N.C. 326, 611 S.E.2d 847 (2005).

Finally, the trial judge sustained the defense counsel's objection to the admission of defendant's consent to allow blood to be drawn from him at the hospital without elaboration. It is unclear why the court ruled summarily and denied the prosecution the right to establish that defendant consented to the blood draw. Even without consent, I believe that the evidence from the blood draw was admissible, as it was done upon probable cause and under exigent circumstances. *State v. Carter*, 322 N.C. 709, 723, 370 S.E.2d 553, 561 (1988). Perhaps the trial judge believed that if the State lacked probable cause to arrest, defendant should not have been at the hospital anyway as his car should not have been stopped. Since those rulings are now shown to be in error, it is clear that the consent form and the results should have been admitted.

In conclusion, I would reverse the trial judge's suppression order without remand and would hold that the traffic stop was executed after reasonable suspicion, under the totality of the circumstances, was demonstrated based upon the officer's undisputed corroboration of the anonymous 911 tip. I would further reverse the trial court's order of suppression of defendant's statements during routine roadside questioning and reverse the lower court's suppression of the evidence gained from the search of defendant's vehicle. Finally, I would reverse the trial court's exclusion of defendant's consent form and the blood draw evidence, all for the reasons stated above.

MISHEW E. SMITH AND HUSBAND ROBERT N. EDWARDS, AND ALTON B. SMITH, JR., PLAINTIFFS v. COUNTY OF DURHAM, DEFENDANT

No. COA10-1500

(Filed 16 August 2011)

Eeasements—express dedication—summary judgment proper

The trial court did not err in a real property case by granting summary judgment in favor of defendant with respect to its claim to possess an express easement across plaintiffs' property. Plaintiffs had expressly dedicated an easement for public use in the Final Plat of Subdivision & Dedication of Easement.

Appeal by plaintiffs from order entered 28 June 2010 by Judge Shannon R. Joseph in Durham County Superior Court. Heard in the Court of Appeals 12 May 2011.

Nexsen Pruett, PLLC, by Robin K. Vinson, and Maxwell Freeman & Bowman, PA, by James B. Maxwell, for Plaintiff-appellants.

Stubbs, Cole, Breedlove, Prentis & Biggs, P.L.L.C., by Richard F. Prentis, Jr., and Bryson M. Aldridge, for Defendant-appellee.

ERVIN, Judge.

Plaintiffs Robert Edwards; his wife, Mishew Smith; and Ms. Smith's brother, Alton Smith, appeal from an order denying Plaintiffs' motion for summary judgment and granting in part and denying in part Defendant County of Durham's motion for partial summary judgment. On appeal, Plaintiffs argue that the trial court erred by granting summary judgment in favor of Defendant with respect to its claim to possess an express easement across Plaintiffs' property. After careful consideration of Plaintiffs' arguments in light of the record and the applicable law, we conclude that the trial court did not err by granting partial summary judgment in Defendant's favor and that the trial court's order should be affirmed.

I. Background

A. Substantive Facts

The parties own adjoining tracts of land located on the Little River in Durham County. In November, 1998, Plaintiffs purchased a

tract of about 162 acres from the heirs of Wallace Clements ("Smith property"). The Clements family had owned the property since 1948. In April, 2008, Defendant purchased the adjoining parcel ("Cockleburr tract"), which was located adjacent to and south of the Smith property. Defendant acquired the Cockleburr tract in order to facilitate the implementation of the Little River Corridor Open Space Plan, which had been adopted by the Durham County Commission in 2001 for the purpose of preserving the watershed, improving water quality and protecting wildlife habitat.

The Cockleburr tract, which had been owned for many years by the Lee family, is bordered on three sides by the Little River and does not directly abut a public road. The nearest public road to both the Smith property and the Cockleburr tract is Johnson Mill Road. An existing easement permits access from the Smith property to Johnson Mill Road across property owned by a third party located to the east of the Smith property. However, ingress to and egress from the Cockleburr tract must be effectuated using an old road that crosses the Smith property. The present case stems from a dispute between the parties over the extent, if any, to which Defendant is entitled to use this road, which crosses the Smith property and connects the Cockleburr tract with the easement leading from the Smith property to Johnson Mill Road.

Beginning no later than the late 1940s and for many decades thereafter, an informal arrangement between the Clements and Lee families allowed the owners of the Cockleburr tract and their guests to cross the Smith property by means of this existing road. At some point, members of the Clements and Lee families erected a gate across the road at the point where it joined the easement connecting the Smith property with Johnson Mill Road for the purpose of restricting access to the area to members of the Clement and Lee families and anyone else who was given a key to the gate.

In 1993, the Clements family formally granted Mr. Lee an easement allowing use of the old access road for the purpose of harvesting timber from the Cockleburr tract and furthering certain development plans. In order to obtain the easement, Mr. Lee agreed to improve the access road so that it met residential lending specifications. However, the agreement also provided that, if Mr. Lee failed to make the necessary improvements, the formal easement would expire upon the earlier of a date twelve months after the date upon which logging operations were completed or eighteen months after the date upon which the easement agreement was executed. During the process

that led to the granting of this temporary easement, the Lee family hired Norman Beaver to prepare a survey of the access road. Since Mr. Lee failed to improve the existing access road, the easement expired by its own terms in 1995.

After purchasing the Smith property, Mishew Smith and her husband, Robert Edwards, identified a proposed home site on the property, which was located at some distance from the point at which the eastern border of their property met the existing access easement leading to Johnson Mill Road. In order to obtain the necessary construction loan, the Smiths created a minor subdivision by dividing their property into two parcels. The first parcel, identified as "Tract 2," consisted of a square tract of less than twenty acres on which Ms. Smith and Mr. Edwards planned to build a house. The other parcel, identified as "Tract 1," consisted of the remainder of the Smith property.

In his affidavit, Steven L. Medlin stated that:

> 2. I have been employed by the City of Durham and County of Durham Planning Department since June 1986, and since February 2008 I have been the Director of the Durham City-County Planning Department. . . .
>
> 3. My job description as Director includes participation in drafting, interpretation, implementation, and application of the Durham City-County Zoning Ordinance . . . [,] the Durham City-County Subdivision Ordinance, and the Durham City-County Unified Development Ordinance[.]
>
> 4. In June 1999, Mishew Edgerton Smith submitted to the Planning Department a plat for review and approval for recording, and was assigned a case number D99-375. This proposed plat showed a minor subdivision of an existing approximately 162-acre tract of land, subdividing said tract of land into an acreage tract of 150.68 acres and a square (700.00 feet by 700.00 feet square) 11.249 acre tract for a "proposed dwelling site". This preliminary plat showed creation of a 30-foot private access easement across an existing gravel drive extending east, connecting with a 60-foot wide easement, which ran from the north-east corner of the subject property to the southern boundary of the property, where it connected with the property of Robert D. Lee, III. Access therefore to the proposed 11.249-acre dwelling site consisted of access across the 30-foot private access easement and access across the 60-foot easement extending through the prop-

erty. Both easements also indicated that there was an existing gravel drive or gravel road along the easements providing access.

5. After review by staff, several comments and requirements of change to the plat were suggested including, among others, the following:

a An "Attorney Certification for Easements" needed to be added;

b. From the Transportation Division a requirement that "the 60-foot easement should be re-dedicated such that the entire gravel road is within the easement."

c. The proposed plat did not conform with and meet the requirements of the Durham City-County Zoning Ordinance section 8.1.13, which provides in part as follows[:] "no building shall be erected or enlarged on a parcel in any district unless such parcel abuts upon or has access to a publicly accepted and maintained street, except in the following circumstances:

"B. Ingress/Egress Easement: 2 ... Easements are allowed for one single family dwelling."

6. Thus the proposed plat did not conform with the requirements of the zoning ordinance for a buildable lot, and therefore in order for the proposed dwelling site to be used for the construction of a dwelling, it was suggested that the requirements of the ordinance could be met if the lot was changed to a "flag lot" in which the 30-foot private access easement connecting with the 60-foot existing easement would be part of the lot as opposed to being an easement (thus the pole of the "flag lot") which would then provide for the "flag lot" to have the required access via the existing 60-foot right-of-way, connecting eventually with Johnson Mill Road.

7. It was also necessary for this "building lot" to meet the requirements of the zoning ordinance for it to connect to an existing easement of record which the 60-foot right of way easement was represented and construed to be.

8. The requested changes to the plat, including the re-dedication of the 60-foot easement, and the creation of the "flag lot" connecting with the existing 60-foot easement to provide access necessary to construct a dwelling were completed, and the plat as amended was subsequently recorded in Plat Book 144 at Page 79 Durham County Registry.

> 9. The acknowledgement, re-dedication, and use of the 60-foot right of way as shown on the plat, and acknowledgement of the 60-foot right of way as an existing right of way, was therefore necessary to provide access to the proposed dwelling site and was therefore a requirement of the zoning ordinance in order to create a buildable lot and the recording of the subdivision plat.

As is evidenced in Mr. Medlin's affidavit, Plaintiffs recorded a plat titled "Final Plat of Subdivision & Easement Dedication" at Plat Book 144, Page 79 in the Durham County Registry on 25 August 1999. The Final Plat of Subdivision & Easement Dedication was prepared by Triangle Surveyors and contains the following recital signed by Mishew Edgerton Smith and Alton Battle Smith:

> The undersigned owner of the property lying within the attached plat and subdivision hereby certifies that he/she ordered the work of surveying and platting done and that all public and private streets, easements, and other areas so designated upon said plat are hereby dedicated for such use.

The Final Plat of Subdivision & Easement Dedication also contains a certification signed by Ronald Carpenter, a surveyor for Triangle Surveyors, stating that:

> I, Ronald D. Carpenter, do hereby certify that the attached . . . plat and subdivision was made by order and direction of Mishew Edgerton Smith, the Owner of the land shown and that the land shown on this plat is entirely within the boundaries of the land conveyed to the above owner by the references listed, and I further certify that the said survey and plat are correct in all respects.

The easement shown on the Final Plat of Subdivision & Easement Dedication is situated at the same location at which the old road was depicted on earlier surveys, including Norman Beaver's 1993 survey, and is described as a "60' wide access easement per unrecorded Easement Document between William B. Terry & Wife, and Ann M. Clements heirs dated November 3, 1993 and per an unrecorded Plat by Norman A. Beaver Entitled 60' R/W tract for James & Robert Lee Property, Property of Ann Clements Estate Dated August 2, 1993." After obtaining approval of their subdivision from Defendant's planning department, Plaintiffs borrowed money on at least seven occasions, using the home site tract as collateral. Each of the resulting notes and deeds of trust refer to the 1999 Final Plat of Subdivision &

Easement Dedication, which depicted the 60' easement as a component of the only access to the proposed residence.

After Defendant purchased the Cockleburr tract, it employed a surveyor to prepare a survey of the property. However, Defendant's representatives were denied access to the road crossing the Smith property, an action which precluded them from entering upon the Cockleburr tract.

B. Procedural History

On 30 June 2008, Plaintiffs filed a "Complaint to Quiet Title and for Declaratory Judgment." In their complaint, Plaintiffs alleged that Defendant "mistakenly and wrongfully" claimed the right to "an access easement through and across Plaintiffs' property" and asserted that "Defendant's claim is valid neither in law nor in equity." Plaintiffs sought "a judgment under the terms of which the court will rule that the cloud of Defendant's purported easement or other assertion of burden adverse to Plaintiffs be resolved in their favor, and that Plaintiffs be declared the owners in fee simple of the Plaintiffs' Property, free and clear of any claims of Defendant."

On 29 August 2008, Defendant filed its "Answer, Counterclaim and Request for a Preliminary Injunction." In its answer, Defendant listed the previous owners of the relevant tracts, described the use made of the road by former owners of those tracts, and quoted from Plaintiffs' filings in the Durham County registry. In addition, Defendant requested the trial court to declare that it had an easement in the existing road across Plaintiffs' property on the basis of express grant, easement by prescription, and easement by implication or necessity theories and asked the trial court to issue a preliminary injunction precluding Plaintiffs from obstructing their access to the Cockleburr tract using the existing road depicted on the Final Plat of Subdivision & Easement Dedication.

On 15 April 2010, Plaintiffs filed a motion seeking the entry of summary judgment in their favor. On 30 April 2010, Defendant filed a motion seeking entry of summary judgment in its favor on the basis of express grant and easement by implication or necessity theories. On 28 June 2010, the trial court entered an order denying Plaintiffs' summary judgment motion, denying Defendant's request for summary judgment on the basis of an easement by necessity or implication theory, and granting Defendant's request for summary judgment on the basis of an express easement theory. After the entry of the 28 June

2010 order, Plaintiffs filed a "Motion for Reconsideration and to Alter or Amend Judgment" pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 on 12 July 2010. The trial court entered an order denying Plaintiffs' motion on 29 July 2010. Plaintiffs noted an appeal to this Court from the trial court's orders.[1]

II. Legal Analysis

A. Standard of Review

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). "A defendant may show entitlement to summary judgment by: '(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim.' " *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 166, 684 S.E.2d 41, 46 (2009) (quoting *James v. Clark*, 118 N.C. App. 178, 180-81, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995)). " 'Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.' " *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343 (2003) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 401 (2000), *cert. denied*, 352 N.C. 371, 547 S.E.2d 810, *cert. denied*, 534 U.S. 950, 151 L. Ed. 2d 261, 122 S. Ct. 345 (2001)), *aff'd*, 358 N.C. 131, 591 S.E.2d 521 (2003).

"An appeal from an order granting summary judgment solely raises issues of whether on the face of the record there is any genuine issue of material fact, and whether the prevailing party is entitled to judgment as a matter of law." *Carcano*, 200 N.C. App. at 166, 684 S.E.2d at 46 (citing *Smith-Price v. Charter Behavioral Health Sys.*,

1. As a result of the fact that the trial court certified the order granting summary judgment for immediate review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), this case is properly before us despite the fact that the trial court's order did not resolve all of the matters in dispute between the parties. *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (citations omitted).

164 N.C. App. 349, 352, 595 S.E.2d 778, 781 (2004)). "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, 342, 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)).

In the present case:

> "Each party based its claim upon the same sequence of events[, and] . . . [n]either party has challenged the accuracy or authenticity of the documents establishing the occurrence of these events. Although the parties disagree on the legal significance of the established facts, the facts themselves are not in dispute. Consequently, we conclude that there is no genuine issue as to any material fact surrounding the trial court's summary judgment order."

Musi v. Town of Shallotte, ___ N.C. App. ___, ___, 684 S.E.2d 892, 894 (2009) (quoting *Adams v. Jefferson-Pilot Life Ins. Co.*, 148 N.C. App. 356, 359, 558 S.E.2d 504, 507, *disc. review denied*, 356 N.C. App. 159, 568 S.E.2d 186 (2002)). As a result, since our review of the record confirms that there is no disputed issue of material fact in the present case, the only issue that we need to address is the extent, if any, to which the trial court erred by concluding as a matter of law that Defendant had an express easement authorizing it to access the Cockleburr tract using the road across the Smith property.

B. Validity of Trial Court's Decision

Plaintiffs' principal challenge to the trial court's order is that the Final Plat of Subdivision & Easement Dedication simply made a "reference" to the "60' wide access easement" for the purpose of providing "historical information" and did "not create a valid, binding easement." We disagree.

A careful review of Mr. Medlin's affidavit establishes that:

> 1. Plaintiffs submitted to Defendant's planning department a subdivision plat showing the division of their property into two lots;
>
> 2. Plaintiffs' proposed subdivision was rejected, in part because the smaller lot on which Plaintiffs planned to construct a home did not connect with or abut a public road or an

existing access easement, as required by Defendant's zoning regulations;

3. To obtain approval of their subdivision plat, Plaintiffs modified the boundary lines of the two lots so that the home site lot included a spur connecting to the 60' road connecting Defendant's property to the border of Plaintiffs' land, where it in turn connected to an easement crossing the property of a third party and connecting Plaintiffs' property to Johnson Mill Road;

4. The Final Plat of Subdivision & Easement Dedication that Plaintiffs submitted to Defendant's planning department depicts the boundary lines of the smaller lot as including a narrow strip of land that connects the main part of the lot with the 60' road across Plaintiffs' property;

5. The road is depicted on the Final Plat of Subdivision & Easement Dedication and is described as a "60' wide access easement per unrecorded Easement Document between William B. Tarry & Wife, and Ann M. Clements heirs dated November.3 1993 and per an unrecorded Plat by Norman Beaver Entitled 60' R/W tract for James & Robert Lee Property, Property of Ann Clements Estate Dated August 2 1993."

6. This road is the only access easement depicted on the Final Plat of Subdivision & Easement Dedication.

7. Plaintiffs signed a certification on the Final Plat attesting that "[t]he undersigned owner of the property lying within the attached plat and subdivision hereby certifies that he/she ordered the work of the surveying and platting done and that all public and private streets, easements, and other areas so designated upon said plat are hereby dedicated for such use."

8. To receive approval for their proposed subdivision, Plaintiffs were required to provide access for their proposed home site to a public road or an existing easement of record. The dedication and acknowledgement of the 60' easement was a requirement for Plaintiffs to be permitted to record their subdivision plat and have a lot on which a house could be built.

9. Plaintiffs recorded the Final Plat of Subdivision & Easement Dedication in the Durham County Registry.

These undisputed facts establish that Plaintiffs, in order to obtain approval for their proposed subdivision and otherwise further their own interests, expressly dedicated the 60' road that crossed their property and linked both their property and Defendant's property to the easement that connected both properties to Johnson Mill Road for public use. As this Court stated in addressing a similar situation:

> It is uncontradicted that [Plaintiffs] employed [a surveyor] to prepare the plat of the subdivision, that they petitioned defendant to approve the subdivision as shown on the plat, and that it was accepted and approved by defendant. They do not deny that they signed the plat and thereby . . . "dedicate[d] to public use as streets, playgrounds, parks, open spaces, and easements forever all areas so shown or indicated on said plat." . . . In one breath, plaintiffs claim all the benefits that are afforded by the defendant's approval of their subdivision and, at the same time, seek to withdraw the burdens on the land that defendant required to be imposed thereon before it would approve the subdivision. The easement appearing on plaintiffs' own map of their subdivision is not a "cloud" on their title.

Sampson v. City of Greensboro, 35 N.C. App. 148, 149, 240 S.E.2d 502, 503 (1978).

In seeking to persuade us to reach a different result, Plaintiffs contend that the Final Plat of Subdivision & Dedication of Easement "is insufficient to create a new easement in favor of Defendant as a matter of law." In support of this argument, Plaintiffs effectively urge us to treat the Final Plat of Subdivision & Dedication of Easement as an agreement between Plaintiffs and Defendant. For example, Plaintiffs argue that "[e]xpress easements are to be construed using the rules for construction of contracts, with the key being to ascertain the intent of the parties 'as gathered from the entire instrument at the time it was made.' " (quoting *Brown v. Weaver-Rogers Assoc.*, 131 N.C. App. 120, 122, 505 S.E.2d 322, 324 (1998), *disc. review denied*, 350 N.C. 92, 532 S.E.2d 523 (1999)). Similarly, Plaintiffs argue that "[a]n express conveyance of an easement must comply with the requirements for deeds, which include identifying a grantee legally capable of holding title to real property, *Gifford v. Linnell*, 157 N.C. App. 530, 579 S.E.2d 440 [*disc. review denied*, 357 N.C. 458, 585 S.E.2d 754] (2003), and being either supported by consideration or validly recorded within two years as a gift deed, *Patterson v. Wachovia Bank & Trust Co.*, 68 N.C. App. 609, 315 S.E.2d 781 (1984)." These arguments lack merit for several reasons.

We first note that Plaintiffs fail to cite any authority in support of their contention that, in all instances, the dedication of an access easement must "comply with the requirements for deeds." Neither of the cases cited in Plaintiffs' brief during their discussion of this issue involve disputes over easements. In addition, the approach that Plaintiffs advocate assumes that an easement must be created by means of a deed of easement from one party to another. However, the express easement at issue in the present case did not result from an agreement or contract between two parties, but resulted, instead, from Plaintiffs' unilateral dedication, or rededication, of the easement for the purpose of obtaining approval of their proposed subdivision and procuring the construction loans needed to facilitate the building of their residence.[2] We are simply not aware of any authority holding that an easement dedicated by a property owner during the course of subdividing his or her property must meet the requirements for the execution of a valid deed, such as an identified "grantee" or the existence of "consideration" for the easement, and conclude that no such requirement exists in current North Carolina law.

On the contrary, we note that, in commercially-developed subdivisions, the plat in which easements are dedicated may well be recorded before any lots have been sold. For example, Durham City-County Unified Development Ordinance, section 3.63 B. provides that "[a]ny person who, being the owner or the agent of the owner of any land located within the jurisdiction of this Ordinance . . . transfers, or sells land by reference to, exhibition of, or any other use of a plat showing a subdivision of the land before the plat has been properly approved under this Ordinance, and recorded in the Office of the Register of Deeds, shall be guilty of a misdemeanor and shall be pun-

2. The need for Plaintiffs to dedicate an easement across their property stemmed from the specific manner in which they wished to configure the lots in their proposed minor subdivision. Had Plaintiffs chosen to do so, they could have modified the boundaries of the home site tract so that this lot extended to the easement across the third party tract connecting the Smith property with Johnson Mill Road. Although acting in that manner would have still resulted in the creation of a two-lot subdivision, the home site tract would have been considerably larger than is currently the case. Alternatively, Plaintiffs might have extended the spur or "flagpole" part of the home site lot so that it reached the easement across the third party tract; however, acting in that manner would have resulted in the creation of three separate lots—the home site lot and two others, one below and one above the "flagpole." Finally, Plaintiffs could have created a two-lot subdivision with the smaller home site tract situated on the eastern side of the Smith property. Instead, for reasons satisfactory to themselves, Plaintiffs elected to build their home on a smaller lot that included a spur or "flagpole" intended to satisfy applicable zoning requirements using an existing access road which remained part of the larger tract.

ishable, accordingly, by fine or imprisonment." Thus, the developer of a subdivision is required to file a plat, including any pertinent easements, before any grantees are identified. Furthermore, it is well established that:

> Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. . . . It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished, altered or diminished except by agreement or estoppel.

Realty Co. v. Hobbs, 261 N.C. 414, 421, 135 S.E.2d 30, 35-36 (1964) (citations omitted). As a result, it is possible to create a valid and binding easement by sale of property in a subdivision, although the plat evidencing the dedication of such easement was recorded before any specific grantees were identified.

In addition, Plaintiffs argue that the 60' easement specified in the Final Plat of Subdivision & Dedication of Easement was nothing more than a description of or reference to a "driveway" that Plaintiffs built for the purpose of connecting their property with the easement leading from their property across the property of a third party to Johnson Mill Road. Plaintiffs have not, however, cited any authority tending to suggest that their description of portions of their two lots as a "driveway" has any legal effect, and we have found none during our own research. As a result, we conclude that the fact that Plaintiffs use a portion of the 60' road accessed by means of a narrow extension of their lot as a "driveway" has no legal significance.

Finally, Plaintiffs assert that "the reference by [their surveyor,] Mr. Carpenter[, to] the old, expired timber easement, as well as the reference by [their attorney,] Ms. Cayton to a portion of Plaintiffs' driveway in deeds of trust to several banks, do[es] not create or constitute a deed of conveyance in favor of the County of Durham, as a matter of law." We do not, however, believe that this contention, even if correct, has any bearing on the validity of the trial court's decision that Plaintiff had expressly dedicated an easement for public use in

the Final Plat of Subdivision & Dedication of Easement. Thus, this contention lacks merit as well.[3]

III. Conclusion

Thus, we conclude, for the reasons set forth above, that the signing and recording of the Final Plat of Subdivision & Dedication of Easement, in which Plaintiffs depicted the "60' access easement" and certified that "all public and private streets, easements, and other areas so designated upon said plat are hereby dedicated for such use," resulted in the express dedication of an easement across their property for the use and benefit of the public, including Defendant. As a result, the trial court correctly granted summary judgment in favor of Defendant based on an express easement theory, so that the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges CALABRIA and THIGPEN concur.

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3. Given our conclusion that the trial court correctly granted summary judgment in favor of Defendant on an express grant theory, we need not address Plaintiffs' remaining arguments in detail. Although Plaintiffs argue at length that the 1993 temporary easement cannot be enforced against them, we see no indication in the present record that Defendant has made any effort to enforce that temporary easement or that the trial court based its order on a decision to enforce that instrument. Furthermore, Plaintiffs argue that the trial court erred by considering the 1993 easement "separately" from the survey by Norman Beaver. As a result of the fact that the easement addressed in the trial court's order was created by the express terms of the Final Plat of Subdivision & Dedication of Easement, any reliance that the trial court may have placed on the temporary easement would not change the proper outcome in this case. In addition, Plaintiffs assert that "Defendant now wants the right to build a huge, public road with water and power lines across Plaintiffs' private residence." However, we need not reach the extent, if any, of Defendant's right to construct necessary improvements on the access easement, since that issue has not been presented for our consideration in this case. Finally, Plaintiffs argue that the Final Plat of Subdivision & Dedication of Easement did not create an implied easement by plat. Although Plaintiffs are correct in noting that Defendant has not purchased a lot in any subdivision described in the Final Plat of Subdivision & Dedication of Easement, the validity of this argument has no bearing on the proper outcome of this case, which rests on an express easement theory rather than an implied easement theory.

STATE OF NORTH CAROLINA v. KENIS RAY JOHNSON

No. COA10-1410

(Filed 16 August 2011)

1. Drugs—trafficking—sale of opium derivative—sale of schedule III substance—not mutually exclusive

Judgments against defendant for both trafficking in opium and the possession and sale of a schedule III substance were not mutually exclusive. The trafficking statute refers to the total weight of the opium derivative at issue rather than the quantitative measure per dosage unit.

2. Evidence—video—replayed during closing and deliberations

A narcotics trafficking defendant did not meet his burden of showing that the trial court abused its discretion by determining that the versions of a video recording played during closing argument and during jury deliberations constituted the same evidence that had been admitted during the State's case-in-chief. The video was enlarged and shown in slow motion during the closing argument and frame-by-frame during deliberations.

3. Constitutional Law—effective assistance of counsel—necessity of prejudice

Defense counsel was not ineffective during a narcotics trafficking prosecution where defense counsel did not object to characterizations of an informant as reliable. Defendant did not show prejudice from the alleged errors.

Appeal by Defendant from judgments entered 23 July 2010 by Judge Benjamin G. Alford in Superior Court, Onslow County. Heard in the Court of Appeals 12 April 2011.

Attorney General Roy Cooper, by Assistant Attorney General Charles G. Whitehead, for the State.

Kevin P. Bradley for Defendant.

McGEE, Judge.

Kenis Ray Johnson (Defendant) was found guilty on 23 July 2010 of: selling and delivering, and possession with the intent to sell and deliver a schedule III controlled substance; trafficking in opium by transporting, selling, and delivering more than 28 grams of an opium derivative; maintaining a vehicle for the purpose of selling controlled substances; and possession of drug paraphernalia. Defendant was found not guilty of child abuse. The trial court sentenced Defendant to a prison term of 225 to 279 months on 23 July 2010, and ordered Defendant to pay a fine of $500,000.00 for trafficking in opium by delivering more than 28 grams of an opium derivative. The trial court also sentenced Defendant to a consecutive prison term of 225 to 279 months, and ordered Defendant to pay an additional fine of $500,000.00 for trafficking in opium by transporting and selling more than 28 grams of an opium derivative, and for selling and possession with intent to sell and deliver a schedule III controlled substance. The trial court arrested judgment on Defendant's guilty verdict for delivery of a schedule III controlled substance. Defendant appeals.

Defendant was arrested in a "buy-bust sting operation" conducted by the Onslow County Sheriff's Office. An informant, Joshua Burgess (Mr. Burgess), called Detective Vishaud Samlall (Detective Samlall) of the Onslow County Sheriff's Office on 17 July 2009 to inform Detective Samlall that he could set up a deal the following day to buy Vicodin pills from Defendant. Detective Samlall authorized the deal and the following morning, he met with Mr. Burgess and several officers of the Onslow County Sheriff's Office, including Sergeant Robert Ides (Sergeant Ides). In preparation for the operation, the officers searched Mr. Burgess and his vehicle; the searches revealed no drugs or money. The officers then equipped Mr. Burgess with a "button camera[,]" a small camera made to look like a button and worn in place of a button on a person's clothing. Mr. Burgess was to use the button camera to record audio and video of the anticipated drug purchase. The officers also issued $350.00 of "buy money" to Mr. Burgess to purchase 180 Vicodin pills from Defendant. Detective Samlall had previously photocopied the $350.00 to make it identifiable.

The officers and Mr. Burgess drove to a grocery store parking lot in Swansboro, North Carolina, the site of the anticipated drug purchase. Mr. Burgess met Defendant in the grocery store parking lot and interacted with him for about a minute. Although several officers observed the interaction, no officers observed Mr. Burgess and Defendant exchange any money or drugs. Mr. Burgess testified that

he purchased a bottle of pills from Defendant for $350.00, signaled to the officers that the deal was complete, and then drove away. After the officers observed Mr. Burgess signal that the deal was complete, the officers converged on Defendant's vehicle and arrested Defendant. Defendant's seven-year-old son was also in Defendant's vehicle. Detective Samlall testified that he searched Defendant's vehicle and found the $350.00 that had been issued to Mr. Burgess. Sergeant Ides testified that he followed Mr. Burgess and stopped him a short distance away from the parking lot. Sergeant Ides searched Mr. Burgess and his vehicle, locating a pill bottle containing 169.5 pills, but no additional drugs and no money. Sergeant Ides took possession of the pill bottle and the button camera worn by Mr. Burgess during the interaction.

Melanie Thornton (Ms. Thornton), a forensic chemist with the N.C. State Bureau of Investigation (SBI), testified that she analyzed and identified the pills "as a mixture of acetaminophen and Hydrocodone." Ms. Thornton also testified that the pills constituted "a Schedule III preparation of an opiate derivative, dihydrocodeinone, with a total weight of 118 grams." It is apparent from the record, and the parties agree, that Hydrocodone and dihydrocodeinone are synonymous.

Defendant testified that he received "180 pills every 30 days" for pain caused by his diabetes. During Defendant's cross-examination, the State asked Defendant if he got "Vicodin or dihydrocodeinone from the VA" and Defendant responded "[t]hat is correct." Defendant testified that he and Mr. Burgess attended a cookout on 17 July 2009, where Mr. Burgess, aware of the pain Defendant's diabetes caused Defendant, offered to give Defendant several Percocet pills the following day. Defendant testified that he met Mr. Burgess in a grocery store parking lot on 18 July 2009, and that Mr. Burgess approached Defendant's vehicle and dropped an empty pill bottle into Defendant's lap, which Defendant immediately gave back to Mr. Burgess. Defendant denied ever selling any pills to Mr. Burgess and denied that the $350.00 "buy money" was ever in his possession or in his vehicle.

A DVD copy of the audio and video recording made by the button camera worn by Mr. Burgess (the recording) was admitted into evidence and published to the jury at trial. During closing arguments, the trial court allowed the State to republish the recording and the trial court made the following remarks:

> The republication of [the recording] was done in a manner differently from the way it was presented to the jury during the [S]tate's case in chief. That difference was that it was presented

> in a frame-by-frame manner and, at times, he had enlarged it. It was done, ostensibly, because, at regular speed, it was unable to be seen—certain items, such as the money and the pill bottle in that—in that video.

At the jury's request, the recording was again republished, in a frame-by-frame manner, during jury deliberations. Further facts will be introduced in the opinion as necessary.

I.

[1] Defendant's first argument is that the trial court erred in entering judgments for both trafficking in opium and for selling and possession with intent to sell and deliver a schedule III controlled substance because the judgments "are mutually exclusive for the same conduct." We disagree.

"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.' " *State v. Mumford*, 364 N.C. 394, 400, 699 S.E.2d 911, 915 (2010) (citation omitted). For example, our Supreme Court concluded in *State v. Speckman*, 326 N.C. 576, 578, 391 S.E.2d 165, 167 (1990) (citation omitted), that "a defendant may not be convicted of both embezzlement and false pretenses arising from the same act or transaction, due to the mutually exclusive nature of those offenses[.]" The *Speckman* Court explained:

> This Court has held that to constitute embezzlement, the property in question initially must be acquired lawfully, pursuant to a trust relationship, and then wrongfully converted. On the other hand, to constitute false pretenses the property must be acquired unlawfully at the outset, pursuant to a false representation. This Court has previously held that, since property cannot be obtained simultaneously pursuant to both lawful and unlawful means, guilt of either embezzlement or false pretenses necessarily excludes guilt of the other.

Id. at 578, 391 S.E.2d at 166-67 (citations omitted).

In the present case, Defendant specifically argues:

> Read together, the [relevant] statutes evince a legislative intent that sale, delivery, and possession with intent to sell or deliver therapeutic amounts of prescription pain pills containing the opium derivative dihydrocodeinone be punished as Class H or

> Class I felonies under Schedule III, and not as the synonymous opium derivative hydrocodone under Schedule II subject to elevated punishment under the trafficking provisions.
>
> . . . .
>
> Schedule III includes "controlled substances . . . [with] currently accepted medical use in the United States", N.C.G.S. §90-91, and the quantitative inclusion in Schedule III of "recognized therapeutic amounts" of specified mixtures containing dihydrocodeinone shows legislative intent to except such amounts of such medicines from trafficking penalties through the "except as otherwise provided in this Article" clause of N.C.G.S. §90-95(h)—while the same opium derivative is otherwise subject to ordinary and trafficking penalties as Schedule II hydrocodone, N.C.G.S. §90-90(1)(a)(10).

The trial court entered judgments against Defendant for trafficking in opium. In relevant part, N.C. Gen. Stat. § 90-95(h)(4) (2009) provides:

> (h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.
>
> . . . .
>
> (4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or . . . derivative, or preparation of opium . . . 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).

The trial court also entered judgment against Defendant for selling and possession with intent to sell and deliver a schedule III preparation of an opium derivative. In relevant part, N.C. Gen. Stat. § 90-95(a)-(b) (2009) provides:

> (a) Except as authorized by this Article, it is unlawful for any person:

> (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;
>
> . . . .
>
> (b) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(1) with respect to:
>
> . . . .
>
> (2) A controlled substance classified in Schedule III . . . shall be punished as a Class I felon, except that the sale of a controlled substance classified in Schedule III . . . shall be punished as a Class H felon.

We find no support for Defendant's argument that a schedule III preparation of an opium derivative does not qualify as a "derivative . . . or preparation of opium" for the purposes of the trafficking statute, N.C.G.S. § 90-95(h)(4). Schedule III preparations of the opium derivative dihydrocodeinone are differentiated from schedule II preparations of the same opium derivative by the quantitative ratio of dihydrocodeinone to nonnarcotic ingredients *per dosage unit*. *See* N.C. Gen. Stat. § 90-91(d)(3)-(5) (providing descriptions of schedule III preparations of dihydrocodeinone); N.C. Gen. Stat. § 90-90(1)(a)-(b) (providing description of schedule II controlled substances including "any . . . derivative . . . or preparation of opium"). In contrast, the quantitative requirements of the trafficking statute refer to the total weight of the opium derivative at issue, and *not* the quantitative measure of the opium derivative per dosage unit. *See* N.C.G.S. § 90-95(h)(4) (referring to "[a]ny person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or . . . derivative, or preparation of opium"). Accordingly, the "except as otherwise provided in this Article" clause of N.C.G.S. § 90-95(h) does not impact that statute's applicability to schedule III controlled substances.

Defendant makes no additional arguments regarding his assertion that the judgments for trafficking in opium and for selling and possession with intent to sell and deliver a schedule III controlled substance are mutually exclusive for the same conduct. Defendant's argument is without merit.

II.

[2] Defendant's second argument is that the trial court "erred in allowing the [State], over objection, to display an enhanced version of a video recording during closing argument and during jury delibera-

tion, which enhanced version had not been offered into evidence[.]" We disagree.

"During a closing argument to the jury an attorney may not . . . make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice." N.C. Gen. Stat. § 15A-1230 (2009). *See also State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) ("references to events and circumstances outside the evidence" constitute improper closing arguments). During jury deliberations, the trial court may, in its discretion, "permit the jury to reexamine in open court . . . materials admitted into evidence." N.C. Gen. Stat. § 15A-1233(a) (2009). We review appeals regarding improper closing arguments and appeals regarding the reexamination of evidence during jury deliberations for an abuse of discretion by the trial court. *See Jones*, 355 N.C. at 131, 558 S.E.2d at 106; *State v. McVay*, 174 N.C. App. 335, 340, 620 S.E.2d 883, 886 (2005). "A court's complete failure to exercise discretion amounts to reversible error." *McVay*, 174 N.C. App. at 340, 620 S.E.2d at 886 (citations omitted). Where a trial court has exercised its discretion, we find an abuse of discretion only " 'where the [trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (citation omitted).

In the present case, Defendant argues that the trial court erred by permitting the State to republish the recording both during closing argument and during jury deliberation because the two republications of the recording constituted "new evidence." Regarding the republication of the recording during closing argument, the trial court made the following statement:

> The republication of [the recording] was done in a manner differently from the way it was presented to the jury during the [S]tate's case in chief. That difference was that it was presented in a frame-by-frame manner and, at times, he had enlarged it. It was done, ostensibly, because, at regular speed, it was unable to be seen—certain items, such as the money and the pill bottle in that—in that video. The court, in its discretion—[defense counsel] objected timely, at the time that it was being done. The court overruled that objection.

Regarding the same republication of the recording during closing argument, Defendant specifically objected

> to the [S]tate's closing argument and the fact that they used the video in a way that was not presented as evidence to the jury; and

> that way was, they slowed it down and first did a still-by-still, picture-by-picture frame, and then they slowed it down and did it in slow motion, in an enhanced version.

The trial court "agree[d] that they did that" but nevertheless overruled Defendant's objection.

Before the recording was republished during jury deliberations, the trial court overruled Defendant's renewed objection to the republication of the recording, stating: "Well, because *the court believes that it's the same evidence that was being offered*, albeit in a slowed down manner, because the court also believes that a lawsuit is a search for the truth, the court is going to overrule the objection and permit it." (Emphasis added). The State accordingly republished the recording, and the following exchange between defense counsel and the trial court occurred.

> [DEFENSE COUNSEL]: I just want to make comments about the video. Frame by frame, there was no money shown, so I don't know what he did during his closing to actually show that money, and I'm trying to figure that out now, because this is frame by frame, and I didn't see any money.
>
> THE COURT: I did.
>
> [DEFENSE COUNSEL]: You saw the money?
>
> THE COURT: I saw the money.
>
> [PROSECUTOR]: I can go back to that section, if you like.
>
> THE COURT: If you would. Go back[.]
>
> . . . .
>
> [PROSECUTOR]: I'm starting at [the relevant time], and I'll tap through it.
>
> (THE ABOVE-REFERRED-TO PORTION OF [THE RECORDING] WAS PLAYED.)
>
> THE COURT: Stop right there. All right.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor.

The foregoing excerpts from the record make clear that the trial court exercised discretion when overruling Defendant's objections to the two republications of the recording. Moreover, Defendant has not met his burden of demonstrating that the trial court abused its dis-

cretion when it determined that the versions of the recording displayed during closing argument and during jury deliberations constituted the same evidence that had previously been admitted during the State's case-in-chief. The record reveals that there were two differences between the original display of the recording and the displays during closing argument and jury deliberations: during closing argument and during jury deliberations, the recording "was presented in a frame-by-frame manner." During closing argument, the video recording was "enlarged" and shown in "slow motion, in an enhanced version." We note, initially, that we consider the displays of the recording in "slow motion" and in a "frame-by-frame manner" to be essentially equivalent, and we will refer to both, collectively, as the display of the recording in a frame-by-frame manner.

Regarding the display of the recording in a frame-by-frame manner, we find useful the analysis in *State v. Brewington*, 343 N.C. 448, 471 S.E.2d 398 (1996). In *Brewington*, the trial court admitted an incriminating videotape into evidence for substantive purposes without objection from the defendant. *Id.* at 455, 471 S.E.2d at 402. Later, the defendant objected when the State moved to publish the videotape to the jury in slow motion; the trial court overruled the objection. *Id.* On appeal, our Supreme Court stated, "[i]n light of the probative value of this videotape, we conclude the trial court did not abuse its discretion in permitting the jury to view the videotape in real time or in slow motion." *Id.* at 456, 471 S.E.2d at 403.

In the present case, the trial court concluded that the display of the recording in a frame-by-frame manner constituted the same evidence which had already been admitted during the State's case-in-chief. Although *Brewington* is not dispositive on the precise issue before this Court, the *Brewington* Court's analysis lends further support to the trial court's determination that the display of the recording in a frame-by-frame manner did not constitute "new evidence." Notably, the decisive factor in *Brewington*, the probative value of the slow motion display of the videotape recording, *id.*, is also present in the case before us. Defendant repeatedly denied that the $350.00 "buy money" was ever in his vehicle. The record reveals that the display of the video in a frame-by-frame manner may have showed "the money" during the interaction between Mr. Burgess and Defendant. The display of the recording in a frame-by-frame manner, like the slow motion display of the videotape in *Brewington*, was therefore particularly probative. In any event, we are unable to conclude that the trial court's determination on this matter was " 'manifestly unsupported

by reason or [wa]s so arbitrary that it could not have been the result of a reasoned decision.' " *McVay*, 174 N.C. App. at 340, 620 S.E.2d at 886 (citation omitted). The trial court did not abuse its discretion in determining that the republication of the recording in a frame-by-frame manner did not constitute new evidence.

The record further reveals, however, that during closing argument the recording was additionally displayed in an "enlarged" or otherwise "enhanced version." As the above excerpts highlight, there is confusion in the record as to the exact nature of this additional "enhance[ment.]" The trial court stated that the State had "at times . . . enlarged" the display of the recording. The trial court also agreed that the recording was displayed "in slow motion, in an enhanced version." It is unclear, however, what exactly constituted this additional "enhance[ment.]" Accordingly, the record has not been sufficiently preserved for us to make a determination that any additional "enhance[ment]" of the recording was such that the display of the recording in such a manner constituted new evidence. We conclude that the trial court did not abuse its discretion in overruling Defendant's objections to the display of the recording during closing argument and during jury deliberation. Defendant's argument is without merit.

III.

[3] Defendant's third argument is that Defendant's trial "counsel failed to function as the 'counsel for defense' guaranteed by Article I, Section 23, of the Constitution of North Carolina and by the Sixth and Fourteenth Amendments to the Constitution of the United States[.]" We disagree.

The "test for ineffective assistance of counsel is the same under both the state and federal constitutions." *State v. Thompson*, 359 N.C. 77, 115, 604 S.E.2d 850, 876 (2004) (citation omitted).

> When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. In order to meet this burden [a] defendant must satisfy a two part test.
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prej-

> udiced 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.*

State v. Braswell, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citations omitted).

In the present case, Defendant argues that he received ineffective assistance of counsel at trial for two reasons. First, Defendant argues that his trial counsel "neglect[ed] to object to and join[ed] in repeated characterizations of the police informant as a 'confidential and reliable informant' or 'CRI[.]' " Defendant reasons that because no "police officer witnessed an exchange of money for pills[,]" the "question for the jury was whether to believe the testimony of [Mr.] Burgess asserting or the testimony of [Defendant] denying such exchange." Defendant concludes that to "determine whether the State met its burden of proof, the jury had to decide whether or not [Mr.] Burgess was reliable." We disagree.

Assuming, *arguendo*, that Defendant has presented a situation where defense counsel " 'made errors so serious that counsel was not functioning as the "counsel" guaranteed' " by the federal and state constitutions, *id.* at 562, 324 S.E.2d at 248 (citation omitted), Defendant has failed to show prejudice from the alleged errors. Defendant's argument presumes that the State could not meet its burden of proof without proving that Mr. Burgess was a more credible witness than Defendant. However, Defendant's argument fails to take account of the fact that the jury also viewed a recording of the interaction between Defendant and Mr. Burgess. As stated by the trial court, that recording featured "certain items, such as the money and the pill bottle[,]" which, alongside the testimony of State's witnesses other than Mr. Burgess, would have allowed the State to meet its burden of proof regarding Defendant's guilt. Accordingly, Defendant has failed to show that these alleged errors " 'were so serious as to deprive . . . [D]efendant of a fair trial[.]' " *Id.* (citation omitted).

Defendant also argues that he received ineffective assistance of counsel because his trial counsel failed to object to "hearsay and non-expert opinion" that characterized Mr. Burgess as a prescription medication addict who was not a potential threat to other people but characterized Defendant as a drug dealer who posed a greater threat to other people. We note that, as stated by Defendant, there was no objection to the alleged "hearsay and non-expert opinion" testimony at trial. Defendant does not argue that the testimony at issue fails the

plain error standard. Accordingly, we make no determination as to whether the admission into evidence of the testimony at issue was in error.

Assuming, *arguendo*, that defense counsel's failure to object to the "hearsay and non-expert opinion" testimony at issue presents a situation where defense counsel " 'made errors so serious that counsel was not functioning as the "counsel" guaranteed' " by the federal and state constitutions, *id.* at 562, 324 S.E.2d at 248 (citation omitted), Defendant has failed to show prejudice from the alleged error. In his brief, Defendant argues why defense counsel should have objected to the testimony at issue, under the applicable evidentiary rule, and then simply asserts: "Trial counsel's failure to object prejudiced fair determination whether to believe [Mr.] Burgess'[] testimony or [Defendant's] testimony." Like Defendant's first argument regarding ineffective assistance, this argument fails to take into account the probative value of the recording which depicted the interaction between Mr. Burgess and Defendant. We also note that, despite Defendant's arguments that his trial counsel's alleged errors bolstered Mr. Burgess' credibility with the jury, Defendant's trial counsel repeatedly attacked Mr. Burgess' credibility throughout the trial. Because the State could meet its burden of proof regardless of the credibility of Mr. Burgess' testimony, Defendant has failed to show prejudice in this matter. Defendant's argument is without merit.

No error.

Judges STROUD and BEASLEY concur.

BATESVILLE CASKET COMPANY, INC. AN INDIANA CORPORATION, PLAINTIFF V. WINGS AVIATION, INC., D/B/A MOODY FUNERAL HOME, A NORTH CAROLINA CORPORATION, DEFENDANT

No. COA10-967

(Filed 16 August 2011)

1. Appeal and Error—interlocutory orders and appeals—receiver appointed—no substantial right affected—dismissed

Defendant's appeal from the trial court's order appointing a receiver was dismissed as interlocutory as there was no substan-

tial right of defendant that would have been lost or irremediably and adversely affected prior to a determination on the merits.

2. Discovery—discovery order—sanctions for noncompliance—defendant not properly served

The trial court erred in an action concerning the payment of a monetary judgment by awarding sanctions based upon defendant's noncompliance with a discovery order. The record did not demonstrate that defendant was properly served with the discovery order as required by N.C.G.S. § 1-352.1.

Appeal by defendant from orders entered 31 December 2009 and 12 February 2010 by Judge Zoro J. Guice in Superior Court, Jackson County. Heard in the Court of Appeals 10 March 2011.

Jeffrey W. Norris & Associates, PLLC, by Jeffrey W. Norris, for plaintiff-appellee.

Jones, Key, Melvin & Patton, P.A., by Fred H. Jones and Karen L. Kenney, for defendant-appellant.

STROUD, Judge.

Defendant appeals trial court orders appointing a receiver and awarding sanctions to plaintiff. For the following reasons, we dismiss defendant's appeal regarding the appointment of a receiver and reverse those portions of the orders regarding sanctions.

I. Background

On 7 August 2008, plaintiff obtained a monetary judgment against defendant. On or about 16 September 2008, a writ of execution was issued seeking satisfaction of the judgment, but on or about 11 December 2008 the Jackson County Sheriff returned the writ because he "did not locate property on which to levy." On 11 March 2009, Plaintiff served defendant with "PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION IN AID OF EXECUTION[.]" Defendant failed to respond to the interrogatories within 30 days, as required by N.C. Gen. Stat. § 1-352.1, and plaintiff filed "PLAINTIFF'S MOTION PURSUANT TO N.C.G.S. SECTION 1-352.1 et. seq. FOR DISCOVERY OF ASSETS[.]"

On 16 July 2009, the clerk of superior court of Jackson County entered an order which required defendant to:

1. Produce at the office of plaintiff's counsel all documents and things requested in plaintiff's Requests for Production within fifteen (15) days of the date of this order;

2. Respond fully to plaintiff's Interrogatories within fifteen (15) days of the date of this order.

3. Submit to an inspection of defendant's offices and grounds located at 714 W. Main Street, Sylva, NC [("Moody Funeral Home") on August 4, 2009 beginning at 10:00 a.m.; and

4. Defendant's principal shall appear before the Clerk of Court for oral examination on August 4, 2009 at 12:30 p.m.

("Discovery Order"). The record does not indicate how, when or if the Discovery Order was served upon defendant or its principal.

On 4 August 2009, plaintiff filed "PLAINTIFF'S RENEWED MOTION TO COMPEL, FOR SANCTIONS, AND FOR THE APPOINTMENT OF A RECEIVER" because defendant "refused to cooperate in any manner and refused to respond to plaintiff's requests and to comply with the Court Order." On or about 19 November 2009, defendant responded in part to plaintiff's discovery requests, but did not provide "bank account statements" and noted that "there are no current bank accounts for Wings[.]" Defendant further noted that

> BB&T foreclosed on its liens with respect to both the Moody Funeral Home realty and the business equipment and other related property. It is my understanding that Coward, Hicks & Siler, P.A. was the purchaser of the entirety.[1]
>
> It is also my understanding that, at this time, Wings Aviation, Inc. hold title only to the two cemeteries discussed in Mr. Moody's deposition, and that any funds received from the sale of lots are expended in connection with maintenance of those cemeteries. There was precious little, if any, other personalty held by the corporation, according to Mr. Moody.

Defendant also asserted that

> Reginald E. Moody, d/b/a Moody Services, leases the property known as Moody Funeral Home and Crematorium from Coward, Hicks & Siler, P.A. Defendant has no ownership interest in Moody Services, but Reginald E. Moody, Jr. is the President of the Defendant, and the Defendant, through Mr.

1. Coward, Hicks, & Siler, P.A. also represents Mr. Moody, Sr. and REM, Inc.

> Moody, conducts business for the cemeteries from the Funeral Home location. Defendant pays no rent and has no formal sublease with Mr. Moody.

On 31 December 2009, the trial court entered an order ("Receivership Order") granting "PLAINTIFF'S RENEWED MOTION TO COMPEL, FOR SANCTIONS, AND FOR THE APPOINTMENT OF A RECEIVER".[2] The trial court ordered the receiver, Sheila Gahagan, CPA, to "enter upon and take possession and control of the business at 714 W. Main Street in Sylva." The Receivership Order further

> acknowledged that defendant's principal has claimed that he is still conducting business in the same location under a slightly different name. However, nothing, including the signage, has changed and it appears that business is and has been conducted under the fictitious name "Moody Funeral Home." The receiver shall have the power and authority to review all transactions and report concerning what business has been transacted and what business continues to be transacted, including all transactions relating to the two cemeteries which remain in the defendant's formal corporate name. It is also acknowledged that defendant no longer owns the real property at 714 W. Main Street, but it has acknowledged to this Court that it is still using that location for its current activities pursuant to an agreement with the current owner, that it continued to conduct business in that location even after the transfer of the property to the current owner, and that there has been no real change in the operations, other than the volume of business, since the time of the filing of this action.

On 13 January 2010, plaintiff's counsel submitted attorney fee affidavits as directed by the Receivership Order.

On 20 January 2010, Coward, Hicks & Siler, P.A., as counsel for REM, Inc., filed a motion to intervene pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a) and a motion to vacate the Receivership Order pursuant to Rule 60(b). REM alleged that it owns Moody Funeral Home, but "does not own or control the Defendant." REM claimed that it was previously defendant's landlord, but it had evicted defendant. REM

2. As to sanctions the trial court specifically ordered: "[D]efendant shall be sanctioned in the amount of plaintiff's fees and costs associated with the plaintiff's pursuit of that information, including the fees associated with plaintiff's counsel's court information, including the fees associated with plaintiff's counsel's court appearances. Plaintiff shall submit to the Court an affidavit of the fees it has incurred relating to this specific issue within thirty (30) days of the date of this Order, and the Court will make the actual award in a subsequent order after reviewing the additional information."

requested "in the alternative" that the receivership be limited to "the business only, and not the real property where the business was previously conducted, to the effect that the receiver would not have possession of the real property and its improvements." On 3 February 2010, the trial court allowed REM to intervene.

On 25 January 2010, defendant filed a "MOTION FOR RELIEF FROM ORDER AND FOR STAY" alleging that the receivership order is void because it calls for the receiver to

> 'take possession and control of the business at 714 W. Main Street in Sylva', when the evidence before the Court is that 'the business at 714 W. Main Street in Sylva' is not owned by the named Defendant in this action, but instead by a third party, not a party to this action, and not subject to the jurisdiction of the Court in this action.

Defendant further alleged that it did "not possess the necessary licenses to provide funeral home services—the licenses that permit the operation of the funeral home business at 714 West Main Street in Sylva, are in the name of Reginald E. Moody, Jr., not a party to this action."

On 28 January 2010, defendant filed notice of appeal from the Receivership Order. On 12 February 2010, the trial court entered an order awarding sanctions in the amount of $3,300.00 to plaintiff, based upon the Receivership Order and the attorney fee affidavits submitted as directed by the Receivership Order ("Sanctions Order"). On 25 February 2010, defendant filed notice of appeal from the Sanctions Order. On 8 March 2010, the trial court entered an order staying any action upon defendant's "MOTION FOR RELIEF FROM ORDER AND FOR STAY" and plaintiff's "MOTION FOR Contempt and Motion for Additional Sanctions[.]"[3]

II. Interlocutory Receivership Order

[1] Defendant's first two issues on appeal are regarding the appointment of the receiver in the Receivership Order. Defendant's brief states that "[t]he Order required the receiver to conduct an accounting and to report back to the Court; as such, the Order is interlocutory." However, defendant claims that the Receivership

> Order provided broad authority to the receiver both with respect to the ongoing business operations of Defendant-Appellant (Wings

3. Plaintiff's "MOTION FOR Contempt and Motion for Additional Sanctions" is not part of the record on appeal.

> Aviation, Inc.), but also with respect to the rights of third parties, not before the Court at the time the receivership was ordered (including REM, Inc., which was later permitted to intervene.)[4]

Defendant contends

> substantial rights have been affected, particularly where the receiver expresses an intent to begin the process of selling the assets to pay off the corporation's debts . . . and where as here, the receiver has failed to file the necessary annual reports with the Secretary of State to avoid administrative dissolution.[5]. . . Without immediate review, [its] assets and corporate opportunities may be lost or irreparably prejudiced.
>
> . . . [T]he Appellant here has a substantial right in managing its own corporation. [Defendants'] right to manage and control its business will be effectively destroyed by the appointment of a receiver, who has far-reaching powers under Judge Guice's [Receivership O]rder of 29 December 2009. . . . The receivership will result in a disruption in and perhaps the complete destruction of [defendant's] business, and thus the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed. . . . If the appeal is not immediately heard from the order appointing a receiver, Defendant-Appellant's business and ability to produce income may be destroyed and its reputation irreparably harmed.

(Quotation marks, brackets, and footnote omitted.) Defendant also claims that interlocutory appeals from orders appointing receivers have previously been considered by the appellate courts, "thereby implying without establishing that such orders inherently affect sub-

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4. REM has not appealed nor filed any documents with this Court, and thus is not a party to this appeal. As such, we will only consider defendant's arguments in regard to defendant's own rights, not those of third parties. Defendant cites to no authority nor are we aware of any which allows this Court to address issues as to non-parties to this action or parties who have not appealed. This extends also to defendant's first argument on appeal which addresses the personal jurisdiction of the court over other parties.

5. Defendant has mischaracterized the record. The record does not indicate that "the receiver has failed to file the necessary annual reports with the Secretary of State[,]" but states that *defendant's president* failed to do so. The receiver noted that "Mr. Moody, Jr. provided a letter for Notice or Grounds for Administrative Dissolution of Wings Aviation, dated March 3, 2010 from the NC Department of the Secretary of State. This is simply due to his failure to file required annual reports and is easily remedied. Mr. Moody, Jr. cannot dissolve the corporation without being in violation of the NC laws pertaining to the sale of cemeteries."

stantial rights. *See, e.g., Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 581, 273 S.E.2d 247, 259 (1981); *York v. Cole*, 251 N.C. 344, 345, 111 S.E.2d 334, 335 (1959)." (Quotation marks and brackets omitted.)

Plaintiff argues that appellant's cited cases "arise from the appointment of a receiver pre-judgment. In the case at hand, a judgment has already been entered against the Appellant. The concerns of appointing a receiver prior to a judgment are not present in this case where [plaintiff] already has a judgment[.]" Plaintiff also notes that "the substantial right [defendant] is arguing does not belong not to [defendant], but to third parties."

> An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

An interlocutory order is generally not immediately appealable.

> Nonetheless, in two instances a party is permitted to appeal interlocutory orders. First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits. Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds.

Bullard v. Tall House Bldg. Co., 196 N.C. App. 627, 637, 676 S.E.2d 96, 103 (2009) (citations and quotation marks omitted). As the trial court did not certify the Receivership Order, we consider whether a substantial right will be impaired. *See id.* While "[o]ur courts have on several occasions considered interlocutory appeals of appointments of receivers without expressly addressing the issue of whether the appellant established a substantial right . . . whether there is a substantial right is normally assessed on a case-by-case basis." *Barnes v. Kochhar*, 178 N.C. App. 489, 496 n.2, 633 S.E.2d 474, 479 n.2, *disc. review denied*, 360 N.C. 644, 638 S.E.2d 462 (2006).

> In determining whether an issue affects a substantial right, our Supreme Court has stated that the substantial right test for appealability of interlocutory orders is more easily stated than applied. Our courts apply a two-part test in determining whether a substantial right exists: 1) that the right in question qualifies as substantial and 2) that, absent immediate appeal, the right will be lost, prejudiced or less than adequately protected by exception to entry of the interlocutory order. A substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right. It is usually necessary to resolve the question of whether there is a substantial right in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.

Id. at 497, 633 S.E.2d at 479 (citations, quotation marks, and brackets omitted).

In *Barnes v. St. Rose Church of Christ*, the defendants

> [a]ppeal[ed] from (A) a preliminary injunction filed 13 September 2002 freezing the assets of St. Rose Church of Christ, Disciples of Christ ("the church") and appointing a receiver to handle the financial affairs of the church, and (B) an order filed 13 September 2002 granting the receiver specific powers to administer the church's financial affairs. . . .
>
> . . . Plaintiff requested that the trial court enjoin the transfer of assets and appoint a receiver to manage the church's finances and assets.
>
> . . . .
>
> . . . [The] defendants note[d] several effects of the preliminary injunction and generally argue[d] that the appointment of a receiver prevents them from conducting their own business.

160 N.C. App. 590, 591-92, 586 S.E.2d 548, 549-50 (2003). This Court determined that

> [a]ssuming that the trial court's interlocutory orders do involve a substantial right by preventing defendants from conducting their own business, defendants have failed to show that the preliminary injunction and appointment of the receiver will potentially result in any harm. In fact, the orders themselves

are designed to maintain the *status quo* of the church's finances during this litigation by placing the assets of the church and control of the day to day finances in the hands of a neutral party until this litigation involving control of those assets and finances is completed.

The order specifying the powers of the receiver authorizes the receiver to pay the ordinary operating expenses of the church as well as salary and a housing allowance for [a defendant], prohibits the church from incurring new liabilities, and allows the receiver to continue the collection of donations. *Thus, the day to day operation of the church is not halted by the trial court's orders, and the effect of the orders is to prevent removal of the church's assets prior to a determination of which entity and set of bylaws properly controls the affairs of the church in order to prevent any potential harm to the assets of the church. Therefore, there is no substantial right of defendants that will be lost or irremediably and adversely affected prior to a determination on the merits. Accordingly this appeal is dismissed as interlocutory and not affecting a substantial right.*

Id. at 592, 586 S.E.2d at 550 (emphasis added) (citation omitted).

Here, the Receivership Order requires the receiver:

i. To enter upon and take possession and control of the business . . . [and] shall have the power and authority to review all transactions and report concerning what business has been transacted and what business continues to be transacted[;]

ii. To take control of all accounts and business transactions, together with all accounts, records, correspondence, and books of accounts relating thereto;

iii. To conduct and/or oversee and control the day-to-day operations of the business in a manner consistent with the power conferred upon this order and consistent with N.C.G.S. section 1-501;

iv. To obtain from the defendant an accounting of the business operations and statements setting forth the budgeted annual and monthly operating expenses, as well as statements, bills, charges, invoices, paid receipts and any

similar documents sufficient to demonstrate the actual operating expenses of the business;

v. To collect all revenues and receipts derived from the business, to pay the current operating expenses (including the costs of administration of the receivership and the premium for the receiver's bond), in accordance with a budget approved by this Court, on a monthly basis;

vi. To maintain an accurate ledger or similar book of account of all receipts and disbursements made by it pursuant to this Order of appointment, and to safely keep the operating statements and all of the documents provided to it;

vii. To obtain any and all permits for the ongoing operation of the business;

viii. To employ attorneys, accountants, other professionals, managing agents, leasing agents, and other persons, firms or corporations necessary or appropriate to the orderly and efficient management of the business;

ix. To enforce contracts and take such action with respect to contracts as may be necessary and appropriate to assure collection and/or payment of such for the orderly and efficient management and operation of the Premises;

x. To renew and extend supply agreements for the business upon such terms and subject to such conditions as the receiver shall deem appropriate;

xi. To make all necessary and proper maintenance, repairs, renewals, replacements, additions, betterments and improvements to the business and to purchase or otherwise acquire additional fixtures and personal property necessary or appropriate to the orderly and efficient management and operation of the property and business;

xii. To keep the business and premises insured to the extent necessary or appropriate and to pay for judgments, insurance, taxes, and assessments;

xiii. To maintain, preserve, and make necessary repairs to the business property and premises during the pendency of these proceedings and until the underlying indebtedness has been satisfied in full; and

xiv. To be vested with all other powers, rights, and duties usually bestowed upon receivers appointed by this Court as by law provided.

Just as in *Barnes v. St. Rose Church of Christ*, "the day to day operation of the [business] is not halted by the trial court's order[], and the effect of the orders is to prevent . . . any potential harm to the assets of the [business]." *Id.* Furthermore, *Barnes v. St. Rose Church of Christ*, addresses the appointment of a receiver prior to entry of a judgment. *See id.*, 160 N.C. App. 590, 586 S.E.2d 548. In a case where it has yet to be determined if the plaintiff is entitled to recovery, protection of the defendant's business or assets would be of much greater concern than here, where there is an unsatisfied judgment against defendant, and had the sheriff found any property upon which to levy, he could have seized that property to satisfy the judgment; certainly, a successful levy would have caused more harm to the business than the receivership as ordered by the trial court. "Therefore, there is no substantial right of defendant[] that will be lost or irremediably and adversely affected prior to a determination on the merits. Accordingly this appeal is dismissed as interlocutory and not affecting a substantial right." *Id.* at 592, 586 S.E.2d at 550.

III. Sanctions

[2] Defendant's last argument on appeal is regarding the sanctions it was ordered to pay; defendant's contentions on appeal are regarding both the sanctions portion of the Receivership Order and the Sanctions Order itself. While the portion of the Receivership Order addressing the receiver was interlocutory, "an order imposing sanctions under Rule 37(b) is appealable as a final judgment." *Smitheman v. Nat'l Presto Indus.*, 109 N.C. App. 636, 640, 428 S.E.2d 465, 468, *disc. review denied*, 334 N.C. 166, 432 S.E.2d 366 (1993). We also note that orders imposing penalties for contempt of court are also immediately appealable. *Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002) ("The appeal of any contempt order . . . affects a substantial right and is therefore immediately appealable.") Thus, even though the orders do not state the statutory basis for the award of attorney fees as a sanction, they are orders establishing a penalty which is analogous to an order under Rule 37(b), and therefore we will consider defendant's argument as to the Sanctions.

As to the sanctions portion of the Receivership Order defendant specifically argues that "[t]here is no evidence in the record on appeal that the Clerk's 16 July 2009 order was served on the judgment debtor

in the manner as required for a summons[.]" N.C. Gen. Stat. § 1-352.1 provides in pertinent part that

> [u]pon failure of the judgment debtor to answer fully the written interrogatories, the judgment creditor may petition the court for an order requiring the judgment debtor to answer fully, which *order shall be served upon the judgment debtor in the same manner as a summons is served pursuant to the Rules of Civil Procedure[.]*

N.C. Gen. Stat. § 1-352.1 (2009) (emphasis added). "The use of the word 'shall' by our Legislature has been held by this Court to be a mandate, and the failure to comply with this mandate constitutes reversible error." *In re Z.T.B.*, 170 N.C. App. 564, 569, 613 S.E.2d 298, 300 (2005).

We first must consider how a summons is served as N.C. Gen. Stat. § 1-352.1 requires that the order entered pursuant to N.C. Gen. Stat. § 1-352.1 be served "in the same manner as a summons is served[.]" N.C. Gen. Stat. § 1-352.1. A summons, unlike motions or other documents filed after a summons, must be served in a particular manner depending on the party being served. *See* N.C.R. Civ. Pro. 4, 5. Furthermore, a person who fails to respond to discovery requested pursuant to N.C. Gen. Stat. § 1-352.1 is subject to contempt of court and may even be punished by imprisonment. *See* N.C. Gen. Stat. § 1-352.1 ("Any person who disobeys an order of the court may be punished by the judge as for a contempt under the provisions of G.S. 1-368."); *see also* N.C. Gen. Stat. § 1-368 (2009) (providing that imprisonment is an appropriate punishment for contempt). Thus, N.C. Gen. Stat. § 1-352.1 has both heightened requirements for service and compliance as compared to other forms of discovery requests which occur prior to entry of a judgment. *See* N.C. Gen. Stat. § 1-352.1; N.C.R. Civ. Pro. 5.

In the record before us there is no evidence that the Discovery Order was "served upon the judgment debtor in the same manner as a summons is served pursuant to the Rules of Civil Procedure" or that it was served at all.[6] N.C. Gen. Stat. § 1-352.1; *see* N.C.R. App. P. 9(a)(1)(j) ("The record on appeal in civil actions and special proceedings shall contain . . . copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal[.]") As the record does not demonstrate that defendant was properly served with the Discovery Order as required by N.C. Gen. Stat. § 1-352.1, *see In re*

6. Furthermore, the parties have not addressed the issue of waiver of service.

Z.T.B., 170 N.C. App. at 569, 613 S.E.2d at 300, and as the trial court awarded sanctions based upon defendant's noncompliance with the Discovery Order, we reverse the portion of the Receivership Order addressing sanctions. *See In re Z.T.B.*, 170 N.C. App. at 569, 613 S.E.2d at 300. As we are reversing the sanctions portion of the Receivership Order, we need not address defendant's argument regarding the Sanctions Order.

IV. Conclusion

For the foregoing reasons, we dismiss defendant's appeal as to appointment of a receiver by the 31 December 2009 Receivership Order and reverse the sanctions portion of the 31 December 2009 Receivership Order and the 12 February 2010 Sanctions Order.

DISMISSED IN PART; REVERSED IN PART.

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

BRANCH BANKING AND TRUST COMPANY, PLAINTIFF-APPELLEE v. CHICAGO TITLE INSURANCE COMPANY; LEWIS A. THOMPSON, III; AND BANZET, THOMPSON & STYERS, PLLC, DEFENDANTS-APPELLANTS

No. COA10-196-2

(Filed 16 August 2011)

1. Reformation of Instruments—title insurance policy—undiscovered deed of trust

The trial court did not err by granting summary judgment to plaintiff on the issue of reformation of a title insurance policy where Chicago Title argued mutual mistake but cited no evidence of any oral agreement that would have excluded an undiscovered deed of trust. Chicago Title did not present evidence sufficient to forecast a showing that BB&T and Chicago Title mutually intended to exclude the undiscovered deed of trust from the policy.

2. Insurance—title—exclusion—actual loss

The trial court did not err when granting summary judgment for BB&T by concluding that an exclusion in a title insurance policy requiring actual loss did not apply to BB&T's action.

3. Statutes of Limitation and Repose—professional malpractice—negligent misrepresentation—undisclosed deed of trust

Chicago Title was not barred by either N.C.G.S. § 1-15 or N.C.G.S. § 1-52(9) from filing a claim for professional malpractice or negligent misrepresentation at the time it was notified of BB&T's claim based on an undiscovered deed of trust and did not suffer any prejudice as a result of any delay by BB&T in informing Chicago Title of the undiscovered deed of trust.

Appeal by Defendants-Appellants from order entered 29 June 2009 by Judge Lindsay R. Davis, Jr. in Superior Court, Forsyth County; order entered 3 November 2009 by Judge Richard W. Stone in Superior Court, Forsyth County; and judgment entered 3 November 2009 by Judge Richard W. Stone in Superior Court, Forsyth County. Heard originally in the Court of Appeals 12 October 2010, and published opinion filed 7 June 2011. A Petition for Rehearing was filed 12 July 2011 and allowed 1 August 2011. Pursuant to the Petition for Rehearing, the matter was reheard in the Court of Appeals. This opinion supersedes the 7 June 2011 opinion previously filed in this matter.

Bell, Davis & Pitt, P.A., by Alan M. Ruley and Bradley C. Friesen, for Plaintiff-Appellee.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell and Christopher C. Finan, for Defendants-Appellants.

McGEE, Judge.

Chicago Title Insurance Company (Chicago Title) issued a title insurance policy (the 2003 policy) to Branch Banking and Trust Company (BB&T) on 11 April 2003, insuring a deed of trust (the 2003 deed of trust) encumbering a 5.678 tract of real property in Warren County, North Carolina. The real property was acquired by Duane White Land Company, LLC (Land Company) from Eaton Ferry Marina, Inc. on 10 April 2001. The 2003 policy included two other deeds of trust as exceptions to the coverage provided to BB&T. The two exceptions listed were (1) a deed of trust in favor of two individuals, known as the "Purchase Money Deed of Trust" and (2) a deed of trust in favor of The Money Store Commercial Mortgage, Inc., known as the "Money Store Deed of Trust." The 2003 deed of trust was recorded in the Warren County Registry on 11 April 2003, by Banzet, Banzet & Thompson, PLLC (the Banzet Firm), through attorneys

Lewis A. Thompson (Thompson) and Julius Banzet, III (Banzet). The firm is presently known as Banzet, Thompson & Styers, PLLC. The Banzet Firm issued a final opinion on title, effective 11 April 2003, and submitted it to Chicago Title. Chicago Title is the only Defendant that is a party to this appeal.

A second deed of trust was executed by BB&T and Land Company on 23 March 2005 (the 2005 deed of trust), and encumbered the same real property as that described in the 2003 deed of trust. Although BB&T requested the Banzet Firm obtain title insurance from Chicago Title on the 2005 deed of trust, no title policy was issued for the 2005 deed of trust. The 2005 deed of trust settlement statement shows that $8,265.00 was allocated to Chicago Title for title charges, and that $8,180.00 was allocated to Chicago Title for title insurance premium. From the record, it appears the check to Chicago Title for title charges was subsequently voided, but that Chicago Title deposited the check for the title insurance premium, even though no title insurance policy was issued for the 2005 deed of trust.

BB&T discovered "no later than" 21 December 2005 that, on the date the 2003 Deed of Trust was executed, a third deed of trust existed. This third deed of trust was dated 6 March 1998 and was in favor of Centura Bank (the Centura deed of trust). The Centura deed of trust encumbered a portion of the 5.678 tract described in the 2003 deed of trust. That portion of real property was not explicitly mentioned in the 2003 deed of trust or in the 2003 policy. Chicago Title had issued the policy of title insurance to Centura Bank in March 1998 (the Centura policy), insuring the Centura deed of trust. However, the Centura deed of trust was not listed as an exception to the coverage under the 2003 policy. BB&T first notified Chicago Title of the additional encumbrance on 26 March 2006.

The notice provision of the 2003 policy, section 3, reads in relevant part as follows:

> [BB&T] shall notify [Chicago Title] promptly in writing . . . in case knowledge shall come to [BB&T] of any claim of title or interest which is adverse to the title to the estate or interest or the lien of the insured mortgage, as insured, and which might cause loss or damage for which [Chicago Title] may be liable by virtue of this policy[.] . . . If prompt notice shall not be given to [Chicago Title], then as to [BB&T] all liability of [Chicago Title] shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify [Chicago Title]

> shall in no case prejudice the rights of [BB&T] under this policy unless [Chicago Title] shall be prejudiced by the failure and then only to the extent of the prejudice.

Centura Bank initiated foreclosure on the Centura deed of trust in early 2006. This foreclosure action was later dismissed. Centura Bank initiated a second foreclosure proceeding on 14 March 2007. BB&T then filed a claim with Chicago Title on 26 March 2007 pursuant to the 2003 policy in which BB&T requested Chicago Title cover BB&T's losses related to the Centura deed of trust. BB&T's subsidiary, BB&T Collateral Service Corporation, acquired the Centura deed of trust for $464,000.00 on 26 April 2007. The pending 2007 foreclosure proceeding was then dismissed. BB&T initiated a foreclosure proceeding on the 2003 deed of trust on 15 August 2007. The real property described in the 2003 deed of trust, including the disputed tract, was sold at foreclosure for $3,263,400.00. BB&T filed an additional claim with Chicago Title to recover the $464,000.00 in damages as a result of the alleged breach of the 2003 policy. Chicago Title denied BB&T's claim for damages on 18 March 2008.

BB&T filed a complaint against Chicago Title in Forsyth County Superior Court for breach of contract and negligence on 20 March 2008. Chicago Title filed a motion to dismiss, answer and counterclaim on 30 May 2008. Chicago Title's counterclaim requested reformation of the 2003 policy on the grounds that the 2003 policy did not conform to the intent of either BB&T or Chicago Title. In the alternative, Chicago Title's counterclaim requested a declaratory judgment from the trial court that BB&T had suffered "no loss or damage" as defined in the 2003 policy. Chicago Title argued that, because no remaining balance was due on the 2003 Deed of Trust, BB&T had not suffered any loss or damage and, thus, should be denied relief under this provision of the 2003 policy.

BB&T filed a reply to the counterclaim on 30 June 2008 in which it denied that reformation would be proper because the 2003 policy accurately described the real property BB&T intended to have covered. BB&T claimed that it believed the 2003 deed of trust, and thus the 2003 policy, included the portion of real property covered by the Centura deed of trust. In its reply, BB&T also denied Chicago Title's claim that BB&T had suffered no loss or damage in relation to the Centura deed of trust. BB&T filed a motion for summary judgment on its claim for breach of contract and Chicago Title's counterclaim for reformation on 15 May 2009. Chicago Title filed a motion for sum-

mary judgment on 26 May 2009 on BB&T's claim for breach of contract and Chicago Title's counterclaim to declare that BB&T had not suffered any loss or damage.

The trial court entered an order on 29 June 2009 granting BB&T's motion for summary judgment on Chicago Title's counterclaims and defenses relating to mutual mistake and no loss or damage. The trial court determined, however, that there was sufficient evidence to go to trial on Chicago Title's defense that it was prejudiced pursuant to the terms of the 2003 policy because BB&T did not provide Chicago Title with sufficient notice of BB&T's discovery of the Centura deed of trust. At trial, the trial court ultimately found for BB&T and, in its 3 November 2009 judgment, awarded BB&T $404,000.00, prejudgment interest, and costs. Chicago Title appeals.

I.

[1] Chicago Title argues that the trial court erred in granting summary judgment to BB&T on the issue of reformation of the 2003 policy because an issue of material fact existed concerning the intent of the parties regarding the 2003 policy. We disagree.

" 'We review an order allowing summary judgment *de novo*. If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.' " *Wiggs v. Peedin*, 194 N.C. App. 481, 485, 669 S.E.2d 844, 847 (2008) (citation omitted).

" 'Reformation is a well-established equitable remedy used to reframe written instruments where, through mutual mistake or the unilateral mistake of one party induced by the fraud of the other, the written instrument fails to embody the parties' actual, original agreement.' " *Metropolitan Property and Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997) (citation omitted). Chicago Title makes no argument that there was any fraud involved in the execution of the 2003 policy; instead its argument for reformation is based solely on its contention that there existed a mutual mistake concerning the real property the 2003 policy was intended to cover. " 'A mutual mistake is one common to both parties to a contract . . . wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement.' " *Id.* (citations omitted).

"When a party seeks to reform a contract due to an affirmative defense such as mutual mistake . . . the burden of proof lies with the

moving party." *Smith v. First Choice Servs.*, 158 N.C. App. 244, 250, 580 S.E.2d 743, 748 (2003) (citation omitted).

> [T]here is "a *strong presumption* in favor of the correctness of the instrument as written and executed, for it must be assumed that the parties knew what they agreed and have chosen fit and proper words to express that agreement in its entirety." This presumption is strictly applied when the terms of a deed are involved in order "to maintain the stability of titles and the security of investments." With these principles in mind, we must examine the record to determine whether [Chicago Title] proved that there was a mutual mistake of fact as to what land was [covered] . . . by "clear, cogent and convincing evidence."

Hice v. Hi-Mil, Inc., 301 N.C. 647, 651, 273 S.E.2d 268, 270-71 (1981) (citations omitted).

> " 'The party asking for relief by reformation of a deed or written instrument, must allege and prove, first, that a material stipulation, as alleged, was agreed upon by the parties, to be incorporated in the deed or instrument as written, and second, that such stipulation was omitted from the deed or instrument as written, by mistake, either of both parties, or of one party, induced by the fraud of the other, or by the mistake of the draughtsman. Equity will give relief by reformation only when a mistake has been made, and the deed or written instrument because of the mistake does not express the true intent of both parties. The mistake of one party to the deed, or instrument, alone, not induced by the fraud of the other, affords no ground for relief by reformation.' "
>
> When the pleader has alleged (1) the terms of an oral agreement made between the parties; (2) their subsequent adoption of a written instrument intended by both to incorporate the terms of the oral agreement but differing materially from it; and (3) their mutual but mistaken belief that the writing contained their true, *i.e.*, the oral, agreement, our cases hold that the pleading will survive a demurrer.

Matthews v. Van Lines, 264 N.C. 722, 725, 142 S.E.2d 665, 668 (1965) (citations omitted).

Chicago Title fails to forecast evidence required for the remedy of reformation. Chicago Title does not allege that it had an oral agreement with BB&T that was mistakenly omitted from the 2003 policy. *Id.* Chicago Title argues that a mutual mistake by both it and BB&T

led to the "inadvertent windfall of coverage" because neither party ever intended for the real property encumbered by the Centura deed of trust to be included in the 2003 policy. BB&T argues that it was not BB&T's intention that the 2003 policy exclude the real property encumbered by the Centura deed of trust, and that BB&T and Chicago Title never agreed that the 2003 policy would exclude coverage for the real property encumbered by the Centura deed of trust.

Chicago Title cites no evidence of any oral agreement between it and BB&T that would have excluded the Centura deed of trust from the 2003 policy. It follows that, without such an agreement between the two parties, their subsequent adoption of the 2003 policy could not have "differ[ed] materially" from the oral agreement as required in order to establish mutual mistake as a basis for reformation. *Matthews*, 264 N.C. at 725, 142 S.E.2d at 668. Having failed to present evidence in support of the first element, Chicago Title necessarily fails the second and third elements. *Id.* Therefore, Chicago Title has not made the necessary showing to support reformation based upon mutual mistake. *Id.*

Even assuming *arguendo* that Chicago Title presented sufficient evidence to support its contention that BB&T intended to exclude the contested parcel from the 2003 policy, Chicago Title's own argument defeats its appeal on this issue. Chicago Title does not argue that its own intent was erroneously represented by the 2003 policy. Chicago Title alleges that when it executed the 2003 policy, its specific intent was to "insure only that interest in real property that BB&T actually intended to encumber and insure in connection with its recordation of the [2003 policy]." We believe more is required for reformation of a title insurance policy. Chicago Title needed to show that it and BB&T had a meeting of the minds as to the specific terms of the 2003 policy, and that some material part of their agreement was mistakenly omitted from the 2003 policy. In the present case, Chicago Title and BB&T needed to have orally agreed upon the specific description of the real property to be covered by the 2003 policy. A general intent on the part of Chicago Title to cover whatever real property BB&T intended to have covered is insufficient to form the basis for a reformation based upon mutual mistake. Chicago Title fails to make any argument that it and BB&T had *specifically* agreed that the contested parcel *would be excluded* from coverage by the 2003 policy. *Matthews*, 264 N.C. at 725, 142 S.E.2d at 668. There is no evidence that a " 'material stipulation . . . *agreed upon by the parties* . . . was omitted from the deed or instrument as written, by [the] mistake . . . of both parties[.]' " *Id.* (citation omitted) (emphasis added).

Viewing the evidence in the light most favorable to the party opposing summary judgment, Chicago Title "simply has not provided a factual basis to support equitable reformation of the [2003 policy]." *Carter v. Am. Ins. Co.*, 190 N.C. App. 532, 539, 661 S.E.2d 264, 270 (2008) (citation omitted). Chicago Title did not present evidence sufficient to forecast a showing that BB&T and Chicago Title had mutual intentions to exclude the Centura deed of trust from the 2003 policy and that the 2003 policy, as the result of a mutual mistake, failed to properly express those intentions. *Matthews*, 264 N.C. at 725, 142 S.E.2d at 668.

II.

[2] Chicago Title next argues that the trial court erred in granting summary judgment in favor of BB&T by concluding that an exclusion in the 2003 policy, namely section 5—the "no loss or damage" exclusion—did not apply to BB&T's cause of action. The "no loss or damage" exclusion provision in the title insurance policy states that if BB&T is unable to show proof that it suffered an actual loss due to any fault of Chicago Title, Chicago Title's obligations to BB&T under the 2003 policy shall terminate.

Chicago Title claims that no amount remained to be paid in connection with the promissory note secured by the 2003 deed of trust, because the 2005 deed of trust, executed on the same real property described in the 2003 deed of trust, effectively replaced the 2003 deed of trust and the debts owed in connection with it. Chicago Title argues that since it did not explicitly insure the 2005 deed of trust, it was not liable for the loss or damage suffered by BB&T in connection with Chicago Title's defective/mistaken coverage of the 2003 deed of trust. We disagree.

When reviewing the provisions of an insurance contract, we employ the following "general principles of construction . . . to divine the meaning of [the] contract." *Woods v. Insurance Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978). "The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect." *Id.* at 506, 246 S.E.2d at 777. "[I]f the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written[.]" *Id.* We consider Chicago Title's argument in light of these principles of construction.

The 2003 policy states:

> The insured mortgage and assignments thereof, if any, are described as follows:
>
> Deed of Trust from DUANE WHITE LAND COMPANY, LLC to BB&T COLLATERAL SERVICE CORPORATION, Trustee for BRANCH BANKING AND TRUST COMPANY, dated April 11, 2003, filed for record April 11, 2003, at 10:37 am, in Book 746, page 298, Warren County Registry, securing $8,000,000.00.

The 2003 policy insures the 2003 deed of trust without restriction, except for those exceptions included in the "Exclusion from Coverage" section of the 2003 policy, none of which are relevant here.

The 2003 deed of trust contains a Statement of Purpose, which states in part:

> In this Deed of Trust reference shall be made simply to the "Note or other Document" and such a reference is deemed to apply to all of the instruments which evidence or describe the Debt, or which secure its payment, and to all renewals, extensions and modifications thereof, whether heretofore or hereafter executed, and includes without limitation all writings described generally and specifically on the first page of this Deed of Trust in numbered paragraph 2. This Deed of Trust shall secure the performance of all obligations of Grantor and of any third party to Beneficiary which are described in this Deed of Trust, in the Note or other Document, and such performance includes the payment of the Debt. In this Deed of Trust the definition of "Debt" includes: (i) the principal; (ii) all accrued interest including possible fluctuations of the interest rate if so provided in the Note or other Document; (iii) all renewals or extensions of any obligation under the Note or other Document (even if such renewals or extensions are evidenced by new notes or other documents)[.]

This Court is required to give weight to every word and provision of the insurance contract and to the documents it covers. *Woods*, 295 N.C. at 506, 246 S.E.2d at 777. We find the third subsection of the definition of "Debt" to be dispositive in this case.

The 2003 deed of trust, which was incorporated into the 2003 policy, defined "Debt" to include "all renewals or extensions of any obligation under the Note or other Document (even if such renewals or extensions are evidenced by new notes or other documents)[.]" We

find that that the language is clear, and that only one reasonable interpretation exists. *Id.* at 506, 246 S.E.2d at 777. We are, therefore, obligated to "enforce the contract as written." *Id.* We hold that the 2005 deed of trust is, for the purposes of its inclusion in the 2003 policy's coverage of the 2003 deed of trust, an "extension[] evidenced by a new note" of the 2003 policy. Therefore, the debt owed on the 2003 deed of trust was not extinguished by the 2005 deed of trust. The debt owed on the 2003 deed of trust was, instead, renewed and extended by a new note or document—the 2005 deed of trust. The trial court did not err in granting summary judgment in favor of BB&T on this issue. This argument is without merit.

III.

[3] Chicago Title also contends the trial court erred in determining that N.C. Gen. Stat. § 1-52(9) was the statute of limitations that controlled claims Chicago Title may have filed against the Banzet Firm rather than N.C. Gen. Stat. § 1-15. Chicago Title further argues the trial court erred in determining that Chicago Title had failed to show it had been prejudiced by any delay on the part of BB&T in informing Chicago Title of the Centura deed of trust. We disagree.

Chicago Title argued at trial that because of BB&T's delay in informing Chicago Title of the Centura deed of trust, Chicago Title was effectively prevented from bringing a claim against the Banzet Firm for improperly issuing a final opinion on title for the 2003 deed of trust to Chicago Title that omitted the Centura deed of trust. The standard of appellate review for a decision rendered in a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001) (citation omitted). If there is competent evidence to support the findings of fact, they are binding on appeal. *Id.* (citation omitted). While a trial court's findings of fact are binding if supported by sufficient evidence, a trial court's conclusions of law are reviewed *de novo*. *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996) (citation omitted).

N.C. Gen. Stat. § 1-52(9) (2009) sets forth a three-year statute of limitations for claims of negligent misrepresentation. For a claim of professional malpractice, N.C. Gen. Stat. § 1-15(c) (2009) states in relevant part:

> [A] cause of action for malpractice arising out of the performance of or failure to perform professional services shall be

> deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is . . . economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]

The trial court concluded at the time of trial that

> [a]ssuming Chicago Title's first discovery of the Centura [deed of trust] as a lien prior to BB&T's 2003 [deed of trust] was on March 26, 2007, the three year statute of limitations for Chicago Title to commence an action for negligent misrepresentation [against the Banzet Firm] still ha[d] not expired.

Similarly, the trial court concluded that the three-year statute of limitation set forth in N.C.G.S. § 1-15 would have expired on 11 April 2006, and that the

> [f]our year statute of repose set forth in N.C. Gen. Stat § 1-15 would have expired . . . on April 11, 2007, but Chicago Title did not commence any action against [the Banzet Firm], Lewis A. Thompson, or Julius Banzet, III before April 11, 2007, even though Chicago Title had received BB&T's Claim Letter two weeks before that date.

Chicago Title argues that the trial court improperly applied N.C.G.S. § 1-52(9) and that "the only proper claim" available against Thompson was "one for professional negligence[,]" which would apply the statute of limitations set forth in N.C.G.S. § 1-15. However, the trial court found as fact that Chicago Title had

> a period of at least eight (8) days . . . to determine what actions, if any, it could . . . take against [the Banzet Firm and Thompson and/or Banzet] . . . prior to the expiration of the four (4) year period of time following [the] parties[']' last act

> with respect to Chicago [Title's] issuance of the [2003 policy]. Chicago Title did not take any such actions against said attorneys.

Chicago Title does not contest this finding of fact and it is, therefore, binding on appeal. *Cornell v. Western & S. Life Ins. Co.*, 162 N.C. App. 106, 110-11, 590 S.E.2d 194, 297 (2004) (citation omitted). The trial court found that Chicago Title was not time barred from filing a claim for professional negligence or negligent misrepresentation, but it took no such actions against The Banzet Firm, Thompson, or Banzet.

We find that, at the time Chicago Title was notified of BB&T's claim and of the Centura deed of trust, Chicago Title was not barred, by either N.C.G.S. § 1-15 or N.C.G.S. § 1-52(9), from filing a claim for professional malpractice or negligent misrepresentation against the Banzet Firm, Thompson, or Banzet. Chicago Title did not suffer any prejudice as a result of any delay by BB&T in informing Chicago Title of the Centura deed of trust; therefore, section 3 of the 2003 policy does not apply.

We note that though Chicago Title included the order filed 3 November 2009 denying its motion to compel in its notice of appeal to our Court, Chicago Title makes no argument on appeal concerning the 3 November 2009 order. Chicago Title has therefore abandoned any appeal it may have had from the 3 November 2009 order. N.C.R. App. P. 28(b)(6); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008).

Affirmed.

Judges HUNTER, JR. and BEASLEY concur.

STATE OF NORTH CAROLINA v. MAURICE DONNELL WHITE

No. COA10-1143

(Filed 16 August 2011)

Search and Seizure—no reasonable suspicion for stop—no probable cause for arrest—motion to suppress improperly denied

The trial court erred in a possession with intent to sell and deliver cocaine and possession of cocaine case by concluding the police had reasonable suspicion to conduct an investigatory stop and in denying defendant's motion to suppress the State's evidence obtained pursuant to his unlawful seizure. The circumstances did not provide the officers with reasonable suspicion necessary to justify an investigatory stop of defendant or probable cause for defendant's arrest.

Appeal by Defendant from denial of motions to suppress entered 17 April 2009 by Judge Shannon R. Joseph and 1 October 2009 by Judge R. Stuart Albright and judgment entered 12 May 2010 by Judge John O. Craig, III in Moore County Superior Court. Heard in the Court of Appeals 24 March 2011.

Attorney General Roy Cooper, by Assistant Attorney General Jay L. Osborne, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Maurice Donnell White ("Defendant") appeals the denial of his motions to suppress evidence in connection with his warrantless arrest for possession with intent to sell and deliver cocaine, and possession of cocaine. Defendant asserts (1) the trial court erred in finding the police conducted a lawful investigatory stop based on reasonable suspicion of criminal activity, and (2) the trial court erred in denying his motions to suppress evidence obtained from an unlawful investigatory stop in violation of the Fourth Amendment of the United States Constitution and analogous provisions of the North Carolina Constitution. We reverse.

I. Facts & Procedural History

The State's evidence tended to show the following. On the 2:00 p.m. to midnight shift of 15 August 2008, Detective Brian Edwards and Sergeant Jack Austin of the Southern Pines Police Department were on patrol in an unmarked white Dodge Durango. Sometime after dark, the officers received a report from dispatch complaining of loud music near the corner of Coates Street and Shaw Avenue. Although this location is at the center of Brookside Park Apartments, the report did not identify the apartment complex or a specific apartment within it as the source of the music complaint, nor did it identify the person who made the complaint. Additionally, Coates Street intersects Shaw Avenue at two locations, but the report did not specify either intersection as the subject of the loud music complaint.

Detective Edwards testified that he had been to the Brookside Park Apartments on "several occasions throughout the evening" and had made between fifty and one hundred drug arrests there in the past. He also stated he was aware of other arrests made at that location by other officers of his department, and thus he believed it to be a high-crime area.

Responding to the loud music complaint, Detective Edwards saw three or four men, including Defendant, standing near a dumpster near the intersection of Coates and Shaw Streets. The officer did not recognize any of these men, but decided to question them about the loud music. As Detective Edwards turned from Shaw Avenue on to Coates Street, he stopped his vehicle about thirty-five feet from the men and on the opposite side of the dumpster.

The officers were dressed in cargo pants and blue polo shirts with "Police" written in black letters on the back and an embroidered badge on the front left chest. The officers' car was unmarked with no labels, decals, or exterior lights. Detective Edwards testified that as he was exiting the vehicle and turning to close the door, he heard Sergeant Austin yell, "Stop! Police[,]" and he "took off running around the back side of the vehicle." Detective Edwards then "ran to the opposite side of the Dumpster so [he] could see[,]" and observed Sergeant Austin chasing a black male up Shaw Avenue. Detective Edwards gave pursuit behind Sergeant Austin.

As he pursued Defendant, Detective Edwards shouted for Defendant to stop. After running approximately one hundred and fifty yards, Defendant tripped and fell to the ground. Detective Edwards then "jumped on top of him," rolled Defendant on his side and hand-

cuffed him. Sergeant Austin then arrived and helped Defendant to his feet. After Defendant stood, Sergeant Austin noticed a small bag on the ground and told Detective Edwards, "There's a bag of crack there next to you." Detective Edwards visually identified the bag's contents as crack cocaine.

Defendant was charged with (1) possession with intent to sell and deliver cocaine, (2) possession of cocaine, and (3) resisting, delaying, and obstructing a public officer pursuant to N.C. Gen. Stat. § 14-223. On 8 December 2008, a grand jury issued indictments on the first two charges, but did not return an indictment for the charge of resisting, delaying, and obstructing a public officer.

On 15 January 2009, Defendant filed a Motion to Suppress the State's evidence arguing that on the night in question Defendant was not engaging in any activity that would provide reasonable suspicion necessary to justify his seizure. He also argued the police officers' recovery of the substance the State contended to be cocaine was the result of an unlawful seizure. The Motion came on for a hearing on 18 February 2009 in Moore County Superior Court, Judge Shannon R. Joseph presiding.

At the suppression hearing, Detective Edwards testified that before he stopped his car and exited the vehicle, he did not hear any music, and did not see any noise-producing device near the men. When asked by the trial court why he stopped where the men were gathered, he replied, "[w]e were given the call that there was loud music at the corner of Coates and Shaw Avenue." When asked by the trial court whether there was loud music at this location, he reiterated that he heard no loud noises. After cross-examination, the trial court asked what Detective Edwards saw the men doing as he approached; he replied, "They were congregating in between the apartment and the trash can area." He did not see any weapons, there was no exchange of hands that would indicate a possible drug transaction, and he was unable to identify any of the men prior to arresting Defendant. Sergeant Austin did not testify at the hearing.

The trial court denied Defendant's Motion to Suppress during the 18 February 2009 hearing (and by Order entered 21 April 2009) and found, *inter alia*: Defendant's flight from the scene was unprovoked; after Defendant fell and before standing again, Detective Edwards arrested Defendant for resisting, delaying, and obstructing an officer; after Defendant was returned to standing, Detective Edwards and Officer Austin observed a plastic bag of rock cocaine where

Defendant had been lying on the ground; and Detective Edwards had personal knowledge that the area at issue is a high-crime area. The trial court concluded that considering the totality of the circumstances the police had reasonable suspicion to believe criminal activity was afoot, and that none of Defendant's state or federal constitutional rights had been violated.

Defendant filed a Supplemental Motion to Suppress the State's evidence on 16 April 2009. In this motion, Defendant argued that the trial court, following the 18 February 2009 suppression hearing, did not rule on whether probable cause existed for Defendant's arrest. Defendant further argued that on the night of his arrest, he was not engaged in any activity that would provide Detective Edwards with probable cause necessary to justify his seizure. Accordingly, Defendant sought to have the trial court suppress the State's evidence derived from Defendant's seizure.

Relying on the transcript from the hearing on Defendant's first motion to suppress, Judge R. Stuart Albright denied the Supplemental Motion in an Order entered 1 October 2009. In this Order, the trial court incorporated the findings of fact from the previous hearing and concluded that Detective Edwards had "reasonable suspicion to justify his stop and detention of the Defendant," and had "probable cause to charge Defendant with resisting, delaying, or obstructing a public officer." Defendant filed a notice of intent to appeal the denial of the suppression motions prior to the entry of an *Alford* guilty plea, on 30 March 2010, to one count of possession with intent to sell and distribute cocaine.

II. Jurisdiction & Standard of Review

Defendant has an appeal of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2009) and N.C. Gen. Stat. § 15A-979(b) (2009) ("An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty."). We review the trial court's order regarding a motion to suppress to determine if competent evidence supports the trial court's findings of fact and whether the findings of fact support its conclusion of law. *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (2007). The trial court's conclusions of law are subject to *de novo* review. *Id.*

III. Analysis

Defendant argues the trial court erred in concluding the police had reasonable suspicion to conduct an investigatory stop and in denying his Motion to Suppress the State's evidence obtained pursuant to his unlawful seizure. We agree and reverse the trial court's Orders.

As an initial matter, we note Defendant incorrectly asserts he was seized at the moment Sergeant Austin exited his car and yelled, "Stop! Police[,]" and thereby violated his Fourth Amendment right to be free from unreasonable seizures. While a show of authority is required for a Fourth Amendment seizure to occur, that alone is not sufficient. *See California v. Hodari D*, 499 U.S. 621, 629, 113 L. Ed. 2d 690, 699 (1991) (explaining that even though an officer's pursuit constituted a show of authority enjoining the defendant to halt, because the defendant did not comply, he was not seized until he was tackled).

"An individual is seized by a police officer and is thus within the protection of the Fourth Amendment when the officer's conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009) (quotation marks omitted) (citing *Florida v. Bostick*, 501 U.S. 429, 437, 115 L. Ed. 2d 389, 400 (1991)). Police conduct necessary for a seizure may include a "show of authority" that restrains an individual's freedom of movement. *State v. Farmer*, 333 N.C. 172, 187, 424 S.E.2d 120, 129 (1993). Such a show of authority includes, among other things, "the officer's words and tone of voice." *Icard*, 363 N.C. at 309, 677 S.E.2d at 827.

However, when a suspect does not yield after the police engage in a verbal show of authority, a seizure has not occurred. *Hodari D*, 499 U.S. at 621, 113 L. Ed. 2d at 694. In *Hodari D*, the United States Supreme Court stated:

> The word 'seizure' . . . . does not remotely apply . . . to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee. That is no seizure . . . . An arrest requires *either* physical force . . . or, where that is absent, *submission* to the assertion of authority.

Id. at 626, 113 L. Ed. 2d at 697.

In the present case, Defendant was not seized until Detective Edwards utilized physical force and "fell on top of him." Once seized,

Defendant was immediately arrested for resisting, delaying, and obstructing a public officer.

Both parties characterize the facts of this case as involving an investigatory stop of Defendant, requiring only reasonable suspicion that criminal activity may be afoot. *See Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968) (holding that where police observe conduct which leads them to reasonably conclude criminal activity may be afoot, they may conduct a brief investigatory stop). We conclude no investigatory stop occurred in the present case. Instead, Detective Edwards arrested Defendant when he "fell on top of him," and placed him in handcuffs for resisting, delaying, and obstructing a public officer.

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). Such a stop may only 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) (citation and quotation marks omitted). "Thus, a police officer must have developed more than an 'unparticularized suspicion or hunch' before an investigatory stop may occur." *State v. Willis*, 125 N.C. App. 537, 541, 481 S.E.2d 407, 410 (1997) (quoting *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70) (citation and quotation marks omitted) (emphasis added).

At the suppression hearing, Detective Edwards was asked, "What was the purpose of you jumping on top of [Defendant]?" He replied, to "[a]pprehend him for resist, delay, obstruct." When again asked by Defense counsel, "Okay. And you told [the prosecutor] that you jumped on [Defendant] to apprehend him for resisting a public officer?" He answered, "Yes."

We recognize that to effectuate an investigatory stop police officers may use means of restraint often associated with an arrest when such means are necessary to "maintain the status quo" or to ensure officer safety. *State v. Campbell*, 188 N.C. App. 701, 710, 656 S.E.2d 721, 728 (2008) (affirming the trial court's order finding the police were justified in handcuffing defendant during an investigatory stop). However, Detective Edwards' testimony at the suppression hearing confirms that he did not handcuff Defendant in order to conduct an investigatory stop, that is to "diligently pursue[] a means of investigation that was likely to confirm or dispel [his] suspicions quickly, during which time it was necessary to detain the defendant." *United*

States v. Sharpe, 470 U.S. 675, 686, 84 L. Ed. 2d 605, 616 (1985). Rather the officer testified he fell upon Defendant and handcuffed him with the intent to arrest Defendant for resisting, delaying, or obstructing, a public officer. *See* N.C. Gen. Stat. § 14-223 (2009) (making it a misdemeanor to "willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office").

Thus, Detective Edwards needed probable cause, not reasonable suspicion, in order to effectuate Defendant's warrantless arrest. *See State v. Mello*, 200 N.C. App. 561, 568, 684 S.E.2d 477, 482 (2009) (explaining that probable cause, not reasonable suspicion, is required before making an arrest), *aff'd*, 364 N.C. 421, 700 S.E.2d 224 (2010).

We find this case analogous to *State v. Sinclair*, 191 N.C. App. 485, 663 S.E.2d 866 (2008), and *State v. Joe*, No. 10-1037, ___ N.C. App. ___, ___ S.E.2d ___, 2011 WL 2732222 (July 5, 2011). In both cases, we concluded the defendants' flight from consensual encounters with the police, in high-crime areas, did not justify their arrest for resisting a public officer. *Sinclair*, 191 N.C. App. at 491, 663 S.E.2d at 871; *Joe*, ___ N.C. App. at ___, ___ S.E.2d at ___, 2011 WL 2732222, at *6.

In *Sinclair*, a police officer received a report of "drug activity" at a bowling alley, which was "a known drug activity area." 191 N.C. App. at 486-87, 663 S.E.2d at 869 (quotation marks omitted). The officer responded to the bowling alley in an unmarked car—with at least two marked vehicles present as well—and parked approximately sixteen to twenty feet from the defendant, who was sitting among a group of other men. *Id.* at 487, 663 S.E.2d at 869. The officer and another law enforcement agent exited the patrol car and walked toward Defendant. *Id.* The officer was wearing khaki pants and a polo shirt with an embroidered police badge on the front. *Id.* As the officer approached the defendant and said " '[L]et me talk to you,' " the defendant stood up took a couple of steps toward the officer and said, " 'Oh, you want to search me again, huh?' "; the officer had searched the defendant on at least one previous occasion. *Id.* The officer replied, " 'Yes, sir[,]" as he continued to walk toward the defendant. The Defendant " 'quickly shoved both of his hands in his front pockets and then removed them,' " balled his fists, and "took a defensive stance." *Sinclair*, 191 N.C. App. at 487, 663 S.E.2d at 869. As the officer got closer, the defendant said, " 'Nope. Got to go,' and 'took off running' across an adjacent vacant lot." *Id.* The police gave chase, quickly apprehended the defendant, and charged him with resisting a public officer, pursuant to N.C. Gen. Stat. § 14-223 (2007). *Sinclair*, 191 N.C. App. at 487, 663 S.E.2d at 869.

On appeal to this Court, we concluded the defendant's flight, viewed in the light most favorable to the State, did not give rise to reasonable suspicion that the defendant was involved in criminal activity, and was not sufficient to justify an investigatory stop. *Id.* at 491, 663 S.E.2d at 871. Rather, we concluded the encounter between the officer and the defendant was consensual and the defendant was free to ignore the officer's request. *Id.* at 490-91, 663 S.E.2d at 871 ("Although Defendant's subsequent flight may have contributed to a reasonable suspicion that criminal activity was afoot thereby justifying an investigatory stop, Defendant's flight from a consensual encounter cannot be used as evidence that Defendant was resisting, delaying, or obstructing [the officer] in the performance of his duties.").

Additionally, we concluded that had the officer in *Sinclair* been attempting to effectuate an investigatory stop of the defendant, the facts were not sufficient to give the officer "a reasonable, articulable suspicion" the defendant was involved in criminal activity. *Id.* at 491, 663 S.E.2d at 871 (noting the only articulated facts to support the investigatory stop were the report of drug activity, that the scene was a "known drug activity area," and that the officer made previous drug arrests in the area).

In *Joe*, the arresting officer testified that he was patrolling an area in which he had made "no less than 10 drug arrests" and had assisted with many more. __ N.C. App. at ___, ___S.E.2d at ___, 2011 WL 2732222, at *1. The officer described that upon seeing the police van the defendant's eyes "got big" and he immediately turned and walked behind an apartment building. *Id.* at ___, ___, S.E.2d at ___, 2011 WL 2732222, at *2. The officer pursued the defendant yelling, "Police, stop[,]" but the defendant kept running. *Id.* After running for several blocks, the officer found defendant sitting beside an air-conditioning unit, as if he were trying to hide, manipulating something in one hand. *Id.* at ___, ___ S.E.2d at ___, 2011 WL 2732222, at *2. The officer ordered the defendant to put his hands up; he refused, and the officer arrested the defendant for resisting a public officer. *Id.* at ___, ___ S.E.2d at ___, 2011 WL 2732222, at *2.

On appeal, we cited *Sinclair* and concluded that prior to the defendant's flight the encounter was consensual and a "reasonable person would have felt at liberty to ignore [the officer's] presence and go about his business." *Joe*, ___ N.C. at ___, ___ S.E.2d at ___, 2011 WL 2732222, at *6 (affirming the trial court's dismissal of the charge for resisting, delaying, or obstructing the officer as the defendant's

flight from a consensual encounter cannot be used as evidence for that offense).

Similarly, in the present case the only articulable facts to support an investigatory stop were that the police officers were responding to a complaint of loud music and Detective Edwards regarded the area as a high-crime area in which he had made previous drug arrests. Detective Edwards testified that he did not see Defendant engaged in any suspicious activity and did not see any device capable of producing loud music. Defendant was merely standing outside at night, with two or three other men. In fact, Detective Edwards testified that he stopped his car because "that was the only intersection near Coates and Shaw that had people standing at it[,] which is why [he and Sergeant Austin] were going to get out and find out about the loud music." These facts do not provide reasonable suspicion necessary to justify an investigatory stop of Defendant. As such, the encounter that Detective Edwards was attempting to make with Defendant would have been a consensual encounter, an encounter that Defendant would have been free to ignore. *See Sinclair*, 191 N.C. App. at 490-91, 663 S.E.2d at 871. Had the officers attempted an investigatory stop on these facts, the stop would be unlawful. *Id.* As such, the officer would not have been "attempting to discharge a duty of his office," an essential element of the statutory offense of resisting, delaying, or obstructing a public officer, and Defendant's subsequent arrest was unlawful. N.C. Gen. Stat. § 14-223; *Sinclair*, 191 N.C. App. at 489-90, 663 S.E.2d at 870 ("If [the attempted investigatory stop] was unlawful, there was insufficient evidence that [the police officer] was discharging or attempting to discharge a duty of his office."). Furthermore, Defendant's subsequent flight from a consensual encounter or from an unlawful investigatory stop cannot be used to justify his arrest for resisting, delaying, or obstructing a public officer. *See Sinclair*, 191 N.C. App. at 489-90, 663 S.E.2d at 870; *Joe*, ___ N.C. at ___, ___ S.E.2d at___, 2011 WL 2732222, at *6.

As the State acknowledges, mere presence in a high-crime area is not sufficient to create reasonable suspicion that the person is involved in criminal activity. *Illinois v. Wardlow*, 528 U.S. 119, 119, 145 L. Ed. 2d 570, 573-74 (2000); *see State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 722-23 (1992) (stating the fact that the defendant was congregating with others on a corner known for drug-related activity did not justify an investigatory stop). The State also correctly notes that presence in a suspected drug area, coupled with evasive action, may provide the reasonable suspicion necessary for an investigatory

stop. *Butler*, 331 N.C. at 234, 415 S.E.2d at 722-23 (noting the "additional circumstance—defendant's immediately leaving the corner and walking away from the officers after making eye contact with them" justified the investigatory stop); *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997) (noting that because the defendant exited a suspected drug house, exhibited "nervous behavior," and "took evasive action when he knew he was being followed" an investigatory stop was justified). The State therefore argues Defendant's flight from the scene justified an investigatory stop.

However, the State has failed to establish a nexus between Defendant's flight and the police officers' presence. The State has provided no evidence that Defendant's flight was in response to the officer's presence. *Cf. Wardlow*, 528 U.S. at 124, 145 L. Ed. 2d at 576 (defendant fled "upon noticing the police"); *Butler*, 331 N.C. at 234, 415 S.E.2d at 722-23 (defendant fled "after making eye contact" with the police); *Willis*, 125 N.C. App. at 542, 481 S.E.2d at 411 (defendant took evasive action after discovering he was being followed). Here, the officers arrived in an unmarked car, after dark, and parked thirty-five feet away from Defendant on the opposite side of a dumpster. There was no testimony to indicate whether Defendant knew the police were present before he began running. There was no testimony that Defendant made eye contact with the officers, or even looked in the direction of the officers. And there was no testimony as to whether other cars were passing by. That the officers were responding to a complaint of loud music and did not see any evidence of a radio near Defendant indicates that some other activity was occurring in the area to which Defendant could have been reacting. To conclude the officers were justified in effectuating an investigatory stop, on these facts, would render any person who is unfortunate enough to live in a high-crime area subject to an investigatory stop merely for the act of running.

IV. Conclusion

We conclude the circumstances did not provide the officers with reasonable suspicion necessary to justify an investigatory stop of Defendant or probable cause for Defendant's arrest. Consequently, the trial court erred in denying Defendant's Motions to Suppress and the trial court's Orders are

Reversed.

Judges STROUD and THIGPEN concur.

ALLIANCE MUTUAL INSURANCE COMPANY, PLAINTIFF v. GLEN DOVE, D/B/A DOVE'S WELDING, DEFENDANT

No. COA10-1395

(Filed 16 August 2011)

Insurance—commercial—exclusion—grain elevator repair

Given precedent and the policy that insurance policies are construed in favor of the insured, the trial court did not err in an action arising from a grain elevator repair and explosion by granting summary judgment in part for defendant on a declaratory judgment action to determine the effect of an exclusionary clause in defendant's commercial insurance policy.

Appeal by plaintiff from order entered 14 June 2010 by Judge W. Erwin Spainhour in Scotland County Superior Court. Heard in the Court of Appeals 13 April 2011.

Pinto Coates Kyre & Brown, PLLC, by David L. Brown and Brady A. Yntema, for plaintiff-appellant.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Robert A. Hasty, Jr. and J. Stewart Butler, III, for defendant-appellee.

STEELMAN, Judge.

The exclusion clause in the commercial liability insurance policy must be narrowly construed to limit its application to the "specific part of any property that must be restored, repaired, or replaced because of faults in **your work.**" We affirm the summary judgment ruling of the trial court.

I. Factual and Procedural Background

Murphy-Brown owns and operates a feed mill in Laurinburg. Murphy-Brown contracted with Glen Dove d/b/a Dove's Welding & Fabrication ("defendant") to repair a broken elevator belt in a grain elevator. Grain was delivered by rail to the feed mill where it was ground into a powder that was lifted by the grain elevator to the top of silos for discharge and storage. The broken elevator belt was located in an elevator duct which connected the grain powder pit to the top of the silos. Defendant cut holes in the metal elevator duct in order to reach in and pull out the broken belt and splice it back together. After completing the work, defendant repaired the hole in the elevator duct by welding the metal back in place. On 30 December

2005, just after defendant had welded the metal back onto the elevator duct, the grain dust ignited, causing an explosion in the elevator. On 24 July 2008, Murphy-Brown filed a complaint against defendant for negligence, seeking to recover monetary damages for the cost to repair and replace the rail receiving bucket elevator, the cost to repair and replace the rail receiving leg, the cost of having to bring grain in by truck rather than by rail as a result of the damaged rail elevator, and damages incurred for business interruption and lost revenue.

Alliance Mutual Insurance Company ("plaintiff") had issued a Commercial Liability Policy to defendant that was in effect at the time of the explosion. Defendant forwarded a copy of the Murphy-Brown complaint to plaintiff. On 5 September 2008, plaintiff acknowledged receipt of the complaint, and advised defendant that it would provide defendant with a defense to the lawsuit under reservation of rights. On 27 February 2009, plaintiff filed a complaint against defendant seeking a declaratory judgment that its commercial liability policy did not provide liability coverage for the claims asserted in the Murphy-Brown lawsuit and that plaintiff had no duty to defend defendant in the Murphy-Brown lawsuit or indemnify defendant for any claims raised in the Murphy-Brown lawsuit.

Both plaintiff and defendant made motions for summary judgment. On 14 June 2010, the trial court entered an order granting summary judgment for plaintiff in part and for defendant in part, but disposing of the entire case. The trial court held that the commercial liability policy did not cover damages for the cost to repair and replace the rail receiving bucket elevator, but that the policy did provide coverage for the cost to repair and replace the rail receiving leg, the cost of bringing grain in by truck, as a result of the damaged rail elevator, and damages incurred due to business interruption and lost revenue.

Plaintiff appeals. Defendant did not appeal the portion of the trial court's ruling excluding coverage for the cost to repair and replace the bucket elevator.

II. Commercial Liability Policy

In its only argument, plaintiff contends the trial court erred in granting summary judgment in favor of defendant, and in failing to grant summary judgment for plaintiff on all issues. We disagree.

A. Standard of Review

> The "liability of an insurance company under its policy . . . [is] a proper subject for a declaratory judgment." *Nationwide Mut. Ins. Co. v. Aetna Casualty and Surety Co.*, 1 N.C. App. 9, 12, 159 S.E.2d 268, 271 (1968). Summary judgment shall be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A–1, Rule 56 (2009). An order granting summary judgment is reviewed *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). The insured "has the burden of bringing itself within the insuring language of the policy." *Hobson Const. Co. v. Great Am. Ins. Co.*, 71 N.C. App. 586, 590, 322 S.E.2d 632, 635 (1984). If it is "determined that the insuring language embraces the particular claim or injury, the burden then shifts to the insurer to prove that a policy exclusion excepts the particular injury from coverage." *Id.*

Builders Mut. Ins. Co. v. Mitchell, ___ N.C. App. ___, ___, 709 S.E.2d 528, 531 (2011).

B. Damages to Property other than Bucket Elevator

The parties do not dispute that the events underlying this action fall within the insuring language of the policy in question, but instead focus entirely on whether or not the underlying events are removed from coverage by an exclusion clause in the policy.

The exclusion clause at issue is the "your work" exclusion clause. The relevant portion of the exclusion clause reads:

We do not pay for **property damage** to that specific part of any property that must be restored, repaired, or replaced because of faults in **your work**.

The policy defines property damage as:

a. physical injury or destruction of tangible property; or

b. the loss of use of tangible property whether or not it is physically damaged. Loss of use is deemed to occur at the time of the **occurrence** that caused it.

"Your work" is defined as:

a. work or operations performed by **you** or on **your** behalf;

b. materials, parts, and equipment supplied for such work or operations;

c. written warranties or representations made at any time regarding quality, fitness, durability, or performance of any of the foregoing; and

d. providing or failing to provide warnings or instructions.

Plaintiff contends that this exclusion clause precludes coverage under the insurance policy for any of the damages sought by Murphy-Brown in the underlying lawsuit.

The parties do not direct us, and we have not found any North Carolina cases construing the precise exclusion clause in question. However, more general principles of North Carolina insurance law do provide guidance. "Any ambiguity must be strictly construed in favor of the insured. Exclusions from and exceptions to undertakings by the company are not favored, and are to be strictly construed to provide the coverage which would otherwise be afforded by the policy." *City of Greenville v. Haywood*, 130 N.C. App. 271, 275, 502 S.E.2d 430, 433 (1998) (citations and quotations omitted), *disc. review denied*, 349 N.C. 354, 525 S.E.2d 449 (1998). "If it is determined that the insuring language embraces the particular claim or injury, the burden then shifts to the insurer to prove that a policy exclusion excepts the particular injury from coverage." *Builders*, ___ N.C. App. at ___, 709 S.E.2d 528, 531 (quotation omitted). The purpose of a work product exclusion clause in a contract of insurance has been described as follows:

> Since the quality of the insured's work is a "business risk" which is solely within his own control, liability insurance generally does not provide coverage for claims arising out of the failure of the insured's product or work to meet the quality or specifications for which the insured may be liable as a matter of contract. . . . The cases interpreting this kind of exclusion recognize, as we do, that *liability insurance policies are not intended to be performance bonds.*

Barbee v. Harford Mutual Ins. Co., 330 N.C. 100, 103, 408 S.E.2d 840, 842 (1991) (quoting *Western World Ins. Co. v. Carrington*, 90 N.C. App. 520, 523, 369 S.E.2d 128, 130 (1988)).

The "specific part" of the property on which defendant was working and for which insurance coverage is excluded is the rail receiving bucket elevator.

Plaintiff asserts the instant case is controlled by *Barbee v. Hartford Mutual Ins. Co.*, 330 N.C. 100, 408 S.E.2d 840 (1991). In *Barbee*, on two separate occasions, employees working at a "Precision Tune" while replacing the spark plugs in an automobile dropped a foreign object through an opening for a spark plug. Later, when the automobiles were operated, the foreign objects damaged the engines. The court in *Barbee* held that the following exclusion clause precluded coverage for the damaged engines: "This insurance does not apply to: 4. Faulty work you performed." *Id.* at 102, 408 S.E.2d at 841. We hold that the exclusion cause in the insurance policy at issue in *Barbee* contained broader language than the clause implicated in the instant case.

The exclusion clause at issue in the instant case excludes coverage for "**property damage** to that specific part of any property that must be restored, repaired, or replaced because of faults in **your work**." The exclusion clause in *Barbee* was not limited to the specific part of property that was damaged by faults in the insured's work. The *Barbee* exclusion clause broadly stated that it applied to all faulty work performed by the insured. The *Barbee* exclusion clause was construed by the North Carolina Supreme Court to apply not only to work done by the insured but also to the consequential damages caused by that work. The exclusion clause at issue in the instant case is much narrower, and applies only to that specific part of the property damaged by the insured.

Several other jurisdictions have construed exclusion clauses similar to the one at issue in the instant case. In *Acuity v. Burd & Smith Const., Inc.*, 721 N.W.2d 33 (N.D. 2006), the Supreme Court of North Dakota construed an exclusion clause that excluded property damage to:

> (5) That particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the property damage arises out of those operations; or
>
> (6) That particular part of any property that must be restored, repaired or replaced because your work was incorrectly performed on it.

Id. at 37. The court in *Acuity* held that that exclusion clause did not exclude coverage for damage to the interior of an apartment building when the insured had been hired to reroof the building. *Id.* The opinion discussed the distinction between "business risks," which are those risks that due to faulty workmanship the end product will not conform to the agreed upon contractual requirements, and the risk that faulty workmanship will cause injury to persons or damage to other property. *Id.*

In *Columbia Mut. Ins. Co. v. Schauf*, 967 S.W.2d 74, 76-77 (Mo. 1998), the Missouri Supreme Court construed the following exclusion clause: "[t]hat particular part of real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the 'property damage' arises out of those operations." *Id.* at 76-77. In *Schauf*, Schauf had been hired to paint, stain, and lacquer the entire interior and exterior of a house. After lacquering the kitchen cabinets he was cleaning his spray equipment inside the house when his generator started a fire that caused damage throughout the home. The court in *Schauf* applied the exclusion clause only to the kitchen cabinets, holding "the kitchen cabinets were the particular part of the real property that was the subject of Schauf's operations at the time of the damage." *Id.* at 81.

The United States District Court in Wisconsin construed a similar exclusion clause in *Minergy Neenah, LLC v. Rotary Dryer Parts, Inc.*, No. 05-C-1181, 2008 WL 1869040 (E.D.Wis. April 24, 2008) (unpublished). The exclusion clause at issue in that case excluded coverage for: "that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." *Id.* at *1. Rotary Dryer was hired to work on steam tubes that composed part of a larger industrial dryer system. The removal and replacement of the steam tubes constituted the primary focus of Rotary Dryer's work; however, Rotary Dryer was also to examine the shell of the dryer for any cracking and repair any cracks found. While Rotary Dryer was working on the steam tubes a fire broke out and caused substantial damage to the dryer. The court in Rotary Dryer concluded that only coverage for damage to the steam tubes was excluded, stating:

> If [the insurance company] wants to exclude coverage for property damage to the entirety of the property on which its insured performs work, instead of 'that particular part' of the property on which work is performed, it should say so. But the court may not by judicial construction do the job for it. I thus conclude that

> even [though Rotary Dryer's contract referred to correcting cracks in the dryer shell], the damage caused to the dryer shell is more like the typical collateral damage covered by a [commercial general liability] policy than a business risk to be borne by the insured.

Id. at *7.

In light of our longstanding policy of construing insurance policies in favor of the insured, that insurers bear the burden of proving that claims fall within exclusion clauses, that commercial liability insurance policies are not designed to provide coverage for "business risks," the distinctions between the instant case and *Barbee*, and the similar exclusion clauses construed by other jurisdictions, we hold that the trial court did not err in finding that the exclusion clause in the instant case only excluded coverage for damage to the rail receiving bucket elevator.

C. Lost Revenue and Consequential Damages

Plaintiff also argues that because coverage was excluded for damage to the rail receiving bucket elevator that the portion of the lost revenue and other consequential damages attributable to the damage to the rail receiving bucket elevator should also be excluded.

The exclusion clause at issue states that "we do not pay for **property damage** to that specific part of any property that must be restored, repaired, or replaced because of faults in **your work**." As discussed above, in addition to the fact that insurance policies are to be construed in favor of the insured, "[e]xclusions from and exceptions to undertakings by the company are not favored, and are to be strictly construed to provide the coverage which would otherwise be afforded by the policy." *Haywood*, 130 N.C. App. at 275, 502 S.E.2d at 433 (quotation omitted). These policies favor construing the exclusion clause as narrowly as possible, and the burden is on the insured to prove that the exclusion clause applies. The plain language of the exclusion clause speaks of excluding damages to that specific part of any property that has been damaged by the insured's work, but does not mention lost revenue or consequential damages flowing from the damage to the specific part of any property damaged by the insured. Considering the policy requiring that exclusion clauses be narrowly construed and the plain language of the exclusion clause, we hold the exclusion clause does not cover lost revenue and other consequential damages.

We further note that to adopt the plaintiff's very broad reading of the exclusion clause would result in the exclusion clause swallowing up the whole of the commercial liability policy, and render any coverage contained therein illusory.

If the plaintiff had wanted to exclude loss of use and consequential damages flowing from damage to specific property that the insured was working on it could have explicitly stated so in the exclusion clause. The trial court properly concluded that the exclusion clause only excludes damages to the "specific part of any property that must be restored, repaired, or replaced because of faults in **your work**," i.e. the rail receiving bucket elevator.

D. *Builders Mut. Ins. Co. v. Mitchell*

Both parties have cited the recent case of *Builders Mut. Ins. Co. v. Mitchell*, —— N.C. App. ——, 709 S.E.2d 528 (2011) in support of their respective positions. While the facts of *Builders* are somewhat different from the instant case, a portion of the analysis contained therein supports the holding set forth above.

In *Builders* a home on Figure Eight Island was damaged due to water intrusion related to faulty construction work performed by Umstead Construction, Inc. ("Umstead") between 2000 and 2005. Maryland Casualty Company provided Umstead with insurance coverage from March 2000 to March 2003. Builders Mutual Insurance Company ("BMI") provided Umstead with coverage from March 2003 to March 2006. BMI settled the homeowners' claim against Umstead. BMI then filed a declaratory judgment action seeking contribution of one-half of the settlement and related defense costs from Maryland Casualty. The trial court granted summary judgment in favor of Maryland Casualty, and BMI appealed to this Court. We held that genuine issues of material fact existed and remanded the case to the trial court for further proceedings.

Builders examined the extent of the coverage afforded by the Maryland Casualty policy, exclusions to that coverage, the period of coverage, and the duty to defend. Its primary focus was whether there was an "occurrence" under the terms of the policy so that the homeowners' claims were covered under the policy. The opinion also discussed the "your work" exclusion clause contained in the policy. This Court noted that it was unclear which portion of the exclusion clause Maryland Casualty contended was applicable. However, this Court clearly stated that "Maryland Casualty seeks a definition of 'your work' that would include all damage arising out of Umstead's

work, even damage to property other than the work product itself. This reading would be too broad." *Builders* —— N.C. App. at ——, 709 S.E.2d at 533. *Builders* held that Maryland Casualty had "not met its burden of showing the applicability of an exclusion." *Id.* at ——, 709 S.E.2d at 533-34. This narrow construction of the "your work" exclusion is consistent with our holdings in this case.

III. Conclusion

We affirm the ruling of the trial court that the "your work" exclusion clause in defendant's insurance policy is limited to damage "for the cost to repair and replace the rail receiving bucket elevator," and that the policy "provides coverage for the cost to repair and replace the rail receiving leg, the cost of trucking in grain . . . as a result of the damaged rail elevator, damages incurred as a result of business interruption, and lost revenue . . . ."

AFFIRMED.

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

IN THE MATTER OF: D.B.

No. COA10-1476

(Filed 16 August 2011)

1. Juveniles—delinquency—felony larceny pursuant to breaking and entering—indictment insufficient

The trial court erred in adjudicating the juvenile defendant delinquent for the offense of felony larceny pursuant to breaking and entering. As the juvenile petition alleging felony larceny pursuant to breaking and entering contained no allegation that the alleged victim was a legal entity capable of owning property, the petition was fatally defective.

2. Juveniles—delinquency—unlawful search—evidence erroneously admitted—not harmless error

The trial court erred in a juvenile delinquency case by admitting evidence obtained by an officer in a search that unlawfully exceeded the scope of a *Terry* frisk. The evidence obtained as a result of that search should have been excluded, and because its admission was not harmless beyond a reasonable doubt, defend-

ant's adjudication of delinquency for the offense of the misdemeanor possession of stolen property was reversed.

3. Juveniles—juvenile delinquency order—clerical error—remanded

The trial court's order adjudicating defendant delinquent was remanded so that the trial court could correct finding of fact three to reflect that the court found beyond a reasonable doubt that the juvenile committed the offenses forming the basis for the delinquency adjudication.

Appeal by juvenile from orders entered 13 April 2010 by Judge Marcia H. Morey in Durham County District Court. Heard in the Court of Appeals 25 April 2011.

Attorney General Roy Cooper, by Assistant Attorney General Jay L. Osborne, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders Mary Cook, Kristen L. Todd, and S. Hannah Demeritt, for juvenile-appellant.

GEER, Judge.

D.B., a juvenile, appeals from the trial court's orders adjudicating him delinquent for committing the offenses of felony breaking and entering, felony larceny pursuant to breaking and entering, and misdemeanor possession of stolen goods. We agree that the petition alleging felony larceny pursuant to breaking and entering was fatally defective because it contained no allegation that the alleged victim, the Crossings Golf Club, was a legal entity capable of owning property. The petition alleging felony larceny pursuant to breaking and entering should, therefore, have been dismissed by the trial court.

We also agree with the juvenile's contention that the trial court erred in admitting evidence obtained by an officer in a search that unlawfully exceeded the scope of a *Terry* frisk. Accordingly, we hold that the evidence obtained as a result of that search should have been excluded, and because its admission was not harmless beyond a reasonable doubt, we must reverse as to the misdemeanor possession of stolen property offense.

Facts

The State's evidence tended to show the following facts. On 26 December 2009, Officer James Sandoval of the Durham Police

Department received a call about an activated burglar alarm at the clubhouse of the Crossings Golf Club in Durham County, North Carolina. Upon arriving at the location, Officers Sandoval and K. Staten observed that a back rear window to the clubhouse was shattered and the door was open. The drawer of the cash register in the pro shop was missing and was later found outside on a grassy area, about 100 feet away from the building. Approximately $12.00 in loose change was missing from that cash register drawer.

The officers had secured the building when Officer Staten received a dispatch regarding a suspicious person running from the golf course area, about two blocks away. The dispatch described the suspicious person as a black male wearing a dark-colored hooded sweatshirt, all black clothes, and blue jeans. In response, Officer Sandoval drove toward the location noted in the dispatch. He saw a black male with a dark hooded sweatshirt and blue jeans run through a yard from Oak Grove Parkway toward Brier Haven Drive.

Officer Sandoval stopped the individual, later identified as the juvenile. The juvenile was out of breath and sweating profusely. Officer Sandoval asked the juvenile to put his hands on Officer Sandoval's car, and Officer Sandoval then frisked the juvenile to make sure he did not have any weapons. At some point, when Officer Sandoval was patting down the juvenile, he felt what he perceived to be an identification card in the front pocket of the juvenile's sweatshirt. He pulled the card out and discovered that it was actually an RBC Centura Visa Card bearing the name Sharon Atkins. Ms. Atkins' card had been stolen earlier that month. After Officer Sandoval determined that the card was stolen, he placed the juvenile under arrest, put him in the vehicle, and drove back to the clubhouse.

In the meantime, Corporal Tammy Schultz had contacted Teresa Easterday, the witness who had made the suspicious person report. Ms. Easterday met Corporal Schultz at the clubhouse and sat in the back of Corporal Schultz's vehicle so she could not be seen by the juvenile. Officer Sandoval had positioned the juvenile beside his vehicle, about 15 to 20 feet away from Corporal Schultz's vehicle. With a spotlight shining on the juvenile, Ms. Easterday was able to make a positive identification, based on the juvenile's clothing, that the juvenile was the person she had seen running away from the golf course.

The positive identification was communicated to Officer Sandoval, who then read the juvenile his Juvenile Miranda Rights. The juvenile followed along with the reading of the Juvenile Miranda

Rights and checked on the form that he understood these rights. The juvenile also checked that he wished to answer questions without a lawyer, parent, or guardian present. In response to Officer Sandoval's questions, the juvenile gave his name and birth date, indicating he was 15 years old at the time. The juvenile then told Officer Sandoval that he was having a bad day, that he had left a friend's house and crossed through the golf course, and that he had the "urge to bust out the window with the chair." After that, the juvenile refused to answer any more questions. Officer Sandoval then retrieved the loose change from the juvenile's pockets, which totaled approximately $7.00.

On 28 January 2010, two juvenile petitions were filed against the juvenile, alleging delinquency in that he had committed felony breaking and entering, felony larceny pursuant to breaking and entering, and misdemeanor possession of property stolen from Ms. Atkins. Following the adjudication hearing, the trial court entered orders adjudicating the juvenile delinquent of felony breaking and entering, felony larceny pursuant to breaking and entering, and misdemeanor possession of the property stolen from Ms. Atkins. The trial court entered a disposition order finding the juvenile to be a Level 2 offender and ordering that he be placed on 12 months probation and pay $85.00 in restitution—the cost to repair the broken window at the clubhouse. The juvenile timely appealed to this Court.

I

[1] The juvenile first contends that the juvenile petition alleging felony larceny pursuant to breaking and entering was fatally defective and should have been dismissed for lack of subject matter jurisdiction. The petition alleged that the juvenile "did unlawfully, willfully and feloniously steal, take and carry away U.S. Currency from a cash register drawer" which was "the personal property of The Crossings Golf Club." The petition does not allege that the Crossings Golf Club is a corporation or other legal entity capable of owning property.

" 'To be sufficient, an indictment for larceny must allege the owner or person in lawful possession of the stolen property.' " *State v. Phillips*, 162 N.C. App. 719, 720, 592 S.E.2d 272, 273 (2004) (quoting *State v. Downing*, 313 N.C. 164, 166, 326 S.E.2d 256, 258 (1985)). "If the entity named in the indictment is not a person, it must be alleged 'that the victim was a legal entity capable of owning property[.]' " *Id.* at 721, 592 S.E.2d at 273 (quoting *State v. Woody*, 132 N.C. App. 788, 790, 513 S.E.2d 801, 803 (1999)). " 'An indictment that insufficiently alleges the identity of the victim is fatally defective . . . .' " *Id.*

(quoting *Woody*, 132 N.C. App. at 790, 513 S.E.2d at 803). *See, e.g.*, *id.*, 592 S.E.2d at 274 (indictment for larceny from "Parker's Marine" insufficient); *State v. Perkins*, 57 N.C. App. 516, 518, 291 S.E.2d 865, 867 (1982) (indictment for larceny from "Metropolitan YMCA t/d/b/a Hayes-Taylor YMCA Branch" insufficient).

Since the petition in this case does not allege that the Crossings Golf Club is a corporation or other legal entity capable of owning property, we hold—and the State concedes—that the petition was fatally defective. We must, therefore, vacate the adjudication and disposition as to the offense of felony larceny pursuant to breaking and entering. *In re M.S.*, 199 N.C. App. 260, 267, 681 S.E.2d 441, 445-46 (2009).

II

[2] The juvenile next argues that the trial court erred in overruling his objection to testimony regarding evidence found in his pocket—Ms. Atkins' RBC Centura Visa card—because Officer Sandoval's search exceeded the scope of a *Terry* frisk and was, therefore, unconstitutional. In *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), the United States Supreme Court held that an officer may conduct a pat-down search to determine whether the person is carrying a weapon. " 'The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.' " *State v. Beveridge*, 112 N.C. App. 688, 693, 436 S.E.2d 912, 915 (1993) (quoting *Adams v. Williams*, 407 U.S. 143, 145, 32 L. Ed. 2d 612, 617, 92 S. Ct. 1921, 1922 (1972)), *aff'd per curiam*, 336 N.C. 601, 444 S.E.2d 223 (1994).

"If a search goes beyond the bounds justifiable in determining that the suspect is armed, then any evidence found as a result of such a search will be suppressed as fruit of the poisonous tree." *Id.* (internal quotation marks omitted). On the other hand, if, " 'in the conduct of the limited weapons search, contraband or evidence of a crime is of necessity exposed, the officer is not required by the Fourth Amendment to disregard such contraband or evidence of crime.' " *Id.* at 694, 436 S.E.2d at 915 (quoting *State v. Streeter*, 17 N.C. App. 48, 50, 193 S.E.2d 347, 348 (1972), *aff'd*, 283 N.C. 203, 195 S.E.2d 502 (1973)).

Here, at trial, during a *voir dire* examination, Officer Sandoval testified that after he stopped the juvenile, he performed a *Terry* frisk of the juvenile to check for weapons. Once he determined the juvenile had no weapons, he did not consider him to be a threat. The following exchange then occurred between defense counsel and Officer Sandoval:

Q When you patted this individual down and found no weapons, you went through his pockets?

. . . .

THE WITNESS: I asked him if he had any identification.

. . . .

Q Did he indicate whether he did have I.D.?

A He didn't answer me.

Q So you went into his pockets?

A I felt what would be what I perceived to be an identification card in his front left pocket.

Q And when you felt what you thought was an I.D. card despite him not answering your question as to whether he had identification, you didn't think that was a weapon did you?

A No.

When later asked by the prosecutor why he thought he felt an identification card, Officer Sandoval explained that the object in the juvenile's pocket "was small—it felt plastic, rectangular, kind of what your drivers [sic] license would feel like." Officer Sandoval further explained:

A I asked him if this was an identification card and he wouldn't answer me. And he wouldn't give me his name so I thought that was an identification card and I wanted to identify him so that's why I grabbed the card from his pocket.

Q And what was the purpose of finding out his identity?

A To see who he is, where he lives and basically to identify what he's doing in the area and why he's running.

Following Officer Sandoval's testimony, defense counsel asked the trial court to exclude the evidence of the RBC Centura Visa card found in the juvenile's pocket because Officer Sandoval's search had exceeded the scope of a *Terry* frisk. The court denied this request, explaining:

I'll note the objection and I'm going to overrule the motion to suppress, and I'm going to allow it based on the suspect's refusal to cooperate by giving his name, by not responding to if he had any I.D.

> In pursuant [sic] or in conjunction with the Terry frisk the Officer felt what he believed to be identification and after [the juvenile] or whoever the suspect was, was uncooperative I'm going to allow what ever [sic] the Officer found as a result of patting him down.

In arguing that the evidence was properly admitted, the State focuses on the purpose of a *Terry* stop. The juvenile, however, has not contended that the stop or seizure was unconstitutional—he argues solely that the subsequent pat-down exceeded the scope of a lawful *Terry* frisk.

It is true that "[o]fficers who lawfully *stop* someone for investigation may *ask* the person a moderate number of questions to determine his identity and to gain information confirming or dispelling the officers' suspicions that prompted the stop." *State v. Steen*, 352 N.C. 227, 239, 536 S.E.2d 1, 9 (2000) (emphasis added), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997, 121 S. Ct. 1131 (2001). The State, however, cites no authority for its suggestion that an officer may physically search a person for evidence of his identity in connection with a *Terry* stop and frisk.

Although the State relies upon *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 159 L. Ed. 2d 292, 124 S. Ct. 2451 (2004), for the proposition that "the identity of a suspect can significantly impact the safety of an officer," *Hiibel* does not address an officer's using a pat-down to uncover evidence of identification. At issue in *Hiibel* was whether a Nevada statute requiring a suspect to disclose his name in the course of a valid *Terry* stop was consistent with Fourth Amendment prohibitions against unreasonable searches and seizures. *Id.* at 187-88, 159 L. Ed. 2d at 303-04, 124 S. Ct. at 2459. The Court determined that because the defendant's obligation to identify himself arose from a state statute, and because the statute satisfied the Fourth Amendment constitutional standards, "[t]he principles of *Terry* permit[ted] a State to require a suspect to *disclose* his name in the course of a *Terry* stop." *Id.* at 187, 159 L. Ed. 2d at 304, 124 S. Ct. at 2459 (emphasis added).

While many states have enacted "stop and identify" statutes such as the one in *Hiibel*, North Carolina has not. The State overlooks this crucial distinction. We further note that in *Hiibel*, the Supreme Court did not hold that an officer could, during the *Terry* frisk, search for proof of identification as well as weapons. Although the Court did note in passing that officers called to investigate domestic disputes

need to know whom they are dealing with in order to assess the situation and the threat to their own safety, the Court did not suggest that an officer can use a pat-down to locate an identification card. *Id.* at 186, 159 L. Ed. 2d at 303, 124 S. Ct. at 2458.

The State cites no other authority to support the notion that an officer may search for a person's identification in order to protect himself, or that an officer who feels what he believes to be an immediately identifiable identification card is free to seize it. Our case law plainly holds to the contrary.

A *Terry* frisk may be used only for the purpose of determining whether a suspect is armed, and contraband may be confiscated if it is immediately identifiable to the officer during the frisk. *See State v. Shearin*, 170 N.C. App. 222, 226, 612 S.E.2d 371, 375-76 (holding scope of *Terry* search is protective in nature and is limited to search for weapons that may be used against officer, but evidence of contraband, plainly felt during pat-down or frisk, may also be admissible, provided officer "had probable cause to believe that the item was in fact contraband"), *appeal dismissed and disc. review denied*, 360 N.C. 75, 624 S.E.2d 369 (2005); *State v. Martinez*, 158 N.C. App. 105, 109, 580 S.E.2d 54, 57-58 (holding officer may conduct pat-down search, for purpose of determining whether person is carrying weapon, when officer is justified in believing individual is armed and presently dangerous; during lawful pat-down search for weapons, if officer discovers contraband, officer may seize item discovered), *appeal dismissed and disc. review denied*, 357 N.C. 466, 586 S.E.2d 773 (2003).

Since an identification card is not a weapon or contraband, and there is no other seizure permitted under *Terry*, Officer Sandoval's removal of the RBC Centura Visa card from the juvenile's pocket exceeded the scope of a *Terry* frisk. The trial court thus erred in admitting the RBC Centura Visa card at trial.

We cannot conclude that this error was harmless beyond a reasonable doubt because the card was the only evidence presented by the State tending to show the juvenile possessed property stolen from Ms. Atkins. *See* N.C. Gen. Stat. § 15A-1443(b) (2009) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless."). Consequently, we must reverse as to the misdemeanor possession of stolen property offense.

III

[3] Finally, the juvenile contends that the adjudication order contains clerical errors in a finding of fact and conclusion of law. A clerical error is " '[a]n error resulting from a minor mistake or inadvertence, [especially] in writing or copying something on the record, and not from judicial reasoning or determination.' " *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702 (2009) (quoting *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000)), *disc. review denied*, 363 N.C. 808, 692 S.E.2d 111 (2010). " 'When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.' " *Id.* (quoting *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008)).

It is clear—and the State concedes—that finding of fact three in the adjudication order contains a clerical error. Finding of fact three states: "That the Court finds that the State has presented a reasonable factual basis, that the juvenile understands their [sic] right, that the admission was freely made, that the juvenile admits that the they [sic] did in fact commit the allegations as alleged." The juvenile did not, however, admit any of the alleged offenses. Rather, as the transcript indicates, the trial court found beyond a reasonable doubt, based on the evidence, that the juvenile had committed felony breaking and entering, felony larceny pursuant to felony breaking and entering, and misdemeanor possession of stolen property.

We, therefore, remand so that the trial court may correct the adjudication order's finding of fact three to reflect that the court found beyond a reasonable doubt that the juvenile committed the offenses forming the basis for the delinquency adjudication. *See State v. Snipes*, 168 N.C. App. 525, 534, 608 S.E.2d 381, 387 (2005) (remanding for correction of clerical errors where trial court checked box on judgment and commitment forms indicating that it " '[i]mpose[d] the prison term pursuant to a plea arrangement as to sentence under Article 58 of G.S. Chapter 15A,' " but record revealed that defendant pled not guilty to each offense); *State v. Shelton*, 167 N.C. App. 225, 230, 605 S.E.2d 228, 232 (2004) (remanding for correction of clerical error where box marked " 'pled guilty' " was erroneously checked on judgment and charges had actually been submitted to jury).

The juvenile further claims that because finding of fact three contains a clerical error, conclusion of law two—that the juvenile committed a "serious (Class F through I felony or Class A1 Misde-

meanor)"—is also a clerical error. This argument is without merit. This conclusion was based on the trial court's finding beyond a reasonable doubt that the juvenile committed two Class H felonies. We have concluded that one of those Class H felonies—larceny pursuant to breaking and entering—should have been dismissed. However, the juvenile has made no argument that would disturb the finding that he committed the breaking and entering offense. Therefore, on remand, the trial court does not need to alter conclusion of law two.

Affirmed in part; vacated in part; reversed and remanded in part.

Chief Judge MARTIN and Judge ELMORE concur.

RIDGE CARE, INC., KERNER RIDGE, LLC, MALLARD RIDGE, LLC, DEERFIELD RIDGE, LLC, WALNUT RIDGE ASSISTED LIVING, LLC, AND BLUESTONE ENTERPRISES, INC., PETITIONERS V. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, ROBERT J. FITZGERALD IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE DIVISION OF FACILITY SERVICES, AND THE STATE OF NORTH CAROLINA, RESPONDENTS AND CARILLON ASSISTED LIVING, LLC, RESPONDENT-INTERVENOR

No. COA10-1316

(Filed 16 August 2011

1. Hospitals and Other Medical Facilities—certificate of need—adult care home facilities—settlement authority

The North Carolina Department of Health and Human Services had the authority to enter into a settlement which allowed a number of adult care home facilities to be constructed outside the certificate of need process, but limited the effect of a prior judicial decision that would have allowed many more.

2. Hospitals and Other Medical Facilities—certificate of need—settlement agreement—prior decision

A contention regarding the constitutional authority of the North Carolina Department of Health and Human Services (DHHS) to enter a settlement agreement that made the certificate of need law not applicable to respondent intervenor was determined by a prior case, which held that N.C.G.S. § 150B-22 provided DHHS with the authority to enter settlement agreements.

3. Constitutional Law—certificate of need—settlement—equal protection and due process

Petitioners' right to due process and equal protection was not violated by a settlement between the North Carolina Department of Health and Human Services and respondent intervenor that allowed the development of adult care home beds without meeting the certificate of need conditions required of other providers. Respondent intervenor already had the right to develop many more beds under a prior decision, and the settlement provided new limitations on development rather than granting respondent intervenor any new rights.

4. Attorney General—DHHS settlement—signature not required

The Attorney General was not required to execute a settlement between an adult care home and the North Carolina Department of Health and Human Services. Moreover, a Joint Motion to Dismiss Appeal Based Upon Settlement by the Parties was signed by the Solicitor General on behalf of the Attorney General.

5. Administrative Law—contested case—no showing of prejudice

The trial court did not err by affirming a final agency decision against petitioners in an action concerning the development of adult care home facilities. There was no showing of substantial prejudice.

Appeal by petitioners from order entered 6 July 2010 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 11 May 2011.

Smith Moore Leatherwood LLP, by Susan M. Fradenburg, for petitioners-appellants.

Attorney General Roy Cooper, by Assistant Attorney General Angel E. Gray, for respondents-appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr. and Charles F. Marshall III, for respondent-intervenor-appellee.

STEELMAN, Judge.

This Court is bound by its prior decisions and must hold that DHHS was authorized to enter into a settlement agreement with

Carillon in 2007. Where the 2000 and 2007 Settlement agreements were outside of the CON Law, petitioners' constitutional challenges must fail. The Attorney General was not required to execute the 2007 Settlement Agreement. Petitioners have failed to demonstrate prejudice.

I. Factual and Procedural Background

In 1997, the North Carolina General Assembly enacted a law that imposed a moratorium on the development of adult care home ("ACH") facilities. Under the moratorium, the North Carolina Department of Health and Human Services ("DHHS") could not approve the addition of any ACH beds unless they qualified for one of five exemptions provided by statute. The General Assembly subsequently passed a statute ("2001 Session Law") providing for the expiration of the moratorium on 31 December 2001. 2001 N.C. Sess. Laws 234, § 3(b). The 2001 Session Law also provided that after the expiration of the moratorium all ACH facilities would be subject to the Certificate of Need ("CON") Law, N.C. Gen. Stat. § 131E-175, *et seq.*, unless the developer had obtained a statutory exemption from the moratorium and retained its exemption by meeting new financing, construction, and occupancy deadlines. 2001 N.C. Sess. Laws 234, §§ 2, 3(b1), 3(b2). Prior to the enactment of the 2001 Session Law, ACH facilities were not subject to the requirements of the CON Law. 2001 N.C. Sess. Laws 234, § 2.

The enactment of the moratorium and the 2001 Session Law gave rise to three legal proceedings involving Carillon Assisted Living, LLC ("Carillon").

In the first proceeding, Carillon contested the application of the moratorium to a number of its planned ACH facilities. This case was resolved by a settlement agreement between DHHS and Carillon ("2000 Settlement") while an appeal to this Court was pending. In the 2000 Settlement, Carillon agreed to forego its constitutional challenges to the moratorium and to relinquish its right to develop 8 of the 27 ACH facilities that the Superior Court had determined were exempt from the moratorium. In return, Carillon received a contractual right to develop 19 ACH facilities ("settlement projects").

In the second proceeding, Carillon asserted that the 2001 Session Law did not apply either to its 19 settlement projects or to 43 additional proposed ACH facilities ("gap projects"), for which it had submitted plans during a gap in the moratorium. This Court held that the moratorium and the 2001 Session Law were inapplicable to the settlement projects and the gap projects. *Carillon Assisted Living, LLC*

v. N.C. Dep't of Health & Human Servs. (Carillon I), 175 N.C. App. 265, 272, 623 S.E.2d 629, 634 (2006), *appeal dismissed*, 361 N.C. 218, 641 S.E.2d 802 (2007). With respect to the settlement projects, this Court held that Carillon had a contractual right to develop the 19 settlement projects, not an exemption from the moratorium. *Id.*

Under this Court's decision in *Carillon I*, Carillon had a right to develop a total of 62 ACH facilities (more than 5,000 ACH beds) in 59 counties throughout North Carolina without obtaining a CON. While DHHS's appeal to the North Carolina Supreme Court was pending, Carillon and DHHS entered into a settlement agreement ("2007 Settlement"). This agreement gave Carillon a contractual right to develop 2,250 ACH beds in 23 counties, subject to specific timelines and notice requirements.

The instant appeal arises out of the third proceeding. Petitioners, all of which are corporations formed to operate ACH facilities in North Carolina, filed a contested case to challenge the validity of the 2007 Settlement before the Office of Administrative Hearings ("OAH"). On 6 August 2007, Administrative Law Judge ("ALJ") Donald W. Overby granted summary judgment in favor of DHHS and Carillon. DHHS adopted the ALJ's decision in its final agency decision. Petitioners filed a Petition for Judicial Review of the final agency decision and a Complaint for Declaratory Relief in the Superior Court of Wake County as well as a direct appeal to this Court. This Court dismissed petitioners' direct appeal for lack of jurisdiction in an unpublished opinion, determining that our holding in *Carillon I* foreclosed petitioners' argument that the 2007 Settlement constituted an exemption from the CON Law. *Ridge Care, Inc. v. N.C. Dept of Health and Human Servs. (Carillon II)*, 195 N.C. App. 598, 673 S.E.2d 799 (2009) (unpublished).

Subsequently, the Superior Court of Wake County affirmed the final agency decision granting summary judgment for DHHS and Carillon and dismissed petitioners' claim for declaratory relief.

Petitioners appeal.

II. Standard of Review

When a court conducts a review of an administrative agency's final decision, the nature of the error asserted dictates the standard of review. *Good Hope Health Sys., L.L.C. v. N.C. Dep't of Health & Human Servs.*, 189 N.C. App. 534, 543, 659 S.E.2d 456, 462, *aff'd per curiam*, 362 N.C. 504, 666 S.E.2d 749 (2008). Errors of law are reviewed *de novo*. *Id.* Because the decision to grant summary judgment is a mat-

ter of law, it is reviewed *de novo*. *Presbyterian Hosp. v. N.C. Dept. of Health & Human Servs.*, 177 N.C. App. 780, 782, 630 S.E.2d 213, 214 (2006), *disc. review denied*, 361 N.C. 221, 642 S.E.2d 446 (2007).

III. DHHS's Statutory Authority to Enter the Agreement

[1] In their first and fourth arguments petitioners contend that the trial court erred in affirming the final agency decision because in the 2007 Settlement DHHS ceded control of the CON process to Carillon and because DHHS exceeded its authority in entering into the 2007 Settlement. Since these arguments are interrelated, we consider them together. We disagree that the trial court erred.

Petitioners argue that DHHS does not have the statutory authority to enter a contract in which it gives up its power to apply the CON Law to Carillon's development projects, citing *Gaddis v. Cherokee County Rd. Comm'n*, 195 N.C. 107, 111, 141 S.E. 358, 360 (1928), in which our Supreme Court held that "administrative boards, exercising public functions, cannot by contract deprive themselves of the right to exercise the discretion delegated by law, in the performance of public duties."

This Court's decision in *Carillon I* contains a number of rulings that are ultimately dispositive of the instant appeal. This Court held: (1) Carillon had a contractual right under the 2000 Settlement to construct 19 facilities, unrestricted by the 2001 Session Law, under which developers of ACH facilities had to follow the CON law or meet new exemption requirements; (2) DHHS had the authority to enter into this settlement; and (3) the requirements of the moratorium and the 2001 Session Law were not applicable to Carillon's 43 gap projects. *Carillon I*, 175 N.C. App. at 270-72, 623 S.E.2d at 633-34. The effect of this decision was to authorize Carillon to construct over 5,000 ACH beds in 59 counties without complying with the CON requirements and without time restrictions.

Since there was a dissent in the Court of Appeals, DHHS appealed the decision to the North Carolina Supreme Court as a matter of right. Prior to the matter being heard in the Supreme Court, Carillon and DHHS entered into the 2007 Settlement Agreement. That agreement reduced the number of beds that Carillon could construct outside of the CON process from over 5,000 to 2,250, reduced the number of counties in which the facilities could be constructed from 59 to 23, and established specific timelines and notice requirements. As a result of the 2007 Settlement, the appeal to the Supreme Court was dismissed. *Carillon v. DHHS*, 361 N.C. 218, 641 S.E.2d 802 (2007).

The *Carillon I* decision placed DHHS upon the horns of a difficult dilemma. It could pursue its appeal to the Supreme Court and run the risk that the Court of Appeals decision would be affirmed, or it could limit the effect of *Carillon I* by entering into a settlement agreement that cut in half the number of beds that could be constructed outside of the CON process. Faced with these unpalatable choices, we cannot say that DHHS acted unreasonably in choosing to settle the case. Given the broad scope of DHHS' authority to settle cases enunciated in *Carillon I*, we hold that DHHS was within its authority to enter into the 2007 Settlement. *See Carillon I*, 175 N.C. App. at 270-71, 623 S.E.2d at 633-34.

We further note that under the explicit holding of this Court in *Carillon II*, the 2007 Settlement was not an exemption to the CON statute. *Carillon II*, 195 N.C. App. 598, 673 S.E.2d 799. This Court is bound by its prior holdings in *Carillon I* and *Carillon II*. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

These arguments are without merit.

IV. Constitutionality of the 2007 Settlement

In their second argument, petitioners contend that the trial court erred in affirming the final agency decision granting summary judgment because the 2007 Settlement was unconstitutional. We disagree.

A. Separation of Powers

[2] Petitioners contend that DHHS did not have the constitutional authority to enter an agreement that makes the CON Law inapplicable to Carillon.

Under the North Carolina Constitution the duty of the executive branch, to which DHHS belongs, is to ensure that legislation enacted by the General Assembly is "faithfully executed." N.C. Const., Art. III § 5(4). Petitioners argue that by entering into the 2007 Settlement DHHS violated its duty to faithfully execute the CON Law because under the agreement Carillon can add ACH beds regardless of the project's conformity with the CON requirements, which were created to "control costs, utilization, and distribution of new health service facilities." N.C. Gen. Stat. § 131E-175.

In *Carillon I*, this Court held that DHHS has the authority to enter settlement agreements pursuant to N.C. Gen. Stat. § 150B–22 and that there is no need to consider whether there is a constitutional limita-

tion on this authority because the case could be resolved on statutory grounds. *See Carillon I*, 175 N.C. App. 271, 623 S.E.2d at 633-34. We are bound by this holding for the reasons discussed above.

B. Due Process and Equal Protection

[3] Petitioners next contend that the trial court erred in affirming the final agency decision granting summary judgment because the 2007 Settlement violates petitioners' right to due process and equal protection of the laws.

Petitioners argue that the 2007 Settlement is unconstitutional because it gave Carillon the right to develop ACH beds without regard to whether Carillon had met the conditions that other providers are required to meet under the CON Law. However, prior to the 2007 Settlement, Carillon already had the right to develop over 5,000 ACH beds without being subject to the CON Law under this Court's decision in *Carillon I*. Rather than giving Carillon any new rights, the 2007 Settlement actually provided new limitations on Carillon's right to develop ACH beds. In addition to reducing the total number of beds that Carillon was able to build without meeting the requirements of the CON Law, the agreement also imposed notice and timing restrictions on Carillon to enable DHHS to effectively perform its inventory and planning functions. Thus, DHHS's decision to enter the 2007 Settlement does not raise due process or equal protection concerns.

This argument is without merit.

V. Execution of 2007 Settlement Agreement

[4] In their third argument, petitioners contend that the trial court erred in affirming the final agency decision because the 2007 Settlement was not executed by a Special Assistant Attorney General on behalf of the State. We disagree.

Petitioners cite to no statutory authority for the proposition that the Attorney General was required to execute the 2007 Settlement. Rather, they cite to language in *Carillon I* noting that the 2000 Settlement was signed by both DHHS and a Special Deputy Attorney General. *Carillon I*, 175 N.C. App. at 271, 623 S.E.2d at 634. *Carillon I* noted the case of *Tice v. Depart. of Transportation*, 67 N.C. App. 48, 312 S.E.2d. 241 (1984), and its holding that when the Attorney General has control of an action, he may settle it when he determines that it is in the best interest of the State to do so. *Carillon I*, 175 N.C. App. at 271, 623 S.E.2d at 634. This holding goes to the authority of the

Attorney General to settle a case, but it does not state that this is the exclusive method for settling a case. *Carillon I* specifically references the provisions of N.C. Gen. Stat. § 150B-22 as being the authority for the 2000 Settlement Agreement. *Id.* at 271, 623 S.E.2d at 234. *Carillon I* was a proceeding brought pursuant to § 150B of the General Statutes. *Id.* at 268, 623 S.E.2d at 632.

The 2007 Settlement was between Carillon on the one hand and DHHS and the State of North Carolina on the other. The agreement was executed by DHHS "on behalf of itself and of the State of North Carolina" by Robert J. Fitzgerald, Director of the Division of Facility Services of DHHS. There is no requirement in § 150B-22 that the Attorney General must execute a settlement. We hold that the signature of the Attorney General was not required in the 2007 Settlement.

Moreover, the Attorney General was undoubtedly aware that the case had been settled by DHHS on behalf of the State because the Attorney General, along with the attorneys for Carillon, filed a Joint Motion to Dismiss Appeal Based Upon Settlement by the Parties ("Joint Motion"), *Carillon v. N.C.D.H.H.S.*, No. 54A06 (N.C. Jan. 4, 2007). In support of this motion, the parties asserted that "[o]n January 3, 2007 the State and Carillon entered into a settlement agreement that resolves all disputes and controversies between the parties with respect to the subject matter of this appeal." The Joint Motion was signed by the Solicitor General, Christopher G. Browning Jr., on behalf of Attorney General Roy Cooper.

This argument is without merit.

VI. Prejudice

[5] In their fifth argument, petitioners contend that the trial court erred in affirming the final agency decision granting summary judgment because they have demonstrated they were substantially prejudiced as a matter of law. We disagree.

Under N.C. Gen. Stat. § 150(B)-23(a) a petition for a contested case hearing in the OAH "shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights." The petitioner has the burden of proving that the agency substantially prejudiced petitioner's rights. *Britthaven, Inc. v. N.C. Dep't of Human Resources*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459, *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995).

First, petitioners assert that they have demonstrated prejudice as a matter of law under this Court's decision in *Hospice & Palliative Care Center of Greensboro v. N.C. Dep't. of Health and Human Servs.*, 185 N.C. App. 1, 16-18, 647 S.E.2d 651, 661-62 (2007). In that case, we held that DHHS's grant of an exemption from the CON Law "substantially prejudices a licensed, pre-existing competing health service provider as a matter of law" because it keeps the competitor from being able to protect its interests in "ensuring that unnecessary and duplicative hospice services are not opened in its service area" by filing written comments on the CON proposal. *Id.*

In *Hospice of Greensboro*, competitors were prejudiced because they would have had the opportunity to comment on the CON process if the agency had not granted an exemption to the CON Law. However, even if DHHS had not entered the 2007 Settlement, it could not have required Carillon to submit a CON application in order to give petitioners the opportunity to comment on Carillon's plans because the CON Law was held to be inapplicable to Carillon's projects. *Carillon I*, 175 N.C. App. at 272, 623 S.E.2d at 634. We are bound by this decision. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d 30 at 37.

Second, petitioners claim that they were prejudiced as a matter of law because Carillon's ability to build an undetermined number of new ACH facilities without obtaining a CON may cause petitioners to face increased costs and a loss of staff and patients. This Court recently rejected a claim of substantial prejudice because the party did not provide data, analysis, or support for its claim that it would lose patients and suffer economic harm as a result of the agency decision. *See Parkway Urology, P.A. v. N.C. Dep't of Health & Human Servs.*, ___ N.C. App. ___, ___, 696 S.E.2d 187, 194-95 (2010), *disc. review denied*, ___ N.C. ___, 705 S.E.2d 739, *disc. review denied*, ___ N.C. ___, 705 S.E.2d 753 (2011). Petitioner's claims of potential harm should Carillon decide to develop facilities in the counties where petitioners are located or where they may wish to file CON applications are similarly unsupported. There was no evidence presented that Carillon is planning to develop facilities in those counties or that petitioners have suffered any actual harm.

This argument is without merit.

AFFIRMED.

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

ROSIE M. JOHNSON, IRENE WALLACE, INDIVIDUALLY AND EX. REL. PLAINTIFFS v. ANTIOCH UNITED HOLY CHURCH, INC., HENRIETTA MCGLENN, DIANNE ARTIS, AND LARRY HANKINS, SR. DEFENDANTS

No. COA11-24

(Filed 16 August 2011)

1. Jurisdiction—subject matter—First Amendment not prohibitive—dismissal improper

The trial court erred in granting defendants' motion to dismiss for lack of subject matter jurisdiction as the trial court was not prohibited by the First Amendment from addressing plaintiffs' claims. Plaintiffs' claims did not implicate an impermissible analysis by the court based on religious doctrine or practice but rather required the trial court to apply neutral principles of law to determine whether, *inter alia*, defendants complied with the North Carolina Nonprofit Corporation Act.

2. Pleadings—sufficient allegations—Rule 11 sanctions—erroneous

The trial court erred in granting defendants' motion for Rule 11 sanctions based on the factual and legal insufficiency of plaintiffs' complaint. Plaintiffs' allegations were warranted by North Carolina statutes and common law.

Appeal by Plaintiffs from Order entered 20 September 2010 by Judge Arnold O. Jones in Pender County Superior Court. Heard in the Court of Appeals 25 May 2011.

Charles M. Tighe for Plaintiffs-appellant.

Erma L. Johnson for Defendants-appellee.

HUNTER, JR., Robert N., Judge.

Rosie M. Johnson, Irene Wallace, and Antioch United Holy Church, Inc. ("Antioch") (collectively "Plaintiffs"), appeal from the trial court's 20 September 2010 Order dismissing their claims, for lack of subject matter jurisdiction, against Henrietta McGlenn, Dianne Artis, Larry Hankins, Sr. and Antioch (collectively "Defendants"). In its Order, the trial court also granted Defendants' Motion for Rule 11 Sanctions. Plaintiffs argue the trial court erred in concluding that resolution of Plaintiffs' claims required the court to address ecclesiasti-

cal matters in violation of the First Amendment of the United States Constitution. Plaintiffs further argue the trial court erred in awarding Defendants reasonable attorneys' fees upon concluding there was no legal or factual basis for Plaintiffs' claims. We reverse the trial court's Order.

I. Facts & Procedural History

Antioch is a small congregational church of approximately 40 members located in Rocky Point, North Carolina. Antioch was incorporated under the North Carolina Nonprofit Corporation Act in 1998. Plaintiffs Johnson and Wallace were incorporators of Antioch. At the organizational meeting of the original Board of Directors in March 1999, Defendant Henrietta McGlenn was appointed President and Plaintiff Wallace was appointed Treasurer of Antioch. Defendant Hankins now serves as Antioch's Treasurer.

At the time of its incorporation, Antioch did not have a permanent place of worship or business. In May 1999, Wallace deeded .94 acres of land to Antioch as a building site for the church's sanctuary and offices. Additionally, in 2001, Wallace donated $150,000 for the construction of the church's physical facilities and served, without compensation, as the Building Coordinator for several months of that year.

Although the record is unclear as to the events that occurred in the intervening years, Defendants assert that Plaintiffs have filed three previous lawsuits against Antioch and McGlenn since 2008. Plaintiffs commenced this action against Defendants on 14 June 2010 alleging a number of violations of the North Carolina Nonprofit Corporation Act and intentional infliction of emotional distress upon Wallace.

In the Complaint, Plaintiffs allege that for a number of years Antioch has not had a duly elected board of directors and that the corporate powers of the church have been exercised by Defendants McGlenn, Artis, and Hankins, in violation of Antioch's bylaws. Plaintiffs allege Defendants have failed to maintain audited financial statements as required by Antioch's bylaws. Additionally, Plaintiffs allege Antioch is in violation of the North Carolina Nonprofit Corporation Act in that it does not keep permanent records of the meetings of its members or of its board of directors; does not keep a record of its members; and does not maintain appropriate accounting records, as required by N.C. Gen. Stat. § 55A-16-01.

The Complaint additionally alleges that McGlenn, Artis, Hankins, and others at Antioch have wasted Antioch property and caused Antioch to engage in transactions prohibited by the Internal Revenue

Code, 26 U.S.C. § 503(b). Plaintiffs allege these actions have put Antioch's tax-exempt status in jeopardy, and have thereby put Wallace, Johnson, and other members of Antioch at risk of having to pay federal and state income taxes for funds received by Antioch.

As for the claim of intentional infliction of emotional distress, the Complaint alleges McGlenn wrote and delivered a letter to Wallace as notice of the "removal of her name" as a member of Antioch. Plaintiffs allege this was done without the authority of Antioch, or a duly recorded vote of its members, in violation of N.C. Gen. Stat. § 55A-6-31. Plaintiffs further allege McGlenn delivered this letter to Wallace "with the intent to vex, intimidate and harm Wallace without justification," and that McGlenn's conduct in doing so was "outrageous," causing Wallace "severe emotional harm, humiliation and distress."

Defendants did not answer Plaintiffs' Complaint and filed a Motion to Dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief could be granted, and a Motion for Sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11.

Defendants' Motions came on for hearing on 23 August 2010 in Pender County Superior Court, Judge Arnold O. Jones presiding. During the hearing, Defendants made an oral motion to dismiss for lack of subject matter jurisdiction, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1). Defendants argued resolution of Plaintiffs' claims would require the trial court to resolve ecclesiastical matters, which is prohibited by the First Amendment of the United States Constitution. As for their request for Rule 11 sanctions, Defendants argued Plaintiffs brought the claims solely for the purpose of harassment and that the claims are factually and legally insufficient. Subject matter jurisdiction and the propriety of sanctions were the only issues addressed during the hearing; no evidence related to Plaintiffs' claims was presented.

In its 20 September 2010 Order, the trial court concluded Plaintiffs' claims "involve[] an internal church governance dispute" and that the claims could not be resolved solely by neutral principals of law. The trial court concluded, *inter alia*, that "seeking a court's review of the matters in the Complaint is no different than asking a court to determine whether a particular church's grounds for membership are spiritually or doctrinally correct or whether a church's charitable pursuits accord with the congregation's beliefs." The trial court further concluded there was "no legal or factual basis supporting the allegations asserted in this Complaint." Consequently, the trial

court granted Defendants' Motion to Dismiss and awarded Defendants attorneys' fees in the amount of $2,580.31. Plaintiffs gave timely notice of appeal from this Order.

II. Jurisdiction & Standard of Review

Jurisdiction in this Court is proper pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). A motion to dismiss for lack of subject matter jurisdiction is reviewed *de novo* pursuant to Rule 12 of the North Carolina Rules of Civil Procedure. *Burgess v. Burgess*, ___ N.C. App. ___, ___, 698 S.E.2d 666, 668 (2010) (citing *Harper v. City of Asheville*, 160 N.C. App. 209, 215, 585 S.E.2d 240, 244 (2003)). "Under the *de novo* standard of review, this Court 'considers the matter anew and freely substitutes its own judgment for that of the [trial court].' " *Burgess*, ___ N.C. App. at ___, 698 S.E.2d at 668 (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)). When a trial court reviews a motion to dismiss for lack of subject matter jurisdiction and confines its evaluation to the pleadings, it must accept the allegations in the complaint as true and construe them in a light most favorable to the plaintiff. *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998). The trial court's decision whether to impose sanctions under Rule 11 is also subject to *de novo* review. *Peters v. Pennington*, ___ N.C. App. ___, ___, 707 S.E.2d 724, 742 (2011) (citing *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989)).

III. Analysis

A. Subject Matter Jurisdiction

[1] Plaintiffs first argue the trial court erred in granting Defendants' Motion to Dismiss for lack of subject matter jurisdiction. We agree.

The First Amendment of the United States Constitution prohibits a civil court from becoming entangled in ecclesiastical matters. *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449, 21 L. Ed. 2d 658, 665 (1969) ("First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.") However, not every dispute involving church property implicates ecclesiastical matters. *Id.* ("Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property.") Thus, while circumscribing a court's authority to resolve internal church disputes, the First Amendment does not provide religious organiza-

tions absolute immunity from civil liability. *Privette*, 128 N.C. App. at 494, 495 S.E.2d at 397 (addressing former church employees' claims of negligent supervision and retention against their former employer).

Accordingly, this Court is not forbidden from resolving disputes by "neutral principles of law, developed for use in all property disputes." *Presbyterian*, 393 U.S. at 449, 21 L. Ed. 2d at 665; *see Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 329, 605 S.E.2d 161, 164 (2004) (holding that courts can adjudicate property disputes as well as exercise jurisdiction over the narrow issue of whether bylaws of the church were properly adopted), *appeal dismissed, disc. rev. denied*, 359 N.C. 326, 611 S.E.2d 853, *cert. denied*, 546 U.S. 819, 163 L. Ed. 2d 59 (2005). "[T]he dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine." *Privette*, 128 N.C. App. at 494, 495 S.E.2d at 398.

Plaintiffs' Complaint contains two untitled claims. While Plaintiffs' first claim for relief may be liberally construed to implicate additional causes of action, we discern that Plaintiffs allege Defendants have wasted corporate assets without proper authority under Antioch's bylaws, caused church assets to inure to the benefit of private individuals, and failed to keep appropriate records of its activities. Plaintiffs further allege these acts have threatened the church's tax-exempt status and exposed Plaintiffs to liability for federal and state income tax for funds received by Antioch.

Whether Defendants' actions were authorized by the bylaws of the church in no way implicates an impermissible analysis by the court based on religious doctrine or practice. As stated by our Supreme Court in *Atkins v. Walker*,

> What is forbidden by the First Amendment . . . is a determination of rights to use and control church property on the basis of a judicial determination that one group of claimants has adhered faithfully to the fundamental faiths, doctrines and practices of the church prior to the schism, while the other group of claimants has departed substantially therefrom.

284 N.C. 306, 318, 200 S.E.2d 641, 649 (1973). Rather, the claim in this case requires the trial court to apply neutral principles of law to determine whether, *inter alia*, Defendants complied with the North Carolina Nonprofit Corporation Act. *See* N.C. Gen. Stat. § 55A-2-06 (requiring corporations to adopt bylaws for "regulating and managing the affairs of the corporation"); N.C. Gen. Stat. § 55A-16-01 (requiring

corporations to, *inter alia*, maintain permanent records of the meetings of its board of directors and its members, as well as accounting records); N.C. Gen. Stat. § 55A-13-02(c) (defining corporations' authorized distributions, and stating, "a corporation other than a charitable or religious corporation may make distributions to purchase its memberships"). Thus, while courts are prohibited from making determinations based on religious doctrine, " '[w]here civil, contract or property rights are involved, the courts will inquire as to whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules.' " *Atkins*, 284 N.C. at 320, 200 S.E.2d at 651 (quoting *W. Conference of Original Free Will Baptists of N.C. v. Creech*, 256 N.C. 128, 140-41, 123 S.E.2d 619, 627 (1962)).

Defendants' insistence that allowing the trial court to address the validity of these alleged acts is tantamount to seeking the court's review of whether the church's "charitable presents accord with the congregation's beliefs" confuses the purpose for making a charitable gift with the authority to do so. We find analogous the issue raised before this Court in *Tubiolo*.

In *Tubiolo*, we recognized that "[m]embership in a church is a core ecclesiastical matter." 167 N.C. App. at 328, 605 S.E.2d at 164. However, we also recognized that an individual's membership in a church is a form of a property interest. *Id.* at 329, 605 S.E.2d at 164. Accordingly, it was proper for a court to address the "very narrow issue" of whether the plaintiffs' membership was terminated in accordance with the church's bylaws—whether bylaws had been adopted by the church, and whether those individuals who signed a letter revoking the plaintiffs' membership had the authority to do so. *Id.* at 329, 605 S.E.2d at 164-65 ("This inquiry can be made without resolving any ecclesiastical or doctrinal matters."). In the present case, the trial court is therefore not prohibited by the First Amendment from addressing Plaintiffs' first claim.

Plaintiffs' second claim alleges common law intentional infliction of emotional distress against McGlenn when McGlenn delivered to Wallace a letter stating that Wallace was no longer a member of Antioch. While a court cannot determine whether a church's grounds for membership are spiritually or doctrinally correct, *Harris v. Matthews*, 361 N.C. 265, 273, 643 S.E.2d 566, 571, applying a secular standard of law to secular tortious conduct by a church is not prohibited by the Constitution. *Privette*, 128 N.C. App. at 494, 495 S.E.2d at 398 (addressing the plaintiffs' claims of negligent supervision and retention against the defendant-church).

The elements of a claim for intentional infliction of emotional distress are "(1) extreme and outrageous conduct by the defendant (2) which is intended to and does in fact cause (3) severe emotional distress." *Guthrie v. Conroy*, 152 N.C. App. 15, 21, 567 S.E.2d 403, 408 (2002). Viewed in a light most favorable to Plaintiffs, the allegations in the Complaint of McGlenn's outrageous conduct in delivering the letter to Wallace with the intent to harm and causing severe emotional distress meets the requirements of pleading the common-law tort of intentional infliction of emotional distress. Whether Plaintiffs' claim has merit must be determined by the trial court, and it is a claim the trial court may resolve without delving into ecclesiastical matters. Accordingly, the trial court's granting of Defendants' Motion to Dismiss both of Plaintiffs' claims was error.

B. Rule 11 Sanctions

[2] Plaintiffs additionally argue the trial court erred in granting Defendants' Motion for Rule 11 sanctions based on the factual and legal insufficiency of Plaintiffs' Complaint. We agree.

Rule 11 of the North Carolina Rules of Civil Procedure requires every pleading must be

> 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). It follows that analysis of a claim for Rule 11 sanctions entails three parts: factual sufficiency, legal sufficiency, and no improper purpose of the pleading. *Id.* A finding of a violation of any one of these three requirements requires the court to impose sanctions. *Dodd v. Steele*, 114 N.C. App. 632, 635, 442 S.E.2d 363, 365, *disc. rev. denied*, 337 N.C. 691, 448 S.E.2d 521 (1994).

Our Supreme Court has explained that an appellate court's *de novo* review of a trial court's decision to impose Rule 11 sanctions requires us to determine whether (1) the trial court's findings of fact are supported by a sufficiency of evidence; (2) whether the findings of fact support the conclusions of law; and (3) whether the conclusions of law support the trial court's determination. *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). In the present case, the trial court imposed sanctions on the basis that Plaintiffs' complaint was factually and legally insufficient, but not that it was filed for an improper purpose.

When analyzing the factual sufficiency of a complaint, this Court must determine " '(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact.' " *Persis Nova Const., Inc. v. Edwards*, 195 N.C. App. 55, 61, 671 S.E.2d 23, 27 (2009) (quoting *Page v. Roscoe, LLC*, 128 N.C. App. 678, 681-82, 497 S.E.2d 422, 425 (1998)). However, because the trial court heard no evidence on Plaintiffs' claims and based its determination on the Complaint, it was required to accept the allegations therein as true and view them in the light most favorable to Plaintiffs. *Privette*, 128 N.C. App. at 493, 495 S.E.2d at 397.

In its 20 September 2010 Order, the trial court acknowledged that Plaintiffs allege Defendants "mismanaged and converted funds" of the church, but concluded Plaintiffs' claims involve "an internal governance dispute" that the court was prohibited from reaching. The Order makes no mention of Plaintiffs' claim for intentional infliction of emotional distress. Taking Plaintiffs' allegations as true, we cannot agree with the trial court that Plaintiffs' complaint is factually insufficient.

To be legally sufficient, Plaintiffs' claims for relief must be "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." N.C. Gen. Stat. § 1A-1, Rule 11; *Steele*, 114 N.C. App. at 635, 442 S.E.2d at 365. In our discussion above, we have concluded Plaintiffs' allegations are warranted by North Carolina statutes and common law. Accordingly, it was error for the trial court to grant Defendants' Motion for Rule 11 Sanctions for the alleged factual and legal insufficiency of Plaintiffs' Complaint.

IV. Conclusion

In summary, we conclude that the trial court erred in granting Defendants' Motion to Dismiss and Motion for Rule 11 Sanctions. Plaintiffs' complaint is factually and legally sufficient, and the issues raised therein may be resolved by applying neutral principles of law. Accordingly, the trial court's Order is

Reversed.

Judges HUNTER, Robert C., and STROUD concur.

STATE OF NORTH CAROLINA v. NICHOLAS BRADY HEIEN

No. COA11-52

(Filed 16 August 2011)

Search and Seizure—traffic stop—one malfunctioning brake light—no statutory violation

The trial court erred by denying defendant's motion to suppress evidence of cocaine possession and transportation where the initial traffic stop was based on a malfunctioning brake light. Vehicles are required by N.C.G.S. § 20-129(g) to have only one functioning stop lamp or "brake light," as did defendant's vehicle, and there was no violation of N.C.G.S. §§ 20-129(d) (rear lamps) or 20-183.3 (safety inspections).

Appeal by Defendant from an order dated 25 March 2010 by Judge Vance Bradford Long and judgments entered 26 May 2010 by Judge A. Moses Massey in Superior Court, Surry County. Heard in the Court of Appeals 24 May 2011.

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

Michele Goldman for Defendant.

McGEE, Judge.

Nicholas Brady Heien (Defendant) pled guilty to attempted trafficking in cocaine by transporting and by possession on 26 May 2010. The trial court determined Defendant's prior record level to be a Level I, and sentenced Defendant to two consecutive prison terms of ten months to twelve months. Defendant appeals.

Sergeant Matt Darisse (Sergeant Darisse), of the Surry County Sheriff's Office, testified that he was "conducting criminal interdiction" on Interstate Highway 77 (I-77) when he observed a passing vehicle (the vehicle) driven by a man who appeared to be "stiff and nervous." Sergeant Darisse pulled onto I-77, "observed the driving of the vehicle, and noticed that [the] vehicle approach[ed] a slower moving vehicle, appl[ied] its brakes[,] and [that] the right side brake light was out." Sergeant Darisse testified that, upon observing that the vehicle's right brake light was out, he "put [his] blue lights on to pull the vehicle over."

When Sergeant Darisse approached the vehicle, he told the driver, Maynor Javier Vasquez (Mr. Vasquez), that he had been "pulled . . . over for the brake light being out" and asked Mr. Vasquez to produce his driver's license and registration. Defendant, the only passenger, was lying in the back seat of the vehicle. Because Mr. Vasquez appeared nervous and was slow to produce the requested documents, Sergeant Darisse asked Mr. Vasquez to step out of the vehicle and wait between the vehicle and Sergeant Darisse's patrol car while Sergeant Darisse checked Mr. Vasquez's license and registration.

Deputy Mark Ward (Deputy Ward), of the Surry County Sheriff's Office, arrived to assist Sergeant Darisse with the traffic stop. Deputy Ward briefly questioned Defendant about where Defendant and Mr. Vasquez were going. Defendant told Deputy Ward they were driving to Kentucky. Mr. Vasquez had already told Sergeant Darisse that he and Defendant were driving to West Virginia. Sergeant Darisse gave Mr. Vasquez a warning ticket for an improperly functioning brake light and returned Mr. Vasquez's license and registration. Sergeant Darisse testified that, at that point, Mr. Vasquez was free to leave. However, upon Sergeant Darisse's request, Mr. Vasquez consented to additional questioning. Sergeant Darisse asked Mr. Vasquez if he had any contraband in the vehicle. Mr. Vasquez replied that he did not. Sergeant Darisse then asked Mr. Vasquez if he could search the vehicle. Mr. Vasquez replied that, because the vehicle belonged to Defendant, Sergeant Darisse would have to ask Defendant.

Sergeant Darisse asked Defendant, who was still lying in the back seat, for consent to search the vehicle. Defendant consented to a search and exited the vehicle. Sergeant Darisse's search of the vehicle revealed cocaine.

Defendant filed a motion to suppress dated 21 January 2010 and an amended motion to suppress dated 4 March 2010, both of which the trial court denied in an order dated 25 March 2010. Defendant entered pleas of guilty to charges of attempted trafficking in cocaine by transportation and by possession, but Defendant reserved the right to appeal the denial of his motion to suppress. Defendant filed a petition for writ of certiorari which was granted by our Court on 14 September 2010.

Defendant first argues that the trial court erred by concluding that Sergeant Darisse's initial stop of the vehicle "was constitutional, as [Sergeant] Darisse had a reasonable and articulable suspicion that

the . . . vehicle and the driver were violating the laws of this State by operating a motor vehicle without a properly functioning brake light."

> Generally, an appellate court's review of a trial court's order on a motion to suppress "is strictly limited to a determination of whether its findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." Where, however, 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) (citations omitted). "[C]onclusions of law drawn from the findings of fact are . . . reviewable *de novo*." *Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 15, 356 S.E.2d 599, 601 (1987) (citations omitted).

"A law enforcement officer may stop and briefly detain a vehicle and its occupants if the officer has reasonable, articulable suspicion that criminal activity may be afoot." *State v. Jackson*, 199 N.C. App. 236, 241, 681 S.E.2d 492, 496 (2009) (citation omitted). However, an officer's determination regarding potential criminal activity must be objectively reasonable, and an officer's mistaken belief that a defendant has committed a traffic violation is not an objectively reasonable justification for a traffic stop. *See State v. McLamb*, 186 N.C. App. 124, 127-28, 649 S.E.2d 902, 904 (2007) (holding that an officer's mistaken belief that the defendant was speeding was not an objectively reasonable purpose for a traffic stop). A passenger in a vehicle which is stopped by a law enforcement officer is seized within the meaning of the Fourth Amendment to the United States Constitution, and may accordingly challenge the constitutionality of the initial stop. *See Jackson*, 199 N.C. App. at 239-41, 681 S.E.2d at 495-96.

In the present case, the trial court made an unchallenged finding of fact that Sergeant Darisse's initial stop of the vehicle was based upon his observation that "the right brake light of the vehicle [did] not . . . function as the left brake light of the vehicle came on as the . . . vehicle slowed." Defendant argues that Sergeant Darisse did not have reasonable, articulable suspicion to stop the vehicle because the stop was based upon the mistaken belief that the malfunctioning brake light constituted a violation of N.C. Gen. Stat. § 20-129(g). The State, however, argues that Sergeant Darisse had reasonable, articulable suspicion to stop the vehicle because the malfunctioning brake light constituted a violation of N.C. Gen. Stat. § 20-129(d) and N.C. Gen. Stat. § 20-183.3. Based on the language of the statutes, we hold that

the malfunction of a single brake light, where a vehicle has at least one functioning brake light, is not a violation of N.C.G.S. § 20-129(g), N.C.G.S. § 20-129(d), or N.C.G.S. § 20-183.3.

> In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished. *Hunt v. Reinsurance Facility*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981). Legislative purpose is first ascertained from the plain words of the statute. *See Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Moreover, we are guided by the structure of the statute and certain canons of statutory construction. *See*, *e.g.*, *Media*, *Inc. v. McDowell County*, 304 N.C. 427, 430-31, 284 S.E.2d 457, 461 (1981) ("statutes dealing with the same subject matter must be construed *in pari materia*"); *Builders*, *Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) ("It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage").

Electric Supply Co. v. Swain Electric Co., 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991).

I. N.C. Gen. Stat. § 20-129(g)

Defendant contends that Sergeant Darisse mistakenly believed that the malfunctioning brake light constituted a violation of N.C.G.S. § 20-129(g), which states:

> (g) No person shall sell or operate on the highways of the State any motor vehicle, motorcycle or motor-driven cycle, manufactured after December 31, 1955, unless it shall be equipped with *a stop lamp* on the rear of the vehicle. *The stop lamp* shall display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake. *The stop lamp* may be incorporated into a unit with one or more other rear lamps.

N.C. Gen. Stat. § 20-129(g) (2009) (emphasis added). Initially, we note that the language of N.C.G.S. § 20-129(g) demonstrates that the "stop lamp" required under that statute is synonymous with what is colloquially called a "brake light." *See* N.C.G.S. § 20-129(g) ("The stop lamp . . . shall be actuated upon application of the service (foot) brake.") Because Sergeant Darisse testified that the vehicle's "right side brake light was out[,]" and the trial court's 25 March 2010 order and both parties' briefs use the term "brake light," we will use the terms "brake

light" and "stop lamp" interchangeably. The use of the articles "a" and "the" before the singular "stop lamp" throughout N.C.G.S. § 20-129(g) clearly conveys that, under the statute, only one stop lamp is required on the rear of a vehicle. Thus, the plain language of subsection (g) requires only one stop lamp on a vehicle.

In the present case, the trial court made an uncontested finding of fact that, at the time of the initiation of the traffic stop, "the left brake light of the vehicle came on as the . . . vehicle slowed." Because the *left* brake light was functioning properly, there was no violation of N.C.G.S. § 20-129(g) at the time of the initial stop.

II. N.C. Gen. Stat. § 20-129(d)

The State argues, however, that Sergeant Darisse had reasonable, articulable suspicion to stop the vehicle because the malfunctioning right brake light constituted a violation of N.C.G.S. § 20-129(d), a subsection of the statute that requires "all originally equipped rear lamps or the equivalent [to be] in good working order[.]" In relevant part, N.C.G.S. § 20-129(a) and (d) provide:

> (a) When Vehicles Must Be Equipped.—Every vehicle upon a highway within this State shall be equipped with lighted . . . rear lamps as required for different classes of vehicles, and subject to exemption with reference to lights on parked vehicles as declared in G.S. 20-134:
>
> (1) During the period from sunset to sunrise,
>
> (2) When there is not sufficient light to render clearly discernible any person on the highway at a distance of 400 feet ahead, or
>
> . . . .
>
> (4) At any other time when windshield wipers are in use as a result of smoke, fog, rain, sleet, or snow, or when inclement weather or environmental factors severely reduce the ability to clearly discern persons and vehicles on the street and highway at a distance of 500 feet ahead[.]
>
> . . . .
>
> (d) Rear Lamps.—Every motor vehicle . . . shall have all originally equipped rear lamps or the equivalent in good working order, which lamps shall exhibit a red light plainly visible under normal atmospheric conditions from a distance of 500 feet to the rear of such vehicle.

It is clear from the language of subsections (a) and (d) that the "rear lamps" provided for therein are separate and distinct from the "stop lamp" provided for in subsection (g). Rear lamps must be lighted during "the period from sunset to sunrise," when "there is not sufficient light to render clearly discernible any person on the highway at a distance of 400 feet ahead," and at "any other time when windshield wipers are in use as a result of smoke, fog, rain, sleet, or snow, or when inclement weather or environmental factors severely reduce the ability to clearly discern persons and vehicles on the street and highway at a distance of 500 feet ahead[.]" N.C.G.S. § 20-129(a)(1), (2) and (4). Additionally, rear lamps must "exhibit a red light plainly visible under normal atmospheric conditions from a distance of 500 feet to the rear of [a] vehicle." N.C.G.S. § 20-129(d). From these statutory requirements, it is apparent that the purpose of rear lamps is to make a vehicle more visible to other drivers and pedestrians during times when visibility is otherwise reduced due to nighttime, inclement weather, or similar conditions.

In contrast to "rear lamps[,]" "a stop lamp" must "display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake." N.C.G.S. § 20-129(g). From the requirements of N.C.G.S. § 20-129(g), it is apparent that the purpose of a stop lamp is to notify drivers and pedestrians to the rear of a vehicle that the driver of that vehicle has applied that vehicle's foot brake and that that vehicle will accordingly reduce speed. Notably, this statutory purpose can be accomplished where a vehicle is equipped with a single stop lamp.

Moreover, the statutory requirements for rear lamps differ from those of stop lamps in several significant aspects. Unlike rear lamps, which must be lighted at night, during periods of inclement weather, and during other periods of reduced visibility, stop lamps are only required to be lighted "upon application of the service (foot) brake." *See* N.C.G.S. § 20-129(a); N.C.G.S. § 20-129(g). Rear lamps must be "visible under normal atmospheric conditions from a distance of *500 feet* to the rear of [a] vehicle." N.C.G.S. § 20-129(d) (emphasis added). A stop lamp, however, must be "visible from a distance of not less than *100 feet* to the rear [of a vehicle] in normal sunlight[.]" N.C.G.S. § 20-129(g) (emphasis added). Finally, there is no required method of actuation for rear lamps, but a stop lamp must be lighted "upon application of the service (foot) brake." *See* N.C.G.S. § 20-129(a), (d) and (g). Thus, as reflected by statutory requirements applicable to each,

rear lamps and a stop lamp are distinct and the requirement for each is intended to serve a separate purpose within the statutory scheme.

Accordingly, the requirement of N.C.G.S. § 20-129(d) that "all originally equipped rear lamps or the equivalent [be] in good working order" is applicable only to the rear lamps provided for in N.C.G.S. § 20-129(a) and (d). There is no similar requirement, under N.C.G.S. § 20-129(g), that all originally equipped *stop lamps* be in good working order. In the present case, the trial court's uncontested finding of fact notes that the traffic stop was based upon Sergeant Darisse's observation that the vehicle's right brake light malfunctioned. The State's argument that, because the vehicle's right brake light malfunctioned, Sergeant Darisse had reasonable, articulable suspicion to stop the vehicle under N.C.G.S. § 20-129(d), is without merit.

III. N.C. Gen. Stat. § 20-183.3

The State also argues that the malfunctioning brake light constituted a "violation of the safety inspection requirements of N.C. Gen. Stat. § 20-183.3[.]" N.C. Gen. Stat. § 20-183.3 (2009) provides, in relevant part:

> (a) Safety.—A safety inspection of a motor vehicle consists of an inspection of the following equipment to determine if the vehicle has the equipment required by Part 9 of Article 3 of this Chapter and if the equipment is in a safe operating condition:
>
> . . . .
>
> (2) Lights, as required by G.S. 20-129 or G.S. 20-129.1.

As explained above, N.C.G.S. § 20-129(g) only requires a vehicle to have a single functioning brake light. Moreover, N.C. Gen. Stat. § 20-129.1 (2009), which provides that "[b]rake lights . . . on the rear of a motor vehicle shall have red lenses so that the light displayed is red[,]" does not alter the requirement of N.C.G.S. § 20-129(g) that a vehicle be equipped with one brake light. Thus, even assuming that a violation of the inspection requirement statute was possible under the facts of the present case, Sergeant Darisse could not have had a reasonable, articulable suspicion that the malfunctioning brake light constituted a violation of that statute.

In sum, at the time of the initial stop, there was no violation of N.C.G.S. § 20-129(g), N.C.G.S. § 20-129(d), or N.C.G.S. § 20-183.3. Because the initial stop was based upon Sergeant Darisse's observation that the right brake light of the vehicle malfunctioned, the justi-

fication for the stop was objectively unreasonable, and the stop violated Defendant's Fourth Amendment rights. *See McLamb*, 186 N.C. App. at 127-28, 649 S.E.2d at 904. Accordingly, the trial court erred in denying Defendant's motion to suppress and amended motion to suppress.

We note that the holding in this case, based upon the present language of the applicable statute, makes it clear that having a single operable brake light is legally sufficient, and that a vehicle having only one operable brake light is not a valid justification for a traffic stop. The statute at issue having been enacted several decades ago, retains an antiquated definition of a stop lamp, not reflecting actual vehicle equipment now included in most automobiles. We are well aware that the role of our courts is to adjudicate the laws as enacted by the General Assembly, and only the General Assembly, as our State's policy-maker, can modify and update this outdated statutory language.

We need not address Defendant's second argument in light of our holding above. The trial court's order denying Defendant's motion to suppress and amended motion to suppress is reversed and its judgment is vacated.

Reversed and vacated.

Judges ERVIN and McCULLOUGH concur.

ASSOCIATION FOR HOME AND HOSPICE CARE OF NORTH CAROLINA, INC., PETITIONER v. DIVISION OF MEDICAL ASSISTANCE, NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA10-710

(Filed 16 August 2011)

Appeal and Error—mootness—administrative decision—superior court review—dismissed

In an appeal arising from an administrative action in which petitioner challenged a new methodology for calculating coverage under the Personal Care Services (PCS) Medicaid program, the superior court's injunction and order directing that the contested case be dismissed was vacated and remanded with instructions to dismiss the contested case for mootness. The PCS Medicaid program and related coverage policy had been termi-

nated, eliminating the effect that any determination in petitioner's contested case could have had on the controversy.

Appeal by Petitioner from order entered 11 March 2010 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 30 November 2010.

Parker Poe Adams & Bernstein, by Renee J. Montgomery, Robb A. Leandro, and Matthew W. Wolfe, for Petitioner-Appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Belinda A. Smith and Assistant Attorneys General Iain Stauffer and Jennifer Hillman, for Respondent-Appellee.

John R. Rittelmeyer for Disability Rights North Carolina, Amicus Curiae.

Ott Cone & Redpath, P.A., by Thomas E. Cone and Wendell H. Ott, for Charlotte-Mecklenburg Hospital Authority, Duke University Medical Center, Mission Hospitals, Inc., Moses Cone Health System, North Carolina Baptist Hospital, and WakeMed Medical Center, Amici Curiae.

BEASLEY, Judge.

Where the Personal Care Services (PCS) Medicaid program and related coverage policy have been terminated, we dismiss this appeal as moot.

Petitioner Association for Home and Hospice Care (AHHC) is an association of agencies that provide home care services to Medicaid-eligible residents. North Carolina's Medicaid program is supervised and administered by Respondent Division of Medical Assistance (DMA), an agency within the Department of Health and Human Services (DHHS). *See* N.C. Admin. Code tit. 10A, r. 22A .0101 (2009). This case arises from an administrative action in which AHHC challenged a new methodology for calculating coverage under the PCS Medicaid program, and the administrative law judge (ALJ) preliminarily enjoined DMA from implementing the same. AHHC appeals the superior court's order reviewing the injunction and directing that the contested case be dismissed.

Medicaid is an optional program making federal financial assistance available to states that elect to subsidize payments owed providers. 42 U.S.C. §§ 1396 *et seq*. Participating states must obtain

approval by the Centers for Medicare and Medicaid Services (CMS) of a "medical assistance" plan (State Plan) and any "material changes" thereto. 42 C.F.R. § 430.12 (2010). In-home personal care services constitute an optional category of medical assistance that states may choose to include in its plan, *see* 42 U.S.C. 1396a(a)(10)(A) (2009), and, in general, are physician-authorized services furnished in-home by a qualified provider to an individual who is not a hospital inpatient or a resident of a nursing home, institution, or like facility, *See* 42 U.S.C. § 1396d(a)(24). North Carolina has elected to provide these services, *see* N.C. Admin. Code tit. 10A, r. 22 O.0120, and, until recently, did so under programs referred to as PCS and PCS-Plus, which were governed by DMA Policy 3C.[1]

A budgetary measure passed in August 2009 (Budget Bill) obliged DMA to effectuate compliance with reductions in Medicaid spending and explicitly addressed PCS. *See* 2009 N.C. Sess. Laws ch. 451 § 10.68A.(a). The law required DMA to implement certain new criteria for assessing PCS eligibility and the level of assistance needed by those who qualified, *id.* § 10.68A.(a)(3). DMA thus adopted a "scoring algorithm" to refine the methodology for determining the number of approved PCS hours and contracted with a third-party entity to conduct independent assessments of all PCS plans of care. These changes to the PCS program prompted AHHC to file a contested case petition, alleging DMA violated the Budget Bill's procedural mandates to, *inter alia*, provide notice of, publish, and allow a 30-day comment period for amended medical coverage policies. *See id.* § 10.68.A(c).

Pending a full adjudication on the merits, the ALJ enjoined DMA from using the scoring algorithm to assign PCS hours and from conditioning payment of PCS hours on prior authorization Prior to any ALJ decision, however, DMA petitioned the Wake County Superior Court "to suspend and review" the preliminary injunction. The trial court granted DMA's writ of certiorari and concluded that the ALJ lacked jurisdiction to enter the injunction order "by reason of sovereign immunity." The trial court dissolved the preliminary injunction and further enjoined the ALJ "from taking any further action in this matter other than dismissing the contested case." AHHC appeals and argues that the superior court: (i) lacked jurisdiction over DMA's petition for certiorari because the order was not a final agency decision

1. Where DHHS is statutorily required to "develop, amend, and adopt medical coverage policy," *see* N.C. Gen. Stat. § 108A-54.2 (2009), DMA has promulgated program-specific clinical coverage policies which outline the clinical content of our state's Medicaid services, and DMA Clinical Coverage Policy No. 3C governs the PCS program.

subject to judicial review; (ii) erroneously applied sovereign immunity to dismiss the contested case; and (iii) erred in granting DMA's petition because it had no merit. We do not reach the issues raised by AHHC because this appeal is moot.

"A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996); *see also Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 20, 652 S.E.2d 284, 298 (2007) ("A matter is rendered moot when (1) the alleged violation has ceased, and there is no reasonable expectation that it will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." (internal quotation marks omitted)). If "during the course of litigation it develops that . . . the questions originally in controversy between the parties are no longer at issue, the case should be dismissed," as the matter is no longer justiciable. *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994). Several exceptions, however, permit our courts to address an otherwise moot claim where there exists, *inter alia*: (1) "a defendant's voluntary cessation of a challenged practice"; (2) a case that is "capable of repetition, yet evading review"; or (3) "a matter of public interest." *Thomas v. N.C. Dept. of Human Resources*, 124 N.C. App. 698, 705, 478 S.E.2d 816, 820-21 (1996) (internal quotation marks and citations omitted).

On 30 June 2010, the General Assembly passed Session Law 2010-31, which repealed the statutory provisions of the Budget Bill which, as the ALJ noted, were "the genesis of the issues in this contested case." *See* 2010 N.C. Sess. Laws ch. 31, § 10.35 (striking the entirety of § 10.68A.(a)(3) of Session Law 2009-451, which had authorized DMA's implementation of new PCS criteria). Session Law 10-31 further amended the Budget Bill by adding § 10.68A.(a)(3a) thereto, which provided that "[i]n order to enhance in-home aid services to Medicaid recipients, [DMA] shall . . . no longer provide services under PCS and PCS-Plus, the later of January 1, 2011, or whenever CMS approves the elimination of the PCS and PCS-Plus programs and the implementation of" two new similar services, In-Home Care for Children (IHCC) and In-Home Care for Adults (IHCA). *Id.*

On 24 September 2010, DMA filed a motion to dismiss AHHC's appeal for mootness (Motion), contending that the issues raised were no longer in controversy due to: (1) the repeal of the Budget Bill's provision that authorized the PCS review and methodology change;

and (2) a newly promulgated PCS Policy 3C abolishing the use of the scoring algorithm challenged by AHHC. Relying in part on the proposition that "[r]epeal of a challenged law generally renders moot the issue of the law's interpretation or constitutionality," *Property Rights Advocacy Grp. v. Town of Long Beach*, 173 N.C. App. 180, 183, 617 S.E.2d 715, 718 (2005), the agency argued that the legislature's enactment of Session Law 10-31 and DMA's rescission of the previous version of Policy 3C mooted the instant appeal. This Court denied DMA's Motion for various reasons.

First, repeal of the subject budgetary provision might have mooted some, but not all, of AHHC's claims. It is true that DMA contended the review of PCS hours by the third-party independent assessment entity was required by the Budget Bill and that AHHC indeed challenged the agency's interpretation of the bill as unsupported by the plain language. Accordingly, the repeal of the statute would usually "render[] moot the issue of the law's interpretation." *Id.* AHHC's remaining claims, however, did not entail construction of the Budget Bill or any other law involved but, rather, DMA's failure to comply therewith. Moreover, DMA argued before this Court that even without the enabling legislation in the Budget Bill, the agency had authority to conduct the PCS assessments pursuant to its general utilization review power, thus suggesting that the repeal of § 10.68.A(a)(3) of the Budget Bill would not preclude DMA from reviewing PCS hours and eligibility in the manner challenged. Finally, while Session Law 10-31 legislated away PCS in favor of implementing the two new in home-care services, it expressly conditioned the program changes on CMS approval. When this Court denied DMA's Motion, CMS had not approved any state plan amendment; thus, the Budget Bill's PCS sunset provision had not been triggered.

Where DMA had suggested that it could re-implement the methodology it had ceased using even without the Budget Bill's authorization and uncertainty prevailed as to if and when CMS would approve the elimination of PCS, exceptions to the mootness doctrine certainly permit our consideration of the appeal even if AHHC's claims were technically no longer viable. However, interim events, namely CMS approval to discontinue PCS, have eliminated the effect that any determination in AHHC's contested case can have on the controversy. Where the mootness issue "is not determined solely by examining facts in existence at the commencement of the action[,] [i]f the issues before a court or administrative body become moot *at any time during the course of the proceedings*, the usual response should be to dis-

miss the action." *Carolina Marina and Yacht Club, LLC v. New Hanover County Bd. of Com'rs*, ___ N.C. App. ___, ___, 699 S.E.2d 646, 648 (2010) (internal quotation marks and citations omitted).

On 15 April 2011 CMS approved the respective North Carolina Medicaid State Plan Amendment (SPA 10-031), noting that the DMA proposal "was submitted as a result of a change to the State Law that discontinued [PCS] and [PCS-Plus]"; "established two new In-Home Personal Care Services" along with "new eligibility criteria for receipt of [IHCA and IHCC]"; and indicated our state's "intent to move the coverage of PCS to Section 1915(i) of the Social Security Act" as Home and Community Based Service State Plan Option.[2] The amended pages of the State Plan reflect that In-Home Care Services for Adults and Children are now provided as community based services and describe the parameters of the IHCA and IHCC programs. DMA's May 2011 North Carolina Medicaid Bulletin notified personal care service providers about the implementation of in-home care (IHC) services and explained that "[e]ffective June 1, 2011, [DMA] will no longer provide services under PCS and PCS-Plus and will implement [the] two new services." Thus, the PCS and PCS-Plus programs ended on 31 May 2011 and superseded by the IHC services on 1 June. The PCS termination date is further noted on Policy 3C, which is now obsolete, and new Clinical Coverage Policies 3E (IHCA) and 3F (IHCC) have an original effective date of 1 June 2011.

In light of the fact that the PCS program has been discontinued entirely, not by DMA but at the direction of our General Assembly, the relief sought by AHHC-reversal of the changes DMA made to the PCS assessment process-if granted, would not have any practical effect on either party. Moreover, the facts in existence at the current stage do

2. In order to address the question of mootness, we take judicial notice of CMS's decision approving the amendment to North Carolina's State Plan, the State Plan amendments, and related publications by DMA. *See Utilities Comm. v. Southern Bell Telephone Co.*, 289 N.C. 286, 288, 221 S.E.2d 322, 323-24 (1976) ("This Court has recognized in the past that important public documents will be judicially noticed. *Staton v. R.R.*, 144 N.C. 135, 145, 56 S.E. 794, 797 (1907) (railroad reports to the Corporation Commission judicially noticed); 1 Stansbury's North Carolina Evidence, § 13 (Brandis Rev. 1973). Consideration of matters outside the record is especially appropriate where it would disclose that the question presented has become moot, or academic, and therefore neither of the litigants has any real interest in supplementing the record."); *see also McGRX, Inc. v. Vermont*, 2011 WL 31022, at *1 n.1 (D. Vt. Jan. 5, 2011) (taking judicial notice of CMS approval of State Medicaid Plan Amendment, noting that "[m]any cases have recognized that a Court may take judicial notice of the rules, regulations and orders of administrative agencies issued pursuant to their delegated authority" and that a "court may take judicial notice of governmental agency determinations" (internal quotation marks and citations omitted)).

not present any exceptions to the general mootness rule. Accordingly, the controversy is no longer appropriate for judicial action, and we dismiss the appeal as moot. *See Matthews v. Dept. of Transportation*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654-55 (1978) ("We find that the substantial amendments to Chapter 126 contained therein, together with the fact that there no longer exists a controversy among the parties in this case, would render our determination of the issues sought to be presented by the defendants little more than an advisory opinion as to the effect of prior law on hypothetical parties.").

The usual disposition when a case is mooted while on appeal is "simply to dismiss the appeal." *Southern Bell*, 289 N.C. at 290, 221 S.E.2d at 324. Our Supreme Court has explained, however, that in appeals from this Court, this procedure "leaves the decision of the Court of Appeals undisturbed as a precedent when, but for intervening mootness, it might not have remained so[,]" and advised that "the better practice in this circumstance is to vacate the decision of the Court of Appeals." *Id.* at 290, 221 S.E.2d at 325. The same problem presents itself in this appeal from the superior court, which itself sat as an appellate court in the administrative action. Thus, "[w]hile we express no opinion as to its correctness," *id.*, we believe that it is likewise the better practice in this circumstance to vacate the decision of the superior court and remand with instructions to dismiss the contested case for mootness.

APPEAL DISMISSED; SUPERIOR COURT ORDER VACATED and REMANDED.

Judges BRYANT and STROUD concur.

JOHN F. GREEN, II, GUARDIAN AD LITEM OF TRENTYN C. LEWIS (A MINOR), PLAINTIFF-APPELLEE v. FISHING PIERS, INC., INDIVIDUALLY AND D/B/A HIGH TIDE LOUNGE AND/OR FLOUNDERS AND/OR CAROLINA BEACH FISHING PIER; AND BETTY JO PHELPS, DEFENDANTS/THIRD-PARTY PLAINTIFFS-APPELLANTS v. ESTATE OF DARYLL LUTZ, THIRD-PARTY DEFENDANT-APPELLEE

No. COA10-1610

(Filed 16 August 2011)

Contribution—Dram Shop Act—negligence—liability

The trial court did not err by granting summary judgment for the third-party defendant, the estate of Ms. Lutz, on a claim for contribution in an action under the Dram Shop Act against the defendants/third-party plaintiffs by the son of a passenger killed in the car which the intoxicated Ms. Lutz was driving. Defendants (the bar at which Ms. Lutz had been drinking) focused on N.C.G.S. § 18B-120, *et seq.*, which created a cause of action against the permittee or a local ABC board only and did not create a cause of action against the negligent driver. There was no claim articulated under any other legal theory by which Ms. Lutz's estate would be liable to plaintiff; the difference between negligence and liability was pivotal.

Appeal by Defendants/Third-Party Plaintiffs from order entered 30 August 2010 by Judge Arnold O. Jones, II in Superior Court, New Hanover County. Heard in the Court of Appeals 10 May 2011.

No Brief for Plaintiff-Appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Scott Lewis and M. Duane Jones, for Defendants/Third-Party Plaintiffs-Appellants.

Marshall, Williams & Gorham, L.L.P., by William Robert Cherry, Jr., for Third-Party Defendant-Appellee.

McGEE, Judge.

The undisputed facts in this case show that Daryll Lutz (Ms. Lutz), Chad R. Lewis (Mr. Lewis), and Dustin Lewis spent the evening of 14 August and the early morning of 15 August 2008 at the High Tide Lounge (the Lounge), a bar in Carolina Beach. Though Ms. Lutz was only twenty years old at the time, she was served alcohol while at the Lounge. Ms. Lutz left the Lounge and drove away in her vehicle, with

Mr. Lewis and Dustin Lewis as passengers. Ms. Lutz was visibly intoxicated when she left the Lounge and, while driving, she lost control of her vehicle and became involved in a single-car accident. Tragically, none of the occupants in Ms. Lutz's vehicle survived the crash.

John F. Green, II (Plaintiff), as Guardian ad Litem of Trentyn C. Lewis (Trentyn), the minor son of Mr. Lewis, filed a complaint on 15 May 2009 against certain parties pursuant to N.C. Gen. Stat. § 18B-120, *et seq.*, known as the Dram Shop Act. The parties filed a stipulation as to the proper identity of the persons and business entities involved in the matter on 11 August 2009 and Plaintiff filed an amended complaint that same date against: "Fishing Piers, Inc., individually and d/b/a High Tide Lounge and/or Flounders, and/or Carolina Beach Fishing Pier; and Betty Jo Phelps, Defendants" (Defendants). Plaintiff alleged that Trentyn was an aggrieved party pursuant to North Carolina's Dram Shop Act and that he was entitled to recover from Defendants for loss of support Trentyn suffered as a result of his father's death.

Defendants filed an answer and third-party complaint against the Estate of Ms. Lutz as Third-Party Defendant (Ms. Lutz's Estate) pursuant to N.C. Gen. Stat. § 1A-1, Rule 14(b) on 21 August 2009. Defendants' third-party complaint alleged that Ms. Lutz's Estate was jointly and severally liable for Plaintiff's damages, pursuant to N.C. Gen. Stat. § 18B-124. Ms. Lutz's Estate filed an answer on 1 October 2009, in which it asserted that it could not be liable to Plaintiff because of the contributory negligence of Mr. Lewis and, therefore, Ms. Lutz's Estate could not be jointly and severally liable with Defendants.

Plaintiff and Defendants entered into a settlement agreement by order entered 7 June 2010. Defendants thereafter filed a motion for summary judgment against Ms. Lutz's Estate on 12 August 2010. In their motion for summary judgment, Defendants argued that they were entitled to contribution under N.C. Gen. Stat. § 18B-124. Ms. Lutz's Estate filed a cross-motion for summary judgment against Defendants dated 17 August 2010. In an order dated 30 August 2010, the trial court denied Defendants' motion for summary judgment and granted the motion for summary judgment filed by Ms. Lutz's Estate. Defendants appeal.

Standard of Review

Our Supreme Court has stated the standard of review for summary judgment in a case where the parties filed cross-motions for summary judgment:

> The instant case presents cross-motions for summary judgment. Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." The standard of review for summary judgment is de novo.

Forbis v. Neal, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citations omitted).

Analysis

All of Defendants' arguments on appeal address whether Defendants were entitled to contribution from Ms. Lutz's Estate. Defendants' third-party complaint contained only the following allegations with respect to the liability of Ms. Lutz's Estate:

> 3. If . . . [P]laintiff is found to have sustained an "injury" as defined by N.C. Gen. Stat. § 18B-120(2), then these injuries were caused by the negligence of [Ms.] Lutz as she was driving the vehicle in which . . . [P]laintiff's decedent, [Mr.] Lewis, was riding at the time of his death in an intoxicated state.
>
> 4. Pursuant to N.C. Gen. Stat. § 18B-124, if [Defendants] are held liable to . . . [P]laintiff pursuant to the provisions of N.C. Gen. Stat. §§ 18B-120 and 18B-121, then N.C. Gen. Stat. §[] 18B-124 mandates that [Ms.] Lutz shall be jointly and severally liable for . . . [P]laintiff's damages.

We note that Defendants' third-party complaint did not allege that Ms. Lutz's Estate was liable to Plaintiff under any theory other than N.C. Gen. Stat. § 18B-124.

Based on Plaintiff's complaint, Defendants' third-party complaint, and the arguments before the trial court, the sole issue before the trial court in ruling on cross-motions for summary judgment was whether N.C. Gen. Stat. § 18B-120, *et seq.*, provide a mechanism whereby Defendant is entitled to seek contribution from Ms. Lutz's Estate. In determining this matter of first impression, we employ rules of statutory construction to interpret the statutes involved.

"It is well settled that statutes dealing with the same subject matter must be construed in *pari materia*, 'as together constituting one law.' " *Williams v. Alexander County Bd. of Educ.*, 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1998) (citation omitted). " 'The paramount objective of statutory interpretation is to give effect to the intent of the legislature. The primary indicator of legislative intent is statutory language; the judiciary must give clear and unambiguous language its plain and definite meaning.' " *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) (citation omitted).

N.C. Gen. Stat. § 18B-121 (2009) states:

> An aggrieved party has a claim for relief for damages *against a permittee or local Alcoholic Beverage Control Board* if:
>
> (1) The permittee or his agent or employee or the local board or its agent or employee negligently sold or furnished an alcoholic beverage to an underage person; and
>
> (2) The consumption of the alcoholic beverage that was sold or furnished to an underage person caused or contributed to, in whole or in part, an underage driver's being subject to an impairing substance within the meaning of G.S. 20-138.1 at the time of the injury; and
>
> (3) The injury that resulted was proximately caused by the underage driver's negligent operation of a vehicle while so impaired.

(Emphasis added). N.C. Gen. Stat. § 18B-120 (2009) defines "aggrieved party" and "injury" as follows:

> (1) "Aggrieved party" means a person who sustains an injury as a consequence of the actions of the underage person, but does not include the underage person or a person who aided or abetted in the sale or furnishing to the underage person.
>
> (2) "Injury" includes, but is not limited to, personal injury, property loss, loss of means of support, or death. Damages for death shall be determined under the provisions of G.S. 28A-18-2(b). Nothing in G.S. 28A-18-2(a) or subdivision (1) of this section shall be interpreted to preclude recovery under this Article for loss of support or death on account of injury to or death of the underage person or a person who aided or abetted in the sale or furnishing to the underage person.

We first note that Trentyn, for whose benefit this action was filed by Plaintiff, was alleged to be an "aggrieved party" within the definition set forth in N.C.G.S. § 18B-120, because Trentyn sustained an injury as a result of Defendants' furnishing alcohol to Ms. Lutz. In his complaint, Plaintiff alleged that Trentyn suffered an injury in that he suffered the loss of support provided for in N.C.G.S. § 18B-120(2) and he suffered damages under the N.C. Wrongful Death Act. The only mention in Plaintiff's complaint regarding Ms. Lutz's actions, or her Estate's alleged liability to Trentyn, is that Ms. Lutz caused an injury to Trentyn "in violation of Section 18B-121[.]"

While N.C.G.S. § 18B-121 does require that the injury arise from an underage driver's "negligent" operation of a motor vehicle, the specific language of the statute does not create a cause of action against the negligent driver. Rather, N.C.G.S. § 18B-121 clearly and unambiguously creates a cause of action *only* against "a permittee or local Alcoholic Beverage Control Board[.]" N.C.G.S. § 18B-121. Our Court has observed that the effect of N.C.G.S. § 18B-120, *et seq.*, was to create a cause of action where none previously existed against a permittee or local ABC Board. *See Hall v. Toreros II, Inc.*, 176 N.C. App. 309, 321, 626 S.E.2d 861, 869 (2006) (observing that Chapter 18B was enacted "in derogation of the common law principle that it was not a tort either to sell or furnish alcohol to an able-bodied person"). As this cause of action is created in derogation of common law, it must be construed narrowly. *Id.* ("It is well settled that '[s]tatutes in derogation of the common law . . . must be strictly construed.' ") (citation omitted). Reading N.C.G.S. § 18B-120, *et seq.*, in context, it is clear that the intent was only to enable an injured party to seek compensation from a permittee or ABC board; we can find nothing in N.C.G.S. § 18B-120, *et seq.*, suggesting a legislative intent to create new theories of liability against the negligent driver who causes the injury.

N.C.G.S. § 18B-121 also refers only to the negligence of the underage driver, and not to any *liability* of the underage driver to the injured party. The difference is pivotal to our application of the statute, for reasons such as those implicated in this case, where an allegation of contributory negligence might defeat the injured party's claims against an admittedly negligent driver if such claims were made.

We note that Defendants contend in their brief that Ms. Lutz was negligent as a matter of law. We do point out that Defendants do not indicate to whom Ms. Lutz would be liable under Defendants' theory that she was negligent as a matter of law. We find Defendants' arguments mutually inconsistent. Defendants first contend that Ms. Lutz

was negligent as a matter of law and that her negligence contributed to the death of Mr. Lewis. However, Defendants also argue that the contributory negligence of Mr. Lewis is not applicable as a defense because "interpretations of case law grounded in tort do not apply to this matter." We are unable to reconcile Defendants' argument that Ms. Lutz was "negligent as a matter of law" with their argument that case law grounded in tort is inapplicable to this case. It does appear from Defendants' arguments that, on appeal, they recognize that the negligence of the underage driver must arise from some theory other than N.C.G.S. § 18B-120, *et seq.*, but this recognition was not apparent from their pleadings and therefore was not before the trial court.

However, it must be reiterated that Defendants focus on N.C.G.S. § 18B-120, *et seq.*, and do not articulate any other legal theory under which Ms. Lutz's Estate would be liable to Plaintiff. Rather, the pleadings are clear in alleging that Plaintiff is an aggrieved party as defined by N.C.G.S. § 18B-120, and that Plaintiff has a claim pursuant to N.C.G.S. § 18B-121. Defendants assert that the liability of Ms. Lutz's Estate is predicated on N.C. Gen. Stat. § 18B-124, which provides that: "The liability of the negligent driver or owner of the vehicle that caused the injury and the permittee or ABC board which sold or furnished the alcoholic beverage shall be joint and several, with right of contribution but not indemnification." N.C. Gen. Stat. § 18B-124 (2009). Because N.C.G.S. § 18B-121 creates a cause of action against the permittee or a local ABC Board only, the theory by which the liability of the negligent driver is determined must arise from some other context, be it common law negligence, the Wrongful Death Act, or otherwise. As we have discussed, the pleadings in the present case do not allege such an alternate theory of liability. Because we have held that Defendants erroneously contended that N.C.G.S. § 18B-124 creates liability on the part of Ms. Lutz's Estate, the trial court did not err in granting summary judgment in favor of Ms. Lutz's Estate.

Affirmed.

Judges ERVIN and BEASLEY concur.

IN RE D.A.Q.

[214 N.C. App. 535 (2011)]

IN THE MATTER OF: D.A.Q.

No. COA10-1325

(Filed 16 August 2011)

1. Juveniles—restitution—juvenile's best interest—no finding

An order requiring a juvenile adjudicated delinquent to pay restitution was vacated and remanded where the judge did not find that restitution was in the juvenile's best interest.

2. Juveniles—restitution—joint and several liability

The trial court did not err by not holding a juvenile jointly and severally liable for restitution along with another juvenile after they feloniously broke and entered a motor vehicle. Although the juvenile bringing this appeal was required to pay more than half the restitution, joint and several liability could have resulted in this juvenile being required to pay the entire amount due to the co respondent's numerous other restitution obligations.

3. Juveniles—restitution—fairness to victim

A restitution order against a juvenile was remanded where the trial court's findings indicated that the court was primarily concerned with fairness to the victim rather than the juvenile.

Appeal by juvenile from order entered 26 August 2010 by Chief Judge Robert B. Rader in Wake County District Court. Heard in the Court of Appeals 11 April 2011.

Attorney General Roy Cooper, by Assistant Attorney General Tawanda N. Foster-Williams, for the State.

Mary McCullers Reece for defendant-appellant.

GEER, Judge.

Juvenile D.A.Q. appeals from the trial court's order requiring him to pay $242.58 in restitution after he was adjudicated delinquent of two counts of feloniously breaking and entering a motor vehicle. We reverse and remand for further findings of fact because the trial court failed to make any findings regarding whether restitution is in the juvenile's best interest and whether the restitution was fair to the juvenile.

Facts

The State's evidence tended to show the following facts. On 24 April 2010, 13-year-old D.A.Q. ("Danny") and another juvenile, D.W. ("Dale"),[1] broke into two vehicles and attempted to break into a building occupied by J and S Auto Services, Inc. Danny admitted to two counts of breaking into a motor vehicle and, in exchange, the State dismissed the charge of attempting to break into a building.

On 8 July 2010, the trial court adjudicated Danny delinquent of two counts of feloniously breaking and entering a motor vehicle. The court concluded that it was required to order a level two disposition, but was also allowed to order any level one disposition. The court then placed Danny on probation for up to nine months with certain terms and conditions. A hearing on the issue of restitution was scheduled for a later date.

On 28 July 2010, a supplemental hearing was held before Chief Judge Robert B. Rader to decide the appropriate amount of restitution, if any, that Danny should pay. The State presented evidence indicating that one vehicle owner suffered a $265.00 loss. The second vehicle owner did not report any loss.

Previously, Dale had been adjudicated delinquent by another judge and had been ordered to pay restitution for this break-in along with others. Since Dale's restitution amount did not cover all of the losses of Dale's victims, the judge apportioned Dale's restitution payment among the victims on a pro-rata basis. Dale was ordered to pay $22.52 in restitution to the victim in this case.

Chief Judge Rader, in determining Danny's restitution, noted that the amount of restitution normally would be split evenly between the two juveniles. In light of the limited amount being paid by Dale, however, he concluded that it was appropriate for Danny to pay the victim restitution in the amount of $242.58—the remainder of the loss after Dale paid his restitution to the victim.

The court made the following findings of fact to support its conclusion that Danny should pay $242.58 in restitution:

8. That in light of the co-respondent's numerous restitution obligations, it is appropriate for the Juvenile to pay more than half of the remaining restitution owed in the amount of $242.58.

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1. The pseudonyms "Danny" and "Dale" are used to protect the juveniles' privacy and for ease of reading.

9. That to split the restitution amount evenly between the Juvenile and the co-respondent in this matter would result in an injustice to the victim who has suffered a financial loss and would not be fully compensated.

10. That $242.58 is a reasonable amount of restitution and the Juvenile has the means and ability to earn the entire amount by performing community service through the Juvenile Restitution Program without paying a dime out-of-pocket.

11. That the Juvenile is physically fit and of an age and maturity level that he is capable of performing community service to satisfy the restitution amount owed.

Danny timely appealed to this Court.

Discussion

[1] The sole issue on appeal is whether the trial court made adequate findings of fact to support its order that Danny pay $242.58 in restitution. Pursuant to N.C. Gen. Stat. § 7B-2506(4) (2009), a trial court may:

> Require restitution, full or partial, up to five hundred dollars ($500.00), payable within a 12-month period to any person who has suffered loss or damage as a result of the offense committed by the juvenile. The court may determine the amount, terms, and conditions of the restitution. If the juvenile participated with another person or persons, all participants should be jointly and severally responsible for the payment of restitution; however, the court shall not require the juvenile to make restitution if the juvenile satisfies the court that the juvenile does not have, and could not reasonably acquire, the means to make restitution.

"An order of restitution must be supported by the record, which demonstrates that the condition is fair and reasonable, related to the needs of the child, and calculated to promote the best interest of the juvenile in conformity with the avowed policy of the State in its relation with juveniles." *In re Schrimpsher*, 143 N.C. App. 461, 464, 546 S.E.2d 407, 410 (2001).

Danny contends, and the State concedes, that the trial court erred when it failed to make a finding of fact that the restitution was in his best interest. As this Court has previously held, " '[a] requirement that a juvenile make restitution as a condition of probation must be supported by the record and appropriate findings of fact which demonstrate that the best interest of the juvenile will be promoted by the

enforcement of the condition.' " *In re D.M.B.*, 196 N.C. App. 775, 778, 676 S.E.2d 66, 68 (2009) (quoting *In re Berry*, 33 N.C. App. 356, 360, 235 S.E.2d 278, 280-81 (1977)). *See also In re Z.A.K.*, 189 N.C. App. 354, 362, 657 S.E.2d 894, 899 (reversing and remanding for findings as to best interest of juvenile when order stated juvenile had ability to pay, but did not make any finding as to restitution being in juvenile's best interest), *appeal dismissed and disc. review denied*, 362 N.C. 682, 671 S.E.2d 532-33 (2008).

Here, the trial court's order contains no finding that the restitution was in Danny's best interest. Instead, the court based its decision that Danny must pay $242.58 on a desire to avoid an "injustice to the victim who has suffered a financial loss and would not [otherwise] be fully compensated." As this Court has noted, however, " 'compensation of victims should *never* become the only or paramount concern in the administration of juvenile justice.' " *In re Heil*, 145 N.C. App. 24, 31, 550 S.E.2d 815, 821 (2001) (quoting *In re Register*, 84 N.C. App. 336, 339, 352 S.E.2d 889, 891 (1987)). Therefore, we must reverse the order of restitution and remand for further findings of fact regarding Danny's best interest.

[2] Danny contends additionally that he and Dale should have been held jointly and severally liable for the restitution payment.[2] This argument—as well as the State's response—suggests a fundamental misunderstanding of the concept of "joint and several liability."

N.C. Gen. Stat. § 7B-2506(4) provides that "[i]f the juvenile participated with another person or persons, all participants should be jointly and severally responsible for the payment of restitution . . . ." Danny, in arguing that the trial court should have imposed joint and several liability for the restitution, relies on *In the Matter of Hull*, 89 N.C. App. 138, 365 S.E.2d 221 (1988).

The trial court in *Hull* found three juveniles delinquent for damage to a mobile home and two of the three juveniles delinquent for damage to certain automobiles. *Id.* at 139, 365 S.E.2d at 222. Each juvenile was ordered to pay $1,000.00 in restitution to the mobile home owner and to pay $130.21 to one of the automobile owners. *Id.* This Court was unable to determine from the record whether the juveniles acted jointly in causing the damage and accordingly

2. Although Danny argues that "all should be held jointly and severally responsible for payment of restitution," Chief Judge Rader could not impose joint and several liability on Dale because Dale's case was not before Chief Judge Rader—his restitution had been previously decided by another judge.

remanded with an instruction to make this determination. *Id.* at 141, 365 S.E.2d at 223. Pursuant to statute,[3] the Court held that "[i]f [the trial judge] finds the juveniles jointly participated in causing the damage, then they should be held jointly and severally liable." *Id.*

When joint and several liability is imposed, "each liable party is individually responsible for the entire obligation." *Black's Law Dictionary* 997 (9th ed. 2009). *See also Sheppard v. Zep Mfg. Co.*, 114 N.C. App. 25, 35, 441 S.E.2d 161, 167 (1994) ("Defendants argue that the instruction [that Champion would be jointly and severally liable for all damages] was prejudicial in that 'the jury was led to believe that Champion would share equally in any damages assessed against the defendants.' However, it is well established that the term 'jointly and severally' implies that one tortfeasor could pay for all of plaintiff's damages . . . .").

Danny and the State, like the defendants in *Sheppard*, appear to mistakenly believe that joint and several liability means that the loss will be divided equally between the juveniles, thus favoring the juvenile. In fact, the application of joint and several liability generally operates to benefit the injured party seeking compensation. *See Harlow v. Voyager Commc'ns V*, 348 N.C. 568, 572, 501 S.E.2d 72, 74 (1998) (explaining that where joint and several liability applies, " 'the liability of each defendant is not necessarily dependent upon the liability of any other defendant, and plaintiff may be made whole by a full recovery from any defendant' " (quoting 10 James W. Moore et al., *Moore's Federal Practice* ¶ 55.25, at 55-46 (3d ed. 1997))); *Bell v. Lacey*, 248 N.C. 703, 705, 104 S.E.2d 833, 835 (1958) ("When negligence is joint and several, the injured party may elect to sue either of the joint tort-feasors separately, or any or all of them together."); *Charnock v. Taylor*, 223 N.C. 360, 363, 26 S.E.2d 911, 914 (1943) (noting that under joint and several liability, "the injured party may sue either of [the tort-feasors] separately or any or all of them together, at his option").

Here, the trial court found as fact "[t]hat normally the amount of restitution required to be paid in this matter would be split evenly," but "[t]hat in light of the co-respondent's numerous restitution obligations, it is appropriate for the Juvenile to pay more than half of the remaining restitution owed in the amount of $242.58." Neither a fifty-

3. The relevant statute then in effect was N.C. Gen. Stat. § 7A-649(2) (1986), which like the current statute, included language that " 'all participants should be jointly and severally responsible for the payment of restitution.' " *Hull*, 89 N.C. App. at 141, 365 S.E.2d at 223 (quoting N.C. Gen. Stat. § 7A-649(2)).

fifty split nor the restitution ultimately ordered is an application of joint and several liability. If the court had applied joint and several liability, Danny could have been required to pay the total amount of $265.00 instead of the lesser amount of $242.58.

In other words, the trial court's order, by requiring Danny to pay less than the full amount, is more favorable to him than if the court had applied joint and several liability. Thus, any lack of findings regarding joint and several liability was not prejudicial to Danny and cannot be a basis for reversal.

[3] Danny also argues that the trial court failed to make adequate findings that the amount of restitution was fair, citing *In re Schrimpsher*, 143 N.C. App. at 463, 546 S.E.2d at 410. In *In re Schrimpsher*, this Court reversed an order of restitution and remanded for further findings of fact when the findings were such that "it [was] impossible to determine whether the conditions [were] fair and reasonable," as well as in the best interest of the juvenile. *Id.* at 466, 546 S.E.2d at 411.

Here, the trial court did not find that the restitution order was fair to Danny, but, rather, the findings of fact indicate that the court was primarily concerned with fairness to the *victim*. The court determined the amount of restitution "in light of the co-respondent's numerous restitution obligations" because "to split the restitution amount evenly between the Juvenile and the co-respondent in this matter would result in an injustice to the victim." Given these findings, we cannot determine that the trial court's order sufficiently demonstrated that the amount of restitution ordered was fair and reasonable to Danny. We, therefore, also remand for further findings establishing that any restitution order is fair and reasonable as to Danny.

Reversed and remanded.

Chief Judge MARTIN and Judge ELMORE concur.

MELVA BANKS WILSON, PLAINTIFF v. DANNY JAMES WILSON, DEFENDANT

No. COA10-1517

(Filed 16 August 2011)

1. Child Custody and Support—support order—impermissibly modified defendant's support obligation

The trial court erred in a child support case by entering an order which impermissibly modified defendant's support obligation. The trial court erroneously computed increases in defendant's salary and applied those increases to payments over an eighteen-year period without a finding of a substantial change of circumstances.

2. Child Custody and Support—support obligation—language of agreement unambiguous

Defendant's argument in a child support case that he was not required to pay child support beyond October 2004 because the younger son was not in good academic standing was overruled. Because the younger son was still enrolled in school and did finish his degree requirements in May 2005, the unambiguous language of the incorporated agreement required that defendant continue to pay child support from November 2004 through May 2005.

3. Preservation of Issues—not alternative basis to support order—failure to cross-appeal—arguments dismissed

Neither of the issues plaintiff presented in her appellee brief in a child support case, if meritorious, would have provided an alternative basis for upholding the trial court's judgment ordering defendant's payment of child support arrearages. To properly present these issues for appellate review, plaintiff should have cross-appealed from the trial court's order. Plaintiff's arguments were dismissed.

Appeal by defendant from order entered 21 June 2010 by Judge David A. Leech in Pitt County District Court. Heard in the Court of Appeals 23 May 2011.

Mills & Bryant, LLP, by Cynthia A. Mills, for plaintiff-appellee.

Sutton Law Offices, P.A., by David C. Sutton, for defendant-appellant.

MARTIN, Chief Judge.

Plaintiff and defendant married on 2 June 1972. Two sons were born during the marriage, one on 22 October 1979 and one on 27 October 1981. The parties later separated and entered into a separation agreement, drafted by plaintiff's attorney, dated 25 June 1987. Defendant was not represented by an attorney. On 13 June 1988, a judgment of absolute divorce was entered and the separation agreement was incorporated into the judgment. The incorporated agreement provides, in relevant part, the following:

> III. Child Support
>
> It is further agreed and understood that the non custodial parent shall pay to the custodial parent for the support and maintenance of the said minor children of the marriage, the sum of Five Hundred and no/100 Dollars ($500.00) per month, said payments beginning on the 5th day of July, 1987, and a like sum being due and payable on the same day of each successive calendar month thereafter.
>
> IV. Termination of Support
>
> . . . .
>
> C. If any child of the parties shall be enrolled in college, technical school or trade school, the summer after graduation from high school, in good academic standing, and desires to continue his education past high school, then the payments specified in this agreement for the maintenance and support and education of the child shall be continued beyond his high school graducation [sic] or until he sooner completes his undergraduate education or course of study and earns an appropriate academic degree or withdraws from school.
>
> V. Additional Child Support
>
> It is understood and agreed between the parties that the non custodial parent may receive bonuses and/or salary increases from that party's employment from time to time. The non custodial parent does agree to pay to the custodial parent for the support and maintenance of the minor children born of the marriage twenty-five percent (25%) of all such bonuses and/or salary increases each years beginning on December 5th of each year in which he has an increase and continue each month thereafter in addition to the child support in Paragraph III.

In April 2005, plaintiff filed a verified Motion for Order to Show Cause and Order Holding Defendant in Contempt in Pitt County District Court. She contended defendant had violated the child support provisions of the incorporated agreement by failing to pay the full amount of child support owed based on his bonuses and/or salary increases, by reducing the amount of the support payments after November 2002 and terminating payments after October 2004, and by failing to pay his share of the medical expenses of the parties' children.

At the hearing, plaintiff testified that, in July 1987, defendant began paying her $500 per month in child support. In December 1987, defendant increased the monthly amount to $525, and each December thereafter, defendant increased the monthly amount by $25. By November 2002, defendant was paying plaintiff $850 per month. In December 2002, defendant decreased his monthly payment to $425, which, according to a finding in the trial court's order, occurred upon the older son's graduation from college. Defendant paid plaintiff $425 per month until October 2004, when he made his last payment.

Following the hearing, the trial court computed 25% of defendant's yearly gross salary increases, beginning in 1987 and continuing until May 2005, to determine the increased amount of child support defendant owed each year, and ordered that defendant pay plaintiff a total of $23,921 for past due child support; that defendant pay plaintiff $3700 for her attorney's fees; and that defendant pay interest on those amounts from the date of the docketing of the judgment until the judgment is paid. Defendant appeals from the trial court's order.

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[1] Defendant initially contends the trial court erred by entering an order which impermissibly modified his child support obligation. Under the circumstances of this case, we are constrained to agree.

N.C.G.S. § 50-13.4(c) provides that

> [p]ayments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c) (2009). "[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). “These principles apply equally to child support agreements between the parties that have been incorporated into a court order.” *Beamer v. Beamer*, 169 N.C. App. 594, 596, 610 S.E.2d 220, 222 (2005) (citing *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983)). “[M]odification of a child support order involves a two-step process. The court must first determine a substantial change of circumstances has taken place; only then does it proceed to . . . calculate the applicable amount of support.” *Meehan v. Lawrance*, 166 N.C. App. 369, 380, 602 S.E.2d 21, 28 (2004) (alteration and omission in original) (internal quotation marks omitted).

This Court has held a clause in an order providing for an automatic annual increase in monthly child support payments based on the percentage increase of the consumer price index unenforceable, recognizing such a clause “is at odds with North Carolina statutory and case law.” *Falls v. Falls*, 52 N.C. App. 203, 219, 278 S.E.2d 546, 557, *disc. review denied*, 304 N.C. 390, 285 S.E.2d 831 (1981). In *Falls*, we noted that the order “allows future changes in support payments without any showing of changed circumstances of the parents.” *Id.* It was “not sufficient that there is a proviso that conditions the increase on the children’s need at the time the increase goes into effect since the income of the parents is also a relevant factor under G.S. 50-13.4(c).” *Id.; see also Snipes v. Snipes*, 118 N.C. App. 189, 199-200, 454 S.E.2d 864, 870 (1995) (applying *Falls* and holding that an incorporated separation agreement ordering automatic child support increases based on the consumer price index was void).

The incorporated agreement in this case provides automatic annual increases in child support based on defendant’s salary and fails to consider the needs of the children or other factors contained in N.C.G.S. § 50-13.4(c). To determine the amount of the increases in child support, the trial court computed annual percentage increases in defendant’s salary for eighteen years, beginning in 1987. We note that “an increase in income alone is not enough to prove a change of circumstances to support [modification of] a child support obligation.” *Thomas v. Thomas*, 134 N.C. App. 591, 595-96, 518 S.E.2d 513, 516 (1999); *Greer v. Greer*, 101 N.C. App. 351, 355, 399 S.E.2d 399, 402 (1991). Defendant contends, and we agree, that by computing increases in defendant’s salary and applying those increases to payments over an eighteen-year period without a finding of a substantial change of circumstances, the trial court impermissibly modified the child support order in this case. We therefore reverse the trial court’s

judgment ordering that defendant pay child support arrearages in the amount of $23,921. Having done so, we need not address defendant's remaining arguments related to this issue.

[2] Defendant also contends he was not required to pay child support beyond October 2004 because the younger son was not in "good academic standing." Defendant testified that he believes "good academic standing" means enrolled as a full-time student and earning at least a "C" average each semester. However, we note that "[t]he effect of the agreement is not controlled by what one of the parties intended or understood." *Grady v. Grady*, 29 N.C. App. 402, 403-04, 224 S.E.2d 282, 283 (1976); *see Fucito v. Francis*, 175 N.C. App. 144, 150, 622 S.E.2d 660, 664 (2005) (The trial court has the authority "to construe or interpret an ambiguous consent judgment" and should "consider normal rules of interpreting or construing contracts."), *appeal after remand*, 184 N.C. App. 377, 646 S.E.2d 441 (2007) (unpublished), *disc. review denied*, 362 N.C. 234, 659 S.E.2d 440 (2008). Furthermore, "[i]f the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Helms v. Schultze*, 161 N.C. App. 404, 409, 588 S.E.2d 524, 527 (2003). Here, the trial court determined that, because the younger son "was still enrolled in school and did finish his degree requirements in May 2005," the unambiguous language of the incorporated agreement required that defendant continue to pay child support from November 2004 through May 2005. Defendant's argument is therefore overruled. However, because the trial court's calculation of arrearages from November 2004 through May 2005 was based on annual increases in defendant's salary, we must remand this case for recalculation of any arrearages during that period.

[3] In plaintiff's appellee brief, she attempts to argue that the trial court erred "in determining the ten year statute of limitations barred collection of a child support arrearage existing on a date within ten years of the filing of the Motion" and "in determining the child support obligation was cut in half when the oldest child was no longer entitled to child support." N.C.R. App. P. 10(c) provides, in relevant part,

> Without taking an appeal, an appellee may list proposed issues on appeal in the record on appeal based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.

Neither of the issues plaintiff presents in her appellee brief, if meritorious, would provide an alternative basis for upholding the trial court's judgment ordering defendant's payment of child support arrearages in the amount of $23,921. To properly present these issues for appellate review, plaintiff should have cross-appealed from the trial court's order. *See Bd. of Dirs. v. Rosenstadt*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (Aug. 2, 2011) (No. COA10-1190) (noting that "[t]he new Rule 10(c) is similar to the old Rule 10(d)" and that "[r]evised Rule 28(c), like former Rule 28(c), permits an appellee to 'present issues on appeal based on any action or omission by the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.' " (quoting N.C.R. App. P. 28(c)); *Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 684 (2002) ("Whereas cross-assignments of error under Rule 10(d) are the proper procedure for presenting for review any action or omission of the trial court which deprives the appellee of an *alternative* basis in law for *supporting* the judgment, order, or other determination from which appeal has been taken; the proper procedure for presenting alleged errors that purport to show that the judgment was erroneously entered and that an altogether different kind of judgment should have been entered is a cross-appeal."); *Mann Contr'rs, Inc. v. Flair with Goldsmith Consultants-II, Inc.*, 135 N.C. App. 772, 776, 522 S.E.2d 118, 121 (1999) (holding that, because "[n]either of the cross-assignments of error brought forward in plaintiff-appellee's brief, if sustained, would provide an alternative basis for upholding the $36,000 judgment in this case," "[i]n order to properly present the alleged errors for appellate review, plaintiff should have cross-appealed from the trial court's judgment"). Accordingly, we do not address plaintiff's issues on appeal.

Affirmed in part, reversed in part, and remanded.

Judges STEPHENS and THIGPEN concur.

STATE OF NORTH CAROLINA v. WILBERT SEYMORE

No. COA10-1578

(Filed 16 August 2011)

Constitutional Law—right to counsel—waiver of appointed counsel—no pro se inquiry

A *pro se* defendant received a new trial where he waived appointed counsel but the record did not show that the trial court conducted the required inquiry before allowing him to proceed *pro se*.

Appeal by Defendant from judgment entered 29 April 2010 by Judge Milton F. Fitch, Jr., in Pasquotank County Superior Court. Heard in the Court of Appeals 23 May 2011.

Roy Cooper, *Attorney General*, *by Tammera S. Hill*, *Assistant Attorney General*, *for the State.*

Greene & Wilson, *P.A.*, *by Thomas Reston Wilson*, *for Defendant.*

THIGPEN, Judge.

Wilbert Seymore ("Defendant") signed a waiver of counsel form waiving his right to assigned counsel. At trial, Defendant proceeded *pro se*. We must determine whether the trial court erred in allowing Defendant to proceed *pro se* without conducting a thorough inquiry as required by N.C. Gen. Stat. § 15A-1242. We conclude the superior court erred and grant Defendant a new trial.

The evidence of record tends to show that on 6 July 2009 Defendant was convicted in district court of driving while impaired, driving while license revoked, driving left of center, and driving eighty-three miles per hour in a fifty-five mile per hour zone. Defendant appealed to the superior court.

The record indicates Defendant was not satisfied with his appointed counsel in district court, and Defendant wished to hire his own private attorney for the appeal to superior court. On 5 April 2010, Defendant's assigned counsel withdrew, and on the same day, Defendant signed a written waiver relinquishing his right to assigned counsel.[1]

1. The waiver of counsel form contains two checkboxes, and a parenthetical instructing the defendant to "check only one[.]" The first denotes, "I waive my right to assigned counsel[.]" The second states, "I waive my right to all assistance of counsel

On the waiver of counsel form, Defendant did not waive his right to all assistance of counsel; rather, Defendant waived only his right to assigned counsel. No evidence of record tends to show Defendant intended to proceed in his appeal to superior court without the assistance of some counsel.[2]

Without explanation, however, Defendant proceeded *pro se* in the trial of his case in the superior court on 26 April 2010. The jury found Defendant guilty of driving while impaired, driving while license revoked, and exceeding posted speed. For the driving while impaired conviction, Defendant was sentenced to 150 days incarceration, which was suspended, and Defendant was placed on supervised probation for twelve months. For the driving while license revoked and exceeding posted speed convictions, Defendant was sentenced to 30 days incarceration, which was suspended, and Defendant was again placed on supervised probation for twelve months, to begin at the expiration of the foregoing period of supervised probation. From this judgment, Defendant appeals.

I: Waiver of Counsel

In Defendant's first argument on appeal, he contends the superior court erred by allowing Defendant to proceed at trial *pro se* with out first conducting the thorough inquiry required by N.C. Gen. Stat. § 15A-1242. We agree.

"This Court has long recognized the state constitutional right of a criminal defendant 'to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes.' " *State v. Moore*, 362 N.C. 319, 321, 661 S.E.2d 722, 724 (2008) (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.' " *Id.*, 362 N.C. at 322, 661 S.E.2d at 724 (citation omitted). "[I]t is error for a trial court to allow a criminal defendant to release his counsel and proceed *pro se* unless, first, the defendant expresses 'clearly and unequivocally' his election to proceed *pro se* and, second, the defendant knowingly,

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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." Generally, a defendant checks box one when he intends to proceed with a privately hired attorney rather than a public defender or court appointed counsel, and a defendant checks box two when he intends to proceed to trial *pro se*. Defendant checked box one.

2. To the contrary, the record shows that Defendant's assigned public defender withdrew as attorney of record because Defendant "want[ed] to hire an attorney."

intelligently, and voluntarily waives his right to in-court representation." *State v. White*, 349 N.C. 535, 563, 508 S.E.2d 253, 271 (1998), *cert. denied*, 527 U.S. 1026, 119 S. Ct. 2376, 144 L. Ed. 2d 779 (1999). "In order to determine whether the waiver meets [this constitutional] standard, the trial court must conduct a thorough inquiry[,] [and] [t]his Court has held that N.C.G.S. § 15A-1242 satisfies any constitutional requirements by adequately setting forth the parameters of such inquiries." *State v. Fulp*, 355 N.C. 171, 175, 558 S.E.2d 156, 159 (2002) (citations and quotation omitted).

N.C. Gen. Stat. § 15A-1242 provides the following:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

A trial court's failure to conduct the inquiry entitles defendant to a new trial. *State v. Hyatt*, 132 N.C. App. 697, 703, 513 S.E.2d 90, 94-95 (1999).

"The record must affirmatively show that the inquiry was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will." *State v. Callahan*, 83 N.C. App. 323, 324, 350 S.E.2d 128, 129 (1986). In cases where "the record is silent as to what questions were asked of defendant and what his responses were" this Court has held, "[we] cannot presume that [the] defendant knowingly and intelligently waived his right to counsel[.]" *Id.*, 83 N.C. App. at 324-25, 350 S.E.2d at 129. When there is no "transcription of those proceedings," the defendant "is entitled to a new trial." *Id.*

"The execution of a written waiver is no substitute for compliance by the trial court with the statute[;] [a] written waiver is 'something in addition to the requirements of N.C. Gen. Stat. § 15A-1242, not . . . an alternative to it.' " *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002). (citations omitted).

In the present case, the transcript of the superior court proceedings shows that the court advised Defendant of the charges against him; however, there is no evidence that any other inquiry as required by N.C. Gen. Stat. § 15A-1242 was made. The transcript does not reveal that Defendant clearly and unequivocally expressed his desire to proceed *pro se*, or that the court clearly advised Defendant of his right to the assistance of counsel or the range of permissible punishments Defendant faced. This falls well short of the requirements of N.C. Gen. Stat. § 15A-1242. Moreover, this Court cannot presume Defendant intended to proceed *pro se* based on only an express waiver of appointed counsel and no evidence of a thorough inquiry as mandated by N.C. Gen. Stat. § 15A-1242. *State v. McCrowre*, 312 N.C. 478, 480, 322 S.E.2d 775, 776-77 (1984) (holding the defendant was entitled to a new trial when the record showed that the defendant only expressed his desire to waive appointed counsel and "[t]here [was] no evidence that [the] defendant ever intended to proceed to trial without the assistance of some counsel"); *see also Callahan*, 83 N.C. App. at 324-25, 350 S.E.2d at 129 (holding "this Court cannot presume that [the] defendant knowingly and intelligently waived his right to counsel" when there is no "transcription of those proceedings" and "the record is silent as to what questions were asked of defendant and what his responses were").

The State puts forth several arguments that either the district or superior court made the appropriate inquiries. First, the State argues the written waiver shows Defendant was advised of his right to counsel and thus, Defendant knowingly, voluntarily and intelligently waived that right. However, this Court has held that "[t]he record must affirmatively show that the inquiry was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will[,]" *Callahan*, 83 N.C. App. at 324, 350 S.E.2d at 129, and "[t]he execution of a written waiver is no substitute for compliance by the trial court with the statute[,]" *Evans*, 153 N.C. App. at 315, 569 S.E.2d at 675.

The State also suggests the district court conducted the mandatory inquiry, even though no evidence of the inquiry exists in the record. Assuming *arguendo* the district court conducted the inquiry, the record contains no transcript of it. Without the transcript, this Court cannot presume Defendant knowingly and intelligently waived his right to counsel. *Callahan*, 83 N.C. App. at 324-25, 350 S.E.2d at 129.

The State also contends, at the very least, Defendant comprehended the nature of the charges and permissible punishments because he received a sentence for the same crimes in district court. However, the fact that Defendant may have known the permissible punishments has no bearing on the trial judge's responsibility to make a thorough inquiry.

Because this Court cannot presume Defendant intended to proceed *pro se* based on only an express waiver of appointed counsel, *see McCrowre*, 312 N.C. at 480, 322 S.E.2d at 776-77, there is no evidence of a thorough inquiry as mandated by N.C. Gen. Stat. § 15A-1242, *see Callahan*, 83 N.C. App. at 324-25, 350 S.E.2d at 129, and it is prejudicial error to allow a criminal defendant to proceed *pro se* without making the inquiry required by N.C. Gen. Stat. § 15A-1242, *see Hyatt*, 132 N.C. App. at 703, 513 S.E.2d at 94-95, we must grant Defendant a new trial.[3]

NEW TRIAL.

Chief Judge MARTIN and Judge STEPHENS concur.

CHARLES H. McKOY, PLAINTIFF v. HARRIETTE SMITH McKOY, DEFENDANT

No. COA11-64

(Filed 16 August 2011)

Divorce—equitable distribution—counterclaim—dismissal—failure to prosecute—lesser sanctions not considered

The trial court erred by dismissing defendant's counterclaim for equitable distribution pursuant to Rule 41(b) of the Rules of Civil Procedure and Rule 11 of the Wake County Family Court Rules. The court failed to make any findings or conclusions indicating that the court considered lesser sanctions prior to dismissing the claim.

Appeal by defendant from order entered 9 September 2010 by Judge Christine M. Walczyk in Wake County District Court. Heard in the Court of Appeals 8 June 2011.

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3. Because we grant Defendant a new trial on the basis of the trial court's failure to comply with N.C. Gen. Stat. § 15A-1242, we do not reach Defendant's remaining arguments.

No brief filed on behalf of plaintiff-appellee.

Law Office of Stephanie J. Brown, by Stephanie J. Brown, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Harriette Smith McKoy appeals from the trial court's order dismissing her counterclaim for equitable distribution against plaintiff Charles H. McKoy pursuant to Rule 41(b) of the Rules of Civil Procedure and Rule 11 of the Wake County Family Court Rules, which governs the prosecution of equitable distribution claims. After careful review, we reverse and remand.

Background

Plaintiff and defendant were married on 12 May 2002. Plaintiff filed a complaint for absolute divorce on 5 September 2007. Defendant filed an answer on 1 November 2007, which included a counterclaim for equitable distribution. Although plaintiff voluntarily dismissed his claim for absolute divorce on 2 October 2008, he subsequently filed another action for an absolute divorce, and the parties were divorced by order entered 30 December 2008.

Plaintiff moved to dismiss defendant's counterclaim for equitable distribution and the trial court conducted a hearing on the motion on 13 August 2010. The trial court subsequently issued an order on 9 September 2010 dismissing defendant's counterclaim with prejudice pursuant to Rule 41(b) for "fail[ure] to prosecute her claim for equitable distribution" and for "fail[ure] to comply" with the rules of civil procedure. The court also determined that defendant's counterclaim should be dismissed under Rule 11 of the Wake County Family Court Rules. Defendant timely appealed to this Court.

Discussion

In arguing for reversal of the trial court's dismissal of her claim, defendant contends that the court erred by not considering "whether any sanction less severe than dismissal would be appropriate and sufficient" under the circumstances of this case. We agree.

Rule 41(b) provides in pertinent part that, "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him." N.C. R. Civ. P. 41(b). Thus, under Rule 41(b), a claim may be dismissed for one of three reasons: failure to

prosecute the claim, failure to comply with the rules of civil procedure, or failure to comply with a court order. *Spencer v. Albemarle Hosp.*, 156 N.C. App. 675, 678, 577 S.E.2d 151, 153 (2003).

Although Rule 41(b) only explicitly references dismissal as a possible sanction for default, our courts have recognized that the trial court has the "inherent power" under the rule to impose lesser sanctions. *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674, 360 S.E.2d 772, 776 (1987); *accord McLean v. Mechanic*, 116 N.C. App. 271, 275, 447 S.E.2d 459, 461 (1994) (observing that "[a]lthough a dismissal with prejudice pursuant to Rule 41(b) is available as a sanction," such a dismissal "is not the only available sanction"), *disc. review denied*, 339 N.C. 738, 454 S.E.2d 653-54 (1995). While certainly not exhaustive, other sanctions the trial court may impose include " '[a]ssessments of fines, costs, or damages against the plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings . . . .' " *Daniels*, 320 N.C. at 674, 360 S.E.2d at 776 (quoting *Rogers v. Kroger Co.*, 669 F.2d 317, 321-22 (5th Cir. 1982)).

Because involuntary dismissal of a claim is "one of the harshest sanctions at a trial court's disposal," effectively "extinguish[ing] the [party]'s cause of action and den[ying] [the party] his [or her] day in court[,]" *United States ex rel. Drake v. Norden Systems, Inc.*, 375 F.3d 248, 251 (2d Cir. 2004), and because "[a]n underlying purpose of the judicial system is to decide cases on their merits, not dismiss parties' causes of action for mere procedural violations[,]" *Wilder v. Wilder*, 146 N.C. App. 574, 576, 553 S.E.2d 425, 427 (2001), the trial court may, in its discretion, dismiss a party's claim only upon "determin[ing] that less drastic sanctions will not suffice." *Harris v. Maready*, 311 N.C. 536, 551, 319 S.E.2d 912, 922 (1984). Consequently, "[t]he trial court must, before dismissing an action with prejudice, make findings [of fact] and conclusions [of law] which indicate that it has considered less drastic sanctions." *Cohen v. McLawhorn*, ___ N.C. App. ___, ___, 704 S.E.2d 519, 528 (2010). "If the trial court undertakes this analysis, its resulting order will be reversed on appeal only for an abuse of discretion." *Foy v. Hunter*, 106 N.C. App. 614, 620, 418 S.E.2d 299, 303 (1992).

Here, in support of its conclusion that "the Plaintiff [wa]s . . . entitled to an Order dismissing the Defendant's claim for equitable distribution" under Rule 41(b), the trial court found that plaintiff filed his complaint for divorce on 5 September 2007; that defendant filed her answer and counterclaim on 1 November 2007; that plaintiff filed his

reply to the counterclaim on 21 November 2007; that, after initially filing the equitable distribution claim, there was "no activity" until 27 January 2010, when defendant filed a "Motion for Order Allowing Entry on Land." The court further found that, during this 26-month period, defendant, in violation of Rule 11 of the Wake County Family Court Rules and N.C. Gen. Stat. § 50-20 *et seq.*, "failed to schedule a status conference or a scheduling and discovery conference related to her claim"; "failed to schedule or calendar any dates for an initial pretrial or final pre-trial conference"; "failed to produce any initial disclosures"; and "failed to produce an Equitable Distribution Inventory Affidavit . . . ."

Although the trial court's order does include findings of fact and conclusions of law addressing defendant's failure to prosecute her equitable distribution counterclaim, the order is completely devoid of any findings or conclusions indicating that the court considered lesser sanctions prior to dismissing the claim. Without findings and conclusions demonstrating that "the trial court [has] undertake[n] this analysis," *Foy*, 106 N.C. App. at 620, 418 S.E.2d at 303, we are compelled to conclude that the trial court erred in dismissing defendant's claim. *See Wilder*, 146 N.C. App. at 577, 553 S.E.2d at 427 (reversing dismissal where, although "the trial court made some findings of fact and conclusions of law concerning plaintiff's failure to prosecute," the "trial court did not consider in the record whether lesser sanctions were appropriate for plaintiff's failure to prosecute"); *Foy*, 106 N.C. App. at 620, 418 S.E.2d at 303 (reversing dismissal where "[t]he record show[ed] that the trial court dismissed the plaintiffs' action with prejudice without assessing the appropriateness of sanctions less severe than dismissal with prejudice"). Accordingly, we vacate the trial court's order dismissing defendant's claim for equitable distribution and remand the case for consideration of whether lesser sanctions are appropriate in this case.

In addition to ruling that dismissal was warranted under Rule 41(b), the trial court also relied on Rule 11 of the Wake County Family Court Rules as a separate, independent basis for "dismissing the Defendant's claim for equitable distribution." This local rule, which sets out the procedures for prosecuting an equitable distribution claim, also authorizes the trial court to impose sanctions for failing to comply with the procedures:

> Failure to comply with these Rules may result in sanctions, including: dismissal of a claim with or without prejudice, award

of attorney fees to the non-offending party, refusal to allow evidence from the offending party as to some or all of the issues in the case, contempt, and any other sanction allowed by law.

Wake County Family Court Rule 11.3.

Although Rule 11.3 does not explicitly require the trial court to consider lesser sanctions before dismissing an equitable distribution claim for non-compliance, this Court has interpreted other rules and statutes which, while "provid[ing] dismissal as an appropriate sanction[,] do not expressly require a trial court to consider lesser sanctions before ordering a dismissal," as "include[ing] such a requirement." *Page v. Mandel*, 154 N.C. App. 94, 101, 571 S.E.2d 635, 639 (2002), *disc. review denied*, 356 N.C. 676, 577 S.E.2d 631 (2003); *accord Goss v. Battle*, 111 N.C. App. 173, 176, 432 S.E.2d 156, 159 (1993) ("Dismissal is specifically listed as an appropriate sanction in N.C. R. Civ. Proc. 41(b) and G.S. § 1-109. The language of these provisions does not expressly require a trial court to consider lesser sanctions before dismissing. However, our courts have interpreted these provisions to require a trial court to consider lesser sanctions before ordering a dismissal pursuant to these provisions."). We similarly conclude that the trial court, before dismissing a claim pursuant to a local court rule, must consider sanctions less severe than dismissal and must make sufficient findings and conclusions indicating that the court performed this analysis.

Here, the trial court found that defendant, in violation of Rule 11, had failed to schedule and calendar several required conferences, as well as failing to file initial disclosures and produce an equitable distribution inventory affidavit. As with N.C. R. Civ. P. 41(b), however, the court made no findings of fact or conclusions of law indicating that it considered less drastic sanctions before dismissing defendant's claim pursuant to Rule 11.3 of the Wake County Family Court Rules. Accordingly, we conclude that the trial court erred in dismissing the claim with prejudice under this rule. On remand, the trial court should consider whether sanctions less severe than dismissal are appropriate under Rule 11.3 and should make findings of fact and conclusions of law demonstrating that it undertook this analysis.

Vacated and remanded.

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

STATE OF NORTH CAROLINA v. LAWRENCE WILLARD SKIPPER, JR.

No. COA10-1225

(Filed 16 August 2011)

Sentencing—remand—one of four convictions vacated—same term

Defendant was not punished more severely on remand after one of his four convictions was vacated and he was resentenced to the same term. His sentences were consolidated, which required a single judgment for the most serious offense, a Class C felony on both occasions. The sentence imposed was near the bottom of the presumptive range for a Class C felony with this prior record level.

Appeal by defendant from judgment entered 1 June 2010 by Judge Ripley E. Rand in Sampson County Superior Court. Heard in the Court of Appeals 23 March 2011.

Attorney General Roy Cooper, by Assistant Attorney General Heather H. Freeman, for the State.

Kimberly P. Hoppin for defendant.

ELMORE, Judge.

Lawrence Willard Skipper, Jr. (defendant), appeals the sentence he received, as a habitual felon, for felonious breaking and entering and felonious possession of stolen goods. After careful review, we affirm the judgment of the trial court.

On 7 July 2008, defendant was indicted for felonious breaking and entering, felonious larceny, felonious possession of stolen goods, and, by an ancillary indictment, for attaining habitual felon status. On 19 August 2008, a jury found defendant guilty of all charges. During sentencing, defendant stipulated that he had a prior record level of five. The trial court consolidated the offenses for judgment, and defendant was sentenced in the presumptive range to a minimum term of 125 months' and a maximum term of 159 months' imprisonment.

On appeal, this Court vacated defendant's conviction for felony larceny because of a defective indictment and remanded the case for resentencing on defendant's remaining three convictions. At the 1 June 2010 resentencing hearing, defendant stipulated to a prior

record level of five. After hearing from witnesses, defendant, and counsel, the trial court consolidated the offenses for judgment and sentenced defendant in the presumptive range to a term of 125 to 159 months' imprisonment. Defendant now appeals.

Defendant argues that the trial court violated N.C. Gen. Stat. § 15A-1335 by resentencing him to a more severe sentence on remand, after this Court vacated his felony larceny conviction. We disagree.

N.C. Gen. Stat. § 15A-1335 provides:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C. Gen. Stat. § 15A-1335 (2009).

"[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). 'An alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo." Armstrong v. N.C. State Bd. of Dental Examiners*, 129 N.C. App. 153, 156, 499 S.E.2d 462, 466 (1998) (citations omitted).

Defendant contends that the trial court violated § 15A-1335 because he received the same prison sentence on resentencing despite having one of his four convictions vacated on appeal. Defendant thus argues that, because the number of convictions fell by one but the aggregate prison sentence remained the same, he was punished more severely on remand for each individual conviction than he was originally. Because defendant's convictions were consolidated for judgment, this argument fails.

N.C. Gen. Stat. § 15A-1340.15(b) provides that, "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[,]" and "[t]he judgment shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense." N.C. Gen. Stat. § 15A-1340.15(b) (2009). As a result, if the trial court consolidates offenses into a sin-

gle judgment, it is required by the Structured Sentencing Act to enter judgment on a sentence for the most serious offense in a consolidated judgment. *State v. Tucker*, 357 N.C. 633, 637, 588 S.E.2d 853, 855 (2003). That is what occurred here.

At the initial sentencing hearing, the trial court consolidated defendant's convictions and imposed a single judgment. All three underlying felonies were categorized as Class C felonies because of defendant's habitual felon status. Thus, the most serious offense in the consolidated judgment was a Class C felony. Therefore, the trial court had no choice but to enter a sentence for a single Class C felony pursuant to § 15A-1340.15(b).

Again, at the second sentencing hearing, the trial court consolidated defendant's convictions and imposed a single judgment. The two underlying felonies were categorized as Class C felonies because of defendant's habitual felon status, and, once again, the most serious offense in the consolidated judgment was a Class C felony. Therefore, the trial court, on remand, had no choice but to enter a sentence for a single Class C felony pursuant to § 15A-1340.15(b). The sentence imposed is near the bottom of the presumptive range for a Class C felony committed by an offender with a prior record level of five. *See* N.C. Gen. Stat. § 15A-1340.17(c), (e) (2003). Both in 2008 and in 2010, defendant was sentenced for a single Class C felony; the sentences were identical. Defendant cannot show that he received a greater punishment on remand or that the trial court erred in imposing the same sentence on remand. That the felony larceny conviction was vacated on appeal is irrelevant.

Defendant points to two cases decided under the Fair Sentencing Act, the Structured Sentencing Act's predecessor, which set out the "equally attributable" rule:

> [W]hen indictments or convictions with equal presumptive terms are consolidated for sentencing without the finding of aggravating or mitigating circumstances, and the terms are totaled to arrive at the sentence . . . the sentence, for purposes of appellate review, . . . will be deemed to be equally attributable to each indictment or conviction.

State v. Hemby, 333 N.C. 331, 336, 426 S.E.2d 77, 79-80 (1993); *see also State v. Nixon*, 119 N.C. App. 571, 574, 459 S.E.2d 49, 51 (1995). However, N.C. Gen. Stat. § 15A-1340.15(b) supercedes the "equally attributable" rule, rendering it irrelevant to the case at hand.

Accordingly, defendant was not punished more severely for each individual conviction on resentencing in violation of N.C. Gen. Stat. § 15A-1335, and we conclude that defendant's sentence was not entered in error.

Affirmed.

Judges BRYANT and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 AUGUST 2011)

BLAKENLEY v. BLYTHE CONSTR., INC. No. 10-1066	Indus. Comm. (872311)	Affirmed
BURGESS v. N.C. CRIMINAL JUSTICE EDUC. No. 10-1456	Wake (09CVS13710)	Affirmed
CARTER v. MAXIMOV No. 10-1408	Mecklenburg (09CVS30047)	Affirmed
CHAVIS v. SIETMAN No. 10-1351	Mecklenburg (08CVD24776)	Dismissed
CONSOLI v. GLOBAL SUPPLY & LOGISTICS, INC. No. 10-570	Mecklenburg (08CVS10480)	Affirmed in part and reversed and remanded in part.
COUNTRYWIDE HOME LOANS v. STATES RES. CORP. No. 10-1348	Pitt (10CVS122)	Affirmed
CURTIS v. GAINES MOTOR LINES, INC. No. 11-51	Indus. Comm. (792425)	Affirmed
DORWANI v. DORWANI No. 10-849	Pasquotank (06CVD528)	Affirmed
DOWNER v. WOLFE No. 11-50	Anson (08CVS174)	Affirmed
EAST BAY CO., LTD. v. BAXLEY COMMERCIAL PROPS., LLC No. 11-180	Wake (08CVS14349)	Dismissed in part and affirmed in part
FULLER v. BEST SERVS. GRP. No. 10-1238	Indus. Comm. (793010)	Affirmed
GRP. HEALTH PLAN v. INTEGON NAT'L INS. No. 10-1282	Edgecombe (09CVD559)	Affirmed
IN RE D.D.D. No. 11-114	Cherokee (02JT59-60) (08JT38-39)	Reversed and Remanded
IN RE H.M. No. 11-286	Mecklenburg (10J484)	Affirmed in part; reversed and remanded in part.

IN RE J.H-S. No. 11-112	Buncombe (04JA231)	Affirmed
IN RE J.R.L.S. No. 11-83	Moore (10JT25)	Affirmed
IN RE L.D.G. No. 11-338	Gaston (09JT22)	Affirmed
IN RE P.C.H. No. 11-419	Rutherford (05JT80)	Affirmed
IN RE PREST No. 11-35	Carteret (10SP129)	Reversed
LYLES v. TURNER No. 10-842	Polk (08CVD131)	Affirmed
NASSER v. DYNAMIC IMAGES SALON & SPA, INC. No. 10-1567	New Hanover (09CVD2085)	Affirmed in part, Vacated in part and Remanded
NICHOLSON v. THOM No. 10-1433	Robeson (08CVS1845)	Affirmed
NOEL v. DICKERSON No. 11-54	Mecklenburg (08CVS2322)	Dismissed
ORR v. KING No. 10-1303	Pender (09CVS1311)	Vacated and remanded
PENICK v. GO POSTAL IN BOONE, INC. No. 10-1493	Watauga (10CVD313)	Affirmed
POLSTON v. INGLES MKTS. No. 10-878	Indus. Comm. (725935)	Affirmed in Part, Reversed and remanded in Part
ROMNEY v. ROMNEY No. 10-1457	Rutherford (05CVD975)	Affirmed
SIGMON v. JOHNSTON No. 10-1276	New Hanover (08CVS2619)	Affirmed in part, vacated and remanded in part.
STATE v. AUSTIN No. 10-1574	Mecklenburg (06CRS257385)	No Error
STATE v. BECTON No. 10-1359	Wake (09CRS38133) (09CRS49109)	No Error
STATE v. BELL No. 11-40	Forsyth (09CRS57481) (09CRS9616)	Vacated in Part, No Error in Part

STATE v. BLACK No. 10-1374	Lenoir (99CRS8290)	No Error
STATE v. BRINSON No. 10-1252	Wayne (07CRS50456-57)	New Trial
STATE v. CARROWAY No. 10-1473	Durham (07CRS45692)	No Error
STATE v. CAUDILL No. 10-1466	Brunswick (07CRS54458) (07CRS54460-61)	Dismissed
STATE v. EASON No. 10-1384	Harnett (09CRS56006) (10CRS241)	No prejudicial error
STATE v. EDWARDS No. 10-930	Union (08CRS56473)	No Error
STATE v. EVANS No. 10-1555	Rutherford (09CRS199-200)	No prejudicial error
STATE v. GALATI No. 10-1196	Iredell (08CRS53782)	No Error
STATE v. HOWARD No. 10-1484	Durham (09CRS40895)	No Error
STATE v. KELLY No. 10-1318	Mecklenburg (09CRS205977) (09CRS205978)	Dismissed
STATE v. LANE No. 11-53	New Hanover (09CRS60412) (09CRS60413) (09CRS60414)	No Error
STATE v. LOFTON No. 10-1291	New Hanover (07CRS62600-02) (07CRS62604) (07CRS62606)	No Error
STATE v. OUAJA No. 10-1224	Durham (09CRS45318)	No Error
STATE v. PERRY No. 10-461	Durham (06CRS59110) (06CRS59115) (06CRS59049)	No Prejudicial Error
STATE v. SMALLS No. 10-1337	Johnston (09CRS57013)	Affirmed in Part; Remanded for Resentencing in Part.

STATE v. STEELE No. 10-1405	Rowan (06CRS56792) (09CRS574-75)	No Error
STATE v. TAYLOR No. 10-1604	Wake (07CRS84551) (07CRS87620) (08CRS37510)	Affirmed
STATE v. TORRES No. 10-1615	Wake (09CRS203207)	No Error
STATE v. WILLIAMS No. 10-1540	Harnett (09CRS53835) (09CRS53869) (10CRS526-527)	No error in part, dismissed without prejudice in part.
STONY POINT HARDWARE & GEN. STORE, INC. v. PEOPLES BANK No. 10-1170	Catawba (08CVS2806)	Affirmed
THOMPSON v. CAROLINA CABINET CO. No. 10-1142	Indus. Comm. (105742)	Remanded
TINAJERO v. BALFOUR BEATTY INFRASTRUCTURE, INC. No. 11-2	Indus. Comm. (091464)	Dismissed
TORRENCE v. AEROQUIP No. 10-1279	Indus. Comm. (061152)	Affirmed
TOWN OF MATTHEWS v. WRIGHT No. 11-68	Mecklenburg (07CVS7662)	Reversed and Remanded
WELLS FARGO BANK v. WINSTON-SALEM INVESTORS, LLC No. 10-1038	Forsyth (09CVS9092)	Affirmed

JUDICIAL STANDARDS COMMISSION
ADVISORY OPINION

CITE AS: COMMUNITY ACTIVITIES
FORMAL ADVISORY OPINION: 2013-01

September 6, 2013

Refer to 214 N.C. App. 564

QUESTION:

May a judge solicit members of the judge's church to serve on a steering committee charged with oversight of a Habitat for Humanity house construction project? Service on the steering committee will include fund-raising activities.

COMMISSION CONCLUSION:

A judge may ask members of the judge's church to serve on a committee responsible for oversight and management of church activities, even if the committee's activities include fund-raising.

DISCUSSION:

The Commission reasoned that the phrase "actively assist such an organization in raising funds", found in Canons 4C and 5B(2) of the Code of Judicial Conduct, does not include the solicitation of committee service from within the membership of a religious organization of which the judge is also a member.

The Commission further reasoned the questioned activity does not "lend the prestige of the judge's office to advance the private interest of" the judge's church, as prohibited by Canon 2B of the Code, nor call into question the independence, integrity and impartiality of the judge or the judiciary as a whole, which a judge is required to promote by Canons 1 and 2A of the Code.

References:

North Carolina Code of Judicial Conduct
Canon 1
Canon 2A
Canon 2B
Canon 4C
Canon 5B(2)

HEADNOTE INDEX

EVIDENCE

Expert testimony—not commentary on victim's credibility—no plain error— The trial court did not commit plain error in a sexual offenses case by admitting testimony of an expert witness regarding the characteristics of sexually abused children. The witness's testimony did not go to the victim's credibility. **State v. Khouri, 389.**

Motion in limine—motion to suppress—definitions—A pretrial motion to suppress is a type of motion in *limine*; a motion to suppress denotes the type of motion, while a motion in *limine* denotes the timing of the motion. **State v. King, 114.**

Mouth swabbing—photographs—belt and shoes—defendant's consent—motion to suppress properly denied—The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by denying defendant's motion to suppress certain evidence. The findings of fact supported the conclusion of law that defendant freely and voluntarily consented to the swabbing of his mouth, the photographs of his injuries, and the collection of his belt and shoes. **State v. McMillan, 320.**

Prior crimes or bad acts—assault—deadly weapon—absence of mistake—not unfairly prejudicial—The trial court did not commit plain error in an assault with a deadly weapon with intent to kill inflicting serious injury case by admitting evidence that defendant had previously assaulted the victim with a fork, injuring his hand. The evidence was properly admitted for the purpose of showing absence of accident or mistake and the probative value outweighed the danger of any unfair prejudice. **State v. Flaugher, 370.**

Prior crimes or bad acts—sexual offenses—common plan or scheme—temporal proximity—The trial court did not abuse its discretion in a sexual offenses case by admitting testimony pursuant to N.C.G.S. § 8C-1, Rules 404(b) and 403 regarding sexual contact between defendant and the prosecuting victim's cousin. There were sufficient similarities between the acts and the acts occurred within sufficient temporal proximity to be admissible under Rule 404(b). Furthermore, the testimony was not more prejudicial than probative and was properly received for the purpose of showing a common plan or scheme. **State v. Khouri, 389.**

Rape Shield Act—not implicated in two instances—testimony of victim's prior sexual activity properly excluded—The trial court did not err in a sexual offenses case by excluding testimony by defense witnesses that the victim had made inconsistent statements. The Rape Shield Act was not implicated in two of the rulings defendant objected to and the trial court properly excluded testimony under the Rape Shield Act concerning the possible paternity of the victim's child. **State v. Khouri, 389.**

Recovered memory—evidence suppressed—Rule 403—The trial court did not abuse its discretion by granting defendant's motion to suppress evidence of a recovered memory where the trial court concluded that the proposed evidence and expert opinion had become so attenuated that they lacked probative value under N.C.G.S. § 8C-1, Rule 403, even if the test for admissibility was technically met. Although B*arrett v. Hyldburg*, 127 N.C. App. 95, requires expert testimony for repressed memory evidence to be admitted, the trial court must still perform its gatekeeping function. **State v. King, 114**.

Video—replayed during closing and deliberations—A narcotics trafficking defendant did not meet his burden of showing that the trial court abused its discretion by determining that the versions of a video recording played during closing argument and during jury deliberations constituted the same evidence that had been

WORKERS' COMPENSATION—Continued

Although defendants argued from cross-examination testimony that plaintiff did not do so, that testimony could plausibly be construed to mean that plaintiff did not continue to seek an even better position after leaving defendant and obtaining another job. **Wynn v. United Health Servs./Two Rivers Health—Trent Campus, 69.**

Refusal to accept suitable employment—pre-maximum medical improvement—The Industrial Commission did not err by not terminating plaintiff's workers' compensation insurance where defendants alleged that she had unjustifiably refused to accept suitable employment. Defendant contended that there should be a different, more lenient standard for determining whether plaintiff refused suitable employment where plaintiff had not reached maximum medical improvement. This approach does not accurately reflect existing North Carolina law. **Wynn v. United Health Servs./Two Rivers Health—Trent Campus, 69.**

Testimony of rehabilitation specialist—not relied upon by Commission—The Industrial Commission did not err in a workers' compensation case by not relying on testimony from defendants' rehabilitation specialist that plaintiff could have obtained higher post-injury earnings. Fact finding is the Commission's function, and there was ample evidentiary support for not crediting the testimony. **Wynn v. United Health Servs./Two Rivers Health—Trent Campus, 69.**