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CASES
ARGUED AND DETERMINED IN THE
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STATE OF NORTH CAROLINA v. NORMA ANGELICA WILLIAMS

No. COA10-738

(Filed 16 August 2011)

1. Appeal and Error—appealability—writ of certiorari—timely written notice of appeal

Although defendant petitioned for a writ of *certiorari*, defendant’s right to appeal was already preserved. Defendant timely filed a written notice to appeal the denial of her motion to suppress.

2. Evidence—findings of fact—sufficiency of evidence

The trial court did not err in a drugs case by concluding there was competent evidence to support its findings of fact numbers 4, 5, and 9. The findings demonstrated uncertainties and inconsistencies regarding the point of origin and destination for travel. The misstatement in number 9 that defendant produced a driver’s license instead of a state-issued identification card was inconsequential and *de minimus*.

3. Search and Seizure—traffic stop—extended detention—reasonable suspicion—uncertainties and inconsistencies

The trial court did not err in a drugs case by concluding that defendant and her companion’s extended detention was supported by reasonable suspicion. The totality of the circumstances revealed a reasonable articulable suspicion that criminal activity was afoot based on muddled stories consisting of numerous uncertainties and inconsistencies.

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

Judge McGEE dissenting.

Appeal by Defendant from judgment entered 3 November 2009 by Judge Christopher M. Collier in Iredell County Superior Court. Heard in the Court of Appeals 25 January 2011.

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

Michele Goldman, for Defendant.

BEASLEY, Judge.

Where the trial court denied Defendant's motion to suppress and competent evidence supports its findings of fact and conclusions of law, we affirm.

Sergeant Randy Cass (Sgt. Cass) of the Iredell County Sheriff's Office was on patrol on 21 May 2008 when, around 11:00 a.m., he observed an SUV with tinted windows heading south on Interstate 77 (I-77). Believing the window tinting to be in violation of North Carolina law, Sgt. Cass stopped the SUV and immediately approached the driver's side. Sgt. Cass asked the driver, Michelle Perez (Perez), to step out of the vehicle, and then asked her several questions. Perez told him that the SUV belonged to her passenger Norma Angelica Williams (Defendant), and Sgt. Cass then asked Perez where their trip originated. Perez told him that she flew to Houston from Arizona to meet Defendant and drive her "to go DJ somewhere" but referred further questions about their trip to Defendant because it was Defendant's "gig," and Perez was not familiar with the details of their travel plans and destination.

Sgt. Cass approached Defendant and asked if she owned the SUV. Defendant replied that she did not own the vehicle but explained that she had arranged to purchase the car from the friend to whom it belonged. Defendant produced two identification cards, each issued by the states of Arizona and Texas respectively, containing consistent information. Sgt. Cass asked where she and Perez were traveling, and Defendant told him that they "were trying to get to Club Kryptonite and showed [him] a map to Myrtle Beach, South Carolina, and then asked [him] directions on how to get there." Sgt. Cass also asked where they were coming from, and Defendant responded that they were travelling from Louisville, Kentucky. Defendant gave Sgt. Cass the SUV's registration and continued to answer his questions, telling him that she and Perez were cousins and that she had recently moved to Texas from Arizona.

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Sgt. Cass left Defendant and returned to speak with Perez, inquiring about her city of departure and her relationship with Defendant. Perez told him that she flew from Tucson, Arizona, and explained that she and Defendant refer to each other as cousins because of their longstanding relationship. Sgt. Cass then asked Perez to sit in his cruiser as he issued her a warning ticket. For about ten minutes, Sgt. Cass and Perez engaged in “small talk” addressing matters such as Perez’s occupation. Meanwhile, Sgt. Cass contacted Blue Light Operational Center (BLOC), which he described as “an agency through United States customs that we’re in access with . . . for the check of the wanted persons or the vehicle, the criminal history, [and] the driver’s license.” Sgt. Cass provided BLOC with information on the SUV, Perez’s driver’s license, and Defendant’s Texas identification card, and answered BLOC’s questions regarding Defendant and Perez’s route from Kentucky to South Carolina. At some point while Sgt. Cass and Perez were in the cruiser, BLOC verified “that everything was good.”

After issuing a warning citation to Perez, Sgt. Cass asked her if there was any contraband, weapons or large quantities of cash in the SUV, and she indicated there was not. Sgt. Cass then asked her if he could search the SUV, but Perez did not consent. Sgt. Cass then asked Defendant if there was any contraband in the SUV, and she stated there was none. Sgt. Cass informed the women that he had requested that a canine trained in drug detection inspect the SUV. Approximately ten minutes later, Sgt. Elliott¹ arrived and walked a canine around the SUV. The canine “alerted” on the SUV, indicating a possible presence of narcotics. Based on the dog’s reaction, Sgt. Cass, Sgt. Elliott, and a third officer searched the SUV and recovered a large quantity of marijuana located in the SUV.

Defendant was arrested and was indicted on 11 August 2008 for trafficking in marijuana by possession and trafficking in marijuana by transporting. Perez was not indicted on any charges. On 12 September 2008, Defendant filed a motion to suppress the marijuana recovered from the search of the SUV. On 3 August 2009, a hearing on Defendant’s motion to suppress was held. Sgt. Cass testified at the hearing, and a video of the stop, including audio portions, was admitted into evidence.

The trial court denied Defendant’s motion to suppress on 5 August 2009. Defendant entered into a plea agreement whereby she

1. Sergeant Elliott’s first name does not appear in the record.

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would plead guilty to one count of trafficking marijuana in exchange for the dismissal of the second count. On 3 November 2009, judgment was entered and Defendant was sentenced to an active term of twenty-five to thirty months. Defendant appeals.

I.

[1] Defendant has petitioned our Court for writ of certiorari out of precaution that her right to appeal was not preserved. We have reviewed the record and believe Defendant's right to appeal in this matter is preserved. Defendant timely filed a written notice to appeal the denial of her motion to suppress. On 28 October 2009, the trial court accepted Defendant's plea agreement with the State. At the plea hearing, both Defendant's counsel and the trial court indicated Defendant would be appealing the denial of the motion to suppress. On 3 November 2009, judgment was entered. At the sentencing hearing, the State, Defendant's counsel, and the trial court all proceeded as if Defendant had properly entered notice of appeal.

Because the transcript from the sentencing hearing does not include an express statement of Defendant's intent to appeal, we have no way of knowing whether Defendant's counsel gave oral notice of appeal before transcription of the proceedings began. However, the record reflects that the State, the trial court, and Defendant's counsel all proceeded as if proper notice of appeal had been properly noted. Upon Defendant's request, the trial court appointed the Appellate Defender's Office to represent her, and stayed the execution of judgment pending resolution of the matter in the Court of Appeals. The trial court stated in its Appellate Entries form that "[D]efendant has given Notice of Appeal to the N.C. Court of Appeals," and "ordered that [Defendant] is allowed to appeal as an indigent."

Where we presume the "regularity and correctness" of the actions of the trial court unless the record proves otherwise, *In re A.R.H.B. & C.C.H.L.*, 186 N.C. App. 211, 219, 651 S.E.2d 247, 253 (2007), we do not believe, on these facts, that the trial court's finding that Defendant gave notice of appeal is sufficiently contradicted by the record. We therefore address the merits of Defendant's appeal.

II.

[2] Defendant first contends the trial court lacked competent evidence to support Findings of Fact 4, 5, and 9, arguing that there was no competent evidence to support them. As Defendant does not challenge the remaining findings of fact, they are binding on this Court.

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See State v. Biber, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (No. 423A10, filed 16 June 2011) (“[W]hen, as here, 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.”).

Our standard of review for the denial of a motion to suppress is as follows:

[T]he trial court’s findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. This Court must not disturb the trial court’s conclusions if they are supported by the court’s factual findings. However, the trial court’s conclusions of law are fully reviewable on appeal. At a suppression hearing, conflicts in the evidence are to be resolved by the trial court. The trial court must make findings of fact resolving any material conflict in the evidence.

State v. McArn, 159 N.C. App. 209, 211-12, 582 S.E.2d 371, 373-74 (2003) (internal quotation marks and citations omitted). Moreover,

[a]n appellate court accords great deference to the trial court’s ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence. Our review of a trial court’s denial of 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.

State v. Hernandez, 170 N.C. App. 299, 303-04, 612 S.E.2d 420, 423 (2005) (internal quotation marks and citations omitted).

In general, “[t]he scope of the detention must be carefully tailored to its underlying justification.” *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 (1983). This Court requires that “[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.” *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968)). “A court must consider ‘the totality of the circumstances—the whole picture’ in determining whether a reasonable suspicion to make an investigatory stop exists.” *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (quoting *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)).

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In Finding of Fact 4, the trial court found that Sgt. Cass asked Perez where they were coming from, and “Perez eventually stated they were coming from Houston, Texas, even though they were traveling south on the interstate.” However, Sgt. Cass knew that, because Defendant and Perez were travelling south on I-77, it was illogical that they would be travelling from Houston. Sgt. Cass testified at the suppression hearing that when he sought clarification from Perez about where their travel commenced, he

asked [Ms. Perez] where she was coming from and she said that she had just flew [sic] out of Houston and not sure where she was coming from. So I started asking her, I said, no, I mean like right now, where are you coming from now? And she was making comments like from Houston.

As Sgt. Cass testified, when Perez told him they were travelling from Houston, he asked, “right now you’re coming from Houston? And she said yeah. I was like, Houston what? Houston, Texas. I’m like, you’re going south on 77, you know, Houston is on further south and you’re indicating that’s where you’re coming from.”² Thus, competent evidence supported the trial court’s finding that Perez told Sgt. Cass that she and Defendant were coming from Houston, notwithstanding the fact that they were travelling in a southerly direction.

While Defendant makes much of the fact that Perez did not *eventually* state that they were coming from Houston but, rather, did so immediately, Defendant failed to demonstrate that the findings of fact are not supported by the evidence. Defendant contends that by using the word “eventually,” the trial court inaccurately implies a delay in Perez’s response to the question. However, assuming *arguendo* that the evidence does not support this temporal element included in Finding of Fact 4, the finding of fact would still be supported by the evidence that Perez had identified, whether eventually or immediately, a point of origin that not only rendered her and Defendant’s route illogical, but also that contradicted the information provided to Sgt. Cass by Defendant.

In contrast to the information provided by Perez, Defendant told Sgt. Cass, as the trial court found in Finding of Fact 7, that “they were coming from Kentucky.” The dissent stresses that both Perez and Defendant told Sgt. Cass that Perez flew into Houston, that Defendant met her there, and that Houston is where their trip began; Perez

2. Travel from Houston, Texas to Myrtle Beach, South Carolina as computed by Mapquest.com and RandMcNally.com is not routed by way of I-77 South.

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admittedly did not know the origin of their travel *that day*. Therefore, because Perez had initially told Sgt. Cass that she and Defendant were coming from Houston “*right now*”, Perez and Defendant’s statements as to the origin of their travel conflicted. Because the evidence supports the trial court’s Finding of Fact 4 and Defendant demonstrates no prejudice related to the error alleged, this argument is overruled.

Defendant challenges the trial court’s Finding of Fact 5 which states, “[t]hat during this conversation Perez could not articulate their destination, even in general terms, even though she was driving the vehicle. Perez further stated that she and the defendant were cousins.”

When Sgt. Cass asked Perez from where she and Defendant were travelling, she told him that she had flown from Arizona to Houston, Texas. But, other than her understanding that their ultimate destination was Defendant’s DJ gig, Perez was “unsure as to where she was driving to.” Perez referred all questions to Defendant because she asserted that she did not know the trip’s details. In fact, the most Perez knew about their destination was that it was circled on Defendant’s map. It is undisputed that Perez was the driver, and her inability to approximate any ultimate geographic location is competent evidence to support Finding of Fact 5. This argument is overruled.

Defendant also challenges the portion of Finding of Fact 9 that she “produced driver’s licenses from the states of Arizona and Texas and had indicated the car was owned by a friend of hers, that she intended to purchase it.”

It is correct that Sgt. Cass testified that Defendant produced state-issued identification cards, not driver’s licenses. The purpose of Defendant’s producing documentation was to prove her identity to Sgt. Cass, not to demonstrate that she was a licensed driver, as she was not driving the SUV at the time of the stop. This discrepancy, however, is inconsequential to the trial court’s consideration of the evidence and to the outcome of this case. Therefore, the misstatement in Finding of Fact 9 is *de minimus*, and this argument is overruled.

The fact that Defendant challenges the above-stated findings of fact does not suggest that a material conflict in the evidence exists. “[F]or purposes of section 15A-977(f), a material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected.” *State v. Baker*, ___ N.C. App. ___, ___, 702 S.E.2d 825, 831 (2010). As in *Baker*, where this

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Court held that “[t]he fact that defendant presented **evidence** is not, and cannot, by itself, be dispositive of whether a material conflict in the **evidence** existed,” *id.* at ___, 702 S.E.2d at 830 (emphasis added), there is no material conflict in the evidence here, and the findings of fact were supported by competent evidence.

III.

[3] Defendant concedes that the initial stop was lawful; thus, we do not address the constitutionality of the traffic stop. Rather, Defendant argues that the detention after Perez and Defendant’s identification was returned was not supported by reasonable suspicion and therefore violated Defendant’s right under the Fourth Amendment to the United States Constitution and Section 20 of Article I of the North Carolina Constitution. We disagree.

“Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay. *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998); *see also Alabama v. White*, 496 U.S. 325, 330, 110 L. Ed. 2d 301, 309 (1990) (“[T]he ‘totality of the circumstances—the whole picture[—]’ . . . must be taken into account when evaluating whether there is reasonable suspicion.” (quoting *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)); *accord State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). “After a lawful stop, an officer may ask the detainee questions in order to obtain information confirming or dispelling the officer’s suspicions.” *State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999) (citing *Berkemer v. McCarty*, 468 U.S. 420, 82 L. Ed. 2d 317 (1984)).

We must resolve whether the “totality of the circumstances” in the case *sub judice* gave rise “to a reasonable articulable suspicion that criminal activity was afoot” to justify Sgt. Cass’ extended detention of Defendant. *See State v. Myles*, 188 N.C. App. 42, 47, 654 S.E.2d 752, 756 (2008) (internal quotation marks and citations omitted). “To determine reasonable articulable suspicion, courts view the facts through the eyes of a reasonable, cautious officer, guided by his experience and training at the time he determined to detain defendant.” *Id.* (internal quotation marks and citation omitted).

Defendant attempts to support her argument that the trial court’s findings of fact do not support its conclusions with our Court’s decisions in *Falana* and *Myles*. We disagree.

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In *Falana*, a trooper observed a car weaving and suspected that the driver was impaired. He detained the vehicle and noticed that the driver breathed rapidly and hesitated to answer the trooper's question. The trooper also found it suspicious that the passenger did not know whether he and the driver left New Jersey on Saturday or Sunday. *Falana*, 129 N.C. App. at 814-15, 501 S.E.2d at 358-59. Our Court held that these factors alone did not give rise to reasonable suspicion that criminal activity was afoot. *Id.* at 817, 501 S.E.2d at 360.

This Court's determination in *Myles* that the officer did not have reasonable suspicion to support an extended detention of a motorist and his passenger is also distinguishable. *See Myles*, 188 N.C. App. at 51, 654 S.E.2d at 758. Upon stopping a vehicle for suspected impaired driving, the officer did not smell alcohol. *Id.* at 43, 654 S.E.2d at 753. When he asked for the driver's license and registration, the officer learned that the vehicle had been rented and then asked for the passenger's license because the rental agreement was in his name. *Id.* After the license check, the officer issued a warning ticket, then asked the driver to step out of the vehicle, and spoke to the passenger and driver separately. *Id.* at 43, 654 S.E.2d at 753-54. He noticed that both were extremely nervous and gave different dates for the rental car to be returned. *Id.* at 43-44, 654 S.E.2d at 753-54. The officer had testified, however, that he did **not** believe the driver was impaired, the driver's license check revealed no outstanding violations, and he found nothing suspicious about the overdue rental car. *Id.* at 47-48, 654 S.E.2d at 756. Thus, the detention was not supported by reasonable suspicion. The sole basis for the officer's suspicion that criminal activity was afoot was the nervousness of the driver and the defendant, and we announced that nervousness cannot be the sole factor supporting reasonable suspicion. *See id.* at 50, 654 S.E.2d at 757-58 ("Although our Supreme Court previously has stated nervousness can be a factor in determining whether reasonable suspicion exists our Supreme Court has never said nervousness alone is sufficient to determine whether reasonable suspicion exists when looking at the totality of the circumstances.").

Unlike *Falana* and *Myers*, several factors permitted Sgt. Cass to form reasonable suspicion: (1) he stopped the SUV, in which Defendant was a passenger, because it "appeared to [have] illegally tinted windows"; (2) the driver, Perez, did not know the name of the city from which the pair travelled nor any details about their destination; (4) Perez and Defendant were travelling on I-77 purportedly from Louisville, KY to Myrtle Beach, SC which is an indirect route; (5)

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Defendant initially stated that Perez was her cousin, but later stated she and Perez “simply called each other cousins based on their close and long term relationship”; and (6) while Perez told Sgt. Cass that Defendant owned the SUV, Defendant stated that a friend of hers was the owner, but that she intended to purchase it. While some of these factors—such as the interstate driver’s complete unawareness as to where she was bound and the dubious route given—are more weighty than others—such as the initially imprecise information as to vehicle ownership and the women’s relationship, which was later amended with corrective details—the totality of the circumstances reveals a muddled story imbued with uncertainties and inconsistencies.

We conclude that the extended detention was supported by reasonable articulable suspicion. Sgt. Cass testified that

Ms. Perez’ inaccurate, or not inaccurate, but unknown story locations of where she was coming from and going to; the conflict in the stories of being family; the third party vehicle at that point, that the owner was not present at that time; the dark tinted windows which a lot of times are used to try to conceal the identity of the people going up and down the interstate of drug couriers or money launderers.

Courts often consider the risk to law enforcement officers and their ability to discern factors suggesting that drug activity may be afoot. In forming reasonable suspicion, one factor that law enforcement officers are permitted to consider is tinting on vehicle windows. There are many cases which address the risk that tinting poses to officer safety, *see United States v. Stanfield*, 109 F.3d 976, 981-82 (4th Cir. 1997) (“[O]fficers face an ‘inordinate risk’ every time they approach even a vehicle whose interior and passengers are fully visible to the officers, [and] the risk these officers face when they approach a vehicle with heavily tinted windows is, quite simply, intolerable.” (citation omitted)).

Sgt. Cass stopped Perez and Defendant because the vehicle in which they rode had tinted windows in violation of state law, *see* N.C. Gen. Stat. § 20-127(b), (d) (2009), and cited Perez for the violation. Further, Perez and Defendant gave conflicting statements about the origin of their travel; Perez told Sgt. Cass that Defendant, with whom she had a “close and long term relationship” as the trial court found in Finding of Fact 8, was the owner of the SUV, while Defendant stated that although she intended to purchase the vehicle, it actually belonged to a friend, as the court found in Finding of Fact 9. Perez did

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not know the pair's purported destination, and their choice of route on I-77 South seemed incongruous with travel to Myrtle Beach from either Houston or Louisville. Sgt. Cass had the opportunity to establish reasonable suspicion that criminal activity was afoot, and the trial court made findings of fact and conclusions of law supported by competent evidence.

While the trial court made no findings of fact about either Perez or Defendant's nervousness, Perez can be heard on the audio from Sgt. Cass' patrol vehicle stating she was nervous. However, the trial court's findings of fact demonstrate that Defendant and Perez provided Sgt. Cass with information, or a lack thereof, including various inconsistencies therein, which objectively created a reasonable suspicion. The trial court stated in Finding of Fact 4 that "Perez eventually stated they were coming from Houston, Texas, even though they were traveling south on the interstate," and in Finding of Fact 5 the court found that "Perez could not articulate their destination, even in general terms, even though she was driving the vehicle." The fact that a driver has absolutely no idea where she is headed is markedly different from the *Falana* confusion over which day a trip began on. In Finding of Fact 7, the trial court found that "Ms. Williams stated they were coming from Kentucky and headed to Club Kryptonite in Myrtle Beach." Perez and Defendant's statements are inconsistent. Further, in Finding of Fact 5, the court found that "Perez further stated that she and the defendant were cousins. In Finding of Fact 8, the court found that "[w]hen asked[,] Williams said that Perez was her cousin and claimed a familial relationship initially, but then later stated they simply called each other cousins based on their close and long term relationship." The trial court's findings of fact demonstrate totality of the circumstances characterized by uncertainties and inconsistencies, which are supported by competent evidence and further support the trial court's conclusion that reasonable suspicion justified Defendant's extended detention. Therefore, we affirm.

Affirmed.

Judge BRYANT concurs.

Judge McGEE dissents.

McGEE, Judge, dissenting.

I respectfully dissent from the majority holding because I do not believe the trial court's findings of fact support a conclusion that

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Sergeant Cass had a reasonable suspicion sufficient to detain Defendant after the issuance of a warning citation for tinted windows.

At the suppression hearing, the trial court made the following relevant findings of fact:

2. That about 10:55 AM [Sgt. Cass] observed a white SUV with what appeared to be illegally tinted windows, at which time he initiated a traffic stop.
3. Sgt. Cass approached the vehicle and spoke with the occupants briefly, then asked the driver, later identified as [Ms.] Perez, to step out of the vehicle.
4. The officer had [Ms.] Perez step to the front of his vehicle and asked where they were coming from. [Ms.] Perez eventually stated they were coming from Houston, Texas, even though they were traveling south on the interstate.
5. That during this conversation [Ms.] Perez could not articulate their destination, even in general terms, even though she was driving the vehicle. [Ms.] Perez further stated that she and [Defendant] were cousins.
6. Sgt. Cass then spoke with the passenger, later identified as [Defendant], who was still seated in the vehicle.
7. During this conversation [Defendant] stated they were coming from Kentucky and headed to Club Kryptonite in Myrtle Beach.
8. When asked[,] [Defendant] said that [Ms.] Perez was her cousin and claimed a familial relationship initially, but then later stated they simply called each other cousins based on their close and long term relationship.
9. [Defendant] produced driver's licenses from the states of Arizona and Texas and had indicated the car was owned by a friend of hers, that she intended to purchase it. The officer then at 11:04 AM told [Ms.] Perez that she was going to get a warning ticket, at which time she was seated in the vehicle.

I.

I disagree with the majority concerning the relevance of the trial court's errors in its findings of fact.

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A.

First, the trial court, by determining in Finding of Fact 4 that Ms. Perez only “eventually” stated that she was coming from Houston, suggests it found that Ms. Perez was being evasive or non-responsive when she was asked where she was coming from. An attempt to evade answering questions can be factored in a reasonable suspicion analysis. *State v. McClendon*, 350 N.C. 630, 637, 517 S.E.2d 128, 133 (1999).

Sergeant Cass testified at the hearing as follows:

And [I] asked [Ms. Perez] where she was coming from and she said that she had just flew out of Houston and not sure where she was coming from. So I started asking her, I said, no, I mean like right now, where are you coming from now? And she was making comments like from Houston. I'm like, right now you're coming from Houston? And she said yeah. I was like, Houston what? Houston, Texas. I'm like, you're going south on 77, you know, Houston is on further south and you're indicating that's where you're coming from.

....

I had asked Ms. Perez where they were going and she said she wasn't sure, that she was going to DJ somewhere, speaking of [Defendant], and she had it marked down on the map. So that's when I walked back up talking with [Defendant]. And [Defendant] indicated they was [sic] going to Club Kryptonite, I believe is the way that you say it, and showed me a map to Myrtle Beach and then started asking me about directions on how to get there.

....

Q. Did you have a conversation at some point with [Defendant] about where they were coming from?

A. [Sergeant Cass] Yes, I did earlier when she was showing me the map.

Q. And what, if anything, did she indicate to you about where they were coming from?

A. There [sic] were coming from I believe it was Louisville, Kentucky. Yes, coming from Kentucky.

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Q. And what had Ms. Perez told you about where they were coming from?

A. She didn't know.

THE COURT: Well, I thought you said Houston, Texas.

[Sergeant Cass]: That's what she originally said, that she had flown into Houston. And when I started saying Houston is here, you know, you're coming south, she couldn't tell me where she was coming from.

Sergeant Cass was asked at the hearing:

[I]sn't it correct that Ms. Perez told you right to begin with that she had come from Houston, and later on when you were talking to her in the side of the road and you asked her where she had come from and she said she had flown in from Houston?

Sergeant Cass answered: "That is correct."

Sergeant Cass's undisputed testimony was that Ms. Perez initially told him she had flown into Houston, and that was where she was coming from. Upon further questioning by Sergeant Cass, Ms. Perez told him that she did not know where she and Defendant were driving from, or where they were headed, because Ms. Perez was unfamiliar with the geography of the area since she had only ever traveled to Tucson, Houston, and California. Ms. Perez said that Defendant had picked her up at the airport in Houston and that she (Ms. Perez) was driving Defendant to a club where Defendant was going to DJ a show. Ms. Perez told Sergeant Cass that she simply drove where Defendant told her to go, and that Defendant had the trip mapped out. When Sergeant Cass asked Defendant the same questions, Defendant told Sergeant Cass they were coming from Louisville, Kentucky, and were on their way to Myrtle Beach, South Carolina. Defendant showed Sergeant Cass a map and asked for help in determining the best route to Myrtle Beach.

To the extent the trial court's finding of fact indicated Ms. Perez "eventually" told Sergeant Cass that she and Defendant were coming from Houston, it is not supported by the evidence presented at the hearing. There is no competent evidence in the record to support the trial court's finding that, when Sergeant Cass asked Ms. Perez where she was coming from, Ms. Perez "*eventually* stated they were coming from Houston, Texas." (Emphasis added).

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The majority states that this error is not prejudicial, as “the finding of fact would still support the belief that Perez had identified, whether eventually or immediately, a point of origin that not only rendered her and Defendant’s route illogical but also contradicted the information provided by her passenger.” There is no dispute that if Defendant and Ms. Perez were heading directly from Houston to Myrtle Beach, their route on Interstate 77 South would be “illogical.” I have no quarrel with Sergeant Cass’s testimony that he was initially suspicious of Ms. Perez’s claim that she and Defendant were coming directly from Houston. As Sergeant Cass’s own statements on the video show, however, this initial suspicion was alleviated.

Sgt. Cass: *That was what was throwing me off awhile ago.* I was like that ain’t makin’ sense. You don’t even know where you are at here. (Emphasis added).

Ms. Perez: Yeah, and then [Defendant is] like just drive me and I don’t know. I haven’t been out of . . . I only went to Houston . . . I only went to California . . . [f]rom Tucson, I’ve only been to California and to Houston.

Sgt. Cass: Right.

Ms. Perez: And that’s my only places I’ve been, anywhere. Everything’s new to me right here.

Ms. Perez told Sergeant Cass right away that she did not know the details about the trip because it was Defendant’s “gig” and this was only the second trip Ms. Perez had ever taken outside Arizona—and the first to the Southeast. Ms. Perez told Sergeant Cass that Defendant had a map with their destination circled, and that Defendant was the one who knew the details about the trip. Ms. Perez just drove where Defendant instructed her to drive. Defendant’s statements to Sergeant Cass did not contradict Ms. Perez’s. In fact, they corroborated what Ms. Perez was stating: Defendant was headed to a “gig,” Defendant did have a map with their destination, and Defendant was able to tell Sergeant Cass the details of their trip. I do not believe the majority’s statement that Ms. Perez “had initially told the officer that she was coming from Houston *right now*” is supported by the record. Ms. Perez never stated that she was coming from Houston “right now,” only that she came from Houston. As was later clarified, so far as driving Defendant was concerned, her trip originated in Houston. Though Sergeant Cass’s initial confusion was understandable, subsequent events and his own testimony indicate that this confusion was cleared up before he issued the warning citation.

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B.

The majority considers the error in the trial court's ninth Finding of Fact to be *de minimis*: "[Defendant] produced driver's licenses from the states of Arizona and Texas[.]" In fact, as Ms. Perez had indicated, Defendant did not have a driver's license. When asked for identification by Sergeant Cass, Defendant produced two identification cards, not driver's licenses. One was from Arizona, where both Ms. Perez and Defendant indicated Defendant had lived for most of her life, and the other was from Texas, where both Ms. Perez and Defendant indicated Defendant had moved and was currently living. No competent evidence exists supporting the trial court's finding of fact that Defendant produced driver's licenses from two different states. Having driver's licenses from multiple states is a violation of N.C. Gen. Stat. § 20-4.25 (2009).

C.

The majority holds that the trial court's fifth Finding of Fact was supported by competent evidence. The fifth finding states:

That during [the conversation between Sergeant Cass and Ms. Perez,] [Ms.] Perez could not articulate [Ms. Perez's and Defendant's] destination, even in general terms, even though she was driving the [SUV].

As discussed above, Ms. Perez did not know the name of the last city she and Defendant had been in, nor their destination. Ms. Perez, after being asked by Sergeant Cass if the SUV was hers, answered: "No, it's [Defendant's]. I'm driving for her because she doesn't have a license and she's gonna go D.J. somewhere." Sergeant Cass then asked where they were coming from, and Ms. Perez responded: "From Houston. I flied [sic] out because she wanted me to drive for her. So that's why I flew out because we're driving, umm, I'm not even sure where we're driving to. Ask her because she knows everything because it's her gig."

Though Ms. Perez had already volunteered that she did not know their destination, Sergeant Cass again asked her where she and Defendant were heading. Ms. Perez again indicated that she was uncertain, but that Defendant had a map with their destination circled. Sergeant Cass then questioned Defendant, who was still seated in the SUV, about their trip, and Defendant stated that they were coming from Louisville, Kentucky, and heading to Club Kryptonite in Myrtle Beach, South Carolina. Defendant showed Sergeant Cass a map, and asked him for directions.

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The competent evidence shows that, though Ms. Perez did not know the name of their destination city, she told Sergeant Cass that they were heading to a club where Defendant had a “gig,” and that Defendant could provide more detailed information about their destination. The information provided by Ms. Perez was corroborated by Defendant when Sergeant Cass questioned Defendant. I would hold that the competent evidence does not support the trial court’s finding of fact that Ms. Perez “could not articulate their destination, *even in general terms*[.]” (Emphasis added).

II.

I would note that subsequent to its denial of Defendant’s motion to suppress, the trial court stated that “it was a close case.” The pertinent findings that support the trial court’s conclusion that Sergeant Cass had a reasonable articulable suspicion to detain Defendant after the issuance of the warning citation are: (1) Sergeant Cass stopped the SUV, in which Defendant was a passenger, because the SUV “appeared to [have] illegally tinted windows.” (2) Ms. Perez, who was driving, did not know the name of the destination city for that day’s drive. (3) Defendant initially stated that Ms. Perez was her cousin, but later stated she and Ms. Perez “simply called each other cousins based on their close and long term relationship.” (4) Defendant stated the SUV was owned by a friend of hers, but she intended to purchase it.

I do not include the trial court’s finding that suggests Ms. Perez only *eventually* told Sergeant Cass that she was coming from Houston. I also do not include, as a supporting finding of fact, that Defendant had two driver’s licenses—one from Arizona and one from Texas. Most importantly, Sergeant Cass *never* testified that the fact Defendant had two identification cards from two different states contributed to his belief that criminal activity may have been afoot. Further, because the two identification cards were entirely consistent with information provided by both Defendant and Ms. Perez concerning Defendant’s prior and current residency, I do not find them particularly relevant. Had Sergeant Cass testified to their relevance in making his determination, and had Defendant produced two *driver’s licenses* from different states, as the trial court erroneously found, this evidence might have been entitled to more weight.

The majority includes added “findings” in its opinion that were not made by the trial court. The trial court did not find that Ms. Perez “did not know the name of the city from which the pair travelled[.]” the trial court only found that Ms. Perez told Sergeant Cass that they

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came from Houston, which was corroborated by Defendant. The majority seems to find some relevance in the fact that tinted windows may pose a threat to officers, as tinted windows make it more difficult for officers to observe what is happening inside a vehicle when they approach. While true, this fact has no relevance in the case before us, and the trial court made no finding of fact related to this danger. There is no evidence or testimony that Sergeant Cass ever felt threatened. The trial court made no finding of fact involving Ms. Perez's statement that the SUV belonged to Defendant. Sergeant Cass gave no testimony that he found this suspicious. No inference can be made from the findings of fact that the trial court considered it suspicious that Ms. Perez, who had a "close and long term relationship"¹ with Defendant, stated that Defendant "owned" the SUV whereas Defendant stated that she was in the process of purchasing the SUV from a friend. The trial court made no finding of fact that the route of Defendant and Ms. Perez south on Interstate 77 was a "suspicious" route to take from Kentucky to Myrtle Beach. Sergeant Cass never questioned Ms. Perez or Defendant concerning this route, and never testified that he found it even the least bit suspicious. Sergeant Cass never raised the issue of this route at the suppression hearing, and our Court does not make factual determinations. The majority further discusses the purported "nervousness" of Ms. Perez in support of its determination. Notably, the trial court made no finding of fact related to Sergeant Cass's testimony that, when Ms. Perez got into his cruiser, "she then became very nervous and said that she was nervous because of seeing cars getting hit on the TV[,] and that she appeared "fidgety." I assume the trial court considered this testimony and rejected it as having no relevance to its determinations. Further, Sergeant Cass did not testify that Ms. Perez's "nervousness" was a basis for his suspicion. Sergeant Cass did not charge Ms. Perez with any crime whatsoever—he only issued Ms. Perez a warning citation for the tinted windows infraction.

The State argues that the case before us is factually analogous to *State v. McClendon*, 350 N.C. 630, 517 S.E.2d 128 (1999), stating that both cases "involved nervousness, vague and unreasonable travel information, inconsistent stories and ownership of the vehicle by an absent third party." I first note that, though the State relies heavily on the assertion that Ms. Perez was acting nervous during the stop, the trial court made no finding of fact to support that assertion, and I find

1. I note that the trial court did not find this "close relationship" as fact; the trial court found as fact that Defendant had stated such.

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little evidence that would support such a finding. Therefore, it is improper to consider any “nervousness” on the part of Ms. Perez.

Nor did the trial court find as fact that Defendant and Ms. Perez gave inconsistent stories. The State argues that Defendant and Ms. Perez gave inconsistent stories regarding their relationship to each other, and the majority states that the trial court’s findings “demonstrate a totality of the circumstances characterized by uncertainties and inconsistencies[.]” However, the trial court made no finding that Defendant’s “story” was inconsistent with Ms. Perez’s “story.” The trial court merely found that Defendant first stated she and Ms. Perez were cousins and later stated that they called each other cousins “based on their close and long term relationship.” Ms. Perez gave the exact same “story” to Sergeant Cass, though this is not mentioned in the trial court’s findings of fact. *See State v. Myles*, 188 N.C. App. 42, 50-51, 654 S.E.2d 752, 758 (2008).

Ms. Perez *volunteered* that she did not know the name of their destination city, but told Sergeant Cass that Defendant did, and had the destination circled on a map. When Sergeant Cass asked Defendant their destination, she answered readily, and showed him the map Ms. Perez had mentioned. Ms. Perez’s knowledge of the travel information can reasonably be termed vague, but it does not appear to be unreasonable, and the trial court made no such finding. Defendant’s knowledge of their travel information was not vague. Defendant told Sergeant Cass where they were driving from, that they were headed to Myrtle Beach, showed him a map, and even asked for the best route.

BLOC informed Sergeant Cass that the SUV was not stolen and there was nothing otherwise suspicious about the SUV; and Sergeant Cass testified he “knew that [Defendant] was . . . going to purchase the vehicle from her friend.” There is nothing inherently suspicious about a person driving a friend’s vehicle, especially when that person has made arrangements to purchase the vehicle from the friend. I contrast these facts to those in *McClendon*, upon which the State relies:

Trooper Lisenby lawfully stopped defendant and asked for his driver’s license and registration. Defendant could not find the registration, and instead produced the title to the car. The title, however, was in the name of Jema Ramirez, instead of defendant’s name. Trooper Lisenby was entitled to inquire further regarding the ownership of the car to determine whether it was stolen. It was defendant’s responses to questions asked during such inquiry

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that aroused Lisenby's, and later Sergeant Cardwell's, suspicions that criminal activity was afoot.

Upon reviewing the evidence and the trial court's findings, we find several factors that gave rise to reasonable suspicion under the totality of the circumstances. First, when asked who owned the car, defendant said his girlfriend, but would not give Trooper Lisenby her name. It was only after defendant had been asked several times that he said his girlfriend "Anna" owned the car. When Trooper Lisenby inquired "Anna?" defendant said "I think so." However, "Anna" was not the name listed on the title as the owner of the car. Second, although defendant seemed unsure of who owned the car, the address of the owner listed on the title and the address on defendant's driver's license were the same, which would seem to indicate that they both lived in the same residence. Third, defendant was extremely nervous, sweating, breathing rapidly, sighing heavily, and chuckling nervously in response to questions. He also refused to make eye contact when answering questions. We conclude that these facts, when viewed in the totality of the circumstances, allowed the officers to form a reasonable suspicion that criminal activity was afoot.

McClendon, 350 N.C. at 637, 517 S.E.2d at 133. I do not find the facts in the present case to be analogous to those in *McClendon*; and the facts in this case provide far less than those in *McClendon* in support of a finding of reasonable suspicion.

I find that the facts in the present case are more analogous to those in *State v. Pearson*, 348 N.C. 272, 498 S.E.2d 599 (1998); *Myles*, 188 N.C. App. 42, 654 S.E.2d 752; and *Falana*, 129 N.C. App. 813, 501 S.E.2d 358, where our appellate courts reversed the denial of the defendants' motions to suppress, and remanded for the trial courts to vacate the judgments entered. The majority finds *Falana* and *Myles* distinguishable. Our Court in *Falana* relied on *Pearson* in reaching its holding. In *Pearson*, the following facts were relied upon to support the officer's reasonable suspicion:

[The officer] observed that the defendant was nervous and had a rapid heart rate. . . . The defendant told Trooper Cardwell that he had had little sleep the previous night. He said that he and his fiancée had left the Charlotte area the day before and spent the night at his parents' home near the Virginia state line.

Trooper Cardwell next spoke with the defendant's fiancée in the defendant's car while the defendant remained seated in the patrol

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car. She said that the couple had spent the previous night in New York visiting the defendant's parents. On each trip to and from the defendant's car, Trooper Cardwell looked into the car for drugs or weapons. He saw nothing suspicious.

Pearson, 348 N.C. at 274, 498 S.E.2d at 599.

We cannot hold that the circumstances considered as a whole warrant a reasonable belief that criminal activity was afoot or that the defendant was armed and dangerous. The defendant was stopped at 3:00 p.m. on an interstate highway. Both officers testified that he was polite and cooperative. He had a slight odor of alcohol but not enough to be charged with driving while impaired. This should not give rise to a reasonable suspicion of criminal activity.

The nervousness of the defendant is not significant. Many people become nervous when stopped by a state trooper. The variance in the statements of the defendant and his fiancée did not show that there was criminal activity afoot. The officers testified the defendant was frisked because it was standard procedure to do so when a vehicle is searched.

The officers had never before encountered the defendant. They were not aware of any criminal record or investigation for drugs pertaining to him. The defendant was polite and cooperative. The bundle in his pants was not obvious and was not noticed by either officer.

Id. at 276, 498 S.E.2d at 600-01. Unlike in the case before us, the defendant in *Pearson* and his fiancée clearly gave conflicting statements concerning where they had spent the previous night. The defendant in *Pearson* was found to have been nervous and to have had a rapid heart rate. Nervousness was not a factor in the trial court's findings of fact in the present case. As in *Pearson*, Sergeant Cass had no outside information concerning Defendant or Ms. Perez to suggest they might be involved in criminal activity. Sergeant Cass, though making multiple trips between Ms. Perez and the SUV never noticed any suspicious items on Defendant, on Ms. Perez, or in the SUV.

In *Myles* our Court held that signs of extreme nervousness—the driver's "heart was beating unusually fast[;]" and the driver "was sweating profusely and wiped his hands on his pants, despite the fact it was a cool day and [the officer] had the air conditioner running in his car"—and arguably inconsistent stories given by the defendant and his cousin, were not sufficient to give rise to a reasonable suspi-

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cion. *Myles*, 188 N.C. App. at 43-44, 50-51, 654 S.E.2d at 753-54, 58. In rejecting the argument that contradictory statements existed, our Court stated:

However, Gilmore's [the arresting officer's] testimony revealed defendant and Croon's [the defendant's cousin's] stories were not contradictory. Gilmore testified as follows:

Q: But did you make an issue of the fact that the [rental] car was late being turned in as being one of your concerns?

A: Yes, sir, I just asked [Croon]. I said the car was supposed to be back yesterday, and he said well, he called and extended it, which is nothing uncommon.

. . . .

Q: And what did you discuss with [the defendant]?

A: . . . I also asked him as far as the extension on the rental agreement. [Defendant] told me he had extended it until the following Wednesday. . . . I believe that's basically the gist of the conversation with him.

Q: And your basis for searching the car for the determination you made to search the car was exactly what?

A: . . . [Croon] was asked how long they would be staying in Fayetteville, he told me that—he initially told me about a week. When he told me that, he kind of looked down. . . . And throughout that conversation he told me that he was going to be looking for employment there and he may be staying if he did find it. When I questioned [the defendant] about the rental agreement as far as the length of the stay and when the rental agreement or the rental car was supposed to be turned back in, when he told me—first he told me it was supposed to be back on Wednesday, but then he told me he was supposed to stay for a week.

Thus, both [the] defendant and Croon told Gilmore the rental agreement had been extended until the following Wednesday. Croon told Gilmore initially they were staying in Fayetteville a week but then later said he *may* stay longer if he found employment. [The defendant] corroborated Croon's story by saying they were "supposed to stay [in Fayetteville] for a week."

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Id. at 50-51, 654 S.E.2d at 758. I find the “inconsistencies” argued by the majority to be analogous to the “inconsistencies” argued and discounted in *Myles*. Defendant and Ms. Perez stated they were cousins, then clarified that they just called each other cousins. Ms. Perez stated that they were coming from Houston, and that she did not know their destination, but Defendant did. Defendant corroborated this information through her own statements and actions. In the present case, there was no finding of nervousness, much less a finding of extreme nervousness, and only superficially contradictory statements that were later clarified by subsequent events.

The first finding in support of the trial court’s conclusion was the reason for the stop itself—Sergeant Cass “observed a white SUV with what appeared to be illegally tinted windows.” When considered in context, Ms. Perez’s uncertainty concerning their destination, Defendant’s statement that she and Ms. Perez were cousins, immediately followed by her explanation that they were not actually related by blood but were so close that they called each other cousins, the fact that the SUV was owned by a third party, and the apparently “illegally tinted windows,” do not support a conclusion that reasonable suspicion existed that criminal activity might be afoot. When all of the trial court’s relevant findings of fact are considered, I would hold they do not support its conclusion that a reasonable suspicion existed justifying the extended detention of Defendant. I would reverse the trial court’s denial of Defendant’s motion to suppress.

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GENE A. BARFIELD AND WIFE, JUDY S. BARFIELD; STEVEN DOUGLAS MOSS AND WIFE, LUANN PENNINGER MOSS; JOHNATHAN EDWARD HARDISON AND WIFE, PAMELA B. HARDISON; AND WILLIAM R. COCHRAN AND WIFE, VIKKI S. COCHRAN, PLAINTIFFS V. ELIEZER MARTY MATOS, DEFENDANT/THIRD-PARTY PLAINTIFF V. COY L. McMANUS AND WIFE, MARGARET C. McMANUS; THE REVOCABLE TRUST OF COY L. McMANUS, AS AMENDED; THE REVOCABLE TRUST OF MARGARET C. McMANUS, AS AMENDED; SCOTT WHITTLE AND WIFE, ELISABETH R. WHITTLE; AND PAUL GAVRILYUK AND WIFE, ALENA I. GAVRILYUK, THIRD-PARTY DEFENDANTS

No. COA10-1090

(Filed 16 August 2011)

1. Appeal and Error—scope of review—complex real estate transaction with multiple orders

In a case involving a complicated set of real estate transactions, restrictive covenants, multiple claims and orders, and a prior appeal, the scope of review was limited to an order entered on 4 August 2009 and not an order entered on 9 December 2008.

2. Appeal and Error—jurisdiction—first appeal interlocutory—summary judgment while appeal pending—final order

The trial court had jurisdiction to hear summary judgment motion during the pendency of an appeal in that case where the appeal was interlocutory and non-appealable. Furthermore, the Court of Appeals had jurisdiction to hear an appeal from the summary judgment order where timely notice of appeal was given.

3. Appeal and Error—jurisdiction—notice of appeal

The appellate court did not have jurisdiction to review a 9 December 2008 summary judgment order where notice of appeal was never given.

4. Appeal and Error—standard of review—summary judgment—prior order with findings

The standard of review for an 8 April 2010 summary judgment order was *de novo*, although complicated by a 4 August 2009 order. The 4 August order was for a permanent injunction after a bench trial and included findings of fact. Those findings were binding on appeal and only the conclusions were considered *de novo*.

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5. Appeal and Error—notice of appeal not given—arguments dismissed

Arguments as to the applicability of restrictive covenants were dismissed for lack of a notice of appeal or grounds for review by *certiorari*.

6. Appeal and Error—preservation of issues—legal authority—not presented

An argument concerning the application of restrictive covenants was abandoned on appeal where no legal authority or argument as to an abuse of discretion was presented.

7. Deeds—restrictive covenants—matter of record

The trial court properly granted summary judgment for the third-party defendants, the McManuses, on a claim for negligent misrepresentation in a restrictive covenants case. Mr. McManus told Matos, the third-party plaintiff, that there were no restrictions on the property preventing farm use and Matos did not realize that he was buying property subject to restrictions of any sort, but the restrictive covenants were a matter of record which should have been discovered by Matos's attorney.

8. Deeds—restrictive covenants—breach of warranty claim

The trial court properly granted summary judgment dismissing a claim for breach of warranty of title arising from restrictive covenants that were not discovered until after the sale of the land but were of record.

Appeal by defendant/third-party plaintiff from order entered on or about 8 April 2010 by Judge Timothy Lee Patti in Superior Court, Mecklenburg County. Heard in the Court of Appeals 9 February 2011.

Bernhardt & Strawser, P.A., by Scott I. Perle and Griffin, Brunson & Wood, L.L.P., by N. Deane Brunson, for plaintiff appellees.

Johnston, Allison & Hord, P.A., by Patrick E. Kelly and Kathleen K. Lucchesi, for defendant/third-party plaintiff appellant.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, P.A., by James E. Scarbrough, for third-party defendant appellees.

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STROUD, Judge.

Third-party defendant appellees, the McManuses, argue that this case arises from “two unintentional errors” made “by four honest men: namely, McManus and his surveyor and Matos and his attorney.” As a result of these unintentional errors, defendant/third-party plaintiff Eliezer Marty Matos (“Matos”) purchased land which was subject to restrictive covenants without realizing that the land was restricted. This is the unavoidable result of the rule established by *Reed v. Elmore*, 246 N.C. 221, 98 S.E.2d 360 (1957) which has been criticized by courts and commentators alike, but our courts are bound by it as precedent. However, as Matos failed to appeal from the trial court’s order addressing the disputed restrictions, we cannot address Matos’ arguments as to *Reed* and the disputed restrictions. Accordingly, we affirm the trial court’s orders granting a permanent injunction in favor of plaintiffs and summary judgment, dismissing Matos’s claims against the McManuses.

I. Background

This case arises from a rather complex series of real estate transactions related to the subdivision of land originally owned by Coy L. McManus and his wife, Margaret C. McManus (referred collectively as “the McManuses”).

A. The Creation of Tract 7

The McManuses acquired a 34.523 acre tract of land (“the land”) in 1965; approximately 7 acres of the land is located in Cabarrus County and the rest is in Mecklenburg County. On 2 February 2001, the McManuses each conveyed his or her interest in the land to their revocable trusts, the Revocable Trust of Coy L. McManus, dated 2 October 2000 and the Revocable Trust of Margaret C. McManus, dated 2 October 2000 (“the McManus trusts”), but the deed to the McManus trusts was recorded only in Cabarrus County and not in Mecklenburg County. Thus, the record owner of the land in Mecklenburg County remained the McManuses individually; the McManus trusts were the record owners of the land in Cabarrus County.

In 2005, the McManuses decided to subdivide their land and sell some of it. Mr. McManus had a surveyor prepare a map (“the first map”) dividing the land into 9 tracts, numbered 1 through 9, although the first map was never recorded. In April 2005, Mr. McManus put up a “for sale” sign on the land, and Matos saw the sign and stopped to talk to Mr. McManus about purchasing Tracts 8 and 9. Matos told Mr.

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McManus that he wanted to use the tracts as a farm, and Mr. McManus told Matos that there were no restrictions on the land that would prevent farm use.

On 26 May 2005, a new map was prepared (“the second map”) and recorded with both the Cabarrus and Mecklenburg County Registers of Deeds. Although the second map also subdivided the same 34.523 acres, the second map divided the land into only seven tracts instead of nine. On the second map, the tracts which were designated as Tracts 8 and 9 on the first map were combined into one tract, now called Tract 7. Tracts 6 and 7 on the first map were combined into one tract, designated as Tract 6.

B. The Contract with Matos

On 26 May 2005, the McManuses individually and Matos entered into a contract for the sale of Tract 7, with an area of 12.458 acres, as shown on the second map. It stated that Tract 7 was located entirely in Mecklenburg County. The contract also included a provision that there were no restrictions on the use of the property preventing “[r]esidential or farm use.”

C. The Moss Deed and Restrictive Covenants

Prior to the closing of the sale of Tract 7 to Matos, on 16 June 2005, the McManuses individually, but not the McManus trusts, conveyed Tract 2 as shown on the second map to Steven Moss and his wife Luann Moss. Tract 2 was located in both Mecklenburg and Cabarrus counties. The Moss deed was recorded in Cabarrus County on 16 June 2005 and in Mecklenburg County on 21 June 2005. The Moss deed included restrictive covenants applicable to Lots 1 through 7 of the second map, identified by reference to the plat recorded at map book 46, Page 92 in Cabarrus County and map book 43, page 685 in Mecklenburg County. The restrictive covenants state as follows, in pertinent part:

Tracts 1 through 7 shall be held, transferred, sold, conveyed and occupied subject to the covenants and restrictions set forth all of which shall run with the land and be binding on all persons owning any right, title or interest in any of said parcels, their heirs, successors and assigns, and shall inure to the benefit of, and be enforceable by, each parcel owner.

The covenants generally include the following restrictions: (1) all homes constructed on the property must be “stick built[;]” (2) dwellings, outbuildings, and “any accessory feature to the dwelling or

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any other structure, including fencing and pools[,]” must be approved in advance by “the then owners of tracts 1 and 2 together with Mr. or Mrs. Coy L. McManus or the assignee of Mr. or Mrs. McManus[;]” (3) only one residence can be constructed on each tract, with at least 3000 square feet of heated floor space; (4) exterior finishes shall be “brick veneer, stone, cedar shakes, cement siding, Hardie plank or other approved pre-finished sidings;” (5) “flared end concrete pipe” must be used with gravel driveway before a house is built; (6) no chain link fences are permitted and other approved fencing shall not be located closer to the front of the house than the rear exterior wall; (7) “[i]llegal, noxious, and/or harmful” activities are prohibited; and (8) the covenants may be amended by a majority vote of tract owners, but any amendment must be approved by either Mr. or Mrs. McManus “for so long as they shall own property on Ben Black Road, McManus Road, or Belt Road.”

D. The First Matos Deed

On 14 July 2005, the McManuses individually, but not the McManus trusts, conveyed Tract 7 to Matos by a general warranty deed prepared by Matos’ attorney, William Hamel. Mr. Hamel performed the title search in Mecklenburg County but failed to discover the restrictive covenants contained in the Moss deed. In his deposition, Mr. Hamel admitted that he should have found these restrictions but the person doing the title search failed to read or obtain a copy of the entire Moss deed. No restrictive covenants are specifically mentioned in the Matos deed, although the deed did state, in pertinent part, as follows:

Title to the property hereinabove described is subject to the following exceptions:

The lien of all valid and enforceable easements, rights-of-way, restrictions, covenants, conditions, and restrictions of record; except, however, this instrument does not reimpose any of the same.

The Matos deed was also executed by Matos as grantee.

E. Deeds of Other Tracts

On 16 November 2005, the McManuses individually and as trustees of the McManus trusts conveyed Tract 1 to Gene and Judy Barfield. Tract 1 is located in both Cabarrus and Mecklenburg counties, so this deed was recorded in both counties. The deed includes the same restrictive covenants as the Moss deed. On 16 November 2005, the McManuses conveyed Tract 3 to Johnathan and Pamela

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Hardison. Tract 3 is located in both Cabarrus and Mecklenburg counties, so this deed was recorded in both counties. This deed includes the same restrictive covenants as the Moss deed. On 5 December 2005, the McManuses deeded Tract 5 to William and Vikki Cochran. Tract 5 is entirely in Mecklenburg County, and the deed was recorded in Mecklenburg County only. This deed includes the same restrictive covenants as the Moss deed. On 2 February 2006, the McManuses deeded Tract 4 to James and Elisabeth Whittle. As Tract 4 is in both counties, the deed was recorded in both counties, and this deed also includes the same restrictive covenants as the Moss deed. On 13 June 2007 the McManuses conveyed Tract 6 to Pavil and Alena Gavriluk. As this tract is entirely in Mecklenburg County, the deed was recorded in Mecklenburg County only and it includes the same restrictive covenants as the Moss deed. Thus, the deeds for tracts one, three, four, five, and six included the same restrictive covenants as the Moss deed.

F. The Third Map and the Second Matos Deed

On 27 October 2005, a revised survey of the entire subdivision was recorded in both Mecklenburg County, at map book 47, page 101 and Cabarrus County, at map book 44, page 626 (“the third map”). The third map established new boundaries for Tracts 1 and 7, carving out a 1.447 acre portion of Tract 1 as shown on the second map and adding this portion to the land Matos had already purchased, Tract 7. The enlarged and newly constituted Tract 7 is located in both Cabarrus and Mecklenburg counties. On 24 August 2006, the McManuses individually and the McManus trusts conveyed the 1.447 acre tract as shown on the third map to Matos by a general warranty deed which was recorded in both counties. This deed did not specifically reference any restrictions, but just as the first Matos deed, stated as follows:

Title to the property hereinabove described is subject to the following exceptions:

The lien of all valid and enforceable easements, rights-of-way, restrictions, covenants, conditions, and restrictions of record; except, however, this instrument does not reimpose any of the same.

G. The Dispute

In July of 2007, Matos began installing “barbed wire fencing on his property to contain his cows and horses.” On 16 August 2007,

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plaintiffs' counsel sent a letter to Matos, notifying him that his fence was in violation of the restrictive covenants and asking him to "cease and desist" from installing the fencing and to remove the fence posts already installed by 27 August 2007; Matos instead "completed construction of the fencing."

On 9 October 2007, Gene and Judy Barfield, Steven and Luann Moss, Johnathan and Pamela Hardison, and William and Vikki Cochran (referred to collectively as "plaintiffs") filed a complaint against Matos for breach of the restrictive covenants, and requesting preliminary and permanent injunctive relief. On 4 January 2008, Matos filed his answer, denying plaintiffs' claims, raising several defenses, and making counterclaims for (1) a declaratory judgment that "both the 12.45 acre and 1.47 acre tracts conveyed to him by the McManuses are free and clear of the Restrictions[;]" and (2) for "equitable reformation of the Deed and/or maps of record to reflect the original intent of the McManuses and Matos that the Matos properties be free of the Restrictions." On or about 28 January 2008, plaintiffs filed a motion to dismiss Mato's counterclaims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) and (7). On or about 29 February 2008, Matos filed a motion to further amend his answer and counterclaim and to join necessary parties.

On 5 March 2008, the trial court entered an order granting plaintiffs' motion for a preliminary injunction and Matos' motion to join additional necessary parties, the McManuses and the McManus trusts, as well as the Whittles and the Gavrilyuks, who had purchased tracts of the subdivision after Matos' second deed. Pursuant to that order, on 4 April 2008, Matos filed an amended answer including his counterclaims and third-party claims against plaintiffs, the McManuses, and the McManus trusts for (1) declaratory judgment (2) reformation, (3) recession, (4) negligent misrepresentation, and (5) breach of warranty. On 16 June 2008, plaintiffs filed a motion to dismiss and strike defendant's counterclaims and asserting crossclaims for breach of covenant and negligent misrepresentation against the McManuses, and the McManus trusts.¹ On 19 June 2008, the McManuses and the McManus trusts, as third-party defendants, filed their answers to defendants' third-party claims, which included a

1. Although, Matos, in his answer and third-party complaint, and plaintiffs in their crossclaims, included the Whittles and the Gavrilyuks as third-party defendants, neither makes any allegations against these parties and these claims are restricted to third-party defendants the McManuses and the McManus trusts. Matos in his answer states that the Whittles and Gavrilyuks had been named as third-party defendants "solely to put them on notice of the pending action and because they have been deemed by the Court to be necessary parties in this action."

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motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), and raised the affirmative defenses of contributory negligence, “cure of title by covenant[,]” failure to mitigate damages, and estoppel and waiver. On 16 July 2008, the McManuses and the McManus trusts, as third-party defendants, filed their answers to plaintiffs’ crossclaims, raising the affirmative defenses of contributory negligence, estoppel and waiver, and lack of standing.

On 16 October 2008, plaintiffs filed a motion for partial summary judgment on Matos’ counterclaims for declaratory judgment, reformation, and rescission; this motion was heard by the Honorable Robert C. Ervin on 10 November 2008. On 3 November 2008, the McManuses and the McManus trusts filed a motion for summary judgment as to Matos’ third-party claims and plaintiffs’ crossclaims. On 24 November 2008, plaintiffs filed a motion for permanent injunction and release of bond. On 4 December 2008, the McManuses’ motion for summary judgment and plaintiff’s motion for permanent injunction and release of bond were scheduled for hearing before the Honorable Robert P. Johnston. However, Judge Ervin had not yet ruled upon the matters from the 10 November 2008 hearing. Judge Johnston entered a consent order which held that the McManuses’ “Motion for Summary Judgment and Plaintiffs’ Motion for Permanent Injunction and Release of Bond shall be held in abeyance by the Court until such time as the Partial Summary Judgment Order has been entered by Judge Ervin and, after entry of such Order, the parties may re-calendar these motions.” The partial summary judgment order referenced by the consent order is the 9 December 2008 order, in which Judge Ervin granted partial summary judgment in favor of plaintiffs, ordering that plaintiffs were entitled to judgment as a matter of law that the restrictive covenants applied to the Matos properties. The trial court also dismissed Matos’s counterclaims for declaratory judgment, reformation, and rescission of the Matos deeds. No notice of appeal has ever been filed as to this order.

The trial court entered an order for permanent injunction on 4 August 2009, which contains detailed findings of fact regarding the restrictive covenants and ordered Matos to “remove any and all structures, including without limitation fencing, on either the First Matos Property or the Second Matos Property which have been constructed in violation of the terms and conditions of the Restrictions.”² On 11

2. The order also provided that the parties agreed that the fencing would remain in place pending appeal, “with the understanding that Defendant Matos will take no further action to develop his Property in violation of the Restrictions during the pendency of the appeal.”

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August 2009, Matos filed a notice of appeal from the 4 August 2009 order; this appeal was ultimately dismissed as interlocutory by this Court on 3 August 2010, in *Barfield v. Matos*, ___ N.C. App. ___, 698 S.E.2d 556, 2010 N.C. App. LEXIS 1423, at *9-10 (N.C. App. Aug. 3, 2010) (unpublished) (“Here, the trial court awarded partial summary judgment for Plaintiffs and entered an order for permanent injunction. The trial court’s order for partial summary judgment only disposed of Defendant’s counterclaims for declaratory judgment, rescission, and reformation. The record before us does not reflect any resolution of Plaintiffs’ claims against Defendant for monetary damages, Plaintiffs’ crossclaims against the Third-Party Defendants seeking monetary damages for alleged breach of covenant and negligent misrepresentation, or Defendant’s crossclaims against the Third-Party Defendants also seeking monetary damages for alleged breach of warranty and negligent misrepresentation. Based on the record before this Court, these actions remain before the trial court for further disposition, and thus, the trial court’s order for permanent injunction is interlocutory.”) (“the first appeal”).

While the prior interlocutory appeal was pending before this Court, on 30 March 2010, the trial court heard the McManuses’ motion for summary judgment, which had been “held in abeyance” by the 4 December 2008 consent order. In that motion, the McManuses requested dismissal of Matos’ claims for negligent misrepresentation and breach of warranty and the plaintiffs’ crossclaims for breach of covenant and negligent misrepresentation. The trial court executed an order granting the McManuses’ motion for summary judgment on 8 April 2010 and, on 26 April 2010, Matos filed notice of appeal from “the Order for Summary Judgment entered on April 8, 2010[.]” On or about 3 June 2010, Matos filed a “notice of voluntary dismissal without prejudice pursuant to Rule 41 of his claims in this action against Third Party Defendants Scott Whittle, Elizabeth R. Whittle, Paul Gavrilyuk and Alena Gavrilyuk.” On 5 August 2010, plaintiffs filed a notice of voluntary dismissal of their “claim for damages against [Matos] and its [sic] crossclaims against [the McManuses and the McManus trusts.]

II. Scope of review

[1] Although not addressed by any of the briefs, we must first consider the proper scope of this appeal. Matos’ issues on appeal as noted in his brief specifically relate to (1) the 9 December 2008 order for partial summary judgment; (2) the 4 August 2009 order granting permanent injunction; and (3) the 8 April 2010 order for summary

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judgment in favor of the McManuses.³ Yet, Matos has appealed only one order: the 8 April 2010 summary judgment order, which granted summary judgment in favor of the McManuses. We noted in the first appeal that Matos appealed from the “Order for Permanent Injunction and Release of Bond entered on July 24, 2009” but did not appeal the 9 December 2008 partial summary judgment order, which concluded “as a matter of law that the relevant restrictive covenants in this action do apply to and encumber” all of Matos’ real property in dispute in this action. *See Barfield*, 2010 N.C. App. LEXIS 1423, at *13 (unpublished). Thus, we did not consider the merits of the 9 December 2008 order in the first appeal. Matos gave his second notice of appeal on 26 April 2010, but this notice of appeal did not include the 9 December 2008 order. The notice of appeal also did not include the 4 August 2009 order granting permanent injunction, which was the subject of the first appeal, but that appeal was still pending at the time; the opinion was filed on 3 August 2010. Because notice of appeal is a jurisdictional requirement, we must determine which issues we have jurisdiction to consider.

A. Petition for Certiorari

In recognition of the problem caused by the lack of a notice of appeal from the 4 August 2009 order, on 13 October 2010, Matos filed a petition for writ of certiorari requesting that we “reconsider on the merits Appellant Matos’ appeal in No. 09-1711 at the same time it considers Appellant Matos’ appeal in No. COA 10-1090.” Matos notes that he timely filed notice of appeal from the 4 August 2009 order in the first appeal, and that he timely filed notice of appeal from the 8 April 2010 order in this appeal. Although the text of Matos’ petition specifically identifies these orders as the orders for which review is sought, he attached as exhibits to the petition the 9 December 2008 order and the 4 August 2009 orders as those for which review is sought. The petition does not address why notice of appeal was never given, in either appeal, as to the 9 December 2008 order.

Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure governs when we may grant review by certiorari:

3. We note that Matos identifies the orders by the date upon which they were executed by the trial court instead of the date upon which they were filed. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 58 (2009), “a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.” We have therefore identified the orders by the date of filing as the date of entry, except as to the 8 April 2010 order, because our record does reflect the date of filing of this order.

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The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

N.C.R. App. P. 21(a)(1).

Although we have no authority to “reconsider” the issues determined by this Court in the first appeal, as Matos requests, we believe that the substance of Matos’ petition is a request to review the 4 August 2009 order for permanent injunction in this appeal. As noted above, the first appeal was still pending when the second notice of appeal was given, so no appeal was noticed as to the 4 August 2009 order in this appeal. We did not review the merits of the 4 August 2009 order in the first appeal as it was dismissed as interlocutory. We believe that this falls within Rule 21(a)(1), as Matos lost his “right to prosecute an appeal” as to the 4 August 2009 order “by failure to take timely action” by filing a second notice of appeal as to the same order. We therefore grant Matos’ petition for certiorari as to the 4 August 2009 order.

As noted above, the petition for certiorari includes as an attachment the 9 December 2008 order as well, although the text of the petition does not address it specifically. The petition states that

Appellant Matos’ Petition for Writ of Certiorari arises as a result of the North Carolina Court of Appeals’ dismissal on 3 August 2010 of Appellant Matos’ timely appeal from an Order entered by Judge Robert C. Ervin in Mecklenburg County Superior Court on 4 August 2009 granting partial summary judgment in favor of the Plaintiff and imposing a permanent injunction against Defendant/Appellant Matos. The stated reason for the dismissal was that the appeal was interlocutory.

....

Appellant Matos respectfully asks the Court in its discretion and without prejudice to the Plaintiffs or Third Party Defendants to allow him to bring to the Court for reconsideration on the merits the issues arising from his appeal of the first Order entered on 4 August 2009.

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However, the petition later identifies Exhibit A to the petition as “a copy of the Order entered by Judge Ervin sought to be reviewed[,] but Exhibit A includes two orders, the 9 December 2008 order and the 4 August 2009 order. The “Defendant/Appellant’s Notice of Appeal at issue in this first appeal” is attached as Exhibit B, but this notice identifies only “the Order for Permanent Injunction and Release of Bond entered on July 24, 2009 [sic]” and not the 9 December 2008 order. As noted above, no notice of appeal was given as to the 9 December 2008 order in the first appeal. The petition does not state that Matos lost his right to prosecute an appeal as to the 9 December 2008 order by failure to take timely action, even if we construe the petition as requesting review of the 9 December 2009 order. Therefore, Matos has not shown any grounds permitting review by certiorari as to the 9 December 2008 order, and his petition is denied as to this order.

B. Appeal of 8 April 2010 Summary Judgment Order

[2] We first note that the trial court had jurisdiction to proceed with hearing on the McManuses’ motion for summary judgment during the pendency of the first appeal, which we determined was interlocutory and non-appealable. We have stated that “[w]here a party appeals from a nonappealable interlocutory order, however, such appeal does not deprive the trial court of jurisdiction, and thus the court may properly proceed with the case.” *RPR & Associates, Inc. v. The University of North Carolina*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 514 (2002), *appeal dismissed and disc. review denied*, 357 N.C. 166, 579 S.E.2d 882 (2003). As all of the pending claims, crossclaims, and counterclaims as to all parties have been disposed of either by order or by voluntary dismissal, the 8 April 2010 summary judgment order is a final and appealable order. *See Goodman v. Holmes & McLaurin Attorneys at Law*, 192 N.C. App. 467, 471, 665 S.E.2d 526, 530 (2008) (noting that interlocutory orders are not immediately appealable but “[p]laintiff’s voluntary dismissal of [the] remaining claim [did] not make the appeal premature but rather ha[d] the effect of making the trial court’s grant of partial summary judgment a final order[,]” and thus appealable. (citation and quotation marks omitted)). Matos gave timely notice of appeal as to the 8 April 2010 summary judgment order, so we have jurisdiction to consider this portion of the issues on appeal.

C. 9 December 2008 Order for Partial Summary Judgment

[3] The 9 December 2008 order for partial summary judgment is the most damaging order, from Matos’ legal perspective in this case, but no appeal has ever been taken from this order.

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Compliance with Rule 3 is required for this Court to have jurisdiction to consider plaintiff's appeal. *See Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) ("In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure.") However,

we may liberally construe a notice of appeal in one of two ways to determine whether it provides jurisdiction . . . First, a mistake in designating the judgment or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake. Second, if a party technically fails to comply with procedural requirements in filing papers with the court, the court may determine that the party complied with the rule if the party accomplishes the functional equivalent of the requirement.

Dafford v. JP Steakhouse LLC, ___ N.C. App. ___, ___, 709 S.E.2d 402, 405 (2011).

In the first appeal, we noted that we had no jurisdiction to consider the 9 December 2008 order, as no notice of appeal had been filed. *See Barfield*, 2010 N.C. App. LEXIS 1423, at *13 (unpublished). We thus made no determination as to the 9 December 2008 order in the first appeal. We are not prevented by the doctrine of the law of the case from considering these issues, if properly presented to us in this appeal. *See Goetz v. North Carolina Dept. of Health & Human Services*, ___ N.C. App. ___, ___, 692 S.E.2d 395, 402-03 ("The law of the case doctrine has been summarized as follows: The doctrine of the law of the case generally prohibits reconsideration of issues which have been decided by the same court, or a higher court, in a prior appeal in the same case. Provided that there was a hearing on the merits and that there have been no material changes in the facts since the prior appeal, such issues may not be re-litigated in the trial court or reexamined in a second appeal."), *disc. review denied*, 364 N.C. 325, 700 S.E.2d 751 (2010). In addition, Matos' proposed issues on appeal do not clearly set forth the proposed issues on appeal we should address as to the 9 December 2008 order, although several of his proposed issues do mention this order. Specifically, Matos sets forth two sets of proposed issues: the first, "with regard to the 24 July 2009 [sic] order" and the second, "with regard to the 27 April 2010

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[sic] order.” Perhaps Matos did not set forth proposed issues on appeal with regard to the 9 December 2008 order, despite the fact that several of the proposed issues refer to that order, because no notice of appeal was filed as to this order. However, we do not have jurisdiction to consider an appeal as to the 9 December 2008 order as no notice of appeal has ever been given. As discussed above, no grounds for review of the 9 December 2008 by certiorari exist. Therefore, we have no jurisdiction to review the 9 December 2008 order.

In conclusion, we have jurisdiction to review only the 4 August 2009 order for permanent injunction and release of bond and the 8 April 2010 summary judgment order.

III. Standards of Review

[4] Matos argues that our standard of review as to the 8 April 2010 summary judgment order is *de novo*, and this is correct, although the true standard of review in this case is somewhat more complicated because of the 4 August 2009 order.

We review a trial court’s order for summary judgment *de novo* to determine whether there is a “genuine issue of material fact” and whether either party is “entitled to judgment as a matter of law.” *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citing N.C.G.S. § 1A-1, Rule 56(c)).

Robins v. Town of Hillsborough, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007). Further, the “evidence is viewed in the light most favorable to the non-moving party.” *Sturgill v. Ashe Memorial Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007) (citation and quotation marks omitted), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

In his argument, Matos fails to recognize that the 4 August 2009 order granting permanent injunction is not a summary judgment order, and it includes numerous findings of fact. “[W]here the trial court decides questions of fact, we review the challenged findings of fact and determine whether they are supported by competent evidence. If we determine that the challenged findings are supported by competent evidence, they are conclusive on appeal.” *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 597, 632 S.E.2d 563, 571 (2006) (citations omitted), *appeal dismissed and disc. review denied*, 361 N.C. 350, 644 S.E.2d 5 (2007). As to the 4 August 2009 order, we also note that Matos does not argue that the findings are not supported by competent evidence; he argues only that there were

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genuine issues of material fact as to some of the facts found by the trial court. But the existence of a genuine issue of material fact is irrelevant in the context of the trial court's findings after a hearing on the merits of plaintiffs' claim for injunctive relief; the trial court considered the evidence and resolved any issues of fact as provided by the findings of fact. Although all parties had requested trial by jury in their pleadings, our record does not indicate that any party requested jury trial upon any of the factual issues presented at the hearing which resulted in the 4 August 2009 order. We have no transcript from this hearing, and as best we can tell from the record, all parties consented to a bench trial on the claim for injunctive relief, which necessarily required the trial court to make findings of fact.⁴

When a jury trial is waived, the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33, and cases cited. There is no difference in this respect in the trial of an action upon the facts without a jury under Rule 52(a)(1) and a trial upon waiver of jury trial under former G.S. 1-185. Findings of fact made by the court which resolve conflicts in the evidence are binding on appellate courts.

Blackwell v. Butts, 278 N.C. 615, 619, 180 S.E.2d 835, 837 (1971).

Therefore, the trial court's findings of fact as contained in the 4 August 2009 order are binding upon this Court. We then may consider *de novo* only whether the conclusions of law are supported by the findings of fact, *Calhoun*, 178 N.C. App. at 597, 632 S.E.2d at 571, and whether the trial court abused its discretion in granting injunctive relief.

A mandatory injunction may be an appropriate remedy to compel removal of structures erected in violation of restrictive covenants. *Crabtree v. Jones*, 112 N.C. App. 530, 534, 435 S.E.2d 823, 825 (1993), *disc. review denied*, 335 N.C. 769, 442 S.E.2d 514 (1994). The issuance of such an injunction depends upon the equities of the parties and such balancing is clearly within the province of the trial court. *Id.* "Whether injunctive relief will be granted to restrain the violation of such restrictions is a matter within the sound discretion of the trial court . . . and the appellate

4. We are also unable to determine from the record if a testimonial hearing was held or if the court considered only the depositions and other documents presented to the court. The order includes several findings which note that "Matos testified" and "McManus testified" to certain facts, but we do not know if this testimony was from a deposition or presented at the hearing.

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court will not interfere unless such discretion is manifestly abused.” 20 Am. Jur. 2d *Covenants, Conditions, and Restrictions* § 313 (1965).

Buie v. High Point Associates Ltd. Partnership, 119 N.C. App. 155, 161, 458 S.E.2d 212, 216, *disc. review denied*, 341 N.C. 419, 461 S.E.2d 755 (1995).

IV. Substantive Analysis

A. Applicability of Restrictive Covenants to Matos property

[5] Matos first argues that the trial court erred as a matter of law in its conclusion that the restrictive covenants apply to his property. The trial court made this determination in the 9 December 2008 order granting partial summary judgment. The trial court specifically ordered “[t]hat the Plaintiffs are entitled to judgment as a matter of law that the relevant restrictive covenants in this action do apply to and encumber” the Matos property. The 4 August 2009 order repeats this conclusion and also includes many findings of fact regarding the deeds and restrictive covenants. Our Supreme Court in *Reed v. Elmore* stated the following rule as to recorded restricted covenants:

if a deed or a contract for the conveyance of one parcel of land, with a covenant or easement affecting another parcel of land owned by the same grantor, is duly recorded, the record is constructive notice to a subsequent purchaser of the latter parcel. The rule is based generally upon the principle that a grantee is chargeable with notice of everything affecting his title which could be discovered by an examination of the records of the deeds or other muniments of title of his grantor.

246 N.C. 221, 231, 98 S.E.2d 360, 367 (1957) (citations and quotation marks omitted).⁵ Matos argues that *Reed* is not applicable to the facts before us in determining whether the restrict covenants in the Moss deed are applicable to his property, mostly based upon the errors in

5. *Reed* has been criticized in subsequent cases. See *Gregory v. Floyd*, 112 N.C. App. 470, 476, 435 S.E.2d 808, 811-12 (1993) (stating that the rule in *Reed* “charges purchasers with constructive notice of all that ‘could be discovered by a search of the deeds and records, whether within the direct chain of conveyances or outside the direct chain of conveyances. . . . [.]’ When this requirement is considered with the rule existent that deeds are construed as a whole and meaning is given to every part without reference to formal divisions of the deed, it becomes obvious that the title searcher is given an entirely impracticable and unreasonable task.” (quoting J. Webster, *Webster’s Real Property Law in N.C.* § 503 at 687-88 (Hetrick and McLaughlin, rev. ed. 1988)); *Stegall v. Robinson*, 81 N.C. App. 617, 620-21, 344 S.E.2d 803, 805-06, *disc. review denied*, 317 N.C. 714, 347 S.E.2d 456 (1986). However, the rule in *Reed* is still good law.

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recording of the deeds as noted above. Yet, also as discussed above, we do not have jurisdiction to review the trial court's determination that the restrictive covenants apply to the Matos property, in the absence of a notice of appeal or grounds for review by certiorari. Matos' arguments as to the applicability of the restrictive covenants are therefore dismissed.

B. 4 August 2009 Order for Permanent Injunction

[6] Matos argues that even if the restrictions apply to his property, they “do not absolutely prohibit the construction of a fence. They do state that if a fence or other structure is to be constructed, it must first be approved by selected owners in the subdivision. Why only owners of Tracts 1 and 2 should have veto authority is unclear” He further argues that “[g]iven that Matos is operating a farm, complete with livestock, under the Farm Program, he is obligated to have fencing—and not just any type of fencing, but barbed wire fencing or other fencing adequate to contain horses, cows or other farm animals.”

As discussed above, Matos does not argue that any of the trial court's findings of fact are not supported by the evidence, and thus they are binding on appeal. The trial court found that Matos “wanted Tracts 8 and 9 consolidated to ensure the land would qualify for farm use[.]” The trial court also found that

22. The Restrictions state in Paragraph 2 that, “No dwelling, out-building or any accessory feature to the dwelling or any other structure, including fencing and pools, shall be located and constructed upon any tract until the completed construction plans (the “Plans”) are approved by the then owners of tracts 1 and 2 together with Mr. or Mrs. Coy L. McManus or the assignee of Mr. or Mrs. McManus.”

23. The Restrictions state in Paragraph 3 that, “Only One residence shall be permitted on each tract and no residence shall be constructed or permitted to remain on any tract unless it shall have at least 3000 square feet of heated floor space.”

24. Defendant Matos is currently using the First and Second Matos Properties as a farm. Defendant Matos has indicated a desire in the future to subdivide his property, install an access road, and develop high-end residential homes on not less than one acre tracts.

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25. Defendant Matos has not submitted any Plans for construction on either of his tracts to any of the owners of Tract 1 or Tract 2 for approval. In July 2007, he installed barbed wire fencing on his property to contain his cows and horses.

26. By letter dated August 16, 2007, counsel for the Plaintiffs, Scott I. Perle, notified Defendant Matos that he was in violation of the Restrictions and demanded that he “cease and desist construction of the fencing and remove the fence posts which have already been installed” by August 27, 2007. Subsequently, Defendant Matos completed construction of the fencing.

These findings of fact are binding, and Matos does not cite any legal authority to support his argument that the trial court abused its discretion by requiring removal of the barbed wire fencing, which had not been pre-approved as required by the restrictions. As Matos has failed to present any legal authority or argument as to an abuse of discretion, this argument is abandoned. *See Holleman v. Aiken*, 193 N.C. App. 484, 508, 668 S.E.2d 579, 594 (2008) (“[P]laintiff has cited no legal authority in support of her argument, and pursuant to North Carolina Rule of Appellate Procedure 28(b)(6), it is deemed abandoned. *See* N.C.R. App. P. 28(b)(6).”).

C. 8 April 2010 Order for Summary Judgment

1. Negligent Misrepresentation

[7] Matos argues that the trial court erred by granting summary judgment in favor of the McManuses on his claim for negligent misrepresentation as there were genuine issues of material fact as to whether Matos reasonably relied upon McManus’ misrepresentations. As discussed above, the standard of review for this case is complicated by the existence of an order which we have affirmed, and which does include many findings of fact. The usual standard of review is a *de novo* determination of “whether there is a ‘genuine issue of material fact’ and whether either party is ‘entitled to judgment as a matter of law.’” *Robins*, 361 N.C. at 196, 639 S.E.2d at 423; *Summey*, 357 N.C. at 496, 586 S.E.2d at 249; N.C. Gen. Stat. § 1A-1, Rule 56(c). Yet, in this instance, even if there was a dispute as to a material fact prior to the 4 August 2009 order, we must consider the facts as determined by that order. As to any facts not determined by the 4 August 2009 order, we shall, as usual for purposes of summary judgment review, consider the evidence in the light most favorable to Matos as the party opposing summary judgment. *See Sturgill*, 186 N.C. App. at 626, 652 S.E.2d at 304.

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In his fourth claim for relief in his third party complaint against the McManuses, for negligent misrepresentation, Matos alleged that

36. In the course of the conveyance of properties to Matos, the McManuses supplied information to Matos for purposes of guidance and/or reliance.

37. The McManuses had a duty to accurately and truthfully convey information and guidance, as owners of the Property, to Matos as a prospective buyer of their property.

38. The McManuses failed to exercise that care and competence in obtaining and communicating the information which Matos was justified in expecting, including accurate information regarding whether the property purchased by Matos would be subject to certain restrictions including, but not limited to, restrictions on its use as a farm and restrictions on subdividing.

39. The McManuses negligently provided false and misleading information to Matos to the effect that the Property being purchased could be used as a farm without restrictions.

40. The McManuses negligently provided false and misleading information to Matos to the effect that there were no restrictions on the ability of Matos to subdivide the First or Second Matos Properties.

41. Matos justifiably relied on these misrepresentations to his damage and detriment.

42. If and to the extent it were to be ultimately determined that Matos is bound by restrictions on the Property, Matos is entitled to damages from the McManuses for negligent misrepresentation, including out-of-pocket losses and consequential damages in excess of \$10,000.00, the amount of damages to be proven at trial.

There was no dispute that Mr. McManus told Matos when he first considered purchasing the property that there were no restrictions on it preventing farm use. In addition, the trial court found in the 4 August 2009 order that "McManus testified that he did not intend to impose Restrictions on the First Matos Property or the Second Matos Property, notwithstanding the prior Moss Deed which states that Tracts 1 through 7 are to be restricted." Matos did not realize that he was purchasing property which was subject to restrictions of any sort, much less restrictions which would prevent his intended use of the property as a farm.

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We have stated that

“ [t]he tort of negligent misrepresentation occurs when in the course of a business or other transaction in which an individual has a pecuniary interest, he or she supplies false information for the guidance of others in a business transaction, without exercising reasonable care in obtaining or communicating the information.’ ” *Ausley v. Bishop*, 133 N.C. App. 210, 218, 515 S.E.2d 72, 78 (1999) (emphasis added) (quoting *Fulton v. Vickery*, 73 N.C. App. 382, 388, 326 S.E.2d 354, 358 (citation omitted), *disc. review denied*, 313 N.C. 599, 332 S.E.2d 178 (1985)); *see also Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519, 525, 430 S.E.2d 476, 480 (1993) (emphasis omitted) (“[i]n this State, we have adopted the Restatement 2d definition of negligent misrepresentation and have held that the action lies where pecuniary loss results from the supplying of false information to others for the purpose of guiding them in their business transactions”).

Pinney v. State Farm Mut. Ins. Co., 146 N.C. App. 248, 256, 552 S.E.2d 186, 191-92 (2001), *disc. review denied*, 356 N.C. 438, 572 S.E.2d 788 (2002).

Matos is correct that Mr. McManus “supplie[d] false information . . . for the guidance of others in a business transaction,” *see id.*, and the McManuses do not deny this. In a light most favorable to Matos, there is also an issue as to whether Mr. McManus failed to exercise reasonable care in communicating this information to Matos, at several points during the process, both before and after Matos’ first deed. But the trial court has found, and it is undisputed that the restrictions were recorded in Mecklenburg County with the Moss deed, which was prior to Matos’ first deed, and the same restrictions were recorded in Cabarrus County with the Barfield deed, prior to Matos’ second deed, which extended his land into Cabarrus County. The restrictive covenants were a matter of record in both counties prior to Matos’ purchase of land in each county.

It has also been held that when a party relying on a “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.”

Id. at 256, 552 S.E.2d at 192 (quoting *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 346, 511 S.E.2d 309, 313 (1999)). Matos

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has neither alleged nor forecast any evidence that he was “denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence.” *See id.* Mr. McManus’ misrepresentations did not prevent Matos from investigating title to the property or hiring an attorney to protect his interests. In fact, Matos had an attorney representing him throughout the entire process, from the contract for purchase through both closings. His attorney acknowledged that his title search should have revealed the existence of the restrictive covenants in the Moss deed in Mecklenburg County. Matos argues that the negligence of his attorney should not be imputed to him. However, he cites no legal authority to this effect. The case he cites, *Hodge v. First Atlantic Corporation*, 6 N.C. App. 353, 169 S.E.2d 917 (1969), citing *Griell v. Vernon*, 65 N.C. 76 (1871), is inapposite; *Hodge* addressed setting aside a default judgment because of excusable neglect where a client has relied upon his attorney to file an answer. 6 N.C. App. at 357-58, 169 S.E.2d at 920-21. In contrast, the case of *Hudson-Cole Dev. Corp. v. Beemer* addresses just this issue in the context of a claim of negligent misrepresentation arising from a business transaction where the pertinent facts were available on the public record. 132 N.C. App. at 346, 511 S.E.2d at 312-13. Where the third-party plaintiff Beemer alleged that he was induced by negligent misrepresentations to execute a subordination agreement, this Court noted that the misrepresentation could have discovered by reference to the “Assignment of Security Interest in Note and Deed of Trust,” which was recorded 22 January 1986 with the Chatham County Register of Deeds in Deed Book 490, Page 120, [which] accurately describes the partial nature of the interest held by Mellott as a result of the assignment.” *Id.* We also noted that Beemer did “not allege that he was in any way prevented from learning the truth about Mellott’s interest.” *Id.* at 346-47, 511 S.E.2d at 313. Under these circumstances, this Court held “that Beemer’s reliance on the misrepresentation in the subordination agreement was unreasonable as a matter of law.” *Id.* at 347, 511 S.E.2d at 313. Likewise, here, the restrictive covenants were a matter of record which could have been, and should have been, discovered by Matos’ attorney. Thus, Matos’ reliance upon Mr. McManus’ misrepresentations was unreasonable as a matter of law, and the trial court properly granted summary judgment dismissing the claim for negligent misrepresentation.

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2. Breach of Warranty

[8] Matos alleged as his fifth claim for breach of warranty.

44. The McManuses conveyed to Matos by North Carolina General Warranty Deeds the Matos Properties described in the Complaint.

45. The Warranty Deeds expressly provide that the “grantor covenants with the grantee that grantor is seized of the premises in fee simple, has a right to convey the same in fee simple, that title is marketable and free and clear of all encumbrances, and that grantor will warrant and defend the title against the lawful claims of all persons whomsoever except for the exceptions hereinafter stated.”

46. The McManuses, as grantors, did not in fact own the Property in fee simple as the Property was owned by the Revocable Trusts of the McManuses.

47. The McManuses have not defended Matos’ title as against the Plaintiffs’ claim that there are restrictions on the First and Second Matos Properties notwithstanding the language of the Matos Deeds.

48. If and to the extent it is determined as a matter of law that Matos does not have unrestricted title to the First and Second Matos Properties, then they have breached the covenants as set forth in the July 14, 2005 Deed to Matos to the extent they were not the owners in fee simple of the Property and failed to disclose to Matos this fact and other facts which were relevant and material to his decision to purchase the Property.

49. If and to the extent it is determined as a matter of law that Matos does not have unrestricted title to the First and Second Matos Properties, and the McManuses have failed to defend Matos’ title to the First and Second Matos Properties, then the McManuses have breached the covenants in the General Warranty Deeds.

50. The McManuses’ acts and/or omissions as herein described constitute breach of the warranties set forth in the Deed.

51. If and to the extent it is ultimately determined that Matos is bound by the Restrictions on the Property, this breach has caused Matos damages in excess of \$10,000.00.

(Emphasis added.)

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Matos reiterates his argument that McManus told him that there were no restrictions on the property, although this was incorrect. However, Matos cites no legal authority in support of this argument. In addition, the deeds each stated that

Title to the property hereinabove described is subject to the following exceptions:

The lien of all valid and enforceable easements, rights-of-way, restrictions, covenants, conditions, and *restrictions of record*; except, however, this instrument does not reimpose any of the same.

(Emphasis added.)

As discussed extensively above, the restrictive covenants were “of record.” The trial court properly granted summary judgment dismissing Matos’ claim for breach of warranty of title. Accordingly, we affirm the trial court’s orders granting permanent injunction and summary judgment in favor of the McManuses.

AFFIRMED.

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

JASON FISHER, BYRON ADAMS, B.C. BARNES, CHERYL BARTLETT, KATHY BEAM, CAROLYN BOGGS, SUSETTE BRYANT, DANNY CASE, GENE DRY, RICKY GRIFFIN, WENDY HERNDON, EVERETT JENKINS, SANDRA LANGSTON, CYNTHIA STAFFORD, MARY TAUTIN, AND TIMOTHY THOMAS, PLAINTIFFS V. COMMUNICATION WORKERS OF AMERICA, COMMUNICATION WORKERS OF AMERICA, DISTRICT 3 AND COMMUNICATION WORKERS OF AMERICA LOCAL 3602, DEFENDANTS

No. COA10-927

(Filed 16 August 2011)

1. Conflict of Laws—withdrawn union memberships—names and social security numbers posted—federal preemption

Plaintiffs’ claims under the North Carolina Identity Theft Protection Act and for unfair and deceptive trade practices were preempted by the National Labor Relations Act where employees of defendants generated and distributed lists of members who had dropped their union membership with their social security

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numbers. Names alone would have been sufficient to inform union members about their fellow employees' nonmember status and the inclusion of social security numbers could have been viewed by plaintiffs as a punishment and as a restraint on others exercising their labor rights.

2. Conflict of Laws—withdrawn union memberships—personal information posted—subject of federal claim

The preemption of state claims by the National Labor Relations Act, as set out in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, places the focus on evaluation of defendant's evidence rather than whether the National Labor Relations Board (NLRB) actually took action on the claims. In this case, the same conduct was the basis for the NLRB and state claims and the *Garmon* preemption was proper.

3. Conflict of Laws—preemption of state claims—peripheral conduct—exception not applicable

The exception to preemption of state claims by federal labor law for conduct peripheral to National Labor Relations Board (NLRB) policy did not apply to a case in which social security numbers were posted on a bulletin board along with the names of those withdrawing from a union. Plaintiffs did not allege that actual damages resulted from the posting, which only lasted for an hour, and the NLRB showed concern for the alleged conduct in the form of an approved settlement agreement.

4. Conflict of Laws—preemption of state claims—significant local interest—exception not applicable

The exception to preemption of state claims by federal labor law for claims of significant local interest did not apply to a case in which social security numbers were posted on a bulletin board along with the names of those withdrawing from a union. The cases cited by plaintiffs were not applicable and the same controversy was alleged and resolved in NLRB claims, so that there was a danger that a state claim would interfere with the NLRB's interest in adjudicating the controversy.

Appeal by plaintiffs from order entered on or about 7 May 2010 by Judge Albert Diaz in Special Superior Court for Complex Business Cases, Gaston County. Heard in the Court of Appeals 14 December 2010.

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National Right To Work Legal Defense Foundation, by Matthew C. Muggerridge and Stephen J. Dunn, for plaintiffs-appellants.

Patterson Harkavy LLP, by Ann E. Groninger and Quinn, Walls, Weaver & Davies LLP, by Robert M. Weaver, for defendants-appellees.

STROUD, Judge.

Jason Fisher, Byron Adams, B.C. Barnes, Cheryl Bartlett, Kathy Beam, Susette Bryant, Gene Dry, Ricky Griffin, Wendy Herndon, Everett Jenkins, Sandra Langston, Cynthia Stafford, Mary Tautin, and Timothy Thomas (collectively referred to herein as “plaintiffs”) appeal from the business court’s order granting summary judgment in favor of Communication Workers of America (“CWA”), Communication Workers of America, District 3 (“CWA District 3”), and Communication Workers of America Local 3602 (“CWA Local 3602”) (collectively referred to herein as “defendants”). As plaintiffs’ claims are preempted by the National Labor Relations Act, we affirm the business court’s order dismissing plaintiffs’ complaint.

I. Background

On 11 June 2008, plaintiffs filed a complaint against defendants setting forth the following claims: (1) a violation of the Identity Theft Protection Act; (2) unfair and deceptive trade practices; and (3) invasion of privacy. The complaint requested that defendants be enjoined “from engaging in future violations of the Identity Theft Protection Act;” that judgment be entered against defendants “jointly and severally, in an amount exceeding \$10,000;” and for treble damages, reasonable attorneys’ fees, and punitive damages. This case was designated as a complex business case and, by order from the Chief Justice of the North Carolina Supreme Court, assigned to the business court on 12 June 2008. Plaintiffs filed an amended complaint on 14 July 2008. On 11 August 2008, defendants CWA and CWA District 3 filed a motion to dismiss plaintiffs’ complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Defendant CWA Local 3602 filed a separate motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on the same date. On 26 September 2008, the business court issued an order “covering scheduling and case management issues and/or trial in this case.” On 30 October 2008, the business court issued an “Order & Opinion” denying defendants’ motions to dismiss as to plaintiffs’ claims for (1) violations of the Identity Theft Protection Act and (2) unfair and deceptive trade practices but granted defendants’ motion

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to dismiss as to plaintiffs' third claim for invasion of privacy. On 1 December 2008, defendants CWA and CWA District 3 filed their "Answer and Counterclaim of Defendant" denying plaintiffs' claims; raising several affirmative defenses, including "preemption by federal law[;]" and raising a separate counterclaim against plaintiff Daniel Case "for contribution and equitable subrogation of damages." Defendant CWA Local 3602 also filed a separate, but similar "Answer and Counterclaim of Defendant" on the same date, denying plaintiffs' claims, raising several affirmative defenses, and raising a counterclaim against plaintiff Daniel Case "for contribution and equitable subrogation of damages." On 31 December 2008, plaintiff Daniel Case moved to dismiss defendants' counterclaims, which was granted by written order of the business court on 9 March 2009. On 2 April 2009, plaintiffs filed their responses to defendant CWA's request for admissions. On 4 February 2010, defendants CWA and CWA District 3, collectively, and defendant CWA Local 3602, individually, filed motions for summary judgment. Likewise, on 8 February 2010, plaintiffs filed their motion for summary judgment.

The affidavits, depositions, and documents filed with those motions, along with the parties' pleadings, tended to show that on the morning of 9 October 2007, defendant CWA Local 3602 President John Glenn, an employee of Bellsouth Communications (now AT&T Southeast), attended a meeting of North Carolina local union presidents in Greensboro, North Carolina. While at this meeting he received a printed copy of a spreadsheet from defendant CWA District 3 identifying the employees of Bellsouth Communications who had revoked their union dues deduction, effectively ending their membership in the union. Defendant CWA District 3 had received this spreadsheet as an attachment in an email from Judy Brown, membership dues specialist for defendant CWA. The spreadsheet identified the employees by name, national ID number, local union number, pay group, and other information. The national ID number is the employee's social security number. After the meeting in Greensboro, Mr. Glenn arrived back at the Bellsouth work center, located in Burlington, finished his shift and, between 4:30 and 5:00 p.m., posted the spreadsheet on defendant CWA Local 3602's bulletin board inside the Burlington facility. Plaintiff Daniel Case removed the list from the bulletin board around 5:30 or 6:00 p.m. the same day and retained it in his possession. Around 6:30 p.m., Mr. Glenn received a phone call from his supervisor stating that there was a problem with the list on the bulletin board because it contained employees' social security numbers.

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Mr. Glenn told his supervisor that he would remove it but his supervisor informed him that he had already instructed the individual who had complained to take it down and “slide it under his door.”

On 14 January 2008, plaintiffs filed individual and identical complaints with the National Labor Relations Board (“NLRB”) against defendant CWA Local 3602 contending that the posting of the spreadsheet containing plaintiffs’ social security numbers “exposed [plaintiffs] . . . and similarly situated employees to risk of ‘identity theft[.]’” and amounted to a violation of “Section 8(b)(1)(a) of the [National Labor Relations Act] by causing [plaintiffs] . . . to feel coerced in the exercise of their Section 7 rights.” The complaint further alleged that defendant CWA Local 3602’s “invasion of [plaintiffs’] . . . privacy constituted a breach of the duty of fair representation.” In March 2008, defendant CWA Local 3602 posted a “Notice to Employees and Members” stating that “Pursuant to a Settlement Agreement Approved by a Regional Director of the National Labor Relations Board” it agreed not to “post on our bulletin boards a list of non-member employees identified with their social security number from our Local—Communications Workers of America, Local 3602[;]” not to “otherwise publicly disclose the social security numbers of any bargaining unit employee of our Local—Communications Workers of America, Local 3602[;]” and not to “in any like or related manner, restrain or coerce our employees in the exercise of their rights as guaranteed in Section 7 of the Act.” Also, as part of the settlement agreement, defendant CWA Local 3602 sent a letter, dated 17 July 2008, to each of employees whose social security numbers had been posted apologizing for its mistake but stating that by its “voluntary settlement agreement” it did “not admit that it ha[d] violated the National Labor Relations Act[.]”

On 7 May 2010, the business court by written order granted defendants’ motion for summary judgment and dismissed plaintiffs’ claims, as defendants were

entitled to a judgment as a matter of law because (1) resolution of Plaintiffs’ claims would entail regulation of conduct that is arguably protected or prohibited by federal labor law, *see generally San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) and is therefore preempted, (2) none of the exceptions to *Garmon* preemption relied on by Plaintiffs applies in this case, and (3) this Court therefore lacks subject matter jurisdiction to consider Plaintiffs’ claims.

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On 1 June 2010, plaintiffs filed written notice of appeal from the business court's 7 May 2010 order.¹

On appeal, plaintiffs contend that “the [business] court erred in ruling that the National Labor Relations Act (“NLRA”) preempted North Carolina’s Identity Theft Protection Act (“NCITPA”) where a labor organization posted employees’ social security numbers on a publicly accessible bulletin board.” Specifically, plaintiffs argue that the business court erred in granting defendants’ motions for summary judgment and ruling that federal law preempted plaintiffs’ claims as (1) “*Garmon* preemption does not apply” or, in the alternative, (2) “Both *Garmon* exceptions apply” as “[t]he admitted conduct is ‘peripheral’ to the National Labor Policy” and “the NCITPA touches significant local interests.” Defendants counter that plaintiffs’ claims are preempted by the National Labor Relations Act, neither of the *Garmon* exceptions apply or, in the alternative, plaintiffs’ claims are also preempted by the duty of fair representation.

II. Standard of Review

The standard of review from a trial court’s ruling on a motion for summary judgment is

whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Summary judgment is appropriate when viewed in the light most favorable to the non-movant, 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.

Whisnant v. Carolina Farm Credit, ___ N.C. App. ___, ___, 693 S.E.2d 149, 152 (2010) (citation omitted), *disc. review denied*, ___ N.C. ___, 705 S.E.2d 745 (2011); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009).

III. Federal Preemption of plaintiffs’ claims

A. *Garmon* Preemption

[1] Plaintiffs first contend that their claims are not preempted by the National Labor Relations Act as (1) the NCITPA does not conflict with the national labor policy; (2) preemption is not triggered by prior

1. Carolyn Boggs and Daniel Case, individual plaintiffs in the original and amended complaints, are not parties to this appeal.

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NLRB action or inaction; and (3) plaintiffs' unsuccessful NLRB charge is different from its State claim. Defendants counter that plaintiffs originally believed that the posting of their social security numbers amounted to an NLRA violation, as they first filed NLRB claims arguing that this conduct amounted to a violation of NLRA Sections 7 and 8; the NLRB provided a remedy for these alleged violations of the NLRA, the voluntary settlement agreement; and the alleged conduct in plaintiffs' State claims is "arguably prohibited by the NLRA[,]" and thus preempted by federal law.

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775, the United States Supreme Court explained the general principles to consider when determining whether state law claims are preempted by the NLRA:

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.

Id. at 244, 3 L. Ed. 2d at 782-83 (footnote omitted). The Court further stated that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* at 245, 3 L. Ed. 2d at 783. The Court further explained that "[t]o require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity[,]" and

[i]f the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether

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such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. . . . It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act.

Id. at 245-46, 3 L. Ed. 2d at 783-84 (footnote omitted). The Court also delineated two exceptions when state law is not preempted by the NLRA: (1) “where the activity regulated was a merely peripheral concern of the Labor Management Relations Act[;]” or (2) “where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.” *Id.* at 243-44, 3 L. Ed. 2d at 782.²

In subsequent cases, the Court has held that “the ‘*Garmon* guidelines [are not to be applied] in a literal, mechanical fashion[.]’ ” *Local 926, Int’l Union of Operating Eng’rs v. Jones*, 460 U.S. 669, 676, 75 L.Ed. 2d 368, 375-76 (1983) (quoting citing *Sears v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 188, 56 L. Ed. 2d 209, 220 (1978)), and “those claiming pre-emption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted.” *International Longshoremen’s Assn. v. Davis*, 476 U.S. 380, 396, 90 L. Ed. 2d 389, 404 (1986). The Court further explained that

[t]he precondition for pre-emption, that the conduct be “arguably” protected or prohibited, is not without substance. It is not satisfied by a conclusory assertion of pre-emption If the word “arguably” is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of

2. The Court in *Local 926, Int’l Union of Operating Eng’rs*, 460 U.S. at 676, n.8, 75 L. Ed. 2d at 376, n.8, noted another established exception to federal preemption, but this exception is not relevant in this case: “The NLRA has been held to pre-empt state law and state causes of action relating to conduct that is neither protected nor prohibited, where it is determined that Congress intended the conduct to be unregulated and left to the free play of economic forces. See *Machinists v. Wisconsin Employment Relations Comm’n*, 427 U.S. 132, 140, 49 L. Ed. 2d 396 (1976); *Teamsters v. Morton*, 377 U.S. 252, 260, 9 L. Ed. 2d 732 (1964).”

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the Act that is not plainly contrary to its language and that has not been “authoritatively rejected” by the courts or the Board. *Marine Engineers v. Interlake S. S. Co.*, 370 U.S. 173, 184, 8 L. Ed. 2d 418, 82 S. Ct. 237 (1962). The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.

Id. at 344-45, 90 L. Ed. 2d at 403. The Court has further noted that NLRA “[p]re-emption . . . is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.” *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292, 29 L. Ed. 2d 473, 486 (1971). Accordingly, in addressing plaintiffs’ arguments, we “[f]irst . . . determine whether the conduct that the State seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA.” *Jones*, 460 U.S. at 676, 75 L. Ed. 2d at 375 (citing *Garmon, supra*, at 245 and *Sears, supra*, at 187-190). Here, there was action from the NLRB, as there was “a settlement agreement approved by a Regional Director of the National Labor Relations Board[,]” but nothing in the settlement agreement or defendant CWA Local 3602’s 17 July 2008 letter to the nonunion employees indicates that the Board made a substantive conclusion or determination regarding plaintiffs’ NLRB claim. Therefore, we cannot say that “the Board decide[d] . . . that [the alleged] conduct [was] protected by § 7, or prohibited by § 8[,]” and the State is “ousted of all jurisdiction.” *See Garmon*, 359 U.S. at 245, 3 L. Ed. 2d at 783. Likewise, there is no indication in the record that the Board made a determination that the alleged conduct by defendants was “neither protected nor prohibited” by the NLRA. *See id.* But, as noted by *Garmon*, it appears that the Board “fail[ed] to determine the status of the disputed conduct by . . . adopting some other disposition which does not define the nature of the activity with unclouded legal significance[,]” *see id.* at 245-46, 3 L. Ed. 2d at 783, specifically the voluntary settlement agreement. Accordingly, we turn to see whether the alleged conduct by defendants was “arguably protected or prohibited by the NLRA[,]” *see Jones*, 460 U.S. at 676, 75 L. Ed. 2d at 375, by determining whether defendants as “the part[ies] claiming pre-emption” made an NLRA argument that the “Board could legally decide in [their] favor.” *See Davis*, 476 U.S. at 395, 90 L. Ed. 2d at 403.

Here, defendants contend that plaintiffs’ state claims under the North Carolina Identity Theft Protection Act and for unfair and

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deceptive trade practices are arguably preempted by the NLRA. Defendant's note that NLRA Section 7, 29 U.S.C. § 157 "protects an individual's right to refrain from union organizing, union membership, and other union activities[,]" and NLRA Section 8(b), 29 U.S.C. § 158(b), "prohibits a union from restraining or coercing employees in the exercise of their Section 7 rights." Defendants contend that the alleged conduct on which plaintiffs based their State claims, posting the social security numbers of those who had withdrawn their membership in the union, could be viewed as a retaliatory action by defendants which would potentially expose those former union members to identity theft and could discourage members from exercising their NLRA rights. Therefore, defendants conclude, the alleged conduct would be arguably prohibited by sections 7 and 8 of the NLRA.

The relevant portions of Section 7 of the NLRA states that

[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 USCS § 158(a)(3)].

29 U.S.C. § 157 (2009) (emphasis added). Additionally, Section 8 of the NLRA, titled "Unfair labor practices by labor organization[,]" states in pertinent part, the following:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) *to restrain or coerce* (A) employees in the exercise of the rights guaranteed in section [7] of this title[, USCS § 157][.]

29 U.S.C. § 158(b) (2009) (emphasis added). The NLRB has noted that "[i]t is well settled that threats designed to restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act constitute a violation of Section 8(b)(1)(A)." *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, et al.*, 237 N.L.R.B. 207, 210 (1978). The NLRB has further stated that "Section 7 affords employees the right to resign from union membership at any time, and that this right cannot lawfully be restricted by

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the union.” *Int’l Bhd. of Teamsters, Local Union 492*, 346 N.L.R.B. 360, 363 (citing *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 N.L.R.B. 1330, 1336 (1984), approved in *Pattern Makers League v. NLRB*, 473 U.S. 95, 87 L. Ed. 2d 68 (1985)). After reviewing the relevant portions of the above quoted law, we cannot say that defendants’ argument is “plainly contrary to [the] language” of the NLRA or has “been ‘authoritatively rejected’ by the courts or the Board.” See *Davis*, 476 U.S. at 395, 90 L. Ed. 2d at 403. We also note that this is exactly the legal basis which the plaintiffs themselves asserted in their complaints filed with the NLRB against defendant CWA Local 3602. Accordingly, we turn to see if defendants “put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim” supporting defendants’ argument that the alleged conduct was preempted by the NLRA. See *id.*

The record shows that employees of defendants CWA and CWA District 3 generated and distributed spreadsheet lists of those nonunion members who had dropped their union membership in 2007 to CWA Local 3602. Those employees of defendants CWA and CWA District 3 were aware that the national ID on the spreadsheet was the non-members’ social security number. On 7 October 2007, defendant CWA Local 3602 president John Glenn received from CWA District 3 and posted a spreadsheet containing the names and social security numbers of plaintiffs and others that had withdrawn their union membership in 2007. Defendant CWA District 3 vice-president, Noah Savant, stated in his deposition that CWA encouraged the local unions to organize the nonmembers and the information in the spreadsheet could be used by members “to contact these [non]members to find out . . . why they withdrew from the union and see if they can get them to rejoin.” As plaintiffs’ NLRB complaint notes, it is well known that a stolen or misappropriated social security number can result in identity theft causing financial hardship or ruin. The posting of an individual’s social security number by any former representative, such as a union, could be viewed by an individual as potentially harmful because of the danger of identity theft; plaintiffs themselves viewed the posting of the numbers in just this manner. As plaintiffs’ names alone would be sufficient to inform the union members about their fellow employees’ nonmember status, the inclusion of plaintiffs’ social security numbers in the spreadsheet that was posted on a union bulletin board could have been viewed by plaintiffs as punishment for exercising their Section 7 rights to withdraw their union membership and act as a restraint on other members considering

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exercising their Section 7 right. Therefore, we hold that “the Board reasonably could uphold a claim based on . . . [defendant’s] interpretation[,]” *see Davis*, 476 U.S. at 394, 90 L. Ed. 2d at 403, and, accordingly, the conduct alleged is “arguably subject to § 7 or § 8 of the Act[.]” *See Garmon*, 359 U.S. at 245, 3 L. Ed. 2d at 783. Consequently, allowing plaintiffs’ state claims to proceed would “involve[] too great a danger of conflict between power asserted by Congress and requirements imposed by state law[,]” *see id.*, at 245-46, 3 L. Ed. 2d at 783-84, and, contrary to plaintiffs’ arguments, would violate national labor policy. Thus, plaintiffs’ state claims are preempted by the NLRA.

[2] Plaintiffs further contend that *Garmon* preemption is not triggered by a prior NLRB action, as the NLRB’s General Counsel did not interview plaintiffs and did not make a determination as to whether defendants’ conduct was prohibited by NLRA sections 7 and 8. Plaintiffs also argue that “*Garmon* does not hold that when the NLRB’s General Counsel takes or refuses to take action, or imposes a settlement on a case having found no violation, all subsequent state remedy will be preempted.” As noted by the above analysis, the “prior NLRB action,” the settlement agreement, is relevant in determining whether the Board decided that defendants’ “conduct [was] protected by § 7, or prohibited by § 8[,]” whether the Board decided that defendants’ conduct was “neither protected nor prohibited,” or whether “the Board . . . fail[ed] to determine the status of the disputed conduct . . . by adopting some other disposition which does not define the nature of the activity with unclouded legal significance.” *Garmon*, 359 U.S. at 245-46, 3 L. Ed. 2d at 783. Here, the settlement agreement showed that the Board did not make a definite decision regarding whether defendants’ conduct was protected or prohibited by the NLRA but “adopt[ed] some other disposition[,]” namely the settlement agreement. *See id.* As a result, the focus of the analysis is to determine whether plaintiffs’ claims were “arguably” preempted by the NLRA, as defendants contend, *see id.* at 245, 3 L. Ed. 2d at 783, and specifically, whether defendants “put forth enough evidence to enable the court to find that the Board reasonably could uphold” a NLRA claim based on defendants’ argument. *See Davis*, 476 U.S. at 395, 90 L. Ed. 2d at 403. Therefore, contrary to plaintiffs’ argument, the focus of the analysis in determining whether plaintiffs’ claims were preempted is not whether the NLRB actually took action on their claims, but instead concerns the evaluation of the evidence put forward by defendants in support of their argument. Accordingly, plaintiffs’ argument is overruled.

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Plaintiffs also contend that “*Garmon* preemption is only proper when there is an actual or potential conflict of legal schemes whereby a state seeks to regulate conduct arguably protected or prohibited under the NLRA[,]” and here “the regulated activity is a business’s misuse of citizens’ personal information. . . . not, as in *Garmon*, a local interpretation of the NLRA.” As noted above, “[i]t is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.” *Lockridge*, 403 U.S. at 292, 29 L. Ed. 2d at 473. Plaintiffs also attempt to differentiate their NLRB claim from their state claims by arguing that their state claims are based only on the posting of their social security numbers, without considering that it was defendant CWA Local 3602’s president who posted the social security numbers. From the record, it is clear that plaintiffs’ NLRB claim was based on defendant CWA Local 3602’s posting of their social security numbers and plaintiffs alleged that this conduct was a violation of the NLRA. Similarly, plaintiffs’ state claims are against defendant CWA Local 3602, a union, and it is defendant CWA Local 3602’s action-posting the social security numbers of nonmembers—that forms the basis for plaintiffs’ state claims. Therefore, the same conduct is the basis for both the NLRB and state claims. Accordingly, plaintiffs’ arguments are overruled.

B. *Garmon* Exceptions

Plaintiffs, in the alternative, contend that the two *Garmon* exceptions are applicable. Defendants counter that neither of the *Garmon* exceptions are applicable in this case. As noted above, the Court in *Garmon* delineated two exceptions to the above analysis when state law is not preempted by the NLRA: (1) “where the activity regulated was a merely peripheral concern of the Labor Management Relations Act[;]” or (2) “where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.” 359 U.S. at 243-44, 3 L. Ed 2d at 782.

1. Peripheral to the NLRA Policy

[3] Plaintiffs, citing *Linn v. United Plant Guard Workers of America, Local 114, et al.*, 383 U.S. 53, 15 L. Ed. 2d 582 (1966) and *R.H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO*, 270 N.C. 160, 154 S.E.2d 344 (1967), argue that “the conduct the state seeks to regulate—custody of sensitive personal information—is clearly of peripheral concern to the NLRA[,]” and the *Garmon* excep-

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tion applies. Plaintiffs further contend that “the conduct in question was peripheral to national labor policy, since that policy is not concerned with the unions’ handling of sensitive personal information of represented employees.” Defendants counter that the holdings in *Linn* and *R.H. Boultingny* were limited to “defamation claims pleading and proving actual malice and damages[.]” The United States Supreme Court has stated that “[i]f an activity were merely a ‘peripheral concern’ of the Act, state and federal courts presumably may restrain it even if arguably protected.” *Sears*, 436 U.S. at 223, n.7, 56 L. Ed. 2d at 242, n.7 (citing *Garmon*, 359 U.S. at 246, 3 L. Ed. 2d at 775).

In *Linn*, the Court applied this exception to the plaintiff-employer’s state action against the defendant union for libel, holding that “where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him.” 383 U.S. at 55, 15 L. Ed. 2d at 586. The Court noted that “although the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false.” *Id.* at 61, 15 L. Ed. 2d at 589. The Court reasoned that

[t]he malicious publication of libelous statements does not in and of itself constitute an unfair labor practice. While the Board might find that an employer or union violated § 8 by deliberately making false statements, or that the issuance of malicious statements during an organizing campaign had such a profound effect on the election as to require that it be set aside, it looks only to the coercive or misleading nature of the statements rather than their defamatory quality. The injury that the statement might cause to an individual’s reputation—whether he be an employer or union official—has no relevance to the Board’s function. Cf. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261 (1940). The Board can award no damages, impose no penalty, or give any other relief to the defamed individual.

Id. at 63, 15 L. Ed. 2d at 590. The Court further noted that “[t]he Board’s lack of concern with the ‘personal’ injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption.” *Id.* at 64, 15 L. Ed. 2d at 590. Because of the issue of juries “award[ing]

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excessive damages for defamation[,]" and "the stability of labor unions and smaller employers[,]" the Court in "recognition of legitimate state interests does not interfere with effective administration of national labor policy" and limited "the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." *Id.* at 64-65, 15 L. Ed. 2d at 591.

Our Supreme Court in *R.H. Boultingny, Inc.*, addressed the issue of NLRA preemption and summarized the United States Supreme Court's application of the "peripheral concern" exception in *Linn* to the plaintiff-business's state defamation claim against the defendant-union. 270 N.C. 160, 154 S.E.2d 344.

[I]t has been determined by the final authority upon the construction of acts of Congress that the National Labor Relations Act does not take from the courts of this State jurisdiction to entertain and to determine, according to the law of this State, actions for damages for libel punished by a union during the course of its campaign to solicit members and become the spokesman for the employees of an industrial plant in their collective bargaining with their employer. It has, however, been so determined that in such an action the courts of this State may not apply the doctrine of libel *per se*. Judgment for the plaintiff in such an action may be rendered only if the plaintiff alleges and proves not only the actual malice sufficient to overcome the qualified privilege allowed the union by the law of this State but also some actual damage resulting from the libelous publication. With this modification, the rules of law applicable to the trial of suits for libel generally in the courts of this State are presently applicable to the trial of such an action against a labor union for libel published by it during the course of a campaign to organize workers in an industrial plant.

Id. at 176, 154 S.E.2d at 357-58. We find that *Linn* and *R.H. Boultingny, Inc.* are distinguishable from the case before us. First, the case before us involves plaintiffs' claims for violation of the Identity Theft Protection Act and unfair and deceptive trade practices, not a defamation claim. Even if the potential for identity theft could be considered as similar to defamation, in that it could cause injury to a person's reputation or credit rating, we note that even in the case of defamation, the exception applies "only if the plaintiff alleges and proves not only the actual malice sufficient to overcome the qualified

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privilege allowed the union by the law of this State but also some actual damage resulting from the libelous publication.” See *R.H. Boultingny, Inc.*, 270 N.C. at 176, 154 S.E.2d at 358. In this case, even if we were to assume that defendants’ action in posting the numbers was malicious, plaintiffs have not alleged that any actual damages resulted from the posting. In fact, the list was only posted for less than an hour before it was removed and there is no indication that any plaintiff has actually suffered from identify theft as a result of the posting. Additionally, we cannot say that the Board had a “lack of concern with the ‘personal’ injury caused by” defendants’ action or the Board had an “inability to provide redress to the maligned party,” which would “vitiate[] the ordinary arguments for pre-emption.” *Linn*, 383 U.S. at 64, 15 L. Ed. 2d at 590. As the settlement agreement shows, the NLRB was concerned with the alleged conduct of defendants and provided a remedy for the parties in the form of an approved settlement agreement. As these cases are distinguishable, we are not persuaded by plaintiffs’ arguments.

2. Significant Local Interests

[4] Plaintiffs citing *Belknap v. Hale*, 463 U.S. 491, 77 L. Ed. 2d 798 (1983), *General Electric Co. v. Local 182 Int’l Union of Electrical, Radio, and Machine Works, et al.*, 47 N.C. App. 153, 266 S.E.2d 750 (1980), and *Farmer v. United Broth. of Carpenters and Joiners of America, Local 25*, 430 U.S. 290, 51 L. Ed. 2d 338 (1977), argue that “even if the NLRB process had found the posting of the Social Security numbers an NLRA violation, preemption would not have been appropriate because North Carolina has a strong interest in protecting its citizens from the egregious and illegal conduct alleged in the Compliant.”

Plaintiffs further contend that “[i]dentity theft is an issue which the state has a strong interest in regulating in order to protect the public welfare[,]” and like the actions in *Farmer*, *Belknap*, and *General Electric*, which “concerned conduct which could arguably have been prohibited or protected by the NLRA[,]” the conduct here should not be preempted “because of the predominating local interest.” Plaintiffs further contend that “the State of North Carolina may regulate certain outrageous conduct, even as it relates to labor unions[,]” and “the Defendants’ total disregard for the privacy of citizens’ social security number[s]” is an example of such conduct. Defendants’ counter that the cases cited by plaintiffs are inapplicable and, therefore, this *Garmon* exception is also inapplicable to the facts before us.

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In *Farmer*, the Court applied the “local interest” exception in *Garmon* and held that the plaintiff union members’ state claim for intentional infliction of emotional distress against the defendant union were not preempted. 430 U.S. 290, 51 L. Ed. 2d 338. In *Farmer*, the Court stated “that inflexible application of the [*Garmon*] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State’s interest is one that does not threaten undue interference with the federal regulatory scheme.” *Id.* at 302, 51 L. Ed. 2d at 351. The Court noted that the plaintiff-member had “alleged that the defendants had intentionally engaged in ‘outrageous conduct, threats, intimidation, and words’ which caused [him] to suffer ‘grievous mental and emotional distress as well as great physical damage.’” *Id.* at 301, 51 L. Ed. 2d at 351. The Court reasoned that “there is no federal protection for conduct on the part of union officers which is so outrageous that no reasonable man in a civilized society should be expected to endure it[.]” and, therefore, “permitting the exercise of state jurisdiction over such complaints does not result in state regulation of federally protected conduct.” *Id.* at 302, 51 L. Ed. 2d at 351 (citation and quotation marks omitted). The Court further noted that “[t]he State . . . has a substantial interest in protecting its citizens from the kind of abuse of which [the plaintiff-member] complained.” *Id.* at 302, 51 L. Ed. 2d at 351. The Court then balanced “the discrete concerns of the federal scheme and the state tort law” and the Board’s inability to address the conduct the plaintiff-member alleged:

If the charges in [the plaintiff-member’s] complaint were filed with the Board, the focus of any unfair labor practice proceeding would be on whether the statements or conduct on the part of union officials discriminated or threatened discrimination against him in employment referrals for reasons other than failure to pay Union dues. . . . Whether the statements or conduct of the respondents also caused [the plaintiff-member] severe emotional distress and physical injury would play no role in the Board’s disposition of the case, and the Board could not award [the plaintiff-member] damages for pain, suffering, or medical expenses. Conversely, the state-court tort action can be adjudicated without resolution of the “merits” of the underlying labor dispute.

Id. at 304, 15 L. Ed. 2d at 352-53. The Court then held that the plaintiff-member’s claims for intentional infliction of emotional distress were not preempted by the NLRA, noting that “[o]ur decision rests in

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part on our understanding that California law permits recovery only for emotional distress sustained as a result of 'outrageous' conduct." *Id.* at 305, 15 L. Ed. 2d at 353.

In *Belknap*, the Court applied the "local interest" exception in *Garmon* and held that the plaintiffs' state misrepresentation and breach of contract claims against the defendant employer were not preempted by the NLRA. 463 U.S. 491, 77 L. Ed. 2d 798. In *Belknap*, the defendant-employer had promised permanent employment to plaintiffs, a group of employees hired to replace striking union employees. *Id.* at 494-95, 77 L. Ed. 2d at 804-05. A NLRB claim was filed and pursuant to a settlement agreement with the union, defendant-employer rehired the striking union employees and laid off the plaintiffs. *Id.* at 446, 77 L. Ed. 2d at 805. In response, the plaintiffs filed a state claim for misrepresentation and breach of contract against the defendant-employer, alleging that it had made assertions about permanent employment that were false and the plaintiffs had relied on those assertions. *Id.* at 496-97, 77 L. Ed. 2d at 805. The plaintiffs' claim was dismissed pursuant to the defendant's motion for summary judgment based on NLRA preemption; the state court of appeals reversed; and the United States Supreme Court granted the defendant's writ of certiorari. *Id.* at 497, 77 L. Ed. 2d at 806. Citing its prior ruling in *Sears*, 436 U.S. 180, 56 L. Ed. 2d 209, the Court noted that

a critical inquiry in applying the *Garmon* rules, where the conduct at issue in the state litigation is said to be arguably prohibited by the Act and hence within the exclusive jurisdiction of the NLRB, is whether the controversy presented to the state court is identical with that which could be presented to the Board.

Id. at 510, 77 L. Ed. 2d at 814. The Court stated that in applying the "local interest" exception

the State's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the National Labor Relations Board's ability to adjudicate controversies committed to it by the Act, *Farmer v. Carpenters*, *supra*, at 297; *Sears, Roebuck & Co. v. Carpenters*, 436 U.S., at 200, and the risk that the State will sanction conduct that the Act protects.

Id. at 498-99, 77 L. Ed. 2d at 807. In applying this balancing test, the Court noted that any NLRB action in regard to the alleged conduct would be focused on "whether the rights of strikers were being infringed" not "whether [the defendant-employer] made misrepresentations to replacements that were actionable under state law." *Id.* at

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510, 77 L. Ed. 2d at 814. Accordingly, the Court stated “that maintaining the misrepresentation action would not interfere with the Board’s determination of matters within its jurisdiction and that such an action is of no more than peripheral concern to the Board and the federal law[,]” and the state had “a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm.” *Id.* at 510-11, 77 L. Ed. 2d at 814. The Court concluded that as the plaintiffs’ state claims had “no relevance to the [NLRB]’s function” and the NLRB could “award no damages, impose no penalty, or give any other relief” for their state claims, “state interests involved in this case clearly outweigh any possible interference with the Board’s function that may result from permitting the action for misrepresentation to proceed.” *Id.* at 511, 77 L. Ed. 2d at 815 (citation and quotation marks omitted).

As to the plaintiffs’ breach of contract claim, the Court noted that defendants’ actions in response to the settlement agreement did “not immunize [the defendant-employer] from responding in damages for its breach of its otherwise enforceable contracts.” *Id.* at 512, 77 L. Ed. 2d at 815. Even if there had been no settlement and the Board had ordered reinstatement of the striking union employees, “the suit for damages for breach of contract could still be maintained without in any way prejudicing the jurisdiction of the Board or the interest of the federal law in insuring the replacement of strikers.” *Id.* In turn, the Court concluded that “[w]e see no basis for holding that permitting the contract cause of action will conflict with the rights of either the strikers or the employer or would frustrate any policy of the federal labor laws.” *Id.* at 512, 77 L. Ed. 2d at 815-16. The Court further concluded that neither of the plaintiffs’ state claims were preempted by the NLRA. *Id.* at 512, 77 L. Ed. 2d at 816.

The third case cited by plaintiffs in support of their argument, *General Electric Co. v. Local 182 Int’l Union of Electrical, Radio, and Machine Works, et al.*, 47 N.C. App. 153, 266 S.E.2d 750, involved the determination of whether a state claim for injunctive relief to enjoin defendant union’s picketing which was “impeding the flow of traffic,” and those involved where alleged to have “engaged in other illegal and violent acts[,]” such as “damaged vehicles entering the plant, thrown rocks and threatened nonunion employees.” On appeal from a trial court’s permanent injunction against the defendant union, this Court noted that

[t]he State is not preempted by the National Labor Relations Act from exercising its historic powers of maintaining peace and

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order within its jurisdiction and protecting its citizens in the free, rightful and safe use of the public roads and highways. The courts of a state cannot regulate orderly and peaceful picketing. But, where picketing results in heavy traffic congestion, damage to property and threats of physical violence as occurred in this case, the State courts have the power to enforce the laws of this State which protect the public welfare and to enjoin acts of violence and civil disobedience.

Id. at 157, 266 S.E.2d at 753. The Court then concluded that “The trial court and consequently this Court has jurisdiction in this case of threatened and actual violence where the picketing could not be characterized as peaceful.” *Id.*

In addition to the state claims in *Farmer* for intentional infliction of emotional distress and in *Belknap* for misrepresentation and breach of contract, the “local interest” exception has been also applied to prohibit NLRA preemption of a state trespass claim, *Sears*, 436 U.S. 180, 56 L. Ed. 2d 209, and for malicious interference with a lawful occupation, *Automobile Workers v. Russell*, 356 U.S. 634, 2 L. Ed. 2d 1030 (1958). However, plaintiffs here brought claims for a violation of the Identity Theft Protection Act and for unfair and deceptive trade practices. Therefore, the specific reasoning in *Farmer*, which was based on the plaintiffs’ allegation of “outrageous conduct” by defendants is not applicable to the facts before us. Also, in balancing the State’s interest in controlling or remedying the effects of the conduct against both the interference with the National Labor Relations Board’s ability to adjudicate controversies committed to it by the Act and the risk that the State will sanction conduct that the Act protects, as prescribed by *Farmer* and *Belknap*, we agree that the state has an interest in protecting its citizens from identity theft and from unfair and deceptive trade practices as the result of purposeful or negligent dissemination of social security numbers. However, in examining the “critical inquiry” of “whether the controversy presented to the state court is identical with that which could be presented to the Board[.]” *Belknap*, 463 U.S. at 510, 77 L. Ed. 2d at 814, we note that, unlike *Belknap*, plaintiffs presented the same controversy—defendant CWA Local 3602’s posting of plaintiffs’ social security numbers—in their state claims as they alleged in their NLRB claims. As noted above, the NLRB settlement stated that defendant CWA Local 3602 would not post non-union members social security numbers on its bulletin board, but a state trial court could potentially, based on the same conduct, hold that labor union defendant CWA

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Local 3602's actions were not prohibited by state law and that it is free to post social security numbers as part of the union's business in recruiting former members back into the union. Accordingly, there is a danger that a state claim would interfere with the NLRB's ability to adjudicate this controversy. Therefore, the NLRB's interest in adjudicating controversies committed to it by the NLRA outweighs the State's interests. Thus, the "local interest" exception is inapplicable to the facts before us.

Finally, unlike *General Electric Co.*, plaintiffs make no allegations of "acts of violence and civil disobedience" *See id.* at 157, 266 S.E.2d at 753, that would justify the application of that case to the facts before us. Although plaintiffs alleged potential harm from the posting of the list, as noted above, no actual harm occurred. Accordingly, we find that none of the *Garmon* exceptions are applicable in this case. We conclude that the trial court correctly determined that plaintiffs' claims are preempted by the NLRA and affirm the trial court's order granting defendants' motion for summary judgment and dismissing plaintiffs' claims.³

AFFIRMED.

Judges BRYANT and BEASLEY concur.

FAIRFIELD HARBOUR PROPERTY OWNERS ASSOCIATION, INC. PLAINTIFF V.
MIDSOUTH GOLF, LLC, DEFENDANT

No. COA10-384

(Filed 16 August 2011)

1. Appeal and Error—appealability—failure to appropriately file notice of appeal

Although defendant failed to appropriately file notice of appeal of a 30 June 2009 order, the Court of Appeals had jurisdiction to review the action under N.C.G.S. § 1-278.

3. As we found that plaintiffs' claims were preempted by the NLRA, we need not address defendants' arguments as to the preemption by the duty of fair representation.

2. Deeds—restrictive covenants—enforcement authority

The trial court did not err by denying defendant's motions to dismiss based on a 1993 restrictive covenant's alleged failure to provide plaintiff with enforcement authority. A plain reading of the covenant revealed that defendant agreed to maintain the amenities and plaintiff was given the authority to file suit to enforce the restrictive covenants in law or in equity.

3. Deeds—restrictive covenants—consideration—radical change—amenities fees

The trial court did not err by granting summary judgment in favor of plaintiff on its claim that defendant breached the 1993 covenants and on defendant's counterclaim and defenses based on alleged lack of consideration. Defendant was unable to identify changes within the covenanted area that were so radical that they would destroy the original purposes of the agreement. Further, a financial hardship did not qualify as a "radical change" occurring within a community. There was nothing to suggest that defendant's right to collect an amenities fee was unenforceable, and defendant failed to present evidence that the decision of individual lot owners to withhold amenity fees was at plaintiff's direction.

4. Deeds—restrictive covenants—radical change—failure of consideration—lack of reciprocal benefits and burdens—bad faith

The trial court did not err in a breach of covenants case by denying defendant's motion for directed verdict on the issues of radical change, failure of consideration, lack of reciprocal benefits and burdens, and bad faith. The Court of Appeals previously concluded there were no genuine issues of material fact as to these issues.

5. Deeds—restrictive covenants—frustration of purpose

The trial court did not err in a breach of covenants case by granting plaintiff's motion for directed verdict on the issue of frustration of purpose. The contractual agreement entered into by the parties allocated the potential risk involved in the frustrating event to defendant.

6. Damages and Remedies—restrictive covenant—motion in limine

The trial court did not err in a breach of covenants case by denying defendant's motion *in limine* on the issue of damages. The

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terms of the restrictive covenant allowed plaintiff to recover damages other than the costs incurred in maintaining the golf courses.

7. Damages and Remedies—motion for directed verdict—motion for judgment notwithstanding verdict

The trial court did not err in a breach of covenants case by denying defendant's motions for a directed verdict and for judgment notwithstanding the verdict on the lack of damages issue.

8. Deeds—restrictive covenants—requested jury instruction—frustration of purpose—damages

The trial court did not err by failing to give defendant's requested jury instructions on the issues of frustration of purpose and damages. Defendant was unable to establish that the evidence warranted these instructions.

Appeal by Defendant from judgment entered 27 July 2009 by Judge John E. Nobles, Jr. in Craven County Superior Court. Heard in the Court of Appeals 26 October 2010.

Stubbs & Perdue, P.A., by John W. King, Jr., for Plaintiff-Appellee.

Ward and Smith, P.A., by Eric J. Remington, for Defendant-Appellant.

BEASLEY, Judge.

Where on 27 August 2009 Defendant entered notice of appeal of judgment on "all rulings made by [the trial court] against Defendant during the trial and any pre-trial proceedings," we hold that notice of appeal was proper. Where the trial court denied Defendant's motion for directed verdict on the issues of radical change, failure of consideration, lack of reciprocal benefits and burden and bad faith, and damages, and denied Defendant's motion for requested jury instruction, granted Plaintiff's motion for directed verdict on the issue of frustration of purpose, denied Defendant's motion *in limine* to limit Plaintiff's evidence of damages, we affirm.

Fairfield Harbour is a residential community located in Craven County, North Carolina. The community consists of residential homes, condominiums, and timeshares. Additionally, residents have access to two golf courses and a number of other amenities located within the community. All property owners within the community are members of Plaintiff, Fairfield Harbour Property Owners Association, Inc.

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In 1975, the original developer of the Fairfield Harbour community recorded the “Supplemental Declaration of Restrictions-Treasure Lake of North Carolina, Inc.” (“Supplemental Declaration”). The Supplemental Declaration allowed the developer to charge an annual fee to all residents for the upkeep and maintenance of all recreational amenities. Later, in 1979, Fairfield Harbour, Inc., as the successor in interest to the original community developer, recorded the “Master Declaration of Fairfield Harbour” which allowed Fairfield Harbour Inc., and its successor to assess an amenity fee to all single family lots, town homes, condominiums, and timeshares sold thereafter. On 29 September 1999, Defendant, Midsouth Golf LLC, entered into a contract of sale for the purchase of many of the amenities in Fairfield Harbour including the two golf courses. Defendant purchased the amenities, subject to the 1993 covenants, in March 2000. The 1993 restrictive covenants required Defendant to operate and maintain two golf courses located within the community. Additionally, pursuant to the 1975 and 1979 restrictions, Defendant was also allowed to collect amenity fees for the maintenance of the golf courses.

Residents in the community were categorized as single family residential lots, town homes, condominiums and owners of timeshares. Though the timeshare property owners outnumbered any other category of residents in the community, they were required to pay the same amount in amenity fees as the other residents. In November 2004, Defendant filed suit against the timeshare property owners seeking to address this concern by assessing the timeshare property owners an amenity fee approximately five times more than that assessed to other owners. On 26 July 2006, the trial court determined that the amenity fee provision of the Master Declaration was unenforceable against the time-share property owners. Following the decision, some of the remaining residents of the Fairfield Harbour community stopped paying the amenity fees and began boycotting use of the amenities. Soon thereafter, Defendant closed the golf courses due to insufficient funds. On 22 April 2008, Plaintiff filed the present action generally arguing that Defendant’s decision to close the Shoreline Golf Course was a breach of the Declaration of Covenants requiring Defendant to operate and maintain the golf course and its amenities.

On 27 June 2009, the trial court allowed Plaintiff’s partial motion for summary judgment, concluding that there was no genuine issue of

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material fact as to Plaintiff's assertion that Defendant breached the covenants by closing the golf course. Additionally, the trial court dismissed all Defendant's defenses and counterclaims except the defense of frustration of purpose. The only issues remaining for trial were the amount of damages and the defense of frustration of purpose. Following the trial, the trial court granted Plaintiff's motion for a directed verdict on Defendant's frustration of purpose defense. Defendant appeals the trial court's order.

Motion to Dismiss

[1] Preliminarily, we address a motion to dismiss filed by Plaintiff in which it seeks to dismiss a portion of Defendant's appeal. Plaintiff contends that because Defendant failed to identify the specific order from which it was appealing, Defendant failed to appropriately provide notice of appellate review. We disagree.

The rules of appellate procedure provide that:

The notice of appeal required to be filed and served by subsection (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

N.C.R. App. P. 3(d). Generally, appellate courts only have jurisdiction to hear appeals from those orders specifically designated in the notice of appeal. *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994). "Proper notice of appeal is a jurisdictional requirement that may not be waived." *Id.*

In this case, Defendant failed to specifically identify the order from which it intended to appeal. Defendant assigns error to the trial court's order granting summary judgment in favor of Plaintiff filed on 30 June 2009. However, in its notice of appeal to this Court, Defendant merely designated that he was appealing from the judgment entered on 27 July 2009 and "all rulings made by [the trial court] against Defendant Mid-South during the trial and any pre-trial proceedings." As discussed above, the trial court addressed numerous pre-trial and post-trial motions made by the parties. Defendant's appeal from "all rulings" and "pre-trial proceedings" is not a specific designation.

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“Notwithstanding the jurisdictional requirements in Rule 3(d), our Court has recognized that even if an appellant omits a certain order from the notice of appeal, our Court may still obtain jurisdiction to review the order pursuant to N.C. Gen. Stat. § 1-278.” *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 348, 666 S.E.2d 127, 133 (2008). Appellate jurisdiction pursuant to N.C. Gen. Stat. § 1-278 is appropriate under the following circumstances: “(1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment.” *Id.* (quoting *Dixon v. Hill*, 174 N.C. App. 252, 257, 620 S.E.2d 715, 718 (2005)).

Though Defendant in this case failed to appropriately file notice of appeal of the 30 June 2009 order, our Court has jurisdiction to review the action pursuant to N.C. Gen. Stat. § 1-278. Defendant timely objected to the trial court’s summary judgment order. The North Carolina Rules of Civil Procedure provide that formal objections are not necessary with respect to pre-trial motions “and other orders of the court not directed to the admissibility of evidence[.]” N.C. Gen. Stat. § 1A-1, Rule 46(b) (2009). To preserve an exception to a pre-trial ruling for appellate review, it is “sufficient if a party, at the time the ruling or order is made or sought, makes known to the court the party’s objection to the action of the court or makes known the action that the party desires the court to take and the party’s grounds for its position.” *Id.* Here, Defendant submitted affidavits, arguments, and a memorandum of law in opposition to Plaintiff’s motion for summary judgment. Accordingly, Defendant timely objected to the trial court’s ruling and satisfied the first element of N.C. Gen. Stat. § 1-278.

The trial court’s order granting Plaintiff’s motion for partial summary judgment was interlocutory and was not immediately appealable. “An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). “A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal.” *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). The trial court’s order in this case disposed of many of Defendant’s defenses; however, it left the issue of damages and the issue of frustration of purpose for trial. The trial court did not certify the order for immediate appellate review, nor did the trial court’s order affect a substantial right held by Defendant.

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Finally, the trial court's grant of partial summary judgment "involved the merits and affected the judgment." "An order involves the merits and necessarily affects the judgment if it deprives the appellant of one of the appellant's substantive legal claims." *Yorke*, 192 N.C. App. at 348, 666 S.E.2d at 133. In the current action, the trial court's order dismissed Defendant's counterclaim and several of its legal defenses. Because the trial court's grant of partial summary judgment eliminated one of Defendant's claims and several of its defenses, we hold that Defendant satisfied the third element of N.C. Gen. Stat. § 1-278.

I.

[2] On 24 June 2008, Defendant moved to dismiss Plaintiff's action for lack of standing. The trial court denied Defendant's motion. On appeal, Defendant first argues that the trial court erred in denying its motions to dismiss because the 1993 restrictive covenants did not provide Plaintiff with enforcement authority. We disagree.

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (quotation omitted). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple v. Commercial Courier Express Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005). In its motion, Defendant moved to dismiss the action pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure.

Standing is properly challenged by a 12(b)(1) motion to dismiss, or 12(b)(6) motion to dismiss for a failure to state a claim upon which relief may be granted. *See Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) ("[s]tanding concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss"); *see also Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003) ("A lack of standing may be challenged by motion to dismiss for failure to state a claim upon which relief may be granted"). "The standard of review on a motion to dismiss under Rule 12(b)(1) is *de novo*. The standard of review on a motion to dismiss under Rule 12(b)(6) is whether, if all the plaintiff's allegations are taken as true, the plaintiff is entitled to recover under some legal theory." *Rowlette v. State*, 188 N.C. App. 712, 714, 656 S.E.2d 619, 621 (2008) (internal citations and quotations omitted).

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In the present case, under the application of either standard of review, the trial court appropriately determined that Plaintiff had standing to bring its action against Defendant. It is well established that the intention of the parties governs this Court's review of restrictive covenants. *Southeastern Jurisdictional Administrative Council, Inc. v. Emerson*, 363 N.C. 590, 596, 683 S.E.2d 366, 369 (2009). "The original parties to a restrictive covenant may structure the covenants, and any corresponding enforcement mechanism, in virtually any fashion they see fit." *Wise v. Harrington Grove Cmty. Ass'n, Inc.*, 357 N.C. 396, 401, 584 S.E.2d 731, 735 (2003). The parties' intent shall be determined from a thorough examination of all the covenants contained in the instrument or instruments creating the restrictions. *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967). "Judicial enforcement of a covenant will occur as it would in an action for enforcement of 'any other valid contractual relationship.'" *Page v. Bald Head Ass'n*, 170 N.C. App. 151, 155, 611 S.E.2d 463, 466 (2005) (quoting *Sheets v. Dillon*, 221 N.C. 426, 431, 20 S.E.2d 344, 347 (1942)).

In this case, the restrictive covenants explain that the "Company and Association shall have the right to enforce, by any proceedings at law or in equity, all of the restrictions, conditions, covenants, easements, reservation, liens and charges now or hereafter imposed by the provisions of this Declaration." The covenant also defines "Association" as Fairfield Harbour Property Owners Association. A plain reading of the covenant reveals that Defendant agreed to maintain the amenities, and Plaintiff was given the authority to file suit to enforce the restrictive covenants in law or in equity. While the 1993 covenants contain several provisions that would allow Plaintiff to enter the premises and take over care of the amenities, application of these specific provisions are not relevant to the current action. Instead, Plaintiff exercised its right to file an action to enforce the restrictive covenants. Accordingly, Defendant's contention that the terms of the restrictive covenant did not provide Plaintiff with enforcement authority is without merit.

II.

[3] Defendant next argues that "the trial court erred in entering summary judgment in [Plaintiff's] favor on its claim that [Defendant] breached the 1993 covenants and on [Defendant's] counterclaim and defenses." We disagree.

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While Defendant's appeal of this issue raises various claims, counterclaims, and defenses, they are all subject to the same standard of review. A trial court's decision to grant a motion for summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "[T]his Court must view the record in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant's favor." *Gaskill v. Jeanette Enterprises, Inc.*, 147 N.C. App. 138, 140, 554 S.E.2d 10, 12 (2001). The moving party bears the burden of establishing that there is no genuine issue of material fact. *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001).

The party moving for summary judgment may meet this burden by "(1) proving that an essential element of plaintiff's claim is non-existent, or (2) showing through discovery that plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that plaintiff cannot surmount an affirmative defense which would bar the claim." *Watts v. Cumberland County Hosp. System, Inc.*, 75 N.C. App. 1, 6, 330 S.E.2d 242, 247 (1985), *reversed on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986). Once the burden of the moving party is satisfied, "the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, establishing at least a prima facie case at trial." *Stephenson v. Warren*, 136 N.C. App. 768, 772, 525 S.E.2d 809, 811-12 (2000).

Defendant first specifically argues that a radical change in circumstances has destroyed the essential purpose of the covenant, rendering the covenant unenforceable against Defendant. We disagree. "The weight of authority is to the effect that, if substantial, radical, and fundamental changes have taken place in a development protected by restrictive covenants, courts of equity will not enforce the restriction." *Higgins v. Hough*, 195 N.C. 652, ___, 143 S.E. 212, 213 (1928). Our Court has held that restrictive "[c]ovenants may . . . be terminated when changes within the covenanted area are so radical as practically to destroy the essential objects and purposes of the agreement." *Medearis v. Trustees of Meyers Park Baptist Church*, 148 N.C. App. 1, 6, 558 S.E.2d 199, 203 (2001) (internal quotation marks omitted). There is not a bright-line test for determining whether a radical change has occurred and the inquiry depends upon

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the facts and circumstances presented in each case. *Id.* at 7, 558 S.E.2d at 204.

Typically, cases in which we contemplated whether a radical change terminated a restrictive covenant involved physical changes in the covenanted area. *See Tull v. Doctors Building, Inc.*, 255 N.C. 23, 38, 120 S.E.2d 817, 827 (1961); *Hawthorne v. Realty Syndicate, Inc.*, 300 N.C. 660, 667-68, 268 S.E.2d 494, 499 (1980); *Sterling Cotton Mills, Inc. v. Vaughan*, 24 N.C. App. 696, 212 S.E.2d 199 (1975); *Barber v. Dixon*, 62 N.C. App. 455, 302 S.E.2d 915 (1983).

In this case, Defendant is unable to identify changes within the covenanted area that were so radical, that they would destroy the original purposes of the agreement. The restrictive covenants require Defendant to maintain and operate the golf course and other amenities in the community. Defendant asserts that because many of the assessed lot owners refuse to pay the required amenity fees, it is unable to comply with the obligations of the restrictive covenants. Defendant fails to cite, nor can we locate, a case in which a financial hardship qualified as a “radical change” occurring within a community. Defendant offers no evidence of changes to the community that would destroy the purpose of maintaining a golf course in the covenanted community. The community remains a residential neighborhood and covenants creating golf courses and amenities for the benefits of those residents are not destroyed.

Next, Defendant contends that the trial court erroneously granted Plaintiff’s motion for summary judgment as to Defendant’s assertion that a failure of consideration rendered the covenants unenforceable. We disagree.

“Restrictive covenants are considered contractual in nature and acceptance of a valid deed incorporating the covenants implies the existence of a valid contract.” *Page*, 170 N.C. App. at 155, 611 S.E.2d at 465. “[I]n order for a contract to be enforceable it must be supported by consideration.” *Duncan v. Duncan*, 147 N.C. App. 152, 155, 553 S.E.2d 925, 927 (2001) (quoting *Investment Properties v. Norburn*, 281 N.C. 191, 195, 188 S.E.2d 342, 345 (1972)). Consideration sufficient enough to support a contract consists of “‘any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee.’” *Lee v. Paragon Group Contractors, Inc.*, 78 N.C. App. 334, 338, 337 S.E.2d 132, 134 (1985) (quoting *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, 215, 274 S.E.2d 206, 212 (1981)).

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Typically, our Court will not examine the adequacy of the consideration in a contractual agreement. *Hejl v. Hood, Hargett & Associates, Inc.*, 196 N.C. App. 299, 305, 674 S.E.2d 425, 429 (2009). “[I]nadequate consideration, as opposed to the lack of consideration, is not sufficient grounds to invalidate a contract. In order to defeat a contract for failure of consideration, the failure of consideration must be complete and total.” *Harllee v. Harllee*, 151 N.C. App. 40, 49, 565 S.E.2d 678, 683 (2002) (internal citations and quotations omitted). “[W]hen parties have dealt at [arms-length] and contracted, the Court cannot relieve one of them because the contract has proven to be a hard one. Whether or not the consideration is adequate to the promise, is generally immaterial in the absence of fraud.” *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 722, 127 S.E.2d 539, 543 (1962).

Here, there was sufficient consideration to support the validity of the restrictive covenants. Defendant argues that because of the time-share decision, and subsequent actions by the residents, there was a failure of consideration and that excused it from its obligation to maintain and operate the amenities. There is nothing here to suggest that Defendant’s right to collect the amenity fees was unenforceable. When Defendant took control of the golf courses, they began to collect fees from the assessed owner for the maintenance of the courses. Though there is evidence that many of the assessed property owners are no longer paying the amenity fees and are boycotting the golf courses, the initial contractual agreement remains valid. Accordingly, the trial court appropriately determined that the original contract between the parties does not fail for a lack of consideration.¹

Next, Defendant contends that the trial court erred in entering summary judgment in favor of Plaintiff because the restrictive covenant’s obligations are no longer tied to any reciprocal benefits arising from its ownership of the golf courses. We disagree.

In its brief Defendant asserts that the restrictive covenants imposes reciprocal benefits and burdens upon Plaintiff and Defendant. Because Defendant was no longer receiving the amount necessary in fees to maintain the golf courses, it was no longer required to operate the golf courses. However, language in the restric-

1. We also note that the authority and arguments raised by Defendant relate to defense of “frustration of purpose.” Because Defendant fails to argue the defense of failure of consideration, it is abandoned on appeal. N.C.R. App. P. 28(b)(6).

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tive covenants specifically provides that the restrictions contained within the covenant are severable. Merely because one restriction in the covenant was declared illegal, the enforceability of the other provisions is not affected. Because language in the 1993 restrictive covenants clearly indicates that the restrictive covenants were not intended to afford reciprocal benefits upon the parties, Defendant's argument is without merit.

In its final argument, Defendant contends that the trial court erroneously failed to determine that "by refusing to pay amenity fees and boycotting the use of the amenities, FHPOA, through its members, has acted in bad faith, thus barring its claims." We disagree.

In addition to its express terms, a contract contains all terms that are necessarily implied "to effect the intention of the parties" and which are not in conflict with the express terms. *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973) (citations omitted.) Among these implied terms is the "basic principle of contract law that a party who enters into an enforceable contract is required to act in good faith and to make reasonable efforts to perform his obligations under the agreement." *Weyerhaeuser Co. v. Godwin Building Supply Co.*, 40 N.C. App. 743, 746, 253 S.E.2d 625, 627 (1979) (citations omitted).

In the present action, there is no evidence indicating that Plaintiff failed to act in good faith to perform its contractual obligations under the agreement. While a number of the assessed lot owners have refused to pay the required amenity fees and are boycotting the golf courses, there is no evidence that these lot owners are acting on Plaintiff's behalf or pursuant to its direction. Plaintiff is an incorporated entity, governed by a board of directors. Defendant failed to present any evidence that the decision of individual lot owners to withhold amenity fees was at Plaintiff's direction. While individual assessed property owners may have breached the terms of the restrictive covenants, these actions are not attributable to Plaintiff. Accordingly, the trial court appropriately determined that there was no genuine issue of material fact as to Defendant's claim of bad faith.

III.

[4] Defendant next argues that the trial court erroneously denied its motion for directed verdict on the issues of radical change, failure of consideration, lack of reciprocal benefits and burdens, and bad faith because the evidence presented at trial supports only one conclusion on these issues. We disagree.

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It is well established that 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 v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991). When determining whether a trial court correctly denied a motion for a directed verdict or a judgment notwithstanding the verdict, “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.” *Id.* at 323, 411 S.E.2d at 138 (internal citations omitted). As we have already determined that there are no genuine issues of material fact as to these arguments raised by Defendant, we hold that these same arguments also lack merit when viewed under essentially the same standard of review. See *Nelson v. Novant Health Triad Region*, 159 N.C. App. 440, 442, 583 S.E.2d 415, 417 (2003) (“The standard of review for a directed verdict is essentially the same as that for summary judgment.”). Accordingly, Defendant’s argument is without merit.

IV.

[5] Defendant next argues that the trial erred in granting Plaintiff’s motion for directed verdict on the issue of frustration of purpose. We disagree.

As discussed above, our Court will review the trial court’s order granting Plaintiff’s motion for a directed verdict in a light most favorable to Defendant, and determine whether the trial court correctly concluded that no reasonable juror could have found in favor of Defendant. *McDonnell v. Tradewind Airlines, Inc.*, 194 N.C. App. 674, 677, 670 S.E.2d 302, 305 (2009). Articulating the applicability of the frustration of purpose doctrine our Supreme Court has explained that,

[while] performance remains possible, [it] is excused whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance. The doctrine of commercial frustration is based upon the fundamental premise of giving relief in a situation where the parties could not reasonably have protected themselves by the terms of the contract against contingencies which later arose.

Brenner v. Little Red School House, Ltd., 302 N.C. 207, 211, 274 S.E.2d 206, 209 (1981). However, the doctrine is inapplicable where the frustrating event is reasonably foreseeable. *Id.* Additionally, “if

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the parties have contracted in reference to the allocation of the risk involved in the frustrating event, they may not invoke the doctrine of frustration to escape their obligations.” *Id.* Essentially the doctrine of frustration of purpose requires proof that: (1) there was an implied condition in the contract that a changed condition would excuse performance; (2) the changed condition results in a failure of consideration or the expected value of the performance; and (3) the changed condition was not reasonably foreseeable. *Faulconer v. Wysong and Miles Co.*, 155 N.C. App. 598, 602, 574 S.E.2d 688, 691 (2002).

In this case, because the contractual agreement entered into by the parties allocated the potential risk involved in the frustrating event at issue to the Defendant, the trial court appropriately granted Plaintiff’s motion for a directed verdict. The 1979 Master Declaration states that “if any of the provisions shall be held to be invalid or to be unenforceable or to lack the quality of running with the land, that holding shall be without effect upon the validity, enforceability, or running quality of any other one of the provisions hereof.” This language from the master declaration was incorporated into the 1993 restrictive covenants.

Defendant asserts that because the earlier decision of this Court prohibited them from collecting amenity fees from the time share owners, the resulting economic hardship was unforeseeable and a frustration of the purpose of the restrictive covenants. However, a review of the language in the master deed reveals that though one restrictive covenant may be found to be illegal, the other provisions, including those requiring Defendant to maintain and operate the golf course, are still enforceable. Because the risk associated with the frustrating event was allocated to Defendant, the trial court appropriately granted Plaintiff’s motion for a directed verdict on the issue of frustration of purpose. Accordingly, Defendant’s argument is without merit.

V.

[6] Defendant next argues that the trial court erred in denying its motion *in limine* in which it sought to limit Plaintiff’s evidence of damages presented at trial. We disagree.

Preliminarily, we note that “[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if [a party] fails to further object to that evidence at the time it is offered at trial.” *State v. Conway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845

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(1995). To preserve issues raised in the motion on appellate review, a party is “required to interpose at least a general objection to the evidence at the time it is offered.” *Id.* Here, Plaintiff sought to present evidence of damages through the testimony of its expert witness, Peter Dejack (“Dejack”). Before Dejack testified at trial, Defendant made an objection and renewed its motion *in limine* to exclude Dejack’s testimony. The trial court denied Defendant’s objection and permitted Dejack to testify. Defendant preserved its argument as to the admissibility of Dejack’s testimony for appellate review; therefore, we address the merits of Defendants argument.

At trial, Dejack generally testified as to his inspection of the golf courses located within the community and his preparation of a report in which he estimated the costs to repair and maintain the courses. Defendant contends that because the restrictive covenants limit liability to the amount actually incurred by Plaintiff in maintaining and operating the amenities, Dejack’s testimony as to repair and maintenance costs was inadmissible.

The enforcement provisions of the restrictive covenant allow Plaintiff to enforce the terms of the covenant in law or in equity. The terms of the restrictive covenant also provide that should the Defendant fail to satisfy its obligations under the agreement, Plaintiff may take possession of the premises and take action necessary to perform Defendant’s duties under the covenant. If the Plaintiff is required to exercise its right to take possession of the premises, Defendant is liable for the expenses incurred by Plaintiff in the exercise of this right. The provision of the restrictive covenant permitting Plaintiff to take possession of the golf course, and file suit to recover the costs in maintaining the amenities is separate from the provisions allowing Plaintiff to seek enforcement of the covenants in law or in equity. A plain reading of the terms of the covenant permits Plaintiff to file a legal action to enforce the terms of the restrictive covenant, or take control of the premises and file suit to recover the costs of maintaining the golf courses. Because the terms of the restrictive covenant allow Plaintiff to recover damages other than the costs incurred in maintaining the golf courses, Defendant’s argument is without merit.

VI.

[7] Defendant contends that the trial court erred in denying Defendants motions for a directed verdict and for a judgment

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notwithstanding the verdict as to the lack of damages issue. For the reasons stated in the preceding section, we disagree.

VII.

[8] In his final argument on appeal, Defendant contends that “the trial court erred in failing to give [its] [requested] jury instructions on the issues of frustration of purpose and damages when sufficient evidence was presented to support these instructions.” We disagree.

To establish that the trial court erred in failing to provide its requested jury instructions, Defendant must show that “(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury.” *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274 (2002) (quotation omitted). Here, the jury instructions requested by Defendant were not supported by the evidence.

At trial, Defendant requested that the trial court instruct jurors as to the defense of frustration of purpose. Additionally, Defendant requested that the trial court instruct jurors that the amount of damages they elected to award must be based upon costs actually incurred. In the preceding sections, we concluded that the trial court appropriately granted Plaintiff’s motions for a directed verdict as to the defense of frustration of purpose and the issue of damages. In reaching this conclusion, we essentially determined that Defendant was unable to establish its arguments on the issue of damages and the defense of frustration of purpose were supported by competent record evidence. *See Gibson v. Ussery*, 196 N.C. App. 140, 143, 675 S.E.2d 666, 668 (2009) (noting that “[i]t is only appropriate for the trial judge to remove a matter from the purview of the jury if there is no evidence in the record that would permit a finding to support the claim.”). Likewise, Defendant is unable to establish that the evidence warranted a jury instruction with respect to these issues. Accordingly, Defendant’s argument is without merit.

Affirmed.

Judges McGEE and HUNTER, JR. concur.

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POINT INTREPID, LLC AND ADVANCED INTERNET TECHNOLOGIES, INC.,
PLAINTIFFS V. ROBYN FARLEY, DEFENDANT

No. COA10-1617

(Filed 16 August 2011)

1. Appeal and Error—preservation of issues—failure to object

Plaintiffs did not preserve for appeal an argument concerning the shifting of discovery fees where they did not obtain a ruling from the trial court on the issue.

2. Costs—expert fees—ex parte contact

The trial court did not abuse its discretion by requiring plaintiffs to pay the balance of an independent expert's fees despite *ex parte* contact between the expert and opposing counsel where the trial court decided that the contact did not bias the witness.

3. Costs—independent expert fees—reasonableness

The trial court did not abuse its discretion by requiring plaintiffs to pay the balance of the fee of an independent expert witness where plaintiffs contended that the fee was unreasonable. Despite evidence to the contrary, there was competent evidence that the invoice was reasonable. The rejection of plaintiffs' expert testimony on reasonableness did not mean that the testimony was not considered or that the trial court's decision was not supported by competent evidence.

4. Costs—expert—expenses for recovering fee

An award for attorney fees and additional expenses expended by an expert witness in seeking recovery of its fees was reversed. The relevant statutes on reimbursement of expert witnesses do not mention attorney fees, the witness was not entitled to compensation for appearing in court voluntarily, and compensation does not extend to travel expenses.

Appeal by Plaintiffs from Orders entered 8 September 2010 and 22 September 2010 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 11 May 2011.

A. Bikash Roy for Plaintiffs-appellant.

Winslow Wetsch, PLLC, by Laura J. Wetsch, for Defendant-appellee.

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Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Thomas M. Buckley, for third-party appellee.

HUNTER, JR., Robert N., Judge.

Point Intrepid, LLC (“Point Intrepid”) and Advanced Internet Technologies, Inc. (“AIT”) (collectively “Plaintiffs”) appeal from Orders directing AIT to pay third-party appellee Forward Discovery’s invoice, attorneys’ fees, and additional expenses. We affirm, in part, and reverse, in part.

I. Facts and Procedural History

This case arises from an employment dispute between Plaintiffs and Robyn Farley (“Farley”), a former employee of AIT. While the parties settled the litigation relating to the underlying employment dispute, this appeal originates from a disagreement over payment of third-party expert fees incurred during the parties’ litigation. Plaintiffs agreed in court to pay the entire cost of the third-party expert, but subsequently refused full payment. Plaintiffs appeal the trial court’s Orders mandating their payment of the balance of the expert’s invoice, attorneys’ fees, and additional expenses.

AIT is a North Carolina corporation in the business of hosting websites and providing internet technology-related services. Point Intrepid is a North Carolina company that acts as the benefits and payroll administrator for AIT, its subsidiaries, and affiliates.

On 6 June 2008, Farley was hired by AIT as a Database Administrator/Engineer. Farley’s employment at AIT was terminated on 26 February 2009 following allegations of her unauthorized access of her supervisor’s computer. Plaintiffs brought suit against Farley for, *inter alia*, breach of contract and breach of fiduciary duty. Farley made numerous counter-claims, including wrongful discharge and defamation. The case was heard at the 19 November 2009 session of the Superior Court of Cumberland County, Judge Gregory A. Weeks presiding.

During a motions hearing, Judge Weeks entered a discovery order on 3 December 2009 requiring AIT to produce “all documents supporting and negating AIT’s decision to determinate [sic] Farley’s employment.” Because AIT wanted to use an expert to protect its proprietary information and avoid inadvertent disclosure of customer banking information, AIT filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b). Specifically, AIT requested that an independent third-

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party expert, either designated by the court or by agreement between the parties, analyze the hard drives “with the costs to be shared equally by the parties.” At a 7 December 2009 hearing for this Motion, Farley conceded to the appointment of an independent third-party expert, but proposed that AIT pay all expenses for the expert. AIT agreed to incur the costs for third-party analysis of its hard drives, and explicitly stated, “[W]e will incur [the costs] voluntarily and a hundred percent, we will incur it.”

On 4 January 2010, the trial court entered an Order requiring the parties to agree to a third-party expert within five business days. Pursuant to the Order, the expert would analyze AIT’s hard drives and report the results. Significantly, the Order provided that “[t]he third-party expert may communicate separately with each party, but shall maintain a complete record of all such communications, which shall be made available to the court or either party upon request.” The Order also stated, “AIT shall promptly pay all fees and expenses of the third-party expert selected to perform the work identified in this Order, consistent with the third party expert’s quote which is incorporated in this Order by reference.”

On 11 January 2010, the parties informed the trial court that they were unable to agree on an expert. Farley proposed as an expert Ryan Johnson (“Johnson”) of Forward Discovery, Inc. (“Forward Discovery”). Johnson provided an estimate of \$10,250 per hard drive (\$20,500 total), for the requested work. AIT suggested as an expert Charles Moreton, of Computer Trauma Center, who stated the cost of the work would not exceed \$2,200. The trial court, in a 14 January 2010 Order, selected Johnson of Forward Discovery, the expert proposed by Farley. The trial court held that Johnson’s estimate of \$20,500 would serve as a cap on the work to be performed.

Pursuant to an agreement between the parties, Johnson did not begin his work until late March 2010 to allow the parties time to mediate the underlying claims. Farley’s attorney e-mailed Johnson on 19 March 2010 to inform him that mediation had failed and that he could begin his work. AIT’s attorneys were included on the e-mail. This prompted an exchange of contentious e-mails in which AIT’s attorney expressed his disapproval of this unilateral request by Farley’s attorney that Johnson begin his court-ordered work. On 22 March 2010, Farley’s attorney called Forward Discovery about these e-mails, on which Johnson had been copied, and Johnson advised her that because the matter seemed “contentious,” it might be best to arrange

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a conference call between all the parties. Forward Discovery logged this phone call with Farley's attorney pursuant to the trial court's Order, but admits it failed to log two instances where Farley's attorney called Forward Discovery's office for driving directions.

In early May 2010, Forward Discovery completed its court-ordered work, and it sent an invoice to AIT in early June 2010. The invoice listed a total amount of \$22,650.12 due by 9 July 2010, exceeding the court-ordered limit of \$20,500. AIT refused to pay the entire amount, and requested clarification of the services provided. In an e-mail exchange with AIT's attorney, Johnson provided the requested clarification. On 30 July 2010, AIT paid Johnson \$10,250, half of the court-ordered limit.

On 9 August 2010, Plaintiffs filed a Motion to Limit Expert Fees. Plaintiffs argued that Forward Discovery's estimate and invoice were unreasonable, that AIT had already paid a reasonable fee for Forward Discovery's work, and that Johnson should show cause as to why the trial court should not consider the estimate and invoice unreasonable. The next day, on 10 August 2010, Forward Discovery filed a Motion to Show Cause why AIT should not be held in contempt of court for failing to pay the balance of Forward Discovery's invoice and requested sanctions against AIT for failure to comply with the trial court's discovery order. Forward Discovery's Motion called for AIT to pay the fees Forward Discovery incurred for its court-ordered work, as well as attorneys' fees, interest, and monetary sanctions for its collection efforts. Both parties appeared for a hearing on these motions on 30 August 2010 before Judge Gregory A. Weeks in Cumberland County Superior Court. Johnson voluntarily attended the 30 August 2010 hearing; he was not required to appear by subpoena.

On 8 September 2010, the trial court entered an Order denying Plaintiffs' Motion and granting Forward Discovery's Motion. Specifically, the trial court found the invoice for Forward Discovery's services to be reasonable under N.C. Gen. Stat. § 8C-1, Rule 706 and required AIT to pay the balance of the invoice (\$12,400.12). On 13 September 2010, the trial court held an additional hearing to rule on Forward Discovery's claim for attorneys' fees and additional expenses. The trial court entered an Order on 22 September 2010 requiring AIT to pay Forward Discovery \$3,762.50 for attorneys' fees and \$2,375.00 for additional expenses (a total of \$6,137.50).

AIT and Farley resolved the underlying employment dispute on 4 October 2010, manifested in a Settlement Agreement and Release

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(“Settlement Agreement”). Pursuant to the Settlement Agreement, AIT filed a Notice of Voluntary Dismissal on 8 October 2010. This voluntary dismissal was with prejudice to all claims, except with regard to “the Plaintiffs’ right to appeal the Order of the Court entered on September 8, 2010 and the Court’s further Order entered on September 22, 2010,” which were dismissed without prejudice.

Plaintiffs timely entered notice of appeal from the trial court’s 8 September 2010 Order requiring payment of the balance of Forward Discovery’s invoice and the 22 September 2010 Order requiring payment of attorneys’ fees and expenses (collectively the “September 2010 Orders”).

II. Jurisdiction and Standard of Review

This Court has jurisdiction to hear the instant appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). We review the trial court’s Orders under an “abuse of discretion” standard. *Smith v. Barbour*, 195 N.C. App. 244, 253, 671 S.E.2d 578, 585 (2009) (citing *Sharp v. Sharp*, 116 N.C. App. 513, 533, 449 S.E.2d 39, 50, *disc. rev. denied*, 338 N.C. 669, 453 S.E.2d 181 (1994)). “Abuse of discretion occurs where the court’s ruling is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision.” *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133 (1993). A trial court does not reach a reasoned decision, and thus abuses its discretion, when its findings of fact are not supported by competent evidence. *Leggett v. AAA Cooper Transp., Inc.*, 198 N.C. App. 96, 104, 678 S.E.2d 757, 763 (2009) (“[T]he trial court’s finding is supported by competent evidence, and does not constitute an abuse of discretion.”).

Findings of fact are conclusive on appeal if they are supported by competent evidence. *Powers v. Tatum*, 196 N.C. App. 639, 648, 676 S.E.2d 89, 95 (citation omitted), *disc. rev. denied*, 363 N.C. 583, 681 S.E.2d 784 (2009). Additionally, “findings of fact to which [the appellant] has not assigned error and argued in his brief are conclusively established on appeal.” *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002). The trial court’s legal conclusions receive *de novo* review. *State v. Newman*, 186 N.C. App. 382, 386, 651 S.E.2d 584, 587 (2007).

III. Analysis

On appeal, Plaintiffs argue the trial court erred in ordering them to pay the balance of Forward Discovery’s invoice, attorneys’ fees, and additional expenses. Specifically, Plaintiffs contend the trial

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court should not have allowed recovery of the balance of the Forward Discovery invoice for its hard drive analysis, since improper communications occurred between Johnson and Defendant's counsel and there was no competent evidence that Forward Discovery's fees were reasonable. Plaintiffs further argue that North Carolina statutes and case law do not permit recovery of attorneys' fees and additional expenses on the facts of this case. We affirm, in part, and reverse, in part.

A. Right to Appeal

[1] Preliminarily, we address Defendant's procedural rebuttal to Plaintiffs' claims. Defendant argues that AIT lost its right to appeal when it filed a voluntary dismissal with prejudice pursuant to the parties' Settlement Agreement. We disagree.

Generally, a voluntary dismissal, even without prejudice, "terminates a case and precludes the possibility of an appeal." *Dodd v. Steele*, 114 N.C. App. 632, 636, 442 S.E.2d 363, 366 (citing *Lloyd v. Carnation Co.*, 61 N.C. App. 381, 384, 301 S.E.2d 414, 416 (1983)), *disc. rev. denied*, 337 N.C. 691, 448 S.E.2d 521 (1994). However, a voluntary dismissal of claims does not necessarily act as a bar against other related but independent claims; as our state's Supreme Court has stated, "[d]ismissal does not deprive the court of jurisdiction to consider collateral issues such as sanctions that require consideration after the action has been terminated." *Bryson v. Sullivan*, 330 N.C. 644, 653, 412 S.E.2d 327, 331 (1992); *see Dodd*, 114 N.C. App. at 634, 442 S.E.2d at 365 ("Furthermore, neither the dismissal of a case nor the filing of an appeal deprives the trial court of jurisdiction to hear Rule 11 motions."); *VSD Commc'ns, Inc. v. Lone Wolf Publ'g Group, Inc.*, 124 N.C. App. 642, 644, 478 S.E.2d 214, 216 (1996) (noting that after a voluntary dismissal, motions for attorneys' fees "have a life of their own").

Still, under our Rules of Appellate Procedure, for a party to raise an issue on appeal, it

must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C.R. App. P. 10(a)(1) (2011); *see Lake Colony Constr., Inc. v. Boyd*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2011 WL 2200607, at *10

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(No. 10-959) (June 7, 2011) (explaining that, pursuant to N.C.R. App. P. 10(a)(1), appellant failed to preserve an issue for appellate review where the appellant did not raise the issue in the trial court).

In the present case, the voluntary dismissal of claims against Farley does not negate Plaintiffs' right to appeal the September 2010 Orders. Although the overall dismissal was with prejudice, the Notice of Voluntary Dismissal provides the following exception:

This dismissal . . . is without prejudice to the Plaintiffs' right to appeal the Order of the Court entered on September 8, 2010 and the Court's further Order entered on September 22, 2010. The foregoing is with Defendant Robyn Farley's consent,, [sic] pursuant to the terms of the mediated settlement agreement between all parties.

Additionally, the Settlement Agreement specifically stated that AIT "preserv[ed] its right to appeal from the Orders entered by the Honorable Gregory Weeks on September 8, 2010 and September 22, 2010." Thus, Plaintiffs may maintain their appeal of the September 2010 Orders.

Nonetheless, we agree with Defendant that Plaintiffs have not preserved the right to appellate review of their fee-shifting argument, whereby Plaintiffs contend that because Defendant engaged in improper communications with Johnson, the burden for paying Forward Discovery's fees should be shifted to Defendant. In its carve-out preserving Plaintiffs' right to appeal the September 2010 Orders, the Settlement Agreement does not address the fee-shifting argument. Additionally, neither AIT's Motion nor the trial court's Orders make any mention of a fee-shifting claim.

Thus, pursuant to North Carolina Rule of Appellate Procedure 10(a)(1), we conclude that Plaintiffs did not preserve the fee-shifting argument because they did not obtain a ruling from the trial court on the issue.

B. Allegations of Improper *Ex Parte* Communications

[2] Plaintiffs argue the trial court erred and abused its discretion by requiring AIT to pay the balance of Forward Discovery's invoice because improper communications occurred between Johnson and Farley's counsel. We disagree.

Improper *ex parte* communication can occur when contact between a litigating party and the expert inhibits the expert's ability

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to “provide the court with . . . unbiased information.” *Bd. of Managers of Bay Club Condominium v. Bay Club of Long Beach Inc.*, 15 Misc. 3d 282, 286, 827 N.Y.S.2d 855, 858 (N.Y. Sup. Ct. 2007). Generally, “court-appointed witnesses should remain neutral and impartial in conducting their evaluations.” *In re David W.*, 759 A.2d 89, 95 (Conn. 2000); see *State v. Adams*, 335 N.C. 401, 408-10, 439 S.E.2d 760, 763-64 (1994) (explaining in an analogous situation of *ex parte* communications between a judge and potential jurors that there is no reversible error when the communication is harmless). We examine the facts of the present case to determine whether Johnson’s neutrality was impacted by any *ex parte* communications with Farley’s counsel.

We find unpersuasive Plaintiffs’ analogy to relevant case law from other jurisdictions, because the conduct here does not rise to the level of impropriety in the cases referenced by Plaintiffs. See, e.g., *Bd. of Managers of Bay Club Condominium*, 15 Misc. 3d at 284-85, 827 N.Y.S.2d at 857-58 (describing how the plaintiff’s attorneys scheduled a meeting with the third-party expert without the defendant’s knowledge and received documents from the expert beyond the scope of the expert’s court-ordered work); *G.K. Las Vegas Ltd. P’ship v. Simon Prop. Grp.*, 671 F. Supp. 2d 1203, 1227 (D. Nev. 2009) (explaining how the defendants invited the experts to their office and interviewed some of the experts “to ensure that the particular [experts] who were expected to be involved would be sufficiently knowledgeable and experienced”); *In re David W.*, 759 A.2d at 92 (noting, in a termination of parental rights case, the assistant attorney general’s request to the court-appointed expert for an independent developmental assessment of the child constituted improper *ex parte* communication).

In the present case, the facts are significantly distinguishable from these cases. First, in the case at hand, the trial court’s Order expressly permitted communications between the litigating parties and the court-appointed expert, and required Johnson to log such communications. Furthermore, we are not persuaded that the communications between Farley’s counsel and Johnson were improper. For instance, Plaintiffs argue that a 22 March 2010 phone call between Farley and Johnson discussing the “contentious” nature of the case biased Johnson as a neutral third-party expert. We disagree.

Per the trial court’s order, Johnson logged this phone call and described the call as follows:

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[Defendant's counsel] called [Johnson]—related to the emails [sic] between the parties. [Johnson] advised that current matter was contentious and that a conference call with counsel would be beneficial to get everyone on the same page.

Wetsch advised that there was no agreement to further delay analysis.

[Johnson] noted that [Johnson] had received an e-mail from [Plaintiffs' counsel] at 9:46 but that [Johnson] hadn't fully read it—[Johnson] would read and respond as necessary.

[Johnson] phoned and left a message for [AIT's outside counsel]. No reply phone call.

We cannot reasonably conclude that Farley's counsel biased Johnson by discussing the fact that the case was contentious. The trial court itself has noted the contentiousness of this case,¹ and Johnson has been included in communications between the litigating parties that have displayed significant tension. We do not believe the call between Farley's counsel and Johnson was improper.

Plaintiffs additionally argue that an e-mail sent by Defendant's counsel to Johnson directing Forward Discovery to begin its work "caused great anguish within AIT because what Farley said and what she left unsaid conveyed the impression that Farley somehow spoke for the court to the exclusion of AIT." The e-mail to Johnson referenced by Plaintiffs, in its entirety, reads:

Lee [sic]—go ahead and do the analysis required by the Court's Order. As the parties did not resolve this matter today, this work needs to be completed as soon as reasonably possible. Let us know if you have any questions/concerns regarding the foregoing. FYI, I am copying Point Intrepid/AIT's new outside counsel (Lee Boughman and Vicki Burge) on this e-mail, as well.

Thanks! Hope your trip overseas was uneventful and enjoyable!

1. For instance, during the 7 December 2009 hearing, the trial court interrupted proceedings to read Rule 12 of the North Carolina General Rules of Practice for the Superior and District Courts, which is titled Courtroom Decorum. The trial court advised counsel for both parties that "[a]ll personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to. Colloquies between counsel should be avoided. . . . Abusive language or offensive personal references are prohibited."

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We find Plaintiffs' argument unconvincing and believe the trial court did not abuse its discretion in deciding this e-mail did not bias Johnson as a neutral third-party expert.

In summary, we find no evidence of improper *ex parte* communications between Defendant's counsel and Johnson. The trial court thus did not abuse its discretion by requiring Plaintiffs to pay the balance of Forward Discovery's invoice.

C. Reasonableness of Forward Discovery's Fees

[3] Plaintiffs next argue the trial court abused its discretion by requiring them to pay the balance of the Forward Discovery invoice because competent evidence does not support the reasonableness of Johnson's fee. We cannot agree.

Rule 706 of the North Carolina Rules of Evidence states, "Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow." N.C. Gen. Stat. § 8C-1, Rule 706(b) (2009); *see Sharp*, 116 N.C. App. at 532-33, 449 S.E.2d at 49-50 (concluding trial court did not err in awarding expert witness fees *in excess* of amount agreed upon by the parties in a consent order). In deciding whether the trial court abused its discretion on this issue, we examine only whether the trial court's findings of fact as to the reasonableness of Forward Discovery's invoice are supported by competent evidence. *Leggett*, 198 N.C. App. at 104, 678 S.E.2d at 763.

In the present case, Forward Discovery presented to the trial court the affidavits of four experts in relevant fields supporting the reasonableness of its invoice. The four experts were: Christopher H. Chappell, a Task Force Agent with the FBI's North Carolina Cyber Crime Task Force; Stephen M. Bunting, a retired Captain in the University of Delaware Police Department who performed computer forensics investigations and has authored three books on this topic; Michael Weber, Founder and CEO of BitSec Global Forensics, Inc., a computer forensics company; and Susan McMinn, a Principal at Dixon Hughes, LLC with over 200 hours of computer forensics training. Each of these experts testified in their affidavits that Johnson took a reasonable amount of time in completing his court-ordered work.

Plaintiffs, in support of their argument that Johnson's fees are unreasonable, offered the testimony of Lawrence Daniel, a digital forensic examiner. Daniel had been certified in other trials as an expert in the field of digital forensic examination, and was accepted by the trial court in this case as an expert. Daniel testified that

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Johnson's quote was unreasonable, citing that Daniel had "performed hundreds of examinations, many much more complicated than this and never came close to that number of hours for that amount of data." Daniel also testified the entire job should have taken Johnson approximately 18 hours and Daniel would have charged \$250 per hour for similar services.

Plaintiffs' offer of this evidence does not negate the fact that the trial court's conclusion that Johnson's fees were reasonable was based upon competent evidence and therefore binding. *Barnhardt v. City of Kannapolis*, 116 N.C. App. 215, 224-25, 447 S.E.2d 471, 477 ("[W]here the trial court sits without a jury, the court's findings of fact are conclusive if supported by competent evidence, even though other evidence might sustain contrary findings."), *disc. rev. denied*, 338 N.C. 514, 452 S.E.2d 807 (1994).

Plaintiffs argue that because the trial court rejected Daniel's testimony without explanation in its 8 September 2010 Order, the court abused its discretion by not considering this evidence. In its 8 September 2010 Order, the trial court "reject[ed] the testimony of Plaintiffs' expert, Mr. Lawrence Daniels [sic] to the effect that Ryan Johnson spent more hours than were reasonable in light of the tasks required by the Court's orders." However, "[c]redibility, contradictions, and discrepancies in the evidence are matters to be resolved by the trier of fact, here the trial judge, and the trier of fact may accept or reject the testimony of any witness." *Smith v. Smith*, 89 N.C. App. 232, 235, 365 S.E.2d 688, 691 (1988); *see also Fox v. Fox*, 114 N.C. App. 125, 134, 441 S.E.2d 613, 619 (1994) ("The trial judge is the sole arbiter of credibility and may reject the testimony of any witness in whole or in part.").

Moreover, we do not believe the trial court's 8 September 2010 Order ignores the evidence presented by Plaintiffs. In its deliberation of the reasonableness of Forward Discovery's invoice, the trial court was presented with conflicting evidence from qualified experts from both parties. The trial court necessarily had to select one expert, and the rejection of the other party's expert does not indicate the trial court's decision was not supported by competent evidence. *See Barnhardt*, 116 N.C. App. at 224-25, 447 S.E.2d at 477. The trial court's rejection of Daniel's testimony does not imply that his testimony was not considered.

Case law cited by Plaintiffs does not support the proposition that the trial court must explicitly address all relevant evidence in its

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Order. For instance, Plaintiffs cite *Langwell v. Albemarle Family Practice, PLLC* where we found the trial court abused its discretion when it entered an order setting aside a jury verdict and granting the plaintiff's motion for a new trial, because it did not address evidence presented by the plaintiff's expert. ___ N.C. App. ___, ___, 692 S.E.2d 476, 482 (2010). Nonetheless, *Langwell* is distinguishable from the present case because (1) in the current case, the trial court's Order refers to the testimony of Plaintiffs' expert, *see id.* at ___, 692 S.E.2d at 481-82, and (2) the cases possess differing evidentiary standards. Here, the trial court's Order must only be supported by competent evidence, whereas in *Langwell*, the trial court had to determine whether the jury verdict was against the greater weight of the evidence. *Id.* at ___, 692 S.E.2d at 480-81. Thus, the *Langwell* trial court was required to analyze and compare all available evidence to determine what verdict the greater weight of evidence supported. Conversely, in the present case the trial court's decision need only be supported by competent evidence, so it need not exhaustively address all available evidence in its Order. *See Fortis Corp. v. Ne. Forest Products, Div. of Hardwood Lumber Mfg. Co.*, 68 N.C. App. 752, 753, 315 S.E.2d 537, 538 (1984) ("The general rule is that in making findings of fact, the trial court is required only to make brief, pertinent and definite findings and conclusions about the matters in issue, but need not make a finding on every issue requested." (citation omitted)).

We conclude the affidavits from Forward Discovery's four experts presented competent evidence that Johnson's invoice was reasonable. Consequently, we find the trial court did not abuse its discretion on this issue.

D. Attorneys' Fees and Travel Costs

[4] Plaintiffs also argue the trial court erred and abused its discretion by awarding Johnson attorneys' fees and additional expenses. We agree and reverse the trial court's decision on this issue.

Forward Discovery seeks to recover both the attorneys' fees and additional expenses it incurred in litigating the present case. By affidavit, Johnson stated that he spent "at least 2.5 hours trying to resolve the concerns AIT expressed with [his] invoice," "at least 4 hours providing counsel with the emails [sic], documents and other materials requested for review and Court preparation," and "3 hours traveling to and from the Courthouse for the Motion to Show Cause hearing and another 1.5 hours in attendance at said hearing." Johnson

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also testified by affidavit that he had driven 174 miles to and from the hearing on Forward Discovery's Motion to Show Cause, and charged \$0.50 per mile for a travel cost of \$87.00. He also spent \$12.60 in express mail fees for shipping his affidavit. The trial court included all of these expenses in its 22 September 2010 Order when it required Plaintiffs to pay Johnson \$2,375 for expenses.

As discussed *supra*, expert witnesses appointed by the Court "are entitled to reasonable compensation in whatever sum the court may allow." N.C. Gen. Stat. § 8C-1, Rule 706(b) (2009); *see also* N.C. Gen. Stat. § 7A-314(d) (2009) ("An expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize."). This reasonable compensation, however, is not without limitations.

For instance, this Court has previously held "[i]t is settled law in North Carolina that ordinarily attorneys [sic] fees are not recoverable either as an item of damages or of costs, absent express statutory authority for fixing and awarding them." *Baxley v. Johnson*, 179 N.C. App. 635, 640, 634 S.E.2d 905, 908 (2006) (quoting *Records v. Tape Corp. and Broad. System v. Tape Corp.*, 18 N.C. App. 183, 187, 196 S.E.2d 598, 602 (1973)) (quotation marks omitted). Additionally, our Supreme Court has held "in the absence of express statutory authority, attorneys' fees are not allowable as part of the court costs in civil actions." *City of Charlotte v. McNeely*, 281 N.C. 684, 695, 190 S.E.2d 179, 187 (1972). If relevant statutes do not permit reimbursement of attorneys' fees, we may not award attorneys' fees even on equitable grounds. *Id.* at 691, 190 S.E.2d at 185. Significantly, N.C. Gen. Stat. § 8C-1, Rule 706, the relevant statutory authority on reimbursement of expert witnesses, makes no mention of attorneys' fees.

When an expert is appointed for court-ordered work, reasonable compensation is limited to reimbursement for performance of that work only. *See Swilling v. Swilling*, 329 N.C. 219, 226, 404 S.E.2d 837, 842 (1991) (describing that while an expert could recover his court-ordered appraisal of property in divorce proceedings, he could not recover a fee for testifying when he was not under subpoena). Reasonable compensation thus does not include restitution for expenses outside the court-ordered services provided by the expert, such as reimbursement for appearing at court when one is not under subpoena. *Peters v. Pennington*, ___ N.C. App. ___, ___, 707 S.E.2d 724, 741 (2011) ("[A] trial court may tax expert witness fees as costs

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only when that witness is under subpoena.”); *Greene v. Hoekstra*, 189 N.C. App. 179, 181, 657 S.E.2d 415, 417 (2008) (“[T]he cost of an expert witness cannot be taxed unless the witness has been subpoenaed.”). If a witness appears at court voluntarily, that witness is not entitled to compensation for the appearance. *Hoekstra*, 189 N.C. App. at 181, 657 S.E.2d at 417.

Our General Statutes also clearly state expert witnesses are only compensated for time spent testifying at trial, and compensation does not extend to travel expenses:

The following expenses, when incurred, are assessable or recoverable, as the case may be. The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court’s discretion . . . (11) Reasonable and necessary fees of expert witnesses *solely* for actual time spent providing testimony at trial, deposition, or other proceedings.

N.C. Gen. Stat. § 7A-305(d) (2009) (emphasis added). The exhaustive list of recoverable expenses in section 7A-305 makes no mention of travel costs. *Id.*; see *Jarrell v. Charlotte-Mecklenburg Hosp. Auth.*, ___ N.C. App. ___, ___, 698 S.E.2d 190, 193 n.1 (2010) (discussing how the plaintiffs could have contested the trial court’s award of the experts’ travel costs under N.C. Gen. Stat. § 7A-305(d)(11), but failed to do so on appeal).

In the present case, the trial court’s 22 September 2010 Order expressly requires Plaintiffs to pay “attorneys’ fees (\$3,762.50) and expert fees (\$2,375.00)” for a total of \$6,137.50 in addition to the balance of the Forward Discovery invoice. We believe these additional fees are not “reasonable compensation” under N.C. Gen. Stat. § 8C-1, Rule 706.

First, Johnson cannot recover attorneys’ fees because Rule 706 does not explicitly mention attorneys’ fees as a recoverable expense. See *McNeely*, 281 N.C. at 691, 190 S.E.2d at 185. Unless attorneys’ fees are explicitly mentioned by statute, they are not recoverable as court costs in civil actions. *Id.* Consequently, the trial court erred in awarding attorneys’ fees to Forward Discovery in the present case.

Furthermore, we conclude Johnson cannot recover additional expenses. These expenses were incurred independent of his court-ordered services (the review of AIT’s hard drives), and thus they are not recoverable. See *Swilling*, 329 N.C. at 226, 404 S.E.2d at 842 (describing how an expert could only recover for expenses from

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court-ordered services he performed). Since expert witnesses are only reimbursed for time actually spent in court under subpoena, N.C. Gen. Stat. § 7A-305(d)(11) (2009), Johnson cannot recover his travel expenses and costs associated with his efforts to recover the balance of the invoice. Additionally, Johnson's appearance at the 30 August 2010 hearing was voluntary, so he cannot recover for expenses associated with this hearing. *Greene*, 189 N.C. App. at 181, 657 S.E.2d at 417 (citing *State v. Johnson*, 282 N.C. 1, 27, 191 S.E.2d 641, 659 (1972)). Consequently, we find the trial court abused its discretion by awarding Johnson an additional \$6,137.50 for attorneys' fees and additional expenses.

IV. Conclusion

We conclude the trial court did not abuse its discretion by requiring Plaintiffs to pay the balance of Forward Discovery's invoice for the court-ordered services. However, we find Plaintiffs cannot be required to pay the attorneys' fees and additional expenses mentioned in the 22 September 2010 Order, and we reverse the trial court's Order regarding this issue.

Affirmed in part, reversed in part.

Judges STEELMAN and STEPHENS concur.

RICHARD HAPP, PLAINTIFF v. CREEK POINTE HOMEOWNER'S
ASSOCIATION, DEFENDANT

No. COA10-1159

(Filed 16 August 2011)

1. Associations—homeowner's association—disbursement of litigation settlement fund

The trial court did not err by granting summary judgment in favor of defendant homeowner's association based on its conclusion that there were no genuine issues of material fact as to whether defendant acted beyond the scope of its authority in its disbursement of funds from the settlement of the parties' previous lawsuit. The funds could not be spent once the litigation had concluded, and defendant acted in the best interest of its contributing members by returning the remaining funds.

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2. Associations—homeowner's association—ultra vires acts—construction of security gate—placement of video camera

The trial court did not err by granting summary judgment in favor of defendant homeowner's association based on its conclusion that there were no genuine issues of material fact as to whether defendant engaged in *ultra vires* acts in its construction of a security gate and placement of a video camera at the entrance to a community. The acts constituted permissible maintenance and modification of the roads under N.C.G.S. § 47F-3-102. Further, for a minor inconvenience, the gate deterred trespassers from accessing the community.

Appeal by Plaintiff from Judgment entered 1 April 2010 by Judge Benjamin G. Alford in Pamlico County Superior Court. Heard in the Court of Appeals 24 March 2011.

Wheatly, Wheatly, Weeks & Lupton, PA, by Claud R. Wheatly, III and Chadwick I. McCullen, for Plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Katie Weaver Hartzog, for Defendant-appellee.

HUNTER JR., Robert N., Judge.

Plaintiff Richard Happ ("Happ") appeals from a Judgment denying his Motion for Summary Judgment and granting summary judgment and declaratory relief in favor of Defendant Creek Pointe Homeowner's Association (the "Association"). Happ alleges the trial court erred as genuine issues of material fact exist as to his claims and as to the Association's counterclaims. We affirm the trial court's Judgment.

I. Facts & Procedural History

This appeal arises out of a dispute over the Association's disbursement of the balance of a litigation fund to its members and its construction of a security gate at the entrance of the Creek Pointe Subdivision, which is located near New Bern, N.C. Happ, a resident of the Creek Pointe subdivision, brought this action alleging, *inter alia*, the Association's disbursement of funds and construction and maintenance of the security gate were *ultra vires* acts.

In the late 1980s, Weyerhaeuser Real Estate Company ("Weyerhaeuser") developed the Creek Pointe subdivision ("Creek Pointe") in

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Pamlico County, North Carolina. Previously, Weyerhaeuser used the property for forest management and timber harvesting. Creek Pointe consists of 34 wooded lots at the end of Creek Pointe Road, a six-mile dirt road. There are also numerous dirt roads located within Creek Pointe, developed at a higher grade than Creek Pointe Road for residential use.

On 14 November 1989, Weyerhaeuser filed a Declaration of Covenants, Conditions, and Restrictions (the "Declaration") applicable to the 33 lots comprising Creek Pointe "in order to provide enforceable standards for improvements and development whereby aesthetics, living conditions and property values may be enhanced." The Declaration established the Creek Pointe Homeowner's Association and requires all lot owners to be members of the Association. The Declaration further requires all members to pay annual dues of \$500 per lot owned for the maintenance of Creek Pointe Road and the interior roads of Creek Pointe. These yearly assessments must be deposited into a common fund account, the "Creek Pointe Maintenance Fund," and must be used solely for: "(A) Road maintenance expenses, and (B) Administration cost[s] for enforcement thereof, including, but not limited to, accounting, attorney's fees, and court costs, and shall not be subject to partition by any individual lot owner."

Additionally, the Association's Articles of Incorporation ("AIC") state that the Association was formed to "provide for maintenance, preservation and architectural control" of the residential lots and roads within the Association and "to promote the health, safety, and welfare of the residents." In so doing, the AIC provides the Association may exercise all powers, rights, and privileges of a corporation organized under the Non-Profit Corporation Law of North Carolina. The AIC also explicitly grants to the Association the power to improve and build upon the real property of the Association.

The Association's by-laws permit the Board of Directors to use assessments collected from the residents to "employ attorneys, accountants and other professionals as the need arises." The Board of Directors may also make special assessments, subject to the provisions of the Declaration. The Board of Directors may further "adopt additional rules relating to utilization of any Lots or any common property (including any street)."

Approximately fifteen years ago, Happ purchased five lots in Creek Pointe from Weyerhaeuser. Upon purchasing the property,

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Happ requested permission to erect a gate, consisting of two posts connected by a chain and padlock, across the dirt road leading to his property because he lived out-of-state and wanted to deter trespassers. The Association approved Happ's request, thinking it a temporary measure until Happ moved to North Carolina. When Happ moved to North Carolina, he informed the Association that he planned to maintain the gate permanently. Due to Happ's placement of his gate, other Association members were unable to utilize the road in accordance with an easement permitting all members use of all the roads within the subdivision. Kenneth Kremer, a lot-owner and member of the Association, was also unable to access part of his property due to Happ's padlocked gate.

A. The Parties' History of Litigation

Happ's construction of this gate in 1994 resulted in litigation between the Association and Happ. *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 161, 552 S.E.2d 220, 222 (2001), *disc. rev. denied*, 356 N.C. 161, 568 S.E.2d 191 (2002). The Association alleged Plaintiff's fence violated a restrictive covenant that granted an easement for use of the road to all subdivision residents, and filed a claim seeking an injunction requiring Plaintiff to remove the fence. *Id.* On appeal, the matter before this Court was whether the trial court properly dismissed the Association's claims for lack of standing. *Id.* at 163, 552 S.E.2d at 224. We concluded the Association did have standing to bring their claim and reversed the trial court's order. *Id.* at 169, 552 S.E.2d at 228.

The Association incurred legal bills in excess of \$90,000 as a result of the litigation. The costs were paid with special assessments levied on each lot in the subdivision, including Plaintiff's lots, and through voluntary contributions from Association members; these funds were maintained in an account separate from the regular Association dues. The Association's members were not, however, willing to pay for additional litigation and the Association reached a settlement with Happ and third-party defendant Weyerhaeuser. Pursuant to the terms of the settlement, Weyerhaeuser paid \$7,500 to the Association and \$7,500 to Happ, and all parties dismissed all claims with prejudice.

Upon receiving the settlement proceeds from Weyerhaeuser, the Board of Directors of the Association used these funds to pay the Association's attorneys' fees. They voted to disburse the remaining funds—approximately \$3,000—to the members of the Association in

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proportion to each member's contribution to the litigation fund. Happ accepted a refund in the amount of \$139.72. Some of the Association members elected to donate their refund to the Association for the construction of the security gate at the entrance of the subdivision. Happ did not donate his refund to the Association and has complained that he should have received a larger refund.

B. Creek Pointe Security Gate

For a number of years, the Association alleges numerous problems with trespassers entering the interior roads of Creek Pointe. This unauthorized access resulted in substantial damage to the roads by all-terrain vehicles and property damage resulting from campfires, unauthorized parties, and littering.

In 2006, the Association constructed a security gate with lights at the entrance of Creek Pointe. To open the gate, the Association provided numeric codes to each Association member, including Happ; members also had the option of purchasing a remote control to open the gate. Happ never attempted to use the code to open the gate. Rather, upon his first encounter with the gate Happ dismantled the gate and tied it in an open position. Happ complained to other members of the Association that he did not want the gate blocking access to the subdivision; Happ was concerned that friends would not be able to visit him and couriers would not be able to make deliveries. When the Association fixed the security gate, Happ disassembled the gate again, removing additional parts to make it more difficult to reassemble. In 2008, the Association's Board of Directors voted to fix the gate and install a camera to monitor the gate. When the Association reassembled the gate, Happ used a saw to "destroy" it and threatened that if the Association repaired the gate he would destroy it again.

C. Plaintiff's Lawsuit

Happ filed suit against the Association in Pamlico County Superior Court on 26 January 2009 seeking: (1) involuntary dissolution of the Association for the alleged misuse of corporate assets; (2) a declaratory judgment that the Association may only use assessments collected for road maintenance, not for the installation of the gate, light, and camera; (3) if the Association is not dissolved, an injunction compelling the Association to use assessments collected for road maintenance solely for that purpose; and (4) a declaratory judgment that the covenants which created the Association are unen-

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forceable due to the Association's radical changes to the conditions and character of the subdivision.

The Association filed a counterclaim seeking declaratory relief that the AIC, Declarations, and by-laws of the Association allow the Association's Board of Directors to expend funds for, but not limited to, the installation and maintenance of a gate and security system at the entrance of the subdivision.

On 4 March 2010, Plaintiff filed a Motion for Summary Judgment alleging there was no genuine issue of material fact. The Association filed a Motion for Summary Judgment alleging the same, or in the alternative, a Motion to Dismiss for failure to join necessary parties. The Motions came on for hearing on 18 March 2010 in Pamlico County Civil Superior Court, Judge Benjamin G. Alford presiding. Judge Alford entered summary judgment on 1 April 2010 in favor of the Association on all claims asserted by Plaintiff and the counterclaim asserted by the Association. Plaintiff filed timely notice of appeal from this Judgment.

II. Jurisdiction & Standard of Review

This Court has jurisdiction to hear the instant appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). The trial court will grant summary judgment when no genuine issues of material fact exist in a case. *Volkman v. DP Associates*, 48 N.C. App. 155, 157, 268 S.E.2d 265, 267 (1980); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). The moving party bears the burden of proving there are no genuine disputes of material fact. *Leake v. Sunbelt Ltd. of Raleigh*, 93 N.C. App. 199, 201, 377 S.E.2d 285, 287, *disc. rev. denied*, 324 N.C. 578, 381 S.E.2d 774 (1989). "A movant may meet its burden by showing either that: (1) an essential element of the non-movant's case is nonexistent; or (2) based upon discovery, the non-movant cannot produce evidence to support an essential element of its claim; or (3) the movant cannot surmount an affirmative defense which would bar the claim." *Moore v. City of Creedmoor*, 120 N.C. App. 27, 36, 460 S.E.2d 899, 904 (1995), *rev'd in part on other grounds*, 345 N.C. 356 (1997) (citing *Watts v. Cumberland Cnty. Hosp. Sys.*, 75 N.C. App. 1, 6, 330 S.E.2d 242, 247 (1985), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986)). If the moving party meets this burden, the non-moving party must then "produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003).

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The non-moving party “may not rest upon the mere allegations or denials of his pleadings, but his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.” N.C. Gen. Stat. § 1A-1, Rule 56(e). When the trial court makes a decision regarding a Motion for Summary Judgment, all evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences should be drawn in the non-moving party’s favor. *Durham v. Vine*, 40 N.C. App. 564, 566, 253 S.E.2d 316, 318–19 (1979), *overruled on other grounds*, *Roumillat v. Simplistic Enters.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992). A trial court’s summary judgment ruling receives *de novo* review. *Barringer v. Forsyth Cnty. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 247, 677 S.E.2d 465, 472 (2009).

III. Analysis

On appeal, Plaintiff argues only two of the four issues he raised at trial. Specifically, he contends the trial court erred in granting summary judgment in favor of the Association because genuine issues of material fact exist as to (1) whether it acted beyond the scope of its authority in its disbursement of funds from the settlement of the parties’ previous lawsuit, and (2) whether the Association committed *ultra vires* acts by constructing the security gate at the entrance of the subdivision. We disagree.

A. Disbursement of Funds

[1] Plaintiff argues there are genuine issues of material fact as to whether the Association had the authority to distribute the remaining portion of its litigation fund at a *pro rata* rate to members who contributed to the fund. Rather, Plaintiff contends the funds should have been utilized for road maintenance in the community. We disagree.

The North Carolina Planned Community Act is the governing authority on regulation of planned communities in North Carolina. *Wise v. Harrington Grove Cmty. Ass’n*, 357 N.C. 396, 399, 584 S.E.2d 731, 734–35 (2003), *superseded on other grounds* 2005 N.C. Sess. 1598–1610 (codified as amended at N.C. Gen. Stat. § 47F-3-102). Specifically, section 47F-1-102 clarifies that the Act in its entirety applies to all planned communities established on or after 1 January 1999, and section 47F-3-102(1) to (6) and (11) to (17) also apply to communities created before 1 January 1999 as long as the events at issue occur after that date. N.C. Gen. Stat. § 47F-1-102 (2009).

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Significantly, section 47F-3-102 expressly states that

[u]nless the articles of incorporation or the declaration expressly provides to the contrary, the association may: . . . (2) Adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from lot owners . . . and (17) Exercise any other powers necessary and proper for the governance and operation of the association.

N.C. Gen. Stat. § 47F-3-102; *see also Indian Rock Ass'n v. Ball*, 167 N.C. App. 648, 650–51, 606 S.E.2d 179, 180–81 (2004) (holding that homeowners' associations can generally collect assessments to fulfill their stated duties).

Furthermore, section 47F-3-114 states that

[u]nless otherwise provided in the declaration, *any surplus funds* of the association remaining after payment of or provision for common expenses, the funding of a reasonable operating expense surplus, and any prepayment of reserves *shall be paid to the lot owners in proportion to their common expense liabilities* or credited to them to reduce their future common expense assessments.

N.C. Gen. Stat. § 47F-3-114 (2009) (emphasis added); *see* N.C. Gen. Stat. § 47F-1-103(5) (“‘Common expenses’ means expenditures made by or financial liabilities of the association, together with any allocations to reserves.”). We find no provisions in the Association’s Declaration, AIC, or by-laws that contradict the Association’s authority under the North Carolina Planned Community Act to disburse surplus funds to its members.

When analyzing the terms of the Declaration, we interpret it as a binding contract between Weyerhaeuser and the purchasers of its lots. Courts have the power to enter summary judgment in contract disputes because they may interpret the terms of contracts. *See Hodgkin v. Brighton*, 196 N.C. App. 126, 128–29, 674 S.E.2d 444, 446 (2009) (interpreting the terms of a contract restricting the use of residential property when reviewing an order granting partial summary judgment). “Where the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law; and the court . . . must construe the contract as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms.” *Id.* at 128, 674 S.E.2d at 446. However, “it is a fundamental rule of contract construction that the courts construe an ambiguous contract in a

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manner that gives effect to all of its provisions, if the court is reasonably able to do so.” *Johnston Cnty. v. R.N. Rouse & Co.*, 331 N.C. 88, 94, 414 S.E.2d 30, 34 (1992).

In the present case, we believe there are no genuine issues of material fact as to whether the Association had the authority to disburse the remaining settlement proceeds to the members of the Association at a *pro rata* rate based on members’ contributions to the litigation fund. Preliminarily, we find the North Carolina Planned Community Act applicable to the present case because members of the Association pay maintenance fees and other expenses for the benefits of real estate described in the Declaration. *See* N.C. Gen. Stat. § 47F-1-103(23) (defining a “Planned community” as “real estate with respect to which any person, by virtue of that person’s ownership of a lot, is expressly obligated by a declaration to pay real property taxes, insurance premiums, or other expenses to maintain, improve, or benefit other lots or other real estate described in the declaration”). Additionally, even though Creek Pointe was established before the Act was passed, the distribution of proceeds occurred in 2005, so section 47F-3-102(2) and (17) are applicable. *See Wise*, 357 N.C. at 399–400, 584 S.E.2d at 735 (describing the provisions of the North Carolina Planned Community Act that apply to planned communities created prior to 1 January 1999). We believe the broad language of statute section 47F-3-102 authorizes the collection and distribution of funds for litigation in which a homeowners’ association is a party as long as this collection and distribution is not prohibited in the Association’s Declaration and AIC.

Given this statutory authorization, we next analyze whether the Declaration, AIC, or by-laws prohibit this type of collection and distribution of funds. We hold this activity is allowed. In fact, the Declaration explicitly states that assessments may be used for “[a]dministration cost for enforcement thereof, including, but not limited to, accounting, *attorneys* [sic] *fees*, and court costs, and shall not be subject to partition by any individual lot owner.” (Emphasis added.) Additionally, the by-laws allow the Board of Directors the power to “employ attorneys, accountants and other professionals as the need arises” and to “make and collect assessments Special assessments, should they be required by the Board of Directors and subject always to the terms and provisions of the Covenants . . . shall be levied and paid in the same manner as hereinbefore provided for regular assessments.”

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Although the Declaration, AIC, and by-laws do not directly address disbursement of surplus special assessment funds to contributing members, we do not find the disbursal impermissible under those documents or N.C. Gen. Stat. § 47F-3-102(2) and (17). Furthermore, as discussed above, N.C. Gen. Stat. § 47F-3-114 explicitly allows such activity. The money was collected for the specific purpose of funding the litigation and kept in a separate account from the Association's general funds. Consequently, because the funds effectively could not be spent once the litigation had concluded, we find the Association acted appropriately in returning the remaining funds to contributing members on a *pro rata* basis.

We also believe that because the Association acted in the interest of its contributing members by returning the remaining settlement proceeds to members who contributed to the litigation fund, it acted in accordance with the business judgment rule.

[The business judgment rule] operates primarily as a rule of evidence or judicial review and creates, first, an initial evidentiary presumption that in making a decision the directors acted with due care (i.e., on an informed basis) and in good faith in the honest belief that their action was in the best interest of the corporation, and second, absent rebuttal of the initial presumption, a powerful substantive presumption that a decision by a loyal and informed board will not be overturned by a court unless it cannot be attributed to any rational business purpose.

Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 14.6, at 281 (5th ed. 1995). Under the business judgment rule, a Board of Directors' decision need only manifest "reasonable care and business judgment." *State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 602, 513 S.E.2d 812, 822 (1999) (quotation marks omitted). Other jurisdictions have already applied the business judgment rule to homeowners' associations. *See, e.g., Colorado Homes, Ltd. v. Loerch-Wilson*, 43 P.3d 718, 724 (Col. App. 2001) ("We perceive no reason why [the business judgment rule] should not apply in this case insofar as the issue for resolution is whether the HOA fulfilled its obligation to enforce the covenants."); *Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 538, 553 N.E.2d 1317, 1321 (1990) ("Clearly, in light of the [business judgment rule's] origins in the quite different world of commerce, the fiduciary principles identified in the existing case law—primarily emphasizing avoidance of self-dealing and financial self-aggrandizement—will of necessity be adapted over

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time in order to apply to directors of not-for-profit homeowners' cooperative corporations." (citation omitted)). Additionally, in analogous case law regarding shareholder derivative disputes, we have held that according to the business judgment rule, "a shareholder will not be permitted to substitute his judgment for that of the company's management" if "the decision was made in good faith." *Swenson v. Thibaut*, 39 N.C. App. 77, 107, 250 S.E.2d 279, 298 (1978). Here, we believe the Association acted reasonably and in good faith by returning the remaining settlement proceeds to the contributing members. Happ may not substitute his judgment for that of the Association in regard to how the settlement proceeds should be managed.

We conclude that no genuine issues of material fact exist as to whether the Association acted beyond its authority in distributing the settlement proceeds to members who contributed to the litigation fund.

B. Construction of the Security Gate

[2] Plaintiff also contends there are genuine issues of material fact as to whether the Association engaged in *ultra vires* acts in its construction of a security gate and placement of a video camera at the entrance to the community. We disagree.

As discussed above, the North Carolina Planned Community Act is the relevant statutory authority in the present situation. Specifically, "[u]nless the articles of incorporation or the declaration expressly provides to the contrary, the association may . . . [r]egulate the use, maintenance, repair, replacement, and modification of common elements." N.C. Gen. Stat. § 47F-3-102(6) (2009). " 'Common elements' means any real estate within a planned community owned or leased by the association, other than a lot." N.C. Gen. Stat. § 47F-1-103(4). Generally, "homeowners' associations have the enumerated powers [in section 47F-3-102] unless their documents expressly provide to the contrary." *Riverpointe Homeowners Ass'n v. Mallory*, 188 N.C. App. 837, 841, 656 S.E.2d 659, 661 (2008).

In the present case, we first must determine whether the relevant statute authorizes the Association's placement of a security gate and video camera at the entrance of the Creek Pointe community. Specifically, section 47F-3-102 allows a homeowners' association to "[r]egulate the use, maintenance, repair, replacement, and modification of common elements," which are defined by section 47F-1-103(4) as "any real estate within a planned community owned or leased by

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the association, other than a lot.” N.C. Gen. Stat. §§ 47F-3-102, 47F-1-103(4). We interpret section 47F-1-103(4) to apply to the private roads in Creek Pointe owned by Weyerhaeuser and maintained by the Association, and believe the roads are “common elements” subject to “maintenance, repair, replacement, and modification.” However, even if the North Carolina Planned Community Act did not apply in the present situation because the roads are not directly owned or leased by the Association, common law contract principles would support the Association’s authority to construct the gate and place a video camera at the entrance in accordance with the Declaration, AIC, and by-laws.

Under a plain meaning approach, we define “maintenance” as “the process of keeping something in good condition.” *The New Oxford American Dictionary* 1022 (2d ed. 2005); see *Smith v. United States*, 508 U.S. 223, 228, 124 L. E. 2d 138, 148 (1993) (“When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.”) We also define “modification” as “the action of modifying something,” and define “modify” as “mak[ing] partial or minor changes to (something), typically so as to improve it.” *Id.* at 1090. Here, the gate and video camera helped deter trespassers whose all-terrain vehicles caused damage to the roads in Creek Pointe. We thus conclude the construction of the security gate and placement of the video camera constitute permissible “maintenance” and “modification” of the roads under section 47F-3-102(6) because they helped keep the roads in good condition.

Next, we analyze whether the Declaration, AIC, or by-laws expressly prohibit the placement of the security gate and video camera. We believe they do not. The Declaration even explicitly authorizes the Association to use assessments to pay for “Road maintenance expenses,” and the AIC allow the Association to “improve, build upon, operate, [and] maintain” “real or personal property in connection with the affairs of the Association.” The by-laws also grant the Board of Directors the authority “to use and expend the assessments collected to carry out the purposes and powers of the Association” as defined in the Declaration and “to purchase supplies and equipment.” In the absence of express prohibition of the activity in question, we conclude that there are no genuine issues of material fact as to whether the Association could construct a security gate and place a video camera at the entrance of the Creek Pointe Community.

We find unconvincing Plaintiff’s reliance on *Armstrong v. Ledges Homeowners Ass’n*, 360 N.C. 547, 633 S.E.2d 78 (2006) to argue the

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Association unreasonably changed the character of the subdivision and increased the obligations of its members, and we distinguish *Armstrong* on two grounds. First, in *Armstrong*, our Supreme Court expressly stated that the homeowners' association at issue was not subject to the North Carolina Planned Community Act. 360 N.C. at 548, 633 S.E.2d at 81. Additionally, the homeowners' association in *Armstrong* amended its by-laws and declaration. *Id.* at 551–52, 633 S.E.2d at 83. Plaintiff states “[t]he only difference in the facts” of the two cases “is that [here] the Appellee-Homeowner’s Association is not attempting to amend the Declaration or By-Laws.” We find this to be a significant difference.

In *Armstrong*, our Supreme Court held that an amendment to a homeowners' association's declaration must be reasonable to be upheld against members who joined the association before the amendment was passed. 360 N.C. at 548, 633 S.E.2d at 81. In order to protect members from *ex post* obligations that they did not intend to incur at the time of contract, *Armstrong* clarifies that “every amendment must be *reasonable* in light of the contracting parties' original intent.” *Id.* at 559, 633 S.E.2d at 87 (footnote omitted). In the present case, there was no amendment to the Declaration, AIC, or by-laws. In summary, while the homeowners' association members in *Armstrong* faced new obligations imposed by amendments that they did not agree to at the time of contract, in the present case we interpret the Declaration, AIC, and by-laws, agreed upon by the Association members, to determine exactly what powers are granted to the Association.

Nor are we persuaded by Plaintiff's argument that the gate interfered with Happ's easement permitting use of the roads in the community. The Declaration establishes “an easement for ingress [and] egress” on all private roads in Creek Pointe for all members of the community. Plaintiff erroneously relies on *Williams v. Abernethy*, 102 N.C. App. 462, 402 S.E.2d 438 (1991), to argue that the gate unreasonably interfered with his easement. *Williams* holds that where the easement does not address the creation of a gate on a road, “the servient estate may maintain a gate across the right-of-way if necessary for the servient estate and if it does not unreasonably interfere with the right-of-way use.” *Id.* at 465, 402 S.E.2d at 440 (quotation marks omitted). However, *Williams* was decided before the North Carolina Planned Community Act was passed, and while common law property principles are still applicable in areas not regulated by statutes, “[w]hen the General Assembly as the policy making agency

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of our government legislates with respect to the subject matter of any common law rule, the statute supplants the common law and becomes the law of the State.” *News and Observer Publ’n Co. v. State ex rel. Startling*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984). However, when statutes are in derogation of common law principles, they must be strictly construed. *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988). “Strict construction of statutes requires only that their application be limited to their express terms, as those terms are naturally and ordinarily defined.” *Id.* We believe that the North Carolina Planned Community Act, construed strictly with regard to common law principles of easements, permits the Association to construct a security gate and place a video camera as part of its “maintenance” of the roads in the community.

Furthermore, we do not believe the construction of the gate and placement of a video camera constituted an unreasonable interference with Plaintiff’s use of his easement. *See Shingleton v. State of North Carolina*, 260 N.C. 451, 458, 133 S.E.2d 183, 188 (1963) (“[T]he maintenance of a gate, even a locked gate, would not necessarily be inconsistent with plaintiff’s rights so long as the use of the road by himself and his agents, servants, employees and licensees is not unreasonably interfered with thereby.”). Members of the community were provided with numeric key codes to access the gate, and were even given the opportunity to purchase a remote control to open the gate. For this minor inconvenience, the gate deterred trespassers, including all-terrain vehicles, partiers, and littering campers, from accessing the community. In light of the benefits of the security gate, we do not find unreasonable the minor inconvenience of entering a numeric code or using a remote control to open the gate. Additionally, because emergency personnel were provided with the numeric code, and members of the Association are allowed to provide the code to guests, we find Plaintiff’s additional arguments on this issue unconvincing.

Consequently, we conclude there are no genuine issues of material fact as to whether the Association acted outside its authority in constructing the security gate and placing a video camera at the entrance to the community.

IV. Conclusion

We find no genuine issue of material fact regarding Plaintiff’s claims that the Association acted beyond the scope of authority in disbursing the remaining litigation funds and engaged in *ultra vires*

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acts by constructing a security gate at the entrance to the community. The trial court appropriately granted Defendant's Motion for Summary Judgment and we affirm the trial court's Order.

Affirmed.

Judges STROUD and THIGPEN concur.

MARK E. CAPPS AND WIFE, PAULA L. CAPPS; ROBERT B. DAWSON; FLOYD D. LOFTIN, JR. AND WIFE, KATHY T. LOFTIN; MAMIE S. O'NEAL; STEWART W. SMITH AND WIFE, EVA H. SMITH, AND MICHAEL J. WARD AND WIFE, LINDA H. WARD, PETITIONERS-APPELLANTS V. CITY OF KINSTON, RESPONDENT-APPELLEE

No. COA10-1477

(Filed 16 August 2011)

1. Cities and Towns—annexation—street maintenance services

The trial court did not err in an annexation case by concluding the annexation report stated a plan for providing street maintenance services on substantially the same basis and in the same manner as such services were provided in the rest of the city.

2. Cities and Towns—annexation—public sewer service

The trial court did not err in an annexation case by concluding that an annexation report stated a plan whereby property owners in the annexation area would be able to secure public sewer service in accordance with respondent city's policies.

3. Cities and Towns—annexation—financial impact

The trial court did not err in an annexation case by concluding that respondent city provided a sufficient statement in an annexation report showing the financial impact of the annexation as required by N.C.G.S. § 160A-47(5).

4. Cities and Towns—annexation—compliance with requirements for fixing boundaries

The trial court erred in an annexation case by concluding that respondent city complied with the requirements of N.C.G.S. § 160A-48(e) when it fixed certain boundaries of an annexation area. This issue was remanded for further action.

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Appeal by Petitioners from judgment entered 21 April 2010 by Judge Kenneth F. Crow in Superior Court, Lenoir County. Heard in the Court of Appeals 26 April 2011.

Eldridge Law Firm, PC, by James E. Eldridge, for Petitioners-Appellants.

Rose Rand Wallace Attorneys, P.A., by James P. Cauley, III, Kimberly Connor Benton, and J. Brian Pridgen, for Respondent-Appellee.

McGEE, Judge.

The City of Kinston (Respondent) adopted a resolution on 17 September 2007, stating its intention to consider annexation of 501.45 acres of real property in Lenoir County, North Carolina (the Annexation Area). Respondent adopted a resolution of intent on 22 January 2009 “to consider annexing the Annexation Area and fixing the dates of the public informational meeting and public hearing.” Respondent adopted a second resolution of intent on 16 February 2009, “which rescinded the [22 January 2009] resolution, described the boundaries of the Annexation Area, re-stated [Respondent’s] intent to consider annexation of the Annexation Area and fixed the dates for the public informational meeting and public hearing[.]” In February 2009, prior to the public informational meeting, Respondent adopted an “Annexation Report and Plan of Services” (Annexation Report).

The Annexation Report provided for, *inter alia*, the annexation of seven acres of developed land (the Galaxy Mobile Home Park) within a larger 34.29 acre lot (the Greater Galaxy Mobile Home Park Property). Silverdale Road runs through a portion of the Greater Galaxy Mobile Home Park Property. Two sections of the annexation boundary line, which divides the Galaxy Mobile Home Park from the undeveloped remainder of the Greater Galaxy Mobile Home Park Property, are drawn parallel to Silverdale Road. Neither of these two sections of the annexation boundary line is drawn on top of a recorded property line or a street. These two sections were drawn parallel to, rather than on, Silverdale Road in order to include portions of the Galaxy Mobile Home Park which lie on the opposite side of Silverdale Road from the remainder of the Galaxy Mobile Home Park.

Respondent adopted an “Ordinance to Extend the Corporate Limits of the City of Kinston Under Authority Granted by Part 3, Article 4A, Chapter 160A of the General Statutes of North Carolina” (the Annexation Ordinance) on 1 June 2009. Petitioners are owners of

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property located within the Annexation Area who filed a petition, pursuant to N.C. Gen. Stat. § 160A-50, in Superior Court in Lenoir County on 30 July 2009 to review Respondent's adoption of the Annexation Ordinance. N.C. Gen. Stat. § 160A-50(f) (2009) states:

The review shall be conducted by the [trial] court without a jury. The [trial] court may hear oral arguments and receive written briefs, and may take evidence intended to show either

- (1) That the statutory procedure was not followed, or
- (2) That the provisions of G.S. 160A-47 were not met, or
- (3) That the provisions of G.S. 160A-48 have not been met.

Our Court has explained the standard of review for the trial court, and for our Court on appeal, as follows:

[N.C.G.S. § 160A-50(f)] limit[s] the court's inquiry to a determination of whether applicable annexation statutes have been substantially complied with. When the record submitted in superior court by the municipal corporation demonstrates, on its face, substantial compliance with the applicable annexation statutes, then the burden falls on the petitioners to show by competent and substantial evidence that the statutory requirements were in fact not met or that procedural irregularities occurred which materially prejudiced their substantive rights.

....

The findings of fact made by the trial court are binding on the appellate court if supported by competent evidence, even if there is evidence to the contrary; conclusions of law drawn from the findings of fact are, however, 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). “[F]indings of fact [which] are essentially conclusions of law . . . will be treated as such on appeal.” *Norwood v. Village of Sugar Mountain*, 193 N.C. App. 293, 298, 667 S.E.2d 524, 528 (2008) (citations omitted).

I.

[1] Petitioners first argue that the “Annexation Report does not state a plan for providing street maintenance services on substantially the same basis and in the same manner as such services are provided in the rest of the City.” We disagree.

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In relevant part, N.C. Gen. Stat. § 160A-47 (2009) provides:

A municipality exercising authority under this Part shall make plans for the extension of services to the area proposed to be annexed and shall, prior to the public hearing provided for in G.S. 160A-49, prepare a report setting forth such plans to provide services to such area. The report shall include:

. . . .

(3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:

a. Provide for extending . . . street maintenance services to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation.

The trial court in this action made the following uncontested findings of fact:

10. Regarding street maintenance, the Annexation Report states that all public streets within the Annexation Area are currently maintained by NC DOT and no public streets in the Annexation Area would become city-maintained.

11. [NC DOT] presently maintains all public streets contained within the Annexation Area and has represented that it will continue maintaining them at the same level it is presently maintaining them and at the same level at which NC DOT maintains streets currently within the corporate limits of . . . Respondent. This representation was confirmed by the testimony of officials of Respondent and through the unopposed affidavits of Preston Hunter, NC DOT district engineer for Lenoir County, and Tommy Lee, former Planning Director of . . . Respondent.

12. The Annexation Area contains the following private streets:

- a. A section of Beechnut Drive in Hickory Hills subdivision;
- b. The end of Holly Ridge Road; and
- c. All streets contained within the Galaxy Mobile Home Park.

13. It is the policy of . . . Respondent that unless offered for dedication to and accepted by . . . Respondent, private streets contained within the corporate limits are the responsibility of the

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owner and . . . Respondent does not provide street maintenance services for private streets. As testified to by witnesses for . . . Respondent, if an offer of dedication is accepted by . . . Respondent, . . . Respondent will provide the same maintenance services to those streets as it does to all other streets located within its corporate limits.

The trial court determined the following in its finding of fact 14:

14. Respondent's plan for extending street maintenance services to the Annexation Area, as set forth in the Annexation Report and as testified to by witnesses for . . . Respondent, will provide street maintenance services to the Annexation Area on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation.

Although listed under the trial court's "Findings of Fact[,]" we find paragraph 14 to be a conclusion of law, and review it as such. *See Norwood*, 193 N.C. App. at 298, 667 S.E.2d at 528 (citations omitted). The trial court also concluded that "the Annexation Report contain[ed] a statement setting forth the plans of . . . Respondent for the extension of street maintenance services to the Annexation Area in compliance with N.C.G.S. [§] 160A-47(3)(a)." We hold that these conclusions are supported by the above uncontested findings of fact. Petitioners' argument is without merit.

II.

[2] Petitioners' second argument is that the "Annexation Report does not state a plan whereby property owners in the Annexation Area will be able to secure public sewer service in accordance with [Respondent's] policies." We disagree.

Petitioners specifically argue that

[Respondent's] planned extension of sewer services was non-compliant because it did not provide for the extension of sewer lines in accordance with [Respondent's] policies for extending those lines to individual lots or subdivisions, and because the fees charged by [Respondent] for extending those lines to residential lots illegally reduced [Respondent's] cost of installing those extensions.

In relevant part, N.C.G.S. § 160A-47 provides:

A municipality exercising authority under this Part shall make plans for the extension of services to the area proposed to be

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annexed and shall, prior to the public hearing provided for in G.S. 160A-49, prepare a report setting forth such plans to provide services to such area. The report shall include:

. . . .

(3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:

. . . .

b. Provide for extension of major trunk water mains and sewer outfall lines into the area to be annexed so that when such lines are constructed, property owners in the area to be annexed will be able to secure public water and sewer service, according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions In areas where the municipality is required to extend sewer service according to its policies, but the installation of sewer is not economically feasible due to the unique topography of the area, the municipality shall provide septic system maintenance and repair service until such time as sewer service is provided to properties similarly situated.

The trial court made the following uncontested findings of fact related to this issue:

26. Municipal sewer service is not currently available in the majority of the Annexation Area.

. . . .

29. Property owners who want to connect to the municipal sewer system may have the pump installed themselves or may pay [Respondent] a fee of \$1,000.00 to perform the installation.

30. . . . Respondent's policy in past annexations did not require immediate connection to . . . Respondent's sewer system, but allowed the property owner to connect when their current septic system fails.

31. The Annexation Report states and the testimony of witnesses for . . . Respondent confirmed that the same policy applied in past annexations regarding existing septic tanks shall apply to the Annexation Area.

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32. The Annexation Area does not have unique topography which would make the extension of sewer service into the Annexation Area economically infeasible.

33. The majority of the residences within the Annexation Area are served by privately owned septic tanks averaging over thirty (30) years of age and have an average lot size of .5 acres. Witnesses for . . . Respondent testified that the low average lot size of residences within the Annexation Area would severely limit and/or prohibit the replacement of septic tanks on most of the Annexation Area residences at any point in the future.

34. The Annexation Area is not served by a single, unified homeowners association.

35. In reaching its decision to extend sewer lines into the Annexation Area and not to provide maintenance services for existing septic tanks, . . . Respondent considered the advanced age of the existing septic tanks, average residential lot sizes within the Annexation Area, and the concern expressed by the Lenoir County Health Department regarding the age and condition of existing septic tanks within the Annexation Area.

36. Respondent's current sewer service policy provides that when . . . Respondent is obligated to provide public sewer services and finds, after thorough engineering and financial review, analysis, and evaluation, it is not feasible or practical for it to provide gravity or force main sewer service to a specific property or (properties), . . . Respondent may provide sewer service through and by use of an approved septic tank system.

37. A force main sewer system is an economically feasible option for providing sewer service to the Annexation Area and was the system adopted by . . . Respondent in the Annexation Report.

38. [Respondent] does not routinely provide septic tank maintenance and/or repair for properties located within the existing corporate limits.

39. In 1989, . . . Respondent reached an agreement with the Hillcrest Farms Homeowners Association (hereinafter the "Hillcrest Agreement") whereby all residents of the subdivision collectively agreed, by and through the single entity Hillcrest Farms Homeowners' Association, to allow . . . Respondent to maintain their septic tanks.

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40. Features existing in the Hillcrest Subdivision in 1989 which do not exist in the Annexation Area in 2009 include an average age of septic tanks of ten years or less (versus 36-43 years within the Annexation Area), a pond/lake, uneven terrain, rolling topography, average lot size of 1.8 acres (versus .5 acres within the Annexation Area), adequate septic field repair areas, and only twelve developed lots (versus 438 in the Annexation Area). These factors made the extension of sewer lines to the Hillcrest Subdivision economically infeasible.

41. The facts and circumstances underlying the Hillcrest Agreement are distinguishable from those in the current Annexation Area.

The trial court also made the following contested finding of fact:

28. A \$1,500.00 tap fee will be charged to residential property owners in the Annexation Area who choose to connect to . . . Respondent's sewer line. This same fee is charged to all other city residents who request to connect to Respondent's sewer system.

Petitioners allege that the trial court's finding of fact 28 is not supported by the evidence. We disagree. The Annexation Report states that:

Sewer service for the annexation area will be provided to those requesting it by construction of a low-pressure sewer collector line system with individual pumps at each property.

Construction of the public portion of this system will cost approximately \$236,000. The cost to install the pump and associated work at each residential lot is estimated [to] be \$4,840. The cost to install the pump and associated work at each commercial lot will be approximately \$8,580. A different pump system is required by state regulations for commercial properties than for residential properties. A portion of this cost will be recovered by charging a \$1,500 tap fee plus a \$1,000 installation fee—\$2,500 total for each residence.

In addition, City Manager Scott Stevens (Mr. Stevens) testified that, in prior situations where a low-pressure sewer system was installed and a tap fee was paid, the customer paid a \$1,500.00 tap fee. Because this evidence supports the trial court's finding that the \$1,500.00 tap fee provided for in the Annexation Report is the "same fee . . . charged to all other city residents who request to connect to Respondent's sewer

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system[,]” the finding is binding on appeal despite the existence of evidence to the contrary. *See Hwycck*, 86 N.C. App. at 15, 356 S.E.2d at 601 (citations omitted).

Petitioners also argue that the trial court erred by concluding that the extension of sewer services to the Annexation Area was in compliance with the applicable statutes. We disagree. The trial court made the following contested finding of fact:

27. The Annexation Report complies with N.C.G.S. 160A-47[(3)](b) [sic] by stating that . . . Respondent will provide sewer service to the Annexation Area by constructing a low-pressure sewer collector line system with individual pumps at each property and by describing in detail how this service will be timely extended to the Annexation Area.

Although listed under the trial court’s “Findings of Fact[,]” we find paragraph 27 to be a conclusion of law, and review it as such. *See Norwood*, 193 N.C. App. at 298, 667 S.E.2d at 528 (citations omitted). The trial court also made the following contested conclusions of law:

5. That the Annexation Report, in compliance with N.C.G.S. 160A-47(3)(b), contains a statement setting forth the plans for the extension of sewer outfall lines into the Annexation Area so that when such lines are constructed, property owners in the area to be annexed will be able to secure public sewer service, according to the policies in effect for . . . Respondent for extending sewer lines to individual lots or subdivisions.

6. Providing septic tank maintenance and repair service in lieu of sewer service in the Annexation Area would not comply with N.C.G.S. 160A-47(3)(b), as the Annexation Area does not have unique topography which would make the installation of sewer in the Annexation Area economically infeasible.

. . . .

16. That the Annexation Report is in substantial compliance with N.C.G.S. 160A-47 and all other applicable statutory requirements.

Petitioners specifically argue that the \$1,000.00 installation fee (the installation fee) was not adopted by Respondent at least 180 days prior to the adoption of the 16 February 2009 resolution of intent to annex the Annexation Area. We disagree.

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N.C. Gen. Stat. § 160A-47.1 (2009) provides:

For purposes of the extension of water and sewer services required under G.S. 160A-47, no ordinance or policy substantially diminishing the financial participation of a municipality in the construction of water or sewer facilities required under this Article may apply to an area being annexed unless the ordinance or policy became effective at least 180 days prior to the date of adoption by the municipality of the resolution giving notice of intent to consider annexing the area under G.S. 160A-49(a).

The installation fee is not expressly included in Respondent's official utility fee schedule (the fee schedule). However, Mr. Stevens testified that the installation fee was provided for in the fee schedule under a catch-all provision designed to provide installation and tap fees for irregular tap sizes, such as the tap size required for the low-pressure sewer system provided for in the Annexation Report. The catch-all provision states: "Fees for all other sewer tap sizes shall be based on actual cost to install, plus 10%, plus a Capital Recovery Fee of \$500 per inch diameter of tap." Mr. Stevens testified that the fee schedule was adopted by Respondent more than 180 days prior to the adoption of the 16 February 2009 resolution of intent. The fee schedule and Mr. Stevens' testimony, taken together, provide sufficient evidence to support the trial court's determination that the Annexation Report complies with N.C.G.S. § 160A-47.1. Petitioners have not met their burden to prove otherwise by substantial, competent evidence.

Thus, based upon the trial court's findings of fact, and our determination that the installation fee complies with the statutory requirements, we hold that the requirements of N.C.G.S. § 160A-47 were met as to this issue. Petitioners' argument is without merit.

III.

[3] Petitioners' third argument is that Respondent "failed to provide a sufficient statement in the annexation Report showing the financial impact of the annexation as required by N.C. Gen. Stat. § 160A-47(5).]" We disagree.

N.C. Gen. Stat. § 160A-47(5) (2009) states that an annexation report shall provide a "statement showing how the proposed annexation will affect the city's finances and services, including city revenue change estimates."

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Although it is unclear from Petitioners' brief how, exactly, they contend Respondent has failed to comply with N.C.G.S. § 160A-47(5), Petitioners' argument seems to rely upon issues we have already decided above. Petitioners argue in their brief:

As shown above, [Respondent] has substantially—by at least \$489,000 through the imposition of the \$1000 installation fee—and illegally reduced its cost of extending sewer lines into the Annexation Area. While it cannot be precisely calculated, the inflated \$1500 sewer tap fee also benefits [Respondent] in this regard.

These omissions are material to this annexation proceeding since . . . Petitioners, along with the rest of the public and [Respondent's] governing board, needed to have reliable information available to them to ensure a meaningful public hearing[.]

We cannot determine to what “omissions” Petitioners refer without reading into Petitioners' argument language and reasoning that is not there. We will not make assumptions, nor make Petitioners' argument for them. It seems clear, however, that whatever Petitioners might contend the “omissions” to be, Petitioners' argument relies upon their contention that the \$1000.00 installation fee and the \$1500.00 sewer tap fee were “illegal.”

As shown above, the \$1,500.00 sewer tap fee is provided for in the Annexation Report and is the fee previously charged to property owners who connected to Respondent's sewer system through low-pressure connector lines like those to be provided to the Annexation Area. The installation fee is also provided for in the Annexation Report and is included in the catch-all provision of the fee schedule. Both of these sewer-related fees were appropriately included in the Annexation Report's financial statement.

Petitioners make no other arguments regarding Respondent's alleged failure to comply with N.C.G.S. § 160A-47(5). Petitioners have failed to show that the Annexation Report did not comply with N.C.G.S. § 160A-47(5). Petitioners' argument is without merit.

IV.

[4] Petitioners' fourth argument is that the trial court erred by concluding that Respondent complied with the requirements of N.C. Gen. Stat. § 160A-48(e) when it fixed certain boundaries of the Annexation Area. We agree.

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In fixing new municipal boundaries, a municipal governing board *shall use recorded property lines and streets as boundaries*. Some or all of the boundaries of a county water and sewer district may also be used when the entire district not already within the corporate limits of a municipality is being annexed.

N.C. Gen. § 160A-48(e) (2009) (emphasis added).

The trial court made the following uncontested findings of fact:

53. The Annexation Area contains seven acres of a 34.29 acre parcel indentified as Lenoir County Tax Parcel Number 4506-01-5625 and otherwise referred to as the “[Greater] Galaxy Mobile Home Park Property.”

54. Only the developed portion of the [Greater] Galaxy Mobile Home Park Property is included in the Annexation Area.

55. The portion of the [Greater] Galaxy Mobile Home Park Property which is not included in the Annexation Area is unlikely to be developed due to a sloping topography which generally follows the Annexation Boundary.

. . . .

57. The westerly portion of the Annexation Boundary contained within the [Greater] Galaxy Mobile Home Park Property and which separates the developed portion from the undeveloped portion, follows in a northerly direction parallel to Silverdale Road, then follows established property lines, then again follows parallel to Silverdale Road, then follows Pantego Drive.

58. In establishing the portion of the Annexation Boundary located within the [Greater] Galaxy Mobile Home Park Property, . . . Respondent used streets and recorded property lines.

59. In establishing the portions of the Annexation Boundary that follow parallel to Silverdale Road, . . . Respondent used a street in setting the Annexation Boundary.

60. Placement of the Annexation Boundary directly on Silverdale Road would have excluded three developed parcels from the Annexation Area. Such an exclusion would have adversely impacted the provision of emergency services to the three excluded residential lots.

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As Petitioners argue, these findings of fact do not support the trial court's conclusion that "the setting of the Annexation Boundary parallel to Silverdale Road within the [Greater] Galaxy Mobile Home Park Property complies with the requirements of N.C.G.S. 160A-48(e)."

"An important function of statutory construction is to ensure accomplishment of the legislative intent." Accordingly, we first look to the words chosen by the legislature and "if they are clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings." Our legislature, in enacting the current version of N.C. Gen. Stat. § 160A-48(e) (2005), removed the "whenever practical" language of the previous versions of the statute and used the word "shall." As such, the plain language of the statute establishes that § 160A-48(e) is a mandatory provision. However, we look not only to the provision at issue but also to the statutory scheme as a whole and to our prior interpretations of the statutory framework. Our Supreme Court has recognized that

It is generally held that slight irregularities will not invalidate annexation proceedings if there has been substantial compliance with all essential provisions of the law. Absolute and literal compliance with a statute enacted describing the conditions of annexation is unnecessary; substantial compliance only is required The reason is clear. Absolute and literal compliance with the statute would result in defeating the purpose of the statute in situations in which no one has been or could be misled.

Fix v. City of Eden, 175 N.C. App. 1, 19, 622 S.E.2d 647, 658 (2005) (citations omitted). In light of the amendment mandating that "a municipal governing board shall use recorded property lines and streets as boundaries[.]" the plain language of N.C.G.S. § 160A-48(e) requires that a municipal governing board draw annexation boundary lines on recorded property lines and on streets. Although the annexation boundary lines at issue may run *parallel* to Silverdale Road, they are not located *on* either a recorded property line or *on* a street. Mr. Stevens testified that the annexation boundary lines at issue were set off from Silverdale Road so that the Annexation Area would include portions of the Galaxy Home Mobile Park which were located on the opposite side of Silverdale Road from the remainder of the Galaxy Mobile Home Park. As such, the annexation boundary lines at issue do not substantially comply with N.C.G.S. § 160A-48(e). Were

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we to hold that a municipal governing board's drawing of annexation boundary lines parallel to—rather than on—recorded property lines and streets substantially complied with the statute, the amendment to N.C.G.S. § 160A-48(e) would essentially be ignored.

Respondent cites to *Fix* in support of the trial court's conclusion that the setting of an annexation boundary line parallel to a street complies with the requirements of N.C.G.S. § 160A-48(e). In *Fix*, our Court held that the City of Eden had substantially complied with the requirements of N.C.G.S. § 160A-48(e), even though a portion of the annexation boundary line was set along a creek rather than on a recorded property line or street. *Fix*, 175 N.C. App. at 19-20, 622 S.E.2d at 658-59. The *Fix* Court based its holding on the fact that literal compliance with N.C.G.S. § 160A-48(e) would have resulted in a “‘gap’ . . . between the City's current boundaries and the area of land to be annexed.” *Id.* at 20, 622 S.E.2d at 659. In the present case, the record does not show, and Respondent does not contend, that setting the annexation boundary on a recorded property line or street would have resulted in a “gap,” or some similar condition, between Respondent's current boundaries and the Annexation Area. *Fix* is distinguishable and does not control our decision.

Thus, the trial court's conclusion that “the setting of the Annexation Boundary parallel to Silverdale Road within the [Greater] Galaxy Mobile Home Park Property complies with the requirements of N.C.G.S. 160A-48(e)” is in error. Accordingly, we remand this issue to the trial court for further action not inconsistent with this opinion.

Affirmed in part; remanded in part.

Judges ERVIN and BEASLEY concur.

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[215 N.C. App. 124 (2011)]

HEALTH MANAGEMENT ASSOCIATES, INC., AND LOUISBURG H.M.A., INC. D/B/A FRANKLIN REGIONAL MEDICAL CENTER, PLAINTIFFS V. LEMUEL G. YERBY, III, M.D., TRIANGLE SURGICAL ASSOCIATES, P.A., MEDICAL MUTUAL INSURANCE COMPANY OF NORTH CAROLINA A/K/A MEDICAL MUTUAL INSURANCE COMPANY OF NORTH CAROLINA, INC., MEDICAL MUTUAL SERVICES, LLC, AND STEVEN SCHWAM, M.D., DEFENDANTS

No. COA10-577

(Filed 16 August 2011)

1. Contribution—medical negligence—piercing corporate veil—instrumentality rule—judicial estoppel—unlicensed insurance carrier

The trial court did not err in a medical negligence case by granting defendants' motion for summary judgment on the claim for contribution. Even assuming arguendo that plaintiffs could show genuine issues of material fact as to whether the corporate veil should have been pierced based upon the instrumentality rule, plaintiffs were barred from making such an argument under the doctrine of judicial estoppel. Health Management Associates (HMA) was not licensed as an insurance carrier in North Carolina, and Louisburg HMA paid no monies to settle the lawsuit.

2. Indemnity—medical negligence—independent contractors

The trial court did not err in a medical negligence case by granting defendants' motion for summary judgment on the claim for indemnity. Defendant doctor and defendant surgical company were independent contractors rather than employees of Louisburg HMA. Thus, HMA was not derivatively liable for any alleged negligence of defendant doctor.

3. Unjust Enrichment—medical negligence—no conscious acceptance of benefit

The trial court did not err in a medical negligence case by granting defendants' motion for summary judgment on the claim for unjust enrichment. Defendants did not consciously accept the benefit of a settlement.

4. Evidence—not newly discovered—motion for new trial—properly denied

The trial court did not err in a medical negligence case by denying plaintiffs' motions for a new trial under N.C.G.S. § 1A-1, Rules 59 and 60. The pertinent document was not "newly discovered" evidence after the summary judgment hearing.

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Appeal by plaintiffs from orders entered 1 June and 23 July 2009 by Judge John R. Jolly, Jr. in the Special Superior Court for Complex Business Cases. Heard in the Court of Appeals 17 November 2010.

The Mitchell Law Group, by Ronnie M. Mitchell and Grant S. Mitchell, for plaintiff-appellants.

Young Moore and Henderson P.A., by Kelly E. Street, William P. Daniell, and Robert D. Walker, Jr., for defendant-appellees.

STEELMAN, Judge.

Where HMA was judicially estopped from asserting that the corporate veil should be pierced between HMA and Louisburg HMA, HMA was not licensed as an insurance carrier in North Carolina, and Louisburg HMA paid no monies to settle the Faulkner lawsuit, the trial court did not err in finding that neither HMA nor Louisburg HMA had standing to recover contribution from defendants. Where there was no factual issue that Dr. Yerby and Triangle Surgical Associates were independent contractors rather than employees of Louisburg HMA, the trial court properly granted summary judgment on plaintiffs' indemnity claim. Where defendants did not consciously accept the benefit of a settlement, there was no claim for unjust enrichment.

I. Factual and Procedural Background

On 25 June 2002, Joan M. Faulkner (Faulkner) visited Franklin Regional Medical Center for an excisional biopsy of her left cervical lymph node. Dr. Lemuel Yerby, III (Dr. Yerby) performed the operation. During the operation, supplemental oxygen was administered through a nasal cannula and face mask. Dr. Steven Schwam (Dr. Schwam) managed and supervised the administration of anesthesia. Dr. Yerby used an electrosurgical unit while performing the operation. The electrosurgical unit came into contact with the oxygen and ignited a fire. Faulkner was severely burned on her face, neck, and chest.

In 2003, Falkner and her husband filed a complaint seeking recovery for medical negligence against Health Management Associates, Inc. (HMA); Louisburg H.M.A., Inc., d/b/a Franklin Regional Medical Center (Louisburg HMA); Dr. Yerby; Triangle Surgical Associates, P.A.; and Dr. Schwam in Franklin County case 03 CVS 271. On 20 September 2004, Dr. Schwam entered into a settlement agreement with the Faulknors and was released from all claims. On 24 August 2005, five days before the scheduled trial, the Faulknors signed a settlement agreement with HMA and its professional liability insurance

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carrier, The Doctor's Company, and agreed to release HMA, Louisburg HMA, Dr. Yerby, and Triangle Surgical Associates, P.A. from any and all claims arising from the 25 June 2002 incident. Dr. Yerby and Triangle Surgical Associates, P.A. had not authorized HMA to act on their behalf and had refused to participate in the settlement negotiations. Pursuant to the settlement agreement, The Doctor's Company paid to the Faulkners its liability policy limits and HMA paid an additional amount.¹ On 5 June 2006, the Faulkners dismissed their complaint with prejudice.

On 24 August 2006, HMA and Louisburg HMA (collectively, plaintiffs) filed this action against Dr. Yerby, Triangle Surgical Associates, P.A., Medical Mutual Insurance Company of North Carolina a/k/a Medical Mutual Insurance Company of North Carolina, Inc., Medical Mutual Services, LLC, and Dr. Schwam, for contribution, indemnity, and unjust enrichment. Subsequently, all defendants were voluntarily dismissed with the exception of Dr. Yerby and Triangle Surgical Associates, P.A. (collectively, defendants). On 27 October 2006, defendants filed an answer and denied the material allegations of plaintiffs' complaint. On 24 July 2007, the Chief Justice of North Carolina designated this case as a complex business case and assigned it for hearing. On 26 January 2009, defendants filed a motion for summary judgment.

On 1 June 2009, the trial court entered a lengthy order, granting defendants' motion for summary judgment, and dismissing plaintiffs' complaint. On 23 July 2009, the trial court denied plaintiffs' motions to reconsider, amend, alter, or otherwise grant relief from the 1 June 2009 order pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure.

Plaintiffs appeal.

II. Summary Judgment Order

In their first argument, plaintiffs contend that the trial court erred in granting defendants' motion for summary judgment. We disagree.

A. Standard of Review

The standard of review on a trial court's ruling on a motion for summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on

1. The settlement agreement was confidential and the amount of the settlement was redacted from the record.

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file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). “All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion.” *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted).

B. Analysis

1. Claims for Contribution

[1] N.C. Gen. Stat. § 1B-1 provides: “Except as otherwise provided in this Article, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.” N.C. Gen. Stat. § 1B-1(a) (2009). However, “[t]he right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share.” N.C. Gen. Stat. § 1B-1(b) (2009). The right of contribution is statutory and only applies to joint tort-feasors. *Roseboro Ford, Inc. v. Bass*, 77 N.C. App. 363, 367, 335 S.E.2d 214, 217 (1985).

Two or more parties are joint tort-feasors when their negligent or wrongful acts are united in time or circumstance such that the two acts constitute one transaction or when two separate acts concur in point of time and place to cause a single injury. *The burden is on the tortfeasor seeking contribution to show that the right exists, and to allege facts which show liability to the injured party as well as a right to contribution.*

State Farm Mut. Ins. Co. v. Holland, 324 N.C. 466, 470, 380 S.E.2d 100, 102-03 (1989) (internal citations omitted) (emphasis added). It was incumbent upon HMA and Louisburg HMA to demonstrate a right to contribution against defendants.

The trial court entered its order upon uncontroverted facts. As to HMA, it held that there was no admissible evidence that HMA was independently negligent in causing injuries to the Faulkners. There was thus no basis for a contribution claim by HMA against defendants. The trial court rejected HMA’s contention that Louisburg HMA was the “mere instrumentality” of HMA based upon two grounds: (1) there was no evidence to support that theory; and (2) HMA, by taking

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a contrary position in the prior litigation, was judicially estopped from asserting that theory. Finally, the trial court rejected HMA's contention that it was a subrogated insurance carrier for Louisburg HMA because it was not licensed as an insurance company in North Carolina. As to Louisburg HMA, it held that because it had made no settlement payments to the Faulkners, it did not have independent standing to pursue a contribution claim against defendants.

a. HMA

With regard to HMA, plaintiffs' main contention was that the corporate veil between Louisburg HMA and HMA should be deemed pierced under the instrumentality rule. Thus, HMA was liable for the acts of Louisburg HMA, and payment made on behalf of Louisburg HMA entitles HMA to contribution from defendants.

Plaintiffs contend that they should be permitted to disregard the corporate structure which they themselves created, *i.e.*, reverse piercing of the corporate veil. "Occasionally the owners of the corporation themselves will urge a court to disregard a separate corporate entity for their own benefit ('insider reverse pierce'). This argument is rarely sustained, but may be accepted in special circumstances." Russell M. Robinson, II, *Robinson on North Carolina Corporation Law*, § 2.10[1], at 2-26 (7th ed. 2010) (footnote omitted); *see also Board of Transportation v. Martin*, 296 N.C. 20, 29, 249 S.E.2d 390, 396 (1978) ("Where persons have deliberately adopted the corporate form to secure its advantages, they will not be allowed to disregard the existence of the corporate entity when it is to their benefit to do so." (citations omitted)); *Department of Transp. v. Airlie Park, Inc.*, 156 N.C. App. 63, 68, 576 S.E.2d 341, 345 (citing Robinson), *appeal dismissed*, 357 N.C. 504, 587 S.E.2d 417 (2003); *Terry v. Yancey*, 344 F.2d 789, 790 (4th Cir. 1965) ("[W]here an individual creates a corporation as a means of carrying out his business purposes he may not ignore the existence of the corporation in order to avoid its disadvantages." (citations omitted)).

Even assuming *arguendo* that plaintiffs could show genuine issues of material fact as to whether the corporate veil should have been pierced based upon the instrumentality rule, plaintiffs are barred from making such an argument under the doctrine of judicial estoppel.

"[J]udicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation." *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005) (quotation omitted). In *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 591

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S.E.2d 870 (2004), the North Carolina Supreme Court articulated three factors to consider for invoking judicial estoppel:

First, a party's subsequent position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 29, 591 S.E.2d at 888-89 (internal quotations and footnote omitted). The only factor that must be present for judicial estoppel to apply is the first factor. *Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 188, 594 S.E.2d 809, 812 (2004). The purpose of this doctrine is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment[.]" *Whiteacre P'ship*, 358 N.C. at 28, 591 S.E.2d at 888 (internal quotations omitted).

In the underlying Faulkner case (Franklin County case 03 CVS 271), plaintiffs, then defendants, denied allegations that HMA "owns, operates, manages and controls defendant Louisburg H.M.A., Inc., as a wholly owned subsidiary that defendant HMA operates as a mere instrumentality."

In response to discovery in the Faulkner case, plaintiffs asserted that "Louisburg H.M.A., Inc., is a North Carolina incorporated entity, doing business as Franklin Regional Medical Center. Louisburg H.M.A. . . . is distinct and apart from H.M.A., Inc., which is incorporated in the State of Delaware." (Emphasis added.) Plaintiffs submitted the following answer in their Supplemental Responses to the Faulkners' First Set of Interrogatories and Request for Production of Documents and Motion for Protective Order:

[Question] 6. If HMA contends that it does not operate Louisburg HMA, Inc. as a mere instrumentality, provide all facts that support the contention.

ANSWER: HMA does [sic] operate Louisburg HMA, Inc., as a mere instrumentality since HMA does not completely dominate Louisburg HMA finances nor its policy or

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business practices. Furthermore, Louisburg HMA has, with regard to its policies and procedures, its own separate mind, will and existence. Louisburg HMA is adequately capitalized and has complied with corporate formalities, and has its own independent corporate identity. Louisburg HMA has its own articles of incorporation and bylaws.

In the instant case, plaintiffs alleged in their complaint that “Plaintiff HMA owns, operates, manages, and controls Franklin Regional Medical Center” and that Louisburg HMA “is . . . doing business as Franklin Regional Medical Center in Franklin County, North Carolina.” In their brief to the trial court in opposition to defendants’ motion for summary judgment, plaintiffs argued that: (1) Louisburg HMA had limited capital; (2) Louisburg HMA did not observe corporate formalities; and (3) HMA operated Louisburg HMA as a mere instrumentality. Further, in their brief to this Court, plaintiffs argue that “HMA . . . completely dominated the Louisburg HMA subsidiary;” “HMA had utter and complete authority and exercised actual control over its subsidiary, operating the latter as a mere instrumentality or tool;” “Louisburg HMA did not manage its own finances, had very little cash or deposits;” and “in total disregard of corporate formalities, HMA . . . had unfettered discretion over the funds of Louisburg HMA” and “exercised its control of Louisburg HMA by operating without contracts or resolutions.”

Plaintiffs’ factual assertions in the underlying Faulkner case (Franklin County case 03 CVS 271) are unequivocally inconsistent with those of the instant case. Plaintiffs are judicially estopped from asserting that the corporate veil should be pierced between HMA and Louisburg HMA.

The trial court also held that HMA did not have standing to recover contribution from defendants on the theory that it was in the position of a subrogated insurance carrier for Louisburg HMA because HMA was operating without the necessary licensure in North Carolina pursuant to N.C. Gen. Stat. § 58-28-15.

N.C. Gen. Stat. § 58-28-15 provides, in part, that “no company transacting insurance business in this State without a license shall be permitted to maintain an action at law or in equity in any court of this State to enforce any right, claim or demand arising out of the transaction of such business until such company shall have obtained a license.” In his deposition, Timothy Parry, HMA’s senior vice presi-

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dent, conceded that HMA had never been licensed to sell insurance in the State of North Carolina.

Plaintiffs argue that HMA's "self-insurance" program does not fall within the meaning of term insurance. Plaintiffs cite *Wake County Hosp. System v. National Cas. Co.*, 804 F. Supp. 768 (E.D.N.C. 1992), *aff'd*, 996 F.2d 1213 (4th Cir. 1993), for this proposition. In *Wake County Hosp. System*, the Court explained that "under a self-insurance scheme, no written insurance policy is issued by another individual or entity nor is a premium paid because obviously a business which is self-insured does not need to pay itself to protect against its own risk of loss." *Id.* at 775. The Court then agreed with the plaintiff hospital's contention that a self-insured retention does not fall within the plain and ordinary meaning of the term insurance, *i.e.* an insurance policy issued by a licensed insurer in exchange for a premium charged. *Id.*

In the instant case, in order for HMA to be protecting itself "against its own risk of loss," HMA and Louisburg HMA must be considered to be a single corporate entity. As discussed above, HMA and Louisburg HMA are estopped from making such an argument. For purposes of this appeal, HMA and Louisburg HMA are separate and distinct entities. Thus, HMA's insurance program with Louisburg HMA cannot be "self-insurance."

HMA was operating an insurance program in North Carolina without a license pursuant to N.C. Gen. Stat. 58-28-15 and is barred from recovering contribution on this basis.

b. Louisburg HMA

With regard to Louisburg HMA, plaintiffs contend that the trial court's conclusion that Louisburg HMA did not pay any of the monies paid to the Faulkners is unfounded. We disagree.

Plaintiffs argue that the payment by The Doctor's Company was made on behalf of Louisburg HMA. However, there is no evidence in the record to support this contention. The insurance policy with The Doctor's Company was not included in the record on appeal. Thus, this Court is unable to discern who was an "Insured" under the policy. We further note that there is no other evidence in the record that Louisburg HMA was a beneficiary under the terms of the policy. To the contrary, HMA's supplemental responses to the first set of interrogatories in the Faulkner lawsuit (Franklin County case 03 CVS 271) identified The Doctor's Company as the insurer and under the sub-

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section where it was to list the “Type of policy and person(s) covered;” it stated “Hospital and healthcare facility liability policy covering Health Care Management Associates, Inc.”

Plaintiffs next argue that Louisburg HMA participated in and made contributions to the “self-insurance” pool of HMA and those funds were paid to settle the Faulkner case. However, as discussed above, HMA’s insurance program with Louisburg HMA is not self-insurance under the facts this case.

Plaintiffs have failed to show that Louisburg HMA has paid its *pro rata* share of the settlement payment to the Faulknors in order to establish a claim for contribution. *See Jones v. Shoji*, 336 N.C. 581, 586, 444 S.E.2d 203, 206 (1994) (holding that where a church did not pay any part of a settlement agreement, it did not pay more than its *pro rata* share and was not entitled to contribution).

The trial court properly concluded that neither HMA nor Louisburg HMA had standing to recover contribution from defendants.

2. Indemnity

[2] Plaintiffs alternatively argue that they are entitled to indemnity from defendants. This Court has stated:

A right to indemnity arises in cases of primary-secondary liability, *i.e.*, when two persons (1) . . . are jointly and severally liable to the plaintiff . . . and (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former.

Sullivan v. Smith, 56 N.C. App. 525, 531, 289 S.E.2d 870, 874 (quotation omitted), *disc. rev. denied*, 306 N.C. 392, 294 S.E.2d 220 (1982). In the instant case, plaintiffs alleged in their claim for indemnity that “[a]s a direct and proximate result of the negligence of defendants Yerby and Schwam . . . HMA suffered derivative fault.” However, “ ‘it has long been . . . the general rule that there is no vicarious liability upon the employer’ for the torts of an independent contractor.” *Id.* at 532, 289 S.E.2d at 874 (quotation and alteration omitted). In their supplemental responses to Dr. Yerby’s first set of interrogatories and requests for production of documents, plaintiffs conceded that Dr. Yerby was not an agent, employee, or servant of HMA or Franklin Regional Medical Center. Thus, Dr. Yerby was an independent contractor and HMA is not derivatively liable for any alleged negligence of Dr. Yerby. *Id.*

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Plaintiffs are not entitled to indemnification. This argument is without merit.

3. Unjust Enrichment

[3] Plaintiffs assert that defendants were unjustly enriched because they benefitted from the settlement of the Faulkner case.

In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable.

Booe v. Shadrick, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (citation omitted), *reh'g denied*, 323 N.C. 370, 373 S.E.2d 540 (1988). In addition, the defendant must have consciously accepted the benefit. *Id.*; *see also Wright v. Wright*, 305 N.C. 345, 350, 289 S.E.2d 347, 351 (1982) (“Not every enrichment of one by the voluntary act of another is unjust. Where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched. The recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for their value.” (quotation omitted)).

In the instant case, plaintiffs’ payment of the settlement agreement on behalf of defendants was voluntary and unsolicited. Defendants had not authorized HMA to act on their behalf and did not participate in the settlement negotiations. Further, defendants did not execute the settlement agreement. At the summary judgment hearing, defendants’ counsel stated, “We did not want them to settle.” Thus, defendants are not liable to plaintiffs under the theory of unjust enrichment.

The trial court properly granted summary judgment in favor of defendants.

III. Rule 59/Rule 60 Order

[4] In their second argument, plaintiffs contend that the trial court erred by denying plaintiffs’ motions for a new trial under Rule 59 and for relief from judgment under Rule 60. We disagree.

Plaintiffs base both motions upon the assertion that the affidavit of Grena Porto, which allegedly evinces the direct negligence of

HMA, was inadvertently not given to HMA's present counsel. Thus, its discovery constituted newly discovered evidence.

In order for evidence to be considered "newly discovered," it "must be such that it could not have been obtained in time for the original proceeding through the exercise of due diligence." *Waldrop v. Young*, 104 N.C. App. 294, 297, 408 S.E.2d 883, 884 (1991) (citation omitted). It is undisputed that plaintiffs' counsel was served with the affidavit on 15 August 2005, and that the affidavit was filed in the Faulkner case with the Clerk of Superior Court for Franklin County. The document was not "newly discovered" after the summary judgment hearing in the instant case had concluded. The trial court did not err in denying plaintiffs' motions pursuant to Rules 59 and 60.

This argument is without merit.

IV. Conclusion

Based upon the peculiar facts of this case, where HMA and Louisburg HMA are judicially estopped from piercing the corporate veil, HMA was not licensed as an insurance carrier in North Carolina, and defendants did not consent to, approve, or ratify the settlement made by HMA with the Faulkners, we affirm the ruling of the trial court granting defendants' motion for summary judgment.

AFFIRMED.

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

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JONATHAN WILLIAMS AND WIFE JAMIE KAUFMAN WILLIAMS, PLAINTIFFS V. DEVERE CONSTRUCTION COMPANY, INC., DAVIS, MARTIN, POWELL & ASSOCIATES, INC., TERRY'S PLUMBING & UTILITIES, INC., AND CITY OF THOMASVILLE, DEFENDANTS

No. COA10-900

(Filed 16 August 2011)

1. Appeal and Error—appealability—interlocutory orders—substantial right—governmental immunity

Plaintiffs' appeal from an order quashing their witness subpoenas and dismissing their negligence claim against defendant City was entitled to immediate review because the defense of governmental immunity affected a substantial right.

2. Negligence—motion to dismiss—sufficiency of evidence—failure to allege duty

The trial court did not err in a negligence case by granting defendant City's motion to dismiss for lack of subject matter jurisdiction under N.C.G.S. § 1A-1, Rule 12(b)(1). Plaintiffs failed to allege a duty or control defendant was required to exercise in the construction and establishment of a new school system sewer.

Appeal by plaintiffs from judgment entered 3 March 2010 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 25 January 2011.

Stone, Bowers, Gray & McDonald, P.A., by Carl W. Gray, for plaintiff-appellants.

Little & Little, P.L.L.C., by Cathryn M. Little, Esq., for defendant-appellant City of Thomasville.

BRYANT, Judge.

Because there exists an issue as to whether or not defendant City of Thomasville was engaged in a proprietary function that would make it subject to tort liability, we reverse the trial court's conclusion that defendant City of Thomasville was engaged in a governmental function and thereby entitled to governmental immunity. Nevertheless, assuming arguendo defendant City of Thomasville is not entitled to a defense of governmental immunity, we hold plaintiffs' negligence claim must fail because plaintiffs fail to allege what duty or control

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defendant City of Thomasville, located in Davidson County, was to exercise in the construction and establishment of the new Randolph County school sewer system. Therefore, we affirm the judgment of the trial court dismissing the negligence claim against City of Thomasville pursuant to Rule 12(b)(6).

Plaintiffs Jonathan Williams and Jamie Kaufman Williams are residents of Randolph County. On 10 August 2009, a sewer line backed up and sewage flowed back through the sewer line connected to a house owned by plaintiffs; sewage spilled from the toilets, bathtubs, and showers onto the flooring of the first floor, down through the walls, basement ceiling, and into the heating and cooling ducts causing substantial damage to the house. On 30 December 2009, plaintiffs filed a negligence complaint against defendants DeVere Construction Company, Inc.; Davis, Martin, Powell & Associates, Inc.; Terry's Plumbing & Utilities, Inc.; and City of Thomasville.

Devere Construction Co. served as general contractor for the construction of a new Randolph County school in the City of Trinity. Plaintiffs alleged that City of Thomasville, located in adjacent Davidson County, "was involved in the process of construction of the sewer system for [the] new school . . . in preparation for taking over operation and control of said sewer system." On 25 January and 18 February 2010, defendant City of Thomasville filed a motion and amended motion, respectively, to dismiss plaintiffs' claim as to them pursuant to Rule 12(b)(1) and 12(b)(6). City of Thomasville contended that it was immune from suit for torts committed by its officers or employees while performing governmental functions based on the doctrine of governmental immunity. A hearing on the motion was set for 1 March 2010.

On 1 March 2010, plaintiffs filed subpoenas for Kelly Craver, City of Thomasville City Manager, and Morgan Huffman, City of Thomasville Director of Public Services. City of Thomasville filed objections and a motion to quash plaintiffs' subpoenas. On 15 March 2010, the trial court entered an order granting City of Thomasville's motion to quash plaintiffs' witness subpoenas, under Rule 45(c)(5), and ordered that plaintiffs' claim against City of Thomasville be dismissed pursuant to Rule 12(b)(1) and Rule 12(b)(6). Plaintiffs appeal.

On appeal, plaintiffs question whether the trial court erred by (I) quashing plaintiffs' subpoenas; dismissing plaintiffs' complaint pursuant to (II) 12(b)(1); and (III) 12(b)(6).

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[1] Before we reach plaintiffs' arguments, we consider whether plaintiffs' interlocutory appeal is properly before this Court.

Under North Carolina Rules of Civil Procedure, Rule 54,

[A]ny order . . . which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes.

N.C. R. Civil P. 54(b) (2009). "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." *Stanford v. Paris*, 364 N.C. 306, 311, 698 S.E.2d 37, 40 (2010) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)).

As a general rule, interlocutory orders are not immediately appealable. *Davis v. Davis*, 360 N.C. 518, 524, 631 S.E.2d 114, 119 (2006). However, "immediate appeal of interlocutory orders and judgments is available in at least two instances": when the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal; and when the interlocutory order affects a substantial right under N.C.G.S. §§ 1-277(a) and 7A-27(d)(1). *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999).

Turner v. Hammocks Beach Corp., 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). Where the trial court does not certify the order pursuant to Rule 54(b), the first avenue is not available to the appellant. *Jefferys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). Pursuant to the second avenue, "the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Id.* at 380, 444 S.E.2d at 254. This Court has held that appeals from interlocutory orders raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review. *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999); see, e.g., *Hines v. Yates*, 171 N.C. App. 150, 614 S.E.2d 385 (2005); *Derwort v. Polk County*, 129 N.C. App. 789, 501 S.E.2d 379 (1998); *Hedrick v. Rains*, 121 N.C. App. 466, 466 S.E.2d 281, *aff'd*, 344 N.C. 729, 477 S.E.2d 171 (1996).

Here, plaintiffs appeal from an order quashing their witness subpoenas and dismissing their negligence claim against City of Thomasville pursuant to Rule 12(b)(1) and 12(b)(6). The trial court's stated basis for the dismissal was that "the doctrine of governmental immunity applies to plaintiffs' allegations against defendant City . . . [,] defendant City has not waived its governmental immunity . . . [, and] defendant City's Motions to dismiss shall be and hereby are granted" These grounds are sufficient to warrant immediate appellate review. *See Price*, 132 N.C. App. 558-59, 512 S.E.2d 785; *see also Murray v. County of Person*, 191 N.C. App. 575, 577, 664 S.E.2d 58, 60 (2008) ("appeals which present defenses of governmental or sovereign immunity . . . have been held by this Court to be immediately appealable as affecting a substantial right." (citations omitted)). Therefore, we review plaintiffs' appeal.

Because the issues presented by plaintiffs in arguments II and III are determinative, our opinion addresses only the arguments corresponding to those issues.

II

[2] Plaintiff argues that the trial court erred in granting defendant City's motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). Plaintiff argues that defendant City is not entitled to governmental immunity because (A) it waived its governmental immunity with the purchase of liability insurance and (B), in the alternative, because defendant City's involvement in the process of construction of the sewer system was a proprietary function. Though the record is undeveloped as to whether City of Thomasville was engaged in a proprietary function, plaintiffs' allegations are sufficient to warrant further review in the determination of whether governmental immunity is applicable.

"We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings." *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007) (citations omitted).

"Under the doctrine of governmental immunity . . . a municipality is not liable for the torts of its officers and employees if the torts are committed while they are performing a governmental function." *Gregory v. City of Kings Mountain*, 117 N.C. App. 99, 101, 450 S.E.2d 349, 352 (1994) (citation omitted). "Application of the doctrine depends upon whether the activity out of which the tort arises is

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properly characterized as ‘governmental’ or ‘proprietary’ in nature.” *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 826-27, 562 S.E.2d 75, 77 (2002) (citation omitted).

A municipal corporation is dual in character and exercises two classes of powers—governmental and proprietary. It has a twofold existence—one as a governmental agency, the other as a private corporation.

Any activity of the municipality which is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.

...

In either event it must be for a public purpose or public use.

So then, generally speaking, the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and “private” when any corporation, individual, or group of individuals could do the same thing. Since, in either event, the undertaking must be for a public purpose, any proprietary enterprise must, of necessity, at least incidentally promote or protect the general health, safety, security or general welfare of the residents of the municipality.

Britt v. City of Wilmington, 236 N.C. 446, 450-51, 73 S.E.2d 289, 293 (1952). “Our courts have long noted that drawing the line between municipal operations which are proprietary and subject to tort liability versus operations which are governmental and immune from such liability is a difficult task.” *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 751, 407 S.E.2d 567, 568 (1991). “The ‘application of the [governmental-proprietary distinction] to given factual situations has resulted in irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary.’” *Id.* (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897 (1972)). Historically, the establishment, construction, and maintenance of a sewer system by a municipality for its residents was a governmental function entitling the municipality to immunity from negligence claims. *E.g.*, *Metz v. City of Asheville*, 150 N.C. 613, 748, 64 S.E. 881 (1909); *Roach v. City of Lenoir*, 44 N.C. App. 608, 610, 261

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S.E.2d 299, 300-01 (1980); *McCombs v. City of Asheboro*, 6 N.C. App. 234, 240, 170 S.E.2d 169, 173 (1969). In more recent cases before this Court, recognizing the development of municipal sewer services provided by privately owned public utility companies, we have declined to grant immunity on the sole basis that sewer service was provided by a municipality. *Pulliam*, 103 N.C. App. 748, 407 S.E.2d 567. As a result, the plaintiffs may establish that a municipality was engaged in a proprietary function stripping it of governmental immunity. *Bostic Packing, Inc.*, 149 N.C. App. 825, 562 S.E.2d 75.

A

Acknowledging the trial court's conclusion "[t]hat the doctrine of governmental immunity applies to plaintiffs' allegations against defendant City[.]" plaintiffs argue that City of Thomasville nonetheless waived its immunity with the purchase of liability insurance.

"[W]here a municipality engages in a governmental function, governmental immunity is applicable, and a city may waive its immunity from civil tort liability by purchasing liability insurance." *Gregory*, 117 N.C. App. at 103, 450 S.E.2d at 352 (citing N.C.G.S. § 160A-485 (1987)). Pursuant to North Carolina General Statutes, section 160A-485, "[a]ny city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. . . . Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability." N.C. Gen. Stat. § 160A-485(a) (2009) (emphasis added).

During the period 1 July 2009 to 1 July 2010, defendant City was insured by the Interlocal Risk Financing Fund of North Carolina, a Property and Liability Insurance Trust administered by the North Carolina League of Municipalities. The policy indemnifies City of Thomasville against "those sums that the insured becomes legally obligated to pay as compensatory damages because of . . . 'property damage' . . ." However, the policy specifically excludes from coverage contractual liability.

1. Exclusions

This insurance does not apply to:

...

b. Contractual Liability

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“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract of agreement; or

(2) Assumed in a contract or agreement that is an “insured contract”, provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement.

City of Thomasville’s indemnification hinges on whether in its contract with the City of Trinity to provide sewer service it assumed liability. However, this contract is not a part of the Record. Thus, we cannot determine at this pleading stage what contractual liability was assumed by City of Thomasville, or whether City of Thomasville waived its governmental immunity with the purchase of applicable liability insurance.

B

In the alternative, plaintiffs argue that City of Thomasville’s operation of the City of Trinity’s sewage system was a proprietary function affording no governmental or sovereign immunity.

In *Pulliam*, the plaintiffs contended that the defendant City of Greensboro’s operation of its main sewer line was a proprietary function and that the defendant city was not entitled to governmental immunity. *Pulliam*, 103 N.C. App. at 750, 407 S.E.2d at 568. In 1991, privately owned public utilities provided sewer service to four North Carolina municipalities and eighty-eight privately owned public utilities provided sewer service to non-municipal areas. *Id.* at 753, 407 S.E.2d at 569. In discussing the provision of public enterprises by privately owned public utilities, the *Pulliam* Court reasoned that “it seem[ed] to be an accepted practice in North Carolina for cities and towns to compete with private enterprise by the ownership and operation of these public enterprises recognized by the General Assembly.” *Id.* With these considerations in mind, the Court held that the defendant City was not immune from tort liability in the operation of its sewer system. *Id.* at 754, 407 S.E.2d at 570.

Here, City of Thomasville concedes that it “has a contract for the operation and maintenance of the City of Trinity’s sewer system” Though the agreement is not a part of the record, the record provides

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sufficient grounds to raise an issue as to whether City of Thomasville was engaged in a proprietary function. However, because we affirm the trial court's ruling that plaintiffs have failed to state a claim for negligence, see *infra*, the last issue we review herein is dispositive of plaintiffs' appeal.

III

Lastly, plaintiffs argue that the trial court erred in granting defendant City's motion to dismiss for failure to state a claim for which plaintiffs could recover under Rule 12(b)(6). We disagree.

"An appellate court conducts a de novo review when considering a trial court's dismissal of a [claim] under North Carolina Rule of Civil Procedure 12(b)(6)." *State Employees Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010). " '[T]he 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.' " *Laster v. Francis*, 199 N.C. App. 572, 575, 681 S.E.2d 858, 861 (2009) (citation omitted).

Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985).

Schlieper v. Johnson, 195 N.C. App. 257, 261, 672 S.E.2d 548, 551 (2009) (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)).

To make out a *prima facie* case of negligence, a plaintiff must show that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) damages resulted from the injury.

Bostic Packaging, Inc., 149 N.C. App. at 830, 562 S.E.2d at 79 (citation omitted).

[A] duty is an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. A legal duty is owed whenever one person is by circum-

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stances placed in such a position towards another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other.

Estate of Mullins by Dixon v. Monroe Oil Co., 349 N.C. 196, 204, 505 S.E.2d 131, 136-37 (1998) (internal citations, quotations, and brackets omitted).

[A] municipality becomes responsible for maintenance, and liable for injuries resulting from a want of due care in respect to upkeep, of [sewer lines] constructed by third persons when, and only when, they are adopted as a part of its [sewer] system, or the municipality assumes control and management thereof.

Geo. A. Hormel & Co. v. City of Winston-Salem, 263 N.C. 666, 674-75, 140 S.E.2d 362, 368 (1965) (citation omitted). However, “[i]n the absence of any control of the place and of the work there [is] a corresponding absence of any liability incident thereto. That authority [must] precede[] responsibility[] or control [as] a prerequisite of liability, is a well recognized principle of law as well as of ethics.” *Wilkerson v. Norfolk S. Ry. Co.*, 151 N.C. App. 332, 343, 566 S.E.2d 104, 111 (2002) (quoting *Mack v. Marshall Field & Co.*, 218 N.C. 697, 700, 12 S.E.2d 235, 237 (1940)).

Here, plaintiffs allege that “Thomasville was involved in the process of construction of the sewage system for the new school being constructed by DeVere in preparation for taking over operation and control of said sewer system” City of Thomasville’s negligence, plaintiffs’ assert, was its failure to “communicate with [defendants Terry’s Plumbing and Davis, Martin, Powell & Associates, Inc.] and properly establish and maintain a procedure for control over the sewage flowing through the sewer system for the new school”

Because plaintiffs fail to assert a duty on the part of City of Thomasville in the construction of the sewer system for the new Randolph County school, they have failed to state a claim for relief. Further, plaintiffs allege that City of Thomasville’s involvement was only “in preparation for taking over operation and control” of the new sewer system; as such, the complaint reveals an absence of facts establishing City of Thomasville’s duty, or conduct constituting a breach of said duty that would proximately cause plaintiffs’ damages. See *Schlieper*, 195 N.C. App. at 261, 672 S.E.2d at 551; *Geo. A. Hormel & Co.*, 263 N.C. at 674-75, 140 S.E.2d at 368. Therefore, plaintiff has

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failed to make out a prima facie claim of negligence. Accordingly, we affirm the order of the trial court dismissing plaintiffs' claim against defendant City of Thomasville pursuant to Rule 12(b)(6).

Affirmed.

Judges McGEE and BEASLEY concur.

STATE OF NORTH CAROLINA v. RAYMUNDO ANTONIO CASTANEDA

No. COA11-7

(Filed 16 August 2011)

1. Evidence—hearsay—not for truth of matter asserted—context—Confrontation Clause

The trial court did not err in a second-degree murder case by admitting the transcript of a police interview without redacting detectives' statements indicating that witnesses saw defendant pick up a knife and stab the victim. The references to statements by unidentified third parties were not hearsay because they were offered to provide context and explain interviewing techniques. Further, the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.

2. Evidence—failure to redact transcript—defendant telling a lie—police interrogation technique

The trial court did not abuse its discretion in a second-degree murder case by failing to redact those portions of the transcript in which a detective accused defendant of telling a lie. The statements were part of an interrogation technique designed to show defendant that the detectives were aware of discrepancies in defendant's story rather than for the purpose of expressing an opinion as to defendant's credibility or veracity at trial.

3. Homicide—second-degree murder—sufficiency of evidence

Even assuming *arguendo* that detectives' statements should have been redacted in a second-degree murder case, defendant was not entitled to a new trial in light of the overwhelming evidence of defendant's guilt.

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Appeal by defendant from judgment entered 2 June 2010 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 June 2011.

Attorney General Roy Cooper, by Assistant Attorney General K. D. Sturgis, for the State.

Duncan B. McCormick for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Raymundo Antonio Castaneda appeals his second-degree murder conviction. After careful review, we find no error.

Facts

The State presented evidence tending to establish the following facts at trial: Around 10:00 a.m. on 23 December 2007, several men, including defendant, Silvano Barrera, and a man nicknamed “Gota,” were drinking beer at Gota’s apartment in Charlotte, North Carolina. Moises Aguilar came over to Gota’s house later that morning and began drinking beer with the other men. In the afternoon, Barrera asked defendant if he could borrow his grill to cook some steaks and defendant left Gota’s house to go get the grill. When defendant returned with the grill, Barrera asked him to clean it while he went grocery shopping. While Barrera was gone, defendant told Aguilar to clean the grill, which made him angry, and the two men began arguing. Defendant threw a beer can at Aguilar and the two men started pushing each other. Aguilar went outside, defendant stayed inside the apartment, and the two men eventually calmed down.

Around 3:00 that afternoon, Barrera, who had been at his apartment preparing the food, went to Gota’s apartment and told everyone to come to his house to eat outside. Defendant and Gota arrived at around 4:00 p.m. and Aguilar showed up a few minutes later. When he arrived, Aguilar “started saying stuff” to defendant and continued saying “stuff” to defendant during the meal. Aguilar then slapped defendant in the face. At this point, defendant “jumped” on Aguilar and the two men began fighting. Although at first Barrera thought defendant was punching Aguilar, when Aguilar fell to the ground on his side, knocking over the grill, Barrera saw that defendant was stabbing him with a kitchen knife. Barrera borrowed a neighbor’s telephone and called 911. When someone told defendant that it looked like Aguilar was going to die, defendant fled the scene.

The paramedics arrived, found Aguilar pulseless and not breathing, and pronounced him dead at the scene. The autopsy revealed that

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Aguilar was stabbed eight times in the chest and abdomen and seven times in the back and that Aguilar died as a result of these wounds.

Defendant was aware, a few days after the incident, that the police were looking for him, but he did not contact the police or turn himself in. Defendant left the state and first went to Charleston, South Carolina, then to Atlanta, Georgia, and finally to Jacksonville, Florida, where he was arrested seven months later, on 31 July 2008. After defendant was apprehended, he was interviewed by Charlotte-Mecklenburg Police Detectives William Brandon and Miguel Santiago. The interview was videotaped and transcribed.

Defendant was charged with first-degree murder. Prior to trial, defendant moved to redact portions of the transcript from the interview where the detectives referred to “other witnesses[’]” statements about the events surrounding the homicide as well as portions in which the detectives told defendant that his version of events was a “lie.” In declining to redact the statements referencing non-testifying third parties, the trial court ruled that the evidence was not being offered to prove the truth of the matter asserted, that the “State w[ould] be prevented from arguing the substance” of these statements, and that it would give a limiting instruction to the jury. The court also refused to redact the detective’s statements that defendant was lying, noting that “officers are permitted to employ investigative and questioning techniques designed to elicit information from a suspect” When the challenged evidence was offered during trial, defendant renewed his objection, and the trial court overruled the objection.

Defendant elected to testify in his defense, explaining that Aguilar had attacked him with the knife and that he had stabbed Aguilar in self-defense. The jury found defendant guilty of second-degree murder and the trial court sentenced defendant to a presumptive-range term of 151 to 191 months imprisonment. Defendant timely appealed to this Court.

I

[1] Defendant first argues that the trial court erred in admitting the transcript of the police interview without redacting the detectives’ “statements indicating that witnesses saw the defendant pick up a knife and stab the decedent.” During the interview, Detective Brandon told defendant that he did not believe defendant’s story that Aguilar attacked him, saying that “people said that . . . you picked the

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knife up and you stabbed [Aguilar].” Later, Detective Santiago told defendant that some parts of his story were “not true” as they did not “match” the evidence from the scene.

A. Hearsay

Defendant contends that the detectives’ statements referring to what they had been told by non-testifying third parties constituted inadmissible hearsay. The State counters that the detectives’ statements were not offered at trial for the truth of the matter asserted and thus did not constitute hearsay. Rule 801 of the Rules of Evidence defines “[h]earsay” as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. R. Evid. 801(c). Consequently, as the State correctly points out, “[o]ut-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay.” *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998). In particular, statements of one person to another to explain subsequent actions taken by the person to whom the statements were made are admissible as non-hearsay evidence. *State v. Coffey*, 326 N.C. 268, 282, 289 S.E.2d 48, 56 (1990). “The reason such statements are admissible is not that they fall under an exception to the [hearsay] rule, but that they simply are not hearsay—they do not come within the . . . legal definition of the term.” *Long v. Paving Co.*, 47 N.C. App. 564, 569, 268 S.E.2d 1, 5 (1980). The trial court’s determination as to whether an out-of-court statement constitutes hearsay is reviewed de novo on appeal. *State v. Miller*, 197 N.C. App. 78, 87-88, 676 S.E.2d 546, 552, *disc. review denied*, 363 N.C. 586, 683 S.E.2d 216 (2009).

Here, as noted by the trial court in denying defendant’s motion, the detectives’ references to statements by unidentified third parties are not hearsay because they were “not admitted for the purpose of conferring the truth of what [was] contained in [the] statements.” Instead, the detectives’ statements were offered to provide context for defendants’ answers and to explain the detectives’ interviewing techniques. *See id.* at 89, 676 S.E.2d at 553 (“Because defendant changed his story as a result of these out-of-court statements, it can be properly said that these questions were admitted to show their effect on defendant, not to prove the truth of the matter asserted.”). As the detectives’ statements were not offered to prove the truth of the matter asserted, they did not constitute hearsay, and the trial court properly admitted the evidence.

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The trial court, moreover, instructed the jury twice “not to consider such statements for the truth of what was said but only for the impact those statements may have had on the Defendant as an interviewing technique by the detective[s].” It is well established that “[t]he law presumes that the jury heeds limiting instructions that the trial judge gives regarding the evidence.” *State v. Shields*, 61 N.C. App. 462, 464, 300 S.E.2d 884, 886 (1983).

B. Right to Confrontation

Defendant also argues that the admission of the detectives’ statements violated his rights under the Confrontation Clause of the Sixth Amendment. It is well recognized, however, that “[t]he Confrontation Clause ‘does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.’” *Miller*, 197 N.C. App. at 87, 676 S.E.2d at 552 (quoting *Crawford v. Washington*, 541 U.S. 36, 59 n.9, 158 L. Ed. 2d 177, 197-98 n.9 (2004)). Thus, because the detectives’ statements were not admitted to establish the truth of the assertions,—that certain witnesses saw defendant pick up the knife and stab Aguilar—but were instead used to provide context for defendant’s responses, the admission of these statements did not violate defendant’s confrontation rights. *See id.* at 90-91, 676 S.E.2d at 554 (finding no Confrontation Clause violation from admission of detectives’ questions which included statements by non-testifying declarants as the evidence was admissible to assist the jury in “understand[ing] the circumstances in which the defendant was caught in a lie, changed his story, and made significant admissions of fact, not to prove the truth of the matter asserted”). Defendant’s arguments are overruled.

II

[2] Defendant next contends that the trial court erred in not redacting those portions of the transcript in which Detective Santiago accused defendant of telling a “lie” and giving an account of the fight that was “bullshit” and like “the shit you see in the movies”. The trial court denied defendant’s motion to redact these statements, observing that “officers are permitted to employ investigative and questioning techniques designed to elicit information from a suspect.”

A. Improper Opinion Evidence

Defendant claims that Detective Santiago’s “statements constituted inadmissible opinion evidence on the truth or falsity of [defendant]’s pretrial statement and, ultimately, [his] testimony at trial.”

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Because, defendant argues, the issue of defendant's credibility was "for the jury and the jury alone," the trial court erred in admitting this evidence. Defendant is correct that "[i]t is fundamental to a fair trial that the credibility of the witnesses be determined by the jury" and that testimony "to the effect that a witness is credible, believable, or truthful is inadmissible." *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995). The issue of the admissibility of an interrogator's statements during an interview that the suspect is being untruthful, however, has not been decided by North Carolina's appellate courts.

The majority of appellate courts of other jurisdictions that have considered such statements have held them admissible based on the rationale that such "accusations" by interrogators are an interrogation technique and are not made for the purpose of giving opinion testimony at trial. *See, e.g., Dubria v. Smith*, 224 F.3d 995, 1001 (9th Cir. 2000) (rejecting, in habeas corpus case, defendant's argument that detective's "comments and questions contained statements of disbelief of [defendant]'s story, opinions concerning [defendant]'s guilt, elaborations of the police theory of [victim]'s death, and references to [defendant]'s involvement in the crime" should have been redacted from tape and transcript because "[t]he questions and comments by [the detective] placed [defendant]'s answers in context"); *State v. Boggs*, 218 Ariz. 325, 334-35, 185 P.3d 111, 120-21 (upholding trial court's admission of video in which detective "repeatedly accused [the defendant] of lying" because detective's "accusations were part of an interrogation technique and were not made for the purpose of giving opinion testimony at trial"), *cert. denied*, ___ U.S. ___, 172 L. Ed. 2d 757 (2008); *State v. Cordova*, 137 Idaho 635, 641, 51 P.3d 449, 455 (Idaho App. Ct. 2002) (concluding that "officers' comments made during both interrogations indicating that they believed [defendant] was lying were admissible for the purpose of providing context to [defendant]'s inculpatory answers"); *but see State v. Elnicki*, 279 Kan. 47, 57, 105 P.3d 1222, 1229 (2005) (concluding that jury "should be prohibited from hearing" videotape of detective's statements during interview that defendant "was a liar," that defendant was " 'bull-shitting' " the detective, and that defendant was " 'weaving a web of lies' "just as "[a] jury is clearly prohibited from hearing such statements from the witness stand").¹

1. While decisions from other jurisdictions may have persuasive value, they are not binding on North Carolina courts. *Morton Bldgs., Inc. v. Tolson*, 172 N.C. App. 119, 127, 615 S.E.2d 906, 912 (2005).

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As one state appellate court has recognized, “there is a difference between an investigating officer giving an opinion as testimony before a jury, and an investigating officer giving an opinion during the interrogation of a suspect.” *Odeh v. State*, ___ So. 3d ___, ___, 2011 Fla. App. LEXIS 11005, *11, 2011 WL 2694434, *5 (Fla. Dist. Ct. App. 2011). The Supreme Court of Kentucky explained in *Lanham v. Commonwealth*, 171 S.W.3d 14 (Ky. 2005), that officers’ comments during questioning that a suspect is not being truthful

are not an attempt to describe to the jury the defendant’s personality; nor are they statements aimed at impeaching a *witness*, especially when it is unknown whether a criminal defendant will take the stand. By making such comments, the officer is not trying to convince anyone—not the defendant (who knows whether he or she is telling the truth), other officers, a prosecutor, or the jury—that the defendant was lying. Rather, such comments are part of an interrogation technique aimed at showing the defendant that the officer recognizes the holes and contradictions in the defendant’s story, thus urging him or her to tell the truth.

Id. at 27 (emphasis in original).

In holding that comments by police, similar to those by Detective Santiago in this case, were admissible, the *Lanham* Court noted that “[a]lmost all of the courts that have considered the issue recognize that this form of questioning is a legitimate, effective interrogation tool. And because such comments are such an integral part of the interrogation, several courts have noted that they provide a necessary context for the defendant’s responses.” *Id.* at 26-27. Thus the court concluded that “such recorded statements by the police during an interrogation are a legitimate, even ordinary, interrogation technique, especially when a suspect’s story shifts and changes.” *Id.* at 27 (emphasis added).

In this case, during his post-arrest interview, defendant’s explanation of what happened at Barrera’s apartment during the afternoon of 23 December 2007 shifted from not “remember[ing] picking [up] the knife,” to remembering “t[aking] it away” from Aguilar; from not remembering stabbing Aguilar at all, to remembering stabbing Aguilar “[m]aybe one” time, and then remembering stabbing him “twice in the stomach.” These changes in defendant’s story were in response to the detective’s statements that defendant was not being truthful. Because Detective Santiago’s statements were part of an interrogation technique designed to show defendant that the detec-

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tives were aware of the holes and discrepancies in his story and were not made for the purpose of expressing an opinion as to defendant's credibility or veracity at trial, the trial court properly admitted the evidence. *See Boggs*, 218 Ariz. at 335, 185 P.3d at 121 (upholding admission of officer's accusation that defendant was not being truthful "[b]ecause [officer]'s accusations were part of an interrogation technique and were not made for the purpose of giving opinion testimony at trial").

Interrogators' comments reflecting on the suspect's truthfulness are not, however, always admissible. As the Idaho Court of Appeals explained:

A suspect's answers to police questioning are only admissible to the extent that they are relevant. Thus, an interrogator's comments that he or she believes the suspect is lying are only admissible to the extent that they provide context to a relevant answer by the suspect. Otherwise, interrogator comments that result in an irrelevant answer should be redacted.

Cordova, 137 Idaho at 641, 51 P.3d at 455 (citing state evidence rule analogous to N.C. R. Evid. 401). Here, Detective Santiago's statements that he believed that defendant was "lying" and that his story was not believable are admissible as the statements provided the context surrounding defendant's inculpatory responses—statements relevant to the murder charge. *See id.* ("The officers' statements in this case that they believed Cordova was lying were admissible because the comments gave context to Cordova's inculpatory statements, which were relevant to the proceedings."); *see also Miller*, 197 N.C. App. at 87, 676 S.E.2d at 552 (finding police statements relevant because "[t]he circumstances under which [the defendant's] concessions were made were relevant to understanding the concessions themselves and therefore to the subject matter of the case").

B. Danger of Unfair Prejudice

Defendant alternatively argues that even if Detective Santiago's statements accusing defendant of not being truthful were relevant, they should have been excluded under Rule 403, which prohibits the admission of evidence, despite being relevant, when the evidence's "probative value is substantially outweighed by the danger of unfair prejudice . . ." N.C. R. Evid. 403. The decision concerning whether to exclude evidence under Rule 403's balancing test is a matter within the discretion of the trial court and its ruling will not be overturned on appeal in the absence of an abuse of discretion, *State v. McCray*,

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342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995), meaning that “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. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Defendant maintains that the trial court abused its discretion under Rule 403 by allowing the jury to hear Detective Santiago’s comments during the interview that defendant was lying and giving a story that was “bullshit” and like the “shit you see in the movies.” As we have already explained, a jury may consider an interrogator’s statements about a crime when they elicit a relevant response from the suspect being questioned. An interrogating detective’s statements to a suspect, when placed in their proper context, may be understood by a rational jury to be interrogation techniques used by law enforcement officers to obtain inculpatory statements from a suspect. *See Eugene v. State*, 53 So. 3d 1104, 1112 (Fla. Dist. Ct. App. 2011) (“When placed in their proper context, an interrogating detective’s statements to a suspect could be understood by a rational jury to be techniques used by law enforcement officers to secure confessions.” (citation and internal quotation marks omitted)).

In this case, when considered in the context of the entire interview, the trial court did not abuse its discretion under Rule 403 in admitting Detective’s Santiago’s statements. *See id.* (holding that, “[w]hen placed in the context of the entirety of the interrogation, the trial court did not abuse its discretion in admitting” interrogating detectives’ accusations that defendant was lying); *Bostick v. State*, 773 N.E.2d 266, 271 (Ind. 2002) (concluding that admission of “interrogators’ accusations” that defendant had lied about not committing crime, “in the context of the entire statement, did not create a substantial risk of unfair prejudice”). This argument is overruled.

III

[3] Although we have held that the trial court did not err in admitting either of the two statements by the detectives, even if we assume for the sake of argument that the statements should have been redacted, defendant is not entitled to a new trial. The State presented overwhelming evidence at trial of defendant’s guilt. Barrera, who was five or six feet from the fight, testified to seeing defendant “jump” on Aguilar, repeatedly stab him in the chest and, after knocking Aguilar down to the ground, stab him several times in the back. After stabbing Aguilar eight times in the front and seven times in the back, defendant left the scene without calling for help and fled the state. In

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light of this overwhelming evidence, any error in the admission of the challenged evidence is harmless. N.C. Gen. Stat. § 15A-1443 (a) and (b) (2009).

No error.

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

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YACHT CLUB, INC., DEFENDANT

No. COA10-1481

(Filed 16 August 2011)

**Landlord and Tenant—summary ejectment—termination of
lease—acts of de facto officers—summary judgment**

The trial court did not err in a summary ejectment case by granting summary judgment in favor of plaintiff. Since the validity of the acts of *de facto* officers cannot be collaterally impeached, defendant's affidavits failed to create a genuine issue of material fact regarding the validity of plaintiff's termination of the lease.

Judge THIGPEN dissenting.

Appeal by defendant from order entered 19 August 2010 by Judge Paul M. Quinn in Craven County District Court. Heard in the Court of Appeals 28 April 2011.

Stubbs & Perdue, P.A., by John W. King, Jr., for plaintiff-appellee.

McAfee Law, P.A., by Robert J. McAfee, for defendant-appellant.

CALABRIA, Judge.

Crystal Lake Yacht Club, Inc. ("defendant") appeals the trial court's order granting summary judgment in favor of Havelock Yacht Club, Inc. ("plaintiff"), in plaintiff's summary ejectment appeal. We affirm.

On 1 April 1983, plaintiff leased property in Havelock, North Carolina, to defendant ("the lease"). The lease was for a term of five

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years, with the option to renew the lease for an additional five years. The lease was executed on plaintiff's behalf by its president, J.R. Shelton ("Shelton"), and on defendant's behalf by Commodore Gene Ruder. The parties ultimately agreed to renew the lease for three additional five-year terms, with the final renewal term expiring in 2003. Upon the expiration of the final renewal term, the lease converted to a month-to-month tenancy.

On 28 September 2009, plaintiff's attorney notified defendant in writing that plaintiff was terminating the lease, effective 31 December 2009. Defendant's attorney negotiated an extension of that deadline until 1 March 2010. Nevertheless, defendant failed to vacate the property after that date. As a result, plaintiff filed a summary ejectment action in small claims court on 9 April 2010. On 13 May 2010, the magistrate ordered that defendant "be removed from and the plaintiff be put in possession of the premises"

Defendant filed a notice of appeal to the Craven County District Court. On 26 May 2010, plaintiff filed a motion for summary judgment. In support of its motion, plaintiff filed two affidavits. The first affidavit was from Frances Diffie ("Diffie"), who averred that she was plaintiff's president and was authorized by its membership to terminate the lease. In the second affidavit, an employee of First Citizens Bank averred that Diffie was listed as an officer of plaintiff according to bank records and had signing authority over plaintiff's account.

On 2 July 2010, defendant filed an answer and an affidavit from Bryan Scoggins ("Scoggins"). Scoggins averred that he was attorney-in-fact for his mother, Bonn Lynn Scoggins, who had inherited an interest in plaintiff through her husband. Scoggins further averred that his mother knew of no election of directors or appointment of officers by plaintiff, and that she desired to extend the lease between plaintiff and defendant. On 6 August 2010, defendant filed a similar affidavit from Harold Frank Craig ("Craig"), who averred that he had acquired an interest in plaintiff through his parents, that to his knowledge there was no election of directors or appointment of officers by plaintiff, and that he wished to continue the lease between plaintiff and defendant.

Plaintiff's motion for summary judgment was heard on 10 August 2010. The trial court granted summary judgment in favor of plaintiff on 19 August 2010. Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred in granting summary judgment to plaintiff. Specifically, defendant

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contends that the affidavits from Scoggins and Craig created a genuine issue of material fact as to whether Diffée had the authority to terminate the lease with defendant. We disagree.

“Summary judgment is appropriate ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’” *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 353 (2009) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007)). “A trial court’s grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party.” *Sturgill v. Ashe Mem’l Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007).

Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:

- (1) When a tenant in possession of real estate holds over after his term has expired.

N.C. Gen. Stat. § 42-26(a) (2009). A month-to-month tenancy may be terminated by a notice to quit given seven days or more before the end of the current month of the tenancy. N.C. Gen. Stat. § 42-14 (2009). In the instant case, defendant does not dispute receiving timely notice from plaintiff’s attorney regarding the termination of defendant’s lease or that defendant held over after the lease was terminated.

Nevertheless, defendant argues in its brief that “due to a lack of by-laws governing membership and property rights of the plaintiff corporation, and the questions raised by the two affidavits it filed by persons claiming to be members of the plaintiff corporation, the trial court erred” by granting summary judgment to plaintiff. Defendant further contends that summary judgment was inappropriate because plaintiff failed to provide the trial court with a copy of its by-laws or the minutes of an organizational meeting that would have supported Diffée’s claim that she had the authority to terminate the lease.

Defendant’s arguments are misplaced. Diffée’s actual authority to act was immaterial to the validity of the termination of the lease.

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“North Carolina recognizes that one may be a *de facto* officer or director of a corporation.” *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 241, 330 S.E.2d 649, 654 (1985).¹

To constitute one a *de facto* officer or director, one must:

- hold office under some degree of notoriety or color of title—the mere assumption of title to office on one occasion cannot clothe a person with the title of a *de facto* officer
- continuously exercise the functions of the office
- appear to hold an actual office—there can be no *de facto* officer where, for want of an office, there can be no *de jure* officer

18B Am. Jur. 2d Corporations § 1229 (footnotes omitted).

A corporation in its corporate name, can maintain any action respecting its corporate property that an individual can. The persons claiming to be the officers of the corporation, and being *de facto* in possession of the corporate franchises and property, may use the corporate name and seal, in the prosecution of such actions. It is settled upon authority, that a defendant in such actions, cannot defend himself by denying the rightful existence of the corporation, if it have a *de facto* existence; or by impeaching the title of the *de facto* officers by showing some irregularity in their election, if they have a colorable right. The only way in which the right to an office can be tried, is by an action of *quo warranto*.

R. R. v. Johnston, 70 N.C. 348, 349-50 (1874). Moreover, “the validity of the acts of *de facto* officers cannot be collaterally impeached.” *Id.* at 350.

In the instant case, there was no genuine issue of material fact that Diffee was acting in at least a *de facto* capacity as plaintiff’s president when she terminated defendant’s lease. In her affidavit, Diffee averred that she was validly elected as president by plaintiff’s members and was acting in that capacity when she terminated the lease. Plaintiff also provided an affidavit that averred that Diffee was listed as an officer of plaintiff on plaintiff’s bank account and had signing authority over that account.

1. While plaintiff is a nonprofit corporation, “the statutory provisions relating to the identity, appointment, functions, resignation, removal, and contract rights of officers are virtually identical” to the statutes governing for profit corporations. Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 33.06 (2009).

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Moreover, there was no genuine issue of material fact that plaintiff, as a corporation, has an officer with the title of president. The original lease between plaintiff and defendant was executed on plaintiff's behalf by Shelton, who was identified on the lease as plaintiff's president. Defendant does not dispute the validity of this lease. In addition, defendant's affidavits do not aver that plaintiff does not have an officer with the title of president; rather, defendant's affiants state their belief that "any officer acting on behalf of the corporation has been without authority of the Board of Directors to do so." Thus, these affidavits do not create a genuine issue of material fact regarding whether Diffie was acting in at least a *de facto* capacity in terminating the lease.

Since "the validity of the acts of *de facto* officers cannot be collaterally impeached," *Johnston*, 70 N.C. at 350, defendant's affidavits failed to create a genuine issue of material fact regarding the validity of plaintiff's termination of the lease. As a result, the trial court correctly granted summary judgment in favor of plaintiff. The trial court's order is affirmed.

Affirmed.

Judge ERVIN concurs.

Judge THIGPEN dissents by a separate opinion.

THIGPEN, Judge *dissenting*.

I dissent from the majority's determination that in this case there is no genuine issue of material fact because Frances Diffie acted in a *de facto* capacity as Plaintiff corporation's president when she terminated Defendant's lease.

The majority opinion holds that Frances Diffie was a *de facto* officer of Plaintiff corporation. While I agree with this conclusion, I do not believe this holding is dispositive of the case. I believe the analysis involves a two-step process, and the majority opinion only resolves one issue in the analysis. The first issue is whether Frances Diffie is an officer of Plaintiff corporation. This issue has been resolved. However, the second issue is whether Frances Diffie was authorized as an officer of Plaintiff corporation to terminate Defendant's lease. On this issue, I believe there continues to be an issue of material fact.

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Moreover, I am concerned that the use of the language in the opinion that the “validity of an act [of a *de facto* officer] cannot be collaterally impeached” is language inapplicable to the facts of this case and should not be read for the general proposition that the acts of a *de facto* officer of a corporation cannot be contested.

Lastly, I believe the affidavit of Frances Diffie and the Articles of Incorporation of Plaintiff corporation are contradictory and thus create a genuine issue of material fact on the issue of whether Frances Diffie had the authority to terminate Defendant’s lease.

“It is axiomatic that the party moving for summary judgment has the burden of establishing the absence of any triable issue of fact.” *Henderson v. Provident Life & Acci. Ins. Co.*, 62 N.C. App. 476, 479, 303 S.E.2d 211, 213 (1983). Plaintiff corporation moved for summary judgment in the present case. Defendant contended “[t]here have been no . . . directors meetings and no appointment of officers to conduct the business of the corporation[,]” ultimately arguing Francis Diffie was without authority to act on behalf of Plaintiff corporation to terminate Defendant’s lease.

“A corporation can act only through its agents, which include its corporate officers.” *Ellison v. Alexander*, ___ N.C. App. ___, ___, 700 S.E.2d 102, 111 (2010) (quotation omitted); *see also Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 205, 130 S.E.2d 281, 285 (1963) (stating, “[i]t is elementary knowledge that a corporation in its relations to the public is represented and can act only by and through its duly authorized officers and agents”). It has been established that officers of private corporations may be *de facto* officers. *See Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 241, 330 S.E.2d 649, 654 (1985); *Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 16, 652 S.E.2d 284, 295 (2007). Arguably, officers of nonprofit corporations may also be *de facto* officers. Russell M. Robinson, II, Robinson on North Carolina Corporation Law § 33.06 (2009) (stating “the statutory provisions relating to the identity, appointment, functions, resignation, removal, and contract rights of officers are virtually identical” to the statutes governing for profit corporations).

In the present case, even though Frances Diffie is a *de facto* officer, Frances Diffie does not thereby necessarily have the authority to terminate Defendant’s lease. With regard to officers of a nonprofit corporation, N.C. Gen. Stat. § 55A-8-41 states “[e]ach officer has the authority and duties set forth in the bylaws or, to the extent consistent with the bylaws, the authority and duties prescribed by the board

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of directors or by direction of an officer authorized by the board of directors to prescribe the authority and duties of other officers.” In this case, the bylaws are not part of the evidence of record, the Articles of Incorporation shed no light on the authority of the office of president, and the record is devoid of evidence that any board of directors or officer of Plaintiff corporation assigned certain duties and authorities to the office of president. Moreover, there is no evidence of record that Frances Diffie has ever, in the past, terminated a lease on behalf of Plaintiff corporation in her *de facto* capacity. In these circumstances, a party should be able to contest the authority of an officer to act on behalf of the corporation. However, the majority’s holding that the “validity of an act cannot be collaterally impeached,” if applied in the context of this case, could be read for the proposition that the authority of a *de facto* officer to take an action on behalf of a corporation could never be contested. This, I believe, is incorrect.

Secondly, I believe the majority’s reliance on *R. R. v. Johnston*, 70 N.C. 348, 350 (1874) for the proposition that “validity of the acts of *de facto* officers cannot be collaterally impeached” is misplaced because *Johnston* is distinguishable from the present case. In *Johnston*, one Board of Directors of a corporation filed suit against another Board of Directors, which claimed to be the legally appointed Directors of the same corporation. The holding in *Johnston* applies to cases in which the validity of an election or appointment is being challenged—essentially, the “right to an office,” *Johnston*, 70 N.C. at 350 (Emphasis in original). However, here, Defendant does not “deny[] the rightful existence of the corporation” or “impeach[] the title” of Frances Diffie as *de jure* or *de facto* president. *See id.* Rather, Defendant challenges Frances Diffie’s authority to terminate their lease on behalf of Plaintiff corporation. This, I believe Defendant may do, not via a proceeding of *quo warranto*, but pursuant to N.C. Gen. Stat. § 1A-1, Rule 9(a), which provides the following:

Any party suing in any representative capacity shall make an affirmative averment showing his capacity and authority to sue. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or *the authority of a party to sue* or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader’s knowledge.

N.C. Gen. Stat. § 1A-1, Rule 9(a) (2009) (Emphasis added).

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Finally, I believe a contradiction between the affidavit of Frances Diffee and Plaintiff corporation's Articles of Incorporation creates a genuine issue of material fact. Frances Diffee averred that "as President of [Plaintiff corporation] she is authorized to conduct banking business and to carry on the everyday business of [Plaintiff corporation] pursuant to its Articles of Incorporation[.]" This authorization, Frances Diffee avers, includes the authority to "initiate the termination of the lease to [Defendant]." However, the Articles of Incorporation make no mention of the authority of particular members, officers or agents to perform "banking business" or "everyday business" on behalf of Plaintiff corporation. Neither do the Articles of Incorporation mention the office of president.¹ See *Gilreath v. N.C. HHS*, 177 N.C. App. 499, 501, 629 S.E.2d 293, 295 (2006) (Exhibits submitted in support of affidavits may be considered on summary judgment). Since the affidavit of Frances Diffee and the attached Articles of Incorporation were the only evidence offered by Plaintiff corporation on the issue of the authority of Frances Diffee to terminate Defendant's lease,² I do not believe such contradictory evidence satisfied Plaintiff corporation's burden of establishing the absence of a triable issue of fact.

For the foregoing reasons, I respectfully dissent.

1. Although "a nonmovant may not generate a conflict simply by filing an affidavit contradicting his own sworn testimony where the only issue raised is credibility[.]" *Allstate Ins. Co. v. Lahoud*, 167 N.C. App. 205, 211, 605 S.E.2d 180, 185 (2004), *aff'd per curiam*, 359 N.C. 628, 614 S.E.2d 304 (2005), "[t]he party moving for summary judgment has the burden of showing the lack of any triable issue of fact; his papers are carefully scrutinized and those of the non-movant are indulgently regarded." *Lessard v. Lessard*, 77 N.C. App. 97, 99, 334 S.E.2d 475, 476 (1985). "If the evidentiary materials filed by the parties disclose the existence of a genuine issue of material fact, summary judgment must be denied." *Id.*

2. I recognize that the affidavit of Roberta F. Justice, a notary public at First Citizens Bank and Trust Company, provided evidence that Frances Diffee was an "officer[]" of Plaintiff corporation and had "signing authority . . . according to bank records." However, evidence of "signing authority" for banking purposes does not equate authority to terminate Defendant's lease.

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STATE OF NORTH CAROLINA v. KELVIN STEPHEN ARRINGTON

No. COA10-1134

(Filed 16 August 2011)

1. Motor Vehicles—driving while impaired—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired. The State was only required to prove defendant had an alcohol concentration of .08 or more while driving a vehicle on a State highway, and defendant's two successive Intoxilyzer tests administered after his car was stopped were .08.

2. Constitutional Law—right to be present—imposition of additional costs and fees—defendant's physical presence not required

The trial court did not err in a driving while impaired case by imposing additional costs and fees outside of defendant's physical presence. The imposition of fines was the necessary byproduct of the sentence, and defendant was given ample opportunity to respond. Further, payment of court costs does not amount to punishment.

Appeal by defendant from a judgment entered 13 May 2010 by Judge Lindsay R. Davis, Jr., in Harnett County Superior Court. Heard in the Court of Appeals 9 March 2011.

Roy Cooper, Attorney General, by Assistant Attorney General Tammera S. Hill, for the State.

William B. Gibson for defendant.

ELMORE, Judge.

Kelvin Stephen Arrington (defendant), appeals from his 13 May 2010 conviction of driving while impaired. Defendant contends that the trial court erred in denying his motion to dismiss based on insufficiency of the evidence and in imposing payment of court costs and fees outside of defendant's presence. After careful review, we find no error.

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I. Background

On 8 July 2009, defendant was convicted in Harnett County District Court of driving while impaired in violation of N.C. Gen. Stat. § 20-138.1. Defendant appealed to the superior court where he was tried before a jury on 13 May 2010 and found guilty. On 13 May 2010, the superior court judge, in open court, rendered a sentence, which included: (1) thirty days' imprisonment, suspended for eighteen months of supervised probation; (2) submitting to an assessment for substance abuse; (3) successfully completing recommended treatment; and (4) serving twenty-four hours of community service in ninety days. The judgment allowed defendant to transfer to unsupervised probation if he fully complied for twelve months. In the written judgment entered later that day, in addition to the above, defendant was ordered to pay \$287.50 in court costs and a \$225.00 community service fee. Defendant filed notice of appeal from this judgment on 18 May 2010.

Evidence was developed at trial that on 2 September 2007 at approximately 1:30 a.m., defendant was pulled over by trooper Antwain Wickware (Trooper Wickware) for driving without a right-side headlight. As he approached the vehicle, Trooper Wickware observed that defendant had "red, glassy eyes and [that there was] a strong odor of alcohol coming from the vehicle." When Trooper Wickware asked defendant if he had been drinking, defendant responded "yes." Defendant submitted to an Alco-Sensor test, which confirmed that defendant had alcohol in his system. Trooper Wickware then administered a Horizontal Gaze Nystagmus Test (HGN Test) to determine whether defendant had "appreciable impairment." The test indicated "negative." After the required fifteen-minute waiting period, Trooper Wickware re-administered the Alco-Sensor test. It again showed a positive result. Based on defendant having "red, glassy eyes," a strong odor of alcohol, and two positive readings on the Alco-Sensor, Trooper Wickware concluded that defendant was appreciably impaired and placed him under arrest for driving while impaired.

After transporting defendant to the law enforcement center in Lillington, Trooper Wickware advised defendant of his Intoxilyzer Rights and administered three more field sobriety tests. Defendant passed the one-leg stand test, marginally failed the walk-and-turn test, and failed the finger-to-nose test. At the conclusion of the required fifteen-minute waiting period, Trooper Wickware adminis-

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tered the Intoxilyzer Test two times. Both tests reported defendant to have an alcohol concentration of .08.

II. Discussion

Defendant contends that the trial court committed reversible error in denying his motion to dismiss for insufficiency of the evidence on the charge of driving while impaired under N.C. Gen. Stat. § 20-138.1, and in ordering defendant to pay costs and community service fees outside of his presence. We deal with each of those contentions in turn.

A. Defendant's Motion to Dismiss

[1] Defendant contends that the trial court erred in denying his motion to dismiss the charge of driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 because of insufficient evidence. We disagree.

Upon defendant's motion to dismiss, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (quotation and citation omitted). "When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citation omitted).

N.C. Gen. Stat. § 20-138.1 says in relevant part:

A person commits the offense of impaired driving if he drives any vehicle upon any highway . . . [a]fter having consumed sufficient alcohol that he has . . . an alcohol concentration of .08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration.

N.C. Gen. Stat. § 20-138.1 (2009). "Chemical analysis" is defined in N.C. Gen. Stat. § 20-4.01(3a) as "[a] test or tests of the breath, blood, or other bodily fluid or substance of a person to determine the person's alcohol concentration or presence of an impairing substance, performed in accordance with G.S. 20-139.1, including duplicate or sequential analysis." N.C. Gen. Stat. § 20-4.01(3a) (2009).

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As to the required procedure for administration of chemical analysis, N.C. Gen. Stat. § 20-139.1 (b3) says in relevant part:

The results of the chemical analysis of all breath samples are admissible if the test results from any two consecutively collected breath samples do not differ from each other by an alcohol concentration greater than .02. Only the lower of the two test results of the consecutively administered tests can be used to prove a particular alcohol concentration.

N.C. Gen. Stat. § 20-139.1(b3) (2009).

The evidence in this case tended to show *inter alia*: Defendant was driving his car when stopped by Trooper Wickware. Two separately administered Intoxilyzer Tests indicated defendant's blood-alcohol level to be .08. Trooper Wickware testified that the reading on the Intoxilyzer 5000 rounds down in order to "give the defendant the benefit of the doubt" if defendant "blew a .079, [the Intoxilyzer 5000] rounds it down to a .07. In this case he blew a .08." Based on the language of the statute and Trooper Wickware's testimony, if the breathalyzer test is correctly administered, then the method of such administration is designed to mitigate any margin of error in favor of defendant.

Defendant asserts that since the blood alcohol reading was the lowest for which he could be convicted under the statute, the margin of error of the Intoxilyzer should be taken into account to undermine the State's case against him. Our Supreme Court has examined the argument that the margin of error of chemical analysis should be taken into account when considering the validity of charges under N.C. Gen. Stat. § 20-138.1 in *State v. Shuping*, 312 N.C. 421, 323 S.E.2d 350 (1984). In *Shuping*, the defendant argued that the accuracy of a breathalyzer which she alleged to be .01 should undermine her conviction under the statute. *Shuping*, 312 N.C. at 429-30, 323 S.E.2d at 351. In rejecting that argument, our Supreme Court made clear that "[o]nce it is determined that the chemical analysis of the defendant's breath was valid when a reading of [.08] constitutes reliable evidence and is sufficient to satisfy the State's burden of proof as to this element of the offense of DWI." *Id.*, at 431, 323 S.E.2d at 356. Likewise, this Court observed that "[t]he 'result of a chemical analysis' is a report of a person's alcohol concentration, and the statute provides that the result of such a test constitutes *prima facie* evidence of the defendant's alcohol concentration as reported in the results." *State v. Narron*, 193 N.C. App. 76, 84, 666 S.E.2d 860, 866 (2008), *disc. review denied*, *State v. Narron*, 363 N.C. 135, 674 S.E.2d 140 (2009).

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As we have noted, a valid chemical analysis of breath samples requires “two consecutively collected breath samples [that] do not differ from each other by an alcohol concentration greater than .02” and that “[o]nly the lower of the two test results . . . can be used to prove a particular alcohol concentration.” N.C. Gen. Stat. § 20-139.1(b3) (2009). In this instance, Trooper Wickware administered the Intoxylizer test two times. Each administration showed a blood alcohol concentration of .08. These two successive administrations, with no difference between them, satisfy the mandates of N.C. Gen. Stat. § 20-139.1(b3).

Therefore, we hold that the Intoxilyzer 5000 test was correctly administered to defendant pursuant to N.C. Gen. Stat. § 20-139.1 (b3) and that the result of the test was valid. The test presents reliable evidence and accurately indicates defendant’s level of impairment. *Shuping*, 312 N.C. at 431, 323 S.E.2d at 356. As such, the test result constitutes *prima facie* evidence, sufficient for submission to the jury, of defendant’s blood alcohol concentration. *Narron*, 193 N.C. App. at 84-85, 666 S.E.2d at 866.

Defendant reminds us that if the evidence “is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant, the motion to dismiss must be allowed.” *State v. Molloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (internal citations omitted). Defendant points out that, here, in this case, he was pulled over for having a broken headlight, not for unsafe driving; was cooperative with the arresting officer; passed the one-leg stand test; and was not “appreciably impaired” at the time of his arrest, according to the HGN test and testimony by Trooper Wickware. However, though such factors may be weighed by the trial court before sentencing, N.C. Gen. Stat. § 20-179(e) (2009), it is not necessary for the State to prove that defendant was appreciably impaired, uncooperative, or driving in an unsafe manner in order to prove that defendant is guilty of a violation of N.C. Gen. Stat. § 20-138.1(a2). To prove guilt, the State need only show that defendant had an alcohol concentration of .08 or more while driving a vehicle on a State highway. N.C. Gen. Stat. § 20-138.1(a2) (2009). It is undisputed in this case that defendant was driving when stopped, that he was given the Intoxilyzer test in the manner described and passed upon by us above, and that the result of this duly administered chemical analysis was .08 in two successive tests. Proof of each element of the charged offense was offered and defendant’s motion to dismiss was properly denied. We find no error.

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B. Costs and Community Service Fees

[2] Defendant contends that the trial court erred in imposing additional costs and fees outside of his physical presence of the defendant in violation of his “right to be present at the time sentenced is pronounced.” *State v. Bonds*, 43 N.C. App. 467, 474, 259 S.E.2d 377, 381 (1979). We disagree.

We review this proposed error of law *de novo*. See N.C.R. App. P. 28(b)(6) (2009); *State v. Crumbley*, 135 N.C. App. 59, 66-67, 519 S.E.2d 94, 99 (1999) (conducting a *de novo* review of the question of whether a sentence imposed on the defendant outside of his presence was proper).

Here, the sentence actually imposed in this case was the sentence contained in the written judgment. See *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 (1997) (“Announcement of judgment in open court merely constitutes ‘rendering’ of judgment, not entry of judgment.”). Defendant had a right to be present at the time that sentence was imposed. See *State v. Beasley*, 118 N.C. App. 508, 514, 455 S.E.2d 880, 884 (1995); see also *State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962) (“The right to be present at the time sentence is pronounced is a common law right, separate and apart from the constitutional or statutory right to be present at the trial.”); *State v. Bonds*, 43 N.C. App. 467, 474, 259 S.E.2d 377, 381 (1979) (vacating judgment entered in response to a motion for appropriate relief while accused was not present).

N.C. Gen. Stat. § 15A-1343(e) provides that as a condition of probation, a defendant shall be required to pay all court costs. N.C. Gen. Stat. § 15A-1343(e) (2009). “Payment of any fines, courts costs, and fees” are to be imposed by the judge as a condition of a suspended sentence of supervised probation. N.C. Gen. Stat. § 20-179(r)(3) (2009). “Conditions not amounting to punishment include . . . a requirement to pay the costs of court.” *State v. Brown*, 110 N.C. App. 658, 659, 430 S.E.2d 433, 434 (1993) (quotations and citation omitted).

Under the community service program, “[a] fee of two hundred and fifty dollars shall be paid by all persons who participate in the program or receive services from the program staff.” N.C. Gen. Stat. § 143B-262.4 (2009). The fee must be paid in full before defendant can participate in the community service program. *Id.*

Defendant does not contest that he was in open court to hear himself sentenced with a level five punishment that included twenty-

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four hours of community service in ninety-days and a thirty-day jail term which the trial court suspended for a term of eighteen months of supervised probation. Nor does he contest that he was given the order containing court costs and about which he complains, the same day as he heard the sentence pronounced in open court. He contends, however, that the trial court did not expressly impose court costs and the fees for community service in open court.

As authority for the proposition that the sentence in this case was improperly imposed, defendant first points to *State v. Crumbley*, 135 N.C. App. 59, 66-67, 519 S.E.2d 94, 99 (1999). In *Crumbley*, this Court examined the question of whether the imposition of consecutive as opposed to concurrent sentences outside the presence of a defendant was proper. *Id.* In holding that the sentence in that case was improperly rendered, this Court observed that by action of N.C. Gen. Stat. § 15A-1354(a), the default for sentencing is that sentences should run concurrently and that the change from concurrent to consecutive sentences was a “*substantive change* in the sentence [which] could only be made in the Defendant’s presence, where he and/or his attorney would have an opportunity to be heard.” *Id.* (emphasis added). Likewise, in *State v. Hanner*, on which defendant next relies, this Court considered the change in the oral disposition at sentencing from default concurrent sentencing at the rendering of judgment in the presence of the defendant to consecutive sentencing in the entry of written judgment and found that the sentence in that case was improperly entered. 188 N.C. App. 137, 141-42, 654 S.E.2d 820, 823 (2008). Finally, defendant looks to *State v. Willis*, wherein this Court found, relying on *Crumbley* and *Hanner*, that a change in the conditions of probation was inappropriately entered when the defendant was not given notice of the statutorily required hearing for a change in his probation. 199 N.C. App. 309, 310-12, 680 S.E.2d 772, 775 (2009).

Defendant’s reliance on these cases is misplaced. In each of the cases defendant cites, the change in the judgment entered and the judgment that was rendered was “substantive,” either in contravention of the statutorily set expectation of concurrent sentencing as in *Crumbley*, resulting in a substantially greater time of confinement, or in the face of no statutory direction for the particular conditions of probation, as in *Hanner*. That is not the case here. In this instance, each of the conditions imposed on defendant was a non-discretionary byproduct of the sentence that was imposed in open court. *See* N.C. Gen. Stat. § 15A-1343(e) (2009) (requiring the imposition of court costs as a condition of probation); N.C. Gen. Stat. § 20-179(r)(3)

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(2009) (requiring the imposition of the “[p]ayment of any fines, court costs, and fees” as a condition of a suspended sentence of supervised probation.); N.C. Gen. Stat. § 143B-262.4 (2009) (requiring “a fee of two hundred fifty dollars (\$250.00) [to] be paid by all persons who participate in the [community service] program or receive services from the program staff.”). Far from being a “substantive change” in defendant’s sentence, the imposition of fines in this case was the necessary byproduct of the sentence he was given and he does not contest that both he and his counsel had ample opportunity to respond to that sentence. *See Crumbley*, 135 N.C. App. at 66, 519 S.E.2d at 99.

Further, as we have noted, payment of court costs does not amount to punishment. *State v. Brown*, 110 N.C. App. at 659, 430 S.E.2d at 434. Therefore, the imposition of costs on defendant outside of his presence did not infringe upon his “right to be present at the time sentence is pronounced,” *Bonds*, 43 N.C. App. at 474, 259 S.E.2d at 381, not only because these statutorily mandated fees were an integral part of the sentence defendant heard imposed upon him in open court, but because, since they did not constitute an additional or other punishment, imposition of costs and fees was not a substantial change in his sentence. *See generally Crumbley*, 135 N.C. App. at 66, 519 S.E.2d at 99. We find there was no error in the trial court’s imposing the costs and fees in question outside the presence of defendant.

III. Conclusion

We find that the trial court did not err in denying defendant’s motion to dismiss for insufficiency of the evidence and that the trial court’s imposition of costs outside the presence of defendant was likewise not error.

NO ERROR.

Judges BRYANT and GEER concur.

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STATE OF NORTH CAROLINA v. JACKIE RAY ANDERSON

No. COA10-1573

(Filed 16 August 2011)

Constitutional Law—right to counsel—failure to obtain knowing, intelligent, and voluntary waiver

The trial court erred in a drugs case by allowing defendant to represent himself at trial without first obtaining a waiver of counsel that was knowing, intelligent, and voluntary as required by N.C.G.S. § 15A-1242. Defendant was not informed of both of the charges for which he was indicted, and thus, defendant received a new trial.

Judge BRYANT dissenting.

Appeal by Defendant from judgment entered 17 May 2010 by Judge Walter H. Godwin in Wilson County Superior Court. Heard in the Court of Appeals 25 May 2011.

Attorney General Roy Cooper, by Assistant Attorney General Donna D. Smith, for the State.

Michael J. Reece, for Defendant.

BEASLEY, Judge.

On appeal, Defendant (Jackie Ray Anderson) argues that the trial court erred in allowing him to defend himself at trial. For the reasons stated herein, we grant Defendant a new trial.

On 11 September 2009, Defendant made his first appearance in Wilson County District Court following his arrest for selling a controlled substance. At this appearance, Defendant waived his right to assigned counsel by signing a “Waiver of Counsel” form. Thereafter, the waiver form was certified by the presiding district court judge.

On 11 January 2010, Defendant was indicted for selling and delivering a controlled substance in violation of N.C. Gen. Stat. § 90-95(a)(1) and for attaining habitual felon status. On 9 February 2010, Defendant made a second appearance at an administrative session of the Wilson County Superior Court. During this session, Defendant stated that he wished to represent himself on the indicted offenses. Following a brief colloquy with the presiding judge, Defendant again signed a

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“Waiver of Counsel.” The second waiver form was certified by the presiding superior court judge. Defendant’s trial began on 17 May 2010. At trial, Defendant represented himself without the assistance of counsel. Defendant was convicted of the offenses for which he was indicted.

In his sole argument on appeal, Defendant contends that the trial court erred in allowing him to represent himself at trial without first obtaining a waiver of counsel that was knowing, intelligent and voluntary. We agree.

“A defendant’s right to represent himself is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution; by Article I, Section 23 of the North Carolina Constitution; and by N.C.G.S. § 15A-1242.” *State v. LeGrande*, 346 N.C. 718, 725, 487 S.E.2d 727, 730 (1997). However, “[b]efore allowing a defendant to waive in-court representation by counsel, . . . the trial court must insure that constitutional and statutory standards are satisfied.” *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992). A defendant must first clearly and unequivocally waive his right to counsel, and elect to proceed *pro se*. *State v. Flowers*, 347 N.C. 1, 17, 489 S.E.2d 391, 400 (1997). Thereafter, “the trial court must determine whether the defendant knowingly, intelligently and voluntarily waived his right to in-court representation by counsel.” *Id.*

The trial court must satisfy these constitutional burdens by complying with the guidelines set forth in N.C. Gen. Stat. § 15A-1242 (2009). *State v. Reid*, 151 N.C. App. 379, 385-86, 565 S.E.2d 747, 752 (2002). The statute provides that:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

- (1) 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.

N.C. Gen. Stat. § 15A-1242 (2009). “The inquiry under [N.C. Gen. Stat. § 15A-1242] is mandatory, and failure to conduct it is prejudicial

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error.” *State v. Thomas*, 331 N.C. 671, 674, 417 S.E.2d 473, 476 (1992). A cursory review of the statutory requirements are insufficient. *Id.*

In the case *sub judice*, the trial court failed to determine whether Defendant “knowingly, intelligently and voluntarily” waived his right to counsel. “When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise.” *State v. Kinlock*, 152 N.C. App. 84, 89-90, 566 S.E.2d 738, 741 (2002) (quoting *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986)). “‘A written waiver of counsel is no substitute for actual compliance by the trial court with G.S. § 15A-1242.’” *State v. Cox*, 164 N.C. App. 399, 402, 595 S.E.2d 726, 728 (2004) (quoting *State v. Wells*, 78 N.C. App. 769, 773, 338 S.E.2d 573, 575 (1986)).

On 11 September 2009, following his arrest, Defendant appeared in Wilson County District Court. It was during this first appearance that Defendant signed a form waiving his right to assigned counsel. Defendant’s waiver was certified by the presiding district court judge, creating a presumption that Defendant’s waiver was made knowingly, intelligently, and voluntarily. However, at the time of Defendant’s district court appearance, he had not yet been indicted for having attained the status of a habitual felon. As there is no transcript of Defendant’s district court appearance, we are unable to determine to what extent Defendant was informed of the charges against him and the potential punishment for those charges. Accordingly, Defendant’s district court waiver of counsel is insufficient to constitute a valid waiver of counsel at his subsequent trial. Therefore, the record demonstrates that the superior court failed to adequately engage in the constitutional inquiry set forth in N.C. Gen. Stat. § 15A-1242. While the State argues that the trial court’s inquiry at the 9 February 2010 hearing and the subsequent waiver signed by Defendant were sufficient enough to determine whether Defendant appropriately waived his right to counsel, we disagree.

At the February 2010 session of Superior Court, Defendant informed the prosecutor that he intended to represent himself at trial. Defendant and others who intended to represent themselves were directed to sit “in a box.” The trial court addressed those who indicated a desire to represent themselves:

[THE COURT]: Ladies and gentlemen in the jury box, you got the right to remain silent. Anything you say can be used against you.

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You got the right to represent yourself. You got the right to hire an attorney of your own choosing and if you feel you cannot afford an attorney—I'll review an affidavit to see if you qualify. Knowing and understanding that, all those who are going to hire an attorney, raise your hand. All right. If you'll come over here to where the sheriff directs you and sign the waiver, then I'll ask the D.A. to give you a court date.

[PROSECUTOR #1]: Can we get their names as they come up? Thank you, Your Honor.

THE COURT: After you all sign that piece of paper, tell [the prosecutor] what your name is.

....

[PROSECUTOR #1]: They need to come back Thursday morning. If they're going to hire a lawyer they need to be back here with their lawyer Thursday morning.

....

THE COURT: All those folks going to represent yourself raise your hand. All right. Come over here and sign the waiver.

[PROSECUTOR #1]: Your Honor, Jackie Anderson, this Defendant, has to be back here Thursday morning on stuff from Monday.

THE COURT: Okay.

[PROSECUTOR #1]: [The other prosecutor] has this case.

[PROSECUTOR #2]: How are you going to plea on this, Mr. Anderson?

THE DEFENDANT: On what?

[PROSECUTOR #1]: This is a different case.

THE DEFENDANT: What charge is it?

[PROSECUTOR #2]: The one you're here for today.

THE DEFENDANT: Not guilty.

[PROSECUTOR #2]: You can set a trial date on April the—set a trial date on April the 19th.

THE COURT: Be back April the 19th.

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THE DEFENDANT: I **mean can you tell me which charge?**
There were two charges.

[PROSECUTOR #2]: You got a sale of cocaine and habitual felon.

THE DEFENDANT: **Which one is this for?**

[PROSECUTOR #2]: Both of them.

[PROSECUTOR #1]: Your Honor, as far as I know he was advised to be back here on this past Monday for Thursday for the case he had on Monday's calendar. He waived, said he was going to represent himself. I don't think that one is a trial. I think that was a case where it was going to be a trial but then when he came into court he asked for a motion to continue and the judge gave him a certain amount of time to pay. I think those were misdemeanor appeals. He was going to remand but needed to have time to pay. If the Court would like him here Thursday or not.

THE COURT: Yeah, be back Thursday. We'll talk about your misdemeanor appeal case. (emphasis added).

Much of the colloquy appears unclear. It was only after Defendant persisted that the trial court informed him that he "got a sale of cocaine and habitual felon." When Defendant inquired "[w]hich one is this for" and the prosecutor responded "both of them." Defendant had not been given clarification of the specific charges to which the court was referring as the prosecution and the trial court made reference to additional pending charges for Defendant. In addition to its failure to clarify the specific charge against Defendant, the trial court failed to inform him of potential punishments. The trial court informed Defendant along with the others, that "if you feel you cannot afford an attorney—I'll review an affidavit to see if you qualify" but did not explicitly inform Defendant that he could request court-appointed counsel. It is questionable whether Defendant could have understood the consequences of his decision.

While "North Carolina has not set out any specific requirements for how the statutory inquiry must be carried out," *State v. Paterson*, ___ N.C. App. ___, ___, 703 S.E.2d 755, 759 (2010), the trial court's inquiry in this case was insufficient. Defendant was not informed of both of the charges for which he was indicted such that his waiver would be knowingly, voluntarily, and intelligently as the trial court did not inquire as to whether Defendant comprehended the

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nature of the proceedings or possible punishments for conviction of the offenses. Accordingly, Defendant is entitled to a new trial.

New Trial.

Judge GEER concurs.

Judge BRYANT dissents.

BRYANT, Judge, dissenting.

The majority holds that the trial court failed to adequately engage in the constitutional inquiry set forth in N.C. Gen. Stat. § 15A-1242 (2009) and therefore grants a new trial. However, because this Court has previously established that unless the record indicates otherwise, a court certified waiver of counsel is presumed to be knowing, intelligent, and voluntary, I must respectfully dissent.

The majority holds that defendant was not informed of both of the charges for which he was indicted such that his waiver would not be knowing, voluntary, and intelligent as the trial court did not inquire as to whether defendant comprehended the nature of the proceedings and possible punishments for conviction of the offenses. I disagree.

Pursuant to N.C.G.S. § 15A-1242, a defendant may elect to represent himself *pro se* only after the trial judge makes a thorough inquiry and is satisfied that the defendant has been advised of his right to counsel, understands and appreciates the consequences of this decision, and comprehends the nature of the charges, the proceedings, and the range of permissible punishments. N.C.G.S. § 15A-1242 (2009). “When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise.” *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986). “In our opinion, the statute^[1] does not require

1. The waiver of consent form exists per N.C.G.S. § 7A-457 (Waiver of counsel; pleas of guilty) and N.C.G.S. § 15A-1242 (2009) (Defendant’s election to represent himself at trial). The “Acknowledgement of Rights and Waiver” signed by defendant is set out, as follows:

As the undersigned party in this action, I freely and voluntarily declare that I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me and my right to have the assistance of counsel in defending against these charges or in handling these proceedings, and that I fully understand and

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successive waivers in writing at every court level of the proceeding. The trial in the district court and the further trial in the superior court on appeal together constituted one in-court proceeding.” *State v. Watson*, 21 N.C. App. 374, 379, 204 S.E.2d 537, 540 (1974).

In the case *sub judice*, defendant signed two waivers of counsel. In his first appearance before the district court on 9 September 2009, defendant signed a waiver of counsel which in turn was certified by Judge Anthony Brown. Subsequently, on 9 February 2010, defendant appeared before the superior court and signed a second waiver of counsel which was certified by Judge Walter H. Godwin, Jr. Where, as here, defendant executes a waiver of counsel certified by the trial court, unless the record indicates otherwise, waiver of counsel is presumed to be knowing, intelligent, and voluntary. *Warren*, 82 N.C. App. at 89, 345 S.E.2d at 441.

The majority opinion acknowledges that defendant’s waiver in district court, signed by the district court judge created a presumption that the waiver was knowing, intelligent, and voluntary. However, the majority states the district court waiver was insufficient as a valid waiver at defendant’s subsequent trial in Superior Court because defendant had not yet been indicted for attaining the status of habitual felon. I accept that premise.

However, the record shows that defendant was subsequently advised of his right to counsel in Superior Court in accordance with N.C.G.S. § 15A-1242, that he stated orally and in writing he was going to represent himself, signed a waiver of counsel, which waiver was certified by a superior court judge dated 9 February 2010, creating a presumption that the second waiver was also knowing, intelligent, and voluntary. At the 9 February 2010 hearing, defendant asked for

appreciate the consequences of my decision to waive the right to assigned counsel and the right to assistance of counsel.

“Certificate of Judge” signed by the judge is set out, as follows:

I certify that the above named defendant has been fully informed in open court of the charges against him/her, the nature of and the statutory punishment for each charge, and the nature of the proceedings against the defendant and his/her right to have counsel assigned by the court and his/her right to have the assistance of counsel to represent him/her in this action; that the defendant comprehends the nature of the charges and proceedings and the range of punishments; that he/she understands and appreciates the consequences of his/her decision and that the defendant has voluntarily, knowingly, and intelligently elected in open court to be tried in this action: . . . without the assignment of counsel.

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clarification of the charges against him, and the assistant district attorney informed defendant, “You got a sale of cocaine and a habitual felon.” Further, defendant’s statements and conduct throughout the trial in which he represented himself lend support to the presumption that defendant understood the charges and potential punishments against him. Defendant testified that “It’s not my first time on the stand. . . . I have had so many cases.” In addition, the record demonstrates that defendant made multiple objections, extensively cross-examined witnesses, had evidence published to the jury, and at the conclusion of the state’s evidence, made a motion to dismiss for lack of evidence. Throughout his trial, defendant neither made any subsequent request to withdraw his waiver of counsel nor requested assistance of counsel. Therefore, instead of supporting a failure to conduct a proper inquiry, this record, noting the actions of the trial court, along with defendant’s statements and conduct throughout the course of the trial, supports the presumption that his waiver of counsel was knowing, intelligent, and voluntary. Therefore, the constitutional inquiry set forth in N.C.G.S. § 15A-1242 was satisfied. As the majority noted, our State “has not set out specific requirements for how the statutory inquiry must be carried out.” *State v. Patterson*, — N.C. App. —, —, 703 S.E.2d 755, 759 (2009) (citation omitted). Therefore, to hold that defendant is entitled to a new trial under circumstances as exist in this record would elevate form over substance. For the foregoing reasons, I respectfully dissent from the majority opinion granting defendant a new trial.

STATE OF NORTH CAROLINA v. ABDELFETTAH LOUALI

No. COA10-1590

(Filed 16 August 2011)

Possession of Stolen Property—receiving stolen goods—explicitly represented as stolen—specific words not required

The trial court did not err by denying defendant’s motion to dismiss the charge of receiving stolen goods. There was sufficient evidence that property found in defendant’s possession was explicitly represented by a law enforcement agent as being stolen as required by N.C.G.S. § 14-71(b), and specific words were not required to be used.

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Appeal by defendant from judgment entered 1 July 2010 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 June 2011.

Attorney General Roy A. Cooper, by Assistant Attorney General Rufus C. Allen, for the State.

Tin Fulton Walker & Owen, PLLC, by Noell P. Tin and Matthew G. Pruden, for defendant-appellant.

BRYANT, Judge.

Where there was sufficient evidence that property found in defendant's possession was explicitly represented by a law enforcement agent as being stolen, an essential element of N.C. Gen. Stat. § 14-71(b), the trial court did not err by denying defendant's motion to dismiss.

Facts and Procedural History

On 28 October 2008, Abdelfettah Louali (defendant) was arrested and charged with receiving stolen goods in violation of N.C. Gen. Stat. § 14-71. On 19 April 2010, a grand jury returned a superceding indictment charging defendant with receiving stolen property, pursuant to a violation of N.C.G.S. § 14-71(b).

Defendant was tried before a jury beginning on 30 June 2010. The State's evidence presented at trial indicated the following, in pertinent part: Officer David T. LaFranque, II, of the Charlotte Mecklenburg Police Department (CMPD), testified that on 28 October 2008, he participated in an undercover operation. Officer LaFranque testified that he entered Global Electronic Center (GEC), a private business, dressed in plain clothing with two laptop computers inside a black bag, both owned by the CMPD. Upon entering GEC, Officer LaFranque saw a customer and two males standing behind the counter. Officer LaFranque made an in-court identification of defendant as being one of the males standing behind the counter that day and described the other male as wearing a black shirt.

Officer LaFranque approached the man in the black shirt placed the laptops on the countertop, and told the man he had laptops for sale. Defendant stood a short distance away, within earshot, from this exchange. Officer LaFranque told the man in the black shirt that his "nephews in the nearby neighborhood told [him] that [GEC] buy[s] stolen property, stolen laptops." While the man wearing a black shirt examined the laptops, Officer LaFranque stated "[T]his guy that owns

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a business, he left the door open, the back door open for the business up the street; I ran in and just took [the laptops].” The man in the black shirt and defendant began conversing with one another in a language other than English.

Thereafter, defendant asked Officer LaFranque for the make and model of the two laptops, as well as how much money he wanted for them. Officer LaFranque offered to sell the laptops for \$60.00 each. Two more times Officer LaFranque stated to both defendant and the man in the black shirt that “this stupid guy kept leaving the door open, I kept running in the back of it and taking laptops.” Defendant offered to purchase both laptops and gave Officer LaFranque \$80.00 in exchange for the laptops.

After giving defendant the laptops, Officer LaFranque was exiting GEC when the following occurred:

[Officer LaFranque:] I pretty much took the [black] bag [the laptops came in]. And after we made the deal, I started to walk out and the defendant asked me for the bag. He said, Can I have the bag? I said, Well, do you want me to get more computers? If the guy keeps leaving the door open, I can get some more. And he says, Okay, yeah, yeah, take the bag. I told him I would need the bag to get them.

[The State:] To get the laptops?

[Officer LaFranque:] To get some more, yes.

Following this exchange, Officer LaFranque exited the store.

At the close of the State’s evidence, defendant made a motion to dismiss the charge under N.C.G.S. § 14-71 arguing that the evidence presented did not state that the undercover officer, Officer LaFranque, explicitly represented to defendant that the goods were stolen. The trial court denied defendant’s motion to dismiss. On 1 July 2010, defendant was found guilty of feloniously receiving stolen goods and was sentenced to six to eight months in the custody of the North Carolina Department of Corrections. Defendant appeals.

Defendant’s sole argument on appeal is that the trial court erred in denying his motion to dismiss the charge of receiving stolen goods in violation of N.C.G.S. § 14-71(b). Defendant contends that there was insufficient evidence “property was explicitly presented to [defendant] by a law enforcement agent as being stolen,” an essential element to a conviction pursuant to N.C.G.S. § 14-71(b). Defendant

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argues that Officer LaFranque failed to explicitly represent to defendant that the laptops were stolen, never referring to the laptops as being “stolen,” “nor even us[ing] the words ‘stole’ or ‘stolen’ when discussing the laptops.” Defendant asserts that “at most, Officer LaFranque implied that the laptops were stolen” which was obscure, ambiguous, and consisted of a disguised meaning or reservation.

“The denial of a motion to dismiss for insufficient evidence is a question of law . . . which this Court reviews *de novo*[.]” *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted). “In ruling on a defendant’s motion to dismiss, the trial court should consider if the state has presented substantial evidence on each element of the crime and substantial evidence that the defendant is the perpetrator.” *State v. Sloan*, 180 N.C. App. 527, 531, 638 S.E.2d 36, 39 (2006) (citation and quotations omitted). “As to whether substantial evidence exists, the question for the trial court is not one of weight, but of the sufficiency of the evidence. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion.” *State v. Harris*, 361 N.C. 400, 402, 646 S.E.2d 526, 528 (2007) (internal citations omitted). “The evidence should be viewed in the light most favorable to the [S]tate, with all conflicts resolved in the [S]tate’s favor . . . If substantial evidence exists supporting defendant’s guilt, the jury should be allowed to decide if the defendant is guilty beyond a reasonable doubt.” *Sloan*, 180 N.C. App. at 531, 638 S.E.2d at 39 (citation and quotations omitted).

Statutory interpretation begins with the cardinal principle of statutory construction that the intent of the legislature is controlling. In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish. Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain meaning and definite meaning of the language.

State v. Stanley, ___ N.C. App. ___, ___, 697 S.E.2d 389, 390 (2010) (citation omitted). The trial court entered judgment against defendant for violating N.C.G.S. § 14-71(b), which reads:

If a person knowingly receives or possesses property in the custody of a law enforcement agency that was *explicitly represented* to the person by an agent of the law enforcement agency as stolen, the person is guilty of a Class H felony and may be indicted, tried, and punished in any county in which the person received or possessed the property.

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N.C.G.S. § 14-71(b) (2009) (emphasis added). N.C.G.S. § 14-71 was amended in 2007 to include section (b). 2007 N.C. Sess. Laws 373. We note that although the phrase “explicitly represented” is not necessarily ambiguous or unclear, it is nevertheless, not defined in Chapter 14 of our General Statutes. Therefore, we must seek the definition of “explicitly represented” which is in accord with the General Assembly’s intent for N.C.G.S. § 14-71(b).

The legislative intent will be ascertained by such *indicia* as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means

State v. White, 58 N.C. App. 558, 559, 294 S.E.2d 1, 2 (1982) (citations and internal quotation marks omitted).

Prior to the addition of section (b) in 2007, N.C.G.S. § 14-71 provided that

[i]f any person shall receive any chattel, property, money, . . . the stealing or taking whereof amounts to larceny or a felony, . . . such person knowing or having *reasonable grounds to believe* the same to have been feloniously stolen or taken, he shall be guilty of a Class H felony, and may be indicted and convicted . . . and such receiver shall be punished as one convicted of larceny.

N.C.G.S. § 14-71 (2003) (emphasis added). By including the phrase “reasonable grounds to believe” that the property received was stolen, the General Assembly necessarily made guilty knowledge an essential element of an offense under N.C.G.S. § 14-71. *See State v. Allen*, 45 N.C. App. 417, 421, 263 S.E.2d 630, 633 (1980) (stating that “[f]urthermore, guilty knowledge may be inferred from the circumstances.”); *State v. Haywood*, 297 N.C. 686, 690, 256 S.E.2d 715, 717 (1979) (holding that the “[d]efendant’s knowledge or reasonable grounds to believe that the goods were stolen can be implied from his willingness to sell the [good] at a mere fraction of its actual value.”); *State v. Fearing*, 304 N.C. 471, 478-9, 284 S.E.2d 487, 491-2 (1981) (noting that, under N.C.G.S. § 14-71, “while it is true that it is not necessary that the person from whom the goods are received shall state to the person charged that the goods were stolen, . . . it is necessary to establish either actual or implied knowledge on the part of the person charged of the facts that the goods were stolen.”)

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We believe that with the addition of section (b), the General Assembly intended to require more than guilty knowledge to support conviction under N.C.G.S. § 14-71(b). The addition of section (b) supports the same type of conviction characterized under section (a) but also provides for circumstances where a person receives or possesses property that is “explicitly represented” as stolen by a law enforcement agency or a person authorized to act on behalf of a law enforcement agency. However, we reject defendant’s argument that specific words are required to be spoken by an agent of the law enforcement agency in order to fulfill the “explicitly represented” element of section (b).

An examination of the ordinary meanings of the words at issue reveals that “explicit” is defined as “[f]ully and clearly expressed.” *The American Heritage College Dictionary* 482 (3rd ed. 1993). A “representation” is defined as “[a] presentation of fact—either by words or conduct—made to induce someone to act[.]” *Black’s Law Dictionary* 1415 (9th ed. 2009). We do not believe the statute requires the strict interpretation defendant advances as he argues there was no explicit representation made because Officer LaFranque “never referred to the laptops as being ‘stolen,’ nor even used the words ‘stole’ or ‘stolen’ when discussing the laptops.” On the contrary, when taken in context, the ordinary meanings of this particular phrase in N.C.G.S. § 14-71(b) merely requires that a person knowingly receives or possesses property that was clearly expressed, either by words or conduct, as constituting stolen property.

In support of our determination that in enacting N.C.G.S. § 14-71(b), the General Assembly did not intend that specific words be required before one could be prosecuted under that statute, we look to how other states have viewed the words “explicitly represented” in similar theft statutes.

In *Allen v. State*, — Tex. App. —, 849 S.W.2d 838 (1993), the defendant was found guilty of theft by receiving property under TEX. PENAL CODE ANN. § 31.03(a) and (b) (Vernon 1989), which read:

(a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.

(b) Appropriation of property is unlawful if:

...

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(3) property in the custody of any law enforcement agency was *explicitly represented* by any law enforcement agent to the actor as being stolen and the actor appropriates the property believing it was stolen by another.

TEX. PENAL CODE ANN. § 31.03(a) and (b) (Vernon 1989) (emphasis added). The defendant argued that the merchandise he purchased from a law enforcement agent was not explicitly represented as being stolen property. The law enforcement agent stated to the defendant that, “It’s Christmas time, there is [sic] not too many people *boosting* like I am right now due to the holidays.” *Id.* at 4, 849 S.W.2d at 840 (emphasis added). The state in *Allen* introduced to the jury, Webster’s New Collegiate Dictionary’s definition of “boost” as slang for “steal” or “shoplift.” *Id.* The Court of Appeals of Texas held that “a representation involving only slang terminology can be an *explicit* representation.” *Id.* at 6-7, 849 S.W.2d at 841.

In *People v. Garmon*, 394 Ill. App. 3d 977, 916 N.E.2d 1191 (2009), the defendant was convicted of theft for “knowingly obtaining property in the custody of a law enforcement agency which was ‘explicitly represented’ to him by a law enforcement officer as stolen” pursuant to 720 ILCS 5/16-1(a)(5)(A) (West 2006). *Id.* at 980, 916 N.E.2d at 1195. The undercover law enforcement officer in *Garmon* presented to the defendant multiple cellular phones over a period of time that the defendant purchased. The undercover law enforcement officer testified that he told the defendant “I almost got caught twice taking them.” *Id.* at 984, 916 N.E.2d at 1198. The Appellate Court of Illinois held that “[a]lthough the word ‘stolen’ was not used during the entirety of [the defendant’s] transaction, . . . veiled references to stealing could be inferred by the trier of fact as an explicit representation, in the same manner that slang references to stealing have been similarly determined by other jurisdictions.” *Id.*

Similarly, we conclude that N.C.G.S. § 14-71(b) does not require that specific words be used by an agent of or person authorized to act on behalf of a law enforcement agency to represent property as stolen. In the case *sub judice*, Officer LaFranque stated to the man in the black shirt, within earshot of defendant, that his “nephews in the nearby neighborhood told [him] that [GEC] buy[s] stolen property, stolen laptops.” (T 49) Further, Officer LaFranque directly reminded defendant on two occasions that “this stupid guy kept leaving the door open, [and] I kept running in the back of it and taking laptops.” (T 53) After the exchange of money for the laptops, Officer LaFranque also told defendant that he could get more laptops.

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We hold that the words used by Officer LaFranque in defendant's presence constituted language that could reasonably be determined to explicitly represent that the items discussed had been stolen. Therefore, there was sufficient evidence that the laptops were explicitly represented to defendant to have been stolen. The trial court did not err in denying defendant's motion to dismiss the charge of receiving stolen goods in violation of N.C.G.S. § 14-71(b). Accordingly, defendant's argument is overruled.

No error.

Judges GEER and BEASLEY concur.

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[215 N.C. App. 184 (2011)]

STATE OF NORTH CAROLINA v. FREDDIE LAWRENCE McDOWELL, JR.

No. COA10-1553

(Filed 6 September 2011)

1. Criminal Law—diminished capacity—instruction—evidence not sufficient

A first-degree murder defendant was not entitled to a diminished capacity instruction based on testimony by defendant's experts. The crucial inquiry was not the extent to which defendant offered evidence of mental impairment, but whether there was evidence tending to show the effect of his condition upon his ability to premeditate, deliberate, and form a specific intent to kill.

2. Evidence—observation of hair on wall—no special expertise required—evidence collection not required

The trial court did not err in a first-degree murder prosecution by allowing law enforcement officers to testify that they observed a hair and attached tissue on the wall of the murder scene. No particular expertise is required for a witness to testify that he saw a hair and officers were not required to collect evidence as a condition to testimony about a subject.

3. Evidence—expert testimony—based on photograph

The trial court did not err in a first-degree murder prosecution by not admitting challenged testimony from a firearms expert who used a photograph in developing his opinions. No authority was cited or found holding that evidence sufficient to form the basis of an expert opinion becomes insufficient if it takes the form of a photograph.

Appeal by defendant from judgment entered 14 November 2008 by Judge Edgar B. Gregory in Ashe County Superior Court. Heard in the Court of Appeals 12 May 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Jill Ledford Cheek, for the State.

Marilyn G. Ozer for Defendant-appellant.

ERVIN, Judge.

Defendant Freddie Lawrence McDowell, Jr., appeals from a judgment sentencing him to life imprisonment without the possibility of

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parole in the custody of the North Carolina Department of Correction based upon his conviction for first degree murder. On appeal, Defendant contends that the trial court erred by refusing to instruct the jury concerning the issue of diminished capacity, admitting testimony concerning a hair allegedly observed by law enforcement officers in the cabin in which the alleged murder occurred, and allowing an agent of the State Bureau of Investigation to testify concerning an opinion that he developed based upon his examination of a photograph depicting certain bullet holes. 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 had a fair trial that was free from prejudicial error and is not entitled to relief from the trial court's judgments on appeal.

I. Factual Background**A. Substantive Facts****1. The Shooting**

In June 2006, Defendant was twenty-one years old and lived in Raleigh with Paul and Connie Stocks. The Stocks were the parents of Ashley Stocks, who was Defendant's girlfriend at that time. The Stocks had a mountain cabin located on Phillips Gap Road in Wilkes County.

On Thursday, 22 June 2006, Defendant drove to the Stocks' mountain cabin with Drew Howell, who had been one of Defendant's good friends for a number of years. Defendant and Mr. Howell brought several firearms with them, including two rifles, a shotgun, and a .38 special Charter Arms revolver. The two men intended to stay at the Stocks' cabin for about a week while drinking, watching movies, playing video games, and engaging in target practice. Although Paul Stocks visited the cabin over the weekend, he returned to Raleigh on Sunday night.

Ashley Stocks and Cassie Burgos were supposed to join Defendant and Mr. Howell on the weekend of 30 June 2006. At around 11:30 p.m. on 29 June 2006, Ms. Burgos called the cabin and asked to speak with Mr. Howell. At the time that he answered the phone, Defendant told Ms. Burgos that Mr. Howell was sleeping, that Mr. Howell was homesick, and that Defendant planned to drive Mr. Howell home in a few hours for that reason. Although Ms. Burgos left a message on Mr. Howell's cell phone, she did not receive a return call from him.

According to available telephone records, Defendant made nineteen calls from the Stocks cabin, including repeated calls to his father

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and Mr. Stocks in which he stated that he had shot Mr. Howell, beginning at about 10:30 p.m. on 29 June 2006 and continuing into the early morning hours of 30 June 2006. Mr. McDowell did not indicate during these calls precisely when he had shot Mr. Howell. None of the calls placed from the Stocks' cabin were made to 911 for the purpose of obtaining emergency assistance.

At around 3:00 a.m. on 30 June 2006, the Stocks arrived at the Wilkes County Sheriff's Office, where they spoke with Deputy Christopher Key. Shortly thereafter, Deputies Harper Hartley and Gene Wyatt arrived. The officers had Mr. Stocks make a recorded phone call to Defendant. After listening to the conversation between Defendant and Mr. Stocks, the group drove to the Stocks' cabin. The officers parked at the top of the driveway leading to the cabin, while Mr. Stocks drove to the residence and returned with Defendant. At that point, Defendant was placed under arrest for the shooting of Mr. Howell.

At the time of his arrest, Defendant smelled of alcohol. Defendant told the officers that he had taken some pills and said, "I guess you want to know where the body is." After making this comment, Defendant led the officers down a trail to a wooded area located about 80 feet from the back deck of the cabin, where they discovered Mr. Howell's body partly hidden by leaves. The officers observed smear or drag marks on the deck steps and reddish stains in the grass that led toward the body. At about 5:00 or 6:00 a.m., when the body was discovered, Mr. Howell was stiff and cold to the touch.

In addition to providing them with information concerning the location of Mr. Howell's body, Defendant told the officers where to find a .38 caliber revolver with which he had shot Mr. Howell and which he had hidden under a grill cover on the deck. The gun, which holds five bullets, was fully loaded at the time the officers retrieved it. After the location of Mr. Howell's body and the discovery of the gun, the officers determined that no one else was in the house, at which point Deputy Wyatt accompanied Defendant to Wilkes Regional Medical Center. At the hospital, Defendant told Detective Alex Nelson of the Wilkes County Sheriff's Department that he had shot Mr. Howell in self-defense.

Dr. Ellen Riemer, a forensic pathologist, conducted an autopsy on Mr. Howell's body. Mr. Howell had a .20 blood alcohol level. Dr. Riemer determined that Mr. Howell died as the result of multiple gunshot wounds. Dr. Riemer identified forty-five gunshot wounds to Mr. Howell's body, including a sufficient number of entrance and exit

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wounds in Mr. Howell's head that his entire brain was destroyed. Dr. Riemer counted twenty-seven gunshot wounds in Mr. Howell's chest, abdomen, and pelvic area and another fourteen such wounds in Mr. Howell's neck and head. Finally, Dr. Riemer detected a cluster of post-mortem gunshot wounds to Mr. Howell's genital area and multiple bullet wounds to his face, including wounds to his eyes and lips. Dr. Riemer determined that thirty-two of the wounds which Mr. Howell sustained were inflicted while he was alive, while the remaining thirteen wounds were inflicted after his death. None of the wounds to Mr. Howell's body had been inflicted at close range. An analysis of fly larvae found on Mr. Howell's body indicated that he had been dead for at least twelve hours at the time that investigating officers found his body.

After observing the interior of the cabin, Detective Steve Cabe of the Wilkes County Sheriff's Department asked the State Bureau of Investigation for assistance in processing the scene and collecting evidence. In the course of that process, investigating officers collected spent casings and live projectiles from many different locations in the house. Shotgun shells, .38 caliber cartridges, and other firearms and ammunition were discovered in the cabin, deck, and yard. A projectile was recovered from the fireplace in the living room and a bullet hole was observed above the kitchen sink. A total of approximately 72 shell casings were discovered in the kitchen, dining, and living area, with .38 caliber shell casings having been found in the kitchen and dining area. Several bullet holes were identified in the north wall of the living room. The investigating officers used trajectory rods to locate the bullets that were probably responsible for making these holes and discovered them in the bedroom behind the living room wall.

A blood spray pattern appeared on the refrigerator door. In addition, blood appeared on a leg of the dining room table. Stains containing blood with DNA matching that of Mr. Howell and inconsistent with that of Defendant were identified inside the house, on the deck, and in the yard, all of which were consistent with someone having dragged something from the cabin to the location at which Mr. Howell's body was discovered. A bloody footwear impression was found on the kitchen floor; although forensic testing eliminated Mr. Howell's shoes as a possible source for this impression, that testing did not eliminate the possibility that Defendant made the footprint.

Although the kitchen floor initially looked clean, the laminate floor in that room appeared to be chipped. A more intensive examination revealed that there had "been a massive clean-up" of the kitchen. After using phenolphthalein and a dye called amido black,

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investigating officers determined that there had been blood on the kitchen floor. In addition, investigating officers found paper towels that tested positive for blood inside a trash bag. An examination of the damaged kitchen floor area using amido black established that blood had seeped beneath the surface of the floor and into the sub-floor. After using a saw to remove an area of laminate from the kitchen floor, investigating officers found bullet holes in the padding and subfloor and retrieved eight to ten bullets from the kitchen sub-floor near the refrigerator. In addition, investigating officers found blood stains near the bullet holes on the kitchen floor; the blood stain pattern detected at that location was consistent with both an effort to clean the premises and with the dragging of Mr. Howell's body from the cabin. A subsequent DNA analysis revealed that the blood found at this location belonged to Mr. Howell.

The three bullets found in the bedroom, sixteen of the eighteen bullets taken from Mr. Howell's body, and various bullets recovered from beneath the kitchen floor had all been fired from the .38 caliber revolver that Defendant had hidden under the grill cover. There were thirty-three bullet holes in the front of Mr. Howell's shirt and twenty-eight holes in the back of that garment. In order to shoot Mr. Howell forty-five times with the .38 revolver, Defendant would have had to stop shooting and reload the weapon eight or nine times. Special Agent Shane Dale Greene of the State Bureau of Investigation, an expert in ballistics, testified that firing the .38 revolver 45 times would have generated a lot of smoke. A smoke detector that had been removed from the ceiling was found on the floor.

2. Self Defense Evidence

At trial, Defendant testified that he and Mr. Howell got along well during the first part of their visit to the Stocks' cabin. On Wednesday, however, Mr. Howell became "ill." Among other things, Mr. Howell refused to assist in cleaning the cabin. Although Mr. Howell continued to be "arrogant and ill" on Thursday, Defendant "blew it off" and went shopping for a broom since he could not find one in the cabin. At that point, debris, shotgun shells, shell casings, beer cans and dishes were strewn throughout the house. Defendant did not want the Stocks to see their cabin in that condition. After Defendant failed to return with the beer that Mr. Howell had requested, Mr. Howell became angry and demanded that Defendant cook something. As a result, Defendant cooked a pizza, and the two men began drinking a bottle of wine.

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After drinking wine, Defendant became intoxicated and lay down on the couch in order to take a nap. On the other hand, Mr. Howell went outside to do some shooting. At some point, Mr. Howell came back inside with a “real ill” look on his face. When Defendant asked Mr. Howell what was wrong, Mr. Howell stated that the treatment that Defendant had received from the Stocks was not fair, that Defendant got better treatment than he deserved, and that, if he could, he would keep the Stocks from treating Defendant so well. After the two of them went out on the deck, Mr. Howell punched Defendant, jumped on top of him, and hit and cursed at Defendant while Defendant begged Mr. Howell to stop. After Mr. Howell stopped hitting him, Defendant went back inside, resumed his position on the couch again, and fell asleep. Upon awaking and hearing Mr. Howell shooting a gun, Defendant asked him to stop shooting because the Stocks did not want them to shoot at night. In response, Mr. Howell cursed at Defendant.

Although Defendant went back to sleep, he was awakened when Mr. Howell said “Get up. I’m going to kill you.” When he sat up, Defendant saw Mr. Howell in the kitchen pointing the shotgun at his head. At that point, Defendant panicked and grabbed the .38 revolver. When Mr. Howell looked down, Defendant shot him for fear that he was going to die. At that point, the shotgun was in Mr. Howell’s hand; however, after Defendant shot Mr. Howell, the shotgun dropped to the floor. Although Mr. Howell fell back against the refrigerator, he tried to grab the shotgun again, so Defendant “picked the pistol up and shot him some more.” Defendant testified that he recalled shooting a few times; after that, Defendant recalled only a “succession” of shots. Defendant did not remember reloading the gun, dragging Mr. Howell down the steps and into the woods, or cleaning up all the blood before the police arrived. In addition, Defendant did not know how the shotgun got onto the bed in the bedroom, where it was discovered by investigating officers. Defendant’s next vivid memory was of waking up in the hospital.

Dave Cloutier, an expert in use-of-force science and self-defense tactics, testified that, given Defendant’s account of the events that occurred at the time of the shooting, Defendant’s initial decision to use force against Mr. Howell was reasonable given the “pre-attack cues” that Defendant had received and applicable “use-of-force variables.” The factors that Mr. Cloutier deemed relevant included Mr. Howell’s decision to point a shotgun at Defendant, the fact that Mr. Howell threatened to kill Defendant, the fact that Defendant feared for his life, and the fact that Defendant needed to react quickly.

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3. Defendant's Mental Statusa. Defendant's Evidence

Dr. George Patrick Corvin, M.D., a forensic psychiatrist, reviewed materials provided to him by Defendant's trial counsel, gathered information concerning Defendant's psychosocial history, and met with Defendant. Dr. Corvin learned that Defendant had been admitted to Brynn Marr Hospital for alcohol detoxification on 11 June 2006, some two and a half weeks prior to the shooting, and had been discharged on 14 June 2006 with a diagnosis of post-traumatic stress disorder, alcohol dependence, personality disorder, and a history of head trauma. At the time of his discharge, Defendant was placed on a number of medications, including an antidepressant, a mood stabilizer and a compound intended to treat his alcohol dependence.

Defendant told Dr. Corvin that he and his mother did not get along; that his mother was violent and unpredictably abusive to him; that she frequently beat him with little or no provocation on his part; and that she had kicked him out of the house when he was sixteen or seventeen. Defendant's parents fought constantly. Defendant's father, an alcoholic, screamed at Defendant and made derogatory comments about him. Defendant reported a history of alcohol dependence and medically-observed alcohol withdrawal symptoms during his conversations with Dr. Corvin. Among other things, Defendant was expelled from school while he was in the eleventh grade for using alcohol. Defendant had never remained employed for an extended period of time and was unemployed at the time of the shooting. Finally, Defendant reported a history of cocaine addiction and acknowledged having used other drugs.

According to Dr. Corvin, post-traumatic stress disorder is an anxiety-related condition resulting from exposure to one or more serious dangers or traumatic situations during the course of a person's life. Individuals suffering from post-traumatic stress disorder are prone to brief dissociative episodes. In addition, Defendant also had a history of head trauma. In February 2002, Defendant had been seriously injured, with documented signs of a concussion, when he was hit on the head with a metal plate or hubcap. Defendant received treatment for numerous facial fractures at the University of North Carolina Hospitals. A subsequent CT scan, an MRI examination, and an EEG produced normal results. Dr. Corvin testified that a person who had sustained a head injury was more prone to alcohol-related blackouts and that Defendant had a history of alcohol-related losses of consciousness.

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The report that Defendant provided to Dr. Corvin concerning the events surrounding the shooting of Mr. Howell generally corroborated his trial testimony. Defendant told Dr. Corvin that he had shot Mr. Howell while acting in self-defense and that, after initially shooting Mr. Howell, he vaguely recalled firing several more shots at Mr. Howell from the area of the couch. However, Defendant claimed to have no clear recall of what had happened until he woke up at the hospital following his arrest. In Dr. Corvin's opinion, at the time that he shot Mr. Howell, Defendant was suffering from post-traumatic stress disorder stemming from his childhood history of abuse and two other assaults that he believed to have been life-threatening; poly-substance abuse; and personality change stemming from his head injury. When asked how Defendant's post-traumatic stress disorder might have affected his behavior at the time of the shooting, Dr. Corvin testified that a person suffering from post-traumatic stress disorder tends to be hyper-vigilant and that a person, such as Defendant, who suffered from post-traumatic stress disorder would have had an exaggerated response to a threat, such as Mr. Howell's decision to point a gun at Defendant. In addition, Dr. Corvin believed that Defendant's head injury made him impulsive and irritable and resulted in frontal lobe disinhibition, further affecting Defendant's ability to control his behavior. Ultimately, Dr. Corvin was of the opinion that Defendant initially acted in self-defense before blacking out and dissociating.

Dr. Claudia Coleman, a forensic psychiatrist, interviewed Defendant and conducted a records review. Defendant provided Dr. Coleman with substantially the same history that he had given Dr. Corvin. Dr. Coleman opined that defendant did not cope with stress well; that Defendant is immature, impulsive, and passive-aggressive; and that Defendant suffers from anxiety and fears that have their origin in low self-esteem. The testing that Dr. Coleman performed indicated that Defendant had exhibited symptoms of post-traumatic stress disorder and dependent, avoidant, and borderline personality features. Defendant's mild cognitive impairment resulted in memory problems and difficulties in processing information. A significant feature of the cognitive impairment that Dr. Coleman noted is that Defendant's brain is susceptible to other insults, including the impact of alcohol and drug use, making him less likely to be good at problem-solving or at thinking things through. The symptoms of post-traumatic stress disorder that Defendant exhibited resulted from his having been abused as a child and from head trauma. Dr. Coleman believed that Defendant was suffering from a mild cognitive disorder

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exacerbated by drug or alcohol use, depression, and post-traumatic stress disorder on 29 June 2006. According to Dr. Coleman, Defendant's fear of Mr. Howell was consistent with his anxiety disorder and with his symptoms of post-traumatic stress disorder. In response to a question inquiring if Defendant was able to carry out a plan at the time that he killed Mr. Howell, Dr. Coleman responded, "[a] very disorganized, unrealistic kind of ridiculous plan but illogical, yeah."

b. State's Rebuttal Evidence

Mark Hazelrigg, a forensic psychologist and director of outpatient forensic evaluation services at Dorothea Dix Hospital, evaluated Defendant pursuant to court order. As part of that process, Dr. Hazelrigg reviewed the reports provided by Drs. Coleman and Corvin and observed Defendant. According to Dr. Hazelrigg, Defendant had a history of and exhibited traits consistent with a diagnosis of antisocial personality features; however, Dr. Hazelrigg concluded that Defendant did not meet all the criteria required for the making of such a diagnosis. Antisocial personality disorder is characterized by abusing the rights of others, breaking the law, lying, cheating, and taking action without regard to the effect of one's conduct on other people. In addition, Defendant exhibited features of borderline personality disorder. The manner in which Defendant portrayed his mental condition in his conversations with Dr. Hazelrigg was inconsistent with Dr. Hazelrigg's personal observations. Dr. Hazelrigg believed that, at the time of the shooting, while Defendant was feeling the effects of alcohol, he was not overly intoxicated; that Defendant did not suffer from any disorder or condition that would have prevented him from forming a specific intent to kill; and that Defendant was capable of forming a specific intent to kill.

Robert Stanley Brown, Jr., M.D., reviewed records and mental health reports prepared by other experts and met with Defendant. Dr. Brown did not detect anything in the course of his work that would lead him to believe that Defendant lacked the capacity to form the specific intent to kill at the time of the shooting. Dr. Brown diagnosed Defendant as suffering from alcohol dependency and antisocial personality disorder. Although Dr. Brown did not believe that Defendant suffered from post-traumatic stress disorder, he opined that any post-traumatic stress disorder from which Defendant might have suffered would not have impaired his ability to think, formulate ideas and plans, or function. Finally, Dr. Brown concluded that the combination of alcohol consumption, antisocial personality disorder, and the

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effects of an earlier head injury would not have prevented the Defendant from being able to form the specific intent to kill.

B. Procedural History

On 30 June 2006, a warrant charging Defendant with the first degree murder of Mr. Howell was issued. On 11 September 2006, the Wilkes County grand jury returned a bill of indictment charging Defendant with first degree murder. On 11 May 2007, Defendant filed a notice indicating that he intended to assert the defenses of voluntary intoxication, self-defense, and diminished capacity. On 23 July 2007, the State moved that Defendant be committed to Dorothea Dix hospital for an evaluation concerning the validity of these defenses.

The charge against Defendant came on for trial before Judge Henry E. Frye, Jr., at the 26 February 2008 criminal session of the Wilkes County Superior Court. However, the trial ended prior to the completion of jury selection because of the prolonged illness of one of the prosecutors.

The charge against Defendant came on for trial a second time before Judge Edgar B. Gregory and a jury at the 28 July 2008 criminal session of the Wilkes County Superior Court. After the completion of jury selection, the participants learned that a courthouse employee had spoken to one of the jurors, causing the trial court to declare a mistrial. On 19 August 2008, the trial court granted Defendant's request for a change of venue and transferred the case to the Ashe County Superior Court.

The charge against Defendant came on for trial a third time before the trial court and a jury at the 27 October 2008 session of the Ashe County Superior Court. On 13 November 2008, the jury returned a verdict convicting Defendant of first degree murder on the basis of malice, premeditation, and deliberation. As a result, the trial court sentenced Defendant to life imprisonment without the possibility of parole 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. Diminished Capacity**

[1] On appeal, Defendant argues that he "is entitled to a new trial because the trial court erroneously denied his request for a jury instruction on diminished capacity." According to Defendant, he was

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entitled to the delivery of a diminished capacity instruction based on the existence of record evidence tending to show that, at the time of the shooting, he suffered from various conditions, including post-traumatic stress syndrome, alcohol dependence, and cognitive impairment resulting from a head injury, that were sufficient to support a finding that Defendant might overreact to stress or conclude that deadly force was necessary to deal with a threatening situation. A careful examination of the record shows, however, that there was no evidence tending to cast any doubt on Defendant's ability to premeditate, deliberate, or form the specific intent to kill necessary for guilt of first degree murder on the basis of malice, premeditation, and deliberation. As a result, the trial court did not err by denying Defendant's request for a diminished capacity instruction.

“ ‘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 defendant.’ ” *State v. Oliver*, 334 N.C. 513, 520, 434 S.E.2d 202, 205 (1993) (quoting *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988)). “ ‘A trial court must give a requested instruction that is a correct statement of the law and is supported by the evidence.’ . . . Where the defendant's requested instruction is not supported by the evidence, the trial court may properly refuse to give it.” *State v. Wright*, ___ N.C. App ___, ___, 709 S.E.2d 471, 473 (2011) (quoting *State v. Conner*, 345 N.C. 319, 328, 480 S.E.2d 626, 629, *cert. denied*, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997), and citing *State v. Rose*, 323 N.C. 455, 459, 373 S.E.2d 426, 429 (1988)).

“The elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation.” *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citing N.C. Gen. Stat. § 14-17 (other citations omitted)). “First degree murder, which has as an essential element the intention to kill, has been called a specific intent crime.” *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994), *cert. denied*, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873 (1995). As a result:

“[A] specific intent to kill is a necessary ingredient of premeditation and deliberation. It follows, necessarily, that a defendant who does not have the mental capacity to form an intent to kill, or to premeditate and deliberate upon the killing, cannot be lawfully convicted of murder in the first degree [on the basis of premeditation and deliberation].”

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State v. Phillips, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2011 N.C. LEXIS 385, *36) (quoting *State v. Cooper*, 286 N.C. 549, 572, 213 S.E.2d 305, 320 (1975) (internal citations omitted), *overruled in part on other grounds* by *State v. Leonard*, 300 N.C. 223, 230, 266 S.E.2d 631, 636, *cert. denied*, 449 U.S. 960, 101 S. Ct. 372, 66 L. Ed. 2d 227 (1980)).

“The diminished capacity defense to first-degree murder on the basis of premeditation and deliberation requires proof of an inability to form the specific intent to kill.” *Id.* (citing *Cooper*, 286 N.C. at 572, 213 S.E.2d at 320). “Diminished mental capacity may be due to intoxication, disease, or some other cause.” *Cooper*, 286 N.C. at 572, 213 S.E.2d at 320. The Supreme Court has held that:

[W]hen a defendant requests the trial court to instruct the jury that it may consider the mental condition of the defendant in deciding whether [he or] she formed a premeditated and deliberate specific intent to kill the victim, . . . [t]he proper test is whether the evidence of defendant’s mental condition is sufficient to cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant was capable of forming the specific intent to kill the victim at the time of the killing.

State v. Clark, 324 N.C. 146, 163, 377 S.E.2d 54, 64 (1989). The production of evidence that a defendant suffers from intoxication, substance abuse, emotional stress, or mental illness does not automatically entitle him or her to an instruction on diminished capacity, absent some evidence that these conditions impacted the defendant’s ability to form the specific intent to kill. *Compare, e.g., State v. Staten*, 172 N.C. App. 673, 685-86, 616 S.E.2d 650, 658-59 (holding that the trial court did not err by denying the defendant’s request for a diminished capacity instruction where, despite evidence that the defendant was mentally retarded, had been diagnosed with paranoid schizophrenia, and operated under a delusional belief system, there was no evidence that he did not have the specific intent to commit armed robbery), *disc. rev. denied*, 360 N.C. 180, 626 S.E.2d 838 (2005), *cert. denied*, 547 U.S. 1081, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006), and *State v. Lancaster*, 137 N.C. App. 37, 44-45, 527 S.E.2d 61, 66-67 (holding that evidence of the defendant’s drug addiction and testimony that drug use “could have had a negative impact” on his ability to plan did not entitle him to instruction on diminished capacity), *review allowed in part for the limited purpose of a remand to the Court of Appeals and denied in part*, 352 N.C. 680, 545 S.E.2d 723 (2000), *with State v. Golden*, 143 N.C. App. 426, 430-34, 546 S.E.2d 163, 166-68 (2001) (holding that the defendant was entitled to an

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instruction on voluntary intoxication where an expert testified that the defendant's impairment would have affected his ability to form specific intent to commit offense), and *State v. Page*, 346 N.C. 689, 698, 488 S.E.2d 225, 231 (1997) (noting that the trial court instructed the jury concerning the issue of diminished capacity in connection with the issue of the defendant's guilt of first degree murder where the defendant adduced evidence that, at the time of the shooting, he was unaware of his surroundings or of the actual event), *cert. denied*, 522 U.S. 1056, 118 S. Ct. 710, 139 L. Ed. 2d 651 (1998). Thus, a review of the relevant decisions leads us to conclude that the crucial inquiry that must be undertaken in connection with a request for a diminished capacity instruction is not the extent to which the defendant has offered any evidence of mental impairment; instead, the crucial issue is whether there is any evidence tending to show the effect of his condition upon his ability to premeditate, deliberate, and form a specific intent to kill.

At trial, Defendant presented the testimony of two expert witnesses who discussed his mental and psychological status. Dr. Corvin, an expert in forensic psychiatry, interviewed Defendant and reviewed pertinent medical records. Dr. Corvin testified that Defendant had had a troubled childhood; had experienced traumatic events, including a head injury; and had a history of severe alcohol dependence. As Defendant correctly notes, "Dr. Corvin told the jurors [that Defendant] suffered from mental disorders including post [-]traumatic stress disorder [and the] after[-]effects of a concussion and alcohol dependence" and that other evidence showed that Defendant's blood alcohol level was elevated at the time of his arrest.

In his brief, Defendant asserts that "Dr. Corvin explicitly stated in his opinion [that Defendant] was not capable of rational thought at the time of the shooting." At trial, Defendant asked Dr. Corvin to describe for the jury "how [Defendant's] diagnosis of post-traumatic stress disorder and the other diagnoses or other conditions he was suffering from" would "interact with each other." In response, Dr. Corvin explained that, in general, a clinician would consider an individual's alcohol use, prior head injury, and post-traumatic stress syndrome in conjunction with each other and noted that this combination of conditions might make a person more susceptible to the effects of alcohol. Dr. Corvin then stated that:

I think of it in terms of like how much water will the cup hold or, in clinical terms, how many risk factors and vulnerabilities does a client—does a patient—does [Defendant] have before his

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capacity for reasonable and rational thought, conceptualization, judgment, and behaviors become absent.

Having adopted the overflowing cup analogy, however, Dr. Corvin did not express an opinion concerning whether Defendant's cup had overflowed or addressing the extent of Defendant's capacity for rational thought. In addition, Dr. Corvin stated in his report, which Defendant offered into evidence, that "it is possible that [Defendant] specifically and intentionally caused the death of Mr. Howell," although the excessive number of shots that Defendant fired caused Dr. Corvin to conclude that this possibility was unlikely. Taken in the light most favorable to Defendant, Dr. Corvin's testimony tended to establish that (1) Defendant's personal history, mental condition, and alcoholism made it more likely that he would react very strongly to Mr. Howell's decision to point a shotgun at him; (2) that, to counter the real or perceived threat posed by Mr. Howell's actions, Defendant initially fired several shots in self-defense; and (3) that, after firing the first few shots, which Dr. Corvin opined would have left Mr. Howell dead or incapacitated, Defendant entered into a dissociative state causing him to experience amnesia about the firing of the additional forty or so shots and his subsequent actions. Nothing in Dr. Corvin's testimony addressed, much less cast doubt on, Defendant's ability to premeditate, deliberate, or form the specific intent to kill Mr. Howell at the time of the firing of the fatal shots.

Similarly, although Dr. Coleman's testimony tended to show that Defendant suffered from post-traumatic stress syndrome, post-concussive syndrome, alcohol abuse, and some degree of cognitive impairment, she did not explain how these circumstances impaired Defendant's ability to premeditate, deliberate, or form a specific intent to kill. When asked directly what effect the combination of these conditions would have had on Defendant's response to Mr. Howell's decision to point a gun at him, Dr. Coleman testified that Defendant would have been very fearful and anxious. Although this evidence was clearly relevant to the sincerity of Defendant's belief that his life was in danger, it does not have any bearing on his ability to premeditate, deliberate, or form a intent to kill.

In seeking to persuade us that the trial court erred by declining to instruct the jury on the issue of diminished capacity, Defendant compares the present case to the facts before the Supreme Court in *State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). In *Shank*, the issue was not whether the defendant was entitled to have the jury instructed on the defense of diminished capacity, but whether the trial court erred

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by excluding evidence pertinent to such a defense. As a result, given that *Shank* did not address the sufficiency of evidence required to warrant such an instruction, it has little bearing on the proper resolution of this case.

At bottom, the fundamental problem with Defendant's argument is that it fails to distinguish between a defendant's ability or capacity to form the specific intent to kill—which is the focus of the defense of diminished capacity—and the wisdom or rationality of the decisions that a defendant actually makes. For example, self-defense is a complete defense to homicide precisely because it represents an exception to the fundamental principle that, when an individual chooses to kill another person, that choice, in addition to being unlawful, is almost always an irrational, unreasonable, and unnecessary response to the situation confronting the defendant that demonstrates the use of, at a minimum, extremely poor judgment. For that reason, evidence tending to show that, despite the fact that the defendant premeditated, deliberated, and formed a specific intent to kill, his decision to take the life of another resulted from an exceedingly unwise choice stemming from an irrational view of the situation in which he found himself does not establish that he could not form the requisite mental state necessary for guilt of first degree murder. As a result, we conclude that Defendant was not entitled to an instruction on diminished capacity based on the testimony of Dr. Corvin or Dr. Coleman and is not, given this conclusion, entitled to relief from his conviction on the basis of this claim.

B. Officers' Testimony Regarding Observation of Hair

[2] Secondly, Defendant contends that he is entitled to a new trial on the grounds that the trial court committed prejudicial error by allowing law enforcement officers to testify that they had observed a small hair on the north wall of the Stocks' cabin and that the hair appeared to have tissue attached to it. In challenging the admission of this evidence, Defendant argues that the court "erroneously allowed the State to present a story resting on untested evidence unavailable to the Defendant." Defendant's argument lacks merit.

Prior to trial, Defendant filed a motion seeking to exclude any testimony or other evidence from Special Agent Eric Wall of the State Bureau of Investigation, Special Agent Van Williams of the State Bureau of Investigation, or Detective Nelson concerning their observation of a small hair with what appeared to be attached tissue on a wall in the Stocks' cabin. Defendant also objected at trial to this evi-

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dence. On appeal, Defendant argues that, since the investigating officers did not photograph the hair or collect it as evidence, he was deprived of the opportunity to test the hair and defend against any implications that might be drawn from its presence on the wall. We conclude that the challenged evidence and testimony was not subject to exclusion on this basis.

At trial, three law enforcement officers testified that, while processing the scene of Mr. Howell's shooting, they observed a small hair on the north wall of the Stocks' cabin. A tiny bit of what appeared to be tissue was attached to this hair. After hearing the arguments of counsel, the trial court overruled Defendant's objection to the admission of this testimony and allowed the officers to testify concerning their personal observations relating to the hair in question.

N.C. Gen. Stat. § 8C-1 Rule 701 provides that:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Defendant does not, in his brief, contend that any particular expertise is required for a witness to properly testify that he saw a hair. Similarly, we conclude that the officers were competent to testify that they observed a hair on the wall, since nothing about such an observation suggests the necessity for any particular degree of expertise in order to provide such testimony. Thus, unless there is some other reason for excluding the challenged evidence, the trial court did not err by admitting it.

Defendant cites *State v. Bass*, 303 N.C. 267, 272, 278 S.E.2d 209, 212 (1981), and *State v. General*, 91 N.C. App. 375, 379-80, 371 S.E.2d 784, 787 (1988), in support of his argument that the officers' testimony did not constitute substantial or conclusive evidence regarding the hair. However, both of the cases upon which Defendant relies address the question of whether the State presented sufficient evidence to support the submission of the case to the jury and not whether the testimony in question was admissible. As a result, these decisions do not control our decision in the present case.

In addition, Defendant relies upon cases, such as *State v. Jones*, 85 N.C. App. 56, 354 S.E.2d 251, *disc. review denied*, 320 N.C. 173, 358 S.E.2d 61, *cert. denied*, 484 U.S. 969, 108 S. Ct. 465, 98 L. Ed. 2d 404

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(1987), which address the right of a criminal defendant to perform independent testing on physical evidence in the State's possession. However, such cases are not relevant to the present issue. Simply put, Defendant cites no authority for the proposition that the State is required to collect evidence as a pre-condition to offering testimony about a particular subject, and we have found no such authority in the course of our own research.

As a general proposition, “[t]he basis or circumstances behind a non-expert opinion affect only the weight of the evidence, not its admissibility.” *State v. Edmondson*, 70 N.C. App. 426, 430, 320 S.E.2d 315, 318 (1983), *aff'd*, 316 N.C. 187, 340 S.E.2d 110 (1986). For the reasons set forth above, we conclude that Defendant's objections to the admission of this testimony went to its weight rather than its admissibility and that the trial court did not err by allowing the law enforcement officers to testify that they observed a hair and attached tissue on the wall of the Stocks' cabin.

C. Agent Greene's Testimony Regarding Path of Bullet

[3] Finally, Defendant contends that he “is entitled to a new trial because the [trial] court erroneously allowed an SBI agent to testify to an opinion not based on scientifically acceptable methodology.” At trial, Defendant challenged the admission of testimony and a related report by Special Agent Greene concerning his conclusion, based upon his review of a photograph of three holes in the north wall of the Stocks' cabin, that these holes were created by bullets and that the shape of one of these holes indicated that the bullet in question had struck an intermediate object before making contact with the wall. On appeal, Defendant argues that the trial court committed reversible error by allowing the admission of this evidence. We disagree.

As a preliminary matter, we must delineate the exact scope of Defendant's argument. At trial, evidence was received without objection tending to show that there were three bullet holes in the north wall of the Stocks' cabin. In addition, Special Agent Wall testified, without objection, that law enforcement officers used trajectory rods to locate the bullets that had passed through the wall in the master bedroom of the house and found them in an adjoining bedroom. Special Agent Greene, who was qualified as an expert in forensic firearms identification, testified, without objection, that forensic testing revealed that the bullets recovered from the bedroom had been fired from the revolver used to kill Mr. Howell. In addition, Special Agent Greene testified, without objection, concerning the effect that

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making contact with an intermediate object might have upon a bullet's trajectory and upon the shape of the hole that such a bullet left in a wall. More specifically, Special Agent Greene was allowed to testify, without objection, that the presence of a "keyhole" shape in a wall might indicate that a bullet had struck an intermediate object before passing through the wall. As a result, Defendant's argument appears to rest solely on the grounds that Special Agent Greene used a photograph in developing his opinions.

N.C. Gen. Stat. § 8C-1, Rule 703, provides, in pertinent part, that "[t]he facts or data . . . upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing." Defendant cites no authority, and we know of none, holding that evidence that would otherwise suffice to form the basis for an expert opinion becomes insufficient if it takes the form of a photograph. For example, in *State v. Temple*, 302 N.C. 1, 10, 273 S.E.2d 273, 279 (1981), the Court allowed expert testimony from a forensic odontologist to the effect that a bite mark found on the victim had been made by the defendant. In *State v. Green*, 305 N.C. 463, 470-71, 290 S.E.2d 625, 630 (1982), the defendant sought to distinguish *Temple* on the grounds that "the expert formed his opinion on the basis of a comparison of defendant's dental impressions and a photograph of the victim's wound." The Supreme Court did not accept the defendant's contention "that this distinction precludes the admissibility of this testimony." Thus, the mere fact that an expert relied upon a photograph does not suffice to render an expert opinion inadmissible. As a result, the trial court did not err by admitting the challenged testimony.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the Defendant received a fair trial that was free from prejudicial error. As a result, Defendant's conviction and the trial court's judgment should remain undisturbed.

NO ERROR.

Judges CALABRIA and THIGPEN concur.

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JANET E. MOORE, PLAINTIFF v. DANIEL H. PROPER, SHAUN O'HEARN, DR. SHAUN O'HEARN, DDS, P.A., AND AFFORDABLE CARE, INC., DEFENDANTS

No. COA10-1475

(Filed 6 September 2011)

1. Medical Malpractice—Rule 9(j)—qualification as expert witness—erroneous conclusion—summary judgment improper

The trial court erred in a medical malpractice case by granting summary judgment in favor of defendants for plaintiff's failure to comply with Rule 9(j). The trial court erroneously concluded that no reasonable person would have expected plaintiff's expert witness to qualify as an expert witness under Rule 702.

2. Medical Malpractice—expert witness—no extraordinary circumstances—insufficient grounds for dismissal—summary judgment improper

The trial court erred in a medical malpractice case by granting summary judgment in favor of defendants. The trial court's ruling that no extraordinary circumstances existed to qualify plaintiff's expert witness to serve as an expert witness under Rule 702(e) was akin to a ruling on a motion in *limine* and was insufficient grounds for dismissal at that point in the litigation.

Appeal by Plaintiff from Order entered 20 August 2010 by Judge James L. Baker, in Madison County Superior Court. Heard in the Court of Appeals 13 April 2011.

Long, Parker, Warren, Anderson & Payne, P.A., by Steven R. Warren, for Plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham, for Defendant-appellee Daniel H. Proper.

Shumaker, Loop & Kendrick, LLP, by Scott A. Hefner and Scott M. Stevenson, for Defendants-appellees Shaun O'Hearn, Dr. Shaun O'Hearn, DDS, P.A., and Affordable Care, Inc.

HUNTER, JR., Robert N., Judge.

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I. Factual and Procedural History

Janet E. Moore (“Plaintiff”) sought treatment for a toothache on 16 January 2006 and was treated by Dr. Proper, a dentist in Dr. Shaun O’Hearn’s office. On 12 January 2009, Plaintiff’s counsel filed a motion and obtained an order from the court pursuant to Rule 9(j) extending the statute of limitations in a medical malpractice action to 16 May 2009 to seek an appropriate expert witness. Plaintiff’s 5 March 2009 Complaint alleges Dr. Proper fractured her jaw while extracting a tooth, and thereafter discharged her without notifying her of the fracture and providing the proper care. Plaintiff alleges Dr. O’Hearn was negligent in failing to provide Plaintiff care after the fracture and that O’Hearn’s office and Affordable Care are liable under the theories of *respondeat superior*, agency, or vicarious liability.

As required by Rule 9(j) of the North Carolina Rules of Civil Procedure, the Complaint contained the following language: “[t]he medical care in this case has been reviewed by Dr. Joseph C. Dunn, who is reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence and who is willing to testify that the medical care provided by the Defendants did not comply with the applicable standard of care.” Defendants, in answering this allegation, denied the allegation for lack of information and belief.

Pursuant to an order of the trial court dated 10 August 2009 (which does not appear in the record), Plaintiff provided an “Expert Witness Designation” which identified Dr. Joseph C. Dunn as Plaintiff’s expert witness. The designation describes Dr. Dunn as a 1966 graduate of the University of North Carolina at Chapel Hill and a 1970 graduate of the University of Louisville School of Dentistry. Dr. Dunn also practiced in the United States Dental Corp. and practiced in Asheville for almost 25 years. Dr. Dunn explained the alleged deviation from the applicable standard of care as follows:

The Plaintiff was not treated in accordance with the expected standard of care for treatment by a General Dentist in North Carolina in that she was not advised of the risks of a fractured jaw occurring from any treatment which was to be afforded by Dr. Proper, Dr. Proper did not take any steps to prevent the fracture of the jaw if extraction became difficult and he failed to provide for her proper follow up care after she experienced pain as a result of the extraction.

Defendants served 10 interrogatories pursuant to Rule 9(j). Dr. Dunn answered the interrogatories, in part, as follows:

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2. State whether you practice dentistry and, if so, what percentage of your professional time was spent in the clinical practice of dentistry, during January, 2005 to January, 2006, and, if not, in what specialty did you practice during that time?

ANSWER: I retired in July 1997 after 35 years of general dentistry practice. However, I have maintained a valid license to practice general dentistry in good standing since my retirement in July of 1997.

3. State whether you taught students in an accredited health professional school or an accredited residence or clinical research program in the area of dentistry and, if so, what percentage of your professional time was spent in teaching students dentistry during January, 2005 to January, 2006.

ANSWER: N/A

After receipt of these Answers, Defendants did not immediately seek to dismiss Plaintiff's Complaint. Discovery continued.

On 29 April 2010, Dr. Dunn was deposed by Defendants. Among the answers given in his deposition were the following responses:

Q. I want to talk a little bit about the time period from January of 2005 until January of 2006. Were you actually practicing dentistry then?

A. I was doing the same fill-in work.

Q. Do you recall how many days you filled in that year?

A. It was a lot more than it is now, but, I—no, I couldn't really give you a number. I'll throw out one, 30 days maybe. I really don't know

Q. I know you don't remember a whole lot about that time, but can you—we're going through the same exercise of breaking it down percentage wise of your practice from January of 2005 until January of 2006. What percentage of your time was in the active clinical practice of dentistry?

A. Well, you know, that is really an unfair question. Whenever you are looking at a patient, you are practicing clinical dentistry.

Q. Right.

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A. Whether you are diagnosing it or looking at their cleaning, or you're filling a tooth, taking out a tooth. So I would say when I am there it is 100 percent. . . .

Q. All right. Over the entire year, of all the time you spent in a year of your professional time—because I understand at that point in time you were also running for mayor?

A. Uh-huh [yes].

Q. You were retired spending time with your grandchildren?

A. Uh-huh [yes].

Q. What percentage of your time are you actually seeing patients?

A. Okay. Gosh, that's—

[Plaintiff's Lawyer]: Is that a 24 hour day time? Is that an eight hour day time?

Q. Let's say an eight hour work day. Of all the eight hour work days in any given year—

A. Three hundred sixty-five days a year.

Q. You are not working on the weekends, are you?

A. Okay.

Q. You're working—dentist[s] work four days a week?

A. Yeah, most of them.

Q. All right. Of those four days a week, we will assume that there are eight professional hours in a day. What percentage over the entire year are you working in the active clinical practice of dentistry?

A. I would say it's got to be less than five percent, I guess.

Q. Less than five percent?

A. Uh-huh (yes). That is just a thrown out number.

Q. But it's not 95 percent?

A. No.

Q. You wouldn't say that? It's not 50 percent?

A. No, it's just as needed you know. . . .

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Q. So just so I am clear, you believe that your active clinical practice of dentistry was roughly less than five percent of your professional time?

A. Yes.

Q. Tell me a little bit about running for mayor, how much time did that take up?

A. It took up a lot.

Q. I'm sure.

A. You know, I'm on city council too, that was a lot of work.

Q. So how many hours a week would that be?

A. That was—I put in at least 20 to 25 hours a week.

Based upon the deposition responses, Defendants made a Motion for Summary Judgment, contending Dr. Dunn's expert witness testimony could not support a malpractice claim under Rule 9(j) of the North Carolina Rules of Civil Procedure and Rule 702 of the Rules of Evidence. Plaintiff then filed a motion under Rule 702(e), requesting that even if Dr. Dunn does not meet the Rule 702 requirements, he be recognized as an expert. Plaintiff also filed an affidavit by Dr. Dunn clarifying that in his deposition testimony, he stated that he spent one hundred percent of his professional time in the clinical practice of dentistry and that any other activities were personal, not professional.

Following the hearing on these motions, the trial court made two rulings. In the first ruling, the trial court granted summary judgment in favor of Defendants and dismissed Plaintiff's Complaint, stating Plaintiff did not comply with Rule 9(j), as no reasonable person would have expected Dr. Dunn to qualify as an expert witness under Rule 702. In the second ruling, the trial court ruled that no extraordinary circumstances existed to qualify Dr. Dunn to serve as an expert witness under Rule 702(e). We note that Defendants did not move to strike Dr. Dunn as an expert witness or to disqualify him pursuant to a motion *in limine*.

II. Jurisdiction

This Court has jurisdiction of this appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2009).

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III. Analysis

[1] Rule 9(j) of the N.C. Rules of Civil Procedure and Rule 702 of the Rules of Evidence provide the statutory framework for resolving this dispute. It is undisputed in this controversy that Dr. Dunn was a licensed dental professional who had extensive experience treating patients, that he did not provide instruction for students at a professional school or clinic, that he was prepared to offer testimony that Dr. Proper did not provide medical care which complied with the applicable standard of care, and that he practiced in the same specialty as Dr. Proper.

The portions of Rule 9(j) relevant to this controversy read as follows:

(j) Medical malpractice.—Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

(1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;

(2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or

(3) The pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*.

N.C. Gen. Stat. § 1A-1, Rule 9(j).

Rule 702 provides, in pertinent part:

(b) In a medical malpractice action as defined in G.S. 90 21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90 21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:

....

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(2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:

a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or

b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

N.C.R. Evid. 702(b).

As a textual matter, Rule 9(j) is straightforward. The statute requires the trial court to answer a series of three questions, which if answered in sequential order will inevitably lead the trial court to the proper resolution of the issues raised by Rule 9(j). The statute requires the complaint to be dismissed *unless* one of the questions is affirmatively answered.

All three questions involve matters of pleading and therefore require an examination of Plaintiff's Complaint akin to a Rule 12(b)(6) motion to dismiss. First, does the Complaint specifically assert "that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[?]" N.C. Gen. Stat. § 1A-1, Rule 9(j)(1). Second, does the Complaint specifically assert that the medical care has been reviewed by a person that the Plaintiff will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the Complaint? N.C. Gen. Stat. § 1A-1, Rule 9(j)(2).

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Our reading of the Complaint reveals Plaintiff pled a paragraph minimally sufficient to meet the requirements of Rule 9(j)(1) and (2). No party herein has argued *res ipsa loquitur*, not is it pled. We do not address the trial court's failure to address this issue, as it is not raised on appeal.

The question is whether Plaintiff could have "reasonably expected" Dr. Dunn to have qualified as an expert witness under Rule 702 at the time the Complaint was filed and whether a majority of Dr. Dunn's professional time was spent "actively engaged in clinical practice," as required by statute.

Because the parties moved for summary judgment, we review the trial court's first ruling under a *de novo* standard. *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 247, 677 S.E.2d 465, 472 (2009) ("We review a trial court's ruling on summary judgment *de novo*."). "Whether the pleader could reasonably expect the witness to qualify as an expert under Rule 702 presents a question of law and is therefore reviewable *de novo* by this Court." *Trapp v. Maccioli*, 129 N.C. App. 237, 241 n.2, 497 S.E.2d 708, 711 n.2 (1998).

This Court inquires as to whether Plaintiff reasonably expected Dr. Dunn to qualify as an expert witness pursuant to Rule 702, not whether he will ultimately qualify. *Smith v. Serro*, 185 N.C. App. 524, 527, 648 S.E.2d 566, 568 (2007) (citing N.C.R. Civ. P. 9(j)(1) (2005); *Trapp*, 129 N.C. App. at 241, 497 S.E.2d at 711). "In other words, were the facts and circumstances known or those which should have been known to the pleader such as to cause a reasonable person to believe that the witness would qualify as an expert under Rule 702." *Trapp*, 129 N.C. App. at 241, 497 S.E.2d at 711 (citing *Black's Law Dictionary* 1265 (6th ed. 1990) (defining "reasonable belief")).

There is a difference between whether a plaintiff could "reasonably expect" an expert to qualify as such under Rule 9(j)(1) and whether the expert does in fact qualify as an expert. Whether the proposed expert is reasonably expected to qualify is resolved at the time the complaint is filed. Whether the proposed expert does in fact qualify as such is resolved after discovery is completed. We conclude that the trial court misapplied Rule 9(j)(1) and decided that the tendered expert could not "reasonably [be] expected to qualify" under Rule 9(j)(1) because the witness would not in fact meet the requirements for expert qualification. Based on our *de novo* review of whether it was reasonable for Plaintiff to expect Dr. Dunn to qualify as an expert, we conclude the trial court erred.

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At the hearing on Defendants' Motion, and in response to the question of the percentage of his time from January 2005 until January 2006 spent in the active clinical practice of dentistry, Dr. Dunn answered that "when [he is] there it is 100 percent." Dr. Dunn then agreed that most dentists work four-day weeks and counsel asked, assuming eight hours of professional time per day, "What percentage over the entire year are you working in the active clinical practice of dentistry?" Dr. Dunn answered five percent in response to this question. It is true that he then answered yes to the question of whether it was five percent of his "professional time," but this is after he was told that the average dentist works four-day weeks, and each day includes eight hours of professional time. His response is taken out of context; when placed in the context of the series of questions being propounded to the expert, it is clear that the connotations concerned the professional time of full-time clinicians, not his professional time individually.

In his Affidavit filed after Defendants' Motion for Summary Judgment, Dr. Dunn claimed "during the time [he] was engaged in the active practice of dentistry, [he] spent one hundred percent of [his] professional time actively engaged in the clinical practice." He stated that he has practiced as a dentist in the area for over forty years and still engages in the active practice of dentistry, though not full-time. Dr. Dunn emphasized that his serving on the city council was a personal activity, and that none of his personal activities were part of his "profession." He stated that when he gave the five percent figure, he was referring to all of his time, "covering all the activities [he] was engaged in as a human being," but that when he was engaged in his profession, one hundred percent of his time was in the active clinical practice of dentistry.

Plaintiff argues that because Dr. Dunn was engaged in active clinical practice one hundred percent of his professional time, he met the standard in Rule 702, and thus their assertion under Rule 9(j) was proper. At the hearing, the trial court indicated that it did not believe the legislature intended the result advocated by Plaintiff. The trial court concluded "no reasonable person would have expected Dr. Joseph Dunn to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence."

Parties cite two cases in support of their positions: *Coffman v. Roberson*, 153 N.C. App. 618, 571 S.E.2d 255 (2002) and *Cornett v. Watauga Surgical Grp.*, 194 N.C. App. 490, 669 S.E.2d 805 (2008).

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There is a tension between *Cornett* and *Coffman* as to what amount of time an expert witness works “professionally.”

In *Coffman*, the expert was retired, but worked “professionally” the requisite period of time and this Court found no error in his qualification as an expert. *Coffman*, 153 N.C. App. at 624, 571 S.E.2d at 258-59 (expert witness stated instruction in his field “didn’t take up a great deal of time,” but that it was “all [he] did professionally during that period of time”). In *Cornett*, the expert was employed full time, according to the opinion, and worked a 60 hour workweek, occasionally performing minor surgery, instructing residents, attending rounds, and performing administrative duties at Tulane Medical School. *Cornett*, 194 N.C. App. at 494-95, 669 S.E.2d at 808. The administrative functions at Tulane Medical School composed a majority of his “professional time,” and the physician was found to not meet the requirements of Rule 702(b). *Id.* at 495, 669 S.E.2d at 808.

The language of the statute does not require a “standard” workweek or give the courts any measure for the length of time a professional must work in order to compute the majority of an expert’s “professional time.” The statutory language relies on a case by case analysis of the term. Thus, a professional workweek is a factual question which the trial court must determine in making its decision.

In *Cornett*, the trial court found the “professional work week” to be 60 hours for the physician in question. 194 N.C. App. at 494-95, 669 S.E.2d at 808. After this fact was found, our Court relied on this finding as a predicate to apply Rule 9(j) and Rule 702(b). Unfortunately, the trial court failed to make any findings of fact, and there is nothing for us to review regarding the number of hours of which Dr. Dunn’s “professional work week” was composed. On remand, the trial court must make sufficient findings of fact regarding the elements of Rule 702(b) qualifications on which it bases its decision as to whether his testimony would be available at trial if he is tendered.

We note the standard for dismissal under Rule 9(j) is different from the standard for admitting expert testimony at the time of trial. We express no opinion whether Dr. Dunn can meet the heightened standard should the matter go to trial, however, the trial court appears to have applied the wrong legal test in dismissing the complaint. The test is not whether the proposed expert can be qualified at trial or what the trial court believes the legislature “intended” when it passed the statute.

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In order to grant summary judgment, a trial court's decision must be based on "undisputed facts." Whether Dr. Dunn met the "professional time" standard of Rule 702 appears to us to be a highly disputed fact, and is a fact which must be reviewed in "the light most favorable to the nonmoving party." *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 294, 628 S.E.2d 851, 855 (2006). From the testimony provided and our interpretations of the Rule, we cannot agree with the trial court that "no reasonable person would have expected Dr. Joseph Dunn to qualify as an expert witness."

[2] As to the second ruling regarding the likelihood of Dr. Dunn to serve as an expert in this case due to extraordinary circumstances, we conclude this portion of the order is akin to a motion *in limine* and seeks a pretrial determination of the admissibility of evidence to be introduced at trial. Because any such determination would be subject to a final ruling by the trial judge, it would be insufficient grounds for dismissal at this point in the litigation.

IV. Conclusion

Based on the foregoing reasons, we reverse.

Reversed and remanded.

Judge STEELMAN concurs.

Judge STEPHENS dissents.

STEPHENS, Judge, dissenting.

I respectfully dissent from the majority opinion to address the majority's misinterpretation and misapplication of North Carolina Civil Procedure Rule 9(j).

Rule 9(j), which sets out the heightened pleading requirements for a medical malpractice complaint, provides that "[a]ny complaint alleging medical malpractice by a health care provider" "*shall be dismissed*" unless the complaint satisfies one of the three following conditions:

(1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;

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(2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, *and* the motion is filed with the complaint; or

(3) The pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2009) (emphasis added).

In this case, it is clear from Moore’s complaint that she sought to satisfy Rule 9(j) by fulfilling the *Rule 9(j)(1) condition only*: (1) Moore’s complaint “specifically asserts” that the medical care was reviewed by Dr. Dunn, “who is reasonably expected to qualify as an expert witness under Rule 702” and “who is willing to testify that the medical care provided by [] Defendants did not comply with the applicable standard of care”; (2) Moore’s complaint contains no “specific assertion” that matches the language of Rule 9(j)(2); and (3) as noted by the majority, *res ipsa loquitur* “was not raised by the parties below and is not argued on appeal.” Nevertheless, the majority concludes that “the [c]omplaint reveals [Moore] pled a paragraph minimally sufficient to meet the requirements of” Rule 9(j)(2). This conclusion is incorrect.

Initially, I again note that nowhere in Moore’s complaint does she “specifically assert” that she will seek to have the person who reviewed the medical care “qualified as an expert witness by motion under Rule 702(e)” as required by Rule 9(j)(2). Further, Rule 9(j)(2) requires a plaintiff to file a Rule 702(e) motion *along with* the complaint. In this case, Moore filed a Rule 702(e) motion, but that motion was filed more than 15 months after the complaint was filed. Unequivocally, Moore failed to satisfy the mandate of Rule 9(j)(2), leading to the inescapable determination that the majority’s conclusion on that issue is incorrect.

Because Moore has failed to satisfy the pleading requirements of Rule 9(j)(2), and because Moore did not satisfy Rule 9(j)(3), Moore’s complaint should have been dismissed—and the trial court’s judgment should be affirmed—unless the complaint satisfied the pleading requirements of Rule 9(j)(1). I conclude that it did not.

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I acknowledge that Moore's complaint, on its face, appears to satisfy the pleading requirements of Rule 9(j)(1): It contains a specific assertion that the medical care had been reviewed by a person who (1) is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence, and (2) is willing to testify that the medical care did not comply with the applicable standard of care. However, this Court has held that "even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is [] appropriate." *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 255, 677 S.E.2d 465, 477 (2009) (quoting *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008)).

In considering whether a plaintiff's Rule 9(j) statement is supported by the facts, a court must consider the facts relevant to Rule 9(j) and apply the law to them. In such a case, this Court does not inquire as to whether there was any question of material fact, nor do we view the evidence in the light most favorable to the plaintiff. Rather, our review of Rule 9(j) compliance is *de novo*, because such compliance clearly presents a question of law.

Id. at 255-56, 677 S.E.2d at 477 (internal quotation marks, citations, and ellipsis omitted).

The dispositive question in this appeal is whether Moore's Rule 9(j)(1) statement that her expert Dr. Dunn "is reasonably expected to qualify as an expert witness under Rule 702" is supported by the facts. The majority concludes that Moore's expectation that Dr. Dunn would qualify as an expert under Rule 702 was reasonable. I disagree.

Rule 702 of the North Carolina Rules of Evidence provides that a proposed expert in a medical malpractice action "shall not give testimony on the appropriate standard of health care" unless the proposed expert is a licensed health care provider and meets the following criteria:

During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:

- a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered . . . or

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b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered

N.C. Gen. Stat. § 8C-1, Rule 702(b) (2009).¹

In this case, because Dr. Dunn is a licensed dentist, because Dr. Dunn testified that he had spent no time instructing students during the year immediately preceding the date of Moore’s alleged injury, and because Dr. Dunn is admittedly in the same health profession as Dr. O’Hearn and Dr. Proper, the more specific issue is whether Dr. Dunn devoted a majority of his professional time to the “active clinical practice” of general dentistry during the year immediately preceding the date of Moore’s alleged injury. I conclude that, based on his description of his professional time, Dr. Dunn did not meet this Rule 702 requirement.

In his deposition, Dr. Dunn testified that, assuming a year of 32-hour workweeks (*i.e.*, four eight-hour days), he spent less than five percent of that time, or an average of less than 1.6 hours per week, in the clinical practice of dentistry, filling in for other dentist friends who needed the help. Dr. Dunn clarified that testimony in a subsequent affidavit, stating that the five-percent figure referred to “five percent of my entire time”—which time included running for and holding public office, spending time with his grandchildren, and golfing—and not five percent of his “professional time.” Dr. Dunn then stated that 100 percent of the time that he was engaged in dentistry—his learned profession and, thus, his “professional time”—was spent in the clinical practice of dentistry. The upshot of Dr. Dunn’s testimony is that he was engaged in the clinical practice of dentistry 100 percent of his “professional time,” which was five percent of his “entire time” of a year’s worth of 32-hour workweeks.

Assuming, without deciding, that Dr. Dunn’s interpretation of “professional time” is correct—that “professional time” is limited to time spent on activities related to one’s health profession and does not include other quasi-professional activities like holding public office—I nonetheless conclude that the majority of Dr. Dunn’s pro-

1. Rule 702 contains additional rules for specialists that are not relevant to this appeal because Dr. Dunn testified in his deposition that he practices only general dentistry and has no specialization. *Cf. Roush v. Kennon*, 188 N.C. App. 570, 575-76, 656 S.E.2d 603, 607 (2008) (discussion of how a general dentist may be qualified as a specialist).

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fessional time was not devoted to the “active clinical practice” of dentistry as required by Rule 702(b).

“When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction.” *Thigpen v. Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002). The clear and unambiguous language of Rule 702 requires that a proposed expert’s clinical practice not only must constitute the majority of that expert’s professional time, but also that that clinical practice must be “active.” N.C. Gen. Stat. § 8C-1, Rule 702. It is this mandate of “active” clinical practice that Dr. Dunn fails to meet.

“Words not defined in [a] statute are given their plain meaning so long as it is reasonable to do so.” *Formyduval v. Bunn*, 138 N.C. App. 381, 386, 530 S.E.2d 96, 100 (2000) (quoting *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), cert. denied, 526 U.S. 1098, 143 L. Ed. 2d 671 (1999)) (internal quotation marks omitted). “Dictionaries may be used to determine the plain meaning of words.” *Id.* at 387, 530 S.E.2d at 100-01 (citing *Hunter v. Kennedy*, 128 N.C. App. 84, 86, 493 S.E.2d 327, 328 (1997)).

Of the several dictionary definitions of “active,” the most reasonable in this context is “disposed to action,” as in “energetic, diligent.” Webster’s Third New International Dictionary, (Unabridged 2002). While other of the definitions—such as “characterized by action rather than contemplation or speculation” or “engaged in an action or activity,” *id.*—present themselves as reasonable alternatives, these alternatives would render the statute’s use of either the word “active” or “clinical” superfluous in that this Court has previously defined “clinical” in this context to mean nearly the same thing, *i.e.*, “based on or pertaining to actual experience in the observation and treatment of patients.” *Formyduval*, 138 N.C. App. at 391, 530 S.E.2d at 103 (quoting 2 J.E. Schmidt, Attorney’s Dictionary of Medicine C-310 (1999)). Because interpretation yielding superfluity is disfavored, *State v. Coffey*, 336 N.C. 412, 417, 444 S.E.2d 431, 434 (1994) (holding that “a statute should not be interpreted in a manner which would render any of its words superfluous”), it is more reasonable to interpret the requirement of “active” clinical practice as requiring “energetic and diligent” clinical practice, as opposed to requiring mere non-speculative, non-inactive clinical practice.

The effect of this interpretation of an *active* clinical practice necessarily is the creation of a baseline level of proposed experts’

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“activeness,” below which a proposed expert’s clinical practice is not sufficiently active to satisfy the requirements of Rule 702(b). Were it otherwise, a proposed expert who devoted 0.01 hours per year to the clinical practice of his health profession—perhaps a general dentist who cleaned one tooth in a year and had no other professional activities—would be eligible to testify under Rule 702(b). The absurdity of this result is magnified by the fact that such an expert would be eligible to testify while a proposed expert who devoted slightly less than 50 percent of a full year’s worth of professional time to clinical practice—or 999 hours in a 40-hour per week, 50-week year—and slightly more than 50 percent of that professional time to administrative functions would be ineligible. Certainly there must be some level at which a proposed expert’s clinical practice cannot be considered active.

While that minimum level of activity may vary among cases and needs no precise determination in this case, in my view, a clinical practice of 1.6 hours per week is not sufficiently active to qualify a proposed expert under Rule 702(b). In support of this conclusion, I note that the intent of the legislature in amending Rule 702 to include the current 702(b) requirements, as indicated by the title of the act introducing those requirements, was to

Prevent Frivolous Medical Malpractice Actions by Requiring that Expert Witnesses in Medical Malpractice Cases Have Appropriate Qualifications to Testify on the Standard of Care at Issue and to Require Expert Witness Review as a Condition of Filing a Medical Malpractice Action.

Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611. By requiring “appropriate qualifications” of experts as a means to prevent frivolous medical malpractice actions, the legislature indicated a clear desire to require the proposed experts who review cases to have adequate familiarity with the relevant standard of care. *Id.*; see also *Formyduval*, 138 N.C. App. at 390, 530 S.E.2d at 102 (noting that the purpose of Rule 702(b) is “to insure that malpractice actions are ‘reviewed by qualified practitioners of a competence similar to’ defendant of suit” (quoting April 19, 1995 *Minutes of the House Select Comm. On Tort Reform*)). One cannot seriously contend that a proposed expert who devotes 0.01 hours per year to the clinical practice of dentistry is qualified to testify to the appropriate standard of care in a health profession that Dr. Dunn describes as “always changing,” and allowing the qualification of such a proposed expert would seriously undermine the legislature’s attempt to prevent frivolous med-

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ical malpractice claims. I conclude that a clinical practice of no more than 1.6 hours per week is likewise insufficient to qualify a proposed expert under Rule 702(b).

Nevertheless, the question in this case is not whether Dr. Dunn *should* qualify under Rule 702(b), but whether *Moore's expectation that Dr. Dunn would* qualify as an expert witness under Rule 702 was reasonable and supported by the facts. "In other words, were the facts and circumstances known or those which should have been known to [Moore] such as to cause a reasonable person to believe that [Dr. Dunn] would qualify as an expert under Rule 702." *See Trapp v. Maccioli*, 129 N.C. App. 237, 241, 497 S.E.2d 708, 711 (1998) (citing *Black's Law Dictionary* 1265 (6th ed. 1990) for the definition of reasonable belief).

The facts and circumstances known or which should have been known to Moore are as follows: In her expert witness designation, Moore alleged that Dr. Dunn was "licensed to practice in North Carolina, having practiced in Asheville from 1973 until [his] retirement in 1997"; in response to interrogatories, Dr. Dunn stated that he "maintained a valid license to practice general dentistry in good standing since [his] retirement in July of 1997"; and in his deposition, Dr. Dunn testified that his clinical practice amounted to less than five percent of a 32-hour workweek, or an average of 1.6 hours per week.

In my view, these facts and circumstances show that Moore's expectation that Dr. Dunn would qualify as an expert witness was not reasonable. First, the fact that Dr. Dunn retired nine years prior to the alleged malpractice—and had been retired for almost 12 years by the time Moore filed her complaint—should have indicated to Moore that Dr. Dunn likely was not maintaining an active clinical practice. This fact would have led a reasonable person to inquire as to the extent of Dr. Dunn's clinical practice in the year prior to the alleged malpractice. Second, and more importantly, a reasonable person who conducted such an inquiry would not have concluded that a dentist who spends an average of 1.6 hours per week in the clinical practice of dentistry would qualify as an expert under a statute that requires a proposed expert to have devoted the majority of his professional time to the *active clinical practice* of dentistry.

As discussed *supra*, the Rule 702(b) requirement of *active* clinical practices requires the proposed expert to have an energetic and diligent practice. In my view, no reasonable person would conclude that 1.6 hours per week constitutes an active, energetic, and diligent

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health care practice.² Rather, a reasonable person would consider such practice to be sporadic, quiescent, and sedentary, *i.e.*, inactive. Accordingly, I agree with the trial court that Moore's expectation that Dr. Dunn would qualify was unreasonable, and I conclude that the trial court did not err in granting summary judgment for Defendants based on Moore's failure to satisfy the certification requirements of Rule 9(j).

Despite the failure of Moore's complaint to satisfy Rule 9(j), Moore argues that summary judgment for Defendants was nevertheless error because "the case could still proceed on the theories of [Defendant] having failed to exercise his best judgment and reasonable care," which theories, Moore urges, do not require a Rule 9(j) certification. Whether Moore is correct that those theories of recovery do not require certification is irrelevant because Moore failed to assert such theories in her complaint. As previously held by this Court, a plaintiff is bound by her pleadings, *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 628, 652 S.E.2d 302, 305 (2007) ("In determining whether or not Rule 9(j) certification is required, the North Carolina Supreme Court has held that 'pleadings have a binding effect as to the underlying theory of plaintiff's negligence claim.'" (quoting *Anderson v. Assimos*, 356 N.C. 415, 417, 572 S.E.2d 101, 102 (2002))), and in this case, Moore has only alleged that she is entitled to recover damages from (1) Dr. Proper's furnishing of tooth extraction services and failure to furnish post-extraction care, and (2) Dr. O'Hearn's failure to furnish post-extraction care. Such a claim for damages "arising out of the furnishing or failure to furnish professional services" in the performance of dental care constitutes a medical malpractice action. N.C. Gen. Stat. § 90-21.11 (2009). As Moore has only asserted this medical malpractice claim, she is required to meet the certification requirements of Rule 9(j). Moore's failure to do so warrants dismissal of her claim.

2. Moore points to *Coffman v. Roberson*, 153 N.C. App. 618, 571 S.E.2d 255 (2002), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 111 (2003)—in which this Court held that a proposed expert who "did some volunteer teaching" that "didn't take up a great deal of time" was qualified to testify under Rule 702, *id.* at 623-24, 571 S.E.2d 258-59—to support her argument that all that is required is that the clinical practice constitute a majority of one's professional time and that the extent, or activeness, of the clinical practice is irrelevant. First, this interpretation ignores the "active" requirement of Rule 702(b). Second, *Coffman* is inapposite in that it addresses only Rule 702(b)(2)(b) and professional time devoted to "[t]he instruction of students in an accredited health professional school," and does not address Rule 702(b)(2)(a) and the active clinical practice of a health profession. Unlike 702(b)(2)(a), 702(b)(2)(b) contains no similar "active" requirement. N.C. Gen. Stat. § 8C-1, Rule 702(b)(2).

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Based on the foregoing, I conclude that the trial court appropriately granted summary judgment for Defendants and properly dismissed Moore's claim.³ The judgment of the trial court should be affirmed.

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No. COA09-1449-2

(Filed 6 September 2011)

1. Liens—materialman's lien—filings sufficient—property sold—liens extinguished

The trial court did not err in a materialman's lien case by discharging plaintiff's lien filings. Although plaintiff's filings were sufficient to protect its rights under both parts of Article 2 of Chapter 44A, the sale and conveyance of the private owners' properties extinguished plaintiff's filed claims of lien or notices of claim of lien on funds. Similarly, foreclosure by defendant Carolina Bank of two of the properties extinguished plaintiff's claims of lien against those properties.

2. Liens—materialman's lien—reference to discharged liens in complaint—motion to strike properly granted

The trial court did not err in a materialman's lien case by granting defendants' motion to strike the allegations in plaintiff's complaint that referred to discharged claims of lien and notices of claim of lien on funds where the trial court did not commit reversible error when it discharged all of plaintiff's claims of lien and notices of claims of lien.

Appeal by plaintiff from order entered 22 April 2009 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the

3. Moore makes a final argument that the trial court erred by denying her Rule 702(e) motion. This argument need not be addressed because the complaint was properly dismissed based on the pleadings.

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Court of Appeals 13 April 2010. Petition for rehearing allowed 19 April 2011. The following opinion supersedes and replaces the opinion filed 15 March 2011.

Smith, James, Rowlett & Cohen, L.L.P., by Seth R. Cohen and J. David James, for plaintiff-appellant.

Sharpless & Stavola, P.A., by Joseph P. Booth III, for defendant-appellee Housing Authority of the City of Greensboro.

Womble Carlyle Sandridge & Rice, PLLC, by Michael Montecalvo and Sarah L. Buthe, for defendant-appellee Willow Oaks Development, LLC.

Ward and Smith, P.A., by Thomas S. Babel, for defendant-appellees Carolina Bank, Andrea M. Bullard, Crystal M. Young, Ebony M. Washington, Marcus L. Purcell and Lakeisha R. Purcell.

CALABRIA, Judge.

Pete Wall Plumbing Co., Inc. (“plaintiff”) appeals the trial court’s order (1) granting Sandra Anderson (Groat)’s motion to strike and (2) discharging plaintiff’s Notices of and Claims of Lien. We affirm.

I. Background

From January through July 2008, plaintiff delivered plumbing supplies and services for the construction of six homes, located on lots 20, 25, 25B, 34, 37, and 54B of Willow Oaks - Zone B (collectively “the properties”), to defendant Sandra Anderson Builders, Inc. (“SAB”).¹ The cost of the plumbing supplies and services provided to the properties totaled \$18,576.12.² SAB failed to pay plaintiff for these supplies and services.

At the time plaintiff provided plumbing supplies and services to the properties, they were owned by defendant Housing Authority of the City of Greensboro (“the Housing Authority”). The Housing Authority had entered into a ground lease (“the Ground Lease”) cov-

1. SAB is now dissolved and not a party to this appeal.

2. Plaintiff asserts in its brief that the debt resulting from SAB’s failure to pay for the provision of supplies and services on the six properties at issue totals \$22,376.12. However, our review of the record indicates that this amount includes a debt alleged for provision of materials to a seventh property, Lot 54. According to the record, the filing against this property was independently satisfied, and plaintiff filed a cancellation of its filing against Lot 54. Consequently, the sum of the debt claimed in plaintiff’s filings for the properties at issue in the instant case actually totals \$18,576.12.

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ering the properties, along with numerous additional properties, with defendant Willow Oaks Development, LLC (“Willow Oaks”). Willow Oaks, in turn, individually subleased the properties, along with many others, to SAB (“the Ground Subleases” or “the Subleases”).

Under the terms of the Ground Subleases, SAB was required to construct certain improvements on the properties; specifically, SAB was to construct single-family homes. In each of the Subleases, Willow Oaks and SAB acknowledged and agreed that SAB would be the owner of these improvements during the term of the Subleases. However, upon completion of the improvements on any lot, SAB was required to “convey the Improvements to a Homebuyer in accordance with the provisions set forth in the Master Ground Lease.” At the end of the term of the Subleases, SAB was required to surrender the properties in “as-is” condition. Additionally, the Subleases specifically stated that SAB had no right to bind any interest of Willow Oaks to any lien or other security interest. The Subleases were officially recorded with the Guilford County Register of Deeds (“the Register of Deeds”).

The construction of the homes was financed by defendant Carolina Bank. In order to secure this financing, the Housing Authority, Willow Oaks, SAB, and Carolina Bank entered into a Multiparty Agreement for each of the properties, whereby the Housing Authority and Willow Oaks agreed to subordinate their interests in the properties to Carolina Bank’s deeds of trust in SAB’s subleasehold interests in the properties (“the Multiparty Agreements”). Each of the Multiparty Agreements included a provision describing the duties of Carolina Bank, the Housing Authority, and Willow Oaks in the event of SAB’s default on the loan. Essentially, in the event of default, Carolina Bank could (1) elect to assume the rights and responsibilities of SAB (i.e., become the sublessee) or (2) force the Housing Authority to choose between either (a) paying the amount due under the loan or (b) transferring to Carolina Bank, upon the payment of \$15,000.00, the interests of the Housing Authority and Willow Oaks in the subject property. The Multiparty Agreements were officially recorded with the Register of Deeds.

On 3 July and 11 July 2008, plaintiff filed six “Notices of and Claims of Lien” on each of the respective properties (“the filings” or “plaintiff’s filings”), which were purported to be filed “pursuant to Article 2 of Chapter 44A of the North Carolina General Statutes.” The filings were given file numbers 08 CVM 333, 345-348 and 350 by the clerk of court. Each of plaintiff’s filings alleged that plaintiff had provided, pursuant to a contract with SAB, “plumbing, labor, supplies

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and or/materials” for the construction of real property improvements located on the properties. While there was some variation in the exact dates the labor and/or materials were provided to the individual properties, the filings all referenced labor and/or materials that were provided between January and April 2008. The specific dates for each lot, according to plaintiff’s filings, were as follows:

File Number:	Lot Number:	Date Materials First Provided:	Date Materials Last Provided:
08 CVM 333	Lot 37	9 January 2008	6 March 2008
08 CVM 345	Lot 20	29 February 2008	15 April 2008
08 CVM 346	Lot 34	24 January 2008	31 March 2008
08 CVM 347	Lot 25B	31 January 2008	31 March 2008
08 CVM 348	Lot 25	29 January 2008	25 March 2008
08 CVM 350	Lot 54B	2 January 2008	14 March 2008

At the time plaintiff’s filings were made, four of the properties had been conveyed by general warranty deed from the Housing Authority and SAB: (1) lot 54B was conveyed to defendant Ebony M. Washington (deed recorded 28 January 2008); (2) lot 25B was conveyed to defendants Marcus and Lakeisha Purcell (deed recorded 1 February 2008); (3) lot 25 was conveyed to defendant Andrea M. Bullard (deed recorded 10 April 2008); and (4) lot 34 was conveyed to defendant Crystal M. Young (deed recorded 17 April 2008). Each deed to the private owners included a clause which provided that the Housing Authority and SAB released the conveyed property from the Ground Lease, its respective Ground Sublease, and its respective Multiparty Agreement. Additionally, the deeds stated that the Ground Lease, Ground Sublease, and Multiparty Agreement were expressly terminated “and shall have no further force or effect with respect to the property” conveyed in the deed.

On 29 August 2008, plaintiff filed a “Complaint and Action to Enforce Lien” against SAB, Sandra B. Anderson (Groat), the Housing Authority, Willow Oaks, Carolina Bank, and the private owners (collectively “defendants”). In the complaint, plaintiff alleged, *inter alia*, that it had valid and enforceable liens against the properties. In addition to the materialman’s liens, the complaint also sought an “equitable lien” against the interests of the Housing Authority and Willow Oaks. Furthermore, the complaint alleged that plaintiff was entitled to money damages from SAB, Sandra Anderson (Groat) individually,

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the Housing Authority, and Willow Oaks. Plaintiff's prayer for relief requested, *inter alia*, that the trial court enforce its liens and order a sale of the properties.

On 16 September 2008, defendant Sandra Anderson (Groat) filed a motion to strike pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(f). The motion to strike requested that the trial court "strike the allegations regarding Notice of and Claim of Lien and the Notices of and Claims of Lien . . . as referenced in the Complaint and that the Court award her such other and further relief as to the Court may seem just and proper." None of the other defendants joined in the motion to strike.

On 8 October 2008 and 2 February 2009, the trial court conducted separate hearings on the motion to strike. Plaintiff was represented by different counsel at the different hearings. At the first hearing, plaintiff's counsel argued that the filings constituted valid notices of claim of lien on funds pursuant to N.C. Gen. Stat. § 44A, Article 2, Part 2. At the second hearing, plaintiff's counsel argued that the filings constituted valid claims of lien pursuant to N.C. Gen. Stat. § 44A, Article 2, Part 1.

On 4 February 2009, the two unsold properties, lots 20 and 37, were foreclosed upon (and subsequently purchased) by Carolina Bank. Carolina Bank's deeds of trust were executed and filed before plaintiff had provided labor and/or materials to these lots.

On 22 April 2009, the trial court issued an order stating that each of the filings that plaintiff sought to enforce was invalid. In addition, the trial court's order struck from plaintiff's complaint a number of allegations including, *inter alia*, each assertion that plaintiff had a valid lien on the properties. The order further stated that "[u]pon the filing of this order with the Clerk of Superior Court, the Notices of and Claims of Lien [for all the properties] shall be marked as discharged, pursuant to N.C.G.S. § 44A-16."

As a result of the trial court's order, plaintiff voluntarily dismissed, with prejudice, all of its claims against Carolina Bank and voluntarily dismissed, without prejudice, some of its claims against Sandra Anderson (Groat). In addition, the trial court later dismissed plaintiff's claims against the Housing Authority, Willow Oaks and the private owners. On 2 June 2009, the trial court entered a consent order for summary judgment against SAB for \$49,913.11. After final judgment was entered on the remaining claims on 27 July 2009, plaintiff appealed the trial court's 22 April 2009 order.

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II. Discharge of Notices of and Claims of Lien

Plaintiff argues that the trial court erred by discharging the filings because they complied with all relevant statutory requirements. Plaintiff contends that the filings were valid and enforceable against SAB's subleasehold interest in each of the properties.

As an initial matter, it is necessary to address the procedural irregularities which led to the trial court's order. The trial court's order granted two forms of relief: the discharge of the liens pursuant to N.C. Gen. Stat. § 44A-16 and the striking of any references to the liens from plaintiff's complaint pursuant to Rule 12(f). However, the motion to strike filed by Sandra Anderson (Groat) was based solely upon Rule 12(f). Moreover, since the motion to strike was only filed by Sandra Anderson (Groat) in her individual capacity, it is not clear from the record why the trial court granted relief to the remaining defendants when it granted the motion.³

A final determination on the merits is not the relief contemplated by a defendant filing a motion to strike pursuant to Rule 12(f). Rule 12(f), by its own terms, only allows the trial court to strike matters from "*any pleading* any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter." N.C. Gen. Stat. § 1A-1, Rule 12(f) (2009) (emphasis added). Thus, a ruling on a Rule 12(f) motion should not have been used as the basis for discharging plaintiff's filings upon the filing of the order, because striking material from the pleadings is not akin to reaching a final determination of the matter.

The discharge of statutory liens is instead governed by N.C. Gen. Stat. § 44A-16 (2009). Indeed, the trial court's order stated that it was discharging the liens pursuant to that statute. N.C. Gen. Stat. § 44A-16 lists six methods by which a filed lien can be discharged. Subsection 4 is the relevant method of discharge in the instant case. This subsection states:

Any claim of lien on real property filed under this Article may be discharged by any of the following methods:

...

(4) By filing in the office of the clerk of superior court the original or certified copy of a judgment or decree of a court of

3. The record on appeal does not contain a transcript from either of the hearings on the motion to strike, and as a result, we are unable to determine which additional defendants, if any, participated in these hearings.

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competent jurisdiction *showing that the action by the claimant to enforce the claim of lien on real property has been dismissed or finally determined adversely to the claimant.*

N.C. Gen. Stat. § 44A-16 (2009) (emphasis added). Typically, “[t]his subsection requires that a judgment be filed showing that the action to perfect a lien has been dismissed or otherwise decided adversely to the lien claimant in order to discharge the lien.” *Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc.*, 333 N.C. 250, 251, 424 S.E.2d 383, 384 (1993). The trial court’s order decreed that, “upon the filing of this order with the Clerk of Superior Court, the Notices of and Claims of Lien . . . shall be marked as discharged, pursuant to N.C. Gen. Stat. § 44A-16[.]” Since the trial court’s order appears to comply with N.C. Gen. Stat. § 44A-16 (4) and plaintiff does not contend that this portion of the trial court’s order was not validly entered, we will review the portion of the trial court’s order which directed that plaintiff’s filings be discharged.

The materialman’s lien statute has its genesis in our State Constitution, which requires that “[t]he General Assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject matter of their labor.” N.C. Const. art. X, § 3. The requirement for a materialman’s lien statute was satisfied by the enactment of Chapter 44A of our General Statutes (“Chapter 44A”). When interpreting Chapter 44A, our Supreme Court has made clear that

[t]he materialman’s lien statute is remedial in that it seeks to protect the interests of those who supply labor and materials that improve the value of the owner’s property. A remedial statute must be construed broadly in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained.

O & M Indus. v. Smith Eng’r Co., 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) (internal quotations and citations omitted).

Article 2 of Chapter 44A contains two parts: Part 1 of Article 2 (“Part 1”) governs the “Liens of Mechanics, Laborers, and Materialmen Dealing with Owner.” It is intended to govern the rights of contractors and materialmen who deal directly with the owner of the subject property. Specifically, Part 1 entitles such mechanics, laborers, and materialmen to a lien on an owner’s property in order to ensure they are compensated for their work and/or materials, so long as they follow the proper procedure in the statute, including the filing

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of a “claim of lien.” N.C. Gen. Stat. § 44A-8 (2009). A suggested format for a claim of lien is contained in N.C. Gen. Stat. § 44A-12 (2009).

In contrast, Part 2 of Article 2 (“Part 2”) governs the “Liens of Mechanics, Laborers, and Materialmen Dealing with One Other Than Owner.” Part 2 is intended to govern the rights of subcontractors and delineate their priority in the funds which are due to the contractor. *See* N.C. Gen. Stat. §§ 44A-8 and -18 (2009). Specifically, it entitles a subcontractor to a lien on funds paid to the contractor or subcontractor with whom it had dealt for the improvements for which the subcontractor had provided labor, materials, or rental equipment. Part 2 requires the subcontractor to follow specific procedures, including serving the party the subcontractor dealt with a “notice of claim of lien upon funds.” N.C. Gen. Stat. § 44A-20 (2009). A suggested format for a notice of claim of lien upon funds is contained in N.C. Gen. Stat. § 44A-19 (2009).

In the instant case, SAB fit both the definitions of: (1) an owner of the properties under Part 1, by virtue of the Subleases, *see* N.C. Gen. Stat. § 44A-7 (2009) (“An ‘owner’ is a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made.”); and (2) a contractor under Part 2, based upon the language in the Subleases in which owner Willow Oaks required it to make improvements upon the properties. *See* N.C. Gen. Stat. § 44A-17 (“‘Contractor’ means a person who contracts with an owner to improve real property.”). Plaintiff’s filings indicate that its counsel attempted to ensure that his client received the protections of Parts 1 and 2 by filing an amalgamation of the forms contained in Parts 1 and 2, titling each of plaintiff’s filings as a “Notice of and Claim of Lien” and including substantially all of the information contained on each statutory form.

A claimant utilizing either a claim of lien or a notice of claim of lien on funds is not required to use the model statutory form and “deviation from the statutory form is permissible so long as all of the information set out in the statutory form is contained” within the filing. *Contract Steel Sales, Inc. v. Freedom Const. Co.*, 321 N.C. 215, 222, 362 S.E.2d 547, 551 (1987). However, a claim of lien and a notice of claim of lien on funds each require specific information in order to be valid. The major difference between the two is that a claim of lien “need only identify the owner, the claimant, and the party with which the claimant contracted[,]” while a notice of claim of lien on funds “must identify all the parties in the ‘contractual chain’ between the claimant and the owner.” *Universal Mechanical v. Hunt*, 114 N.C.

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App. 484, 488, 442 S.E.2d 130, 132 (1994). The specific requirements for a claim of lien affecting title to real property are

intended to place “the world” on notice of the claim. Such notice must clearly delineate the tiered relationships in which the claimant is involved. This is so the owner may understand how the lien has arisen, and also so a title searcher may ascertain which entities are potential claimants and how each is connected to the real estate.

Cameron & Barkley Co. v. American Insurance Co., 112 N.C. App. 36, 45, 434 S.E.2d 632, 637 (1993).

Plaintiff’s filings contain all of the information required by N.C. Gen. Stat. §§ 44A-12 and -19. Moreover, the filings contain enough information to allow a title searcher to “ascertain which entities are potential claimants and how each is connected to the real estate.” *Id.* Thus, plaintiff’s filings were sufficient to protect its rights under both parts of Article 2 of Chapter 44A. Nonetheless, it must still be determined whether plaintiff’s filings actually created a valid claim of lien under Part 1 or a valid notice of claim of lien on funds under Part 2.

A. The Private Owners

[1] The private owners argue that any claims of liens or notices of claim of lien on funds filed against their properties were invalid because they each received general warranty deeds that cancelled the interests of SAB in their properties before plaintiff’s filings were made. We agree.

1. Claims of Lien

Our Supreme Court has explicitly approved the judicial enforcement of a materialman’s lien against a leasehold (and, by extension, a subleasehold) interest in real property, when the enforcement is completed before the interest terminates. *See Asheville Woodworking Co. v. Southwick*, 119 N.C. 611, 615, 26 S.E. 253, 254 (1896) (A materialman’s lien on a leasehold interest “can be levied upon and sold under execution. The mechanic’s lien is executionary in its nature, operation, and effect, and, like other attaching liens, it gives cause of action.”); *Weathers v. Cox*, 159 N.C. 575, 576, 76 S.E. 7, 8 (1912) (A materialman’s lien “attaches to a lessee’s leasehold estate, subject to all the conditions of the lease . . .”).

However, a claim of lien is only valid “to the extent of the interest of the owner.” N.C. Gen. Stat. § 44A-9 (2009). In the instant case,

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plaintiff did not begin enforcement proceedings on lots 25, 25B, 34, and 54B until after SAB's ownership interests in these lots as sublessee had been extinguished by the sale and conveyance of the properties to the private owners. Upon the termination of this interest, by a conveyance which was explicitly required by the terms of the Subleases filed with the Register of Deeds, "the property revert[ed] to the lessor, free from the lien of mechanics, unless these [we]re in some way protected by the statute." *Id.* Since our statutes only provide plaintiff with a claim of lien to the extent of an owner's interest in a property, plaintiff possessed no statutory protection in the private owners' properties after SAB's interest in each property was terminated. Thus, the trial court properly ordered plaintiff's claims of lien against lots 25, 25B, 34, and 54B, filed in 08 CVM 346-48 and 350, to be discharged.

As the facts of the instant case demonstrate, the combination of the time limited nature of a leasehold interest and the time required to judicially enforce a materialman's lien effectively makes the protections of a claim of lien against a leasehold interest almost theoretical for shorter-termed leases. However, this result is necessitated by previous decisions of our Supreme Court and by the language of Chapter 44A of our General Statutes. It was ultimately plaintiff's decision to furnish materials to an entity with only a time-limited interest in the properties. The extent and terms of SAB's interest in the properties were filed with the Register of Deeds and were thus a matter of public record, readily ascertainable by plaintiff. As our Supreme Court has previously admonished a party similarly situated to plaintiff,

[i]f [plaintiff was] unwilling to do the work and furnish the material upon . . . credit and intended to look to the security provided by statute, ordinary prudence required that [plaintiff] exercise that degree of diligence which would enable them to ascertain the status of the title to the land upon which the building was to be erected and to obtain the approval or procurement of the owners. Their loss must be attributed to their failure so to do.

Brown v. Ward, 221 N.C. 344, 347-48, 20 S.E.2d 324, 326-27 (1942).

2. Notices of Claim of Lien on Funds

In addition, the sale and conveyance of the private owners' properties extinguished plaintiff's filed notices of claim of lien on funds. Under Part 2, a claim of lien on funds does not attach to any funds until after it is received by an obligor:

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Upon receipt of the notice of claim of lien upon funds provided for in this Article, the obligor shall be under a duty to retain any funds subject to the lien or liens upon funds under this Article up to the total amount of such liens upon funds as to which notices of claims of lien upon funds have been received.

N.C. Gen. Stat. § 44A-20 (a) (2009) (emphasis added). In Part 2, an “Obligor” means an owner, contractor or subcontractor in any tier who owes money to another as a result of the other’s partial or total performance of a contract to improve real property.” N.C. Gen. Stat. § 44A-17(3) (2009). Thus, at the time plaintiff provided plumbing services and supplies to what would later become the private owners’ properties, only SAB, by virtue of its ownership interest in the properties, qualified as an obligor under the statute. Although Carolina Bank, as a construction lender, held a deed of trust in the properties, it did not qualify as an owner, and thus, was not an obligor under the statute. *See Con Co. v. Wilson Acres Apts.*, 56 N.C. App. 661, 666-67, 289 S.E.2d 633, 637 (1982) (Construction lender holding a deed of trust not an owner under the materialman’s lien statutes because it is not “a person ‘for whom an improvement was made’ or ‘who ordered the improvement to be made.’”). Thus, the trial court correctly discharged the notices of claim of lien on funds against Carolina Bank on all of the properties.

The record is silent on whether SAB failed to comply with N.C. Gen. Stat. § 44A-20 after it received notice of plaintiff’s filings. However, such information is immaterial, because plaintiff eventually received a judgment against SAB for the full amount it sought in its complaint. This judgment was consented to by SAB and was not appealed. Therefore, even assuming, *arguendo*, that plaintiff possessed a valid lien on funds paid by SAB, so that the trial court’s order discharging the lien on funds would constitute error, that error would be harmless. Plaintiff could not have received a larger judgment if it had been permitted to pursue a lien on funds against SAB than it had already received by virtue of the consent judgment. The assignments of error regarding plaintiff’s filings filed against the private owners’ properties are overruled.

B. Lots 20 and 37

On 4 February 2009, Carolina Bank foreclosed upon its deeds of trust on lots 20 and 37. Carolina Bank recorded a deed of trust on lot 20 on 6 February 2008. Plaintiff’s filing alleged that labor and/or materials were first provided to lot 20 on 29 February 2008, after the deed

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of trust was recorded. Similarly, plaintiff's filing on lot 37 alleged that labor and/or materials were first provided to that lot on 9 January 2008, after Carolina Bank recorded a deed of trust on 1 November 2007.

1. Claims of Lien

"A claim of lien on real property granted by this Article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the claim of lien on real property." N.C. Gen. Stat. § 44A-10 (2009). Since Carolina Bank recorded deeds of trust on lots 20 and 37 before plaintiff provided labor and/or materials to them, Carolina Bank's deeds of trust were senior to plaintiff's claims of lien.

Long settled case law holds, [t]he sale [under a mortgage or deed of trust] . . . cuts out and extinguishes all liens, encumbrances and junior mortgages executed subsequent to the mortgage containing the power. Ordinarily, all encumbrances and liens which the mortgagor or trustor imposed on the property subsequent to the execution and recording of the senior mortgage or deed of trust will be extinguished by sale under foreclosure of the senior instrument.

In re Foreclosure of Lien by Ridgeloach Homeowners Ass'n, 182 N.C. App. 464, 469, 642 S.E.2d 532, 536 (2007) (internal quotations and citations omitted). Therefore, foreclosure by Carolina Bank of these two properties extinguished plaintiff's claims of lien against lots 20 and 37. Because plaintiff's lien interests resulting from the claims of liens filed on lots 20 and 37, in file numbers 08 CVM 333 and 345, had been extinguished, the trial court properly ordered these claims of lien to be discharged.

2. Notices of Claim of Lien on Funds

However, a notice of claim of lien on funds only attaches to "funds that are owed to the contractor with whom the . . . subcontractor dealt and that arise out of the improvement on which the . . . subcontractor worked or furnished materials." N.C. Gen. Stat. § 44A-18 (2009). A lien on funds does not attach to real property, and thus the foreclosures of lots 20 and 37 had no effect on these filings. Nonetheless, as previously noted, the erroneous discharge of any lien on funds against SAB would be harmless, and thus we do not disturb the trial court's order discharging the notice of claim of lien on funds for improvements on lots 20 and 37 against SAB.

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V. Motion to Strike

[2] Plaintiff finally argues that the trial court erred by granting the motion to strike upon reference to the Liens in plaintiff's complaint. We disagree.

Rule 12(f) states:

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him or upon the judge's own initiative at any time, the judge may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter.

N.C. Gen. Stat. § 1A-1, Rule 12(f) (2009). "Rule 12(f) motions are addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of discretion." *Reese v. City of Charlotte*, 196 N.C. App. 557, 567, 676 S.E.2d 493, 499 (2009) (internal quotations and citation omitted). "Matter should not be stricken unless it has no possible bearing upon the litigation. If there is any question as to whether an issue may arise, the motion [to strike] should be denied." *Id.* In the instant case, plaintiff's complaint sought to enforce its filings of both a claim of lien and a notice of claim of lien on funds against all of the properties. The trial court's order struck all allegations regarding these filings. Since we have determined that the trial court did not commit reversible error when it discharged all of plaintiff's claims of lien and notices of claims of lien, the trial court did not abuse its discretion by striking any allegations related to plaintiff's filings. This assignment of error is overruled.

VI. Conclusion

Plaintiff argued only that its filings were valid against SAB's subleasehold interest in each of the properties. Because SAB's subleasehold interest in lots 25, 25B, 34, and 54B had been extinguished by general warranty deeds to the private owners, as explicitly contemplated by the Subleases, the trial court properly discharged plaintiff's notices of and claims of lien filed in 08 CVM 346-48 and 08 CVM 350. In addition, Carolina Bank's foreclosure of its deeds of trust on lots 20 and 37 extinguished plaintiff's alleged junior claims of lien. Thus, the trial court properly discharged plaintiff's claims of lien filed in 08 CVM 333 and 345. That portion of the trial court's order is affirmed.

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Although the record does not reveal whether SAB complied with N.C. Gen. Stat. § 44A-20 after it received notice of plaintiff's filings, a judgment was entered against SAB for the full amount plaintiff sought in its complaint. Therefore, even if the trial court erred by discharging all of plaintiff's notices of claims of lien on funds on all of the properties, such error would be harmless. That portion of the trial court's order is also affirmed.

Finally, the trial court did not abuse its discretion by striking the allegations in plaintiff's complaint that referred to discharged claims of lien and notices of claim of lien on funds. That portion of the trial court's order is affirmed.

Affirmed.

Judge HUNTER, JR., Robert N. concurs.

Judge STEELMAN concurs with separate opinion.

STEELMAN, Judge, concurring.

I concur in the majority opinion. It carefully and thoroughly analyzes each of the transactions involved and reaches the correct legal conclusions under the present state of our statutory and case law.

I write separately because I am concerned that the present state of our law does not provide adequate protection to suppliers of labor and materials as envisioned by Article X, section 3 of the North Carolina Constitution. In addition, the increasingly complex real estate arrangements now being used make it virtually impossible for a supplier of labor or materials to protect themselves under our lien laws.

I. Constitutional Provisions

Article X, section 3 of the North Carolina Constitution provides:

Sec. 3. Mechanics' and laborers' liens.

The General Assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject matter of their labor. The provisions of Sections 1 and 2 of this Article shall not be so construed as to prevent a laborer's lien for work done and performed for the person claiming the exemption or a mechanic's lien for work done on the premises.

The General Assembly enacted Article 2 of Chapter 44A of the General Statutes to give effect to this Constitutional provision. *See*

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Steel Corp. v. Brinkley, 255 N.C. 162, 164, 120 S.E.2d 529, 531 (1961) (“Our Constitution contains a mandate directing the General Assembly to enact legislation to give mechanics and laborers a lien on the subject matter of their labor.”); *Smith & Associates v. Properties, Inc.*, 29 N.C. App. 447, 449, 224 S.E.2d 692, 693 (1976) (“North Carolina’s Lien Law is mandated by Article X, Section 3, of our State Constitution . . .”). The purpose of the materialman’s lien statute is to “protect the interest of the contractor, laborer or materialman.” *Embree Construction Group v. Rafcor, Inc.*, 330 N.C. 487, 492, 411 S.E.2d 916, 920 (1992) (citation omitted); see also *Carolina Builders Corp. v. Howard Veasey Homes, Inc.*, 72 N.C. App. 224, 229, 324 S.E.2d 626, 629 (stating that the purpose of Article 2 is “to protect the interest of the supplier in the materials it supplies; the materialman . . . should have the benefit of materials that go into the property and give it value.” (citation omitted)), *disc. review denied*, 313 N.C. 597, 330 S.E.2d 606 (1985).

II. Contractor as Lessee

In the instant case, the property was owned by the Housing Authority, which leased the property to Willow Oaks, which sub-leased the property to SAB. Plaintiff supplied labor and materials to SAB. Any lien is valid “to the extent of the interest of the owner.” N.C. Gen. Stat. § 44A-9 (2009). In a lease situation, such as that before this Court, the lien protection of the supplier of labor and materials is illusory. The lien can only attach to the extent of the sublessee’s interest, and this evaporates upon expiration of the lease. I agree that this result is mandated by the Supreme Court decision in *Brown v. Ward*, 221 N.C. 344, 20 S.E.2d 324 (1942). However, I believe that such a holding does not provide suppliers of labor and materials with “an adequate lien” as mandated by our Constitution. The Supreme Court should reconsider its holding in *Brown* and the General Assembly should consider revising the provisions of Chapter 44A to prevent this unjust result.

III. Complex Real Estate Agreements

In the instant case, a series of complex agreements were executed to achieve two purposes: (1) the erection of dwellings upon the lots owned by the Housing Authority; and (2) by contract to eliminate the possibility of any lien ever attaching to the lots and improvements in question.

Where it is clear that the principal purpose of the agreements was the construction of improvements upon real estate to the joint bene-

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fit of the owner, the lessee, and the sublessee, those parties should be deemed to be joint venturers, and the clauses in the leases prohibiting the lessee and sublessee from causing any lien to attach to the lots be declared void as against public policy.

If such provisions in leases and subleases are enforced by the courts, then they will effectively eviscerate the constitutionally protected lien rights of laborers and materialmen.

DENISE H. BARTON, PLAINTIFF v. JOHN S. BARTON, DEFENDANT

No. COA10-1160

(Filed 6 September 2011)

1. Divorce—equitable distribution—arbitration award—appreciation in account

The increase in the balance of a couple's account between marriage and separation was active rather than passive, and the trial court did not err by adopting an arbitration award that found the appreciation to be marital.

2. Divorce—equitable distribution—marital property—account contribution

A contribution to an account held to be marital was not separate property, given the account activity that occurred during the marriage.

3. Divorce—equitable distribution—stock account—tracing contribution

The Court of Appeals rejected an argument in an equitable distribution case that the contribution of stock to an account could be traced out and would exhaust any marital component of the account.

4. Divorce—equitable distribution—separate assets—purchase ordered

An arbitrator did not err in an equitable distribution action by ordering defendant to purchase separate assets from plaintiff where real estate was awarded to defendant as marital property and defendant was ordered to pay plaintiff the value of plaintiff's separate interest.

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5. Divorce—equitable distribution—classification of property as marital—no prejudice

An argument concerning the classification of the appreciation of real estate as marital property was overruled where reclassifying the appreciation would not diminish or increase either party's interest or change the total value conferred on each party.

6. Divorce—equitable distribution—appreciation of real property

The arbitrator did not miscalculate the appreciation of real property in an equitable distribution action where defendant contended that the arbitrator incorrectly valued the property at the date of the marriage. The valuation was not the result of an evident miscalculation.

7. Divorce—equitable distribution—depreciation of car

The arbitrator in an equitable distribution action did not err by finding that the depreciation in the value of a car was divisible property. The basis for the decrease in value could not be attributed to the actions of one spouse and occurred after the date of separation.

8. Divorce—equitable distribution—marital property—boat and trailer

The arbitrator did not err in an equitable distribution action by conferring marital property status upon a boat and trailer that were purchased during the marriage.

9. Divorce—equitable distribution—marital property—401(k)

The arbitrator did not err in an equitable distribution action by concluding that defendants 401(k) account retained a marital component. Defendant did not raise a question of law but contested the valuation of the marital property component. He did not argue and the appellate court did not find that the arbitrator committed an evident miscalculation or evident mistake in the description of the property.

10. Divorce—equitable distribution—arbitrator's finding—no prejudice

Defendant's contention that an arbitrator erred in an equitable distribution action in the use of a 401(k) plan in the distrib-

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ution of assets was not addressed where defendant did not contend that the finding prejudiced him.

11. Divorce—equitable distribution—arbitrator’s award value of 401(k)—remanded

In an equitable distribution action, the confirmation of an arbitrator’s award was remanded where plaintiff conceded that the value of her 401(k) confirmed by the trial court included contributions made after the date of separation, as well as losses occurring after separation.

12. Divorce—equitable distribution—marital property—date of valuation

Marital property is to be valued on the date of separation of the parties; in this case, an equitable distribution action was remanded where there was an evident mistake in valuation of a pension plan joint and survivor annuity.

13. Divorce—equitable distribution—marital property—retirement plan

The arbitrator did not err in an equitable distribution action in the calculation of the marital portion of an executive retirement plan.

14. Divorce—equitable distribution—marital property—IRA

The arbitrator in an equitable distribution case did not err in determining the value of the marital portion of an IRA.

15. Divorce—equitable distribution—arbitration award—remanded for modification

While an arbitration decision in an equitable distribution case was remanded for modification, there was no error prejudicing defendant’s rights and providing a basis to vacate the order.

Appeal by defendant from order entered 18 May 2010 by Judge Anna Worley in Wake County District Court. Heard in the Court of Appeals 23 February 2011.

Tharrington Smith, LLP, by Alice C. Stubbs, H. Suzanne Buckley, and Steve Mansbery, for plaintiff-appellee.

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*Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by
Max R. Rodden, for defendant-appellant.*

BRYANT, Judge.

John and Denise Barton married on 12 April 1997. Prior to the marriage, Denise (plaintiff) had one minor child whose biological father was deceased. John (defendant) adopted the child. On 4 September 2006, the parties separated. On 28 December 2007, plaintiff filed a complaint seeking equitable distribution, and, defendant filed an amended answer and counterclaims for child custody, equitable distribution, and attorney fees. The parties entered into a Consent Order for Child Custody and Child Support, and, on 17 July 2008, the parties entered into a consent order for arbitration on the remaining issues.

The arbitration was to be conducted pursuant to the Family Law Arbitration Act, N.C. Gen. Stat. § 50-40 *et seq.* The parties preserved their right to appeal errors of law. The arbitration was held beginning 20 November 2008, and by the terms of the consent order, K. Edward Greene was designated as the arbitrator. Both parties were present and represented by counsel; both were permitted to testify, as well as, present exhibits. On 24 April 2009, the arbitrator signed the Arbitration Decision Award. On 28 April 2009, plaintiff filed a motion to confirm the arbitration award in the Wake County District Court. Defendant filed a motion to vacate or modify the award based on what defendant believed to be “evident partiality by the arbitrator” and “evident miscalculation of figures[.]” On 10 May 2010, following a 27 October 2009 hearing on the parties’ motions, the District Court denied defendant’s motion, confirmed the Arbitration Decision Award, and incorporated it into its order. Defendant appeals.

On appeal, defendant argues the trial court erred (I) in adopting the arbitration award and (II) in confirming the arbitration award.

Standard of Review

“[T]he Uniform Arbitration Act, which as enacted and codified in our statutory law is virtually a self-contained, self-sufficient code . . . [which] provides controlling limitations upon the authority of our courts to vacate, modify or correct an arbitration award.” *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 155, 423 S.E.2d 747, 751 (1992) (citation omitted). “If the parties contract in an arbitration agreement for judicial review of errors of law in the award, the court

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shall vacate the award if the arbitrators have committed an error of law prejudicing a party's rights." N.C. Gen. Stat. § 50-54(a)(8) (2009). "[T]he court shall modify or correct the award where . . . (1) [t]here is an evident miscalculation of figures or an evident mistake in the description of a person, thing, or property referred to in the award" N.C. Gen. Stat. § 50-55(a)(1) (2009).

If an arbitrator makes a mistake, either as to law or fact unless it is an evident mistake in the description of any person, thing or property referred to in the award . . . it is the misfortune of the party. . . . There is no right of appeal and the Court has no power to revise the decisions of judges who are of the parties' own choosing. An award is intended to settle the matter in controversy, and thus save the expense of litigation.

Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 236, 321 S.E.2d 872, 880 (1984) (discussing N.C. Gen. Stat. § 1-567.14 (1983)).

If a mistake be a sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus . . . arbitration instead of ending would tend to increase litigation.

Semon v. Semon, 161 N.C. App. 137, 142, 587 S.E.2d 460, 464 (2003) (discussing N.C. Gen. Stat. § 50-55) (citing *Cyclone Roofing Co.*, 312 N.C. at 236, 321 S.E.2d at 880). "On appeal of a trial court's decision confirming an arbitration award, we accept the trial court's findings of fact that are not clearly erroneous and review its conclusions of law de novo." *First Union Secs., Inc. v. Lorelli*, 168 N.C. App. 398, 400, 607 S.E.2d 674, 676 (2005) (citation omitted).

I

[1] Defendant contends the trial court erred in adopting the arbitration award. Specifically, he contests the "marital property" status conferred upon the following pieces of property: (A) the appreciation in Scott & Stringfellow account #1110; (B) the calculation of the amount of appreciation in Scott & Stringfellow account #1110; (C) the existence of any marital component in Scott & Stringfellow account #1110; (D) the ordered distribution of separate property; (E) the appreciation in value of Lot 8; (F) Countryview Road property; (G) the post-separation diminution in value of a Volvo; (H) a boat and trailer; (I) defendant's 401(k); (J) post-separation withdrawals from defendant's 401(k); (K) plaintiff's Prudential 401(k); (L) defendant's

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McClatchy pension plan; (M) defendant's News and Observer supplemental executive retirement plan; and (N) the SECU IRA #3966.

In equitable distribution matters, property is classified as marital or separate depending upon the proof presented as to of the nature of the assets. *Ciobanu v. Ciobanu*, 104 N.C. App. 461, 465, 409 S.E.2d 749, 751 (1991). “[T]he court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties” N.C. Gen. Stat. § 50-20(a) (2009).

Marital property is defined under North Carolina General Statutes, section 50-20(b)(1), in part, as follows:

[A]ll real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property

N.C. Gen. Stat § 50-20(b)(1) (2009). “[M]arital property shall be valued as of the date of the separation of the parties” N.C. Gen. Stat. § 50-21(b) (2009). “Separate property” is defined, in short, as follows:

[A]ll real and personal property acquired by a spouse before marriage The increase in value of separate property and the income derived from separate property shall be considered separate property.

N.C.G.S. § 50-20(b)(2) (2009).

A. Appreciation in the Scott & Stringfellow account #1110 as marital property.

Defendant argues that the arbitrator erred in conferring the status of marital property upon a \$201,937.00 increase in the balance of Scott & Stringfellow account #1110. He contends that prior to the date of separation neither he nor plaintiff took any action which amounted to “substantial activity.” Thus, the balance increase, which occurred between the date of marriage and the date of separation, was the result of passive rather than active appreciation. We disagree.

Generally, property “acquired” by a party before marriage remains that party’s separate property, and increases in value to such separate property are “acquired” by that separate estate but

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“only to the extent that the increases were passive . . .” Increases in value to separate property attributable to the financial, managerial, and other contributions of the marital estate are “acquired” by the marital estate.

Ciobanu, 104 N.C. App. at 464-65, 409 S.E.2d at 751 (internal citations omitted).

On appeal, defendant cites *O'Brien v. O'Brien*, 131 N.C. App. 411, 508 S.E.2d 300 (1998), where this Court upheld a trial court's determination that despite meetings between both spouses and the wife's broker, during which the spouses routinely chose between investment alternatives based on the broker's recommendation, such action did not elevate the status of the appreciation in the account from “purely passive” appreciation to “active appreciation” achieved by “substantial activity.” *Id.* at 419-20, 421, 508 S.E.2d at 306, 307.

At the arbitration hearing, defendant testified that he met with his broker every month or two and that he authorized every trade. Further, defendant's evidence reflects frequent trading activity in account #1110 during the time of marriage and prior to the date of separation. While defendant presents *O'Brien* as compelling the conclusion that his involvement in trading the assets within account #1110 did not amount to substantial activity as a matter of law, such is not the case. The *O'Brien* Court reviewed the trial court order for abuse of discretion and held that, on the issue of active versus passive appreciation, competent evidence supported the trial court's findings of fact and the findings supported the trial court's conclusion of law.

The arbitrator in the instant case concluded that the appreciation in account #1110, after the date of marriage and prior to the date of separation, was property acquired by the marital estate. There was no evident miscalculation or mistake in the description of the \$201,937.00 balance increase in Scott & Stringfellow account #1110. Defendant's argument is overruled.

B. The calculation of the appreciation of account #1110

[2] Defendant contends that the arbitrator erred in concluding that the \$201,937.00 balance increase in Scott & Stringfellow account #1110 contained no separate property component. Defendant contends that a \$95,546.89 contribution to the account was comprised of funds acquired prior to the marriage and was, thus, separate property. We disagree.

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While defendant cites no authority, his argument proposes what is referred to as the source of funds rule: “‘each party retain[s] as separate property the amount he or she contributed . . . , plus the increase on that investment due to passive appreciation.’” *McLean v. McLean*, 323 N.C. 543, 546, 374 S.E.2d 376, 378 (1988) (quoting *McLeod v. McLeod*, 74 N.C. App. 144, 154, 327 S.E.2d 910, 916 (1985)). However, this Court has held that where “[the] defendant failed to rebut the presumption under N.C. Gen. Stat. § 50-20(b)(1) that the funds in the account as of the date of separation were marital . . . the trial court properly classified the entire account balance as marital property.” *Stovall v. Stovall*, ___ N.C. App. ___, ___, 698 S.E.2d 680, 688 (2010).

Defendant’s records reflect \$95,546.89 in contributions to Scott & Stringfellow account #1110 during the first quarter of 2003, during the time of marriage. [Def. Exhibit 42]. Defendant testified that the funds originated from a brokerage account opened prior to the date of marriage at Wheat First Securities. Defendant’s records show two accounts at Wheat First Securities—account 4695 and account 4717—that were merged during the marriage. Prior to the balance transfer of the surviving account, account 4695, to Scott & Stringfellow account #1110 during 2003, defendant’s records reflect several transfers within account 4695 during the course of the marriage. As in subpart A, given the activity within the Wheat First account, as well as the trading activity that occurred within Scott & Stringfellow account #1110 subsequent to the transfer of the Wheat First balance there was no evident mistake in the arbitrator’s failure to classify the \$95,546.89 rollover from Wheat First as separate property. *See Ciobanu*, 104 N.C. App. at 465, 409 S.E.2d at 751 (“Increases in value to separate property attributable to the financial, managerial, and other contributions of the marital estate are ‘acquired’ by the marital estate.”). Therefore, there was no evident miscalculation in including the \$95,546.89 contribution to Scott and Stringfellow account #1110 or mistake in the description of the \$201,937.00 appreciation in account #1110 as marital property. Defendant’s argument is overruled.

C. The existence of any marital component in Scott & Stringfellow account #1110

[3] Defendant contends that any contribution of marital property to Scott & Stringfellow account #1110 can be traced out, exhausting any marital competent. Specifically, defendant contends that 682 shares

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of stock in McClatchy Newspapers, Inc. was marital property received for his employment during the marriage, and these funds were traced into Scott & Stringfellow account #1110 and completely traced out.

For the reasons stated in subparts A and B supra, we overrule this contention.

D. Distribution of separate property

[4] Defendant argues that the arbitrator erred in ordering him “to purchase separate assets from [plaintiff]” for a total of \$145,000.00. Defendant contends that the arbitrator failed to credit him with providing “all the consideration amounting to \$291,212.00 for Lots 7 and 8” from his separate funds. We disagree.

“Our courts have adopted a source of funds approach to distinguish marital and separate contributions to a single asset. Under the source of funds approach, each party retains as separate property the amount he contributed to purchase the property plus passive appreciation in value.” *McLean v. McLean*, 88 N.C. App. 285, 288-89, 363 S.E.2d 95, 98 (1987) (citing *Wade v. Wade*, 72 N.C. App. 372, 325 S.E. 2d 260 (1985)).

In *Wade*, this Court reviewed an equitable distribution order in which it was confronted with the question of whether a court could award one spouse’s separate property to the opposing party. *Wade*, 72 N.C. App. at 382, 325 S.E.2d at 270. The parties’ house had been constructed after the date of marriage on land purchased by the plaintiff prior to the marriage. *Id.* at 378, 325 S.E.2d at 267. The Court reasoned that though the house was marital property and the land was plaintiff’s separate property, they represented one asset. *Id.* at 377, 325 S.E.2d at 267. And, because of the presence of the marital property component, the trial court had the authority to include that asset in the distribution of assets. *Id.* at 382, 325 S.E.2d at 270.

If it is necessary in order to achieve an equitable distribution of the marital property that the court award that part of the [plaintiff’s] asset which is separate in character to defendant, then we believe the court has it within its power in equity to do so to the extent necessary so long as plaintiff is reimbursed or given credit for the value of his separate property contribution. That part of the asset which is separate in character should be returned in kind to the person contributing it so far as it is practical, but if it is not practical or equitable to do so, then the court must be per-

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mitted to take whatever measures are necessary in distributing the property to achieve equity between the parties.

Id. at 382-83, 325 S.E.2d at 270.

Here, the arbitrator ordered that defendant pay plaintiff \$126,000.00 and \$19,000.00—a total of \$145,000.00—for plaintiff's separate portion of the properties located at 6909 Landingham Drive (Lot 7) and 6913 Landingham Drive (Lot 8), respectively. The uncontested findings of fact state that defendant purchased Lot 7 prior to the date of marriage and titled it in the names of himself and plaintiff as joint tenants with right of survivorship. On the date of marriage, Lot 7 was valued at \$252,000.00. The arbitrator reasoned that in titling the property in the names of both parties, defendant made a gift to plaintiff of one-half of the property value; therefore, on the date of marriage, plaintiff's separate property interest in Lot 7 was valued at \$126,000.00.

Lot 8 was also purchased by defendant prior to the date of marriage and titled in the names of both parties as tenants in common. On the date of marriage, Lot 8 was valued at \$38,000.00. Under the same rationale applied to Lot 7, plaintiff's separate property interest in Lot 8 was valued at \$19,000.00.

On the date of separation, the value of Lot 7 had increased to \$320,000.00; Lot 8 had increased to \$52,500.00. The arbitrator awarded Lot 7 and Lot 8 to defendant as marital property. However, defendant was ordered to pay plaintiff \$126,000.00—representing the value of plaintiff's separate interest in Lot 7, and \$19,000.00—representing the value of her separate interest in Lot 8.

Defendant does not contest the arbitrator's conclusion that titling the properties in both his and plaintiff's names prior to the date of marriage represented a gift to plaintiff of one-half of the property interest. And, as Lot 7 and Lot 8 each contained a marital property component on the date of separation, the arbitrator had authority to distribute the properties in the award. *See id.* at 382, 325 S.E.2d at 270. The arbitrator had the power to distribute the property to defendant, including plaintiff's separate property component, so long as plaintiff was reimbursed for the value of her separate property interest. *See id.* at 382-83, 325 S.E.2d at 270. Therefore, there was no evident miscalculation or mistake in the description of the property conferred. Defendant's argument is overruled.

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E. The appreciation in value of Lot 8

[5] Defendant argues that the arbitrator erred in conferring the status of marital property upon the appreciation of Lot 8. Defendant contends that Lot 8 was purchased prior to the marriage, that no improvements were made to the property, and that “[n]o evidence was presented of any marital contributions, monetary or otherwise, to account for the appreciation of each party’s one half interest”

Presuming the accuracy of the argument, defendant does not indicate how he has been prejudiced. The trial court’s order credits both parties with a separate property interest equal to one-half of the value of Lot 8 as of the date of marriage and labels as marital property the appreciation in Lot 8 which occurred during the marriage prior to the date of separation. Defendant was awarded Lot 8 and ordered to pay plaintiff for her separate property interest as well as a distributive award “to equalize the division of marital . . . assets” Reclassifying the appreciation of Lot 8 from marital to separate property would not diminish or increase either parties’ individual one-half interest in the property and would not change the total value conferred each party pursuant to the trial court order. Therefore, we overrule this argument.

F. The marital component of the Countryview Road property

[6] Defendant argues that the arbitrator erred in calculating the appreciation of the marital component of the property located at 6016 Countryview Road. Specifically, defendant contends that the arbitrator incorrectly calculated the fair market value of the Countryview property as of the date of marriage. We disagree.

“In an equitable distribution proceeding, the trial court is to determine the net fair market value of the property based on the evidence offered by the parties. There is no single best method for assessing that value, but the approach utilized must be ‘sound[.]’” *Walter v. Walter*, 149 N.C. App. 723, 733, 561 S.E.2d 571, 577 (2002) (internal citations omitted).

Defendant testified that in August 1996, prior to his marriage, he purchased the property located at 6016 Countryview Road for \$58,500.00. Also, prior to his marriage, he invested \$6,500.00 in the property and bought out the interest of two partners who helped him refurbish the residence for \$10,000.00, bringing his cost for the property to \$75,000.00. The arbitrator found the value of the property, as of the date of marriage, to be \$75,000.00. This valuation is not the

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result of an evident miscalculation; therefore, defendant's argument is overruled. *See* N.C.G.S. § 50-55(a)(1); *see also, e.g., Semon*, 161 N.C. App. 137, 587 S.E.2d 460 (overruling the appellant's argument where he merely argued that the arbitrator should have used a different methodology in valuing the marital property).

G. The diminution of value of the Volvo

[7] Defendant argues that the arbitrator erred in finding that the depreciation in the value of a Volvo was divisible property. Plaintiff retained possession of the vehicle after the date of separation, and, after the parties separated, the vehicle was operated for an additional 40,000 miles. Defendant contends that the \$13,000.00 post-separation decrease in the value of the vehicle was not divisible property. We disagree.

“Divisible property” means . . . [a]ll appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

N.C.G.S. § 50-20(b)(4). “Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section.” N.C.G.S. § 50-20(a).

The arbitrator found that on the date of separation, the value of the vehicle was \$21,000.00. Defendant testified that after the date of separation, he drove the vehicle and had accidents that, on two occasions, resulted in “minimal damage.” The bumper sustained scrapes and the side of the vehicle a dent. At the time of the arbitration hearing, the car had not been repaired. The arbitrator made the uncontested finding that the post-separation decrease in the value of the vehicle was \$13,000.00. Because the basis for the Volvo's decrease in value cannot be attributed to the actions of one spouse and occurred after the date of separation, the arbitrator's finding that the diminution in value is properly within the definition of divisible property is not an evident miscalculation or mistake in the description. *See* N.C.G.S. §§ 50-20(b)(4), 50-55. Defendant's argument is overruled.

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H. Determination that the boat and trailer were marital property

[8] Defendant argues that the arbitrator erred in conferring marital property status upon a boat and trailer that were purchased during the marriage. Defendant contends that he withdrew \$20,000.00 from Scott & Stringfellow account #1110 for the purchase, and, because account #1110 is his separate property, the boat and trailer remain his separate property.

Because of our holdings in subparts A and B above, we overrule defendant's argument.

I. Defendant's McClatchy 401(k) plan had a marital component of \$55,500.00

[9] Defendant argues that the arbitrator erred in concluding that his account in the McClatchy Company News and Observer Publishing Company Money Shelter 401(k) Plan retained a \$55,500.00 marital component. Defendant contends that his 401(k) plan was not actively managed; therefore, any increase in value which occurred during the marriage was due to passive appreciation. On this basis, defendant contends that his McClatchy Company 401(k) plan is his separate property. We disagree.

Defendant provided exhibits and testimony in support of his contention that \$39,681.57 in marital contributions had been made to the McClatchy Company 401(k) plan. Therefore, defendant's 401(k) plan account contained a marital property component. Defendant determined that the marital property component of the 401(k) account was worth \$19,301.52 on the date of separation and \$13,169.02 at the time of that arbitration hearing. However, these figures do not reflect a decline in the value of the investments due solely to market forces. Indeed the 401(k) account appreciated \$113,043.22 between the date of marriage and the date of the arbitration hearing. Prior to the date of separation, defendant elected to take early retirement withdrawals from his 401(k) account. The early retirement withdrawals made prior to the parties separation amounted to \$42,196.04 but, according to defendant's calculations, reduced only the marital component of the 401(k) account. His records indicate that in the quarter prior to the first early retirement withdrawal, the balance of the marital property component was \$55,308.89. The arbitrator determined that on the date of separation, the value of the marital property component of the McClatchy Company 401(k) plan was \$55,500.00.

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Having established that defendant's McClatchy Company 401(k) plan contained a marital property component upon the date of separation, defendant does not raise a question of law but contests the valuation of the marital property component. As he does not argue and we do not find that the arbitrator committed an evident miscalculation or evident mistake in the description of the property, defendant's argument is overruled.

J. Postseparation withdrawals from the McClatchy 401K

[10] Defendant argues that the arbitrator erred in using the rollover of defendant's McClatchy Company 401(k) plan to two individual retirement accounts (IRAs) held by Scott & Stringfellow as a factor to favor plaintiff in the distribution of assets. However, defendant does not contend how this finding prejudiced him, and we do not address it further.

K. Plaintiff's Prudential 401(k) and related debt

[11] Defendant argues that the arbitrator erred in his determination that plaintiff's account in the North Carolina State Employee's 401(k) plan was valued at \$58,524.00 on the date of separation. Defendant contends that the marital component of the account was valued at \$87,523.38 on the date of separation. We agree.

Marital property is to be valued as of the date of the separation of the parties. N.C.G.S. § 50-21(b). At the arbitration hearing, plaintiff testified that she began making contributions to the account during the marriage, thus making all contributions made prior to the date of separation marital property. The arbitrator found that on the date of separation, 4 September 2006, the marital component of plaintiff's 401(k) account was valued at \$58,524.00. However, according to plaintiff's records, on 4 September 2006, her account balance in the State of North Carolina 401(k) Plan was \$87,523.38. No evidence of separate property was presented. The arbitrator awarded plaintiff the balance of the 401(k) plan, \$58,524.00. On appeal, plaintiff concedes that the figure the trial court confirmed as plaintiff's 401(k) account balance on the date of separation included plaintiff's contributions made after the date of separation, as well as, losses in the account occurring after the date of separation. Given that the trial court ordered defendant to pay plaintiff a distributive award "to equalize the division of marital and divisible assets and debts[,]” we remand this matter for modification of the award of the marital and separate property components of plaintiff's Prudential 401(k) plan as well as

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the distributive award payable to plaintiff in a manner consistent with this opinion.

L. Date of separation value of defendant's McClatchy Company Pension Plan

[12] Defendant argues that the arbitrator erred in finding that the value of the joint life portion of defendant's McClatchy Company Pension Plan account on the date of separation was \$20,648.00 and erred in assigning no value to the 100% survivor portion of the account. Defendant contends that on the date of separation, the joint life portion of the account was valued at \$18,039.00 and the 100% survivor portion valued at \$5,589.00. We agree in part.

Marital property is to be valued as of the date of the separation of the parties. N.C.G.S. § 50-21(b). Plaintiff and defendant separated on 4 September 2006. The Arbitration Decision Award confirmed and incorporated by the trial court in its order states that defendant's McClatchy Company retirement plan account is marital property with a date of separation value of \$20,648.00. The record reflects that a \$20,648.00 lump sum value of defendant's joint and survivor annuity through the McClatchy Pension Plan corresponds to a benefit valued as of 1 July 2005. On the same page of the record, the lump sum annuity benefit valued as of 4 September 2006, the date of separation, is listed as \$18,039.00. There is no other evidence in the record of a different account valuation as of the date of separation. The finding that the lump sum value of defendant's McClatchy Pension Plan joint and survivor annuity on the date of separation was \$20,648.00 rather than \$18,039.00 is an evident mistake. Therefore, we reverse and remand the matter for modification of the trial court's order to reflect a lump sum annuity benefit valued as of 4 September 2006, the date of separation, in the amount of \$18,039.00. *See* N.C. Gen. Stat. § 50-55(a)(1). Because the arbitration award as confirmed by the trial court's order compels defendant to retain plaintiff as the beneficiary of the pension plan, we do not otherwise consider the valuation of the survivor annuity benefit.

M. The marital component of defendant's News and Observer supplemental executive retirement plan

[13] Defendant argues that the arbitrator erred in finding that thirty percent of defendant's News and Observer Supplemental Executive Retirement Plan account was marital property. Defendant contends that the fraction used to determine the marital portion of the Executive Retirement Plan account was not in accordance with the

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directive as set out in N.C. Gen. Stat. § 50-20.1(d). Defendant asserts that the denominator of the fraction should reflect the duration of defendant's employment with the News and Observer from 1977 through 2000, rather than only the time defendant participated in the plan from 1989 through 2000. We disagree.

Under North Carolina General Statutes, section 50-20.1, “[t]he award of vested pension, retirement, or other deferred compensation benefits may be made payable . . . (2) [o]ver a period of time in fixed amounts by agreement” N.C. Gen. Stat. § 50-20.1(a)(2) (2009). “The award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested and nonvested pension, retirement, or deferred compensation benefit, to the total amount of time of employment.” N.C. Gen. Stat. § 50-20.1(d) (2009). “This section . . . shall apply to all pension, retirement, and other deferred compensation plans and funds” N.C.G.S. § 50-20.1(h). Known as the “fixed percentage method,” the Court has interpreted the description of the denominator in section 50-20.1(d) as “being the total amount of time the employee spouse is employed in the job which earned the vested pension or retirement rights.” *Gagnon v. Gagnon*, 149 N.C. App. 194, 198, 560 S.E.2d 229, 231 (2002) (citation and internal quotations omitted).

Defendant began working for the McClatchy Company on 2 May 1977. Defendant testified that on 15 December 1989, he was admitted to participate in the News and Observer Supplemental Executive Retirement Plan, a non-qualified retirement plan funded entirely by the News and Observer. The plan had no formal service requirement for plan entry. Defendant testified that he believed his entry into the plan was intended as “golden handcuffs,” “granted to [defendant] to retain [him] as an employee at the News & Observer.” The arbitrator determined that the award was to be premised upon the time the marriage existed (simultaneous with the employment that earned the benefit)—34 months, as compared to the amount of time defendant participated in the retirement plan (from 15 December 1989 until 26 February 2000)—123 months. Acknowledging that this is a non-qualified plan with no formal service requirement or qualification for plan entry and participation is conferred on a case-by-case basis, the arbitrator's determination that the amount of time defendant participated in the News and Observer Supplemental Executive Retirement Plan equals the total amount of time defendant earned the benefit conferred upon him by the plan—123 months is not an evident mistake. N.C.G.S. § 50-55(a)(1). Therefore, defendant's argument is overruled.

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N. The marital component of SECU IRA

[14] Defendant argues that the arbitrator erred by finding that the value of the Individual Retirement Account (IRA) held in State Employees' Credit Union (SECU) account #3966 on the date of separation was \$6,525.00. Defendant contends that, like the valuation of the McCatchy Pension Plan discussed in subpart L supra, the arbitrator evidently selected an account value other than the value on the date of separation. However, here, it is not evident that the value reflected for account #3966 at the date of separation was a mistake.

Defendant testified that he participated in a defined benefit plan that was valued as a lump sum and rolled over to an IRA held by the SECU in account #3966. The amount rolled into the IRA was \$109,425.00. Defendant testified that most of the property was separate. However, he worked for eight-and-a-half months during his marriage to accrue benefits under the defined benefit plan; therefore, the account balance rolled into account #3966 contained some component of marital property. Defendant testified that the amount of his required minimum distribution, calculated from the balances of two IRAs and a 401(k) plan, was deducted entirely from SECU account #3966. Defendant's evidence details both the calculation of the required minimum distribution as well as the deduction from the SECU account and indicates that on 30 June 2005 the balance of account #3966 was \$109,425.08. Following the separation of the parties on 4 September 2006, account #3966 was valued at \$55,461.84. Defendant testified that the account was "totally deleted" at the time of the arbitration hearing, but, on 1 July 2005, the marital component of the account was \$6,525.00. The arbitrator's determination that defendant's required minimum distribution did not reduce the marital property component of account #3966, valued at \$6,525.00, was not an evident mistake. N.C.G.S. § 50-55(a)(1). Therefore, defendant's argument is overruled.

II

[15] Defendant argues that the trial court erred in adopting the arbitration decision award because of the aforementioned asserted errors. However, while we reverse and remand this matter to the Wake County District Court for modification of two portions of the court's order, defendant does not argue nor do we find that the arbitrator or the trial court committed an error of law prejudicing defendant's rights, providing a basis to vacate the order. *See* N.C.G.S. 50-54(a)(8). Therefore, we overrule defendant's argument.

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Affirmed in part; reversed in part; and remanded.

Judges ELMORE and GEER concur.

CHRISTIE ARRINGTON AS ADMINISTRATOR OF THE ESTATE OF NYLES ARRINGTON AND CHRISTIE ARRINGTON, INDIVIDUALLY, PLAINTIFFS v. ROSALINDA MARTINEZ, AS OWNER OF LA ROSA LINDA'S MEXICAN RESTAURANT, MICHELLE PEELE, INDIVIDUALLY, IN HER OFFICIAL CAPACITY AS AN OFFICER OF THE RALEIGH POLICE DEPARTMENT, AND IN HER CAPACITY AS A SECURITY GUARD WITH LA ROSA LINDA'S MEXICAN RESTAURANT, CITY OF RALEIGH, AND RALEIGH POLICE DEPARTMENT, DEFENDANTS

No. COA10-1204

(Filed 6 September 2011)

1. Appeal and Error—appealability—partial summary judgment—denial of summary judgment on sovereign immunity

A City's appeal from the denial of summary judgment on the grounds of sovereign immunity was properly before the appellate court, but the City's appeal of a partial summary judgment on a wrongful death claim was not.

2. Appeal and Error—standard of review—summary judgment—governmental immunity

The City's appeal from the denial of summary judgment on a wrongful death claim was reviewed de novo to determine whether the City was entitled to judgment as a matter of law based on governmental immunity.

3. Immunity—governmental—limited waiver—execution of release required

A plaintiff with a wrongful death claim did not trigger a waiver of governmental immunity by agreeing to sign releases. The City's limited waiver resolution required that the release be executed.

4. Immunity—governmental—initial self-insurance with limited waiver—subsequent excess policies

Despite the existence of insurance policies for damages in excess of the first one million dollars, which defendant city self-insured, there was no genuine issue of fact as to plaintiff's failure to trigger the City's waiver of immunity for the first one million dollars.

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5. Appeal and Error—preservation of issues—sovereign immunity—North Carolina constitutional claims—dismissed below—not raised in brief

Whether claims against a city under the North Carolina Constitution were barred by sovereign immunity was not considered where those claims had been dismissed below and were not before the court, and plaintiff did not include the argument in her brief.

Appeal by defendant City of Raleigh from order entered 11 June 2010 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 10 March 2011.

The Key Law Firm, by Mark A. Key, for plaintiff-appellees.

City of Raleigh Attorney Thomas A. McCormick, by Deputy City Attorney Dorothy K. Leapley and Hunt K. Choi, for defendant-appellant, City of Raleigh.

STROUD, Judge.

The City of Raleigh (“defendant”) appeals from a trial court’s order granting in part its motion for summary judgment but denying its “motion for summary judgment . . . based on immunity[.]” For the following reasons, we reverse and remand the trial court’s order.

I. Background

Plaintiff, individually and as an administrator of Nyles Arrington’s estate, filed a complaint against Rosalinda Martinez, the owner of La Rosa Linda’s Mexican Restaurant; Michelle Peele, in her capacity as an officer for the Raleigh Police Department and as security for La Rosa Linda’s Mexican Restaurant; the City of Raleigh; and the Raleigh Police Department (collectively referred to herein as “defendants”) on 11 December 2006, alleging several claims arising out of the fatal shooting of plaintiff’s decedent, Nyles Arrington, by Officer Michele Peele on 28 August 2005. Peele was a full-time law enforcement officer with the Raleigh Police Department working on a part time basis as a “uniformed armed security guard” at La Rosa Linda’s Mexican Restaurant. Plaintiff’s complaint alleged claims of (1) respondeant superior against La Rosa Linda’s; (2) premises liability against La Rosa Linda’s; (3) a civil rights violation under 42 U.S.C. § 1983 against all defendants; (4) violations of the North Carolina Constitution, Art. I, Sections 19, 20, 21, 35 and 36 against Peele, the Raleigh Police

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Department (“the Police Department”) and the City of Raleigh (“the City”); (5) wrongful death against Peele, the Police Department, and the City; (6) negligence in “hiring, retaining, and/or supervising” Peele against the City and Police Department; and (7) punitive damages against all defendants. On 9 January 2007, the City and Police Department gave notice of removal of plaintiff’s claim to the United States District Court for the Eastern District of North Carolina pursuant to 28 U.S.C. § 1441(b) based upon plaintiff’s claim under 42 U.S.C. § 1983. Thereafter, on 22 January 2007, plaintiff filed in federal court an amended complaint which did not include the 42 U.S.C. § 1983 claim. The other claims were the same as in the original complaint, although the amended complaint made additional allegations as to the third claim under the North Carolina Constitution. Plaintiff did not seek remand to the state court, so the case proceeded in federal court.

The City filed its answer to the amended complaint on 12 February 2007. The City denied plaintiff’s substantive factual allegations and alleged 19 separate affirmative defenses. We will not list each affirmative defense raised, as most are not relevant to the arguments in this appeal. The affirmative defense which is pertinent to this appeal is as follows:

TWELFTH DEFENSE

The City of Raleigh is a municipal corporation. Providing police service is a governmental function. The City of Raleigh and its officers, in their official capacity, possess sovereign immunity. The City has not waived its sovereign immunity and this immunity bars Plaintiffs’ [sic] claims.

On 10 April 2007, plaintiff voluntarily dismissed all claims against the Raleigh Police Department with prejudice. On 25 March 2008, the District Court granted defendant Peele’s motion for judgment on the pleadings, dismissing plaintiff’s North Carolina Constitutional claims against her and granted the City’s motion for judgment on the pleadings, dismissing plaintiff’s North Carolina Constitutional and punitive damages claims against it. The parties conducted discovery in the federal action and two defendants, the City and Peele, moved for summary judgment on 14 July 2008. On 26 January 2009, the United States District Court partially granted the City’s motion but denied summary judgment on the City’s sovereign immunity defense and denied Peele’s motion for summary judgment. Both the City and Peele filed interlocutory appeals as to the denial of sovereign immunity, and

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on 5 March 2010, the United States Court of Appeals for the Fourth Circuit issued an opinion which vacated the District Court's summary judgment order and remanded the action to Wake County Superior Court, holding that "the district court should not have maintained jurisdiction over this action upon the early dismissal by the plaintiff of the federal claims[.]" as the case calls for the "resolution of the important and potentially far-reaching issues of state law[.]" *Arrington v. City of Raleigh*, 369 Fed. Appx. 420, 424 (4th Cir. 2010) (unpublished) (per curiam).

Upon remand to Superior Court, Wake County, on 1 April 2010, the City filed a motion for summary judgment. On 3 May 2010, the City filed an amended motion for summary judgment. On 20 May 2010, the Superior Court entered an order recognizing and adopting the "pleadings filed, discovery conducted, and certain orders entered while this action was pending" before the federal court. The trial court adopted

the U.S. District Court's order on the motions for judgment on the pleadings filed by Defendants Peele and City of Raleigh [thus ordering that] Plaintiffs' claims against Defendant Peele arising under the North Carolina Constitution are DISMISSED with prejudice, Plaintiffs' claims against Defendant City of Raleigh arising under the North Carolina constitution are DISMISSED with prejudice, and Plaintiffs' claims for punitive damages against the City of Raleigh are DISMISSED with prejudice[.]

(Emphasis in original.)

The City's motion for summary judgment was heard on 17 May 2010; by order entered on 11 June 2010, the Superior Court granted summary judgment allowing the City's motion in part, dismissing "all claims asserted by Christi Arrington in her individual capacity against all Defendants[;]" "all claims of negligent hiring, training, supervision, or retention of an incompetent employee" against the City; denying the City's motion "based on a lack of agency and based on immunity[;]" and denying "Defendant Martinez's verbal motion to dismiss[.]" The City timely filed notice of appeal from the 11 June 2010 order which "denied the City's motion seeking summary judgment on grounds of sovereign or governmental immunity."

II. Interlocutory appeal

[1] We first address the interlocutory nature of the City's appeal. We have stated that

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[a]n order is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy. There is generally no right to appeal an interlocutory order.

An interlocutory order is subject to immediate appeal only if (1) the order is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to Rule 54(b) of the Rules of Civil Procedure, or (2) the trial court's decision deprives the appellant of a substantial right that will be lost absent immediate review.

Gregory v. Penland, 179 N.C. App. 505, 509, 634 S.E.2d 625, 628 (2006) (citations and quotation marks omitted). As plaintiff's wrongful death claim, as administrator of Nyles Arrington's estate, against the City, as well as various other claims against defendants Peele and Rosalinda Martinez, have not been resolved, the Superior Court's 11 June 2010 ruling on summary judgment was not a final order and the City's appeal is interlocutory. However, a defendant's appeal from denial of summary judgment on grounds of sovereign immunity is immediately appealable, as "it represents a substantial right[.]" *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009). Accordingly, the City's appeal is properly before us.

III. Standard of review

[2] We have noted that

The entry of summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c); see also *Johnson v. Beverly-Hanks & Assoc.*, 328 N.C. 202, 207, 400 S.E.2d 38, 41 (1991) (stating that "[i]t is well settled that a party moving for summary judgment is entitled to such judgment if the party can show, through pleadings, depositions, and affidavits, that there is no genuine issue of material fact requiring a trial and that the party is entitled to judgment as a matter of law") (citations omitted). "The party who moves for summary judgment has the initial burden to prove that there are no disputed factual issues[;]" however, "[o]nce the moving party has met this initial burden, the nonmoving party must produce a forecast of evidence demonstrating that he or she will be able to

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make out a prima facie case at trial.” *Johnson*, 328 N.C. at 207, 400 S.E.2d at 41 (citations omitted).

We review a trial court order granting or denying a summary judgment motion on a *de novo* basis, with our examination of the trial court’s order focused on “determin[ing] whether there is a ‘genuine issue of material fact’ and whether either party is ‘entitled to judgment as a matter of law.’” *Stone v. State*, 191 N.C. App. 402, 407, 664 S.E.2d 32, 36 (2008) (quoting *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007)), *disc. review denied and app. dismissed*, 363 N.C. 381, 680 S.E.2d 712 (2009). As part of that process, we view the evidence “ ‘in the light most favorable to the nonmoving party.’ ” *Brown v. City of Winston–Salem*, 171 N.C. App. 266, 270, 614 S.E.2d 599, 602 (quoting *Moore v. Coachmen Industries*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 775 (1998)), *cert. denied*, 360 N.C. 60 (2005).

Kirkpatrick v. Town of Nags Head, ___ N.C. App. ___, ___ S.E.2d ___, 2011 N.C. App. LEXIS 1375, at *8-10 (N.C. App. July 5, 2011). The City claims that it is entitled to summary judgment because plaintiff’s claims are barred by governmental immunity. The City argues that providing police service is a governmental function for which is immune from suit. Although the facts surrounding Officer Peele’s shooting of decedent are certainly in dispute, there is no genuine issue of material fact as to the facts which are relevant to a determination of governmental immunity. We will thus review the trial court’s order *de novo* to determine whether the city is “entitled to judgment as a matter of law[,]” *see id.*, on the grounds of governmental immunity.

IV. Analysis

[3] The provision of police services is a governmental function which is protected by governmental immunity, although this immunity can be waived in whole or in part.

“As a general rule, the doctrine of governmental, or sovereign immunity bars action against, *inter alia*, the state, its counties, and its public officials sued in their official capacity.” *Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 683, 529 S.E.2d 458, 461 (2000) (citation omitted). The doctrine applies when the entity is being sued for the performance of a governmental function. *Id.* “ ‘[S]uits against public officials are barred by the doctrine of governmental immunity where the official is performing a governmental function, such as providing

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police services.’ ” *Parker v. Hyatt*, 196 N.C. App. 489, 493, 675 S.E.2d 109, 111 (2009) (citation omitted). A town or municipality may waive sovereign immunity through the purchase of liability insurance. *Satorre v. New Hanover Cty. Bd. of Comm’rs*, 165 N.C. App. 173, 176, 598 S.E.2d 142, 144 (2004). However, “[i]mmunity is waived only to the extent that the [municipality] is indemnified by the insurance contract from liability for acts alleged.’ ” *Id.* (quoting *Combs v. Town of Belhaven*, 106 N.C. App. 71, 73, 415 S.E.2d 91, 92 (1992)). “A governmental entity does not waive sovereign immunity if the action brought against them is excluded from coverage under their insurance policy.” *Patrick v. Wake Cty. Dep’t of Human Servs.*, 188 N.C. App. 592, 596, 655 S.E.2d 920, 923 (2008).

Lunsford v. Lori Renn, ___ N.C. App. ___, ___, 700 S.E.2d 94, 100 (2010), *disc. review denied*, ___ N.C. ___, 707 S.E.2d 244 (2011).

By statute, a City may, but is not required to, waive governmental immunity. North Carolina General Statutes § 160A-485 sets forth how a City may waive immunity:

(a) Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Participation in a local government risk pool pursuant to Article 23 of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section. Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability. No formal action other than the purchase of liability insurance shall be required to waive tort immunity, and no city shall be deemed to have waived its tort immunity by any action other than the purchase of liability insurance. *If a city uses a funded reserve instead of purchasing insurance against liability for wrongful death, negligence, or intentional damage to personal property, or absolute liability for damage to person or property caused by an act or omission of the city or any of its officers, agents, or employees acting within the scope of their authority and the course of their employment, the city council may adopt a resolution that deems the creation of a funded reserve to be the same as the purchase of insurance under this section. Adoption of such a resolution waives the city’s governmental immunity only to the extent specified in the council’s resolution, but in no event greater than funds available in the funded reserve for the payment of claims.*

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(b) An insurance contract purchased pursuant to this section may cover such torts and such officials, employees, and agents of the city as the governing board may determine. The city may purchase one or more insurance contracts, each covering different torts or different officials, employees, or agents of the city. . . .

N.C. Gen. Stat. § 160A-485 (2009) (emphasis added). Here, the Raleigh City Council adopted a resolution waiving governmental immunity to a limited extent, established a self-funded reserve (“SFR”) for claims up to \$1 million, and obtained insurance for claims above this amount, up to \$11 Million (“the resolution”). Specifically, the resolution provides in pertinent part as follows:

AUTOMOBILE DAMAGE CLAIMS WAIVER OF SOVEREIGN IMMUNITY GUIDELINES ADOPTED¹

Chairperson Shanahan reported the Law and Public Safety Committee recommends that the Council adopt the following interim policy guidelines on the waiver of sovereign immunity only for those claims or judgments in the range of one cent to one million dollars.

**WAIVER OF IMMUNITY
INTERIM GUIDELINES**

Prior to enactment of final guidelines, the City adopts the following interim policy on the waiver of immunity for claims or judgments in the range of \$.01 to \$1,000,000.00:

1. The City will waive sovereign immunity and waive immunity for public officials acting in their official capacity only and only to the extent set forth herein.
2. This policy applies only to claims that arose on or after January 1 1998.
3. This policy is intended only to waive the City’s immunity in the limited circumstances described herein. This policy is not intended to alter or expand the City’s liability, to limit available defenses, to waive immunity from certain types of damages, or to affect any principle of law other than waiver of sovereign immunity and immunity for public officials acting in their official capacities.

1. Neither party argues that the resolution’s title which refers to “Automobile Damage Claims” has any relevance to this case, although it does not involve “Automobile Damage” in any way. In fact, the City has acknowledged that plaintiff had a potential claim within the terms of the resolution, although limited in amount to \$18,325.26.

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4. The City will waive immunity only for those claims proximately caused by the wrongdoing or negligence of the City or its employee. The City will not waive immunity in any instance in which an affirmative defense exists that would preclude recovery.

5. If a claimant or plaintiff agrees to execute a release of all claims against all persons, firms, and corporations on account of the incident giving rise to the claim, the City will pay for the following damages if proven to be proximately caused by the incident:

A. All property damage;

B. Medical expenses;

C. Chiropractic expenses or physical therapy expenses for no more than three consecutive months during any calendar year;

D. Lost wages for time authorized out of work by physicians licensed to practice medicine in North Carolina;

E. Out of pocket expenses, but no attorney's fees.

The City will not waive immunity for claims or damages for pain and suffering or for any other element of damage not listed above.

The resolution above provided for waiver of immunity as to claims covered by the SFR up to \$1,000,000.00. The City had no insurance to cover claims under \$1,000,000.00 or in excess of \$11,000,000.00. The City had two policies of excess insurance. The policy issued by Genesis Insurance Company covered claims from \$1,000,000.00 to \$2,000,000.00; the policy issued by the Insurance Company of the State of Pennsylvania provided coverage from claims above \$2,000,000.00 up to \$11,000,000.00. However, these policies do not provide coverage until and unless the SFR has been exhausted.

Our courts have consistently held that a waiver of sovereign immunity extends only as far as the municipality has determined. In addition, statutes as to waiver of governmental immunity are strictly construed against waiver. *See Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 N.C. App. 435, 438-39 477 S.E.2d 179, 181 (1996); *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 25-26, 348 S.E.2d 524, 527 (1986) (noting that “[w]aiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the right to sovereign immunity, must be strictly construed.” *Guthrie v. State Ports Authority*, 307 N.C. 522,

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537-38, 299 S.E.2d 618, 627 (1983). *See also Floyd v. Highway Commission*, 241 N.C. 461, 85 S.E.2d 703 (1955); *Construction Co. v. Dept. of Administration*, 3 N.C. App. 551, 165 S.E.2d 338 (1969).” The terms of N.C. Gen. Stat. § 160A-485 make it clear that immunity is waived “only to the extent that the city is indemnified by the insurance contract from tort liability.” A City is permitted to determine the extent of its waiver of immunity, as the statutes states that “[a]doption of such a resolution waives the city’s governmental immunity only to the extent specified in the council’s resolution, but in no event greater than funds available in the funded reserve for the payment of claims.” *Id.*

The City argues that it has not waived immunity as to plaintiff’s claims because those claims do not fall within the conditions of its limited waiver resolution for several reasons. First, the resolution provides that immunity will be waived and certain types of damages paid only *if* a plaintiff or claimant agrees to certain conditions, including execution of a release. Even then, the City has agreed to pay only specified types of damages. Section 5 of the resolution states that “[i]f a claimant or plaintiff agrees to execute a release of all claims against all persons, firms, and corporations on account of the incident giving rise to the claim, the City will pay for” certain specific types of damages proximately caused by the incident. Thus, the plaintiff has to agree to accept only the specific damages which the City has agreed to pay, and to waive recovery of any additional damages from any other party, in order to receive the benefit of the waiver. The City argues that plaintiff has not executed such a release and has not agreed to limit damages recovered to those specified by the resolution. Instead, plaintiff has itemized the damages sought in discovery responses filed just 13 days prior to the summary judgment hearing as follows:

Los[t] Wages:	\$620,000.00
Funeral Expenses:	\$3[,]210.00
Medical Expenses:	\$15,115.68
Out of Pocket Expenses:	\$34,242.00
Loss of Consortium:	\$500,000.00
Punitive Damages:	\$1,512,120.00
Pain and Suffering:	\$1,000,000.00

It is undisputed that plaintiff has not executed any sort of release of her claims arising out of this incident as to any party. On 5 October 2007, plaintiff answered requests for admissions regarding this issue as follows:

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25. You have not executed a release of all claims against all persons, firms, and corporations on account of the August 28, 2005 incident.

RESPONSE: Admitted.

26. You have not agreed to execute a release of all claims against all persons, firms, and corporations on account of the August 28, 2005 incident.

RESPONSE: Admitted.

Plaintiff filed an affidavit on 13 April 2010 in which she alleges that “On this date I agree to execute release of all persons, firms and corporations on account of the incident which is the subject of this litigation for the damages enumerated in the waiver of immunity and to the extent required by the waiver.” She claims that her affidavit does not contradict her prior answer to the request of admissions quoted above because “[t]he plain language of the waiver resolution does not require that a claimant agrees [sic] to execute a release during a certain period of time. It does not preclude a person from agreeing to execute a release at the conclusion, in the middle or in the beginning of litigation.” She further claims that “I have never refused to agree to execute a release of all claims against all persons, firms, and corporations on account of the August 28, 2005 [sic].” In addition, plaintiff states that she will not execute a release in compliance with the terms required by the resolution, as she states that “[t]his affidavit is not intended to limit any damages in excess of \$1,000,000.00 which are covered by any insurance policies in effect at time of this incident.” Based upon this affidavit, plaintiff argues before this Court that “[t]he resolution requires that claimants or plaintiff *agree* to execute a release. It does not require the plaintiff to *execute* a release.” (emphasis added.)

Plaintiff’s argument as to the interpretation of the resolution has no basis in law or logic. Essentially, she claims that she *agrees* to execute a release, but she has not done so and will not actually execute a release until she decides to do so—even as late as the conclusion of this litigation which has already been pending for over four years. Even then, she agrees to execute a release which is not in accord with the terms required by the resolution. Plaintiff’s argument overlooks the basic nature of governmental immunity as a defense. Governmental immunity is an immunity from *suit*—not just immunity from having to pay damages at the conclusion of years of litigation. See *Craig*, 363 N.C. at 337-38, 678 S.E.2d at 354 (stating that “[a]

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noted by the United States Supreme Court, such immunity is more than a mere affirmative defense, as it shields a defendant entirely from having to answer for its conduct at all in a civil suit for damages. *See Mitchell v. Forsyth*, 472 U.S. 511, 525, 86 L. Ed. 2d 411, 424 (1985). Thus, unlike affirmative defenses explicitly listed in our Rules of Civil Procedure, *see* N.C.G.S. § 1A-1, Rule 8(c) (2007), the denial of summary judgment on grounds of sovereign immunity is immediately appealable, though interlocutory, because it represents a substantial right, as “[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial.” *Mitchell*, 472 U.S. at 526, 86 L. Ed. 2d at 425.”). Waiver of immunity must be established at the outset of a lawsuit. In fact, our courts have held that immunity raises a jurisdictional issue, although it is unsettled as to whether it is personal or subject matter jurisdiction. *See Zimmer v. North Carolina Dept. of Transp.*, 87 N.C. App. 132, 133-34, 360 S.E.2d 115, 116-17 (1987). However, for purposes of this case, it is irrelevant whether immunity implicates personal or subject matter jurisdiction. Because it is a jurisdictional matter, a plaintiff’s complaint must affirmatively demonstrate the basis for the waiver of immunity when suing a governmental entity which has immunity. *See Eaker v. Gower*, 189 N.C. App. 770, 774, 659 S.E.2d 29, 32 (2008) (noting that “[w]hen jurisdiction is challenged, plaintiff has the burden of proving prima facie that a statutory basis for jurisdiction exists. The failure to plead the particulars of personal jurisdiction is not necessarily fatal, so long as the facts alleged permit the reasonable inference that jurisdiction may be acquired.” (citation omitted)). Plaintiff made the required allegations in her complaint that the City had purchased a policy of general liability insurance and had thereby “waived any applicable immunity defenses in tort[.]” The City, in its answer, denied waiver of immunity and raised immunity as an affirmative defense. Upon discovery, it appeared that the City had not made a wholesale waiver of immunity by purchase of liability insurance, but instead had made a limited waiver as described above, which is specifically permitted by North Carolina General Statutes § 160A-485. We need not set forth a bright line rule that a plaintiff would need to execute a release as required by the resolution prior to filing suit or even within a particular time after filing suit, as here plaintiff has taken the position that she will not ever execute a release in accord with the terms of the resolution. This lawsuit has been pending for over four years and plaintiff has been aware of the resolution’s requirements since last 5 October 2007, when in her responses to defendant City’s requests for admis-

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sion she admits that she had not executed a release as required by the resolution. Under these circumstances, there is no question that plaintiff has not triggered the waiver of immunity as defined by the City's resolution.

[4] Plaintiff also argues that the City's purchase of insurance to cover damages in excess of the limited waiver resolution has waived its immunity. Apparently, plaintiff takes the position that she can skip over the first million, which is self-insured by the City by the SFR, and recover only upon the policies which provide excess coverage for damages in excess of \$1 million. Although the City has insurance policies which cover claims in excess of \$1,000,000.00, the City argues that it has no coverage for plaintiff's claim because the terms of the policies require that the City first pay its entire SFR on a claim before the insurance will provide any indemnification. The Genesis policy reads:

SECTION I—COVERAGE

A. Insuring Agreement

1. Subject to the applicable **Limit(s) of Insurance** of this Coverage Part, we agree to indemnify the **Insured** for **ultimate net loss** in excess of the **retained limit** which the **Insured** becomes legally obligated to pay because of **bodily injury, personal injury, advertising injury, or property damage** which occurs during this policy period and to which this insurance applies. **Our** indemnification obligation shall not arise until the **Insured** itself has paid in full the entire amount of its **retained limit**. The **retained limit** must be paid by the **Insured**, and may not be paid or satisfied, in whole or in part, by any other source of payment, including but not limited to other insurance, or negated, in whole or in part, by any form of immunity to judgment or liability. No other obligation or liability to pay sums or performance acts or services is covered. . . .

(Bold in original.) The "retained limit" as noted in the agreement, is the City's \$1,000,000.00 SFR and is specifically listed on the agreement's "Declarations Page[.]" The definition of "retained limit" contained in the Genesis policy reiterates that

Payment of the **retained limit** may not be satisfied by any other insurance or negated in whole or part by any form of immunity to judgment or liability.

(Bold in original.) Likewise the Pennsylvania policy states the following:

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Our duty to pay any sums that **you** become legally obligated to pay arises only after there has been a complete expenditure of **your retained limit** by means of payments for judgments, settlements, or defense costs. **Your retained limit** shall not be exhausted by **your** office expenses, **employees'** salaries, or expenses of any claims servicing organization that you have engaged. **We** will then be liable only for that portion of damages in excess of **your retained limit** up to our Limits of Insurance.

The Pennsylvania policy required an "expenditure" of the City's \$2,000,000.00 retained limit "by means of payments for judgments, settlements, or defense costs before providing indemnification.

Plaintiff's position is that she should be able to benefit from the City's SFR and insurance for all types of damages she claims and also to preserve her rights to recover against other potentially liable parties. Plaintiff argues that the City "cannot arbitrarily and capriciously prohibit parties from recovering under its laws." Yet plaintiff has not presented any legal basis for claiming that the City's SFR and insurance coverage are arbitrary or capricious. North Carolina General Statutes § 160A-485(a) provides that a municipality *may* purchase insurance coverage and *may* waive its immunity to whatever extent it determines appropriate. It may also elect not to waive its immunity at all, in which case plaintiff would have no possibility of any recovery from the City. Based on the City's limited waiver, the City has acknowledged that plaintiff would be entitled to recover \$18,325.68 for medical and funeral expenses from the SFR, for damages permitted by the resolution as documented by bills provided by plaintiff in discovery. In fact, the City tendered a check in this amount to plaintiff on or about 3 May 2010, in conjunction with a Release and Settlement Agreement, but she declined to execute the release or accept the check. There is thus no genuine issue of material fact as to plaintiff's failure to trigger the City's waiver of immunity, and the trial court erred in denying the City's motion for summary judgment as to governmental immunity.

[5] We recognize that not all claims against the sovereign are barred by governmental immunity. In particular, our Courts have determined that some types of claims under the North Carolina constitution are not barred by governmental immunity. *See Craig*, 363 N.C. at 338, 678 S.E.2d at 354 (stating that "[i]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." (quoting *Corum v. University of North Carolina Through Bd. of Governors*,

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330 N.C. 761, 782, 413 S.E.2d 276, 289, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992)). Plaintiff's complaint did include a claim under the North Carolina Constitution against Peele and the City. However, we will not address this potential constitutional issue for two reasons. First, the superior court entered an order dismissing plaintiff's constitutional claims on 20 May 2010, so at this point these claims are not before the court. See *Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960) (stating that "[t]he courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions." (citation omitted)). In addition, plaintiff has not argued or even mentioned in the record or her brief as an alternative basis for the trial court's denial of summary judgment the theory that the City's governmental immunity may not be applicable to her constitutional claims.² North Carolina Rule of Appellate Procedure 28(c) states that "[w]ithout 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 . . ." N.C.R. App. P. 28(c); See also N.C.R. App. P. 10(c) (stating that "[w]ithout 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. . . ."). We believe that in the absence of argument by either party on the issue of the applicability of governmental immunity to plaintiff's constitutional claims, it is not appropriate for us to address it. Our Supreme Court noted in *Viar v. N.C. DOT* that we are not to review issues "not raised or argued by" the appellant. 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam). Although *Viar* addresses violations of the appellate rules, here we are not confronted by a rule violation, and we believe that in the absence of a rule violation, it is even less appropriate for us to presume to create arguments for the parties. In *Kirkpatrick v. Town of Nags Head*, — N.C. App. —, — S.E.2d —, 2011 N.C. App. LEXIS 1375 (N.C. App. July 5, 2011), this Court

2. It is apparent that the trial court did not base its denial of summary judgment upon the existence of plaintiff's constitutional claim, as it had previously dismissed this claim.

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recently considered a similar issue regarding the existence of sovereign immunity upon the municipality's appeal of an order denying summary judgment. Yet, there the plaintiff did argue an alternative basis for the trial court's order: "On the other hand, Plaintiffs argue that their challenge to Judge Tillett's implicit determination is properly before this Court as an alternate ground for sustaining the trial court's order as authorized by N.C.R. App. P. 10(c) and N.C.R. App. P. 28(c)". *Kirkpatrick*, 2011 N.C. App. LEXIS 1375, at *11. As noted by the Fourth Circuit Court of Appeals, this issue is an "important and potentially far-reaching issue[] of state law[,]” see *Arrington*, 369 Fed. Appx. at 424, and we decline to address it where neither party has so much as mentioned it.

We thus conclude “that there is no genuine issue of material fact concerning the extent to which Defendant is entitled to rely on a defense of governmental immunity in opposition to Plaintiff[’s] claim, that Defendant is entitled to judgment as a matter of law with respect to that defense, and that the trial court erred by reaching a contrary conclusion. As a result, the trial court’s order should be, and hereby is, reversed and this case should be, and hereby is, remanded to the [Wake] County Superior Court with instructions that judgment be entered in favor of Defendant.” *Kirkpatrick*, 2011 N.C. App. LEXIS 1375, at *31.

REVERSED AND REMANDED.

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

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JAMES L. COBB, PLAINTIFF v. PENNSYLVANIA LIFE INSURANCE COMPANY, UNIVERSAL AMERICAN CORPORATION, UNIVERSAL AMERICAN CORP., UNIVERSAL AMERICAN FINANCIAL CORP., TAMARIND CORPORATION, AND AMANDA CARLSON, DEFENDANTS

No. COA11-117

(Filed 6 September 2011)

1. Negligence—insurance policy—no duty to explain definition beyond text of policy—no implied duty to advise—summary judgment proper

The trial court did not err in a negligence case based on an insurance policy by granting summary judgment in favor of defendant insurance salesperson. Plaintiff failed to demonstrate that defendant had a duty to explain the definition of “total disability” beyond providing the definition in the text of the insurance policy and plaintiff failed to show an implied duty to advise.

2. Fraud—negligent misrepresentation—insurance policy—no justifiable reliance—summary judgment proper

The trial court did not err in a negligent misrepresentation case based on an insurance policy by granting summary judgment in favor of defendant insurance salesperson. Plaintiff could not establish that he justifiably relied on any misrepresentations by defendant because the terms of the policy were unambiguously expressed in the policy, which plaintiff had a duty to read.

3. Fraud—insurance policy—no reasonable reliance—summary judgment proper

The trial court did not err in a fraud case based on an insurance policy by granting summary judgment in favor of defendant insurance salesperson. Plaintiff could not claim that he reasonably relied on defendant’s representation of the disability coverage in the policy when he could have discovered its true meaning with minimal investigation.

4. Fraud—constructive fraud—insurance policy—no relation of trust and confidence—summary judgment proper

The trial court did not err in a constructive fraud case based on an insurance policy by granting summary judgment in favor of defendant insurance salesperson. There were no facts or circumstances which created a relation of trust and confidence.

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5. Unfair Trade Practices—insurance policy—no violation—summary judgment proper

The trial court did not err in an unfair and deceptive trade practices case based on an insurance policy by granting summary judgment in favor of defendants. The evidence did not support plaintiff's claim that defendant insurance company employed tactics to delay the investigation or the payment of claims and plaintiff could not claim that defendant refused to make payments without conducting a reasonable investigation based upon all the available information. Furthermore, a violation of N.C.G.S. § 58-3-115, the anti-twisting statute, does not bestow liability upon an insurance company for a private action.

6. Contracts—insurance policy—reformation—no special circumstances

Defendant's argument in a breach of contract case based on an insurance policy that he was entitled to contract reformation was meritless. There were no special circumstances that justified his failure to read his policy, and his failure to read his policy barred him from contract reformation.

7. Insurance—coverage under policy—no genuine issue of fact—summary judgment proper

The trial court did not err in a case involving an insurance contract by granting summary judgment in favor of defendants. There were no genuine issues of fact as to whether plaintiff should have been covered under the terms of the policy as written.

Appeal by Plaintiff from summary judgment entered 18 August 2010 by Judge Paul C. Ridgeway in Wake County. Heard in the Court of Appeals 8 June 2011.

Hemmings & Stevens, PLLC, by Aaron C. Hemmings, for Plaintiff-appellant.

Alston & Bird, LLP, by Matthew P. McGuire and Anitra Goodman Royster, for Defendants-appellee.

HUNTER, JR., Robert N., Judge.

James L. Cobb ("Cobb" or "Plaintiff") argues the trial court erred by granting summary judgment to Defendants on Plaintiff's claims of negligence, negligent misrepresentation, fraud, constructive fraud, and unfair and deceptive trade practices. Plaintiff also argues there

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are genuine issues of fact regarding Plaintiff's request for reformation, whether Plaintiff's injuries would be covered under the policy if reformed, and whether Plaintiff's injuries are covered by the policy as written. We affirm.

I. Factual and Procedural History

Plaintiff is a landscaper who was the sole owner of An Outdoor Look, Inc. Since 1996, Cobb's business has been the primary source of income for his family. The Cobb family consists of two children with special needs, who have required multiple surgeries and constant care, and Cobb's wife, Denise Cobb, who is unable to work because she suffers adverse side effects from epilepsy medication.

Defendant Amanda Carlson ("Carlson") is an insurance sales person for Pennsylvania Life Insurance Company ("Penn Life"). Carlson marketed disability policies providing a maximum annual payout of \$60,000 to blue-collar workers.

In January 2002, Carlson approached Cobb at a jobsite and made a sales pitch for a Penn Life disability insurance policy. Carlson read the details of their disability policy to Cobb from a Penn Life policy presentation book. After their initial meeting at the jobsite, Carlson met with Cobb at Cobb's home on 24 January 2002, where he completed an application for a Penn Life disability insurance policy. Cobb was issued a temporary disability policy that provided him with insurance coverage until his permanent policy was underwritten.

On 12 March 2002, Carlson delivered the permanent Penn Life disability policy (the "Policy"). The Policy stated in bold capital letters that the policyholder had a thirty-day right to examine the policy before signing it, and could reject it with a full refund if unsatisfied. The Policy informed the policyholder of "YOUR THIRTY-DAY RIGHT TO EXAMINE YOUR POLICY" and advised, "PLEASE READ YOUR POLICY CAREFULLY." The Policy had a monthly premium of \$103.78 and a monthly payout of \$2,500 if the policyholder became "totally disabled." On the first page of section two of the Policy was a list of definitions of terms used in the Policy. The Policy defined "Totally Disabled" as "mean[ing] that you or your [c]overed [s]pouse are unable to engage in any employment or occupation for which you or your [c]overed [s]pouse are or become qualified by reason of education, training or experience." The temporary policy did not include a definition of "Total Disability." Thus, the first time Cobb could have read this definition was on delivery of the Policy on 12 March 2002.

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Prior to purchasing the Penn Life policy, Cobb had purchased a disability income policy and a mortgage disability policy from State Farm Insurance on 3 June 1996. These State Farm policies were “own occupation policies,” providing disability income and mortgage income if the policyholder could not perform the occupation he held when he was rendered disabled. Cobb’s Penn Life policy contained a ratification endorsement clause requiring Cobb to cancel his State Farm insurance in order to obtain coverage from Penn Life, which he did.

Cobb did not see Carlson again after the 12 March 2002 meeting in which the Policy was delivered and accepted. Cobb did not change the Policy in the three years between the date he signed it and the date of his first claim for benefits. Nor did Cobb call Penn Life to ask questions about the policy prior to filing his first claim.

On 8 April 2005, Cobb was in an automobile accident in Wake Forest, N.C. Cobb complained to an emergency room physician of neck pain, left shoulder pain, and pain on the left side of his chest. On 19 April 2005, Cobb was evaluated by Dr. G. Hadley Callaway at the Raleigh Orthopedic Clinic claiming that “he [was] unable to do lifting or driving,” that it “hurt[] to do any repetitive or overhead activities, and that he was “unable to do his current job, which is landscaping.” On 30 April 2005, Cobb filed his first claim with Penn Life, explaining his accident and the nature of his injuries and including a physician’s report. On 20 May 2005, Cobb was diagnosed with rotator cuff tendinitis. After the claim and physician’s report were filed, Penn Life investigated the claim and began making payments on 8 June 2005.

On 22 August 2005, Cobb underwent arthroscopic surgery on his left shoulder, which was undertaken because more conservative therapies were ineffective and Cobb wished to regain a full and active lifestyle. On 30 December 2005, Dr. Callaway reported that Cobb had reached “maximum medical improvement with regard to the left shoulder,” rated Cobb to have “10% permanent partial impairment of the upper left extremity,” and released Cobb from treatment.

On 20 January 2006, Penn Life informed Cobb that his policy covered total disability, not partial disability, and, as a result of the latest report indicating only 10% permanent partial disability, Penn Life was discontinuing his payments after 30 December 2005. Cobb received total disability benefits from April through December 2005 for the injury to his left arm.

On 24 January 2006, Cobb saw Dr. Joel Krakauer of the Raleigh Orthopedic Clinic with complaints of numbness in two fingers of his

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left hand and was diagnosed with Cubital and Carpal Tunnel Syndromes. Consequently, on 6 February 2006, Cobb underwent surgery on his left arm and filed another claim for total disability benefits along with an attending physician's report that stated that Cobb would be disabled for four to six weeks after surgery. Penn Life accepted Cobb's claim and began to pay total disability benefits in February 2006. On 1 March 2006, Cobb was again diagnosed with Cubital and Carpal Tunnel Syndromes, this time in his right arm, and on 1 June 2006 underwent another carpal tunnel release surgery. After Cobb's second surgery, Dr. Krakauer estimated in his attending physician's report that Cobb would not be able to return to work until 31 July 2006. However, Dr. Krakauer amended his report a number of times, finally concluding that by 25 September 2006, Cobb was capable of doing only "supervisory" or "light duty" work without heavy use of either arm; it was undetermined when he would be able to return to work as a landscaper. Cobb was paid total disability benefits for the second and third claims and the surgeries for Cubital and Carpal Tunnel Syndromes in both arms from February 2006 to 6 September 2007.

During the period of permanent disability payments in August 2007, Penn Life requested Cobb undergo a Functional Capacity Evaluation to determine his capability to return to work. The report concluded that Cobb was functionally capable of work in the "medium" category, which is defined as the ability to have a "maximum occasional lift of 20 to 50 pounds, a frequent lift of ten to 20 pounds," and capability of "at least frequent sitting and at least frequent standing and/or walking." As a result, Penn Life terminated Cobb's benefit payments for total disability on 6 September 2007.

After Cobb's accident and during the course of his medical treatment, Cobb continued to operate his business, An Outdoor Look, Inc. However, due to his injuries he had to dissolve the company in 2007. Cobb also worked for a period of time in a restaurant he and his wife started, and he installed decks for a third company. Cobb testified, in his deposition, that he was attempting to start a new business selling trees.

On 13 April 2009, Cobb filed a complaint against Carlson and Penn Life (collectively "Defendants"). Cobb alleged negligence, negligent misrepresentation, fraud, and constructive fraud against Carlson for her description of the Penn Life disability insurance policy. Cobb alleged breach of contract, unfair and deceptive trade practices, and unfair claims settlement practices against Penn Life, in addition to claims of vicarious liability for the underlying acts of Carlson. Cobb sought equitable reformation, punitive damages, and special damages.

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On 1 June 2010, Defendants filed a motion for summary judgment. Also, Plaintiff filed a motion for partial summary judgment. On 18 August 2010, the trial court granted summary judgment on all claims in favor of Defendants and denied Plaintiff's motion for partial summary judgment. On 10 September 2010, Plaintiff entered his notice of appeal.

II. Jurisdiction & Standard of Review

This Court has jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2009). When examining a trial court's grant of summary judgment, we must decide whether "on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party [was] entitled to judgment as a matter of law." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2007). This is a question of law subject to *de novo* review. *Wilkins v. Safran*, 185 N.C. App. 668, 672, 649 S.E.2d 658, 661 (2007). "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Id.* (quoting *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. All inferences of fact must be drawn against the movant and in favor of the nonmovant." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (quotation marks omitted) (citation omitted).

III. Analysis

On appeal, Plaintiff argues the trial court erred by granting summary judgment with respect to Plaintiff's claims of (1) negligence, (2) negligent misrepresentation, (3) fraud, (4) constructive fraud, and (5) unfair and deceptive trade practices. Plaintiff further contends the trial court erred in granting Defendants' summary judgment because there were genuine issues of material fact regarding whether Plaintiff was entitled to reformation, whether Plaintiff's injuries would be covered under the policy if reformed, and whether Plaintiff's injuries should be covered under the policy as written.

A. Negligence

[1] Cobb alleges Carlson represented or implied that if he purchased the Policy and was injured to the degree that he could not perform the duties of his current job as a landscaper, he would receive monthly payments from Penn Life. Instead, the policy Cobb purchased was an "any occupation" policy that would pay benefits only

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if he or his spouse were “unable to engage in any employment or occupation” for which he or his spouse were qualified to perform or became qualified to perform with “education, training or experience.” (Emphasis added.) Cobb alleges Carlson failed to exercise due care when describing and procuring his disability policy.

Under North Carolina law, “[n]egligence is the failure to exercise proper care in the performance of a legal duty which the defendant owed the plaintiff under the circumstances surrounding them.” *Moore v. Moore*, 268 N.C. 110, 112, 150 S.E.2d 75, 77 (1966). It is well established that,

‘if an insurance agent or broker undertakes to procure for another insurance against a designated risk, the law imposes upon him the duty to use reasonable skill, care and diligence to procure such insurance and holds him liable to the proposed insured for loss proximately caused by his negligent failure to do so.’

White v. Consol. Planning, Inc., 166 N.C. App. 283, 301, 603 S.E.2d 147, 160 (2004) (quoting *Kaperonis v. Underwriters at Lloyd’s, London*, 25 N.C. App. 119, 128, 212 S.E.2d 532, 538 (1975)). However, the insurer is not obligated to procure a policy that has not been requested by the proposed insured. *Phillips v. State Farm Mut. Auto. Ins. Co.*, 129 N.C. App. 111, 113, 497 S.E.2d 325, 327 (1998). As such, while an insurer does have the duty to obtain coverage requested by the proposed insured, the agent does not have a duty to advise the individual of other types of insurance coverage for which he is eligible, if that information is not requested. *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 255, 552 S.E.2d 186, 191 (2001). Furthermore, it is not a duty of the insurer to inquire and inform the policyholder of all aspects of his policy. *Bentley v. N.C. Ins. Guar. Ass’n*, 107 N.C. App. 1, 14, 418 S.E.2d 705, 712 (1992). In the absence of a request, the insurer does not have a legal duty to explain the meaning of every provision in a policy. *Id.*

Here, Carlson procured the insurance policy Cobb applied for and delivered the Policy to him for a 30-day review period. The Policy delivered on 12 March 2002 contained the definitions of terms and listed them at the front of the Policy. Carlson read the presentation book to Cobb that outlined the major terms of the Policy, indicating Cobb would pay a premium of \$103.78 a month and would receive \$2,500 in benefits if he was totally disabled, and up to \$5,000 for a single surgical procedure per accident. Cobb did not ask Carlson, or anyone at Penn Life, questions about the Policy in the time between signing his policy and his accident. Because Carlson did not have a legal

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duty to explain and define every term and provision of the Policy unless so asked, and because Carlson did not have a duty to explain the definition of “totally disabled” or the difference between an “any occupation” policy or an “own occupation” policy absent an inquiry by Cobb, Cobb has failed to demonstrate Carlson had a duty to explain the definition of “total disability” beyond providing the definition in the text of the Policy.

In the alternative, Cobb contends Carlson had a duty to advise him of these issues based on their fiduciary relationship. An insurance agent has a limited fiduciary duty to the insured, to wit, the agent must correctly name the insured in the policy and correctly advise the insured of the nature and extent of his coverage under the policy. *Phillips*, 129 N.C. App. at 113, 497 S.E.2d at 327.

An implied duty to advise may only be shown if “(1) the agent received consideration beyond mere payment of the premium; (2) the insured made a clear request for advice; or (3) there is a course of dealings over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice [was] being sought and relied on.” *Bigger v. Vista Sales & Mktg, Inc.*, 131 N.C. App. 101, 104, 505 S.E.2d 891, 893 (1998). Here, considering the evidence in the light most favorable to Cobb, there is no evidence Carlson or Penn Life received additional consideration beyond the payment of the premium. Cobb does not allege that he made a request of advice, and Carlson does not recall Cobb asking questions about his policy. Furthermore, there is nothing in Cobb’s and Carlson’s course of dealings that would put an objectively reasonable insurance agent on notice that her advice was sought or being relied upon. Carlson did not have prior dealings with Cobb before she approached him in January 2002. Carlson and Cobb met three times: when she proposed the Policy, when he filled out an application, and when she delivered the Policy to Cobb. After Carlson delivered the Policy to Cobb, they did not have contact with one another until after Cobb’s automobile accident. These exchanges do not suggest the existence of an ongoing relationship of trust and confidence by which Carlson should have been aware that Cobb sought and relied upon her advice. Accordingly, Plaintiff has failed to show an implied duty to advise. Absent any duty, there is no possibility of negligence and summary judgment was appropriate.

B. Negligent Misrepresentation

[2] Cobb next contends Defendants negligently misrepresented the Policy. Negligent misrepresentation “ ‘occurs when a party justifiably

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relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care.’” *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 58, 554 S.E.2d 840, 846 (2001) (citation omitted). It is unclear how Carlson represented the Policy’s terms to Cobb—specifically, the terms “totally disabled” and “any occupation.” However, even when the facts are construed in the light most favorable to Plaintiff, Cobb cannot establish that he justifiably relied on any misrepresentations by Carlson, because the terms of the policy were unambiguously expressed in the Policy, which Cobb had a duty to read. *Baggett v. Summervin Ins. & Realty, Inc.*, 143 N.C. App. 43, 53, 545 S.E.2d 462, 468 (Tyson, J., dissenting) (“Persons entering contracts of insurance, like other contracts, have a duty to read them and ordinarily are charged with knowledge of their contents.”), *rev’d for reasons stated in the dissent*, 354 N.C. 347, 554 S.E.2d 336 (2001). Despite any alleged misrepresentations, “[w]here a party has reasonable opportunity to read the instrument in question, and the language of the instrument is clear, unambiguous and easily understood, failure to read the instrument bars that party from asserting its belief that the policy contained provisions which it does not.” *Id.* at 53, 545 S.E.2d at 468-69. Additionally, “when 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.” *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 346, 511 S.E.2d 309, 313 (1999).

Here, when Carlson delivered the Policy to Plaintiff, she informed him that he had a thirty-day review period during which he could review the Policy with either his lawyer or accountant and call Penn Life to ask any questions he might have. The Policy she delivered on 12 March 2002 stated in bold capital letters that Cobb had a thirty day right to examine his policy before signing it, and could reject it with a full refund if he was unsatisfied. On the first page of second section of the Policy, there was a list of definitions, including the definition of “Totally Disabled.” The Policy stated, “Totally Disabled means that you or your Covered Spouse are unable to engage in any employment or occupation for which you or your Covered Spouse are or become qualified by reason of education, training or experience.” Despite any claims of alleged negligent misrepresentation, Cobb had a duty to read and make sure he understood the nature of his policy. Rather than being prevented or denied an opportunity to read the policy, he was in fact urged to do so and was given ample time. Cobb cannot claim he was misinformed on certain elements of his coverage when

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the terms were clearly expressed in the policy. Accordingly, summary judgment was appropriate on negligent misrepresentation.

C. Fraud

[3] Cobb next alleges Carlson committed fraud when she sold him the Policy. The essential elements of actionable fraud are: “(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.” *State Props., L.L.C. v. Ray*, 155 N.C. App. 65, 72, 574 S.E.2d 180, 186 (2002) (citation omitted) (quotation marks omitted) (alteration in original), *disc. rev. denied*, 356 N.C. 694, 577 S.E.2d 889 (2003). Furthermore, any reliance on alleged false representations must be reasonable. *Id.* Reliance is not reasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate. *Id.* “Justifiable reliance is an essential element of both fraud and negligent misrepresentation.” *Helms v. Holland*, 124 N.C. App. 629, 635, 478 S.E.2d 513, 517 (1996).

As with his claim for negligent misrepresentation, Cobb cannot claim that he reasonably relied on Carlson’s representation of the disability coverage when he could have discovered its true meaning with minimal investigation. The terms were defined on the fourth page of the Policy, which Cobb received on 12 March 2002. Assuming *arguendo* Carlson fraudulently represented the terms of the Policy, Cobb’s failure to read the Policy would have resulted in unjustifiable reliance. Accordingly, the trial court did not err in granting summary judgment on fraud.

D. Constructive Fraud

[4] Cobb also alleges constructive fraud based on Carlson’s representation of the Policy. To maintain a claim for constructive fraud, Plaintiff has the burden of proving “facts and circumstances ‘(1) which created [a] relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.’” *Watts v. Cumberland Cty. Hosp. Sys., Inc.*, 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986) (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)).

Carlson did not know Cobb prior to approaching him to advertise Penn Life accident disability coverage in January 2002. After their initial meeting, Carlson only met with Cobb two more times: when he filled out his application which she filed for underwriting, and when

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she delivered his policy to him. Cobb never met with Carlson after the Policy was delivered. Three meetings that are part of the normal course of dealing between an insurance agent and the insured do not constitute a special relation of “trust and confidence.” As a result, Cobb cannot satisfy this element of constructive fraud, and the trial court ruled appropriately, granting summary judgment on constructive fraud.

E. Unfair and Deceptive Trade Practices

[5] Cobb also alleges Penn Life violated the unfair and deceptive trade practices statute, N.C. Gen. Stat. § 75-1.1. “To prevail on a claim of unfair and deceptive trade practice a plaintiff must show (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business.” *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991). An unfair or deceptive trade practice claim against an insurance company can be based on violations of section 58-63-15 of our General Statutes. *See* N.C. Gen. Stat. § 58-63-15 (2009) (defining “unfair methods of competition and unfair and deceptive acts or practices in the business of insurance”). Any violation of section 58-63-15 constitutes a violation of section 75-1.1. *Lee v. Mut. Cmty Sav. Bank*, 136 N.C. App. 808, 811 n.2, 525 S.E.2d 854, 857 n.2 (2000). Furthermore, the remedy for a violation of section 58-63-15 is the filing of a section 75-1.1 claim. *Id.* Whether a given act is unfair or deceptive is a matter of law to be decided by a court. *Gray v. N.C. Ins. Underwriting Ass’n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000).

Cobb alleges Penn Life specifically violated section 58-63-15(11)(1), which states “[d]elaying the investigation or payment of claims by requiring an insured claimant, or the physician, [or] either, to submit a preliminary claim report and then requiring the subsequent submission of formal proof-of-loss forms, both of which submissions contain substantially the same information.” N.C. Gen. Stat. § 58-63-15(11)(1) (2009). However, in *Douglas v. Pennamco, Inc.*, we stated that “[w]e see nothing unfair in requiring an insured whose injury is of uncertain duration and subject to improvement to show that he is still disabled before paying him further disability benefits.” 75 N.C. App. 644, 645, 331 S.E.2d 298, 299 (1985).

The nature of Cobb’s injury changed dramatically in the period between April 2005 and September 2007. Cobb initially filed a disability benefits claim for a rotator cuff injury to his left shoulder and received arthroscopic surgery for it on 22 August 2005. On 25 December

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2005, Cobb was released from care for that injury with an evaluated “10% permanent partial impairment of the upper left extremity.” In February 2006, Cobb filed for disability benefits after surgery for Cubital and Carpal Tunnel Syndromes in his left arm, and his doctor estimated he would recover from that surgery in four to six weeks. Subsequently, Cobb was diagnosed with Cubital and Carpal Tunnel Syndromes in his right arm and had surgery to correct it on 6 June 2006. Following Cobb’s second Carpal Tunnel release surgery, his physician changed his estimation of when Cobb would recover on a number of occasions but finally concluded that by 25 September 2006 Cobb would be capable of doing “supervisory” or “light duty” work.

It is evident that the nature of Cobb’s injuries and the estimated date on which he would recover from them were in constant flux from April 2005 to September 2007. As a result, it is reasonable that Penn Life requested Cobb file multiple “proof of loss” reports and attending physician’s reports in order to determine if Cobb was eligible for disability benefits. Some of the reports may have mirrored each other during the course of Cobb’s recovery, but the evolving nature of Cobb’s ailments made it necessary for Penn Life to request repeated updates on his condition. Accordingly, the evidence does not support Cobb’s claim that Penn Life employed these tactics to “delay[] the investigation or the payment of claims.” N.C. Gen. Stat. § 58-63-15(11)(1).

Cobb also claims that Penn Life violated section 58-63-15(11)(d), which states it is unlawful “[to refuse] to pay claims without conducting a reasonable investigation based upon all available information.” N.C. Gen. Stat. § 58-63-15(11)(d) (2009). Penn Life paid Cobb disability benefits from April 2005 until December 2005, based upon the attending physician’s reports from Dr. Callaway. When Dr. Callaway released Cobb from his care he filed a report to Penn Life stating Cobb had “10% permanent partial disability.” Based on this report, Penn Life determined Cobb was not “totally disabled” and canceled his benefits. In February 2006, Cobb filed a new claim for benefits and received payment until September 2007. Cobb’s benefits were terminated after he was given a functional capability evaluation by a physical therapist and it was determined he could perform “medium” work duties.

In both instances Cobb’s benefits were terminated, Penn Life relied on medical experts to determine Cobb’s level of disability and working capability. When Penn Life terminated Cobb’s benefits in

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December 2005, it was based on the assessment of Cobb's physician, who had all the relevant information pertaining to Cobb's rotator cuff injury and surgery. Subsequently, when Penn Life terminated Cobb's benefits in September 2007, it was based on his physician's assessment and the corroborating assessment of a physical therapist. Accordingly, Cobb cannot claim that Penn Life did not "conduct[] a reasonable investigation based upon all the available information." N.C. Gen. Stat. § 58-63-15(11)(d).

Cobb also alleges Penn Life violated section 58-63-15(11)(n), by "[f]ailing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement." N.C. Gen. Stat. § 58-63-15(11)(n) (2009). Although Cobb listed a violation of section 58-63-15(11) in his initial complaint, he only argued two subsections of 58-63-15(11) in his motion for summary judgment, 58-63-15(11)(l) and (d). His argument on section 58-63-15(11)(n) was not presented to the trial court, and Cobb is barred from raising a new theory on appeal to defeat summary judgment. *Hoisington v. ZT-Winston-Salem Assoc.*, 133 N.C. App. 485, 490, 516 S.E.2d 176, 180 (1999). Therefore, we do not review Cobb's argument as to section 58-63-15(11)(n).

Cobb alleges Penn Life violated section 58-63-15(1), which prohibits misrepresentations and false advertising of insurance policies. N.C. Gen. Stat. § 58-63-15(1). However, Cobb did not include this claim in his Second Amended Complaint, the only complaint in the record before us. This Court may only consider claims alleged in the pleadings. *Davis v. Durham Mental Health/Dev. Disabilities Area Auth.*, 165 N.C. App. 100, 104, 598 S.E.2d 237, 240 (2004). We therefore do not review this issue.

Cobb also alleges Penn Life violated section 58-3-115, the anti-twisting statute, by inducing Cobb to cancel his existing policies with State Farm Insurance after making incomplete or false comparisons of the State Farm and Penn Life policies. The anti-twisting statute states, in part:

No insurer shall make or issue, or cause to be issued, any written or oral statement that willfully misrepresents or willfully makes an incomplete comparison as to the terms, conditions, or benefits contained in any policy of insurance for the purpose of inducing or attempting to induce a policyholder in any way to terminate or surrender, exchange, or convert any insurance policy. Any person

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who violates this section is subject to provisions of G.S. 58-2-70 or G.S. 58-3-100.

N.C. Gen. Stat. § 58-3-115 (2009).

Generally, a statute “allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute.” *Lea v. Grier*, 156 N.C. App. 503, 508, 577 S.E.2d 411, 415 (2003) (quoting *Vanasek v. Duke Power Co.*, 132 N.C. App. 335, 339, 511 S.E.2d 41, 44 (1999)). As established by sections 58-2-70 and 58-3-100, a violation of the anti-twisting statute does not bestow liability upon an insurance company for a private action. Instead, the company may be subject to sanctions from the Commissioner of Insurance. *See* N.C. Gen. Stat. § 58-2-70 (2009) (granting the Commissioner the power to suspend or revoke the license of any person found to be in violation of Chapter 58 of our General Statutes if that person is subject to licensure or certification under the Chapter, or require the payment of a civil penalty or restitution to the person harmed) and N.C. Gen. Stat. § 58-3-100 (2009) (granting the Commissioner the power to revoke, suspend, or restrict the license of any insurer for violation of any law). Cobb does not have a private action based upon section 58-3-115.

F. Contract Reformation

[6] Cobb claims he is entitled to contract reformation. It is well settled that insurance policies can be reformed for mutual mistake, inadvertence, or the mistake of one induced by the fraud or inequitable conduct of another. *Williams v. Greensboro Fire Ins. Co.*, 209 N.C. 765, 769, 185 S.E. 21, 23 (1936). We have also held that, “if no trick or device has prevented a person from reading a paper which he has signed or accepts as the contract prepared by the other party, then the failure to read the paper when he had an opportunity to do so bars any right to reformation.” *Richardson v. Webb*, 119 N.C. App. 782, 785, 460 S.E.2d 343, 345 (1995).

In support of his argument, Cobb cites *Davis v. Davis*, 256 N.C. 468, 472, 124 S.E.2d 130, 133 (1962), which states, “To escape the consequences of a failure to read because of special circumstances, complainant must have acted with reasonable prudence.” In *Davis*, the plaintiff, who was 83 years old, had poor vision, and no more than a sixth grade education, claimed that she acted reasonably in relying upon an insurance agent’s representations of the contents of a document. *Id.* at 469-70, 124 S.E.2d at 131-32. Our Supreme Court overturned a judgment ruling against the plaintiff and granted a new trial,

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in part, to determine if the plaintiff's reliance was reasonable. *Id.* at 473, 124 S.E.2d at 134.

In the present case, Cobb has a high school diploma and attended one year of community college. Cobb, in the course of owning his own business, has conducted many transactions that have required a level of reading comprehension commensurate with the insurance policy at issue. As we have discussed above, Cobb was delivered the Policy in which all the terms of the Policy were unambiguously and conspicuously defined. He was encouraged to read the Policy carefully and had a 30-day period in which to do so. Cobb has alleged no trick or device that prevented him from reading the Policy. As there were no special circumstances that justified Cobb's failure to read his policy, Cobb's failure to read his policy bars him from contract reformation.

G. Coverage Under Policy

[7] Lastly, Cobb alleges there are genuine issues of material fact as to whether he should be covered under the terms of the Policy as written. Cobb argues that he fits within the Policy's current definition of total disability because his limited education and work experience only qualifies him for landscaping or occupations involving heavy manual labor. Cobb purchased an "any occupation" insurance policy that clearly defined the term "totally disabled." Cobb's physician and a physical therapist determined Cobb is capable of performing "light" to "medium" work and thus he was not unable to work in "any occupation." Not only has Cobb been evaluated as being capable of some types of work, he has, in fact, worked in multiple capacities since his accident, including supervising for his landscaping company, starting and working in a restaurant, and building decks for another company. Also, at the time of his deposition, Cobb was considering starting a new venture selling trees. Cobb is not totally disabled according to the terms of his policy, and he is therefore not entitled to coverage.

IV. Conclusion

For the reasons stated above, we hold the trial court did not err in ordering summary judgment in favor of Defendants. We affirm the trial court's Order granting summary judgment in favor of Defendants.

Affirmed.

Judges HUNTER, Robert C., and STROUD concur.

BODIE ISLAND BEACH CLUB ASS'N, INC. v. WRAY

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BODIE ISLAND BEACH CLUB ASSOCIATION, INC., ET AL., PLAINTIFFS v. DON WRAY, PENNY WRAY, JESSICA SMITH, DAVID R. DIXON, STEPHEN R. SMITH, TOM FEIST, SEA WRAY, LLC, CROC, LLC, AND SRS NORTH CAROLINA PROPERTIES, LLC, DEFENDANTS

No. COA10-1569

(Filed 6 September 2011)

1. Appeal and Error—interlocutory orders—concerning title—immediately appealable—petition for certiorari granted

Defendant's appeal from the trial court's interlocutory orders granting summary judgment in favor of plaintiff and denying defendant's motion to set aside default and summary judgment were orders concerning title and were immediately appealable. The Court of Appeals treated defendant's appeal from the trial court's denial of defendant's motion for leave to amend answer as a petition for *certiorari* and addressed the merits.

2. Deeds—action to set aside—plaintiff's failure to answer—motion for leave to amend answer properly denied

The trial court did not err in an action to set aside a deed by denying defendant SRS's motion for leave to amend answer. Defendant failed to answer the complaint and Dr. Smith's response did not constitute an answer on behalf of SRS.

3. Deeds—action to set aside—entry of default—proper

The trial court did not err in an action to set aside a deed by entering an order of default against defendant SRS. As the trial court properly found that no responsive pleading had been filed by SRS, there was no abuse of discretion by the trial court in entering default against SRS.

4. Deeds—action to set aside—summary judgment—proper

The trial court did not err in an action to set aside a deed by entering summary judgment against defendant SRS. Because SRS filed no answer in response to plaintiffs' complaint, SRS judicially admitted that the averments in the complaint were true and plaintiffs were entitled to summary judgment as there were no genuine issues of material fact. SRS's contention on appeal that the complaint failed to state a claim against SRS was untimely. SRS's arguments that the trial court erred in entering summary judgment

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ment because not all defendants were in default and that the summary judgment against it was based on misapprehensions of law were meritless.

Appeal by SRS North Carolina Properties, LLC, from orders entered 14 June 2010, 30 July 2010, and 24 September 2010 by Judge John R. Jolly, Jr., in Dare County Superior Court. Heard in the Court of Appeals 11 May 2011.

Bradford J. Lingg for plaintiff-appellee.

C. Everett Thompson, II, for defendant-appellant.

BRYANT, Judge.

Where the trial court properly found that SRS failed to answer the complaint, there was no error in denying SRS's Motion for Leave to Amend Answer, entering default against SRS, granting plaintiff's motion for summary judgment against SRS, and denying SRS's Motion to Set Aside Default and Summary Judgment.

Facts and Procedural History

On 10 July 2009, Bodie Island Beach Club Association, Inc., et al. (plaintiffs) filed a complaint against Don Wray, Penny Wray, Jessica Smith, David R. Dixon, Stephen R. Smith (Dr. Smith), Tom Feist, Sea Wray, LLC, CROC, LLC, and SRS North Carolina Properties, LLC (SRS). The complaint alleged legal malpractice, conversion, constructive fraud, civil conspiracy, breach of fiduciary duty, and an action to set aside a deed due to fraud and undue influence. Plaintiffs also filed a Notice of Designation of Mandatory Complex Business Case. On 20 July 2009, Chief Justice Sarah Parker of the Supreme Court of North Carolina designated this case as a mandatory complex business case and ordered the case to be assigned to a business court judge.

On 13 August 2009, David R. Dixon filed an answer. Dr. Smith was served with process in his individual capacity as well as in his capacity as the registered agent of SRS on 24 August 2009. On 17 September 2009, in lieu of a formal answer, Dr. Smith sent a letter to plaintiffs' counsel, denying the allegations. The letter, printed on his personal letterhead, was signed by "Stephen R. Smith, MD." On the same date, the trial court issued an Order to Show Cause. The Order to Show Cause stated that on 14 August 2009, Donald Wray purported to file answers to plaintiffs' complaint on behalf of himself, Penny Wray, Sea

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Wray, LLC and Croc, LLC. In its Order to Show Cause, the trial court stated the following, in pertinent part:

2. On August 14, 2009, Defendant Donald Wray purported to file Answers to Plaintiffs' Complaint [o]n behalf of himself, Defendant Penny Wray, Defendant Sea Wray, LLC and Defendant Croc, LLC.

. . .

4. Pursuant to N.C. Gen. Stat. § 1-11, a party may appear either in person or by a licensed attorney in actions or proceedings in which the party is interested.

5. Defendant Donald Wray does not appear to be licensed to practice law by the North Carolina State Bar.

6. It is inappropriate for Defendant Donald Wray to propound pleadings in this matter on behalf of Defendant[']s Penny Wray, Sea Wray, LLC or Croc, LLC.

7. Defendant Penny Wray may appear and propound pleadings in this matter while acting pro se, in her own behalf.

8. Defendants Sea Wray, LLC and Croc, LLC may not appear or propound pleadings in this matter pro se, and may appear only through duly licensed legal counsel.

NOW THEREFORE, it is ORDERED that Defendants Penny Wray, Sea Wray, LLC and Croc, LLC shall appear . . . to SHOW CAUSE why the Answers lodged in their behalf by Defendant Don Wray should not be stricken.

However, on 15 October 2009, plaintiffs took a voluntary dismissal with prejudice as to their claims against Don Wray, Penny Wray, Jessica L. Smith, and Sea Wray, LLC, and dismissed Tom Feist as well in December 2009.

In an order filed 22 October 2009 following a hearing upon the court's 17 September 2009 Order to Show Cause, the trial court allowed Kathryn Fagan to appear as counsel for Croc, LLC, and to file an amended answer in November 2009. On 23 November 2009, Dr. Smith sent a letter to Fagan listing his responses to the amended answer filed on behalf of Croc, LLC.

On 30 November 2009, plaintiffs filed a motion for summary judgment as to SRS which stated, in pertinent part, that SRS had not filed

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a response to plaintiff's complaint within thirty days of service of the summons and complaint and had not made a request to extend the time to answer. In response, Dr. Smith sent a letter to plaintiffs' counsel, opposing summary judgment. Thereafter, SRS retained counsel who on 7 March 2010 filed a Motion for Leave to Amend Answer on behalf of Dr. Smith and SRS.

On 14 June 2010, the trial court granted the Motion for Leave to Amend Answer as to Dr. Smith but denied the Motion for Leave to Amend as to SRS. Further, "[u]pon the court's own motion, default . . . [was] entered against [SRS]." The trial court scheduled a 22 June 2010 hearing for plaintiffs' motion for summary judgment. Dr. Smith filed an amended answer on 21 July 2010.

On 20 July 2010, counsel for SRS sent a letter to the trial court apologizing for having missed the 22 June 2010 hearing for plaintiffs' summary judgment motion, asking the court to reconsider the entry of default against SRS, and requesting that should the trial court enter summary judgment against SRS, that the order be certified final and, therefore, immediately appealable. On 30 July 2010, the trial court entered an order granting plaintiffs' motion for summary judgment as to SRS. The trial court also entered an order that stated the following, in pertinent part:

THE COURT, having considered the [20 July 2010] Letter, observes that in submitting the Letter, Counsel has made no effort to comply in either form or substance with numerous provisions of the North Carolina Rules of Civil Procedure . . . or the General Rules of Practice and Procedure for the North Carolina Business Court[.] . . .

However, notwithstanding Counsel's unexplained failure to abide by [the rules], the court has reviewed the substance of the requests for relief reflected in the Letter and CONCLUDES that SRS has made no showing of good cause for any such relief. Accordingly, to the extent the Letter constitutes a request in behalf of SRS for (a) relief from prior rulings of this court, (b) leave to file an Answer in this action [on] behalf of SRS or (c) certification by the court of the finality of any ruling it has made or might make in the future, the request is DENIED.

On 6 August 2010, SRS filed a Motion to Set Aside Default and Summary Judgment which the trial court denied in a 24 September 2010 order. SRS appeals the following orders: 14 June 2010 Order on

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Motion for Leave to Amend Answer; 30 July 2010 Order on Motion for Summary Judgment as to Defendant SRS; and 24 September 2010 Order denying Motion to Set Aside Default and Summary Judgment.

[1] At the outset, we note that this appeal is interlocutory in nature. “Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy.” *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999) (citation omitted). “Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 568 (2007) (citation omitted).

An interlocutory order may be immediately appealable if the court certifies that the order represents a final judgment as to one or more claims in a multi-claim lawsuit or one or more parties in a multi-party lawsuit and certifies that there is no just reason for delay. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2009). “[I]nterlocutory orders are [also] immediately appealable if they: (1) affect a substantial right and (2) [will] work injury if not corrected before final judgment.” *Harris*, 361 N.C. at 269, 643 S.E.2d at 568-69 (internal quotation marks omitted). “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 [one] is entitled to have preserved and protected by law: a material right.” *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (internal quotation marks and citation omitted).

SRS contends that the 30 July 2010 Order on Motion for Summary Judgment as to Defendant SRS, although interlocutory, affects a substantial right allowing review. SRS also argues that because the 30 July 2010 Order affects a substantial right, the 24 September 2010 Order Denying the Motion to Set Aside Default and Summary Judgment is likewise immediately appealable.

On 6 August 2010, SRS filed a Motion to Set Aside Default and Summary Judgment pursuant to Rule 55(d), 59(a)(8) and (9), and 60(b) of the North Carolina Rules of Civil Procedure. SRS argues that the Rule 59 Motion to Set Aside Default and Summary Judgment tolled the appeal from 6 August 2010, filed within ten days of the 30 July 2010 order, making its appeal timely. We disagree. Because both Rule 59(a)(8) and (9) are properly made after a trial, and the case *sub judice* concluded at the summary judgment stage, SRS’ 6 August 2010

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motion did not toll the appeal, permitting us to dismiss the appeal as to the 30 July 2010 Order and the 24 September 2010 Order. However, “[we note that] interlocutory orders concerning title . . . must be immediately appealed as vital preliminary issues involving substantial rights adversely affected.” *Watson v. Millers Creek Lumber Co.*, 178 N.C. App. 552, 554, 631 S.E.2d 839, 840-41 (2006). Therefore, we will address the appeal of these two orders.

In regards to the 14 June 2010 Order on Motion for Leave to Amend Answer, SRS concedes that this order was not timely appealed, leaving us without jurisdiction to review this order on appeal. However, we exercise our authority under Rule 21 to consider SRS’ appeal of the 14 July 2010 order as a petition for *writ of certiorari*, and we grant *certiorari* to review this order. N.C. R. App. P., Rule 21 (2009). Accordingly, we will address the merits of this appeal.

SRS raises the following six issues on appeal: Whether the trial court (I) abused its discretion in denying SRS’s Motion for Leave to Amend Answer; (II) erred in its entry of default against SRS; (III) erred in entering summary judgment against SRS; (IV) abused its discretion in denying SRS’ motion to set aside the entry of default pursuant to N.C. Gen. Stat. § 60(b)(6); (V) erred in denying SRS’ motion to set aside summary judgment under N.C. Gen. Stat. § 1A-1, Rule 59(a)(8); and (VI) erred in denying SRS’ motion to set aside summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(9).

I

[2] SRS first argues that the trial court erred in its 14 June 2010 order denying their Motion for Leave to Amend Answer. SRS contends that the “record overwhelmingly discloses that the letter was meant as a response on behalf of SRS as well as Dr. Smith.” SRS also argues that the trial court erred by denying their leave to amend based on the misapprehension of law that “where a corporation attempts to appear through a non-attorney, the corporation is in default.” We disagree.

“Leave to amend should be granted when ‘justice so requires,’ or by written consent of the adverse party[.] . . . The granting or denial of a motion to amend is within the sound discretion of the trial judge, whose decision is reviewed under an abuse of discretion standard.” *House Healers Restorations, Inc. v. Ball*, 112 N.C. App. 783, 785-86, 437 S.E.2d 383, 385 (1993) (internal citation omitted). “If the trial court articulates a clear reason for denying the motion to amend, then our review ends. Acceptable reasons for which a motion to

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amend may be denied are ‘undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice, and futility of the amendment.’” *Nationsbank of N.C., N.A. v. Baines*, 116 N.C. App. 263, 268, 447 S.E.2d 812, 815 (1994) (quoting *Coffey v. Coffey*, 94 N.C. App. 717, 722, 381 S.E.2d 467, 471 (1989)).

SRS argues that the trial court’s denial of their motion for leave to amend was based on a “mistaken assumption of fact lacking any basis in the record” in regards to finding that Dr. Smith’s letter was not filed on behalf of SRS. Alternatively, SRS argues that the trial court’s denial of SRS’ motion for leave to amend was based on a misapprehension of the law, specifically the trial court’s incomplete understanding and reliance on *Lexis-Nexis v. Travishan Corp.*, 155 N.C. App. 205, 573 S.E.2d 547 (2002). SRS asserts that the trial court erred by concluding that “where a corporation attempts to appear through a non-attorney, the corporation is in default.” SRS contends that the question before this Court is whether “because of the technical insufficiency of a response through a non-attorney, a corporation should be denied the opportunity to file a proper answer through counsel.”

In the case *sub judice*, the trial court denied SRS’ motion for leave to amend answer, articulating the following pertinent findings:

13. In the Motion [for Leave to Amend Answer], [Dr.] Smith states that he believed that the Answer was an answer filed on behalf of himself and SRS.
14. [Dr.] Smith is not an attorney. [Dr.] Smith is a medical doctor[.]
15. Smith wholly owns and is the sole managing member of SRS.
16. [Dr.] Smith’s answer was written on personal letterhead. Moreover, [Dr.] Smith signed the letter on his own behalf and did not purport to respond on behalf of SRS.
17. “A corporation must be represented by a duly admitted and licensed attorney-at-law and cannot proceed *pro se*.” *Lexis-Nexis v. Travishan Corp.*, 155 N.C. App. 205, 209 (2002). The exceptions to this general rule are not satisfied here. See *Lexis-Nexis*, 155 N.C. App. at 208; *Beard v. Pembaur*, 68 N.C. App. 52, 54-56 (1984).
18. Because SRS did not answer the Complaint pursuant to Rule 12(a)(1) (see also Rule 4(b)), relief pursuant to Rule 15(a), which allows for amendment of pleadings, is not appropriate.

Our Court in *Lexis-Nexis* held that “in North Carolina a corporation must be represented by a duly admitted and licensed attorney-at-

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law and cannot proceed *pro se* unless doing so in accordance with the exceptions set forth in this opinion.” *Id.* at 209, 573 S.E.2d at 549. The exceptions noted by our Court in *Lexis-Nexis* were as follows: “a corporate employee, who was not an attorney, could prepare legal documents[;]” “a corporation need not be represented by an attorney in the Small Claims Division[;]” and “a corporation may make an appearance in court through its vice-president and thereby avoid default.” *Id.* at 208, 573 S.E.2d at 549 (citations omitted).

Based on the trial court’s findings, the court articulated a clear reason for denying SRS’ motion for leave to amend the answer: SRS failed to answer the complaint and Dr. Smith’s response did not constitute an answer on behalf of SRS. Dr. Smith’s letter of response filed on 17 September 2009 failed to indicate that he was responding on behalf of any other person or entity other than himself, was written on his personal letterhead, and was signed solely by Dr. Smith in his individual capacity. Even assuming *arguendo* that Dr. Smith’s letter of response could be considered to constitute an answer on behalf of SRS, Dr. Smith was not a licensed attorney. The case does not fit within the exceptions noted by our Court in *Lexis-Nexis* and SRS’ argument must fail. Based on the foregoing, we hold that the trial court did not abuse its discretion. SRS’ argument is overruled.

II

[3] In SRS’ second argument, it asserts that the trial court erred in its entry of default against SRS. Specifically, SRS contends that the trial court lacked authority to enter default against SRS and, alternatively, that even if the trial court had the authority to enter default, it abused its discretion by doing so.

When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.

N.C. Gen. Stat. § 1A-1, Rule 55(a) (2009). “[T]he [trial] judge has concurrent jurisdiction and can order entry of default.” *Ruiz v. Mecklenburg Utils., Inc.*, 189 N.C. App. 123, 126, 657 S.E.2d 432, 434 (2008) (citation omitted). “A trial court’s decision to enter a default judgment, like entry of default, is reviewable for abuse of discretion. As such, we only find abuse of discretion where the trial court’s judgment is ‘manifestly unsupported by reason’ ” *Lowery v. Campbell*, 185 N.C. App. 659, 665, 649 S.E.2d 453, 456 (2007) (internal citation omitted).

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SRS relies on *Peebles v. Moore*, 302 N.C. 351, 275 S.E.2d 833 (1981) for its argument that “it is error to enter a default against a defendant who files an untimely answer.” SRS argues that the trial court was barred from entering default after SRS filed a motion for leave to amend answer with a proposed amended answer attached. *Peebles* does state that “the better reasoned and more equitable result [than entering default because an answer is filed late] may be reached by adhering to the principle that a default should not be entered, even though technical default is clear, if justice may be served otherwise.” *Id.* at 356, 275 S.E.2d at 836. However, the trial court found the following in its Order on Motion for Leave to Amend Answer, entering default against SRS, in pertinent part:

20. Pursuant to Rule 55(a) . . . an entry of default can be made. The court has concluded, *supra*, that SRS has not filed an answer to the Complaint. Therefore, default may be entered.

. . .

23. The court recognizes that SRS may contend that the Proposed Amended Answer submitted with the Motion is an answer and bars entry of default pursuant to *Peebles*, 302 N.C. 351. The court does not find this argument convincing. “The rules which require responsive pleadings within a limited time serve important social goals, and a party should not be permitted to flout them with impunity.” Moreover, the North Carolina Court of Appeals found that a defendant’s failure to respond after service of summons for a period of several months was not a mere technical error, but rather dilatory. Thus, the court upheld an entry of default “where the evidence show[ed] defendant simply neglected the matter at issue.” In the case at bar, SRS neglected the matter at issue in failing timely to file a responsive pleading.

(internal citations omitted).

The complaint was filed on 10 July 2009. Because SRS had failed to file a response to the complaint within thirty days and failed to make a request to extend time to answer, plaintiffs filed a motion for summary judgment on 30 November 2009. It was not until 7 March 2010 that SRS filed their Motion for Leave to Amend Answer. However, as the trial court properly found that no responsive pleading had been filed by SRS, there could be no abuse of discretion by the trial court in entering default against SRS. This argument is overruled.

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III

[4] In its third argument, SRS contends that the trial court erred in entering summary judgment against SRS. SRS asserts that because the trial court erred in entering default against SRS, summary judgment is void since it was based on that erroneous default judgment. We disagree.

The applicable standard of review of a ruling on a motion for summary judgment is *de novo*. *Thrash Ltd. P'ship v. County of Buncombe*, 195 N.C. App. 678, 682, 673 S.E.2d 706, 709 (2009). "Summary judgment is proper where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *Joslyn v. Blanchard*, 149 N.C. App. 625, 628, 561 S.E.2d 534, 536 (2002).

Where a party fails to deny averments in a pleading to which a responsive pleading is required, those averments are duly considered admitted. N.C. Gen. Stat. § 1A-1, Rule 8(d) (2009). In the case before us, because SRS filed no answer in response to plaintiffs' complaint, SRS has judicially admitted that the averments in the complaint are true. *See Student Bar Ass'n Bd. of Governors v. Byrd*, 293 N.C. 594, 612, 239 S.E.2d 415, 427 (1977). Accordingly, plaintiffs were entitled to summary judgment as there were no genuine issues of material fact. Also, because we have already discussed in issue II that the trial court's entry of default against SRS was not made in error, SRS' argument is meritless.

Next, SRS contends that the complaint failed to state a claim against SRS, therefore, the summary judgment order against SRS was based on a deficient pleading. "Unquestionably, a motion to dismiss for failure to state a claim upon which relief may be granted, under Rule 12(b)(6), can be made as late as trial upon the merits. However, we are of the opinion that, as a general rule, the motion comes too late on appeal." *Dale v. Lattimore*, 12 N.C. App. 348, 350, 183 S.E.2d 417, 418-19 (1971).

SRS further argues that the trial court erred in entering summary judgment because not all defendants were in default. "In an action commenced against multiple defendants where some, but not all, of the defendants fail to plead or otherwise respond, a default judgment against the non-responding defendants does not bar the other defendants from asserting all defenses they might have to defeat plaintiff's claim." *Little v. Barson Fin. Servs. Corp.*, 138 N.C. App. 700, 702, 531

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S.E.2d 889, 891 (2000) (citation omitted). Plaintiffs filed a motion for summary judgment as to SRS only on 30 November 2009 “request[ing] relief based on the merits of the pleadings or lack of Defendant SRS pleadings.” On 30 July 2010, the trial court granted plaintiffs’ motion for summary judgment as to SRS. “[I]t is equally clear that default final judgment against [SRS], d[oes] not adjudicate any rights between plaintiff[s] and the answering defendants.” *Id.* Based on the foregoing, SRS’ argument is overruled.

Lastly, SRS argues that the summary judgment against it was based on misapprehensions of law. This argument resembles those raised and discussed in *I* and *II*: that it was error for the trial court to find that SRS failed to file a response to plaintiffs’ motion for summary judgment and that it was error for the trial court to base the granting of a summary judgment motion on SRS’ failure to respond to plaintiffs’ motion. Because we have already addressed these issues, we decline to do so here.

IV

[5] In its fourth argument, SRS asserts that the trial court abused its discretion in denying SRS’ motion to set aside the entry of default. SRS contends that since error in the entry of default has already been established, it necessarily follows that the trial court’s refusal to set aside the entry of default constituted error as well. SRS contends that it has several meritorious defenses to plaintiffs’ allegations including: plaintiffs’ failure to state a claim; denial of the allegations of fraud; statute of limitations defense; and that the trial court abused its discretion by unjustly ordering Dr. Smith to forfeit his \$730,000.00 investment.

“A trial court’s decision to grant or deny a motion to set aside an entry of default and default judgment is discretionary. Absent an abuse of that discretion, this Court will not reverse the trial court’s ruling.” *Basnight Constr. Co. v. Peters & White Constr. Co.*, 169 N.C. App. 619, 621, 610 S.E.2d 469, 470 (2005) (citations omitted). Rule 60(b)(6) provides that, “[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . [a]ny other reason justifying relief from the operation of the judgment.” N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2009).

As previously discussed, we held that the trial court did not abuse its discretion in entering a default judgment against SRS. In the Order Denying the Motion to Set Aside Default and Summary Judgment, the trial court concluded that “in its discretion, [it] finds no reason justi-

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fying Defendant SRS's request to set aside the entry of default judgment and summary judgment pursuant to Rule 60(b)(6).” Because we have held that the trial court did not err by entering default against SRS because SRS failed to file a response to the complaint within thirty days and failed to make a request to extend time to answer, we also hold that the trial court did not abuse its discretion in denying SRS' motion to set aside an entry of default.

V and VI

In its fifth and sixth arguments, SRS asserts that the trial court erred in denying SRS' Motion to Set Aside the Summary Judgment under N.C. Gen. Stat. § 1A-1, Rule 59(a)(8) and (9) when it found that “[a] Rule 59(a) motion is not a proper ground for relief from an entry of summary judgment.”

Rule 59(a)(8) provides that “[a] new trial may be granted to all or any of the parties and on all or part of the issues for any . . . [e]rror in law occurring at the trial and objected to by the party making the motion[.]” N.C.G.S. § 1A-1, Rule 59(a)(8) (2009).

According to Rule 59, a new trial *may* be granted for the reasons enumerated in the Rule. By using the word *may*, Rule 59 expressly grants the trial court the discretion to determine whether a new trial should be granted. Generally, therefore, the trial court's decision on a motion for a new trial under Rule 59 will not be disturbed on appeal, absent an abuse of discretion. [This Court] recognize[s] a narrow exception to the general rule, applying a *de novo* standard of review to a motion for a new trial pursuant to Rule 59(a)(8), which is an error in law occurring at the trial and objected to by the party making the motion.

Xiong v. Marks, 193 N.C. App. 644, 654, 668 S.E.2d 594, 601 (2008) (citing *Greene v. Royster*, 187 N.C. App. 71, 77-78, 652 S.E.2d 277, 282 (2007)). Rule 59(a)(9) states that a new trial may be granted for “[a]ny other reason heretofore recognized as grounds for new trial.” N.C.G.S. § 1A-1, Rule 59(a)(9). “[R]equests for relief under [N.C.G.S. §] 1A-1, Rule 59(a)(9) are reviewed for an abuse of discretion[.]” *Battle v. Sabates*, 198 N.C. App. 407, 423, 681 S.E.2d 788, 799 (2009). “However, where the [Rule 59] motion involves a question of law or legal inference, our standard of review is *de novo*.” *Id.* (citation omitted).

Because both Rule 59(a)(8) and (9) are post-trial motions and because the instant case concluded at the summary judgment stage, the court did not err by concluding that “it [was] not proper to set

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aside default against Defendant SRS and vacate the summary judgment pursuant to Rule 59(a)(8) and (9).” This argument is overruled.

Based on the foregoing, we affirm the following orders of the trial court: the 14 June 2010 order denying SRS’ Motion for Leave to Amend Answer and entering default against SRS; the 30 July 2010 order granting plaintiff’s motion for summary judgment against SRS; and the 24 September 2010 order denying SRS’ Motion to Set Aside Default and Summary Judgment.

Affirmed.

Judges HUNTER, Robert C., and McCULLOUGH concur.

JAMES HYLTON, PLAINTIFF V. HANESBRANDS, INC., DEFENDANT

No. COA10-1442

(Filed 6 September 2011)

11. Landlord and Tenant—liability of landlord—injury to tenant’s employee—control of premises

The trial court properly granted summary judgment for defendant where an employee of a power company (plaintiff) was injured while operating a front-end loader at a steam plant that was leased by plaintiff’s employer (Suez) from defendant. The Steam Agreement, which included the lease, did not provide evidence that defendant retained sufficient control of the premises to establish a duty to plaintiff.

2. Negligence—industrial plant—subcontractor—collateral acts

Although there was an issue as to whether an injured plaintiff’s operation of a front-end loader was an inherently dangerous activity, it was undisputed that an agreement specifically stated that the relationship of plaintiff’s employer (Suez) to defendant (the owner of the site) was that of a subcontractor that made the decisions as to how to provide the product (steam for a textile plant). Therefore, the nature of the site and its lighting were collateral to providing steam and no recovery was allowed.

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Appeal by plaintiff from order entered 16 August 2010 by Judge Edwin G. Wilson, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 10 May 2011.

Benson Brown & Faucher, PLLC, by Drew Brown and James R. Faucher, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Reid C. Adams, Jr., Rachel E. Daly and Jennifer B. Lyday, for defendant-appellee.

STROUD, Judge.

James Hylton (“plaintiff”) appeals from a trial court’s order granting Hanesbrands, Inc.’s (“defendant”) motion for summary judgment and dismissing his complaint. For the following reasons, we affirm the trial court’s order.

I. Background

On 14 September 2009, plaintiff filed a complaint against defendant Hanesbrands, Inc., Sara Lee Corporation, and National Textiles, L.L.C. in Superior Court, Forsyth County, alleging defendants’ were negligent, in (1) failing to “keep, create, and maintain the property in a reasonably safe condition[;]” (2) failing to “warn persons present of hidden perils and unsafe conditions;” and (3) failing to “make reasonable inspections of the area in question and to correct unsafe conditions which such an inspection would have or did reveal[;]” and that this negligence was the direct and proximate cause of plaintiff’s injuries that occurred when the front-end loader he was operating turned over and rolled down a large pile of sawdust. Specifically, plaintiff alleged that “[t]here were significant lighting issues and problems which existed in the area and which the defendant failed to correct despite the ability to do so.” On or about 18 November 2009, defendants filed an answer to plaintiff’s complaint, denying the allegations of negligence and raising several affirmative defenses. The parties filed two joint stipulations dismissing without prejudice plaintiff’s claims against Sara Lee and National Textiles, on 10 December 2009 and 16 February 2010, respectively. On 2 July 2010, defendant Hanesbrands filed a motion for summary judgment, arguing that in 2006 when plaintiff’s injuries occurred it was leasing the premises to Suez Energy pursuant to an agreement and had no control over “the maintenance of the lighting structures on the Premises” or “the operation of the Steam Plant” and were therefore “not liable for injuries to third parties” such as plaintiff. The affidavits, depositions, and documents filed tended to show that in 1995 Power Sources, Inc. (“Power

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Sources”) entered into a contract with Sara Lee Corporation (“the Steam Agreement”) in which Power Sources agreed to sell steam to Sara Lee for use in its textile mill in Eden, North Carolina. As part of the Steam Agreement, Sara Lee leased a portion of its property in Eden to Power Sources for it to construct and operate a steam plant on that premises to provide steam for Sara Lee’s mill. Suez Energy (“Suez”) later succeeded Power Sources as lessee of the premises and owner/operator of the steam plant. Similarly, defendant took over Sara Lee’s position as lessor of the premises. Plaintiff was an employee of Suez. On 21 September 2006, plaintiff was injured when the front-end loader he was operating overturned while he was backing it down a large pile of sawdust at night at the steam plant. On 16 August 2010, the trial court granted summary judgment for defendant, dismissing plaintiff’s complaint. Plaintiff filed notice of appeal to this Court on 2 September 2010. On appeal, plaintiff argues that the trial court erred in granting defendant’s motion for summary judgment as (1) defendant had possession or control of the premises and therefore owed a duty of reasonable care to plaintiff or in the alternative, (2) defendant “had a non-delegable duty to prevent harm from an inherently dangerous activity occurring on its land.”

II. Summary Judgment

A. Standard of Review

We have stated that

[s]ummary judgment is appropriate ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’ N.C. Gen. Stat. § 1A-1, Rule 56(c). ‘A trial court’s grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party.’ *Sturgill v. Ashe Memorial Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer, ___ N.C. App. ___, ___, 705 S.E.2d 757, 764-65 (citation omitted), *disc. review denied*, ___ N.C. ___, 707 S.E.2d 243 (2011). We have further noted that

[i]n a negligence claim, summary judgment is appropriate where the plaintiff’s forecast of evidence is insufficient to support an

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essential element of negligence. *See Patterson v. Pierce*, 115 N.C. App. 142, 143, 443 S.E.2d 770, 771, *disc. review denied*, 337 N.C. 803, 449 S.E.2d 749 (1994). In order to establish a *prima facie* case for negligence, the plaintiff must show the following essential elements: (1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered damages as a result of the injury. *See id.* at 144, 443 S.E.2d at 772.

Vares v. Vares, 154 N.C. App. 83, 87, 571 S.E.2d 612, 615 (2002), *disc. review denied*, 357 N.C. 67, 579 S.E.2d 576 (2003). "If it is shown the defendant had no duty of care to the plaintiff, summary judgment is appropriate." *Walden v. Morgan*, 179 N.C. App. 673, 680, 635 S.E.2d 616, 622 (2006) (quotation marks, brackets, and citations omitted).

B. Analysis

Plaintiff contends that defendant owed a duty of reasonable care to him to maintain the premises because certain terms in the Steam Agreement establish that defendant "maintained possession and control of the premises it lease[d] to Suez[.]"

1. Sufficient Control

[1] We have noted that "[i]t is a well established common law principle that a landlord who has neither possession nor control of the leased premises is not liable for injuries to third persons." *Vera v. Five Crow Promotions, Inc.*, 130 N.C. App. 645, 650, 503 S.E.2d 692, 696 (1998) (citation and quotation marks omitted). Plaintiff cites to *Holcomb v. Colonial Associates, LLC*, 358 N.C. 501, 597 S.E.2d 710 (2004) in support of his argument that defendant retained sufficient control of the premises by the terms of the Steam Agreement but distinguishes *McCorkle v. North Point Chrysler Jeep, Inc.*, ___ N.C. App. ___, 703 S.E.2d 750 (2010), which held that the terms of the landowner's contract were not sufficient to establish control. Plaintiff argues that the owner in *McCorkle* turned over "sole" control of the premises to the contractor but here defendant retained some control over the premises sufficient to establish a duty to plaintiff. Defendant counters that the terms of the Steam Agreement were dissimilar to the terms in the lease contract in *Holcomb* and that this case is more similar to the contracts in *McCorkle* and *Walden v. Morgan*, 179 N.C. App. 673, 635 S.E.2d 616, where the Courts found that the terms in those contracts were not sufficient to establish control by the landowner or a duty to the plaintiff.

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In *Holcomb*, the plaintiff was injured by dogs owned by the landlord's tenant and the plaintiff filed a negligence claim against the landowner and the tenant. 358 N.C. at 503-04, 597 S.E.2d at 712-13. After this Court reversed the jury verdict in favor of the plaintiff, the plaintiff appealed to our Supreme Court. *Id.* at 504-05, 597 S.E.2d at 713-14. The Court noted that "a landlord owes a duty to third parties for conditions over which he retained control." *Id.* at 508, 597 S.E.2d at 715. The Court further noted that the lease between the landowner and tenant "required the tenant to 'remove any pet . . . within forty-eight hours of written notification from the landlord that the pet, in the landlord's sole judgment, creates a nuisance or disturbance or is, in the landlord's opinion, undesirable.'" *Id.* In affirming the jury's verdict and reversing this Court's ruling, the Court concluded that because the "landlord and tenant contractually agreed that landlord would retain control over tenant's dogs[,] the condition that caused the plaintiff's injuries, "[t]his lease provision granted [the landlord] and [the management company] sufficient control to remove the danger posed by [the tenant's] dogs." *Id.* at 508-09, 597 S.E.2d at 715.

In *Walden*, this Court, in distinguishing *Holcomb*, held that the landowner's lease with his tenant, which operated a gas station on the leased premises, was insufficient to establish that plaintiff had sufficient control of the leased premises so that it owed the plaintiffs a duty of care. 179 N.C. App. at 682-83, 635 S.E.2d at 623. In *Walden*, the plaintiffs' real property was damaged by a gasoline explosion at the tenant's gas station and the plaintiffs brought a negligence claim against the landowner. *Id.* at 675-76, 635 S.E.2d at 619. On the plaintiffs' appeal from a trial court's order granting the landowner's motion for summary judgment, the plaintiffs, citing *Holcomb*, made the following argument before this Court:

[the landowner] owed them a duty of care because it retained control over the property through the lease agreement with [the tenant]. Paragraph 3 of the lease states [the tenant] will, "b. Not use the premises for any unlawful or immoral purposes or occupy them in such a way as to constitute a nuisance" Plaintiffs contend this lease provision requires [the landowner] to prevent or stop any nuisance and "to take precautions to protect plaintiffs from harm."

Id. at 682, 635 S.E.2d at 623. In distinguishing *Holcomb* and overruling the plaintiffs' argument, the Court stated

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[the landowner's] lease provision does not provide it control over the premises. In *Holcomb*, the landlord could remove any pet within forty-eight hours. 358 N.C. at 508-09, 597 S.E.2d at 715. Under section 7 of its lease with [the tenant], [the landowner] could only re-enter the property upon sixty days prior notice of default for a non-monetary lease provision. In *Holcomb*, the lease provision addressed the issue of liability and a third party was injured. 358 N.C. at 508-09, 597 S.E.2d at 715. The lease provision before us is too broad and indefinite to create liability for negligence for [the landowner's] failure to exercise control over the premises. This lease governs the business relationship between [the landowner] and [the tenant], not [the landowner] and [the gasoline supplier]. Under the lease, [the tenant] possessed the right to "[u]se the premises for purposes in keeping with the proper zoning." [The zoning official's] affidavit showed the convenience store was operating in compliance with applicable zoning regulations.

Id. at 682-83, 635 S.E.2d at 623.

Likewise in *McCorkle*, this Court recently addressed the issue of a landowner's control of a construction site and held that the landowner did not retain sufficient control of the construction site via the contract to establish a duty to a third party subcontractor. ___ N.C. App. at ___, 703 S.E.2d at 754. In *McCorkle*, the landowner, a car dealership, contracted with the contractor to construct a building on its premises and the plaintiff, an employee of a painting subcontractor, was injured when he "was walking down a stairway in the newly constructed building when a handrail broke[.]" *Id.* at ___, 703 S.E.2d at 751. The plaintiff filed a complaint alleging that the landowner "was negligent in failing to keep the construction site 'in reasonably safe condition.'" *Id.* On appeal from the trial court's granting the landowner's motion for summary judgment dismissing the plaintiff's claims, the plaintiff argued to this Court that the "Defendant, as a landowner, owed to Plaintiff the duty of reasonable care, which includes the duty to make a reasonable inspection of the construction site[.]" *Id.* at ___, 703 S.E.2d at 752. The Court noted the general rule that "an independent contractor and his employees who go upon the premises of an owner, at the owner's request, are lawful visitors and are owed a duty of due care[.]" and that "[t]his duty also requires a landowner, as well as a general contractor, to make a reasonable inspection to ascertain the existence of hidden dangers." *Id.* (citations omitted). The Court went on to note the following exception:

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“an owner or occupier of land who hires an independent contractor is not required to take reasonable precautions against dangers which may be incident to the work undertaken by the independent contractor.” *Id.* at ____, 703 S.E.2d at 753 (citations and quotation marks omitted). The Court explained that the “reason for the exception is that if a landowner relinquishes control and possession of property to a contractor, the duty of care, and the concomitant liability for breach of that duty, are also relinquished and should shift to the independent contractor who is exercising control and possession[,]” and “the exception itself, extends only as far as the independent contractor, and not the landowner, is in control of the hazard or danger.” *Id.* (citations and quotation marks omitted). The Court went on to apply this exception to the facts:

In this case, [the landowner] contracted with [the contractor] so that possession and control of the construction site were vested solely with [the contractor]. Under the terms of the contract, [the contractor] was to “supervise and direct the [w]ork, using [the contractor’s] best skill and attention.” [The contractor] was “solely responsible for and [had] control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the [w]ork under the Contract[.]” [The contractor] was further charged with responsibility for “inspection of portions of [w]ork already performed to determine that such portions are in proper condition to receive subsequent [w]ork.”

With respect to safety, [the contractor] was responsible “for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the [c]ontract.” Further, [the contractor] was to “take reasonable precautions for safety of, and [] provide reasonable protection to prevent damage, injury or loss to” “employees . . . and other persons who may be affected thereby” and to “the [w]ork and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of [the contractor] or [the contractor’s] [s]ubcontractors or [s]ub-subcontractors[.]”

Based on the foregoing, it is clear that, contractually, [the contractor] was in control of the construction site. Further, the only evidence presented by Plaintiff to indicate that [the landowner] actually exercised any control over the construction was in Plaintiff’s affidavit, in which Plaintiff stated that, at some-time before the accident, he observed a person, who was report-

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edly an executive of [the landowner], on the stairway on which Plaintiff was injured. However, the mere fact that an employee of [the landowner] visited or toured the construction site is insufficient to show that Defendant retained any control of the construction site.

Id. at ___, 703 S.E.2d at 754. The Court then concluded “that [the landowner] was not in possession and control of the construction site such that it would be improvident to impose the duty of reasonable care and inspection on [the landowner].” *Id.*

Accordingly, we must determine whether the terms of the Steam Agreement were sufficient for defendant to be “in control of the hazard or danger[.]” *see McCorkle*, ___ N.C. App. at ___, 703 S.E.2d at 753, or to retain control over the condition that caused the plaintiff’s injuries. *See Holcomb*, 358 N.C. at 508-09, 597 S.E.2d at 715. Plaintiff, in alleging that defendant failed to maintain the premises in a safe condition, warn of hidden dangers, or make a reasonable inspection of the premises, specifically alleged that “[t]here were significant lighting issues and problems which existed in the area and which the defendant failed to correct despite the ability to do so.” In support of this allegation, plaintiff testified in his deposition that while building a road using a front-end loader on a large sawdust pile, he got to the top of the pile; he began backing back down the pile but because it was dark and there was inadequate lighting around the sawdust pile he could not see where he was backing; the front-end loader he was operating began to slide off of the side of the road, as the road collapsed; and the loader then flipped over and rolled down the sawdust pile, causing plaintiff’s injuries. Therefore, the specific “hazard or danger[.]” *see McCorkle*, ___ N.C. App. at ___, 703 S.E.2d at 753, arose from the safety issues posed by the piles of sawdust and the inadequate lighting. Therefore, we look to the Steam Agreement to see the extent of defendant’s control as to these conditions on the leased property in question.

Turning to the terms of the Steam Agreement, it appears that this is merely a “mutual covenant[.]” between Suez’s predecessor in interest to provide steam and defendant’s predecessor to provide land for a steam facility and to buy their steam exclusively from that predecessor. The Steam Agreement specifically addresses *inter alia* the facilities that would be built to supply that steam, details surrounding the amount and type of steam required, and specific information regarding payment for the steam. However, plaintiff points to six sep-

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arate portions of the Steam Agreement in which he argues are evidence that defendant retained sufficient control of the premises to establish a duty to plaintiff. We will address each individually.

Plaintiff first contends this portion of the Steam Agreement demonstrates aspects of defendant's control of the leased premises:

7.3 [Suez] shall allow [defendant] reasonable access, as deemed necessary by [defendant], to the Site and Boiler Facility.

We fail to see how this portion of the agreement has anything to do with safety on the premises, control of the lighting on the premises, or the size of the sawdust pile, "the hazard[s] or danger[s,]" *see McCorkle*, ___ N.C. App. at ___, 703 S.E.2d at 753, that contributed to plaintiff's injuries. Plaintiff cites no case law for the proposition that a lessor with reasonable access to leased property can be liable for injuries to a third party that occurred on that leased property just because of that access.

Plaintiff next points us to another portion of the Steam Agreement in Section 7:

7.4 [Suez] shall allow [defendant] to inspect and review operational and maintenance procedures as needed to convince [defendant] that the Boiler Facility is operated using good standard practices and that the Boiler Facility is kept in good condition.

Although this portion of the agreement mentions "good standard practices" it could very well be addressing defendant's inspection of Suez's premises for compliance with government regulations as much as it could be for an inspection of safety. At most it gives defendant the right to inspect Suez's facilities but no immediate right of correction, unlike the terms in the *Holcomb* lease, which allowed the landowner to remove the dog within 48 hours if he deemed the animal to be "undesirable." 358 N.C. at 508, 597 S.E.2d at 715. As this Court noted in *Walden*, this provision is "too broad and indefinite to create liability for negligence" 179 N.C. App. at 683, 635 S.E.2d at 623, or to establish that defendant had control of the safety issues that plaintiff alleged at the Suez premises.

Plaintiff next points to the following portions of the agreement:

9.3 [Suez] shall take all necessary measures to assure that when its employees, contractors, or representatives are present at the [defendant's] Facility, they will comply with [defendant's] rules, policies and customary practices governing safety; cutting, weld-

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ing, and brazing; identification badges; plant security; and other personnel activities.

9.4 All work to be performed by [Suez] at [defendant's] Facility must be scheduled in advance with engineering personnel, and all restoration work at that facility must meet with [defendant's] approval.

As plaintiff's complaint addresses defendant's control of Suez's premises, portions of the Steam Agreement governing how Suez employees should perform when at defendant's facility are irrelevant to the issues before us.

Plaintiff further points to the following provisions of the Steam Agreement:

4.3 [Defendant] shall provide access to the Boiler Facility by an access road from public roads or through [defendant's] facility.

This provision does not control any aspect of Suez's operation of the steam plant on the premises but merely states that defendant is to provide Suez with an access road to the Suez facility. Finally, plaintiff points to this portion of the Steam Agreement:

20.4 Wood Fuel. [Suez] shall procure wood fuel in sufficient quantity and proper form, to provide fuel for [defendant's] gasifiers. All procurement costs shall be to [Suez's] account. The cost of the fuel, delivered to the Boiler Facility, shall be to [defendant's] account. [Defendant] shall have the right to approve or reject any wood fuel suppliers, and shall have the right to review all files and procedures associated with wood fuel procurement.

Although this portion deals with the supply of wood to the "Boiler Facility" on Suez's premises, it makes no requirements or directions as to how the wood is to be stored or regarding lighting around that wood supply. Even in the aggregate, these specific portions tend to demonstrate that the Steam Agreement left the specifics of operating the steam facility to Suez's discretion.

Plaintiff's argument also ignores portions of the Steam Agreement which demonstrate that the detailed operation of the steam facility on Suez's premises and issues of safety were in exclusive control of Suez. In Section 2 the agreement states that Suez will operate a facility comprising of "[f]acilities for the storage and handling of the wood fuel and other materials[;]" maintain "[a]ll . . . safety, traffic control and security equipment and services as required

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by law[.]” and “[a]ll access roads, drainage and lighting structures[.]” and “keep the Boiler Facility neat, clean, and well-maintained[.]” Based on the foregoing, it is clear that, contractually, Suez was in exclusive control of the safety issue alleged by plaintiff. *See McCorkle*, ___ N.C. App. at ___, 703 S.E.2d at 754. Plaintiff also argues that the Steam Agreement “is ambiguous as to the degree of control retained by” defendant thus the interpretation of the contract is for the jury to determine. However, given the above portions of the Steam Agreement, we do not find the Steam Agreement to be ambiguous as to control of the safety issues regarding the Suez facility as plaintiff alleged. Accordingly, plaintiff’s argument is overruled.

2. Inherently Dangerous

[2] As noted above, plaintiff also argues in the alternative that defendant owed plaintiff a duty of care as “operating heavy machinery at night without sufficient lighting, is inherently dangerous[.]” and defendant’s representatives were aware or should have been aware “of the lack of adequate lighting.” This Court in *Hooper v. Pizzagalli Constr. Co.*, addressed the issue of inherently dangerous activities in the context of work performed by an independent contractor, noting that

“[o]ne who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide for the safety of others[.]” [*Woodsen v. Rowland*, 329 N.C. 330, 352, 407 S.E.2d 222, 235 (1991)]. An inherently dangerous activity is defined as work to be done from which mischievous consequences will arise unless preventative measures are adopted, *Greer v. Construction Co.*, 190 N.C. 632, 130 S.E. 739 (1925), and that which has “a recognizable and substantial danger inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor, which later might take place on a job itself involving no inherent danger.” *Woodson*, 329 N.C. at 351, 407 S.E.2d at 234.

In the instant case, the record reveals that Acme was hired to perform plumbing work. At the time of the accident, the decedent was working on a valve located on the seventh floor interstitial area of the project. The record reveals that the decedent and his co-worker Rigsbee used a scaffold to better reach the valve. The decedent and Rigsbee stood on the scaffold thirteen feet off the ground and did not properly secure the scaffold board or take any other precautions. Use of a scaffold in conjunction with the

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plumbing work was not set out in the contract. As a result, use of the scaffold by the decedent and Rigsbee was totally collateral to the work as contracted. No recovery may be allowed for an injury resulting from an act or fault purely collateral to the work and which arises entirely from the wrongful act of the independent contractor or his employees. *Evans v. Elliott*, 220 N.C. 253, 259, 17 S.E.2d 125, 128 (1941); *Goolsby v. Kenney*, 545 S.W.2d 591, 594 (1976).

112 N.C. App. 400, 405-06, 436 S.E.2d 145, 148-49 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 516 (1994). Here, there is an issue as to whether plaintiff's operation of the front-end loader was an inherently dangerous activity. Plaintiff admitted in his deposition that prior to his accident he had safely deposited sawdust on various sawdust piles "a couple hundred" times per eight hour shift since 2003 when he started working at the steam plant, and plaintiff was not aware of any other Suez employee who was injured while depositing sawdust on Suez's premises. Without reaching this issue, it is undisputed that the Steam Agreement specifically states that Suez's relation to defendant is as its subcontractor to provide steam for defendant's facility. Therefore, Suez contracted to provide steam and Suez made the decision as to how to provide that steam, which included constructing large piles of sawdust in a particular location that had poor lighting. Therefore, the nature of the sawdust piles and the lighting were actions that were collateral to providing steam, and as noted above, "[n]o recovery may be allowed for an injury resulting from an act or fault purely collateral to the work and which arises entirely from the wrongful act of the independent contractor or his employees." *See id.* Accordingly, we are not persuaded by plaintiff's argument. For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judges McGEE and BEASLEY concur.

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TRAVIS T. BUMPERS AND TROY ELLIOT, ON BEHALF OF THEMSELVES AND ALL OTHERS
SIMILARLY SITUATED, PLAINTIFFS V. COMMUNITY BANK OF NORTHERN VIRGINIA,
DEFENDANT

No. COA08-1135-2

(Filed 6 September 2011)

1. Unfair Trade Practices—loan discount fees—summary judgment

The trial court did not err by granting summary judgment for plaintiffs on Chapter 75 claims based upon defendant charging a loan discount fee when no discount was provided. Defendant's conduct was actionable as an unfair or deceptive trade practice under N.C.G.S. § 75-1.1, the evidence in the record supported the summary judgment, and plaintiffs' claim was not preempted by federal legislation.

2. Unfair Trade Practices—real estate closing fees—summary judgment

The trial court erred by granting summary judgment to plaintiffs on Chapter 75 claims based upon fees charged by Title America at real estate closings. There was a genuine issue of material fact as to whether Title America overcharged for its closing fees.

3. Class Actions—certification—federal injunction vacated

In an action remanded on other grounds, it would be proper for the trial court to consider class certification on remand because federal orders barring prosecution as a class action were vacated.

On remand to the Court of Appeals from an opinion of the Supreme Court of North Carolina directing that this case be considered on the merits. Appeal by defendant from orders entered 22 April 2008 and 10 May 2008 by Judge John B. Lewis, Jr., in Wake County Superior Court granting summary judgment to plaintiffs on their Unfair and Deceptive Trade Practices (UDTP) claims. Originally heard in the Court of Appeals 25 February 2009.

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Hartzell & Whiteman, L.L.P., by J. Jerome Hartzell, and Financial Protection Law Center, by Mallam J. Maynard, for plaintiff-appellee Bumpers.

Ellis & Winters LLP, by Matthew W. Sawchak, Ballard Spahr Andrews & Ingersoll, LLP, by Darryl J. May, and Odin, Feldman & Pittleman, P.C., by F. Douglas Ross, for defendant-appellant.

STEELMAN, Judge.

Where the undisputed evidence showed that defendant charged plaintiffs a loan discount fee for a loan that did not have a discounted interest rate, summary judgment in favor of plaintiffs on their Chapter 75 claims was proper. Where there were genuine issues of material fact as to whether Title America's loan closing fees were excessive, we reverse the granting of summary judgment on that claim, and vacate the award of damages pertaining to that claim. Upon remand, the trial court may consider the question of class certification.

I. Factual and Procedural Background

This case was initially filed in Wake County Superior Court on 13 September 2001. Since that time, it has been removed to federal court twice, undergone substantial litigation in the federal courts, and was ultimately remanded to the Wake County Superior Court for determination of the Unfair and Deceptive Trade Practices claims that are the subject of this appeal.

Travis T. Bumpers (Bumpers) and Troy Elliott (Elliott) each closed second mortgage loans with Community Bank of Northern Virginia (Community Bank) in 1999.

Bumpers responded to a mailed solicitation from Community Bank advertising loans. He called the 800 number, submitted a loan application over the phone, made a few more telephone calls, faxed requested documents, and then was directed to a women's lingerie shop to sign the closing documents before a notary public who worked at the store. Bumpers was approved for a \$28,450.00 loan, with an interest rate of 16.99%. Title America, LLC (Title America) provided the closing services for the loan.

Community Bank and Title America charged Bumpers fees totaling \$4,827.88. The fees paid to Community Bank included a loan orig-

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ination fee of \$2,062.63, a “loan discount” fee of \$1,280.25, an application fee of \$95.00, and an underwriting fee of \$185.00. The fees paid to Title America included a settlement or closing fee of \$225.00, an abstract or title search fee of \$120.00, a title examination fee of \$300.00, an overnight fee of \$25.00, a document review fee of \$275.00, and a processing fee of \$260.00.

Elliott also responded to a mailed solicitation from Community Bank advertising loans. He called the 800 number because of the 12.99% interest rate advertised in the mailed solicitation. He submitted a loan application over the phone, made a few more telephone calls, faxed requested documents, and then went to the residence of Tyler Toulane (Toulane) to execute the loan documents. Toulane advised Elliott that he was a notary public. Elliott was approved for a \$35,000.00 loan, with a 12.99% interest rate. Title America provided closing services for the loan.

Community Bank and Title America charged Elliott fees totaling \$5,650.00. The fees paid to Community Bank included a loan origination fee of \$2,800.00, a “loan discount” fee of \$1,400.00, an application fee of \$95.00, and an underwriting fee of \$185.00. The fees paid to Title America included a settlement or closing fee of \$225.00, an abstract or title search fee of \$120.00, a title examination fee of \$300.00, an overnight fee of \$25.00, a document review fee of \$250.00, and a processing fee of \$250.00.

In September 2001, plaintiffs filed a lawsuit against Community Bank and Chase Manhattan Bank in Wake County Superior Court asserting violations of Chapter 24 of the North Carolina General Statutes based on excessive fees, violations of N.C. Gen. Stat. § 53-238 and N.C. Gen. Stat. § 75-1.1 based upon duplicative fees, violations of N.C. Gen. Stat. § 53-238 and N.C. Gen. Stat. § 75-1.1 based upon a loan discount fee charge when the loan rate was not discounted, and violations of N.C. Gen. Stat. §§ 24-1.1A(c)(1)(e), 24-8(d), 53-238¹, and 75-1.1 based upon the fees charged by Title America.

In October 2001, this case (hereinafter *Bumpers*) was removed to the United States District Court for the Eastern District of North Carolina for the first time. In August 2002, the case was remanded to

1. Plaintiffs’ complaint recites N.C. Gen. Stat. § 53-238; however, this statute was repealed in 1988. 1987 N.C. Sess. Laws ch. 1017, § 1. The applicable provision has been recodified in Article 19A and subsequently in Article 19B of Chapter 53. Plaintiffs’ claim for relief based on this statute was dismissed by the Wake County Superior Court by order filed 1 May 2003.

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Wake County Superior Court. In April 2003, the trial court entered an order granting defendants' motions to dismiss as to all of plaintiffs' claims that were based upon either Chapter 24 of the General Statutes or N.C. Gen. Stat. § 54-238, and denying defendants' motions to dismiss as to the claims under N.C. Gen. Stat. § 75-1.1. Plaintiffs then filed a notice of withdrawal as to the claims that were dismissed by the April 2003 order and waived all rights of appeal with respect to those claims.²

In June 2003, Community Bank removed the case to the United States District Court for the Eastern District of North Carolina for a second time. Plaintiffs filed a motion to remand the case to state court that was not immediately ruled upon.

Meanwhile, several cases had been commenced against Community Bank in the United States District Court for the Western District of Pennsylvania, and Community Bank was seeking to join all of these claims throughout the United States into one case. *See In re Cmty. Bank of N. Va.*, 418 F.3d 277, 284-86 (3rd Cir. 2005). In July of 2003, a proposed national class settlement was submitted to the federal district court in Pennsylvania. Plaintiffs moved to intervene in *In re Community Bank*, were allowed to intervene, and filed objections to the proposed settlement.

In August 2003, the parties consented to transfer venue of *Bumpers* from the Eastern District of North Carolina to join the national class action against Community Bank and other defendants in the Western District of Pennsylvania.

In December 2003, the federal court approved the class action settlement, which was subsequently set aside and remanded for further proceedings in August 2005 by the United States Third Circuit Court of Appeals. *In re Cmty. Bank of N. Va.*, 418 F.3d at 293, 320. In August 2006, the federal class representatives filed a joint motion for approval of modified and enhanced settlement agreement with Community Bank and other defendants, which the United States District Court conditionally approved in January 2008.

On 22 January 2008, the instant case was transferred to the United States District Court for the Eastern District of North Carolina for remand to the Wake County Superior Court for lack of subject

2. Plaintiffs gave this notice of withdrawal and waiver of right to appeal to ensure that all parties and the court were clearly informed that plaintiffs did not seek relief under Chapter 24 of the General Statutes or 12 U.S.C. §1831(d), and would not seek relief under these statutes on appeal.

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matter jurisdiction because “plaintiffs’ state court complaint sounded purely in North Carolina statutory and common law.”

Plaintiffs voluntarily dismissed the claims asserted against Chase Manhattan Bank on 11 February 2008. Bumpers and Elliott then sought to have their motion for class certification and motion for summary judgment ruled upon in state court. In March 2008, the United States District Court for the Western District of Pennsylvania issued an injunction prohibiting Bumpers and Elliott from proceeding with class certification efforts but declined to halt proceedings on the summary judgment motion.

On 22 April 2008, the trial court granted plaintiffs’ motion for partial summary judgment on the issues of liability, holding that Community Bank’s practice of charging a loan discount fee without providing a loan with a discounted interest rate constituted an unfair and deceptive trade practice under Chapter 75. This order further held that Community Bank and Title America’s duplicative and excessive fees constituted systematic overcharging also in violation of Chapter 75. In a second order filed 15 May 2008, each of the plaintiffs were awarded damages and treble damages pursuant to N.C. Gen. Stat. § 75-16, along with interest on the excess settlement charges, but not upon the trebled amount.

On 14 August 2008, the United States District Court for the Western District of Pennsylvania entered final orders approving and enforcing the national class settlement. The terms of this settlement agreement prohibited class members from pursuing further litigation against Community Bank. Elliott remained a member of that certified class, and appealed the district court’s rulings on the ground that the nation-wide settlement does not afford North Carolina borrowers the relief to which they are entitled under North Carolina law. As a result, Elliot is not participating in the instant appeal. Bumpers “opted out” of the nation-wide class, is not affected by the order enforcing the settlement, and is defending this appeal.

Defendant appealed the trial court’s orders granting summary judgment to this Court. In May 2009, this Court held that defendant’s appeal constituted a non-appealable interlocutory order, and dismissed the appeal. *See Bumpers v. Cmty. Bank of N. Va.*, 196 N.C. App. 713, 675 S.E.2d 697 (2009). Our Supreme Court reversed and remanded, and directed that we consider the case on the merits. *Bumpers v. Cmty. Bank of N. Va.*, 364 N.C. 195, 695 S.E.2d 442 (2010).

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On 22 September 2010 (subsequently amended on 20 October 2010), the United States Court of Appeals for the Third Circuit filed an opinion in *In re Cmty. Bank of N. Va.*, 622 F.3d 275 (3rd Cir. 2010). This opinion once again vacated the class certification decision of the District Court and remanded the case to the District Court for further proceedings. The opinion of the Third Circuit specifically addressed the objections of the North Carolina class members, including Elliot. Upon remand, the District Court was directed to “consider the North Carolina Objectors’ arguments and determine whether the creation of a subclass is necessary to represent their interests adequately.” *In re Cmty. Bank*, 622 F.3d at 311.

On 29 September 2010, Bumpers filed a Rule 60(b) motion in the trial court seeking an amendment to the trial court’s summary judgment order to allow class certification proceedings. On 25 January 2011, the trial court entered a document styled as “Statement of Trial Court Concerning Rule 60(b) Motion.” In this order, Judge Lewis stated if he currently had jurisdiction over the case he would be inclined to make the following rulings: (1) the order granting partial summary judgment would be modified to reflect that all federal injunctions against class proceedings have now expired or been vacated; and (2) the trial court would entertain motions for class certification and consider class relief at a future date.

On 10 February 2011, this Court entered an order directing that the parties submit supplemental briefs concerning the developments in this case and related cases since the remand of this case by the North Carolina Supreme Court. Defendants submitted a supplemental brief on 1 March 2011, and plaintiff submitted a supplemental brief on 21 March 2011.

This matter is before the Court upon defendant’s appeal of the trial court’s order of partial summary judgment.

II. Standard of Review

“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). Summary judgment is appropriate where “there is no genuine issue as to any material fact” and “any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). “In ruling on a motion for summary judgment, ‘the court may consider the pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documen-

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tary materials.’ ” *Howerton*, 358 N.C. at 470, 597 S.E.2d at 693 (quoting *Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E.2d 214, 217 (1975)). The evidence must be considered in the light most favorable to the non-moving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

III. Loan Discount Fee

[1] In its first argument, defendant contends that the trial court erred in granting summary judgment in favor of plaintiffs on their Chapter 75 claims based upon defendant charging a loan discount fee where no discount of the interest rate was provided. We disagree.

A. Actionability under Chapter 75

Defendant contends that plaintiffs’ claim is based upon a misrepresentation, and that because plaintiffs did not demonstrate actual reliance on Community Bank’s representation regarding the loan discount fee, they cannot prove that defendant’s unfair and deceptive trade practice proximately caused their injury.

N.C. Gen. Stat. § 75-1.1(a) (2009) states that “unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” “In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.” N.C. Gen. Stat. § 75-1.1; *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001) (citation omitted).

i. Unfair and Deceptive Trade Practice

“A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive.” *Id.* (citation omitted). The determination of whether an act or practice is unfair or deceptive under § 75-1.1 is a question of law for the court. *Ellis v. Northern Star Co.*, 326 N.C. 219, 226, 388 S.E.2d 127, 131, *reh’g denied*, 326 N.C. 488, 392 S.E.2d 89 (1990). This Court has held that systematic overcharging is an unfair trade practice squarely within the purview of N.C. Gen. Stat. § 75-1.1. *Sampson-Bladen Oil Co. v. Walters*, 86 N.C. App. 173, 177, 356 S.E.2d 805, 808, *disc. review denied*, 321 N.C. 121, 361 S.E.2d 597 (1987). In *Sampson-Bladen Oil Co.*, this Court found a violation of § 75-1.1 where plaintiff charged defendants for approximately 2,600 more gallons of oil than plaintiff delivered to defendants over a two-year period. *Id.* In the instant case, plaintiffs’ claim is

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based upon Community Bank charging them for something that they did not receive (i.e. charging a “loan discount fee” where there was no evidence that plaintiffs received a discounted interest rate on the loan). Defendant’s conduct is actionable as an unfair or deceptive practice under § 75-1.1.

ii. Affecting Commerce

“Commerce” is broadly defined, and with few exceptions, “includes all business activities, however denominated . . .” N.C. Gen. Stat. § 75-1.1(b) (2009). The relationship between a creditor and borrower, and the activities appurtenant thereto, affect commerce. *See, e.g., Johnson v. Insurance Co.*, 300 N.C. 247, 261-62, 266 S.E.2d 610, 620 (1980), *overruled on other grounds, Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). Accordingly, the second prong of N.C. Gen. Stat. § 75-1.1 is met.

iii. Proximate Cause

Defendant argues that plaintiffs cannot prove that defendant’s conduct proximately caused plaintiffs’ injury, because plaintiffs’ claim is based on a misrepresentation, and plaintiffs did not demonstrate actual reliance on the misrepresentation.

Actual reliance is not ordinarily required to recover for a violation of N.C. Gen. Stat. § 75-1.1. *See, e.g., Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 21, 598 S.E.2d 570, 584 (2004) (noting that while North Carolina does not require reliance by the plaintiff to successfully pursue a claim under § 75-1.1, other states that have similarly-crafted statutes do); *cf. Cullen v. Valley Forge Life Ins. Co.*, 161 N.C. App. 570, 580, 589 S.E.2d 423, 431 (2003) (holding that actual reliance is not required to establish injury under N.C. Gen. Stat. § 58-63-15(1) (2001), which governs the unfair methods of competition and unfair and deceptive acts or practices in the business of insurance), *disc. review denied sub nom. Santomassimo v. Valley Forge Life Ins. Co.*, 358 N.C. 377, 598 S.E.2d 138 (2004).

However, “[w]here an unfair or deceptive practice claim is based upon an alleged misrepresentation by the defendant, the plaintiff must show ‘actual reliance’ on the alleged misrepresentation in order to establish that the alleged misrepresentation ‘proximately caused’ the injury of which plaintiff complains.” *Tucker v. Blvd. at Piper Glen L.L.C.*, 150 N.C. App. 150, 154, 564 S.E.2d 248, 251 (2002) (citation omitted). While defendant contends that plaintiffs’ claims regarding the loan discount fee are based on a misrepresentation, we find the

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facts of this case to be similar to those in *Sampson-Bladen Oil Co.*, discussed *supra*. In the instant case, the essence of plaintiffs' claims regarding the loan discount fee are not that they were induced by a misrepresentation made by defendant, but rather that they were charged for a product that was never delivered. As we held in *Sampson-Bladen Oil Co.*, this type of systematic overcharging constitutes a violation of N.C. Gen. Stat. § 75-1.1. We hold that where a defendant charges customers fees for a product that was never provided, defendant's conduct proximately causes injury to those customers.

This argument is without merit.

B. Summary Judgment

Defendant contends that the evidence in the record did not support the trial court's grant of summary judgment to plaintiffs on the claim based upon the "loan discount fee."

According to the United States Department of Housing and Urban Development's ("HUD") "Buying Your Home, Settlement Costs and Helpful Information," a "loan discount is a one-time charge imposed by the lender or broker to lower the rate at which the lender or broker would otherwise offer the loan to you." The undisputed evidence in the record demonstrates that plaintiffs did not receive a discounted interest rate on the loan as a *quid pro quo* for paying the loan discount fee.

C. Federal Preemption

Defendant next contends that the portion of plaintiff's UDTP claim based upon the loan discount fee was preempted by section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA), 12 U.S.C. § 1831d (2006).

DIDA was enacted by Congress, in part, to prevent discrimination against state-chartered banks. 12 U.S.C. § 1831d(a) (2006); *Greenwood Trust Co. v. Com. of Massachusetts*, 971 F.2d 818, 826 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052, 122 L. Ed. 2d 129 (1993). It achieved this by allowing state-chartered banks to charge the maximum interest rate permitted under the laws of their home states; thus preempting state law usury claims against out-of-state chartered banks:

In order to prevent discrimination against State-chartered insured depository institutions, . . . such State bank or such insured branch of a foreign bank may, notwithstanding any State

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constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, . . . at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

12 U.S.C. 1831(d)(a) (2006). Federal courts have held that DIDA exempts out-of-state banks from state usury laws establishing maximum permissible interest rates. *See Vaden v. Discover Bank*, 556 U.S. 49, ___, 173 L. Ed. 2d 206, 215 (2009) (“Section 27(a) prescribes the interest *rates* state-chartered, federally insured banks like Discover can charge, ‘notwithstanding any State constitution or statute which is hereby preempted.’”) (emphasis added); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 295 (3d Cir. 2005) (“Likewise, § 521 of DIDA completely preempts any state law attempting to limit the amount of interest and fees a federally insured-state chartered bank can charge.”) (citation omitted).

We first note that in its order of remand, filed 24 January 2008, the United States District Court for the Western District of Pennsylvania held that plaintiffs’ claims were state law claims, specifically holding that they were not preempted by DIDA. The federal court held that plaintiffs’ claims were not claims for usury, but were claims for charging fraudulent fees; specifically “discount rate fees although a discount rate was not given.” While we are not bound by this ruling, *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 647, 165 L. Ed. 2d 92, 106-07 (2006), we find its reasoning to be persuasive.

We hold that the portion of the plaintiffs’ UDTP claim based upon the charging of a loan discount fee for a discounted interest rate that was in fact never received was not preempted by DIDA. We reject defendant’s assertion that under DIDA, “interest” should be construed so broadly as to encompass any fees connected with the loan.

This argument is without merit.

IV. Title America’s Fees

[2] In its second argument, defendant contends that the trial court erred in granting summary judgment to plaintiffs on their Chapter 75 claims based upon fees charged by Title America. We agree.

A. Overcharging of Fees

The trial court’s order relied upon a 1998 survey of the North Carolina Bar Association, and the affidavit and deposition testimony

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of Nancy Guyton (Guyton), a certified real estate specialist in North Carolina to conclude that the closing fees charged by Title America were excessive and constituted “systematic overcharging.” The trial court further concluded that “Title America, LLC was Community Bank’s agent,” and thus attributed Title America’s “systematic overcharging” to defendant.

We hold that there were genuine issues of material fact concerning whether Title America’s closing fees were excessive. In her affidavit, Guyton stated that “the fees charged to Mr. Bumpers and Mr. Elliot for services rendered by Title America, LLC, were substantially in excess of a reasonable fee and were substantially in excess of what would have been charged for closing services for such loans by North Carolina attorneys.” She further stated that the reasonable and customary cost of these closing services “would not have exceeded \$400.00.”

In her deposition, Guyton acknowledged that in 1999 to close a second mortgage real estate loan would require 5-10 hours of attorney and staff time. If this was billed at the normal rate for attorney and paralegal time, the fee for a closing would have been \$850-\$1500. She advanced a twofold rationale for charging substantially less than the amount of time involved would indicate: (1) “[t]he market would not bear higher costs;” and (2) “it’s going to generate other business with your firm in some form or fashion.”

Based upon the above testimony of Guyton, there was a genuine issue of material fact as to whether Title America overcharged for its closing fees. It was error for the trial court to enter summary judgment in favor of plaintiff on the question of overcharging of fees by Title America.

V. Advisory Ruling of the Trial Court

[3] The trial court ruled that it was inclined to entertain motions for class certification in this case. The class certification aspects of this case were blocked by the rulings of the federal courts until 22 September 2010, when the Third Circuit vacated the orders of the United States District Court for the Western District of Pennsylvania that had barred the prosecution of the instant case as a class action. *In re Cmty. Bank of N. Virginia*, 622 F.3d 275 (3d Cir. 2010), *as amended* (Oct. 20, 2010). Since this case is being remanded to the trial court, upon remand it would be proper for the trial court to consider the issue of class certification.

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V. Conclusion

We affirm the trial court's grant of summary judgment in favor of plaintiffs on their claims under § 75-1.1 based upon the loan discount fee charged by Community Bank. We reverse the trial court's grant of summary judgment on plaintiffs' § 75-1.1 claims based on the fees charged by Title America, vacate the portion of the award of damages based on that claim, and remand for further proceedings consistent with this opinion.

Defendant does not argue its remaining assignments of error, and they are therefore deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

AFFIRMED IN PART, REVERSED, and VACATED, IN PART.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. DEANTE OCTARIO HOWARD

No. COA10-1273

(Filed 6 September 2011)

1. Evidence—prior crimes or bad acts—course of conduct—complete story—no error

The trial court did not err in a robbery with a dangerous weapon case by admitting evidence of a break-in at the Daddy Rabbit's gun store. The evidence was properly admitted under the "course of conduct" or "complete story" exceptions to Rule 404(b) of the Rules of Evidence.

2. Evidence—prior crimes or bad acts—probative value—not substantially outweighed by unfair prejudice—no error

The trial court did not err in a robbery with a dangerous weapon case by admitting evidence of a break-in at the Daddy Rabbit's gun store and testimony from a detective concerning defendant wearing dark clothing in another investigation. The probative value of the evidence substantially outweighed its potential for unfair prejudice and the detective's response was to a question from defendant's own counsel and did not in any way discuss the nature of the prior investigation.

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3. Evidence—lay testimony—detective—based on personal observations and training—no error

The trial court did not commit error or plain error in a robbery with a dangerous weapon case by admitting the lay testimony of a detective. The testimony was based upon his personal observations at the scene and his investigative training background as a police officer.

4. Identification of Defendants—detective’s lay testimony—no error

The trial court did not commit error or plain error in a robbery with a dangerous weapon case by allowing a detective to identify defendant as the person in a still photograph made from a surveillance tape. The detective observed defendant in custody on the same morning as the photo was taken, located the clothes defendant was wearing in the photo (with blood on them), and had more familiarity with defendant’s appearance at the time the photo was taken than the jury could have.

5. Evidence—authentication—best evidence rule—failure to object—no error

The trial court did not err in a robbery with a dangerous weapon case by admitting into evidence receipts and photos captured from a surveillance video and a copy of the victim’s social security card. Had defendant objected to the receipts and photos, the State could have properly authenticated them. Further, had defendant objected to the admission of the receipts, photos, and social security card, the State could have provided the necessary foundation and documentation relating to the best evidence rule.

6. 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 at the close of the evidence. There was sufficient evidence presented of each element of the crime and of defendant being the perpetrator of the crime.

7. Robbery—dangerous weapon—cumulative errors—not plain error

Defendant’s argument in a robbery with a dangerous weapon case that the cumulative errors of the trial court deprived him of a fair trial was without merit. Given the overwhelming evidence

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of defendant's guilt, the cumulative effect of any of the asserted errors did not constitute plain error.

Appeal by defendant from judgment entered 19 May 2010 by Judge R. Stuart Albright in Randolph County Superior Court. Heard in the Court of Appeals 11 May 2011.

Attorney General Roy Cooper, by N.C. Department of Justice Deputy Director Caroline Farmer, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for defendant-appellant.

STEELMAN, Judge.

Evidence of the Daddy Rabbit's break-in was properly admitted under the "course of conduct" or "complete story" exception. The evidence admitted under the "course of conduct" exception was also properly admitted under North Carolina Rule of Evidence 403. Detective Shuler was properly allowed to give lay opinion testimony relating to items stolen from Wal-Mart, the appearance of blood, and the matching of wood panel fragments. Where Detective Shuler had more familiarity than the jury with defendant's appearance at the time of the crime, he was properly allowed to identify defendant on a Wal-Mart surveillance video. Where defendant did not object at trial, we find no plain error in the authentication and compliance with the "best evidence rule" of some of the State's evidence at trial. Where there was overwhelming evidence of defendant's guilt, the trial court properly denied defendant's motion to dismiss. Where we found that there was no plain error as to each of defendant's prior arguments, and the evidence of defendant's guilt was overwhelming, there can be no cumulative error that deprived defendant of a fair trial.

I. Factual and Procedural History

At approximately 12:50 a.m. on the morning of 13 October 2008, a black male approached Sandra Pennington (Pennington) as she attempted to enter her room at the Innkeeper Hotel in Archdale. He produced a silver snub nosed revolver and demanded that Pennington give him money or he would "pop three in [her]." Pennington refused but offered her laptop computer. The man then took her laptop computer, camcorder, and wallet which contained credit cards, approximately fifty dollars cash, Pennington's driver's license, and the social security cards of herself and her two children.

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Around 4:30 a.m. a citizen reported a break-in at Daddy Rabbit's gun store in Lexington, located approximately eleven miles from Archdale. After reviewing the inventory, it was discovered that a laptop computer and a rifle had been stolen. The suspect was reported to be driving an Isuzu Rodeo automobile and was followed by a citizen to an apartment located at 109 Oak Hill Drive, Lexington, belonging to Amanda Ebert. Detective Derrick Shuler (Detective Shuler) went to Ebert's apartment to investigate. Deante Octario Howard (defendant) was apprehended at Ebert's apartment.

Ebert gave the police consent to search her apartment and her Isuzu Rodeo automobile. The search yielded several bags of Wal-Mart merchandise, two laptop computers, a rifle, and some bloody clothing. The owner of Daddy Rabbit's verified that the serial number of the laptop computer taken from his store matched one of the laptop computers located at Ebert's apartment. A tag from Daddy Rabbit's with the rifle's serial number on it was found in defendant's pocket, along with Pennington's social security card.

The second laptop computer was determined to belong to Pennington. Upon contacting Pennington, Detective Shuler learned of the earlier robbery in Archdale. Receipts for the Wal-Mart merchandise were found in the bags, and the last four digits of the credit card number shown on the receipts were identical to the last four digits of one of the credit cards taken from Pennington. After establishing that the Wal-Mart items were likely purchased with a stolen credit card, Detective Shuler obtained the surveillance video from Wal-Mart and identified defendant as the individual who made the purchases. Detective Shuler further noted that the clothing defendant was wearing in the surveillance video was the same clothing located at Ebert's apartment, with blood on it. The Wal-Mart purchases were made at approximately 4:00 a.m.

A search of the Isuzu Rodeo automobile revealed blood and paneled board that matched the area broken to gain entry into Daddy Rabbit's.

On 13 October 2008, defendant was indicted for the robbery of Pennington with a dangerous weapon. After deliberating for seven minutes, the jury found defendant guilty as charged. The court found the defendant to be a prior felony record level V with sixteen prior record points. Defendant was sentenced to an active term of imprisonment of 133 to 169 months.

Defendant appeals.

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II. Course of Conduct

In his first argument, defendant contends the trial court erred in admitting evidence of the Daddy Rabbit's break-in. We disagree.

A. Admissibility of the Evidencei. Standard of Review

[1] Defendant failed to object to this evidence at trial. Our review of this argument is limited to plain error.

In 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(a)(4). "In order to show plain error, a defendant must show that absent the error the jury probably would have reached a different verdict." *State v. Riley*, 159 N.C. App. 546, 551, 583 S.E.2d 379, 383 (2003) (quotation omitted). Plain error only applies when "the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation omitted).

ii. Analysis

[A]dmission of evidence of a criminal defendant's prior bad acts, received to establish the circumstances of the crime on trial by describing its immediate context, has been approved in many other jurisdictions following adoption of the Rules of Evidence. This exception is known variously as the "same transaction" rule, the "complete story" exception, and the "course of conduct" exception. Such evidence is admissible if it forms part of the history of the event or serves to enhance the natural development of the facts. We similarly hold that the "chain of circumstances" rationale established in our pre-Rules cases survives the adoption of the Rules of Evidence.

State v. Agee, 326 N.C. 542, 547-48, 391 S.E.2d 171, 174 (1990) (citations and quotations omitted). The Supreme Court of North Carolina has held "that evidence of 'other wrongs' is admissible for the purpose, not enumerated in Rule 404(b) itself, of 'complet[ing] the story of a crime by proving the immediate context of events near in time and place.'" *See Id.* at 349-50, 391 S.E.2d at 175 (citations omitted).

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The evidence from the Daddy Rabbit's break-in was properly admitted by the trial court under the "course of conduct" or "complete story" exception. The evidence was necessary for the jury to be able to understand how defendant was identified as the perpetrator of the Pennington robbery, and how items stolen from Pennington and purchased with a credit card stolen from Pennington were recovered. The Daddy Rabbit's break-in evidence was necessary for the jury to understand the complete story and timeline of the events that took place on the night in question, and therefore was properly admitted under the "course of conduct" exception.¹

B. Admissibility Under Rule 403 Standard

[2] Defendant further argues that the trial court erred in admitting the Daddy Rabbit's evidence because the probative value of the evidence, particularly defendant's bloody clothing, did not substantially outweigh its potential for unfair prejudice.

North Carolina Rule of Evidence 403 states "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2009). "Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court. . . . Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *Agee*, 326 N.C. at 550, 391 S.E.2d at 176 (quoting *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990)).

The trial court did not err in admitting evidence relating to defendant's break-in at Daddy Rabbit's under Rule 403. The bloody clothing found at Ebert's apartment helped Detective Shuler to identify defendant as the individual who made purchases with a credit card stolen from Pennington at Wal-Mart, because that clothing was worn by defendant when he made the Wal-Mart purchases. The fact that blood was found on the clothing was a necessary detail for the jury to understand why this clothing appeared significant to the police when they searched the apartment, and to connect the clothing to the Daddy Rabbit's break-in. The evidence was neces-

1. We also note that the learned trial judge analyzed the admissibility of this evidence under both Rules 403 and 404(b) of the Rules of Evidence, and correctly determined that it was admissible under those Rules as well as under the course of conduct rule. Since we have held that the evidence was admissible under that exception, we do not further discuss the Rule 404(b) analysis.

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sary to provide the jury with a complete narrative of the events that took place. This evidence was not unfairly prejudicial, and the trial court did not abuse its discretion in admitting the evidence of the Daddy Rabbit's break-in, including the bloody clothing, under Rule 403.

Defendant also complains of Detective Shuler testifying concerning defendant wearing dark clothing in another investigation. This testimony was in response to a question from defendant's counsel as to whether Detective Shuler ever saw defendant with a black hooded sweatshirt "during any of your investigation." Since this was in response to a question from defendant's own counsel, which was less than artfully worded, and did not in any way discuss the nature of the prior investigation, we hold that the trial court did not err under Rule 403 in failing to intervene *ex mero motu* to exclude this evidence. The admission of this evidence did not constitute error, much less plain error.

This argument is without merit.

III. Lay Opinion Testimony

[3] In his second argument, defendant contends the trial court erred in admitting Detective Shuler's lay opinion testimony. We disagree.

Defendant did not object to Detective Shuler's testimony at trial. Our review is thus limited to plain error.

A. Lay Opinion Related to Evidence at Ebert's Apartment

Defendant contends that because Detective Shuler was not qualified as an expert he should not have been allowed to give lay opinion testimony on the following: (1) that items located at Ebert's apartment were purchased with a stolen credit card and that it appeared someone had attempted to hide them; (2) that subtotals on a Wal-Mart receipt indicated that the credit card was stolen because defendant would not have known how much money was available on the card and would have purchased a few items at a time to be sure the card would clear; (3) that there was blood on clothing found in Ebert's apartment and in the Isuzu Rodeo automobile when no lab tests confirmed its presence; and (4) the broken wood panel piece found in the Isuzu Rodeo automobile matched the piece broken to gain entry to Daddy Rabbit's "like a 'puzzle piece.'"

North Carolina Rule of Evidence 701, Opinion Testimony by Lay Witness, states:

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If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2009).

This Court has long held that a witness may state the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time. Such statements are usually referred to as shorthand statements of facts.

State v. Alexander, 337 N.C. 182, 191, 446 S.E.2d 83, 88 (1994) (quotation omitted). In the past this Court has upheld a police officer's lay opinion testimony based upon his "personal observations at the scene and his investigative training background as a police officer." *State v. Ray*, 149 N.C. App. 137, 145, 560 S.E.2d 211, 217 (2002), *aff'd*, 356 N.C. 665, 576 S.E.2d 327 (2003).

The trial court properly admitted the challenged testimony of Detective Shuler. Detective Shuler's testimony that the items found at Ebert's were bought with a stolen credit card was based upon the Wal-Mart receipt found at the apartment, and his investigation. We held in *State v. Ray*, 149 N.C. App. at 145, 560 S.E.2d at 217, that an officer can give lay opinion testimony based on his investigative training. The fact that someone had tried to hide the items was based on Detective Shuler's rational observation, and represented nothing more than an instantaneous conclusion he reached after observing the location of the merchandise at Ebert's apartment. Detective Shuler's testimony that the presence of a series of subtotals on the Wal-Mart receipt could indicate a purchase with a stolen credit card was again based on Detective Shuler's investigative training and background as a police officer, and was a proper basis for lay opinion testimony. *Ray*, *supra*. The Supreme Court of North Carolina has upheld lay opinion testimony identifying blood or bloodstains, *State v. Mason*, 295 N.C. 584, 595, 248 S.E.2d 241, 248 (1978), *cert. denied*, 440 U.S. 984, 60 L. Ed. 2d 246 (1979); therefore, there was no error in the admission of Detective Shuler's testimony that there was blood present on the clothing and in the Isuzu Rodeo automobile. Finally, Detective Shuler's testimony that the wood panel found in the Isuzu Rodeo automobile matched the broken entry site of Daddy Rabbit's, was an instantaneous conclusion based on the appearance of the bro-

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ken panel piece, and was a proper subject for lay opinion testimony. The trial court did not commit error, much less plain error, in allowing Detective Shuler to offer this lay opinion testimony.

B. Video Identification by Lay Witness

[4] Defendant also contends that it was plain error for the trial court to allow Detective Shuler to identify defendant as the person shown in a still photograph made from Wal-Mart's surveillance tapes, and as making the purchases at Wal-Mart.

In *State v. Belk*, this Court noted:

The current national trend is to allow lay opinion testimony identifying the person, usually a criminal defendant, in a photograph or videotape where such testimony is based on the perceptions and knowledge of the witness, the testimony would be helpful to the jury in the jury's fact-finding function rather than invasive of that function, and the helpfulness outweighs the possible prejudice to the defendant from admission of the testimony.

State v. Belk, ___ N.C. App. ___, ___, 689 S.E.2d 439, 441 (2009) (quotation omitted), *writ denied, disc. review denied*, 364 N.C. 129, 695 S.E.2d 761 (2010). This Court has found the following factors to be significant:

(1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's familiarity with the defendant's appearance at the time the surveillance photograph was taken or when the defendant was dressed in a manner similar to the individual depicted in the photograph; (3) whether the defendant had disguised his appearance at the time of the offense; and (4) whether the defendant had altered his appearance prior to trial.

Id. (citations omitted).

Detective Shuler observed the defendant in custody on the same morning as the Wal-Mart photo was taken, affording Detective Shuler the opportunity to see defendant at a time when his appearance most closely matched his appearance in the video. Detective Shuler also located the clothes defendant was wearing at Wal-Mart in Ebert's apartment, with blood on them. Detective Shuler had more familiarity with defendant's appearance at the time the photo was taken than the jury could have. The trial court did not err in admitting Detective Shuler's lay opinion testimony, much less commit plain error.

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This argument is without merit.

IV. Document Authentication and Best Evidence Rule

[5] In defendant's third argument, he contends that Wal-Mart receipts and photos captured from the Wal-Mart surveillance video were not properly authenticated, and that the receipts, photos, and a copy of the victim's social security card admitted into evidence all violated the "best evidence rule." We disagree.

Defendant did not object to the admission of any of these pieces of evidence at trial. Our review is thus limited to plain error.

North Carolina Rule of Evidence 901(a) states "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2009). North Carolina Rule of Evidence 1002, known as the "best evidence rule" states, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." N.C. Gen. Stat. § 8C-1, Rule 1002 (2009). Rule 1003, Admissibility of Duplicates, provides, "[a] duplicate is admissible to the same extent as an original unless (1) a genuine issue is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." N.C. Gen. Stat. § 8C-1, Rule 1003 (2009).

"Based upon our review of the record, it appears that if defendant had made a timely objection, the State could have supplied the necessary foundation" *State v. Jones*, 176 N.C. App. 678, 683, 627 S.E.2d 265, 268 (2006). Had defendant objected to the evidence now challenged the State could have properly authenticated it and either provided the originals of the social security card and receipts to comply with the "best evidence rule" or explained why admission of duplicates was appropriate. "Since defendant has made no showing that the foundational prerequisites, upon objection, could not have been supplied and has pointed to nothing suggesting that [the evidence in question] is inaccurate or otherwise flawed, we decline to conclude the omissions discussed above amount to plain error." *Id.* at 684, 627 S.E.2d at 269.

The trial court did not commit plain error in admitting the social security card, Wal-Mart photos, and receipts into evidence without full authentication and explanation as to whether or not the "best evi-

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dence rule” was complied with, because had the defendant objected to the admission of these pieces of evidence the State could have provided the necessary foundation and documentation relating to the “best evidence rule.”

This argument is without merit.

V. Motion to Dismiss

[6] In his fourth argument, defendant contends the trial court erred in denying his motion to dismiss at the close of the evidence. We disagree.

A. Standard of Review

Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.

....

In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

State v. Fritsch, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quotation and citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

B. Analysis

“The elements of robbery with a dangerous weapon are (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim.” *State v. Jarrett*, 137 N.C. App. 256, 262, 527 S.E.2d 693, 697 (2000) (citation omitted).

We hold that the trial court did not err in denying defendant’s motion to dismiss. There was sufficient evidence presented of each element of robbery with a dangerous weapon and of defendant being the perpetrator of the crime. The victim identified the defendant as the man who robbed her at gun-point in open court. Defendant was apprehended at Ebert’s apartment where the police located items

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purchased from Wal-Mart with one of Pennington's stolen credit cards, the clothing defendant was wearing when he used Pennington's stolen credit card at Wal-Mart, and Pennington's laptop computer. Pennington's social security card was found in defendant's wallet. Pennington was robbed at approximately 12:50 a.m. Pennington's stolen credit card was used at Wal-Mart in Lexington at about 4:00 a.m., the Daddy Rabbit's break-in was reported around 4:30 a.m., and defendant was apprehended by 5:00 a.m. All of these events took place within an eleven mile radius. Motions to dismiss based upon the insufficiency of the evidence must be viewed in the light most favorable to the State and contradictions and discrepancies are for the jury to decide. *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455. The evidence against defendant was overwhelming. The trial court properly denied defendant's motion to dismiss.

This argument is without merit.

VI. Cumulative Errors

[7] In his fifth argument, defendant contends that should this Court conclude that no single error was sufficiently prejudicial to warrant a new trial, that the cumulative errors deprived him of a fair trial. We disagree.

Defendant has asserted a series of questionable instances of plain error, all of which we have found not to constitute plain error. Given the overwhelming evidence of defendant's guilt in this case, the cumulative effect of any of the asserted errors does not come close to constituting plain error.

This argument is without merit.

VII. Conclusion

We hold that defendant received a fair trial, and was properly convicted by the jury of robbery with a dangerous weapon, based upon overwhelming evidence.

NO ERROR.

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

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[215 N.C. App. 330 (2011)]

FEDERATED FINANCIAL CORPORATION OF AMERICA, PLAINTIFF V.
MATT JENKINS, INDIVIDUALLY AND D/B/A/ SHEPHARD SERVICE COMPANY, DEFENDANT

No. COA10-1349

(Filed 6 September 2011)

1. Conflict of Laws—choice of law—unchallenged

The trial court did not err in applying Utah law to a case arising out of a dispute concerning a credit card agreement. At trial, neither party challenged the choice of law provision in the agreement.

2. Conflict of Laws—forum selection clause—unenforceable under Utah law—jurisdiction proper in North Carolina

The trial court did not err in a case arising out of a dispute over a credit card agreement by failing to dismiss the case pursuant to the agreement's forum selection clause. The forum selection clause was unenforceable under Utah law and did not deprive the North Carolina trial court of jurisdiction.

3. Civil Procedure—adequate notice of hearing—motion to set aside judgment—properly denied

The trial court did not err in a case arising out of a dispute concerning a credit card agreement by denying defendant's Rule 60 motion to set aside the judgment. The record contained evidence that defendant received adequate notice of the hearing.

4. Appeal and Error—preservation of issues—failure to argue

Defendant failed to preserve for appellate review his argument that the trial court erred in a case arising out of a dispute concerning a credit card agreement by hearing arguments on motions and entering orders on the matter after the case had been dismissed for arbitration, but later reopened. Defendant failed to argue the issue before the trial court.

5. Pleadings—sanctions—argument well-grounded in fact and warranted by law—motion denied

Plaintiff's motion for sanctions in a case arising out of a dispute concerning a credit card agreement was denied. Although some of plaintiff's assertions were not without validity, defendant's arguments pertaining to the forum selection clause were well-grounded in fact and warranted by existing law, even if ultimately unpersuasive.

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Appeal by Defendant from order entered 29 June 2010 by Judge James E. Hardin, Jr., in Wake County Superior Court. Heard in the Court of Appeals 24 March 2011.

Law Offices of Gregory P. Chocklett, by Gregory P. Chocklett, for Plaintiff-Appellee.

W. Andrew LeLiever, for Defendant-Appellant.

THIGPEN, Judge.

Matt Jenkins, individually and doing business as Shephard Service Company, Inc. (“Defendant”), a corporation registered in the State of California, entered into a credit card agreement, which contained a forum selection clause designating the State of Utah as the proper venue and jurisdiction for any lawsuit arising from the Agreement. Defendant argues this clause deprived North Carolina courts of jurisdiction. By means of the application of Utah law, we disagree.

I: Substantive Facts

Defendant opened a business credit card account with Advanta Bank Corporation, a Utah corporation. The Advanta Business Card Agreement (“Agreement”) contained the following choice of law provision:

This Agreement shall be governed solely by and interpreted entirely in accordance with the laws of the State of Utah, except as (and to the degree that) such laws are superseded by the banking or other laws of the United States, regardless of where you reside.

The Agreement also contained the following forum selection clause:

I consent to personal jurisdiction in the state and federal courts of Utah and agree that any lawsuit pertaining to the account must be brought only in such courts in Utah, regardless of who files the suit, and may be maintained only in those courts unless and until any party elects arbitration pursuant to the arbitration provision in this agreement.

Defendant relocated to and, at the time of the commencement of this action, was residing and operating a business in North Carolina. Nonbusiness purchases were made on the Advanta Bank Corporation credit card. The account became delinquent. On 10 April 2008, the delinquent account was sold to Federated Financial Corporation of

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America, a business organized under the laws of the State of Michigan, which purchases and collects from delinquent credit card accounts.

II: Procedural History

On 2 February 2009, Federated Financial Corporation of America (“Plaintiff”) filed a complaint against Defendant in North Carolina, alleging Defendant entered into a credit card agreement with Plaintiff’s predecessor in interest, Defendant failed to make credit card payments when due and is in default, and Defendant breached the credit card agreement. Plaintiff further alleged “there remain[ed] a payoff of Eighteen Thousand Three Hundred Eighty Four and 43/100 Dollars (\$18,384.43).”

On 18 March 2009, Defendant filed a motion to dismiss for improper venue, and an order was entered on 8 May 2009 denying this motion to dismiss.

On 29 September 2009, Defendant filed a motion to dismiss for lack of subject matter and personal jurisdiction in North Carolina, stating, according to the Agreement, “any suit brought to enforce the terms of the agreement ‘must be brought only in the State of Utah.’” On 12 October 2009, the trial court denied this motion to dismiss.

On 23 December 2009, Defendant filed a motion to stay proceedings and compel arbitration. On 3 February 2010, the trial court entered an order stating that the “action is going to binding arbitration” and ordering “that this action be dismissed without prejudice to reinstate or reopen the same in the event the action is not disposed of as aforesaid.”

Based on Defendant’s alleged failure to comply with the provisions pertaining to arbitration in the Agreement, on 11 February 2010, Plaintiff filed a motion to hold Defendant in contempt of court, lift stay, deny Defendant’s request for arbitration and enter discovery sanctions.

On 16 March 2010, the trial court entered an order denying Plaintiff’s motion to hold Defendant in contempt of court, lifting the stay of litigation, denying Defendant’s request for arbitration, granting Plaintiff’s motion for discovery sanctions, ordering default judgment against Defendant and in favor of Plaintiff, and ordering Plaintiff to recover from Defendant the sum of \$18,384.43, plus pre-judgment interest at 29.99% per annum and post-judgment interest at

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8% per annum, the costs of the action, and attorneys' fees in the amount of \$7,879.20.

On 31 March 2010, Defendant filed a motion to set aside the default judgment. The trial court denied this motion in an order entered 29 June 2010. On 28 July 2010, Defendant filed notice of appeal from the order denying his motion to set aside default judgment.

III: Analysis

i: Choice of Law

[1] As a preliminary matter, we must determine whether the choice of law provision in the Agreement necessitates that we review the appeal through application of the law of the State of Utah. We conclude it does.

“[A] choice of law provision[] names a particular state and provides that the substantive laws of that jurisdiction will be used to determine the validity and construction of the contract, regardless of any conflicts between the laws of the named state and the state in which the case is litigated.” *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 92, 414 S.E.2d 30, 33 (1992) (citation omitted). “[W]here parties to a contract have agreed that a given jurisdiction’s substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect.” *Sawyer v. Mkt. Am., Inc.*, 190 N.C. App. 791, 794, 661 S.E.2d 750, 752, *disc. review denied*, 362 N.C. 682, 670 S.E.2d 235 (2008) (quotation omitted). “[T]he parties choice of law is generally binding on the interpreting court as long as they had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental public policy of the state or otherwise applicable law.” *Id.*, 190 N.C. App. at 794, 661 S.E.2d at 752 (quotation omitted).

The Agreement in the present case contained a choice of law provision providing that the Agreement would be interpreted under the laws of the State of Utah. At trial, neither party petitioned the trial court to apply Utah law; however, neither did either party challenge the choice of law provision in the Agreement. Similarly, on appeal, neither Defendant nor Plaintiff argue that Utah law does not apply, and neither Defendant nor Plaintiff challenge the choice of law provision in the Agreement. In accordance with the unchallenged terms of the Agreement, we apply Utah law.

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ii: Forum Selection Clause

[2] In Defendant's second argument,¹ he contends the trial court erred by failing to dismiss the case pursuant to the Agreement's forum selection clause. Specifically, Defendant argues that the forum selection clause deprived the North Carolina trial court of jurisdiction. We disagree.

iii. Utah Jurisdiction

In Utah, as in North Carolina, questions concerning jurisdiction may be raised at any time, even for the first time on appeal. *See Jefferies v. Jefferies*, 895 P.2d 835, 838 (1995) ("Although raised for the first time on appeal, an issue of jurisdiction may be so raised").

"[W]hile a forum selection/consent-to-jurisdiction clause by itself is not sufficient to confer personal jurisdiction over a defendant as a matter of law, such clauses do create a presumption in favor of jurisdiction and will be upheld as fair and reasonable so long as there is a rational nexus between the forum selected and/or consented to, and either the parties to the contract or the transactions that are the subject matter of the contract." *Phone Directories Co. v. Henderson*, 8 P.3d 256, 261 (2000). "[T]he rational nexus element does require *some* connection between Utah and either the parties to or the actions contemplated by the contract[.]" *Id.* (Emphasis in original). One party's connection to Utah is sufficient to satisfy the rational nexus inquiry. *See Jacobsen Constr. Co. v. Teton Builders*, 106 P.3d 719, 728 (2005).

We believe, through the application of Utah law, the language, "either the parties to or the actions contemplated by the contract[.]" *Phone Directories Co.*, 8 P.3d at 261, should be interpreted to reference Plaintiff in this case, not Advanta Bank Corporation, even though Plaintiff is not the original party to the Agreement, but a successor in interest. *See Lundberg v. Dastrup*, 497 P.2d 648, 650 (1972) (affirming an award against the final successor in interest to a contract instead of the original party to the contract). Therefore, we review to determine whether there is a rational nexus between either Plaintiff or Defendant and the State of Utah.

In this case, the forum selection clause in the Agreement created a presumption in favor of jurisdiction in Utah. The clause is fair and reasonable so long as there is a rational nexus between Utah and the

1. We note that Defendant filed a motion to withdraw his first issue on appeal on 19 January 2011, which this Court allowed on 24 January 2011. Therefore, we do not address Defendant's first argument.

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parties or the transactions that are the subject matter of the contract. We now determine whether such a rational nexus exists.

It is undisputed that Defendant is a citizen and resident of Iredell County, North Carolina, and formerly a resident of California. Plaintiff's corporate headquarters is in Michigan. Both parties agree that charges on the credit card were mostly incurred in California and North Carolina. The only evidence of a rational nexus to the State of Utah is Defendant's assertion that Plaintiff is "registered to do business in the state of Utah" and "uses a third party contractor as it[s] registered agent" in Utah. We believe, under Utah law, this is insufficient to establish a rational nexus. *See Jacobsen Constr. Co.*, 106 P.3d at 728 ("[T]he nexus between the underlying dispute and the State of Utah must be truly 'rational[,] [and] [c]onsequently, the mere presence of a post office box maintained in Utah by a litigant, for example, . . . would not provide a sufficiently rational nexus to justify the exercise of personal jurisdiction"). Based on the facts of this case, we conclude there is no rational nexus between the State of Utah and the parties to or the actions contemplated by the Agreement. Therefore, we conclude the forum selection clause in the Agreement is unenforceable under Utah law, and Utah does not have personal jurisdiction.

iv: North Carolina Jurisdiction

We must now determine whether the State of North Carolina has subject matter and personal jurisdiction. Pursuant to either North Carolina or Utah law, North Carolina has subject matter jurisdiction. *See Harris v. Pembaur*, 84 N.C. App. 666, 668, 353 S.E.2d 673, 675 (1987) (citing N.C. Gen. Stat. § 7A-240) (holding that because the "contract dispute between the parties in this case constitutes a 'justiciable matter' that is 'cognizable' in our trial courts" our courts had subject matter jurisdiction); *see also Herzog v. Bramel*, 23 P.2d 345, 348 (1933) ("[C]ourts of this state are courts of general jurisdiction, possessing original jurisdiction in all matters civil and criminal not excepted by our Constitution or not prohibited by law"). Moreover, pursuant to either North Carolina or Utah law, North Carolina has personal jurisdiction. *See General Foods Corp. v. Morris*, 49 N.C. App. 541, 543, 272 S.E.2d 17, 18 (1980) (holding "[t]he verified complaint in this case alleges that defendant is a citizen and resident of North Carolina[;] [t]his is sufficient for the court to obtain personal jurisdiction over defendant"); *Stunzi v. Medlin Motors, Inc.*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2011) ("[A] court may properly obtain personal jurisdiction over a party who consents or makes a

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general appearance, for example, by filing an answer or appearing at a hearing without objecting to personal jurisdiction”); *Pohl, Inc. of Am. v. Webelhuth*, 201 P.3d 944, 953 (2008) (A defendant has minimum contacts with the forum state when a defendant “purposefully and voluntarily direct[s] his activities toward the forum so that he should expect . . . to be subject to the court’s jurisdiction based on his contacts with the forum[,]” and a defendant may “direct [his] activities toward the forum by ‘purposefully avail[ing] [him]self of the benefits of conducting business’ in the forum state”) (citation omitted).

In the present case, the facts regarding Defendant’s connections to North Carolina are not disputed. By Defendant’s own admission in his responsive pleading, he is a citizen and resident of Iredell County, North Carolina. Furthermore, Defendant’s responsive pleading did not challenge personal jurisdiction, and it contained counterclaims. The record shows Defendant has purposefully availed himself of the benefits of conducting business in Iredell County, North Carolina, as Shephard Service Company, which is an unincorporated entity.² Defendant also submitted an affidavit averring that he resides in Mooresville, North Carolina. The contract dispute in this case is a justiciable matter that is cognizable in our trial courts, which is not prohibited by law or otherwise excepted by statute or Constitution.

We conclude the forum selection clause is unenforceable under Utah law, and Utah does not have personal jurisdiction. We further conclude subject matter and personal jurisdiction is properly in North Carolina.

IV: Application of North Carolina Law

North Carolina choice of law rules provide that, in this case, we apply the substantive law of Utah—due to the choice of law provision in the contract—and the procedural rules of North Carolina. *See Stokes v. Wilson & Redding Law Firm*, 72 N.C. App. 107, 112-13, 323 S.E.2d 470, 475 (1984), *disc. review denied*, 313 N.C. 612, 332 S.E.2d 83 (1985) (stating that “[u]nder North Carolina choice of law rules, we apply the substantive law of the state where the cause of action accrued and the procedural rules of North Carolina”). Because the remainder of Defendant’s arguments derive from North Carolina procedural rules, we apply North Carolina law to address these arguments.

2. Defendant also formerly did business in California as Shephard Service Company, Inc., a registered California corporation.

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i: Rule 60 Motion

[3] In Defendant's third argument, he contends the trial court erred by denying Defendant's Rule 60 motion to set aside the judgment because "confusion existed among the parties as to the scheduled hearing date." We find this argument without merit.

"[T]he standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citation omitted). "Findings of fact made by the trial court upon a motion to set aside a judgment by default are binding on appeal if supported by any competent evidence." *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 132, 180 S.E.2d 407, 410, *cert. denied*, 278 N.C. 701, 181 S.E.2d 602 (1971) (citation omitted).

In the present case, Defendant made an N.C. Gen. Stat. 1A-1, Rule 60(b) motion to set aside the judgment because Defendant's absence from the 15 March 2010 hearing was allegedly the result of "mistake, inadvertence, surprise, or excusable neglect[.]" Specifically, Defendant contends that neither "Defendant nor Defendant's legal counsel ever received notice of hearing[.]" Defendant further argues that Defendant's absence from the hearing was a result of "fraud, misrepresentation, or other misconduct of an adverse party[.]" specifically contending that Plaintiff "contacted the Trial Court Coordinator's office" and said the hearing "must be held only on the 15th[.]"

The trial court made the following findings of fact:

[T]he Court finds that Defendant received ample, appropriate and due notice of the March 15, 2010 hearing, and Defendant's failure to appear at the hearing was based upon communications between Defendant and his counsel. Defendant's failure to appear does not constitute mistake, inadvertence, surprise or excusable neglect[.]

The record contains evidence showing that Defendant was served with an Amended Notice of Hearing, containing the hearing date, 15 March 2010. Defendant's counsel specifically acknowledged the new 15 March 2010 hearing date in an email to Plaintiff's counsel, which is included in the record. We believe this is competent evidence to support the trial court's findings of fact, and as such, they are binding on appeal. Defendant's only argument on appeal regarding the order on Defendant's Rule 60(b) motion pertains to whether Defendant received adequate notice of the hearing. Because the record contains evidence that Defendant received adequate notice of the hearing, we

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do not believe the trial court abused its discretion in denying Defendant's Rule 60(b) motion.

ii: Dismissal for Arbitration

[4] In Defendant's fourth argument, he contends the trial court erred by hearing arguments on motions and entering orders on the matter after the case had been dismissed for arbitration, but later reopened.

In an appeal from a N.C. Gen. Stat. 1A-1, Rule 60(b) motion, an appellant is "limited to arguing that the trial court abused its discretion in denying that motion." *Surles v. Surles*, 154 N.C. App. 170, 173-74, 571 S.E.2d 676, 678 (2002) (citations omitted). A party "may argue that the judgment underlying the Rule 60(b) motion is erroneous only insofar as the error demonstrates the trial court's abuse of discretion in denying the Rule 60(b) motion[.]" *Id.*

Any argument by Defendant pertaining to the order to compel arbitration and subsequent order reopening the case would have been properly made before the trial court. Defendant did not argue before the trial court in his N.C. Gen. Stat. 1A-1, Rule 60(b) motion that there were legal deficiencies in the order entered by the trial court after the order compelling arbitration. Because our review is limited to Defendant's arguments contained in his N.C. Gen. Stat. 1A-1, Rule 60(b) motion, we do not address this argument made by Defendant for the first time on appeal.

iii: Sanctions

[5] On appeal, Plaintiff filed a N.C. R. App. P. Rule 34 motion for sanctions against Defendant, arguing the following: Defendant raised issues on appeal that were not raised at trial, including the first issue, which Defendant withdrew on 19 January 2011, only a few days after Plaintiff filed its motion for sanctions; Defendant drafted documents, which were signed by Defendant's counsel before counsel reviewed them; Defendant continues to file motions at the trial court level even though Defendant's appeal divested the trial court of jurisdiction; and Defendant made "frivolous and slanderous" allegations in his brief.

Although, we note that Plaintiff's assertions in its motion for sanctions are not without validity, Defendant's arguments pertaining to the forum selection clause were well grounded in fact and warranted by existing law, even if ultimately unpersuasive. For this reason, we decline to sanction Defendant pursuant to N.C. R. App. P. 34.

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AFFIRMED.

Judges STROUD and HUNTER, JR. concur.

**STATE OF NORTH CAROLINA v. ANTONIO LEE JACKSON AND
RODRICO LEWIS JACKSON**

No. COA10-1566

(Filed 6 September 2011)

1. Jury—venire—underrepresentation of race

The trial court did not err by denying a motion by defendants in an armed robbery trial to discharge the jury venire based on underrepresentation of their race. Without more, the fact that only three of sixty people in the jury venire were African-American was not sufficient to show that the underrepresentation was due to systematic exclusion.

2. Robbery—sufficiency of evidence—credibility of witnesses—acting in concert

The trial court did not err by denying motions by two defendants to dismiss armed robbery charges. The determination of the credibility of witnesses and the weight of the evidence is for the jury to determine and there was substantial evidence to support an acting in concert theory.

3. Robbery—sufficiency of evidence—perpetrator of offense

The trial court did not err by refusing to dismiss an armed robbery prosecution for insufficient evidence that defendant Jackson was the perpetrator of the offense. The combined testimony of two witnesses was sufficient to raise an appropriate question for the jury.

Appeal by Defendants from judgments entered 19 August 2010 by Judge Carl R. Fox in Orange County Superior Court. Heard in the Court of Appeals 28 April 2011.

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[215 N.C. App. 339 (2011)]

Roy Cooper, Attorney General, by Angel E. Gray, Assistant Attorney General, and June S. Ferrell, Assistant Attorney General, for the State.

James W. Carter, for Defendant Antonio Lee Jackson, and Thomas R. Sallenger, for Defendant Rodrico Lewis Jackson.

THIGPEN, Judge.

Rodrico Lewis Jackson (“Rodrico”) and Antonio Lee Jackson (“Antonio”)¹ (together, “Defendants”) were convicted of robbery with a dangerous weapon. On appeal, they contend that the trial court erred by denying their motion to discharge the jury venire because their race was disproportionately underrepresented and by denying their motions to dismiss for insufficiency of the evidence. We find their arguments without merit, and conclude Defendants had a fair trial, free from error.

The evidence of record tends to show that on 1 May 2009, Antonio met Justin Dent while Dent was walking his dog in Hillsborough, North Carolina. Antonio asked Dent about his new iPhone and Dent allowed him to look at it; Antonio then handed it back to him. Several friends were visiting Dent’s Ashford Lake apartment that day, and Dent invited Antonio to visit. Antonio and another person visited Dent’s apartment later that day.

Katina Jeffries, Antonio’s girlfriend, drove a burgundy Chrysler and frequently gave Defendants rides in her car. Although Jeffries did not remember the exact date, she recalled giving Defendants a ride one day from Efland to Ashford Lakes apartments in Hillsborough around midday.

At midday on 5 May 2009, Dent said Defendants visited his Ashford Lakes apartment. Dent’s dog began barking, and Dent stepped out of the front door to talk to Defendants. He closed the door behind him to keep the dog in the apartment. Dent recognized Antonio from their meeting a few days earlier, but he had not seen Rodrico before. Dent noticed a burgundy sedan in the parking lot with people in it.

Antonio told Dent he planned to meet someone in the area and asked if he could use Dent’s iPhone to call and ask about his ride.

1. It is not customary for this Court to refer to Defendants by their first names. However, in this case, we refer to Defendants as such for ease of reading, as Defendants have the same surnames.

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Dent let Antonio use his iPhone, after entering the code to unlock it, and Antonio began talking and walking away with Dent's iPhone. Dent noticed the iPhone still showed the home screen, which meant that Antonio had not actually made a call. Dent became suspicious and began following Antonio. Rodrico stepped in front of Dent, pulled out a gun, pointed it at his face, and stated, "Get the [expletive deleted] back[.]" Dent described the gun as a "small revolver, possibly a .22[.]" At that point, Antonio started running away, and Rodrico slowly started to walk backwards, turned around, and began running.

On 19 August 2010, a jury found both Defendants guilty of robbery with a dangerous weapon, and the court entered judgments consistent with the jury's verdicts, sentencing Antonio, a prior record level II offender, in the presumptive range to 65 to 87 months incarceration, and sentencing Rodrico, a prior record level III offender, in the presumptive range to 92 to 120 months incarceration. From these judgments, Defendants appealed.

I: Disproportionate Jury Representation

[1] In Defendants' first argument on appeal, they contend the trial court erred in denying their motion to discharge the jury venire. Specifically, Defendants argue the trial court erred because their race was disproportionately underrepresented in the composition of the jury venire in violation of their State and federal constitutional rights. We disagree.

"Our state and federal Constitutions protect a criminal defendant's right to be tried by a jury of his peers." *State v. Williams*, 355 N.C. 501, 548, 565 S.E.2d 609, 637 (2002), *cert. denied*, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003) (quotation omitted). "This constitutional guarantee assures that members of a defendant's own race have not been systematically and arbitrarily excluded from the jury pool which is to decide [his] guilt or innocence." *Id.* (quotation omitted). "However, the Sixth Amendment does not guarantee a defendant the right to a jury composed of members of a certain race or gender." *Id.*, 355 N.C. at 549, 565 S.E.2d at 637 (quotation omitted).

The burden is upon the defendant to show a *prima facie* case of racial systematic exclusion. *State v. Brower*, 289 N.C. 644, 652-54, 224 S.E.2d 551, 558-59 (1976), *motion for reconsideration denied*, 293 N.C. 259, 243 S.E.2d 143 (1977). In order for a defendant to establish a *prima facie* violation for disproportionate representation in a venire, he must show the following:

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- (1) that the group alleged to be excluded is a “distinctive” group in the community;
- (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
- (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Williams, 355 N.C. at 549, 565 S.E.2d at 637 (quoting *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 668, 58 L. Ed. 2d 579, 587 (1979)).

At trial, Defendants argued that because there were sixty people in the venire and only three African-Americans, the venire was not representative of Orange County. Defendants stated they did not have any demographic data to present to the court with regard to the racial composition of Orange County. However, without any data to corroborate their assertion, Defendants said the African-American population in Orange County was “certainly greater than . . . five percent.” Defendants made a motion to strike the jury panel and moved for a mistrial, stating their constitutional rights were violated. The trial court denied Defendants’ motion.

On appeal, Defendants’ argue that the trial court erred by denying their motion because only three out of sixty people in the venire were African-American. We believe this alone is insufficient to support the second and third prongs set forth in *Williams* to establish a *prima facie* violation for disproportionate representation in a venire.

With respect to the first prong of the *prima facie* test, Defendants have met their burden. African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair cross-section purposes. See *State v. Golphin*, 352 N.C. 364, 393, 533 S.E.2d 168, 191 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305 (2001) (“There is no question . . . that defendants satisfied the first prong . . . because African-Americans are unquestionably a ‘distinct’ group for purposes of [this] analysis”).

However, with respect to the second prong, Defendants failed to produce any evidence at trial that the representation of African-Americans in the venire from which the jury was selected “[was] not fair and reasonable in relation to the number of such persons in the community.” *Williams*, 355 N.C. at 549, 565 S.E.2d at 637. Defendants

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stated that the African-American population in Orange County was “certainly greater than . . . five percent.” However, Defendants produced no evidence to support their assertion.² The opinion of the defense attorneys as to what they believed to be the percentage of African-Americans in Orange County is insufficient to show that the representation of African-Americans in the venire from which the jury was selected was not fair and reasonable in relation to the number of African-Americans in the community. *Compare, Duren*, 439 U.S. at 364-66, 99 S. Ct. at 668-69, 58 L. Ed. 2d at 587-88 (1979) (stating “the defendant must demonstrate the percentage of the community made up of the group alleged to be underrepresented” and concluding, “[g]iven petitioner’s proof [from census figures] that in the relevant community slightly over half of the adults are women, we must disagree with the conclusion of the court below that jury venires containing approximately 15% women are ‘reasonably representative’ of this community”).³

With respect to the third prong, Defendants have presented no evidence showing that the alleged deficiency of African-Americans in the venire was because of the systematic exclusion of this group in the jury selection process. Both Defendants contend on appeal that the fact that only three out of sixty potential jurors in the venire were African-American is sufficient to show systematic exclusion of the group. This contention falls short of satisfying the requirement of the third prong established in *Duren*. “The fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the [Equal Protection] Clause.” *Bowman*, 349 N.C. at 469, 509 S.E.2d at 435 (quotation omitted). We conclude the fact, without more, that only three of sixty people in the jury venire were African-American is insufficient to show that the underrepresentation was due to systematic exclusion of the group in the jury-selection process. *Compare Duren*, 439 U.S. at 366-67, 99 S. Ct. at 669, 58 L. Ed. 2d at 588 (holding that an “undisputed demonstration that a

2. *Compare, Williams*, 355 N.C. at 549, 565 S.E.2d at 638 (The defendant provided data from statistics that “the African-American population of Wake County was 20.8% in 1997 and that African-Americans made up 8.67% of the jury pool, for a difference of 12.13%); *State v. Bowman*, 349 N.C. 459, 467, 509 S.E.2d 428, 434 (1998), *cert. denied*, 527 U.S. 1040, 119 S. Ct. 2403, 144 L. Ed. 2d 802 (1999) (showing data creating a difference of 16.17%); *State v. Price*, 301 N.C. 437, 447-48, 272 S.E.2d 103, 110-11 (1980) (showing data from statistics and census data).

3. The Court in *Duren* recognized women as a “distinctive” group for Sixth Amendment fair cross-section purposes.

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large discrepancy [in the number of women versus the number of men in the jury venire] occurred not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic[,]” and stating the system of exclusion was further supported by evidence that “[in] the construction of the jury wheel from which persons are randomly summoned for service[,] [l]ess than 30% of those summoned were female[,]” and “at the summons stage women were not only given another opportunity to claim exemption, but also were presumed to have claimed exemption when they did not respond to the summons”).

Overall, the only evidence Defendants offered in support of their contention that their race was disproportionately underrepresented in the composition of the jury venire was an opinion by the defense attorneys regarding what they believed to be the percentage of African-Americans in Orange County and the fact that only three out of sixty people in the jury venire were African-American. This alone does not establish a *prima facie* violation for disproportionate representation in a venire.

II: Motion to Dismiss

[2] In Defendants’ second argument on appeal, they contend the trial court erred in denying their motions to dismiss the charge of robbery with a dangerous weapon. We disagree.

When reviewing a challenge to the denial of a defendant’s motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines “whether the State presented substantial evidence in support of each element of the charged offense.” *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005) (quotation omitted). “Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.” *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (quotation omitted). “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.* (quotation omitted). Additionally, a “substantial evidence inquiry examines the sufficiency of the evidence presented but not its weight,” which remains a matter for the jury. *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (quotation omitted). Thus, “[i]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the

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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.* (quotation omitted).

“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, 124 S. Ct. 475, 157 L. Ed. 2d 382 (2003); *see also* N.C. Gen. Stat. § 14-87(a) (2009).

The following are the elements of acting in concert: “(1) being present at the scene of the crime, and (2) acting together with another person who commits the acts necessary to constitute the crime pursuant to a common plan or purpose.” *State v. Poag*, 159 N.C. App. 312, 320, 583 S.E.2d 661, 667, *appeal dismissed, disc. review denied*, 357 N.C. 661, 590 S.E.2d 857 (2003) (citation omitted).

i: Defendant Antonio Jackson

Antonio first argues there was insufficient evidence to support the charge of robbery with a dangerous weapon because Dent was not a credible witness and because Jeffries only remembered taking Defendants to Dent’s apartment on one day, but not specifically on 5 May 2009. These arguments fail. The “[d]etermination of [a] witness’s credibility is for the jury[.]” *State v. Espinoza-Valenzuela*, ___ N.C. App. ___, ___, 692 S.E.2d 145, 153 (2010) (citation omitted). Likewise, a determination of the weight of the evidence is a matter for the jury. *McNeil*, 359 N.C. at 804, 617 S.E.2d at 274.

Antonio next argues the evidence was insufficient to support the “common plan or purpose” element of acting in concert. A defendant must have “a common purpose to commit a crime; it is not strictly necessary, however, that the defendant share the intent or purpose to commit the particular crime actually committed.” *State v. Herring*, 176 N.C. App. 395, 400, 626 S.E.2d 742, 746, *disc. review denied, appeal dismissed*, 360 N.C. 651, 637 S.E.2d 183-84 (2006), *cert. denied*, 549 U.S. 1293, 127 S. Ct. 1848, 167 L. Ed. 2d 342 (2007) (quotation omitted). Moreover, “[t]he communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators.” *State v. Sanders*, 288 N.C. 285, 291, 218 S.E.2d 352, 357 (1975), *cert. denied*, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d

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102 (1976) (citations omitted). However, “[a] defendant’s mere presence at the scene of the crime does not make him guilty . . . even if he sympathizes with the criminal act and does nothing to prevent it.” *State v. Capps*, 77 N.C. App. 400, 402-03, 335 S.E.2d 189, 190 (1985).

Here, Antonio was not merely present at the scene. There is evidence that Antonio took Dent’s iPhone and began walking, then running, away from Dent, while pretending to make a phone call. *Compare, Capps*, 77 N.C. App. at 402, 335 S.E.2d at 190 (The defendant did not act in concert when evidence showed that the defendant was neither aware of nor intended to—and in fact did not—participate in a felonious larceny; the defendant was merely present). Although the record does not reveal whether Antonio shared the intent or purpose to rob Dent *with a dangerous weapon*, this is not a necessary element under the theory of acting in concert. *See Herring*, 176 N.C. App. at 400, 626 S.E.2d at 746.

Based on the foregoing, we believe there was substantial evidence submitted at trial to support the elements of the offense of robbery with a dangerous weapon under a theory of acting in concert, such that the question of whether Antonio acted in concert with Rodrico was appropriately a question for the jury. Therefore, we find no error in the trial court’s denial of Antonio’s motion to dismiss.

ii: Defendant Rodrico Jackson

[3] Rodrico argues there was insufficient evidence to support the charge of robbery with a dangerous weapon based on the identity element—that Rodrico was, in fact, the perpetrator of the crime. *See McNeil*, 359 N.C. at 804, 617 S.E.2d at 274. Specifically, Rodrico contends the insufficiency of the evidence lies in Dent’s testimony that he was not 100% certain that Rodrico was the second man who came to his apartment on 5 May 2009; Dent was only 70% certain.

Rodrico cites *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902 (1967), for the proposition that, as a general rule, the credibility of witnesses and the weight to be given their testimony is exclusively a matter for the jury, but in exceptional cases, testimony is inherently unreliable. In *Miller*, the Supreme Court reversed a trial court’s order on a motion to dismiss because there was “a complete failure of the State’s evidence to connect the defendant *Miller* with the offense with which he is charged[,]” except for the testimony of Melton, a 16-year-old boy, who identified Miller out of a lineup of men, which besides Miller and his co-defendant, consisted of “neatly dressed police officers and two prisoners held on the charge of drunkenness.” *Miller*, 270 N.C. at

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728-32, 154 S.E.2d at 903-05. Melton was “never closer than 286 feet from” the perpetrators of the crime—“who[] he saw running along the side” of a building—and Melton’s description to the police was substantially different from Miller’s actual appearance. *Miller*, 270 N.C. at 732, 154 S.E.2d at 905. The Court stated “the distance was too great for an observer to note and store in memory features which would enable him, six hours later, to identify a complete stranger with the degree of certainty which would justify the submission of the guilt of such person to the jury.” *Id.*

We believe *Miller* is distinguishable from the present case. Here, Dent was face-to-face with the men outside his apartment door. The great distance between the witness and the perpetrators in *Miller* is not a factor in this case. Moreover, unlike *Miller* in which there was no other evidence identifying the defendant, Jeffries corroborated Dent’s testimony that Rodrico was, in fact, the perpetrator of the offense. Jeffries testified that she drove Rodrico and Antonio to Dent’s apartment complex in a burgundy Chrysler, and Dent testified he saw a burgundy sedan in the parking lot of his apartment complex during the perpetration of the robbery. We believe the combined testimony of Jeffries and Dent is sufficient evidence, such that the question of whether Rodrico was the perpetrator of the offense, was appropriately a question for the jury. Therefore, we conclude the trial court did not err in denying Rodrico’s motion to dismiss.

For the foregoing reasons, we conclude Defendants had a fair trial, free from error.

NO ERROR.

Judges CALABRIA and ERVIN concur.

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STATE OF NORTH CAROLINA EX REL THE GUILFORD COUNTY BOARD OF
EDUCATION, PLAINTIFF V. THEODORE DOUGLAS HERBIN, DEFENDANT

No. COA10-1178

(Filed 6 September 2011)

1. Bail and Pretrial Release—bond forfeiture—motion to set aside—bail agent

The trial court did not err by finding that a bail agent may file a motion to set aside forfeiture of a bail bond. The strict and literal interpretation of N.C.G.S. § 15A-544.5 argued by the Board of Education was declined as leading to bizarre and untoward results.

2. Bail and Pretrial Release—bail agent—motion to set aside forfeiture—not unauthorized practice of law

The trial court did not err by concluding that a bail agent was not engaging in the unauthorized practice of law by filing a motion to set aside a bond forfeiture. Filing a motion to set aside a bond forfeiture is not considered an appearance before a judicial body.

3. Bail and Pretrial Release—bail agent—motion to set forfeiture—preparing document—appearance at hearing

The trial court did not err by concluding that a bail bond agent's activity was permitted under *State v. Pledger*, 257 N.C. 634. A bail agent who is appointed by power of attorney to execute or countersign bail bonds is not prohibited from filing a motion to set aside a bond forfeiture. Furthermore a bail agent may appear *pro se* at a hearing on a motion to set aside forfeiture if the agent has a financial liability to the surety, but may not appear to represent the corporate surety.

Appeal by plaintiff from order entered 9 July 2010 by Judge Joseph E. Turner in Guilford County District Court. Heard in the Court of Appeals 13 April 2011.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Clint S. Moore, for plaintiff-appellant.

Steven A. McCloskey for defendant-appellee.

Tharrington Smith, LLP, by Rod Malone, and North Carolina School Boards Association, by Allison B. Schafer, for North Carolina School Boards Association, amicus curiae.

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BRYANT, Judge.

In this appeal we affirm the ruling of the trial court and hold that a bail agent may file a motion to set aside forfeiture as the filing of such motion does not constitute an appearance before a judicial body and therefore does not constitute a violation of N.C. Gen. Stat. § 84-4 regarding the unauthorized practice of law.

Facts and Procedural History

In September 2009, Brandon Morgan (bail agent) executed an Appearance Bond on behalf of Allegheny Casualty Company (corporate surety) for the pretrial release of Theodore Douglas Herbin (defendant). When defendant was called and failed to appear in court on 8 February 2010, the corporate surety's bond was forfeited. Thereafter, notice of forfeiture was served on the corporate surety, bail agent, and defendant.

On 15 April 2010, the Guilford County Board of Education (the Board) and the State of North Carolina (collectively plaintiffs) filed in Guilford County District Court and Guilford County Superior Court motions entitled "Motion for Rule 2.1 Designation; Motion for Order Staying All Pending Actions to Set Aside or Remit a Forfeiture; Motion for Transfer of Venue; and Motion to Transfer from District to Superior Court." Plaintiffs urged the Superior Court to recommend to the Chief Justice that actions seeking to set aside or remit a bond forfeiture filed between 5 April 2010 and 10 May 2010 be designated as an exceptional group and be assigned to a single Superior Court judge. In support of their motions, plaintiffs argued that "[e]ven though a bail agent writes the bond, the surety is liable—not the bail agent—for a forfeiture of the bond. By statute, only the surety can move to set aside the forfeiture, and only the surety can move to remit the forfeiture." On 26 April 2010, then Senior Resident Superior Court Judge Catherine Eagles ordered that "[a]ll hearings on motions to set aside and motions to remit bond forfeitures in Superior Court cases [be] stayed pending further Order of the Court."¹ On 9 June 2010, a hearing on the plaintiffs' motions was held in Guilford County

1. There is no indication in the record that any further action was taken on the Board's Rule 2.1 motion, and no indication the Superior Court division filed an administrative order. However, the record does contain an order signed by Superior Court Judge Stuart Albright, dated 8 July 2010, finding and concluding that two individuals (presumably bail agents) who filed motions to set aside on behalf of Allegheny Casualty Company, had committed a violation of N.C.G.S. § 84-4, and striking the motion to set aside forfeiture from the trial court record. The record does not indicate that Judge Albright's ruling was appealed.

District Court before Chief District Court Judge Joseph Turner. Judge Turner rendered a decision in open court on 9 June 2010 denying the plaintiffs' motions. Thereafter, Judge Turner entered a written administrative order which stated the following findings:

1. Bail agents may make motions to set aside bond forfeitures;
2. A bail agent who has financial liability as a result of the bond obligation has a financial interest in the bond forfeiture such that the agent may appear *pro se* to protect that interest.
- 3.² Bail agents who appear pro se under this procedure must serve notice on the Guilford County Board of Education, by service on its attorney and serve notice to the corporate surety insuring the bond and to any other bail agent or bondsman associated with the bond for which forfeiture has been entered, in accordance with Rule 4 of the North Carolina Rules of Civil Procedure (NCGS 1A-1 [,]Rule 4).
4. A corporate surety must be represented by counsel to be heard at a bond-related hearing, and failure to so appear will constitute a waiver of the right to be heard on any issue raised in the proceeding.
5. The stay in the undersigned's Order of May 20, 2010 regarding cases filed between April 15, 2010 and June 9, 2010, is hereby lifted. As a matter of equity, the relevant time periods in N.C. Gen. Stat. § 15A-544.5 are tolled for the period of time between April 15 and June 9, 2010, inclusive.

The order also set out the following pertinent conclusions:

7. [T]he bail agent is not "appear[ing] as attorney or counselor at law in any action or proceeding before any judicial body." Therefore, in making motions to set aside forfeiture, bail agents do not violate N.C. Gen. Stat. § 84-4.

...

10. The Court concludes that a bail agent who has financial liability to the surety as a result of the bond obligation has a financial interest in the bond forfeiture issue such that the agent may appear *pro se* at the bond forfeiture hearing to protect that interest. If a corporate surety wishes to be heard at a bond-related

2. On 13 July 2010, after a hearing on the Board's motion to reconsider the court's administrative order, Judge Turner amended the order to include finding of fact number 3 and renumbered the paragraphs accordingly. Otherwise the order remained the same.

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hearing, it must be represented by counsel, pursuant to *LexisNexis, Div. of Reed Elsevier, Inc. v. Travishan Corp.*, 155 N.C. App. 205, 573 S.E.2d 547 (2002).

Meanwhile on 22 June 2010, the bail agent in the instant case filed a Motion to Set Aside the forfeiture of the corporate surety's bond, and the Board objected. Soon thereafter, the Board filed a motion asking the District Court to reconsider its administrative order. On 9 July 2010, Judge Turner overruled the Board's objections and granted the motion to set aside forfeiture. From this order, the Board appeals.

We first note that the notice of appeal filed on 20 July 2010 refers to the 9 July 2010 "Order Granting Allegheny Casualty Company / Brandon Morgan's Motion to Set Aside Forfeiture." However, the briefs submitted by the parties on appeal, including that of amicus curiae, reference the findings of fact and conclusions of law entered by the trial court in its amended administrative order. Our record does not support a notice of appeal from the administrative order. Nevertheless, because all of the arguments on appeal clearly challenge or support the ruling of the trial court in the administrative order, we will issue a writ of certiorari pursuant to N.C. R. App. P. Rule 21(a)(1) (2009) to hear this appeal of the administrative order as well. (*See* Rule 21 stating that "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . .").

In this appeal, the Board essentially challenges the trial court's conclusions of law that: (I) a bail agent may file a motion to set aside pursuant to N.C. Gen. Stat. § 15A-544.5; (II) the filing of a motion to set aside is not an appearance in front of a judicial body and therefore not a violation of N.C. Gen. Stat. § 84-4; and (III) a bail agent's activity is permitted pursuant to *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962).

I

[1] First, the Board argues that the trial court erred in finding that a bail agent may file a Motion to Set Aside pursuant to N.C.G.S. § 15A-544.5. The Board contends that by its express terms, in N.C.G.S. § 15A-544.5(d) "the legislature conspicuously denied this right [to move to set aside a forfeiture] to bail agents." We disagree.

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Here, the Board does not challenge the trial court's findings of fact, only its conclusions of law. Therefore the findings of fact are binding on appeal. *In re Estate of Trogdon*, 330 N.C. 143, 147, 409 S.E.2d 897, 900 (1991). "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *Martin v. N.C. HHS*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) (citation omitted).

Statutory interpretation begins with the cardinal principle of statutory construction that the intent of the legislature is controlling. In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish. Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.

State v. Stanley, ___ N.C. App. ___, ___, 697 S.E.2d 389, 390 (2010) (citation omitted).

N.C.G.S. § 15A-544.5(a) provides that "[t]here shall be no relief from a forfeiture except as provided in this section." N.C.G.S. § 15A-544.5(d)(1) sets out the "only procedure" for setting aside a forfeiture. "At any time before the expiration of 150 days after the date on which notice was given under G.S. 15A-544.4, the *defendant or any surety* on a bail bond may make a written motion that the forfeiture be set aside[.]" N.C.G.S. § 15A-544.5(d)(1) (emphasis added). "Surety" is defined as "[t]he insurance company, when a bail bond is executed by a bail agent on behalf of an insurance company." N.C.G.S. § 15A-531(8)(a). A "bail agent" is defined as "any person who is licensed by the Commissioner as a *surety bondsman* . . . , is appointed by an insurance company by power of attorney to execute or countersign bail bonds for the insurance company in connection with judicial proceedings, and receives or is promised consideration for doing so." N.C.G.S. § 15A-531(3) (emphasis added).

The Board urges us to adopt a strict and literal interpretation of N.C.G.S. § 15A-544.5 and hold that only a defendant or surety, as opposed to a bail agent, can file a motion to set aside a forfeiture. However, to adopt the Board's argument would make the statute meaningless. Viewing other provisions of Chapter 15A indicates that bail agents, who are licensed as surety bondsmen, are treated similarly to the defendant and the sureties they represent in bond forfeiture procedures.

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For example, in cases where there is an entry of forfeiture, “[t]he name, address of record, license number, and power of appointment number of any *bail agent* who executed the bail bond on behalf of an insurance company” is to be included in the forfeiture. N.C.G.S. § 15A-544.3(b)(6) (2009) (emphasis added). The forfeiture notice must also include the following language: “TO THE DEFENDANT AND EACH SURETY NAMED ABOVE: . . . A forfeiture for the amount of the bail bond shown above was entered in favor of the State against the defendant and each surety named above[.]” N.C.G.S. § 15A-544.3(b)(9). The surety named above includes the name of the bail agent who executed the bail bond on behalf of an insurance company.

“In construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results.” *In re J.N.S.*, ___ N.C. App. ___, ___, 704 S.E.2d 511, 516 (2010) (citation omitted). In light of this rule of statutory interpretation, we respectfully decline to embrace the Board’s argument that we adopt a strict and literal interpretation of N.C.G.S. § 15A-544.5(d)(1). We do not believe this was the intent of the General Assembly, as such an interpretation would lead to bizarre and untoward results. For instance, in light of the other sections of Chapter 15A that require the bail agent’s name and mailing address to be included on every relevant bail bond that is executed (N.C.G.S. § 15A-544.3(a)(4)) and that require a bail agent receive notice of forfeiture (N.C.G.S. § 15A-544.3(b)(6)), to hold that N.C.G.S. § 15A-544.5(d)(1) is not applicable to a bail agent, especially one acting as an agent for an insurance company, would render an absurd result.

Such reasoning would suggest that accommodation bondsmen and other professional bondsmen who are also defined as sureties (N.C.G.S. § 15A-531(8)(b) and (c)) but, who like bail agents are not specifically named as sureties under N.C.G.S. § 15A-544.5(d)(1), would not be allowed to file a motion to set aside forfeiture. This cannot be the result intended by the legislature. Therefore, we overrule this argument.

II

[2] Next, the Board, in disputing the right of a bail agent to file a motion to set aside forfeiture, argues that the bail agent is engaging in the unauthorized practice of law by making an unauthorized appearance before a judicial body in violation of N.C.G.S. § 84-4. We disagree.

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The “practice of law” is defined as:

performing any legal service for any other person, firm or corporation . . . specifically including . . . preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies[.]

N.C.G.S. § 84-2.1 (2009). N.C.G.S. § 84-4 provides for the following:

[e]xcept as otherwise permitted by law, it shall be unlawful for any person or associate of persons, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding before any judicial body.

In the case *sub judice*, the trial court made the following relevant findings of fact in its administrative order:

5. Bail agents, in writing a bond on behalf of a surety, are sometimes contractually obligated to indemnify the surety and/or a surety’s managing agent, which supervises the bail agents acting on behalf of a surety. This arrangement means that a bail agent may become financially liable to the surety or managing agent, if the bond becomes forfeit. Bail agents also typically sign a number of different forms on behalf of the surety during the bonding process.

6. The North Carolina Administrative Office of the Courts provides a form (AOC-CR-213) by which motions to set aside forfeiture may be made by the defendant, a surety’s corporate officer, the bail agent, or an attorney. Regardless of which of the aforementioned four persons makes the motion to set aside forfeiture, the form merely requires checking two boxes, inserting the surety’s name, and signing the motion; the motion is then filed with the Clerk of Court.

The trial court then concluded:

in making the motion to set aside forfeiture, the bail agent is not “appear[ing] as attorney or counselor at law in any action or proceeding before any judicial body.” Therefore, in making motions to set aside forfeiture, bail agents do not violate N.C. Gen. Stat. § 84-4.

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The Board asserts that our holding in *Lexis-Nexis v. Travishan Corp.*, 155 N.C. App. 205, 573 S.E.2d 547 (2002) is controlling and cannot be reconciled with the trial court's conclusion. We find the Board's arguments unconvincing.

In *Lexis-Nexis*, our Court held that “[t]he prevailing rule is that a corporation cannot appear and represent itself either in proper person or by its officers, but can do so only by an attorney admitted to practice law.” *Lexis-Nexis*, 155 N.C. App. at 207, 573 S.E.2d at 549. However, because the word “appearance” is not defined in Chapter 84, we apply the plain meaning of the word within the statute. *Stanley*, ___ N.C. App. at ___, 697 S.E.2d at 390. An “appearance” is defined as

[a] coming into court as a party or interested person, or as a lawyer on behalf of a party or interested person; esp., a defendant's act of taking part in a lawsuit, whether by formally participating in it or by an answer, demurrer, or motion, or by taking postjudgment steps in the lawsuit in either the trial court or an appellate court.

Black's Law Dictionary, 107 (8th ed. 1999).

We must agree with the trial court that filing a motion to set aside a bond forfeiture is not considered an appearance before a judicial body in the manner contemplated by N.C.G.S. § 84-4 and, therefore, does not constitute the practice of law. The Board's argument is overruled.

III

[3] In its third issue, the Board argues that the trial court erred in finding that a bail agent's activity was permitted pursuant to *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962). The Board's argument is based on the following conclusion of the trial court:

Even if an agent's checking two boxes, inserting the surety's name, and signing the motion [to set aside forfeiture] was deemed to constitute the preparation of a legal document, that activity would still be permitted pursuant to *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962), because the agent would be “prepar[ing] a legal document in connection with a business transaction in which the corporation [surety] has a primary interest,” that is, the undertaking on the bond.

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In *Pledger*, the defendant was charged with the unauthorized practice of law under N.C.G.S. § 84-4 when he allegedly prepared deeds of trust without being a member of the North Carolina Bar and without being licensed as an attorney at law. *Id.* at 636, 127 S.E.2d at 339. The question before the *Pledger* court was whether the defendant prepared the documents “‘for another person, firm or corporation’ within the intent and meaning of [N.C.G.S. § 84-4].” *Id.* at 637, 127 S.E.2d at 339. The *Pledger* court held that “[a] person, firm or corporation having a primary interest, not merely an incidental interest, in a transaction, may prepare legal documents necessary to the furtherance and completion of the transaction without violating G.S. 84-4.” *Id.*

[A] person who, in the course of his employment by a corporation, prepares a legal document in connection with a business transaction in which the corporation has a primary interest, the corporation being authorized by law and its charter to transact such business, does not violate the statute [against the unauthorized practice of law], for his act in so doing is the act of the corporation in furtherance of its business.

Gardner v. N.C. State Bar, 316 N.C. 285, 290, 341 S.E.2d 517, 520 (1986) (citation omitted). Therefore, based on our reading of *Pledger*, a bail agent who, as an agent for the corporate surety, “is appointed by an insurance company by power of attorney to execute or countersign bail bonds for the insurance company in connection with judicial proceedings” is not prohibited from filing a motion to set aside a bond forfeiture. N.C.G.S. § 15A-531(3). Further, we agree with the trial court that a bail agent may appear pro se at a hearing on a motion to set aside forfeiture if the agent has a financial liability to the surety as a result of the bond. However, a bail agent is prohibited from appearing at the motion hearing in court to represent the corporate surety. See *Lexis-Nexis*, 155 N.C. App. 205, 573 S.E.2d 547. Based on the foregoing, the trial court did not err in its conclusion that the bail agent’s actions were permitted under *Pledger*. The Board’s argument is overruled.

For the foregoing reasons, the trial court’s order is affirmed.

Affirmed.

Judges HUNTER, Robert C., and McCULLOUGH concur.

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MARION PARTNERS, LLC, GEORGETOWN DEVELOPERS, LLC, MYRTLE RIDGE/501 ASSOCIATES, LLC, MANTEO PARTNERS, LLC AND KILL DEVIL HILLS ASSOCIATES, LLC, PLAINTIFFS v. WEATHERSPOON & VOLTZ, LLP, AND WILLIAM H. WEATHERSPOON, JR., DEFENDANTS

No. COA10-1122

(Filed 6 September 2011)

Attorneys—legal malpractice—negligence—breach of contract—summary judgment—properly granted

The trial court did not err in a legal malpractice case by granting summary judgment in favor of defendants and dismissing all of the plaintiffs' claims. Summary judgment was properly allowed as to plaintiffs' negligence causes of action based on plaintiffs' contributory negligence. Furthermore, no evidence existed to support plaintiffs' breach of contract and negligence claims.

Appeal by plaintiffs from judgment entered 24 May 2010 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 9 March 2011.

Crawford & Crawford, LLP, by Robert O. Crawford, III, for plaintiff.

Hemmings & Stevens, PLLC, by Aaron C. Hemmings, for plaintiff.

Yates, McLamb & Weyher, LLP, by Dan J. McLamb and T. Carlton Younger, III, for defendants.

ELMORE, Judge.

This dispute arises between William H. Weatherspoon, an attorney (defendant, along with his law firm, Weatherspoon & Voltz),¹ and the companies (plaintiffs²) that hired him to review leases between their company and CVS Corporation. Plaintiffs constructed the buildings in which CVS drugstores operated, leasing the buildings to the company for that purpose. They have used defendant's legal services since at least 2002.

1. Throughout, we refer to "defendant" rather than "defendants" because all of the conversations, understandings, etc. were with Mr. Weatherspoon as an individual.

2. There are five plaintiffs in this action, all of which are limited liability companies created by the same three individuals. Only three of the LLCs—Marion Partners, Georgetown Developers, and Myrtle Ridge—are actually party to the incidents that led up to this lawsuit. Throughout this opinion, the term "plaintiffs" refers only to these three businesses.

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In January/February 2006, plaintiffs executed leases with CVS for properties in South Carolina, first having defendant review the leases. Those three leases included a new tax provision, referred to by the parties as Section 34(d)³:

In the event Landlord sells the Premises and the Appropriate taxing authorities increase the assessed valuation and taxes on the Premises as a result of the sale, or if the Landlord takes any other action which causes a tax increase, then Tenant shall pay [sic] as Taxes, during the year of such sale and for all succeeding fiscal tax years, only the portion of the Taxes related to the assessed value of the Premises prior to the sale and Landlord shall pay all Taxes related to the increase in the assessed value of the Premises.

Essentially, it shifts certain tax burdens to the landlord from the tenants. In June 2006, the South Carolina legislature passed a law changing the way certain properties are assessed for tax purposes; pursuant to the new law, property can be so assessed upon sale, among other events. That law went into effect on 1 January 2007.

In the spring of 2008, plaintiffs became aware of the change in the tax law after having entered into purchase contracts with a buyer for the properties in question (referred to by the parties as the Marion and Georgetown properties). Per the deposition of Troy Legge⁴, the broker who marketed the properties, after the new law was passed, the sale of the properties fell through based on the leases' inclusion of Section 34(d).

Plaintiffs sued defendant for legal malpractice; the trial court granted summary judgment in favor of defendant. On appeal, plaintiffs argue that the trial court erred by allowing defendants' motion for summary judgment, that the trial court erred by sustaining defendants' objection to consideration of certain statements in the affidavits of Crayne Howes and James Street, and that the trial court erred by dismissing plaintiffs' negligent misrepresentation and breach of contract claims as well as the claims of Manteo Partners and Kill Devil

3. The quoted language is in Section 34(d) of two of the leases involved in this case; in the third, it is in Section 34(h). We refer to it as Section 34(d) throughout for simplicity's sake.

4. Plaintiffs term Mr. Legge an "expert witness," but only a handful of pages from his deposition have been included in the Exhibits, and they are from the middle of that deposition (pages 62-67). Thus, any self-identification has been omitted from the reproduced pages of his deposition, and the only information this Court has about him is that he was the broker who marketed the properties.

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Hills Associates. After careful consideration, we hold that the trial court properly granted summary judgment in favor of defendants and dismissed all of the plaintiffs' claims.

With respect to all of plaintiffs' negligence claims, we uphold the trial court's decision based on the defense of contributory negligence. As this Court recently held, "[c]ontributory negligence is a defense to a claim of professional negligence by attorneys, just as it is to any other negligence action." *Piraino Bros., LLC v. Atl. Fin. Group, Inc.*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2011).

It is well established in North Carolina that "[o]ne who signs a written contract without reading it, when he can do so understandingly is bound thereby unless the failure to read is justified by some special circumstance." *Davis v. Davis*, 256 N.C. 468, 472, 124 S.E.2d 130, 133 (1962). Although plaintiffs try to suggest that this rule may be altered when the party has retained an attorney to review the contract, this Court has held otherwise: "[Plaintiff's] attorney owed her a duty to review and explain to her the legal import and consequences which would result from her executing the Separation Agreement. *However, this duty does not relieve her from her own duty to ascertain for herself the contents of the contract she was signing.*" *Lowry v. Lowry*, 99 N.C. App. 246, 254, 393 S.E.2d 141, 145 (1990) (emphasis added). Thus, under *Lowry*, although Mr. Weatherspoon had a duty to advise plaintiffs regarding the leases, that duty did not relieve plaintiffs from their duty to read the leases themselves. *See also Harris v. Bingham*, 246 N.C. 77, 79, 97 S.E.2d 453, 455 (1957) ("The right to rely upon the assumption that another will exercise due care is not absolute and must yield to the realities of the situation to the extent that if the plaintiff observes a violation of duty which imperils him, he must be vigilant in attempting to avoid injury to himself. If the defendant were guilty of negligence in failing to exercise reasonable care and skill as a real estate broker in drafting the contract of sale, a question not necessary for us to decide here, the plaintiffs are charged with full knowledge and assent as to the contents of the contract they signed . . .") (citations omitted).

Plaintiffs, however, further argue that their failure to read the leases was justified by "special circumstances," as provided in *Davis*. *Davis* explained, however, that "[t]o escape the consequences of a failure to read because of special circumstances, complainant must have acted with reasonable prudence." 256 N.C. at 472, 124 S.E.2d at 133.

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The sole “special circumstance” claimed by plaintiffs is their assertion that they had a “custom and practice” of relying upon Mr. Weatherspoon, with his “knowledge and ascent [*sic*],” to review the leases and “to notify them of any changes or additional language inserted into a new lease as compared to their prior leases.” They argue that Mr. Weatherspoon accepting responsibility under this claimed custom and practice “put the Members ‘off their guard.’”

Contrary to this argument, the record in this case contains emails from Mr. Weatherspoon to each of plaintiffs’ members directing them to read the lease for each of the properties that is the subject of this action. On 10 August 2005, Mr. Weatherspoon sent an email regarding one South Carolina lease stating: “Jay [Street], Crayne [Howes] and Leigh [Polzella]—please review the attached draft lease from CVS for the Conway site.” The email noted that the lease contained a number of new paragraphs. Leigh Pozella responded on 13 September 2005 to Mr. Weatherspoon and the two other members: “I have reviewed the lease and have my comments below.” On 3 December 2005, Mr. Weatherspoon emailed the three members regarding the Georgetown, South Carolina store: “Leigh, Jay and Crayne—please review the draft CVS lease for Georgetown, SC and provide me with any comments.” Likewise, on the same date, he emailed the members regarding the Marion, South Carolina store: “Leigh, Jay and Crayne—please review the draft CVS lease for Marion, SC.”

There is no dispute that plaintiffs’ members received the emails, and plaintiffs do not address the emails in arguing that they were not contributorily negligent. Further, plaintiffs do not contend that they needed Mr. Weatherspoon to explain the legal import of the new tax provision. The record lacks any suggestion that they would not have understood the provision if they had read it. Given Mr. Weatherspoon’s explicit request that plaintiffs’ members review the attached draft leases, plaintiffs *chose* not to review the leases, despite this advice. They failed to “act[] with reasonable prudence” and are not entitled “[t]o escape the consequences of a failure to read because of special circumstances” *Davis*, 256 N.C. at 472, 124 S.E.2d at 133.

Moreover, the affidavits of Mr. Howes and Mr. Street constitute the sole evidence supporting plaintiffs’ claim that Mr. Weatherspoon had assented to a “custom and practice” that he would “notify them of any changes or additional language inserted into a new lease,” as plaintiffs argue in their brief. Plaintiffs contend that the trial court

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erred in sustaining defendants' objection to these affidavits on the grounds that they contradicted Mr. Howes's and Mr. Street's depositions. We conclude that the trial court properly found that the affidavits did, in fact, contradict the depositions.

Mr. Howes, in his affidavit, stated:

[I]f there were any new provisions added by CVS that were different from prior leases, it was our understanding, expectation and agreement that Mr. Weatherspoon, as our attorney, and according to our established custom and practice of doing business, would have identified any such term and notified us to specifically review such term.

He added: "I had specifically told Mr. Weatherspoon that we did not read the entire proposed leases and that we relied on him to do so and notify us of any modifications or additions to the proposed lease as compared to our prior leases."

Mr. Howes, in his deposition, talked about his personal "expectation" for what Mr. Weatherspoon would do and what Mr. Howes's personal practices were regarding leases. He did not refer to any agreement with Mr. Weatherspoon or any custom or practice to which Mr. Weatherspoon assented. Even as to his own expectations, Mr. Howes did not suggest that he expected Mr. Weatherspoon to identify all new provisions. He talked only about provisions that constituted "significant changes."

Mr. Street, in his affidavit, described a particular lease negotiation that took place in 2002 and stated:

At that time, I informed Mr. Weatherspoon that I did not read proposed leases in their entirety and that I relied on him, as my attorney, to read the leases and to notify me of any new lease provisions and any changes to the proposed lease as compared to my prior leases. Since that time, the mutual understanding between Mr. Weatherspoon and I, and our custom and practice of doing business, has been to rely on Mr. Weatherspoon to identify and notify me of any new lease provisions and any changes to a proposed lease with CVS as compared to my prior leases with CVS or its subsidiaries.

Mr. Street then also included language that was, word for word, identical with language in Mr. Howes's affidavit asserting that,

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if there were any new provisions added by CVS that were different from prior leases, it was our understanding, expectation and agreement that Mr. Weatherspoon, as our attorney, and according to our established custom and practice of doing business, would have identified any such term and notified us to specifically review such term.

Mr. Street, in his deposition, talked about “my course of business” and his “trust” that they “were being looked after” by Mr. Weatherspoon. He discussed what he “assumed” Mr. Weatherspoon would do. He did not mention an agreement, an agreed-upon custom and practice, or a mutual understanding. With respect to his 2002 conversation with Mr. Weatherspoon, Mr. Street testified that, after Mr. Weatherspoon had overlooked a clause in a lease for a particular transaction, the two men talked about it, and Mr. Street testified that he told Mr. Weatherspoon, “‘Please read the lease,’ or something.” When asked whether he had testified to everything he remembered regarding those discussions, he replied, “Yeah.”

In short, in the depositions, there was no mention by either man of an agreement, an agreed-upon custom and practice, or even a mutual understanding with Mr. Weatherspoon that he would notify them of every change or addition to a new lease. The depositions addressed only the individual men’s assumptions, personal expectations, and personal ways of doing business. The deposition testimony is a far cry from the claims in the affidavits that,

if there were any new provisions added by CVS that were different from prior leases, it was our understanding, expectation and agreement that Mr. Weatherspoon, as our attorney, and according to our established custom and practice of doing business, would have identified any such term and notified us to specifically review such term.

The additions and changes appearing in the affidavits are conclusory statements or recharacterizations more favorable to plaintiffs. The affidavits materially alter the deposition testimony in order to address gaps in the evidence necessary to survive summary judgment. As this Court observed in *Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 9-10, 249 S.E.2d 727, 732 (1978) (quoting *Perma Research & Dev. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)), “‘[i]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screen-

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ing out sham issues of fact.’” The trial court, therefore, properly excluded these portions of the affidavits.

To the extent that plaintiffs have relied upon Mr. Weatherspoon’s deposition to support their claim that Mr. Street told Mr. Weatherspoon that he expected Mr. Weatherspoon to notify him each time there was a new provision in a lease, they have not fully quoted that testimony. After Mr. Weatherspoon, in his deposition, acknowledged a conversation with Mr. Street regarding a prior lease problem, he was asked: “Is it your testimony that you remember that Mr. Street’s position, with respect to new leases, was that it was your duty to notify him if there were any new provisions?” He responded: “[N]ot in so many words. It would have been an understanding. Easiest way to put it would be of—of changes that have an impact, or changes that matter.”

Mr. Weatherspoon’s testimony that there was an understanding that he would notify plaintiffs of any lease changes that had an impact or changes that mattered does not amount to “special circumstances” that relieved plaintiffs of their duty to read the leases, especially given the emails urging them to do so and the fact that plaintiffs would have understood the significance of the tax provision if they had read it. To hold otherwise would require this Court to implicitly overrule *Lowry*. Accordingly, summary judgment was properly allowed as to plaintiffs’ negligence causes of action based on plaintiffs’ contributory negligence.

Turning to plaintiffs’ breach of contract claim, we assume without deciding that it may be asserted independently of a legal malpractice claim. Significantly, plaintiffs have cited no authority at all in support of the breach of contract claim. In arguing that summary judgment was improper, plaintiffs state: “Plaintiffs contend that they specifically contracted with Weatherspoon to notify them of any additional language in Part II of a proposed lease as compared to their prior leases.” The only evidence of a specific agreement of this nature that arguably could support a contract claim appears in Mr. Howes’s and Mr. Street’s affidavits. Because the trial court properly concluded that the assertions in the affidavits regarding an agreement to notify plaintiffs of any new lease language were in conflict with the deposition testimony and were, therefore, properly excluded, no evidence exists to support plaintiffs’ breach of contract claim.

Finally, plaintiffs Manteo Partners and Kill Devil Hills Associates have asserted claims for breach of contract, negligence, and legal

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malpractice based on the decision to negotiate with CVS to transfer the objectionable tax provision from the leases on two of the South Carolina properties to North Carolina properties owned by those two plaintiffs. As Mr. Howes's and Mr. Street's affidavits both state, this action was undertaken on the advice of Mr. Weatherspoon to mitigate the damages arising with respect to the South Carolina properties.

In response to defendant's argument that plaintiffs have failed to present any evidence that Mr. Weatherspoon violated the standard of care in connection with this advice, plaintiffs argue only that (1) "[b]ased on [Mr. Weatherspoon's] advice, Mr. Street agreed to move forward with the transfer"; and (2) plaintiffs' real estate expert "testified that the mere existence of the problematic lease language caused significant damages to a property regardless of the tax law of the state in which the property is located." Plaintiffs conclude: "Thus, Manteo and Kill Devil Hills sustained damages as a direct result of the negligent advice given by Weatherspoon."

In other words, plaintiffs argue only that they were damaged by following Mr. Weatherspoon's advice. They have pointed to no evidence that the advice was negligent. Even apart from the standards applicable to legal malpractice actions, "[n]egligence is not presumed from the mere fact of injury." *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 68, 414 S.E.2d 339, 345 (1992). Consequently, without any evidence of negligence, the trial court properly granted summary judgment on the Manteo Partners and Kill Devil Hills Associates' claims as well.

Affirmed.

Judges BRYANT and GEER concur.

IN RE: J.H.K. J.D.K. MINOR CHILDREN

No. COA10-12-2

(Filed 6 September 2011)

1. Termination of Parental Rights—neglected juveniles—unchallenged findings of fact—conclusion of law supported

The trial court did not err in a termination of parental rights case by determining that the juveniles in question were

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neglected. The unchallenged findings of fact supported the trial court's conclusion that there was a reasonable probability of a repetition of neglect.

2. Termination of Parental Rights—best interests of minor children—no abuse of discretion

The trial court did not abuse its discretion in a termination of parental rights case by finding that it was in the best interests of the minor children to terminate respondent's parental rights. Contrary to respondent's argument, the nonlawyer guardian *ad litem* volunteer was not required to be physically present at the termination hearing.

On remand to the Court of Appeals from an order of the Supreme Court of North Carolina remanding the decision in *In re J.H.K. and J.D.K.*, ___ N.C. App. ___, 695 S.E.2d 162 (2010), for consideration of issues not addressed by the Court of Appeals' original opinion. Appeal by Respondent from an order entered 18 September 2009 by Judge Polly D. Sizemore in Guilford County District Court. Originally heard in the Court of Appeals 28 April 2010.

Janet K. Ledbetter, for Respondent-appellant father.

Smith, James, Rowlett, and Cohen, by Margaret Rowlett, for Guardian ad litem-appellee.

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

HUNTER, JR., Robert N., Judge.

The North Carolina Supreme Court reversed the 6 July 2010 opinion of the Court of Appeals and remanded the matter back to this Court for further consideration of issues not addressed by the original opinion. We affirm the decision of the trial court.

I. Factual and Procedural History

J.D.K. and J.H.K. were first placed into the custody of Guilford County Department of Social Services ("GCDSS") 25 January 2007 because of their parents' ongoing substance abuse and because the children's needs were not being met. GCDSS became involved after receiving a neglect report for injurious environment, and police were

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then called to the residence. When police arrived at the residence, they found marijuana and drug paraphernalia. At that time, the mother was charged with child neglect.¹ GCDSS worker, Latarsha Martin (“Ms. Martin”), gave the following testimony with regard to the conditions of the home:

There were DVDs and videotapes on the floor and the children were slipping on them. In the living room a towel was stuck to the floor with a dark sticky substance, the same substance that was all over the table beside the computer. The kitchen table was sticky and dirty. There was an open bag of trash lying on its side in the kitchen and the garbage can was overflowing with trash. [The mother] stated that the sticky substance on the carpet was chocolate syrup. There was a bowl of cereal on the table with a large sharp knife beside it in easy reach of the children. There were only apples in the refrigerator and the mother stated that there was no other food in the home. The hallways and the bedrooms were unkept and there was debris on the floor throughout the home. Dirty water was like standing water in the washing machine, dirty standing water.

J.D.K. and J.H.K. were adjudicated dependent and neglected 16 March 2007.

During the thirty months that J.D.K. and J.H.K. were in foster care, Respondent was in compliance with his case plan for a period of seven months, from August 2007 to March 2008. Throughout this period of compliance, Respondent was enrolled in Christian Counseling Wellness Group (“CCWG”), an in-patient treatment program. CCWG is a two-year program that can be completed in twelve months. Respondent was enrolled in CCWG as a condition of his probation.² Respondent did not complete the CCWG program, in violation of his probation. As a result, “[Respondent] admitted to a willful violation of his probation and took an active sentence in September of 2008.”

Since J.D.K. and J.H.K. were adjudicated dependent and neglected, Respondent has exhibited a pattern of recovery and relapse regarding his addiction to crack-cocaine and marijuana. Respondent was incarcerated at the time of the Termination of Parental Rights Hearing

1. Respondent’s was not at residence at the time of the investigation

2. Respondent’s probation resulted from a plea deal he took for crimes he was charged with in June 2007. Those charges included attempted strangulation, possession of a controlled substance, and failure to appear for a felony.

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(“TPR Hearing”), but he was able to attend the hearing.³ During the TPR Hearing, Respondent contended he was in a period of recovery and not suffering from active addiction due to his successful completion of the New Direction program at Duplin Correctional Center.

GCDSS (“Petitioner”) and Karen Moorefield, the guardian *ad litem* (“GAL”), moved to terminate the parental rights of Respondent, pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (6)(2009). A court may terminate parental rights if it finds one or more of the grounds outlined in N.C. Gen. Stat. § 7B-1111(a)(1)-(10) to be applicable. The trial court agreed with Petitioner that termination of Respondent’s parental rights was proper. A court may terminate the parental rights upon finding “[t]he parent has abused or neglected the juvenile.” N.C. Gen. Stat. § 7B-1111(a)(1). A court may also terminate parental rights upon finding “[t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101.” N.C. Gen. Stat. § 7B-1111(a)(6).

When this case previously came before this Court, we addressed only the first of four issues raised by Respondent. We found the trial court erred when it did not ensure that the court appointed GAL was present at the TPR hearing to protect and promote the best interests of J.D.K. and J.H.K, in violation of N.C. Gen. Stat. §7B-1108(b). The North Carolina Supreme Court reversed this decision and remanded back to this Court for consideration of issues not addressed by the original opinion.

The remaining three issues raised by Respondent are (1) whether the trial court erred in finding neglect of J.D.K. and J.H.K.; (2) whether the trial court erred in finding J.D.K. and J.H.K. to be dependent juveniles; and (3) whether the trial court erred in determining termination of Respondent’s parental rights to be in the best interest of J.D.K and J.H.K.

II. Standard of Review

When reviewing an appeal from an order terminating parental rights, we look to whether: (1) there is clear, cogent, and convincing evidence to support the trial court’s findings of fact; and (2) the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App.

3. While Respondent’s appeal is the matter before this Court, it should be noted that the children’s mother was not present at the TPR hearing and that she has not appealed the trial court’s order terminating her parental rights.

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288, 291, 536 S.E.2d 838, 840 (2000). Clear, cogent, and convincing evidence “is greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases.” *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984). If the decision is supported by such evidence, the trial court’s findings are binding on appeal, even if there is evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988).

III. Analysis

[1] N.C. Gen. Stat. § 7B-1111(b) (2009) provides that “[t]he burden in [termination of parental rights] proceedings shall be upon the petitioner or movant to prove the facts justifying such termination by clear and convincing evidence.” Pursuant to this statute, GCDSS had the burden of proving, through clear and convincing evidence, that the termination of Respondent’s parental rights was proper under the applicable statutes.

Respondent first argues GCDSS failed to meet its burden of proof as to whether the juveniles in question were neglected as defined by N.C. Gen. Stat. § 7B-101(15). A neglected juvenile is defined as:

[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile’s parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile’s welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2009).

Evidence of prior adjudication of neglect or abuse is admissible in a subsequent proceeding to terminate parental rights. *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984). However, to reach the legal conclusion of neglect, the trial court must determine neglect exists at the time of the termination of parental rights proceeding. *See id.* at 716, 319 S.E.2d at 232. The trial court must consider evidence of changed conditions following the adjudication and must evaluate the probability of repetition of neglect. *Id.* at 715, 319 S.E.2d at 232. Where the evidence shows a likelihood of repetition of neglect, the trial court may reach a conclusion of neglect under N.C. Gen. Stat. § 7B-1111(a)(1). *In re Leftwich*, 135 N.C. App. 67, 72, 518 S.E.2d 799, 803 (1999).

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Relevant to the determination of probability of repetition of neglect is whether the parent has “made any meaningful progress in eliminating the conditions that led to the removal of [the] children.” *Id.* That a parent provides love and affection to a child does not prevent a finding of neglect. *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 251-52. Neglect exists where the parent has failed in the past to meet the child’s physical and economic needs and it appears that the parent will not, or cannot, correct those inadequate conditions within a reasonable time. *Id.* at 109, 316 S.E.2d at 252.

The trial court made the following findings of fact:

5. The juveniles are currently in the legal and physical custody of the Guilford County Department of Social Services and were placed in custody by a Non-secure Custody Order entered on January 25, 2007. The juveniles were adjudicated neglected and dependent on March 16, 2007. The juveniles have remained in the legal and physical custody of the Guilford County Department of Social Services since that date.

6. The issues which cause[d] the juveniles to enter foster care include but are not limited to the following:

a. The police were called to the home on January 22, 2007 due to a water leak and a child who had been crying for approximately twenty minutes.

b. Needles, presumably used for drugs, were left where the children could access them.

c. The police found a small amount of marijuana, and the mother was arrested for the possession of marijuana and drug paraphernalia. She was also charged with child neglect.

d. The washing machine and the master bath tub were full of dirty water. The refrigerator was empty except for a few apples. The freezer had no food.

e. The father, who was not at home at the time, had pending criminal charges.

....

26. [Repondent’s] case plan was updated to include that condition that he would participate in the Christian Counseling Wellness Group.

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27. During the time [Respondent] was in the Christian Counseling Wellness Group, he was in substantial compliance with the case plan as he residing [sic] at this facility, he was submitting to drug screens, which were negative, and he obtained a substance abuse assessment through the facility. In addition, he was visiting with the children. He did not participate in a parenting psychological assessment. He began parenting classes but did not complete the program.

28. In March of 2008, [Respondent] left the Christen [sic] Counseling Wellness Group without successfully completing the program.

29. After leaving this program, [Respondent] did not maintain any contact with Department of Social Services, he did not submit to any drug screens and did not remain in compliance with his case plan.

30. [Respondent] has not visited with the minor children since leaving the residential drug treatment facility on March 25, 2008.

31. In June, 2008, [Respondent] was arrested for violating his probation. He did not contact DSS and let them know of his incarceration. [Respondent] admitted to a willful violation of his probation and took an active sentence in September, 2008.

32. Since being in prison, [Respondent] has successfully completed the New Directions program and is working on his substance abuse issues as well as other issues. His maximum release date is December, 2009, and his possible release date is October 2, 2009.

33. [Respondent's] last release from custody resulted in a period of recovery that lasted 4 months and then he relapsed which resulted in his current incarceration.

34. Upon his release, [Respondent] admits he would not be able to care for the children until he had established himself in the world outside of prison.

35. During the 2 1/2 years or 30 months, the children have been in foster care, [Respondent] has been in compliance with his case plan from his release from jail in November of 2007 to March of 2008 for a period of 5 months. He worked on components of his case plan while in the Guilford County jail from April of 2007 to November of 2007.

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36. Since the minor children came into custody, [Respondent] does well and addresses his substance abuse issues only while incarcerated or in residential treatment.

. . . .

42. There is a probability of a repetition of neglect if the minor children are returned to [Respondent] as he remains incarcerated on charges which occurred after the children were placed in foster care, he relapsed within four months of his release from jail in 2008 and he has not successfully addressed his substance abuse issues except during incarceration or a residential drug treatment program and that was for a period of only four months.

These findings of fact are not challenged on appeal and are therefore binding on this Court. *See In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003). Respondent contends these findings of fact do not support a reasonable probability of a repetition of the neglect. We disagree.

Despite the progress Respondent made in the New Directions program at Duplin Correctional Center, he failed to complete the CCWG program and has relapsed in the past. The trial court acknowledged Respondent's most recent efforts toward sobriety, but determined his success at sobriety while incarcerated was not indicative of how he would manage his addiction when released from custody. The trial court balanced the weight of the evidence and came to a reasonable conclusion. We hold the findings of fact evidence a reasonable probability of repetition of neglect. The trial court's conclusion of law that the juveniles were neglected is clearly supported by this factual predicate.

Because a finding of only one ground is necessary to terminate one's parental rights, we need not consider Respondent's arguments with respect to the other ground found by the trial court. *See In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93-94 (2004) ("Having concluded that at least one ground for termination of parental rights existed, we need not address the additional ground of neglect found by the trial court.").

[2] Respondent finally argues the trial court abused its discretion in finding it was in J.D.K. and J.H.K.'s best interest to terminate Respondent's parental rights. Respondent's argument is based on the absence of the GAL at the termination hearing. The law of the case is

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otherwise. Our Supreme Court held “the nonlawyer GAL volunteer is not required to be physically present at the TPR hearing.” *In re J.H.K.*, 365 N.C. 171, ___, 711 S.E.2d 118, 122 (2011). We thus find no abuse of discretion by the trial court in finding termination of Respondent’s parental rights to be in the best interest of the juveniles.

We hold there is clear, cogent, and convincing evidence to support the trial court’s findings of fact, and the findings of fact support the conclusions of law. Therefore, we affirm the trial court’s decision to terminate Respondent’s parental rights.

Affirmed.

Judges McGEE and STROUD concur.

DAVID ROBINSON, BY HIS GUARDIAN CASSANDRA ROBINSON, PETITIONER V. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA11-4

(Filed 6 September 2011)

Administrative Law—testimony not available to agency—medical review

The trial court erred by holding that an Administrative Law Judge was precluded from considering testimony not available to the agency at the time of its initial decision in a Continued Need Medicaid Review Hearing. *Britthaven, Inc. v. N.C. Dep’t of Human Resources*, 118 N.C. App. 379, was limited to cases in which certificate of need law is applicable.

Appeal by petitioner from order entered 13 October 2010 by Judge Eric Levinson in Gaston County Superior Court. Heard in the Court of Appeals 26 May 2011.

Legal Services of Southern Piedmont, by Douglas Stuart Sea and Robert Davis, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Eaddy, for respondent-appellee.

STEELMAN, Judge.

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It was error to hold that an Administrative Law Judge was precluded from considering testimony not available to the agency at the time of its initial decision in a Continued Need Medicaid Review Hearing.

I. Factual and Procedural Background

David Robinson (Robinson) is a mentally and physically disabled man. Robinson began receiving medical assistance in 1995 through the North Carolina Community Alternatives Program for persons with Mental Retardation/Developmental Disabilities (CAP-MR/DD). The CAP-MR/DD waiver provides home and community based services to Medicaid recipients with severe mental retardation and other disabilities to reduce governmental costs by preventing or delaying institutionalization. In May 2008, Robinson's case manager submitted a plan of care requesting continued Medicaid coverage under the CAP-MR/DD waiver: (1) 210.7 hours per month of Home and Community Supports (HCS); (2) 90.3 hours per month of enhanced Personal Care Services (PCS); and (3) 48 hours per month of enhanced Respite Care. This plan of care was to be effective 1 June 2008 until 31 May 2009. Robinson had received this level of services for several years prior to 2008.

On 20 June 2008, ValueOptions, Inc., the mental health utilization review contractor for the North Carolina Department of Health and Human Services (DHHS)¹, issued a letter reducing HCS service from 210.7 to 86 hours per month, terminating enhanced PCS and enhanced respite, and approving regular PCS of 150.5 hours per month and regular respite of 48 hours per month. The letter stated that sufficient justification was not provided to demonstrate medical necessity for the requested services.

An informal hearing was held on 31 July 2008 in the Hearing Office of DHHS and a notice of decision was filed 8 August 2008 modifying the recommendation of ValueOptions. The hearing officer upheld the termination of enhanced services, reduced HCS from 210.7 to 120 hours per month, and approved regular PCS of 116.5 per month and regular respite of 48 hours per month. Robinson appealed to the Office of Administrative Hearings.

A contested case hearing was held before Administrative Law Judge J. Randall May (ALJ) on 10 March 2009. At the hearing,

1. The North Carolina Administrative Code requires that all Medicaid-authorized services be medically necessary. 10A N.C.A.C. § 220.0301. DHHS contracted with ValueOptions, Inc. to perform prior approval reviews of recipient requests for CAP-MR/DD services.

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Robinson's treating physician, Dr. Olufolarin Ajao (Dr. Ajao), testified as to Robinson's medical condition and needs. Dr. Ajao testified that without the services requested, Robinson would be at an increased risk for institutionalization. Dr. Daphne Timmons (Dr. Timmons), an evaluating psychologist and expert in evaluation for CAP-MD/DD services, opined that the levels of service in the 2008 plan of care were clinically necessary and that DHHS's criteria for the requested levels of service had been met in this case. Based upon the evidence presented at the contested case hearing, the ALJ vacated the decision to reduce Robinson's level of CAP-MR/DD services and ordered that Robinson continue to receive the level of services as requested in the 2008 plan of care.

On 5 August 2009, a final agency decision was issued reversing the decision of the ALJ. The agency held that *Britthaven, Inc. v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 455 S.E.2d 455, *disc. review denied*, 341 N.C. 418, 461 S.E.2d 754 (1995), precluded the ALJ from considering evidence not available to the agency at the time of its initial decision.

On 24 August 2009, Robinson petitioned for judicial review in the superior court. On 10 February 2010, a hearing was held in Gaston County Superior Court and an order was filed 13 October 2010 affirming the final agency decision.

Robinson appeals.

II. Standard of Review

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. If it is alleged that an agency's decision was based on an error of law then a *de novo* review is required.

D.B. v. Blue Ridge Ctr., 173 N.C. App. 401, 405, 619 S.E.2d 418, 422 (2005) (internal citation and quotation omitted).

III. Additional Evidence Presented to ALJ

In his first argument, Robinson contends that the superior court erred by adopting the agency's findings that the ALJ erred in admitting testimony and other evidence about Robinson's medical needs that were not provided to the agency by his case manager before the initial agency decision to modify and reduce services. We agree.

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At the hearing before the ALJ, Dr. Timmons, an expert in evaluation for CAP-MD/DD services, testified as to Robinson's medical needs. The ALJ made two findings of fact regarding her evaluation of Robinson:

27. Dr. Daphne Timmons evaluated Petitioner in September and October 2008 and prepared a written psychological assessment. Pet. Exh. 9. In preparing her assessment, she reviewed the Plan of Care and other records, interviewed and observed Petitioner and his mother, and administered testing.

28. Dr. Timmons is familiar with the service definitions and CAP-MR/DD waiver and manual sections for Home and Community Supports, enhanced and regular Personal care, and enhanced and regular respite. She regularly works with providers of those services. In her expert opinion, Petitioner has intense behavioral needs, severe adaptive behavior deficits, and needs intensive training to be able to continue to live in a non-institutional setting. In her opinion, the levels of services included in the 2008 Plan of Care are clinically necessary and Respondent's criteria for the requested level of services are met in this case. Dr. Timmons testified that if services are reduced and terminated as proposed by Respondent, Petitioner is likely to regress in his habilitative skills and he will be at risk for institutionalization.

In its final decision, the agency found that findings of fact 27 and 28 were based on "inadmissible evidence not submitted at the time of the Agency's decision" and cited *Britthaven*, *supra*, for the proposition that the ALJ was precluded from considering Dr. Timmons's testimony in making his decision. The agency rejected findings of fact 27 and 28 on this basis. On a petition for judicial review, the superior court "adopted and incorporate[d] by reference" the findings of fact contained in the final agency decision.

In *Britthaven*, this Court held:

The subject matter of a contested case hearing by the ALJ is an agency decision. Under N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine whether the petitioner has met its burden in showing that *the agency* substantially prejudiced petitioner's rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. G.S. § 150B-23(a). *The judge determines these issues based on*

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a hearing limited to the evidence that is presented or available to the agency during the review period.

Britthaven, 118 N.C. at 382, 455 S.E.2d at 459 (emphasis added). However, the Court in *Britthaven* was describing “the nature of contested case hearings *under the CON law* and the Administrative Procedure Act.” *Id.* (emphasis added). This holding is consistent with the CON regulation in 10A N.C.A.C. § 14C.0204, which provides, “An applicant may not amend an application” once the application is completed. *See also Dialysis Care of N.C., L.L.C., v. N.C. Dept. of Health & Human Servs.*, 137 N.C. App. 638, 647-48, 529 S.E.2d 257, 262 (“An applicant may not amend a CON application. *See* 10 N.C.A.C. 3R.0306² (Dec. 1999 Supp.). The hearing officer (ALJ) is properly limited to consideration of evidence which was before the CON Section when making its initial decision.” (citation omitted)), *aff'd per curiam*, 353 N.C. 258, 538 S.E.2d 566 (2000); *In re Application of Wake Kidney Clinic*, 85 N.C. App. 639, 643, 355 S.E.2d 788, 790-91 (“The rules adopted by the Department of Human Resources to govern contested certificates of need hearings prevent a party from amending his application once it is deemed completed by the Section.” (citing 10 N.C.A.C. § 3R.0306)), *disc. review denied*, 320 N.C. 793, 361 S.E.2d 89 (1987). Thus, we hold that *Britthaven* is limited to cases in which CON law is applicable.

The agency has cited no comparable regulation in the Medicaid context which would prohibit the ALJ from considering additional evidence regarding a petitioner’s medical needs.

N.C. Gen. Stat. § 150B-34 provides:

§ 150B-34. Decision of administrative law judge.

(a) Except as provided in G.S. 150B-36(c), and subsection (c) of this section, in each contested case the administrative law judge shall make a decision that contains findings of fact and conclusions of law and return the decision to the agency for a final decision in accordance with G.S. 150B-36. *The administrative law judge shall decide the case based upon the preponderance of the evidence*, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency. All references in this Chapter to the administrative law

2. 10 N.C.A.C. § 3R.0306 is now codified as 10A N.C.A.C. § 14C.0204.

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judge's decision shall include orders entered pursuant to G.S. 150B-36(c).

N.C. Gen. Stat. § 150B-34(a) (2009) (emphasis added). Further, regulations for the Office of Administrative Hearings provide:

.0122 Evidence

The North Carolina Rules of Evidence as found in Chapter 8C of the General Statutes shall govern in all contested case proceedings, except as provided otherwise in these Rules and G.S. 150B-29.

(1) *The administrative law judge may admit all evidence that has probative value.* Irrelevant, incompetent, and immaterial or unduly repetitious evidence shall be excluded. . . .

26 N.C.A.C. § 3.0122(1) (emphasis added). The regulations also provide that the administrative law judge's decision shall be based exclusively on "competent evidence and arguments presented during the hearing and made a part of the official record[.]" 26 N.C.A.C. § 3.0127(b)(1).

The agency has failed to cite and we have found no applicable case law or statutory authority for the proposition that the ALJ erred by considering Dr. Timmons's expert testimony regarding Robinson's medical needs in rendering his decision.³

We note that, from a public policy standpoint, Robinson's argument that "the superior court's ruling would deny Medicaid recipients meaningful input at any stage of the process" is persuasive. Prior to its initial decision, the agency only requests documents from a Medicaid recipient's case manager. Therefore, any failure to submit the relevant medical evidence necessary to support the case plan would be on the part of the case manager, who is also an agent of the

3. We note that the General Assembly has now enacted N.C. Gen. Stat. § 108A-70.9B for contested Medicaid cases, effective 1 July 2010, which expressly provides the procedure for the consideration of additional evidence. N.C. Gen. Stat. § 108A-70.9B(e) provides that "The recipient shall be permitted to submit evidence regardless of whether obtained prior to or subsequent to the Department's actions and regardless of whether the Department had an opportunity to consider the evidence in making its adverse determination. When the evidence is received, at the request of the Department, the administrative law judge shall continue the hearing for a minimum of 15 days and a maximum of 30 days to allow for the Department's review of the evidence. Subsequent to review of the evidence, if the Department reverses its original decision, it shall immediately inform the administrative law judge." N.C. Gen. Stat. § 108A-70.9B(e) (2010 Interim Supp.). This provision was not applicable to the instant case.

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State. Thus, if a recipient is barred from presenting additional evidence to the ALJ during a contested hearing, there is no way to remedy any deficiencies in the presentation of his case plan and to have a meaningful opportunity to be heard.

We hold that the superior court erred by adopting the agency's findings that the ALJ was precluded from considering evidence about Robinson's medical needs that was not provided to the agency before its initial decision to modify and reduce services. This case is remanded to DHHS for a correct application of the law. *See Meza v. Division of Soc. Servs.*, 364 N.C. 61, 72, 692 S.E.2d 96, 104 (2010) (holding that where the superior court's order was entered under a misapprehension of the law, the Court may remand for the application of the correct legal standard).

REVERSED and REMANDED.

Judges CALABRIA and ELMORE concur.

TIMOTHY SCOTT BOBBITT, BY SASHA DEEANN BOBBITT, HIS ATTORNEY-IN-FACT, PLAINTIFF
v. KELLIE LYNN EIZENGA, DEFENDANT

No. COA10-1580

(File 6 September 2011)

Child Visitation—attempted statutory rape—sex offender registration—no law against visitation—dismissal improper

The trial court erred by dismissing plaintiff father's claim for visitation of his child based on his conviction for attempted statutory rape, an act which resulted in the birth of a child, and required registration as a sex offender. No law prevented plaintiff from claiming visitation rights with the child.

Appeal by plaintiff from order entered 27 August 2010 by Judge B. Carlton Terry in Davie County District Court. Heard in the Court of Appeals 6 June 2011.

The Dummit Law Firm, by Cerene O. Setliff, for plaintiff.

No brief filed for defendant.

THIGPEN, Judge.

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Timothy Bobbitt was convicted of attempted statutory rape of Kellie Eizenga, an act which resulted in the birth of a child.¹ We must determine whether the trial court erred in dismissing Bobbitt's claim for visitation because of his conviction and sex offender status. Because there is no law preventing Bobbitt from claiming visitation rights with his child, we reverse and remand.

In November 2009, Bobbitt pled guilty to attempted statutory rape of Eizenga. Bobbitt was sentenced to 94 to 122 months in prison and was required to register as a sex offender for 30 years upon release from prison. As a result of the attempted statutory rape, Eizenga gave birth to L.W. in March 2010. Bobbitt was not listed as the biological father on L.W.'s birth certificate, and Eizenga gave L.W. the last name of Eizenga's boyfriend at the time of L.W.'s birth. However, a paternity test indicated a 99.99% probability that Bobbitt is the father of L.W.

While incarcerated, Bobbitt filed a complaint seeking joint legal custody and reasonable visitation with L.W., a change of L.W.'s last name, and visitation rights for Bobbitt's parents. On 3 March 2010, Eizenga filed a motion to dismiss for failure to state a claim. After a hearing on 26 July 2010, the trial court filed an order on 27 August 2010 granting Eizenga's motion to dismiss. Bobbitt appeals.

On appeal, Bobbitt contends the trial court erred by (I) dismissing his action for visitation because he was not convicted of a crime that would cause him to lose visitation rights, (II) finding that Bobbitt cannot have any contact with L.W. because of his status as a sex offender, and (III) finding that visitation is impossible.

I. Effect of Attempted Statutory Rape Conviction

Bobbitt first argues the trial court erred by dismissing his action for visitation because he was not convicted of a crime that limits his right to seek custody or visitation. We agree.

We review a motion to dismiss for failure to state a claim *de novo*. *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 606, 659 S.E.2d 442, 447 (2008) (citation omitted). "The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal

1. In his brief, Bobbitt states he pled guilty to attempted statutory rape. However, the record is void of any explanation of how completion of the elements necessary to constitute the offense of *attempted* statutory rape resulted in the birth of a child.

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theory when the complaint is liberally construed and all the allegations included therein are taken as true.” *Guyton v. FM Lending Services, Inc.*, 199 N.C. App. 30, 33, 681 S.E.2d 465, 469 (2009) (citation and quotation marks omitted). “On a motion to dismiss, the complaint’s material factual allegations are taken as true.” *Id.* (citation and quotation marks omitted). Dismissal 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.” *Id.* (citation and quotation marks omitted).

Pursuant to N.C. Gen. Stat. § 50-13.1(a) (2009), any parent or relative claiming the right to custody of a minor child may institute an action for custody of or visitation with the child. However, “[a]ny person whose actions resulted in a conviction under G.S. 14-27.2 [first-degree rape] or G.S. 14-27.3 [second-degree rape] and the conception of the minor child may not claim the right to custody [or visitation] of that minor child.”² *Id.*

In this case, the trial court found as fact that Bobbitt “had been convicted of attempted statutory rape of [Eizenga] which caused the birth of the minor child” and that Bobbitt “was given an active sentence of 94 to 122 months in prison and is required to register as a sex offender for 30 years once he is released from prison.” The court concluded Bobbitt “is not entitled to visitation with the minor child as a result of his conviction [of attempted statutory rape] and sex offender status.” Bobbitt correctly contends that a conviction of attempted statutory rape does not preclude him from claiming visitation rights under N.C. Gen. Stat. § 50-13.1(a).

Pursuant to N.C. Gen. Stat. § 50-13.1(a), any person whose actions resulted in a conviction of first-degree rape or second-degree rape and the conception of a minor child may not claim the right to custody or visitation of that minor child. Bobbitt, however, was convicted of attempted statutory rape, not first-degree rape or second-degree rape. N.C. Gen. Stat. § 50-13.1(a) does not prevent a person convicted of attempted statutory rape that resulted in the conception

2. N.C. Gen. Stat. §§ 14-27.2(c) and 14-27.3(c) (2009) similarly state that “[u]pon conviction, a person convicted under this section has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape, nor shall the person have any rights related to the child under Chapter 48 or Subchapter 1 of Chapter 7B of the General Statutes.”

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of a child from claiming visitation rights to that child. Similarly, in the context of an adjudication order, this Court has explained that “[e]ven if respondent were eventually indicted and convicted of statutory rape . . . such a conviction would not result in respondent losing his parental rights[.]” *In re J.L.*, 183 N.C. App. 126, 131, 643 S.E.2d 604, 607 (2007). Thus, the trial court erred by concluding that Bobbitt is not entitled to visitation as a result of his conviction of attempted statutory rape and by dismissing Bobbitt’s complaint on that basis.

II. Sex Offender Status

Bobbitt next argues the trial court erred in concluding that he is not entitled to visitation with his child due to his status as a sex offender. We agree.

Although the North Carolina Sex Offender and Public Protection Registration Program prevents sex offenders from certain activities involving minor children, *see* N.C. Gen. Stat. § 14-208.16(a) (2009) (a sex offender “shall not knowingly reside within 1,000 feet of the property on which any public or nonpublic school or child care center is located”); N.C. Gen. Stat. § 14-208.17 (2009) (unlawful for a sex offender to work “at any place where a minor is present and the person’s responsibilities or activities would include instruction, supervision, or care of a minor or minors”), there are no provisions preventing a parent from having contact with their child. In fact, at least one of the statutes contemplates a sex offender having contact with their child. Specifically, N.C. Gen. Stat. § 14-208.18 (2009) allows a registered sex offender who is a parent or guardian of a minor to be present on certain premises with the minor for the purposes specified in the statute.

In this case, the trial court found as fact that “it would be a violation of the current criminal law in the State of North Carolina for [Bobbitt] to be around the minor child which is the subject of this action” and that “visitation is an impossibility as a result of his conviction and sex offender status as he is not entitled to visitation under the current criminal laws.” The court then concluded Bobbitt “is not entitled to visitation with the minor child as a result of his conviction and sex offender status.” Our review of North Carolina statutes and case law has revealed no law that would prevent a parent from claiming visitation rights with their child on the basis of their status as a sex offender. Therefore, the trial court erred by concluding that Bobbitt is not entitled to visitation as a result of his status as a sex offender.

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[215 N.C. App. 382 (2011)]

Absent legislation prohibiting a person whose actions resulted in a conviction of attempted statutory rape and the conception of a minor child from claiming the right to custody or visitation of that minor child, we find no basis upon which to rule Bobbitt is not entitled to claim visitation. Thus, taking Bobbitt's factual allegations as true, we hold Bobbitt has sufficiently stated a claim for custody and visitation of L.W. As a result, we reverse the trial court's order granting Eizenga's motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) and remand this case to the trial court for further proceedings on the merits of Bobbitt's claims pursuant to the appropriate statutory procedures applicable to custody and visitation disputes.

Because we conclude the trial court erred in dismissing Bobbitt's complaint, we will not address his remaining argument.

REVERSED AND REMANDED.

Chief Judge MARTIN and Judge STEPHENS concur.

JACK TILLET, LYDIA TILLET, AND ANDREA MCCONNELL, PLAINTIFFS v. ONSLOW
MEMORIAL HOSPITAL, INC., DEFENDANT

No. COA11-116

(Filed 6 September 2011)

Privacy—invasion of—autopsy photographs

The trial court correctly dismissed a claim for invasion of privacy under N.C.G.S. § 1A-1, Rule 12(b)(6) where the claim was based on the viewing of autopsy x-rays by defendant's employees and the disclosure of those photographs to third parties. By statute, autopsy photographs are accessible by any person, subject only to restrictions on time and supervision, and publishing the x-rays to third parties was relevant only to the employees' potential criminal liability.

Appeal by plaintiff from order entered 21 September 2010 by Judge Benjamin G. Alford in Onslow County Superior Court. Heard in the Court of Appeals 18 August 2011.

TILLET v. ONSLOW MEM'L HOSP., INC.

[215 N.C. App. 382 (2011)]

Economos Law Firm, PLLC, by Larry C. Economos, for plaintiff-appellants.

Cranfill Sumner & Hartzog, LLP, by John D. Martin and Carolyn C. Pratt, for defendant-appellee.

CALABRIA, Judge.

Jack Tillet, Lydia Tillet, and Andrea McConnell (collectively “plaintiffs”) appeal the trial court’s order dismissing their claim for tortious invasion of privacy against Onslow Memorial Hospital, Inc. (“defendant”). We affirm.

I. Background

According to the allegations in plaintiffs’ complaint, plaintiffs are the immediate family members of Cynthia Louise Tillet-Knighten (“Ms. Tillet-Knighten”). Ms. Tillet-Knighten died on 17 April 2009 as the result of a homicide.

Since Ms. Tillet-Knighten’s cause of death was homicide, an autopsy was performed on her body by Coastal Pathology Associates, P.A. During the autopsy, x-ray photographs were taken which depicted massive blunt force trauma to Ms. Tillet-Knighten’s face and skull. After the autopsy was completed, several of defendant’s employees accessed and viewed Ms. Tillet-Knighten’s x-ray photographs and additionally published and disclosed them to third parties.

On 12 July 2010, plaintiffs initiated an action against defendant in Onslow County Superior Court. Plaintiffs’ complaint alleged that the actions of defendant’s employees constituted a common law tortious invasion of plaintiffs’ privacy. On 26 July 2010, defendant filed an answer and motion to dismiss plaintiffs’ complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After a hearing, the trial court granted defendant’s motion on 21 September 2010. Plaintiffs appeal.

II. Invasion of Privacy

Plaintiffs’ sole argument on appeal is that the trial court erred by granting defendant’s motion to dismiss their claim for tortious invasion of privacy. We disagree.

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting the question whether, as a matter of law, the allegations of the complaint, treated as true,

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are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory. A motion to dismiss pursuant to Rule 12(b)(6) should not be granted *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*

Isenhour v. Hutto, 350 N.C. 601, 604-05, 517 S.E.2d 121, 124 (1999) (internal quotations and citations omitted).

Plaintiffs contend that their complaint alleged a valid cause of action for common law tortious invasion of privacy. Our Supreme Court has stated that four basic types of invasion of privacy torts exist: “(1) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness; (2) intrusion upon the plaintiff’s seclusion or solitude or into his *private affairs*; (3) public disclosure of embarrassing *private* facts about the plaintiff; and (4) publicity which places the plaintiff in a false light in the public eye.” *Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 322, 312 S.E.2d 405, 411 (1984). Plaintiffs’ claim is brought pursuant to the second type of privacy tort, intrusion upon the plaintiffs’ seclusion or solitude or into their private affairs (“intrusion upon seclusion”).

“The tort of invasion of privacy by intrusion into seclusion has been recognized in North Carolina and is defined as the intentional intrusion [‘]physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . [where] the intrusion would be highly offensive to a reasonable person.[’]” *Toomer v. Garrett*, 155 N.C. App. 462, 479, 574 S.E.2d 76, 90 (2002) (quoting *Miller v. Brooks*, 123 N.C. App. 20, 26-27, 472 S.E.2d 350, 354 (1996)). Examples of recognized intrusions upon seclusion include “‘physically invading a person’s home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another.’” *Id.* at 480, 574 S.E.2d at 90 (quoting *Hall v. Post*, 85 N.C. App. 610, 615, 355 S.E.2d 819, 823 (1987)).

In the instant case, plaintiffs contend that they possess a personal privacy interest in the autopsy x-ray photographs of Ms. Tillet-Knighten that was intruded upon by the actions of defendant’s employees. However, the statute which regulates access to autopsy photographs makes clear that family members cannot possess a privacy interest in these photographs for the purposes of the intrusion upon seclusion tort.

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N.C. Gen. Stat. § 130A-389.1 governs the inspection and examination of autopsy photographs. This statute states, in relevant part: “Except as otherwise provided by law, *any person may inspect and examine original photographs* or video or audio recordings of an autopsy performed pursuant to G.S. 130A-389(a) at reasonable times and under reasonable supervision of the custodian of the photographs or recordings.” N.C. Gen. Stat. § 130A-389.1(a) (2009) (emphasis added). Moreover, “[i]f the investigating medical examiner has retained the original photographs or recordings, then the investigating medical examiner is the custodian of the photographs or video or audio recordings and *must allow the public to inspect and examine them in accordance with this subsection.*” *Id.* (emphasis added).

However, “no custodian of the original recorded images shall furnish copies of photographs or video or audio recordings of an autopsy to the public.” *Id.* Thus, *original* autopsy photographs may be inspected and examined by any member of the public under the supervision of the photographs’ custodian. But members of the public do not possess a general right to obtain a copy of these original autopsy photographs, and may obtain such copies only if they fall within specific exceptions which comprise the rest of the statute. The remainder of N.C. Gen. Stat. § 130A-389.1 repeatedly references the term “copies” and regulates how and by whom they may be obtained and disseminated. *See, e.g.*, N.C. Gen. Stat. § 130A-389.1(b) (“The following public officials may obtain *copies* of autopsy photographs”); N.C. Gen. Stat. § 130A-389.1(c) (“The following persons may obtain *copies* of autopsy photographs”); and N.C. Gen. Stat. § 130A-389.1(d) (“A person who is denied access to *copies* of photographs”). The statute does not contain similar detailed regulations regarding the general right of access to the original photographs referenced in N.C. Gen. Stat. § 130A-389.1(a); in fact, it does not reference originals at all after this initial subsection.

When discussing the invasion of privacy tort of intrusion upon seclusion, the Restatement (Second) of Torts explains:

The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. *Thus there is no liability for the examination of a public record concerning the plaintiff, or of documents that the plaintiff is required to keep and make available for public inspection.*

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Restatement (Second) of Torts § 652B, cmt. c. (emphasis added). Thus, a plaintiff cannot successfully pursue an intrusion upon seclusion claim based upon the accessing of items which are either in the public record or required to be made available for public inspection.

In the instant case, plaintiffs allege that defendant's employees intruded upon their seclusion by "unlawfully accessing, viewing, disclosing, [and] publishing the decedent's x-ray film autopsy photographs." However, since the originals of these photographs may be inspected and examined by any member of the public, subject only to the restriction that they be viewed at reasonable times and under reasonable supervision, autopsy photographs cannot be considered private for the purposes of this tort. *See id.*

The allegations in plaintiffs' complaint allege that defendant's employees unlawfully exceeded the statutory authorization in N.C. Gen. Stat. § 130A-389.1(a) when they viewed the autopsy photographs and published them to third parties. Nonetheless, such violations of the statute are only relevant to the employees' potential criminal liability. *See* N.C. Gen. Stat. § 130A-389.1(g)-(h) (2009). As plaintiffs concede in their brief, a violation of N.C. Gen. Stat. § 130A-389.1 does not give rise to a civil cause of action. Ultimately, in light of N.C. Gen. Stat. § 130A-389.1(a), the alleged actions of defendant's employees did not invade plaintiffs' privacy by intruding upon their solitude, seclusion, private affairs or concerns. Therefore, plaintiffs' complaint failed to state a claim for invasion of privacy. This argument is overruled.

III. Conclusion

The viewing of autopsy photographs cannot be considered an intrusion upon the plaintiffs' seclusion in that, by statute, the photographs are readily accessible by "any person" subject only to a restriction that the viewing occur at reasonable times and under reasonable supervision. N.C. Gen. Stat. § 130A-389.1(a). Thus, the actions of defendant's employees in viewing and distributing Ms. Tillet-Knighten's autopsy photographs cannot be considered a tortious intrusion into the seclusion of plaintiffs. The trial court correctly granted defendant's motion to dismiss plaintiffs' claim.

Affirmed.

Judges ELMORE and McCULLOUGH concur.

SARTORI v. N.C. DEP'T of CORR.

[215 N.C. App. 387 (2011)]

ROBERT ALLEN SARTORI, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CORRECTION, ET AL; ROBERT LEWIS, DIRECTOR OF PRISONS; ALVIN KELLER, SECRETARY; DOC CENTRAL MANAGEMENT TEAM, ET AL, DEFENDANTS

No. COA11-167

(Filed 6 September 2011)

Prisons and Prisoners—monetary charges—arguments previously decided—dismissal proper

The trial court did not err in dismissing plaintiff's complaint seeking injunctive and declaratory relief for charges by the North Carolina Department of Correction to inmates for disciplinary infractions and medical treatment co-payments. Plaintiff's exact arguments had previously been ruled upon and the Court of Appeals adopted the reasoning of those prior decisions in affirming the trial court's decision.

Appeal by plaintiff from order entered 22 September 2010 by Judge James L. Baker in Mitchell County Superior Court. Heard in the Court of Appeals 18 August 2011.

Robert Allen Sartori, pro se.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for defendant-appellees.

STEELMAN, Judge.

On 12 July 2010, Robert Allen Sartori (plaintiff) filed this action against the North Carolina Department of Correction (DOC), Director of Prisons Robert Lewis, Secretary of DOC Alvin Keller, and DOC Central Management Team (collectively, defendants) seeking injunctive and declaratory relief for the charges by DOC to inmates for disciplinary infractions and medical treatment co-payments on the basis that they were invalid due to failure to comply with the provisions of N.C. Gen. Stat. § 12-3.1. The trial court dismissed plaintiff's action on 22 September 2010 pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

Plaintiff appeals.

Plaintiff's exact arguments have been ruled upon in *Griffith v. N.C. Dept. of Corr.*, ___ N.C. App. ___, 710 S.E.2d 707 (2011) (unpublished) (medical co-payments), and *Griffith v. N.C. Dept. of Corr.*,

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___ N.C. App. ___, 709 S.E.2d 412 (2011) (disciplinary infractions fee).
We adopt the reasoning of these prior decisions and affirm the ruling
of the trial court.

AFFIRMED.

Judges CALABRIA and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 SEPTEMBER 2011)

BALDWIN v. A.S. SEASON, INC. No. 10-1430	Ind. Comm. (621178)	Affirmed
BELCH v. DELHAIZE AM., INC. No. 10-1532	Ind. Comm. (093568) (793827)	Affirmed
BYNUM v. WILSON CNTY. No. 11-115	Wilson (08CVS2443)	Dismissed in Part; Withdrawn in Part.
FRANKLIN v. BROYHILL FURN. INDUS., INC. No. 10-1334	Ind. Comm. (992243)	Affirmed in part; reversed and remanded in part.
GOODWIN v. CENTURY CARE OF CHERRYVILLE, INC. No. 10-1449	Gaston (10CVS238) (10CVS238)	Vacated and Remanded
HATLEY v. CONTINENTAL GEN. TIRE No. 10-1527	Ind. Comm. (569479)	Affirmed
IN RE A.C.G. No. 10-1552	Davidson (05J199)	Affirmed in part; and vacated in part.
IN RE A.M.W. No. 11-452	Mecklenburg (10JT79)	Affirmed
IN RE B.E. No. 11-140	New Hanover (08JT247-249)	Affirmed
IN RE C.T. No. 11-236	Durham (08J22-25)	Affirmed
IN RE D.B. No. 11-66	Durham (09JB269) (09JB319)	Dismissed
IN RE D.T.F. No. 11-257	Columbus (09JB33)	Vacated and remanded remanded for new dispositional hearing
IN RE ESTATE OF RANEY No. 10-1480	Iredell (08E694)	No Error
IN RE J.E. No. 11-378	Wake (09JT124)	Affirmed
IN RE M.S.H., JR. No. 11-458	Greene (10JA27)	Affirmed

IN RE N.S. No. 11-232	Columbus (07CVD1232) (08JA41)	Vacated and Remanded
IN RE P.M. No. 11-33	Guilford (02JB386)	Affirmed
IN RE R.F. No. 11-100	Washington (10JB20)	Affirmed in part, Vacated in part and Remanded
JOUMA v. JOUMA No. 11-92	Mecklenburg (09CVD3119)	Affirmed
LEWIS v. STANLEY No. 10-1092	Johnston (09CVS4486)	Affirmed
MOSS v. STATE No. 11-144	Lincoln (10CVS377)	Reversed
OAKES v. OAKES No. 10-1607	Brunswick (09CVS2087)	Reversed and Remanded
PEGRAM-WEST v. SANDRA ANDERSON BUILDERS No. 09-1448-2	Guilford (08CVS10825)	Affirmed in part and dismissed in part.
SNIDER v. TULLS BAY COLONY PROP. No. 10-1257	Currituck (09CVS445)	Reversed
STATE v. AUTRY No. 11-274	Sampson (85CRS9027-9033) (85CRS9458-60)	No Error
STATE v. BANDY No. 10-1445	Wayne (06CRS52600) (07CRS1250)	No Error
STATE v. BARNES No. 10-1244	Wake (08CRS77718-19) (08CRS77720-21) (08CRS77724) (08CRS79343) (08CRS79343)	No Error
STATE v. BETHEA No. 10-1602	Scotland (10CRS1089)	Affirmed
STATE v. BOUKNIGHT No. 10-1528	Durham (09CRS42966)	Affirmed; Remanded for Correction of Clerical Error.

STATE v. BROWN No. 11-82	Edgecombe (09CRS53221)	No Error
STATE v. BURCH No. 10-1199	Guilford (08CRS111914) (08CRS111916-21)	No Error
STATE v. CHANEY No. 11-366	Brunswick (10CRS52649)	Dismissed
STATE v. DAVIS No. 11-188	Henderson (05CRS6065-67)	Affirmed
STATE v. DUMAS No. 10-1614	Guilford (09CRS84048-49) (09CRS84051-52) (09CRS84055)	No Error
STATE v. DUNN No. 11-99	Cleveland (08CRS55157) (08CRS55159)	Dismissed as to case 08 CRS 55159 and New Trial as to case 08 CRS 55157
STATE v. FLOYD No. 11-175	Wake (09CRS210668)	No Error
STATE v. FULTON No. 10-1568	Mecklenburg (08CRS245726) (08CRS245728)	No Error
STATE v. GRIFFIN No. 10-1357	Forsyth (09CRS53278) (09CRS53285) (09CRS8442)	Dismissed
STATE v. HARDING No. 11-161	Cumberland (08CRS68715)	No error in part; reversed in part
STATE v. HAYES No. 10-1437	Guilford (10CRS24107-110)	No Error
STATE v. HEFNER No. 11-269	Catawba (07CRS2604) (08CRS1090)	Affirmed
STATE v. JACOBS No. 11-47	Durham (09CRS52613)	No Error

STATE v. LAWSON No. 11-206	Buncombe (05CRS63479) (05CRS63909) (06CRS64414-17)	Affirmed
STATE v. LAWSON No. 11-214	Sampson (08CRS51113)	Affirmed
STATE v. LITTLE No. 11-32	Anson (08CRS51033)	No Error
STATE v. MARTIN No. 10-1284	Alamance (10CRS3371) (10CRS50245)	No Error
STATE v. McFADDEN No. 11-131	Catawba (06CRS9157)	Affirmed; Remanded for correction clerical errors
STATE v. McKOY No. 11-280	Johnston (08CRS51323)	No Error
STATE v. McSWAIN No. 10-1595	Cumberland (08CRS53375-76)	Affirmed
STATE v. MESSER No. 11-387	Buncombe (09CRS417-418) (09CRS438) (09CRS58022) (09CRS58023-29)	No Error
STATE v. MILLER No. 11-121	Guilford (08CRS78489)	Affirmed
STATE v. MORALES No. 10-1572	Mecklenburg (08CRS207208)	No Error
STATE v. MUMFORD No. 09-300-2	Greene (07CRS50575) (07CRS50574)	No Error
STATE v. PARKER No. 11-123	Guilford (08CRS89735)	No Error
STATE v. ROBINSON No. 10-1560	Wake (09CRS17080) (09CRS31412)	No Error
STATE v. SAMPSON No. 11-62	Wilson (10CRS50520)	No Error

STATE v. SANDERS No. 11-88	Gaston (09CRS57022-23) (09CRS57029) (10CRS2984) (10CRS8273)	Reversed and Remanded
STATE v. SAUER No. 10-1491	Dare (09CRS1258) (09CRS50824)	No Error
STATE v. SMALLS No. 11-130	Hoke (10CRS50195)	Dismissed
STATE v. SPEAKS No. 11-86	Forsyth (08CRS29803) (08CRS59220)	No Error
STATE v. TAYLOR No. 11-42	Pitt (08CRS11517) (08CRS2357)	Affirmed
STATE v. THOMAS No. 11-91	Pitt (08CRS59421-22)	No Error
STATE v. WASHINGTON No. 10-1494	Mecklenburg (09CRS246128-29)	No Error
STATE v. WEATHERS No. 11-261	Mecklenburg (07CRS229819)	No Error
STATE v. WILLIAMS No. 11-183	Johnston (08CRS56681) (08CRS8632)	No Error
STATE v. WILLIAMS No. 11-84	Washington (09CRS50267) (09CRS700201)	No Error
STATE v. WILSON-LOPEZ No. 11-69	Randolph (09CRS86)	Affirmed; Remanded for correction of clerical errors
STATE v. WOOD No. 10-372	Buncombe (09CRS53938-40)	Affirmed
WAKE RADIOLOGY v. N.C. DEPT OF HEALTH & HUMAN SERVS. No.10-1129	N.C. Dept. of Health & Human Svcs. (09DHR3473)	Affirmed

WATFORD v. MIDSOUTH GOLF, LLC No. 10-1562	Craven (07CVS1202) (07CVS1536) (07CVS1537) (07CVS1539) (07CVS1541-43) (07CVS1592) (07CVS1676) (07CVS1677-78) (07CVS1770) (08CVS1861)	Affirmed
WEST v. N.C. DEPT OF TRANSP. No. 10-1298	Wake (09CVS17772)	Affirmed

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[215 N.C. App. 395 (2011)]

MARY FRANCES POWE, EMPLOYEE, PLAINTIFF v. CENTERPOINT HUMAN SERVICES,
EMPLOYER, BRENTWOOD SERVICES, CARRIER, DEFENDANTS

No. COA10-1022

(Filed 6 September 2011)

1. Workers' Compensation—vocational rehabilitation—sufficiency of findings of fact

The Industrial Commission erred in a workers' compensation case by failing to apply the correct legal standard in determining whether plaintiff complied with vocational rehabilitation under N.C.G.S. § 97-25. When an employee is participating to some degree in vocational rehabilitation services, the Commission must determine, in deciding whether to reinstate benefits, whether the employee is substantially complying with those services and not significantly interfering with the vocational rehabilitation specialist's efforts to assist the employee in returning to suitable employment. The case was remanded for the Commission to make the required findings of fact.

2. Workers' Compensation—vocational rehabilitation—non-cooperation—temporary total disability

On remand, the Industrial Commission in a workers' compensation case must consider why vocational rehabilitation was not being provided. If it was due to non-cooperation, then the Commission erred in reinstating temporary total disability. If the failure to continue was not due solely to non-cooperation, or if the Commission determines that vocational rehabilitation should have been continued, then temporary total disability could be reinstated.

3. Workers' Compensation—denial of motion to admit additional evidence—not an abuse of discretion

The Industrial Commission did not abuse its discretion in a workers' compensation case when it denied defendants' motion to admit additional evidence following their appeal to the Commission. The Commission effectively declined to consider a new ground for suspension of benefits not yet addressed by a deputy commissioner and left the issue for a subsequent hearing.

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4. Workers' Compensation—Rule 802—sanctions—no finding of rules violation

Although plaintiff contended that the Industrial Commission erred in a workers' compensation case by concluding that defendants' failure to comply with certain opinions and awards of the Commission did not mandate the imposition of sanctions against defendants under Rule 802 of the Workers' Compensation Rules, this issue was not preserved. The Commission was never asked to award sanctions below and made no findings of a rules violation that would be required in order to impose sanctions under Rule 802.

Appeal by plaintiff and defendants from opinion and award entered 15 July 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 February 2011.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff.

Rudisill White & Kaplan, P.L.L.C., by Stephen Kushner, for defendants.

GEER, Judge.

Both plaintiff and defendants appeal from an opinion and award entered by the Industrial Commission that found plaintiff had failed to "fully comply" with Commission-ordered vocational rehabilitation, but still reinstated disability benefits on the grounds that defendants had ceased offering vocational rehabilitation services to plaintiff. We hold that the Commission failed to apply the correct legal standard in determining whether plaintiff complied with vocational rehabilitation under N.C. Gen. Stat. § 97-25 (2009). We, therefore, remand for the Commission to make findings of fact using the standard set out in this opinion.

Facts

On 21 May 2001, plaintiff sustained a compensable injury to her lower back and left hip while working as a Human Services Clinician III for defendant employer. On 10 January 2005, a deputy commissioner suspended plaintiff's temporary total disability benefits due to her noncompliance with vocational rehabilitation. Both parties appealed to the Full Commission, which affirmed the deputy commissioner's suspension of plaintiff's benefits. Following plaintiff's appeal, this Court affirmed the Commission's opinion and award in

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Powe v. Centerpoint Human Servs., 183 N.C. App. 300, 644 S.E.2d 269 (May 15, 2007) (unpublished).

Plaintiff moved to reinstate her temporary total disability benefits on 1 May 2008 asserting that she was now compliant with vocational rehabilitation. On 4 December 2008, an administrative order was entered directing defendants to reinstate temporary total disability compensation.

This matter was heard before a deputy commissioner on 24 February 2009, and the deputy entered an opinion and award 17 July 2009 finding that plaintiff had continued to be non-compliant with her vocational rehabilitation. Because, however, defendants had ceased offering vocational rehabilitation services to plaintiff, the deputy ordered defendants to reinstate plaintiff's temporary total disability compensation. Both parties appealed to the Full Commission.

On 15 July 2010, the Commission entered an opinion and award affirming the deputy commissioner's opinion and award with modifications. Commissioner Bernadine S. Ballance dissented. The Commission's opinion and award made the following findings of fact.

Plaintiff, who has a Masters of Education degree and has received additional post-graduate training at several schools, began vocational rehabilitation in June 2006 with Sonya Ellington. Ms. Ellington met with plaintiff and her attorney on a weekly or biweekly basis. She provided job leads to plaintiff weekly and required plaintiff to keep a job search log. Ms. Ellington stated that plaintiff kept her appointments and provided her with documentation indicating that she was looking for work.

Plaintiff provided the Commission with handwritten notes of her job search and testified that she had contacted more than 300 employers. The Commission found, however, that plaintiff's documentation indicated that she "sent out exactly one resume per week by mail without a cover letter and did not follow up on the submission." The Commission further found that "[a]fter originally testifying that the job search documents detailed her efforts in full, Plaintiff amended her testimony and indicated that there were additional notes she made of telephonic follow ups to her resume submissions, but that they were not included in the materials she submitted." Plaintiff had claimed that she did not know she was supposed to include the additional notes in the materials provided to the Commission.

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Plaintiff also called the City of Winston-Salem each week to listen to their recorded list of potential jobs. She testified that there are 18 to 20 listings every week. Plaintiff, however, never applied for any of the jobs because, she asserted, none were appropriate for her.

Plaintiff appeared at every vocational rehabilitation meeting with a cane and requested that the use of the cane be part of her vocational plan. The Commission pointed out, however, that in surveillance videos, plaintiff did not use a cane during a shopping trip that lasted more than three hours and was able to move without any apparent difficulty throughout the trip. In addition, plaintiff acknowledged that she did not use her cane while grocery shopping. The Commission concluded that “[t]he greater weight of the evidence shows that plaintiff misrepresented her true physical capacity to Ms. Ellington, specifically with respect to her need to use a cane.”

The Commission further noted that plaintiff testified she has more problems in the morning before her joints have had a chance to loosen up, and, therefore, she rarely leaves her house during the morning. She also indicated to the Commission that “she always had her vocational rehabilitation meetings in the morning, and as such was sleepy during those meetings.” The Commission, however, found that “[d]espite [plaintiff’s] claim that she has difficulty functioning during the morning, plaintiff never requested that her vocational rehabilitation meetings be moved to the afternoon, even though she had to drive to get to the meetings.”

With respect to plaintiff’s participation in vocational rehabilitation, the Commission further found that “[a]ccording to Ms. Ellington, plaintiff put up barriers to the vocational rehabilitation process.” Specifically,

[a]lthough she attended appointments, plaintiff had a variety of excuses for why she did not follow through with various suggestions made by Ms. Ellington. She indicated sometimes she did not have stamps to mail résumés. She indicated she had no computer skills, and thus could not search for work over the internet. When Ms. Ellington suggested that plaintiff utilize community resources such as the library, plaintiff indicated she did not have money for gas to get there. At one point plaintiff contended she did not have appropriate clothing for interviews, but refused to meet Ms. Ellington at Goodwill to participate in a program designed to assist individuals in that circumstance. Ms. Ellington

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felt that plaintiff relied on her to lead the process, and that plaintiff was not developing job leads on her own.

The Commission found that Ms. Ellington decided to end plaintiff's vocational rehabilitation on or about 22 February 2008 because "she did not feel she could find work for plaintiff under the present circumstances. She felt that plaintiff's vocational rehabilitation efforts had plateaued, and that they were not effecting change in plaintiff's situation." Consequently, defendants have not provided vocational rehabilitation services to plaintiff since February 2008.

The Commission then made the following findings regarding plaintiff's compliance with the ordered vocational rehabilitation:

17. Plaintiff's mere attendance at meetings does not constitute *full compliance* with vocational rehabilitation. Although plaintiff claims to have done everything asked of her, based on the greater weight of the credible evidence, she has failed to make a genuine effort to locate employment and to *fully comply* with vocational rehabilitation.

. . . .

19. The Full Commission finds based upon the greater weight of the evidence that plaintiff has failed to make a reasonable effort to *fully comply* with vocational rehabilitation efforts provided by defendants.

(Emphasis added.)

As for plaintiff's medical treatment, the Commission found that defendants did not provide medical treatment "to the extent contemplated" in the 2 June 2006 opinion and award, and, as a result, plaintiff has not reached maximum medical improvement ("MMI"). The Commission further determined that plaintiff had made a reasonable request that defendants assign a new authorized treating physician.

Based on these findings, the Commission concluded: "As plaintiff has not put forth a reasonable effort to fully comply with vocational rehabilitation plaintiff is prohibited from receiving temporary total disability benefits through February 22, 2008, the day in which defendants were no longer providing vocational rehabilitation." Because, however, defendants had not provided vocational rehabilitation to plaintiff since 22 February 2008, the Commission concluded that "plaintiff is entitled to temporary total disability benefits from February 23, 2008 and continuing at the rate of \$461.36 per week."

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The Commission then ordered that “[d]efendants shall provide to plaintiff and plaintiff shall fully comply with vocational rehabilitation.”

Regarding plaintiff’s medical treatment, the Commission concluded plaintiff was not at MMI and was entitled to receive medical treatment for her compensable injury that is reasonably necessary to effect a cure or provide relief or lessen the period of disability. The Commission determined that plaintiff was entitled to a change of treating physician and ordered plaintiff to designate a board-certified neurosurgeon or pain management physician of her choosing to provide medical treatment for her compensable injuries to her back, left hip, and left leg.

Both plaintiff and defendants timely appealed to this Court.

Discussion

When this Court reviews an opinion and award of the Industrial Commission, we are “limited to two inquiries: (1) whether the findings of fact are supported by any competent evidence in the record, and (2) whether the conclusions of law are justified by the findings of fact.” *Silva v. Lowe’s Home Improvement*, 176 N.C. App. 229, 232, 625 S.E.2d 613, 617 (2006). The conclusions of law are reviewed de novo. *Hawkins v. Gen. Elec. Co.*, 199 N.C. App. 245, 247, 683 S.E.2d 385, 388 (2009).

I

[1] Plaintiff first argues that the Commission erred by failing to apply the proper legal standard to determine her compliance with vocational rehabilitation under N.C. Gen. Stat. § 97-25. N.C. Gen. Stat. § 97-25¹ provides:

The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when

1. In the last legislative session, the General Assembly amended N.C. Gen. Stat. § 97-25 to limit its application to only refusals of “medical compensation.” 2011 N.C. Sess. Laws 287 sec. 6. The General Assembly added a new section, N.C. Gen. Stat. § 97-32.2 (2011), that addresses vocational rehabilitation. N.C. Gen. Stat. § 97-32.2(g), which applies to claims arising on or after 24 June 2011, provides: “The refusal of the employee to accept or cooperate with vocational rehabilitation services when ordered by the Industrial Commission shall bar the employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension, unless in the opinion of the Industrial Commission the circumstances justified the refusal. Any order issued by the Commission suspending compensation per G.S. 97-18.1 shall specify what action the employee should take to end the suspension and reinstate the compensation.” 2011 N.C. Sess. Laws 287 sec. 13.

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ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases, and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case, the Industrial Commission may order a change in the medical or hospital service.

Under N.C. Gen. Stat. § 97-25, when a defendant meets its “burden of showing that plaintiff has unjustifiably refused to cooperate with [its vocational] rehabilitation efforts,” then the Commission must suspend the plaintiff’s compensation. *Sanhueza v. Liberty Steel Erectors*, 122 N.C. App. 603, 608, 471 S.E.2d 92, 95 (1996).

The statute, however, “is clear in its mandate that a claimant who refuses to cooperate with a rehabilitative procedure is only barred from receiving further compensation ‘until such refusal ceases’” *Id.* (quoting N.C. Gen. Stat. § 97-25 (1991)). An opinion and award of the Commission suspending benefits “must reflect the fact that plaintiff may again be entitled to weekly compensation benefits upon a proper showing by plaintiff that he is willing to cooperate with defendants’ rehabilitative efforts.” *Id.* In a subsequent hearing to reinstate benefits, the “*plaintiff* must meet the threshold burden of demonstrating she is now willing to cooperate before she is entitled to have her payments resumed.” *Scurlock v. Durham Cnty. Gen. Hosp.*, 136 N.C. App. 144, 151, 523 S.E.2d 439, 443 (1999).

Cases addressing N.C. Gen. Stat. § 97-25 in the context of vocational rehabilitation services have primarily involved either (1) the initial opinion and award suspending benefits or (2) an employee who is no longer receiving vocational rehabilitation because of non-cooperation, but now expresses a willingness to cooperate if services are resumed. Here, however, vocational rehabilitation continued even after compensation was suspended. The parties have cited no case and we have found none that specifically addresses the standard for determining when an employee, whose benefits were suspended, has sufficiently complied with ongoing vocational rehabilitative services to warrant reinstatement of benefits under N.C. Gen. Stat. § 97-25.

The Commission, in this case, found that “plaintiff has failed to make a reasonable effort to *fully comply* with vocational rehabilitation efforts provided by defendants.” (Emphasis added.) Plaintiff argues that full compliance is the wrong standard—she contends that she need only declare that she has a “present willingness” to comply, and her benefits should then be reinstated. According to plaintiff,

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under this standard, the Commission should have reinstated her benefits on 9 June 2006 when she notified the Commission and defendants in writing that she was willing to comply with vocational rehabilitation.

Plaintiff's test—a requirement that an employee merely assert a present willingness to comply—was rejected by this Court in *Alphin v. Tart L.P. Gas Co.*, 192 N.C. App. 576, 666 S.E.2d 160 (2008), *disc. review denied*, 363 N.C. 257, 676 S.E.2d 899 (2009). In *Alphin*, this Court upheld the Commission's refusal to reinstate benefits when the "plaintiff's showing of a willingness to cooperate was based almost entirely on oral and written expressions of intent unsupported by current conduct corroborating those statements." *Id.* at 592-93, 666 S.E.2d at 171. The Court held that "[i]n assessing the sincerity of plaintiff's representations, the Commission could appropriately consider, as it did, plaintiff's lack of recent conduct suggesting a willingness to cooperate and any recent conduct inconsistent with his expressed intent." *Id.* at 593, 666 S.E.2d at 171. Thus, declarations of a willingness to comply are not necessarily sufficient if deemed not credible by the Commission.

Here, since plaintiff's assertions that she was willing to comply do not require reinstatement of benefits, the question remains whether the Commission properly determined that N.C. Gen. Stat. § 97-25 requires that a plaintiff whose benefits have already been suspended must "fully comply" with vocational rehabilitation services prior to reinstatement of benefits. "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992).

Section 97-25 provides for suspension of benefits upon "[t]he refusal of the employee to accept any . . . rehabilitative procedure when ordered by the Industrial Commission . . ." The statute thus requires a "refusal." It is well established that "[w]here words of a statute are not defined, the courts presume that the legislature intended to give them their ordinary meaning determined according to the context in which those words are ordinarily used." *Reg'l Acceptance Corp. v. Powers*, 327 N.C. 274, 278, 394 S.E.2d 147, 149 (1990). If, as here, there is an "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).

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This Court in *Johnson v. Jones Grp., Inc.*, 123 N.C. App. 219, 222, 472 S.E.2d 587, 589 (1996), construed the word “refusal” as used in N.C. Gen. Stat. § 97-25 by looking at the definition of the word in the 1990 edition of *Black’s Law Dictionary*:

“[T]he declination of a request or demand, or the omission to comply with some requirement of law, as the result of a positive intention to disobey. . . . [T]he word is often coupled with ‘neglect,’ as if a party shall ‘neglect or refuse’ to pay a tax, file an official bond, obey an order of court, etc. But ‘neglect’ signifies a mere omission of a duty, which may happen through inattention, dilatoriness, mistake, or inability to perform, while ‘refusal’ implies the positive denial of an application or command, or at least a mental determination not to comply.”

(Quoting *Black’s Law Dictionary* 1282 (6th ed. 1990).) This definition focuses on an intent to disobey as opposed to neglect, such as inattention or dilatoriness.

The current edition of *Black’s Law Dictionary* defines “refusal” as “[t]he denial or rejection of something offered or demanded.” *Black’s Law Dictionary* 1394 (9th ed. 2009). *Webster’s Dictionary* defines “refusal” as “rejection of something demanded, solicited, or offered for acceptance.” *Webster’s Third New International Dictionary* 1910 (1968). We, therefore, construe N.C. Gen. Stat. § 97-25, in accordance with the common understanding of the word “refusal,” as authorizing the Commission to terminate benefits when an employee has rejected vocational rehabilitation services ordered by the Industrial Commission.

This construction is consistent with *Johnson*. In *Johnson*, this Court addressed whether the Commission could suspend the benefits of a cognitively-impaired employee for failure to cooperate with vocational rehabilitation. The Court held, based on the definition in *Black’s Law Dictionary*, that “‘refusal’ as employed in [N.C. Gen. Stat. § 97-25] connotes a willful or intentional act.” 123 N.C. App. at 222, 472 S.E.2d at 589. The Court then explained that in order for the Commission to suspend benefits based on a cognitively-impaired employee’s failure to cooperate, the Commission “must record findings that the claimant possessed the ability to think and act as a reasonable person and, notwithstanding, *willfully rebuked* defendants’ treatment efforts.” *Id.* at 226, 472 S.E.2d at 591 (emphasis added).

However, concluding that N.C. Gen. Stat. § 97-25 requires a rejection—or willful rebuke—of services does not resolve this appeal. In this case, we do not have a complete rejection of services. We, there-

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fore, must decide when participation in some services may still amount to a rejection of services.

Here, the Commission repeatedly stated it was finding a lack of cooperation because plaintiff failed to “fully comply” with vocational rehabilitation services. A requirement of “full” compliance, however, risks continued suspension of benefits for conduct that was not willful or intentional, contrary to *Johnson*. The definition in *Johnson* of “refusal” discussed a “‘positive intention to disobey’” and distinguished conduct that amounted to inattentiveness or dilatoriness. *Johnson*, 123 N.C. App. at 222, 472 S.E.2d at 589 (quoting *Black’s Law Dictionary* 1282 (6th ed. 1990)). An employee may not be “fully complying” with vocational rehabilitation and yet not be intentionally disobeying the Commission’s order to cooperate. Thus, under the Commission’s standard, rather than intentional disobedience as *Johnson* anticipated, suspension of benefits could occur for conduct that does not rise to or amount to a rejection of services. Such a result would not be consistent with N.C. Gen. Stat. § 97-25’s focus on cessation of benefits only for a refusal of services.

On the other hand, an employee may be participating in some level of vocational rehabilitation but engage in conduct that sabotages the efforts to find him or her suitable employment. See *Brooks v. Capstar Corp.*, 168 N.C. App. 23, 30, 606 S.E.2d 696, 700 (2005) (concluding that evidence supported the Commission’s finding of cooperation when the plaintiff “did not intentionally sabotage defendants’ efforts to find her suitable employment”). Conduct rising to the level of sabotage—preventing the very purpose of vocational rehabilitation—would have the same effect as an outright refusal of vocational rehabilitation. Even, however, in the absence of sabotage, an employee’s participation may be so minimal that the purpose of vocational rehabilitation cannot be served.

Our appellate courts have addressed an analogous situation when construing N.C. Gen. Stat. § 97-32 (2009), which provides in language similar to that of § 97-25:

If 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.

N.C. Gen. Stat. § 97-32 (emphasis added). Thus, N.C. Gen. Stat. § 97-32 resembles § 97-25 in that a refusal by the employee results in suspen-

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sion of compensation until the refusal ceases unless the employee shows the refusal was justified.

The question has arisen under N.C. Gen. Stat. § 97-32 about how to handle the situation when an employee has been working for the employer in suitable employment, but is fired for misconduct unrelated to the employee's injury. In other words, the employee has not actually refused the employment, but has acted in a manner that precludes continuation of the employment. This factual scenario is called a "constructive refusal" of suitable work. *See Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 234, 472 S.E.2d 397, 401 (1996). The analysis in *Seagraves* addressing constructive refusals was subsequently adopted by the Supreme Court in *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 597 S.E.2d 695 (2004).

The specific test applied in deciding whether a constructive refusal of suitable work warrants termination of benefits is not helpful in structuring a test under N.C. Gen. Stat. § 97-25, but we do find instructive the Supreme Court's reasoning in adopting the *Seagraves* test. The Court explained:

This Court's review of the *Seagraves*' test reveals that its proper application, as dictated by the Court of Appeals, can and will produce results that square with the underlying intent of our state's workers' compensation laws. In our view, the test provides a forum of inquiry that guides a fact finder through the relevant circumstances in order to resolve the ultimate issue: Is a former employee's failure to procure comparable employment the result of his or her job-related injuries or the result of the employee's termination for misconduct? In disputes like the one at bar, the critical area of inquiry into the circumstances of an injured employee's termination is to determine from the evidence whether the employee's failure to perform is due to an *inability* to perform or an *unwillingness* to perform.

. . . . In our view, any rule that would allow employers to evade benefit payments simply because the recipient-employee was terminated for misconduct could be open to abuse. Such a rule could give employers an incentive to find circumstances that would constitute misconduct by employees who were previously injured on the job. We also recognize that the current benefit scheme faces the potential for abuse by employees. If injury-related benefits continued without regard to an employee's misconduct, injured employees conceivably could commit miscon-

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duct in order to be terminated without suffering the appropriate financial consequences.

Id. at 494-95, 597 S.E.2d at 699-700. The Court stressed the need to adopt a “test . . . intended to weigh the actions and interests of employer and employee alike.” *Id.* at 495, 597 S.E.2d at 700.

The focus in constructive refusal of suitable employment cases is, therefore, on assuring that employees are awarded benefits for wage loss clearly attributable to a job-related disability, while protecting employers from liability to employees who engage in “intentional, unacceptable conduct” when employed in rehabilitative or light duty settings. *Seagraves*, 123 N.C. App. at 234, 472 S.E.2d at 401.

Following the rationale of constructive refusal of suitable work cases, employees participating in vocational rehabilitation should not be precluded from receiving benefits when any lack of full cooperation with vocational rehabilitation does not substantially interfere with the vocational rehabilitation professionals’ ability to serve the purposes of vocational rehabilitation. On the other hand, employers should not be required to pay benefits to employees whose intentional conduct significantly interferes with the vocational rehabilitation professional’s efforts to return the employee to suitable employment and, therefore, amounts to a refusal of ordered vocational rehabilitation services. *See* N.C. Ind. Comm. R. Rehabilitation Professionals, Rule III(E), 2011 Ann. R. N.C. 1158 (defining goal of vocational rehabilitation as being to “assist[] injured workers to return to suitable employment”).

We, therefore, hold that when an employee is participating to some degree in vocational rehabilitation services, the Commission must determine, in deciding whether to reinstate benefits, whether the employee is substantially complying with those services and not significantly interfering with the vocational rehabilitation specialist’s efforts to assist the employee in returning to suitable employment. Because the Commission based its decision on plaintiff’s failure to “fully comply,” the Commission made its findings of fact under a misapprehension of law.

We must, therefore, reverse the opinion and award and remand for further findings of fact under the correct legal standard. *See Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (“If the conclusions of the Commission are based upon a deficiency of evidence or misapprehension of the law, the case should be remanded so ‘that the

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evidence [may] be considered in its true legal light.’” (quoting *McGill v. Town of Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939)).

II

[2] Defendants contend that once the Commission determined that plaintiff had not cooperated with vocational rehabilitation services, it erred by then concluding that “as defendants have not provided vocational rehabilitation to plaintiff since February 22, 2008, plaintiff is entitled to temporary total disability benefits from February 23, 2008 and continuing” Because this issue may arise again on remand, we address it even though we have remanded for further findings of fact on the issue of cooperation.

In support of its conclusion of law regarding reinstatement of benefits, the Commission made the following finding of fact:

15. On or about February 22, 2008, Ms. Ellington made the decision to end plaintiff’s vocational rehabilitation, *as she did not feel she could find work for plaintiff under the present circumstances*. She felt that plaintiff’s vocational rehabilitation efforts had plateaued, and that they were not effecting change in plaintiff’s situation. Accordingly, Ms. Ellington has not met with plaintiff since February 2008. She indicated plaintiff has a number of skills that would be useful to an employer, including quite a bit of education and relevant work experience. Defendants have not provided vocational rehabilitation services to plaintiff since February 2008.

(Emphasis added.)

Defendants argue that Ms. Ellington recommended termination of services because of “the ‘barriers’ put up by Plaintiff” and claims that “[t]he cessation of vocational rehabilitation services to Plaintiff was based entirely on Plaintiff’s continued non-compliance with vocational rehabilitation.” Significantly, however, defendants have included no citations to the record in support of these assertions. In fact, we cannot determine from the Commission’s finding of fact why vocational rehabilitation services were ceased—the finding of fact is ambiguous.

The Commission does not specifically identify the “present circumstances” that caused Ms. Ellington to feel she could not find work for plaintiff. While one possibility would be plaintiff’s lack of cooperation, other possibilities include the economy, the economy combined with the nature of plaintiff’s disability, or some other factor out-

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side of plaintiff's control. The fact that efforts had "plateaued" or that efforts were not making a change in plaintiff's situation does not necessarily mean that the Commission found that services ended because of the lack of cooperation by plaintiff. On remand, the Commission must resolve this ambiguity and make a finding as to why vocational rehabilitation was ceased by Ms. Ellington.

With respect to the question whether the Commission may conclude both that plaintiff failed to cooperate with vocational services (under the above standard) and reinstate temporary total disability benefits, plaintiff has acknowledged that the Commission's ordering reinstatement of benefits only after defendants terminated vocational rehabilitation "is not logical and does not comply with N.C. Gen. Stat. § 97-25." Instead of citing authority permitting the Commission's approach—we have found none—plaintiff repeats her arguments that the Commission erred in determining that she had failed to cooperate. She also argues that she should not have been required to participate in vocational rehabilitation in the first place, an argument foreclosed by this Court's prior opinion.

Plaintiff, however, also cites *Sykes v. Moss Trucking Co.*, 199 N.C. App. 540, 685 S.E.2d 1, *remanded for reconsideration*, 363 N.C. 743, 689 S.E.2d 378 (2009), as holding that vocational rehabilitation services may be provided only under the supervision of an authorized physician. She argues that "because (1) [plaintiff] was not under the care of an authorized physician, and (2) there was no authorized treating physician to oversee her vocational rehabilitation, thus, the employer could not offer vocational rehabilitation services to [plaintiff]." She then concludes that because defendants could not offer vocational rehabilitation services, the Commission properly reinstated benefits.

On remand, however, from the Supreme Court, the *Sykes* panel reached an entirely different result, and it is questionable whether the initial decision remains precedent. *See Sykes v. Moss Trucking Co.*, ___ N.C. App. ___, ___ S.E.2d ___, 2011 N.C. App. LEXIS 1668, 2011 WL 3276678 (Aug. 2, 2011) (unpublished). In any event, *Sykes* did not hold that vocational rehabilitation services may only be provided under the supervision of an authorized treating physician. Instead, the Court reached its conclusion based on a particular order entered in that case: "According to the 1 October 1999 order, defendants' vocational rehabilitation efforts to allow plaintiff to return to the work force should be made under the supervision of plaintiff's autho-

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rized treating physician.” 199 N.C. App. at 547-48, 685 S.E.2d at 6 (emphasis added). Plaintiff points to no similar order in this case.

In fact, the order at issue, here, does not require physician supervision, and *Sykes* does not suggest that physician supervision is required in all cases. Plaintiff offers no other support for her contention, and, therefore, we reject plaintiff’s suggested basis for upholding the Commission’s reinstatement of plaintiff’s benefits.

On remand, the Commission must consider why vocational rehabilitation was not being provided. If it was due to non-cooperation, then the Commission erred in reinstating temporary total disability. If the failure to continue vocational rehabilitation was not due solely to non-cooperation, or if the Commission determines that vocational rehabilitation should have continued, then temporary total disability could be reinstated. The factual issue must be resolved in the first instance by the Commission.

III

[3] Defendants next contend that the Commission abused its discretion when it denied defendants’ motion to admit additional evidence. This evidence included surveillance videotape taken after the hearing before the deputy commissioner and documentation regarding plaintiff’s failure to attend an independent medical evaluation (“IME”). “ ‘Ordinarily, the question of whether to reopen a case for the taking of additional evidence rests in the sound discretion of the Industrial Commission, and its decision will not be disturbed on appeal in the absence of an abuse of discretion.’ ” *Guy v. Burlington Indus.*, 74 N.C. App. 685, 688, 329 S.E.2d 685, 687 (1985) (quoting *Schofield v. Tea Co.*, 299 N.C. 582, 596, 264 S.E.2d 56, 65 (1980)).

With respect to the videotaped surveillance, defendants had already submitted video of plaintiff shopping, going to church, and walking to and from her car. As for the additional video, defendants acknowledge that “[p]erhaps [the Commission] felt that the surveillance materials offered were duplicative of the materials previously submitted. If so, and given that the Full Commission found Plaintiff to be non-compliant with vocational rehabilitation, Defendants would concede that point.” In light of defendants’ concession and given that the Commission found, based on the existing video, that plaintiff had misrepresented her physical capacity to Ms. Ellington, we can find no abuse of discretion in the Commission’s refusal to admit the additional video surveillance materials.

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Defendants primarily argue that the Commission abused its discretion in excluding documentation regarding defendants' scheduling of an IME after the hearing before the deputy commissioner and plaintiff's failure to attend that examination. Defendants assert that the IME evidence showed that defendants were attempting to get plaintiff evaluated, and she was refusing to cooperate. Defendants point to the Commission's finding that defendants failed to provide medical treatment to plaintiff following the 2 June 2006 opinion and award and argue that the IME evidence "was certainly relevant to and probative of this issue." We disagree.

The hearing before the deputy commissioner took place on 24 February 2009 and his opinion and award was filed 17 July 2009. The IME was scheduled for 21 October 2009. We fail to see how evidence that defendants scheduled an IME eight months after the hearing is relevant to whether defendants provided medical treatment between 2 June 2006 and the hearing before the deputy commissioner.

Defendants further argue that plaintiff's failure to attend the IME "provided an entirely new ground for the suspension of her benefits." With respect to this issue, defendants argued to the Commission that "[i]f the Commission fails to consider Plaintiff's behavior since the hearing when reaching its decision, defendants' only recourse would be to file yet another Form 33 once the Full Commission has issued a decision." We cannot conclude, under the circumstances of this case, that the Commission abused its discretion when it effectively declined to consider a new ground for suspension of benefits not yet addressed by a deputy commissioner and left the issue for a subsequent hearing. We, therefore, hold that the Commission did not err in denying defendants' motion to admit additional evidence following their appeal to the Commission.²

IV

[4] Finally, plaintiff contends that the defendants' failure to comply with certain opinions and awards of the Commission mandates the imposition of sanctions against the defendants pursuant to Rule 802 of the Workers' Compensation Rules. Yet, before the deputy commissioner, and, according to the Form 44, before the Commission, plaintiff did not ask for sanctions, but rather requested an order to show cause why defendants should not be held in contempt.

2. Defendants also contend that plaintiff failed to meet her burden of proving that she is disabled under N.C. Gen. Stat. § 97-2(9) (2009). Because this determination may be affected by the Commission's findings of fact on remand, we do not address it on appeal.

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“Proceedings for civil contempt are by motion pursuant to G.S. 5A-23(a1)” N.C. Gen. Stat. § 5A-23(a) (2009). “To initiate a proceeding for civil contempt under N.C. Gen. Stat. § 5A-23(a), an interested party must move the trial court to issue an order or notice to the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt.” *Young v. Mastrom, Inc.*, 149 N.C. App. 483, 484, 560 S.E.2d 596, 597 (2002) (internal quotation marks omitted). As this Court has previously held, “[t]he purpose of civil contempt is to coerce the defendant to comply with a court order, not to punish him.” *Scott v. Scott*, 157 N.C. App. 382, 393, 579 S.E.2d 431, 438 (2003).

In her argument on appeal, however, plaintiff is not seeking to coerce defendant into complying with the Commission’s orders. She is instead seeking to punish defendants for their lack of compliance—she is seeking sanctions. Sanctions in a workers’ compensation matter are awarded pursuant to Rule 802 of the Workers’ Compensation Rules, which provides:

Upon failure to comply with any of the [Workers’ Compensation] rules, the Industrial Commission may subject the violator to any of the sanctions outlined in Rule 37 of the North Carolina Rules of Civil Procedure, including reasonable attorney fees to be taxed against the party or his counsel whose conduct necessitates the order.

Workers’ Comp. R. of N.C. Indus. Comm’n 802, 2011 Ann. R. N.C. 1073.

Asking the Commission to hold a hearing to determine if defendants are in contempt pursuant to N.C. Gen. Stat. § 5A-23 is not the same as asking for sanctions against defendants pursuant to Rule 802. “This Court has long held that issues and theories of a case not raised below will not be considered on appeal.” *Venters v. Albritton*, 184 N.C. App. 230, 239, 645 S.E.2d 839, 845 (2007) (quoting *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001)). Furthermore, “[t]he ‘law does not permit parties to swap horses between courts in order to get a better mount’ on appeal.” *Floyd v. Exec. Pers. Grp.*, 194 N.C. App. 322, 329, 669 S.E.2d 822, 828 (2008) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

On appeal, plaintiff has not argued that the Commission erred in failing to hold a contempt hearing or in failing, after a hearing, to hold defendants in contempt. Instead, she argues that the Commission should have ordered sanctions. The Commission was never asked to

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award sanctions below and made no finding of a rules violation that would be required in order to impose sanctions under Rule 802. The issue of sanctions was not preserved, and we do not address it.³

Reversed and remanded.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. ERIC ALLEN WILLIAMS

No. COA10-1133

(Filed 6 September 2011)

1. Confessions and Incriminating Statements—motion to suppress statements—intoxication—credibility—custody—written findings and conclusions required

The trial court erred in a sex offense in a parental role and incest case by denying defendant’s motion to suppress his statements to a detective and in later overruling the objections he made when this evidence was introduced at trial. Although the extent of defendant’s intoxication at the time he gave his statement, and the weight to be given it, was for the jury to consider in evaluating the credibility of the evidence, the case was remanded for written findings of fact and conclusions of law resolving the material conflict in the evidence regarding whether defendant was in custody at the time he gave his statements and whether he should have been read his Miranda rights.

3. Plaintiff also contends that the Commission violated her constitutional rights when it “demonstrated a clear disqualifying personal bias against her and in favor of defendants.” Plaintiff did not raise this issue before the Commission, and “[i]t is well established that ‘a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.’” *State v. Williams*, 201 N.C. App. 161, 172, 689 S.E.2d 412, 418 (2009) (quoting *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982)). We also do not consider bias on appeal when a party has not raised it below. *See State v. Key*, 182 N.C. App. 624, 632-33, 643 S.E.2d 444, 450-51 (2007) (holding that issue of bias was not properly preserved where defendant made no motion to recuse trial judge); *State v. Love*, 177 N.C. App. 614, 627-28, 630 S.E.2d 234, 243 (2006) (holding issue of bias not properly preserved where defendant made “no request, objection or motion” at trial for judge to recuse herself).

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2. Jury—request for evidence—failure to conduct jurors back to courtroom—failure to show prejudice

Although the trial court in a sex offense in a parental role and incest case violated N.C.G.S. § 15A-1233(a) by failing to conduct the jurors back to the courtroom after the jury sent a note requesting all State's evidence including copies of letters, defendant failed to meet his burden of showing that he was prejudiced.

3. Appeal and Error—preservation of issues—failure to raise constitutional issue at trial

Although defendant contended that the trial court violated his right to be free from double jeopardy when it sentenced him for both sex offense in a parental role and incest, defendant failed to preserve this argument because he did not raise this issue at trial and the Court of Appeals declined to exercise its discretion under N.C. R. App. P. 2.

4. Sentencing—prior record level—calculation

The trial court did not err by determining that defendant was a prior record level IV offender. The trial court properly calculated defendant's prior record level without including any of the felonies used to establish his habitual felon status.

Judge BRYANT concurring in part and dissenting in part.

Appeal by defendant from judgments entered 24 March 2010 by Judge James G. Bell in Johnston County Superior Court. Heard in the Court of Appeals 23 February 2011.

Attorney General Roy Cooper, by Assistant Attorneys General Charles E. Reece and Catherine F. Jordan, for the State.

William D. Spence for defendant-appellant.

GEER, Judge.

Defendant Eric Allen Williams appeals from his convictions of two counts of sex offense in a parental role and two counts of incest. Defendant primarily contends on appeal that the trial court erred in admitting a statement he made to a detective prior to being read his *Miranda* rights. Defendant argues that the statement should have been excluded because (1) he was in custody at the time of the statement, and (2) he was so intoxicated that his statement was not voluntarily made. Because there exists a conflict in the evidence as to

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whether defendant was in custody and because the trial court failed to enter a written order containing findings of fact resolving this conflict, we must remand for entry of a written order including findings of fact and conclusions of law. We find unpersuasive, however, defendant's argument as to his level of impairment and his remaining arguments regarding the trial.

Facts

The State's evidence tended to show the following facts. In February 2007, when "Natalie"¹ was 16 years old, her mother married defendant. At some point, Natalie became concerned about the relationship between her younger sister and defendant. Natalie observed instances in which defendant moved her sister away from Natalie and her brother, and Natalie's sister, according to Natalie, "would be sitting on his lap and he would be in her face talking to her and he would kiss her on her lips." When Natalie asked her sister what defendant was saying, she answered, "[H]e says I'm the only one that understands him and stuff like that." Natalie was concerned because when she herself was eight years old, she was abused by her first stepfather, who used to say similar things to her.

In November 2007, Natalie, her sister, her brothers, and defendant were in the living room watching television. Defendant was lying on the floor on a blanket. Natalie noticed that defendant was "moving the covers like over his penis . . . maybe he was scratching." But then the covers flipped down and he exposed his penis. Natalie took her little sister into another bedroom to get away from defendant and tried to pretend as if nothing happened.

Either the next day or later that week, defendant exposed his penis to Natalie again as she walked through the living room. He was sitting with his legs pulled up to his chest, and his loose basketball shorts were "up and his penis was hanging out the bottom of it." He said, "psst" and "was like I know you see me."

Later that week, Natalie confronted defendant about his actions. Defendant at first claimed not to know what she was talking about, but after Natalie said she had seen him, he asked, "[D]o you want to see it again." She said "no" and went into another room to call a friend. Defendant came into the room and "had his pants kind of

1. The pseudonym "Natalie" is used to protect the victim's privacy and for ease of reading.

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down and his penis was out and he was jumping up and down.” As he did this, he repeatedly asked Natalie if she was “ready,” and she replied “No.” She got off the phone and walked to her room. Defendant walked behind her, continuing to ask her whether she was ready, and she finally said “yeah, okay.” When asked at trial why she said “yeah, okay,” she explained: “Because I was tired of him bothering me.”

Defendant entered Natalie’s room and sat on the bed. He asked her, “[D]o you see what you do to me”? He then put her hand on his erect penis and asked if he could touch her chest. She said, “[Y]eah, sure, okay” and “just look[ed] off in space” as defendant touched her chest. Defendant asked whether she was ready, and Natalie lay back. Defendant put his penis into Natalie’s vagina until she told him to stop. Afterward, she said to defendant, “I thought you wanted my sister.” He responded, “[N]o, I got you now.”

Natalie testified that after that day in November 2007, when Natalie came home from school each day, defendant, who did not work, would be walking around the house naked. Natalie and defendant would have sex every day after Natalie got home from school while they were alone in the house. Natalie was always the first child to arrive home from school, and her mother would still be at work. Natalie testified that in January 2008, they had sex more than once a day. They continued to have sex “a lot” through April 2009, at least every week, except during periods when defendant was in jail. Natalie was ashamed of what was happening, but she never told anyone because she did not want defendant or her mother to get in trouble and because she feared that her mother would blame her.

In April 2009, Natalie’s mother, Ms. Williams, discovered a letter Natalie had written to defendant but never given him. The letter indicated Natalie felt “guilty about what they did,” and it “said something about just because you have good dick.” Later that day, Ms. Williams told Natalie that she had found the letter, and Natalie admitted that she and defendant had been having sex. Ms. Williams subsequently reported the matter to law enforcement.

Detective Matt DeSilva of the Johnston County Sheriff’s Office was assigned to investigate the case in May 2009. Detective DeSilva first spoke with Natalie and her mother, and their statements to him were consistent with their trial testimony.

Detective DeSilva also spoke to defendant about his relationship with Natalie. Defendant admitted that he had vaginal sex with Natalie

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before he went to jail in November 2007. After he got out of jail in January 2008, he had sex with Natalie again. He was incarcerated again from March 2008 until February 2009, when he was released from prison. He and Natalie, who was 18 years old at that time, then continued to have sex. Defendant had sex with Natalie for the last time in March 2009, just prior to when he and Ms. Williams ended their relationship. Detective DeSilva read each page of defendant's statement to defendant, and defendant initialed each page before signing and dating the statement at the end.

On 6 July 2009, defendant was indicted for two counts of statutory rape in a parental role and two counts of incest. Subsequently, on 2 November 2009, he was indicted as a habitual felon based on two prior convictions for sale of cocaine and a conviction for uttering a forged instrument.

At trial, defendant denied ever having a sexual relationship with Natalie. Defendant claimed that Natalie had come into his room one night in April 2009 while he was intoxicated and begun to perform oral sex on him and that he told her to stop. Defendant said Natalie told him she "wanted her mama to suffer like she was suffering because the relationship [sic] her mama wouldn't let her have." Defendant admitted, however, that, prior to one of his previous periods of incarceration, he had sent Natalie a letter asking her to spend a weekend with him and to bring him penis enlargement pills, and to hide the letter itself " 'so no one will find it.' " Defendant also claimed that Detective DeSilva had fabricated his written statement and that he had not paid attention to the statement when he signed it.

In addition, one of the indictments had listed January 2008 as the date of the offense. Defendant's mother and sister testified, however, that defendant was at his mother's house for the first several days in January 2008.

The jury found defendant guilty of two counts of sex offense in a parental role and two counts of incest. Defendant pled guilty to being a habitual felon. The trial court sentenced defendant to a presumptive-range term of 133 to 169 months imprisonment for the January 2008 offenses and to a consecutive presumptive-range term of 37 to 54 months imprisonment for the November 2007 offenses. Defendant timely appealed to this Court.

I

[1] Defendant first argues that the trial court erred in denying his motion to suppress his statement to Detective DeSilva and in later

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overruling the objections he made when this evidence was introduced at trial. Defendant insists that his statement was inadmissible because, at the time he gave it, he was in custody but had not yet been read his *Miranda* rights. In addition, he argues that he was impaired to such an extent that the statement was made involuntarily.

The State presented the following evidence during a *voir dire* examination of Detective DeSilva. On the morning of 20 May 2009, Detective DeSilva drove by defendant's residence and saw defendant and another man on the top of the residence repairing the roof. Detective DeSilva did not see any alcohol on the roof or near defendant. Detective DeSilva turned his vehicle around and returned to the residence. He saw the other man working on the rooftop and asked him where defendant went. The man said that defendant had just stepped down. Detective DeSilva noticed that the front door of the residence was open, and he called out for defendant. Defendant exited the residence voluntarily.

Defendant did not appear to be intoxicated. Detective DeSilva did not detect any odor of alcohol, defendant was steady on his feet, defendant made good eye contact, and defendant's speech was not slurred. Detective DeSilva introduced himself and explained that he needed to speak with defendant about the situation between Natalie and him. Because there was a lot of noise from the roof work, Detective DeSilva asked defendant if he minded sitting in his patrol vehicle with him in the front seat. Detective DeSilva explained to defendant that he was not under arrest, and he was not being charged with any crime.

According to Detective DeSilva, defendant entered the patrol vehicle and sat down in the passenger seat, although he left the passenger side door open. Detective DeSilva again told defendant that he was not under arrest. Defendant agreed to speak with Detective DeSilva. At no time during their conversation did Detective DeSilva advise defendant of his *Miranda* rights.

Detective DeSilva reported the allegations that defendant had engaged in sex with Natalie. Detective DeSilva told defendant that he was not saying that defendant had sex with Natalie when she was 16 years old; rather, Detective DeSilva told defendant, he had been told that Natalie was 17 years old when the sex occurred. Defendant told Detective DeSilva that he did not have sex with Natalie when she was 16, but he admitted that he had engaged in sex with her when she was 17 years old.

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Detective DeSilva further testified that defendant admitted that he had vaginal sex with Natalie (1) in 2007 before he was incarcerated later that year, (2) in January 2008 after being released, and (3) after he completed a prison term from June 2008 to February 2009, when Natalie was 18. Defendant admitted he also had oral sex with Natalie when she was 18 years old, but claimed he “never had sex with her again in any way after that.” Defendant said the last time he had sex with her was in March 2009 when he split up with her mother.

Detective DeSilva took handwritten notes during his conversation with defendant. Detective DeSilva read the notes aloud to defendant while defendant followed along. Defendant did not indicate that anything was wrong with the statement, and he signed the pages. After the conversation, defendant exited Detective DeSilva’s vehicle. Detective DeSilva left and did not arrest defendant.

Detective DeSilva stated that defendant was not handcuffed, he seemed to understand the questions Detective DeSilva asked him, and he had no problem speaking or reading. Detective DeSilva was seated close enough to defendant that he was able to observe defendant—he did not observe anything unusual about defendant. Defendant did not appear to be impaired.

On cross-examination, Detective DeSilva further testified that defendant never said that he had been drinking and never indicated that he was impaired. When Detective DeSilva invited defendant into his patrol vehicle, defendant never protested, and he never suggested that he could speak with him at a later time. Defendant’s eyes were not red, glassy, or bloodshot. No odor of alcohol was present.

Defendant also testified on *voir dire*, and his evidence tended to show the following. When Detective DeSilva arrived at his residence, he was in the backyard drinking beer. Defendant testified that he was drinking “Old Gold, Old English 800,” and that he had consumed about two 40 ounce beers. Defendant testified that he told Detective DeSilva that he did not feel like talking at that time because he was “not in [his] right state of mind,” and he asked if he could talk to Detective DeSilva the next day. Defendant testified that Detective DeSilva told him, “[N]o, since I have you here now, just go get in the car and I will talk to you now.” Defendant testified that after he entered the patrol vehicle, Detective DeSilva placed handcuffs on the dashboard, and defendant closed the passenger side door. Defendant testified that he “kept asking” Detective DeSilva if he could exit the vehicle, and Detective DeSilva said “no.”

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Following the testimony and arguments by counsel, the trial court announced: “The Court will find that the defendant was not in custody, that the defendant was not impaired at the time of the statement; that the statement of the defendant was voluntary to the detective and the Court will deny the motion to suppress.” The trial court did not make any additional findings or reduce the ruling to writing.

Defendant contends that the trial court violated N.C. Gen. Stat. § 15A-977(f) (2009) by failing to enter a written order on the motion to suppress that included findings of fact resolving all material conflicts in the evidence. N.C. Gen. Stat. § 15A-977(f) provides that in ruling on a motion to suppress, “[t]he judge must set forth in the record his findings of facts and conclusions of law.” “This statute has been interpreted as mandating a written order unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing.” *State v. Williams*, 195 N.C. App. 554, 555, 673 S.E.2d 394, 395 (2009). If both these criteria are met, the necessary findings of fact are implied from the denial of the motion to suppress. *Id.*

Here, although the trial court announced its rationale for the denial from the bench, defendant contends that a written order was required because there was a material conflict in the evidence. According to defendant, the evidence gave rise to an issue as to (1) whether he was impaired at the time he gave his statement and (2) whether he was in custody at the time he gave his statement.

With respect to the question of defendant’s impairment, it is well established that “[w]hether a confession was voluntarily given is to be determined from the totality of the circumstances surrounding the confession.” *State v. Tuck*, 173 N.C. App. 61, 72, 618 S.E.2d 265, 273 (2005) (quoting *State v. Greene*, 332 N.C. 565, 579, 422 S.E.2d 730, 738 (1992)). “[W]hile they are factors to be considered, intoxication and subnormal mentality do not of themselves necessarily cause a confession to be inadmissible because of involuntariness or the ineffectiveness of a waiver.” *Id.* (quoting *State v. Barnes*, 345 N.C. 184, 245, 481 S.E.2d 44, 78 (1997)). “Instead, the confession ‘is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words.’” *Id.* (quoting *State v. Oxendine*, 303 N.C. 235, 243, 278 S.E.2d 200, 205 (1981)).

In arguing that he was impaired, defendant points to his testimony that he had consumed two 40-ounce beers and did not feel in his “right state of mind” at the time. This testimony is not sufficient

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to show that defendant was unconscious of the meaning of his words or that he “was so heavily under the influence that he could not understand the implications of confessing to sexually assaulting his [step]daughter.” *State v. Barnes*, 154 N.C. App. 111, 116, 572 S.E.2d 165, 169 (2002) (“The record does not show defendant was so heavily under the influence that he could not understand the implications of confessing to sexually assaulting his daughter. There was no evidence defendant was unable to walk or carry on a normal conversation. Defendant’s own testimony was the only evidence tending to prove any use of prescription drugs and alcohol, and defendant contends only that he was under the influence of alcohol and perhaps prescription drugs. Lastly, defendant was able to relate the events of 20 July 1998 to a degree of detail inconsistent with someone who was impaired and unaware of the meaning of his words.”).

Although defendant’s testimony conflicted with Detective DeSilva’s on the question whether defendant was intoxicated, because defendant’s testimony was not adequate to meet the standard for rendering his statement involuntary, the conflict was not *material*. See *State v. Baker*, ___ N.C. App. ___, ___, 702 S.E.2d 825, 831 (2010) (“Based on the foregoing, we hold that, for purposes of section 15A-977(f), a material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected.”).

This conflict did not, therefore, require the trial court to make written findings regarding defendant’s level of impairment. The extent of defendant’s intoxication at the time he gave his statement, and the weight to be given it, was for the jury to consider in evaluating the credibility of the evidence. *State v. Isom*, 243 N.C. 164, 166, 90 S.E.2d 237, 238-39 (1955).

We now turn to defendant’s contentions regarding whether he was in custody when he gave his statement. *Miranda*’s requirements are triggered when an individual is “in custody.” *State v. Davis*, 305 N.C. 400, 414-15, 290 S.E.2d 574, 583 (1982). The “appropriate inquiry in determining whether a defendant is in custody for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001) (internal quotation marks omitted).

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The State's evidence, on the one hand, showed that Detective DeSilva asked defendant if he could speak with him about what happened with Natalie. Defendant got in the patrol car himself and left the passenger door open during the conversation. Detective DeSilva told defendant he was not under arrest and was not being charged with any crime.

Defendant's evidence, on the other hand, indicated that Detective DeSilva, whose gun and badge were visible to defendant, asked if he could speak to defendant. Defendant asked if he could speak to him the next day, but Detective DeSilva "said no, . . . just go get in the car and I will talk to you now." Defendant got in the car, Detective DeSilva displayed his handcuffs on the dashboard, and Detective DeSilva directed defendant to close the passenger door. According to defendant, he "closed the door, but [defendant] kept asking [Detective DeSilva] could [he] get out because [he] didn't feel like talking. [Detective DeSilva] said no, since you're here we're going to talk." Defendant "kept telling him [he] didn't want to talk to him."

Detective DeSilva and defendant thus presented completely conflicting descriptions of what occurred. The question remains whether this conflict was material with respect to whether defendant's statement should have been excluded.

The State, in arguing that defendant was not in custody, relies upon Detective DeSilva's testimony. That testimony would suggest that defendant was not in custody. *See State v. Higgs*, 348 N.C. 377, 399, 501 S.E.2d 625, 638 (1998) (holding that defendant was not in custody when "defendant got into the car on his own, sat beside the officer in the front seat, was not handcuffed, and was not told he was under arrest or that he could not leave"); *State v. Rooks*, 196 N.C. App. 147, 151, 674 S.E.2d 738, 741 (2009) (holding that defendant was not in custody when "the trial court found that defendant was asked politely by the detective to enter an unmarked police car and answer questions"; "[h]e was told that he was not under arrest"; "[t]he car was unlocked and defendant was left unattended after the officer completed the interview"; and "[n]o evidence was presented indicating that the officer displayed a weapon, or otherwise threatened the defendant").

Defendant's testimony, however, if believed in whole, would support a conclusion that defendant was in custody. A trial court could reasonably find, based on that testimony, that defendant did not voluntarily get into Detective DeSilva's car, but rather was required to do

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so and was required to shut the door. Further, the trial court could find that defendant was then prohibited by Detective DeSilva, who displayed his gun and handcuffs, from leaving the car without answering the detective's questions. This testimony would be sufficient to support a conclusion that defendant was in custody.

Our Supreme Court, in *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828, noted that “[c]ircumstances supporting an objective showing that one is ‘in custody’ might include a police officer standing guard at the door [or] locked doors or application of handcuffs.” In *State v. Washington*, 102 N.C. App. 535, 538, 402 S.E.2d 851, 853-54 (Greene, J., dissenting), *rev'd for reasons in dissenting opinion*, 330 N.C. 188, 410 S.E.2d 55 (1991) (per curiam), Judge Greene applied a similar reasoning. In *Washington*, the defendant was stopped and placed in the back seat of the officer's police car where the door handles did not work. Judge Greene pointed out that the defendant was, “in effect, incarcerated on the side of the road” and that “[a] reasonable person in the defendant's position would have believed that he had been taken into custody . . .” *Id.*, 402 S.E.2d at 854. Consequently, the defendant was in custody for purposes of *Miranda*. *Id.*

Here, defendant's account would allow a trial court to reasonably infer that Detective DeSilva required defendant to get inside the patrol car, told him to shut the door, and was essentially “standing guard at the door” of the vehicle, in that he was sitting right next to defendant, who asked to leave, and—with handcuffs prominently displayed—told defendant that he could not leave and that they were going to talk. *See also Commonwealth v. Turner*, 2001 PA Super 79, ¶ 2, 772 A.2d 970, 976 (2001) (“We conclude that the combination of placing Turner in the police car, shutting the door, leaving him there until Cassidy arrived, and Cassidy questioning him while blocking the doorway and leaning into the backseat with Torres behind him, compels the conclusion that Turner reasonably could have presumed that he was not free to leave.”).

If the trial court accepted defendant's version of the encounter, then it could conclude defendant was in custody. The State, in attempting to distinguish *Washington*, depends entirely on Detective DeSilva's testimony. The State makes no argument that defendant's testimony, if believed, would result in a determination that defendant was not in custody. This conflict between Detective DeSilva's testimony and defendant's testimony was, therefore, material. “Because a material conflict in the evidence presented at the suppression hearing exist[ed], the trial court, by virtue of the mandate of section 15A-977(f)

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and our holding in *Williams*, was required to make findings of fact and conclusions of law.” *Baker*, ___ N.C. App. at ___, 702 S.E.2d at 833.

Consequently, we must remand for written findings of fact and conclusions of law resolving the material conflict in the evidence regarding whether defendant was in custody at the time he gave his statement and whether he should have been read his *Miranda* rights. If the trial court determines that the motion to suppress was properly denied, then defendant would not be entitled to a new trial because there would have been no error in the admission of the evidence, and his convictions would stand. If, however, the trial court determines that the motion to suppress should have been granted, defendant would be entitled to a new trial.

II

[2] Defendant next argues that, during jury deliberation, the trial court violated N.C. Gen. Stat. § 15A-1233(a) (2009) by failing to conduct the jurors back to the courtroom after the jury sent a note saying: “Want to see all State’s evidence including both copies of letters.” N.C. Gen. Stat. § 15A-1233(a) provides:

If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors *must be conducted to the courtroom*. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

(Emphasis added.)

In this case, when the jury sent its request, the judge read the request aloud. Both the prosecutor and defense counsel indicated they had no objection to the request. Then, pursuant to the judge’s instruction, the bailiff took the State’s exhibits to the jury room. Although defendant did not object to the failure of the trial court to conduct the jury to the courtroom, defendant is not precluded from raising this issue on appeal. *State v. Nobles*, 350 N.C. 483, 506, 515 S.E.2d 885, 899 (1999).²

2. We recognize that this Court has previously held that “when a defendant’s lawyer consents to the trial court’s communication with the jury in a manner other than bringing the jury back into the courtroom, the defendant waives his right to assert

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In *Nobles*, the Supreme Court held that although the trial court erred in failing to conduct the jury to the courtroom, the defendant was still required to “demonstrate that there [was] a reasonable possibility that a different result would have been reached had the trial court’s error not occurred.” *Id.* The Court pointed out that “[n]ot only did defendant’s counsel agree with the trial court when it erroneously thought that it had discretion whether to bring the jury to the courtroom, but there was unanimous agreement among the State, the defendant, and the trial judge concerning the items requested by the jury; and the prosecution and defendant consented to permitting the jury to have those items.” *Id.* Given those circumstances, the Court concluded that the defendant failed to show he was prejudiced by the trial court’s failure to follow the requirements of N.C. Gen. Stat. § 15A-1233(a). *Nobles*, 350 N.C. at 506, 515 S.E.2d at 899.

In this case, it is apparent that the trial court also violated N.C. Gen. Stat. § 15A-1233(a). But, as in *Nobles*, defendant consented to the jury’s receiving the requested items and had no objection to submitting the items to the jury without bringing the jury to the courtroom. With respect to the question of prejudice, defendant admits in his brief that “on its face, the jury’s request seems to be fairly clear,” but defendant suggests that perhaps the jury wanted a copy of the transcript of the State’s witnesses’ testimony. Defendant cannot, however, meet his burden through speculation in his brief as to the mere possibility that the jury was requesting evidence not provided. Accordingly, we hold that defendant has failed to meet his burden of showing that he was prejudiced by the trial court’s failure to comply with N.C. Gen. Stat. § 15A-1233(a).

III

[3] Defendant further argues that after the jury returned its verdicts, the trial court violated defendant’s right to be free from double jeopardy when it sentenced him for both sex offense in a parental role and incest because, he claims, this amounted to multiple punishments for the same offense. Defendant admits that he 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

a ground for appeal based on failure to bring the jury back into the courtroom.” *State v. Pointer*, 181 N.C. App. 93, 99, 638 S.E.2d 909, 913 (2007). We are, however, bound to follow the Supreme Court and thus, consistent with *Nobles*, we address the merits of defendant’s argument.

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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. Although defendant asks, in the alternative, that we exercise Rule 2, we decline, in our discretion, to do so.

IV

[4] In his final argument, defendant contends that the trial court erred in determining that he was a prior record level IV offender because the State improperly used two of his felony convictions both to establish defendant’s habitual felon status and to calculate his prior record level. N.C. Gen. Stat. § 14-7.6 (2009) provides that “[i]n determining the prior record level, convictions used to establish a person’s status as an habitual felon shall not be used.”

The State contended that defendant was a habitual felon based on (1) a 19 January 1999 conviction for the Class G felony of selling cocaine (file number 98 CRS 16308), (2) a 9 January 2002 conviction for the Class G felony of selling cocaine (file number 01 CRS 59125), and (3) a 13 December 2007 conviction for the Class I felony of uttering a forged instrument (file number 05 CRS 59401). Based on our review of the record, we conclude that the trial court properly calculated defendant’s prior record level without including any of these felonies used to establish defendant’s habitual felon status.

Defendant stipulated to the prior record level worksheet and that worksheet indicates defendant had *two* 9 January 2002 convictions for the Class G felony of selling a schedule II controlled substance. Moreover, at trial, defendant testified that he was convicted of two counts of selling cocaine on 9 January 2002. This Court has previously held that a “trial court is not prohibited ‘from using one conviction obtained in a single calendar week to establish habitual felon

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status and using another separate conviction obtained the same week to determine prior record level.’ ” *State v. Skipper*, 146 N.C. App. 532, 537, 553 S.E.2d 690, 693 (2001) (quoting *State v. Truesdale*, 123 N.C. App. 639, 642, 473 S.E.2d 670, 672 (1996)). Accordingly, after the trial court used one of the 9 January 2002 convictions for habitual felon determination, under *Skipper*, it could still use the other 9 January 2002 conviction to calculate defendant’s prior record level.

Defendant also contends that the prior record level calculation improperly “includ[ed] a class H cocaine conviction in 98 CRS 16308,” even though that “felony cocaine conviction[] [was] alleged in the habitual felony bill of indictment.” The “cocaine conviction” in the indictment was, however, the Class G felony of sale of cocaine, while the conviction used to calculate the prior record level was a Class H felony for possession with intent to manufacture, sell, or deliver cocaine. The record contains a copy of defendant’s 19 January 1999 judgment indicating that defendant was convicted of one Class G offense and one Class H offense on the same day. The trial court used the Class G offense for the habitual felon determination, but, under *Skipper*, the court was free to use the Class H offense for prior record level points. Since defendant makes no other argument about the calculation of his prior record level, we conclude that the trial court did not err in determining that defendant was a prior record level IV offender.

Remanded in part; no error in part.

Judge ELMORE concurs.

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

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

Where the majority holds that there exists a material conflict in the evidence regarding whether defendant was in custody at the time he gave his statement and remands for entry of an order including findings of fact and conclusions of law, I disagree, and, therefore, respectfully dissent from this portion of the majority opinion only. I otherwise fully concur in the majority opinion holding no error as to defendant’s remaining arguments.

Preliminarily, I note that in his appeal defendant did not object to the issue at hand; i.e. the trial court’s failure to make findings of fact

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and conclusions of law. Failure to object at trial makes this issue subject to dismissal for failure to properly preserve an issue for appellate review. N.C. R. App. P. 10(a)(1) (“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . .”). However, citing N.C.G.S. § 15A-977, defendant avers that his right to appeal this issue is properly preserved because the trial court “acted contrary to a statutory mandate.” Because I do not find that the trial court acted contrary to a statutory mandate, I would dismiss defendant’s appeal of this issue based on failure to properly preserve the issue.

The majority acknowledges that the trial court announced its rationale for denial of defendant’s motion to suppress in open court. In its ruling, the trial court stated, *inter alia*, that defendant was not in custody, that defendant’s statement was voluntary and denied defendant’s motion to suppress. While the trial court’s order was not set out in a separate writing containing formal findings of fact, conclusions of law, and signature of the trial court, the trial court’s order denying suppression is a part of the record as recorded in the transcript of the hearing. Therefore, I must emphasize that in this case, because the trial court’s findings of fact are clearly, albeit succinctly, a part of the record, requiring remand to clarify the record in writing is elevating form over substance.

“The language of section 15A-977(f) has been interpreted as mandatory to the trial court unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing.” *Baker*, ___ N.C. App. at ___, 702 S.E.2d 828-29. *See also, State v. Jacobs*, 174 N.C. App. 1, 620 S.E.2d 204 (2005) (holding no error where the trial court failed to make written findings of fact and conclusions of law in support of its conclusion to deny the defendant’s motion to suppress where the trial court provided its rationale from the bench. (citing *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980)) (*vacated in part on other grounds, rev’d in part on other grounds*, 361 N.C. 565, 648 S.E.2d 841 (2007)).

The critical issue that distinguishes the majority’s reasoning from the reasoning in this dissent: The majority says the conflict in the evidence was material. I strongly disagree. The record supports that there exists conflict in the evidence between what defendant said occurred (officer asked if he could speak to defendant and had him

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get into patrol car where handcuffs were “displayed” on dashboard, defendant did not feel like talking but officer said since you are here we’re going to talk), and what officer said occurred (officer asked if he could speak to defendant and defendant got in patrol car and left passenger door open while they talked; and defendant was told by officer he was not under arrest and not being charged). Again, I disagree that this constitutes a material conflict.

In order to constitute a material conflict, evidence presented must be so controverted as to likely affect the outcome of the matter. *Baker*, ___ N.C. App. at ___, 702 S.E.2d at 831 (“a material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected.”). Here, defendant’s evidence needs to be sufficient to support a conclusion that defendant was in custody. I do not believe this evidence is sufficient to do so. Further, the majority cites a number of cases from our Supreme Court and Court of Appeals holding that on similar facts, the defendant was found not to be in custody: *Hipps*, 348 N.C. 377, 501 S.E.2d 625; *Buchanan*, 353 N.C. 332, 543 S.E.2d 823; *Rooks*, 196 N.C. App. 147, 674 SE.2d 738; *Washington*, 102 N.C. App. 535, 402 S.E.2d 851; and *Turner*, 2001 Pa. Super. 79, 772 A.2d 970. With the exception of *Washington* (where facts showed defendant involuntarily restricted in back seat of patrol car), the majority cites only one Pennsylvania case holding that a custodial interrogation occurred, and in that case defendant was placed in the back seat of a car and questioned by one officer while another stood just behind him. *Turner*, 2001 Pa. Super. 79, 772 A.2d 970. Therefore, the majority’s reasoning seems to be that the evidence in the instant case presents a material conflict because, based on the cases the majority discusses, defendant’s evidence would be sufficient to support a conclusion that defendant was in custody.

Because I disagree with the basic premise that these facts, if taken as true, would support a conclusion that defendant was in custody, I would hold that the trial court’s summary findings, on the record, though not in writing, were more than sufficient to meet the dictates of N.C.G.S. § 15-977. I would affirm the trial court’s denial of defendant’s motion to suppress.

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CAPTAIN CHARLES W. McADAMS, PLAINTIFF v. NORTH CAROLINA DEPARTMENT
OF TRANSPORTATION, DEFENDANT

No. COA11-102

(Filed 6 September 2011)

1. Administrative Law—racial harassment and retaliation—jurisdiction

The trial court did not err by remanding plaintiff's petition to the Office of Administrative Hearings for a hearing concerning alleged racial harassment and retaliation. Plaintiff sufficiently complied with the requirements of N.C.G.S. § 126-34 to vest the State Personnel Commission with jurisdiction over his complaint.

2. Public Officers and Employees—state employee—racial harassment and retaliation—adoption of alternative findings—written warning relevant to other claims

The trial court did not err in an action arising from alleged harassment or retaliation based on race by adopting the State Personnel Commission's alternative findings relative to a written warning. Another trial court's dismissal of one of plaintiff state employee's two claims did not necessarily preclude any consideration of the written warning to the extent that it was relevant to the other claim on the merits.

3. Public Officers and Employees—state employee—racial harassment and retaliation—alternative conclusions of law

The trial court did not err by upholding the State Personnel Commission's alternative conclusions of law numbers 2 and 3 because they constituted a determination that plaintiff state employee was subjected to retaliation on the basis of his race.

4. Public Officers and Employees—state employee—racial harassment and retaliation—legitimate non-retaliatory reason for discipline

The trial court did not err by determining that the Department of Transportation had failed to produce sufficient evidence of a legitimate non-retaliatory reason for the discipline of plaintiff state employee. Defendant's argument was a challenge to the State Personnel Commission's factual determinations, which were binding on the Court of Appeals.

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Appeal by defendant from orders entered on 1 August 2008 by Judge Cressie H. Thigpen, Jr., and on 31 August 2010 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 24 May 2011.

Alan McSurely for Plaintiff-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General Neil Dalton, for the Defendant-appellant.

ERVIN, Judge.

Defendant North Carolina Department of Transportation appeals from orders reversing a determination by the State Personnel Commission to the effect that it lacked jurisdiction over Plaintiff's claim of harassment or retaliation based on race, adopting the Commission's alternative findings and conclusions to the effect that Plaintiff had been subject to retaliation on the basis of race, and ordering Defendant to take various steps intended to compensate Plaintiff for the salary and retirement benefits that he lost as a result of Defendant's conduct. On appeal, Defendant argues that the trial courts erred by concluding (1) that the Commission had jurisdiction over Plaintiff's claim and (2) that the Commission's alternative determination awarding relief to Plaintiff should be affirmed. After careful consideration of Defendant's challenges to the trial courts' orders in light of the record and the applicable law, we conclude that the trial courts' orders should be affirmed.

I. Factual Background

Plaintiff, an African-American male, was a career state employee as defined in N.C. Gen. Stat. § 126-1.1. In 2000, Plaintiff unsuccessfully applied for a vacant District Supervisor position. After failing to receive the requested promotion, Plaintiff initiated a contested case proceeding before the Office of Administrative Hearings in which he alleged that his failure to receive that promotion stemmed from impermissible racial discrimination. At the conclusion of the contested case proceeding, Administrative Law Judge James L. Conner determined that Defendant had, in fact, discriminated against Plaintiff by hiring a less-qualified white candidate for the District Supervisor position instead of offering the position to Plaintiff. As a result, Judge Conner recommended that Defendant be required to place Plaintiff in the District Supervisor's position for which he had originally applied and to provide him with all of the back pay,

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increased compensation, and benefits to which he would have been entitled in the absence of Defendant's discriminatory conduct. According to prevailing North Carolina law, however, Judge Conner's recommended decision was subject to review by the Commission, which would make a final decision concerning the merits of Plaintiff's claim.

On 18 November 2002, a written warning alleging "unsatisfactory job performance" was placed in Plaintiff's personnel file. In addition, instead of placing Plaintiff into the District Supervisor position for which he had originally applied, Defendant placed Plaintiff into a vacant Catawba County position and then transferred that position to Forsyth County, effectively leaving the individual who had been hired in lieu of Plaintiff in the position for which Plaintiff should have been hired. As a result, Plaintiff initiated another contested case proceeding and obtained the issuance of a preliminary injunction requiring Defendant to place Plaintiff in the proper District Supervisor's position and prohibiting Defendant from taking any adverse employment action against him pending a hearing on his retaliation claim. More specifically, Defendant was ordered to put Plaintiff into the Forsyth County District Supervisor's position, to "take no action to adversely affect [Plaintiff's] employment pending appeal," and to "treat [Plaintiff] in good faith and with the same concern it shows for white senior officers." After the issuance of the preliminary injunction, Defendant placed Plaintiff into the proper position, paid the necessary back pay and other compensation, and took other actions consistent with Judge Conner's decision in the initial recommended decision, a series of events that led Plaintiff to voluntarily dismiss his original contested case proceeding. On 14 November 2003, Judge Conner made permanent the "executory provisions" of the preliminary injunction prohibiting Defendant from engaging in further acts of discrimination against Plaintiff. On 5 May 2004, the Commission upheld Judge Conner's decision.

On 27 July 2004, Plaintiff received a written warning citing him for "unacceptable personal conduct" based upon his decision to copy his attorney on an e-mail that he sent to his superiors. In that e-mail, Plaintiff complained about the manner in which he had been treated in connection with the disciplining of another employee, whose name he mentioned, allegedly in violation of the prohibition against the release of confidential personnel information set out in N.C. Gen. Stat. §§ 126-22 and 126-24.¹ On 3 August 2004, Plaintiff sent a memo-

1. The e-mail in question alleged that Defendant had acted improperly by having one of his subordinates bring an employee to a disciplinary meeting rather than having Plaintiff transport the employee to that meeting.

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randum to the director of his department in which he requested that the written warning be removed from his personnel file on the grounds that the written warning contained statements that were “deceitful [and] which [would] cause harm to [his] character.” Plaintiff’s request was denied on 5 August 2004.

On 1 February 2005, Plaintiff renewed his request that Defendant remove the written warning from his file. According to Plaintiff, the warning was “inaccurate and misleading.” At the time that he made this request, Plaintiff suggested that the Department’s conduct with respect to the written warning violated the provisions of the earlier injunction that required Defendant to afford Plaintiff with the same respect shown to white senior officers.²

On 18 April 2005, Plaintiff initiated a contested case proceeding with the Office of Administrative Hearings in which he alleged that his personnel file contained inaccurate and misleading information and that he had been the victim of racially-based harassment or retaliation. According to Plaintiff, the 27 July 2004 warning constituted a violation of the injunction precluding Defendant from “tak[ing] [any] action [that] adversely affect[ed] [Plaintiff’s] employment pending appeal” and requiring Defendant to “treat [Plaintiff] in good faith and with the same concern it shows for white senior officers.” In his petition, Plaintiff noted that he had requested removal of the written warning on 1 February 2005, that more than sixty days had passed since the submission of his request without any response from Defendant, and that he was entitled to seek relief by initiating a contested case proceeding pursuant to N.C. Gen. Stat. § 126-36. On 2 November 2006, Administrative Law Judge Fred G. Morrison Jr., granted Defendant’s motion to dismiss Plaintiff’s petition on the grounds that Plaintiff had failed to file his petition for a contested case proceeding in a timely manner, failed to submit his complaint to the agency prior to initiating a contested case proceeding, and failed to allege sufficient facts to establish that he had been subjected to unlawful workplace harassment or retaliation.

On 6 December 2006, Plaintiff sought judicial review of Judge Morrison’s decision pursuant to N.C. Gen. Stat. § 150B-43. On 1 August 2008, Judge Cressie H. Thigpen, Jr., entered an order addressing the issues raised in Plaintiff’s petition for judicial review. First, Judge

2. Plaintiff retired from his position with Defendant effective 28 February 2005. However, as will be discussed in more detail later in this opinion, Plaintiff’s claim was not rendered moot by his retirement.

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Thigpen affirmed Judge Morrison's dismissal of Plaintiff's request for removal of the written warning that he had received on 27 July 2004 from his personnel file on the grounds that Plaintiff had failed to challenge the written warning in a timely fashion. As a result, Judge Thigpen did not address the substantive issue of whether the information contained in the written warning was, in fact, inaccurate or misleading.³ Secondly, Judge Thigpen found, with respect to Plaintiff's claim of racial harassment, that:

8. N.C. Gen. Stat. § 126-34 provides that any State employee having a grievance arising out of or due to the employee's employment who alleges unlawful harassment because of the employee's race shall submit a written complaint to the employee's department or agency. The department or agency shall thereafter have 60 days within which to take appropriate remedial action. If the employee is not satisfied with the department or agency's response to the complaint, the employee shall have the right to appeal directly to the State Personnel Commission.
9. Petitioner's memorandum dated February 1, 2005, compared his treatment with treatment of senior white officers. This complaint, coupled with the prior history existing between Petitioner and Respondent, was sufficient to place Respondent on notice that Petitioner was complaining of either harassment or retaliation, or both, based on his race.
10. The February 1, 2005 memorandum met the requirement of N.C. Gen. Stat. § 126-34 that Petitioner submit a written complaint to the employee's department or agency prior to appealing such matter.
11. Respondent did not respond to Petitioner's February 1, 2005 memorandum.
12. The matters complained of in Petitioner's February 1, 2005 memorandum and the facts alleged in Petitioner's Petition For a Contested Case Hearing with attachment were sufficient to withstand a[n N.C. Gen. Stat. § 1A-1, Rule] 12(b)(6) motion.

3. As a result of the fact that Plaintiff did not advance any further challenge to this aspect of Judge Thigpen's decision, the substantive issue of whether the written warning was "inaccurate and misleading" and should, for that reason, have been removed from Plaintiff's personnel file has been finally resolved and need not be addressed in this opinion.

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Based upon these and other findings of fact, Judge Thigpen concluded as a matter of law that:

Based on the foregoing, the Order of Dismissal [and] Final Decision regarding the Written Warning dated July 27, 2004 and Respondents responses dated July 29, 2004 and August 5, 2004 is Affirmed.

IT IS FURTHER ORDERED that the Order of Dismissal [and] Final Decision regarding the issue of harassment and retaliation based on race is Remanded to the Office of Administrative Hearings for a hearing and further proceedings on that issue.

Upon remand from Judge Thigpen's decision, Plaintiff's harassment and retaliation claim was heard before Judge Morrison. On 14 August 2009, Judge Morrison entered a recommended decision in which he concluded, in relevant part, that Plaintiff "ha[d] not convinced [him] by the greater weight of the evidence presented that he was the victim of harassment or retaliation based on race" and that, as a result, Plaintiff was "not entitled to any further relief from [Defendant]." On 10 December 2009, the Commission issued a Final Decision in which it determined that:

[T]hat there is no jurisdiction for a claim for unlawful workplace harassment or retaliation based on race or any other basis where a petitioner has not complied with the procedures required under [N.C. Gen. Stat. §§] 126-34 and 126-37 and that any such claim should have been remanded to the agency for the completion of the internal grievance policies required by statute and thus exhaustion of Petitioner's administrative remedies.

In addition, the Commission stated that, "should a superior forum disagree with the Commission, the Commission makes the following Alternative Order Findings of Fact." At that point, the Commission adopted the majority of Judge Morrison's factual findings. However, the Commission did modify Finding of Fact No. 13 so as to "eliminate a statement which is actually a conclusion of law and to include findings of fact that reflect the evidence contained in the whole record." Although the Commission adopted Judge Morrison's conclusion that the parties were "before the Office of Administrative Hearings pursuant to an Order from Wake County Superior Court" and had "received proper notice of the hearing in this matter," it rejected Judge Morrison's conclusion that Plaintiff "ha[d] not persuaded [him] by the greater weight of the evidence presented that he was the vic-

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tim of harassment or retaliation based on race.” Instead, the Commission concluded that:

2. The facts relating to [Plaintiff’s] conduct and to the disciplinary action taken by Director Robinson relating to Major Edwards and [Plaintiff’s] interactions and the email sent by [Plaintiff] show that [Plaintiff’s] written warning was awarded in retaliation for his taking protected activity, *i.e.* protesting his circumvention in the disciplinary process of another employee which he perceived to be treating him differently from other District Supervisors. [Plaintiff] was not required to produce evidence that he was, in fact, treated differently in order to prevail on a claim that he was retaliated against. The evidence showed that [Plaintiff] was awarded disciplinary action almost immediately after he alleged that he was being treated differently from other District Supervisors. Thus, [Plaintiff] has shown that he suffered adverse action. *i.e.* a written warning, from his employer very close in time after engaging in protected activity, *i.e.* protesting treatment that he perceived to be different from other similarly situated employees, and that his protests were precisely the reason for his discipline.

3. [Plaintiff] met his burden of proving a *prima facie* case of illegal workplace retaliation. [Defendant] failed to produce sufficient evidence of a legitimate, non-retaliatory reason for the disciplinary action. Thus, [Plaintiff’s] written warning should be removed as illegal workplace retaliation.

On 12 January 2010, Plaintiff sought judicial review of the Commission’s decision that it lacked jurisdiction over his claim and urged the Court to adopt the Commission’s alternative decision. On 31 August 2010, Judge Stephens entered an order concluding that the Commission had erred by deciding that it lacked jurisdiction over Plaintiff’s harassment and retaliation claim, adopting the Commission’s alternative findings and conclusions, and ordering “appropriate remedies for illegal workplace retaliation under the circumstances” of the case. In his order, Judge Stephens stated that

. . . . Two years ago, [the Superior Court, in an order entered by Judge Thigpen] analyzed the unique and lengthy history of this case and found, in an order dated August 1, 2008, that [Plaintiff’s] February 1, 2005 complaint to his superiors comparing his treatment to the treatment of senior white officers, coupled with the prior history existing between himself and [Defendant], was suf-

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ficient to place [Defendant] on notice that [Plaintiff] was complaining of either harassment or retaliation, or both, based on his race. This Court found, in its 2008 analysis of [the] jurisdictional question in this same case, that [Plaintiff's] complaint of February 1, 2005 met [N.C. Gen. Stat.] § 126-34's conditions precedent because [Defendant] "did not respond" to it. This Court then remanded the case to the Office of Administrative Hearings [] for hearing on the retaliation and harassment issues. . . . [T]hese findings . . . are the law of the case. The [Office of Administrative Hearings] and [Commission] had jurisdiction over the claim of retaliation, and the [Commission] decision that it lacked jurisdiction is in error.

In addition, Judge Stephens "adopt[ed] the[] decisive facts and conclusions in the [Commission's] Alternative Order as its own findings and conclusions." As a result, Judge Stephens ordered that this case be "remanded to the [] Commission with instruction that [Defendant] shall, without delay, compute the additional amount [Plaintiff] should have received in the absence of the written warning wrongfully placed in his personnel file and pay Petitioner such additional amount" and "make the necessary contributions to [Plaintiff's] Retirement Fund account . . . to reflect the new 'last four years base,' consistent with this order."⁴ Defendant noted an appeal to this Court from the orders entered by Judge Thigpen and Judge Stephens.

II. Legal Analysis

A. Standard of Review

The orders from which Defendant has appealed were entered in connection with judicial review of the Commission's final agency decision. According to N.C. Gen. Stat. § 150B-43, "[a]ny person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision[.]" N.C. Gen. Stat. § 150B-51(b) authorizes a trial court to reverse or modify an agency's decision if the substantial rights of the petitioner have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

4. According to the record, the presence of the written warning in Plaintiff's personnel file made him ineligible for a pay increase which he would have otherwise received, a fact that adversely affected the amount of retirement benefits that he received following the end of his employment with Defendant.

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- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (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.

“On judicial review of an administrative agency’s final decision, the substantive nature of each assignment of error dictates the standard of review.” *N.C. Dep’t of Env’t & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004) (citations omitted). As a result:

The first four grounds are “law-based” inquiries warranting *de novo* review. The latter two grounds are “fact-based” inquiries warranting review under the whole-record test. Under *de novo* review, a court “considers the matter anew[] and freely substitutes its own judgment for the agency’s.” Under the whole-record test, a court “examines all the record evidence . . . to determine whether there is substantial evidence to justify the agency’s decision.”

Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 121, 619 S.E.2d 862, 864 (2005) (quoting *Carroll*, 358 N.C. at 659-60, 599 S.E.2d at 894-95), *aff’d*, 360 N.C. 396, 627 S.E.2d 462 (2006). “As to appellate review of a superior court order regarding an agency decision, ‘the appellate court examines the trial court’s order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.’” *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini v. N.C. Dep’t of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994)).

B. Substantive Legal Issues

1. Jurisdiction over Plaintiff’s Claim

[1] First, Defendant argues that Judge Thigpen erred by remanding Plaintiff’s petition to the Office of Administrative Hearings for a hearing concerning his racial harassment and retaliation claim. According to Defendant, Plaintiff failed to file his petition for a contested case

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hearing in a timely manner and the 1 February 2005 memorandum did not adequately notify Defendant that he claimed to have been retaliated against or harassed on the basis of his race. As a result, Defendant argues that, “as a matter of law, there is no jurisdiction for the Petition for Contested Case Hearing, the State Personnel Commission Decision or the second order from the superior court,” so that “the second order of the superior court should be reversed.” We disagree.

According to N.C. Gen. Stat. § 126-34, “[a]ny State employee having a grievance arising out of or due to the employee’s employment who alleges unlawful harassment because of the employee’s . . . race . . . shall submit a written complaint to the employee’s department or agency,” with “[t]he department or agency [] hav[ing] 60 days within which to take appropriate remedial action.” “If the employee is not satisfied with the department or agency’s response to the complaint, the employee shall have the right to appeal directly to the State Personnel Commission.” N.C. Gen. Stat. § 126-34.

On 1 February 2005, Plaintiff submitted a memorandum to Defendant requesting that the 27 July 2004 written warning be removed from his file and asserting that, “[a]s you know, when the State Personnel Commission ruled [that] your predecessor had retaliated against me, it also adopted as a permanent injunction that the DMV should treat me with the same respect it showed to senior white officers at the DMV.” According to Plaintiff, although “white senior officers [are included] when personnel matters are being handled,” he had not received similar consideration. After Defendant failed to respond to Plaintiff’s memorandum within sixty days, Plaintiff filed a petition for a contested case hearing on 18 April 2005 alleging (1) that his personnel file contained inaccurate and misleading information and (2) that he had been the victim of racial harassment. In an attachment to his petition, Plaintiff reviewed the history of the administrative litigation arising from Plaintiff’s complaints of racial discrimination and referenced the requirement that Defendant treat him “in good faith and with the same concern it shows for white senior officers.” Following dismissal of his petition, Plaintiff sought judicial review.

As we have already noted, Judge Thigpen concluded that, even though Plaintiff adequately notified Defendant that he claimed to have been subjected to harassment on the basis of his race, Defendant failed to act on Plaintiff’s complaint, a fact which authorized Plaintiff to seek relief through the administrative review process. After carefully reviewing the record, we conclude that Judge

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Thigpen's findings have adequate record support, that his findings support his conclusions, and that he did not err by determining that Plaintiff sufficiently complied with the requirements of N.C. Gen. Stat. § 126-34 to vest the Commission with jurisdiction over his complaint of racially-based harassment or retaliation.

In urging us to reach a contrary conclusion, Defendant argues that, pursuant to N.C. Gen. Stat. § 126-38, Plaintiff "had 30 days from the date of the issue complained of here, the written warning, to file a Petition for Contested Case hearing at OAH." According to N.C. Gen. Stat. § 126-38, "[a]ny employee appealing any decision or action shall file a petition for a contested case with the Office of Administrative Hearings as provided in [N.C. Gen. Stat. §] 150B-23(a) no later than 30 days after receipt of notice of the decision or action which triggers the right of appeal." However, Plaintiff's claim of racial harassment did not constitute an appeal from a "decision or action" and so was not subject to the time limitations set out in N.C. Gen. Stat. § 126-38. Thus, Defendant's first challenge to Judge Thigpen's order lacks merit.

Secondly, Defendant contends that, to "bring a 'racial harassment' claim at OAH, [Plaintiff] must have first complained to the agency concerning this issue." Defendant cites N.C. Gen. Stat. § 126-34 in support of this proposition and claims that this statutory provision "also has a 30 day time limit." N.C. Gen. Stat. § 126-34 provides, in pertinent part, that:

Any State employee having a grievance arising out of or due to the employee's employment who alleges unlawful harassment because of the employee's . . . race . . . shall submit a written complaint to the employee's department or agency. The department or agency shall have 60 days within which to take appropriate remedial action. If the employee is not satisfied with the department or agency's response to the complaint, the employee shall have the right to appeal directly to the State Personnel Commission.

Contrary to Defendant's contention, N.C. Gen. Stat. § 126-34 makes no reference to a "30 day time limit." In addition, Defendant cites *Lee v. N.C. Dep't of Transp.*, 175 N.C. App. 698, 625 S.E.2d 567, *aff'd*, 360 N.C. 585, 634 S.E.2d 887 (2006), in support of his argument that Plaintiff failed to comply with the "time limits" set out in N.C. Gen. Stat. § 126-34. However, this Court held in *Lee* that the Commission lacked jurisdiction over the plaintiff's racial harassment claim on the grounds that the plaintiff failed to provide Defendant with any written

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complaint at all rather than on the basis of any sort of timeliness consideration. In this case, on the other hand, the trial court explicitly ruled that Plaintiff's 1 February 2005 memorandum constituted sufficient compliance with the requirement that he submit a written complaint to the department or agency by which he was employed. As a result, we conclude that Defendant's timeliness argument lacks merit.

Finally, Defendant contends that Plaintiff's 1 February 2005 memorandum "does not allege that he was harassed, nor does it mention race." However, as we have already noted, Plaintiff's communication asserted that the Commission had "ruled [that] your predecessor had retaliated against me;" that Defendant "should treat me with the same respect it showed to senior white officers at the DMV;" and that Plaintiff did not "believe [that] Deputy Director Edwards [] circumvent[s] the white senior officers when personnel matters are being handled." We agree with Judge Thigpen that Plaintiff's memorandum, "coupled with the prior history existing between [Plaintiff] and [Defendant]," sufficed "to place [Defendant] on notice that [Plaintiff] was complaining of either harassment or retaliation, or both, based on his race." As a result, we conclude that Defendant's final challenge to Judge Thigpen's jurisdictional decision lacks merit.

2. Adoption of Commission's Alternative Findings

[2] Next, Defendant argues that Judge Stephens "should not have adopted [the Commission's] alternative findings [] relative to the written warning since [Judge Thigpen's] order [] upheld the dismissal of the petition regarding the written warning." We do not find this argument persuasive.

Judge Thigpen upheld the dismissal of Plaintiff's challenge to the inclusion of the 27 July 2004 written warning in his personnel file. Judge Thigpen's decision to this effect rested on Plaintiff's failure to comply with the procedural requirements enunciated in N.C. Gen. Stat. §§ 126-25 and 126-38, which address a state employee's ability to challenge the inclusion of inaccurate or misleading information in his personnel file. However, Judge Thigpen did not dismiss Plaintiff's harassment or retaliation claim despite the fact that it was supported, at least in part, by the written warning. Although Defendant argues that, because Judge Thigpen upheld the dismissal of Plaintiff's claim relating to the allegedly inaccurate or misleading information contained in the written warning, "[a]ny Alternative Findings of Fact or Conclusions of Law reinstating the written warning as an issue in this case should be deemed a nullity," we are unable to understand why

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Judge Thigpen's dismissal of one of Plaintiff's two claims necessarily precludes any consideration of the written warning to the extent that it is relevant to the other claim on the merits. Defendant cites no authority tending to suggest that the dismissal of Plaintiff's challenge to the accuracy of the information contained in the written warning bars consideration of that document in the course of an examination of the merits of Plaintiff's harassment or retaliation claim, and we have not found any such authority in the course of our own research. Thus, this aspect of Defendant's challenge to Judge Stephens' order lacks merit.

3. Commission's Conclusions of Law Nos. 2 and 3

[3] Thirdly, Defendant argues that "alternative conclusions of law #2 and #3 [] should not be upheld because they are outside the scope of Judge Thigpen's order in that they do not find 'harassment and retaliation based upon race.'" We disagree.

Judge Thigpen's order remanded Plaintiff's complaint that he had been subject to "either harassment or retaliation, or both, based on his race" for a hearing. (emphasis added). The Commission's alternative conclusions, which were adopted by Judge Stephens and which we have quoted above, clearly constitute a determination that Plaintiff was subjected to retaliation on the basis of his race. Although Defendant appears to contend that, given the absence of any specific reference to the races of the participants in the relevant conclusions, the Commission's alternative decision cannot be understood as a determination that the treatment that Plaintiff received stemmed from his race, that argument lacks persuasive force. Given the context in which this case arose, including Plaintiff's history of multiple, successful, claims to have been subjected to discriminatory conduct, and given that the Commission's alternative conclusions explicitly reference Plaintiff's complaint that he had been treated differently from white senior officers, we conclude that the Commission's alternative decision adequately addressed the issue of race-based retaliation and that Defendant's argument to the contrary lacks merit.

4. Non-Retaliatory Basis for Discipline

[4] Finally, Defendant challenges Judge Stephens' determination that "the DOT had failed to produce sufficient evidence of a legitimate non-retaliatory reason for the discipline" on the grounds that this finding was "without basis in the record." Defendant is not entitled to relief on the basis of this argument.

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According to Defendant, the written warning that Plaintiff received rested on Plaintiff's alleged violation of N.C. Gen. Stat. § 126-27, which prohibits state employees from "knowingly and willfully permit[ing] any person to have access to or custody or possession of any portion of a personnel file designated as confidential by this Article," and insubordination. Defendant claims that Plaintiff's decision to include the name of another employee who was the subject of disciplinary proceedings in an e-mail to his attorney resulted in a violation of N.C. Gen. Stat. § 126-27 and that the tone of his communications with his superiors justified the written warning. However, Judge Stephens determined that:

[Plaintiff] met his burden of proving a *prima facie* case of illegal workplace retaliation. Respondent failed to produce sufficient evidence of a legitimate, non-retaliatory reason for the disciplinary action. Thus, [Plaintiff's] written warning should be removed as illegal workplace retaliation.

This excerpt from Judge Stephens' order does not indicate whether Judge Stephens concluded that (1) Plaintiff's e-mail to his attorney, particularly given the history between the parties, did not fall within the ambit of N.C. Gen. Stat. § 126-27 or that (2) the proffered reasons were, even if facially valid, a mere pretext for retaliation and not a "legitimate non-retaliatory" reason for issuing a written warning to Plaintiff. As we understand the evidentiary record, Judge Stephens would have been entitled to reach either or both of these conclusions. At bottom, this aspect of Defendant's challenge to Judge Stephens' order is nothing more than a challenge to the factual determinations made by the Commission, which are binding upon us for purposes of appellate review given that they have adequate record support. As a result, Defendant's final argument lacks merit as well.

III. Conclusion

Thus, for the reasons discussed above, we conclude that none of Defendant's challenges to the orders entered by Judge Thigpen and Judge Stephens have merit. As a result, the challenged orders should be, and hereby are, affirmed.

AFFIRMED.

Judges McGEE and McCULLOUGH concur.

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[215 N.C. App. 443 (2011)]

K2 ASIA VENTURES, BEN C. BROOCKS, AND JAMES G.J. CROW, PLAINTIFFS V.
ROBERT TROTA, ET AL., DEFENDANTS

No. COA10-1065

(Filed 6 September 2011)

1. Appeal and Error—interlocutory orders—substantial right—attorney-client privilege—work product immunity

The portion of a trial court's 15 June 2010 order compelling Krispy Kreme defendants to produce documents covered by plaintiffs' request was immediately appealable because defendants' defenses of attorney-client privilege and work product immunity affected a substantial right.

2. Appeal and Error—interlocutory orders and appeals—blanket general objections—inadequate to establish substantial right—privilege logs

The Philippine defendants' blanket general objections purporting to assert attorney-client privilege or work product immunity to all of the opposing parties' discovery requests were inadequate to establish a substantial right to an immediate appeal. Even if the privilege logs could have been construed as an adequate assertion of privilege, defendants' failure to utter the word "privilege" or to make some reference to that legal principle at the hearing constituted a failure to establish the privilege.

3. Discovery—request for production of documents—failure to meet burden establishing validity of objections

The trial court did not abuse its discretion in an action arising out of alleged breaches of business agreements by overruling the Krispy Kreme defendants' objections to plaintiffs' request for production of documents. Defendants bore the burden to establish the validity of its objections and failed to offer any evidence whatsoever in support of its claims.

Appeal by Defendants from orders entered 15 June 2010 by Judge James M. Webb in Forsyth County Superior Court. Heard in the Court of Appeals 8 March 2011.

Watts Guerra Craft LLP, by Christopher V. Goodpastor, and Blanco Tackabery & Matamoros, P.A., by Peter J. Juran, for Plaintiffs.

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Bell, Davis & Pitt, P.A., by William K. Davis, Alan M. Ruley, and Bradley C. Friesen, for Defendants Robert Trota, Veronica Trota, Joselito Saludo, Carolyn T. Salud, Roland V. Garcia, Cristina T. Garcia, Jim Fuentebella, Mavis Fuentebella, Sharon Fuentebella, Max's Baclaran, Inc., Chickens R Us, Inc., Max's Makati, Inc., Max's Ermita, Inc., Max's of Manila, Inc., The Real American Donut Company Inc., Trofi Ventures, Inc., and Ruby Investment Company Holdings, Inc.

Kilpatrick Stockton LLP, by Daniel R. Taylor, Jr., Adam H. Charnes, and Jason M. Wenker, for Defendants Krispy Kreme Doughnut Corporation and Krispy Kreme Doughnuts, Inc.

STEPHENS, Judge.

I. Procedural History and Factual Background

In April 2009, Plaintiffs K2 Asia Ventures, Ben C. Broocks, and James G.J. Crow filed a complaint in Forsyth County against Defendants Robert Trota, Veronica Trota, Joselito Saludo, Carolyn T. Salud, Roland V. Garcia, Cristina T. Garcia, Jim Fuentebella, Mavis Fuentebella, Sharon Fuentebella, Max's Baclaran, Inc., Chickens R Us, Inc., Max's Makati, Inc., Max's Ermita, Inc., Max's of Manila, Inc., The Real American Donut Company Inc., Trofi Ventures, Inc., Ruby Investment Company Holdings, Inc., Krispy Kreme Doughnut Corporation, and Krispy Kreme Doughnuts, Inc., asserting various causes of action arising out of alleged breaches of business agreements between Plaintiffs and various Defendants. All Defendants filed motions to dismiss Plaintiffs' lawsuit on various grounds, including an assertion of lack of personal jurisdiction by, *inter alia*, Defendants Robert Trota, Carolyn T. Salud, Cristina T. Garcia, Jim Fuentebella, and Sharon Fuentebella (collectively, "the K2 I appellants"). These Defendants agreed to postpone the hearing on their motion to allow Plaintiffs to conduct limited discovery on the issue of personal jurisdiction.

On 11 August 2009, Plaintiffs served their first set of interrogatories, requests for production of documents, and requests for admissions on Defendants Krispy Kreme Doughnut Corporation and Krispy Kreme Doughnuts, Inc., (collectively, "the KKD Defendants"), and also on the remaining Defendants, including the *K2 I* appellants, who will be referred to collectively in this opinion as "the Philippine Defendants." On 13 October 2009, the Philippine Defendants responded to Plaintiffs' discovery requests, including stating various objections.

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On 14 October 2009, the KKD Defendants timely served their responses and objections to Plaintiffs' discovery requests.

After receiving Defendants' responses to interrogatories, requests for production of documents, and requests for admissions, Plaintiffs sought to supplement their jurisdictional discovery by deposing the *K2 I* appellants. The *K2 I* appellants, who are residents of the Philippines, objected to the depositions and moved the trial court for a protective order. Plaintiffs filed an amended notice of depositions, but when they were unable to secure the *K2 I* appellants' voluntary appearance at the depositions, Plaintiffs filed a 10 March 2010 motion to compel depositions.

Following a 5 April 2010 hearing on these discovery motions, on 19 April 2010, the trial court entered an order granting Plaintiffs' motion to compel depositions and denying the *K2 I* appellants' motion for a protective order. The trial court ordered the *K2 I* appellants to appear for depositions in Glendale, California, where Defendant Max's of Manila, Inc., a corporation in which three of the *K2 I* appellants are directors or officers, has its headquarters. On 20 April 2010, the *K2 I* appellants appealed the trial court's 19 April 2010 order. On 1 March 2011, this Court issued an opinion dismissing the appeal as interlocutory. *K2 Asia Ventures v. Trota*, ___ N.C. App. ___, ___, 708 S.E.2d 106, 112 (2011) ("*K2 I*").

While the *K2 I* appeal was pending, on 30 April 2010, Plaintiffs filed separate motions to compel the KKD Defendants and the Philippine Defendants to produce additional documents. Each motion asked the trial court to strike or limit any objections and "compel[] full responses" to Plaintiffs' discovery requests. Following a hearing on 17 May 2010, on 15 June 2010, the trial court entered orders compelling both the KKD and Philippine Defendants to produce certain documents. From these orders, the KKD and Philippine Defendants appeal.

II. Grounds for Appellate Review

[1] At the outset, we must consider the interlocutory nature of both the KKD and Philippine Defendants' appeals. Interlocutory orders are immediately appealable only if they have been certified by the trial court pursuant to Rule 54(b) or if the order affects a substantial right of the appellants. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2009); N.C. Gen. Stat. § 1-277(a) (2009) ("An appeal may be taken from every judicial order or determination of a judge of a superior or district court . . . which affects a substantial right claimed in any action or proceeding."). Here, there has been no Rule 54(b) certification by the trial court. In

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determining whether an interlocutory order may be appealed because of its effect on a party's substantial rights, our State's appellate courts have developed the following two-part test: (1) the right itself must be substantial, and (2) the "deprivation of that substantial right must potentially work injury to [the appellant] if not corrected before appeal from final judgment." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citing *Wachovia Realty Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977)).

"An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999). However, where "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under [N.C. Gen. Stat. §] 1-277(a) and [N.C. Gen. Stat. §] 7A-27(d)(1)." *Id.* at 166, 522 S.E.2d at 581. This Court has applied the reasoning of *Sharpe* to the common law attorney-client privilege. *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 24, 541 S.E.2d 782, 786, cert. denied and disc. review dismissed, 353 N.C. 371, 547 S.E.2d 810 (2001).

Here, the KKD Defendants argue that the trial court abused its discretion in compelling it to produce the documents covered by Plaintiffs' request 3. As the record reveals and Plaintiffs concede, the KKD Defendants asserted attorney-client privilege and work product immunity in their specific response to Plaintiffs' request 3. Thus, that portion of the trial court's 15 June 2010 order compelling the KKD Defendants to produce the documents covered by Plaintiffs' request 3 is immediately appealable under *Evans* and *Sharpe*, and the KKD Defendants' appeal is therefore addressed *infra*.

III. Philippine Defendants' Appeal

A. General Objections

[2] Unlike the KKD Defendants, the Philippine Defendants did not assert attorney-client privilege or work product immunity in any of their specific responses to Plaintiffs' individual requests. However, they first contend they are entitled to immediate appeal from the trial court's discovery order because they made a "general objection" as to all of Plaintiff's "Definitions" to the extent that they seek to require

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the disclosure of information or documents protected by the attorney/client privilege, the work product doctrine, or any other applicable privilege or doctrine.” This general objection is one of twelve “Objections to ‘Definitions.’” listed at the beginning of the Philippine Defendants’ responses to Plaintiffs’ first set of interrogatories and document requests. The Philippine Defendants assert that this general objection was sufficient to comply with the mandate of *Evans* (quoting *Sharpe*) that, to be immediately appealable, an appellant must “ ‘assert[] a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial.’ ” 142 N.C. App. at 24, 541 S.E.2d at 786. We disagree.

Civil Procedure Rule 34, concerning production of documents, provides in pertinent part:

The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. . . .

There shall be sufficient space following each request in which the respondent may state the response. The respondent shall: (1) state the response in the space provided, using additional pages if necessary; or (2) restate the request to be followed by the response. An objection to a request *shall be made* by stating the objection and the reason therefor either in the space following the request or following the restated request.

N.C. Gen. Stat. § 1A-1, Rule 34(b) (2009) (emphasis added). We conclude that the blanket general objection provided by the Philippine Defendants based on “the attorney/client privilege, the work product doctrine, or any other applicable privilege or doctrine” does not comply with Rule 34 by “stating the objection and the reason therefor either in the space following the request or following the restated request.” Nor does the Philippine Defendants’ blanket general objection comply with the holding of *Sharpe* as quoted in *Evans* that appellants must make an “ ‘assertion of such privilege [that] is not otherwise frivolous or insubstantial.’ ” 142 N.C. App. at 24, 541 S.E.2d at 786. We hold that blanket general objections purporting to assert attorney-client privilege or work product immunity to all of the opposing parties’ discovery requests are inadequate to effect their intended purpose and do not establish a substantial right to an immediate appeal.

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We note that this holding, while a matter of first impression in our State, is in keeping with the decisions of the federal courts which have rejected general objections based on privilege, instead requiring that such objections “be made and established on a document-by-document basis.” *Culinary Foods, Inc. v. Raychem Corp.*, 150 F.R.D. 122, 126 (N.D. Ill. 1993) (citing *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991)); see also *Burlington Northern & Santa Fe Ry. Co. v. United States Dist. Court*, 408 F.3d 1142, 1149 (9th Cir. 2005) (“We hold that boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a privilege.”), *cert. denied*, 546 U.S. 939, 163 L. Ed. 2d 326 (2005); *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 541-42 (10th Cir. 1984) (holding that a blanket, non-specific attorney-client and work product privilege objection was insufficient and effected a waiver of the privilege), *cert. dismissed*, 469 U.S. 1199, 83 L. Ed. 2d 984 (1985); *Eureka Financial Corp. v. Hartford Acci. & Indem. Co.*, 136 F.R.D. 179, 182 (E.D. Cal. 1991) (“Whether a responding party states a general objection to an entire discovery document on the basis of privilege, or generally asserts a privilege objection within an individual discovery response, the resulting ‘blanket objection’ is decidedly improper.”); *Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12, 24 (D. Neb. 1985) (“A general objection of work product is insufficient under this definition where it does not designate which documents allegedly enjoyed that privilege.”).

Our holding is also in line with decisions of state courts which have reached the same conclusion. See e.g., *Loudoun County Asphalt, L.L.C. v. Wise Guys Contr., L.L.C.*, 79 Va. Cir. 605 (Cir. Ct. of Loudoun Cty. 2009) (rejecting the use of general objections); *Burton v. West*, 749 S.W.2d 505 (Tex. App. 1988) (disallowing “blanket” objections to all interrogatories); *Twaddell v. Twaddell*, 199 So. 2d 501 (Fla. Dist. Ct. App. 1967) (“A ‘blanket’ objection to interrogatories consisting of many, separate questions is insufficient.”).

B. Privilege Logs

The Philippine Defendants also contend that the privilege logs they submitted to Plaintiffs’ counsel beginning on 11 January 2010 with subsequent updates on 19 January and 29 April 2010 constituted a proper assertion of attorney-client privilege. Specifically, the Philippine Defendants cite, *inter alia*, *Burlington Northern & Santa Fe Ry. Co.* for the proposition that submission of “a privilege log is *sufficient* to properly assert the privilege[.]” 408 F.3d at 1148 (empha-

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sis in original) (citation omitted). However, because the Philippine Defendants did not assert or obtain a ruling on claims of attorney-client privilege or work product immunity in the trial court, we conclude this matter is not properly before us on appeal.

Rule of Appellate Procedure 10(b)(1) “provides in pertinent part that ‘[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent.’” *Evans*, 142 N.C. App. at 25, 541 S.E.2d at 787 (quoting *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991)). When an appellant has failed to comply with this requirement, “[t]his Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal.” *Eason*, 328 N.C. at 420, 402 S.E.2d at 814.

Here, the Philippine Defendants’ privilege logs were transmitted via United States mail and email between counsel for the parties, but not to the trial court. In the ordinary course of discovery, of course, an objecting party need not automatically file a privilege log with a trial court. If the party seeking the documents accepts the assertion of privilege, the trial court need have no involvement in the issue at all. However, if the parties cannot resolve discovery disputes on their own and a motion to compel is filed seeking to strike “any remaining objections and compel[] full responses” to requests for documents, the party wishing to assert the protection of a privilege must make the trial court aware of this point of contention. It is well established that “[t]he burden of establishing the attorney-client privilege rests upon the claimant of the privilege.” *Evans*, 142 N.C. App. at 32, 541 S.E.2d at 791. The claimant also bears the burden of establishing the applicability of work product immunity. *Id.* at 29, 541 S.E.2d at 789.

As discussed above, the Philippine Defendants’ general objection on grounds of attorney-client privilege and work product immunity was insufficient to raise either protection. We find the next mention of privilege in the record on appeal in the documents which are attached to the 30 April 2010 “Plaintiffs’ Motion to Compel Production of Documents from [the Philippine Defendants].” That mention is contained in a letter dated 9 January 2010, in which Plaintiffs’ counsel Christopher V. Goodpastor states that the Philippine Defendants have promised to submit a privilege log that Plaintiffs will then review to determine whether any privilege claims will be accepted. This letter does not indicate that any such claims

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have been accepted by Plaintiffs. The Philippine Defendants sent their first and admittedly incomplete privilege log to Plaintiffs on 11 January 2010. Counsel Goodpastor replied by letter dated 14 January 2010, noting that the privilege log provided did not contain sufficient information and Plaintiffs reserved the right to challenge the assertions of privilege. On 19 January 2010, counsel for the Philippine Defendants Bradley C. Friesen sent a new privilege log with additional information to Plaintiffs. By letter dated 13 April 2010, Goodpastor informed the Philippine Defendants that Plaintiffs needed still further information in order to evaluate any claims of privilege.¹ On 20 April 2010, counsel for the Philippine Defendants agreed to provide additional privilege log information, although no copy of any updated log was attached to Plaintiffs' motion.² Nothing in these attached documents or in the motion itself even suggests, much less shows, that Plaintiffs ever accepted the Philippine Defendants' assertion of privilege. Indeed, the motion to compel was very broad and sought to strike "any remaining objections and compel[] full responses" to Plaintiffs' requests for documents. (Emphasis added).

Despite the expansive nature of Plaintiffs' motion, the Philippine Defendants did not mention any privilege logs, submit the final, updated version of the log to the trial court, or request an *in camera* review of documents asserted to be privileged at the 17 May 2010 hearing on Plaintiffs' motion to compel. At that hearing, Plaintiffs' counsel focused much of his argument on whether the interlocutory appeal in *K2 I* served to stay further discovery and trial court proceedings pending an opinion from this Court. He then stated:

1. In their reply brief, the Philippine Defendants characterize this letter as a "meet and confer" letter, presumably referring to the requirements of N.C. Gen. Stat. § 1A-1, Rule 37(b), and assert that it "does not challenge any asserted privileges." However, the 13 April 2010 letter requests un-redacted copies of more than 30 specific documents or information regarding their status as privileged "so that we may evaluate your claim of privilege." The letter goes on to request legible copies of dozens of listed documents that appeared to have been superimposed on each other and complete copies of numerous incomplete documents. Nothing in the letter suggests that any privilege claims had been accepted by Plaintiffs.

2. The "final" updated version of the privilege log was apparently not submitted to the trial court until 21 June 2010 (after entry of the trial court's order to compel), when the Philippine Defendants attached it as an exhibit to their "Supplemental Response to Plaintiffs' Request for Production of Documents Pursuant to the June 15, 2010 Order on Plaintiffs' Motion to Compel Production from [the Philippine] Defendants." In their reply brief, the Philippine Defendants assert that a copy of an updated privilege log was submitted to the trial court at the hearing on the motion to compel. However, the hearing transcript reveals only that Friesen, counsel for the Philippine Defendants, tendered "part of our response to their, to Plaintiffs[]" April

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There were objections initially made regarding vagueness[,] over breadth [sic] and to some of the terms or definitions that we used to streamline the requests initially, but to their credit, counsel for [the Philippine] Defendants after, after several negotiations back and forth agreed to withdraw those objections based on some concessions we made. And so the same with the travel to North Carolina, those documents are requested by numbers, request numbers 8 through 10, 32, 33, 41 and 43. Again, vagueness[,] over breadth [sic] objections also withdrawn based upon negotiations between counsel.

The only objection that remains, and it only remains for request numbers 2 through 4, and number 43, is they claim somehow the documents we're seeking don't relate to the issues of personal jurisdiction, and for the reasons I've said before we believe they relate directly to the issues of personal jurisdiction. and for the reasons I've said before we believe they relate directly to the issues of personal jurisdiction.

(Emphasis added). In sum, according to Plaintiffs' counsel, the Philippine Defendants had withdrawn most of their objections, leaving only four remaining objections, each based on relevancy to the issue of personal jurisdiction, not privilege.

Counsel for the Philippine Defendants responded only briefly to Plaintiffs' counsel's remarks, first asserting a lack of personal jurisdiction as to the *K2 I* appellants and arguing that further proceedings were stayed pending the *K2 I* appeal. He went on to state that "it is our understanding that nothing has been withheld from production." Defense counsel did not dispute Plaintiffs' assertion that the Philippine Defendants had withdrawn all objections except those to request numbers 2 through 4, and number 43, nor did he mention privilege logs, attorney-client privilege, or work product doctrine. The privilege logs were not submitted for the trial court's review or consideration. In light of these facts, we conclude that the Philippine Defendants failed to assert claims of attorney-client privilege or work product immunity before the trial court. Having failed to "present[]

13th requests for additional documents." Nothing in the transcript or record suggests that this "response" was a privilege log. As discussed in the previous footnote, the 13 April letter from Plaintiffs' counsel made numerous requests for additional documents, legible copies of documents, and un-redacted versions of documents. Thus, we are unable to determine from the record before us whether the "response" which the Philippine Defendants provided to the trial court was an updated privilege log or some other requested document.

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the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought[.]” the Philippine Defendants have failed to preserve the question of the effect of their privilege logs for appellate review. *Evans*, 142 N.C. App. at 25, 541 S.E.2d at 787; N.C. R. App. P. 10(b)(1).

Further, we note that, even if the incomplete and still-evolving privilege logs addressed in the correspondence attached to *Plaintiffs’* motion could be construed as an adequate assertion of privilege by the Philippine Defendants, their failure even to utter the word “privilege” or to make some reference to that legal principle at the hearing constitutes a failure to establish the privilege. *See Evans*, 142 N.C. App. at 29, 32, 541 S.E.2d at 789, 791. On this issue, the Philippine Defendants argue in their reply brief that the trial court erred in failing to conduct an *in camera* review of the documents listed in the privilege logs, to wit, “[t]he best explanation for why the trial court did not [conduct an *in camera* review] is that Plaintiffs had not challenged the Philippine Defendants’ privilege assertions[.]” We conclude that an equally likely, if not more plausible, explanation is that the Philippine Defendants failed to (1) object to or take issue with Plaintiffs’ assertion during the hearing on the motion to compel that the Philippine Defendants had withdrawn most of their objections, (2) argue the issue of privilege, or (3) ask the trial court to conduct an *in camera* review of the documents listed in the privilege logs and determine whether such documents were protected by the attorney-client privilege or work product doctrine. The Philippine Defendants’ argument on appeal that they adequately asserted privilege protections to the disclosure of the documents at issue is overruled.

C. Burden of Establishing Privilege

The Philippine Defendants also contend that Plaintiffs’ motion to compel did not provide “fair notice” that Plaintiffs were contesting any claims of privilege because the motion did not specifically mention privilege. The Philippine Defendants also list various times at which Plaintiffs were “silent” regarding challenges to privilege assertions or failed to state an explicit challenge thereto. These arguments are unavailing because, as we have noted *supra*, *it was the Philippine Defendants who bore the burdens of asserting and then establishing the privilege*, *Evans*, 142 N.C. App. at 29, 32, 541 S.E.2d at 789, 791, burdens which they utterly failed to meet. A careful review of the record reveals that, before entry of the order to compel, the Philippine Defendants (1) never made specific objections or claims based on privilege in their responses to Plaintiffs’ discovery requests;

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(2) never alerted the trial court to the existence of the privilege logs or provided the court with copies thereof; and (3) never raised the issue of privilege at the hearing. In addition, Plaintiffs' motion to compel asked the trial court to strike or limit "any remaining objections and compel[] full responses" to Plaintiffs' requests. Simply put, the Philippine Defendants never made a proper assertion of privilege before the trial court, much less a showing to establish any privilege. Accordingly, we dismiss the appeal of the Philippine Defendants.

D. 19 April 2010 Order to Compel Depositions

We also note that the *K2 I* Defendants, a subset of the Philippine Defendants, ask this Court to address the trial court's 19 April 2010 order compelling depositions. However, as noted above, on 11 March 2011, this Court issued an opinion dismissing the *K2 I* Defendants' appeal from that order as interlocutory and not affecting a substantial right of the *K2 I* appellants. See *K2 Asia Ventures*, ___ N.C. App. at ___, 708 S.E.2d at 112. Those matters having been previously determined by this Court, we do not address them here.

IV. KKD Defendants' Appeal

[3] "[I]t is well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion." *Evans*, 142 N.C. App. at 27, 541 S.E.2d at 788. Under this standard, an appellant can only prevail "upon a showing that [the] actions 'are manifestly unsupported by reason' " and " 'so arbitrary that [they] could not have been the result of a reasoned decision.' " *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

The KKD Defendants argue that the trial court abused its discretion in overruling the KKD Defendants' objections to Plaintiffs' request 3. We disagree.

The KKD Defendants first contend that, having made a written and specific objection to request 3 on the basis of attorney-client privilege and work product immunity, these "objections required the trial court to make specific findings" about whether the immunity and privilege applied. However, "[f]indings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party" N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2009). Further,

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[i]t has been repeatedly held by our Supreme Court that, “[w]hen the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court on proper evidence found facts to support its judgment.” *Estrada v. Burnham*, 316 N.C. 318, 324, 341 S.E.2d 538, 542 (1986); *Sherwood v. Sherwood*, 29 N.C. App. 112, 113-14, 223 S.E.2d 509, 510-11 (1976). Thus, it is within the trial judge’s discretion whether to make findings of fact “if a party does not choose to compel a finding through the simple mechanism of so requesting.” *Watkins v. Hellings*, 321 N.C. 78, 82, 361 S.E.2d 568, 571 (1987).

Evans, 142 N.C. App. at 27, 541 S.E.2d at 788. The KKD Defendants do not contend that they made any such request of the trial court, and thus, the trial court was not required to find facts or enter conclusions in support of its ruling.

The KKD Defendants next contend that “Plaintiffs never challenged [the KKD Defendants’] objections.” The KKD Defendants assert that Plaintiffs’ motion to compel did not specifically mention attorney-client privilege or work product immunity and that the parties never discussed these issues before the trial court’s hearing on the motion to compel. We again note, however, that Plaintiffs’ motion asked the trial court to strike or limit “*any remaining objections* and compel[] full responses” to Plaintiffs’ requests. (Emphasis added.) Nonetheless, the KKD Defendants argue further that, because Plaintiffs did not specifically mention attorney-client privilege or work product immunity, the KKD Defendants did not present oral arguments on this issue, offer any evidence in support of their privilege and immunity claims, or submit any of the requested documents for *in camera* review.

As noted *supra*, the claimant bears the burdens of establishing both attorney-client privilege and the applicability of the work product doctrine. *Evans*, 142 N.C. App. at 29, 32, 541 S.E.2d at 789, 791. Here, the KKD Defendants acknowledge that they presented no proof and made no argument on either matter to the trial court. We believe that a trial court can hardly be said to have abused its discretion in ordering production of documents where the party bearing the burden to establish the validity of its objections failed to offer any evidence whatsoever in support of its claims. These arguments are overruled.

The order of the trial court requiring production of the documents covered by Plaintiffs’ request 3 is affirmed.

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Affirmed in part; dismissed in part.

Judges HUNTER, ROBERT C., and ERVIN concur.

JOSEPH CARSANARO, PLAINTIFF v. JOHN TREVOR COLVIN, DEFENDANT

No. COA11-43

(Filed 6 September 2011)

1. Appeal and Error—interlocutory orders and appeals—substantial right—claims connected and intertwined

Plaintiff's appeal from a portion of the trial court's order dismissing his claim for negligent infliction of a sexually transmitted disease affected a substantial right and was thus entitled to immediate review. Each of plaintiff's causes of action was based upon injuries suffered as a result of the same underlying conduct, which was defendant's sexual affair with plaintiff's wife. The claims were connected and intertwined to such a degree that they should have been determined by a single jury.

2. Appeal and Error—interlocutory orders and appeals—denial of motion to dismiss

Defendant's cross-appeal from an interlocutory order denying defendant's motion to dismiss plaintiff's remaining claims was dismissed. Denial of a motion to dismiss for failure to state a claim is not a final determination within the meaning of N.C.G.S. § 1-277(a) and does not affect a substantial right.

3. Sexual Offenses—negligent infliction of sexually transmitted disease—motion to dismiss—sufficiency of evidence

The trial court erred by dismissing plaintiff's claim for negligent infliction of a sexually transmitted disease (NISTD) against defendant who had a sexual affair with plaintiff's wife. The duty owed by an individual who knows or has reason to know that he has contracted a sexually transmitted disease is to warn those persons with whom he expects to have sexual relations of his condition. This duty also extends to the spouse of the infected person's sexual partners if the spouse is known or should have been known to the infected person at the time of the sexual intercourse. Further, plaintiff's attempt to

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recover damages for criminal conversation did not foreclose recovery for NISTD.

Appeal by plaintiff and cross-appeal by defendant from order entered 7 October 2010, *nunc pro tunc* 7 September 2010, by Judge Carl R. Fox in Orange County Superior Court. Heard in the Court of Appeals 26 May 2011.

Bagwell Holt Smith Jones & Crowson, P.A., by Nathaniel C. Smith and John G. Miskey, IV, for plaintiff-appellant/cross-appellee.

Gailor, Wallis & Hunt, P.L.L.C., by S. Nicole Taylor and Stephanie T. Jenkins, for defendant-appellee/cross-appellant.

CALABRIA, Judge.

Joseph Carsanaro (“plaintiff”) appeals from the portion of the trial court’s order dismissing his claim against John Trevor Colvin (“defendant”) for negligent infliction of a sexually transmitted disease (“NISTD”). Defendant cross-appeals from the portion of the trial court’s order denying his motion to dismiss plaintiff’s claims for criminal conversation, intentional infliction of emotional distress (“IIED”), and negligent infliction of emotional distress (“NIED”). We reverse the trial court’s dismissal of plaintiff’s NISTD claim and dismiss defendant’s cross-appeal.

I. Background

According to the allegations in plaintiff’s complaint, plaintiff and Jacqueline Carsanaro (“Mrs. Carsanaro”) married in August 1989. Beginning in January 2009, defendant engaged in clandestine email communications with Mrs. Carsanaro in which defendant professed his longstanding attraction to her. On 1 February 2009, plaintiff discovered some of these emails.

On 4 February 2009, plaintiff sent defendant an email informing defendant that he had discovered the emails between defendant and Mrs. Carsanaro and asking defendant to stay away from his family. Defendant responded to the email and promised to stay away. However, in early April 2009, defendant and Mrs. Carsanaro engaged in sexual intercourse. This sexual relationship continued through September 2009.

In May 2009, plaintiff felt flu-like symptoms and discovered a sore area on his penis. Plaintiff sought a medical evaluation and it was determined that he had contracted genital herpes. In September 2009, plaintiff confronted Mrs. Carsanaro about her relationship with defend-

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ant. Mrs. Carsanaro admitted that she had engaged in a sexual relationship with defendant and stated that she believed she had contracted genital herpes from defendant.

On 14 June 2010, plaintiff initiated an action against defendant in Orange County Superior Court. Plaintiff's complaint included claims for criminal conversation, NISTD, IIED, and NIED. On 28 July 2010 and 18 August 2010, defendant filed motions to dismiss all of plaintiff's claims for failure to state a claim upon which relief may be granted. On 7 October 2010, the trial court granted defendant's motion to dismiss plaintiff's claim for NISTD and denied defendant's motion for the remaining claims. Plaintiff appeals and defendant cross-appeals.

II. Interlocutory Appeals

[1] As an initial matter, we note that the trial court's order is interlocutory, as it does not dispose of all of plaintiff's claims.

An appeal from an interlocutory order is permissible only if [(1)] the trial court certified the order under Rule 54(b) of the Rules of Civil Procedure, or (2) the order affects a substantial right that would be lost without immediate review. The burden rests on the appellant to establish the basis for an interlocutory appeal.

Chidnese v. Chidnese, ___ N.C. App. ___, ___, 708 S.E.2d 725, 730 (2011) (citation omitted). The trial court's order does not include a Rule 54(b) certification, and thus, the instant case is only properly before us if it affects a substantial right. Both parties contend that the trial court's order affects a substantial right, but "acquiescence of the parties does not confer subject matter jurisdiction on a court." *McCutchen v. McCutchen*, 360 N.C. 280, 282, 624 S.E.2d 620, 623 (2006).

A. Plaintiff's Appeal

This Court has stated that "[a] substantial right . . . is considered affected if 'there are overlapping factual issues between the claim determined and any claims which have not yet been determined' because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues." *Liggett Group v. Sunas*, 113 N.C. App. 19, 24, 437 S.E.2d 674, 677 (1993) (quoting *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 26, 376 S.E.2d 488, 492 (1989)). In *McCutchen*, our Supreme Court addressed the merits of an interlocutory appeal when the trial court had granted summary judgment on the plaintiff's claim for alienation of affections, but left the plaintiff's claim for criminal conversation unresolved. 360 N.C. at 282, 624 S.E.2d at 623. The *McCutchen* Court rea-

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soned that “[b]ecause the two causes of action and the elements of damages here are so connected and intertwined, only one issue of . . . damages should [be] submitted to the jury.” *Id.* As a result, the Court ultimately determined that “[i]n light of this legal interdependence, the same jury should determine damages for both claims” and held that “the interlocutory order granting summary judgment on plaintiff’s alienation claim is subject to appeal.” *Id.* at 283, 624 S.E.2d at 623.

In the instant case, each of plaintiff’s causes of action is based upon injuries suffered as a result of the same underlying conduct: defendant’s sexual affair with plaintiff’s wife. Since the basis of the claims is the same conduct, the claims necessarily involve overlapping factual issues. Moreover, similar to *McCutchen*, plaintiff’s damages resulting from his various causes of action are connected and intertwined to such a degree that they should be determined by a single jury. Thus, plaintiff’s appeal affects a substantial right and is properly before this Court.

B. Defendant’s Cross-Appeal

[2] While plaintiff has appealed from the portion of the trial court’s order *granting* defendant’s motion to dismiss his claim for NISTD, defendant has appealed from the trial court’s order *denying* his motion to dismiss plaintiff’s remaining claims.

Denial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of defendants that cannot be corrected upon appeal from final judgment. Denial of a motion to dismiss for failure to state a claim upon which relief can be granted is not a final determination within the meaning of G.S. 1-277(a), does not affect a substantial right, and is not appealable.

Baker v. Lanier Marine Liquidators, Inc., 187 N.C. App. 711, 717, 654 S.E.2d 41, 46 (2007) (internal quotations and citations omitted). Accordingly, we dismiss defendant’s cross-appeal.

III. Standard of Review

This Court reviews an order granting a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2009) to determine “whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true.” *Chidnese*, ___ N.C. App. at ___, 708 S.E.2d at 730. “Our review of a trial court’s ruling with respect to a motion to dismiss made pursuant

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to N.C.G.S. § 1A-1, Rule 12(b)(6) is *de novo*.” *Quesinberry v. Quesinberry*, ___ N.C. App. ___, ___, 709 S.E.2d 367, 375 (2011).

IV. Negligent Infliction of a Sexually Transmitted Disease

[3] Plaintiff argues that the trial court erred by dismissing his claim for NISTD. We agree.

Our Supreme Court has stated that “it is a well settled proposition of law that a person is liable if he negligently exposes another to a contagious or infectious disease[.]” *Crowell v. Crowell*, 180 N.C. 516, 519, 105 S.E. 206, 208 (1920). In *Crowell*, our Supreme Court allowed a married woman to maintain a cause of action against her husband for infecting her with venereal disease. *Id.* at 518, 105 S.E. at 207.

In the instant case, plaintiff is not suing Mrs. Carsanaro, the source of plaintiff’s infection, for exposing him to genital herpes. Instead, he is suing defendant, who infected Mrs. Carsanaro. Our Courts have never addressed the scope of liability to third parties for the negligent exposure of a contagious or infectious disease. Nonetheless, “[t]he fact that a case is novel does not operate to defeat a recovery if it can be brought within the general rules applicable to torts.” *Id.* at 521, 105 S.E. at 209. In the instant case, in order to establish his claim for NISTD, plaintiff must establish the traditional elements of a negligence claim.

To state a claim for common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach. The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence. The duty of ordinary care is no more than a duty to act reasonably. The duty does not require perfect prescience, but instead extends only to causes of injury that were reasonably foreseeable and avoidable through the exercise of due care. Thus, [i]t is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might have been expected. Usually the question of foreseeability is one for the jury.

Fussell v. N.C. Farm Bureau Mut. Ins. Co., 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010) (internal quotations and citations omitted).

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A. Defendant's Duty to Plaintiff and Proximate Cause

The first issue to be determined is whether, treating the facts of plaintiff's complaint as true, defendant owed a legal duty to plaintiff. "When there is no dispute as to the facts or when only a single inference can be drawn from the evidence, the issue of whether a duty exists is a question of law for the court." *Mozingo v. Pitt County Memorial Hospital*, 101 N.C. App. 578, 588, 400 S.E.2d 747, 753 (1991). In order to determine whether defendant owed a duty to plaintiff, we must first articulate the duty that is owed to others by an individual infected with a sexually transmitted disease.

Although our Supreme Court recognized the tort of negligent exposure of a contagious or infectious disease in *Crowell*, it did not specifically address the duty owed by an individual infected with such a disease. However, several other states which have also recognized this tort had explicitly defined this duty, particularly in the context of a sexually transmitted disease. A typical formulation of the duty is as follows: "[A] person who knows, or should know, that he or she is infected with a venereal disease has the duty to abstain from sexual conduct or, at the minimum, to warn those persons with whom he or she expects to have sexual relations of his or her condition." *Mussivand v. David*, 544 N.E.2d 265, 270 (Ohio 1989); see also *Berner v. Caldwell*, 543 So. 2d 686, 689 (Ala. 1989), *overruled on other grounds by Ex Parte General Motors Corp.*, 799 So. 2d 903 (Ala. 1999); *Meany v. Meany*, 639 So. 2d 229, 235 (La. 1994); *McPherson v. McPherson*, 712 A.2d 1043, 1046 (Me. 1998); *M.M.D. v. B.L.G.*, 467 N.W.2d 645, 647 (Minn. Ct. App. 1991); *Lockhart v. Loosen*, 943 P.2d 1074, 1080 (Okla. 1997); *Hamblen v. Davidson*, 50 S.W.3d 433, 439 (Tenn. Ct. App. 2000); *Howell v. Spokane & Inland Empire Blood Bk.*, 818 P.2d 1056, 1059 (Wash. 1991). We find this articulation of the duty owed by a defendant infected with a sexually transmitted disease to be sensible and adopt it to describe the duty of defendant in the instant case.

Having defined defendant's duty pursuant to the tort of negligent exposure of a contagious or infectious disease, we must now determine whether this duty would be owed to plaintiff. While this issue is one of first impression in North Carolina, other states which have also recognized the tort have had the opportunity to consider it. In *Mussivand*, the plaintiff was infected with venereal disease by his wife after she had engaged in a sexual affair with the defendant. 544 N.E.2d at 266-67. The Supreme Court of Ohio considered the question of "what duty, if any, does a person infected with a venereal disease owe to the spouse of his paramour." *Id.* at 270. The *Mussivand* Court reasoned

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that the question of how this duty applied to a third party depended upon “the foreseeability of the injury to [the plaintiff].” *Id.* at 272.

An inherent component of any ordinary negligence claim is *reasonable foreseeability of injury*, which has been discussed by our courts both in terms of the duty owed and of proximate cause. In order to plead this element properly, a plaintiff must set out allegations showing that a man of ordinary prudence would have known that [plaintiff’s injury] or some similar injurious result was *reasonably foreseeable* However, foreseeability requires only reasonable prevision. A defendant is not required to foresee events which are merely possible but only those which are reasonably foreseeable.

Winters v. Lee, 115 N.C. App. 692, 694, 446 S.E.2d 123, 124 (1994) (internal quotations and citations omitted). Applying foreseeability principles to the facts before it, the *Mussivand* Court concluded that

[i]f one negligently exposes a married person to a sexually transmissible disease without informing that person of his exposure, it is reasonable to anticipate that the disease may be transmitted to the married person’s spouse. Hence liability to a third party for failure to disclose to the original sexual partner turns on whether, under all the circumstances, injury to the third-party spouse was foreseeable.

544 N.E.2d at 272. The *Mussivand* Court ultimately determined that the plaintiff had a valid claim against the defendant. *Id.* at 273.

In *Lockhart*, the Oklahoma Supreme Court was faced with a similar factual scenario in which the plaintiff had been infected with herpes after her spouse had engaged in sexual intercourse with the defendant. The *Lockhart* Court addressed the issue of the defendant’s duty to the plaintiff as follows:

While normally [the defendant] would owe no duty of care to the wife, a third party, every person is under a duty to exercise due care in using that which he/she controls so as not to injure another. If [the defendant] knew or should reasonably have known that she had herpes and copulated with [the plaintiff’s husband] during a period when she was infectious, under common-law principles she had a duty to warn him of her contagion. Further, if [the defendant] knew that [the plaintiff’s husband] was copulating with another person and could identify that person [whether that person was married to [the plaintiff] or not], it

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would be reasonably foreseeable to [the defendant] that silence about her infectious state—*i.e.*, a breach of the duty of care owed to her sexual partner—could result in the transmittal of herpes to that third person. Under this hypothetical factual scenario, the trial court could determine that it was reasonably foreseeable to [the defendant] that a natural and probable consequence of her silence would be the transmittal of this highly contagious disease to this plaintiff.

943 P.2d at 1080 (footnotes omitted). Based upon this reasoning, the *Lockhart* Court also determined that the plaintiff had a valid claim against the defendant. *Id.*

We find the reasoning of *Mussivand* and *Lockhart* persuasive and hold that the duty owed by a defendant who knows or has reason to know that he or she has contracted a sexually transmitted disease “to warn those persons with whom he or she expects to have sexual relations of his or her condition,” *Mussivand*, 544 N.E.2d at 270, also extends to the spouse of the infected person’s sexual partners, if the spouse is known or should have been known to the infected person at the time of the sexual intercourse. This is because a spouse is a reasonably foreseeable sexual partner. However, we expressly decline to address the scope of this duty as it may relate to non-spouses. While the *Lockhart* Court found the duty to third-party spouses also extended to any known third party with whom the infected person’s sexual partner was having sexual intercourse, we find it unnecessary to address such a scenario when it is not required by the facts before us.

In the instant case, plaintiff’s complaint alleges that defendant knew or should have known that he was infected with herpes, that he infected Mrs. Carsanaro with herpes, that defendant was aware that plaintiff and Mrs. Carsanaro were married, and that defendant knew or should have known that plaintiff and his wife would engage in sexual intercourse. Thus, the allegations in plaintiff’s complaint, when treated as true, sufficiently alleged that defendant owed a duty to plaintiff.

B. Intervening Cause

Defendant contends that since plaintiff was actually infected with herpes by Mrs. Carsanaro, it was she, and not defendant, who was the proximate cause of plaintiff’s injury. “An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original

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action and rendering its effect in the causation remote.” *Barber v. Constien*, 130 N.C. App. 380, 383, 502 S.E.2d 912, 914-15 (1998) (citation omitted).

Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause. . . .

Powers v. Sternberg, 213 N.C. 41, 44, 195 S.E. 88, 90 (1938).

In the instant case, Mrs. Carsanaro would only become an intervening cause of plaintiff’s herpes infection if she knew or had reason to know that she herself was infected with herpes when she engaged in sexual intercourse with plaintiff. In that scenario, Mrs. Carsanaro would have “become aware of the existence of a potential danger created by the negligence of an original tort-feasor” and transformed defendant’s negligence into a condition of plaintiff’s infection, rather than its proximate cause. *Id.*; see also *Mussivand*, 544 N.E.2d at 272-73; *Lockhart*, 943 P.2d at 1080-81. Plaintiff’s complaint is silent as to when Mrs. Carsanaro discovered that defendant had infected her with herpes; therefore, dismissal on this basis pursuant to Rule 12(b)(6) is not appropriate. See *Fussell*, 364 N.C. at 227, 695 S.E.2d at 441 (“A trial court should not grant a motion to dismiss unless it is certain that the plaintiff could prove no set of facts that would entitle him or her to relief.”).

C. Criminal Conversation

Defendant additionally argues that plaintiff’s recovery, if any, should only be pursuant to his criminal conversation claim. While this Court has stated that a jury may consider “injury to health” as part of the damages resulting from a criminal conversation claim, *Hutelmyer v. Cox*, 133 N.C. App. 364, 373, 514 S.E.2d 554, 561 (1999), our Courts have never specifically determined whether the transmission of a sexually transmitted disease would be part of the “injury to health” damages of this tort. Nonetheless, even assuming, *arguendo*, that plaintiff may recover damages for contracting herpes pursuant to his criminal conversation claim, this does not foreclose plaintiff from attempting to recover pursuant to his claim for NISTD for the same conduct. Our Supreme Court has recognized two distinct claims: criminal conversation and negligent exposure of a contagious or infectious disease. “Whether plaintiff may recover on any or all of these claims depends

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on the extent to which the elements of any or all of them may be proved.” *Holloway v. Wachovia Bank And Trust Co.*, 339 N.C. 338, 352, 452 S.E.2d 233, 241 (1994) (allowing the plaintiffs to seek recovery for assault and battery claims and an IIED claim which arose out of the same conduct). However, we note that these two causes of actions are similar to criminal conversation and alienation of affections in that “the two causes of action and the elements of damages here are so connected and intertwined” that “the same jury should determine damages for both claims.” *McCutchen*, 360 N.C. at 282-83, 624 S.E.2d at 623.

Contrary to defendant’s assertions, our holding today does not create a new cause of action; rather, it determines that, pursuant to traditional negligence principles, the allegations in plaintiff’s complaint meet the requirements for pursuing a claim for negligent exposure of a contagious or infectious disease that was recognized by our Supreme Court in *Crowell*. As a result, we must reverse the trial court’s order dismissing plaintiff’s NISTD claim.

V. Conclusion

“[A] person who knows, or should know, that he or she is infected with a venereal disease has the duty to abstain from sexual conduct or, at the minimum, to warn those persons with whom he or she expects to have sexual relations of his or her condition.” *Mussivand*, 544 N.E.2d at 270. Since a spouse is a foreseeable sexual partner, this duty is also owed to the spouse of any of the infected person’s sexual partners, if the spouse is known or should have been known to the infected person at the time of the sexual intercourse. Moreover, the infected person can be liable in tort for breaching this duty.

However, if the adulterous spouse knows or should know that he or she has been infected with a sexually transmitted disease prior to their transmission of the disease, the adulterous spouse becomes the intervening cause of their spouse’s infection and transforms the infected person’s negligence into a condition of the infection, rather than its proximate cause.

In the instant case, plaintiff’s complaint, when treated as true, contains sufficient allegations to establish a claim for NISTD. Consequently, the trial court’s order dismissing this claim is reversed.

Defendant’s cross-appeal is interlocutory and does not affect a substantial right. Therefore, defendant’s cross-appeal is dismissed.

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Reversed; cross-appeal dismissed.

Judges ELMORE and STEELMAN concur.

UNITRIN AUTO AND HOME INSURANCE COMPANY, PLAINTIFF v. ELRITA ANN
McNEILL, INTEGON NATIONAL INSURANCE COMPANY, AND PENNSYLVANIA
NATIONAL MUTUAL INSURANCE COMPANY, DEFENDANT

No. COA10-1192

(Filed 6 September 2011)

**Insurance—automobile—uninsured motorist coverage—
opportunity to reject or select coverage amounts**

The trial court erred by granting summary judgment in favor of defendant Penn National and by ordering that defendant McNeill was only entitled to \$100,000.00 in uninsured motorist coverage (UIM) as opposed to the \$1,000,000.00 that is the upper limit of N.C.G.S. § 20-279.21(b)(4). There were genuine issues of material fact as to whether one of the policy holders was given the opportunity to reject or select differing coverage amounts of UIM.

Appeal by Elrita Ann McNeill from an order for summary judgment entered 10 May 2010 by Judge W. Russell Duke, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 11 April 2011.

Willardson Lipscomb & Miller, LLP, by William F. Lipscomb and David A Jolly, for defendant-appellant Elrita Ann McNeill.

Pinto Coates Kyre & Brown, PLLC, by Deborah J. Bowers and David G. Harris, II, for defendant-appellee Pennsylvania Mutual Insurance Company.

Roberta B. King, for defendant-appellee, Integon National Insurance Company.

ELMORE, Judge.

Defendant Elrita Ann McNeill (defendant McNeill) appeals from an order of summary judgment for defendant, Pennsylvania National Mutual Casualty Insurance Company (defendant Penn National), ordering that defendant McNeill was entitled to only \$100,000.00 in uninsured motorist coverage (UIM) as opposed to the \$1,000,000.00

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that is the upper limit of N.C. Gen. Stat. § 20-279.21(b)(4). As we have concluded that there are genuine issues of material fact as to whether one of the policy holders was given the opportunity to reject or select differing coverage amounts of UIM, we reverse the decision of the trial court.

I. Background

On 7 January 2008, defendant McNeill, driving a 1993 Ford, was injured in an accident with another driver on U.S. Highway 221, near West Jefferson. Defendant McNeill sustained substantial injuries. State Farm Mutual Automobile Insurance Company, the insurer for the other driver involved in the accident, tendered its liability limit of \$30,000.00 per person on 2 February 2008 and defendant McNeill subsequently filed a claim for UIM with defendant Penn National under a policy issued to her husband, Mr. McNeill, on 27 February 2007. On 19 February 2009, plaintiff, Unitrin Auto and Home Insurance Company, filed a complaint for declaratory judgment in Forsyth County Superior Court seeking determination of the extent to which the insurance policy it had issued provided UIM to defendant McNeill, and the extent to which the other named defendants had issued auto insurance policies which imposed obligations upon them in relation to defendant McNeill and the auto accident which occurred on 7 January 2008. Defendant Penn National answered the complaint and admitted that it may have issued a policy that was applicable to the accident giving rise to this controversy consistent with the terms and conditions of its policy, which provided for UIM with a limit of \$100,000.00 per person and \$300,000.00 per accident. On 4 January 2010, defendant Penn National filed a motion for summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure asserting that it was entitled to judgment as a matter of law that “to the extent its policy provides any UIM or other coverage for defendant McNeill, the maximum UIM coverage provided is equal to the highest limits of bodily injury liability coverage available for any one vehicle under the Penn National policy issued to Benny McNeill”. In support of its motion, defendant Penn National submitted the following documents: 1) the affidavit of Roger Richardson, an insurance agent at the Miller Agency in West Jefferson who issued the policy in question; 2) the deposition of Roger Richardson; and 3) the deposition of Mr. McNeill. Defendant Penn National also submitted the pleadings in the case and all interrogatories and documents on file. In response, defendant McNeill moved to amend her counterclaim for declaratory judg-

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ment to allege that the selection/rejection form submitted by defendant Penn National had not been signed by Mr. McNeill and that he had not been given an opportunity to select or reject UIM. Defendant McNeill submitted an affidavit of Mr. McNeill as well as the affidavit, curriculum vitae, and two expert reports of Haywood Starling, a certified questioned document examiner. On 10 May 2010, the trial court issued an order granting defendant Penn National's motion for summary judgment and finding that defendant McNeill was entitled to UIM in the amount of the highest limits of bodily injury liability coverage under the Penn National policy, \$100,000.00 per person and \$300,000.00 per accident. It is from this order that defendant McNeill appeals. Further relevant facts are developed below.

II. Discussion

“Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quotations and citation omitted). “The evidence must be viewed in the light most favorable to the non-moving party.” *Wiley v. United Parcel Service, Inc.*, 164 N.C. App. 183, 186, 594 S.E.2d 809, 811 (2004) (citation omitted). A two-part analysis is required, first, to determine whether “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, second, whether “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) (quotations and citation omitted), *aff'd per curiam*, 353 N.C. 445, 545 S.E.2d 210-11 (2001). “[A]n issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail.” *McNair v. Boyette*, 282 N.C. 230, 235, 192 S.E.2d 457, 460 (1972). “The party moving for summary judgment ultimately has the burden of establishing the lack of any issue of triable fact.” *Edwards v. GE Lighting Sys. Inc.*, 200 N.C. App. 754, 757, 685 S.E.2d 146, 148 (2009) (citing *Spaulding v. Honeywell Int'l, Inc.*, 184 N.C. App. 317, 320, 646 S.E.2d 645, 648 (2007) (citation omitted)). “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.” *Id.*

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N.C. Gen. Stat. § 20-279.21(b)(4), governing the requirements for UIM in North Carolina, provided at the time of the issuing of the defendant Penn National policy in 2007 and at all times relevant to this action, that the amount of UIM coverage in any insurance policy was “not to be less than the financial responsibility limits for bodily injury liability as set forth in G.S. 20-279.5 nor greater than one million dollars (\$1,000,000.00) as selected by the policy owner.” N.C. Gen. Stat. § 20-279.21(b)(4) (2007). The statute continues in relevant part:

The coverage required under this subdivision is not applicable where any insured named in the policy rejects the coverage. An insured named in the policy may select different coverage limits as provided in this subdivision. ***If the named insured in the policy does not reject uninsured motorist coverage and does not select different coverage limits, the amount of uninsured motorist coverage shall be equal to the highest limit of bodily injury and property damage liability coverage for any one vehicle in the policy.*** Once the option to reject the uninsured motorist coverage or to select different coverage limits is offered by the insurer, the insurer is not required to offer the option in any renewal, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy unless the named insured makes a written request to exercise a different option. ***The selection or rejection of uninsured motorist coverage or the failure to select or reject by a named insured is valid and binding on all insureds and vehicles under the policy.*** Rejection of or selection of different coverage limits for uninsured motorist coverage for policies under the jurisdiction of the North Carolina Rate Bureau ***shall be made in writing by a named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance.***

Id. (emphasis added).

This Court has held that where there has been

a total failure to provide the insured with an opportunity to reject UIM coverage or select different UIM policy limits [this] violates the requirement that these choices be made by the policy owner. Such a failure should not invoke the minimum UIM coverage limits established in N.C.G.S. § 20-279.21(b)(4) and shield the insurer from additional liability.

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Williams v. Nationwide Mut'l Ins. Co., 174 N.C. App. 601, 605-06, 621 S.E.2d 644, 647 (2005). “[T]he relevant inquiry in determining whether *Williams* applies is whether defendants were given the opportunity to reject or select different UIM coverage limits.” *Nationwide Mutual Insurance Company v. Burgdoff*, ___ N.C. App. ___, ___, 698 S.E.2d 500, 503 (2010) (quotations and citation omitted).

The central factual question in this case is whether Mr. McNeill, husband of defendant McNeill, under whose policy plaintiff claims UIM, received proper instruction regarding UIM by defendant Penn National’s agent at the time of his signing up for his policy despite his name and purported signature appearing on a UIM rejection form presented by defendant Penn National. The central legal question is whether this Court’s previous holding in *Williams* applies in this case and also whether defendant Penn National’s production of the testimony of its agent was sufficient to entitle Penn National to judgment as a matter of law.

Defendant McNeill asserts that our decision in *Williams* applies, and that because Mr. McNeill was not provided with an opportunity to select or reject UIM coverage, the coverage limits imposed by N.C. Gen. Stat. § 20-279.21 (b)(4) do not apply. In *Williams*, this Court considered a situation in which it was stipulated that the plaintiffs in that case were not offered an opportunity to accept or reject UIM limits that were greater than the policy’s liability limits. *Williams*, 174 N.C. App. at 603, 621 S.E.2d at 645. Given that situation, this Court ruled that, in order to effectuate the purposes of the statute in protecting innocent victims of automobile accidents from financially irresponsible motorists, it was appropriate to disregard the limitations of liability imposed by N.C. Gen. Stat. § 20-279.21(b)(4) and mandate coverage to the statutory maximum of \$1,000,000.00. *Williams*, 174 N.C. App. at 605-06, 621 S.E.2d at 647.

Likewise, in *Burdoff*, following the holding of *Williams*, we considered the question of whether the coverage limits of N.C. Gen. Stat. § 20-279.21(b)(4) should apply where the policy holders never completed a UIM selection/rejection form and where the plaintiff had provided testimony that she had not talked to the defendant’s agents about UIM coverage. *Nationwide Mut. Ins. Co. v. Burgdoff*, ___ N.C. App. ___, ___, 698 S.E.2d 500, 503-04 (2010). In that case, we concluded that a genuine issue of material fact did exist as to whether the plaintiffs were offered an opportunity to accept or reject UIM coverage. *Id.* Indeed, we observed, “[w]hether or not [the] defendants were

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provided the opportunity to reject or select different UIM coverage limits is a factual determination that is generally best resolved by a jury.” *Id.* at S.E.2d at 503.

The following evidence was presented in relation to the summary judgment motion presented in this case. Defendant Penn National presented a UIM rejection form with the purported signature of Mr. McNeill. Defendant Penn National also presented the affidavit and deposition of its agent, Roger Richardson, who averred in his affidavit:

6. On February 24, 2007, I specifically recall that Benny McNeill came to the Miller Insurance Agency office; and that I went over the insurance paperwork with Mr. McNeill for the Penn National policy. I specifically recall going over the selection/rejection form for uninsured/underinsured motorists coverage, because the amount of the premium was dependent upon his selection of coverage.

7. Having been an insurance agent for almost thirty-seven [*sic*] with The Miller Insurance Agency, and licensed as a Penn National agent for thirty-four years, it is my customary practice and procedure to obtain all required signatures by policyholders for whom The Miller Insurance Agency obtains insurance coverage. It is my practice to sign documents only after the customer has signed. The procedures I used in connection with obtaining coverage for Benny T. McNeill’s owned autos were no different than my normal and customary procedures that I have used throughout my career as a licensed insurance agent. I have examined the selection/rejection form attached to Mr. McNeill’s policy, and I recognize my signature on that document.

Defendant Penn National also offered the deposition testimony of Mr. McNeill. At his deposition (and after having denied any memory of having the selection/rejection form explained to him) Mr. McNeill gave the following testimony regarding whether he had signed the UIM selection/rejection form relating to the Penn National policy and whether anyone at Miller Insurance agency had discussed the choice of UIM and specifically his purported designation on the UIM selection/rejection form with him:

Q. Does Number 10 also appear to contain your signature?

A. It says Benny T. McNeill on it.

Q. Is that your signature?

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A. It don't—sure don't look like that one.

Q. Well, I didn't ask what it looked like. I asked if it's your signature.

A. And I said it looks like Benny T. McNeill.

Q. Okay, the answer—

A. —And—and I—it doesn't look like my signa—it doesn't look like my signature.

...

A. I'm just saying it doesn't look like my signature.

Q. Who would have—have any idea who would have signed that with your name if it wasn't you?

A. No, I don't. No, I don't.

...

Q. Can you testify sitting here today as you are, under oath, that the signature on Number 10 is absolutely not your signature?

A. Well, it says Benny T. McNeill. That's the only thing I know.

Q. Okay. Have you ever signed your signature that looked—to look like that?

A. It just don't look like my signature.

Q. Okay. Well, let's back up just a little bit. People don't sign their name exactly the same way every time, and my question is could that be your signature or is that just so different that it just couldn't be your signature?

A. It could be my signature.

Q. It could be.

A. Yeah.

Q. Do you have any recollection of that document?

A. No I don't.

Q. All right. If someone at the Miller Agency were to say that the document was—that you were there, that that document

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was shown to you, explained to you, and signed, would there be any reason that you would not believe that?

A. No.

Following that deposition, defendant McNeill produced an affidavit from Mr. McNeill which made the following relevant assertions:

I understand that the paper attached hereto as Exhibit 1 has been identified in this case as a selection/rejection form regarding my Penn National policy. I did not sign this paper and did not authorize anyone at Miller Insurance Agency to sign it for me. The signature on this paper, which says “Benny T. McNeill,” is not my signature.

A poor quality fax copy of this paper was shown to me during my deposition on June 9, 2009. In response to repeated questions by counsel for Unitrin, I stated at least four (4) times during my deposition that my signature on this paper does not look like my signature. I understand that when counsel for Unitrin asked me (page 39) if someone at the Miller Agency said that this document was shown to me, explained to me and signed, would there be any reason I would not believe that, and that I responded “no”. Since my deposition was taken, I looked at this signature further and have also looked at the attached Exhibit 1, which is a better copy of this paper. I am now certain I did not sign this selection/rejection form [*sic*] and if anyone at the Miller Agency says I signed it, they are mistaken.

In addition to the preceding, defendant McNeill presented evidence in the form of an expert report by Haywood Starling, a forensic document examiner, who determined, based upon his examination of the questioned signature, that:

IT IS MY OPINION TO A REASONABLE DEGREE OF CERTAINTY THAT BENNY T. McNEILL, AS REPESENTED BY THE K-1 KNOWN SIGNATURES IS NOT IDENTIFIABLE AS THE AUTHOR OF THE Q-2 QUESTIONED SIGNATURE.

The dissimilarities noted include repetitive letter form dissimilarities and line quality.

The line quality in the Q-2 signatures bears evidence of a slowly drawn writing with evidence of hesitation and restraint while the line quality in each of the K-1 known signatures reveal lines that are free and flowing without evidence of hesitation or restraint.

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From these findings, Haywood Starling testified by affidavit that he “concluded that Benny T. McNeill was not the author of the questioned signature dated 2/24/2007 on the selection/rejection form.”

A genuine issue of material fact exists when properly contested facts “are of such nature as to affect the result of the action.” *Boyette*, 282 N.C. at 235, 192 S.E.2d at 460. As this Court has said in *Burgdoff* the central inquiry in this case is whether the McNeills were offered an opportunity to accept or reject UIM limits. *Burgdoff*, ___ N.C. App. at ___, 698 S.E.2d at 503. Defendant Penn National argues and we agree that “a nonmoving party may not contradict [its own] earlier sworn testimony in an effort to defeat a motion for summary judgment[,]” and points to *Allstate Ins. Co. v. Lahoud*, 167 N.C. App. 205, 211-12, 605 S.E.2d 180, 185 (2004), in support of the proposition. Though we agree with the premise, we do not agree that it applies in this case. In *Lahoud*, the question presented was whether the plaintiff would be required to provide insurance coverage for actions undertaken by the defendant in relation to actions which gave rise to charges of taking indecent liberties with a child. *Id.* at 206-07, 605 S.E.2d at 182. The defendant pled guilty to the charge. *Id.* The victim’s family subsequently sued Lahoud in a civil action alleging various causes of action. *Id.* Lahoud asserted that Allstate had a duty to defend him in the civil action. *Id.* at 207, 605 S.E.2d at 185. Allstate filed a declaratory judgment action for determination of the extent to which it was required to provide coverage, and the trial court granted summary judgment in their favor. *Id.* at 207, 605 S.E.2d at 182. The issue of whether coverage was due under Allstate’s policy centered on whether the defendant’s actions were “intentionally harmful.” *Id.* at 211, 605 S.E.2d at 184. This Court, found that Lahoud’s guilty plea to indecent liberties with a minor was in direct contradiction to his affidavit, and therefore, his affidavit “[could] not create a genuine issue of material fact because he submitted his own affidavit” *Id.* at 211, 605 S.E.2d at 185.

Reading the evidence in the light most favorable to the nonmoving party, we find no direct contradiction in the testimony of Mr. McNeill. Looking to his testimony dealing with his opportunity to accept or reject UIM, Mr. McNeill responded to the question of whether anyone had reviewed the selection/rejection form presented to him with an assertion that he did not remember it being explained. He also responded repeatedly to the question of whether his signature appeared on the UIM selection/rejection form with the assertion that the signature that appeared there did not look like his signature.

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However, he admitted that “[i]t could be [his] signature” after being asked “could that be your signature or is that just so different that it just couldn’t be your signature[.]” That statement is not an admission that the signature is his. Having not given a definite answer to either question, the assertions in Mr. McNeill’s affidavit, explaining that upon further reflection that he had determined that it was not his signature and that he did not have UIM explained, are not contradictions, but explanations of his former testimony. Mr. McNeill’s affidavit appears to us not to contradict, but to explain his former testimony. Therefore, we conclude that Mr. McNeill is not barred from using his own affidavit to raise an issue of material fact as to the central question in the analysis of whether the UIM limits should apply.

Further, taking *Lahoud* as our touchstone, the majority in that case found that the defendant could defeat summary judgment “by producing evidence other than his own affidavit or deposition contradicting his own testimony.” *Lahoud*, 167 N.C. App. at 211-12, 605 S.E.2d at 185 (citation omitted); *See also Hubbard v. Fewell*, 170 N.C. App. 680, 613 S.E.2d 58 (2005) (distinguishing *Lahoud* and finding the affidavit of the nonmoving party in that case, paired with that of an uninterested third party, was sufficient to raise a genuine issue of material fact even in contradiction of the non-movant’s prior testimony). Here, defendant McNeill produced the affidavits of Haywood Starling, a contested document expert, who found that Mr. McNeill was not the author of the signature on the UIM selection/rejection. This evidence, coupled with Mr. McNeill’s deposition testimony that he did not remember the selection/rejection form being explained to him, presents a genuine issue of material fact as to whether Mr. McNeill had been offered the opportunity to accept or reject UIM coverage. Therefore, summary judgment in this instance was improperly granted. We reverse the decision of the trial court and remand the case for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

Chief Judge MARTIN and Judge GEER concur.

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[215 N.C. App. 475 (2011)]

STATE OF NORTH CAROLINA v. TERRY RICHMOND

No. COA10-1296

(Filed 6 September 2011)

Search and Seizure—drugs—pat down—reasonable articulable suspicion

The trial court did not err in a drugs case by denying defendant's motion to suppress evidence obtained from the search of his pants pocket and the seizure of eleven bags containing marijuana. The evidence showed that an officer had a reasonable belief that for his safety he should perform a pat down of defendant. Further, based on the officer's training and experience, he immediately formed the opinion that the bulge in defendant's pocket contained a controlled substance.

Appeal by defendant from order entered 30 August 2010 by Judge Howard E. Manning, Jr. in Superior Court, Person County. Heard in the Court of Appeals on 26 April 2011.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Steven F. Bryant, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by Maitri "Mike" Klinkosum, for defendant-appellant.

STROUD, Judge.

Terry Richmond ("defendant") appeals from the denial of his motion to suppress, arguing that (1) the search of his person was unlawful because the officer "had neither reasonable suspicion nor probable cause to conduct the search of [defendant][,]" and (2) the nature of the object seized from him during the pat-down was not immediately apparent. For the following reasons, we affirm the denial of defendant's motion to suppress.

I. Background

On 12 April 2010, defendant was indicted for possession with intent to manufacture, sell, and deliver marijuana in violation of N.C. Gen. Stat. § 90-95(a)(1). On 26 July 2010, defendant filed a motion to suppress, which was heard at the 30 August 2010 Criminal Session of Superior Court, Person County. Following the hearing, the trial court denied defendant's motion to suppress the search of his person, and

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defendant gave notice of appeal in open court. Defendant subsequently pled guilty to possession with intent to manufacture, sell, and deliver marijuana but reserved his right to appeal the denial of his motion to suppress. The trial court sentenced defendant to four to five months imprisonment but suspended that sentence and placed defendant on supervised probation for 24 months. On 30 August 2010, the trial court entered its written order denying defendant's motion to suppress, making the following findings of fact:

1. On December 16, 2009, Investigator Will Dunkley with the Roxboro Police Department applied for and was issued a search warrant for a private residence at 410 Green Street in Roxboro and an individual, Rodney Fuller.
2. Investigator Dunkley and other officers executed the search warrant on December 16, 2009 at 410 Green St., and located the defendant inside the residence.
3. The defendant was ordered to the ground, cuffed and stood up. Investigator Dunkley patted down the exterior of the defendant's left front pocket.
4. Based on the officer's training and experience, he immediately formed the opinion that the bulge contained a controlled substance.
5. Investigator Dunkley removed the item from the defendant's pocket, and found it to be 11 bags of marijuana.

Based on these findings, the trial court made the following conclusions:

1. The investigator had a right to detain the defendant for officer safety when he was located in a private residence which was the subject of a search warrant.
2. The investigator had a right to frisk the defendant for weapons for officer safety when he was located in a private residence which was the subject of a search warrant for illegal drugs.
3. The investigator's frisk caused the officer, based on his training and experience, to believe that what he was touching was a package containing illegal drugs, and therefore he had a right to remove the object from the defendant's pocket.
4. The defendant's motion to suppress the search should be denied.

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As noted above, defendant argues on appeal that the denial of his motion to suppress was error as the search of his person was unlawful and the nature of the object seized from his pocket was not immediately apparent to the police officer.

II. Motion to Suppress

A. Standard of review

Defendant contends that the trial court erred when it denied his motion to suppress.

It is well established that “[t]he standard of review to determine whether a trial court properly denied a motion to suppress is whether the trial court’s findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law.” *State v. Tadeja*, 191 N.C. App. 439, 443, 664 S.E.2d 402, 406-07 (2008). “The trial court’s conclusions of law are reviewed *de novo* and must be legally correct.” *State v. Campbell*, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724, (citations, brackets, and quotation marks omitted), *appeal dismissed*, 362 N.C. 364, 664 S.E.2d 311-12 (2008). Additionally, “findings of fact to which defendant failed to assign error are binding on appeal.” *Id.*

State v. Williams, ___ N.C. App. ___, ___, 703 S.E.2d 905, 907, *disc. review denied*, ___ N.C. ___, 707 S.E.2d 237 (2011). Although assignments of error are no longer required under North Carolina Rule of Appellate Procedure 10(a), in order to challenge a finding of fact as unsupported by the evidence, the appellant must make this argument in his brief. *See* N.C.R. App. P. 28(a) (stating that “[t]he 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.”). Defendant does not clearly object to any particular finding of fact, but his second argument can be construed as challenging finding of fact No. 4 as unsupported by the evidence. The other findings of fact are therefore binding on appeal, and we will consider the sufficiency of the evidence to support finding No. 4. *See Williams*, ___ N.C. App. At ___, 703 S.E.2d at 907.

B. Pat-down of defendant

Defendant citing N.C. Gen. Stat. § 15A-256 (2009) and *Ybarra v. Illinois*, 444 U.S. 85, 62 L. Ed. 2d 238 (1979) argues that Investigator Dunkley’s search of defendant was unlawful. N.C. Gen. Stat. § 15A-256 permits officers who are executing a search warrant to detain persons present at the time of the execution of the search warrant, and

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to conduct a search of such persons if the search of the premises, vehicle, or person designated in the warrant does not produce the items named in the warrant and if the property in the warrant could be concealed upon a person. The United States Supreme Court in *Ybarra* held that “a person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.” 444 U.S. at 91, 62 L. Ed. 2d at 245 (citation omitted). N.C. Gen. Stat. § 15A-256 would have permitted Investigator Dunkley to detain defendant during the search of the residence, but the unchallenged findings of fact state that Investigator Dunkley did not immediately search defendant’s person during the execution of the warrant but merely “patted down the exterior of the defendant’s clothing[.]” Under N.C. Gen. Stat. § 15A-255 (2009), “[a]n officer executing a warrant directing a search of premises or of a vehicle may, if the officer reasonably believes that his safety or the safety of others then present so requires, search for any dangerous weapons by an *external patting of the clothing of those present*.” (emphasis added) See *State v. Jones*, 97 N.C. App. 189, 196, 388 S.E.2d 213, 217 (1990) (noting that “[a]n officer executing a search warrant is authorized by statute to detain persons present on the premises, G.S. 15A-256, and to frisk those present for weapons if he reasonably believes that there is a threat to the safety of himself or others. G.S. 15A-255. These provisions are clearly designed to enable officers to ensure their safety and to prevent possible suspects from fleeing or destroying evidence. See *State v. Watlington*, 30 N.C. App. 101, 226 S.E.2d 186, *disc. rev. denied and appeal dismissed*, 290 N.C. 666, 228 S.E.2d 457 (1976). To require officers to serve the warrant prior to taking the precautionary measures authorized by G.S. 15A-255 and 15A-256 would frustrate the purposes of the [warrant] statutes.”).

This Court has further stated that “[t]he purpose of the officer’s frisk or pat-down is for the officer’s safety; as such, the pat-down is limited to the person’s outer clothing and to the search for weapons that may be used against the officer.” *State v. Robinson*, 189 N.C. App. 454, 458, 658 S.E.2d 501, 504 (2008) (citation and quotation marks omitted). Therefore, we have stated that a police officer is permitted to conduct a stop and pat-down, when he “observes unusual behavior which leads him to conclude, in light of his experience, that criminal activity may be occurring and that the person may be armed and dangerous[.]” *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968)). See *State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007) (noting that *Terry* established that “[a] police

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officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway.”). Reasonable suspicion requires that “[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.” *State v. Watkins*, 337 N.C. 437, 441-42, 446 S.E.2d 67, 70 (1994) (citing *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906 and *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979)). A court considers the totality of the circumstances in determining whether the officer possessed a reasonable and articulable suspicion. *Bernard*, 184 N.C. App. at 29, 645 S.E.2d at 783 (citation omitted).

The trial court only made two findings of fact relating to Investigator Dunkley’s pat-down of defendant:

2. Investigator Dunkley and other officers executed the search warrant on December 16, 2009 at 410 Green St., and located the defendant inside the residence.
3. The defendant was ordered to the ground, cuffed and stood up. Investigator Dunkley patted down the exterior of the defendant’s left front pocket.

Based on these findings the trial court concluded

2. The investigator had a right to frisk the defendant for weapons for officer safety when he was located in a private residence which was the subject of a search warrant for illegal drugs.

Based on these findings we cannot determine as a matter of law whether Investigator Dunkley “reasonably believe[d] that his safety or the safety of others then present” required a pat down of defendant for dangerous weapons during the execution of the search warrant, *see* N.C. Gen. Stat. § 15A-255, or any observations by Investigator Dunkley of “unusual behavior which [led] him to conclude, in light of his experience, that criminal activity may be occurring and that [defendant] may be armed and dangerous[.]” *See Robinson*, 189 N.C. App. at 458, 658 S.E.2d at 504. “When a trial court conducts a hearing on a motion to suppress, the court should make findings of fact that will support its conclusions as to whether the evidence is admissible. If there is no conflict in the evidence on a fact, failure to find that fact is not error. Its finding is implied from the ruling of the court.” *State v. Smith*, 346 N.C. 794, 800, 488 S.E.2d 210, 214 (1997) (citation and quotation marks omitted). Here, there is no conflict in the evidence

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and the record shows that Investigator Dunkley reasonably believed that the safety of the officers justified the pat-down of defendant. Investigator Dunkley applied for the search warrant and, with other officers, conducted the search. Investigator Dunkley's application stated that the basis for the search was that law enforcement believed that illegal narcotics were being sold from the residence, as officers had conducted two previous controlled buys from this residence, one only 72 hours prior to the warrant application on 16 December 2009. When officers entered, they found six individuals, including defendant, and they secured each individual pursuant to N.C. Gen. Stat. § 15A-256. In the residence officers discovered drugs in plain view. Investigator Dunkley in response to the State's question "Why are you concerned about officer safety on a search warrant like this?" explained that it was his experience as a narcotics officer that, "Where there's drugs, there's guns[.]" As there was no conflict in the evidence and the evidence shows that Investigator Dunkley reasonably believed that for his safety he should perform a pat down of defendant, *see* N.C. Gen. Stat. § 15A-255, *Robinson*, 189 N.C. App. at 458, 658 S.E.2d at 504, we find no merit in defendant's argument.

C. Immediately apparent nature of the object

Defendant next challenges the trial court's conclusion that Investigator Dunkley had probable cause to seize the object from defendant's pocket based on the plain feel doctrine. In explaining the "plain feel" doctrine, we have stated that

[i]f during "[a] 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." *State v. Streeter*, 17 N.C. App. 48, 50, 193 S.E.2d 347, 348 (1972). "Evidence of contraband, plainly felt during a pat-down or frisk, may . . . be admissible, provided the officer had probable cause to believe that the item was in fact contraband." [*State v. Shearin*, 170 N.C. App. 222, 226, 612 S.E.2d 371, 376 (2005)] (citing *Minnesota v. Dickerson*, 508 U.S. 366, 375-77, 124 L. Ed. 2d 334, 346-47 (1993)).

Under the "plain feel" doctrine if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. *Minnesota*, 508 U.S. 366, 124 L. Ed. 2d 334.

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This Court must consider the totality of the circumstances in determining whether the incriminating nature of the object was immediately apparent and thus, whether probable cause existed to seize it. *State v. Briggs*, 140 N.C. App. 484, 492, 536 S.E.2d 858, 863 (2000). A probable cause determination does not require hard and fast certainty by the officer but involves more of a common-sense determination considering evidence as understood by those versed in the field of law enforcement. *Id.* at 493, 536 S.E.2d at 863.

Robinson, 189 N.C. App. at 458-59, 658 S.E.2d at 504-05.

On appeal, defendant contends that the nature of the contraband was not “immediately apparent” to Investigator Dunkley because he could not testify that he identified which specific drugs he was touching. However, under the plain feel doctrine, to conduct a search an officer need only have probable cause to believe the object felt during the pat down was contraband before he seized it, not that he determine the specific controlled substance before taking action. *See id.* As noted above, the probable cause determination, “involves more of a common-sense determination considering evidence as understood by those versed in the field of law enforcement.” *See id.* Here, the trial court found that when Investigator Dunkley patted down defendant during the execution of the warrant he “felt a bumpy bulge in the defendant’s left front pocket” and based on Investigator Dunkley’s “training and experience, he immediately formed the opinion that the bulge contained a controlled substance.”

As noted above, defendant challenges the sufficiency of the evidence to support the trial court’s finding that Investigator Dunkley immediately formed the opinion that defendant’s pocket contained a controlled substance. Defendant focuses upon Investigator Dunkley’s testimony that he felt a “knot” in the defendant’s pants which he could not “describe with any specificity.” But Defendant’s argument takes one of Investigator Dunkley’s statements out of context. Investigator Dunkley testified as follows regarding his pat-down of defendant:

[Defense counsel:] So, if your hands are out, then how could you determine that what was in his pocket was some sort of contraband?

[Investigator Dunkley:] Through six years of doing this job, knowing what it feels like.

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Q. What did it feel like?

A. A knot of lumps. I don't know how else to describe it to you.

Q. Did you have your hands out—just with your hands flat out, you could feel a knot of lumps?

A. Yes, ma'am. They got good feeling in them.

Q. Exactly how were you feeling him?

A. Just like that.

Q. So, were you just patting down for weapons or were you groping?

A. I don't believe there was any groping involved. It was a pat-down for weapons. I don't know how to describe it to you other than a pat-down for weapons.

Q. And somehow with this pat-down for weapons, you felt a knot of something?

A. Yes.

Q. And why would that be considered contraband in your experience?

A. Why would it?

Q. Um-hum.

A. Because I discovered that same thing many times.

Q. But what was it when you discovered it before?

A. Bags of marijuana, bags of cocaine, bags of crack.

This evidence supports the trial court's finding that "[b]ased on the officer's training and experience, he immediately formed the opinion that the bulge contained a controlled substance." We uphold the trial court's conclusion that the facts were sufficient to justify a search of defendant's pants pocket and seizure of the eleven bags containing marijuana.

For the foregoing reasons, we affirm the trial court's denial of defendant's motion to suppress.

AFFIRMED.

Judges McGEE and BEASLEY concur.

BEST v. GALLUP

[215 N.C. App. 483 (2011)]

R. SCOTT BEST, PLAINTIFF V. AMBER L. GALLUP, DEFENDANT

No. COA10-1488

(Filed 6 September 2011)

1. Child Custody and Support—acting inconsistently with paramount parental status—erroneous dismissal of claim

The trial court erred by dismissing plaintiff's child custody claim based on its conclusion that defendant adoptive mother had not acted inconsistently with her paramount parental status. The findings established that defendant ceded paramount decision-making authority by bringing a nonparent into the family unit, representing that the nonparent was a parent, and voluntarily giving custody of the child to the nonparent without creating an expectation that the relationship would be terminated.

2. Child Visitation—best interests of child

The trial court properly concluded that it was in the best interest of the minor child to have visitation with plaintiff.

Appeal by plaintiff from order entered 10 June 2010 by Judge Lori Christian in District Court, Wake County. Heard in the Court of Appeals 26 April 2011.

Robinson & Lawing, LLP, by Michelle D. Connell, for plaintiff-appellant.

No brief filed for defendant-appellee.

STROUD, Judge.

Plaintiff appeals the trial court's order dismissing his custody claim. For the following reasons, we reverse and remand.

I. Background

In 2004, plaintiff and defendant had a romantic relationship and "informally adopted and raised together Defendant's niece, Ruth[.]"¹ In 2008, defendant legally adopted Ruth; plaintiff and defendant had plans to marry once plaintiff returned from a job in Iraq so that he too could legally adopt Ruth. While plaintiff was in Iraq, "Defendant informed Plaintiff she was leaving him."

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

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On 3 February 2010, plaintiff filed a verified complaint seeking custody of Ruth and an ex parte temporary custody order reinstating visitation with her. On 10 February 2010, defendant filed a motion to dismiss plaintiff's complaint or remove the action for improper venue. On 5 March 2010, defendant filed a motion to dismiss for plaintiff's lack of standing to bring the custody action.

On 12 March 2010, defendant's motions were heard; at the hearing, the trial court specifically noted that it would only be considering defendant's motions to dismiss and change venue and not the merits of the custody claim because "if you prevail, then it will be transferred; if you don't, then you'll have to go through with the mediation" scheduled for 1:00 p.m. that same day. Nevertheless, and despite the fact that the parties would have had no reason to be prepared to proceed on the merits of the custody claim, the "motions hearing" ultimately became a custody hearing during which the trial court considered the several affidavits in the case and heard testimony from Jeff Wagner, defendant's live-in boyfriend and plaintiff himself. Both Mr. Wagner and plaintiff testified extensively about Ruth and their involvement with her. Defendant did not object to the trial court's consideration of testimonial evidence regarding custody nor to the trial court's consideration of the merits regarding custody. On 10 June 2010, the trial court entered an order, based on the 12 March 2010 hearing which (1) denied defendant's motion to dismiss or remove the case for a different venue; (2) denied defendant's motion to dismiss for lack of standing, and (3) dismissed the custody case upon unstated grounds. Plaintiff appeals.

II. Custody

On appeal, neither party has challenged the trial court's denial of defendant's motions for change of venue or the motion to dismiss for lack of standing, and thus we only address the custody portion of the trial court's order. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief . . . will be taken as abandoned.") Furthermore, neither party has challenged the findings of fact, and thus they are binding on appeal. *Peters v. Pennington*, ___ N.C. App. ___, ___, 707 S.E.2d 724, 733 (2011) ("Unchallenged findings of fact are binding on appeal.").

A. Conduct Inconsistent with Paramount Parental Status

[1] Here, plaintiff contends that the trial court's binding findings of fact do not support the trial court's conclusion of law that defendant had not acted inconsistently with her parental rights and "do not sup-

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port the court's decree[,]" (original in all caps), to dismiss plaintiff's case. "Under our standard of review in custody proceedings . . . [w]hether . . . findings of fact support the trial court's conclusions of law is reviewable de novo." *Mason v. Dwinnell*, 190 N.C. App. 209, 221, 660 S.E.2d 58, 66 (2008).

This case is controlled by *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997) and *Boseman v. Jarrell*, 364 N.C. 537, 704 S.E.2d 494 (2010); indeed, the findings of fact to a large extent seem to track the language of these cases. In *Boseman*, our Supreme Court stated,

A parent has an interest in the companionship, custody, care, and control of his or her children that is protected by the United States Constitution. So long as a parent has this paramount interest in the custody of his or her children, a custody dispute with a nonparent regarding those children may not be determined by the application of the best interest of the child standard.

A parent loses this paramount interest if he or she is found to be unfit or acts inconsistently with his or her constitutionally protected status. However, there is no bright line beyond which a parent's conduct meets this standard. . . .

. . . .

In *Price v. Howard* we observed a custody dispute between a natural mother and a nonparent. The child in that case was born into a family unit consisting of her natural mother and a man who the natural mother said was the child's father. The mother chose to rear the child in a family unit with plaintiff being the child's *de facto* father.

After illustrating the creation of the family unit in *Price*, we focused our attention on the mother's voluntary grant of nonparent custody. . . .

. . . .

Thus, under *Price*, when a parent brings a nonparent into the family unit, represents that the nonparent is a parent, and voluntarily gives custody of the child to the nonparent without creating an expectation that the relationship would be terminated, the parent has acted inconsistently with her paramount parental status.

In *Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008), our Court of Appeals applied our decision in *Price* to facts

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quite similar to those in the case *sub judice*. In *Mason* the parties jointly decided to create a family and intentionally took steps to identify the nonparent as a parent of the child. . . . They shared caretaking and financial responsibilities for the child. As a result of the parties' creation, the nonparent became the only other adult whom the child considers a parent.

The parent in that case also relinquished custody of the minor child to the nonparent with no expectation that the nonparent's relationship with the child would be terminated. The parent chose to share her decision-making authority with the nonparent. The parent also executed a "Parenting Agreement" in which she agreed that the nonparent should participate in making all major decisions regarding their child. . . .

. . . .

As such, the natural parent created along with the nonparent a family unit in which the two acted as parents, shared decision-making authority with the nonparent, and manifested an intent that the arrangement exist indefinitely.

The Court of Appeals recognized that the degree of custody relinquishment in *Mason* differed from that in *Price*[, but] . . . the similarity in both cases is that *if a parent cedes paramount decision-making authority, then, so long as he or she creates no expectation that the arrangement is for only a temporary period, that parent has acted inconsistently with his or her paramount parental status.*

The record in the case *sub judice* indicates that defendant intentionally and voluntarily created a family unit in which plaintiff was intended to act—and acted—as a parent. . . . The record also contains ample evidence that defendant allowed plaintiff and the minor child to develop a parental relationship. . . .

Moreover, the record indicates that defendant created no expectation that this family unit was only temporary. . . .

. . . [D]efendant has acted inconsistently with her paramount parental status.

364 N.C. at 549-53, 704 S.E.2d at 502-05 (citations, quotation marks, ellipses, and brackets omitted). Furthermore,

the focus must . . . be on the legal parent's intent during the formation and pendency of the parent-child relationship between

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the third party and the child. Intentions after the ending of the relationship between the parties are not relevant because the right of the legal parent does not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the party's separation she regretted having done so.

Estroff v. Chatterjee, 190 N.C. App. 61, 70-71, 660 S.E.2d 73, 79 (2008) (citations, quotation marks, and brackets omitted).

Before reviewing the trial court's findings of fact in light of *Price* and *Boseman*, we note that the trial court's comments upon rendering the decision reflect a misapprehension of these cases. The trial court appears to have been under the impression that because defendant had legally adopted Ruth, but plaintiff had not, that plaintiff could not, as a matter of law, prevail on his custody claim. The trial court stated:

She has adopted the child. She's the parent of the child. He has not adopted the child. And do I think it stinks? I think it stinks. He certainly has paid—she has accepted money from him. And—and—but she has made this choice. I have to respect her Constitutional right to make decisions with regard to her child. That's really not before me. If I understand correctly, it's really just the venue issue and the standing. I find that he has standing because he has connection with the child, but with regards to the actual lawsuit, she will prevail. The law is going to have her prevail.

So I don't know what you guys want to do from here. She's right. I don't like it personally. I—I think it's not in the best interest of the child.

The trial court made the following findings of fact, which are not challenged by either party and are binding on this Court:

7. . . . the parties informally adopted and raised together Defendant's niece

. . . .

10. In July 2004, the parties began caring for Ruth full-time. Ruth lived with the parties in their homes in Mount Holly, North Carolina. Each shared equally in the care and custody of Ruth.

. . . .

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12. In June 2004, . . . [a]lthough the parties did not live together during this time, Plaintiff continued to share in the care and custody of Ruth by caring for her while Defendant worked and keeping her overnight while Defendant was out of town. . . .

. . . .

15. From July 2004 until September 2005, . . . both parties were primary caretakers and custodians of the minor child. Defendant voluntarily created a family unit [by allowing plaintiff to take care of Ruth, attend Ruth's doctor's appointments, and pick Ruth up from daycare.]

. . . .

17. From September 2005 until late-December 2009, the parties continued to function as a family unit in the following ways:

- a. The minor child calls Plaintiff "Daddy" with Defendant's knowledge and consent.
- b. Plaintiff represented himself as the minor child's father with Defendant's knowledge and consent.
- c. Defendant refers to Plaintiff as "Daddy" and "Dad" when speaking about Plaintiff to the minor child.
- d. Plaintiff, a physician's assistant, treated Ruth for any minor illnesses.
- e. Plaintiff paid for Ruth's dental expenses.
- f. The parties lived together, shared Ruth's expenses, vacationed together, and shared custody and care of the minor child.
- g. In July of 2006, Defendant purchased a home in Garner, North Carolina for the parties and the minor child.
- h. After visiting different daycares in the area, the parties jointly selected the pre-school programs Defendant allowed Plaintiff to pay for a substantial portion of the minor child's daycare expenses and tuition and after-school expenses[.]
- i. Defendant listed Plaintiff on the daycare sheet and authorized Plaintiff's access to pick up the minor

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child from daycare. Plaintiff actively participated in the minor child’s preschool activities by attending arts & crafts classes with the minor child and reading stories to the kids.

j. Ruth’s preschool teachers referred to Plaintiff has Ruth’s father.

....

....

20. The parties agreed that they would marry when Plaintiff finished his rotation in Iraq. Plaintiff would then be able to legally adopt Ruth.

21. Although both parties interviewed with Wake County Department of Health and Human Services concerning Ruth’s legal adoption, Plaintiff was unable to join in the adoption petition as a party because . . . if the petitioner for adoption is unmarried, no other individual may join in the petition.

22. After making the decision to adopt Ruth and get married, the parties announced the news to Plaintiff’s former co-workers and celebrated

....

25. While Plaintiff worked in Iraq, the parties continued to function as a family unit . . .

. . . through telephone, video, and email [and by plaintiff a will leaving defendant and Ruth as his beneficiaries and a power of attorney for defendant before his departure to Iraq].

....

....

29. . . . [Even after “Defendant informed Plaintiff she was leaving him”] the parties continued to function as a family unit

....

....

34. Defendant voluntarily created a family unit by authorizing Plaintiff’s access to Ruth’s daycare and pre-school programs, allowing Plaintiff to jointly care for and share in decision making

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regarding Ruth’s education, nutrition, potty training, discipline and overall raising of the minor child; allowing Plaintiff to attend Ruth’s extracurricular activities together, and allowing Ruth to call Plaintiff “Daddy” alone and in front of others.

. . . .

38. Plaintiff is Ruth’s *de facto* father.

. . . .

40. In October 2009, Plaintiff designated Ruth the sole beneficiary of his retirement account death benefits.

The findings of fact establish that defendant “has acted inconsistently with her paramount parental status” by “ced[ing] paramount decision-making authority” and “bring[ing] a nonparent into the family unit, represent[ing] that the nonparent is a parent, and voluntarily giv[ing] custody of the child to the nonparent without creating an expectation that the relationship would be terminated[.]” *Boseman*, 364 N.C. at 550-52, 704 S.E.2d at 504. The trial court’s conclusion of law that defendant “has not acted inconsistent with her constitutionally protected rights as an adoptive mother” and the dismissal of the custody claim are therefore in error.

B. Best Interest of the Child

[2] In *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), our Supreme Court established that the best interest of the child standard applies in a custody dispute between a legal parent and a non-parent when clear and convincing evidence demonstrates that the legal parent’s conduct has been inconsistent with his or her constitutionally protected status.

Davis v. Swan, ___ N.C. App. ___, ___, 697 S.E.2d 473, 476-77 (2010), *disc. review denied*, 365 N.C. 76, 706 S.E.2d 239 (2011). A determination regarding the best interest of the child will not be disturbed unless there is a showing of abuse of discretion. *Mason*, 190 N.C. App. at 230, 660 S.E.2d at 71. (“It is well established that the district court’s determination regarding the best interest of the child will not be disturbed unless there is an abuse of discretion.”) Here, the trial court determined that “[i]t is in the best interest of the minor child that she would have visitation with Plaintiff.” Neither party challenges the trial court’s determination as to best interest of the child and based on the binding findings of fact, we agree.

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III. Conclusion

In conclusion, the trial court erred in concluding that defendant had not acted inconsistently with her paramount parental status, but correctly determined that it was in the best interest of Ruth to have visitation with plaintiff. Accordingly, as to the custody portion of the order, we reverse the dismissal of the plaintiff's custody claim and remand for the trial court to order a custodial schedule, including but not limited to visitation with plaintiff, and to address any other custodial issues as necessary for the best interest of the child.

REVERSED AND REMANDED.

Judges McGEE and BEASLEY concur.

STATE OF NORTH CAROLINA v. ANDREW JACKSON OATES

No. COA10-725

(Filed 6 September 2011)

Appeal and Error—dismissal of appeal—failure to give proper notice

The State's appeal from the trial court's order allowing defendant's motion to suppress was dismissed based on failure to give proper notice of appeal. Further, the State made no request for its brief to be treated as a petition for writ of *certiorari*.

Appeal by the State from order entered 22 March 2010 by Judge Russell J. Lanier, Jr. in Superior Court, Sampson County. Heard in the Court of Appeals 30 November 2010.

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

Anne Bleyman, for defendant-appellee.

STROUD, Judge.

This matter is before the Court on the State's appeal from a trial court's order allowing Andrew Jackson Oates's ("defendant") motion to suppress. As the State failed to give proper notice of appeal, we dismiss the State's appeal.

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I. Background

On 7 September 2007, a search warrant of defendant's residence was executed at 451 McKoy Street, Clinton, North Carolina. As a result of that search, defendant was found to be in possession of a firearm and, on 25 February 2008, he was indicted for one count of possession of a firearm by a convicted felon. On or about 19 November 2009, defendant filed a motion to suppress evidence seized by police as a result of the 7 September 2007 search of defendant's residence. Defendant's motion to suppress came on for hearing at the 14 December 2009 Criminal Session of Superior Court, Sampson County. In open court, the trial court granted defendant's motion to suppress. The State filed written notice of appeal from the trial court's order on 22 December 2009. On 22 March 2010, the trial court entered a written order granting defendant's motion to suppress.

II. Notice of Appeal

Although it is not raised by either party, the record before us presents an issue as to whether the State gave proper notice of appeal. N.C. Gen. Stat. § 15A-1445(b) (2009) states that "[t]he State may appeal an order by the superior court granting a motion to suppress as provided in G.S. 15A-979."¹ 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). N.C. Gen. Stat. § 15A-101(4a) (2009) states that "Entry of Judgment" is defined as "when sentence is pronounced," but in this case, there was no "sentence" pronounced. Thus, N.C. Gen. Stat. § 15A-101(4a) does not establish when "entry of judgment" occurs where a trial court grants a defendant's motion to suppress. Our Supreme Court has determined that N.C. Gen. Stat. § 15A-101(4a) is "sufficiently analogous" to N.C. Gen. Stat. § 1A-1, Rule 58 "to pro-

1. N.C. Gen. Stat. § 15A-979(c) (2009) requires the State to submit a "certificate" to the trial judge who granted the motion to suppress stating "that the appeal is not taken for the purpose of delay and that the evidence is essential to the case[.]" and further states that "appeal is to the appellate court that would have jurisdiction if the defendant were found guilty of the charge and received the maximum penalty."

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vide guidance” in “constru[ing] G.S. § 15A-101(4a).” *State v. Boone*, 310 N.C. 284, 290, 311 S.E.2d 552, 556 (1984). Accordingly, in the criminal context, we have stated that

“[e]ntry” of an order occurs when it is reduced to writing, signed by the trial court, and filed with the clerk of court. *West v. Marko*, 130 N.C. App. 751, 756, 504 S.E.2d 571, 574 (1998) (holding that the oral rendition of an order in open court does not constitute entry of that order); cf. N.C.G.S. § 1A-1, Rule 58 (Supp. 1997) (providing that entry of judgment occurs “when it is reduced to writing, signed by the judge, and filed with the clerk of court”).

State v. Gary, 132 N.C. App. 40, 42, 510 S.E.2d 387, 388, cert. denied, 350 N.C. 312, 535 S.E.2d 35 (1999). Therefore, N.C.R. App. P. 4(a) provides only two options for giving notice of appeal in a criminal case: (1) by giving “oral notice of appeal at trial” or (2) by filing written notice of appeal “within fourteen days after entry of the judgment or order” which is when the court’s order “is reduced to writing, signed by the trial court, and filed with the clerk of court.” If a party fails to give oral notice of appeal at trial, they must wait until the trial court’s order or judgment is entered, as defined by *Gary*, and “within fourteen days” after entry, file written notice of appeal. See *id.*²

At defendant’s hearing on his 14 December 2009 motion to suppress, the trial court made its ruling and had the following exchange with the State and defense counsel at the close of the hearing:

The Court: I’m uncomfortable with it. I would have never signed it, not under the circumstances. I’d have had to have more.

I’m going to enter the order suppressing. You can enter you [sic] notice of appeal. And you and [defense counsel] can have fun in Raleigh.

2. We note that in the context of N.C.R. App. P. 3(a), “[a]ppeal in civil cases[,]” this Court in *Abels v. Renfro Corp.*, 126 N.C. App. 800, 804, 486 S.E.2d 735, 738, disc. rev. denied, 347 N.C. 263, 493 S.E.2d 450 (1997) stated that oral ruling or “rendering of an order commences the time when notice of appeal *may* be taken by filing and serving written notice” and, therefore, “appeal of a rendered order or judgment may be timely filed, [but] jurisdiction will not vest with this Court if judgment in substantial compliance with the judgment rendered is not subsequently entered.” We believe it is inappropriate to apply this procedure in a criminal matter, as it has not previously been applied in a criminal setting, and N.C.R. App. P. 4(a)(1) specifically allows for oral notice of appeal at trial following the trial court’s oral rendering of judgment in a criminal case. Oral notice of appeal after rendering of judgment is a method of appeal which is not available by rule or statute in a civil case. N.C.R. App. P. 4(a)(2) also mandates when written notice of appeal can be filed in a criminal case.

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The State: Yes, sir.

The Court: All right.

Defense Counsel: Thank you for hearing us. Your Honor.

The Court. All right.

Even though the trial court said that the State could “enter . . . notice of appeal[,]” the State did not enter oral notice of appeal at that time. *See* N.C.R. App. P. 4(a)(1). The State subsequently filed written notice of appeal on 22 December 2009. However, the trial court’s 14 December 2009 oral ruling did not amount to “entry of the . . . order[,]” *see* N.C.R. App. P. 4(a)(2), as the order had not been “reduced to writing, signed by the trial court, and filed with the clerk of court.” *See Gary*, 132 N.C. App. at 42, 510 S.E.2d at 388. It was not until 22 March 2010 that the trial court entered the order by filing its written order containing its findings of fact and conclusions of law. The record does not contain any written notice of appeal by the State filed “within fourteen days after entry of the . . . order” on 22 March 2010. *See* N.C.R. App. P. 4(a)(2). Accordingly, we must dismiss the State’s appeal because it did not give proper notice of appeal and “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). We also note that the State makes no request that we treat its brief as a petition for writ of certiorari. *See* N.C.R. App. P. 21(a) (providing that the writ of certiorari may be issued “in appropriate circumstances” to permit appellate review “when the right to prosecute an appeal has been lost by failure to take timely action”). Accordingly, we dismiss the State’s appeal.

DISMISSED.

Judges BRYANT and BEASLEY concur.

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[215 N.C. App. 495 (2011)]

REBECCA W. ROMULUS, PLAINTIFF v. JOHN M. ROMULUS, DEFENDANT

No. COA10-1453

(Filed 20 September 2011)

1. Divorce—equitable distribution—marital property—post-separation appreciation

The trial court's findings in an equitable distribution action supported its conclusion of law that the post separation appreciation of defendant's dental practice was divisible property. Essentially, the trial court found that it could not determine the cause of the postseparation increase in value and applied the statutory presumption that postseparation increases in the value of marital property are divisible.

2. Divorce—equitable distribution—separate property—findings

A conclusion of law in an equitable distribution case classifying real estate as separate property was remanded where there were no supporting findings as to the facts necessary for the determination, even though ample evidence was presented.

3. Divorce—equitable distribution—separate property—testimony of donor

The trial court erred by concluding in an equitable distribution case that certain real estate was plaintiff's separate property. The trial court should consider the credibility and weight of all the relevant evidence, including the testimonial evidence of the donor spouse as to her intent in conveying the separate property to the parties as tenants by the entireties. Any statement in *Warren v. Warren*, 175 N.C. App. 509, adopting a rule that the donor's testimony alone cannot satisfy the burden of rebutting the marital gift presumption was *obiter dicta*.

4. Divorce—equitable distribution—rental income and losses

There was sufficient evidence in an equitable distribution action to support the trial court's findings as to rental income and losses from certain property. The trial court's findings adequately addressed the issues raised.

5. Divorce—alimony—illicit sexual behavior—doctrine of inclination and opportunity

The trial court did not err when ruling on an alimony claim by finding that plaintiff had voluntarily participated in an act of illicit

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sexual behavior as defined by N.C.G.S. § 50-16.1A(3)(a). Although more certain and clear evidence is required for proof of a sexual act in the criminal context, in alimony claims North Carolina has long endorsed proof of intercourse by the doctrine of inclination and opportunity, and there is no reason that this doctrine would not apply to illicit sexual behavior.

6. Divorce—alimony—illicit sexual behavior—date of separation

The trial court did not err in its findings or conclusions in determining the date the parties separated in an alimony action in which one party was found to have engaged in illicit sexual behavior.

7. Attorney Fees—alimony—properly denied

The trial court properly denied plaintiff's claim for attorney fees in an alimony action where the court properly denied the alimony claim.

8. Divorce—alimony—equitable distribution—simultaneous hearing—distinct orders

Any error in the trial court simultaneously hearing alimony and equitable distribution claims was invited by plaintiff and was not prejudicial to her. Even if the trial court heard all of the claims in one trial, the court entered two separate and distinct orders.

Appeal by plaintiff and defendant from a judgment entered 4 March 2010 and order entered 5 March 2010 by Judge Jeffrey Evan Noecker in District Court, New Hanover County. Heard in the Court of Appeals 8 June 2011.

Jonathan McGirt, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for defendant-appellant.

STROUD, Judge.

The trial court entered a judgment and order addressing the claims and counterclaims of the parties regarding child support, alimony, equitable distribution, and attorney fees, all of which were tried in the same trial, conducted on 30 June 2009, 1-2 July 2009, 11 September 2009, and 9 October 2009. The trial court entered an order addressing only equitable distribution, and one day later the trial court entered an order addressing the other claims, including denial of plaintiff's claims for alimony and attorney fees. Defendant

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appealed and plaintiff cross-appealed from the order regarding equitable distribution and the order denying alimony for plaintiff. Defendant's appeal raises issues regarding classification of divisible and separate property, while plaintiff's appeal raises issues regarding marital misconduct as a bar to alimony. For the reasons as discussed below, we remand the equitable distribution order to the trial court for additional findings of fact and conclusions of law as to the Darlington Avenue property and otherwise affirm the equitable distribution order. As to the denial of alimony, we affirm the trial court's conclusion that plaintiff is barred from alimony by her uncondoned "illicit sexual behavior" during the marriage, despite the trial court's findings as to defendant's physical abuse of plaintiff and their children. Our legislature has decreed that even one fleeting incident of "illicit sexual behavior" by a dependent spouse automatically bars her from an alimony award, even if the supporting spouse has committed serious, indeed criminal, physical abuse, against his wife and children throughout the marriage, and we have no authority to question the legislature's wisdom in adopting this rule.

I. Background

The parties were married on 27 August 1988 and separated on 1 July 2006. On 12 April 2007, Rebecca Romulus ("plaintiff") filed a complaint alleging claims for postseparation support, alimony, child custody, child support, and equitable distribution; on 27 April 2007, John Romulus ("defendant") filed his answer and counterclaims for child custody, child support, and equitable distribution. On 30 June 2009, the trial court began the hearing on equitable distribution, alimony, and child support, continuing on several additional dates and concluding the hearing on 9 October 2009. On 4 March 2010, the trial court entered an equitable distribution order which granted a distributive award to plaintiff of \$629,840.00, payable over seven years in 84 monthly installments of \$7,498.10. The next day, the trial court entered an order denying plaintiff's claim for alimony based upon her marital misconduct, denying plaintiff's claim for attorney fees arising from the alimony claim, and granting child support.

Defendant filed notice of appeal from the equitable distribution judgment and the order regarding alimony and child support on 31 March 2010. Plaintiff also filed a notice of appeal from the judgment and order on 9 April 2010. We will first address defendant's appeal as to the equitable distribution order and then plaintiff's cross-appeal as to the denial of alimony.

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II. Defendant's appeal of equitable distribution judgment

A. Classification and valuation of marital and divisible property

[1] Defendant first argues that the trial court made several errors as to classification and valuation of divisible and marital property. Our standard of review as to these issues is well-settled: “[w]hen 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.” *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004) (citation and quotation marks omitted). “While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*.” *Id.* (citation omitted). We review the trial court’s distribution of property for an abuse of discretion. *Embler v. Embler*, 159 N.C. App. 186, 187, 582 S.E.2d 628, 630 (2003) (citation omitted).

1. Post-separation appreciation of defendant’s dental practice

Defendant argues that the “trial court erred as a matter of law in concluding the post-separation increase in value of [his] dental practice was a passive increase and, thus, divisible property.” The trial court identified the dental practice as follows:

Y. John H. Romulus, DDS, PA: This entity is Husband’s dental practice. This asset was stipulated to be marital by the parties in the [pretrial order or “PTO”]. Husband and Wife each offered expert testimony on the issue of the valuation of this asset on the [date of separation or “DOS”] and on the [date of trial or “DOT”] value. R.F. Warwick, CPA, with RSM McGladry was Wife’s expert on the issue of valuation and has substantial experience in valuation of professional practices. Husband’s expert was Terry Smith, CPA.

After an extensive and detailed series of findings regarding the valuation of the dental practice, which are not contested in this appeal, the trial court made the following findings of fact as to classification and valuation of the dental practice:

2. Based on the foregoing, the Court finds that John M. Romulus, DDS, PA has a value of on the DOS of \$983,558.00 and a value on the DOT of \$1,284,555.00.

3. Post DOS Increase in Value: The statute (50-20(b)(4)(a)) sets out that the appreciation in the value of marital property occur-

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ring after the date of separation of the parties and prior to the date of distribution is divisible property subject to distribution by the Court in an equitable distribution judgment. As to the change in value of John M. Romulus, PA after the separation of the parties, the Court finds that such increase was passive and is thus divisible property. In support of this conclusion, the Court finds that Dr. Romulus' efforts to grow the business were essentially unchanged from DOS until DOT. The Defendant did not invest substantially more time working at his practice than on the DOS, and in fact continued to work "dentist's hours", which included taking at least one weekday afternoon out of the office or otherwise away from work. There was no evidence of other substantial efforts to grow the business by Dr. Romulus, by increasing advertising, adding new services, new patient recruitment, patient retention efforts or the like.

Even though Dr. Romulus undoubtedly actively worked in the business by going to the office and doing dentistry, that does not lead to the conclusion that the increase in value of his practice is active and his separate property. Take the example of a shopkeeper who runs a corner store. He works from Monday to Friday, 9am to 5pm. A 20 story residential complex is completed across the street and his receipts increase greatly. Contrast that situation with a similar shopkeeper who expands his hours to nights and weekends, increases advertising to capture new customers, and establishes a website offering online shopping and delivery. This shopkeeper sees a similar increase in receipts, without the benefit of the new apartment building across the street. Although both shopkeepers were actively involved in the business of running the store, the increase in the value of the business itself is passive in the first case and active in the other.

Dr. Romulus has not presented sufficient evidence to rebut the presumption that the increase in value of marital property post separation is divisible property, and thus such increase will be classified as divisible property and distributed as set out in this order.

4. This asset is assigned to Husband at the DOS value of \$983,558.00. The increase in value from DOS until DOT is passive as indicated above, and is thus divisible property assigned to the Husband at a DOT value of \$300,997.00.

(Emphasis added). The trial court also made the following related conclusions of law:

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3. The marital assets and debts, the fair market value of each on the DOS, and the divisible property are as set out in the paragraphs above and they are incorporated herein by reference.
4. The increase in value of the Husband's dental practice was passive and therefore divisible property.

We first note that the findings of fact above actually include the conclusion of law that the post-separation appreciation of the dental practice is divisible property. "Because the classification of property in an equitable distribution proceeding requires the application of legal principles, this determination is most appropriately considered a conclusion of law." *Hunt v. Hunt*, 112 N.C. App. 722, 729, 436 S.E.2d 856, 861 (1993). We will therefore review this determination as a conclusion of law *de novo*. See *Lee*, 167 N.C. App. at 253, 605 S.E.2d at 224. Defendant does not challenge the sufficiency of the evidence to support the portions of the findings of fact quoted above which are actually facts, as to the nature and extent of defendant's work in the dental practice before and after the date of separation.

N.C. Gen. Stat. § 50-20(b)(4)a (2009) defines "divisible property" as:
all real and personal property as set forth below:

- a. All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of post-separation actions or activities of a spouse shall not be treated as divisible property.

Defendant argues that since the trial court found that defendant continued to be actively involved in the dental practice after the date of separation, that any increase in the value of the business must also be appreciation "which is the result of postseparation actions or activities[.]" See *id.* Defendant contends that

the trial court had to concede "Dr. Romulus undoubtedly actively worked in the business . . ." . . . Nevertheless, the trial court determined the increase in the business value was passive because [defendant] had not *increased* his active involvement in the practice or substantially increased his marketing of the practice. This was error. The test is not whether there has been *increased* active involvement, but rather whether the increase is the result of active involvement. The fact, as found by the trial court, [defendant] continued to work actively in his

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dental practice—maintaining the same consistent effort which built a dental practice with a net value of over \$900,000 (as found by the trial court) in July 2006, which then jumped 25% in value after the date of separation to over \$1.2 million—precludes a conclusion the increase in value of his dental practice was passive. [*Lawing v. Lawing*, 81 N.C. App. 159, 176, 344 S.E.2d 100, 112 (1986)].

Defendant also argues that the trial court’s hypothetical regarding a shopkeeper is “wholly inapplicable” and “logically flawed[,]” as some of the facts therein are not applicable or analogous to defendant’s practice.

Plaintiff responds that defendant’s argument is flawed both procedurally and substantively. Procedurally, plaintiff argues that defendant simply failed to meet his burden of proof to overcome the statutory presumption that the postseparation appreciation is divisible. This Court has determined that

[u]nder the plain language of [N.C. Gen. Stat. § 50-20(b)(4)a], all appreciation and diminution in value of marital and divisible property is presumed to be divisible property *unless* the trial court finds that the change in value is attributable to the post-separation actions of one spouse. Where the trial court is unable to determine whether the change in value of marital property is attributable to the actions of one spouse, this presumption has not been rebutted and must control.

Wirth v. Wirth, 193 N.C. App. 657, 661, 668 S.E.2d 603, 607 (2008) (citation omitted). As noted by plaintiff, this Court in *Wirth*, “identified the ‘unless’ clause of Subsection 50-20(b)(4)(a) to be a rebuttable presumption, with the burden of overcoming the presumption placed on the party seeking to show that the postseparation appreciation/increase (or diminution/decrease) was the result of ‘postseparation actions or activities’ of a spouse[.]”. Substantively, plaintiff argues that defendant has “fail[ed] to apply the complete statutory test[,]” explaining that although defendant may have presented evidence as to his postseparation “actions or activities[,]” he has not proven that the increase in value was attributable to these activities. Essentially, plaintiff contends that defendant failed to prove causation: that it is more likely than not that the increase in value was *caused by* his post-separation actions or activities.

We agree with plaintiff that this case is governed by the statutory presumption that the post-separation increase in value of marital

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property is divisible as set forth in *Wirth*. Regardless of the usefulness of the “hypothetical” set forth in the findings of fact, the operative portion of the finding—which as we have noted is actually a conclusion of law—is that “Dr. Romulus has not presented sufficient evidence to rebut the presumption that the increase in value of marital property post separation is divisible property, and thus such increase will be classified as divisible property and distributed as set out in this order.” There is no dispute that the dental practice prior to the date of separation is marital property. Based upon the statutory presumption that post-separation appreciation to marital property is divisible, defendant had the burden of proof to rebut this presumption for the trial court to be able to find that the postseparation appreciation in the dental practice was defendant’s separate property. The trial court is the sole judge of the weight and credibility of the evidence. *See Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) (noting that “it is within the trial court’s discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial.”). The trial court’s findings of fact as to the valuation of the dental practice and defendant’s work in the dental practice are unchallenged. Although we review the trial court’s conclusions of law *de novo*, we cannot reweigh the evidence and credibility of the witnesses. Essentially, the trial court found that it could not determine the cause of the postseparation increase in value, and because of the statutory presumption, it must be considered divisible. We also note, although we have not quoted the extensive findings of fact about valuation of the dental practice as they are not directly relevant to the issues raised on appeal, the trial court did find the valuation methodology and evidence as presented by plaintiff to be more credible than that presented by defendant,¹ and the trial court’s determination of the dental practice’s value and increase in value postseparation is clearly a part of the trial court’s rationale for its conclusion that defendant did not meet the burden of proof to rebut the presumption of divisible appreciation. The trial court’s findings of fact support its conclusion of law that the postseparation appreciation of the dental practice is divisible property, so defendant’s first argument is without merit.

1. The trial court specifically found that “the Wife’s expert had more credibility than the Husband’s expert” and “adopt[ed] Wife’s evidence regarding the business valuation with the following exceptions[,]” which were an adjustment to the capitalization rate and use of the weighted average of net income instead of the simple average.

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2. Darlington Avenue property classification

[2] Defendant next argues that the “trial court erred as a matter of law in classifying the Darlington Avenue property as plaintiff’s separate property” in finding of fact 6 (L.). Defendant contends that the Darlington Avenue house was “obtained through a property exchange using the 717 Mercer Avenue house, which Plaintiff owned prior to the marriage” and was “held by both parties in the entirety as husband and wife.” N.C. Gen. Stat. § 50-20(b)(2) defines “separate property” as follows:

(2) “Separate property” means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance.

Defendant accurately summarizes the law applicable to classification of this property as follows:

“When previously separate real property becomes titled by the entirety, the law presumes the transfer to be a gift to the marital estate.” Warren v. Warren, 175 N.C. App. 509, 513, 623 S.E.2d 800, 802-803 (2006) (citing McLean v. McLean, 323 N.C. 543, 551-52, 374 S.E.2d 376, 381-82 (1988) and 3 Suzanne Reynolds, Lee’s North Carolina Family Law § 12.33, at 12-100 (5th ed. 2002) (“The [marital gift] presumption applies in all instances when the spouses cause title to real property, or an interest in real property, to be in the entirety. The presumption applies when one spouse conveys to the other spouse in the entirety and when, because of a purchase, third parties convey to the spouses in the entirety.”)). “This presumption may be rebutted only by clear, cogent, and convincing evidence that there was no donative intent to make a gift to the marriage on the part of the alleged donor spouse.” Id.

The same is true where real property is purchased using separate funds: “This Court, in previously construing G.S. sec. 50-20(b) (2), has determined that ‘where a spouse furnishing

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consideration from separate property causes property to be conveyed to the other spouse in the form of tenancy by the entirety, a presumption of a gift of separate property to the marital estate arises, which is rebuttable by clear, cogent, and convincing evidence.’” Thompson v. Thompson, 93 N.C. App. 229, 231, 377 S.E.2d 767, 768 (1989) (quoting McLeod v. McLeod, 74 N.C. App. 144, 154, 327 S.E.2d 910, 916-17 (1985))

The trial court’s findings of fact and conclusions of law as to the Darlington Avenue property, in their entirety,² are as follows:

L. 73 Darlington Avenue, Wilmington, N.C.: This asset is Wife’s separate property however it is encumbered by a Promissory Note payable to Herbert Fisher on the DOS in the amount of \$176,000.00 and on the DOT in the amount of \$149,252.00, which debt the Court finds to be marital debt. This is a debt that was incurred by the parties during the course of the marriage but in fact, encumbers Wife’s separate property. The Court assigns this marital debt to the Wife.

The trial court made the following conclusion of law, covering all of the items of separate property identified in the findings of fact, including the Darlington Avenue:

5. The separate property of each of the Parties is set out and valued in the paragraphs above and they are incorporated herein by reference as if fully set out.

As noted above, the classification of property is actually a conclusion of law, not a finding of fact, and we will therefore review the trial court’s classification of the Darlington Avenue property *de novo*. See Hunt, 112 N.C. App. at 729, 436 S.E.2d at 861.

Plaintiff acknowledges that the trial court’s “finding of fact/conclusion of law might leave something to be desired in several respects” but argues that this “does not mean that Paragraph 6(L) is either factually incorrect or legally unsustainable.” The arguments of both parties focus on whether the presumption of a gift to the marital estate which arises from titling the property as tenants by the

2. The order also incorporated the provisions of the Pretrial Order “filed on June 30, 2009” “as if fully set forth in this Order” but this order does not add any findings which may assist in classification. The Pretrial Order states that the Darlington Avenue property is titled “Jt[,]” or jointly, although it does not state that it is titled as tenants by the entirety. The parties agreed on the value of the property as of the DOS and DOT but disagreed as to the classification of the property.

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entireties may be rebutted solely by the testimony of the donor-spouse. Yet we must first consider whether the trial court's findings of fact are sufficient to support its conclusion of law that the Darlington Avenue property is plaintiff's separate property. This is the simple part of our analysis, as the trial court actually made *no* findings of fact which could support the classification of the Darlington Avenue property as either marital or separate property. Essentially, the trial court made a finding of fact as to the valuation and the debt associated with the house, facts which were agreed upon by the parties, but only a conclusion of law as to the contested issue, the classification of the Darlington Avenue property as separate or marital property. The order contains no finding as to the facts necessary for the determination of whether the property is marital or separate such as when it was acquired, how it was acquired, or even how it was titled. Although ample evidence was presented on all of these facts, the trial court did not make the findings. To support the conclusion of law that the Darlington Avenue property is separate, the trial court must make "specific findings of the ultimate facts established by the evidence, admissions, and stipulations that are determinative of the questions involved in the action and essential to support the conclusions of law reached." *Plott v. Plott*, 313 N.C. 63, 74, 326 S.E.2d 863, 870 (1985) (citation omitted). Although the trial court need not and should not recite all of the evidence, "[t]he purpose for the requirement of specific findings of fact that support the court's conclusion of law is to permit the appellate court on review to determine from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of the law." *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986) (citation and quotation marks omitted). We therefore find that the trial court erred as to its conclusion as to the classification of the Darlington Avenue property, as there were no findings of fact to support the conclusion of law. We therefore remand the matter to the trial court to make additional findings of fact regarding the classification of the Darlington Avenue property and to make its conclusion of law based upon its findings of fact.

[3] Our analysis as to the classification of the Darlington Avenue property is not over, because the additional issue as presented at trial and ably argued by both parties will arise again on remand. We will therefore address these arguments as well.

At trial, undisputed evidence was presented that plaintiff owned a house located at 717 Mercer Avenue prior to her marriage to defendant. During the marriage, the Mercer Avenue property was exchanged

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for the Darlington Avenue property, which was titled in both parties' names in the entirety. Defendant had also owned a house prior to the parties' marriage, and plaintiff testified that the parties had essentially agreed that defendant would keep his house and she would keep hers. Although defendant's testimony as to the parties' agreement, if any, as to the Darlington Avenue property at the time of its acquisition is not entirely clear, he did affirm that there was no "discussion that [the Darlington Avenue house] was her separate property[.]" Yet, arguably the only evidence which could potentially support findings of fact to rebut the marital property presumption is plaintiff's testimony as to her intent. Herein lies the issue which the trial court must resolve on remand.

Defendant argues that plaintiff's testimony alone cannot, as a matter of law, suffice to rebut the marital property presumption:

"the donor's testimony alone that [s]he lacked the requisite intent is insufficient to rebut the marital gift presumption." Warren, 175 N.C. at 514, 623 S.E.2d at 803 (citing Thompson, 93 N.C. App. at 232, 377 S.E.2d at 768-69 (defendant's testimony alone "certainly" did not rise to the level of clear, cogent, and convincing evidence); and 3 Reynolds, supra, § 12.33, at 12-102 ("Often the only evidence of a lack of donative intent is the donor's testimony. The appellate cases of North Carolina have uniformly held that such evidence alone will not satisfy the burden of rebutting the presumption by clear, cogent, and convincing evidence.")).

The only evidence in this case which could possibly be construed as attempting to overcome the marital gift presumption is Plaintiff's own testimony both parties had a house before the marriage and Plaintiff traded hers for the Darlington Avenue property. . . . This testimony standing alone is insufficient, as a matter of law, to overcome the marital gift presumption as to the Darlington Avenue real property. Id.

Plaintiff takes issue with defendant's characterization of *Warren* as establishing that "the donor's testimony alone that [s]he lacked the requisite intent is insufficient to rebut the marital gift presumption" as well as Reynolds' characterization of the caselaw. Plaintiff argues that North Carolina's appellate cases have actually not "uniformly held that [the donor's testimony] alone will not satisfy the burden of rebutting the presumption by clear, cogent, and convincing evidence." Plaintiff argues that

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[t]he Defendant's argument actually relies upon a *subsequent erroneous extension of the McLean* presumption, by which a certain species of testimony has been deemed insufficient—apparently, as a matter of law—to meet the “clear, cogent, and convincing” standard. To the extent these opinions from the Court of Appeals maintain such a rule, they are in conflict with the original holding in *McLean*, in that they substitute a blanket evidentiary rule (which is not the rule found in *McLean*) for the trial court's discretion in determining the sufficiency of the evidence (which is the rule found in *McLean*).

(Emphasis in original.) We must therefore review the development of the marital gift presumption and how it may be rebutted from *McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376 to the present, to determine if a rule as articulated by Reynolds has actually been established in our caselaw. If it has, on remand the trial court would have no option but to conclude that the Darlington Avenue house is marital property, as the only evidence as to intent of the donor is plaintiff's testimony; if not, the trial court on remand would weigh the relevant evidence, including plaintiff's testimony, and determine, based upon clear, cogent, and convincing evidence, whether plaintiff successfully rebutted the presumption.

We begin our analysis with an opinion of this Court which predated *McLean* and was cited as part of the rationale of *McLean*, *Draughon v. Draughon*, 82 N.C. App. 738, 347 S.E.2d 871 (1986), *cert denied*, 319 N.C. 103, 353 S.E.2d 107 (1987). *Draughon* is also one of the cases cited by Reynolds to support the proposition that appellate cases have “uniformly” held that testimony of the donor spouse is insufficient as a matter of law to rebut the marital gift presumption. In *Draughon*, the wife argued that her separate funds which were used to pay the mortgage on the marital home should have been classified as her separate property, as she testified that she did not intend to make a gift to the marital estate. *Id.* at 739, 347 S.E.2d at 872. We noted that the wife

contends this testimony was sufficient to rebut the presumption of a gift of separate property to the marital estate by clear, cogent, and convincing evidence. This evidence may be clear and cogent, but evidently it was not convincing to the trial court. The credibility of a witness is a matter to be resolved by the trier of fact. *Laughter v. Lambert*, 11 N.C. App. 133, 180 S.E.2d 450 (1971). Upon appellate review of a case heard without a jury the trial

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court's findings of fact are conclusive on appeal if there is evidence to support them, even though evidence might sustain findings to the contrary. *Dixon v. Kinser and Kinser v. Dixon*, 54 N.C. App. 94, 282 S.E.2d 529 (1981), *disc. rev. denied*, 304 N.C. 725, 288 S.E.2d 805 (1982). We have reviewed the evidence and find that it supports the court's findings. The court properly concluded, based upon the case law, that defendant's sum was a gift to the marital estate in the form of a mortgage payment.

Id. at 739-40, 347 S.E.2d at 872. *Draughon* did not establish a rule that testimony of the donor spouse cannot rebut the marital gift presumption as a matter of law. Instead, it recognized and applied the well-settled rule that the trial court determines the credibility of the witnesses and the weight to be given to the testimony. The trial court did not find the wife's evidence convincing, and this Court found the trial court's determination conclusive because it was supported by the evidence.

In *McLean v. McLean*, 323 N.C. 543, 546-47, 374 S.E.2d 376, 378-79, our Supreme Court addressed the operation of the marital gift presumption as established in *McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E.2d 910 and how this presumption may be rebutted.

[C]onsidering the nature of the marital relationship and of the entireties estate, we conclude that the marital gift presumption established in *McLeod* is appropriate as an aid in construing N.C.G.S. § 50-20(b)(2). Donative intent is properly presumed when a spouse uses separate funds to furnish consideration for property titled as an entireties estate. *McLeod*, 74 N.C. App. at 154, 327 S.E.2d at 916-17. This presumption is sufficiently strong that it is, and should be, rebuttable only by clear, cogent, and convincing evidence. *Id.* Rebuttal of the presumption would then result in application of traditional source of funds analysis.

When property subject to classification is titled as a tenancy by the entirety, therefore, the marital gift presumption controls the initial determination of whether a gift has been made. If a spouse uses separate funds to acquire property titled by the entireties, the presumption is that a gift of those separate funds was made, and the statute's interspousal gift provision applies. Unless that presumption is rebutted by clear, cogent and convincing evidence, the statute dictates that the gift "shall be considered separate property only if such an intention is stated in the conveyance." N.C.G.S. § 50-20(b)(2) (1987).

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Id. at 551-52, 374 S.E.2d at 381-82 (footnote omitted). Thus, *McLean* sets forth the rule that when one spouse deeds his or her separate real property to both parties as tenants by the entireties, a presumption of a gift to the marital estate arises, which can be rebutted only by either “clear, cogent, and convincing evidence” or by the intention that the property remain separate as “stated in the conveyance.” *See id.* *McLean* does not say that testimony of the donor cannot, as a matter of law, be sufficient evidence to rebut the presumption. In the preceding case, *McLean v. McLean*, 88 N.C. App. 285, 289-90, 363 S.E.2d 95, 98-99 (1987), this Court noted that the trial court found that the defendant had not presented “clear, cogent, and convincing” evidence sufficient to rebut the marital gift presumption. This Court did not find that the trial court was correct because the defendant’s evidence as to his own intent was incompetent as a matter of law to support a finding; instead the *McLean* court noted that

[d]efendant presented evidence showing the source of his separate funds and their application to the Camp Branch Road property and the office building. He also elicited testimony from plaintiff that she did not want to be awarded anything from defendant’s inheritance. *Whether defendant succeeded in rebutting the presumption of gift to the marital estate by clear, cogent, and convincing evidence is a matter left to the trial court’s discretion.* Defendant’s evidence “may be clear and cogent, but evidently it was not convincing to the trial court.” *Draughon v. Draughon*, 82 N.C. App. 738, 739, 347 S.E.2d 871, 872 (1986), *cert. denied*, 319 N.C. 103, 353 S.E.2d 107 (1987). There is some competent evidence to support the trial court’s findings; therefore, its rulings will not be disturbed on appeal. *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986). . . .

Id. (emphasis added). Thus, the *McLean* court recognized that the determination of the weight of the evidence, whether from testimony of the donor spouse or other evidence, was left to the trial court’s discretion. As the trial court had properly exercised its discretion, the Supreme Court affirmed this Court’s ruling on this issue. *McLean*, 323 N.C. at 555, 374 S.E.2d at 383.

Defendant relies primarily on two of the next cases in this line, *Thompson v. Thompson*, 93 N.C. App. 229, 377 S.E.2d 767 (1989) and *Warren v. Warren*, 175 N.C. App. 509, 623 S.E.2d 800 (2006) to argue that “the donor’s testimony alone that [s]he lacked the requisite intent is insufficient to rebut the marital gift presumption.” *See id.* at 514, 623 S.E.2d at 803. Although these words are accurately quoted from

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Warren, we must determine if this statement is in fact a rule of law or *obiter dicta*. We will address these cases also in chronological order.

In *Thompson v. Thompson*, the husband contributed separate property to the purchase of the parties' marital home, which was titled as tenants by the entireties, but presented evidence that he did not intend to make a gift to the marital estate of his separate inheritance. 93 N.C. App. at 230, 232, 377 S.E.2d at 767, 768. The trial court concluded that he made a gift to the marital estate by placing title to the property as tenants by the entireties, and the husband argued on appeal that this conclusion was in error. *Id.* at 230, 377 S.E.2d at 767. The *Thompson* court noted the "settled rule" that "*McLean* [had] adopted the marital gift presumption of *McLeod* for entireties property" and stated that

The question then becomes whether defendant has come forward with clear, cogent, and convincing evidence to rebut this presumption. We find that he has not.

The conveyance itself contained no statement that defendant intended to keep the residence his separate property. Whether evidence presented by defendant at trial is sufficient to "[rebut] the presumption of gift to the marital estate by clear, cogent, and convincing evidence is a matter left to the trial court's discretion." *Id.* at 555, 374 S.E.2d at 383, *quoting with approval, McLean v. McLean*, 88 N.C. App. 285, 290, 363 S.E.2d 95, 98-99 (1987).

At trial the only evidence properly before the court as to defendant's intent concerning the status of the residence on Asheboro Street was the following:

Q: Mr. Thompson, was it your intent to have your former wife's name placed on the deed?

A: No, and this is the reason I asked twice first.

As to defendant's intent concerning the property on Mystic Drive, the transcript reveals only the following interchange:

Q: Whenever you bought the second house [on Mystic Drive], do you know whose names were put on the deed?

A: The second house, due to the fact that Peggy's name was placed on the deed to my second house it was only natural then that her name was going to go to the third house.

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We agree with plaintiff's argument that the above-quoted statements of defendant show merely that he considered whether to place plaintiff's name on the deed and then proceeded to do so. In any event, they certainly do not rise to the level of clear, cogent, and convincing evidence of defendant's intention not to make a gift to the marital estate.

Id. at 232, 377 S.E.2d at 768-69. If the absence of a statement of contrary intent in the conveyance were the only competent evidence to refute the marital gift presumption, the *Thompson* court would not have addressed the defendant's testimonial evidence, as this would have been unnecessary for its ruling. Likewise, if the husband's testimony, as the donor spouse, was incompetent as a matter of law to rebut the presumption, the *Thompson* court need not have considered his actual testimony. *Thompson* therefore does not hold that the donor's testimony cannot be sufficient evidence to rebut the marital gift presumption; it merely agreed that the trial court had properly weighed the evidence and concluded that it did not rebut the presumption.

Likewise, in *Lawrence v. Lawrence*, this Court considered whether a parcel of real property purchased with the husband's inheritance but deeded to both parties as tenants by the entireties was properly classified as his separate property. 100 N.C. App. 1, 7-8, 394 S.E.2d 267, 269-70 (1990). The wife argued that based upon *McLean*, the trial court should have classified the real property as marital as it was titled as tenants by the entireties. *Id.* at 8-9, 394 S.E.2d at 269-70. The trial court made extensive findings of fact about the property, including the following:

This property is ancestral property and has been in the Defendant's maternal ancestry for over 100 years. The Court further finds that when the Plaintiff took an appraiser to these tracts of land for an appraisal to be made in Mitchell County to testify in this cause, the Plaintiff did not know where the 24 acres or the 2.14 acres were located on Conley Ridge Road. That the Defendant testified that at no time did he ever intend to make a gift of any of these deeds to the Mitchell County property to his wife. That the Plaintiff did not testify that she understood that the Defendant intended to make her a gift of the Mitchell County property. The Court finds that the evidence is clear, cogent and convincing and of sufficient weight to rebut the presumption of gift created by the deeds being in the form of tenants by the entirety.

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Id. at 8, 394 S.E.2d at 270. This Court found that the trial court had supported its conclusion of separate property with some facts which could not support this conclusion as they did not relate to the donor spouse's intent. *Id.* Specifically, *Lawrence* rejected the facts as to the use of the property, that it was "ancestral," and the donee spouse's knowledge or understanding of the facts regarding the property. *Id.* at 8-9, 394 S.E.2d at 270. But significantly for the issue before us now, the *Lawrence* court stated that the trial court should consider and weigh the husband's testimony as to his intent.

The trial court erred by relying on defendant's use of separate property to purchase the 24 acre tract to rebut the presumption of a gift to the marital estate. Additionally, the findings that this property was "ancestral," that plaintiff did not know its location and her lack of testimony that she understood that defendant intended to make a gift are irrelevant to the issue of whether this property is marital property.

The remaining basis for the trial court's determination that the gift presumption was rebutted is defendant's testimony that he did not intend to make a gift to his wife. "Whether defendant succeeded in rebutting the presumption of gift to the marital estate by clear, cogent and convincing evidence is a matter left to the trial court's discretion." *McLean v. McLean*, 88 N.C. App. 285, 290, 363 S.E.2d 95, 98-99 (1987), *aff'd*, 323 N.C. 543, 374 S.E.2d 376 (1988). The general rule is that "[u]pon appellate review of a case heard without a jury the trial court's findings of fact are conclusive on appeal if there is evidence to support them" *Draughon v. Draughon*, 82 N.C. App. 738, 740, 347 S.E.2d 871, 872 (1986), *cert. denied*, 319 N.C. 103, 353 S.E.2d 107 (1987). Although the trial court here found as a fact that defendant had rebutted the gift presumption, the court erred in relying on evidence that has no bearing on the issue. Accordingly, *we remand to the trial court for a determination whether defendant's relevant evidence was sufficiently clear, cogent and convincing to rebut the gift presumption. We note that this court has affirmed findings that property is marital even though a donor spouse testified that a gift was not intended. See Thompson v. Thompson*, 93 N.C. App. 229, 232, 377 S.E.2d 767, 768-69 (1989) (trial court did not err in determining that parties' home was marital property where only competent evidence that a gift was not intended was donor's testimony); *Draughon*, 82 N.C. App. at 739-40, 347 S.E.2d at 872 (although donor spouse testified that she did not intend a

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gift there was evidence to support trial court's finding that the property was marital).

Id. at 8-9, 394 S.E.2d at 270-71 (emphasis added). If Mr. Lawrence's testimony alone as to his intent was insufficient as a matter of law to support the trial court's determination that he had rebutted the marital gift presumption, just as in *Thompson*, there would have been no need to remand the case to the trial court to make additional findings. The *Lawrence* court noted that some cases have found the testimony of the donor spouse to be insufficient, but it remains a determination which is made in the discretion of the trial judge.

Finally, we reach the most recent case, *Warren v. Warren* 175 N.C. App. 509, 623 S.E.2d 800. In *Warren*, Mr. Warren and his brother inherited real property from their father. *Id.* at 513, 623 S.E.2d at 802. Later, Mr. Warren and his brother deeded the entire property to Mr. Warren and his wife as tenants by the entireties, thus creating the marital gift presumption. *Id.* Mr. Warren testified at trial that he "did not instruct the attorney performing the conveyance to transfer the property by the entireties[.]" *Id.* at 514, 623 S.E.2d at 803. He made an offer of proof that "he had no intent to make a gift to [his wife] of [any] inheritance whatsoever," but this evidence was not admitted by the trial court. *Id.* (footnote and quotation marks omitted). On appeal, this Court specifically did not address Mr. Warren's offer of proof of testimony as to his intent. *Id.* We noted that "Mr. Warren did not assign [the trial court's ruling which excluded his testimony regarding his intent] as error and we, therefore, will not review it. N.C.R. App. P. 10(a)." *Id.* at 514 n.2, 623 S.E.2d at 803 n.2. We addressed only Mr. Warren's testimony that he "did not instruct the attorney" to deed the property by the entireties. *Id.* at 514, 623 S.E.2d at 803. We then stated:

Our courts have held, however, that the donor's testimony alone that he lacked the requisite intent is insufficient to rebut the marital gift presumption. *See Thompson v. Thompson*, 93 N.C. App. 229, 232, 377 S.E.2d 767, 768-69 (1989) (defendant's testimony alone "certainly" did not rise to the level of clear, cogent, and convincing evidence). *See also* 3 Reynolds, *supra*, § 12.33, at 12-102 ("Often the only evidence of a lack of donative intent is the donor's testimony. The appellate cases of North Carolina have uniformly held that such evidence alone will not satisfy the burden of rebutting the presumption by clear, cogent, and convincing evidence."). Accordingly, because the only relevant evidence Mr. Warren offered to rebut the presumption was his own testimony, the trial court did not err in finding that the entire parcel was marital property.

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Id. Thus, any statement in *Warren* addressing Mr. Warren's proffered testimony that he did not intend to make a gift to the marital estate was unnecessary for the court's ruling. The *Warren* court specifically stated that this issue was not assigned as error and was not reviewed. *Warren* cannot be read as adopting a rule that the donor's testimony alone cannot "satisfy the burden of rebutting the presumption by clear, cogent, and convincing evidence[.]" *see id.*, because any statement to this effect is *obiter dicta*. Our Supreme Court has noted that

"[i]n every case what is actually decided is the law applicable to the particular facts; all other legal conclusions therein are but *obiter dicta*." *Hill v. Houpt*, 292 Pa. 339, 141 A. 159, 160.

On the subject of *obiter dicta*, we find this statement in Black, Law of Judicial Precedents, at page 173: ". . . if the statement in the opinion was . . . superfluous and not needed for the full determination of the case, it is not entitled to be accounted a precedent, for the reason that it was, so to speak, rendered without jurisdiction or at least extra-judicial. Official character attaches only to those utterances of a court which bear directly upon the specific and limited questions which are presented to it for solution in the proper course of judicial proceedings. Over and above what is needed for the solution of these questions, its deliverances are unofficial."

True, where a case actually presents two or more points, any one of which is sufficient to support decision, but the reviewing Court decides all the points, the decision becomes a precedent in respect to every point decided, and the opinion expressed on each point becomes a part of the law of the case on subsequent trial and appeal. In short, a point actually presented and expressly decided does not lose its value as a precedent in settling the law of the case because decision may have been rested on some other ground. 21 C.J.S., Courts, Sec. 190, p. 314.

Hayes v. Wilmington, 243 N.C. 525, 536-37, 91 S.E.2d 673, 682 (1956). The *Warren* court did not base its decision upon, or even consider, two points as to Mr. Warren's testimony; it considered only one as it considered only one assignment of error, as to Mr. Warren's testimony that he did not instruct the attorney to deed the property as tenants by the entirety. 175 N.C. App. at 514-15, 623 S.E.2d at 803. This testimony does not address Mr. Warren's intent but is merely testimony that he did not instruct the attorney as to the content of the deed. In addition, *Warren* held simply that the trial court did not err in deter-

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mining that Mr. Warren had not rebutted the marital gift presumption by his testimony that he did not instruct the attorney as to the deed. *See id.* This holding is entirely consistent with the prior cases as noted above, which leave the determination of the credibility of the witnesses and the weight of the evidence to the trial judge.

We also note that the quoted “rule” from *Warren* that “[o]ur courts have held, however, that the donor’s testimony alone that he lacked the requisite intent is insufficient to rebut the marital gift presumption[,]” *see id.* at 514, 623 S.E.2d at 803, is an accurate description of the cases cited to the extent that in those cases, the trial court determined that the donor’s testimony as to intent was not sufficient to rebut the marital gift presumption by clear, cogent, and convincing evidence. This does not mean that a trial court can never determine, in another case, upon weighing all of the evidence and the credibility of the witnesses, that a donor’s testimony is sufficient to rebut the presumption.

Our Supreme Court has not directly addressed the issue of whether testimony of the donor spouse as to intent is insufficient as a matter of law to rebut the marital gift presumption. However, it has expressed its approval of this Court’s holdings which left the determination of the weight of the evidence “to the trial court’s discretion” in *Haywood v. Haywood*, 106 N.C. App. 91, 103, 415 S.E.2d 565, 572 (1992) (Wynn, J., dissenting), *rev’d per curiam* by 333 N.C. 342, 425 S.E.2d 696 (1993) (adopting J. Wynn’s dissent). In *Haywood*, our Supreme Court adopted the dissent of Judge Wynn, which noted that

previous holdings of our courts . . . have required that a presumption of a gift of separate property to the marital estate is rebuttable only by a showing of *clear, cogent, and convincing evidence*. *See [McLean, 323 N.C. at 552, 374 S.E.2d at 382]; Lawrence v. Lawrence, 100 N.C. App. 1, 394 S.E.2d 267 (1990).* Moreover, whether a party has succeeded in rebutting the presumption of a gift to the marital estate by clear, cogent, and convincing evidence is a matter left to the trial court’s discretion. *Lawrence, 100 N.C. at 9, 394 S.E.2d at 270.*

Id.

We therefore hold that the trial court should consider the credibility and weight of all of the relevant evidence, including testimonial evidence of the donor spouse as to her intent in making a conveyance of separate real property to the parties as tenants by the entireties, just as it considers all other evidence. Of course, the trial court must

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find clear, cogent, and convincing evidence to rebut a presumption of a gift to the marital estate in this situation, but whether the plaintiff's evidence is "clear, cogent, and convincing" is left to the trial court's discretion. The donor spouse's testimony is not incompetent as a matter of law on this issue.

In summary, we reverse the trial court's conclusion of law that the Darlington Avenue property is the separate property of plaintiff as this conclusion is not supported by findings of fact. On remand, the trial court shall make findings of fact regarding the Darlington Avenue property, including findings as to whether plaintiff has rebutted the marital gift presumption by clear, cogent, and convincing evidence; shall make its conclusion of law as to classification of this property based upon those findings of fact; and shall adjust the distribution of property accordingly, if the classification changes and adjustment is necessary. We express no opinion on what findings of fact or conclusion of law the trial court should make on remand, but direct only that the trial court shall exercise its discretion in making the appropriate findings of fact and shall make the proper conclusion of law based on those findings. There is no need for presentation of additional evidence.

3. Post-separation net rental income and losses from investment properties

[4] Defendant's last argument is that the trial court erred in its valuation of "the post-separation net rental income and losses from the parties' investment properties." The parties agreed in the PTO that the "net post-separation income and loss from the marital investment properties constituted divisible property" but "disagreed on the valuation of the net income and loss and the properties to be included in this calculation." Defendant's evidence showed a net loss on the investment properties, while plaintiff's evidence was that defendant had a net income of \$266,443.00.

The trial court made the following findings of fact regarding the valuation of the post-separation rental income or loss:

[6.] NN. Divisible Property: The Court finds that following the separation of the parties, the Husband collected rent from various commercial properties owned by the parties. From mid-2006 (DOS) through the end of 2008, the Husband collected a net of \$266,443.00 and had sole use of the proceeds. The Court adopts as its findings the credible evidence regarding the same introduced

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by the Plaintiff in the chart entitled “Calculation of Rental Income Net of Mortgage and Taxes for Romulus Commercial Properties” located at tab H3.1 in Plaintiffs notebook and incorporates the same herein as if fully set forth. The Court finds these proceeds to be a marital divisible asset and assigns them to Husband.

The table at Tab H3.1, which was incorporated by reference in Finding 6(NN) summarized rental receipt and expenses for 2006, 2007, and 2008 for each of the following properties:

1. 3725 Wrightsville
2. 3131-3147 Wrightsville
3. 715-717 Market
4. 3538 S. College
5. 2309 Delaney
6. 6401 Windmill Way

The net income for all of the properties is shown as \$266,443.00.

The trial court also addressed the post-separation rental income or loss in its findings of fact regarding distributional factors:

7. DISTRIBUTIONAL FACTORS:

M. Any other factor which the Court finds to be just and proper.

The Court considers that there was additional divisible property in the form of rents from the commercial and other real estate holdings of the parties, but there was insufficient evidence at trial to value such rents. However, there is substantial value to this divisible property and it was considered by the Court in achieving equity. This factor weighs in favor of the Wife. The Court further considered that the Husband paid substantial sums of PSS to the Wife and upon hearing before this Court, the alimony claim of the Wife was ultimately denied. This will be a distributional factor (not a credit) that weighs in favor of the Husband.

Defendant argues that the trial court failed to make findings regarding his evidence of post-separation losses on three additional properties, which were not listed on Plaintiff’s exhibit H3.1. These properties were identified as 202 Cape Pointe, 73 Darlington Avenue, and 911 Orange Street. Defendant argues that his evidence indicated that these properties had net post-separation losses of \$33,457.00. Defendant contends that the trial court erred by failing to make specific findings regarding the value of these divisible losses: “In performing the necessary steps to equitably distribute the parties’ prop-

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erty, a court is required to make sufficiently specific findings of fact for an appellate court to determine what was done and to evaluate its correctness. See Wade v. Wade, 72 N.C. App. 372, 376, 325 S.E.2d 260, 266 (1985).”

Our standard of review as to this issue 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.” *Lee*, 167 N.C. App. at 253, 605 S.E.2d at 224 (citation and quotation marks omitted). Defendant does not argue that there was no evidence to support finding of Fact 6(NN), but instead that the trial court did not make adequate findings of fact as to each potential item of divisible income or loss for which defendant presented evidence, such that the findings are inadequate for this Court to “evaluate its correctness.”

Plaintiff responds that taken together, Finding 6(NN) and 7(M) demonstrate that the trial court made findings as to all of the post-separation rental loss or income for which it deemed the evidence to be sufficiently credible that the court could make specific findings noting that “[t]he mere introduction of evidence does not entitle the proponent to a finding thereon, since the finder must pass on its weight and credibility[.]” *Long v. Long*, 71 N.C. App. 405, 407, 322 S.E.2d 427, 430 (1984).

As to the Darlington Avenue property, we note that the trial court classified it as plaintiff’s separate property, so that the post-separation income or loss could not be divisible property. As discussed above, we have remanded to the trial court to make additional findings of fact and conclusions of law regarding the Darlington Avenue property, so the issue of the treatment of the post-separation income or loss from that property must also be addressed on remand. We will therefore address defendant’s argument only as to 202 Cape Pointe and 911 Orange Street properties. Upon review of the testimony and exhibits regarding the rental income and losses from these properties, we find that the trial court’s findings of fact are supported by the evidence, and they adequately address the issues raised. The trial court determined that although there was rental income from properties other than those identified in finding of fact 6(NN), there was not sufficient credible evidence to permit the trial court to determine specific values. This is reflected in Finding of fact 7(M), which notes that “there was insufficient evidence at trial to value such rents.” Defendant’s argument as to error in the valuation of the post-separation rental income or loss is therefore without merit.

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III. Plaintiff's cross-appeal of the order denying alimony

A. Illicit sexual behavior

[5] Plaintiff filed notice of cross-appeal to the trial court's order denying her claim for alimony based upon its conclusion that she had "engaged in an act of illicit sexual behavior as defined in N.C.G.S. § 50-16.1A(3)(a) which has not been condoned by the Defendant and did not occur during a period of separation." Plaintiff argues that the trial court "erred as a matter of law in concluding that the plaintiff's 'sexual' conduct met the definition of 'illicit sexual behavior' within the meaning of N.C. Gen. Stat. § 50-16.1A(3)a." Plaintiff's arguments require that we consider the definitions of "illicit sexual behavior" as applicable to N.C. Gen. Stat. § 50-16.3A. Also, a portion of the trial court's findings here is based upon the plaintiff's admission to engaging in "sexual relations." Although defendant argues that "[i]n common usage, the term 'sexual relations' is synonymous with 'sexual intercourse,'" based upon Merriam-Webster's Online Dictionary definition, the meaning of "sexual relations" is not always so obvious. In addition, the term "sexual relations" is not part of the statutory definition for illicit sexual behavior. *See* N.C. Gen. Stat. § 50-16.1A(3)a (2009).

The trial court made the following findings of fact regarding plaintiff's entitlement to alimony:

10. Although the Plaintiff is a dependent spouse and the Defendant is a supporting spouse, the Court finds that the Plaintiff has voluntarily participated in an act of illicit sexual behavior as defined by N.C.G.S. §50-16.1A(3)(a) during the course of the marriage which has not been condoned by the Defendant in that he did not know of the Plaintiff's activities until the trial of this matter.

11. During the marriage in the summer and fall of 1999, the Plaintiff was involved in an act or acts of illicit sexual behavior with a man by the name of Steve Cline by allowing Mr. Cline to penetrate her vagina either with his finger or his penis on at least one or more occasions.

12. At the initial hearing of this trial, the Plaintiff admitted under oath to having "sexual relations" or "sexual encounters" with Steve Cline in 1999.

13. Thereafter, the case was continued at the request of the Plaintiff. At the subsequent hearing, the Plaintiff testified that she

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considered kissing to be “sexual relations.” This testimony is not believable to this Court. Steve Cline was subpoenaed to testify and testified that he remembered having sexual relations with the Plaintiff on two occasions, once on Bald Head Island and once in a pool. Although Mr. Cline testified that he did not recall the exact details of the two encounters, he did recall that even though sexual intercourse may have failed due to his failure to obtain or maintain an erection, he rubbed the Plaintiff’s vaginal area and she touched his penis. The Court has had the opportunity to observe the witnesses testify, had access to their demeanor, tone of voice and ultimately the credibility of the parties. Based on these factors, it is clear to this Court that the Plaintiff engaged in active illicit sexual behavior with Steve Client during the parties’ marriage.

14. As stated above, the Defendant was not ever made aware of these encounters until the trial of this matter and as such, did not condone such actions.

. . . .

17. There is insufficient evidence to indicate that the Defendant has committed any act of illicit sexual behavior during the marriage. However, [t]he Court finds [the] Plaintiff’s testimony credible and Defendant’s admission that Defendant committed marital misconduct by the following:

- a. His excessive viewing of pornography, in spite of Plaintiff’s request to the contrary and to the extent that one of the parties’ children “caught” him viewing same. He was in excessive [sic] therapy for this problem.
- b. His multiple incidents of violence against the Plaintiff, the most violent one being the incident intentionally breaking her right arm.
- c. His violence against the parties’ minor children pushing them, hitting them and in one instance choking one of the minor children until he lost consciousness.
- d. His repeated verbal abuse of Plaintiff and the minor children.

Our standard of review for the trial court’s determination as to plaintiff’s entitlement to alimony is *de novo*.

As our statutes outline, alimony is comprised of two separate inquiries. First is a determination of whether a spouse is *entitled*

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to alimony. N.C. Gen. Stat. § 50-16.3A(a) (1999). Entitlement to alimony requires that one spouse be a dependent spouse and the other be a supporting spouse. *Id.* If one is entitled to alimony, the second determination is the amount of alimony to be awarded. N.C. Gen. Stat. § 50-16.3[A](b). We review the first inquiry de novo, *Rickert v. Rickert*, 282 N.C. 373, 379, 193 S.E.2d 79, 82 (1972), and the second under an abuse of discretion standard, *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982).

Barrett v. Barrett, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000) (emphasis in original).

N.C. Gen. Stat. § 50-16.3A (2009) sets forth when alimony may be awarded:

(a) Entitlement.—In an action brought pursuant to Chapter 50 of the General Statutes, either party may move for alimony. The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those set out in subsection (b) of this section. If the court finds that the dependent spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, the court shall not award alimony. If the court finds that the supporting spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, then the court shall order that alimony be paid to a dependent spouse. If the court finds that the dependent and the supporting spouse each participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation, then alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances. Any act of illicit sexual behavior by either party that has been condoned by the other party shall not be considered by the court. . . .

“Illicit sexual behavior” is one of the eight forms of “marital misconduct” as defined by N.C. Gen. Stat. § 50-16.1A(3) (2009).³ “Illicit sexual

3. N.C. Gen. Stat. § 50-16.1A(3) lists the others:

“b. Involuntary separation of the spouses in consequence of a criminal act committed prior to the proceeding in which alimony is sought;

c. Abandonment of the other spouse;

d. Malicious turning out-of-doors of the other spouse;

e. Cruel or barbarous treatment endangering the life of the other spouse;

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behavior” is treated differently from all other forms of “marital misconduct,” as the trial court has the discretion to weigh all of the other forms of “marital misconduct” and to determine what effect, if any, the misconduct should have upon the alimony award. *See* N.C. Gen. Stat. § 50-16.3A(b) (“The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. . . . In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including: (1) The marital misconduct of either of the spouses. . . .”). As to “illicit sexual behavior” only, N.C. Gen. Stat. § 50-16.3A(a) eliminates the trial court’s discretion to weigh the marital misconduct of the parties unless both parties have committed “illicit sexual behavior.” If only the dependent spouse has engaged in uncondoned “illicit sexual behavior” during the marriage and prior to the date of separation, the trial court cannot award alimony, even if the supporting spouse has committed egregious “marital misconduct” of another sort. *See id.*

N.C. Gen. Stat. § 50-16.1A(3)a defines “illicit sexual behavior” as “acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in G.S. 14-27.1(4), voluntarily engaged in by a spouse with someone other than the other spouse[.]” Thus, N.C. Gen. Stat. § 50-16.1A(3) establishes four categories of sexual misconduct:

- (1) “sexual intercourse”
- (2) “deviate sexual intercourse”
- (3) “deviate sexual acts”
- (4) “sexual acts as defined in [N.C. Gen. Stat. §] 14-27.1(4).”

Because the trial court’s finding of fact was that plaintiff had allowed “Mr. Cline to penetrate her vagina either with his finger or his penis on at least one or more occasions[.]” the trial court did not clearly find one particular form of “sexual misconduct” but instead found

f. Indignities rendering the condition of the other spouse intolerable and life burdensome;
g. Reckless spending of the income of either party, or the destruction, waste, diversion, or concealment of assets;

h. Excessive use of alcohol or drugs so as to render the condition of the other spouse intolerable and life burdensome;

i. Willful failure to provide necessary subsistence according to one’s means and condition so as to render the condition of the other spouse intolerable and life burdensome.”

4. Plaintiff argues that the “deviate sexual intercourse” and “deviate sexual acts” are undefined and essentially too vague to be useful. As the acts as found by the trial court fall within the two better-defined categories of sexual misconduct, we will not attempt to discern the meaning of “deviate” in the context of N.C. Gen. Stat. § 50-16.1A(3)a.

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one or the other; it is also unclear whether the trial court found that both might have occurred, one on one occasion and one on another. So based upon the trial court's findings of fact, two of these categories of sexual misconduct are relevant to this case: "sexual intercourse" and "sexual acts as defined in [N.C. Gen. Stat. §] 14-27.1(4)."⁴

The definition of "sexual intercourse" is clear:

The terms "carnal knowledge" and "sexual intercourse" are synonymous. There is "carnal knowledge" or "sexual intercourse" in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient. G.S. 14-23; *State v. Monds*, 130 N.C. 697, 41 S.E. 789; *State v. Hargrave*, 65 N.C. 466; *State v. Storkey*, 63 N.C. 7; Burdick: Law of Crime, section 477; 44 Am. Jur., Rape, section 3; 52 C.J. Rape, sections 23, 24.

State v. Bowman, 232 N.C. 374, 375-76, 61 S.E.2d 107, 108 (1950). The trial court's finding of penetration of the plaintiff's vagina by Mr. Cline's penis satisfies the definition of "sexual intercourse." Plaintiff argues that the trial court's finding of "sexual intercourse" is not supported by the evidence. Plaintiff testified that she did not have "sexual intercourse" with Mr. Cline. Mr. Cline testified that he was unable to penetrate plaintiff's vagina with his penis due to erectile dysfunction. Plaintiff is correct that there was no direct evidence of "sexual intercourse" between herself and Mr. Cline. Defendant responds that under the doctrine of "inclination and opportunity," the evidence was sufficient to support the trial court's finding of "sexual intercourse." Our Supreme Court has declared that:

Adultery is nearly always proved by circumstantial evidence. 1 Robert E. Lee, *North Carolina Family Law* § 65 (4th ed. 1979). Circumstantial evidence "is often the only kind of evidence available, as misconduct of this sort is usually clandestine and secret." *Id.* Where adultery is sought to be proved by circumstantial evidence, resort to the opportunity and inclination doctrine is usually made. *Id.* Under this doctrine, adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; and (2) the opportunity created to satisfy their mutual adulterous inclinations. *Id.*

In *Owens v. Owens*, 28 N.C. App. 713, 222 S.E.2d 704, *disc. rev. denied*, 290 N.C. 95, 225 S.E.2d 324 (1976), the North Carolina

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Court of Appeals warned against adopting broad rules to prove adultery. The court said:

We consider it unwise to adopt general rules as to what will or will not constitute proof of adultery, but the determination must be made with reference to the facts of each case. In some cases evidence of opportunity and incriminating or improper circumstances, without evidence of inclination or adulterous disposition, may be such as to lead a just and reasonable [person] to the conclusion of adulterous intercourse.

Id. at 716, 222 S.E.2d at 706 (footnote added).

In re Estate of Trogdon, 330 N.C. 143, 148-49, 409 S.E.2d 897, 900 (1991). We agree with defendant that the testimony of both plaintiff and Mr. Cline demonstrates their mutual “adulterous inclination” and their opportunity to “satisfy their mutual adulterous inclinations.” *See id.*

Since the trial court phrased its finding of fact in the alternative, it is unclear if it actually did find that plaintiff and Mr. Cline had “sexual intercourse.” We must therefore also address the finding as to penetration of plaintiff’s vagina by Mr. Cline’s finger, which arguably falls under N.C. Gen. Stat. § 50-16.1A(3)a, which addresses “sexual acts as defined in [N.C. Gen. Stat. §] 14-27.1(4).”

N.C. Gen. Stat. § 14-27.1(4) (2009) defines “sexual act” as follows:

(4) “Sexual act” means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person’s body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

“Sexual acts” are distinguished from other forms of “sexual contact” as N.C. Gen. Stat. § 14-27.1(5) defines “sexual contact” as “(i) touching the sexual organ, anus, breast, groin, or buttocks of any person, (ii) a person touching another person with their own sexual organ, anus, breast, groin, or buttocks, or (iii) a person ejaculating, emitting, or placing semen, urine, or feces upon any part of another person.” Thus, a “sexual act” requires “penetration, however slight, by any object into the genital or anal opening of another person’s body[.]” while touching without penetration would be “sexual contact.” The trial court’s finding of fact that Mr. Cline’s finger penetrated plaintiff’s vagina is a finding of a “sexual act” as defined by N.C. Gen. Stat. § 14.27.1(4).

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Just as for “sexual intercourse,” the testimony of plaintiff and Mr. Cline provides sufficient evidence to support the trial court’s finding of fact. Although more certain and clear evidence is required for proof of a “sexual act” under N.C. Gen. Stat. § 14.27.1(4) in the criminal context, in alimony claims our Supreme Court has long endorsed proof of “sexual intercourse” by the doctrine of inclination and opportunity, and we see no reason why this doctrine would not also apply to other forms of “illicit sexual behavior.” *See* N.C. Gen. Stat. § 50-16.1A(3)a. The trial court did not err by its finding that plaintiff “voluntarily participated in an act of illicit sexual behavior as defined by N.C.G.S. §50-16.1A(3)(a).”

B. Date of separation

[6] Plaintiff next argues that even if plaintiff’s conduct was “illicit sexual behavior[.]” that the “trial court erred as a matter of law in concluding that the parties were not ‘separated’ at the time of the ‘sexual encounters’ between” plaintiff and Mr. Cline. Pursuant to N.C. Gen. Stat. § 50-16.1A(3)a, the dependent spouse’s “illicit sexual behavior” must occur “during the marriage and prior to or on the date of separation” in order to be a bar to alimony.

The trial court’s findings of fact as to the date of separation are as follows:

15. In addition to her inconsistent testimony with regard to sexual relations, the Plaintiff has contended that she was “separated” at the time of the sexual behavior. Although there was some physical separation of the parties after a choking incident involving the parties’ youngest son in the summer of 1999, neither party had expressed to the other party they wanted to separate nor in fact intended to permanently separate during the summer of 1999 through Christmas of 1999. Defendant continued to maintain all of his belongings at the marital residence and continued to have his mail delivered there. He did household chores and only occasionally slept at his dental office during this period of time.

16. Neither party sought the advice of attorneys, executed any type of separation or property settlement agreement nor expressed a contention to permanently end their marriage.

Plaintiff argues that the trial court found that in order for the parties to have been “separated” that plaintiff “had to verbalize unequivocally, overtly, and expressly to [defendant] her intention for him never to return to live with her in the marital home, and her intention for the

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parties' separation to be 'permanent.' ” Defendant responds that plaintiff's argument is based upon “an incomplete recitation of the trial court's findings[,]” and that in fact, the trial court properly “viewed the totality of the evidence from both parties and after weighing the credibility of the testimony and weighting the evidence, the trial court determined there had been no actual separation of the parties.”

The phrase “the date of separation[,]” as used in N.C. Gen. Stat. § 50-16.3A(3), is not defined by the statutory provisions regarding alimony, but has been addressed by our courts in the context of N.C. Gen. Stat. § 50-6, which addresses absolute divorce. N.C. Gen. Stat. § 50-6 (2009) provides that “[m]arriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year” The date upon which the husband and wife begin to live “separate and apart” is commonly known as the date of separation. We have noted that “[t]he words ‘separate and apart,’ as used in G.S. 50-6, mean that there must be both a physical separation and an intention on the part of at least one of the parties to cease the matrimonial cohabitation.” *Myers v. Myers*, 62 N.C. App. 291, 294, 302 S.E.2d 476, 479 (1983) (citing *Mallard v. Mallard*, 234 N.C. 654, 68 S.E.2d 247 (1951) and *Earles v. Earles*, 29 N.C. App. 348, 224 S.E.2d 284 (1976)). Further,

[i]n addressing whether a husband and wife have lived “separate and apart,” this Court has repeatedly held that these words require “both a physical separation and an intention on the part of at least one of the parties to cease the matrimonial cohabitation.” *Earles v. Earles*, 29 N.C. App. 348, 349, 224 S.E.2d 284, 286 (1976). *See also Myers v. Myers*, 62 N.C. App. 291, 294, 302 S.E.2d 476, 479 (1983); *Daniel v. Daniel*, 132 N.C. App. 217, 219, 510 S.E.2d 689, 690 (1999). Our courts have never required that the remaining party must also have knowledge of the other party's intent to cease cohabitation; therefore, we decline to do so now, especially when there is overwhelming evidence that all the requirements of Section 50-6 were met.

Smith v. Smith, 151 N.C. App. 130, 132-33, 564 S.E.2d 591, 592-93 (2002). In addition to the intention of at least one of the spouses to separate, the parties must physically separate in such a way that indicates “[a] cessation of cohabitation of husband and wife.” *Dudley v. Dudley*, 225 N.C. 83, 85, 33 S.E.2d 489, 490 (1945) (quotation marks omitted).

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[S]eparation implies . . . the living apart for such period in such a manner that those in the neighborhood may see that the husband and wife are not living together. . . .

Marriage is not a private affair, involving the contracting parties alone. Society has an interest in the marital status of its members, and when a husband and wife live in the same house and hold themselves out to the world as man and wife, a divorce will not be granted on the ground of separation, when the only evidence of such separation must, in the language of the Supreme Court of Louisiana (in the case of *Hava v. Chavigny*, 147 La., 331, 84 So., 892), “be sought behind the closed doors of the matrimonial domicile.” Our statute contemplates the living separately and apart from each other, the complete cessation of cohabitation. See *Taylor v. Taylor*, ante, 80.

Id. at 86, 33 S.E.2d at 491 (citations omitted). Here, there was evidence that at times, the parties would have an argument and defendant “would go to the office for a couple of days and cool down or whatever [then he] would go, and then [he] would basically come back.” However, even during these times when he went to stay in his office, defendant still would return to the marital home to take care of household chores, pay bills, and take the children to activities. Some of the parties’ family members and acquaintances testified that they were unaware of any separation of the parties prior to their final separation in 2006; others testified that the parties had separated for a period of time in 1999. The trial court weighed all of the evidence and determined the credibility of the witnesses, and its findings of fact are fully supported by the evidence. The trial court’s findings of fact and conclusions of law do not indicate any error of law as to the definition of “separation.” This argument is overruled.

C. Attorney fees

[7] Plaintiff also argues that the trial court erred by denial of her claim for attorney fees based upon N.C. Gen. Stat. § 50-16.4. Plaintiff concedes that if this Court determines that the trial court properly denied her claim for alimony, her claim for attorney fees was also properly denied. As we have determined that the trial court did not err by denying plaintiff’s alimony claim, there was no basis for the trial court to award her attorney fees. This argument is dismissed.

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D. Simultaneous hearing of equitable distribution and alimony claims

[8] Plaintiff’s last argument addresses the permissible timing of the alimony and equitable distribution orders. Plaintiff argues that “the trial court erred as a matter of law in simultaneously conducting a hearing for both equitable distribution and alimony and in simultaneously rendering judgment on both claims, in contravention of the express provisions of statutory and case law.” Plaintiff bases this argument primarily upon N.C. Gen. Stat. § 50-20(f) and cases interpreting it. N.C. Gen. Stat. § 50-20(f) (2009) provides as follows:

(f) The court shall provide for an equitable distribution *without regard to alimony* for either party or support of the children of both parties. After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

(Emphasis added.) Subsequent cases have stated that alimony must be determined after equitable distribution, because of “the obvious relationship that exists between the property that one has and his or her need for support and the ability to furnish it.” *Capps v. Capps*, 69 N.C. App. 755, 757, 318 S.E.2d 346, 348 (1984).

Defendant argues that if it was error to hear the two claims together, plaintiff is barred by the doctrine of invited error from consideration of this argument. Plaintiff has waived any argument that the “trial court erred by conducting a single proceeding for both alimony and equitable distribution,” as plaintiff did not request separate hearings and never objected to having both claims heard at the same time.

Invited error has been defined as

“a legal error that is not a cause for complaint because the error occurred through the fault of the party now complaining.” The evidentiary scholars have provided similar definitions; e.g., “the party who induces an error can’t take advantage of it on appeal”, or more colloquially, “you can’t complain about a result you caused.”

21 Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5039.2, at 841 (2d ed.2005) (footnotes omitted); see also *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) (“A party may not complain of action which he induced.” (citations omitted)).

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Boykin v. Wilson Med. Ctr., 201 N.C. App. 559, 563, 686 S.E.2d 913, 916 (2009), *disc. review denied*, 363 N.C. 853, 694 S.E.2d 200 (2010).

In addition, defendant notes that plaintiff cannot demonstrate any prejudice because the trial court did actually enter the alimony order *after* the equitable distribution order, and the basis for the denial of plaintiff's alimony claim was not her financial need for support, which may be affected by the property distribution, but instead her marital fault. Also, plaintiff has requested only reversal of the order denying alimony and not the equitable distribution award. If it was error for the trial court to hear both claims together, this error could not be corrected without reversal of both orders.

We agree that even if we were to assume *arguendo* that the trial court should not have heard the alimony and equitable distribution claims together, plaintiff invited this error and was not prejudiced by it. We also note that N.C. Gen. Stat. § 50-20(f) does not address the details of scheduling of hearings, but only what the trial court should consider as to each aspect of the case, and that even if the trial court heard all of the claims in one trial, the trial court entered two separate and distinct orders. This argument is without merit.

IV. Conclusion

For the reasons as stated above, the order denying alimony is affirmed. We remand the matter of equitable distribution to the trial court for additional findings of fact regarding the classification of the Darlington Avenue property, for conclusions of law based upon these findings of fact, and for adjustment to the distributive award, if the trial court should find and conclude that any adjustment is warranted.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

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

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THOMAS JEFFERSON CLASSICAL ACADEMY, D/B/A THOMAS JEFFERSON CLASSICAL ACADEMY CHARTER SCHOOL, PLAINTIFF v. THE RUTHERFORD COUNTY BOARD OF EDUCATION, D/B/A RUTHERFORD COUNTY SCHOOLS, DEFENDANT

No. COA10-1121

(Filed 20 September 2011)

1. Schools and Education—charter school funding—funds placed in local expense fund—per pupil amount

The trial court did not err in a charter school funding case by including restricted monies that defendant Rutherford County Schools received from the state and federal governments in calculating the funds that it must share with plaintiff charter school. As the funds were placed in the “local current expense fund” and not in a “special fund,” they must be considered when calculating the per pupil amount due the charter schools. Furthermore, while the inclusion of “restricted funds” in the “local current expense fund” resulted in a larger per pupil appropriation to the charter school, the statute does not direct that the “restricted funds” be shared with the charter schools and does not violate provisions of the United States Constitution.

2. Schools and Education—charter school funding—court’s authority—construe acts of the General Assembly

Defendant Rutherford County Schools’ argument in a charter school funding case that the courts are without authority to direct that “restricted” state funds be shared with the charter school was overruled. Under our State Constitution, the role of the courts is to construe acts of the General Assembly and had the General Assembly believed that the Court of Appeals had misinterpreted its intent with respect to the method of computation of amounts due to a charter school under N.C.G.S. § 115C-238.29H(b), it had ample opportunity to amend the statute to reflect a different intent.

3. Schools and Education—charter school funding—restricted funds—per pupil allotment

Defendant Rutherford County Schools’ argument in a charter school funding case that by including “restricted funds” in the computation of per pupil allotments, charter school students are receiving a higher level of funding than those in the regular public schools was overruled as the Court was bound by the deci-

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sions in *Delany*, 150 N.C. App. 338, *Sugar Creek I*, 188 N.C. App. 454, and *Sugar Creek II*, 195 N.C. App. 348.

4. Schools and Education—charter school funding—retroactive budget amendment—no legal effect

The trial court correctly held in a charter schools funding case that defendant Rutherford County Schools' purported amendment to its 2008-09 budget was "without legal effect" as the funds had already been spent. Further, the fact that prior to November 2009, local school administrative units were permitted to segregate restricted and non-restricted funds within the confines of the "local current expense fund" did not permit the purported retroactive amendment.

5. Schools and Education—charter school funding—budget amendment valid

The trial court did not err in a charter schools funding case by concluding that defendant Rutherford County Schools' amendment to its 2009-10 budget was valid. The provisions of N.C.G.S. § 115C-433(d) were inapplicable to the case, the provisions of Chapter 115C did not require that all monies provided to the local administrative unit be placed into the "local current expense fund," and there was no requirement that the entities that were the source of those funds required defendant Rutherford County Schools to account for the monies in a separate fund.

Appeals by plaintiff and defendant from order of summary judgment entered 9 July 2010 by Judge A. Robinson Hassell in Rutherford County Superior Court. Heard in the Court of Appeals 9 February 2011.

Robinson Bradshaw & Hinson, P.A., by Richard A. Vinroot, and A. Ward McKeithen, for plaintiff.

Campbell Shatley, PLLC, by Christopher Z. Campbell and Chad R. Donnahoo, for defendant.

Allison B. Schafer, Kathleen C. Boyd, and Katherine J. Brooks, for North Carolina School Boards Association, amicus curiae.

STEELMAN, Judge.

Funds restricted as to their use, but placed into a school board's "local current expense fund" must be considered in the computa-

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tion of monies due to a charter school pursuant to N.C. Gen. Stat. § 115C-238.29H(b) (2009). The trial court correctly determined that a purported amendment to the 2008-09 budget of the county schools, adopted over five months after the end of the fiscal year and after the funds had been expended, was of no legal effect. Under our prior holdings in *Sugar Creek I* and *II*, the county schools can place restricted funds in accounts other than the “local current expense fund.”

I. Factual and Procedural History

In 1995, the General Assembly provided for the creation of charter schools, defined as “deregulated schools under public control.” Charter Schools Act of 1996, ch. 731, House Bill 955, 1995 N.C. Sess. Laws. The General Assembly required that the local school administrative unit in which each charter school student resides “transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit” N.C. Gen. Stat. § 115C-238.29H(b).

Plaintiff, Thomas Jefferson Classical Academy (TJCA), is a charter school. On 15 January 2010, TJCA filed a complaint against the Rutherford County Board of Education (RCS) in the Superior Court of Rutherford County. TJCA’s amended complaint (filed 26 March 2010) asserted two claims: (1) for a declaratory judgment that RCS must apportion monies to TJCA in accordance with the applicable state statutes and the prior decisions of the North Carolina Court of Appeals; and (2) that TJCA recover from RCS the amount which it underfunded TJCA from 2006-2010 in at least the amount of \$903,707. On 28 April 2010, RCS filed an answer and counterclaims seeking: (1) a declaration that TJCA was not entitled to share in revenues restricted to specific purposes by state or federal law or to provide voluntary services to populations outside of its obligation to provide basic education; (2) a declaration that it was entitled to amend its budget resolutions for the 2009 and 2010 fiscal years; and (3) for appointment of a referee to provide an accounting of the number of students involved and the applicable revenues involved in the controversy. On 4 June 2010, both TJCA and RCS moved for summary judgment pursuant to North Carolina Rule of Civil Procedure 56.

On 9 July 2010, the trial court entered judgment holding that there were no genuine issues of material fact, and entering judgment as a matter of law resolving all of TJCA’s claims and RCS’ counterclaims. The trial court ruled that: (1) RCS’ budget amendment for the 2008-09 fiscal year was “without legal effect;” (2) that RCS underfunded TJCA

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during the fiscal years 2006-07, 2007-08, and 2008-09 in the amount of \$730,889 and ordered that sum to be paid by RCS to TJCA, without interest; (3) RCS' budget amendment for the fiscal year 2009-10 was upheld, so that certain monies were not to be included in the computation of sums due to TJCA for the 2009-10 fiscal year; (4) that RCS must comply with the Funding and Budget Statutes in determining monies to be included in its "local current expense fund" for the fiscal year 2009-10, and in the future; and (5) each party was to bear its own costs, including attorney's fees.

TJCA appeals the portions of the judgment upholding the budget amendment for the 2009-10 fiscal year and holding that certain monies were not to be included in the computations. RCS appeals the portions of the judgment declaring its 2008-09 budget amendment to be invalid and holding that certain restricted revenues should be included in the computation.

II. Standard of Review

Neither party asserts that there are genuine issues of material fact in this case. As such, our review is limited to the correctness of the trial court's legal determinations. *See Showalter v. N.C. Dep't. of Crime Control & Pub. Safety*, 183 N.C. App. 132, 134, 643 S.E.2d 649, 651 (2007). This review is *de novo*. *Id.*

The basis of both appeals is a question of statutory interpretation. "Questions of statutory interpretation are questions of law," which we review *de novo*. *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) (quoting *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559-60, 589 S.E.2d 179, 180-81 (2003)). We are to give the statute the effect intended by the legislature. *Id.* "Where the language of a statute is clear and unambiguous there is no room for judicial construction and the courts must give it its plain and definite meaning . . ." *Begley v. Employment Security Comm.*, 50 N.C. App. 432, 436, 274 S.E.2d 370, 373 (1981). However, "when the meaning of a statute is unclear, '[t]he spirit and intent of an act controls its interpretation.'" *Wake Cares, Inc. v. Wake Cty. Bd. of Educ.*, 363 N.C. 165, 180, 675 S.E.2d 345, 355 (2009) (Martin, J., dissenting) (alteration in original) (quoting *Lithium Corp. of Am. v. Town of Bessemer City*, 261 N.C. 532, 536, 135 S.E.2d 574, 577 (1964)).

III. Statutory and Case Law Background

This case continues the series of cases brought before this Court in which a local charter school disputes the amount of funding allo-

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cated to it by the local school board pursuant to N.C. Gen. Stat. § 115C-238.29H.

A. Charter School Funding

Chapter 731 of the North Carolina General Assembly 1995 Session Laws authorized the creation and funding of charter schools as “deregulated schools under public control.” Subsection (a) of N.C. Gen. Stat. § 115C-238.29H sets forth the funding to be provided to each charter school by the State Board of Education. Subsection (b) of N.C. Gen. Stat. § 115C-238.29H sets forth the funding to be provided to each charter school by the local school administrative unit, stating “[i]f 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. . . .”

In *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), this Court held that there is no material distinction between the term “local current expense appropriation” as found in N.C. Gen. Stat. § 115C-238.29H, and the term “local current expense fund” as found in N.C. Gen. Stat. § 115C-426(e). The statute defines this fund as follows:

(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 in conformity with the educational goals and policies of the State and the local board of education, within the financial resources and consistent with the fiscal policies of the board of county commissioners. 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 levied by or on behalf of the local school administrative unit pursuant to a local act or G.S. 115C-501 to 115C-511, State money disbursed directly to the local school administrative unit, and other moneys made available or accruing to the local school administrative unit for the current operating expenses of the public school system.

N.C. Gen. Stat. § 115C-426(e) (2009).

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Under the provisions of N.C. Gen. Stat. § 115C-426, local school administrative units are required to operate under a uniform budget format. Subsection (c) of that statute mandates the following:

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 required 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.¹

The 2008 case of *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 188 N.C. App. 454, 655 S.E.2d 850 (*Sugar Creek I*), *disc. review denied*, 362 N.C. 481, 665 S.E.2d 738 (2008), dealt with whether funds deposited in the “local current expense fund” given to the local school administrative unit for “Bright Beginnings,” a special program for “at-risk,” “pre-kindergarten” children, and for a High School Challenge Grant should be included as part of the “local current expense fund” for purposes of computing the per pupil amount due to the charter school. This Court held that even assuming that “Bright Beginnings” was a “special program” under N.C. Gen. Stat. § 115C-426(c), the local school administrative unit failed to place it in a special fund. Since it was placed in the “local current expense fund,” and the charter school was entitled to a

1. Session law 2010-31, Senate Bill 897, Section 7.17(a) amended the second portion of N.C. Gen. Stat. § 115C-426(c) to read as follows:

In addition, other funds may be used to account for reimbursements, including indirect costs, fees for actual costs, tuition, sales tax revenues distributed using the ad valorem method pursuant to G.S. 105-472(b)(2), sales tax refunds, gifts and grants restricted as to use, trust funds, federal appropriations made directly to local school administrative units, funds received for prekindergarten programs, and special programs. In addition, the appropriation or use of fund balance or interest income by a local school administrative unit shall not be construed as a local current expense appropriation.

Each local school administrative unit shall maintain those funds shown in the uniform budget format that are applicable to its operations.

This amendment is applicable “beginning with the 2010-2011 school year.” It is thus inapplicable to any of the school fiscal years at issue in this case.

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pro rata share of that fund, “[Charlotte-Mecklenburg Board of Education and the Charlotte-Mecklenburg County Superintendent of Schools (CMS) were] required to apportion this money on a per pupil basis between CMS and the Charter Schools” *Id.* at 461, 655 S.E.2d at 855.

In ruling on the “Bright Beginnings” funds, this Court expressly rejected the argument of the charter school that “all moneys made available to CMS by the Board are part of the current local expense fund, and thus must be apportioned *pro rata* between the CMS schools and the Charter Schools” *Id.*

As to the High School Challenge funds, this Court held that it was not a special program, and that the trial court correctly allocated a portion of those funds to the charter schools. *Id.* at 463, 655 S.E.2d 856.

Finally, in the case of *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 673 S.E.2d 667 (*Sugar Creek II*), *appeal dismissed and disc. review denied*, 363 N.C. 663, 687 S.E.2d 296 (2009), this Court made a number of specific rulings with respect to monies held in the local school administrative unit’s “local current expense fund.” The rulings relevant to the issues presented in the instant case are as follows:

(1) *Fund Balance*. Funds carried over from a previous year into the current year’s “local current expense fund” constitute monies in the fund and are to be considered in the calculation of amounts due to the charter schools. *Id.* at 360, 673 S.E.2d at 675.

(2) *Hurricane Katrina Relief Funds*. Funds received from the federal government to cover the cost of educating students displaced by Hurricane Katrina and placed in the “local current expense fund” are required to be included in the amount used to calculate the amount owed the charter schools. *Id.* at 361, 673 S.E.2d at 676.

(3) *Sales Tax Reimbursement*. Where reimbursements were deposited in the “local current expense fund,” they were required to be included in the calculation of amounts due to the charter schools. *Id.*

(4) *Preschool Programs*. In accordance with *Sugar Creek I*, these monies in the “local current expense fund” are required to be included in the total used to calculate the amount owed the charter schools. *Id.*

(5) *Donations for other Specific Programs*. Donations from individuals and organizations for “specific special programs and

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schools,” if not held in a special fund, and placed in the “local current expense fund” are required to be included in the calculation of amounts due to the charter schools. *Id.*

The common thread running through each of these holdings is that if funds are placed in the “local current expense fund” and not held in a “special fund,” they must be considered as being part of the “local current expense fund” used to determine the *pro rata* share due to the charter schools.

On 16 December 2009, Phillip Price, Associate Superintendent for Financial and Business Services for the North Carolina Department of Public Instruction, issued a memorandum to school finance officers as follows:

Establishment of Other Restricted Funds—Fund 8:

Representatives from DPI and the Local Government Commission met last week to discuss the establishment of a fund into which local school systems may deposit monies designated for restricted purposes. This new fund, Fund 8, will allow LEAs to separately maintain funds that are restricted in purpose and not intended for the general K-12 population in the LEA. These are funds that may legitimately be kept separate from the local current expense fund.

Examples of funds that may be placed in Fund 8 are:

- (a) State funds that are provided for a targeted non-K-12 constituency such as More-at-Four funds;
- (b) Funds targeted for a specific, limited purpose, such as a trust fund for a specific school within the LEA;
- (c) Federal or other funds not intended for the general K-12 instructional population, or a sub-group within that population, such as funds for a pilot program;
- (d) Indirect cost, such as those associated with a federal grant that represent reimbursement for cost previously incurred by the LEA.

The decision of which funds may legitimately be placed in Fund 8 remains a local decision, to be made after consulting with the LEA attorney if necessary. The LGC will be providing more guidance on the establishment of this Fund 8 and the Consolidated Annual Financial Reports.

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IV. Restricted Funds Placed into the
“Local Current Expense Fund”

[1] In its first argument as appellant, RCS contends that the trial court erred in including restricted monies that it received from the state and federal governments in calculating the funds that it must share with TJCA. We disagree.

A. Whether Funds Designated for Specific Programs Placed into
“Local Current Expense Fund” are Considered in Calculation of
Sums Due to Charter Schools

RCS argues that funds appropriated for specific programs or purposes by the federal and state governments cannot be shared with a charter school. It particularly focuses upon monies for pre-kindergarten programs, and contends that the question of whether funds specifically designated for a particular purpose or program can be shared with the charter schools is an issue of first impression for our courts.

We hold that this question is not one of first impression for our courts. This very question has been thoroughly discussed and analyzed in *Sugar Creek I* and *II*. *Sugar Creek I* held that funds specifically appropriated for “Bright Beginnings” a program for “at-risk,” “pre-kindergarten” children placed into the “local current expense fund” had to be considered in determining the amount due to the charter schools. 188 N.C. App. 454, 655 S.E.2d 850. Similarly, the Hurricane Katrina Relief Funds, Preschool Programs, and Donations for other Specific Programs at issue in *Sugar Creek II* were required to be considered part of the “local current expense fund” when calculating the amount due the charter school, if they were placed in that fund. 195 N.C. App. 348, 673 S.E.2d 677. As was noted in section III of this opinion, if the funds are placed in the “local current expense fund” and not in a “special fund,” they must be considered when calculating the per pupil amount due the charter schools. We are bound by prior decisions of this Court on the same issue, even though it is in a different case, under the rationale of *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-7 (1989).

B. Alleged Violation of Supremacy Clause and
Conflict Preemption

RCS next argues that to order funds restricted as to their use by the United States Congress to be shared with a charter school is a violation of the Supremacy Clause of the United States Constitution

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(Article VI, Section 2, The laws of the United States shall be the supreme law of the land.)

As noted above N.C. Gen. Stat. § 115C-238.29H(b) required that the local school administrative unit pay 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.” Under the rationale of *Delany*, the statute provides the method for computation of the amount of per pupil funds that must be paid to the charter school. It does not require that the local school administrative unit “share” a portion of either federal, state, or local “restricted funds” with the charter school. While we acknowledge that the inclusion of “restricted funds” in the “local current expense fund” will result in a larger per pupil appropriation to the charter school, because the statute does not direct that the “restricted funds” be shared with the charter schools, it does not violate provisions of the United States Constitution as alleged by RCS.

We further note, as has been explicitly held in *Sugar Creek I* and *II*, that when “restricted funds” are placed in the “local current expense fund” and not in a separate account, they must be included in the computation of the amount due to the charter school.

C. Role of the Courts in Construing Acts of General Assembly

[2] RCS next argues that the judiciary has no role in the administration of public funds that the General Assembly has allocated for a specific purpose. It contends that the courts are without authority to direct that “restricted” state funds be shared with the charter school.

We first of all note that under our State Constitution it is the role of the courts to construe acts of the General Assembly. Article IV, Section 1 of the North Carolina Constitution; see *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 460, 665 S.E.2d 449, 451 (2008); *State v. Jones*, 358 N.C. 473, 477, 598 S.E.2d 125, 128 (2004). Commencing in 2002 with the *Delany* decision, and continuing in 2008 and 2009 with the *Sugar Creek I* and *II* cases, this Court has consistently construed the provisions of section 115C-238.29H(b) to require that the amount of all monies placed in the “local current expense fund” for the local school administrative unit must be considered in calculating the per pupil amount due to a charter school. *Delany*, 150 N.C. App. 338, 563 S.E.2d 92; *Sugar Creek I*, 188 N.C. App. 454, 655 S.E.2d 850; *Sugar Creek II*, 195 N.C. App. 348, 673 S.E.2d 667. As noted in Section IV, B, above, inclusion of these funds in the computation does not constitute a directive that “restricted funds” be “shared” with the charter school.

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It has been over eight years since *Delany* was decided. Had the General Assembly believed that this Court had misinterpreted its intent with respect to the method of computation of amounts due to a charter school under N.C. Gen. Stat. § 115C-238.29H(b), it certainly has had ample opportunity to amend the statute to reflect a different intent. *Jones*, 358 N.C. at 476, 598 S.E.2d at 127 (“If the General Assembly had not intended such an interpretation . . . to continue, it could have amended the statute to end this long-standing practice.”).

D. Following Prior Decisions of this Court

[3] RCS argues that *Sugar Creek II* held that “the General Assembly intended that charter school children have access to the same level of funding as children attending the regular public schools of this State.” *Sugar Creek II*, 195 N.C. App. at 357, 673 S.E.2d at 673. RCS contends that by including “restricted funds” in the computation, charter school students are receiving a higher level of funding than those in the regular public schools.

As has been noted above, the trial court’s order correctly reflected the prior holdings of this Court in *Delany* and *Sugar Creek I* and *II*. The trial court was bound by those decisions. *Reid v. Town of Madison*, 145 N.C. App. 146, 151, 550 S.E.2d 826, 829 (2001), *disc. review improvidently allowed*, 355 N.C. 276, 559 S.E.2d 786 (2002). This Court is bound by those decisions. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

These arguments are without merit.

V. Purported Amendment of the 2008-09 Budget

[4] RCS’ 2008-09 budget year ran from 1 July 2008 through 30 June 2009. On 8 December 2009, RCS purported to amend its 2008-09 budget to create a new Fund Seven and to transfer funds from Fund Two (“local current expense fund”). This purported amendment did not actually transfer any funds, since the funds for the 2008-09 school year had already been expended. The purported budget amendment did not affect the audit of the 2008-09 budget year.

RCS argues that under the provisions of N.C. Gen. Stat. § 115C-433(a) (2009), it had the authority to amend its 2008-09 budget:

- (a) Subject to the provisions of subsection (b) of this section, the board of education may amend the budget resolution at any time after its adoption, in any manner, so long as the resolution as amended continues to satisfy the requirements of G.S. 115C-425 and 115C-432.

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RCS further argues that “[p]rior to November 2009, the Board had no reason to create a special fund solely for its restricted federal and state revenue.”²

It is clear from the record that the only purpose of the purported retroactive amendment to the 2008-09 budget shifting funds out of Fund Two (“local current expense fund”) and into Fund Seven was to avoid the holdings of this Court in *Delany* and *Sugar Creek I* and *II*. Since the funds were already spent, the trial court correctly held that the purported amendment to the 2008-09 budget was “without legal effect.”

RCS further argues that prior to November 2009, local school administrative units were permitted to segregate restricted and non-restricted funds within the confines of Fund Two, and that this should permit the purported retroactive amendment, allowing their accounting to conform to their prior practice. We hold that this argument is without merit for two reasons. First, the date of the denial of defendants’ appeal and petition for discretionary review in *Sugar Creek II* is without legal significance in the context of this argument. The Court of Appeals decision in *Sugar Creek II* was unanimous, and it was not stayed pending the appeal and petition to the Supreme Court. Second, *Sugar Creek II* was decided by the Court of Appeals in February 2009, and was the law in North Carolina long before November 2009. Further, the holdings in *Sugar Creek II* were consistent with the prior decisions in *Delany* and *Sugar Creek I*.

This argument is without merit.

VI. Amendment of the 2009-10 Budget

[5] In its first argument on appeal, TJCA contends that RCS’ amendment to its 2009-10 budget was invalid. We disagree.

On 12 January 2010, RCS amended its 2009-10 budget to transfer over five million dollars from Fund Two (“local current expense fund”) into Funds Seven (Reserved for LEA or charter school local use) and Eight (Reserved for future state use). The intent of this amendment was to leave only county appropriations and fines and forfeitures in Fund Two. TJCA argues that amendments to RCS’ budget under N.C. Gen. Stat. § 115C-433(a) must comply with N.C. Gen. Stat. § 115C-425 and N.C. Gen. Stat. § 115C-432. These statutes man-

2. The November 2009 date appears to reference the order of the North Carolina Supreme Court of 5 November 2009 that dismissed defendants’ appeal based upon a substantial constitutional question and denied defendants’ petition for discretionary review in *Sugar Creek II*. 363 N.C. 663, 687 S.E.2d 296.

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date compliance with the uniform budget format set forth in N.C. Gen. Stat. § 115C-426.

TJCA first argues that under N.C. Gen. Stat. § 115C-433 RCS can transfer money from “one ‘fund’ to another only in limited ‘emergency’ circumstances.” In support of this proposition, TJCA cites N.C. Gen. Stat. § 115C-433(d) which provides that the “transfer of money” to or from the capital outlay fund to or from any other fund requires approval of the board of county commissioners to meet unforeseen emergencies. The transfer of funds in the instant case did not involve the transfer of funds to or from the capital outlay fund. The provisions of N.C. Gen. Stat. § 115C-433(d) are inapplicable to this case.

TJCA next argues that N.C. Gen. Stat. § 115C-426 requires that the funds that were the subject of the January 2010 budget amendment were required to remain in the “local current expense fund.” It contends that under the provisions of section 115C-426(e) all monies provided to the local administrative unit must be placed into the “local current expense fund” (Fund Two). This is essentially the same argument that was made by the charter schools in *Sugar Creek I*, and rejected by this Court:

The Charter Schools further argue that the fact the uniform budget format mandates an “independent fiscal and accounting entity” for a special program does not address the need to apportion the revenues diverted to that fund where, as here, those revenues originally are part of the moneys “made available” to CMS by the Board. In essence, the Charter Schools contend that all moneys made available to CMS by the Board are part of the current local expense fund, and thus must be apportioned *pro rata* between the CMS schools and the Charter Schools before any of those moneys are diverted to other funds. This is inaccurate.

....

Thus, contrary to the Charter Schools’ contention, not *all* appropriations from the Board to CMS 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 CMS by the County Commissioners specifically for the current local expense fund.

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Sugar Creek I, 188 N.C. App. at 461-62, 655 S.E.2d at 855-56 (emphasis in original).

The January 2010 budget amendment was adopted following receipt of the 16 December 2009 memorandum from the North Carolina Department of Public Instruction. This memorandum, as set forth in Section III of this opinion, specifically authorized the creation of Fund Eight for the purpose of separately maintaining “restricted funds.” The January 2010 budget amendment placed all restricted funds into Fund Eight with the exception of Head Start funds. The Head Start monies were placed into Fund Seven because “[Head Start] has a separate Board of Directors and audit requirements necessitate tracking the revenues and expenditures as a ‘component unit.’”

We hold that the provisions of Chapter 115C as construed by *Sugar Creek I* and *II* do not require that all monies provided to the local administrative unit be placed into the “local current expense fund” (Fund Two).

TJCA next argues that RCS cannot create separate funds unless the entities that are the source of those funds require RCS to account for the monies in a separate fund. N.C. Gen. Stat. § 115C-426 sets forth the three basic funds that are required under the uniform budget format. “In addition, other funds may be required to account for trust funds, federal grants restricted as to use, and special programs.” N.C. Gen. Stat. § 115C-426(c). TJCA argues that this language means that other funds cannot be created unless the donor of the funds requires that the funds be held in a separate and different fund, and cites to *Sugar Creek I* and *II* in support of this proposition. The record before us does not reveal any separate and distinct requirement of a separate fund or account by the donor for the monies transferred from Fund Two to Funds Seven and Eight by virtue of the January 2010 budget amendment.

We have reviewed the prior decisions of this Court in *Delany* and *Sugar Creek I* and *II*; particularly the specific portions of the opinions cited by TJCA, and find that they do not support the proposition that there must be a specific requirement of a donor before a separate fund can be created by a local school administrative unit.

In *Sugar Creek I*, we held that with respect to funding for the Bright Beginnings programs:

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Assuming *arguendo*, that Bright Beginnings was a special program, the Board would have been within its statutory authority to allocate money for the program, separate and apart from money allocated for current operating expenses, capital outlay expenses, or other special programs. However, instead of allocating money to a Bright Beginnings special program fund, the County Commissioners allocated the money for Bright Beginnings to the local current expense fund, earmarked for Bright Beginnings. Furthermore, CMS was required to set up and maintain a separate special fund for the Bright Beginnings program, pursuant to N.C. Gen. Stat. § 115C-426(c); this they failed to do. As a result, the Bright Beginnings money was requested for the local current expense fund, allocated to the local current expense fund, deposited into the local current expense fund, and deducted from the local current expense fund. Because the Charter Schools were entitled to a *pro rata* share of all the money in the local current expense fund, CMS was required to apportion this money on a per pupil basis between CMS and the Charter Schools before the Bright Beginnings program was funded.

Sugar Creek I, 188 N.C. App. at 460-61, 655 S.E.2d at 855.

In *Sugar Creek II*, a similar discussion took place with respect to Hurricane Katrina Relief Funds:

[B]ecause these funds were deposited in the local current expense fund, the trial court did not err in ordering them shared with Plaintiffs. *Sugar Creek I*, 188 N.C. App. at 458, 655 S.E.2d at 854. We further note that “other funds may be required 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.” *Id.* at 458, 655 S.E.2d at 853 (emphasis added). If the federal Hurricane Katrina funds were restricted, then they should have been placed in a separate fund, not the current local expense fund.

Sugar Creek II, 195 N.C. App. at 361, 673 S.E.2d at 676.

Nowhere in these two passages is the legal principle enunciated that “restricted funds” cannot be placed in a fund separate from the “local current expense fund” without the specific direction from the donor of the funds. Rather, *Sugar Creek I* and *II* clearly indicate that it is incumbent upon the local administrative unit to place restricted

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funds into a separate fund. If the funds are left in the “local current expense fund,” then they are to be considered in computing the per pupil amount to be allocated to the charter school.

RCS had the authority to amend its 2009-10 budget to transfer restricted funds from Fund Two to Funds Seven and Eight.

This argument is without merit.

VII. Inclusion of Monies Transferred to Funds Seven and Eight
in Computation of Monies Due to TJCA

In its second argument, TJCA contends that since RCS lacked authority to transfer monies from Fund Two to Funds Seven and Eight under its January 2010 budget amendment, those funds must be included in the calculation of monies due to TJCA for the 2009-10 fiscal year. For the reasons set forth in Section VI of this opinion, we hold that this argument is without merit.

VIII. Conclusion

Under our prior holdings in *Delany* and *Sugar Creek I and II*, funds placed into the “local current expense fund” must be considered in computing the amounts due to a charter school. During the current fiscal year, a local administrative unit may amend its budget to place restricted funds into special funds. However, it may not retroactively amend the budget of a fiscal year that has already ended and the funds expended.

AFFIRMED.

Judges ELMORE and ERVIN concur.

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KENNETH E. ROSS, PLAINTIFF v. LINDA O. ROSS (NOW OSBORNE), DEFENDANT

No. COA11-141

(Filed 20 September 2011)

1. Appeal and Error—interlocutory orders and appeals—contempt order—immediately appealable

Plaintiff's interlocutory appeal in a domestic litigation case was properly before the court as a contempt order and was immediately appealable.

2. Discovery—discovery sanctions—domestic litigation—no error

The trial court did not err as a matter of law in a domestic litigation by imposing discovery sanctions against plaintiff. The trial court's findings as to plaintiff's failure to respond to discovery were fully supported by the record. Further, it was apparent from the transcript that the trial court considered lesser sanctions prior to striking plaintiff's equitable distribution claim and barring him from introducing evidence in support of his claim. Finally, the trial court's sanctions were not inconsistent with the Court of Appeals' prior mandate.

3. Contempt—contempt of court—no proper notice—failure to specify method to purge contempt

The trial court erred in a domestic litigation by holding plaintiff in contempt of court in two orders. Plaintiff did not receive proper notice of the contempt hearing and both orders failed to specify how plaintiff might purge himself of contempt.

Appeal by plaintiff from orders entered 6 May 2010, 21 July 2010, and 28 July 2010 by Judge Paul Quinn in District Court, Carteret County. Heard in the Court of Appeals 17 August 2011.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for plaintiff-appellant.

Judith K. Guibert, for defendant-appellee.

STROUD, Judge.

This is plaintiff's third appeal to this Court arising from the domestic litigation between him and defendant. *See Ross v. Ross*, 193

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N.C. App. 247, 666 S.E.2d 889, 2008 N.C. App. LEXIS 1801 (N.C. App. October 7, 2008) (unpublished) (affirmed in part; vacated and remanded in part), *disc. review denied*, 363 N.C. 656, 685 S.E.2d 106 (2009); and *Ross v. Ross (now Osborne)*, 194 N.C. App. 365, 669 S.E.2d 828 (2008) (appeal dismissed; filed 16 December 2008). After our prior opinion of 7 October 2008, only one issue remained for consideration on remand: “an appropriate reclassification and valuation of [the Emerald Isle] property.” *Ross*, 2008 N.C. App. LEXIS 1801, at *15. Plaintiff now appeals from three orders from the trial court’s proceedings on remand: the 6 May 2010 order compelling discovery (“the discovery order”); the 21 July 2010 order for sanctions (“the sanctions order”); and the 28 July 2010 order for civil contempt and granting temporary possession of the Emerald Isle property to defendant (“the contempt order”). For the reasons stated below, we affirm the discovery order and we affirm in part and reverse in part the sanctions order and the contempt order.

We have stated the factual background of this dispute in detail in *Ross v. Ross*, 194 N.C. App. at 366-67, 669 S.E.2d at 829-30, and will not repeat it in full here. Additional facts as relevant to the arguments raised in this appeal are noted below.

I. Interlocutory appeal

[1] This is plaintiff’s third interlocutory appeal in the course of this domestic litigation. Because the orders appealed do not dispose of all of the remaining issues, this appeal is interlocutory. Although “[a]n order compelling discovery is not a final judgment” and “does [not] affect a substantial right,” it is not immediately appealable, unless the order also imposes sanctions. *Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 554-55, 353 S.E.2d 425, 426 (1987) (noting that “when the order is enforced by sanctions pursuant to N.C.R. Civ. P., Rule 37(b), the order is appealable as a final judgment.”). In addition, the last two orders found plaintiff in contempt, and a contempt order is immediately appealable. See *Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002) (noting that “[t]he appeal of any contempt order affects a substantial right and is therefore immediately appealable.” (citation omitted)). Thus plaintiff’s interlocutory appeal is properly before us.

II. Rule 37 sanctions

[2] Plaintiff first argues that the “trial court erred as a matter of law in imposing discovery sanctions . . . which included striking his claim for equitable distribution and barring him from presenting evidence

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in support of his claims.” Our standard of review of an order imposing discovery sanctions under N.C. Gen. Stat. § 1A-1, Rule 37 is abuse of discretion. *Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 55, 524 S.E.2d 53, 62 (1999).

Rule 37 provides as follows, in pertinent part:

(a) A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

. . . .

(2) Motion.—If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. . . .

(3) Evasive or Incomplete Answer.—For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer. . . .

N.C. Gen. Stat. § 1A-1, Rule 37 (2009).

After the prior appeal of the equitable distribution order, the only issue remaining to be determined by the trial court upon remand was the classification and valuation of the Emerald Isle house and land (“the Emerald Isle property”). Plaintiff claims that the Emerald Isle property is his separate property because he acquired the lot prior to marriage, and he paid for construction of the house with his separate funds. We summarized defendant’s evidence regarding the Emerald Isle property in our prior opinion, *Ross v. Ross*, 2008 N.C. App. LEXIS 1801, at *3-5:

Prior to the parties’ marriage, on 13 April 1987, plaintiff-husband purchased a lot in Emerald Isle (“Emerald Isle property”).

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The lot was undeveloped and was titled in plaintiff-husband's name alone. Sometime between the date of marriage and November of 1992, the parties constructed a house on the lot. On 6 November 1992, the parties both executed a Deed of Trust to this property with First Financial Savings Bank ("First Financial") to secure a loan in the amount of \$60,000.00. On 18 September 1998, the parties executed another Deed of Trust to the Emerald Isle property with Branch Banking and Trust ("BB & T") to secure a \$50,000.00 equity line of credit. The parties made payments on this loan until 26 July 1999, when both parties executed a final Deed of Trust to this property with BB & T to secure a loan in the amount of \$92,000.00. On 27 July 1999, the outstanding balance on the First Financial loan was paid in full. The parties continued to make payments on the BB & T debts for the duration of their marriage. By the date of separation, the parties had paid \$9,143.00 of the principal balance of the BB & T mortgage.

Prior to the parties' 4 January 2002 separation, the parties had been living at a home that they owned in Summerfield, Florida ("Florida residence"), but after separation, plaintiff-husband resided at the Emerald Isle property and continued to make mortgage payments with respect to the Emerald Isle property. On 5 June 2003, plaintiff-husband, in his name alone, executed a Deed of Trust to the Emerald Isle property with RBC Centura Bank, to secure an equity line of credit in the amount of \$110,000.00.

Defendant argues that the Emerald Isle property is presumed to be marital based upon the source of funds used to build the house and pay the mortgage during the marriage, so that the burden then shifts to plaintiff to produce evidence to show that it is actually his separate property. As plaintiff failed to attend the equitable distribution trial, he did not present evidence regarding his separate interest in the property. Defendant's interrogatories and request for production at issue in this appeal were therefore focused on the acquisition of the Emerald Isle property, construction of the house, and maintenance of the house.

Plaintiff claims that he did respond to the discovery requests as ordered by the 6 May 2010 discovery order, as it is undisputed that he served responses on 1 June 2010. Plaintiff also claims that his responses were "full and complete" and that he was not able to provide certain documentation since some of the items requested dated back to prior to the marriage in 1990. Plaintiff argues that he pro-

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duced all that he could and should not be subject to sanctions. We have noted that

[i]f a party's failure to produce is shown to be due to inability fostered neither by its own conduct nor by circumstances within its control, it is exempt from the sanctions of the rule. The rule does not require the impossible. It does require a good faith effort at compliance with the court order.

Laing v. Liberty Loan Co. of Smithfield and Albemarle, 46 N.C. App. 67, 71, 264 S.E.2d 381, 384 (citing *Societe Internationale v. Rogers*, 357 U.S. 197, 2 L. Ed. 2d 1255 (1958)), *disc. review denied and appeal dismissed*, 300 N.C. 557, 270 S.E.2d 109 (1980).

Even though plaintiff did provide a response to the discovery requests, under Rule 37, sanctions may be ordered for "evasive or incomplete" responses. *See* N.C. Gen. Stat. § 1A-1, Rule 37(a)(3). Plaintiff's responses were both evasive and incomplete. As noted above, the only issue remaining on remand from this Court was the classification and valuation of the Emerald Isle property. *See Ross*, 2008 N.C. App. LEXIS 1801, at *15. Plaintiff claimed in his responses to interrogatories that this property is his separate property because he purchased the lot in 1987, prior to marriage, and that he built the house on the lot "for \$117,500 under contract April 1990 with pre-marital funds and investments." Plaintiff did respond to some of the requests for production and interrogatories, at least in part. But for the most important request, which went directly to the issue remaining to be determined, plaintiff flatly refused to answer. In the request for production of documents which accompanied the interrogatories, defendant requested that plaintiff produce

[a]ny and all documents upon which you have relied, or intend to rely, to support your contention that the land and/or the residential building at 7018 Ocean Drive, Emerald Isle, North Carolina is your separate property, including but not limited to any evidence of source of funds used in acquiring said alleged marital property.

Plaintiff responded as follows:

Any and all documents that I have to support my contention that the land and/or residential building at 7018 Ocean Drive, Emerald Isle, North Carolina is my separate property, is [sic] proprietary at this time. This evidence will be presented and reveled [sic] in court at the ED hearing(s) when necessary. I have always contended the Emerald Isle property is my separate property

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from the beginning. (Refer to Plaintiff's Interrogatories, June 14, 2002, items 5 and 6.

Thus, although this equitable distribution claim, originated by plaintiff, had been pending for eight years, and plaintiff had been ordered by the court to respond to discovery requests which directly addressed the one remaining issue, plaintiff refused to answer. We note that plaintiff did not state in response to this request that he did not have or could not obtain the documents requested; instead, he stated that he did have documents but he refused to produce them because they were "proprietary at this time" and they "will be presented . . . at the ED hearing(s) when necessary." Plaintiff has not explained in his brief what he means by claiming the documents to be "proprietary at this time." The common meaning of "proprietary" is "[b]elonging to ownership; . . . belonging or pertaining to a proprietor; relating to a certain owner or proprietor." A "proprietor" is essentially synonymous with "owner." Black's Law Dictionary 1219-20 (6th ed. 1990). Thus, it appears that plaintiff was claiming that he is the owner of his documents and he will not reveal them to anyone unless and until he wants to; this is not a valid or reasonable response to a discovery request.

Plaintiff also responded to request No. 4, regarding records of payments on the property, as follows:

No payment records have been kept for this period. These records have gone to three attorneys that represented me in case #02-CVVD 558, Bill Kafer, Andrew Wigmore, and C.M. Ludwig that were made available and were never returned or lost during this 8 year period of time.

Plaintiff's dispute with his own attorneys regarding documents was not a new development; in fact, this dispute was referenced in the 27 October 2005 order regarding plaintiff's "oral motion to set aside" the trial court's 24 October 2005 order permitting plaintiff's then-counsel, Mr. Kafer, to withdraw, over plaintiff's objection. The trial court found that "[s]ome of the issues that appeared to exist between plaintiff and counsel related to providing documents, cooperating with counsel, and paying counsel. The plaintiff did not offer to provide the documents, indicated that irreconcilable differences existed between plaintiff and counsel, and did not offer to pay counsel." It is apparent from the voluminous record that literally for years, defendant has been requesting information regarding the Emerald Isle property, and plaintiff has been

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refusing to produce it. The trial court's findings as to plaintiff's failure to respond to discovery are fully supported by the record.

Plaintiff next argues that the trial court erred "by failing to consider lesser sanctions prior to striking plaintiff's equitable distribution claim and barring him from introducing evidence in support of his claim."

This Court has recently reaffirmed "that trial courts are not without the power to sanction parties for failure to comply with discovery orders." *Harrison v. Harrison*, 180 N.C. App. 452, 456, 637 S.E.2d 284, 288 (2006). Striking of defenses or counterclaims is an appropriate remedy, and is within the province of the trial court. *Jones v. GMRI, Inc.*, 144 N.C. App. 558, 565, 551 S.E.2d 867, 872 (2001). This Court will not disturb a dismissal absent a showing of abuse of discretion by the trial judge. *Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 524 S.E.2d 53 (1999). However, if the trial court chooses to exercise the option of striking a party's defenses or counterclaims, it must do so after considering lesser sanctions. See *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251, 618 S.E.2d 819 (2005); *Goss v. Battle*, 111 N.C. App. 173, 176, 432 S.E.2d 156, 159 (1993).

Clawser v. Campbell, 184 N.C. App. 526, 531, 646 S.E.2d 779, 783 (2007). Although the 21 July 2010 order does not specifically state that the trial court considered lesser sanctions, it is apparent from both the order and the transcript that it did. The 21 July 2010 order reviewed the history of the case relevant to the requests, defendant's extensive efforts to secure this information by discovery, and plaintiff's failures to respond in good faith. We cannot overlook the fact that this litigation has been underway since 2002. In *Clawser*, we noted that "[a]n examination of the transcript reveals that the trial court did not consider any lesser sanctions before striking the defendants' defenses on the issue of liability." *Id.* Thus, this Court considered not just the order but also the transcript. Our examination of the transcript here reveals that the trial court *did* consider lesser sanctions before deciding to strike plaintiff's claim. At the hearing on the motion for sanctions, plaintiff failed to appear, as he had failed to appear at several prior hearings and the equitable distribution trial. As he had done for prior hearings, he had requested continuance of the 1 July 2010 hearing via letters and facsimiles; in this instance, he requested a 60 day continuance because he had had a colonoscopy on 16 June 2010, and he had an appointment with his dermatologist three weeks *after* the court date, on 21 July 2010. The trial court denied

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plaintiff's request for continuance. Defendant's counsel then reviewed the extensive history of defendant's efforts to obtain discovery from plaintiff and the prior court orders addressing these issues, all of which is reflected in the record. In addition, Mr. Green, one of plaintiff's prior attorneys who had withdrawn from representing him, was also present and informed the court that

[w]e do not represent him, however, we do not have any of the records. Any of the records that he did provide to us we, pursuant to the Rules of Civil Procedure, sent them to [defendant's counsel], and anything else we sent to him. So, we don't have anything else in our file related to, I assume, this is a discovery issue that he's failure [sic] to . . . provide the discovery.

We also note that defendant's motion for sanctions requested the specific relief as granted by the trial court, and plaintiff made no recommendation or request to the court, either by filing a written response to defendant's motion or even in his letters requesting yet another continuance, as to what other, lesser sanctions may be appropriate. It is apparent from the transcript that the trial court considered the entire course of the litigation and the years of futile efforts of both defendant's counsel and the trial court to secure plaintiff's compliance with the Rules of Civil Procedure, concluding as follows:

You've—you've done everything that anybody could ask you to do, you know, with an adverse position to him to—to try to get to the—the bottom on this, and I don't—I don't know what more to do then [sic] to grant your motions and just—we just need to move along.

Plaintiff's argument is without merit.

Plaintiff next argues that the trial court "erred by imposing the specific sanctions . . . directed to preventing plaintiff from presenting his case." The legal basis of this argument is unclear, as plaintiff does not contend that the trial court abused its discretion in striking plaintiff's equitable distribution claim and barring him from presentation of evidence. Instead, plaintiff argues that even if this order is reviewed for abuse of discretion, "the most drastic penalties, dismissal or default, are examined in the light of the general purpose of the Rules to encourage trial on the merits." *American Imports, Inc. v. G.E. Employees Western Region Federal Credit Union*, 37 N.C. App. 121, 124, 245 S.E.2d 798, 800 (1978) (citations and quotation marks omitted). Plaintiff also notes that "the mandate of this Court was solely to reclassify and value the marital portion of the Emerald

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Isle Property in making an equitable distribution.” Thus, plaintiff claims that the trial court’s order essentially violates this Court’s mandate to classify a portion of the Emerald Isle Property as marital, as that cannot be done without some evidence from plaintiff as to the value of his separate portion. Plaintiff actually has the audacity to argue that

[t]he remedy in this case is not [to] continue to allow the parties to endlessly litigate and relitigate this case, engaging in discovery fishing expeditions and innumerable Motions in the Cause, as have they have [sic] done for close to a decade, but rather to expeditiously place this matter on for a hearing and allow each party to present what evidence they can muster (or has already been presented)- and for the trial court to enter a final equitable distribution judgment in line with this Court’s prior mandate.

Defendant responds that she has been desperately trying to have this case tried for years, but plaintiff’s actions have delayed and prolonged this litigation. Defendant has attempted to have this matter peremptorily set for trial repeatedly (19 August 2002, continued to 4 September 2002; 9 September 2002, continued to 5 November 2002; 12 January 2004, continued to 10 February 2004, continued to 24 February 2004, continued to 29 March 2004, and continued to 7 June 2004; peremptory trial setting for week of 7-11 June 2004; peremptory trial setting for 17 June 2004; trial set 13 December 2004; peremptory trial setting for 28 November 2005, continued to 17 January 2006, and continued to 8 May 2006). On 1 May 2006, plaintiff sent a letter to the clerk of court claiming that he did not have sufficient notice of the pre-trial conference set for 2 May 2006 (despite at least four prior calendar settings for pretrial conferences) and that he was “recovering in Florida from a previous surgery” and had unspecified “medical test and examinations[.]” The trial court denied plaintiff’s request for continuance and we affirmed this ruling in the first appeal. *See Ross*, 2008 N.C. App. LEXIS 1801, at *8-10. Defendant argues that

in a mind boggling demonstration of either lack of comprehension or disrespect for the Court, plaintiff went through exactly the same routine of sending a letter to the clerk of court complaining of lack of notice, wanting to hire an attorney, and needing to remain in Florida for medical care (this time for a colonoscopy 12 days earlier and a dermatology appointment three weeks later) when notified of the hearing on defendant’s motion for sanctions.

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Plaintiff is correct that this Court directed the trial court to reconsider the classification and valuation of the Emerald Isle property, but this mandate does not exempt him from compliance with the Rules of Civil Procedure or court orders. Plaintiff has no right to keep his “proprietary” information which he has been required by court order to produce in discovery a secret until he deems it necessary to reveal it at the equitable distribution hearing. Plaintiff does not have the prerogative to decide what information he will produce in discovery after the trial court has ordered this production. Thanks to plaintiff’s intransigence, the trial court has not yet had the opportunity to reconsider the classification and valuation of the marital and separate interests in the Emerald Isle property and to enter an order as directed by our prior opinion. The trial court’s sanctions order barring plaintiff’s equitable distribution claim¹ and presentation of evidence does not prevent the trial court from entering an order as to classification and valuation of the separate and marital property but affects only the evidence which will be available at the hearing which will someday, we trust, be held on this issue. The trial court’s sanctions are therefore not inconsistent with this Court’s prior mandate, and plaintiff’s argument is without merit.

III. Civil contempt

[3] Plaintiff next argues that the trial court erred by holding him in contempt of court in both the 21 July and 28 July 2010 orders. In the 21 July 2010 order, which was based upon a hearing held on 1 July 2010, the trial court found and concluded that defendant was in contempt of court for his failure to abide by the order filed on 6 May 2010, but did not impose any sanction for the contempt. We note that on 1 July 2010, defendant had not yet filed a motion to hold plaintiff in contempt of the 6 May 2010 order; on 7 July 2010, defendant filed a verified motion requesting that plaintiff be held in “willful contempt of this court” for his failure to abide by the 6 May 2010 order, and this motion was served upon plaintiff by mail on the same date. However, no order to show cause was issued and the record contains no notice of hearing which sets a date for hearing of the motion for contempt.

In the 28 July 2010 order, based upon a hearing held on 21 July 2010, the trial court made additional, extensive findings regarding plaintiff’s willful failure to cooperate with the real estate appraiser appointed by the trial court to conduct an appraisal of the Emerald

1. As defendant also brought an equitable distribution counterclaim, barring plaintiff’s identical equitable distribution claim would not appear to have any practical effect upon the trial court’s rulings.

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Isle property and concluded that plaintiff was in civil contempt of the 6 May 2010 order, but still did not impose a sanction for contempt and reserved defendant's request for attorney fees on this issue "for resolution at a later date."

Plaintiff argues that defendant failed to comply with the requirements of N.C. Gen. Stat. § 5A-23(a1) (2009), which states:

Proceedings for civil contempt may be initiated by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. A copy of the motion and notice must be served on the alleged contemnor at least five days in advance of the hearing unless good cause is shown. The motion must include a sworn statement or affidavit by the aggrieved party setting forth the reasons why the alleged contemnor should be held in civil contempt. The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party.

Plaintiff contends that "there was no sworn statement or affidavit and no notice to [plaintiff] of the contempt charges against him." No verified motion was filed prior to the 1 July 2010 hearing, which resulted in the 21 July 2010 order. Although defendant did file a verified motion to hold plaintiff in contempt prior to the hearing held on 21 July 2010, which resulted in the 28 July 2010 order, we agree that plaintiff did not have proper notice of a contempt hearing. The record does not include any notice of hearing upon the contempt motion and no order to show cause was issued by the trial court. In addition, plaintiff argues that both orders "failed to provide any mechanism by which [plaintiff] could purge himself of civil contempt." N.C. Gen. Stat. § 5A-23(e) provides that:

At the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor on each of the elements set out in G.S. 5A-21(a). If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself or herself of the contempt.

We agree that the 21 July and 28 July 2010 orders were in error as to the findings and conclusions as to contempt only, based upon the lack of proper notice of the contempt hearing and upon the failure of both orders to specify how plaintiff might purge himself of contempt.

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Defendant argues that the contempt issues are moot and that “the trial court’s determination of contempt did not impact the posture of this litigation in any way, because the trial court did not impose any consequence or penalty for plaintiff’s contempt.” Although we agree that the orders did not impose a penalty, the trial court did reserve for future hearing the matter of attorney fees and retained jurisdiction “for purposes of modification and/or enforcement of this Order.” Thus, the finding of contempt may have consequences in future proceedings and it is not moot. *See Smith ex rel. Smith v. Smith*, 145 N.C. App. 434, 436, 549 S.E.2d 912, 914 (2001) (noting that “[g]enerally, an appeal should be dismissed as moot ‘[w]hen events occur during the pendency of [the] appeal which cause the underlying controversy to cease to exist.’ *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977). Nevertheless, ‘even when the terms of the judgment below have been fully carried out, if collateral legal consequences of an adverse nature can reasonably be expected to result therefrom, then the issue is not moot and the appeal has continued legal significance.’ *Id.*”).

We note that the 28 July 2010 order also required plaintiff to pay defendant’s attorney fees related to her postseparation support claim and granted temporary possession of the Emerald Isle property to defendant so that she could facilitate the real estate appraisal. Plaintiff has not challenged these rulings on appeal and therefore we affirm the order as to these issues.

We therefore affirm the 6 May 2010 discovery order and we affirm in part and reverse in part the 21 July and 28 July 2010 orders. Specifically, we reverse the 21 July 2010 and 28 July 2010 orders to the extent that they hold plaintiff in contempt of court but affirm all other provisions of the orders. We remand to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

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NELSON W. TAYLOR, III, AND PATRICIA V. TAYLOR, PLAINTIFFS
v. MARILYN MILLER, DEFENDANT

No. COA10-1535

(Filed 20 September 2011)

**Real Property—right of first refusal—valid and enforceable—
insufficient evidence of reasonableness**

The trial court did not err in an action concerning defendant's right of first refusal on the sale of a piece of property by denying plaintiffs' motion for summary judgment but did err in entering a declaratory judgment in defendant's favor concluding that the right of first refusal was valid and enforceable. Neither party was entitled to summary judgment on the issue of the reasonableness of the right of first refusal because the Court of Appeals could not determine whether either party submitted sufficient evidence regarding the circumstances surrounding the agreement to the fixed option price to warrant judgment in their favor.

Appeal by plaintiffs from judgment entered 26 February 2010 and order entered 10 May 2010 by Judge W. Allen Cobb, Jr. in Carteret County Superior Court. Heard in the Court of Appeals 25 April 2011.

James W. Thompson, III, PLLC, by James W. Thompson, III, for plaintiffs-appellants.

Marilyn Miller, pro se, defendant-appellee.

GEER, Judge.

Plaintiffs Nelson W. Taylor, III and his wife Patricia V. Taylor appeal from the trial court's decision denying their motion for summary judgment, but apparently granting summary judgment for defendant Marilyn Miller under Rule 56(c) (providing that summary judgment may be entered for "any party"). The trial court entered judgment upholding as valid and enforceable a provision in a deed that granted Ms. Miller, Mr. Taylor's former wife, a right of first refusal with respect to the property that was the subject of the deed. The Taylors contend that the provision, as a matter of law, constitutes an unreasonable restraint on alienation of property and is, as a result, invalid. We agree with the trial court that the Taylors were not entitled to summary judgment, but we disagree with the trial court's determination as a matter of law that the right of first refusal was valid and enforceable. Because there are genuine issues of material

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fact as to whether the right of first refusal is reasonable, we reverse and remand.

Facts

We first note that the transcript of the summary judgment hearing filed with the record indicates that the parties filed cross motions for summary judgment and that although the decision was captioned “Declaratory Judgment,” the trial court was deciding the matter on summary judgment. It also appears that the parties each filed multiple affidavits in support of their positions and that some, although perhaps not all, of the pertinent documents were attached to those affidavits. The record, however, does not contain copies of the motions, the affidavits, or any other materials presented to the trial court. The following undisputed facts are drawn from the verified pleadings to the extent that the allegations are admitted, a single letter attached to the Taylors’ reply to Ms. Miller’s counterclaim, and the trial court’s findings of fact that are not challenged on appeal.

Mr. Taylor and Ms. Miller married in 1982 and separated in March 1993. On 17 June 1994, Mr. Taylor and Ms. Miller executed a warranty deed to Mr. Taylor for a piece of property on Fisher Street in Morehead City, North Carolina, known as “Lot 3, Block or Square 90.” The deed, as quoted by the trial court, contained the following provision regarding Ms. Miller’s right to repurchase the land:

“If Grantee [Mr. Taylor] decides to sell Lot 3, Block or Square 90, as shown on the official map or plan of the Town of Morehead City of record in Map Book 1, Page 139, Carteret County Registry, he will communicate the full terms of any bona fide offer to the femme Grantor [Ms. Miller] by certified or registered mail, return receipt requested. She will then have ten (10) days from the date of the mailing [of] such notice in which to notify the Grantee herein that she will buy the property on the same terms and conditions as contained in the bona fide offer or for the sum of \$41,500.00 plus the costs of all repairs and improvements (but not maintenance) made in/or on [sic] the premises from the date of this Deed to the date of the exercise of this right to repurchase by the femme Grantor herein. Grantee will keep careful records of all such repairs and improvements and will be paid only for those for which such records exist. If the femme Grantor does exercise her right under this provision, closing shall take place in Carteret County, North Carolina, within thirty (30) days of the mailing to Grantee above the notice by femme Grantor. If the femme

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Grantor does not keep the Grantee herein notified of a mailing address by which she can be reached, this right given in this paragraph to her shall terminate. If the femme Grantor herein does not exercise her right given in this paragraph within ten (10) days of the mailing of the notice to her as provided herein, her rights hereunder will terminate.”

(Emphasis omitted.)

In October 2002, Mr. Taylor conveyed an interest in the property to himself and his present wife, Patricia, in order to create a tenancy by the entireties. Seven years later, on 10 June 2009, Mr. Taylor wrote a letter to Ms. Miller stating, “As you will remember, there is in the separation agreement that we signed a provision that in the event that I want to sell the house on Fisher Street or the property upon which it sits you will have the right to buy it back at the amount that I paid you for it plus the costs of any improvements.” According to Mr. Taylor’s letter, the house was badly in need of repairs, but it was impossible for him to borrow any money on the property for the purpose of making repairs or improvements. He asked Ms. Miller to “agree to forego any rights under that provision of the separation agreement.” Ms. Miller did not respond to this letter.

Subsequently, on 30 June 2009, Mr. Taylor wrote Ms. Miller another letter that explained, as quoted by the trial court: “ ‘Enclosed you will find a Non-Warranty Deed from you to Bayard ([Mr. Taylor’s] son). He has been living in the house on Fisher Street for some years. It is my intention to convey this property to him. The house is beyond the point where it would be worthwhile to spend money on it to try to refurbish it. Therefore, the plan is to raze the house and build something new on it.’ ” (Emphasis omitted.) The letter further stated: “ ‘I do not believe the provision in the separation agreement has any validity. Your execution of the enclosed non-warranty deed will clear the record.’ ”

Ms. Miller did not respond to this letter either. Instead, Mr. Taylor received a letter, dated 2 July 2009, from Ms. Miller’s attorney, which stated, as quoted by the trial court: “ ‘I am hereby invoking the provision that allows my client to purchase from you said property for the sum of Forty-One Thousand Five Hundred Dollars (\$41,500.00). Marilyn Miller is exercising her right under the provisions to purchase the property.’ ”

Five days later, on 7 July 2009, Mr. and Mrs. Taylor filed a verified complaint seeking a declaration of rights under the deed and a deter-

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mination whether the right of first refusal provision was a valid restraint on alienation of property. Ms. Miller filed a verified answer and counterclaim seeking an order (1) upholding the right of first refusal and (2) directing the Taylors to specifically perform their obligations under it by conveying the property to Ms. Miller for \$41,500.00.

At some point, the parties apparently filed cross motions for summary judgment.¹ At the hearing on 22 February 2010, the trial court considered the parties' various affidavits and other materials, as well as the arguments presented by Ms. Miller, appearing *pro se*, and by Mr. Taylor, who is an attorney, acting as the Taylors' counsel. On 26 February 2010, the trial court entered a decision entitled "Declaratory Judgment" that concluded, after 11 findings of fact, that the Taylors were "not entitled to a declaration that the [right of first refusal] provision is invalid." The trial court then included in the decretal portion of the judgment a determination that the right of first refusal as set forth in the deed between the parties "is VALID AND ENFORCEABLE." The court ordered that Ms. Miller's counterclaim for specific performance of the Taylors' obligations under the right of first refusal would be calendared for disposition at a later date.

On 8 March 2010, the Taylors filed a motion to amend the judgment. The Taylors asked the trial court to remove from the declaratory judgment all references to the parties' contentions, or, in the alternative, to amend the findings of fact concerning the parties' contentions. The Taylors also filed a motion to dismiss Ms. Miller's counterclaim.

On 10 May 2010, the trial court entered an order denying the Taylors' motion to amend the declaratory judgment and allowing their motion to dismiss Ms. Miller's counterclaim without prejudice to being refiled once Ms. Miller's cause of action was ripe. The court also stated in this order that "[t]he motion for Summary Judgment filed by the Defendant is not ruled upon as her counterclaim is dismissed." The Taylors timely appealed from the declaratory judgment and the order denying their motion to amend the declaratory judgment.

Discussion

The Taylors contend that the deed's right of first refusal is, on its face, an unreasonable restraint on alienation and that the trial court, therefore, erred in denying their motion for summary judgment and entering a declaratory judgment that the provision is valid and

1. The record does not specifically set out the basis for Ms. Miller's motion for summary judgment although it appears to have been seeking summary judgment on Ms. Miller's counterclaim.

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enforceable. 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.R. Civ. P. 56(c).

The party moving for summary judgment has the burden of establishing the lack of any triable issue. *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party meets its burden, then the non-moving party must “produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial.” *Id.* All inferences of fact must be drawn against the movant and in favor of the party opposing the motion. *Purvis v. Moses H. Cone Mem’l Hosp. Serv. Corp.*, 175 N.C. App. 474, 476, 624 S.E.2d 380, 383 (2006). We review a trial court’s grant of summary judgment de novo. *Coastal Plains Utils., Inc. v. New Hanover Cnty.*, 166 N.C. App. 333, 340-41, 601 S.E.2d 915, 920 (2004).

A right of first refusal “requires that, before the property conveyed may be sold to another party, it must first be offered to the conveyor or his heirs, or to some specially designated person.” *Smith v. Mitchell*, 301 N.C. 58, 61, 269 S.E.2d 608, 610 (1980) (quoting 6 *American Law of Property* § 26.64 at 506-07 (1952)). In *Smith*, our Supreme Court established that a right of first refusal clause is not void per se and will be enforced if reasonable. *Id.*

The *Smith* Court considered the validity of a restrictive covenant requiring the defendant land owners (the Mitchells) to offer the plaintiff (Smith) the option to repurchase specified property at a price no higher than the lowest price the Mitchells were willing to accept from any other purchaser. *Id.* at 59-60, 269 S.E.2d at 610. The Court rejected the defendants’ argument that a right of first refusal, a “preemptive right,” is always an unreasonable restraint on alienation and held that “[c]ertain such restrictions on alienability, if defined as preemptive rights and if carefully limited in duration and price, are not void *per se* and will be enforced if reasonable.” *Id.* at 61, 269 S.E.2d at 610.

The Court explained that even though a preemptive right is a restraint on alienability, which is generally disfavored, “the minimal interference with alienability presented by a preemptive right does little violence to the primary reason for prohibiting restraints on alienation in the first place, and should not be *per se* void.” *Id.* at 63, 269 S.E.2d at 611. Further, “[j]ust as the commercial device of the

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option is upheld, if it is reasonable, so too the provisions of a preemptive right should be upheld if reasonable, particularly here where the preemptive right appears to be part of a commercial exchange, bargained for at arm's length." *Id.*, 269 S.E.2d at 612. Finally, the Court noted that a preemptive right is a useful tool for planned and orderly real estate development. *Id.* The Court concluded that "[t]o hold such a provision void *per se* [would be] an unnecessary limiting of the right of a developer and is in contradiction to a general trend to uphold restrictive covenants running with the land if those covenants are reasonable." *Id.* at 64, 269 S.E.2d at 612.

The Court then turned to the question of how to determine whether a right of first refusal is unreasonable, pointing out that there are two primary considerations in determining the reasonableness of a preemptive right: "[1] the duration of the right and [2] the provisions it makes for determining the price of exercising the right." *Id.* at 65, 269 S.E.2d at 613. The Court then adopted the following general rule:

We believe the better rule is to limit the duration of the right to a period within the rule against perpetuities and thus avoid lengthy litigation over what is or is not a reasonable time within the facts of any given case. We further agree with the authorities that a reasonable price provision in a preemptive right is one which somehow links the price to the fair market value of the land, or to the price the seller is willing to accept from third parties.

Id. at 66, 269 S.E.2d at 613.

The Taylors rely on *Smith* to argue that the right of first refusal in this case is unenforceable because it fails to satisfy the second *Smith* prong: the reasonable price provision. According to the Taylors, the fact that Ms. Miller has the option to pay a fixed price, \$41,500.00, for the property means that the price is not actually linked to the fair market value or to the price the Taylors are willing to accept from a third party.

In making this argument, however, the Taylors overlook the Supreme Court's subsequently decided opinion in *Texaco, Inc. v. Creel*, 310 N.C. 695, 314 S.E.2d 506 (1984), in which the Court considered whether Texaco, as the defendants' lessee, was entitled to specific performance of a fixed price option provision in a lease.² The

2. In *Smith*, 301 N.C. at 63, 269 S.E.2d at 611, the Supreme Court explained that "the reasons courts uphold the nearest analog to preemptive rights, the option, are equally applicable to preemptive provisions."

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lease, agreed upon 35 years earlier in 1949, provided that Texaco had an option to purchase the leased premises for either the fixed price of \$50,000.00 or the same price as a bona fide third-party offer acceptable to the lessor. *Id.* at 697, 314 S.E.2d at 507. That provision is materially indistinguishable from the right of first refusal in this case.

The Supreme Court held that Texaco was entitled to summary judgment on its specific performance claim despite the defendants' claim that enforcing the option " 'would place a ceiling of \$50,000.00 on the price which the lessor could obtain for the property during the entire thirty years that the lease and its renewals were in effect thus depriving lessor of all appreciation in value.' " *Id.* at 700, 314 S.E.2d at 509. The Court explained:

We recognize the result of this interpretation of the lease is harsh if it deprives defendants of the appreciated value of their property which exceeds the fixed price. But, as stated earlier, in construing a contract we look not only at its language, but also at the situation of the parties *at the time the contract was made*. In 1949 it was unlikely that either party anticipated the dramatic increases in property values on Franklin Street in Chapel Hill which have occurred in the intervening years.

Id. at 704, 314 S.E.2d at 511.

The Court emphasized that the circumstances showed the parties had bargained for the fixed price option and determined it to be a reasonable figure at the time the lease was agreed upon:

It is also apparent from the lease that Texaco was concerned about a third party buying the property after it had improved the property and established a business. The lessors were most likely concerned about being in a position to induce lessee to buy the property at a price more advantageous than the fixed price option, should they no longer wish to have their asset tied up in a long-term lease. The first refusal provision thus served the purposes of both parties. *In addition, the actual price set in the fixed price option was obviously a bargained-for sum*. It is apparent from [two cases in other jurisdictions] that Texaco did not have a uniform price it insisted upon in the fixed price option. Given that the rent on the property was only \$100 per month for the entire term of the lease, it is probable that the lessors viewed the \$50,000 price as being reasonable even at the end of the lease term.

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Id. at 704-05, 314 S.E.2d at 511 (emphasis added). *See also Pure Oil Co. of the Carolinas v. Baars*, 224 N.C. 612, 615, 31 S.E.2d 854, 856 (1944) (relied upon in *Smith*, 301 N.C. at 63, 269 S.E.2d at 612 and holding that when “option is an integral part of the transaction,” then “it would be inequitable to allow the defendants to claim the property under deed from the plaintiff and at the same time annul the essential terms of its acquisition”).

Thus, notwithstanding the language in *Smith*, *Texaco* established that an option—and, therefore, a right of first refusal—providing for a fixed price will not necessarily be invalid. Rather, the courts must look to the circumstances existing at the time the contract was made to determine whether the price is reasonable. In the event that the circumstances are disputed, then genuine issues of material fact exist that preclude summary judgment. *See Witt v. Disque*, 79 A.D.2d 419, 426-27, 436 N.Y.S.2d 890, 895 (1981) (in reversing trial court’s summary judgment order that concluded fixed-price option to repurchase was void as unreasonable restraint on alienation, holding (1) that reasonableness of option terms had to be determined by all circumstances at time of creation of option and (2) that bare documents relating to option were not sufficient to assess reasonableness of price because they did not establish facts relating to nature of relationship between parties, precise nature of transactions, relationship of parties to property at time of execution of option, or reason behind option terms).

Applying *Texaco* and the reasoning of *Witt*, which we find persuasive, we conclude that the trial court, in this case, did not err in denying the Taylors’ motion for summary judgment, but it did err in entering a declaratory judgment in Ms. Miller’s favor concluding that the right of first refusal is valid and enforceable. The record contains a letter from Mr. Taylor to Ms. Miller, in which he stated that their separation agreement contained a provision that if he wished to sell the house, Ms. Miller would have the right to buy it back for the amount that Mr. Taylor had paid plus the costs of any improvements. Similar to the situation in *Texaco*, if the fixed price option was “a bargained-for sum” arising out of negotiations relating to the parties’ division of property during a divorce and relating to the parties’ respective interests in the property, then those circumstances could suggest that the fixed-price right of first refusal was reasonable. 310 N.C. at 705, 314 S.E.2d at 511.

To hold, as the Taylors urge, that the right of first refusal is invalid could, in this context, risk disturbing the balance of interests

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struck by the parties in their divorce negotiations. We note that *Smith*, in discussing why a preemptive right should not be per se void, relied upon not only the minimal impact of such a right on alienability, but also on the need to enforce arms-length negotiations and the importance of such rights in certain contexts, such as real estate development. 301 N.C. at 64, 269 S.E.2d at 612. We believe that just as a right of first refusal may be an important tool for developers, a fixed-price right of first refusal may be an important tool for spouses and courts in deciding how to divide up property.

We are not persuaded by the Taylors' attempt to distinguish *Texaco*. The Taylors essentially argue that the circumstances of *Texaco* are different from those in this case, but they have not addressed *Texaco*'s holding that makes relevant the circumstances at the time the parties entered into the contract including the option or right of first refusal. They did not argue to the trial court, and the trial court did not address, whether the circumstances surrounding the deed were such that the right of first refusal was invalid as a matter of law. Moreover, we cannot make that determination on appeal because the Taylors did not include the evidence submitted to the trial court. Similar to *Witt*, the few documents before this Court and the trial court's findings of fact are not sufficient to resolve, on summary judgment, the reasonableness of the price.

Ms. Miller, seeking to uphold the trial court's entry of a declaratory judgment in her favor, contends on appeal that her ability to reacquire the property was vital to her and that the repurchase provision was an integral part of the transaction when she transferred the property to Mr. Taylor, which was in turn part of the parties' property settlement. Although the transcript of the summary judgment hearing suggests that the parties may have submitted multiple affidavits and some documentation, those evidentiary materials, which may have supported Ms. Miller's arguments, are not part of the record before this Court. Ms. Miller had a responsibility to ensure that any materials necessary for her arguments on appeal were included in the record on appeal. See *Fleming Produce Corp. v. Covington Diesel, Inc.*, 21 N.C. App. 313, 315, 204 S.E.2d 232, 234 (1974) ("While an appellant has the primary responsibility for the preparation of a record on appeal, an appellee has the responsibility of ascertaining that the record clearly sets forth things favorable to him that the appellate court is called upon to review.").

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Ms. Miller argues, however, that the burden was on the Taylors to prove the unreasonableness of the provision and complains that the Taylors “would have this Court ignore the circumstances behind the creation of the buy-back provision in the deed he prepared to [sic] himself.” In doing so, she overlooks the fact that in order for the trial court to enter judgment in her favor, as it did, she bore the burden of showing that no genuine issue of fact existed regarding whether the right of first refusal was valid and enforceable and that she was entitled to judgment as a matter of law.

Because we cannot determine on appeal whether either party submitted sufficient evidence regarding the circumstances surrounding the agreement to the fixed option price to warrant judgment in their favor, we hold that neither party was entitled to summary judgment on the issue of the reasonableness of the right of first refusal. See *Johnson v. News & Observer Publ'g Co.*, 167 N.C. App. 86, 89, 604 S.E.2d 344, 346-47 (2004) (“As we conclude that the evidence is susceptible to more than one inference, we hold that summary judgment was not appropriate for either party”); *Grundey v. Clark Transfer Co.*, 42 N.C. App. 308, 312, 256 S.E.2d 732, 735 (1979) (“Since there is an issue as to this material fact, summary judgment for either party is not proper.”).

The trial court, therefore, properly denied the Taylors’ motion for summary judgment, but it erred when, in deciding the Taylors’ summary judgment motion, it entered judgment in Ms. Miller’s favor. Accordingly, we reverse and remand for further proceedings consistent with this opinion. Because of our disposition of this appeal, we need not address the Taylors’ remaining argument on appeal regarding the denial of their motion to amend the judgment.

Reversed and remanded.

Chief Judge MARTIN and Judge ELMORE concur.

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BARBARA R. SEARCY, PLAINTIFF V. GREGORY BLAKE SEARCY, DEFENDANT

No. COA11-11

(Filed 20 September 2011)

Fraud—constructive—assets not listed for equitable distribution

There was a material issue of fact as to plaintiff's action for constructive fraud where defendant failed to disclose purchase money notes in his list of assets for equitable distribution. A fiduciary relationship existed when plaintiff alleged that the constructive fraud occurred and, although plaintiff did not make those assertions in her initial pleadings, the pleadings are considered amended where the evidence at a summary judgment hearing would justify an amendment.

Appeal by Plaintiff from Orders entered 21 September 2010 and 28 September 2010 by Judge Karen A. Alexander in Carteret County District Court. Heard in the Court of Appeals 23 May 2011.

Trimpi & Nash, LLP, by John G. Trimpi, for Plaintiff.

Kirkman, Whitford, Brady and Berryman, by Kimberly L. Farias, for Defendant.

THIGPEN, Judge.

Barbara R. Searcy ("Plaintiff") appeals from an order granting Gregory Blake Searcy's ("Defendant") motion for summary judgment on the issue of whether their separation agreement is valid and enforceable. We must determine whether a genuine issue of material fact exists regarding Plaintiff's allegations that Defendant committed constructive fraud when the parties were in a fiduciary relationship. We conclude the trial court erred by entering summary judgment in favor of Defendant.

The evidence of record tends to show that Plaintiff married Defendant on 22 June 1983, and Plaintiff and Defendant jointly owned a marital home in Emerald Isle, North Carolina, worth \$400,000.00, with a mortgage of \$334,164.40. Plaintiff and Defendant also jointly owned a lot adjacent to the marital home worth \$82,000.00. On 12 August 2003, during Plaintiff and Defendant's marriage, Defendant acquired an interest in two parcels of real property, Lot 17 and Lot 18 in Surf Landing Cove, North Carolina. On 27 July 2004, Plaintiff and Defendant deeded both Lot 17 and Lot 18 to Builders by Design. The

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deeds were executed and recorded in the Carteret County Registry, and Plaintiff signed a HUD-1 Settlement Statement for each transaction showing Defendant receiving purchase money notes in the amount of \$73,400.00 for Lot 17 and \$75,400.00 for Lot 18 in Defendant's name.

On 16 February 2005, Plaintiff told Defendant she wanted a divorce, and in early March, Plaintiff and Defendant met with Attorney Arnold Stone ("Attorney Stone"), who mediated Plaintiff and Defendant's division of marital property. Attorney Stone told the parties to compile a list of Plaintiff and Defendant's assets and liabilities. Defendant did not include the purchase money notes in the amounts of \$73,400.00 for Lot 17 and \$75,400.00 for Lot 18 in the list of his assets.

On 13 April 2005, the parties separated. On 25 April 2005, Plaintiff and Defendant bought a condominium in Morehead City for Plaintiff and jointly signed a note and deed of trust for the purchase price.

On 25 April 2005, Defendant received a check for \$75,400.00. On 7 June 2005, Defendant received a second check for \$75,400.00. These checks were proceeds from the sale of Lot 17 and Lot 18 in Surf Landing Cove.¹

On 10 June 2005, the parties executed a separation agreement before a notary public, purporting to equitably divide the marital property. The agreement provided that Defendant would be the residential parent and legal custodian of the minor child and would receive the marital home and lot adjacent to the marital home. Defendant agreed to pay off all marital debt, which consisted of credit card debt of approximately \$26,000.00. Defendant also agreed to pay Plaintiff \$82,000.00 over ten years for her interest in the marital home and adjacent lot by making two payments of \$5,000.00, one on 1 July 2005 and one on 1 July 2006, and by making \$600 payments per month for 120 months beginning 1 July 2005. Plaintiff received the condominium in Morehead City pursuant to the agreement. The agreement stated, "This Agreement is effective April 13th, 2005, although either or both parties may have signed it before or after that date." The agreement also included a mutual release, which stated the following:

[E]ach party does hereby release and discharge the other of and from all causes of action, claims, rights or demands whatsoever,

1. There is an unexplained \$2,000.00 discrepancy between the purchase money note in the amount of \$73,400.00 for Lot 17 and the check in the amount of \$75,400.00.

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at law or in equity, which either of the parties ever had or now has against the other, known or unknown, by reason of any matter, cause or thing up to the date of execution of this Agreement, except the cause of action for divorce based upon the separation of the parties.

The purchase money notes in the amounts of \$73,400.00 for Lot 17 and \$75,400.00 for Lot 18 were not mentioned in the separation agreement.

On 1 July 2005, quitclaim deeds were executed transferring property between the parties in accordance with the separation agreement. The divorce judgment for the parties was entered 9 June 2006, which did not incorporate the separation agreement.

On 13 June 2008, Plaintiff filed a complaint alleging legal malpractice, breach of fiduciary duty, constructive fraud, punitive damages, and statutory damages. Plaintiff claimed that Defendant and Attorney Stone perpetrated fraud in the execution of deeds transferring property. Plaintiff's complaint prayed that the court set aside the conveyances of property from Plaintiff to Defendant; that the court determine Plaintiff had valid claims for equitable distribution, alimony, and post-separation support; and that Defendant and Attorney Stone be held liable for an award of punitive and treble damages to Plaintiff. The complaint also alleged that Defendant had paid her \$600 per month for only twenty-four months and had "informed the Plaintiff that the payments were not to purchase the lot but were in fact for support."

On 1 July 2008, Defendants filed an answer and counterclaim asserting that the separation agreement was a bar to recovery. Defendant's answer contained a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

On 9 February 2009, Plaintiff filed a motion to amend her complaint, stating that although she had requested a copy of the separation agreement from Defendant and from Attorney Stone, she had not been provided a copy of the separation agreement until Defendant attached the document to the answer to Plaintiff's complaint. Plaintiff also stated in her motion to amend that Defendant did not disclose all of his assets in the division of property, specifically, the purchase money notes in the amounts of \$73,400.00 for Lot 17 and \$75,400.00 for Lot 18. On 15 October 2009, Plaintiff filed a second motion to amend and voluntarily dismissed Attorney Stone from the action. On

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22 October 2009, Plaintiff filed a third motion to amend the complaint. Plaintiff's motions to amend were denied on 13 April 2010.

On 5 February 2009, Defendant filed a motion for summary judgment contending there was no genuine issue of material fact and Defendant was entitled to judgment as a matter of law. Plaintiff responded to Defendant's motion for summary judgment with exhibits and affidavits.

On 21 September 2010, the trial court entered an order granting in part Defendant's Rule 12(b)(6) motion and dismissing with prejudice all of Plaintiff's causes of action in her complaint except her cause of action for constructive fraud. On the same day, the trial court entered an order granting Defendant's motion for summary judgment and dismissing, with prejudice, the issue of constructive fraud. The order stated the following:

2. The parties' Separation Agreement executed by the parties on [the] 10th day of June, 2005, which had an effective date of April 13, 2005, is valid and enforceable.
3. No fiduciary duty existed between the parties after the effective date of the Separation Agreement.
4. At the time of the execution of the deeds which transferred the properties pursuant to the Separation Agreement no fiduciary duty existed between the parties.
5. The Separation Agreement entered into by the parties is a complete bar to the recovery sought by Plaintiff.

From both orders entered 21 September 2010, Plaintiff appeals. However, on appeal, Plaintiff stated in her brief, "[t]he issues plaintiff intends to argue on appeal . . . are those relating to [the trial court's] ruling on summary judgment."

I: Summary Judgment

Plaintiff argues on appeal the trial court erred in awarding summary judgment to Defendant and dismissing Plaintiff's complaint. Plaintiff essentially argues Defendant breached his fiduciary duty to her and committed constructive fraud when he failed to disclose the purchase money notes for Lot 17 and Lot 18 in Surf Landing Cove.

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together

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with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). “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) (quotation omitted). “The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact.” *Thomco Realty, Inc. v. Helms*, 107 N.C. App. 224, 226, 418 S.E.2d 834, 835-36, *disc. review denied*, 332 N.C. 672, 424 S.E.2d 407 (1992) (citation omitted). When a moving party establishes entitlement to summary judgment, the burden shifts to the non-moving party to forecast evidence that a genuine issue of material fact exists. *Hill v. Hill*, 94 N.C. App. 474, 478, 380 S.E.2d 540, 544 (1989).

“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. (citation omitted). “We review a trial court’s order granting or denying summary judgment *de novo*.” *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Id.* (quotation omitted). Our review, however, “is necessarily limited to whether the trial court’s conclusions as to the[] questions of law were correct ones.” *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987). “Summary judgment is improper where there is a genuine issue of material fact as to whether defendant disclosed all material facts pertaining to the [separation] agreement.” *Harroff v. Harroff*, 100 N.C. App. 686, 689, 398 S.E.2d 340, 342 (1990), *disc. review denied*, 328 N.C. 330, 402 S.E.2d 833 (1991) (citation omitted).

“Separation [and] property settlement agreements are contracts and as such are subject to rescission on the grounds of (1) lack of mental capacity, (2) mistake, (3) fraud, (4) duress, or (5) undue influence.” *Sidden v. Mailman*, 137 N.C. App. 669, 675, 529 S.E.2d 266, 270 (2001).

“A duty to disclose arises where a fiduciary relationship exists between the parties to [a] transaction.” *Sidden v. Mailman*, 150 N.C. App. 373, 376, 563 S.E.2d 55, 58 (2002) (quotation omitted). “The rela-

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tionship of husband and wife creates such a [fiduciary] duty.” *Id.* “During a marriage, a husband and wife are in a confidential relationship[;] [i]n this relationship, the parties have a duty to disclose all material facts to one other, and the failure to do so constitutes fraud.” *Lancaster v. Lancaster*, 138 N.C. App. 459, 462, 530 S.E.2d 82, 84 (2000). “However, th[e] [fiduciary] duty ends when the parties separate and become adversaries negotiating over the terms of their separation.” *Mailman*, 150 N.C. App. at 376, 563 S.E.2d at 58 (quotation omitted). Furthermore, “[t]ermination of the fiduciary relationship is firmly established when one or both of the parties is represented by counsel.” *Id.* at 376-77, 563 S.E.2d at 58 (quotation omitted). However, “the mere involvement of an attorney does not automatically end the confidential relationship.” *Lancaster*, 138 N.C. App. at 463, 530 S.E.2d at 85 (citation omitted). “[W]hen one party moves out of the marital home, this too is evidence that the confidential relationship is over, although it is not controlling.” *Id.* (citation omitted).

“A claim based on constructive fraud is sufficient if it alleges facts and circumstances (1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust.” *Mailman*, 137 N.C. App. at 677, 529 S.E.2d at 272 (quotation omitted). “Further, an essential element of constructive fraud is that defendant[] sought to benefit [himself] in the transaction.” *Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 406, 653 S.E.2d 181, 186 (2007), *disc. review denied*, 362 N.C. 361, 663 S.E.2d 316 (2008) (quotation omitted). “Indeed, [p]ut simply, a plaintiff must show (1) the existence of a fiduciary duty, and (2) a breach of that duty.” *Id.* (quotation omitted).

“The pleading must contain an allegation of the particular representation made, . . . [but] there is no requirement there be allegations of dishonesty or intent to deceive, as fraud is presumed from the nature of the relationship[.]” *Mailman*, 137 N.C. App. at 677, 529 S.E.2d at 272 (citation omitted). Nevertheless, “[i]t is sufficient if, upon a liberal construction of the whole pleading, the charge of fraud might be supported by proof of the alleged constitutive facts.” *Piles*, 187 N.C. App. at 406, 653 S.E.2d at 186 (quotation omitted).

A constructive fraud claim requires even less particularity because it is based on a confidential relationship rather than a specific misrepresentation. The very nature of constructive fraud defies specific and concise allegations and the particularity require-

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ment may be met by alleging facts and circumstances (1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.

Terry v. Terry, 302 N.C. 77, 85, 273 S.E.2d 674, 678-79 (1981) (citation and quotation omitted).

In the present case, Plaintiff and Defendant consulted Attorney Stone to mediate an equitable distribution of their marital property in early March 2005. Plaintiff and Defendant separated on 13 April 2005, at which time Plaintiff moved into the condominium in Morehead City. Plaintiff and Defendant signed the separation agreement on 10 June 2005, which stated that the effective date was 13 April 2005, and on 1 July 2005, quitclaim deeds were executed by both parties transferring real property as specified in the separation agreement. We do not disagree with the trial court's conclusion that no fiduciary relationship existed between the parties after the effective date of the separation agreement (13 April 2005) or at the date of the execution of the deeds which transferred the properties pursuant to the separation agreement (1 July 2005). At that point, Plaintiff had separated from Defendant. *See Lancaster*, 138 N.C. App. at 463, 530 S.E.2d at 85 (stating, "when one party moves out of the marital home," this is "evidence that the confidential relationship is over"). However, neither the effective date of the separation agreement (13 April 2005) nor the date of the execution of the deeds which transferred the properties pursuant to the separation agreement (1 July 2005) is the appropriate date to consider in Plaintiff's cause of action for constructive fraud. The appropriate date to consider is the date Defendant failed to disclose the purchase money notes for Lot 17 and Lot 18 in Surf Landing Cove in his list of assets. The evidence tends to show this was in March 2005, before Plaintiff separated from Defendant, and before either party retained an attorney. *Id.* at 463, 530 S.E.2d at 85 ("[T]he mere involvement of an attorney does not automatically end the confidential relationship"). Plaintiff stated in her complaint that at that time "a relationship of trust and confidence existed between [Plaintiff] and [Defendant][.]" This is supported by statements in Plaintiff's affidavit, including the following: "I didn't have a lawyer and I didn't think I needed one"; "my ex-husband helped me purchase the things for the new condominium, including a bedroom suite"; and "[w]e continued to maintain cordial relations[.]" The evidence shows that in March 2005, when Plaintiff alleged the constructive fraud

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occurred, neither party had retained lawyers or separated from each other. A fiduciary relationship existed at that time.

Defendant argues that assuming a fiduciary relationship existed in March 2005, Plaintiff did not sufficiently plead constructive fraud in her initial complaint, and the motions to amend her complaint were denied. Specifically, Defendant contends that because Plaintiff did not assert that Defendant failed to disclose the purchase money notes for Lot 17 and Lot 18 in Surf Landing Cove in Plaintiff's initial complaint, Plaintiff did not allege constructive fraud with particularity. While we agree that Plaintiff did not make the foregoing assertions in her initial pleadings, we do not believe this bars our consideration of constructive fraud on the basis of failure to disclose the purchase money notes. "Where the evidence presented at a summary judgment hearing would justify an amendment to the pleadings, we will consider the pleadings amended to conform to the evidence raised at the hearing." *Stephenson v. Warren*, 136 N.C. App. 768, 771, 525 S.E.2d 809, 811, *disc. review denied*, 351 N.C. 646, 543 S.E.2d 883 (2000). At the hearing on summary judgment in the present case, the trial court considered documents including deeds, notes and deeds of trust for Lot 17 and Lot 18 in Surf Landing Cove, and copies of two checks for \$75,400.00 signed by Defendant. The court also received into evidence Plaintiff's affidavit which stated that Defendant did not disclose the 2004 notes and deeds of trust for Lot 17 and Lot 18 when the parties divided the marital assets in March 2005, and Plaintiff did not know these notes existed.² It is undisputed that the separation agreement contains no mention of notes for Lot 17 and Lot 18. Consistent with *Stephenson*, we conclude "it is both proper and fair that the complaint in this case be treated as amended to conform to the evidence reviewed on the motion for summary judgment, noting that it is the better procedure at all stages of a trial to require a formal amendment to the pleadings." *Id.* Based on the evidence presented at the hearing on summary judgment, in conjunction with Plaintiff's initial complaint, we further conclude that Plaintiff's claim for constructive fraud was pled with sufficient particularity.

2. Defendant contends that Plaintiff did, in fact, know about Lot 17 and Lot 18, because her signatures were on the HUD-1 Settlement Statements. However, this Court held in *Harroff*, 100 N.C. App. at 691, 398 S.E.2d at 344, that summary judgment was inappropriate when the facts involving the defendant's disclosure of assets were in conflict, despite the defendant's contention that the undisclosed assets "were all reported on the couple's tax returns[.]" and the plaintiff had "full access to the couple's income tax returns and asked questions about the returns."

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[215 N.C. App. 576 (2011)]

Because a fiduciary relationship existed in March 2005, the time during which the evidence tends to show Defendant failed to disclose the purchase money notes for Lot 17 and Lot 18 in Surf Landing Cove in his list of assets for equitable distribution, and because Defendant had a duty to disclose the aforesaid assets for purposes of equitable distribution, we conclude a genuine issue of material fact exists as to Plaintiff's cause of action for constructive fraud.

REVERSED and REMANDED.

Chief Judge MARTIN and Judge STEPHENS concur.

STATE OF NORTH CAROLINA v. ELDER G. CORTEZ, DEFENDANT AND RICHARD L. LOWRY, SURETY; LARRY D. ATKINSON, SURETY; AND TONY L. BARNES, SURETY

No. COA10-1211

(Filed 20 September 2011)

Bail and Pretrial Release—bond forfeiture—defendant called and failed—clerk and trial court lacked jurisdiction

The Clerk of Court and the trial court erred in a bond forfeiture case by entering 17 November 2009 notices of forfeiture and a 17 May 2010 order. The defendant sureties could not have been held liable for more than the amount agreed upon pursuant to the bonds they actually executed, and the 10 November 2009 appeal divested the Clerk and the trial court of jurisdiction to take further action relating to the 16 September 2008 bonds so long as issues surrounding those bonds remained subject to appellate review.

Appeal by Richard L. Lowry, Larry D. Atkinson, and Tony L. Barnes from amended order entered 17 May 2010 by Judge Thomas H. Lock in Superior Court, Johnston County. Heard in the Court of Appeals 16 August 2011.

Tharrington Smith, L.L.P., by Rod Malone and Christine Scheef, for Johnston County Board of Education.

Narron, O'Hale and Whittington, P.A., by John P. O'Hale, for Appellants-Sureties.

McGEE, Judge.

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A warrant for the arrest of Elder G. Cortez (Defendant) for the charges of first-degree kidnapping, first-degree rape, and taking indecent liberties with a child was issued on 24 August 2007. On 16 September 2008, Larry Atkinson, Tony L. Barnes, and Richard Lowry (Sureties) executed three appearance bonds for Defendant in the respective amounts of \$10,000.00, \$20,000.00, and \$570,000.00. Defendant failed to appear at an 18 February 2009 hearing, and the Clerk of Superior Court, Johnston County (the Clerk), issued a bond forfeiture notice to the Sureties for each of the three bonds. The notices informed the Sureties of Defendant's failure to appear, and stated that final judgment in the amount of the respective bonds would be entered on 23 July 2009 unless the Sureties filed motions to set aside the forfeitures. N.C. Gen. Stat. § 15A-544.5 provides:

(d) Motion Procedure.—If a forfeiture is not set aside under subsection (c) of this section, the only procedure for setting it aside is as follows:

(1) At any time before the expiration of 150 days after the date on which notice was given under G.S. 15A-544.4, the defendant or any surety on a bail bond may make a written motion that the forfeiture be set aside, stating the reason and attaching the evidence specified in subsection (b) of this section.

(2) The motion is filed in the office of the clerk of superior court of the county in which the forfeiture was entered, and a copy is served, under G.S. 1A-1, Rule 5, on the district attorney for that county and the county board of education.

(3) Either the district attorney or the county board of education may object to the motion by filing a written objection in the office of the clerk and serving a copy on the moving party.

N.C. Gen. Stat. § 15A-544.5(d) (2009).

The Sureties filed motions to set aside the forfeitures on 22 July 2009. The Johnston County District Attorney and the Johnston County Board of Education (the Board) did not file any objection to the Sureties' motions to set aside the forfeitures. Thereafter, the Clerk entered an order on 3 August 2009 setting aside the bond forfeitures pursuant to N.C.G.S. § 15A-544.5(d)(4). On 25 August 2009, the Board filed a motion to strike the Clerk's 3 August 2009 order. The trial court heard the Board's motion on 5 October 2009, and entered on order on 12 October 2009 denying the Board's motion.

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The Board filed notice of appeal from the trial court's 12 October 2009 order on 10 November 2009, and this Court addressed the matter by opinion filed 19 April 2011. *State v. Cortez*, ___ N.C. App. ___, ___ S.E.2d ___, 2011 WL 1467664 (Apr. 19, 2011) (unpublished opinion) (*Cortez I*). In *Cortez I*, this Court held that the Clerk did not have the authority to grant the Sureties' motion because that motion did not allege any of the exclusive grounds for setting aside a forfeiture as stated in N.C.G.S. § 15A-544.5(b). *Cortez I*, 2011 WL 1467664, 5-6. This Court reversed and remanded "with instructions for the trial court to either dismiss Sureties' motion or deny the same for the reasons set forth [in the opinion]." *Id.* at 6.

The State again placed Defendant's criminal offenses on the court calendar for 2 November 2009. Defendant also failed to appear for this court date; he was again called and failed; and the trial court again ordered that Defendant's bond be forfeited. The Clerk issued notices of forfeiture to the Sureties on 17 November 2009. These notices of forfeiture were for the original bonds executed by the Sureties as the Sureties had not re-bonded Defendant following his initial 18 February 2009 failure to appear. The Sureties filed a "Motion to Dismiss and to Set Aside Forfeiture" on 14 April 2010, arguing that the Board's 10 November 2009 notice of appeal from the trial court's 12 October 2009 order divested the trial court of jurisdiction to decide the bond forfeiture issue. The Board filed an objection to the Sureties' motion on 23 April 2010. By order entered 17 May 2010, the trial court denied the Sureties' 14 April 2010 motion to dismiss and motion to set aside forfeiture, and sustained the Board's objection to the Sureties' motion. The Sureties appeal.

I.

The Sureties argued before the trial court, and now argue on appeal, that both the Clerk and the trial court were without jurisdiction to enter the 17 November 2009 notices of forfeiture and the 17 May 2010 order, respectively. We agree.

The Sureties executed bonds in this case on 16 September 2008. These were the only bonds executed in the matter. Defendant was called and failed on 18 February 2009. The trial court ordered the 16 September 2008 bonds forfeited, and an order for Defendant's arrest was issued. The Clerk set aside the orders for forfeiture on 3 August 2009 and the trial court, in an order entered 12 October 2009, affirmed the orders to set aside the forfeitures. The Board appealed the 12 October 2009 order on 10 November 2009.

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“When an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein . . .” N.C. Gen. Stat. § 1-294 (2009). “The general rule has been that a timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court. Pending appeal, the trial judge is generally *functus officio*, subject to two exceptions and one qualification”

The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal. The qualification to the general rule is that the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned and thereby regain jurisdiction of the cause.

In re Adoption of K.A.R., ___ N.C. App. ___, ___, 696 S.E.2d 757, 763 (2010).

The Board argues that, because Defendant was called and failed a second time, the actions of the Clerk and trial court following this subsequent called and failed constitute an entirely new matter, unrelated to the matter appealed on 10 November 2009. Thus, no jurisdictional issue arises in this case. We cannot agree with the Board’s argument, as it would undermine policy considerations, including prevention of fragmentary appeals and avoidance of inefficiencies and confusion of the issues. *Thomas v. Contract Core Drilling & Sawing*, ___ N.C. App. ___, ___, 703 S.E.2d 862, 865 (2011).

“An order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions.” N.C.G.S. § 15A-544.5(h). “If a forfeiture is set aside under this section, the forfeiture shall not thereafter ever become a final judgment of forfeiture or be enforced or reported to the Department of Insurance.” N.C.G.S. § 15A-544.5(g). “When an order setting aside a forfeiture is entered, the defendant’s further appearances shall continue to be secured by that bail bond unless the court orders otherwise.” N.C.G.S. § 15A-544.5(c).

In this case, the only bonds at issue are those that were executed on 16 September 2008. The Sureties cannot be held liable for more than the amounts of the bonds they executed. In *Cortez I*, our Court determined that the Clerk improperly set aside the forfeitures ordered on 18 February 2009 when Defendant failed to appear on that

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date. The Board never moved to withdraw its appeal in *Cortez I*. Thus, the Board continued to contend that the Sureties were liable for Defendant's 18 February 2009 failure to appear. After notice of appeal was filed in *Cortez I*, but before any opinion had been filed in *Cortez I*, the trial court ruled that a second forfeiture had occurred and that the Sureties were, therefore, liable on the bonds they had executed on 16 September 2008 for this second forfeiture, based on Defendant's second failure to appear on 2 November 2009.

Were we to hold that the Clerk and the trial court had jurisdiction to enter and affirm the second orders of forfeiture, the Sureties would currently be liable for two separate failures to appear and, therefore, liable for two times the actual amount of the bonds executed in Defendant's case. As the Sureties may not be held liable for more than the amount agreed upon pursuant to the bonds they actually executed, the actions of the Clerk and the trial court following the notice of appeal in *Cortez I* have resulted in unnecessary inefficiencies and confusion. One of these "final" judgments, *see* N.C.G.S. § 15A-544.5, would have to be revisited. The public and the parties have an interest in maintaining a final judgment. *State v. Buckom*, 126 N.C. App. 368, 378, 485 S.E.2d 319, 326 (1997) (citation omitted).

We hold that, in the present case, the 10 November 2009 appeal divested the Clerk and the trial court of jurisdiction to take further action relating to the 16 September 2008 bonds so long as issues surrounding those bonds remained subject to appellate review.

Vacated.

Judges ERVIN and McCULLOUGH concur.

ROBERT L. SKELLY v. JENNIFER FRYE SKELLY

No. COA11-150

(Filed 20 September 2011)

Pretrial proceedings—motion to continue—attorney's intention to withdraw—no reasonable notice given

The trial court erred in a child custody case by denying defendant's motion to continue. Although defendant was given notice of her attorney's intention to withdraw from the case, defendant

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[215 N.C. App. 580 (2011)]

was not given reasonable notice nor adequate opportunity to secure other counsel.

Appeal by Defendant from orders entered 15 February 2010 and 3 September 2010 by Judge Burford A. Cherry in Burke County District Court. Heard in the Court of Appeals 23 May 2011.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, and G. Russell Kornegay, III, for Defendant.

Kuehnert & Jones, PLLC, by Jonathan L. Jones, for Plaintiff.

THIGPEN, Judge.

Jennifer Frye Skelly (“Defendant”) appeals from a custody order granting Robert L. Skelly (“Plaintiff”) custody of their two minor children and an order denying Defendant’s post-trial motions. On appeal, Defendant argues she was not provided reasonable notice of the withdrawal of her attorney, such that the trial court’s denial of her motion to continue was an abuse of discretion. We agree.

Plaintiff filed a complaint against Defendant on 6 August 2009, seeking custody of and support for their two minor children. On 17 September 2009, the trial court entered a temporary custody order awarding the parties joint legal and physical custody of the children consistent with a separation agreement executed on 23 March 2009.

On 4 February 2010, counsel for Defendant moved to continue the trial because Defendant sought to retain new counsel. The trial court denied the motion, and called the case for trial on 10 February 2010. On 10 February 2010, the following colloquy ensued:

JUDGE CHERRY: Robert Skelly and Jennifer Skelly.

MR. [BEYER]: Your Honor, this morning, I filed a Motion to Withdraw, and I have a proposed Order. Ms. Skelly has asked that I do so.

JUDGE CHERRY: Ma’am, do you understand that if I let your lawyer out, I’m not continuing the case?

MR. [BEYER]: Well, Your Honor, on her behalf, at the time of the docket call last week, the matter was left open, and I informed the Court that she wished to discuss her matter with someone else. And I believe she may have—hasn’t had much chance to do that. I don’t know that the parties would be significantly preju-

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diced by the matter not being heard today in that they share custody of the children. So, it's not as if either one is going to keep the children from the other in the interim. But in any event, I'd ask that the Court enter that Order at her request and mine.

JUDGE CHERRY: Mr. Jones, do you want to be heard?

MR. JONES: Your Honor, we just indicate the same thing we did the other day; we're ready. You may recall we were in the same situation last time. We were ready then, and the Court—It really wasn't their fault that time. The last time it was a matter of scheduling that we ended up not having enough time to start it and try it, but we were here, ready then, too.

JUDGE CHERRY: Okay. Ma'am I'm not going to continue the case. Do you want me to sign this Order allowing your lawyer to withdraw?

MS. SKELLY: What does that mean? I'm not—I don't—I need—

JUDGE CHERRY: It means you're going to be representing yourself, ma'am.

MS. SKELLY: Oh, well, then, No. No, sir.

MR. BEYER: That puts me in the position of not having prepared for today.

JUDGE CHERRY: Well, ma'am, did you tell him you didn't want him to represent you?

MS. SKELLY: Yes. I told him that last Thursday—or Wednesday.

JUDGE CHERRY: Okay. Well, I'm going to let him withdraw then, because you've indicated to him you don't want him to be your lawyer. Mr. Jones, I believe you're the Plaintiff.

MR. JONES: We're ready, Your Honor.

JUDGE CHERRY: Call your first witness.

MR. JONES: Your Honor, we would call Ms. Skelly.

JUDGE CHERRY: Come around and be sworn, please, ma'am.

On 15 February 2010, the trial court entered a custody order awarding Plaintiff custody of the children and dismissing, without prejudice, Plaintiff's claim for child support. The custody order allowed Defendant visitation privileges with the children and did not

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expressly deny her claim for child custody or address her claim for attorneys' fees. On 19 February 2010, Defendant filed a motion to stay, a motion for a new trial, a motion for relief from the judgment or order, and a supporting affidavit. On 3 September 2010, the trial court denied the foregoing motions. On 30 September 2010, Defendant filed notice of appeal specifically designating the following issues for appeal: the denial of her first continuance request; the order permitting counsel for Defendant to withdraw on the day of trial; the denial of her second continuance request; the post-trial order; and pursuant to N.C. Gen. Stat. § 1-278, "any and all intermediate orders involving the merits and necessarily affecting the aforementioned rulings." On 11 October 2010, Defendant filed a supplemental notice of appeal specifically designating her appeal from the custody order. Defendant also filed a notice of voluntary dismissal without prejudice of her claims for child support and attorneys' fees.

I: Appealability

Preliminarily, we address the question of whether the appeal in this case was properly taken. Defendant contends, and Plaintiff does not dispute, that the appeal is not interlocutory and that notice of appeal of the custody order was timely. We agree that the appeal is properly before this Court.

II: Motion to Continue

In Defendant's first argument, she contends the trial court erred by denying Defendant's motion to continue. We agree.

N.C. Gen. Stat. § 1A-1, Rule 40(b) (2009) provides, in pertinent part, the following: "No continuance shall be granted except upon application to the court[;] [a] continuance may be granted only for good cause shown and upon such terms and conditions as justice may require."

"Whether to grant a motion to continue is within the sound discretion of the trial court." *Brown v. Rowe Chevrolet-Buick, Inc.*, 86 N.C. App. 222, 224, 357 S.E.2d 181, 183 (1987) (citations omitted). However, the trial court's "discretion is not unlimited, and must not be exercised absolutely, arbitrarily, or capriciously, but only in accordance with fixed legal principles." *Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E.2d 380, 386 (1976) (quotation omitted). "Our standard of review for a trial court's denial of a motion to continue is abuse of discretion." *Kimball v. Vernik*, ___ N.C. App. ___, ___, 703 S.E.2d 178, 181 (2010) (citation omitted).

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After an attorney has made “a formal appearance” on his client’s behalf, he is not “at liberty to abandon [his client’s] case without (1) justifiable cause, (2) reasonable notice to [his client], and (3) the permission of the court.” *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 305 (1965) (citations omitted).

On appeal, Defendant does not contest that the attorney had “justifiable cause” to withdraw: Defendant sought to retain different counsel. *County of Wayne ex rel. Scanes v. Jones*, 79 N.C. App. 474, 475, 339 S.E.2d 435, 436 (1986) (“It appears from the record that the defendant in this case told his attorney that he did not require his services any longer, which constitutes just cause for the attorney’s withdrawal within the meaning of the rule.”). However, Defendant contests that she was not provided “reasonable notice[.]” “[T]he attorney must give specific and reasonable notice so that the client may have adequate time to secure other counsel[.]” *Bryant*, 264 N.C. at 211, 141 S.E.2d at 306.

The evidence here tends to show that at 8:00 a.m. on 3 February 2010, Defendant met with her counsel, Mr. Beyer, and asked Mr. Beyer to seek a continuance in order for her to seek the advice of new counsel. Defendant called Mr. Beyer’s office the same afternoon to inquire about the status of the continuance, and Mr. Beyer’s paralegal told Defendant that Mr. Beyer would make the motion to continue at the calendar call the next day. On 4 February 2010, Mr. Beyer moved to continue the trial because Defendant sought to retain new counsel. The trial court denied the motion and scheduled the case for trial on 10 February 2010. Defendant called Mr. Beyer’s office at 11:30 a.m. on 4 February 2010, and Mr. Beyer’s paralegal informed Defendant that Mr. Beyer was still in court and that she did not know the status of the continuance. Defendant received no communication from Mr. Beyer or his staff between 4 February 2010 and 9 February 2010. At 2:40 p.m. on 9 February 2010, Mr. Beyer’s paralegal told Defendant by telephone the trial was not continued but would be held the next morning, on 10 February 2010. The paralegal also instructed Defendant to stop by Mr. Beyer’s office before trial the next morning, sign his motion to withdraw, and appear before the court to personally seek a continuance. Defendant followed these instructions. At trial on 10 February 2010, the trial court granted Mr. Beyer’s motion to withdraw, but denied Defendant’s motion to continue.

Defendant cites *Williams & Michael, P.A. v. Kennamer*, 71 N.C. App. 215, 321 S.E.2d 514 (1984) in her brief, proposing that Mr. Beyer

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gave Defendant no prior notice of his intent to withdraw, and therefore, the trial court was without discretion and required to continue the case. *Id.* at 217, 321 S.E.2d at 516 (“Where an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion[;] [t]he Court must grant the party affected a reasonable continuance or deny the attorney’s motion for withdrawal.”). We believe the foregoing proposition of law in *Kennamer* is inapplicable in this case. Defendant was on notice of Mr. Beyer’s withdrawal on 3 February 2010 when she told Mr. Beyer that she intended to seek the advice of new counsel. *See Jones*, 79 N.C. App. at 475, 339 S.E.2d at 436 (stating the defendant received “notice of his attorney’s withdrawal as evidenced by the defendant’s statement in court that he did not want a lawyer”). The pertinent question, therefore, is not whether Defendant had notice of Mr. Beyer’s withdrawal, but rather, whether the notice was *reasonable*. Our case law shows the reasonableness of notice often hinges on whether the party had an adequate opportunity to locate new counsel. *See Bryant*, 264 N.C. at 211, 141 S.E.2d at 306 (holding the denial of a motion to continue a trial was improper where defense counsel withdrew a day before trial and stating “the attorney must give specific and reasonable notice so that the client may have adequate time to secure other counsel”); *compare, Jones*, 79 N.C. App. at 475, 339 S.E.2d at 436 (stating the defendant “received reasonable notice of his attorney’s withdrawal as evidenced by the defendant’s statement in court [on 10 April 1985] that he did not want a lawyer[,]” after which the case proceeded to trial two weeks later, on 24 April 1985, and holding that the denial of the defendant’s motion for a continuance to obtain new counsel on 24 April 1985 was not error, in part because the defendant had earlier informed the court he “intended to proceed unrepresented”); *Roberson v. Roberson*, 65 N.C. App. 404, 406-07, 309 S.E.2d 520, 522 (1983), *disc review denied*, 310 N.C. 626, 315 S.E.2d 691-92 (1984) (holding the trial court did not err in denying respondent’s motion to continue when “respondent chose to allow her attorney of record to withdraw so that she could find more suitable counsel”; respondent “indicated to the court that respondent had already been in contact with other attorneys”; and “[r]espondent was informed [by the court] that she would have three weeks to locate new counsel”). In this case, Defendant was on notice of the withdrawal of Mr. Beyer as counsel on 3 February 2010, one week before the court date. However, the record shows that Mr. Beyer did not inform Defendant that the trial court had denied Defendant’s motion to continue until 9 February 2010, the day before the trial. Defendant’s reliance on Mr. Beyer to

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inform her that the motion for a continuance had been denied, which he did not do until the day before trial, essentially reduced Defendant's time to retain new counsel to less than one day.

Plaintiff cites *Pickard Roofing Co. v. Barbour*, 94 N.C. App. 688, 692, 381 S.E.2d 341, 343 (1989) for the proposition that "an attorney's withdrawal from a case on the eve of trial is not *ipso facto* grounds for a continuance." We believe *Pickard Roofing* is distinguishable from the present case. In *Pickard Roofing*, "one day before the trial was scheduled to commence, defendant relieved his counsel of his duties[,] and the defendant's counsel filed a motion to withdraw and a motion for a continuance the next day. *Id.* at 690, 381 S.E.2d at 342-43. The court allowed counsel's motion to withdraw but denied the defendant's motion for a continuance. *Id.* The trial court stated the defendant "should have made a decision with respect to representation by counsel prior to the eve of trial[,] and "[n]o circumstances beyond the control of the defendant have prevented him from appearing in court with an attorney of his choice." *Id.* at 691, 381 S.E.2d at 343. This Court, on appeal, stated the defendant in *Pickard Roofing* "overemphasizes the fact that his attorney was allowed to withdraw the day before the trial was scheduled to commence[,] [and] simultaneously de-emphasizes the reason why the attorney withdrew, because defendant terminated his employment." *Id.* at 692, 381 S.E.2d at 343.

The present case and *Pickard Roofing* have similarities: The defendant in *Pickard Roofing* fired his counsel the day before trial, and Defendant here told Mr. Beyer of her desire to seek the advice of new counsel the day before the calendar call on 4 February 2010. However, unlike in *Pickard Roofing*, where there was no evidence that notice of withdrawal was unreasonable, the evidence in this case shows that Mr. Beyer, knowing Defendant wanted to seek the advice of other counsel, had six days to inform Defendant that her motion to continue was denied, and he failed to inform Defendant until the fifth day, 9 February 2010, which was the day before trial. Furthermore, unlike *Pickard Roofing*, where the defendant unequivocally fired his attorney, the evidence here shows Defendant asked Mr. Beyer "if he would ask for a continuance for me so that I could seek advice from a different attorney[,] after which Mr. Beyer's staff instructed Defendant "to come by [the] office . . . and sign" the motion to withdraw. Defendant relied on Mr. Beyer and his staff, "expect[ing] to come in the courtroom and ask Judge Cherry for a continuance and for it to be granted." Defendant said Mr. Beyer "never gave me any indication that [the continuance] wouldn't happen or that the trial

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would be held that morning.” When asked, “How much notice did you have . . . that you were going to be trying this case by yourself[,]” Defendant replied, “Two minutes.” Furthermore, unlike in *Pickard Roofing*, where there is no indication that the defendant disputed the withdrawal of his counsel or disputed proceeding to trial *pro se*, the circumstances of this case show that Defendant revoked her consent of the withdrawal of Mr. Beyer:

The Court: . . . Do you want me to sign this Order allowing your lawyer to withdraw?

Defendant: What does that mean? . . .

The Court: It means you’re going to be representing yourself, ma’am.

Defendant: Oh, well, then, No. No, sir.

Based on the unique facts of this case, and taking into consideration that Defendant did not know her motion to continue had been denied until the day before trial because Mr. Beyer failed to inform her, we believe Defendant had neither “reasonable notice” of withdrawal nor an adequate opportunity to secure other counsel. As such, we conclude the trial court abused its discretion by denying Defendant’s motion for a continuance. Defendant was entitled to a reasonable opportunity to obtain new counsel, which she did not receive. Therefore, we reverse the 15 February 2010 custody order and remand for further proceedings.

REVERSED and REMANDED.

Chief Judge MARTIN and Judge STEPHENS concur.

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STATE OF NORTH CAROLINA v. MARCELLUS JAMES

No. COA10-1375

(Filed 20 September 2011)

1. Evidence—crack cocaine swallowed by defendant—field test—visual identification admitted

The trial court did not err by admitting an officer's visual identification of crack cocaine as well as the result of a field test where defendant precluded additional chemical analysis by swallowing the substance. Defendant forfeited his right to challenge the testimony by his conduct.

2. Constitutional Law—effective assistance of counsel—failure to move to suppress

A defendant in a crack cocaine case did not receive ineffective assistance of counsel when his counsel did not make a motion to suppress statements made by defendant to a doctor and a magistrate after defendant swallowed the crack.

Appeal by defendant from judgment entered 3 February 2010 by Judge Russell J. Lanier in New Hanover County Superior Court. Heard in the Court of Appeals 12 May 2011.

Roy Cooper, Attorney General, by Elizabeth N. Strickland, Special Deputy Attorney General, for the State.

Economos Law Firm, PLLC, by Larry C. Economos, for defendant.

THIGPEN, Judge.

After performing a Narcotics Field Test Kit ("NIK test"), police officers arrested Marcellus James ("Defendant") for possession with intent to sell and deliver crack cocaine. While at the police station awaiting processing, Defendant ate the crack cocaine. We must decide whether (I) the trial court erred by allowing a police officer to testify that the substance was crack cocaine based on his visual inspection; (II) the trial court erred by allowing two police officers to testify regarding the results of the NIK test; and (III) Defendant received ineffective assistance of counsel. Having eaten the crack cocaine, thereby preventing the State from conducting additional chemical analysis, we hold Defendant has forfeited his right to challenge the admission of the police officers' testimony based on

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Defendant's own wrongdoing. Regarding Defendant's remaining argument, we find no error.

On 27 April 2010, Officer Sherry Donelson, a detective with the Wilmington Police Department, was patrolling in an unmarked vehicle when she was waived over by Defendant. As Officer Donelson opened her car door, displaying her utility uniform and badge, Defendant started running and dropped something on the ground. Officer Donelson radioed for assistance and pursued Defendant in her car until he stopped running.

Officers Robert Simpson and Joshua Brown were in the vicinity and responded to the radio call. After Officer Simpson secured Defendant, he and Officer Donelson searched for the object Defendant had dropped. They found a colored, balled-up wrapper with what "appeared to [Officer Donelson] to be a little rock substance." Officer Simpson testified, over objection, that based on his training and experience, the substance appeared to him "to be crack cocaine." Officer Brown performed a NIK test on the contents of the wrapper by swabbing the substance with a small "moist towelette . . . about the size of a[n] alcohol wipe[.]" Officer Brown testified, without objection, that the wipe turned blue, thereby indicating that the substance tested positive for cocaine. Officer Simpson also testified, over objection, that "the wipe turned blue, which is an indication that [the substance is] positive for cocaine base." Officer Simpson arrested Defendant for possession with intent to sell and deliver crack cocaine and took him to the Wilmington Police Department for processing.

At the police station, Officer Simpson placed the wrapper containing the cocaine on the other side of a glass divider from Defendant and unhooked Defendant's handcuffs to secure him to a ring on the wall. As Officer Simpson walked into the control room, Defendant grabbed the crack cocaine from under the glass divider and swallowed it. Officer Simpson took Defendant to a hospital emergency room. Defendant was in Officer Simpson's custody the entire time he was at the hospital. In an effort to determine how to treat Defendant, the doctor asked Defendant, "What did you take or what did you eat?" Officer Simpson testified that Defendant told the treating doctor "that he ate approximately a gram of crack cocaine." Officer Simpson also stated that once his supervisor arrived at the hospital, Defendant repeatedly asked Officer Simpson and his supervisor, "how [Officer Simpson] was charging him since he had ate the crack."

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After Defendant received treatment, Officer Simpson took him back to the police department where Defendant was processed and also charged with resisting a public officer and destroying criminal evidence. Officer Simpson then took Defendant to a probable cause hearing before a magistrate. Officer Simpson testified that Defendant asked the magistrate, “How are they charging me with the crack, when I ate it? Or possessing the crack when I ate it?”

Defendant was charged with possession with intent to sell and deliver cocaine, resisting a public officer, and altering or destroying criminal evidence. The trial court dismissed the charge of resisting a public officer and reduced the charge of possession with intent to sell and deliver cocaine to possession of cocaine. A jury convicted Defendant of possession of cocaine and destroying criminal evidence. Defendant then pled guilty to attaining the status of a habitual felon, and the trial court sentenced Defendant to 70 to 93 months imprisonment. Defendant appeals.

I. Testimony by the Police Officers

[1] Defendant first contends the trial court erred by (1) allowing Officer Simpson to testify that the substance found on the ground was crack cocaine based on his visual examination and (2) allowing Officer Simpson and Officer Brown to testify regarding the results of the NIK test which indicated the presence of cocaine on the substance.

Under normal circumstances, we agree that Officer Simpson and Officer Brown’s testimony would not have been admissible at Defendant’s trial. Officer Simpson’s visual identification testimony would be inadmissible because testimony identifying a controlled substance “must be based on a scientifically valid chemical analysis and not mere visual inspection.” *State v. Ward*, 364 N.C. 133, 142, 694 S.E.2d 738, 744 (2010); *see also State v. Meadows*, ___ N.C. App. ___, ___, 687 S.E.2d 305, 309 (holding that the trial court erred by admitting a police officer’s lay testimony that he “collected what he believed to be crack cocaine” based on his visual identification), *disc. review denied*, 364 N.C. 245, 699 S.E.2d 640 (2010). Furthermore, the testimony regarding the results of the NIK test would be inadmissible because the State did not sufficiently establish the reliability of the NIK test pursuant to “any of the ‘indices of reliability’ under *Howerton [v. Arai Helmet, Ltd.]*, 358 N.C. 440, 597 S.E.2d 674 (2004) or any alternative indicia of reliability[.]” *Meadows*, ___ N.C. App. at ___, 687 S.E.2d at 308-09; *see also State v. Helms*, 348 N.C. 578, 581, 504 S.E.2d 293, 295 (1998) (holding that it was impermissible to allow

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a lay witness to testify regarding the results of an HGN test, a field sobriety test, when the reliability of the test was not sufficiently established). Under the unique circumstances of this case, however, we conclude Defendant forfeited his right to challenge the admission of this otherwise inadmissible testimony.

Our courts have recognized that even constitutional protections are subject to forfeiture as a result of improper conduct by a defendant. For example, this Court has held that a defendant forfeits his right to the assistance of counsel by engaging in “willful actions . . . that result in the absence of defense counsel[.]” *State v. Quick*, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006); *see also State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000) (stating that “an accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial”). Similarly, a defendant “who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.” *State v. Lewis*, 361 N.C. 541, 549, 648 S.E.2d 824, 830 (2007) (citation and quotation marks omitted). Finally, “[a] defendant who misbehaves in the courtroom may forfeit his constitutional right to be present at trial.” *Montgomery*, 138 N.C. App. at 525, 530 S.E.2d at 69 (citation omitted); *see also Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 1060-61, 25 L. Ed. 2d 353, 359 (1970) (holding that “a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom”).

Just as a defendant can lose the benefit of a constitutional right established for his or her benefit, we hold a defendant can lose the benefit of a statutory or common law legal principle established for his or her benefit in the event that he or she engages in conduct of a sufficiently egregious nature to justify a forfeiture determination. In this case, having prevented the State from conducting additional chemical analysis by eating the crack cocaine, Defendant has little grounds to complain about the trial court’s decision to admit the police officers’ testimony identifying the substance as crack cocaine based on visual inspection and the NIK test results. Defendant has lost his right to challenge the admission of Officer Simpson and Officer Brown’s testimony due to his conduct of eating the crack cocaine.

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At trial, Officer Simpson explained that “[e]very piece . . . of the narcotics that we get in, especially when we just field test it, we actually submit it to the police department and they, at the DA’s request, submit [it] to the SBI for testing.” Defendant, however, ate the crack cocaine before the SBI could conduct a chemical analysis of the substance. After eating the crack cocaine, Defendant asked Officer Simpson and his supervisor, “how [Officer Simpson] was charging him since he had ate the crack.” Similarly, at the hearing before the magistrate, Defendant asked, “How are they charging me with the crack, when I ate it? Or possessing the crack when I ate it?” It is clear from Defendant’s statements that he swallowed the crack cocaine for the express purpose of preventing the State from charging him with possession of cocaine. “The North Carolina Supreme Court has long recognized as a basic principle of law and equity that no man shall be permitted to take advantage of his own wrong[.]” *Belk v. Cheshire*, 159 N.C. App. 325, 330, 583 S.E.2d 700, 705 (2003) (quotation marks and citation omitted).

Given Defendant’s deliberate and successful attempt to preclude the State from conducting additional chemical analysis, Defendant has forfeited his right to challenge the admission of Officer Simpson’s visual identification testimony and Officer Simpson and Officer Brown’s testimony regarding the results of the NIK test. Accordingly, the trial court did not err by admitting the challenged testimony.

II. Ineffective Assistance of Counsel

[2] Defendant next contends he received ineffective assistance of counsel because his counsel did not make a motion to suppress Defendant’s statements to the doctor and magistrate, which Defendant argues were obtained in violation of Defendant’s Fifth and Sixth Amendment rights because he was not advised of his *Miranda* rights. We disagree.

When a defendant attacks his conviction on the basis that counsel was ineffective, he must satisfy a two-prong test to show that his counsel’s conduct fell below an objective standard of reasonableness:

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 error w[as] so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

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State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)).

“It is well established that *Miranda* warnings are required only when a defendant is subjected to custodial interrogation.” *State v. Patterson*, 146 N.C. App. 113, 121, 552 S.E.2d 246, 253 (citation omitted), *disc. review denied*, 354 N.C. 578, 559 S.E.2d 548 (2001). “[I]nterrogation under *Miranda* refers not only to express questioning, but also to any words or actions *on the part of the police* (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *State v. Leak*, 90 N.C. App. 351, 355-56, 368 S.E.2d 430, 433 (1988) (emphasis added) (citation and quotation marks omitted). “[V]olunteered statements of any kind are not barred by the Fifth Amendment.” *State v. Walls*, 342 N.C. 1, 28, 463 S.E.2d 738, 750 (1995) (citation and quotation marks omitted), *cert. denied*, 517 U.S. 1197, 116 S. Ct. 1694, 134 L. Ed. 2d 794 (1996). “In order to determine the voluntariness of a statement, we must assess the totality of all the surrounding circumstances.” *State v. Wiggins*, 334 N.C. 18, 28, 431 S.E.2d 755, 761 (1993) (citation and quotation marks omitted).

While we agree Defendant was in custody, we conclude his incriminating statements were not made in response to police interrogation. Moreover, Defendant’s statement to the magistrate was voluntary. The record indicates Defendant told the doctor “that he ate approximately a gram of crack cocaine” in response to the doctor’s, not Officer Simpson’s, questioning. Specifically, the doctor asked Defendant, “What did you take or what did you eat?” so that the doctor could determine how best to treat Defendant. *See State v. Holcomb*, 295 N.C. 608, 611-12, 247 S.E.2d 888, 891 (1978) (although defendant was in custody, evidence did not result from “custodial interrogation” where police did not initiate questioning). Additionally, the record indicates that Defendant’s statement before the magistrate was spontaneous and not the result of police questioning. When the magistrate “was advising him what he was being charged with,” Defendant asked the magistrate, “How are they charging me with the crack, when I ate it? Or possessing the crack when I ate it?”

Considering “the totality of all the surrounding circumstances[,]” *Wiggins*, 334 N.C. at 28, 431 S.E.2d at 761, we conclude Defendant’s statements were not in response to police interrogation and his statement to the magistrate was voluntary. Thus, his Fifth Amendment

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rights were not violated because he had not received *Miranda* warnings. See *State v. Monk*, 63 N.C. App. 512, 519, 305 S.E.2d 755, 760 (1983) (holding that no *Miranda* warnings were required because the defendant's "initial statement, made in the jail cell, was not the result of custodial interrogation but was volunteered by defendant"). Accordingly, Defendant's counsel was not ineffective when he did not make a motion to suppress Defendant's incriminating statements.

NO ERROR.

Judges CALABRIA and ERVIN concur.

IN THE MATTER OF: D.L., JR., D.M., A.D., A.D.

No. COA11-256

(Filed 20 September 2011)

Child Abuse, Dependency, and Neglect—neglect—custody with mother—placement with relatives

The trial court did not abuse its discretion in a neglected juvenile case by continuing placement of the children with relatives while leaving custody with the mother. Custody was not removed from the mother at any time and the mother had placed the children with relatives under her own authority, although her decision was ultimately endorsed by DSS and the trial court. The concerns of the guardian *ad litem* regarding medical care were appropriately addressed through a medical power of attorney.

Appeal by guardian *ad litem* from orders entered 14 December 2010 by Judge Rebecca B. Knight in Buncombe County District Court. Heard in the Court of Appeals 29 August 2011.

Matthew J. Putnam, for petitioner-appellee Buncombe County Department of Social Services.

Michael N. Tousey, for appellant guardian ad litem.

Duncan B. McCormick, for respondent-appellee mother.

STEELMAN, Judge.

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The trial court did not abuse its discretion in continuing the placement of the children with relatives while leaving custody with Mother.

I. Factual and Procedural Background

On 20 July 2010, the Buncombe County Department of Social Services (“DSS”) filed juvenile petitions alleging the minor children to be neglected pursuant to N.C. Gen. Stat. § 7B-101(15) (2009) for not receiving proper care, supervision, or discipline; for not receiving necessary medical care; and for living in an environment injurious to their welfare. DSS did not seek a non-secure custody order as the children were residing in safe homes with their maternal aunts when the petitions were filed. The mother of the children (“Mother”) appeared and participated in the hearings, with her attorney. The three fathers of the children were served in the proceedings, but failed to file any response to the petitions or appear at the hearings.

The matter was heard on 3 November 2010. The parties stipulated to the facts in the juvenile petition, and the court entered consent orders adjudicating all four children neglected. The guardian *ad litem* requested that the trial court grant custody of the minor children to the relative caretakers so they would have the authority to obtain medical care for the children. DSS opposed the request and argued that custody did not need to be changed to a relative, and could remain with Mother. The trial court denied the guardian *ad litem*’s request and declined to change custody of the children to either DSS or the relative caretakers, but rather “sanction[ed]” the continued placement of the children in their relative kinship placements. The court also ordered Mother to complete a power of attorney to allow the relatives to seek medical, dental, and educational services for the children. The record reflects that Mother signed a power of attorney with regard to medical and dental care. The trial court’s orders were entered on 14 December 2010. The guardian *ad litem* timely appealed each order.

II. Placement of Children with Relative
while Mother Retained Custody

[1] The guardian *ad litem* contends that the trial court erred by keeping custody with Mother while placing the juveniles in a kinship placement because such a disposition is not authorized by the Juvenile Code. We disagree.

The Juvenile Code lists dispositional alternatives for abused, neglected, or dependent children, one of which is to “[p]lace the juve-

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nile in the custody of a parent . . .” N.C. Gen. Stat. § 7B-903(a)(2)(b) (2009). The trial court “may combine any of the applicable alternatives when the court finds the disposition to be in the best interests of the juvenile.” N.C. Gen. Stat. § 7B-903(a). A court’s decision on best interests is reviewed for abuse of discretion. *In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007). A court’s discretionary ruling will not be overturned absent a showing that the ruling is “manifestly unsupported by reason.” *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

Where the guardian *ad litem* does not challenge any findings of fact, our review focuses solely on whether the trial court’s disposition is authorized by law. We note that custody of the minor children was not removed from Mother at any time during the pendency of this case. The trial court specifically declined to change custody to either DSS or the relative caretakers, thereby leaving custody with Mother. Section 7B-903 clearly authorizes a trial court to place custody of minor children with a parent. Since the trial court left custody of the children with a parent in this case, that part of the disposition does not contravene the Juvenile Code.

The guardian *ad litem* argues, however, that the court could not grant custody to Mother while also placing the children with a relative, which she contends is not allowed by section 7B-903. She relies on *In re H.S.F.*, 177 N.C. App. 193, 628 S.E.2d 416 (2006) for support. In *In re H.S.F.*, this Court overturned a disposition whereby the trial court granted joint legal custody of the juvenile to the mother and father, primary physical custody to the mother, and primary placement with the maternal grandfather, with whom the mother did not reside. *Id.* at 202, 628 S.E.2d at 422. This Court cited section 7B-903 and stated, “[n]othing in that statute permits a court to grant physical custody to a parent, but order ‘physical placement’ to be with another person. Except when custody has been granted to DSS, the statute anticipates that any person with whom the child is ‘placed’ shall be given custody.” *Id.* This Court noted an inherent inconsistency in ordering physical custody with a person with whom the juvenile did not reside. *Id.*

We hold that *In re H.S.F.* is distinguishable from the instant case. First, custody was never removed from Mother, while in *In re H.S.F.*, DSS took non-secure custody of the minor child, and at the adjudication and disposition proceedings the trial court changed custody and ordered a new arrangement. Second, the trial court did not order placement of the minor child with a relative in the instant case as did

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the trial court in *In re H.S.F.* Mother in this case placed the children in relatives' homes under her own authority as legal custodian of the children, although her decision was ultimately endorsed by both DSS and the trial court. Third, the trial court's disposition does not involve the obvious contradiction which occurred in *In re H.S.F.* when the trial court ordered physical custody with one person and physical placement with another. In the instant case, the court continued custody with Mother, which encompasses both legal and physical custody. The court recognized Mother's legal status when it asked her to provide a medical power of attorney in order to meet the medical needs of the children. While the children were physically placed with someone other than Mother, it was Mother's choice as custodial parent of the children to determine a suitable placement for them.

We find the instant case to be similar to that of *Everette v. Collins*, 176 N.C. App. 168, 625 S.E.2d 796 (2006), a Chapter 50 custody case which was cited and distinguished by this Court in *In re H.S.F.* In *Everette*, the trial court approved a custodial father's decision to place the minor child with a grandparent, even though the mother had joint legal custody and the father had primary physical custody. *Id.* at 174, 625 S.E.2d at 800. In the instant case, the trial court merely approved of Mother's decision after determining it was appropriate for her to continue to have custody of the children.

Based on the foregoing, we are unable to say the trial court abused its discretion in fashioning a disposition which is authorized by statute and which appropriately addressed the concerns of the guardian *ad litem* regarding access to medical care for the minor children.

We affirm the orders of the trial court.

AFFIRMED.

Chief Judge MARTIN and Judge McCULLOUGH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 SEPTEMBER 2011)

CLARK v. CHAVIS No. 11-234	Ind. Comm. (W08094)	Affirmed
HATTERAS REALTY, INC. v. PETTY No. 10-1339	Dare (09CVS731)	Reversed
HAWKINS v. A & M AUTO BODY, INC. No. 10-1620	Ind. Comm. (097083) (PH-2268)	Reversed; Remanded in part
IN RE A.R.G. No. 11-435	Macon (09JA2-3)	Affirmed
IN RE B.K.B.P. No. 11-197	Cumberland (10JT179)	Affirmed
IN RE C.C. No. 11-173	Wayne (10JB61)	Affirmed
IN RE D.A.H-C. No. 11-379	Catawba (08JA47-49)	Affirmed
IN RE D.A.M. No. 11-396	Alleghany (08JT4)	Affirmed
IN RE D.F.M. No. 11-380	New Hanover (09JT24) (09JT65)	Affirmed
IN RE D.K. No. 11-329	New Hanover (08JT145)	Affirmed
IN RE F.E.P. No. 11-348	Brunswick (09JA132)	Affirmed in Part and Reversed in Part
IN RE J.L. No. 11-603	Haywood (01JA20-21)	Affirmed in part; reversed and remanded in part.
IN RE J.M. No. 11-138	Johnston (09JB81)	Reversed and Remanded
IN RE K.M.B. No. 11-346	Guilford (08JT458) (09JT430)	Affirmed
IN RE K.N.S. No. 11-477	Wake (02JA506) (09JT164)	Affirmed
IN RE Q.J. No. 11-512	Mecklenburg (09JT26-27)	Reversed

IN RE T.O. No. 11-377	Mecklenburg (08JT658-659)	Remanded
PLOMARITIS v. PLOMARITIS No. 10-1195	Guilford (03CVD12636)	Affirmed
STATE v. BAINES No. 11-279	Nash (09CRS53407) (09CRS53409-12)	No Error
STATE v. BELL No. 11-49	Durham (09CRS41186)	Affirmed
STATE v. BYRD No. 11-101	Sampson (10CRS50300-01)	No error in part and dismissed in part
STATE v. DUNN No. 11-155	Moore (09CRS54556) (10CRS79)	No Error
STATE v. GRAHAM No. 11-363	Cabarrus (07CRS9698) (07CRS9699) (07CRS9700)	Affirmed
STATE v. GRAVES No. 11-392	Randolph (10CRS238)	Affirmed
STATE v. HOOVER No. 11-320	Mecklenburg (08CRS201428-29) (08CRS201433)	No Error
STATE v. HUDGINS No. 10-1600	Buncombe (08CRS65343) (09CRS2818) (10CRS97)	Remanded in part; civil judgment vacated.
STATE v. HURST No. 11-145	Buncombe (09CRS65286) (10CRS40)	Dismissed
STATE v. LITTLE No. 10-1459	Buncombe (08CRS58820)	Affirmed in part; remanded in part.
STATE v. LOGAN No. 11-521	Buncombe (09CRS53221) (09CRS54830)	No Error
STATE v. McCONICO No. 10-1424	Guilford (08CRS102408-09) (08CRS104256-57) (08CRS104260) (08CRS104263) (08CRS104270)	New trial in part; no error in part.

STATE v. McNEIL No. 11-103	Mecklenburg (09CRS223292) (09CRS223293) (09CRS223295) (10CRS20524)	No Error
STATE v. MOORE No. 11-172	Columbus (08CRS3270-71)	Affirmed
STATE v. MOORE No. 11-333	Cabarrus (09CRS53954) (09CRS54037) (09CRS5418)	No Error
STATE v. OWENS No. 11-357	Cumberland (09CRS54863)	No Error
STATE v. PACE No. 11-266	Forsyth (07CRS62716) (07CRS62726-27)	No Error
STATE v. PETERSON No. 11-20	Wake (08CRS86433)	No Error
STATE v. POOLE No. 11-21	Carteret (08CRS55459) (09CRS1139)	New Trial
STATE v. SPENCER No. 11-391	Guilford (09CRS24524) (09CRS80073)	No Error
STATE v. WRIGHT No. 11-105	Buncombe (10CRS52384)	Affirmed
WETHERBY v. B6USA, INC. No. 10-1613	Wake (07CVS18147)	Affirmed
WRIGHT v. FRYE No. 10-800	Davidson (09CVS1402)	Affirmed

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ADMINISTRATIVE LAW

Racial harassment and retaliation—jurisdiction—The trial court did not err by remanding plaintiff's petition to the Office of Administrative Hearings for a hearing concerning alleged racial harassment and retaliation. Plaintiff sufficiently complied with the requirements of N.C.G.S. § 126-34 to vest the State Personnel Commission with jurisdiction over his complaint. **McAdams v. N.C. Dep't of Transp.**, 429.

Testimony not available to agency—medical review—The trial court erred by holding that an Administrative Law Judge was precluded from considering testimony not available to the agency at the time of its initial decision in a Continued Need Medicaid Review Hearing. *Britthaven, Inc. v. N.C. Dep't of Human Resources*, 118 N.C. App. 379, was limited to cases in which certificate of need law is applicable. **Robinson v. N.C. Dep't of Health & Human Servs.**, 372.

APPEAL AND ERROR

Appealability—failure to appropriately file notice of appeal—Although defendant failed to appropriately file notice of appeal of a 30 June 2009 order, the Court of Appeals had jurisdiction to review the action under N.C.G.S. § 1-278. **Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC**, 66.

Appealability—interlocutory orders—substantial right—governmental immunity—Plaintiffs' appeal from an order quashing their witness subpoenas and dismissing their negligence claim against defendant City was entitled to immediate review because the defense of governmental immunity affected a substantial right. **Williams v. Devere Constr. Co., Inc.**, 135.

Appealability—partial summary judgment—denial of summary judgment on sovereign immunity—A City's appeal from the denial of summary judgment on the grounds of sovereign immunity was properly before the appellate court, but the City's appeal of a partial summary judgment on a wrongful death claim was not. **Arrington v. Martinez**, 252.

Appealability—writ of certiorari—timely written notice of appeal—Although defendant petitioned for a writ of *certiorari*, defendant's right to appeal was already preserved. Defendant timely filed a written notice to appeal the denial of her motion to suppress. **State v. Williams**, 1.

Dismissal of appeal—failure to give proper notice—The State's appeal from the trial court's order allowing defendant's motion to suppress was dismissed based on failure to give proper notice of appeal. Further, the State made no request for its brief to be treated as a petition for writ of *certiorari*. **State v. Oates**, 491.

Interlocutory orders—concerning title—immediately appealable—petition for certiorari granted—Defendant's appeal from the trial court's interlocutory orders granting summary judgment in favor of plaintiff and denying defendant's motion to set aside default and summary judgment were orders concerning title and were immediately appealable. The Court of Appeals treated defendant's appeal from the trial court's denial of defendant's motion for leave to amend answer as a petition for *certiorari* and addressed the merits. **Bodie Island Beach Club Ass'n, Inc. v. Wray**, 283.

Interlocutory orders and appeals—blanket general objections—inadequate to establish substantial right—privilege logs—The Philippine defendants' blanket general objections purporting to assert attorney-client privilege or work product

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immunity to all of the opposing parties' discovery requests were inadequate to establish a substantial right to an immediate appeal. Even if the privilege logs could have been construed as an adequate assertion of privilege, defendants' failure to utter the word "privilege" or to make some reference to that legal principle at the hearing constituted a failure to establish the privilege. **K2 Asia Ventures v. Trota, 443.**

Interlocutory orders and appeals—contempt order—immediately appealable—Plaintiff's interlocutory appeal in a domestic litigation case was properly before the court as a contempt order and was immediately appealable. **Ross v. Ross, 546.**

Interlocutory orders and appeals—denial of motion to dismiss—Defendant's cross-appeal from an interlocutory order denying defendant's motion to dismiss plaintiff's remaining claims was dismissed. Denial of a motion to dismiss for failure to state a claim is not a final determination within the meaning of N.C.G.S. § 1-277(a) and does not affect a substantial right. **Carsanaro v. Colvin, 455.**

Interlocutory orders and appeals—substantial right—attorney-client privilege—work product immunity—The portion of a trial court's 15 June 2010 order compelling Krispy Kreme defendants to produce documents covered by plaintiffs' request was immediately appealable because defendants' defenses of attorney-client privilege and work product immunity affected a substantial right. **K2 Asia Ventures v. Trota, 443.**

Interlocutory orders and appeals—substantial right—claims connected and intertwined—Plaintiff's appeal from a portion of the trial court's order dismissing his claim for negligent infliction of a sexually transmitted disease affected a substantial right and was thus entitled to immediate review. Each of plaintiff's causes of action was based upon injuries suffered as a result of the same underlying conduct, which was defendant's sexual affair with plaintiff's wife. The claims were connected and intertwined to such a degree that they should have been determined by a single jury. **Carsanaro v. Colvin, 455.**

Jurisdiction—first appeal interlocutory—summary judgment while appeal pending—final order—The trial court had jurisdiction to hear summary judgment motion during the pendency of an appeal in that case where the appeal was interlocutory and non-appealable. Furthermore, the Court of Appeals had jurisdiction to hear an appeal from the summary judgment order where timely notice of appeal was given. **Barfield v. Matos, 24.**

Jurisdiction—notice of appeal—The appellate court did not have jurisdiction to review a 9 December 2008 summary judgment order where notice of appeal was never given. **Barfield v. Matos, 24.**

Notice of appeal not given—arguments dismissed—Arguments as to the applicability of restrictive covenants were dismissed for lack of a notice of appeal or grounds for review by *certiorari*. **Barfield v. Matos, 24.**

Preservation of issues—failure to argue—Defendant failed to preserve for appellate review his argument that the trial court erred in a case arising out of a dispute concerning a credit card agreement by hearing arguments on motions and entering orders on the matter after the case had been dismissed for arbitration, but later reopened. Defendant failed to argue the issue before the trial court. **Federated Fin. Corp. of Am. v. Jenkins, 330.**

APPEAL AND ERROR—Continued

Preservation of issues—failure to object—Plaintiffs did not preserve for appeal an argument concerning the shifting of discovery fees where they did not obtain a ruling from the trial court on the issue. **Point Intrepid, LLC v. Farley, 82.**

Preservation of issues—failure to raise constitutional issue at trial—Although defendant contended that the trial court violated his right to be free from double jeopardy when it sentenced him for both sex offense in a parental role and incest, defendant failed to preserve this argument because he did not raise this issue at trial and the Court of Appeals declined to exercise its discretion under N.C. R. App. P. 2. **State v. Williams, 412.**

Preservation of issues—legal authority—not presented—An argument concerning the application of restrictive covenants was abandoned on appeal where no legal authority or argument as to an abuse of discretion was presented. **Barfield v. Matos, 24.**

Preservation of issues—sovereign immunity—North Carolina constitutional claims—dismissed below—not raised in brief—Whether claims against a city under the North Carolina Constitution were barred by sovereign immunity was not considered where those claims had been dismissed below and were not before the court, and plaintiff did not include the argument in her brief. **Arrington v. Martinez, 252.**

Scope of review—complex real estate transaction with multiple orders—In a case involving a complicated set of real estate transactions, restrictive covenants, multiple claims and orders, and a prior appeal, the scope of review was limited to an order entered on 4 August 2009 and not an order entered on 9 December 2008. **Barfield v. Matos, 24.**

Standard of review—summary judgment—governmental immunity—The City's appeal from the denial of summary judgment on a wrongful death claim was reviewed *de novo* to determine whether the City was entitled to judgment as a matter of law based on governmental immunity. **Arrington v. Martinez, 252.**

Standard of review—summary judgment—prior order with findings—The standard of review for an 8 April 2010 summary judgment order was *de novo*, although complicated by a 4 August 2009 order. The 4 August order was for a permanent injunction after a bench trial and included findings of fact. Those findings were binding on appeal and only the conclusions were considered *de novo*. **Barfield v. Matos, 24.**

ASSOCIATIONS

Homeowners association—disbursement of litigation settlement fund—The trial court did not err by granting summary judgment in favor of defendant homeowners association based on its conclusion that there were no genuine issues of material fact as to whether defendant acted beyond the scope of its authority in its disbursement of funds from the settlement of the parties' previous lawsuit. The funds could not be spent once the litigation had concluded, and defendant acted in the best interest of its contributing members by returning the remaining funds. **Happ v. Creek Pointe Homeowner's Ass'n, 96.**

Homeowners association—ultra vires acts—construction of security gate—placement of video camera—The trial court did not err by granting summary judgment in favor of defendant homeowners association based on its

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conclusion that there were no genuine issues of material fact as to whether defendant engaged in *ultra vires* acts in its construction of a security gate and placement of a video camera at the entrance to a community. The acts constituted permissible maintenance and modification of the roads under N.C.G.S. § 47F-3-102. Further, for a minor inconvenience, the gate deterred trespassers from accessing the community. **Happ v. Creek Pointe Homeowner's Ass'n, 96.**

ATTORNEYS

Legal malpractice—negligence—breach of contract—summary judgment—properly granted—The trial court did not err in a legal malpractice case by granting summary judgment in favor of defendants and dismissing all of the plaintiffs' claims. Summary judgment was properly allowed as to plaintiffs' negligence causes of action based on plaintiffs' contributory negligence. Furthermore, no evidence existed to support plaintiffs' breach of contract and negligence claims. **Marion Partners, LLC v. Weatherspoon & Voltz, LLP, 357.**

ATTORNEY FEES

Alimony—properly denied—The trial court properly denied plaintiff's claim for attorney fees in an alimony action where the court properly denied the alimony claim. **Romulus v. Romulus, 495.**

BAIL AND PRETRIAL RELEASE

Bail agent—motion to set aside forfeiture—not unauthorized practice of law—The trial court did not err by concluding that a bail agent was not engaging in the unauthorized practice of law by filing a motion to set aside a bond forfeiture. Filing a motion to set aside a bond forfeiture is not considered an appearance before a judicial body. **State of N.C. ex rel. Guilford Cnty. Bd. of Educ. v. Herbin, 348.**

Bail agent—motion to set aside forfeiture—preparing document—appearance at hearing—The trial court did not err by concluding that a bail bond agent's activity was permitted under *State v. Pledger*, 257 N.C. 634. A bail agent who is appointed by power of attorney to execute or countersign bail bonds is not prohibited from filing a motion to set aside a bond forfeiture. Furthermore a bail agent may appear pro se at a hearing on a motion to set aside forfeiture if the agent has a financial liability to the surety, but may not appear to represent the corporate surety. **State of N.C. ex rel. Guilford Cnty. Bd. of Educ. v. Herbin, 348.**

Bond forfeiture—defendant called and failed—clerk and trial court lacked jurisdiction—The Clerk of Court and the trial court erred in a bond forfeiture case by entering 17 November 2009 notices of forfeiture and a 17 May 2010 order. The defendant sureties could not have been held liable for more than the amount agreed upon pursuant to the bonds they actually executed, and the 10 November 2009 appeal divested the Clerk and the trial court of jurisdiction to take further action relating to the 16 September 2008 bonds so long as issues surrounding those bonds remained subject to appellate review. **State v. Cortez, 576.**

Bond forfeiture—motion to set aside—bail agent—The trial court did not err by finding that a bail agent may file a motion to set aside forfeiture of a bail bond. The strict and literal interpretation of N.C.G.S. § 15A-544.5 argued by the Board of Education was declined as leading to bizarre and untoward results. **State of N.C. ex rel. Guilford Cnty. Bd. of Educ. v. Herbin, 348.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Neglect—custody with mother—placement with relatives—The trial court did not abuse its discretion in a neglected juvenile case by continuing placement of the children with relatives while leaving custody with the mother. Custody was not removed from the mother at any time and the mother had placed the children with relatives under her own authority, although her decision was ultimately endorsed by DSS and the trial court. The concerns of the guardian *ad litem* regarding medical care were appropriately addressed through a medical power of attorney. **In re D.L., 594.**

CHILD CUSTODY AND SUPPORT

Acting inconsistently with paramount parental status—erroneous dismissal of claim—The trial court erred by dismissing plaintiff's child custody claim based on its conclusion that defendant adoptive mother had not acted inconsistently with her paramount parental status. The findings established that defendant ceded paramount decision-making authority by bringing a nonparent into the family unit, representing that the nonparent was a parent, and voluntarily giving custody of the child to the nonparent without creating an expectation that the relationship would be terminated. **Best v. Gallup, 483.**

CHILD VISITATION

Attempted statutory rape—sex offender registration—no law against visitation—dismissal improper—The trial court erred by dismissing plaintiff father's claim for visitation of his child based on his conviction for attempted statutory rape, an act which resulted in the birth of a child, and required registration as a sex offender. No law prevented plaintiff from claiming visitation rights with the child. **Bobbitt v. Eizenga, 378.**

Best interests of child—The trial court properly concluded that it was in the best interest of the minor child to have visitation with plaintiff. **Best v. Gallup, 483.**

CITIES AND TOWNS

Annexation—compliance with requirements for fixing boundaries—The trial court erred in an annexation case by concluding that respondent city complied with the requirements of N.C.G.S. § 160A-48(e) when it fixed certain boundaries of an annexation area. This issue was remanded for further action. **Capps v. City of Kinston, 110.**

Annexation—financial impact—The trial court did not err in an annexation case by concluding that respondent city provided a sufficient statement in an annexation report showing the financial impact of the annexation as required by N.C.G.S. § 160A-47(5). **Capps v. City of Kinston, 110.**

Annexation—public sewer service—The trial court did not err in an annexation case by concluding that an annexation report stated a plan whereby property owners in the annexation area would be able to secure public sewer service in accordance with respondent city's policies. **Capps v. City of Kinston, 110.**

Annexation—street maintenance services—The trial court did not err in an annexation case by concluding the annexation report stated a plan for providing street maintenance services on substantially the same basis and in the same manner as such services were provided in the rest of the city. **Capps v. City of Kinston, 110.**

CIVIL PROCEDURE

Adequate notice of hearing—motion to set aside judgment—properly denied—The trial court did not err in a case arising out of a dispute concerning a credit card agreement by denying defendant's Rule 60 motion to set aside the judgment. The record contained evidence that defendant received adequate notice of the hearing. **Federated Fin. Corp. of Am. v. Jenkins, 330.**

CLASS ACTIONS

Certification—federal injunction vacated—In an action remanded on other grounds, it would be proper for the trial court to consider class certification on remand because federal orders barring prosecution as a class action were vacated. **Bumpers v. Cmty. Bank of Northern Va., 307.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Motion to suppress statements—intoxication—credibility—custody—written findings and conclusions required—The trial court erred in a sex offense in a parental role and incest case by denying defendant's motion to suppress his statements to a detective and in later overruling the objections he made when this evidence was introduced at trial. Although the extent of defendant's intoxication at the time he gave his statement, and the weight to be given it, was for the jury to consider in evaluating the credibility of the evidence, the case was remanded for written findings of fact and conclusions of law resolving the material conflict in the evidence regarding whether defendant was in custody at the time he gave his statements and whether he should have been read his *Miranda* rights. **State v. Williams, 412.**

CONFLICT OF LAWS

Choice of law—unchallenged—The trial court did not err in applying Utah law to a case arising out of a dispute concerning a credit card agreement. At trial, neither party challenged the choice of law provision in the agreement. **Federated Fin. Corp. of Am. v. Jenkins, 330.**

Forum selection clause—unenforceable under Utah law—jurisdiction proper in North Carolina—The trial court did not err in a case arising out of a dispute over a credit card agreement by failing to dismiss the case pursuant to the agreement's forum selection clause. The forum selection clause was unenforceable under Utah law and did not deprive the North Carolina trial court of jurisdiction. **Federated Fin. Corp. of Am. v. Jenkins, 330.**

Preemption of state claims—peripheral conduct—exception not applicable—The exception to preemption of state claims by federal labor law for conduct peripheral to National Labor Relations Board (NLRB) policy did not apply to a case in which social security numbers were posted on a bulletin board along with the names of those withdrawing from a union. Plaintiffs did not allege that actual damages resulted from the posting, which only lasted for an hour, and the NLRB showed concern for the alleged conduct in the form of an approved settlement agreement. **Fisher v. Commc'n Workers of Am., 46.**

Preemption of state claims—significant local interest—exception not applicable—The exception to preemption of state claims by federal labor law for claims of significant local interest did not apply to a case in which social security numbers were posted on a bulletin board along with the names of those withdrawing from a

CONFLICT OF LAWS—Continued

union. The cases cited by plaintiffs were not applicable and the same controversy was alleged and resolved in NLRB claims, so that there was a danger that a state claim would interfere with the NLRB's interest in adjudicating the controversy. **Fisher v. Commc'n Workers of Am., 46.**

Withdrawn union memberships—names and social security numbers posted—federal preemption—Plaintiffs' claims under the North Carolina Identity Theft Protection Act and for unfair and deceptive trade practices were preempted by the National Labor Relations Act where employees of defendants generated and distributed lists of members who had dropped their union membership with their social security numbers. Names alone would have been sufficient to inform union members about their fellow employees' nonmember status and the inclusion of social security numbers could have been viewed by plaintiffs as a punishment and as a restraint on others exercising their labor rights. **Fisher v. Commc'n Workers of Am., 46.**

Withdrawn union memberships—personal information posted—subject of federal claim—The preemption of state claims by the National Labor Relations Act, as set out in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, places the focus on evaluation of defendant's evidence rather than whether the National Labor Relations Board (NLRB) actually took action on the claims. In this case, the same conduct was the basis for the NLRB and state claims and the *Garmon* preemption was proper. **Fisher v. Commc'n Workers of Am., 46.**

CONSTITUTIONAL LAW

Effective assistance of counsel—failure to move to suppress—A defendant in a crack cocaine case did not receive ineffective assistance of counsel when his counsel did not make a motion to suppress statements made by defendant to a doctor and a magistrate after defendant swallowed the crack. **State v. James, 588.**

Right to counsel—failure to obtain knowing, intelligent, and voluntary waiver—The trial court erred in a drugs case by allowing defendant to represent himself at trial without first obtaining a waiver of counsel that was knowing, intelligent, and voluntary as required by N.C.G.S. § 15A-1242. Defendant was not informed of both of the charges for which he was indicted, and thus, defendant received a new trial. **State v. Anderson, 169.**

Right to be present—imposition of additional costs and fees—defendant's physical presence not required—The trial court did not err in a driving while impaired case by imposing additional costs and fees outside of defendant's physical presence. The imposition of fines was the necessary byproduct of the sentence, and defendant was given ample opportunity to respond. Further, payment of court costs does not amount to punishment. **State v. Arrington, 161.**

CONTEMPT

Contempt of court—no proper notice—failure to specify method to purge contempt—The trial court erred in a domestic litigation by holding plaintiff in contempt of court in two orders. Plaintiff did not receive proper notice of the contempt hearing and both orders failed to specify how plaintiff might purge himself of contempt. **Ross v. Ross, 546.**

CONTRACTS

Insurance policy—reformation—no special circumstances—Defendant's argument in a breach of contract case based on an insurance policy that he was entitled to contract reformation was meritless. There were no special circumstances that justified his failure to read his policy, and his failure to read his policy barred him from contract reformation. **Cobb v. Pa. Life Ins. Co., 268.**

CONTRIBUTION

Medical negligence—piercing corporate veil—instrumentality rule—judicial estoppel—unlicensed insurance carrier—The trial court did not err in a medical negligence case by granting defendants' motion for summary judgment on the claim for contribution. Even assuming arguendo that plaintiffs could show genuine issues of material fact as to whether the corporate veil should have been pierced based upon the instrumentality rule, plaintiffs were barred from making such an argument under the doctrine of judicial estoppel. Health Management Associates (HMA) was not licensed as an insurance carrier in North Carolina, and Louisburg HMA paid no monies to settle the lawsuit. **Health Mgmt. Assocs., Inc. v. Yerby, 124.**

COSTS

Expert—expenses for recovering fee—An award for attorney fees and additional expenses expended by an expert witness in seeking recovery of its fees was reversed. The relevant statutes on reimbursement of expert witnesses do not mention attorney fees, the witness was not entitled to compensation for appearing in court voluntarily, and compensation does not extend to travel expenses. **Point Intrepid, LLC v. Farley, 82.**

Expert fees—ex parte contact—The trial court did not abuse its discretion by requiring plaintiffs to pay the balance of an independent expert's fees despite *ex parte* contact between the expert and opposing counsel where the trial court decided that the contact did not bias the witness. **Point Intrepid, LLC v. Farley, 82.**

Independent expert fees—reasonableness—The trial court did not abuse its discretion by requiring plaintiffs to pay the balance of the fee of an independent expert witness where plaintiffs contended that the fee was unreasonable. Despite evidence to the contrary, there was competent evidence that the invoice was reasonable. The rejection of plaintiffs' expert testimony on reasonableness did not mean that the testimony was not considered or that the trial court's decision was not supported by competent evidence. **Point Intrepid, LLC v. Farley, 82.**

CRIMINAL LAW

Diminished capacity—instruction—evidence not sufficient—A first-degree murder defendant was not entitled to a diminished capacity instruction based on testimony by defendant's experts. The crucial inquiry was not the extent to which defendant offered evidence of mental impairment, but whether there was evidence tending to show the effect of his condition upon his ability to premeditate, deliberate, and form a specific intent to kill. **State v. McDowell, 184.**

DAMAGES AND REMEDIES

Motion for directed verdict—motion for judgment notwithstanding verdict—The trial court did not err in a breach of covenants case by denying defendant's

DAMAGES AND REMEDIES—Continued

for a directed verdict and for judgment notwithstanding the verdict on the lack of motions damages issue. **Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC, 66.**

Restrictive covenants—motion in limine—The trial court did not err in a breach of covenants case by denying defendant's motion *in limine* on the issue of damages. The terms of the restrictive covenant allowed plaintiff to recover damages other than the costs incurred in maintaining the golf courses. **Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC, 66.**

DEEDS

Action to set aside—entry of default—proper—The trial court did not err in an action to set aside a deed by entering an order of default against defendant SRS. As the trial court properly found that no responsive pleading had been filed by SRS, there was no abuse of discretion by the trial court in entering default against SRS. **Bodie Island Beach Club Ass'n, Inc. v. Wray, 283.**

Action to set aside—plaintiff's failure to answer—motion for leave to amend answer properly denied—The trial court did not err in an action to set aside a deed by denying defendant SRS's motion for leave to amend answer. Defendant failed to answer the complaint and Dr. Smith's response did not constitute an answer on behalf of SRS. **Bodie Island Beach Club Ass'n, Inc. v. Wray, 283.**

Action to set aside—summary judgment—proper—The trial court did not err in an action to set aside a deed by entering summary judgment against defendant SRS. Because SRS filed no answer in response to plaintiffs' complaint, SRS judicially admitted that the averments in the complaint were true and plaintiffs were entitled to summary judgment as there were no genuine issues of material fact. SRS's contention on appeal that the complaint failed to state a claim against SRS was untimely. SRS's arguments that the trial court erred in entering summary judgment because not all defendants were in default and that the summary judgment against it was based on misapprehensions of law were meritless. **Bodie Island Beach Club Ass'n, Inc. v. Wray, 283.**

Restrictive covenants—breach of warranty claim—The trial court properly granted summary judgment dismissing a claim for breach of warranty of title arising from restrictive covenants that were not discovered until after the sale of the land but were of record. **Barfield v. Matos, 24.**

Restrictive covenants—consideration—radical change—amenities fees—The trial court did not err by granting summary judgment in favor of plaintiff on its claim that defendant breached the 1993 covenants and on defendant's counterclaim and defenses based on alleged lack of consideration. Defendant was unable to identify changes within the covenanted area that were so radical that they would destroy the original purposes of the agreement. Further, a financial hardship did not qualify as a "radical change" occurring within a community. There was nothing to suggest that defendant's right to collect an amenities fee was unenforceable, and defendant failed to present evidence that the decision of individual lot owners to withhold amenity fees was at plaintiff's direction. **Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC, 66.**

Restrictive covenants—enforcement authority—The trial court did not err by denying defendant's motions to dismiss based on a 1993 restrictive covenant's alleged failure to provide plaintiff with enforcement authority. A plain reading of the

DEEDS—Continued

covenant revealed that defendant agreed to maintain the amenities and plaintiff was given the authority to file suit to enforce the restrictive covenants in law or in equity. **Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC, 66.**

Restrictive covenants—frustration of purpose—The trial court did not err in a breach of covenants case by granting plaintiff's motion for directed verdict on the issue of frustration of purpose. The contractual agreement entered into by the parties allocated the potential risk involved in the frustrating event to defendant. **Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC, 66.**

Restrictive covenants—matter of record—The trial court properly granted summary judgment for the third-party defendants, the McManuses, on a claim for negligent misrepresentation in a restrictive covenants case. Mr. McManus told Matos, the third-party plaintiff, that there were no restrictions on the property preventing farm use and Matos did not realize that he was buying property subject to restrictions of any sort, but the restrictive covenants were a matter of record which should have been discovered by Matos's attorney. **Barfield v. Matos, 24.**

Restrictive covenants—radical change—failure of consideration—lack of reciprocal benefits and burdens—bad faith—The trial court did not err in a breach of covenants case by denying defendant's motion for directed verdict on the issues of radical change, failure of consideration, lack of reciprocal benefits and burdens, and bad faith. The Court of Appeals previously concluded there were no genuine issues of material fact as to these issues. **Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC, 66.**

Restrictive covenants—requested jury instruction—frustration of purpose—damages—The trial court did not err by failing to give defendant's requested jury instructions on the issues of frustration of purpose and damages. Defendant was unable to establish that the evidence warranted these instructions. **Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC, 66.**

DISCOVERY

Discovery sanctions—domestic litigation—no error—The trial court did not err as a matter of law in a domestic litigation by imposing discovery sanctions against plaintiff. The trial court's findings as to plaintiff's failure to respond to discovery were fully supported by the record. Further, it was apparent from the transcript that the trial court considered lesser sanctions prior to striking plaintiff's equitable distribution claim and barring him from introducing evidence in support of his claim. Finally, the trial court's sanctions were not inconsistent with the Court of Appeals' prior mandate. **Ross v. Ross, 546.**

Request for production of documents—failure to meet burden establishing validity of objections—The trial court did not abuse its discretion in an action arising out of alleged breaches of business agreements by overruling the Krispy Kreme defendants' objections to plaintiffs' request for production of documents. Defendants bore the burden to establish the validity of its objections and failed to offer any evidence whatsoever in support of its claims. **K2 Asia Ventures v. Trota, 443.**

DIVORCE

Alimony—equitable distribution—simultaneous hearing—distinct orders—Any error in the trial court simultaneously hearing alimony and equitable distribution

DIVORCE—Continued

claims was invited by plaintiff and was not prejudicial to her. Even if the trial court heard all of the claims in one trial, the court entered two separate and distinct orders. **Romulus v. Romulus, 495.**

Alimony—illicit sexual behavior—date of separation—The trial court did not err in its findings or conclusions in determining the date the parties separated in an alimony action in which one party was found to have engaged in illicit sexual behavior. **Romulus v. Romulus, 495.**

Alimony—illicit sexual behavior—doctrine of inclination and opportunity—The trial court did not err when ruling on an alimony claim by finding that plaintiff had voluntarily participated in an act of illicit sexual behavior as defined by N.C.G.S. § 50-16.1A(3)(a). Although more certain and clear evidence is required for proof of a sexual act in the criminal context, in alimony claims North Carolina has long endorsed proof of intercourse by the doctrine of inclination and opportunity, and there is no reason that this doctrine would not apply to illicit sexual behavior. **Romulus v. Romulus, 495.**

Equitable distribution—appreciation of real property—The arbitrator did not miscalculate the appreciation of real property in an equitable distribution action where defendant contended that the arbitrator incorrectly valued the property at the date of the marriage. The valuation was not the result of an evident miscalculation. **Barton v. Barton, 235.**

Equitable distribution—arbitration award—appreciation in account—The increase in the balance of a couple's account between marriage and separation was active rather than passive, and the trial court did not err by adopting an arbitration award that found the appreciation to be marital. **Barton v. Barton, 235.**

Equitable distribution—arbitration award—remanded for modification—While an arbitration decision in an equitable distribution case was remanded for modification, there was no error prejudicing defendant's rights and providing a basis to vacate the order. **Barton v. Barton, 235.**

Equitable distribution—arbitrator's award—value of 401(k)—remanded—In an equitable distribution action, the confirmation of an arbitrator's award was remanded where plaintiff conceded that the value of her 401(k) confirmed by the trial court included contributions made after the date of separation, as well as losses occurring after separation. **Barton v. Barton, 235.**

Equitable distribution—arbitrator's finding—no prejudice—Defendant's contention that an arbitrator erred in an equitable distribution action in the use of a 401(k) plan in the distribution of assets was not addressed where defendant did not contend that the finding prejudiced him. **Barton v. Barton, 235.**

Equitable distribution—classification of property as marital—no prejudice—An argument concerning the classification of the appreciation of real estate as marital property was overruled where reclassifying the appreciation would not diminish or increase either party's interest or change the total value conferred on each party. **Barton v. Barton, 235.**

Equitable distribution—depreciation of car—The arbitrator in an equitable distribution action did not err by finding that the depreciation in the value of a car was divisible property. The basis for the decrease in value could not be attributed to the actions of one spouse and occurred after the date of separation. **Barton v. Barton, 235.**

DIVORCE—Continued

Equitable distribution—marital property—401(k)—The arbitrator did not err in an equitable distribution action by concluding that defendant's 401(k) account retained a marital component. Defendant did not raise a question of law but contested the valuation of the marital property component. He did not argue and the appellate court did not find that the arbitrator committed an evident miscalculation or evident mistake in the description of the property. **Barton v. Barton, 235.**

Equitable distribution—marital property—account contribution—A contribution to an account held to be marital was not separate property, given the account activity that occurred during the marriage. **Barton v. Barton, 235.**

Equitable distribution—marital property—boat and trailer—The arbitrator did not err in an equitable distribution action by conferring marital property status upon a boat and trailer that were purchased during the marriage. **Barton v. Barton, 235.**

Equitable distribution—marital property—date of valuation—Marital property is to be valued on the date of separation of the parties; in this case, an equitable distribution action was remanded where there was an evident mistake in valuation of a pension plan joint and survivor annuity. **Barton v. Barton, 235.**

Equitable distribution—marital property—IRA—The arbitrator in an equitable distribution case did not err in determining the value of the marital portion of an IRA. **Barton v. Barton, 235.**

Equitable distribution—marital property—postseparation appreciation—The trial court's findings in an equitable distribution action supported its conclusion of law that the post separation appreciation of defendant's dental practice was divisible property. Essentially, the trial court found that it could not determine the cause of the postseparation increase in value and applied the statutory presumption that postseparation increases in the value of marital property are divisible. **Romulus v. Romulus, 495.**

Equitable distribution—marital property—retirement plan—The arbitrator did not err in an equitable distribution action in the calculation of the marital portion of an executive retirement plan. **Barton v. Barton, 235.**

Equitable distribution—rental income and losses—There was sufficient evidence in an equitable distribution action to support the trial court's findings as to rental income and losses from certain property. The trial court's findings adequately addressed the issues raised. **Romulus v. Romulus, 495.**

Equitable distribution—separate assets—purchase ordered—An arbitrator did not err in an equitable distribution action by ordering defendant to purchase separate assets from plaintiff where real estate was awarded to defendant as marital property and defendant was ordered to pay plaintiff the value of plaintiff's separate interest. **Barton v. Barton, 235.**

Equitable distribution—separate property—findings—A conclusion of law in an equitable distribution case classifying real estate as separate property was remanded where there were no supporting findings as to the facts necessary for the determination, even though ample evidence was presented. **Romulus v. Romulus, 495.**

Equitable distribution—separate property—testimony of donor—The trial court erred by concluding in an equitable distribution case that certain real estate was plaintiff's separate property. The trial court should consider the credibility and

DIVORCE—Continued

weight of all the relevant evidence, including the testimonial evidence of the donor spouse as to her intent in conveying the separate property to the parties as tenants by the entirety. Any statement in *Warren v. Warren*, 175 N.C. App. 509, adopting a rule that the donor's testimony alone cannot satisfy the burden of rebutting the marital gift presumption was *obiter dicta*. **Romulus v. Romulus, 495.**

Equitable distribution—stock account—tracing contribution—The Court of Appeals rejected an argument in an equitable distribution case that the contribution of stock to an account could be traced out and would exhaust any marital component of the account. **Barton v. Barton, 235.**

EVIDENCE

Authentication—best evidence rule—failure to object—no error—The trial court did not err in a robbery with a dangerous weapon case by admitting into evidence receipts and photos captured from a surveillance video and a copy of the victim's social security card. Had defendant objected to the receipts and photos, the State could have properly authenticated them. Further, had defendant objected to the admission of the receipts, photos, and social security card, the State could have provided the necessary foundation and documentation relating to the best evidence rule. **State v. Howard, 318.**

Crack cocaine swallowed by defendant—field test—visual identification admitted—The trial court did not err by admitting an officer's visual identification of crack cocaine as well as the result of a field test where defendant precluded additional chemical analysis by swallowing the substance. Defendant forfeited his right to challenge the testimony by his conduct. **State v. James, 588.**

Expert testimony—based on photograph—The trial court did not err in a first-degree murder prosecution by not admitting challenged testimony from a firearms expert who used a photograph in developing his opinions. No authority was cited or found holding that evidence sufficient to form the basis of an expert opinion becomes insufficient if it takes the form of a photograph. **State v. McDowell, 184.**

Failure to redact transcript—defendant telling a lie—police interrogation technique—The trial court did not abuse its discretion in a second-degree murder case by failing to redact those portions of the transcript in which a detective accused defendant of telling a lie. The statements were part of an interrogation technique designed to show defendant that the detectives were aware of discrepancies in defendant's story rather than for the purpose of expressing an opinion as to defendant's credibility or veracity at trial. **State v. Castaneda, 144.**

Findings of fact—sufficiency of evidence—The trial court did not err in a drugs case by concluding there was competent evidence to support its findings of fact numbers 4, 5, and 9. The findings demonstrated uncertainties and inconsistencies regarding the point of origin and destination for travel. The misstatement in number 9 that defendant produced a driver's license instead of a state-issued identification card was inconsequential and *de minimus*. **State v. Williams, 1.**

Hearsay—not for truth of matter asserted—context—Confrontation Clause—The trial court did not err in a second-degree murder case by admitting the transcript of a police interview without redacting detectives' statements indicating that witnesses saw defendant pick up a knife and stab the victim. The references to statements by unidentified third parties were not hearsay because they were offered

EVIDENCE—Continued

to provide context and explain interviewing techniques. Further, the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. **State v. Castaneda, 144.**

Lay testimony—detective—based on personal observations and training—no error—The trial court did not commit error or plain error in a robbery with a dangerous weapon case by admitting the lay testimony of a detective. The testimony was based upon his personal observations at the scene and his investigative training background as a police officer. **State v. Howard, 318.**

Not newly discovered—motion for new trial—properly denied—The trial court did not err in a medical negligence case by denying plaintiffs' motions for a new trial under N.C.G.S. § 1A-1, Rules 59 and 60. The pertinent document was not "newly discovered" evidence after the summary judgment hearing. **Health Mgmt. Assocs., Inc. v. Yerby, 124.**

Observation of hair on wall—no special expertise required—evidence collection not required—The trial court did not err in a first-degree murder prosecution by allowing law enforcement officers to testify that they observed a hair and attached tissue on the wall of the murder scene. No particular expertise is required for a witness to testify that he saw a hair and officers were not required to collect evidence as a condition to testimony about a subject. **State v. McDowell, 184.**

Prior crimes or bad acts—course of conduct—complete story—no error—The trial court did not err in a robbery with a dangerous weapon case by admitting evidence of a break-in at the Daddy Rabbit's gun store. The evidence was properly admitted under the "course of conduct" or "complete story" exceptions to Rule 404(b) of the Rules of Evidence. **State v. Howard, 318.**

Prior crimes or bad acts—probative value—not substantially outweighed by unfair prejudice—no error—The trial court did not err in a robbery with a dangerous weapon case by admitting evidence of a break-in at the Daddy Rabbit's gun store and testimony from a detective concerning defendant wearing dark clothing in another investigation. The probative value of the evidence substantially outweighed its potential for unfair prejudice and the detective's response was to a question from defendant's own counsel and did not in any way discuss the nature of the prior investigation. **State v. Howard, 318.**

FRAUD

Constructive—assets not listed for equitable distribution—There was a material issue of fact as to plaintiff's action for constructive fraud where defendant failed to disclose purchase money notes in his list of assets for equitable distribution. A fiduciary relationship existed when plaintiff alleged that the constructive fraud occurred and, although plaintiff did not make those assertions in her initial pleadings, the pleadings are considered amended where the evidence at a summary judgment hearing would justify an amendment. **Searcy v. Searcy, 568.**

Constructive fraud—insurance policy—no relation of trust and confidence—summary judgment proper—The trial court did not err in a constructive fraud case based on an insurance policy by granting summary judgment in favor of defendant insurance salesperson. There were no facts or circumstances which created a relation of trust and confidence. **Cobb v. Pa. Life Ins. Co., 268.**

FRAUD—Continued

Insurance policy—no reasonable reliance—summary judgment proper—The trial court did not err in a fraud case based on an insurance policy by granting summary judgment in favor of defendant insurance salesperson. Plaintiff could not claim that he reasonably relied on defendant's representation of the disability coverage in the policy when he could have discovered its true meaning with minimal investigation. **Cobb v. Pa. Life Ins. Co., 268.**

Negligent misrepresentation—insurance policy—no justifiable reliance—summary judgment proper—The trial court did not err in a negligent misrepresentation case based on an insurance policy by granting summary judgment in favor of defendant insurance salesperson. Plaintiff could not establish that he justifiably relied on any misrepresentations by defendant because the terms of the policy were unambiguously expressed in the policy, which plaintiff had a duty to read. **Cobb v. Pa. Life Ins. Co., 268.**

HOMICIDE

Second-degree murder—sufficiency of evidence—Even assuming *arguendo* that detectives' statements should have been redacted in a second-degree murder case, defendant was not entitled to a new trial in light of the overwhelming evidence of defendant's guilt. **State v. Castaneda, 144.**

IDENTIFICATION OF DEFENDANTS

Detective's lay testimony—no error—The trial court did not commit error or plain error in a robbery with a dangerous weapon case by allowing a detective to identify defendant as the person in a still photograph made from a surveillance tape. The detective observed defendant in custody on the same morning as the photo was taken, located the clothes defendant was wearing in the photo (with blood on them), and had more familiarity with defendant's appearance at the time the photo was taken than the jury could have. **State v. Howard, 318.**

IMMUNITY

Governmental—initial self-insurance with limited waiver—subsequent excess policies—Despite the existence of insurance policies for damages in excess of the first one million dollars, which defendant city self-insured, there was no genuine issue of fact as to plaintiffs failure to trigger the City's waiver of immunity for the first one million dollars. **Arrington v. Martinez, 252.**

Governmental—limited waiver—execution of release required—A plaintiff with a wrongful death claim did not trigger a waiver of governmental immunity by agreeing to sign releases. The City's limited waiver resolution required that the release be executed. **Arrington v. Martinez, 252.**

INDEMNITY

Medical negligence—independent contractors—The trial court did not err in a medical negligence case by granting defendants' motion for summary judgment on the claim for indemnity. Defendant doctor and defendant surgical company were independent contractors rather than employees of Louisburg HMA. Thus, HMA was not derivatively liable for any alleged negligence of defendant doctor. **Health Mgmt. Assocs., Inc. v. Yerby, 124.**

INSURANCE

Automobile—uninsured motorist coverage—opportunity to reject or select coverage amounts—The trial court erred by granting summary judgment in favor of defendant Penn National and by ordering that defendant McNeill was only entitled to \$100,000.00 in uninsured motorist coverage (UIM) as opposed to the \$1,000,000.00 that is the upper limit of N.C.G.S. § 20-279.21(b)(4). There were genuine issues of material fact as to whether one of the policy holders was given the opportunity to reject or select differing coverage amounts of UIM. **Unitrin Auto & Home Ins. Co. v. McNeill, 465.**

Coverage under policy—no genuine issue of fact—summary judgment proper—The trial court did not err in a case involving an insurance contract by granting summary judgment in favor of defendants. There were no genuine issues of fact as to whether plaintiff should have been covered under the terms of the policy as written. **Cobb v. Pa. Life Ins. Co., 268.**

JURY

Request for evidence—failure to conduct jurors back to courtroom—failure to show prejudice—Although the trial court in a sex offense in a parental role and incest case violated N.C.G.S. § 15A-1233(a) by failing to conduct the jurors back to the courtroom after the jury sent a note requesting all State's evidence including copies of letters, defendant failed to meet his burden of showing that he was prejudiced. **State v. Williams, 412.**

Venire—underrepresentation of race—The trial court did not err by denying a motion by defendants in an armed robbery trial to discharge the jury venire based on underrepresentation of their race. Without more, the fact that only three of sixty people in the jury venire were African-American was not sufficient to show that the underrepresentation was due to systematic exclusion. **State v. Jackson, 339.**

LANDLORD AND TENANT

Liability of landlord—injury to tenant's employee—control of premises—The trial court properly granted summary judgment for defendant where an employee of a power company (plaintiff) was injured while operating a front-end loader at a steam plant that was leased by plaintiff's employer (Suez) from defendant. The Steam Agreement, which included the lease, did not provide evidence that defendant retained sufficient control of the premises to establish a duty to plaintiff. **Hylton v. Hanesbrands, Inc., 295.**

Summary ejectment—termination of lease—acts of de facto officers—summary judgment—The trial court did not err in a summary ejectment case by granting summary judgment in favor of plaintiff. Since the validity of the acts of *de facto* officers cannot be collaterally impeached, defendant's affidavits failed to create a genuine issue of material fact regarding the validity of plaintiff's termination of the lease. **Havelock Yacht Club, Inc. v. Crystal Lake Yacht Club, Inc., 153.**

LIENS

Materialman's lien—filings sufficient—property sold—liens extinguished—The trial court did not err in a materialman's lien case by discharging plaintiff's lien filings. Although plaintiff's filings were sufficient to protect its rights under both parts of Article 2 of Chapter 44A, the sale and conveyance of the private owners'

LIENS—Continued

properties extinguished plaintiff's filed claims of lien or notices of claim of lien on funds. Similarly, foreclosure by defendant Carolina Bank of two of the properties extinguished plaintiff's claims of lien against those properties. **Pete Wall Plumbing Co., Inc. v. Sandra Anderson Builders, Inc.**, 220.

Materialman's lien—reference to discharged liens in complaint—motion to strike properly granted—The trial court did not err in a materialman's lien case by granting defendants' motion to strike the allegations in plaintiff's complaint that referred to discharged claims of lien and notices of claim of lien on funds where the trial court did not commit reversible error when it discharged all of plaintiff's claims of lien and notices of claims of lien. **Pete Wall Plumbing Co., Inc. v. Sandra Anderson Builders, Inc.**, 220.

MEDICAL MALPRACTICE

Expert witness—no extraordinary circumstances—insufficient grounds for dismissal—summary judgment improper—The trial court erred in a medical malpractice case by granting summary judgment in favor of defendants. The trial court's ruling that no extraordinary circumstances existed to qualify plaintiff's expert witness to serve as an expert witness under Rule 702(e) was akin to a ruling on a motion *in limine* and was insufficient grounds for dismissal at that point in the litigation. **Moore v. Proper**, 202.

Rule 9(j)—qualification as expert witness—erroneous conclusion—summary judgment improper—The trial court erred in a medical malpractice case by granting summary judgment in favor of defendants for plaintiff's failure to comply with Rule 9(j). The trial court erroneously concluded that no reasonable person would have expected plaintiff's expert witness to qualify as an expert witness under Rule 702. **Moore v. Proper**, 202.

MOTOR VEHICLES

Driving while impaired—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired. The State was only required to prove defendant had an alcohol concentration of .08 or more while driving a vehicle on a State highway, and defendant's two successive Intoxilyzer tests administered after his car was stopped were .08. **State v. Arrington**, 161.

NEGLIGENCE

Industrial plant—subcontractor—collateral acts—Although there was an issue as to whether an injured plaintiff's operation of a front-end loader was an inherently dangerous activity, it was undisputed that an agreement specifically stated that the relationship of plaintiff's employer (Suez) to defendant (the owner of the site) was that of a subcontractor that made the decisions as to how to provide the product (steam for a textile plant). Therefore, the nature of the site and its lighting were collateral to providing steam and no recovery was allowed. **Hylton v. Hanesbrands, Inc.**, 295.

Insurance policy—no duty to explain definition beyond text of policy—no implied duty to advise—summary judgment proper—The trial court did not err in a negligence case based on an insurance policy by granting summary judgment

NEGLIGENCE—Continued

in favor of defendant insurance salesperson. Plaintiff failed to demonstrate that defendant had a duty to explain the definition of “total disability” beyond providing the definition in the text of the insurance policy and plaintiff failed to show an implied duty to advise. **Cobb v. Pa. Life Ins. Co.**, 268.

Motion to dismiss—sufficiency of evidence—failure to allege duty—The trial court did not err in a negligence case by granting defendant City’s motion to dismiss for lack of subject matter jurisdiction under N.C.G.S. § 1A-1, Rule 12(b)(1). Plaintiffs failed to allege a duty or control defendant was required to exercise in the construction and establishment of a new school system sewer. **Williams v. Devere Constr. Co., Inc.**, 135.

PLEADINGS

Sanctions—argument well-grounded in fact and warranted by law—motion denied—Plaintiff’s motion for sanctions in a case arising out of a dispute concerning a credit card agreement was denied. Although some of plaintiff’s assertions were not without validity, defendant’s arguments pertaining to the forum selection clause were well-grounded in fact and warranted by existing law, even if ultimately unpersuasive. **Federated Fin. Corp. of Am. v. Jenkins**, 330.

POSSESSION OF STOLEN PROPERTY

Receiving stolen goods—explicitly represented as stolen—specific words not required—The trial court did not err by denying defendant’s motion to dismiss the charge of receiving stolen goods. There was sufficient evidence that property found in defendant’s possession was explicitly represented by a law enforcement agent as being stolen as required by N.C.G.S. § 14-71(b), and specific words were not required to be used. **State v. Louali**, 176.

PRETRIAL PROCEEDINGS

Motion to continue—attorney’s intention to withdraw—no reasonable notice given—The trial court erred in a child custody case by denying defendant’s motion to continue. Although defendant was given notice of her attorney’s intention to withdraw from the case, defendant was not given reasonable notice nor adequate opportunity to secure other counsel. **Skelly v. Skelly**, 580.

PRISONS AND PRISONERS

Monetary charges—arguments previously decided—dismissal proper—The trial court did not err in dismissing plaintiff’s complaint seeking injunctive and declaratory relief for charges by the North Carolina Department of Correction to inmates for disciplinary infractions and medical treatment co-payments. Plaintiff’s exact arguments had previously been ruled upon and the Court of Appeals adopted the reasoning of those prior decisions in affirming the trial court’s decision. **Sartori v. N.C. Dep’t of Corr.**, 387.

PRIVACY

Invasion of—autopsy photographs—The trial court correctly dismissed a claim for invasion of privacy under N.C.G.S. § 1A-1, Rule 12(b)(6) where the claim was based on the viewing of autopsy x-rays by defendant’s employees and the disclosure

PRIVACY—Continued

of those photographs to third parties. By statute, autopsy photographs are accessible by any person, subject only to restrictions on time and supervision, and publishing the x-rays to third parties was relevant only to the employees' potential criminal liability. **Tillet v. Onslow Mem'l Hosp., Inc.**, 382.

PUBLIC OFFICERS AND EMPLOYEES

State employee—racial harassment and retaliation—adoption of alternative findings—written warning relevant to other claims—The trial court did not err in an action arising from alleged harassment or retaliation based on race by adopting the State Personnel Commission's alternative findings relative to a written warning. Another trial court's dismissal of one of plaintiff state employee's two claims did not necessarily preclude any consideration of the written warning to the extent that it was relevant to the other claim on the merits. **McAdams v. N.C. Dep't of Transp.**, 429.

State employee—racial harassment and retaliation—alternative conclusions of law—The trial court did not err by upholding the State Personnel Commission's alternative conclusions of law numbers 2 and 3 because they constituted a determination that plaintiff state employee was subjected to retaliation on the basis of his race. **McAdams v. N.C. Dep't of Transp.**, 429.

State employee—racial harassment and retaliation—legitimate non-retaliatory reason for discipline—The trial court did not err by determining that the Department of Transportation had failed to produce sufficient evidence of a legitimate non-retaliatory reason for the discipline of plaintiff state employee. Defendant's argument was a challenge to the State Personnel Commission's factual determinations, which were binding on the Court of Appeals. **McAdams v. N.C. Dep't of Transp.**, 429.

REAL PROPERTY

Right of first refusal—valid and enforceable—insufficient evidence of reasonableness—The trial court did not err in an action concerning defendant's right of first refusal on the sale of a piece of property by denying plaintiffs' motion for summary judgment but did err in entering a declaratory judgment in defendant's favor concluding that the right of first refusal was valid and enforceable. Neither party was entitled to summary judgment on the issue of the reasonableness of the right of first refusal because the Court of Appeals could not determine whether either party submitted sufficient evidence regarding the circumstances surrounding the agreement to the fixed option price to warrant judgment in their favor. **Taylor v. Miller**, 558.

ROBBERY

Dangerous weapon—cumulative errors—not plain error—Defendant's argument in a robbery with a dangerous weapon case that the cumulative errors of the trial court deprived him of a fair trial was without merit. Given the overwhelming evidence of defendant's guilt, the cumulative effect of any of the asserted errors did not constitute plain error. **State v. Howard**, 318.

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 at the close of the evidence. There was sufficient evidence presented of each element of the crime and of defendant being the perpetrator of the crime. **State v. Howard**, 318.

ROBBERY—Continued

Sufficiency of evidence—credibility of witnesses—acting in concert—The trial court did not err by denying motions by two defendants to dismiss armed robbery charges. The determination of the credibility of witnesses and the weight of the evidence is for the jury to determine and there was substantial evidence to support an acting in concert theory. **State v. Jackson, 339.**

Sufficiency of evidence—perpetrator of offense—The trial court did not err by refusing to dismiss an armed robbery prosecution for insufficient evidence that defendant Jackson was the perpetrator of the offense. The combined testimony of two witnesses was sufficient to raise an appropriate question for the jury. **State v. Jackson, 339.**

SCHOOLS AND EDUCATION

Charter school funding—budget amendment valid—The trial court did not err in a charter schools funding case by concluding that defendant Rutherford County Schools' amendment to its 2009-10 budget was valid. The provisions of N.C.G.S. § 115C-433(d) were inapplicable to the case, the provisions of Chapter 115C did not require that all monies provided to the local administrative unit be placed into the "local current expense fund," and there was no requirement that the entities that were the source of those funds required defendant Rutherford County Schools to account for the monies in a separate fund. **Thomas Jefferson Classical Acad. v. Rutherford Cnty. Bd. of Educ., 530.**

Charter school funding—court's authority—construe acts of the General Assembly—Defendant Rutherford County Schools' argument in a charter school funding case that the courts are without authority to direct that "restricted" state funds be shared with the charter school was overruled. Under our State Constitution, the role of the courts is to construe acts of the General Assembly and had the General Assembly believed that the Court of Appeals had misinterpreted its intent with respect to the method of computation of amounts due to a charter school under N.C.G.S. § 115C-238.29H(b), it had ample opportunity to amend the statute to reflect a different intent. **Thomas Jefferson Classical Acad. v. Rutherford Cnty. Bd. of Educ., 530.**

Charter school funding—funds placed in local expense fund—per pupil amount—The trial court did not err in a charter school funding case by including restricted monies that defendant Rutherford County Schools received from the state and federal governments in calculating the funds that it must share with plaintiff charter school. As the funds were placed in the "local current expense fund" and not in a "special fund," they must be considered when calculating the per pupil amount due the charter schools. Furthermore, while the inclusion of "restricted funds" in the "local current expense fund" resulted in a larger per pupil appropriation to the charter school, the statute does not direct that the "restricted funds" be shared with the charter schools and does not violate provisions of the United States Constitution. **Thomas Jefferson Classical Acad. v. Rutherford Cnty. Bd. of Educ., 530.**

Charter school funding—restricted funds—per pupil allotment—Defendant Rutherford County Schools' argument in a charter school funding case that by including "restricted funds" in the computation of per pupil allotments, charter school students are receiving a higher level of funding than those in the regular public schools was overruled as the Court was bound by the decisions in *Delany*, 150 N.C. App. 338, *Sugar Creek I*, 188 N.C. App. 454, and *Sugar Creek II*, 195 N.C. App. 348. **Thomas Jefferson Classical Acad. v. Rutherford Cnty. Bd. of Educ., 530.**

SCHOOLS AND EDUCATION—Continued

Charter school funding—retroactive budget amendment—no legal effect—The trial court correctly held in a charter schools funding case that defendant Rutherford County Schools’ purported amendment to its 2008-09 budget was “without legal effect” as the funds had already been spent. Further, the fact that prior to November 2009, local school administrative units were permitted to segregate restricted and non-restricted funds within the confines of the “local current expense fund” did not permit the purported retroactive amendment. **Thomas Jefferson Classical Acad. v. Rutherford Cnty. Bd. of Educ.**, 530.

SEARCH AND SEIZURE

Drugs—pat down—reasonable articulable suspicion—The trial court did not err in a drugs case by denying defendant’s motion to suppress evidence obtained from the search of his pants pocket and the seizure of eleven bags containing marijuana. The evidence showed that an officer had a reasonable belief that for his safety he should perform a pat down of defendant. Further, based on the officer’s training and experience, he immediately formed the opinion that the bulge in defendant’s pocket contained a controlled substance. **State v. Richmond**, 475.

Traffic stop—extended detention—reasonable suspicion—uncertainties and inconsistencies—The trial court did not err in a drugs case by concluding that defendant and her companion’s extended detention was supported by reasonable suspicion. The totality of the circumstances revealed a reasonable articulable suspicion that criminal activity was afoot based on muddled stories consisting of numerous uncertainties and inconsistencies. **State v. Williams**, 1.

SENTENCING

Prior record level—calculation—The trial court did not err by determining that defendant was a prior record level IV offender. The trial court properly calculated defendant’s prior record level without including any of the felonies used to establish his habitual felon status. **State v. Williams**, 412.

SEXUAL OFFENSES

Negligent infliction of sexually transmitted disease—motion to dismiss—sufficiency of evidence—The trial court erred by dismissing plaintiff’s claim for negligent infliction of a sexually transmitted disease (NISTD) against defendant who had a sexual affair with plaintiff’s wife. The duty owed by an individual who knows or has reason to know that he has contracted a sexually transmitted disease is to warn those persons with whom he expects to have sexual relations of his condition. This duty also extends to the spouse of the infected person’s sexual partners if the spouse is known or should have been known to the infected person at the time of the sexual intercourse. Further, plaintiff’s attempt to recover damages for criminal conversation did not foreclose recovery for NISTD. **Carsanaro v. Colvin**, 455.

TERMINATION OF PARENTAL RIGHTS

Best interests of minor children—no abuse of discretion—The trial court did not abuse its discretion in a termination of parental rights case by finding that it was in the best interests of the minor children to terminate respondent’s parental rights. Contrary to respondent’s argument, the nonlawyer guardian ad litem volunteer was not required to be physically present at the termination hearing. **In re J.H.K.**, 364.

TERMINATION OF PARENTAL RIGHTS—Continued

Neglected juveniles—unchallenged findings of fact—conclusion of law supported—The trial court did not err in a termination of parental rights case by determining that the juveniles in question were neglected. The unchallenged findings of fact supported the trial court's conclusion that there was a reasonable probability of a repetition of neglect. **In re J.H.K., 364.**

UNFAIR TRADE PRACTICES

Insurance policy—no violation—summary judgment proper—The trial court did not err in an unfair and deceptive trade practices case based on an insurance policy by granting summary judgment in favor of defendants. The evidence did not support plaintiff's claim that defendant insurance company employed tactics to delay the investigation or the payment of claims and plaintiff could not claim that defendant refused to make payments without conducting a reasonable investigation based upon all the available information. Furthermore, a violation of N.C.G.S. § 58-3-115, the anti-twisting statute, does not bestow liability upon an insurance company for a private action. **Cobb v. Pa. Life Ins. Co., 268.**

Loan discount fees—summary judgment—The trial court did not err by granting summary judgment for plaintiffs on Chapter 75 claims based upon defendant charging a loan discount fee when no discount was provided. Defendant's conduct was actionable as an unfair or deceptive trade practice under N.C.G.S. § 75-1.1, the evidence in the record supported the summary judgment, and plaintiffs' claim was not preempted by federal legislation. **Bumpers v. Cmty. Bank of Northern Va., 307.**

Real estate closing fees—summary judgment—The trial court erred by granting summary judgment to plaintiffs on Chapter 75 claims based upon fees charged by Title America at real estate closings. There was a genuine issue of material fact as to whether Title America overcharged for its closing fees. **Bumpers v. Cmty. Bank of Northern Va., 307.**

UNJUST ENRICHMENT

Medical negligence—no conscious acceptance of benefit—The trial court did not err in a medical negligence case by granting defendants' motion for summary judgment on the claim for unjust enrichment. Defendants did not consciously accept the benefit of a settlement. **Health Mgmt. Assocs., Inc. v. Yerby, 124.**

WORKERS' COMPENSATION

Denial of motion to admit additional evidence—not an abuse of discretion—The Industrial Commission did not abuse its discretion in a workers' compensation case when it denied defendants' motion to admit additional evidence following their appeal to the Commission. The Commission effectively declined to consider a new ground for suspension of benefits not yet addressed by a deputy commissioner and left the issue for a subsequent hearing. **Powe v. Centerpoint Human Servs., 395.**

Rule 802—sanctions—no finding of rules violation—Although plaintiff contended that the Industrial Commission erred in a workers' compensation case by concluding that defendants' failure to comply with certain opinions and awards of the Commission did not mandate the imposition of sanctions against defendants under Rule 802 of the Workers' Compensation Rules, this issue was not preserved. The Commission was never asked to award sanctions below and made no findings of

WORKERS' COMPENSATION—Continued

a rules violation that would be required in order to impose sanctions under Rule 802. **Powe v. Centerpoint Human Servs., 395.**

Vocational rehabilitation—non-cooperation—temporary total disability—On remand, the Industrial Commission in a workers' compensation case must consider why vocational rehabilitation was not being provided. If it was due to non-cooperation, then the Commission erred in reinstating temporary total disability. If the failure to continue was not due solely to non-cooperation, or if the Commission determines that vocational rehabilitation should have been continued, then temporary total disability could be reinstated. **Powe v. Centerpoint Human Servs., 395.**

Vocational rehabilitation—sufficiency of findings of fact—The Industrial Commission erred in a workers' compensation case by failing to apply the correct legal standard in determining whether plaintiff complied with vocational rehabilitation under N.C.G.S. § 97-25. When an employee is participating to some degree in vocational rehabilitation services, the Commission must determine, in deciding whether to reinstate benefits, whether the employee is substantially complying with those services and not significantly interfering with the vocational rehabilitation specialist's efforts to assist the employee in returning to suitable employment. The case was remanded for the Commission to make the required findings of fact. **Powe v. Centerpoint Human Servs., 395.**