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CASES REPORTED

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

TYRONE WILLIAMS AND WHF, INC. OF VIRGINIA, PLAINTIFF V. ANNITTIE PEABODY AND PEABODY'S HOME IMPROVEMENTS, INC., DEFENDANTS

No. COA10-1461

(Filed 15 November 2011)

1. Collateral Estoppel and Res Judicata—collateral estoppel—no determination in original final judgment on merits

The trial court erred by entering summary judgment in favor of defendants on grounds of collateral estoppel. Plaintiffs brought suit against defendants alleging unjust enrichment and praying for injunctive relief, and no determination was made regarding these claims in the original final judgment on the merits.

2. Collateral Estoppel and Res Judicata—res judicata—reasonable diligence

Assuming *arguendo* that plaintiffs and defendants satisfied the requirement of identity of parties, plaintiffs' claims were barred by *res judicata* when the heart of both the original and present lawsuits were disputes regarding four properties. Plaintiffs, exercising reasonable diligence, should have brought forward the claims for unjust enrichment and prayer for injunctive relief at the time of the original lawsuit.

3. Collateral Estoppel and Res Judicata—res judicata—identity of parties—Lassiter exception

Although the trial court did not err by dismissing plaintiff individual's lawsuit against defendants based on the doctrine of

res judicata, it erred by barring defendant company's complaint on grounds of *res judicata*. The *Lassiter* exception did not apply because the evidence did not support the control requirement of privity. The case was remanded for a determination of whether defendant individual had control of defendant company and its action against defendants.

Judge ERWIN concurring in part and dissenting in part.

Appeal by Plaintiff from Order entered 12 June 2010 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 28 April 2011.

Jack E. Carter, *for Plaintiffs.*

Thorp, *Clarke & Neville*, *by J. Thomas Neville and Sharon Lee Tucker*, *for Defendants.*

THIGPEN, Judge.

Tyrone Williams ("Williams") and WHF, Inc. of Virginia ("WHF") (together, "Plaintiffs") filed suit against Annittie Peabody ("Peabody") and Peabody's Home Improvements, Inc. (together "Defendants") subsequent to a similar lawsuit involving some but not all of the same parties. Upon motion by Defendants, the trial court granted summary judgment in favor of Defendants on the grounds of *res judicata* and collateral estoppel. We must determine whether Plaintiffs' lawsuit was correctly dismissed pursuant to the doctrines of *res judicata* and collateral estoppel. We affirm the trial court's order dismissing Williams' lawsuit against Defendants. However, we reverse the trial court's order dismissing WHF's lawsuit against Defendants and remand for additional evidence.

The evidence of record tends to show that Williams and Crystal Williams were at all times relevant to these proceedings husband and wife and managers of Platinum Lions Group, LLC., and WHF, Inc. of Virginia. Peabody is the sole shareholder and officer of Peabody's Home Improvements, Inc.

On 3 April 2008, Williams changed the registered agent of Peabody's Home Improvements, Inc., from Peabody to Williams by allegedly forging Peabody's signature on a Change of Registered Office and/or Registered Agent form, which stated that Williams was the new registered agent and president of Peabody's Home Improvements, Inc.

On 1 October 2008, Williams, allegedly misrepresenting himself as the president of Peabody's Home Improvements, Inc., signed four general warranty deeds purportedly granting Platinum Lions Group, LLC, a fee simple interest in four properties owned by Peabody's Home Improvements, Inc. On 4 October 2008, Williams allegedly forged the signature of Crystal Williams, his wife and the president of Platinum Lions Group, LLC, on an additional four general warranty deeds referencing the same four properties, which supposedly granted Crystal Williams a fee simple interest in the properties. The record also contains one additional general warranty deed, filed on 3 April 2009, which purportedly conveyed title to three of the same four properties from Crystal Williams to WHF.

On 10 November 2008, Peabody's Home Improvements, Inc., filed a complaint and action to quiet title (File # 08 CVS 11281) ("original lawsuit") against Williams, Crystal Williams, and Platinum Lions Group, LLC, alleging claims for fraud, conspiracy to commit fraud, and unfair and deceptive trade practices.

On 15 January 2009, Williams filed a motion to dismiss the complaint alleging the following: "[T]he action . . . involve[d], at best, an intracorporate dispute between shareholders [of Peabody's Home Improvements, Inc.]"; Peabody lacked standing and corporate authority to file the complaint; Williams was the president and sole shareholder of Peabody's Home Improvements, Inc.; Williams, as president of Peabody's Home Improvements, Inc., executed general warranty deeds conveying title to the four aforementioned properties; Williams "does not desire that his wholly owned corporation . . . sue him and has not authorized it to sue him." Williams asserted no counterclaims.

On 12 March 2010, Williams filed a response to Peabody's request for admissions, in which Williams admitted he signed Peabody's name to the Change of Registered Office and/or Registered Agent form. However, Williams claimed to have signed it with Peabody's assent and permission.

Also on 12 March 2010, Williams filed an affidavit which ostensibly contradicted his assertions in the motion to dismiss by stating that Peabody's Home Improvements, Inc., is "sole[ly] operated by Annittie Peabody[.]" Williams also stated in the affidavit that he placed $100,000.00 in an account Peabody opened in the name of Peabody's Home Improvements, Inc., and these monies were used to purchase the four properties. Williams asserted that to quiet title such

that Peabody's Home Improvements, Inc., owned the four properties would unjustly enrich Peabody and be grossly inequitable.

Peabody's Home Improvements, Inc., filed a motion for summary judgment, which the trial court granted on 19 March 2010. Williams did not appeal this order.

On 24 March 2010, Plaintiffs filed a complaint (File # 10 CVS 2682) ("present lawsuit") against Defendants, alleging unjust enrichment and requesting injunctive relief to restrain Defendants from selling the four properties.

On 1 June 2010, Defendants filed an answer and moved to dismiss Plaintiffs' complaint on grounds of *res judicata* and collateral estoppel. On 21 June 2010, the trial court entered an order granting summary judgment in favor of Defendants on grounds of *res judicata* and collateral estoppel. From this order, Plaintiffs appeal.

I: Summary Judgment

Plaintiffs' argument on appeal is that the trial court erred by entering summary judgment against Plaintiffs because the doctrines of *res judicata* and collateral estoppel do not apply.

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (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). *Res judicata* and collateral estoppel are affirmative defenses. *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 374, 649 S.E.2d 14, 26 (2007).

"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).

In the trial court's order granting Defendants' motion for summary judgment, the trial court made the following conclusion:

> The court finds as a matter of law and pursuant to the doctrine[s] of *res judicata* and collateral estoppel that all issues involving the parties related to this subject suit were decided in *Peabody's Home Improvements Inc. v. Tryone Williams et al.* (Cumberland County File No.: 08-CVS-11281) and the Plaintiff is therefore estopped from asserting this new lawsuit.

As such, our review is limited to whether the doctrines of *res judicata* and collateral estoppel were correctly applied.

II: *Res Judicata* and Collateral Estoppel

"The doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) are companion doctrines which have been developed by the Courts for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Little v. Hamel*, 134 N.C. App. 485, 487, 517 S.E.2d 901, 902 (1999) (quotation omitted).

"Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citation omitted). "For *res judicata* to apply, a party must show that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both the party asserting *res judicata* and the party against whom *res judicata* is asserted were either parties or stand in privity with parties." *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413-14, 474 S.E.2d 127, 128 (1996) (quotation omitted). "The doctrine prevents the relitigation of all matters . . . that were or should have been adjudicated in the prior action." *Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880 (quotation omitted).

Under the doctrine of collateral estoppel, or issue preclusion, "a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." *Frinzi*, 344 N.C. at 414, 474 S.E.2d at 128. A party asserting collateral estoppel is required to show that "the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both the party asserting collateral estoppel and the party against whom collateral estoppel is asserted were either parties to the earlier suit or were in privity with parties."[1] *Id.* at 414, 474 S.E.2d at 128-29.

"In general, a cause of action determined by an order for summary judgment is a final judgment on the merits." *Green v. Dixon*, 137 N.C. App. 305, 310, 528 S.E.2d 51, 55, *aff'd per curiam*, 352 N.C. 666, 535 S.E.2d 356 (2000). The parties in the present case do not dispute that a final judgment on the merits was entered in the original lawsuit.

i: Collateral Estoppel

[1] We first address whether the trial court erred by barring Plaintiffs' action on grounds of collateral estoppel. We conclude the trial court erred.

For purposes of collateral estoppel, "the prior judgment serves as a bar *only as to issues actually litigated* and determined in the original action." *City of Asheville v. State*, 192 N.C. App. 1, 17, 665 S.E.2d 103, 117 (2008), *appeal dismissed, disc. review denied*, 363 N.C. 123, 672 S.E.2d 685 (2009) (quotation omitted) (emphasis in original). "[A]n issue is actually litigated, for purposes of collateral estoppel or issue preclusion, if it is properly raised in the pleadings or otherwise submitted for determination and [is] in fact determined." *Id.* (quotation omitted). "A very close examination of matters actually litigated must be made in order to determine if the underlying issues are in fact identical[;] [i]f they are not identical, then the doctrine of collateral estoppel does not apply." *Id.*

In the original lawsuit in this case, Peabody's Home Improvements, Inc., brought suit against Williams, Crystal Williams, and Platinum

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1. *But see Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 432-34, 349 S.E.2d 552, 559-60 (1986) (stating, "[t]he modern trend in both federal and state courts is to abandon the requirement of mutuality for collateral estoppel, subject to certain exceptions, as long as the party to be collaterally estopped had a full and fair opportunity to litigate the issue in the earlier action[,]" and holding, "we see no good reason for continuing to require mutuality of estoppel in cases like this case").

Lions Group, LLC, alleging causes of action to quiet title, for unfair and deceptive trade practices, fraud, and conspiracy to commit fraud. The defendants in the original lawsuit did not assert counterclaims. In the present lawsuit, Plaintiffs brought suit against Defendants alleging unjust enrichment and praying for injunctive relief. No determination was made regarding unjust enrichment or injunctive relief in the original final judgment on the merits. We conclude the issues in the present lawsuit were not actually litigated in the original lawsuit, and therefore, collateral estoppel does not bar Plaintiffs' action. The trial court erred by entering summary judgment because Plaintiffs' claims were barred by collateral estoppel.

ii: *Res Judicata:* Estoppel of Claims

[2] We next address whether Plaintiffs' claims were estopped on principles of *res judicata. Res judicata* "bars every ground of recovery or defense which was actually presented or which could have been presented in the previous action." *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 93, 367 S.E.2d 335, 336-37, *disc. rev. denied*, 323 N.C. 173, 373 S.E.2d 108 (1988). A final judgment "operates as an estoppel not only as to all matters actually determined or litigated in the prior proceeding, but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination." *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986) (citation omitted). "A party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery; thus, a party will not be permitted, except in special circumstances, to reopen the subject of the . . . litigation with respect to matters which might have been brought forward in the previous proceeding." *Id.* at 23, 331 S.E.2d at 730. "The defense of *res judicata* may not be avoided by shifting legal theories or asserting a new or different ground for relief[.]" *Id.* at 30, 331 S.E.2d at 735.

> The plea of *res adjudicata* applies, . . . not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it.

Edwards v. Edwards, 118 N.C. App. 464, 472, 456 S.E.2d 126, 131 (1995) (quotation omitted).

Plaintiffs argue on appeal that "the issues in the first suit . . . were different[;] . . . and the issues raised in the [present lawsuit] were not relevant and material to the first ligitation[.]" We are not persuaded. At the heart of both the original and present lawsuits lies a dispute regarding the four properties. In the original lawsuit, Peabody's Home Improvements, Inc., alleged the deeds conveying title were "deceptively and fraudulently executed[.]" In the present lawsuit, Plaintiffs alleged "the funds of the Plaintiffs were the sole source of revenue for acquisition of the properties." We believe Plaintiffs' claims in the present lawsuit are claims which Plaintiffs, exercising reasonable diligence, might have brought forward at the time of the original lawsuit. Thus, assuming *arguendo* Plaintiffs and Defendants in the present lawsuit satisfy the requirement of identity of parties, Plaintiffs' claims are barred by *res judicata*.

iii: *Res Judicata:* Identity of Parties

[3] We now address whether Plaintiffs and Defendants in the present lawsuit are the same or in privity with the parties to the original lawsuit. "[B]oth the party asserting *res judicata* and the party against whom *res judicata* is asserted [must be] either parties or stand in privity with parties" to the original action. *Frinzi*, 344 N.C. at 414, 474 S.E.2d at 128. "In general, privity involves a person so identified in interest with another that he represents the same legal right." *Whitacre P'ship*, 358 N.C. at 36, 591 S.E.2d at 893 (quotation omitted). "Although the meaning of 'privity' has proven to be elusive, and there is no definition of the word . . . which can be applied in all cases, the prevailing definition in our cases, at least in the context of *res judicata[,]* . . . is that privity denotes a mutual or successive relationship to the same rights of property." *Id.* (quotation omitted). "In determining whether such a privity relation exists, courts will look beyond the nominal party whose name appears on the record as plaintiff and consider the legal questions raised as they may affect the real party or parties in interest." *Id.*

The mere fact that one is a shareholder or officer of a corporation is not sufficient to establish privity for purposes of *res judicata* between the shareholder or officer and the corporation. *Troy Lumber Co. v. Hunt*, 251 N.C. 624, 627, 112 S.E.2d 132, 135 (1960).

However, there is an exception to the general rule requiring identity of parties:

> A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary interest or financial interest in the judgment or *in the determination of a question of fact or a question of law with reference to the same subject matter, or transactions;* if the other party has notice of his participation, the other party is equally bound.

Thompson v. Lassiter, 246 N.C. 34, 39, 97 S.E.2d 492, 496 (1957) (emphasis in original); *see also Smoky Mountain Enterprises, Inc. v. Rose*, 283 N.C. 373, 196 S.E.2d 189 (1973). *Smoky Mountain Enterprises* and *Troy Lumber Co.* address this exception in the context of corporations. In both *Smoky Mountain Enterprises* and *Troy Lumber Co.*, the North Carolina Supreme Court placed emphasis on the shareholders of the corporations in determining whether an individual had "control" for purposes of applying the *Lassiter* exception to the rule of privity. *Smoky Mountain Enterprises, Inc.*, 283 N.C. at 377, 196 S.E.2d at 192 (applying the exception in part because the individual was the president and owned all the stock of the corporate party); *Troy Lumber Co.*, 251 N.C. at 628, 112 S.E.2d at 136 (declining to apply the exception in part because "[the corporation] has other shareholders than [the individual]").

In the present case, the parties to the original lawsuit (File # 08 CVS 11281) were Peabody's Home Improvements, Inc., Williams, Crystal Williams, and Platinum Lions Group, LLC. The parties to the present lawsuit (File # 10 CVS 2682) are Williams, WHF, Peabody, and Peabody's Home Improvements, Inc. Both Peabody and WHF are new parties in the present lawsuit.[2] Although evidence of record tends to show that Williams is the chief operating officer of WHF, this fact alone is insufficient to create privity between WHF and Williams. *See Troy Lumber Co.*, 251 N.C. at 627, 112 S.E.2d at 135 (holding, "[t]he admission that F. L. Taylor is the controlling stockholder of Troy Lumber Company, is chairman of its board of directors, [is] President, and has complete charge of its operations and business, is insufficient to establish identity or privity between him and the corporation for the purpose of *res judicata*"). Likewise, the evidence surrounding Peabody's roles in ownership and management of Peabody's Home Improvements, Inc., is insufficient to create privity between Peabody

2. We note that both Crystal Williams and Platinum Lions Group, LLC, were parties to the original lawsuit but not to the present lawsuit. Their absence in the present case is immaterial, as they are neither a "party asserting *res judicata*" nor a "party against whom *res judicata* is asserted[.]" *Frinzi*, 344 N.C. at 414, 474 S.E.2d at 128.

and Peabody's Home Improvements, Inc. *Id.* Therefore, we must determine whether the *Lassiter* exception to the rule requiring privity of identities applies to Peabody and Peabody's Home Improvements, Inc., and to Williams and WHF.

a: Peabody and Peabody's Home Improvements, Inc.

We first consider Peabody's "control" of the original lawsuit and the present lawsuit, which is the threshold requirement of the exception to the rule requiring privity of identities. *See Lassiter*, 246 N.C. 34, 39, 97 S.E.2d 492, 496 (stating, "[a] person who is not a party but who *controls* an action, individually or in cooperation with others . . .") (emphasis added). Williams' affidavit provides uncontroverted evidence that Peabody's Home Improvements, Inc., is "solely operated by Anittie Peabody"; is "without real directors or shareholders"; and is "the alter ego of Anittie Peabody." We believe this is sufficient to satisfy the control element of the *Lassiter* exception to the rule requiring privity. *See Smoky Mountain Enterprises, Inc.*, 283 N.C. 373, 196 S.E.2d 189.

We next address the second requirement of the *Lassiter* exception, whether Peabody "has a proprietary interest or financial interest in the judgment[.]" *Lassiter*, 246 N.C. at 39, 97 S.E.2d at 496. Peabody's Home Improvements, Inc., owned the four properties central to both the original and present lawsuits prior to the properties being purportedly conveyed to Platinum Lions Group, LLC, by Williams. There fore, the corporate party, Peabody's Home Improvements, Inc., has a financial interest in the judgment. Because the evidence shows Peabody's "control" of the corporate party, Peabody, individually, also has a financial interest in the judgment.

We finally address the third requirement of the *Lassiter* exception, whether Peabody has an interest "in the determination of a question of fact or a question of law with reference to the same subject matter, or transactions[.]" *Lassiter*, 246 N.C. at 39, 97 S.E.2d at 496. Because this is a dispute regarding four properties, and because Peabody's Home Improvements, Inc., alleged in the original lawsuit the deeds conveying title were "deceptively and fraudulently executed[,]" we believe Peabody and Peabody's Home Improvements, Inc., have an interest in the determination of questions of law and fact in this case.

Because the foregoing evidence supports the requirements set forth in *Lassiter* for application of the exception to the rule requiring privity, we conclude the *Lassiter* exception applies to Peabody and

Peabody's Home Improvements, Inc. Therefore, assuming *arguendo* the *Lassiter* exception also applies to Williams and WHF, the identity of parties requirement is met, such that the trial court did not err in concluding the doctrine of *res judicata* operated to estop Plaintiffs' action against Defendants. We must next determine whether the *Lassiter* exception, in fact, applies to Williams and WHF.

b: Williams, individually

Regardless of whether there is evidence of control to support the *Lassiter* exception as to WHF, Williams was a party to the original lawsuit and also a party to the present lawsuit. Satisfying the *Lassiter* exception to the rule requiring privity is not necessary to our determination of whether *res judicata* applies to Williams, individually. Because Williams was a party to both lawsuits, and because the evidence supports application of the *Lassiter* exception to Peabody and Peabody's Home Improvements, Inc., the identity of parties requirement for application of *res judicata* to Williams' lawsuit against Defendants in the present case is met. *Frinzi*, 344 N.C. at 414, 474 S.E.2d at 128 ("[B]oth the party asserting *res judicata* and the party against whom *res judicata* is asserted [must be] *either* parties or stand in privity with parties" to the original action") (Emphasis added). *Res judicata* thus applies to Williams' lawsuit against Defendants, and the trial court did not err by dismissing his lawsuit pursuant to the doctrine of *res judicata*. We affirm this portion of the trial court's order.

c: Williams and WHF

We must next determine whether the *Lassiter* exception applies to WHF. We first consider Williams' "control" of the original lawsuit and the present lawsuit, which is the threshold requirement of the exception to the rule requiring privity of identities. *See Lassiter*, 246 N.C. 34, 39, 97 S.E.2d 492, 496.

We believe *Smoky Mountain Enterprises, Inc.*, 283 N.C. 373, 196 S.E.2d 189, is instructive in this case. In *Smoky Mountain Enterprises, Inc.*, W.F. Burbank was the president and sole stockholder of Smoky Mountain Enterprises, Inc. *Id.* at 374, 196 S.E.2d at 190. Burbank and Jesse Rose signed a paper writing purporting to be a sales contract, which provided for the sale of all the assets of Smoky Mountain Enterprises, Inc. Burbank's signature on the contract did not denote his corporate capacity and was not attested to by any other officer of Smoky Mountain Enterprises, Inc. *Id.* On 27 February 1970, Burbank individually instituted an action against the

defendant, Rose, for breach of the contract. The trial court granted the defendant's motion for summary judgment and dismissed that action with prejudice. *Id.* at 375, 196 S.E.2d at 191. On 7 October 1971, Smoky Mountain Enterprises, Inc., as the plaintiff, filed a complaint against Rose, alleging the same breach of contract. The North Carolina Supreme Court held the second suit was barred by the doctrine of *res judicata. Id.* at 378, 196 S.E.2d at 193.

In *Smoky Mountain Enterprises, Inc.*, unlike the present case, Burbank's control of the corporation and of both the original and subsequent lawsuits, was sufficiently supported by evidence. The Court concluded, "Burbank was personally in control of the action before Judge Martin in Superior Court and the present action[;] [h]e had the same proprietary interest or financial interest in the judgment in both cases, and was equally concerned with the determination of questions of fact or questions of law pertaining to the contract which was involved in both actions." *Id.* at 377, 196 S.E.2d at 192. Burbank's control of the original and subsequent actions was shown, in part, by evidence that Burbank was the president and owned all the stock of Smoky Mountain Enterprises, Inc. The Court emphasized Burbank's testimony: "On June 26, 1969, I was President of Smoky Mountain Enterprises, Inc., a corporation in which I owned all the stock." *Id.* at 376, 196 S.E.2d at 192. The Court also emphasized the fact that central to both the original and subsequent lawsuit was a contract between Smoky Mountain Enterprises, Inc., and the defendant, which was signed by Burbank. The Court held that *res judicata* required that "Smoky Mountain Enterprises, Inc., is bound by the judgment of [the previous action][,]" which was instituted by Burbank, individually. *Id.* at 378, 196 S.E.2d at 192.

In the present case, the only evidence of record pertaining to Williams' control of the original and present lawsuits, particularly the action by WHF against Defendants, is that Williams is the chief operating officer of WHF. There is no evidence of record that Williams is the sole or controlling shareholder of WHF, such that Williams was in control of WHF, and thereby, in control of WHF's action against Defendants. The record is also silent on the question of whether there are other shareholders of WHF. Unlike in *Smoky Mountain Enterprises, Inc.* where the issue of control was clear, the evidence in this case shows, at most, that Williams was WHF's chief operating officer. *Troy Lumber Co.* holds this alone is insufficient to create privity. We believe a logical extension of *Smoky Mountain Enterprises, Inc.* and *Troy Lumber Co.*, is that this alone is insufficient to establish control

for purposes of suspension of the rule of privity. Because there is no evidence regarding the shareholders or other officers of WHF of record, and because the sole evidence of control is that Williams is WHF's chief operating officer, we believe this case is distinguishable from *Smoky Mountain Enterprises, Inc.* We believe the evidence in this case is insufficient to invoke the exception to the rule requiring privity as to WHF. If we concluded otherwise, the rule of privity for purposes of *res judicata* would be suspended in every case involving a chief operating officer of a corporation and the respective corporation, provided the remaining requirements in *Lassiter*, apart from "control," were met.[3]

We next address the second requirement of the *Lassiter* exception to the rule requiring identity of parties, whether WHF "has a proprietary interest or financial interest in the judgment[.]" *Lassiter*, 246 N.C. at 39, 97 S.E.2d at 496. At the heart of both the original and present lawsuits lies a dispute regarding the four properties. In the original lawsuit, Peabody's Home Improvements, Inc., alleged the deeds conveying title were "deceptively and fraudulently executed[.]" In the present lawsuit, Plaintiffs alleged "the funds of the Plaintiffs were the sole source of revenue for acquisition of the properties." Moreover, the record contains a general warranty deed purporting to convey three of the four aforementioned properties from Crystal Williams to WHF. Based on the foregoing, we conclude WHF has a financial interest in the judgment.

We finally address the third requirement of the *Lassiter* exception, whether WHF has an interest "in the determination of a question of fact or a question of law with reference to the same subject matter, or transactions[.]" *Lassiter*, 246 N.C. at 39, 97 S.E.2d at 496. Again, because this is a dispute regarding the four properties, because Plaintiffs alleged that Plaintiffs' funds "were the sole source of revenue for acquisition of the properties[,]" and because three of the properties were purportedly conveyed to WHF, we conclude WHF has an interest in the determination of questions of fact and law in reference to the subject matter in this case.

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3. By comparison, although not authoritative in the context of *res judicata*, the definition of the element of control in the instrumentality rule for purposes of piercing the corporate veil offers some instruction on this point. It requires the following: "Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practices in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will, or existence of its own." *Glenn v. Wagner*, 313 N.C. 450, 455, 329 S.E.2d 326, 330 (1985) (quotation omitted).

While the evidence supports the second and third requirements set forth in *Lassiter*—that WHF has a "financial interest" and an interest in the "determination of a question of fact or a question of law with reference to the same subject matter"—the evidence is insufficient to support the control requirement of the *Lassiter* exception to the rule requiring privity. Therefore, we must conclude the *Lassiter* exception cannot apply to WHF. Based on the foregoing, we conclude there is a genuine issue as to whether the exception to the rule of privity applies to WHF because the evidence in this case is insufficient to satisfy the requirement of control. Therefore, we further conclude the trial court erred by granting summary judgment barring WHF's complaint on grounds of *res judicata*.

The dissenting opinion places strong emphasis on this Court's opinion in *Cline v. McCullen*, 148 N.C. App. 147, 557 S.E.2d 588 (2001), in its determination that the identity of parties requirement is met with regard to WHF and Williams. We believe *Cline* is neither contrary to nor concordant with our holding on the issue of identity of parties in the present case: *Cline* is simply inapplicable because the opinion in *Cline* does not involve corporations, and the *Cline* Court does not apply the Lassiter exception to the rule requiring privity of parties.

III: Conclusion

In summary, we conclude that the doctrine of collateral estoppel does not apply to the present case, and the trial court erred by concluding Plaintiffs' action was barred by collateral estoppel. We further conclude the trial court did not err in applying the doctrine of *res judicata* to dismiss Williams' lawsuit against Defendants. However, in considering the application of *res judicata* to WHF's lawsuit against Defendants—particularly, the requirement of identity of parties—we cannot presume facts not in the record regarding Williams' control of the original and present lawsuits. We believe these facts are necessary in light of the holdings in *Smoky Mountain Enterprises* and *Troy Lumber Co.* As the evidence at trial was inadequate for the trial court to conclude the doctrine of *res judicata* applied to bar WHF's action, we conclude the trial court erred by doing so. We reverse this portion of the trial court's order on summary judgment and remand[4]

4. *See Johnson v. Schultz*, 364 N.C. 90, 96, 691 S.E.2d 701, 706 (2010) (affirming this Court's reversal of an order on summary judgment, stating that "a factual inquiry must be conducted to determine whether [the attorney] also represented sellers during the closing process[,]" and holding that "we remand this case to the trial court to determine if an attorney-client relationship existed between sellers and [the attorney]").

this case to the trial court to determine whether Williams had control of WHF and its action against Defendants.[5]

REVERSED and REMANDED.

Judge CALABRIA concurs.

Judge ERVIN concurs in part, dissents in part by separate opinion.

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

Although I concur in the Court's treatment of the "identity of claims" issue, its determination that the necessary "identity of parties" exists between Ms. Peabody and Peabody Home Improvements, and its decision to affirm the trial court's conclusion that the claims asserted by Mr. Williams against Ms. Peabody and Peabody Home Improvements are barred by the doctrine of *res judicata*, I am unable to reach a similar conclusion with respect to its discussion of the "identity of parties" question as applied to Mr. Williams and WHF. After carefully reviewing the record in light of the applicable law, I believe that the trial court correctly determined that the necessary "identity of parties" existed in this case with respect to Mr. Williams and WHF and, for that reason, properly granted summary judgment against both Plaintiffs and in favor of both Defendants on *res judicata* grounds. Given my conclusion that this case can be fully resolved by applying *res judicata* principles, I see no need to address the extent to which Plaintiffs' claims are collaterally estopped by determinations made during the course of the prior litigation between certain of the parties to this case. As a result, I concur in the Court's decision in part and dissent in part.

"Under the doctrine of *res judicata*, or claim preclusion, 'a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them.' " *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413, 474 S.E.2d 127, 128 (1996) (quoting *Thomas M. McInnis & Assoc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)). "For *res judicata* to apply, a party must 'show that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both [the party asserting *res judicata* and the party

5. We do not address Defendants' remaining arguments on appeal because our review is limited to the trial court's conclusion of law in the order granting summary judgment. *Ellis*, 319 N.C. at 415, 355 S.E.2d at 481.

against whom *res judicata* is asserted] were either parties or stand in privity with parties.' " *Tucker*, 344 N.C. at 413-14, 474 S.E.2d at 128 (quoting *McInnis*, 318 N.C. at 429, 349 S.E.2d at 557). As a result of the fact that my only disagreement with the Court's discussion of the *res judicata* issue stems from its discussion of the "identity of parties" issue and its conclusion that Mr. Williams' participation in the prior litigation does not operate to bar the claims that have been asserted on behalf of WHF, I will focus the remainder of this concurring and dissenting opinion on that issue.

"The meaning of "privity" for res judicata purposes may be elusive." *Settle v. Beasley*, 309 N.C. 616, 620, 308 S.E.2d 288, 290 (1983). "Indeed, 'there is no definition of the word "privity" which can be applied in all cases.' " *Hales v. N.C. Insurance Guaranty Assn.*, 337 N.C. 329, 333-34, 445 S.E.2d 590, 594 (1994) (quoting *Masters v. Dunstan*, 256 N.C. 520, 524, 124 S.E.2d 574, 577 (1962)). "In general, 'privity involves a person so identified in interest with another that he represents the same legal right.' " *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 36, 591 S.E.2d 870, 893 (2004) (quoting *Tucker*, 344 N.C. at 417, 474 S.E.2d at 130). "The prevailing definition that has emerged from our cases is that 'privity' for purposes of *res judicata* and collateral estoppel 'denotes a mutual or successive relationship to the same rights of property.' " *Hales*, 337 N.C. at 334, 445 S.E.2d at 594 (quoting *Settle*, 309 N.C. at 620, 308 S.E.2d at 290) (other citations omitted); *see also Cline v. McCullen*, 148 N.C. App. 147, 150-51, 557 S.E.2d 588, 591 (2001) (holding that an action brought by a bonding business was barred by a prior judgment entered in a proceeding brought by a bond runner employed by that bonding business on the grounds that the bond runner "was in essence suing for the lost profits of [the bonding business] from whom he derived his commission," that "this successive or mutual relationship in the same rights in property establishes that the interests of both [the bond runner and the bonding business were] so intertwined that privity exists between them," and that the bond runner "had a substantial interest [stemming from the sharing of commissions that] constituted a proprietary interest in the judgment").

In addition:

> A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary interest or financial interest in the judgment or *in the determination of a question of fact or a question of law with reference to the same subject matter, or transactions*;

> if the other party has notice of his participation, the other party is equally bound.

Thompson v. Lassiter, 246 N.C. 34, 39, 97 S.E.2d 492, 496 (1957) (emphasis in original) (quoting *Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co.*, 238 N.C. 679, 692, 79 S.E.2d 167, 176 (1953) (quoting *Restatement of Judgments* § 84)). Put another way:

> "The rule is stated in 50 C.J.S. 318, as follows: 'A person who is neither a party nor privy to an action may be concluded by the judgment therein if he openly and actively, and with respect to some interest of his own, assumes and manages the defense of the action. A person who is not made a defendant of record and is not in privity with a party to the action may, as a general rule, subject himself to be concluded by the result of the litigation if he openly and actively, and with respect to some interest of his own, assumes and manages the defense of the action, although there is some authority to the contrary.' "

Thompson, 246 N.C. at 39, 97 S.E.2d at 496. As a result, in a case in which the plaintiff in the former action "is the president and owns all of the stock of [the plaintiff in the present action]," "was personally in control of [both the former action and the present action]," "had the same proprietary interest or financial interest in the judgment in both cases, and was equally concerned with the determination of questions of fact or questions of law pertaining to the contract which was involved in both actions," the plaintiff in the second action is bound by a judgment rendered against the plaintiff in the prior action even if the parties in question are not in "privity" with each other as that concept is utilized in our *res judicata* jurisprudence. *Enterprises v. Rose*, 283 N.C. 373, 377, 196 S.E.2d 189, 192 (1973); *see also Rodgers Builders v. McQueen*, 76 N.C. App. 16, 29, 331 S.E.2d 726, 734 (1985) (holding that an arbitration award was entitled to *res judicata* effect against an individual "not named as a party to the arbitration" because "he had a strong financial interest in the determination of the issues there because of his ownership interests" in entities that were parties to the arbitration and because "he was an active and controlling participant in the arbitration"), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986).

In reaching the conclusion that WHF is not bound by the prior judgment in favor of Peabody Home Improvements and adverse to Mr. Williams, the Court focuses on its determination that the record does not contain sufficient evidence that Mr. Williams controlled

WHF.[1] In essence, the Court concludes that the trial court's order with respect to WHF should be reversed on the grounds that *res judicata* principles have no application to cases involving individuals or entities that were not parties to the prior case in the absence of a finding that one of these individuals or entities "controlled" the other. I am unable to agree with the Court's exclusive focus upon the presence or absence of "control" because I believe that a proper resolution of the "identity of parties" issue in cases in which there is not a literal identity of parties does not hinge exclusively on the issue of "control." Instead, I believe that the relevant decisions of the Supreme Court and this Court require us to engage in a two-step analysis in such cases. First, we must determine whether Mr. Williams and WHF were "so identified in interest with another that [they] represent[] the same legal right[s]," *Whitacre*, 358 N.C. at 36, 591 S.E.2d at 893, such that they had " 'a mutual or successive relationship to the same rights of property.' " *Hales*, 337 N.C. at 334, 445 S.E.2d at 594 (quoting *Settle*, 309 N.C. at 620, 308 S.E.2d at 290). In the event that the answer to that initial question is in the affirmative, we need not reach the "control" issue upon which the Court focuses its attention. *Cline*, 148 N.C. App. at 150-51, 557 S.E.2d at 591 (stating that, "[a]lthough there is insufficient evidence to show that plaintiff controlled the prior litigation . . ., the court's findings do establish that plaintiff had a substantial interest, which in light of the fifty-fifty sharing of commission[s], constituted a proprietary interest in the judgment" sufficient to trigger a *res judicata* bar). In the event that the answer to the first question is negative, we must determine whether *res judicata* principles should be deemed applicable on the basis of "control." Unless one adopts an approach like that which I have outlined and rejects the approach adopted by the Court, the concept of "privity" becomes co-extensive with the concept of "control," a result which finds no support in the applicable decisional law, is directly

1. In its opinion, the Court concludes that the undisputed record evidence shows that Ms. Peabody controlled Peabody Home Improvements to such an extent as to render the two of them "identical" for *res judicata* purposes. As a result of the fact that I agree with the Court's conclusion to that effect, I see no need to address the extent, if any, to which Ms. Peabody and Peabody Home Improvement were asserting the same legal rights, thereby obviating any need for a "control" analysis.

contrary to this Court's decision in *Cline*,[2] and which the Court makes no effort to explain or defend.[3]

The undisputed evidence before the trial court clearly demonstrates that the legal interests asserted by Mr. Williams and WHF were identical. According to the allegations of the verified complaint filed in the present case, the properties at issue in this litigation "were acquired with funds belonging to the Plaintiffs" and "all funds for improvements and/or repairs to the above described real properties were derived from the Plaintiffs." Simply put, the allegations set out in the Plaintiffs' complaint describe the rights of Mr. Williams and WHF as one and the same. For that reason, Mr. Williams and WHF are, in fact, asserting the "same legal rights," a determination which compels the conclusion that the claims asserted by Mr. Williams and WHF rest on a " 'mutual or successive relationship to the same rights of property,' " *Hales*, 337 N.C. at 334, 445 S.E.2d at 594 (quoting *Settle*, 309 N.C. at 620, 308 S.E.2d at 290), sufficient to establish the necessary privity for *res judicata* purposes. As a result, I believe that the undisputed evidence before the trial court at the time of the summary judgment hearing demonstrated the existence of a sufficient identity of legal interests between Mr. Williams and WHF to support application of the doctrine of *res judicata* for the purpose of barring Plaintiffs' claims in this case.[4]

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2. Although *Cline* involved a proprietorship rather than a corporation, I do not believe that this distinction is a material one, since both *Cline* and the present case deal with the *res judicata* effect of a litigation brought by an affiliated individual on subsequent litigation brought by a business, or *vice versa*.

3. The form of analysis adopted by the Court is also substantially undercut by *Troy Lumber*, in which the Supreme Court held that *res judicata* effect should not be afforded to a judgment rendered in a previous personal injury action in a subsequent property damage case brought on behalf of a corporation arising from the same accident despite the fact that the personal injury case was prosecuted by the corporate president, chairman of the board, and controlling stockholder acting in his individual capacity. In direct conflict with the Court's "control-only" approach to resolving "identity of parties" issues, the Supreme Court found that the judgment entered in the individual plaintiff's personal injury suit was not entitled to *res judicata* effect despite the fact that he "has at all times since the institution of the [property damage] action had control of it, as he also had control over his" individual personal injury claim. [*Troy*] *Lumber Co. v. Hunt*, 251 N.C. 624, 626, 112 S.E.2d 132, 134 (1960).

4. For the reasons set forth in the text, I do not believe that we need to address the "control" issue in order to properly resolve this case. In the event that "control" is, as the Court suggests, critical to the making of a proper decision, I question the correctness of the Court's conclusion that the person designated as the chief operating officer of a corporate entity is not in "control" of that corporation for *res judicata* purposes. Although the Court cites *Troy Lumber* for the proposition that "[t]he mere fact

Thus, I believe that the trial court correctly granted summary judgment in favor of both Defendants and against both Plaintiffs and respectfully dissent from the Court's determination that the necessary "identity of parties" between Mr. Williams and WHG needed to support an affirmance of the trial court's order in its entirety did not exist. In addition, I do not believe, given my conclusion that we should affirm the trial court's decision on *res judicata* grounds, that we need to determine whether a similar result should be reached on the basis of collateral estoppel principles. I do, however, concur in the Court's discussion of the "identity of claims" component of the required *res judicata* analysis, in the Court's determination that the necessary "identity of parties" exists between Ms. Peabody and Peabody Home Improvements, and in the Court's decision to affirm the trial court's determination that Mr. Williams' claims should be dismissed on *res judicata* grounds. As a result, I concur in the Court's opinion in part and dissent in part.

WALTER SUTTON BAYSDEN v. THE STATE OF NORTH CAROLINA

No. COA11-395

(Filed 15 November 2011)

Constitutional Law—Second Amendment—Felony Firearms Act—unconstitutional as applied

The trial court erred by granting summary judgment for the State and denying plaintiff's "as applied" constitutional challenge to N.C.G.S. § 14-415.1, the Felony Firearms Act (Act). Although plaintiff had been convicted in Virginia in the 1970s of possessing a sawed-off shotgun and of the felonious sale of marijuana, the circumstances of neither involved any sort of violent conduct and plaintiff has been a law abiding citizen ever since; he was in

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that one is a shareholder or officer of a corporation is not sufficient to establish privity for purposes of *res judicata* between the shareholder or officer and the corporation," I do not believe that *Troy Lumber*, when read in context, supports the Court's conclusion with respect to the "control" issue. In fact, the Supreme Court held in *Troy Lumber* that the corporate officer involved in that case did, in fact, control litigation brought by the corporation and found *res judicata* principles inapplicable in that case for an entirely different reason. However, given my conclusion that the necessary "identity of parties" exists based on other considerations, I express no opinion concerning the extent, if any, to which the record shows that Mr. Williams sufficiently controlled WHF for *res judicata* purposes.

essentially the same position as the plaintiff in *Britt v. State*, 363 N.C. 546. The fact that the Act has been amended since *Britt* to allow exception or possible relief was not particularly relevant to the constitutional analysis because there was no statutory mechanism which plaintiff could use to seek relief given his particular situation. The fact that plaintiff had two rather than one prior felony conviction did not demonstrate the appropriateness of a finding for the State.

Judge BEASLEY dissenting.

Appeal by plaintiff from order entered 11 February 2011 by Judge Lucy N. Inman in Wake County Superior Court. Heard in the Court of Appeals 28 September 2011.

Dan L. Hardway Law Office, by Dan L. Hardway, for Plaintiff-Appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General John J. Aldridge, III, for the State.

ERVIN, Judge.

Plaintiff Walter Sutton Baysden appeals from an order rejecting his challenge to the constitutionality of the Felony Firearms Act, N.C. Gen. Stat. § 14-415.1 *et seq.*, both facially and as applied to the facts surrounding his personal situation. More specifically, Plaintiff argues that the Felony Firearms Act violates his right to bear arms as guaranteed by the Second Amendment to the United States Constitution as made applicable to the States by the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 30 of the North Carolina Constitution; the prohibition against the enactment of *ex post facto* laws and bills of attainder set out in Article I, Section 10 of the United States Constitution and Article I, Section 16 of the North Carolina Constitution; and the equal protection guarantees afforded by the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. After careful consideration of Plaintiff's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should be reversed and that this case should be remanded to the Wake County Superior Court for the entry of summary judgment in favor of Plaintiff.

I. Factual Background

A. Substantive Facts

On 8 November 1972, Plaintiff was convicted in Virginia Beach, Virginia, for the felonious possession of an unlawful weapon (a sawed-off shotgun). At that time, Plaintiff was 22 years old. Plaintiff had discovered the shotgun, which was "rusted up and inoperable," under a house on the beach. Plaintiff never engaged in any violent conduct while in possession of the sawed-off shotgun.

On 26 April 1977, Plaintiff was convicted for the felonious sale of marijuana in Norfolk, Virginia. Although Plaintiff admitted having experimented with marijuana when he was young, he denied having ever sold marijuana or having used or possessed illegal drugs since 1977.

In 1982, the Governor of Virginia restored the firearms-related rights that Plaintiff had forfeited as a result of these two convictions. A year later, the Bureau of Alcohol, Tobacco, and Firearms of the United States Department of the Treasury granted Plaintiff's application for relief from federal firearms disabilities pursuant to 18 U.S.C. § 925(c).

Plaintiff has resided in a house that he owns with his wife of 32 years in Onslow County since 1995. Since his conviction for selling marijuana in 1977, Plaintiff has not been charged with or convicted of any criminal offense other than minor traffic violations. In addition, Plaintiff has never been accused of engaging in acts of domestic violence or been the subject of either a protective order issued pursuant to Chapter 50B of the General Statutes or a no-contact order issued pursuant to Chapter 50C of the General Statutes.

Plaintiff was employed by the United States Department of Defense from 1981 until his retirement in 2007. During the course of his employment by the Department of Defense, Plaintiff maintained aircraft for the United States Navy. While employed by the Department of Defense, Plaintiff passed the background checks required for him to obtain necessary government security clearances and was decorated for exemplary service during a tour of duty in Iraq.

After the restoration of his right to use and possess firearms, Plaintiff owned firearms, which he used for self-defense purposes. In addition, Plaintiff collected guns and frequently participated in shooting matches. Plaintiff's possession and use of firearms after the restoration of his gun-related rights in 1983 never resulted in a complaint of any nature.

Upon moving to North Carolina in 1995, Plaintiff limited his possession of firearms to his home and business premises, consistent with North Carolina law as it existed at that time. After the enactment of the 2004 amendments to the Felony Firearms Act, which precluded convicted felons from possessing firearms at any location and under any set of circumstances, Plaintiff "dispossessed himself of all firearms." Plaintiff has never been charged with violating North Carolina's firearms statutes.

B. Procedural History

On 6 May 2010, Plaintiff filed a complaint seeking a declaration that the Felony Firearms Act is unconstitutional, both facially and as applied to him. On 1 June 2010, the State filed an answer denying the material allegations of Plaintiff's complaint. On 23 August 2010, after obtaining leave of court to do so, Plaintiff filed an amended complaint which reflected the 2010 amendments to the Felony Firearms Act enacted by the General Assembly and reiterated his request for a declaration that the Felony Firearms Act, as amended, violated his federal and state constitutional rights, both facially and as applied. On 13 September 2010, the State filed an amended answer denying the material allegations of Plaintiff's amended complaint.

On the same date, the State filed a motion seeking, alternatively, the dismissal of Plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2), 12(b)(3), and 12(b)(6), or the entry of summary judgment in the State's favor pursuant to N.C. Gen. Stat. § 1A-1, Rule 56. On 13 October 2010, Plaintiff filed a motion seeking the entry of summary judgment in his favor. After providing the parties with an opportunity to be heard at the 5 January 2011 civil session of the Wake County Superior Court, the trial court entered an order denying the State's dismissal motion and Plaintiff's summary judgment motion and granting the State's summary judgment motion on 11 February 2011. Defendant noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

A motion for summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). "A defendant may

show entitlement to summary judgment by: '(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim.' " *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 166, 684 S.E.2d 41, 46 (2009) (quoting *James v. Clark*, 118 N.C. App. 178, 180-81, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995)). As a result, "[a]n appeal from an order granting summary judgment solely raises issues of whether on the face of the record there is any genuine issue of material fact, and whether the prevailing party is entitled to judgment as a matter of law." *Carcano*, 200 N.C. App. at 166, 684 S.E.2d at 46 (citing *Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 352, 595 S.E.2d 778, 781 (2004)). A trial court's order granting or denying summary judgment is reviewed by this Court on a *de novo* basis, so that we " 'consider[] the matter anew and freely substitute[our] own judgment' for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 342, 678 S.E.2d 351, 354 (2009) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). As a result of the fact that, while "the parties disagree on the legal significance of the established facts, the facts themselves are not in dispute[,]" *Musi v. Town of Shallotte*, 200 N.C. App. 379, 381, 684 S.E.2d 892, 894 (2009) (quoting *Adams v. Jefferson-Pilot Life Ins. Co.*, 148 N.C. App. 356, 359, 558 S.E.2d 504, 507, *disc. review denied*, 356 N.C. 159, 568 S.E.2d 186 (2002)), "the only issue that we need to address is the extent, if any, to which the trial court erred," *Smith v. County of Durham*, ___ N.C. App. ___, ___, 714 S.E.2d 849, 855 (2011), by concluding that the Felony Firearms Act did not violate any of Plaintiff's state or federal constitutional rights, either facially or as applied to a person in Plaintiff's position.

B. Substantive Legal Analysis

According to Article I, Section 30 of the North Carolina Constitution:

> A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying con-

> cealed weapons or prevent the General Assembly from enacting penal statutes against that practice.

As a result of the fact that "North Carolina decisions have interpreted our Constitution as guaranteeing the right to bear arms to the people in [both] a collective sense . . . and also to individuals" and that "the right of individuals to bear arms is not absolute, but is subject to regulation," *State v. Dawson*, 272 N.C. 535, 546, 159 S.E.2d 1, 10 (1968) (citing *Nunn v. State*, 1 Ga. 243 (1846)), we are required to "determine whether, as applied to [P]laintiff, N.C. [Gen. Stat.] § 14-415.1 is a reasonable regulation." *Britt v. State*, 363 N.C. 546, 549, 681 S.E.2d 320, 322 (2009).

The legal principles governing "as-applied" constitutional challenges to the Felony Firearms Act have been enunciated in recent decisions of the Supreme Court and this Court. "Based on the facts of plaintiff's crime, his long post-conviction history of respect for the law, the absence of any evidence of violence by plaintiff, and the lack of any exception or possible relief from the statute's operation, as applied to plaintiff, the 2004 version of N.C. [Gen. Stat.] § 14-[415].1 is an unreasonable regulation, not fairly related to the preservation of public peace and safety." *Britt*, 363 N.C. at 550, 681 S.E.2d at 323. Put another way, "it is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety." *Id.* In considering an "as-applied" challenge to the application of the Felony Firearms Act to a specific individual, our analysis must "focus[] on five factors . . . : (1) the type of felony convictions, particularly whether they 'involved violence or the threat of violence,' (2) the remoteness in time of the felony convictions[,] (3) the felon's history of 'law-abiding conduct since [the] crime,' (4) the felon's history of 'responsible, lawful firearm possession' during a time period when possession of firearms was not prohibited, and (5) the felon's 'assiduous and proactive compliance with the 2004 amendment.' " *State v. Whitaker*, 201 N.C. App. 190, 205, 689 S.E.2d 395, 404 (2009) (quoting Britt, 363 N.C. at 550, 681 S.E.2d at 323), *aff'd on other grounds*, 364 N.C. 404, 700 S.E.2d 215 (2010). As a result of the fact that the trial court entered a detailed order spelling out the information disclosed by the undisputed record evidence, we clearly have a sufficient evidentiary record upon which to evaluate the validity of Plaintiff's claim, *State v. Buddington*, ___ N.C. App. ___, ___, 707 S.E.2d 655, 657 (2011) (stating that, "[i]n order for [a party] to prevail [based upon]

an as-applied constitutional challenge to N.C. Gen. Stat. § 14-415.1, he must present evidence which would allow the trial court to make findings of fact" relating to the factors enunciated in the Supreme Court's decision in *Britt* and this Court's decision in *Whitaker*), and will proceed to address Plaintiff's claim on the merits.

The analysis outlined in *Britt* and *Whitaker* is relatively straightforward. Nothing in either *Britt* or W*hitaker* indicates that any one of the five factors listed above is determinative. Instead, each of the five factors is a consideration that must be taken into account in making the required constitutional determination. As a result, the "five factor" analysis set out in *Britt* and *Whitaker* is not a hard and fast set of rules; instead, the five factors constitute a set of criteria that must be considered in determining the validity of a litigant's "as-applied" challenge to the constitutionality of the Felony Firearms Act.

After carefully examining the undisputed evidentiary materials in the record, we believe that Plaintiff is in essentially the same position as Mr. Britt. As the record clearly reflects, Plaintiff was convicted of two felony offenses, neither of which involved any sort of violent conduct, between three and four decades ago. Since that time, Plaintiff has been a law-abiding citizen. After having had his firearms-related rights restored, Plaintiff used such weapons in a safe and lawful manner from the date of restoration until he became subject to the prohibition worked by the 2004 amendment to the Felony Firearms Act on 1 December 2004. At that point, Plaintiff took action to ensure that he did not unlawfully possess any firearms and has "assiduously and proactively" complied with N.C. Gen. Stat. § 14-415.1 since that time. Instead of being criminally charged with having violated N.C. Gen. Stat. § 14-415.1, like Mr. Whitaker and Mr. Buddington, Plaintiff, like Mr. Britt, initiated the present declaratory judgment action for the purpose of obtaining a legal determination of the validity of his claim to have the constitutional right to possess firearms despite his prior felony convictions. As a result, we are unable to see any material distinction between the facts at issue in the Supreme Court's decision in *Britt* and the facts at issue here.

The State, the trial court, and our dissenting colleague appear to conclude that Plaintiff's "as-applied" challenge should fail because (1) the 2010 amendments to the Felony Firearms Act expressly exclude Plaintiff from the class of individuals eligible to seek the restoration of their right to possess a firearm, (2) Plaintiff committed a "violent crime," and (3) Plaintiff has two, rather than one, prior felony convictions. We do not find this logic persuasive.

The fact that the Felony Firearms Act has been amended to allow "exception or possible relief from the statute's operation," *Britt*, 363 N.C. at 550, 681 S.E.2d at 323, since *Britt* is not particularly relevant to the required constitutional analysis. As was the case with respect to Mr. Britt at the time of the Supreme Court's decision, there is no statutory mechanism which Plaintiff can use to seek relief from the operation of N.C. Gen. Stat. § 14-415.1 given the facts surrounding his own peculiar situation. The enactment of an exception to the prohibition worked by N.C. Gen. Stat. § 14-415.1 that permits a certain group of persons to obtain restoration of the right to possess a firearm for which Plaintiff does not qualify[1] is not one of the five factors specified in *Britt* and *Whitaker*. Although the Supreme Court mentioned "the lack of any exception or possible relief from the statute's operation" in *Britt*, 363 N.C. at 550, 681 S.E.2d at 323, it appears to have done so for the purpose of justifying its decision to address Mr. Britt's "as-applied" constitutional challenge to N.C. Gen. Stat. § 14-415.1 on the merits rather than for the purpose of sending a signal to the General Assembly that the enactment of an amendment to the Felony Firearms Act allowing a person with a single non-violent felony conviction to seek the restoration of his or her state constitutional right to possess a firearm would insulate the relevant statutory provisions from subsequent "as-applied" constitutional challenges. At bottom, a decision to reject Plaintiff's claim based on the enactment of the 2010 amendment to the Felony Firearms Act would be inconsistent with the judiciary's obligation to make constitutional determinations. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60, 73 (1803) (stating that "[i]t is emphatically the province and duty of the judicial department to say what the law is"). As a result, the fact that there is no statutory mechanism which Plaintiff can utilize to seek relief from the prohibition on firearm possession worked by N.C. Gen. Stat. § 14-415.1 is, in actuality, a reason for considering Plaintiff's "as-applied" constitutional challenge to the Felony Firearms Act on the merits rather than a reason for upholding the existing statute as applied to Plaintiff.

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1. Plaintiff is not eligible to seek the restoration of his right to possess a firearm pursuant to newly enacted N.C. Gen. Stat. § 14-415.4 because he has more than one prior felony conviction, N.C. Gen. Stat. § 14-415.4(d)(2), and because one of his prior convictions involved "the possession . . . of a firearm or other deadly weapon as an essential or nonessential element of the offense," N.C. Gen. Stat. § 14-415.4(a)(2)(b), a fact which precludes him from establishing that his prior conviction was for a non-violent felony as that term is used in the relevant statutory language. N.C. Gen. Stat. § 14-415.4(d)(2).

Secondly, neither of Plaintiff's convictions involved the commission of a "violent" crime as that expression is used in *Britt* and *Whitaker*[2]. According to the undisputed record evidence, Plaintiff was convicted for possessing an illegal sawed-off shotgun in 1972 and for selling marijuana in 1977. As the trial court noted, Defendant "offered no evidence disputing Plaintiff's" contention that the sawed-off shotgun in question was "found under a house on the beach, 'rusted up and inoperable,' with a firing pin that 'wouldn't move.' " In determining that one of Plaintiff's prior felony convictions involved a "violent crime," the trial court noted that the 2010 amendment to the Felony Firearms Act excludes any "offense that includes the possession . . . of a firearm or other deadly weapon as an essential or nonessential element," N.C. Gen. Stat. § 14-415.4(a)(2)(b), from the definition of a "nonviolent felony." We do not believe that these statutory definitions control our determination of whether Plaintiff's prior conviction for possessing a sawed-off shotgun constituted a "violent" felony conviction for purposes of the constitutional analysis required by *Britt* and *Whitaker*. Instead, we are of the opinion that the Supreme Court's references to Mr. Britt's "uncontested lifelong nonviolence towards other citizens," *Britt*, 363 N.C. at 550, 681 S.E.2d at 323, and the reiteration of similar language in *Whitaker* require us to focus on the litigant's actual conduct rather than upon the manner in which the General Assembly has categorized or defined certain offenses. As we have already noted, statutory definitions adopted by the General Assembly are simply not controlling for constitutional purposes. In light of the undisputed evidence that the sawed-off shotgun that Plaintiff possessed in 1972 was inoperable and the absence of any indication that Plaintiff did anything other than possess that inoperable object,[3] we are unable to conclude that Plaintiff's prior convictions include "violent" crimes for purposes of the constitutional analysis required by *Britt* and *Whitaker*.

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2. We need not address the extent to which Plaintiff's conviction for selling marijuana constituted the commission of a violent offense in any detail given that the fact that Mr. Britt had been convicted of possession of methaqualone with the intent to sell or deliver did not preclude the Supreme Court from ruling in his favor.

3. Our dissenting colleague contends that, by focusing on the facts revealed by the record developed in the trial court, we are impermissibly forcing the State "to retry the case against Plaintiff" and analogizes the inquiry that should be made in evaluating the merits of an "as-applied" challenge to the Felony Firearms Act to that which must be conducted in determining the number of prior record points that should be awarded for out-of-state convictions pursuant to N.C. Gen. Stat. § 15A-1340.14(e). Aside from our conclusion that the approach outlined in the text is required by *Britt* and *Whitaker*, we do not believe that the comparison of the elements of specific out-of-state offenses with the elements of specific North Carolina offenses required for

Finally, we do not believe that the fact that Plaintiff has two, rather than one, prior felony convictions demonstrates the appropriateness of a finding in the State's favor. Nothing in *Britt* suggests the existence of such a limitation on a litigant's ability to bring a successful "as-applied" challenge to the constitutionality of the Felony Firearms Act. On the contrary, the reference to "felony convictions" in *Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404, clearly indicates that no "single-conviction" limitation can be found in existing North Carolina jurisprudence relating to such "as-applied" constitutional challenges. Instead, *Britt* and *Whitaker* suggest that the appropriate inquiry requires an analysis of the number, age, and severity of the offenses for which the litigant has been convicted. In view of the fact that Plaintiff's convictions are both older than the single conviction at issue in *Britt* and the fact that both Plaintiff and Mr. Britt have had lengthy post-conviction histories of law-abiding conduct, the fact that Plaintiff has two, rather than one, prior felony convictions, while relevant, is not dispositive. As a result, the fact that the undisputed evidence relating to "the facts of [P]laintiff's crime[s], his long post-conviction history of respect for the law, the absence of any evidence of violence by the [P]laintiff, and the lack of any exception or possible relief from the statute's operation," *Britt*, 363 N.C. at 550, 681 S.E.2d at 323, require us to sustain Plaintiff's "as-applied" challenge to the Felony Firearms Act despite the fact that he has two, rather than one, prior felony convictions.

Thus, for the reasons set forth above, we conclude that Plaintiff's "as-applied" challenge to N.C. Gen. Stat. § 14-415.1 has merit and that the trial court erred by granting the State's summary judgment motion and denying the summary judgment motion filed by Plaintiff. Having concluded that Plaintiff has a right under Article I, Section 30 of the North Carolina Constitution to possess a firearm despite the prohibition set out in N.C. Gen. Stat. § 14-415.1, we need not address Plaintiff's other challenges to the trial court's order. *Britt*, 363 N.C. at 549, 681 S.E.2d at 322 (stating that, "[b]ecause we agree with plaintiff that the application of N.C. [Gen. Stat.] § 14-415.1 to him violates

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purposes of resolving the legal issue of "substantial similarity," *State v. Fortney*, ___ N.C. App. ___, ___, 687 S.E.2d 518, 525 (2010), is in any way comparable to the determination of whether, as a matter of fact, a litigant committed a violent crime for purposes of the inquiry required by Article I, Section 30 of the North Carolina Constitution. In addition, the fact that the State is entitled to investigate and conduct discovery before seeking or responding to a request for summary judgment provides ample opportunity for the development of a record concerning the extent, if any, to which the felony for which a litigant was previously convicted constituted a "violent crime."

Article I, Section 30 of the North Carolina Constitution, it is unnecessary for us to address any of plaintiff's remaining arguments, and we express no opinion on their merit"). As a result, the trial court's order is reversed and this case is remanded to the Wake County Superior Court for the entry of summary judgment in favor of Plaintiff based upon his "as-applied" challenge to the constitutionality of the Felony Firearms Act.

REVERSED AND REMANDED.

Judges STEPHENS concurs.

Judge BEASLEY dissents by separate opinion.

BEASLEY, Judge, dissenting.

After review of the record and the applicable law, I believe that the North Carolina Felony Firearms Act, N.C. Gen. Stat. § 14-415.1 (2009), constitutionally applies to Plaintiff, and I would therefore affirm the trial court's order granting summary judgment to the State on that issue. Accordingly, I would review Plaintiff's other claims on their merits, and would affirm the trial court's order with regard to those claims as well. Thus, I respectfully dissent.

I.

I first address Plaintiff's contention that the North Carolina Felony Firearms Act (the Act) is unconstitutional as applied to him, as that is the sole issue decided by the majority.

Our Supreme Court has recognized that

> [t]he right to bear arms, which is protected and safeguarded by the Federal and State constitutions, is subject to the authority of the General Assembly, in the exercise of the police power, to regulate, but the regulation must be reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety.

State v. Dawson, 272 N.C. 535, 547, 159 S.E.2d 1, 10 (1968)(citation omitted).

Because Plaintiff brings an as applied challenge to the Act, the question before this Court is whether the Act is a reasonable regulation when applied to him. In support of his argument that the Act is

unreasonable when applied to him, Plaintiff, and subsequently the majority of this court, rely heavily on our Supreme Court's opinion in *Britt v. State* (*Britt II*), 363 N.C. 546, 681 S.E.2d 320 (2009). In *Britt II*, the Supreme Court found that the Act, prior to the 2010 amendments, was unconstitutional as applied to the plaintiff Barney Britt. In stating its rationale for this holding, the Supreme Court reasoned that

> [b]ased on the facts of plaintiff's crime, his long post-conviction history of respect for the law, the absence of any evidence of violence by plaintiff, and the lack of any exception or possible relief from the statute's operation, as applied to plaintiff, the 2004 version of N.C.G.S. § 14-415.1 is an unreasonable regulation ... .

Britt II, 363 N.C. at 550, 681 S.E.2d at 323.

Since *Britt II* was decided, the Act has been amended to allow for the restoration of firearms rights to felons who meet certain requirements. The General Assembly has ensured that the Act will no longer operate as a regulation towards those situated similarly to the plaintiff in *Britt II*. Plaintiff is expressly excluded from the class of felons who can apply to have their rights restored because one of his crimes was a Class F felony that includes possession of a firearm as an essential element of the offense, and because he has more than one conviction. *See* N.C. Gen. Stat. § 14-415.4(a)(2); § 14-415.4(d)(2) (2011)[1]. Thus, Plaintiff falls into the class of felons that our legislature intended to prohibit from owning firearms.

It is well settled that "a statute enacted by the General Assembly is presumed to be constitutional." *Wayne County Citizens Assn. for Better Tax Control v. Wayne County Bd. of Commrs.*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991). "A statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground." *Id.* (citing *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 63, 366 S.E.2d 697, 698 (1988)).

Aside from the 2010 amendments to the Act, the fact that Plaintiff committed a violent crime makes this case distinguishable from *Britt II*. *See* N.C. Gen. Stat. § 14-288.8(c)(3) (2009) (defining a sawed off shotgun as a "weapon of mass death and destruction"). It is certainly reasonable for the General Assembly to decide that those felons who

1. N.C. Gen. Stat. § 14-415.4 was an amendment to the Act which allows certain felons to petition for restoration of their rights to own firearms. It was made effective 1 February 2011 by 2010 N.C. Sess. Laws ch. 108, § 7.

have not committed more than one crime, and have not committed any violent crimes, should be afforded an opportunity to have their rights to own firearms restored while repeat felons and those convicted of possession of dangerous firearms should not.

In concluding that Plaintiff has not committed any violent crimes, the majority focuses on Plaintiff's assertion that the sawed off shotgun in his possession was inoperable, and comments that the State failed to produce evidence that disputed this assertion. This argument is unavailing. It is not the State's duty to re-try the cases against Plaintiff. In the analogous context of sentencing an offender with convictions from other jurisdictions pursuant to the Structured Sentencing Act, if the State shows by a preponderance of the evidence that an offense classified as a felony in another jurisdiction is classified as a Class I felony or higher in North Carolina, the conviction from the other jurisdiction is treated as that class of felony for assigning prior record points. N.C. Gen. Stat. § 15A-1340.14(e) (2009). Our courts do not re-weigh the evidence in the other jurisdiction's cases; we simply compare the statutory definitions. As this Court has previously stated, "[t]he comparison of the elements of an out-of-state criminal offense to those of a North Carolina criminal offense does not require the resolution of disputed facts. Rather, it involves statutory interpretation, which is a question of law." *State v. Hanton*, 175 N.C. App. 250, 254-55, 623 S.E.2d 600, 604 (2006)(internal quotations and citations omitted). The same rationale should be applied here. Thus, I would overrule this argument.

II.

Plaintiff also argues that the Act is unconstitutional on its face, as it violates Article I, Section 30 of our state constitution, which provides "the right of the people to keep and bear arms shall not be infringed . . . ." N.C. Const. art. I, § 30. "The standard of review for questions concerning constitutional rights is de novo." *Row v. Row (Deese)*, 185 N.C. App. 450, 454, 650 S.E.2d 1, 4 (2007) (citation omitted). Plaintiff carries the burden of proving that the Act is facially unconstitutional, and to do so he "must establish that no set of circumstances exists under which the [a]ct would be valid. The fact that a statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987)) (internal quotation marks omitted). Facial challenges are rarely upheld "because it is the role of the legislature, rather than this Court,

to balance disparate interests and find a workable compromise among them." *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009).

At the outset, I note that although Plaintiff argues for a stronger standard of review for his constitutional challenges, "[t]he rational basis standard for review of regulations upon the right to keep and bear arms has been articulated by North Carolina courts since at least 1921." *State v. Whitaker* (*Whitaker I*), 201 N.C. App. 190, 198, 689 S.E.2d 395, 399 (2009) (citations omitted). Further, this Court has already considered, and rejected, facial challenges to the Act prior to the 2010 amendments. *See Britt v. State* (*Britt I*), 185 N.C. App. 610, 649 S.E.2d 402 (2007), *rev'd on other grounds*, 363 N.C. 546, 681 S.E.2d 320 (2009); *Whitaker I*, 201 N.C. App at 202-03, 689 S.E.2d at 403. The Act was amended subsequent to those decisions, but the 2010 amendments do not impose any additional restriction of felons' rights to possess firearms. In fact, those amendments provide a process of restoration of rights for certain classes of felons. I decline to hold that this amendment makes an otherwise rational statute irrational, in the same way that our Supreme Court declined to find that the exception in the Act for antique firearms made the otherwise rational statute irrational. *See State v. Whitaker (Whitaker II)*, 364 N.C. 404, 410, 700 S.E.2d 215, 219 (2010). Plaintiff does not meet his heavy burden of showing that the Act is facially unconstitutional.

III.

Plaintiff next asserts that the Act is an *ex post facto law*, a bill of attainder, or both. As a basis for this argument, Plaintiff contends that when the General Assembly amended the Act in 2004 and 2010, it effectively increased the punishment for his past crimes without the benefit of a judicial hearing, because he was stripped of the right to bear arms.

Ex post facto laws are expressly prohibited by the United States Constitution and the North Carolina State Constitution. *See* U.S. Const. art. I, § 10; N.C. Const. art. I, § 16. The constitutional prohibition on *ex post facto* laws implicates four types of laws:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law

> that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

State v. Wiley, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (quoting *Collins v. Youngblood*, 497 U.S. 37, 42, 111 L. Ed. 2d 30, 38-39 (1990)) (citations omitted)). Article I, Section 10 of the U.S. Constitution also prohibits the passing of a bill of attainder, which "is a legislative act which inflicts punishment without a judicial trial." *United States v. Lovett*, 328 U.S. 303, 315, 90 L. Ed. 1252, 1259 (1946) (citation omitted).

The question of whether the Act is an impermissible *ex post facto* law or bill of attainder has already been considered by, and rejected by, our Supreme Court in *Whitaker II*. However, Plaintiff argues that his case is distinguishable from the plaintiff in *Whitaker II* because the plaintiff in *Whitaker II* had violated the Act whereas here, Plaintiff has complied with the Act at all times, and therefore should not be subjected to what he considers additional punishment. Plaintiff overlooks that this Court has already rejected the argument that the Act is an *ex post facto* law or a bill of attainder when applied to a plaintiff who had not violated the Act. In *Britt I*, we held:

> [b]ecause the intent of the legislature was to create a non-punitive, regulatory scheme by amending N.C.G.S. § 14-415.1, and because the result of the amended statute is not so punitive in nature and effect as to override the legislative intent, N.C.G.S. § 14-415.1 is a non-punitive, regulatory scheme that does not violate the *ex post facto* clause under either the North Carolina Constitution or the United States Constitution.

185 N.C. App. at 616, 649 S.E.2d at 407. Because we found that the Act was not a form of punishment, we also found that it could not be an impermissible bill of attainder that imposes "punishment" without a judicial trial. *See id.* at 617, 649 S.E.2d at 407. Our decision in *Britt I* was overruled only in regard to our analysis of the as applied challenge. *See Britt II*, 363 N.C. at 550, 681 S.E.2d at 323 ("[W]e reverse the decision of the Court of Appeals to the extent that court determined N.C.G.S. § 14-415.1 can be constitutionally applied to plaintiff.") Thus, we remain bound by the former decision of this Court. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (citations omitted)). The 2010 amendments

to the Act have no bearing on the *ex post facto* and bill of attainder claims. Accordingly, this issue has already been decided.

IV.

Plaintiff's final argument is that the Act violates the Equal Protection Clause of both the U.S. and North Carolina Constitutions, which guarantee equal protection of the law for all citizens. *See Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971) (stating that the Equal Protection Clause of the XIV amendment has been expressly incorporated into Art. I, § 19 of our State Constitution). Plaintiff argues that the Act is overbroad in prohibiting any felons from owning a firearm, and thus violates his right of equal protection under the law.

Plaintiff insists that this issue should be reviewed under the standard of strict scrutiny, as he repeatedly refers to "a compelling state interest." If this Court were to assume, *arguendo*, that Plaintiff is correct, his argument would be without merit. Although Plaintiff bases his argument on the 2004 amendments to the Act, his argument cannot be decided without considering the Act with the 2010 amendments included. The Act no longer prohibits all felons from owning firearms interminably; nonviolent felons can apply to have their rights to possess firearms restored. Thus, the distinction the General Assembly made was not only between felons and nonfelons, as Plaintiff asserts, but between felons with convictions of violent crimes and nonviolent felons. The trial court properly asserted that the distinction between felons whose crimes involved firearms and those whose crimes did not involve firearms is necessary to serve the compelling state interest in public safety.

Plaintiff also attempts to assert an Equal Protection claim on behalf of the family members of those felons who have lost their right to possess firearms. I would decline to address this issue, because Plaintiff does not have standing to assert this claim. These families, including Plaintiff's wife, are not parties to this proceeding, and there is no basis on which we find that Plaintiff has standing to assert a claim on behalf of these families' right to bear arms when they do not assert that claim on their own behalf. *See Tileston v. Ullman, State's Attorney, et al.*, 318 U.S. 44, 46, 87 L. Ed. 603, 604 (1943).

DAVIS REX MAULDIN, EMPLOYEE, PLAINTIFF v. A.C. CORPORATION, EMPLOYER, ARGONAUT INSURANCE, PMA INSURANCE, LIBERTY MUTUAL INSURANCE, THE NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, CARRIERS, DEFENDANTS

No. COA11-119

(Filed 15 November 2011)

1. Workers' Compensation—occupational disease—asbestosis

The Industrial Commission erred in a workers' compensation case by concluding that defendant Argonaut Insurance was the responsible carrier for plaintiff's asbestosis. The record did not contain evidence supporting the Commission's finding that plaintiff was last injuriously exposed to asbestos for 30 days, as required by N.C.G.S. § 97-57, during a seven month period while Argonaut was the insurance carrier.

2. Workers' Compensation—occupational disease—laryngeal cancer

The Industrial Commission erred in a workers' compensation case by finding and concluding defendant Argonaut Insurance was the carrier responsible for compensation related to plaintiff's laryngeal cancer. The case was remanded for the Commission to make findings of fact regarding whether plaintiff's exposure to asbestos during Argonaut's policy period proximately augmented his laryngeal cancer.

3. Workers' Compensation—occupational disease—lymph node cancer—pleural plaquing

The Industrial Commission did not err in a workers' compensation case by awarding compensation for lymph node cancer and pleural plaquing even though plaintiff did not file a claim for either disease. The Commission may award compensation for all conditions within the chain of causation flowing from a compensable condition.

4. Workers' Compensation—maximum compensation rate—calculation of average weekly wage

The Industrial Commission erred in a workers' compensation case by awarding plaintiff the maximum compensation rate for 2007 when he was disabled and last worked and earned wages in 1997. The case was remanded to the Commission for reconsideration of the amount of weekly disability benefits to which plaintiff was entitled.

Judge BEASLEY concurring in part and dissenting in part.

Appeal by defendant Argonaut Insurance from opinion and award entered 28 September 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 June 2011.

Wallace and Graham, P.A., by Edward L. Pauley, for plaintiff-appellee.

McAngus, Goudelock & Courie, P.L.L.C., by Charles D. Cheney and Daniel L. McCullough, for defendants-appellants A.C. Corporation and Argonaut Insurance.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones, for defendant-appellee PMA Insurance.

Mullen Holland & Cooper, P.A., by John H. Russell, Jr., for defendants-appellees A.C. Corporation and Liberty Mutual Insurance Company.

GEER, Judge.

Defendants Argonaut Insurance and A.C. Corporation appeal from an opinion and award finding that Argonaut was the carrier on the risk for plaintiff's asbestos-related occupational illnesses, the damage to his organs, and his resulting total disability. We have found no error with respect to the Commission's decision regarding plaintiff's lung cancer, lymph node cancer, and pleural plaquing. Based on our review of the record, however, we hold that the evidence does not support the Commission's determination that Argonaut was the responsible carrier for plaintiff's asbestosis. Further, while the record would support a determination that Argonaut is the responsible carrier with respect to plaintiff's laryngeal cancer, the Commission failed to make findings of fact sufficient to support its conclusion of law on that issue. Finally, the Commission failed to make adequate findings of fact and conclusions of law as to plaintiff's average weekly wage. We, therefore, affirm in part and reverse and remand in part.

Facts

Plaintiff began working for defendant employer A.C. Corporation in 1971 as a welder and pipefitter. He was employed by A.C. Corporation in 1971, from 1976 until 1977, and again from 3 March 1980 until June 1997. Plaintiff replaced and performed maintenance work on pipes, boilers, and heating and air conditioning units for various clients

throughout the country that contracted with A.C. Corporation for such services. For the last 10 years of his employment, plaintiff was a foreman. In this position, plaintiff continued to perform the same job but had the added responsibility of supervising other A.C. Corporation employees.

In performing his job, plaintiff was required to climb around and stand or lie on insulation covering pipes and equipment. When repairing the pipes and equipment, he would have to remove insulation, which resulted in his being covered in a significant amount of dust. Plaintiff also replaced gaskets located at the joints of pipes, which generated dust from the insulation. Plaintiff, along with his supervisors and co-workers believe most of the insulation and some of the gaskets he worked with and around contained asbestos.

Plaintiff was diagnosed with laryngeal cancer in 1997. As a result, he underwent surgery to remove his larynx and portions of his neck. This surgery left him unable to talk without the assistance of a mechanical voice box. He breathes through a "stoma," which is a hole in his neck. A.C. Corporation told plaintiff that he could no longer perform his job because he could not communicate effectively. Plaintiff has not worked since 1997.

Plaintiff was not advised by any doctor that his laryngeal cancer was related to his employment with A.C. Corporation until 2007. In the meantime, plaintiff applied for and was approved for social security disability.

In 2007, plaintiff was diagnosed with lung cancer and underwent radiation and chemotherapy. He is still receiving treatment for lung cancer. During his treatment, chest x-rays revealed abnormalities in addition to the cancer. His treating physicians then diagnosed him with asbestosis.

On 6 March 2008 plaintiff filed a workers' compensation claim alleging that his asbestosis and lung cancer were the result of his occupational exposure to asbestos. Plaintiff subsequently filed an amended claim alleging that his asbestosis, lung cancer, and laryngeal cancer were all related to his asbestos exposure. A.C. Corporation had insurance coverage with several different providers over the course of plaintiff's employment. All defendants denied plaintiff's claim.

Following a hearing on 15 June 2009, the deputy commissioner filed an opinion and award on 25 March 2010 finding that plaintiff's laryngeal cancer, lung cancer, lymph node cancer, asbestosis, and

pleural plaques were compensable occupational diseases and that plaintiff has been totally disabled as a result of his laryngeal cancer since 1 July 1997. The deputy commissioner further found that defendant Argonaut is the responsible carrier. The deputy commissioner awarded permanent total disability in the amount of $786.00 per week beginning 1 July 1997, $20,000.00 for damage to plaintiff's lungs due to lung cancer, $20,000.00 for lung damage from asbestosis, and $10,000.00 for damage to four lymph nodes resulting from lymph node cancer. Defendants Argonaut and A.C. Corporation appealed to the Full Commission.

On 28 September 2010, the Full Commission entered an opinion and award affirming and modifying the opinion and award of the deputy commissioner. Like the deputy commissioner, the Full Commission concluded that plaintiff's laryngeal cancer, lung cancer, lymph node cancer, asbestosis, and pleural plaques were all compensable occupational diseases and that plaintiff has been totally disabled pursuant to N.C. Gen. Stat. § 97-29 as a result of his laryngeal cancer since 1 July 1997. The Commission further found that Argonaut is the responsible carrier and liable for payment of compensation pursuant to N.C. Gen. Stat. § 97-57.

The Commission modified the deputy commissioner's opinion and award by awarding compensation of $754.00 per week beginning 1 July 1997, $40,000.00 for damage to plaintiff's lungs from lung cancer and asbestosis, and $20,000.00 for damage to plaintiff's lymph nodes from cancer to the lymph nodes. The Commission also concluded that plaintiff is entitled to medical treatment incurred or to be incurred related to his asbestosis, laryngeal cancer, lung cancer, pleural plaquing, and lymph node cancer pursuant to N.C. Gen. Stat. §§ 97-25 and 97-25.1. Defendants Argonaut and A.C. Corporation timely appealed to this Court.

Discussion

"[A]ppellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The "findings of fact are conclusive on appeal if supported by competent evidence. This is true even if there is evidence to support a contrary finding." *Nale v. Ethan Allen*, 199 N.C. App. 511, 514, 682 S.E.2d 231, 234, *disc. review denied*, 363 N.C. 745, 688 S.E.2d 454 (2009).

I. \Argonaut's Liability for Plaintiff's Compensable Conditions

A. Plaintiff's Asbestosis Claim

[1] Defendant Argonaut first challenges the Commission's determination that Argonaut was the responsible carrier for plaintiff's asbestosis. N.C. Gen. Stat. § 97-57 (2009) sets out the basis for determining which carrier is responsible for compensation due for occupational diseases:

> In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.
>
> For the purpose of this section when an employee has been exposed to the hazards of asbestosis or silicosis for as much as 30 working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious; provided, however, that in the event an insurance carrier has been on the risk for a period of time during which an employee has been injuriously exposed to the hazards of asbestosis or silicosis, and if after insurance carrier goes off the risk said employee is further exposed to the hazards of asbestosis or silicosis, although not so exposed for a period of 30 days or parts thereof so as to constitute a further injurious exposure, such carrier shall, nevertheless, be liable.

The first paragraph of N.C. Gen. Stat. § 97-57 applied to plaintiff's lung cancer, laryngeal cancer, lymph node cancer, and pleural plaques. The second paragraph governed as to plaintiff's asbestosis.

With respect to plaintiff's asbestosis, the Commission found, as required by N.C. Gen. Stat. § 97-57, that "[p]laintiff's last injurious exposure to the hazards of asbestos in excess of thirty (30) working days, or parts thereof, within seven (7) consecutive months occurred during his employment with Defendant-Employer during 1997." Because Argonaut insured the defendant employer during 1997, the Commission concluded that Argonaut was the responsible carrier for plaintiff's asbestosis.

We agree with Argonaut that the record does not contain evidence supporting the Commission's finding that plaintiff was last injuriously exposed to asbestos for 30 days during a seven month

period while Argonaut was the carrier on the insurance. Plaintiff and defendant PMA Insurance Group point to plaintiff's testimony that he believed the last time he would have been exposed to asbestos for more than 30 days within a six-month period "was probably there at Kimberly-Clark in South Carolina while we were doing all the units on the roof." While both plaintiff and PMA Insurance claim that plaintiff testified this job took place in January 1997, plaintiff stated that the last time he was at the Kimberly-Clark plant "was back about '86 or '87." He repeatedly and expressly denied working at the Kimberly-Clark plant in 1997.

On appeal, plaintiff points to A.C. Corporation job logs indicating that plaintiff worked on the Kimberly-Clark plant project from 19 January 1997 through 23 February 1997. Those logs, however, included both employees working at the actual job site as well as employees who were performing work for the project at one of A.C. Corporation's shops. The A.C. Corporation project director, who was responsible for scheduling workers in the field, explained that "[y]ou have to look further than [the logs] to see exactly whether [plaintiff] was at the job site or whether he was working in the shop under that job." The director testified that checking expenses was the only way to determine exactly at which job sites plaintiff worked during the pertinent years: "The expenses would be the dead giveaway because, I mean, you're going to get paid whether you're at a job site or in the shop, so the expenses were the primary thing that I saw."

The project director had determined that A.C. Corporation had not paid plaintiff any expenses during the time frame listed on the job log: "And guys don't go out of town and work for free, so that was a dead giveaway that that was a shop project that [plaintiff] was involved with . . . ." The record contains no contrary evidence. Indeed, plaintiff himself confirmed, in his testimony, that the logs contained inaccuracies regarding where he physically worked. The fact that plaintiff may have worked on the Kimberly-Clark plant project, although in the shop, is not sufficient to support the Commission's finding that plaintiff was exposed to asbestos for 30 days in 1997.

Plaintiff stated that he was last exposed to asbestos at the Allied facility, where he was working at the end of his employment at A.C. Corporation, which was in 1997. Plaintiff, however, reported only working at the Allied facility for "two or three weeks" and specifically denied having worked at the Allied facility for 30 days. Before work-

ing at the Allied facility, plaintiff worked for A.C. Corporation at a Revlon plant, which no party contends contained asbestos.

Since plaintiff specifically denied being present at Kimberly-Clark's plant in 1997—the last job that he recalled meeting the 30-day requirement of N.C. Gen. Stat. § 97-57—the record contains no evidence meeting the standard in N.C. Gen. Stat. § 97-57 for holding Argonaut responsible for plaintiff's asbestosis. We, therefore, must reverse as to plaintiff's asbestosis and remand to the Commission for a determination of (1) when plaintiff was last exposed to asbestos for 30 days within a seven-month period and (2) the carrier who was insuring A.C. Corporation during that time frame.

Argonaut asserts that "this Court should also reverse the award [of] benefits for [asbestosis]," but does not specifically discuss those benefits. Apart from medical expenses, the Commission awarded plaintiff "$40,000 for damage to the lungs from lung cancer and lung asbestosis." This award was based on the Commission's conclusion that plaintiff is entitled to compensation for damage to an organ, his lungs, caused by both asbestosis and lung cancer. Argonaut has not requested any relief from this Court regarding the lung cancer. Thus, while Argonaut is not liable for the lung damage to the extent it was caused by asbestosis, it is liable to the extent that the damage arose out of the lung cancer.

Consequently, on remand, the Commission must also determine whether it can apportion the damage to the lungs resulting from the asbestosis and from the lung cancer. If the damage cannot be apportioned, then the Commission must hold Argonaut and the carrier the Commission determines is liable for the asbestosis jointly and severally liable. *See Newcomb v. Greensboro Pipe Co.*, 196 N.C. App. 675, 682, 677 S.E.2d 167, 171 (2009) (holding that when plaintiff suffered two injuries with different employer responsible for each injury and when Commission could not determine percentage of disability attributable to each injury, "both employers became responsible for the full amount, resulting in joint and several liability").

B. Plaintiff's Claim for Laryngeal Cancer

[2] Argonaut next contends that the Commission erred when it found and concluded that it was the carrier responsible for compensation related to plaintiff's laryngeal cancer. Pursuant to the first paragraph of N.C. Gen. Stat. § 97-57, the insurance carrier for A.C. Corporation at the time when plaintiff was last exposed to the hazards of laryngeal cancer is the responsible carrier. Our Supreme Court has explained that

> it is not necessary that claimant show that the conditions of her employment with defendant caused or significantly contributed to her occupational disease. She need only show: (1) that she has a compensable occupational disease and (2) that she was "last injuriously exposed to the hazards of such disease" in defendant's employment. *The statutory terms "last injuriously exposed" mean "an exposure which proximately augmented the disease to any extent, however slight.*"

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 89, 301 S.E.2d 359, 362 (1983) (emphasis added) (quoting *Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 166, 169, 22 S.E.2d 275, 277, 278 (1942)).

Here, the Commission found generally that "[p]laintiff's employment with Defendant-Employer exposed him to asbestos which in turn was a causative factor in his development of laryngeal cancer, lung cancer, asbestosis, and pleural plaquing." With respect to the last injurious exposure, the Commission found that "[p]laintiff was last exposed to asbestos the last week of his employment with Defendant-Employer which was on or about June 20, 1997" and that "[t]herefore, Argonaut Insurance was the carrier on risk at the time of Plaintiff's last injurious exposure."

Argonaut does not challenge the Commission's finding that plaintiff was last exposed to asbestos during his last week at work in 1997. Argonaut points out, however, that the Commission failed to find that this exposure proximately augmented the disease to any extent, however slight, as required by *Rutledge*, 308 N.C. at 89, 301 S.E.2d at 362. We agree that the general finding that plaintiff's laryngeal cancer was caused by his exposure to asbestos during his employment with A.C. Corporation does not establish that plaintiff's exposure during 1997 proximately augmented his laryngeal cancer. We must, therefore, remand for the Commission to make findings of fact regarding whether plaintiff's exposure to asbestos during Argonaut's policy period proximately augmented his laryngeal cancer to any extent, however slight.

Argonaut, however, further argues that the expert testimony shows that exposure during Argonaut's coverage period did not sufficiently contribute to plaintiff's laryngeal cancer due to the latency period between asbestos exposure and the development of laryngeal cancer. The expert testimony was, in fact, conflicting. While Argonaut points to expert evidence supporting its view that the exposure in 1997 was not sufficient, the record also contains expert testimony

that would allow the Commission to find that the exposure during Argonaut's policy period did proximately augment plaintiff's laryngeal cancer to some extent, even though it may have been a slight extent. It is the responsibility of the Commission to decide the credibility and weight to be afforded to the testimony of the various expert witnesses.

Argonaut misreads *Jones v. Beaunit Corp.*, 72 N.C. App. 351, 354, 324 S.E.2d 624, 626 (1985), when it argues that "[a]s in Jones, the medical evidence in this case shows that Plaintiff's exposure to asbestos had reached a *point of saturation* and was unaffected by any additional exposure at the Allied Chemical plant in June 1997." In *Jones*, the Court simply referenced "point of saturation" as an alternative way of saying that further exposure to the hazardous conditions had not augmented the disease to any extent. *Id.*

The Court concluded in *Jones* that the evidence showed that no point of saturation had been reached and that the plaintiff's last injurious exposure to the hazards which augmented his occupational disease occurred after responsibility for the risk shifted from one carrier to another. *Id.* In support of that conclusion, the Court pointed to the fact that (1) "plaintiff was employed by defendant employer until he was no longer able to work due to his breathing problem," (2) "plaintiff was exposed to dust and fumes from the machine he operated and from the adjacent room," and (3) "[p]laintiff thus worked at the same company under the same deleterious conditions for the duration of his employment." *Id.* The same could be found in this case. *Jones*, therefore, would permit the Commission to conclude that Argonaut is the carrier on the risk as to plaintiff's laryngeal cancer.

C. Plaintiff's Claim for Lymph Node Cancer and Pleural Plaquing

[3] Argonaut next contends that the Commission erred when it awarded compensation for lymph node cancer and pleural plaquing because plaintiff did not file a claim for either disease. The Commission awarded $20,000.00 for damage to plaintiff's lymph nodes due to lymph node cancer, as well as medical benefits. As for plaintiff's pleural plaques, the Commission ordered only that Argonaut pay for medical expenses related to treatment of the pleural plaques.

With respect to the lymph node cancer, the Commission found that "[p]laintiff's lymph node cancer is not a primary cancer, but rather is a natural and direct result of the metastasizing of [p]laintiff's lung cancer." It is well established that the Commission may award compensation for all conditions within the chain of causation flowing

from a compensable condition. *See Roper v. J. P. Stevens & Co.*, 65 N.C. App. 69, 74-75, 308 S.E.2d 485, 489 (1983) ("The Commission's award at present is not proper as it does not take into account all the complications of her injury."). The Commission was, therefore, entitled to award compensation for lymph node cancer based on the claim for lung cancer.

As for the pleural plaques, Argonaut has not demonstrated that the condition is sufficiently unrelated to plaintiff's asbestosis that his claim for asbestosis was inadequate to support a claim for pleural plaques as well. Argonaut cites no authority suggesting that the Commission lacked jurisdiction to award compensation for pleural plaquing. We hold that plaintiff's claim for asbestosis was sufficient to vest the Commission with jurisdiction over plaintiff's pleural plaquing. *See Erickson v. Siegler*, 195 N.C. App. 513, 521, 672 S.E.2d 772, 778 (2009) (holding that claim for lumbar spine condition was sufficient to vest Commission with jurisdiction for cervical spine condition because plaintiff should not "be precluded from receiving compensation for not properly diagnosing his own injury and informing the defendant of that diagnosis"; limiting jurisdiction would be contrary to the principal "that the Workers' Compensation Act requires liberal construction to accomplish the legislative purpose of providing compensation for injured employees, and that this overarching purpose is not to be defeated by the overly rigorous technical, narrow and strict interpretation of its provisions").

II. Plaintiff's Compensation Rate

[4] Argonaut also contends that the Commission erred when it awarded plaintiff the maximum compensation rate for 2007 when he was disabled and last worked and earned wages in 1997. The Commission's opinion and award included the following conclusion of law: "Defendants failed to file a Form 22. Plaintiff's weekly compensation rate is set at $745.00 per week, the maximum compensation rate for 2007. N.C. Gen. Stat. § 97-2(5)." The Commission, however, made no findings of fact articulating its reason for this determination.

Pursuant to N.C. Gen. Stat. § 97-29 (2009), "where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of his average weekly wages, but not more than the amount established annually to be effective October 1 as provided herein, nor less than thirty dollars ($30.00) per week." An

employee's average weekly wage is determined in accordance with N.C. Gen. Stat. § 97-2(5) (2009).

N.C. Gen. Stat. § 97-2(5) sets out five methods for calculating an employee's average weekly wage:

> [1] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52; [2] but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. [3] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. [4] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
>
> [5] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Our Supreme Court has explained:

> This statute sets forth in priority sequence five methods by which an injured employee's average weekly wages are to be computed, and in its opening lines, this statute defines or states the meaning of "average weekly wages." It is clear from its wording and the prior holdings of this Court that this statute establishes an order of preference for the calculation method to be used, and that the primary method, set forth in the first sentence, is to calculate the total wages of the employee for the fifty-two weeks of the year prior to the date of injury and to divide that sum by fifty-two.

McAninch v. Buncombe Cnty. Sch., 347 N.C. 126, 129, 489 S.E.2d 375, 377 (1997). *See also Hensley v. Caswell Action Comm., Inc.*, 296 N.C. 527, 533, 251 S.E.2d 399, 402 (1979) ("When the first method of compensation *can* be used, it *must* be used."). "The final method, as set forth in the last sentence, clearly may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods." *McAninch*, 347 N.C. at 130, 489 S.E.2d at 378.

Here, the sole authority cited by the Commission as support for its conclusion of law was N.C. Gen. Stat. § 97-2(5). The Commission did not, however, specify which of the five methods it was using in calculating plaintiff's average weekly wage. While the parties assert that the Commission must have used the fifth method, the Commission made no finding that unjust results would occur if the other four methods were used instead, contrary to *McAninch*.

Plaintiff contends that the Commission was sanctioning Argonaut for failing to file a Form 22. Because of the lack of any findings of fact to support the average weekly wage determination, the lack of any reference to the Commission rules, and the lack of any reference to sanctions or penalties, we cannot conclude that the Commission was in fact sanctioning Argonaut.

Although Argonaut urges that this Court may review the determination of an employee's average weekly wage *de novo* and asks that we apply the first method under N.C. Gen. Stat. § 97-2(5), our Supreme Court has squarely held that the determination of the average weekly wage is for the Commission as the finder of fact. *McAninch*, 347 N.C. at 131, 489 S.E.2d at 378 ("Hence, the recalculation of plaintiff's average weekly wages by the Court of Appeals through application of the fifth computation method constituted an improper contravention of the Commissions's [sic] fact-finding authority, and specifically its finding of fairness in this case."). We instead apply the customary standard of review for workers' compensation cases. *Id.* ("When the Court of Appeals reviews a decision of the full Commission, it must determine, first, whether there is competent evidence to support the Commission's findings of fact and, second, whether the findings of fact support the conclusions of law.").

Our Supreme Court has, however, previously instructed:

> "[T]he court cannot ascertain whether the findings of fact are supported by the evidence unless the Industrial Commission reveals with at least a fair degree of positiveness what facts it

> finds. It is likewise plain that the court cannot decide whether the conclusions of law and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend."

Johnson v. Southern Tire Sales & Serv., 358 N.C. 701, 708, 599 S.E.2d 508, 513 (2004) (quoting *Thomason v. Red Bird Cab Co.*, 235 N.C. 602, 606, 70 S.E.2d 706, 709 (1952)).

Without further findings of fact explaining the basis for the Commission's average weekly wage determination in this case, we cannot effectively review that determination on appeal. We, therefore, reverse as to the Commission's average weekly wage determination and remand for further findings of fact. *See Pope v. Johns Manville*, ___ N.C. App. ___, ___, 700 S.E.2d 22, 33 ("[W]e conclude that the Commission erred by failing to adopt one of the first four methods for calculating claimant's average weekly wage set out in N.C. Gen. Stat. § 97-2(5) without making sufficient findings and conclusions to allow use of the fifth method for calculating a claimant's average weekly wage set out in that statutory provision. As a result, we remand this case to the Commission for reconsideration of the amount of weekly disability benefits to which Plaintiff is entitled . . . ."), *disc. review denied*, 365 N.C. 71, 705 S.E.2d 375 (2010). Nothing in this opinion is intended to express any view regarding what would be the proper average weekly wage under the circumstances of this case.

Conclusion

We affirm the Commission's opinion and award as to plaintiff's claims for lung cancer, lymph node cancer, and pleural plaquing. We reverse the Commission's determination that Argonaut was the responsible carrier as to plaintiff's claim for asbestosis and remand for a determination of which carrier was on the risk at the time plaintiff was last exposed to asbestos for 30 working days, or parts thereof, within seven consecutive calendar months, in accordance with N.C. Gen. Stat. § 97-57. We further remand for findings of fact regarding apportionment as to the $40,000.00 award for damage to plaintiff's lungs.

While we hold that the record contains evidence sufficient to support a determination that Argonaut was the responsible carrier with respect to plaintiff's laryngeal cancer, we must remand for further

findings of fact addressing that issue. Finally, we reverse the Commission's determination of plaintiff's compensation rate and remand for further findings of fact and conclusions of law regarding plaintiff's average weekly wage.

Affirmed in part; reversed and remanded in part.

Judge BRYANT concurs.

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

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

I join the majority in affirming the Commission's opinion and award as to Plaintiff's claims for lung cancer and pleural plaquing. I also agree that there is sufficient evidence that Argonaut was the responsible carrier with respect to Plaintiff's laryngeal cancer and that we must remand for further findings and that we must reverse and remand on the issue of Plaintiff's average weekly wage.

However, after careful review of the record, I believe the Commission's determination that Defendant Argonaut was the responsible carrier for Plaintiff's asbestosis was supported by competent evidence. Accordingly, I would affirm the Commission's opinion and award as to Argonaut's responsibility for Plaintiff's asbestosis and the resulting damage to his lungs. To the extent that the majority holds otherwise, I respectfully dissent.

It is well settled in matters of worker's compensation that "[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony," and thus "courts may set aside findings of fact only upon the ground they lack evidentiary support." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). This Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains *any* evidence tending to support the finding." *Id.* at 434, 144 S.E.2d at 274.

The majority concludes that the record does not contain evidence supporting the Commission's finding that plaintiff was last injuriously exposed to asbestos for 30 days during a seven month period while Argonaut was the carrier on the insurance. In reaching this conclusion, the majority points to Plaintiff's testimony before the Commission, where he denied working at the Kimberly-Clark plant in 1997.

While Plaintiff did deny that he worked at the Kimberly-Clark plant in 1997, he also stated several times that he did not remember and indicated that if the job logs contradicted his statements he would rely on the logs rather than his memory. The majority acknowledges that logs from the Kimberly-Clark plant job in 1997 indicate that Plaintiff did work there at that time, but counters that those logs included employees who performed work at the actual job site as well as those performing work at one of A.C. Corporation's shops.

The Commission was in the best position to examine Plaintiff's testimony and the weight it should be accorded. Plaintiff's testimony was contradictory, and he stated multiple times that he did not remember all of his jobs. Given that the job in question occurred more than ten years before the hearing, the Commission could competently have decided not to give Plaintiff's testimony much weight, and instead relied on the job logs. Although David Friddle, Project Director at A.C. Corporation, testified that an employee's name on a job log does not *necessarily* mean that employee was on site and not at an A.C. Corporation shop, certainly the employee's name on the log is an indication that the employee was on-site. Thus, I would hold that the Commission had enough evidence from which to conclude Argonaut was the responsible carrier for Plaintiff's asbestos. Because I would affirm the finding that Argonaut is the responsible carrier for Plaintiff's asbestosis, it follows that I would hold Argonaut responsible for the damage to his lungs resulting from the asbestosis. Accordingly, I would also hold Argonaut liable for the entirety of the award of $40,000 for damage for Plaintiff's lungs resulting from his asbestosis and lung cancer.

STATE OF NORTH CAROLINA v. HARISH PURUSHOTTAMDAS PATEL

No. COA10-1564

(Filed 15 November 2011)

1. Homicide—first-degree murder—sufficiency of evidence

The trial court did not err when it denied defendant's motion to dismiss a charge of first-degree murder for insufficient evidence. Taken in the light most favorable to the State, there was evidence of motive including two prior attacks on the victim; evidence of opportunity including the victim saying that she was

going to defendant's apartment on the day of the murder and the presence of her car at defendant's apartment complex long after she was dead; evidence of means in defendant's purchase of gas and a gas can the morning of the murder and the burning of the body, with gasoline detected at the scene; and an inculpatory statement by defendant.

2. Homicide—first-degree murder—sufficiency of evidence—premeditation and deliberation

There was sufficient evidence of premeditation and deliberation in a first-degree murder prosecution in defendant's conduct before the murder and in disposing of the body. The State presented evidence that included defendant twice threatening and choking the victim, his wife, before the murder as well as buying a gas can and gas (the body was burned) and cancelling an appointment.

3. Constitutional Law—effective assistance of counsel—cold record

A first-degree murder defendant's assignment of error alleging ineffective assistance of counsel was dismissed without prejudice to reassert the claim in a motion for appropriate relief where defense counsel first challenged jurisdiction and then stipulated jurisdiction and requested that the jury not be instructed on the issue. The Court of Appeals could not tell from the cold record whether there was a strategic reason for the stipulation.

Appeal by defendant from judgment entered 18 December 2009 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 17 August 2011.

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

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

GEER, Judge.

Defendant Harish Purushottamdas Patel appeals from his conviction of first degree murder. Defendant primarily argues on appeal that the trial court erred in denying his motion to dismiss on the ground of insufficient evidence. When, however, all of the evidence is viewed in the light most favorable to the State, as required by the standard of review, there is sufficient evidence to allow a jury to find that defend-

ant was the perpetrator of the offense and that defendant formed the specific intent to kill after premeditation and deliberation. The trial court, therefore, correctly denied defendant's motion to dismiss.

Facts

The State's evidence tended to show the following facts. In 2005, Vanlata Patel and defendant, who were married, moved to Cary, North Carolina.[1] On 14 September 2007, Vanlata checked into a hotel near the airport, not far from their home. Tierena King, a hotel employee, "could tell something wasn't right" when Vanlata arrived at the hotel. She thought that Vanlata seemed in "a rush just to get safe." Vanlata asked Ms. King not to transfer any calls to her room.

Later that evening, Vanlata asked Ms. King how long it would take to get a taxi. When Ms. King replied that it would take 15 minutes, Vanlata responded that she did not have 15 minutes. Vanlata explained that she was leaving her husband and needed to get some jewelry that her mother had given her while her husband was out of the apartment. She told Ms. King that her husband had choked her and had threatened to kill her. Ms. King gave Vanlata a ride to her apartment. In the car, Vanlata was very emotional, expressing fear that defendant might be at the apartment.

Vanlata retrieved a box from the apartment and returned to Ms. King's car. She told Ms. King that her son's friend had given her money for a plane ticket to Canada, where her son lived. The next day, Vanlata flew to Vancouver, Canada to stay with her son from a previous marriage, Ashesh Patel.

Vanlata later told Ashesh's wife, Priya, that defendant was abusive, and, according to Priya, Vanlata "was convinced that she was going to die if she continued to live with him." She explained that defendant had choked her on two occasions. Vanlata also told Priya that, during the second attack, she "was sure she was going to die, and in his eyes she could see that he was going to kill her." The second incident was so severe that Vanlata lost her voice. Because of this attack, Vanlata was afraid for her safety.

Vanlata returned to North Carolina on 5 November 2007 and met with Attorney Corrie Seagroves to initiate divorce proceedings. She told Ms. Seagroves that she wanted to file suit for equitable distribu-

1. To avoid confusion, because a number of people related to this case have the last name "Patel," we refer to those individuals by their first names throughout this opinion.

tion. Vanlata was worried that defendant might prevent her from accessing their financial assets. According to Vanlata, defendant had previously forged her son Ashesh's name to take money sent to him from his grandparents.

During her conversation with Ms. Seagroves, Vanlata talked about the two incidents when defendant had choked her. Ms. Seagroves suggested that Vanlata obtain a domestic violence protective order, but Vanlata did not want to apply for one. Vanlata explained that members of her culture did not like to involve the police in their personal affairs, and if defendant "wanted to harm her, that a piece of paper was not going to stop him." Ms. Seagroves filed the divorce complaint that afternoon.

The day after their meeting, Vanlata called Ms. Seagroves sounding upset. Defendant had parked outside the house of her niece and nephew—where Vanlata was staying—and would not leave. Her niece and nephew did not want to call the police and eventually invited defendant inside. Vanlata locked herself in a bedroom to call Ms. Seagroves. During their conversation, Ms. Seagroves heard a very loud bang. Vanlata told Ms. Seagroves that defendant had just come through the bedroom door. Ms. Seagroves then heard defendant asking Vanlata who she was speaking to on the phone. When Vanlata revealed that she was speaking to her lawyer, defendant got on the phone. Ms. Seagroves warned defendant to leave the residence and threatened to call the police. After defendant stepped away from the phone, Ms. Seagroves heard him say, "[Y]ou are inviting trouble" and "something else . . . like you're going down."

Later, both parties expressed interest in settling the divorce case, but they did not reach an agreement before Vanlata returned to Canada later that month. On 10 January 2008, Vanlata returned again to North Carolina to meet with Ms. Seagroves in preparation for an interim distribution hearing scheduled for the next day. At the hearing, the judge awarded Vanlata the couple's Nissan Sentra as well as certain other assets. After the hearing, Ms. Seagroves drove Vanlata to defendant's apartment to take possession of the Nissan and some personal property. Defendant arrived at the apartment shortly thereafter in the Nissan. Four days later, on 14 January 2008, Vanlata reported to Ms. Seagroves that she had met defendant at the mall with a friend over the weekend, and the parties had reached a settlement agreement.

During her January visit, Vanlata stayed with friends, Pankaj and Raxa Patel. Raxa testified that Vanlata "was very scared" of defend-

ant. On 15 January 2008, defendant had dinner at Pankaj and Raxa's house. Vanlata left the house before defendant arrived. After dinner, defendant went next door where Pankaj's nephew, Pratik, lived and started looking around; defendant said that he was looking for Vanlata. Vanlata returned to Pankaj and Raxa's house after defendant had left and parked the Nissan in their driveway.

Vanlata told Raxa—as well as Ms. Seagroves, Vanlata's mother, and Vanlata's brother—that she planned to return to defendant's residence on 16 January 2008 to pick up her computer and a few personal items before her return flight to Canada on 17 January 2008. When Raxa left for work on 16 January 2008 at 9:15 a.m., Vanlata had a phone in her hand and explained that she was going to call defendant. Phone records showed a telephone call from Pankaj and Raxa's house to defendant's apartment, lasting from 9:20 a.m. to 9:27 a.m.

Pratik placed calls to defendant's residence using his cell phone from 9:52 a.m. to 9:54 a.m. and then again from 9:54 a.m. to 9:58 a.m. Pratik was asking defendant to accompany him to help his sister file for social security. Defendant replied, "[N]o, no, no, no, don't come. Don't call. I'm very busy. Don't come. Don't call." Pratik did not go to defendant's apartment that morning. He thought, however, that the conversation was "very strange."

At 10:05 a.m., defendant walked into a Cary Circle K gas station. At 10:09 a.m., defendant purchased a gas can and gas. Phone records showed a second telephone call from Pankaj and Raxa's house to defendant's apartment at 10:34 a.m. At 10:35 a.m., defendant called his regular table tennis partner and canceled their 1:30 p.m. scheduled match. Vanlata and the Nissan had left Pankaj and Raxa's house at some time before Pankaj woke up, after working the night shift, between 1:00 p.m. and 2:00 p.m.

At approximately 2:30 p.m., authorities in Mecklenburg County, Virginia received reports of a brush fire on the shoulder of I-85 north between mile markers 18 and 19. Once at the scene, law enforcement found a burning body with a green paisley and floral quilted fabric found underneath it. The watch found on the body had stopped at 2:28 p.m. Law enforcement subsequently determined that the body was the origin of the fire, and that an accelerant was used. A wild fire investigator on the scene smelled gasoline.

When a resident of defendant's apartment complex went to dinner at 5:30 p.m. that evening, there was no car parked beside his. When he returned between 7:30 p.m. and 8:00 p.m., however, Vanlata's

Nissan was backed into a spot next to the one where his car was parked. The resident had never seen the Nissan in that area of the parking lot prior to 16 January 2008.

The next day, 17 January 2008, Pankaj called Ashesh to tell him that Vanlata was missing. That afternoon, the Cary Police Department became involved. On 19 January 2008, Cary detectives spoke with defendant. Defendant said that he had last seen Vanlata on 12 January 2008 for their meeting at the mall to discuss the settlement.

On 20 January 2008, employees of the Mecklenburg County Sheriff's Office in Virginia learned about the missing Cary woman. That day, a Mecklenburg County, Virginia Investigator and a Cary Detective interviewed defendant in Cary. When asked about his whereabouts on 16 January 2008, defendant did not say anything about his trip to the gas station. Defendant claimed that he had gone to South Point Mall from 12:00 p.m. to 4:00 p.m. and had eaten "Italian at Sabinos." Cary police subsequently reviewed video footage from the mall—even though there is no Sbarro's at South Point Mall—and saw no sign of defendant.[2]

Subsequently, the body found on the shoulder of I-85 in Virginia was confirmed to be Vanlata Patel. On 23 January 2008, Cary police interviewed defendant again. Detective George Daniels informed defendant that his wife's body had been discovered in Virginia. During this interview, defendant gave another account of his activities on 16 January 2008 that included his trip to the Circle K gas station in Cary. Defendant told Detective Daniels that he got ready for the day, checked his e-mail, and went to purchase gasoline. Then, according to Detective Daniels, defendant backtracked and said that on his way to the gas station, he saw a man who had run out of gas and pulled over to assist him. According to defendant, the man, whose race defendant could not identify and whom he could not describe, gave him $20.00 in return for defendant's buying him gas. Defendant claimed that he paid with a credit card at the gas station and kept the $20.00 as well as the gas can.

After the interview, Detective Michael Lindley gave defendant a ride back to his apartment, but defendant could not re-enter the apartment because officers were conducting a search. While sitting in the car, defendant told the detective that "it was his wife's fate to die," and "if I go to jail, I go to jail, that would be my fate."

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2. It seems law enforcement assumed that defendant meant Sbarro's.

During the 23 January 2008 search, law enforcement found the gas can at defendant's apartment. Cary Detective Jim Young examined the gas can. Upon reviewing the manufacturer's instructions, he learned that the gas can's cap needed to be removed from the can's collar in order to dispense gas using the spout. Detective Young found, however, that the cap had not been removed and was still attached to the collar. Although he took the appropriate steps, he was unable to remove the cap from the collar.

On 30 January 2008, defendant reported having suicidal thoughts. Officer Donna Pell and another officer took defendant to Wake Medical Health. At the facility, defendant told Officer Pell, "[I]f I'm guilty, then I'm guilty, and I will accept my punishment, but I want them to be a hundred percent positive." On 7 February 2008, defendant again spoke with Officer Pell about his wife's disappearance and told her "he wanted to get through this, to put it behind him and become a better person, to make sure he did not do this again."

An expert in forensic pathology performed the autopsy on Vanlata and found the cause of death to be "homicidal violence of undetermined type." Evidence indicated that Vanlata was not breathing when the fire began. An expert in forensic fiber comparison and identification determined that a fiber found in the trunk of defendant's Subaru was consistent with fibers from the green paisley and floral bedding found under Vanlata's body.

On 26 February 2008, defendant was indicted for the first degree murder of Vanlata. Before trial, defense counsel filed a motion to dismiss on the ground that the trial court lacked jurisdiction because the evidence did not establish beyond a reasonable doubt that Vanlata was killed within the territorial boundaries of North Carolina. Both parties agreed that the court should address the issue at the close of the State's evidence. After the State rested its case, defense counsel moved to dismiss for lack of jurisdiction. The State asked the court to deny the motion to dismiss, but noted that the court should instruct the jury to make a special finding as to jurisdiction. Taking the evidence in the light most favorable to the State, the trial court denied the motion to dismiss for lack of jurisdiction.

The court later invited both parties to offer their input regarding the special verdict as to jurisdiction. The State contended that a jurisdictional instruction was necessary and that the court had a "duty" to give such an instruction in this case. Defense counsel, however, "requested specifically the jury not be instructed on [jurisdiction]" and

explained, "I think this Court has jurisdiction, that this state has jurisdiction over this case, and I'm not going to argue they don't at this point." The State noted that it did not understand defense counsel's changed position, stating "this is a heck of an issue on appeal." Upon further questioning, defense counsel clarified, "there's not an issue, a factual issue, and we're raising no factual issue as to whether North Carolina has jurisdiction. We are not disputing that North Carolina has jurisdiction in this case."

The State requested that the court obtain an admission of jurisdiction from defendant himself. After asking defendant to rise, Judge Morgan had the following conversation with defendant:

> [THE COURT:] Mr. Patel, do you understand that you have a right to have a jury to determine as a matter of a special verdict as to jurisdiction whether or not the State of North Carolina has jurisdiction to try the Defendant?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Has your lawyer . . . explained to you this special verdict as to jurisdiction opportunity?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand the aspects of the special verdict as to jurisdiction as explained to you by your attorney . . .?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Do you agree that North Carolina has jurisdiction to try you in this first degree murder case?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: In agreeing that the State of North Carolina has jurisdiction to try you in this first degree murder case, do you agree as your counsel has stated, that there is no need to submit as a special verdict as to jurisdiction the option to the jury as to whether or not the State of North Carolina has or does not have jurisdiction to try you in this case?
>
> THE DEFENDANT: Yes, Your Honor.

In light of the stipulation, the court did not submit the issue of jurisdiction to the jury.

The jury found defendant guilty of first degree murder, and defendant was sentenced to life imprisonment without parole. Defendant timely appealed to this Court.

I

[1] Defendant contends that the trial court erred when it denied his motion to dismiss on the ground of insufficient evidence. "This Court reviews the trial court's denial of a motion to dismiss *de novo.*" *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " '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.' " *State v. Lowry*, 198 N.C. App. 457, 465, 679 S.E.2d 865, 870 (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)), *cert. denied*, 363 N.C. 660, 686 S.E.2d 899 (2009).

"Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002). "When reviewing a motion to dismiss based on insufficiency of the evidence, this Court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Bullock*, 178 N.C. App. 460, 466, 631 S.E.2d 868, 873 (2006).

Defendant first contends that the evidence was insufficient for a reasonable juror to conclude that defendant was the perpetrator. As the *Lowry* Court explained,

> "[a]lthough the language is by no means consistent, courts often speak in terms of proof of motive, opportunity, capability and identity, all of which are merely different ways to show that a particular person committed a particular crime. In most cases these factors are not essential elements of the crime, but instead are circumstances which are relevant to identify an accused as the perpetrator of a crime.
>
> . . . While the cases do not generally indicate what weight is to be given evidence of these various factors, a few rough rules do appear. It is clear, for instance, that evidence of *either* motive or opportunity alone is insufficient to carry a case to the jury. . . . [W]hen the question is whether evidence of *both* motive and opportunity will be sufficient to survive a motion to dismiss, the answer is much less clear. The answer appears to rest more upon

> the strength of the evidence of motive and opportunity, as well as other available evidence, rather than an easily quantifiable 'bright line' test."

198 N.C. App. at 466, 679 S.E.2d at 870-71 (quoting *State v. Bell*, 65 N.C. App. 234, 238-39, 309 S.E.2d 464, 467-68 (1983), *aff'd per curiam*, 311 N.C. 299, 316 S.E.2d 72 (1984)).

Here, viewed in the light most favorable to the State, the State's evidence of motive included defendant's two prior attacks on Vanlata, his threat that she was "inviting trouble" and was "going down," and Vanlata's expressed fear of defendant. *See e.g.*, *State v. Hayden*, ___ N.C. App. ___, ___, 711 S.E.2d 492, 495 ("This Court has, in the past, held that evidence of a defendant's history of threats or physical abuse of the victim constitute evidence of defendant's motive to kill that victim."), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___, 2011 N.C. LEXIS 821, 2011 WL 4638739 (Oct. 6, 2011). Further, Vanlata and defendant were in the midst of a divorce, which had included a dispute over equitable distribution.

The State also presented sufficient evidence of opportunity and means. Evidence of opportunity included evidence that Vanlata told several people that she was going to defendant's apartment the day of the murder and that she called defendant twice that morning. Defendant told his nephew not to come to his apartment, defendant canceled his tennis match for that afternoon, and no evidence supported his proposed alibi. The night of Vanlata's murder, her Nissan was parked—long after she was dead—in a spot in defendant's apartment complex away from defendant's apartment. Moreover, a fiber found in the trunk of defendant's Subaru was consistent with the fibers found under Vanlata's body. *See*, *e.g.*, *State v. Banks*, ___ N.C. App. ___, ___, 706 S.E.2d 807, 813 (2011) (finding evidence sufficient where, along with other evidence, red fiber consistent with victim's jacket was recovered from defendant's car).

Evidence of means included defendant's purchase of gas and a gas can the morning of the murder. After the murder, law enforcement determined that Vanlata's body had been burned with an accelerant, and an investigator smelled gasoline at the crime scene.

In addition to the evidence of motive, opportunity, and means, defendant made an inculpatory statement when he told Officer Pell that "he wanted to get through this, to put it behind him and become a better person, to make sure he did not do this again." *See*, *e.g.*, *State v. Lambert*, 341 N.C. 36, 43, 460 S.E.2d 123, 127 (1995) (holding defend-

ant's statement—" 'Honey, why did you make me do it?' "—was inculpatory where reasonable juror could infer " 'it' " referred to the murder). Further, defendant initially failed to disclose his trip to the gas station, and the State was able to raise questions regarding the credibility of his explanation for that trip, including evidence that would permit the jury to find that the gas can could not be used to put gas into a car and defendant's inability to provide any description of the man he purportedly helped.

Taken as a whole, the evidence in this case is analogous to the evidence presented in cases where our courts have held that there was sufficient evidence to withstand the defendant's motion to dismiss. *See*, *e.g.*, *id.* at 41-42, 460 S.E.2d at 126-27 (holding evidence sufficient where victim was planning to leave wife, wife was in mobile home with husband when he was shot, police found murder weapon in mobile home, and wife made inculpatory statement); *Banks*, ___ N.C. App. at ___, 706 S.E.2d at 813 (holding evidence sufficient where defendant threatened victim, four spent casings found in defendant's bedroom were fired from murder weapon, and red fiber consistent with victim's jacket was recovered from defendant's car); *State v. Parker*, 113 N.C. App. 216, 223, 438 S.E.2d 745, 749 (1994) (holding evidence sufficient where defendant conducted surveillance of victim, possessed two guns, threatened to kill victim, and was present near crime scene; further, defendant's brand of cigarette package was on road where victim was found).

Although defendant relies on two cases in which our Supreme Court found the evidence insufficient to prove that the defendant murdered the woman with whom he lived, the evidence in those cases is not comparable. In *State v. Lee*, 294 N.C. 299, 301, 240 S.E.2d 449, 450 (1978), and *State v. Furr*, 292 N.C. 711, 714, 235 S.E.2d 193, 195 (1977), the State presented evidence of prior threats by the defendant to kill the victim (and, in *Lee*, prior beatings). In neither case, however, was the State able to present any evidence placing the defendant with the murdered victim at the time of the murder. *Lee*, 294 N.C. at 300-01, 240 S.E.2d at 450; *Furr*, 292 N.C. at 717, 235 S.E.2d at 197. Further, there was no evidence linking either defendant to the murder scene or tying him to the means by which the victim was killed. *Lee*, 294 N.C. at 301, 240 S.E.2d at 450; *Furr*, 292 N.C. at 717, 235 S.E.2d at 197.

In short, in each case, there was evidence of motive, but no actual evidence allowing the jury to find that the defendant had the opportunity to kill the victim or access to the means used to kill the victim.

See Lowry, 198 N.C. App. at 467, 679 S.E.2d at 871 (characterizing *Lee* and *Furr* as cases in which "the State presented evidence of motive, but not opportunity"). In this case, however, the State did not rely upon only motive—it also offered evidence placing Vanlata (and her car) at defendant's apartment at the time she would have been murdered and evidence of defendant's purchase, just hours before Vanlata's body was burned, of a gas can and gas.

'The State also relied upon statements by defendant that could be construed by the jury as admissions. Defendant argues those statements are not sufficient and points to the Supreme Court's holding in *Furr* that the following statement was not inculpatory: " 'Well, you'all [sic] know who did it and I know who did it, but nobody else will ever know but me.' " *Furr*, 292 N.C. at 718, 235 S.E.2d at 198. That remark, however, tended "to show only that he knew who killed his wife, not that he did so himself." *Id.* at 719, 235 S.E.2d at 198. Here, by contrast, defendant told Officer Pell "he wanted to get through this, to put it behind him and become a better person, *to make sure he did not do this again."* (Emphasis added.) This statement suggests that defendant was the perpetrator and not simply that he knew the identity of the perpetrator.

Unlike in *Lee* and *Furr*, the evidence in this case—taken as a whole in the light most favorable to the State—allows for the reasonable inference that defendant was the perpetrator. The trial court, therefore, did not err in denying defendant's motion to dismiss on that ground.

[2] Defendant also contends that the evidence was insufficient for a reasonable juror to conclude that defendant formed the specific intent to kill after premeditation and deliberation. In order for a killing to be premeditated, it must be "thought out beforehand for some length of time, however short." *State v. Hunt*, 330 N.C. 425, 427, 410 S.E.2d 478, 480 (1991). "Deliberation means an intent to kill carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.*

In arguing that there was insufficient evidence of premeditation and deliberation, defendant contends that the evidence did not show ill will by defendant toward Vanlata, that the cause of death was not the kind of violence associated with premeditated murder and that the death may have been the product of "some sudden and thought-

less act." In making this argument, however, defendant ignores the standard of review by viewing the evidence in the light most favorable to defendant rather than in the light most favorable to the State.

Our Supreme Court has explained that

> [p]remeditation and deliberation generally must be established by circumstantial evidence, because both are processes of the mind not ordinarily susceptible to proof by direct evidence. Among the circumstances to be considered in determining whether a killing was done with premeditation and deliberation is the conduct and statements of the defendant before and after the killing. Further, any unseemly conduct towards the corpse of the person slain, or any indignity offered it by the slayer, as well as concealment of the body, are evidence of express malice, and of premeditation and deliberation in the slaying.

State v. Rose, 335 N.C. 301, 318, 439 S.E.2d 518, 527 (1994) (internal citations and quotation marks omitted), *overruled in part on other grounds by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). *See also State v. Battle*, 322 N.C. 69, 72-73, 366 S.E.2d 454, 456-57 (1988) (finding sufficient evidence of premeditation and deliberation, including "conduct and statements of defendant before and after the killing").

The State, in this case, presented evidence that before Vanlata's murder, defendant threatened her and choked her twice. On the morning of the murder, defendant purchased a gas can and gas after speaking with Vanlata who had told others that she was going to call defendant about going to pick up belongings at his apartment. When defendant returned to his apartment and spoke again with Vanlata at 10:34, he immediately then called to cancel a 1:30 appointment. Viewed in the light most favorable to the State, this conduct before the murder constitutes evidence of premeditation and deliberation.

Moreover, the fact that Vanlata's body was burned after she was killed constitutes additional evidence of premeditation and deliberation. *See Rose*, 335 N.C. at 317, 439 S.E.2d at 527 ("Defendant first argues that his conduct in burning the body a day after the killing was not relevant to prove premeditation or deliberation. We disagree."). In *Rose*, the defendant purchased gasoline, dug a grave and inserted the body, poured gasoline on the body, and started a fire. *Id.* at 318, 439 S.E.2d at 527. The Court held that the "[d]efendant's handling of

the body from the time of the killing until the body was finally burned and buried is evidence from which a jury could infer premeditation and deliberation." *Id.* at 319, 439 S.E.2d at 527. *See also Battle*, 322 N.C. at 73, 366 S.E.2d at 457 (finding that defendant's demand that two witnesses help him dispose of victim's body by burning it was evidence of premeditation and deliberation).

Here, in the light most favorable to the State, the evidence of defendant's conduct both before the murder and in disposing of the body after the murder was sufficient for a reasonable juror to conclude that defendant killed Vanlata with premeditation and deliberation. Because the State presented sufficient evidence that defendant was the perpetrator and that he premeditated and deliberated, the trial court properly denied defendant's motion to dismiss.

II

[3] Defendant also contends that he was deprived of his state and federal constitutional right to effective assistance of counsel because his trial attorney reversed course and withdrew the jurisdictional challenge. Specifically, defendant contends trial counsel's request that the jury not be instructed on the jurisdiction issue and defendant's stipulation that North Carolina has jurisdiction constitutes ineffective assistance of counsel ("IAC").

The United States Supreme Court has held that IAC claims should rarely be raised on direct appeal because

> [i]f the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse.

Massaro v. United States, 538 U.S. 500, 505, 155 L. Ed. 2d 714, 720, 123 S. Ct. 1690, 1694 (2003).

Our Supreme Court, in a decision prior to *Massaro*, held that "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required . . . ." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). If, however, "the reviewing court determine[s] that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *Id.* at 167, 557 S.E.2d at 525.

Here, the record only indicates that the stipulation was not a casual decision. The record does not reveal why defense counsel reversed course. Defendant contends that "there is no conceivable trial strategy" for eliminating a "major hurdle" that the State would need to overcome in order to procure a conviction. The State, by contrast, speculates that defense counsel may have chosen to withdraw the jurisdictional challenge in order to avoid a capital charge in Virginia.

It is indeed possible that stipulating jurisdiction was a strategic decision. *See, e.g.*, *Bierenbaum v. Graham*, 607 F.3d 36, 59 (2d Cir. 2010) (holding defense counsel's failure to request territorial jurisdiction instruction did not constitute IAC because "counsel could reasonably have concluded that it made no sense to request a territorial jurisdiction instruction—unsupported by any evidence—that contradicted the defense's theory of the case"), *cert. denied*, ___ U.S. ___, 179 L. Ed. 2d 645, 131 S. Ct. 1693 (2011). Because we cannot determine from the cold record whether defense counsel in this case had a strategic reason for stipulating that North Carolina has jurisdiction, we dismiss this assignment of error without prejudice to defendant's right to reassert his claim in a motion for appropriate relief.

No error.

Judges BRYANT and BEASLEY concur.

GREEN v. KEARNEY

[217 N.C. App. 65 (2011)]

LARRY DONNELL GREEN, BY AND THROUGH HIS GUARDIAN AD LITEM, SHARON CRUDUP; LARRY ALSTON, INDIVIDUALLY; AND RUBY KELLY, INDIVIDUALLY, PLAINTIFFS V. WADE R. KEARNEY, II; PAUL KILMER; KATHERINE ELIZABETH LAMELL; PAMELA BALL HAYES; RONNIE WOOD; PHILLIP GRISSOM, JR.; DR. J.B. PERDUE, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS MEDICAL EXAMINER OF FRANKLIN COUNTY; LOUISBURG RESCUE AND EMERGENCY MEDICAL SERVICES, INC.; FRANKLIN COUNTY EMERGENCY MEDICAL SERVICES; EPSOM FIRE AND RESCUE ASSOCIATION, INC.; AND FRANKLIN COUNTY, NORTH CAROLINA, A BODY POLITIC, DEFENDANTS

No. COA11-439

(Filed 15 November 2011)

1. **Immunity—EMS providers—failure to provide medical treatment based on erroneous belief victim dead—failure to show intentional wrongdoing or deliberate misconduct—summary judgment**

The trial court did not err by granting summary judgment and dismissing plaintiff accident victim's various negligence claims against defendant EMS providers arising from defendants' failure to determine that plaintiff was alive and thus their failure to provide any medical treatment because they believed he was dead. Defendants' claims of immunity under N.C.G.S. § 90-21.14 were not inappropriate since plaintiff failed to forecast any intentional wrongdoing or deliberate misconduct.

2. **Evidence—exclusion of affidavits—improper legal conclusions for gross negligence and intentional wrongdoing**

The trial court properly struck various affidavits filed by plaintiff because these affidavits sought to present evidence of the legal conclusion that defendants were grossly negligent or engaged in wanton conduct or intentional wrongdoing. It would be improper for a jury to hear expert testimony as to whether a certain legal standard has been met. Even if the affidavits were considered, they did not present any new information as to the underlying factual premise or any facts to support a forecast of gross negligence.

Appeal by plaintiff Larry Donnell Green by and through his Guardian *ad litem*, Sharon Crudup, from orders entered 20 December 2010 by Judge Henry W. Hight, Jr. in Superior Court, Franklin County. Heard in the Court of Appeals 29 September 2010.

Bell & Vincent-Pope, P.A., by Judith M. Vincent-Pope, for plaintiff-appellant.

Troutman Sanders, L.L.P., by Gary S. Parsons and Whitney S. Waldenburg, for defendant-appellees Pamela Ball Hayes, Ronnie Wood, and Louisburg Rescue and Emergency Medical Services, Inc.

Young Moore and Henderson, P.A., by David M. Duke, Brian O. Beverly, and Michael S. Rainey, for defendant-appellee Wade R. Kearney II

STROUD, Judge.

Plaintiff appeals the trial court's orders granting summary judgment in favor of defendants.[1] Because defendants are immune from liability under N.C. Gen. Stat. § 90-21.14, we affirm.

I. Background

This is the second appeal before this Court arising out of the treatment of Mr. Larry Green following his accident on 24 January 2005. *See Green v. Kearney*, ___ N.C. App. ___, ___, 690 S.E.2d 755, 758-59 (2010) ("*Green I*"). Although the prior appeal addressed only the dismissal of plaintiffs' claims against defendant Dr. J.B. Perdue, the factual circumstances surrounding the accident and Mr. Green's treatment are the same, and were described in the prior opinion as follows:

> The facts as alleged in plaintiffs' complaint show that on 24 January 2005, at approximately 8:53 p.m., emergency services were dispatched in Franklin County, North Carolina to the scene of an accident involving a pedestrian—Green--and a motor vehicle. Green suffered an open head wound as a result of the accident. Defendant Wade Kearney ("Kearney") with the Epsom Fire Department was the first to arrive at the scene and checked Green for vital signs. Kearney determined that Green was dead and did not initiate efforts to resuscitate him.

1. We will refer only to Larry Donnell Green, by and through his Guardian *ad litem*, Sharon Crudup, as "plaintiff," as the individual plaintiffs did not appeal the dismissal of their individual claims. We will refer to Wade R. Kearney, II, Pamela Ball Hayes, Ronnie Wood, and Louisburg Rescue and Emergency Medical Service, Inc., collectively as "defendants" as they are the defendants who remained in the case at the time of the trial court's orders which are the subject of this appeal.

Several minutes later, defendants Paul Kilmer ("Kilmer") and Katherine Lamell ("Lamell") with Franklin County EMS arrived. Kearney asked Kilmer to verify that Green did not have a pulse, but Kilmer declined to do so, stating that Kearney had already checked and that was sufficient. Without checking the pupils or otherwise manually rechecking for a pulse, Kearney and Kilmer placed a white sheet over Green's body.

At approximately 9:00 p.m., defendants Pamela Hayes ("Hayes") and Ronnie Wood ("Wood") with the Louisburg Rescue Unit arrived at the scene. After being informed by Kearney and Kilmer that Green was dead, neither Hayes nor Wood checked Green for vital signs. At around 9:31 p.m., Perdue, the Franklin County Medical Examiner, arrived at the scene. He first conducted a survey of the scene, taking notes regarding the location of Green's body and the condition of the vehicle that struck him. Once the Crime Investigation Unit arrived, Perdue inspected Green's body. While Perdue was examining Green, eight people saw movement in Green's chest and abdomen. Kearney asked Perdue whether Green was still breathing and Perdue responded: "That's only air escaping the body." Once Perdue finished examining Green, he directed that Green should be taken to the morgue located at the Franklin County jail.

At approximately 10:06 p.m., Green was transported to the morgue by Hayes and Wood where Perdue examined him. Perdue lifted Green's eyelids, smelled around Green's mouth to determine the source of an odor of alcohol that had been previously noted, and drew blood. During this particular examination, Perdue, Hayes, and Wood all observed several twitches in Green's upper right eyelid. Upon being asked if he was sure Green was dead, Perdue responded that the eye twitch was just a muscle spasm. Plaintiffs claim that Hayes did not feel comfortable with Perdue's response and went outside to report the eye twitch to Lamell. Hayes then returned inside and asked Perdue again if he was sure Green was dead. Perdue reassured Hayes that Green was, in fact, dead. Green was then placed in a refrigeration drawer until around 11:23 p.m. when State Highway Patrolman Tyrone Hunt ("Hunt") called Perdue and stated that he was trying to ascertain the direction from which Green was struck. To assist Hunt, Perdue removed Green from the drawer and unzipped the bag in which he was sealed. Perdue then noticed movement in Green's abdomen and summoned emergency services. Green was

> rushed to the hospital where he was treated from 25 January 2005 to 11 March 2005. Green was alive at the time this action was brought. His exact medical condition is unknown, though plaintiffs allege that he suffered severe permanent injuries.

___ N.C. App. at ___, 690 S.E.2d at 758-59. There is no dispute that Mr. Green was immediately disabled by his injuries. On 21 February 2005, Mr. Larry Alston, Mr. Green's father, was appointed as Mr. Green's Interim General Guardian. "On 22 May 2008, Green, through his guardian *ad Litem*, and Green's parents, Larry and Kelly Alston, brought this action in Franklin County Superior Court." *See id.* at ___, 690 S.E.2d at 759.

The complaint alleges the factual circumstances as summarized above, and based upon those facts, five claims for relief. Only the first, third, and fourth claims are applicable to defendants in this case. The first claim alleges general negligence on the part of defendants Wade R. Kearney II ("Kearney"), Pamela Ball Hayes ("Hayes"), Ronnie Wood ("Wood"), and Louisburg Rescue and Emergency Medical Services, Inc. ("Louisburg Rescue"). The third claim is against defendants for negligent infliction of emotional distress upon Mr. Green's parents. The fourth claim is against defendants for "Willful and Wanton Negligence[;]" this claim states that the negligent acts already described constitute "willful and wanton" conduct which "entitles Green to punitive damages." Defendants filed motions for partial summary judgment as to the claim for negligent infliction of emotional distress, and on 12 March 2009, the trial court granted the motions for partial summary judgment as to this claim.

On 15 November 2010, defendants Hayes, Wood, and Louisburg Rescue filed a motion for summary judgment as to "all remaining claims against them[.]" Defendants Hayes, Wood, and Louisburg Rescue alleged, *inter alia*, they "are immune from liability to Plaintiff pursuant to G.S. § 90-21.14." On 16 November 2010, defendant Kearney filed a motion for summary judgment as to "all claims remaining against him," also alleging, *inter alia*, immunity. On 13 December 2010, defendants filed motions to strike various affidavits on the grounds that each affidavit "improperly attempt[ed] to offer the witnesses' legal conclusions purportedly drawn from underlying evidence, and that except the Affidavit of George Wittenburg, MD, PhD, these Affidavits fail to state that the affiants are familiar with the standard of care in Franklin County or similarly situated communities[;]" that same day, the trial court heard the motions to strike and the motions for summary judgment. On 20 December 2010, the trial

court struck the contested affidavits and granted summary judgment in favor of defendants. Upon entry of the 20 December 2010 orders, all claims as to all defendants had been dismissed. Plaintiff filed notices of appeal from the 20 December 2010 orders.

II. Immunity

[1] Plaintiff argues that the trial court erred by granting summary judgment dismissing his claims against defendants because "[d]efendants' [c]laims of [i]mmunity on the [g]rounds of N.C. Gen. Stat. § 90-21.14 are [i]nappropriate, since [p]laintiffs have [e]stablished that the [i]njuries [s]ustained by [p]laintiff were [c]aused by [d]efendants' [g]ross [n]egligence, and [w]illful and [w]anton [c]onduct[.]"

> This Court's standard of review is *de novo*, and we view the evidence in the light most favorable to the non-movant. The standard of review for an order granting a motion for summary judgment
>
> > requires a two-part analysis of whether, (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.

Honeycutt v. Honeycutt, ___ N.C. App. ___, ___, 701 S.E.2d 689, 694 (2010) (citations and quotation marks omitted).

N.C. Gen. Stat. § 90-21.14 grants immunity as to first aid or emergency treatment rendered under certain circumstances:

> (a) Any person, including a volunteer medical or health care provider at a facility of a local health department as defined in G.S. 130A-2 or at a nonprofit community health center or a volunteer member of a rescue squad, who receives no compensation for his services as an emergency medical care provider, who renders first aid or emergency health care treatment to a person who is unconscious, ill or injured,
>
> (1) When the reasonably apparent circumstances require prompt decisions and actions in medical or other health care, and
>
> (2) When the necessity of immediate health care treatment is so reasonably apparent that any delay in the rendering of the treatment would seriously worsen the physical condition or endanger the life of the person,

> shall not be liable for damages for injuries alleged to have been sustained by the person or for damages for the death of the person alleged to have occurred by reason of an act or omission in the rendering of the treatment unless it is established that the injuries were or the death was caused by gross negligence, wanton conduct or intentional wrongdoing on the part of the person rendering the treatment.

N.C. Gen. Stat. § 90-21.14 (2005). Plaintiff's brief does not dispute the applicability of N.C. Gen. Stat. § 90-21.14(1) and (2). Thus, in order to prevail, plaintiff must forecast evidence that his injuries were "caused by gross negligence, wanton conduct or intentional wrongdoing on the part of the person rendering the treatment[,]" specifically, defendants. *Id.*

Considering "the evidence in the light most favorable" to plaintiff, *Honeycutt* at ___, 701 S.E.2d at 694, we must determine whether the evidence forecasts negligence which rises to the level of "gross negligence, wanton conduct, or intentional wrongdoing." N.C. Gen. Stat. § 90-21.14.

> In determining or defining gross negligence, this Court has often used the terms willful and wanton conduct and gross negligence interchangeably to describe conduct that falls somewhere between ordinary negligence and intentional conduct. We have defined gross negligence as wanton conduct done with conscious or reckless disregard for the rights and safety of others. An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others. Our Court has defined willful negligence in the following language:
>
> > An act is done wilfully when it is done purposely and deliberately in violation of law or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. The true conception of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by operation of law.
>
> It is clear from the foregoing language of this Court that the difference between ordinary negligence and gross negligence is substantial. As this Court has stated:

> An analysis of our decisions impels the conclusion that this Court, in references to gross negligence, has used that term in the sense of wanton conduct. Negligence, a failure to use due care, be it slight or extreme, connotes inadvertence. Wantonness, on the other hand, connotes intentional wrongdoing. Where malicious or wilful injury is not involved, wanton conduct must be alleged and shown to warrant the recovery of punitive damages. Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others.
>
> Thus, the difference between the two is not in degree or magnitude of inadvertence or carelessness, but rather is intentional wrongdoing or deliberate misconduct affecting the safety of others. An act or conduct rises to the level of gross negligence when the act is done purposely and with knowledge that such act is a breach of duty to others, i.e., a conscious disregard of the safety of others. An act or conduct moves beyond the realm of negligence when the injury or damage itself is intentional.

Yancey v. Lea, 354 N.C. 48, 52-53, 550 S.E.2d 155, 157-58 (2001) (citations and quotation marks omitted).

We have no prior cases under N.C. Gen. Stat. § 90-21.14 to provide guidance as to factors which may elevate ordinary negligence by a volunteer emergency medical provider to gross negligence, and thus we turn to other types of cases which have addressed this issue. In the context of motor vehicle accidents, our Supreme Court has noted that

> [o]ur case law as developed to this point reflects that the gross negligence issue has been confined to circumstances where at least one of three rather dynamic factors is present: (1) defendant is intoxicated; (2) defendant is driving at excessive speeds; or (3) defendant is engaged in a racing competition. In some of these cases, a combination of the above factors are present.

Id. at 53-54, 550 S.E.2d at 158 (citations omitted).

Cases dealing with pursuits by law enforcement officers are also instructive in our consideration of gross negligence as those cases address immunity conferred on officers who are responding to emergency situations in a manner quite similar to emergency medical responders:

> Our Supreme Court has held that in any civil action resulting from the vehicular pursuit of a law violator, the gross negligence

> standard applies in determining the officer's liability. Gross negligence has been defined as wanton conduct done with conscious or reckless disregard for the rights and safety of others. An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.
>
> Our Courts have discussed several factors as relevant to the issue of whether the conduct of a law enforcement officer engaged in pursuit of a fleeing suspect meets the grossly negligent standard. These factors, although not dispositive standing alone, include: (1) the reason for the pursuit; (2) the probability of injury to the public due to the officer's decision to begin and maintain pursuit; and (3) the officer's conduct during the pursuit.

Lunsford v. Renn, ___ N.C. App. ___, ___, 700 S.E.2d 94, 98 (2010) (citations, quotation marks, and footnote omitted), *disc. review denied*, 365 N.C. 193, 707 S.E.2d 244 (2011).

Here, the factual situation is complicated by the fact that each defendant is subject to various rules and protocols which set forth the standards for the medical care which should be provided to a person in plaintiff's situation and the delegation of authority to particular types of responders. In other words, the situation presented to each defendant, upon arrival at the scene of the accident, was somewhat different. From the facts as provided in *Green I*, we know that Kearney responded to a dispatch made at 8:53 p.m.; by 9:00 p.m. Hayes and Wood of Louisburg Rescue had arrived, and at some point within this seven minutes "Paul Kilmer . . . and Katherine Lamell . . . with Franklin County EMS arrived." *Green*, ___ N.C. App. at ___, 690 S.E.2d at 758. Furthermore, "[a]t around 9:31 p.m., Perdue, the Franklin County Medical Examiner, arrived at the scene." *Id.* at ___, 690 S.E.2d at 759.

Plaintiff correctly notes that "[t]here is a lack of North Carolina case law on what constitutes gross negligence and willful and wanton conduct for EMS providers" and thus urge us to consider Illinois law, as Illinois courts have dealt with these issues many times. In considering Illinois law, we find *Fagocki v. Algonquin Fire Protection Dist.*, 496 F.3d 623 (7th Cir. 2007), to be extremely instructive on the issue. In *Fagocki*, the Seventh Circuit United States Court of Appeals considered the defendant's appeal of a jury verdict in favor of the plaintiff who alleged a claim based upon the "willful and wanton misconduct" of the emergency medical providers under Illinois law. *Id.* at 624-26 (citation and quotation marks omitted).

Illinois's Emergency Medical Services Systems Act provided that a licensed emergency medical services provider, such as the defendant paramedic service, who in good faith provides emergency medical services in the normal course of conducting their activities, or in an emergency, shall not be civilly liable as a result of their acts or omissions in providing such services unless such acts or omissions constitute willful and wanton misconduct. The purpose of thus exempting emergency medical providers from liability for mere negligence is to encourage emergency response by trained medical personnel without risk of malpractice liability for every bad outcome or unfortunate occurrence. Emergency situations are often fraught with tension, confusion, and as here, difficult physical locations for giving medical care. Emergency personnel must not be afraid to do whatever they can under less than ideal circumstances.

At common law, rescuers were fully liable for any negligence committed by them in the course of the rescue. This made sense when the intervention of an incompetent worsened the patient's condition or precluded intervention by a competent rescuer. But it had a tendency (as the Illinois cases emphasize) to deter even competent rescuers from volunteering their services, since if the rescue failed they might face a lawsuit. The problem is especially acute if, as in a case such as this, the rescuer cannot seek restitution for the benefit conferred by a successful rescue. Nevertheless if the negligence system operated with a zero error rate, and if a successful defendant could recoup his attorney's fees, the rescuer would have no fear about having to defend against such a suit. But these conditions are not satisfied. Judges, jurors, and lawyers make mistakes and litigants in ordinary civil litigation bear their litigation expenses even when they win. In addition, an employer is liable, by virtue of the doctrine of respondeat superior, for the negligent acts of an employee even if there was no way the employer could have prevented them.

So Illinois has decided to restrike the balance by exempting licensed providers of emergency medical treatment from liability for negligence. They remain liable if they are willful and wanton, but what does that doublet mean? The definitions in the Illinois cases are not very helpful, in part because general statements often make a poor match with specific facts and in part because the definitions are not uniform.

Id. at 626-27.

The Court in *Fagocki* went on to discuss the definitions of "willful and wanton" conduct under Illinois law. *Id.* at 627. In particular, one Illinois case states that "willful and wanton" conduct exhibits "an utter indifference to or conscious disregard for safety[,]" while another case notes that "willful and wanton may be synonymous with gross negligence[.]" *Id.* (citations and quotation marks omitted). The Court then analyzed Illinois cases "in which paramedics are accused of willful and wanton misconduct" and noted that there is a "high threshold for liability" but nonetheless there are at least three cases in which "the paramedics lost." *Id.*

One of these three cases is the sole Illinois case cited in plaintiff's brief, wherein paramedics

> responded to a 911 call by a woman who told the 911 operator that she was having an asthmatic attack and thought she was dying. The paramedics arrived at the woman's apartment, knocked on the door, heard nothing, and left. The door was unlocked, but they had not bothered to turn the doorknob. She died.

Id. at 627-28.

In another case,

> The paramedics knew that the plaintiff's decedent, killed when the stretcher she was on collapsed was not secured to the stretcher, that the stretcher's legs were not locked, that the paramedics placed the stretcher on a pothole, making it highly unstable, and that, despite their knowledge of the instability of the stretcher, they did not maintain physical contact with the stretcher.

Id. at 628 (citation, quotation marks, and brackets omitted).

> In the third case . . . the court ruled that a complaint was sufficient to state a claim against paramedics when it alleged that despite defendants' knowledge prior to their arrival on the scene that decedent was having difficulty breathing and her throat was closing due to an allergic reaction, and despite their training and standard operating procedures and accepted emergency practices, they waited between seven and eight minutes to administer two of the necessary medications and never administered the third.

Id.

The Court then analyzed the evidence presented in the case before it, in which the plaintiff's decedent suffered "irreversible brain damage" and ultimately died. *Id.* at 626. The plaintiff's decedent suffered from anaphylactic shock due to a food allergy and then was subjected to a series of medical errors. *Id.* at 625-26. The paramedics repeatedly failed to administer the proper medications, allowed the decedent to fall off of the gurney, failed to secure her oral airway, and made multiple attempts at intubation, ending with the endotracheal tube in her esophagus instead of her trachea, although the paramedics failed to realize that the tube was not properly placed. *Id.* The Court ultimately determined that there was no evidence that some of the medical errors would have made any difference to the causation of the decedent's injuries, and those errors which may have contributed to her injuries "would not amount to willful and wanton misconduct without circumstances of aggravation." *Id.* at 628-29.

Thus, Illinois cases addressing immunity of providers of emergency medical services appear to be in accord with North Carolina's law regarding gross negligence in other factual contexts, where

> the difference between . . . [ordinary negligence and gross negligence] is not in degree or magnitude of inadvertence or carelessness, but rather is intentional wrongdoing or deliberate misconduct affecting the safety of others. An act or conduct rises to the level of gross negligence when the act is done purposely and with knowledge that such act is a breach of duty to others, i.e., a conscious disregard of the safety of others. An act or conduct moves beyond the realm of negligence when the injury or damage itself is intentional.

Yancey, 354 N.C. at 53, 550 S.E.2d at 158.

There is no doubt that the acts or omissions of defendants which resulted in plaintiff's being erroneously declared dead and thus denied attempts at resuscitation could be characterized as "inadvertence or carelessness" of a very high "degree or magnitude[,]" but plaintiff has not forecast evidence of "intentional wrongdoing or deliberate misconduct[,]" or what the Seventh Circuit referred to as "circumstances of aggravation." *Id; Fagocki*, 496 F.3d at 628. In each of the Illinois cases discussed which found that claims of "willful and wanton" conduct had been stated, the courts stressed the knowledge of the emergency personnel and their actions which were not in accord with that knowledge: knowledge that a person was suffering a potentially fatal asthma attack but failing even to attempt to open an

unlocked door; knowledge that a person was unsecured on a stretcher with unstable legs placed on a pothole and leaving the person unattended despite this knowledge; knowledge that a person was having an allergic reaction and difficulty breathing but still waiting seven to eight minutes to administer medication. *Fagocki*, 496 F.3d at 627-28. Here, the problem was defendants' lack of knowledge: they did not know that plaintiff was alive. Even if their lack of knowledge was caused by a negligent failure to conduct a sufficiently thorough examination to establish whether plaintiff was living or deceased, this is still ordinary negligence. *See Yancey*, 354 N.C. at 53, 550 S.E.2d at 158. Plaintiff has not forecast any "intentional wrongdoing or deliberate misconduct" as to these defendants. *Id.*

[2] Another issue raised on appeal is whether the trial court properly struck various affidavits filed by plaintiff. We conclude that the trial court did not err, as these affidavits sought to present evidence of the legal conclusion that defendants were "gross[ly] negligen[t] or engaged in "wanton conduct or intentional wrongdoing[.] *See* N.C. Gen. Stat. § 90-21.14. It would be improper for a jury to hear expert testimony

> as to whether a certain legal standard has been met.
>
> > The rule that an expert may not testify that such a particular legal conclusion or standard has or has not been met remains unchanged by the new Evidence Code, at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness.
>
> Opinion testimony may be received regarding the underlying factual premise, which the fact finder must consider in determining the legal conclusion to be drawn therefrom, but may not be offered as to whether the legal conclusion should be drawn.

Norris v. Zambito, 135 N.C. App. 288, 292, 520 S.E.2d 113, 115-16 (1999) (citations omitted) (determining that "[w]hether the officers' conduct in pursuing Zambito was "grossly negligent" or "showed reckless disregard for the safety of others" are legal conclusions to be drawn from the evidence; Mr. Gormley's opinion testimony drawing such conclusions was, therefore, properly excluded" (citation omitted)). Much of the information contained in the excluded affidavits could properly be considered as to the issues of the standards of care applicable to each defendant and how defendants failed to meet those standards, but to the extent that any affiant states a legal conclusion, the affidavits were properly excluded. *See id.*

But even if we were to consider the affidavits, they did not present any new information as to the "underlying factual premise" or any facts to support a forecast of gross negligence. *Id.* at 292, 520 S.E.2d at 116. These affidavits review the facts, as summarized above, and review the applicable standards of care, stating how various defendants failed to comply with the applicable standards of care. In this regard, the affidavits would support claims for ordinary medical negligence. But the affidavits fail to identify any factors which would elevate the actions of defendants to gross negligence. Although the affidavits make generous use of phrases such as "conscious and reckless disregard for the rights and safety of Mr. Green[,]" the factual bases for these averments are simply the failures of defendants to comply with the applicable standards of care, which are, without more, still ordinary negligence, despite the adjectives an affiant may have used in stating the opinion.

We also note that this Court considered in *Green I* whether Dr. Perdue's actions as alleged by plaintiffs' complaint rose beyond a claim of ordinary negligence. *Green*, ___ N.C. App. at ___, 690 S.E.2d at 765. Although some of the legal issues raised in the prior case were different from those raised in this appeal, some were essentially the same. *See id.*, ___ N.C. App. ___, 690 S.E.2d 755. This Court addressed plaintiffs' claims against Dr. Perdue in his individual capacity, "alleg[ing] that his actions were in bad faith, or willful, wanton, corrupt, malicious or recklessly indifferent, and that Perdue acted outside the scope of his duties as a public officer." *Id.* at ___, 690 S.E.2d at 765 (quotation marks and brackets omitted). This Court noted:

> A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another. An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.

Id. (citations and quotation marks omitted).

The specific acts which plaintiffs alleged "were perpetrated outside and beyond Perdue's duties and authority" were the following:

> a. failing to determine if he was dealing with someone who was dead prior to beginning a forensic examination of that person;
>
> b. failing, upon three separate and specific inquiries, to determine if Green was dead or alive at the scene;

c. directing that Green be removed from the scene to the morgue when Green was not in fact dead;

d. attempting to determine the cause of death of someone who was not dead;

e. disregarding evidence of breathing while examining Green's exposed chest;

f. concluding that the twitching in Green's right upper eyelid was because of muscle spasms "like a frog leg lumping in a frying pan" when Green was in fact alive;

g. holding on to his erroneous conclusion that Green was dead when questioned whether Green was alive after he, himself, and others observed Green's right eyelid twitch several times;

h. dissuading the paramedics and first responders from checking or rechecking Green for vital signs or otherwise reevaluating Green's condition;

i. handling Green as if he were a corpse when Green was, in fact, alive; and

j. failing to provide any medical treatment.

Id. We note that the essence of the allegations is the same as the allegations against defendants in this appeal: they failed to determine that plaintiff was alive and thus failed to provide any medical treatment because they believed he was dead.

This Court determined that

> the allegations establish that Perdue acted under the assumption that Green was deceased and that he disregarded signs that Green was still alive; however, we find that these allegations do not support plaintiffs' assertion that Perdue's actions were in bad faith, or willful, wanton, corrupt, malicious or recklessly indifferent.

Id. (quotation marks, ellipses, and brackets omitted). Although there are some differences between the legal duties of defendants herein and Dr. Perdue and some factual differences as to when and how each defendant encountered plaintiff, the similarities between this case and Dr. Perdue's case far outweigh any differences. *See id.*, ___ N.C. App. ___, 690 S.E.2d 755. Thus, we too conclude that plaintiff's forecast of evidence fails to demonstrate that defendants acts or

omissions rose to a level beyond ordinary negligence. The trial court properly granted summary judgment in favor of the defendants pursuant to N.C. Gen. Stat. § 90-21.14. This argument is overruled.

III. Conclusion

As we have concluded that the trial court properly granted defendants' motions for summary judgment, we need not address plaintiff's other issue on appeal regarding the taxing of costs against plaintiffs as this argument was based upon plaintiff's argument that he should have prevailed on the summary judgment motions.

AFFIRMED.

Judges GEER and THIGPEN concur.

STATE OF NORTH CAROLINA v. MEGAN SUE OTTO

No. COA11-189

(Filed 15 November 2011)

1. Motor Vehicles—driving while impaired—trooper's knowledge private club served alcohol

The trial court erred in a driving while impaired case by finding that a trooper "knew" that a private club, approximately one-half mile from where defendant was stopped, served alcohol to the extent it determined that the trooper had actual knowledge or reasonably could have known that alcohol consumption occurred at the private club on that evening.

2. Motor Vehicles—driving while impaired—reasonable articulable suspicion to stop vehicle—weaving in own lane

The trial court erred in a driving while impaired case by concluding a trooper had a reasonable articulable suspicion for stopping defendant's vehicle. Based on the totality of circumstances, the trooper stopped defendant after he observed her weaving within her lane of travel at 11:00 p.m. near a facility that he "had heard" might be serving alcohol, but had no direct knowledge of alcohol service occurring on any occasion, let alone on that evening.

Judge ERVIN dissenting.

Appeal by Defendant from judgment entered 30 September 2010 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 31 August 2011.

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

The Robinson Law Firm, P.A., by Leslie S. Robinson, for Defendant.

BEASLEY, Judge.

Megan Sue Otto (Defendant) appeals from a judgment imposing a suspended sentence based on her conviction for driving while impaired. On appeal, Defendant contends that the trial court erred by denying her motion to suppress on the grounds that the arresting officer lacked the required reasonable suspicion immediately prior to the stop that she was driving while impaired. For the following reasons, we reverse.

On 29 February 2008, Trooper Ashley Brent Smith of the North Carolina Highway Patrol noticed that Defendant was weaving from the center line to the fog line. Defendant's vehicle did not leave the roadway or cross the center line, nor did Defendant commit any additional traffic violations, but Trooper Smith activated his blue lights after following her "for approximately three-quarters of a mile." When Trooper Smith initially observed Defendant, she was approximately one-half mile from a private club known as the Rock Springs Equestrian Club (Rock Springs) and was coming from the direction of that facility. Trooper Smith was aware that a Ducks Unlimited banquet was being held at Rock Springs that evening. Despite the fact that Trooper Smith did not know if alcohol would be served at Rock Springs that evening, he had previously heard others indicate that functions at which alcohol was served were held at Rock Springs on occasion. Trooper Smith issued Defendant a citation for driving while subject to an impairing substance.

On 2 December 2008, Defendant filed a motion to suppress any evidence obtained as a result of her initial detention on the grounds that the evidence in question had been obtained as the result of a "substantial violation" of her rights under North Carolina statutes and the state and federal constitutions. A hearing on Defendant's motion

was conducted before Judge Charles M. Vincent in Pitt County District Court, after which Judge Vincent stated that he intended to grant Defendant's motion. The State sought review of Judge Vincent's decision in the Pitt County Superior Court.

On 22 May 2009, a hearing on Defendant's suppression motion was held before the Pitt County Superior Court. On 23 August 2009, the superior court entered an order reversing Judge Vincent and remanding this case to the Pitt County District Court for further proceedings. On remand, Defendant was convicted of driving while impaired in the Pitt County District Court and appealed the resulting judgment to the Pitt County Superior Court.

On 3 December 2009, Defendant filed a motion seeking suppression of the evidence obtained as a result of her arrest which was heard on 30 September 2010. The superior court entered a written order denying Defendant's suppression motion on 13 January 2011. After the denial of her suppression motion, Defendant entered a plea of guilty to driving while impaired while reserving her right to seek appellate review of the order denying her suppression motion. In light of Defendant's plea, the superior court found that Defendant was subject to Level V punishment and sentenced her to sixty days imprisonment, which was suspended on the condition that Defendant successfully complete a twenty-four month period of supervised probation. Defendant noted an appeal to this Court from the superior court's judgment.

I.

[1] Defendant first argues that the trial court erred in finding that Trooper Smith "knew" that Rock Springs serves alcohol. We agree.

In reviewing a ruling on a motion to suppress, the trial court's findings of fact "are conclusive and binding on the appellate courts when supported by competent evidence." *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994).

In its order, the trial court found, in pertinent part, that:

1. On 29 February 2008, at approximately 10:59 p.m., Trooper A.B. Smith . . . was traveling north on Highway 43 in Pitt County when he received a phone call . . . [and] pulled off of Highway 43[.]

2. As Trooper Smith was ending the telephone conversation . . . he observed a burgundy Ford Explorer traveling down High-

way 43 coming from the direction of the Rock Springs Equestrian Center.

3. By chance, Trooper Smith pulled back onto Highway 43 . . . behind the burgundy Ford Explorer. There were no other vehicles between [his] patrol car and the Ford Explorer.

4. Trooper Smith remained behind the Ford Explorer for approximately three-quarters of a mile, during which time [he] observed the vehicle weaving constantly and continuously within the width of the travel lane . . . .

5. Trooper Smith knew that there was a Ducks Unlimited Banquet being held at the Rock Springs Equestrian Center that evening, which was approximately four-tenths to five-tenths of a mile away from where he initially observed the vehicle, and Trooper Smith knew that Rock Springs Equestrian Center serves alcohol.

6. As a result of his observations, Trooper Smith activated his blue lights and emergency equipment.

The trial court's Finding of Fact number 5 which state that Trooper Smith "knew" that Rock Springs serves alcohol is not supported by the evidence. While Trooper Smith testified that he had heard from others that alcohol was sometimes served at Rock Springs, he had never been inside the facility or personally observed alcohol being consumed there. Further, unlike an establishment which regularly serves alcohol such as a bar or restaurant, there was no basis upon which Trooper Smith could presume that alcohol was served that evening at an equestrian club. *State v. Jacobs*, 162 N.C. App. 251, 255, 590 S.E.2d 437, 441 (2004). As a result, the trial court's finding that Trooper Smith "knew" that alcohol was served at Rock Springs lacks competent evidentiary support to the extent that the trial court determined that Trooper Smith had actual knowledge or reasonably could have known that alcohol consumption occurred at Rock Springs on that evening.

II.

[2] Defendant next argues that the trial court erred in concluding that Trooper Smith had a reasonable, articulable suspicion for stopping her vehicle. We agree.

While a trial court's factual findings are binding on appeal if supported by competent evidence, the conclusions of law "are binding

upon us on appeal [only] if they are supported by the trial court's findings." *Brooks*, 337 N.C. at 141, 446 S.E.2d at 585. The prohibition against unreasonable search and seizure is guaranteed. U.S. Const., amend. IV. Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of a "person" within the meaning of this provision. *See Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979); *Whren v. United States*, 517 U.S. 806, 809, 135 L. Ed. 2d 89, 95 (1996). "[R]easonable suspicion is the necessary standard for traffic stops[.]" *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008). In *State v. Fields*, we held that there was no reasonable, articulable suspicion to stop a vehicle where defendant was stopped at 4:00 p.m. after an officer observed him weaving in his lane. 195 N.C. App. 740, 746, 673 S.E.2d 765, 768 (2009). Without any additional circumstances giving rise to a reasonable suspicion that criminal activity is afoot, stopping a vehicle for weaving is unreasonable.

> [W]eaving can contribute to a reasonable suspicion of driving while impaired. However, in each instance, the defendant's weaving was coupled with additional specific articulable facts, which also indicated that the defendant was driving while impaired. *See, e.g.*, *State v. Aubin*, 100 N.C. App. 628, 397 S.E.2d 653 (1990) (weaving within lane, plus driving only forty-five miles per hour on the interstate), *appeal dismissed*, *disc. review denied*, 328 N.C. 334, 402 S.E.2d 433 (1991); *State v. Jones*, 96 N.C. App. 389, 386 S.E.2d 217 (1989) (weaving towards both sides of the lane, plus driving twenty miles per hour below the speed limit), *appeal dismissed*, *disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990); *State v. Adkerson*, 90 N.C. App. 333, 368 S.E.2d 434 (1988) (weaving within lane five to six times, plus driving off the road); *State v. Thompson*, 154 N.C. App. 194, 571 S.E.2d 673 (2002) (weaving within lane, plus exceeding the speed limit).

Id. at 744, 673 S.E.2d at 768. When determining if reasonable suspicion exists under the totality of the circumstances, a police officer may also evaluate factors such as traveling at an unusual hour or driving in an area with drinking establishments. In *Jacobs*, 162 N.C. App. at 255, 590 S.E.2d at 441, the defendant was weaving within his lane and touching the designated lane markers on each side of the road. We concluded that the defendant's weaving combined with the fact that he was driving at 1:43 a.m., which we deemed an "unusual hour," in an area near bars was sufficient to establish a reasonable suspicion of driving while impaired. *Id.* Similarly, we found that the facts in

State v. Watson, 122 N.C. App. 596, 599-600, 472 S.E.2d 28, 30 (1996), established a reasonable suspicion, due to the fact that the defendant was weaving within his lane and driving on the center line of the highway at 2:30 a.m. on a road near a nightclub.

Based on the totality of the circumstances here, we find that Trooper Smith did not form a reasonable, articulable suspicion to stop Defendant; consequently the stop occurred in violation of Defendant's Fourth Amendment rights. In reviewing the trial court's pertinent findings of fact, Trooper Smith stopped Defendant after he observed her weaving within only her lane of travel at 11:00 p.m. (which is not an "unusual hour") near a facility that he "had heard" might be serving alcohol, but had no direct knowledge of alcohol service occurring on any occasion, let alone on the evening in question. Moreover, Trooper Smith did not observe Defendant commit any traffic violations other than weaving within her own lane. We therefore conclude that Trooper Smith did not have a reasonable, articulable suspicion to stop Defendant.

Reversed.

Judge STEPHENS concurs.

Judge ERVIN dissents.

ERVIN, Judge, dissenting.

As a result of my determination that the trial court's findings of fact, when understood in conjunction with the evidence presented at the suppression hearing, support the trial court's conclusion that Trooper Smith had the necessary "reasonable articulable suspicion" that Defendant was operating a vehicle while subject to an impairing substance, I believe that the trial court did not err by denying Defendant's suppression motion. Given that the Court reaches a different conclusion, I respectfully dissent from its decision to overturn Defendant's conviction.

Applicable Legal Standard

"[R]easonable suspicion is the necessary standard for traffic stops." *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008) (citations omitted). In *Styles*, the Supreme Court stated that:

> The Fourth Amendment protects individuals "against unreasonable searches and seizures," U.S. Const. amend. IV, and the North Carolina Constitution provides similar protection, N.C. Const. art. I, § 20. A traffic stop is a seizure "even though the purpose of the stop is limited and the resulting detention quite brief." Traffic stops have "been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Under *Terry* and subsequent cases, a traffic stop is permitted if the officer has a "reasonable, articulable suspicion that criminal activity is afoot."

Styles, 362 N.C. at 414, 665 S.E.2d at 439 (quoting *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667 (1979); *U.S. v. Delfin-Colina*, 464 F.3d 392, 396 (3d Cir. 2006); and *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 675, 145 L. Ed. 2d 570, 576 (2000)). Reasonable suspicion is a "less demanding standard than probable cause," *Wardlow*, 528 U.S. at 123, 120 S. Ct. at 675, 145 L. Ed. 2d at 576, and simply requires that investigatory stops "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) (citation omitted). "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 *U.S. v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 629 (1981)).

Finding that Trooper Smith "Knew"
that Rock Springs Served Alcohol

In its order, the trial court found, in pertinent part, that:

> 2. As Trooper Smith was ending the telephone conversation[,] . . . he observed a burgundy Ford Explorer traveling down Highway 43 coming from the direction of the Rock Springs Equestrian Center.
>
> . . . .
>
> 5. Trooper Smith knew that there was a Ducks Unlimited Banquet being held at the Rock Springs Equestrian Center that evening, which was approximately four-tenths to five-tenths of a mile away from where he initially observed the vehicle, and Trooper Smith knew that Rock Springs Equestrian Center serves alcohol.

In her brief, Defendant contends that the trial court's finding that Trooper Smith "knew" that the Rock Springs club serves alcohol lacked adequate evidentiary support. After carefully reviewing the record, I agree with Defendant and the Court that, while Trooper Smith testified that he had heard from others that alcohol was sometimes served at Rock Springs, he had no direct personal knowledge that such alcohol service actually occurred at the location in question. As a result, the trial court's finding that Trooper Smith "knew" that alcohol was served at Rock Springs lacks adequate evidentiary support to the extent that it constituted a determination that Trooper Smith had direct personal knowledge of the extent to which alcohol was served at that establishment. Instead, all that the trial court could appropriately find consistently with the record evidence was that Trooper Smith had heard that alcohol was sometimes served there. In view of the fact that the word "know" can be understood as having either of these two meanings,[1] I believe that, instead of totally disregarding the challenged finding, we should address the ultimate issue that is before us in this case by understanding the challenged finding to mean that Trooper Smith "knew" that alcohol was sometimes served at Rock Springs in the sense that he had heard that such was the case. Given that Trooper Smith was entitled to consider information that he received from others in deciding whether to stop Defendant, *Alabama v. White*, 496 U.S. 325, 330-31, 110 S. Ct. 2412, 2416, 110 L. Ed. 2d 301, 309 (1990) (stating that "[r]easonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability," so that, "if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable"), I believe that we are entitled to consider the fact that Trooper Smith had been informed that alcohol was sometimes served at Rock Springs in deciding whether he had "reasonable articulable suspicion" that Defendant was driving while subject to an impairing subject, with that fact being given appropriate weight in light of the absence of any indication in the record as to the source from which Trooper Smith obtained this information and the fact that Trooper Smith had no definitive knowl-

1. Among the alternative definitions for "know" are "to apprehend immediately with the mind or with the senses: perceive directly: have direct unambiguous cognition" and "to have acquaintance or familiarity with through experience or acquisition of information or hearsay." *Webster's Third New International Dictionary* 1252 (1966). As a result, interpreting the challenged finding of fact in the manner outlined in the text is fully consistent with ordinary English usage.

edge that alcohol was actually being served at Rock Springs on the evening in question.

Validity of Trooper Smith's Decision to Stop Defendant

The trial court's findings of fact (understood as outlined above), which Defendant has not challenged on appeal, establish that:

> 1. Trooper Smith observed Defendant driving on Route 43 at 11:00 p.m.
>
> 2. Defendant was coming from the direction of Rock Springs, which was half a mile away, when Trooper Smith first saw her.
>
> 3. Trooper Smith knew that there was a Ducks Unlimited banquet at Rock Springs that night, and had heard from others that alcohol was sometimes served there.
>
> 4. Trooper Smith followed Defendant for about three-quarters of a mile, during which time Defendant's vehicle was "constantly weaving from the center line to the fog line."
>
> 5. Defendant did not cross the center line or leave the road, but her vehicle was continuously weaving from one side of her lane of travel to the other until Trooper Smith initiated a traffic stop.

I believe that the information available to Trooper Smith, as reflected in the trial court's findings and when considered in its entirety, gave him the required "reasonable suspicion" that Defendant was driving while impaired and, for that reason, provided ample justification for his decision to stop Defendant's vehicle.

In successfully urging the Court to reach a different conclusion, Defendant notes that, while Trooper Smith saw her weaving within her own lane of travel for three-quarters of a mile, he did not observe her violate any traffic laws, cross the center line, or go outside the fog line. According to Defendant, "there is not one case in our appellate case law that would support a reasonable suspicion for the stop of a vehicle that is traveling at the speed limit, weaves in her travel lane while entering two curves, but otherwise operates in a normal fashion and is not operating late at night or near any bars or areas known for drug activity." As a result, Defendant believes, and the Court appears to agree, that her challenge to the denial of her suppression motion "is governed by this Court's reasoning in [*State v.*] *Fields*, [195 N.C. App 740, 673 S.E.2d 765, *disc. review denied*, 363 N.C. 376, 679 S.E.2d 390 (2009),] and [*State v.*] *Peele*, [196 N.C. App 668, 675 S.E.2d

682, *disc. review denied*, 363 N.C. 587, 683 S.E.2d 383 (2009),] and . . . is clearly distinguishable from the 'weaving' cases [in which a] stop was upheld." I do not find this logic persuasive.

Although Defendant asserts that she only "weave[d] in her travel lane while entering two curves" and that she was "not operating [her vehicle] late at night or near any bars," the undisputed evidence as reflected in the trial court's findings does not support either of these contentions. As the trial court's unchallenged findings reflect, Defendant weaved continuously in her own lane for three-quarters of a mile. In addition, Defendant was weaving from one side of her lane across to the other and back again, rather than merely making slight adjustments as she entered a curve. When Trooper Smith initially observed her at 11:00 p.m., Defendant was just a half mile from an establishment at which Trooper Smith understood that alcohol was sometimes served on an evening when a Ducks Unlimited banquet was taking place at that location. As a result, I believe conclude that the evidence as reflected in the trial court's factual findings, when properly understood, demonstrates something more than an isolated instance of weaving in one's own lane under otherwise innocuous circumstances.

In light of the trial court's findings concerning these two issues, *Fields* and *Peele* are, contrary to the Court's apparent determination, readily distinguishable from the present case. In *Fields*, an officer observed the defendant swerve three times while driving over a distance of a mile and a half at around 4:00 p.m. *Fields*, 195 N.C. App 741, 673 S.E.2d at 766. Similarly, in *Peele*, the defendant engaged in "a single instance of weaving within his lane over a tenth of a mile" at about 7:50 p.m. *Peele*, 196 N.C. App at 669, 675 S.E.2d at 684. The defendants in *Fields* and *Peele* were not driving at 11:00 p.m. in the vicinity of a facility at which the investigating officer understood alcohol was sometimes served or, even more importantly, constantly weaving from side to side within their own lane for a distance of three-quarters of a mile.

The decisions of the Supreme Court and this Court have not, contrary to Defendant's contention and the Court's apparent conclusion, ever adopted a *per se* rule to the effect that weaving within one's own lane of travel may never, regardless of the totality of the surrounding circumstances, support a "reasonable suspicion" that criminal activity is afoot. On the contrary, we have observed that "most North Carolina cases upholding investigatory stops in the context of driving while impaired have involved weaving within a lane or weaving

between lanes." *State v. Bonds*, 139 N.C. App. 627, 629, 533 S.E.2d 855, 857 (2000). "In upholding the [trial] court's decision that reasonable suspicion of impaired operation existed in this case, we note that the overwhelming weight of authority from other jurisdictions holds that repeated intra-lane weaving can create reasonable suspicion of impaired operation." *State v. Pratt*, 182 Vt. 165, 168-69, 932 A.2d 1039, 1041 (2007) (collecting cases). "In addition, decisions from outside this jurisdiction have routinely held that weaving within one's lane for substantial distances are facts which give rise to a reasonable suspicion that one is driving under the influence." *People v. Perez*, 175 Cal. App. 3d Supp. 8, 11, 221 Cal. Rptr. 776, 777 (1985) (citing cases). As a result, for the reasons stated above, I believe that the trial court did not err by concluding that, given the totality of the circumstances, Trooper Smith had a "reasonable suspicion" that Defendant was driving while impaired so that his decision to stop her vehicle did not violate Defendant's rights under the state and federal constitutions. *State v. Jacobs*, 162 N.C. App. 251, 255, 590 S.E.2d 437, 441 (2004) (holding that "Officer Smith's observation of defendant's weaving within his lane for three-quarters of a mile at 1:43 a.m. in an area near bars was sufficient to establish a reasonable suspicion of impaired driving"); *State v. Watson*, 122 N.C. App. 596, 599, 472 S.E.2d 28, 30 (1996) (holding that the fact that "Trooper Deans . . . observed defendant driving on the center line and weaving back and forth within his lane for 15 seconds" "at 2:30 a.m. on a road near a nightclub" was "sufficient to form a suspicion of impaired driving"). As a result of the fact that my colleagues have reached a contrary conclusion, I respectfully dissent from the Court's decision.

STATE OF NORTH CAROLINA v. THOMAS JAY ALLEN SURRETT

No. COA11-428

(Filed 15 November 2011)

1. Burglary and Unlawful Breaking or Entering—instructions—disjunctive—theories of underlying offense

The trial court did not err by giving disjunctive instructions in a prosecution for second-degree burglary allowing a conviction under the theories of accessory before the fact, aiding and abetting, or acting in concert. Two of the instructions required defendant's presence for conviction and one required that he not be present,

but all were merely different methods for the State to prove the underlying offense of second-degree burglary.

2. Criminal Law—defenses—voluntary intoxication—evidence not sufficient

There was no plain error in the trial court's failure to instruct the jury on voluntary intoxication in a prosecution for second-degree burglary where neither party presented evidence regarding crack cocaine's effect on defendant's mental state.

3. Accomplices and Accessories—instructions—accessory before the fact—not a separate offense

The trial court did not err in a second-degree burglary prosecution in its instruction on accessory before the fact. Although defendant argued that the legislature fully abolished the theory of accessory before the fact through the enactment of N.C.G.S. § 14-5.2, that statute merely abolished the distinction between an accessory before the fact and a principal, so that a defendant may not be convicted as both an accessory before the fact and as a principal. In this case, the jury merely had the opportunity to find defendant guilty of second-degree burglary using the theory of accessory before the fact; he was not convicted of a separate offense of accessory before the fact.

4. Accomplices and Accessories—accessory after the fact—arrest of judgment

The trial court erred in a second-degree murder prosecution by not arresting judgment for defendant's conviction of accessory after the fact because he could not be both an accessory and a principal.

5. Firearms and Other Weapons—possession of two stolen firearms—one count

The trial court erred by convicting defendant of two counts of possession of a stolen firearm where defendant possessed two separate firearms. *State v. Boykin*, 78 N.C. App. 572, was distinguished.

Appeal by defendant from judgment entered 3 November 2010 by Judge James U. Downs in Haywood County Superior Court. Heard in the Court of Appeals 12 October 2010.

Attorney General Roy Cooper, by Assistant Attorney General Charles G. Whitehead, for the State.

Michael E. Casterline for defendant appellant.

McCULLOUGH, Judge.

Thomas Jay Allen Lewis Surrett ("defendant") appeals his convictions of second-degree burglary, conspiracy to commit second-degree burglary, accessory after the fact to second-degree burglary, felonious possession of stolen property, and two counts of possession of stolen firearms. For the following reasons, we find no error as to the convictions of second-degree burglary, conspiracy to commit second-degree burglary, felonious possession of stolen property, and one count of possession of stolen firearms, but must arrest judgment on the conviction of accessory after the fact and one count of possession of stolen firearms. As a result, we remand for resentencing.

I. Background

On 16 September 2009, David Forney ("Forney") received news that his grandfather had died. At the time, Forney, along with his fiancé and children, resided in a two-bedroom trailer behind the Meadowlark Motel in Maggie Valley, North Carolina. After receiving the news about his grandfather, Forney took his family to visit relatives in Franklin, North Carolina. During their return to the Meadowlark Motel, Forney and his family stopped by his mother's place near Lake Junaluska.

Defendant and his wife, April, also resided in the Meadowlark Motel with April's three children. They lived in an apartment less than one hundred yards from Forney's trailer. On 16 September 2009, defendant was in his apartment drinking beer, smoking crack cocaine, and using methamphetamine with Andre Logan, Tabitha Jones, Dustin Surrett, and Nathan Hayes. At some point they ran out of crack cocaine and decided to meet with Forney to replenish their supply. The group got into April's car and met Forney near Lake Junaluska. They proceeded to buy crack cocaine from Forney and then returned to the apartment at the Meadowlark Motel. Defendant knew Forney would not be returning to his trailer until later, as he was attending a party near the lake; so defendant directed Dustin and Nathan to break into Forney's trailer and steal any guns or valuable items. Dustin and Nathan agreed.

Around 9:00 p.m., Dustin broke through a back window of Forney's trailer. He then opened the sliding glass door to let in Nathan and Tabitha. Tabitha left soon after entering without removing anything. Dustin and Nathan, however, stole a flat screen television, laptop computer, Playstation 3, cameras, and a gun case containing a .17 caliber and a .22 caliber rifle. They took the items to defendant's apartment where he took possession and decided to move the items to his mother's house in Waynesville, North Carolina. Dustin and Nathan helped load the items into April's truck and April then drove the three men to defendant's mother's house. At his mother's house, the three transferred the items to the trunk of his mother's gold Chrysler, and continued to move the items throughout the night, stopping at various places on occasion to smoke crack.

Sometime between 11:00 p.m. and 1:00 a.m., Forney returned to his apartment to find that it had been burglarized. He immediately called the sheriff's department to report the break-in and theft. Tabitha notified defendant of the police presence at Forney's trailer. Defendant, Dustin, and Nathan proceeded to take the stolen items to the Whispering Pine Motel in Asheville, North Carolina, where defendant rented a room. April returned to the Meadowlark Motel to look after the children.

Around 7:00 a.m., the three went to a friend's apartment in Waynesville where they unloaded the stolen items. Defendant then left with some other acquaintances, taking all the items except for the Playstation 3, which he let Dustin and Nathan keep. Nine days later, on 25 September 2009, law enforcement personnel stopped defendant near the Haywood and Buncombe County line. Defendant was driving his black Dodge Charger, with Kevin Keeny in the passenger seat. Law enforcement officers immediately arrested defendant and took him into custody. Keeny informed Buncombe County Anticrime Unit Officer Scott Hawkins that there were rifles in April's blue Dodge pickup truck outside of a hotel in Haywood County. The information was conveyed to drug agent Mark Mease with the Haywood County Sheriff's office. Mease went to the Days Inn Hotel, where he met April in the parking lot. April granted Mease permission to search her truck and the two rooms she and defendant were renting. The search of the rooms produced a gun case containing the two guns stolen from Forney's trailer. Defendant was charged with second-degree burglary, conspiracy to commit second-degree burglary, accessory after the fact to second-degree burglary, two counts of possession of a stolen firearm, and felonious possession of stolen property. He was also

charged with being an habitual felon to which he pled guilty. At trial, a jury convicted defendant on all counts. The trial court orally consolidated the charges into one count based on defendant's habitual felon status, with a sentence of 168 to 211 months in prison. Defendant appeals.

II. Analysis

A. Disjunctive Jury Instructions

[1] Defendant first argues the trial court committed reversible error by instructing the jury on conflicting theories in regard to the burglary charge, which he argues could lead to a non-unanimous jury verdict. Specifically, defendant contends the trial court erred by instructing the jury in a disjunctive form that it could find defendant guilty of second-degree burglary under a theory of accessory before the fact, aiding and abetting, or acting in concert.

"No person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24; *see also* N.C. Gen. Stat. § 15A-1237(b) (2009). We review the existence of a unanimous jury verdict *de novo* on appeal and in doing so "we must examine the verdict, the charge, the jury instructions, and the evidence to determine whether any ambiguity as to unanimity has been removed." *State v. Petty*, 132 N.C. App. 453, 461-62, 512 S.E.2d 428, 434 (1999). "Burglary is a common law offense. To warrant a conviction thereof it must be made to appear that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein. That the building was or was not occupied at the time affects the degree." *State v. Mumford*, 227 N.C. 132, 133, 41 S.E.2d 201, 202 (1947); *see also* N.C. Gen. Stat. § 14-51 (2009).

At trial, the court instructed the jury on three legal theories under any of which the jury could find defendant guilty of the crime of second-degree burglary even though defendant did not actually break into Forney's trailer. The trial court first instructed the jury on the theory of acting in concert, explaining that

> for a person to be guilty of a crime, it's not necessary that they do all of the []acts necessary to constitute the crime. If two or more persons join in a common purpose to commit second-degree burglary . . . , each of them, if actively or constructively present, is not only guilty of that crime, if the other person commits it, but is also guilty of any other crime committed by the other person in the furtherance or pursuance of the common purpose to commit second-degree burglary[.]

The trial court went on to instruct the jury concerning the theory of aiding and abetting that "[a] person may be guilty of a crime although he personally does not do any of the acts necessary to constitute that crime." The elements for aiding and abetting as given by the trial court are that (1) the second-degree burglary must have been committed by someone else; (2) the defendant reasonably advised, instigated, encouraged, procured and/or aided the other person to commit the crime; and (3) the defendant's actions or his statements caused or contributed to the commission of the crime by that other person or persons. Finally, the trial court instructed the jury on the theory of accessory before the fact explaining that "[a] person who, although not present at the time the crime is committed, nevertheless counsels, procures, commands or knowingly aids another to commit second-degree burglary, . . . is guilty . . . just as if he had been present and personally done all the acts necessary to constitute that crime."

Defendant contends instructing the jury on the three separate theories was fatally ambiguous and could confuse the jury because two of the theories require the presence of defendant during the crime, while accessory before the fact requires defendant not be present during the crime. Defendant argues that the trial court's instructions were disjunctive and created a risk of ambiguity in the jury's verdict because some jurors might have convicted defendant on the theory that he was present during the crime on the basis of acting in concert, while others might have convicted him on the theory that he was not present as an accessory before the fact.

Our Supreme Court has addressed disjunctive instructions under two lines of cases. *See State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986); *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990).

> There is a critical difference between the lines of cases represented by *Diaz* and *Hartness*. The former line establishes that a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. The latter line establishes that if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied.

State v. Lyons, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991). The jury instructions in the case at hand follow the *Hartness* line of cases in which a disjunctive instruction does not lead to an ambiguous verdict.

In *Diaz*, the trial court instructed the jury to return a guilty verdict if it determined the defendant "knowingly possessed or knowingly transported marijuana." *Diaz*, 317 N.C. at 553, 346 S.E.2d at 494. Our Supreme Court has

> noted that transportation and possession of marijuana "are separate trafficking offenses for which a defendant may be separately convicted and punished" and that by instructing the jury as he did, the trial judge "submitted two possible crimes to the jury." This Court found the instruction to be fatally ambiguous because it was impossible to determine whether all of the jurors found possession, all found transportation, or some found one and some the other.

Hartness, 326 N.C. at 564, 391 S.E.2d at 179 (citation omitted).

Alternatively, in *Hartness* the Supreme Court held that

> [e]ven if we assume that some jurors found that one type of sexual conduct occurred and others found that another transpired, the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of "any immoral, improper, or indecent liberties." Such a finding would be sufficient to establish the first element of the crime charged.

Id. at 565, 391 S.E.2d at 179 (quoting N.C. Gen. Stat. § 14-202.1 (1981)). Therefore, "A single wrong [may be] established by a finding of various alternative elements." *Id.* at 566, 391 S.E.2d at 180.

In the case *sub judice*, the trial court instructed the jury as to three alternative theories of guilt under which defendant could be found guilty of second-degree burglary. The separate theories of guilt were not separate offenses, but were merely different methods under which the jury could find defendant guilty of second-degree burglary. All the theories require that defendant have had a common mindset to burglarize the Forneys' residence and also acted in furtherance of the crime. The evidence shows that defendant had the similar intent and desire for the burglary to occur. He ordered and encouraged Nathan and Dustin to commit the burglary. Even if some of the jurors found defendant to be constructively present for the crime under acting in concert or aiding and abetting, while others found him to not

be present under accessory before the fact, the fact remains that the jury as a whole would unanimously find that defendant had the same intent needed to warrant a conviction of second-degree burglary.

Also, whether or not defendant was present during the crime is not "in itself a separate offense." *See Lyons*, 330 N.C. at 302, 412 S.E.2d at 312. Even further, defendant cannot be separately convicted and punished under the three theories because defendant cannot be guilty as a principal and an accessory to the same crime. *See State v. Rowe*, 81 N.C. App. 469, 471-72, 344 S.E.2d 574, 576, *appeal dismissed, disc. review granted in part, decision vacated in part*, 318 N.C. 419, 349 S.E.2d 604 (1986). Therefore, we find no error in the jury instructions on the three separate theories, two requiring defendant's presence and one requiring him to not be present, as they were merely different methods for the State to prove the underlying offense of second-degree burglary.

B. Failure to Instruct on Defense of Voluntary Intoxication

[2] In defendant's second argument he contends the trial court committed plain error in failing to instruct the jury on the defense of voluntary intoxication. Defendant did not object to the trial court's failure to give the instruction on the defense of voluntary intoxication. Defendant argues each crime he was charged with has an element of specific intent and his voluntary intoxication would negate this element in each charge. We disagree.

Our Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). Plain error arises when the error is "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 (1984) (internal quotation marks and citation omitted). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

"Although voluntary intoxication is no excuse for crime, where a specific intent is an essential element of the offense charged, the fact of intoxication may negate the existence of that intent." *State v. Bunn*, 283 N.C. 444, 458, 196 S.E.2d 777, 786 (1973). However, to warrant an instruction on voluntary intoxication,

> [t]he evidence must show that at the time of the [crime] the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose . . . . In the absence of such evidence of intoxication to such degree, the court is not required to charge the jury thereon.

State v. Medley, 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978) (citation omitted).

Defendant argues second-degree burglary, possession of stolen goods and firearms, and conspiracy to commit second-degree burglary all involve an element of specific intent which can be negated by the defense of voluntary intoxication. Defendant further contends that generally the burden is on defendant to raise an affirmative defense, but where the defense arises from the State's own evidence, it is not an affirmative defense and the burden is on the State to disprove it. *See State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975). At trial, the State did present evidence that defendant had been smoking crack cocaine throughout the night of 16 September 2009. Nonetheless, the State did not present any evidence regarding the effect smoking crack cocaine had on defendant, specifically his inability to formulate the intent to perform the crimes with which he was charged. "Evidence of mere intoxication . . . is not enough to meet defendant's burden of production." *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988) (Defendant was awarded a new trial because the trial court failed to give instruction on voluntary intoxication, but there the defendant had been found to be "definitely drunk" and "pretty high." The defendant had returned to the party "drunker, wilder and out of control" and was having trouble walking and speaking.).

In the case at hand, the evidence presented by the State of defendant having smoked crack cocaine does not amount to the level of intoxication involved in *Mash*. Neither party presented evidence regarding crack cocaine's effect on defendant's mental state. The evidence shows defendant was fully functional through the night and the next morning as he helped transport the stolen items around Western North Carolina. Based on the lack of evidence showing the effects of smoking crack cocaine on defendant, we find the trial court did not commit plain error in failing to instruct the jury on the defense of voluntary intoxication.

C. Jury Instruction on Theory of Accessory Before the Fact

[3] Defendant next argues the trial court committed plain error by instructing the jury on the theory of accessory before the fact. This is an extension of defendant's first argument contesting the use of the accessory before the fact instruction because it could lead to jury confusion. Defendant maintains that the North Carolina legislature fully abolished the theory of accessory before the fact through the enactment of N.C. Gen. Stat. § 14-5.2 in 1994. We disagree.

As stated above, we review jury instructions not objected to at the trial level for plain error. *See Gregory*, 342 N.C. at 584, 467 S.E.2d at 31. Defendant contends the State used a shotgun strategy to convict him of second-degree burglary by charging him with six distinct offenses arising out of the same burglary. He argues that his conviction of accessory before the fact should be vacated based on N.C. Gen. Stat. § 14-5.2 (2009), which he contends abolished the theory. Defendant, however, misconstrues the statute. The statute in relevant part states: "All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony." N.C.G.S. § 14-5.2. The statute did not abolish the theory of accessory before the fact, but merely abolished the distinction between an accessory before the fact and a principal, meaning that a person who is found guilty as an accessory before the fact should be convicted as a principal to the crime. As a result, a defendant may not be convicted as both an accessory before the fact to a crime and as a principal to the crime. *See Rowe*, 81 N.C. App. at 471-72, 344 S.E.2d at 576. Here, defendant was not convicted of a separate offense of accessory before the fact; instead the jury merely had the opportunity to find defendant guilty of burglary in the second-degree using the theory of accessory before the fact. Therefore, the trial court did not err in its instruction to the jury on the theory of accessory before the fact.

D. Conviction of Accessory After the Fact

[4] Defendant's final argument is that the trial court erred in failing to arrest judgment on his accessory after the fact conviction because defendant cannot be both a principal and an accessory to the same crime. We agree.

We review questions of law under the *de novo* standard of review. *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). When we apply the *de novo* standard of

review, we consider the matter anew and freely substitute our own judgment for that of the lower court. *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999). It is fundamental that accessories and principals to a crime are two distinct categories of participants and therefore one cannot be guilty of the crime under both theories. *See Rowe*, 81 N.C. App. at 471, 344 S.E.2d at 576.

> A principal is one who either alone or in concert with others commits or accomplishes a forbidden criminal act or acts, *State v. Small*, 301 N.C. 407, 272 S.E.2d 128 (1980) ; while an accessory is one who either before the fact counsels, encourages, instigates or procures another to commit a felony—*State v. Sauls*, 291 N.C. 253, 230 S.E.2d 390 (1976), *cert. denied*, 431 U.S. 916, 53 L. Ed. 2d 226, 97 S. Ct. 2178 (1977)—or after a felony is committed knowingly renders assistance to the *felon*. *State v. Potter*, 221 N.C. 153, 19 S.E.2d 257 (1942).

Id. As a result, defendant cannot be a principal and an accessory after the fact to second-degree burglary. Therefore, the trial court erred in failing to arrest judgment for defendant's conviction of accessory after the fact to second-degree burglary.

[5] We also note the trial court erred in convicting defendant of two counts of possession of a stolen firearm. While defendant did possess the two separate stolen firearms, we hold that defendant may not be convicted on separate counts for each firearm possessed. *See State v. Boykin*, 78 N.C. App. 572, 575-76, 337 S.E.2d 678, 681 (1985) ("[T]he Legislature . . . did not intend . . . to create a separate unit of prosecution for each firearm stolen nor to allow multiple punishment for the theft of multiple firearms . . . ."). Although *Boykin* construes N.C. Gen. Stat. § 14-72(b)(4), we believe its interpretation of the Legislature's intent applies to charges of possession of stolen firearms under N.C. Gen. Stat. § 71.1. *See* N.C. Gen. Stat. §§ 14-72(b)(4),-71.1 (2009). Consequently, we arrest judgment on one of defendant's convictions of possession of a stolen firearm. We must also remand the judgment for resentencing because the trial court consolidated it with the accessory after the fact and possession of a stolen firearm convictions, which we have now vacated. *See State v. Brown*, 350 N.C. 193, 213, 513 S.E.2d 57, 70 (1999). "[W]e cannot assume that the trial court's consideration of two offenses, as opposed to one, had no affect [sic] on the sentence imposed." *Id.*

III. Conclusion

Based on the foregoing, we find no error on behalf of the trial court in connection with defendant's convictions of second-degree burglary, conspiracy to commit second-degree burglary, possession of stolen goods, and one count of possession of a stolen firearm—Nos. 10CRS000686, 10CRS050601 and 10CRS050603. But, we arrest judgment on defendant's conviction for accessory after the fact and one count of possession of a stolen firearm—Nos. 10CRS000575 and 10CRS050602. Furthermore, we remand for resentencing.

As to Nos. 10CRS000686, 10CRS050601 and 10CRS050603, no error.

As to Nos. 10CRS000575 and 10CRS050602, arrest judgment.

Remand for resentencing.

Judges STEELMAN and ERVIN concur.

COASTAL FEDERAL CREDIT UNION, PLAINTIFF v. MELISSA OVERCASH FALLS AND STEPHEN ANTHONY OVERCASH, DEFENDANTS

No. COA11-331

(Filed 15 November 2011)

1. Judgments—default judgment—appearance prior to entry

The trial court erred by denying defendants' motion to set aside a default judgment under N.C.G.S. § 1A-1, Rule 60(b)(4) based on an alleged appearance prior to entry of a default judgment. The case was remanded to the trial court to make findings as to when defendants made contact with plaintiff's law firm and to make the appropriate conclusions of law based on those findings.

2. Judgments—entry of default—good cause—potential injustice—meritorious defense

The trial court erred by failing to consider setting aside the entry of default based on good cause under N.C.G.S. § 1A-1, Rule 55(d). The findings showed a potential injustice to defendants if they were not allowed to defend the action based on a meritorious defense and the trial court may have found there was good cause had the default judgment not already been entered. If the

trial court concludes on remand that defendants had appeared and the default judgment was thus void, the trial court should then determine whether defendants have shown "good cause" under Rule 55(d) to set aside the entry of default.

Appeal by defendants from order entered 13 January 2011 by Judge Richard Abernethy in District Court, Gaston County. Heard in the Court of Appeals 29 September 2011.

Kirschbaum, Nanney, Keenan & Griffin, P.A., by Krista F. Norstog Leonard, for plaintiff-appellee.

The Bumgardner Law Firm, by Thomas D. Bumgardner, for defendants-appellants.

STROUD, Judge.

Melissa Overcash Falls and Stephen Anthony Overcash (referred to collectively as "defendants") appeal from a trial court's order denying their motion to set aside entry of default and default judgment. For the following reasons, we remand for further findings of fact.

I. Background

On 11 May 2010, Coastal Federal Credit Union ("plaintiff") filed suit against defendants alleging that defendants had defaulted under the terms of an installment sales contract for a 2001 Ford F-350 truck, which was entered into on 6 May 2006. Plaintiff requested that the court award the deficiency due, $26,000.00, plus interest, and attorney's fees. On 18 June 2010, plaintiff filed a "motion and affidavit for entry of default and default judgment" alleging that "[c]ounsel for Plaintiff, upon information and belief, says that the Defendants have failed to plead and that no extension of time in which to file pleadings has been requested, and the time within which an Answer or other responsive pleading may be filed has expired[,]" and "[u]pon information and belief, Defendants have failed to appear, either personally or by representative, and are not infants nor incompetents." On 18 June 2010, the Gaston County Assistant Clerk of Superior Court allowed plaintiff's motion and entered default and default judgment against both defendants for the sum requested, including interest, and awarded $3,900.00 in attorney's fees. On 2 November 2010, defendants filed a verified motion to set aside entry of default and default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rules 6, 55, and 60, alleging that "[d]uring the summer of 2010 and prior to the entry of default" defendant Falls had been in contact with the law firm repre-

senting plaintiff in this action and had talked with an employee named "Joyce" who had attempted to set up a payment plan for the debt; this communication amounted to an "appearance" pursuant to Rule 55(b), which required plaintiff to serve defendants with written notice of the application for judgment; and because no notice was ever given to defendants, the default judgment against defendants is void and should be set aside pursuant to Rule 60(b).[1] Defendants also argued that the original contract did not call for the payment of attorney's fees upon breach of the contract and they had a

> meritorious defense in this action because the automobile that provides the subject matter of the contract dispute was fully insured by Farm Bureau Insurance Company . . . and the Defendants should have the ability to pursue a third-party claim against their insurance company for the full satisfaction of the loan alleged in the Plaintiff's complaint.

In response to this motion, on 9 December 2010 plaintiff filed the "affidavit of Joyce B. Courtney" custodian of business records at the law firm representing plaintiff. The affidavit stated that, according to their records, "[a]fter the filing of the Complaint on May 11, 2010, and prior to the Entry of Default and Judgment by Default, on June 18, 2010, no communications with [plaintiff's law firm] were made by the Defendants or others acting on their behalf" but it was not until "June 28, 2010, [that] Defendant Falls made contact with [plaintiff's firm]" and Ms. Courtney spoke with defendant Falls regarding setting up a payment plan, after default judgment had been entered. In response to defendant's allegations that she spoke with defendant Falls, Ms. Courtney stated "I did not speak with Defendant Falls, Defendant Overcash, or any party acting on their behalf prior to the Entry of Default and Judgment by Default on June 18, 2010[.]" Included with the affidavit was a "History Report" detailing the firm's work on plaintiff's case, including each contact that the firm attempted to make with defendants'. There is no contact by either defendant noted until 28 June 2010. By order entered 13 January 2011, the trial court denied defendants motion to set aside the entry of default and default judgment. On 19 January 2011, defendants gave notice of appeal from the 13 January 2011 order.

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1. Defendants did not allege or argue "mistake, inadvertence, surprise, or excusable neglect" under N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) but relied entirely upon Rule 60(b)(4).

II. Appearance

[1] Defendants first contend that "the trial court committed reversible error by denying [their] motion to set aside the default judgment pursuant to Rule 60(b)(4) because the judgment entered by the clerk was void[,]" as they made an appearance prior to entry of default judgment.

We have stated that

> N.C. Gen. Stat. § 1A-1, Rule 55(d) (2007) provides that a default judgment may be set aside in accordance with N.C. Gen. Stat. § 1A-1, Rule 60(b). Rule 60(b) states that "the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (4) [t]he judgment is void[.]" N.C.G.S. § 1A-1, Rule 60(b) (2007). Motions for relief from judgment are reviewed for an abuse of discretion. *Basnight Constr. Co. v. Peters & White Constr. Co.*, 169 N.C. App. 619, 621, 610 S.E.2d 469, 470 (2005) (citing *Grant v. Cox*, 106 N.C. App. 122, 124-25, 415 S.E.2d 378, 380 (1992)).

Connette v. Jones, 196 N.C. App. 351, 352-53, 674 S.E.2d 751, 752 (2009). Further in the context of a default judgment, we have stated that

> " '[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.' " *Knight v. Higgs*, 189 N.C. App. 696, 699, 659 S.E.2d 742, 746 (2008) (citation omitted). " 'Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated.' " *In re D.R.B.*, 182 N.C. App. 733, 736, 643 S.E.2d 77, 79 (2007) (citation omitted). Evidence must support the findings, the findings must support the conclusions of law, and the conclusions of law must support the ensuing judgment. *Lake Gaston Estates Prop. Owners Ass'n v. County of Warren*, 186 N.C. App. 606, 610, 652 S.E.2d 671, 673 (2007).

Jackson v. Culbreth, 199 N.C. App. 531, 537, 681 S.E.2d 813, 817 (2009).

Defendants' first argument on appeal is the same as their first argument in their motion to set aside entry of default and default judgment: Defendants made contact with an employee at plaintiff's law firm to set up a payment plan prior to entry of default judgment; this contact was an "appearance" pursuant to Rule 55(b); thus, they

were entitled to notice of the motion for entry of default judgment, which they did not receive; and the clerk did not have jurisdiction to enter the default judgment. N.C. Gen. Stat. § 1A-1, Rule 55(b) (2009), states that judgment by default may be entered:

> (1) By the Clerk.—When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for *failure to appear* and if the defendant is not an infant or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.
>
> . . . .
>
> (2) By the Judge.—
>
> a. In all other cases the party entitled to a judgment by default shall apply to the judge therefor; . . . . If the party against whom judgment by default is sought *has appeared* in the action, that party (or, if appearing by representative, the representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. . . .

(Emphasis added.) Therefore, if a defendant makes an "appearance in the plaintiff's action for the purposes of Rule 55, it follows that plaintiff [is] required to provide the three days' notice." *Stanaland v. Stanaland*, 89 N.C. App. 111, 115, 365 S.E.2d 170, 172 (1988). We have further noted that

> this statute is clearly intended to allow a clerk to enter default judgment against a defendant only if he has never made an appearance. Moreover, when a party, or his representative, has appeared in an action and later defaults, then G.S. 1A-1, Rule 55(b) requires that the judge, rather than the clerk, enter the judgment by default after the required notice has been given.

Roland v. W & L Motor Lines, Inc., 32 N.C. App. 288, 291, 231 S.E.2d 685, 688 (1977) (citations omitted).

> As a general rule, an "appearance" in an action involves some presentation or submission to the court. However, it has been stated that a defendant does not have to respond directly to a complaint in order for his actions to constitute an appearance. In fact, an

> appearance may arise by implication when a defendant takes, seeks, or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff.

Id. at 289, 231 S.E.2d at 687 (citations omitted). This Court has held that when a defendant does not make an appearance prior to the entry of default by the clerk or default judgment, the plaintiff is not required to serve written notice of application of a default judgment at least three days prior to the hearing on the application. *North Brook Farm Lines, Inc. v. McBrayer*, 35 N.C. App. 34, 39, 241 S.E.2d 74, 77 (1978).

Defendants do not challenge any of the findings of fact as not being supported by the evidence. Instead defendants argue that the findings do not support the trial court's conclusion that "[t]he communications between the Defendant Falls and employees of the Plaintiff's attorney do not constitute an 'appearance' as that term is utilized by Rule 55 of the North Carolina Rules of Civil Procedure[.]" Defendants argue that the findings "confirm the Defendants' position by expressly concluding that Melissa Overcash acting on her own and as an agent for her father, 'spoke with an employee named 'Joyce' who attempted to organize a payment plan so that Falls could satisfy the loan's balance' " and "makes plain that theses communications occurred between Falls and the Plaintiff's law firm 'after [Falls and Overcash] were served with the complaint and prior to the expiration of her time to file responsive pleadings as required by law[.]' " Defendants, citing several cases, also argue that defendant Falls' contact with the law firm amounted to an appearance. Plaintiff counters that defendants are misconstruing the trial court's findings, as finding number three is "a recital of [defendants'] allegations only, not as a finding that said allegations are true" but it is finding of fact four, which includes plaintiff's evidence, that supports the trial court's conclusion that the order of entry of default and default judgment is not void. (Emphasis in original.)

The trial court's relevant findings of fact state:

> 3. The Defendant's verified motion reveals that after being served with the complaint and prior to the expiration of her time to file responsive pleadings as provided by law, Melissa Falls contacted the law firm of Kirschbaum, Nanney, Keenan & Griffin, P.A. to inquire about the status of the action. Falls spoke with an employee named "Joyce," who attempted to organize a payment plan for Falls to satisfy the loan's balance.

> During June, July, and August the Defendant Falls continued her attempts to organize a payment plan with the Plaintiff's law firm. Following her conversations with the Plaintiff's law firm, Falls informed her father, Stephen Overcash, that she was working on a compromise with the Plaintiff's attorney and that no further action was necessary on his part. Defendant Overcash reasonably relied upon his daughter's statements and took no further action.
>
> 4. Although Ms. Falls remains adamant that the communications between herself and the Plaintiff's attorney's law firm occurred prior to 18 June 2010, the Plaintiff's affidavit in response to the Defendant's verified motion contends that neither Defendant contacted the law firm until 28 June 2010. Furthermore, the partial records attached to the Plaintiff's affidavit appear to reveal that neither Defendant contacted the Plaintiff's attorney's firm prior to the entry of default and default judgment.
>
> 5. On 18 June 2010, the Plaintiff filed a motion for entry of default and for a default judgment before the Clerk of Gaston County Superior Court. The Plaintiff never provided notice to the Defendants of this hearing, and neither of the Defendants were present when the clerk entered the Defendants' default and judgment in favor of the Plaintiff. Furthermore, the Plaintiff never served the Defendants with the default judgment.

According to Rule 55(b), for any contact by defendant to amount to an "appearance[,]" it must occur before entry of default judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 55(b). As the parties' arguments indicate, it is not clear whether the trial court found if defendants contacted plaintiff's law firm before or after entry of default judgment, as its findings on this issue are merely recitations of the parties' evidence. "Where there is directly conflicting evidence on key issues, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 366 (2000). If no contact whatsoever was made with plaintiff prior to the entry of the default judgment, then defendants made no "appearance" and no notice was required and the clerk of court could properly enter default judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 55(b); *North Brook Farm Lines, Inc.*, 35 N.C. App. at 39, 241 S.E.2d at 77. But if defendants made an appearance prior to entry of judgment, the clerk of court had no jurisdiction to enter the default judgment. *See Roland*,

32 N.C. App. at 291, 231 S.E.2d at 688 (holding that because the defendants had made an appearance default judgment filed by the clerk was void). Therefore, we remand to the trial court to make findings as to when defendants made contact with plaintiff's law firm and to make the appropriate conclusions of law based upon those findings.

III. Entry of default

[2] Defendants also contend that the "trial court committed reversible error because the entry of default should have been set aside pursuant to Rule 55(d)[,]" because good cause existed as defendants "possess a meritorious defense against Coastal Federal through a third-party claim against their insurance company." Defendants argue that the trial court's findings of fact, that "the vehicle that provides . . . the subject matter of this lawsuit was stolen and suffered a total loss[;]" defendants "maintained comprehensive insurance coverage for this vehicle[;]" and defendants had purchased Guaranteed Automobile Protection or "GAP" insurance coverage, show that they had a valid third-party claim and a meritorious defense that should have been permitted to go forward.

In their "motion to set aside entry of default and default judgment" defendants made the following argument as to their meritorious defense:

> 7. Finally, the Defendants have a meritorious defense in this action because the automobile that provides the subject matter of the contract dispute was fully insured by Farm Bureau Insurance Company, . . . and the Defendants should have the ability to pursue a third-party claim against their insurance company for the full satisfaction of the loan alleged in the Plaintiff's complaint.

The trial court made the following relevant findings:

> 7. According to the verified complaint and arguments of counsel, this is an action to recover a debt incurred by the Defendants arising out of the purchase of an automobile on 6 May 2006. In October of 2007, the automobile that provides the subject matter of this action was stolen and suffered a total loss. Although the Defendants maintained comprehensive insurance coverage for this vehicle, the Defendants' insurance company never paid the fair market value.
>
> 8. Furthermore, when the Defendants originally purchased the vehicle, they also purchased Guaranteed Automobile Protection or "GAP" coverage, which would have satisfied the difference

between the fair market value of the car and the total amount remaining on their financing agreement.

9. Therefore, the Defendants appear to have a valid third-party claim against their insurance company and the entity providing GAP protection, which would absolve them from any liability to the Plaintiff.

We have stated that "[d]efault is a two-step process requiring (i) the entry of default and (ii) the subsequent entry of a default judgment." *West v. Marko*, 130 N.C. App. 751, 754, 504 S.E.2d 571, 573 (1998) (citation omitted). An entry of default may be set aside "[f]or good cause shown" but a default judgment may be set aside only "in accordance with Rule 60(b)." N.C. Gen. Stat. § 1A-1, Rule 55(d). Allowing entry of default to be set aside for "good cause shown" "gives a court greater freedom in granting relief than is available in the case of default judgments. . . . Courts are willing to grant relief from a default entry more readily and with a lesser showing than they are in the case of a default judgment." *West*, 130 N.C. App. at 755, 504 S.E.2d at 573 (citation omitted). "[W]hat constitutes 'good cause' depends on the circumstances in a particular case, and within the limits of discretion[,]" *Brown v. Lifford*, 136 N.C. App. 379, 381, 524 S.E.2d 587, 588 (2000), and in making that determination the court "balance[s] the defendant's diligence with the following additional factors when deciding whether to set aside an entry of default: (1) the harm suffered by the plaintiff by virtue of the delay and (2) the potential injustice to the defendant if not allowed to defend the action." *Atkins v. Mortenson*, 183 N.C. App. 625, 628, 644 S.E.2d 625, 627 (2007) (citations omitted). Here, the above findings show a "potential injustice to the defendant[s] if [they are] not allowed to defend the action[,]" *see id.*, as they indicate defendants may have had a meritorious defense. Therefore, because relief from an entry of default requires "a lesser showing than . . . in the case of a default judgment[,]" *see West*, 130 N.C. App. at 755, 504 S.E.2d at 573, the trial court may have found that there was "good cause" to set aside the entry of default, had the default judgment not already been entered. However, unless the clerk entered the default judgment without jurisdiction because defendants had "appeared" prior to entry of the default judgment, these findings are unnecessary to the conclusions of law and are therefore superfluous. If the trial court were to conclude, on remand, that defendants had appeared and the default judgment is thus void, the trial court should then determine whether defendants have shown "good cause" under Rule 55(d) to set aside the entry of default as

well. For the foregoing reasons, we remand to the trial court for further consideration, based upon its findings of fact and conclusions of law as to the default judgment.

REMANDED.

Judges GEER and THIGPEN concur.

IN THE MATTER OF C.L.

No. COA11-434

(Filed 15 November 2011)

1. Juveniles—Alford plea—inquiry by court—sufficient

There was no merit to a juvenile's challenge to the trial court's decision to accept the juvenile's *Alford* admission where the juvenile contended that the trial court had not ensured that he understood that he would be treated as guilty despite his denial of guilt. The juvenile's argument rested upon N.C.G.S. § 7B-2405(6) and N.C.G.S. § 15A-1022(d) rather than any sort of alleged noncompliance with N.C.G.S. § 7B-2407; therefore, the extent to which the juvenile entitled to relief hinged upon the proper application of the totality of the circumstances test. The record developed in the trial court indicated that the juvenile was adequately apprised of the consequences of making his *Alford* decision, understood what would happen if he persisted in making such an admission, and made an "informed choice" to admit responsibility pursuant to *Alford*.

2. Juveniles—motion for continuance—no prejudice from denia

The trial court did not abuse its discretion by denying a juvenile's motion for a continuance where the juvenile was seeking to review a predispositional report which had been available for some time rather than seeking to obtain additional evidence, reports, or assessments of the sort specified by N.C.G.S. § 7B-2406. It was difficult for the appellate court to find serious prejudice.

IN RE C.L.

[217 N.C. App. 109 (2011)]

Appeal by respondent from adjudication and disposition orders entered 17 December 2010 by Judge Carol Jones Wilson in Onslow County District Court. Heard in the Court of Appeals 28 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Stephanie A. Brennan for the State.

W. Michael Spivey, for juvenile-appellant.

ERVIN, Judge.

Juvenile C.L. appeals from orders adjudicating him delinquent based upon a finding that he was responsible for misdemeanor possession of stolen property. On appeal, Juvenile contends that the trial court erred (1) by failing to determine whether Juvenile's *Alford* admission represented his informed choice and (2) by denying his motion to continue the dispositional hearing. After careful consideration of Juvenile's challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders should be affirmed.

I. Factual Background

In January 2010, Juvenile allegedly broke into a residence and stole a number of items, including a 12-gauge shotgun, a video game system, and a laptop computer. Juvenile was subsequently charged with felonious breaking and entering, felonious larceny, and felonious possession of stolen property. On 16 December 2010, Juvenile entered into an admission agreement pursuant to which the State agreed that the felony charges lodged against Juvenile would be dismissed and that a probationary disposition would be imposed in exchange for Juvenile's *Alford* admission to misdemeanor possession of stolen property. On the same date, Juvenile appeared before the trial court for the purpose of entering his *Alford* admission.

At the time that Juvenile tendered his admission of responsibility, the trial court questioned Juvenile using Form AOC-J-410, which is entitled "Transcript of Admission by Juvenile." After Juvenile indicated that he was able to hear and understand the proceedings and that he understood that he had the right to remain silent, the following colloquy occurred between Juvenile and the trial court:

> [Trial Court]: This charge has been explained to you by your lawyer?

[Juvenile]: Yes, ma'am.

[Trial Court]: Do you understand the nature of the charge?

[Juvenile]: Yes, ma'am.

[Trial Court]: Do you understand every element of the charge?

[Juvenile]: Yes ma'am.

[Trial Court]: Have you and your lawyer discussed any possible defenses, if any, to the charges?

[Juvenile]: Yes, ma'am.

[Trial Court]: And are you satisfied with her legal services to you?

[Juvenile]: Yes, ma'am.

[Trial Court]: You understand you can deny this allegation, have a hearing where the witnesses are called to testify, or by making this admission you give up that right to a hearing?

[Juvenile]: Yes, ma'am.

After the Court explained the most restrictive disposition that could be imposed upon him, Juvenile personally admitted having committed the offense of misdemeanor possession of stolen property. Finally, Juvenile stated that he understood the admission arrangement that had been worked out with the State, that he accepted it, that he made the tendered admission of his own free will, and that he had no questions concerning the proceedings or his case. Juvenile and his trial counsel signed the "Transcript of Admission by Juvenile," affirming Juvenile's responses to the trial court's questions and indicating that these responses were correct.

At the conclusion of his inquiry into the voluntariness of Juvenile's admission, the trial court found that Juvenile understood his rights, the nature of the charges, and the most restrictive disposition that could be imposed upon him and that he was satisfied with the representation that he had received from his trial counsel. After the State recited the factual basis underlying the charges that had been lodged against Juvenile, his trial counsel informed the trial court that Juvenile had not been arrested on the underlying charges, had not been interviewed concerning the charges, and had never

received discovery regarding a charge that had been lodged against an adult who made statements implying that Juvenile had attempted to sell him the goods taken during the breaking and entering. Even so, Juvenile's trial counsel indicated that Juvenile believed he was "enough in jeopardy to plead . . . pursuant to *Alford* rather than risk going to training school." At that point, the trial court found that there was a factual basis for Juvenile's admission; that his admission was the product of his informed choice and had been made freely and voluntarily; that his admission should be accepted; and that Juvenile should be found responsible for misdemeanor possession of stolen property.

After the State, consistently with the admission agreement, requested that a Level 2 disposition be imposed and that Juvenile be placed on probation for twelve months, serve 190 hours of community service, and spend seven days in custody, Juvenile's trial counsel asked the Court to continue the dispositional hearing on the grounds that she had not had the chance to fully discuss the "parameters" of the suggested punishment with Juvenile, including whether Juvenile would be in custody during the Christmas holiday. In addition, Juvenile's trial counsel claimed that, because the admission agreement had been reached earlier that day, she had not had an opportunity to review the Court Counselor's recommendation that Juvenile be subject to a Level 2 disposition, including spending twelve months on probation and seven days in custody. In response, the Court Counselor informed the trial court that "we have been working on this case for quite some time" and that, although a copy of the recommendation had been prepared for Juvenile's trial counsel, she had never requested that one be provided to her. The trial court denied the requested continuance, determined that a Level 2 disposition was appropriate, and ordered Juvenile to cooperate with a wilderness program, to spend seven days in confinement, to perform 190 hours of community service for the purpose of providing restitution, to successfully complete twelve months' probation, and to observe a curfew. At the conclusion of the hearing, Defendant's trial counsel requested the trial court to clarify its written order to reflect that Juvenile had entered an *Alford* admission, leading the trial court to note on the adjudication order that, "[t]hrough his [a]ttorney, the Juvenile entered an admission pursuant to an *Alford* Plea." Juvenile noted an appeal to this Court from the trial court's adjudication and dispositional orders.

II. Legal Analysis

A. *Alford* Admission

[1] On appeal, Juvenile contends that the trial court erred by failing to determine whether his *Alford* admission represented his free and informed choice. In support of this contention, Juvenile notes that the trial court did not make any inquiry concerning whether Juvenile understood the nature and effect of an *Alford* admission and contends that the trial court's failure to undertake such an inquiry invalidates his admission of responsibility. Juvenile's argument lacks merit.

"The acceptance of an admission by a juvenile is tantamount to the acceptance of a guilty plea by an adult in a criminal case." *In re Kenyon N.*, 110 N.C. App. 294, 296, 429 S.E.2d 447, 449 (1993) (citation omitted). An admission by a juvenile "must be made knowingly and voluntarily, and this fact must affirmatively appear on the face of the record[.]" *In re Chavis*, *3*1 N.C. App. 579, 581, 230 S.E.2d 198, 200 (1976), *disc. review denied*, 291 N.C. 711, 232 S.E.2d 203 (1977). A trial court may accept a juvenile's admission only after determining that his or her admission is a product of the juvenile's informed choice. *In re T.E.F.*, 359 N.C. 570, 573, 614 S.E.2d 296, 298 (2005); *see also* N.C. Gen. Stat. § 7B-2407(b). The fact that a proceeding is juvenile rather than criminal should "not lessen but . . . actually increase the burden upon the State to see that the child's rights were protected." *In re Meyers*, 25 N.C. App. 555, 558, 214 S.E.2d 268, 270 (1975). As a result, a juvenile is entitled, at an adjudicatory hearing, to "[a]ll rights afforded adult offenders except the right to bail, the right of self-representation, and the right of trial by jury," N.C. Gen. Stat. § 7B-2405(6), in addition to those specifically enumerated in Chapter 7B of the General Statues.

N.C. Gen. Stat. § 7B-2407 delineates the minimum requirements that must be met prior to the acceptance of a juvenile's admission of responsibility. *T.E.F.*, 359 N.C. at 576, 614 S.E.2d at 299. According to N.C. Gen. Stat. § 7B-2407, the trial court must personally address the juvenile and:

(1) Inform[] the juvenile that the juvenile has a right to remain silent and that any statement the juvenile makes may be used against the juvenile;

(2) Determin[e] that the juvenile understands the nature of the charge;

(3) Inform[ ] the juvenile that the juvenile has a right to deny the allegations;

(4) Inform[ ] the juvenile that by the juvenile's admissions the juvenile waives the juvenile's right to be confronted by the witnesses against the juvenile;

(5) Determin[e] that the juvenile is satisfied with the juvenile's representation; and

(6) Inform[ ] the juvenile of the most restrictive disposition on the charge.

N.C. Gen. Stat. § 7B-2407(a). In addition, the trial court must "inquire of the prosecutor, the juvenile's attorney, and the juvenile personally" to determine "whether there were any prior discussions involving admissions, whether the parties have entered into any arrangement with respect to the admissions and the terms thereof, and whether any improper pressure was exerted." N.C. Gen. Stat. § 7B-2407(b). Finally, the trial court may only accept a juvenile's admission after determining that there is a "factual basis for the admission." N.C. Gen. Stat. § 7B-2407(c).

In *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167-68, 27 L. Ed. 2d 162, 171 (1970), the United States Supreme Court held that a criminal defendant was entitled to enter a guilty plea while continuing to maintain his or her innocence. "[A]n '*Alford* plea' constitutes 'a guilty plea in the same way that a plea of *nolo contendere* or no contest is a guilty plea.' " *State v. Alston*, 139 N.C. App. 787, 792, 534 S.E.2d 666, 669 (2000) (quoting *State ex rel. Warren v. Schwarz*, 219 Wis.2d 615, 637, 579 N.W.2d 698, 706, *cert. denied*, 525 U.S. 966, 119 S. Ct. 413, 142 L. Ed. 2d 335 (1998)). "A defendant enters into an *Alford* plea when he proclaims he is innocent, but 'intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.' " *State v. Chery*, ___ N.C. App. ___, ___, 691 S.E.2d 40, 44 (2010) (quoting *Alford*, 400 U.S. at 37, 91 S. Ct. at 167, 27 L. Ed. 2d at 171). Juvenile's admission was tendered pursuant to the approach approved in *Alford* and its progeny.

Juvenile does not contend that the trial court failed to comply with any of the requirements set forth in N.C. Gen. Stat. § 7B-2407. Instead, Juvenile argues that the trial court erred by failing to ensure that he understood that, by making an Alford admission, he would be

treated as guilty despite his denial of guilt.[1] In support of this argument, Juvenile notes that N.C. Gen. Stat. § 15A-1022(d) requires a trial court, when accepting a plea of *nolo contendere* in a criminal case, to advise the defendant that he or she will be treated as guilty regardless of whether he or she admits guilt and argues that this requirement should be deemed applicable to juvenile proceedings pursuant to N.C. Gen. Stat. § 7B-2405(6).

Although this Court has adopted a "totality of the circumstances" test for use in evaluating the voluntariness of guilty pleas tendered by adult defendants, *State v. Hendricks*, 138 N.C. App. 668, 669-71, 531 S.E.2d 896, 898-99 (2000), this Court and the Supreme Court have declined to require the use of such an analysis for purposes of evaluating the sufficiency of a trial court's compliance with N.C. Gen. Stat. § 7B-2407. *In re T.E.F.*, 167 N.C. App. 1, 5-6, 604 S.E.2d 348, 351 (2004), *aff'd*, 359 N.C. 570, 614 S.E.2d 296 (2005). However, while the "strict compliance" approach delineated by this Court and the Supreme Court in *T.E.F.* rested on the statutory language of N.C. Gen. Stat. § 7B-2407, Juvenile's argument in this case rests upon N.C. Gen. Stat. § 7B-2405(6) and N.C. Gen. Stat. § 15A-1022(d) rather than any sort of alleged noncompliance with N.C. Gen. Stat. § 7B-2407. For that reason, the extent to which Juvenile is entitled to relief from the trial court's adjudication order hinges upon the proper application of the "totality of the circumstances" test set out in *Hendricks*. Thus, the ultimate issue before us in connection with Juvenile's challenge to the acceptance of his admission of responsibility is "whether [the trial court's failure to make the inquiry specified in N.C. Gen. Stat. § 15A-1022(d)] either affected [Juvenile's] decision to plead or undermined the plea's validity." *Hendricks*, 138 N.C. App. at 670, 531 S.E.2d at 898 (citation omitted).

Although the trial court did not strictly comply with N.C. Gen. Stat. § 15A-1022(d), we readily conclude that Juvenile had been informed of the consequences of his *Alford* admission and fully understood that he would be treated as subject to the trial court's dispositional authority after entering his admission. Among other things, Juvenile acknowledged during his colloquy with the trial court that he was admitting responsibility for committing misdemeanor possession of stolen goods and that he had been informed of the most severe consequence that could result from his admission. In addition,

1. The trial court did not explicitly address the issue upon which Juvenile's challenge to his adjudication of responsibility is based during its colloquy with Juvenile. Similarly, the relevant issue is not addressed on Form AOC-J-410.

Juvenile indicated that he understood the charge to which he was admitting responsibility and the contents of the admission arrangement that he had entered into with the State, that he had discussed the defenses that might be available to him with his trial counsel, and that he was satisfied with his trial counsel's legal services. Finally, Juvenile stated that he understood that he could deny the allegations and have a hearing and that, by admitting responsibility, he was foregoing that right. The fact that Juvenile admitted his guilt during his admission colloquy with the trial court does not, contrary to the argument advanced in Juvenile's brief, convince us that he failed to understand the information that was communicated to him during his colloquy with the trial court. As a result, we conclude that the record developed in the trial court indicates that Juvenile was adequately apprised of the consequences of making his *Alford* admission, understood what would happen if he persisted in making such an admission, and made an "informed choice" to admit responsibility pursuant to *Alford* instead of asserting the rights that would have been available to him had he gone to hearing. *State v. Thompson*, 16 N.C. App. 62, 63, 190 S.E.2d 877, 878 (holding that, where the defendant signed a transcript of plea and the trial judge made careful inquiry of the defendant regarding the voluntariness of his pleas of guilty, the record was "replete with evidence to support the adjudication that the defendant's pleas of guilty were in fact freely, understandingly, and voluntarily given"), *cert. denied*, 282 N.C. 155, 191 S.E.2d 604 (1972). As a result, Juvenile's challenge to the trial court's decision to accept his *Alford* admission lacks merit.

B. Motion for Continuance

[2] Secondly, Juvenile contends that the trial court erred by denying his motion for a continuance. Once again, we conclude that Juvenile's argument lacks merit.

According to N.C. Gen. Stat. § 7B-2406:

> The court for *good cause* may continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

(emphasis added). " 'A motion to continue is addressed to the court's sound discretion and will not be disturbed on appeal in the absence of abuse of discretion.' " *In re Humphrey*, 156 N.C. App. 533, 538, 577 S.E.2d 421, 425 (2003) (quoting *Doby v. Lowder*, 72 N.C. App. 22, 24, 324 S.E.2d 26, 28 (1984)). The burden of establishing adequate justification for allowing a requested continuance is on the party seeking such relief. *Id.*

In seeking a continuance of the dispositional hearing, Juvenile argued that such relief was appropriate because (1) his trial counsel had not talked with Juvenile about the possibility that he might be in custody over the Christmas holiday and (2) his trial counsel needed more preparation time. According to Juvenile's trial counsel, the fact that the admission agreement had been entered into on the morning of the hearing had deprived her of an opportunity to review the Court Counselor's recommendation. After carefully reviewing the record, we conclude that the trial court did not abuse its discretion by denying Juvenile's continuance motion. Juvenile was not seeking to obtain additional evidence, reports, or assessments of the type specified in N.C. Gen. Stat. § 7B-2406; instead, Juvenile was seeking to review a pre-dispositional report which had been available to his trial counsel for some period of time. In addition, we have difficulty seeing that Juvenile was seriously prejudiced by the denial of his continuance motion given that the Court Counselor's recommendation and the trial court's dispositional decision were consistent with Juvenile's admission agreement. Juvenile has not claimed that he had access to additional evidence or had any other basis for seeking a disposition that differed from the one that the trial court ultimately adopted. As a result, we conclude that the trial court did not abuse its discretion by denying Juvenile's continuance motion.[2]

2. In his brief, Juvenile appears to suggest that the trial court violated N.C. Gen. Stat. § 7B-2501(b), which allows the juvenile and the juvenile's parent, guardian, or custodian an opportunity to present evidence and advise the court "concerning the disposition they believe to be in the best interests of the juvenile," by simply proceeding to enter a dispositional order after denying Juvenile's continuance motion. In view of the fact that Juvenile's trial counsel had already addressed the trial court at the admission hearing, the fact that Juvenile made no effort to present any evidence or to advance any argument concerning dispositional issues, and the fact that the trial court gave Juvenile's mother an opportunity to speak and to ask any questions that she might have had, we conclude that the record does not establish that the trial court violated N.C. Gen. Stat. § 7B-2501(b) at the dispositional hearing.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court did not err by accepting Juvenile's admission of responsibility or denying Juvenile's continuance motion. As a result, the trial court's orders should be, and hereby are, affirmed.

AFFIRMED.

Judges STEPHENS and BEASLEY concur.

GORDON W. JENKINS, GUARDIAN *Ad Litem* FOR MIRIAM HAJEH, A MINOR, AND ASMA S. HAJEH AND JAMAL HAJEH PLAINTIFFS V. HEARN VASCULAR SURGERY, P.A. D/B/A CAROLINA VASCULAR AND VEIN SPECIALISTS AND ANDREW T. HEARN, M.D., DEFENDANTS

No. COA11-454

(Filed 15 November 2011)

1. Appeal and Error—interlocutory orders and appeals—substantial right—venue

The portion of an interlocutory order denying defendants' motion for change of venue affected a substantial right thus allowing for immediate appellate review.

2. Venue—motion for change—residence of unemancipated infant

The trial court erred in a medical malpractice case by denying defendants' motion for change of venue to Alamance County. The fact that a baby was a long-term patient at a medical center in Forsyth County after her birth did not affect her residence with her parents in Alamance County. Further, defendants reside and do business in Alamance County in addition to the alleged injury occurring in Alamance County.

3. Appeal and Error—interlocutory orders and appeals—motion to dismiss did not affect substantial right

The trial court did not err in a medical malpractice case by denying defendants' motion to dismiss because this portion of an interlocutory order did not affect a substantial right. Defendants offered no evidence as to any potential injury to either party if the issue was presented after a final judgment on the merits.

Appeal by Defendants from Order entered 15 December 2010 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 13 October 2011.

Wilson Helms & Cartledge, LLP, by G. Gray Wilson and Linda L. Helms, for Defendants.

Pulley Watson King & Lischer, P.A., by Richard N. Watson, for Plaintiffs.

THIGPEN, Judge.

Hearn Vascular Surgery, P.A., doing business as Carolina Vascular and Vein Specialists, and Andrew T. Hearn, M.D. ("Dr. Hearn") (collectively, "Defendants") appeal from an order entered 15 December 2010 denying their N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) motion for change of venue and their N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion to dismiss. First we must determine whether the trial court's interlocutory order denying Defendants' motions is suitable for immediate appellate review. If the order is immediately appealable, we must then decide whether the trial court erred in denying defendants' motion for change of venue and motion to dismiss. We conclude the portion of the order denying Defendant's motion for change of venue is immediately appealable, and venue is properly in Alamance County. We also conclude the order denying Defendants' motion to dismiss is interlocutory and not immediately appealable. We therefore dismiss Defendants' appeal from the portion of the order denying Defendants' motion to dismiss.

The evidence of record tends to show that Asma Hajeh ("Asma") and Jamal Hajeh ("Jamal") are husband and wife and the parents of Miriam Hajeh ("Miriam") (collectively, "Plaintiffs"). Asma and Jamal are residents of Alamance County. Gordon W. Jenkins, a Forsyth County resident, is Miriam's guardian *ad litem*.

On 24 December 2009, Asma, who was three weeks pregnant, began suffering from acute appendicitis. Jamal drove Asma to Alamance Regional Medical Center, where Dr. Hearn performed a laparoscopic appendectomy. Asma was discharged from Alamance Regional Medical Center on 27 December 2009.

On 9 May 2010, when Asma was twenty-three weeks pregnant, Asma began experiencing abdominal pain and vomiting. Asma was readmitted to the Alamance Regional Medical Center and transferred to Forsyth Medical Center in Winston-Salem the next day. Exami-

nations at Forsyth Medical Center revealed Asma was suffering from sepsis as a result of acute appendicitis. An open laparotomy surgery was performed on 10 May 2010, which revealed that a four centimeter portion of Asma's appendix remained in her body and had not been removed by Dr. Hearn.

Asma also went into premature labor on 10 May 2010, and attempts to prevent premature labor were unsuccessful. Asma delivered a one pound, eight ounce baby girl—Miriam.

Miriam was hospitalized at Forsyth Medical Center and was a patient in the Forsyth Medical Center Neonatal Intensive Care Unit from the date of her birth on 10 May 2010 until after the filing of the complaint in this case on 22 September 2010. Miriam suffers from permanent and severe physical and cognitive conditions. Plaintiffs' complaint, filed in Forsyth County, alleges Dr. Hearn's negligence in failing to remove Asma's entire appendix during the 24 December 2009 appendectomy.

On 23 November 2010, Defendants filed motions pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) and Rule 12(b)(6), contending Plaintiffs instituted the action in an improper venue, and Plaintiffs' complaint failed to state a claim upon which relief may be granted because the alleged negligence injured a nonviable fetus.

On 15 December 2010, the trial court entered an order denying Defendants' motions made pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) and Rule 12(b)(6).

On 12 January 2011, Defendants filed a notice of appeal from the trial court's 15 December 2010 order.

I: Interlocutory Appeal

We must first determine whether the interlocutory order denying Defendants' motions made pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) and Rule 12(b)(6) is immediately appealable. We conclude the denial of Defendants' motion for change of venue is immediately appealable, and the denial of Defendants' motion to dismiss is not.

"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." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (quotation omitted). "As a general rule, interlocutory orders are not immediately appealable." *Id.* (cita-

tion omitted). 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)." *Id.* (quotation omitted).

In the present case, the trial court did not certify pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) its order denying Defendants' motions. We must determine whether the order affects a substantial right.

i: Venue

[1] We first consider whether the portion of the order denying Defendants' motion for change of venue affects a substantial right. We conclude it does. We further conclude the trial court erred by denying Defendants' motion for change of venue, as venue is properly in Alamance County.

"[T]he denial of a motion for change of venue, though interlocutory, affects a substantial right and is immediately appealable where the county designated in the complaint is not proper." *Caldwell v. Smith*, ___ N.C. App. ___, ___, 692 S.E.2d 483, 484 (2010) (citations omitted); *see also Roberts v. Adventure Holdings, LLC*, ___ N.C. App. ___, ___, 703 S.E.2d 784, 786 (2010) (stating, "the grant or denial of venue established by statute is deemed a substantial right, it is immediately appealable") (internal quotation omitted). Therefore, because Defendants have alleged the county indicated in the complaint is improper, we address the merits of Defendants' appeal.

[2] Generally, absent an applicable specific statutory provision, venue is proper in the county in which any party is a resident at the commencement of the action. N.C. Gen. Stat. § 1-82 (2009) (providing, "[i]n all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement"). N.C. Gen. Stat. § 1-83 (2009) provides the following:

> If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

> The court may change the place of trial in the following cases:
>
> (1) When the county designated for that purpose is not the proper one.

"The provision in N.C.G.S. § 1-83 that the court 'may change' the place of trial when the county designated is not the proper one has been interpreted to mean 'must change.' " *Roberts*, ___ N.C. App. at ___, 703 S.E.2d at 786 (quotation omitted).

In the present case, Asma and Jamal reside in Alamance County. Dr. Hearn resides in Alamance County, and Hearn Vascular Surgery, P.A., doing business as Carolina Vascular Specialists, is located in Alamance County. Defendants' argue on appeal that because all of the parties in this case, including Miriam, reside in Alamance County, Alamance County is the proper venue. Plaintiffs counter with two arguments: (1) Miriam "resided" in Forsyth Medical Center because, from the time of her birth until after the filing of the complaint, Miriam was a patient in Forsyth Neonatal Intensive Care Unit at Forsyth Medical Center; and (2) the fact that Miriam's guardian *ad litem* resides in Forsyth County, in addition to Miriam's other ties to Forsyth County, is sufficient to establish venue. We find these arguments unconvincing.

a: Residence of Unemancipated Infant

We first address the question of whether Miriam "resided" in Forsyth County because she was a long-term patient at Forsyth Medical Center. We conclude Miriam's residence is with her parents in Alamance County.

There is a "common law presumption that a minor's domicile is the same as that of the minor's parents[.]" *Fain v. State Residence Comm. of the Univ. of N.C.*, 117 N.C. App. 541, 544, 451 S.E.2d 663, 665, *aff'd per curiam*, 342 N.C. 402, 464 S.E.2d 43 (1995) (citation omitted). "[A]n unemancipated infant, being *non sui juris*, cannot of his own volition select, acquire, or change his domicile." *Thayer v. Thayer*, 187 N.C. 573, 574, 122 S.E. 307, 308 (1924). Therefore, "[a]s a general rule, the domicile of every person at his birth is the domicile of the person on whom he is legally dependent[.]" *Id.* "It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother if illegitimate." *Id.*

We find the opinion of our Supreme Court in *Thayer v. Thayer*, 187 N.C. 573, 122 S.E. 307 dispositive in this case. In *Thayer*, a nine-year old illegitimate son brought suit in Davidson County against his putative father. The son lived with his grandfather in Montgomery County. *Id.* at 574, 122 S.E. at 308. The son's mother was a resident of Davidson County, and the father was a resident of Montgomery County. *Id.* The question for the Court was whether the son resided, for purposes of venue, in Davidson County with his mother or in Montgomery County with his grandfather. *Id.* The Court in *Thayer* recognized that the appropriate question for purposes of venue is the place of residence, not the place of domicile. *Id.* at 575, 122 S.E. at 308 (stating "there is a technical distinction between 'domicile' and 'residence' "). However, the *Thayer* Court stated "there is no suggestion that the domicile of the plaintiff's mother is in Montgomery County[.]" *Id.* The Court concluded, "the residence of the mother, in our opinion, is the residence of the plaintiff; and as the plaintiff has not been emancipated or abandoned by his mother, the mere fact that he is living with his grandfather in Montgomery County does not affect our conclusion." *Id.*

As in *Thayer*, there is no suggestion in the present case that Asma or Jamal either reside or are domiciled in Forsyth County. Asma and Jamal do not dispute that they reside in Alamance County. Miriam has neither been emancipated nor abandoned by her mother and father. The question of Miriam's legitimacy is not at issue, and *Thayer* supports the proposition that Miriam's in-patient stay at Forsyth Medical Center does not affect her residence. We therefore conclude the residence of the infant, Miriam, is the residence of her parents, Asma and Jamal. *See Id.* at 574, 122 S.E. at 308 (stating, "the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate"); *Fain*, 117 N.C. App. at 544, 451 S.E.2d at 665; *see also In re A.B.*, 179 N.C. App. 605, 611, 635 S.E.2d 11, 16 (2006) (holding, in the context of N.C. Gen. Stat. § 7B-101 (15), that "a newborn still physically in residence in the hospital may properly be determined to 'live' in the home of his or her parents"). The fact that Miriam was a long-term patient at Forsyth Medical Center in Forsyth County after her birth does not affect her residence with her parents in Alamance County.

b: Residence of Guardian *ad Litem*

We next address the question of whether the fact that Miriam's guardian *ad litem* resides in Forsyth County, in addition to Miriam's

other ties to Forsyth County, is sufficient to establish venue. We conclude it is not.

> [A] guardian *ad litem* . . . is appointed for the mere temporary duty of protecting the legal rights of an infant in a particular suit and his duties and his office end with that suit. He is not a party in interest in the suit, no property comes into his hands, and he has no powers nor duties either prior to the institution of the suit or after its termination.

Roberts, ___ N.C. App. at ___, 703 S.E.2d at 787 (quoting *Blackwell v. Vance Trucking Company*, 139 F.Supp. 103, 106-07 (1956)). As such, "a [guardian *ad litem*]'s county of residence is insufficient, standing alone, to establish venue." *Roberts*, ___ N.C. App. at ___, 703 S.E.2d at 787.

Plaintiffs contend in the present case that "venue in Forsyth County is not predicated solely upon the residence of Miriam Hajeh's guardian *ad litem*." In addition to the guardian *ad litem's* residence in Forsyth County, Plaintiffs emphasize that "Miriam had never lived anywhere other than in Forsyth County prior to filing suit[;]" and "Miriam was born in Forsyth County and resided in Forsyth County for months before this lawsuit was filed." However, this Court has already determined that Miriam's in-patient stay at Forsyth Medical Center did not affect Miriam's residence for purposes of venue. We reiterate that Asma and Jamal, Miriam's mother and father, reside in Alamance County; as such, the law requires that Miriam, an unemancipated infant, also resides with her mother and father. Dr. Hearn resides in Alamance County, and Hearn Vascular Surgery, P.A., doing business as Carolina Vascular Specialists, is located in Alamance County. The injury alleged also occurred in Alamance County. We believe the Court's holding in *Roberts*, ___ N.C. App. at ___, 703 S.E.2d at 787, is dispositive, and the facts of this case are insufficient to establish venue in Forsyth County.[1]

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1. Plaintiffs also state in their brief that "[a]ll of Miriam's doctors, physician assistants, therapists, and nurses" are in Forsyth County. Although this has no bearing on the determination of Miriam's residence pursuant to N.C. Gen. Stat. § 1-82, nothing in this opinion precludes Plaintiffs, after the transfer of venue to Alamance County, from filing a motion to transfer venue back to Forsyth County pursuant to N.C. Gen. Stat. § 1-83 (2), which states that "[t]he court may change the place of trial . . . [w]hen the convenience of witnesses and the ends of justice would be promoted by the change." *See also Stephenson v. Bartlett*, 358 N.C. 219, 228, 595 S.E.2d 112, 118 (2004) ("[V]enue is sufficiently flexible that it may be changed 'when the convenience of witnesses and the ends of justice would be promoted by the change' ") (citing N.C. Gen. Stat. § 1-83 (2)).

For the foregoing reasons, we conclude the trial court erred by denying Defendants' motion for change of venue. We reverse this portion of the trial court's order and remand to the Forsyth County superior court for transfer of venue to Alamance County.[2]

ii: Motion to Dismiss

[3] We next consider whether the portion of the order denying Defendants' motion to dismiss affects a substantial right. We conclude it does not.

> Ordinarily, a denial of a motion to dismiss under Rule 12(b)(6) merely serves to continue the action then pending. No final judgment is involved, and the disappointed movant is generally not deprived of any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on its merits. Thus, an adverse ruling on a Rule 12(b)(6) motion is in most cases an interlocutory order from which no direct appeal may be taken.

State ex rel. Edmisten v. Fayetteville Street Christian School, 299 N.C. 351, 355, 261 S.E.2d 908, 911 (1980) (citation omitted). The inquiry as to whether a substantial right is affected is "two-part"—"the right itself must be substantial and the deprivation of that substantial right must potentially work injury to [a party] if not corrected before appeal from final judgment[.]" *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). Although we do not disagree with Defendants' general contentions on appeal that addressing the question presented in their motion to dismiss would be in "the interests of judicial economy[,]" and that the issue raised is one "of public importance[,]" we find it dispositive that Defendants have offered no evidence as to any potential injury to either party, and we see none, if the issue presented in this interlocutory appeal is instead presented after a final judgment on the merits. Therefore, we conclude the portion of the order denying Defendants' motion to dismiss is not immediately appealable, and we dismiss this portion of Defendants' appeal.

REVERSED and REMANDED, in part; DISMISSED, in part.

Judges HUNTER, JR. and BEASLEY concur.

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2. Although Defendants prayed in their motion for change of venue that the court "dismiss[ ] plaintiffs' action with prejudice[,]" we conclude the appropriate remedy is transfer of venue to Alamance County. *See, e.g.*, *Roberts*, ___ N.C. App. at ___, 703 S.E.2d at 788 ("[V]enue is not jurisdictional, but is only ground for removal to the proper county upon a timely objection made in the proper manner").

ANITA THOMPSON, EMPLOYEE, PLAINTIFF v. FEDEX GROUND/RPS, INC., EMPLOYER, CRAWFORD & COMPANY, THIRD-PARTY ADMINISTRATOR, DEFENDANTS

No. COA11-448

(Filed 15 November 2011)

1. Workers' Compensation—presumption of continuing disability—not applicable

A workers' compensation plaintiff with a back injury was not entitled to a presumption of continuing disability related to alleged mysofascial pain syndrome and fibromyalgia where defendant's admission of compensability related only to back issues arising from plaintiff's accident and did not relate in any way to plaintiff's alleged mysofascial pain syndrome and fibromyalgia. The Industrial Commission's prior award was also clearly unrelated to plaintiff's alleged mysofascial pain syndrome and fibromyalgia.

2. Workers' Compensation—back injury—mysofascial pain and fibromyalgia—symptoms psychologically induced

There was competent evidence to support the Industrial Commission's findings of fact that a workers' compensation plaintiff's symptoms were psychologically induced and not related to her accident and back injury, and the findings supported the conclusion that plaintiff had failed to prove that any continuing disability or inability to earn wages was related to her injury by accident.

Appeal by plaintiff from opinion and award entered 27 January 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 September 2011.

Hardison & Cochran PLLC, by Benjamin T. Cochran and John P. Godwin, for plaintiff-appellant.

McAngus, Goudelock & Courie, P.L.L.C., by Jason C. McConnell, for defendant-appellees.

STEELMAN, Judge.

Where there was no prior award by the Commission of disability relating to plaintiff's alleged mysofascial pain syndrome and fibromyalgia and defendants' lack of any admission relating thereto, we hold that plaintiff was not entitled to a presumption of continuing

disability. Where there was competent evidence to support the trial court's finding that plaintiff's alleged fibromyalgia and mysofascial pain syndrome were psychologically induced, the trial court did not err in finding those conditions to be unrelated to plaintiff's 16 December 2000 injury by accident.

I. Factual and Procedural History

On 16 December 2000, Anita Thompson (plaintiff) was employed by Federal Express Ground as a manager in training. Plaintiff was returning from a business trip when she sustained a compensable injury by accident involving her back and neck while lifting luggage out of the trunk of a rental car. Plaintiff returned to work part-time for a short period following the accident, but has not worked after that time. On 8 August 2001, Federal Express Ground along with its third-party administrator, Crawford & Company, (collectively defendants) accepted the compensability of plaintiff's claim by filing a Form 60, which stated that plaintiff sustained an injury by accident to her back on 16 December 2000 and that her disability began on 22 May 2001.

Dr. Raphael Orenstein was plaintiff's treating physician following her accident. Plaintiff's complaints of pain continued to worsen, and even with the results of an MRI scan, Dr. Orenstein was unable to determine the source of plaintiff's pain. When plaintiff did not respond to conservative treatment, which included physical therapy, medication, and chiropractic care, Dr. Orenstein recommended she attend an interdisciplinary pain program designed to change a patient's attitude toward pain. As a result of this recommendation, plaintiff underwent a psychological evaluation with Dr. Scott Sanitate on 11 April 2001. Dr. Sanitate found plaintiff's pain to be psychological and not physiological in nature. Plaintiff requested a referral for a second opinion with an osteopath. When Dr. Orenstein refused to refer plaintiff to an osteopath, she found one through the Internet. Plaintiff started seeing Dr. Thomas Motyka, an osteopathic consultant with UNC hospitals on 24 April 2001. Dr. Motyka diagnosed plaintiff with fibromyalgia and myofascial pain syndrome.

In response to a Form 33 request for hearing filed by plaintiff following defendants' refusal to pay for Dr. Motyka's treatment, the Full Commission filed an opinion and award on 1 September 2004 awarding plaintiff temporary total disability and requiring defendants to pay for medical expenses resulting from her back injury. The Commission only required defendants to pay for Dr. Motyka's care for the limited period from 24 April 2001 through 26 June 2001. Plaintiff appealed to

this Court. This Court affirmed the Full Commission in *Thompson v. Federal Express Ground*, 175 N.C. App. 564, 569, 623 S.E.2d 811, 814 (2006), holding that "[s]ince plaintiff failed to obtain the Commission's approval of Dr. Motyka within a reasonable time, defendants were not required to pay for her treatments with Dr. Motyka from 27 June 2001 until 8 August 2001" (the time period between when Dr. Orenstein's retroactive approval of Dr. Motyka's treatment ended and when defendants admitted liability by filing a Form 60).

On 6 January 2005, the Commission entered an order designating Dr. Veeraindar Goli plaintiff's authorized treating physician.

On 29 October 2007, plaintiff filed a Form 33 request for hearing to resolve disputes over whether or not plaintiff's alleged myofascial pain syndrome and fibromyalgia, including her vision and oral problems, were causally related to her 16 December 2000 injury by accident, and if so, to what compensation she was entitled. In an opinion and award entered by the Full Commission on 27 January 2011, the Commission held that the Commission's 1 September 2004 opinion and award "concluded that plaintiff [was] entitled to have defendants pay for all medical treatment related to her compensable back injury which may provide relief." However, the Commission held that the opinion and award of 1 September 2004 "did not find that plaintiff's alleged fibromyalgia, myofascial pain syndrome, or the vision problems she associates therewith, were causally related to her December 16, 2000 injury by accident, and did not specifically hold that plaintiff was entitled to have defendants pay for medical treatment for her alleged fibromyalgia, mysofascial pain syndrome, or the vision problems she associates therewith." Based upon these findings the Commission concluded that "[p]laintiff has failed to prove that her fibromyalgia, myofascial pain syndrome, or the vision problems she associates therewith are the direct and natural result of, or are causally related to, her December 16, 2000 injury by accident." The Commission further concluded that "[p]laintiff has failed to prove that any continuing disability or inability to earn wages is related to her December 16, 2000 injury by accident."

Plaintiff appeals.

II. Standard of Review

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360

N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (citation omitted). "[I]f there is competent evidence to support the findings, they are conclusive on appeal even though there is plenary evidence to support contrary findings." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608, (2001) (citation omitted).

III. Presumption of Disability

[1] In her first argument, plaintiff contends that the Industrial Commission erred by failing to hold that there exists a presumption of disability for the plaintiff in light of a prior award of disability by the Commission, and as a subpart to this argument contends that defendants have failed to rebut this presumption. We disagree.

> In *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 599 S.E.2d 508 (2004), this Court expressly stated that "a presumption of disability in favor of an employee arises only in limited circumstances." *Id.* at 706, 599 S.E.2d at 512. Those limited circumstances are (1) when there has been an executed Form 21, "AGREEMENT FOR COMPENSATION FOR DISABILITY"; (2) when there has been an executed Form 26, "SUPPLEMENTAL AGREEMENT AS TO PAYMENT OF COMPENSATION"; or (3) when there has been a prior disability award from the Industrial Commission. *Id.* Otherwise, the burden of proving "disability" remains with plaintiff, even if the employer has admitted "compensability."

Clark, 360 N.C. at 44, 619 S.E.2d at 493.

Plaintiff argues that the 1 September 2004 opinion and award by the Commission constituted a prior disability award by the Commission entitling her to a presumption of disability. However, the prior award of disability did not address any disability related to plaintiff's alleged myofascial pain syndrome and fibromyalgia, which is the subject of the instant appeal. In the 1 September 2004 award the Commission found as fact that Dr. Motyka diagnosed plaintiff with mysofascial pain syndrome and fibromyalgia, and then went on to find that:

> Dr. Orenstein disagreed with Dr. Motyka's diagnosis of fibromyalgia, though they both agreed plaintiff would respond better once the workers' compensation claim was over. He also disagreed with Dr. Motyka because he felt plaintiff had reached maximum medical improvement. He later gave the opinion that in retrospect the treatment provided plaintiff by Dr. Motyka for the lim-

ited period from April 24, 2001 through June 26, 2001 was not necessarily inconsistent with the type of chiropractic treatment he had recommended and thus, was reasonable and necessary.

Based on its findings of fact the Commission made the following conclusion of law in its 1 September 2004 award:

Plaintiff is entitled to have the defendants pay for all medical treatments that **are related to her compensable back injury** so long as such treatments may reasonably be required to effect a cure, give relief and will tend to lessen plaintiff's disability. This includes reimbursement of past medical expenses plaintiff has incurred that have not been paid by defendants for Dr. Motyka's treatment, **but only for the period from April 24, 2001** through June 26, 2001. N.C. Gen. Stat. § 97-25.

(emphasis added).

Plaintiff's original injury of 16 December 2000 was admittedly compensable; however, this admission and the findings and conclusions of the Commission in its 1 September 2004 award relate only to the compensable back injury and disability clearly arising therefrom. The North Carolina Supreme Court has held in the past that "[t]he Commission erred in presuming plaintiff was disabled merely as a result of her receipt of ongoing benefits arising from defendants' admission of compensability." *Clark*, 360 N.C. at 44, 619 S.E.2d at 493. Defendants' admission of compensability related only to the back issues arising from the 16 December 2000 accident, but did not relate in any way to plaintiff's alleged mysofascial pain syndrome and fibromyalgia. The Commission's 1 September 2004 award was also clearly unrelated to plaintiff's alleged mysofascial pain syndrome and fibromyalgia. Rather, the award focused on plaintiff's medical treatment, and was limited to treatment related to her back injury and specifically excluded treatment by Dr. Motyka beyond a limited period. Defendants were required to pay only for the treatment by Dr. Motyka from 24 April 2001 through 26 June 2001. This only involved a limited type of chiropractic care, and clearly excluded other treatment by Dr. Motyka, which may have involved treatment for plaintiff's alleged mysofascial pain syndrome and fibromyalgia. Based upon the lack of any prior award by the Commission of disability relating to plaintiff's alleged mysofascial pain syndrome and fibromyalgia, and defendants' lack of any admission relating thereto, we conclude that plaintiff was not entitled to a presumption of continuing disability based upon the Commission's opinion and award of 1 September 2004.

Because we hold that plaintiff was not entitled to a presumption of continuing disability, we do not address the second part of plaintiff's argument asserting that defendants have failed to rebut a presumption of disability.

This argument is without merit.

IV. Findings of Fact and Conclusions of Law

[2] In her second argument, plaintiff contends the Commission erred in finding that her alleged fibromyalgia was not related to the 16 December 2000 compensable injury. We disagree.

The Commission made the following findings:

> 31. The Full Commission finds that the greater weight of the competent, credible evidence shows that plaintiff's ongoing problems are almost entirely self-induced, psychologically related conditions that are not the direct and natural result of, or causally related to, her December 16, 2000 injury by accident.
>
> 32. Plaintiff has failed to prove that her fibromyalgia, myofascial pain syndrome, or the vision problems she associates therewith are the direct and natural result of, or causally related to, her December 16, 2000 injury by accident.

As stated in Section II of this opinion, we review the award of the Commission to determine whether the findings of fact are supported by competent evidence. *Clark*, 360 N.C. at 43, 619 S.E.2d at 492 (citation omitted). We hold that these findings are supported by competent evidence.

Dr. Orenstein testified as follows:

> Q Okay. And just to follow up, within a reasonable degree of medical certainty, can you state that [plaintiff] suffers either from the condition of fibromyalgia or myofascial pain syndrome?
>
> A Based on my review of the notes and what I described back in July 2004 and previously, I would say no.

Dr. Sanitate testified as follows:

> Q Now going down to the impression section [of Dr. Sanitate's report from his 2001 exam of plaintiff]; if you could read the first impression that you noted there?
>
> A I stated non-organic symptom magnified physical exam. I am unable to corroborate her described injury with her pre-

sent complaints. She denies any other underlying psychosocial stressors at work or at home. The diffuse nature of her present symptoms suggests a psychiatric source unrelated to her work injury.

Q And that was your opinion as of the April 11, 2001, examination?

A Correct.

. . . .

Q [I]t was still your opinion as of April 2001 that [plaintiff] did not suffer from fibromyalgia, is that correct?

A I really felt there was more of a psychiatric origin or component to the presentation that she had had on both occasions.

Q And was there anything that revealed itself during the April of 2007 examination which changed your opinion?

A Like I said, it was just more of an extreme presentation based on the things that she brought to the visit.

Q And if you could turn to page four of your report [relating to the 2007 exam] under your impression section; if I could just ask you to read again the first paragraph there under number one?

A Okay. Non-organic neuromusculoskeletal exam. I stated in my last dictation from April of 2001 I feel that her symptom complex is more consistent with a psychiatric original [sic] and I am unable to attribute her diffuse complaints to a lifting injury from December of 2000. The degree to which she has become consumed with her research multi-system involvement of fibromyalgia has defined her.

This was the most peculiar presentation I have ever witnessed. The quantity of assisted devices/apparatus was extreme and included a motorized cart, net covering her upper body, seating cushion, cane, ear plugs, surgical mask, latex gloves, and Jobst stockings. It appeared to have provided her an identity and I do not feel that they are medically necessary. She provided references regarding physicians treating fibromyalgia in a page from a source describing a soleus—which is one of your calf muscles—trigger point referring pain to the jaw. She reported this during her examination.

This testimony constitutes competent evidence to support the Commission's findings of fact that plaintiff's symptoms are psychologically induced and not related to her 16 December 2000 accident, and that plaintiff's alleged fibromyalgia and myofascial pain syndrome are not causally related to her 16 December 2000 accident. These findings are binding on appeal, despite any evidence to the contrary. *Oliver*, 143 N.C. App. at 170, 544 S.E.2d at 608 (citation omitted).

These findings support the Commission's conclusion of law that "[p]laintiff has failed to prove that any continuing disability or inability to earn wages is related to her December 16, 2000 injury by accident." The Commission did not err in holding that plaintiff's fibromyalgia was not related to the 16 December 2000 compensable injury.

This argument is without merit.

AFFIRMED.

Judges HUNTER, Robert C., and McCULLOUGH concur.

DANIEL L. DAVENPORT, PLAINTIFF v. D.M. RENTAL PROPERTIES, INC. D/B/A HENRY MOBILE HOME PARK AND HENRY MOORE IN HIS INDIVIDUAL CAPACITY, DEFENDANTS

No. COA11-231

(Filed 15 November 2011)

Premises Liability—landowner's failure to keep property safe—personal injuries—no reasonable safety measure would have deterred assault

The trial court did not err in a personal injuries case arising out of an assault on defendants' property by granting summary judgment in favor of defendant based on insufficient evidence to establish a *prima facie* case of actionable negligence. No reasonable safety measure would have deterred the attack on defend-ants' property, and thus, defendants were not liable for the assault based on an alleged failure to make the property safe.

Appeal by Plaintiff from order entered 2 December 2010 by Judge Mark E. Klass in Gaston County Superior Court. Heard in the Court of Appeals 31 August 2011.

The Bumgardner Law Firm, by Thomas D. Bumgardner, for Plaintiff.

Bolster Rogers & McKeown, LLP, by Jeffrey S. Bolster, for Defendants.

STEPHENS, Judge.

Plaintiff Daniel L. Davenport commenced this action against D.M. Rental Properties, Inc. ("DMRP") and DMRP's president Henry Moore (collectively, "Defendants") seeking damages for personal injuries sustained while Davenport was a tenant of Henry Mobile Home Park, a 10-acre, 20-lot residential community owned by DMRP. In their answer to Davenport's complaint, Defendants denied all allegations of negligence and asserted various affirmative defenses, including contributory negligence, assumption of risk, and intervening criminal conduct of a third party. Both parties filed motions for summary judgment.

The forecast of evidence on summary judgment tended to show the following: On 19 July 2009, Tony Herrin, another tenant at Henry Mobile Home Park, began an altercation with Davenport on Defendants' property. Around 7:00 p.m., Herrin, who "had been drinking quite heavily," drove his car "slam up on top of the [ ] tire" of a bicycle on which Davenport's wife was sitting. Thereafter, Herrin encountered Davenport's wife riding the bicycle and, after grabbing its rear wheel, attempted to wrest the bicycle from Davenport's wife. Davenport's wife grabbed the front wheel and handlebars and attempted to pull the bicycle back. When Davenport's wife let go of the bicycle, Herrin and the bicycle landed in a culvert. When Davenport attempted to retrieve the bicycle, Herrin stomped on the bicycle's wheel and shouted, "You want some of me, you old [ ] bastard?" Herrin then placed his hand on his utility knife and threatened Davenport. In response, Davenport put his hands to Herrin's neck and pushed Herrin back into the culvert. When Herrin got out of the culvert, he punched Davenport in the jaw.

Davenport left Herrin, went inside his trailer, and called the police. Shortly thereafter, Davenport and his wife saw Herrin swinging a shovel at their pets and went outside to confront him. Davenport and his wife fought Herrin with a shovel and a rake for several minutes until Herrin discovered that he was bleeding. Herrin shouted, "I'm [ ] burning y'all!" He then retrieved a container of gasoline from his property, ran at Davenport with the gasoline and a lighter, and set Davenport on fire. Davenport sustained severe burns.

Following a hearing on the parties' motions, the trial court entered an order denying Davenport's motion for summary judgment and granting summary judgment for Defendants. Davenport appeals.

On appeal, Davenport contends that the trial court erred by granting Defendants' summary judgment motion because Davenport "established a *prima facie* case of actionable negligence." We are unpersuaded.

A *prima facie* case of negligence liability is alleged when a plaintiff shows that: defendant owed him a duty of care; defendant's conduct breached that duty; the breach was the actual and proximate cause of plaintiff's injury; and damages resulted from the injury. *Southerland v. Kapp*, 59 N.C. App. 94, 95, 295 S.E.2d 602, 603 (1982). Davenport contends that Defendants breached a duty owed to Davenport by (1) negligently failing to take measures to make their property safe; (2) negligently leasing property to Herrin; and (3) negligently failing to evict Herrin. Davenport further contends the breaches proximately caused his injuries. Each alleged duty and breach is discussed separately below.

Failure to make property safe

As correctly noted by Davenport, a landlord has a duty to exercise reasonable care to protect his tenants from third-party criminal acts that occur on the premises if such acts are foreseeable. *See Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638-39, 281 S.E.2d 36, 38 (1981) (holding that a proprietor of a public business establishment has a duty to exercise reasonable care to protect his patrons from intentional injuries by third persons, if he has reason to know that such acts are likely to occur); *see also Murrow v. Daniels*, 321 N.C. 494, 501, 364 S.E.2d 392, 397 (1988) (noting that foreseeability is the test in determining the existence of such a duty); *Shepard v. Drucker & Falk*, 63 N.C. App. 667, 669, 306 S.E.2d 199, 201 (1983) ("A tenant is normally seen as an invitee and the liability of a landlord for physical harm to its tenant depends on if it knows of the danger."). However, assuming *arguendo* the evidence presented by Davenport was sufficient to raise a triable issue of fact as to whether an assault on a tenant was foreseeable such that Defendants had a duty to exercise reasonable care to prevent that assault, we cannot conclude that Defendants' breach of that duty proximately caused Davenport's injuries.

Davenport argues that Defendants breached their duty by failing to install security cameras, hire security guards, install fences, or post warning signs. As has been recognized by this Court, such mea-

sures are preventative in nature and their purpose is to deter criminal activity on the premises. *See Liller v. Quick Stop Food Mart, Inc.*, 131 N.C. App. 619, 625-26, 507 S.E.2d 602, 606-07 (1998) (discussing how "the provision of security guards and installation of a security surveillance or burglar alarm system . . . or any other measures" could have prevented the plaintiff's assault; noting expert testimony on deterrent effect of security precautions); *Shepard*, 63 N.C. App. at 668, 306 S.E.2d at 201 (in syllabus of opinion, noting expert testimony on security measures' deterrent effect on intruder-related crime); *Urbano v. Days Inn of Am., Inc.*, 58 N.C. App. 795, 798, 295 S.E.2d 240, 242 (1982) (citing Wisconsin Supreme Court decision stating that "failure to maintain adequate security measures not only permits but may even encourage intruders to rob or assault [ ] patrons"). As such, where the proposed safety measures would not have prevented the plaintiff's injury, the alleged negligent failure to take such measures could not have constituted a proximate cause of the plaintiff's injury. *Liller*, 131 N.C. App. at 625-26, 507 S.E.2d at 606-07 (holding that where assailant would not have been reasonably deterred by security precautions, failure to take those precautions cannot constitute the proximate cause of the assault on the plaintiff). So it is in this case.

The safety measures that Davenport alleges Defendants negligently failed to provide—cameras, guards, fences, signs—would not have prevented Herrin's attack on Davenport. According to Davenport, Herrin had "a really bad crack habit and a drinking habit," became delusional and aggressive when intoxicated, and was "pretty well toasted [ ] on beer" on the evening of Davenport's assault. After falling in the culvert with the bicycle, Herrin became enraged, cursed at Davenport's wife, warped the bicycle's tire, and began threatening Davenport. Throughout the altercation, Davenport observed that Herrin was "doing all kind of mumbo-jumbo talk, screaming and hollering," "talking in tongue," and looking like "the devil himself." Further, Herrin was not deterred by Davenport's threats to call the police, and after Davenport called the police and informed Herrin thereof, Herrin continued to provoke and attack Davenport in spite of an increased likelihood of apprehension.

In our view, the foregoing evidence shows that Herrin would not have been deterred by any reasonable safety measures on Defendants' property. *See id.* (holding that security measures would not have prevented plaintiff's assault based on evidence that the assailant "appeared to be intoxicated or high on drugs," had a "wild look" on his face, and "shot plaintiff in front of a well-lighted store

and thereupon chased plaintiff into the store to shoot him again, thereby increasing the likelihood of identification and apprehension"). Rather than showing that either a lack of deterrents or an opportunity created by the premises' condition caused, or promoted in any way, Herrin's assault on Davenport, the evidence in this case tends to show that Herrin's intoxicant-induced aggression and a prior incident with Davenport's wife were the causes of Herrin's assault. We, thus, conclude that Defendants cannot be held liable for Herrin's assault based on an alleged failure to make the property safe.

Lease of property

Davenport further argues that Defendants "were obligated to ensure a reasonable procedure for screening potential residents." Davenport's only support for this argument is a general "Statement of Public Policy" from Article 7 of Chapter 42 of the North Carolina General Statutes, a group of statutes which provide for expedited eviction of criminals by landlords. N.C. Gen. Stat. § 42-59, *et seq.* (2009). That article, however, does not impose any obligations for screening potential tenants and certainly does not impose any liability for a failure to do so.

Further, we find compelling the following discussion by a Massachusetts court on some of the policy concerns raised by imposing on landlords a duty to decline housing:

> A landlord cannot reasonably be expected to control the interpersonal relationships of tenants or to predict from a criminal record whether one friend poses a threat to another friend, both of whom live in the same apartment building. To impose liability [in such a case] would induce landlords to decline housing to those with a criminal record in the absence of evidence of an actual threat to cotenants or individual tenants. That would only export the "problem" somewhere else. The resulting unstable living conditions or homelessness may increase the chances of recidivism to the detriment of public safety . . . .

Anderson v. 124 Green St., LLC, No. SUCV2009-2626-H, 2011 Mass. Super. LEXIS 24, at *15-16 (Mass. Super. Ct. Jan. 21, 2011).

Based on the foregoing, we conclude that Defendants cannot be held liable for their allegedly negligent leasing of property to Herrin.

Failure to evict

Although we have recognized a landowner's duty to exercise reasonable care to protect tenants from foreseeable third-party criminal acts, we have never recognized as included in that duty to protect the duty to evict a tenant. While other jurisdictions have recognized such a duty, for the following reasons we decline to do so in this case.

First, presuming that the duty to evict is not a separate duty imposed by the landlord-tenant relationship, but rather is an extension of a general landowner's duty to protect those lawfully on his property from foreseeable third-party criminal acts, foreseeability of a future criminal act by the third-party tenant/assailant—as shown by evidence of *relevant* prior criminal acts by the third-party tenant on the premises, *cf. Connelly v. Family Inns of Am., Inc.*, 141 N.C. App. 583, 588-89, 540 S.E.2d 38, 41-42 (2000)—would logically be the test for determining the existence of the duty. *See, e.g., Cusmano v. Lewis*, 55 Pa. D. & C.4th 1, 5-6 (2002) (recognizing a potential duty to evict where defendant mobile home park had knowledge of a tenant's minor child's dangerous propensities and failed to act); *Anderson*, 2011 Mass. Super. LEXIS 24, at *10 ("A duty to evict . . . may arise where the landlord knows of a specific threat that one tenant poses to another or where there is a history of violence by one tenant against other tenants."); *Williams v. Gorman*, 214 N.J. Super. 517, 521-23, 520 A.2d 761, 764 (1986) (discussion of landlord's potential duty to evict); *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 364 (2009) (discussing possible duty to evict where harm was foreseeable). In our view, however, the evidence of Herrin's prior conduct at Henry Mobile Home Park—which certainly did not portray Herrin as a model tenant, but which also did not indicate a propensity for violence at the level of his attack on Davenport—was insufficient to establish the foreseeability of the assault in this case. On the contrary, the evidence in this case clearly establishes (1) that Herrin and Davenport's relationship was at least cordial prior to the assault, and (2) the sudden descent from tolerant cordiality to intense hostility was due entirely to Herrin's intoxication and his run-in with Davenport's wife. As rightly stated by a Massachusetts court, "[a] landlord cannot reasonably be expected to control the interpersonal relationships of tenants." *Anderson*, 2011 Mass. Super. LEXIS 24, at *15. We conclude that imposing liability on Defendants under these circumstances would place just such an unreasonable burden on landlords in North Carolina.

Second, irrespective of a potential duty to evict imposed by Defendants' duty to protect its tenants, we disagree with Davenport's contention that Defendants' eviction of Herrin was mandated by section 42-59.1. As discussed *supra*, this section, and the article in which it is contained, provides landlords with the *power* to evict tenants engaged in certain criminal activity, but neither mandates eviction nor imposes liability on a landlord for failing to evict. Accordingly, Davenport's contention is meritless.

Finally, we disagree with Davenport that the parties' rental agreement imposes liability on Defendants for their failure to evict Herrin. Although there is some evidence that Herrin violated several terms of the agreement—and the agreement states that failure to obey the rules of the agreement "shall be an event of default"—the portion of the agreement in the record does not provide for the consequences of "an event of default." Accordingly, there is no evidence that Herrin's prior violation of the agreement warranted eviction under the agreement. Further, there is nothing to indicate that Defendants' failure to evict under the agreement resulted in liability. Therefore, we conclude that Defendants cannot be held liable for Davenport's injury based on their alleged failure to evict Herrin.

In summary, Davenport has failed to allege a *prima facie* claim of negligence liability against Defendants. Accordingly, we hold that the trial court did not err in granting summary judgment for Defendants. The order of the trial court is

AFFIRMED.

Judges ERVIN and BEASLEY concur.

IN RE S.H.

[217 N.C. App. 140 (2011)]

IN THE MATTER OF: S.H., E.L., W.L., MINOR CHILDREN

No. COA11-756

(Filed 15 November 2011)

1. Child Abuse, Dependency, and Neglect—neglect adjudication—findings

A mother's challenge to a trial court order adjudicating three of her four children neglected (with the fourth having been separately found neglected) lacked merit where the trial court's findings concerning neglect had ample evidentiary support, showed that the trial court had considered all relevant factors in an appropriate manner, and adequately supported the conclusion.

2. Child Abuse, Dependency, and Neglect—dispositional order—best interests of children

There was no merit to the parents' challenge to a dispositional order that the neglected children remain in DSS custody with supervised visitation where returning the children to the parents' home was not in the children's best interests.

3. Child Abuse, Dependency, and Neglect—placement in DSS custody—no finding that more care needed

The trial court erred by placing neglected children in DSS custody without specifically determining that they needed more adequate care or supervision than they could receive in the parents' home. The relevant statutory language requires that the finding be made as a precondition for the adoption of one of the dispositional alternatives outlined in N.C.G.S. § 7B-903(a)(2).

Appeal by respondents from order entered 5 April 2011 by Judge Mark Galloway in Caswell County District Court. Heard in the Court of Appeals 24 October 2011.

Stuart N. Watlington for Caswell County Department of Social Services, petitioner-appellee.

Deana K. Fleming, for guardian ad litem.

Charlotte Gail Blake for respondent-appellant mother.

Michael E. Casterline for respondent-appellant father.

ERVIN, Judge.

Respondent-Father W. L. and Respondent-Mother Dominique L. appeal from an order concluding that their three oldest children, S.H., E.L., and W.L.[1] were neglected juveniles and that all three children should remain in the custody of the Caswell County Department of Social Services. On appeal, Respondent-Mother argues that the trial court erred by concluding that Susan, Emily, and Wes are neglected juveniles. In addition, both Respondent-Father and Respondent-Mother contend that the trial court erred by ordering that the children remain in DSS custody. After careful consideration of the challenges to the trial court's order advanced by Respondent-Father and Respondent-Mother in light of the record and the applicable law, we conclude that the trial court's adjudication order should be affirmed, that the trial court's dispositional order should be reversed, and that this case should be remanded to the Caswell County District Court for further proceedings not inconsistent with this opinion, including the entry of a new dispositional order.

I. Factual Background

On 6 October 2010, DSS filed juvenile petitions alleging that Susan, Emily, and Wes were neglected juveniles on the grounds that they did not receive proper care, supervision or discipline from their parents and lived in an environment that was injurious to their welfare. More specifically, DSS alleged that, on 2 October 2010, the children's youngest sibling, D.L.,[2] had suffered cardiac arrest as the result of starvation and had to be airlifted to UNC Hospital. In addition, DSS alleged that Respondent-Father had disciplined Wes using a fishing pole and belt, resulting in scarring on his back.

On 21 October 2010, the trial court conducted a hearing concerning a separate juvenile petition that DSS filed with respect to Dawn. On 22 November 2010, the trial court entered an order finding that Dawn was an abused and neglected juvenile. In response to an appeal noted by Respondent-Father and Respondent-Mother, this Court filed an opinion on 5 July 2011 affirming the trial court's adjudication and disposition order with respect to Dawn. *In re D.L.*, No. COA11-60, 2011 N.C. App. LEXIS 1405 (5 July 2011).

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1. S.L., E.L., and W.L. will be referred to throughout the remainder of this opinion as Susan, Emily, and Wes, respectively, which are pseudonyms that will be used to protect the juveniles' privacy and for ease of reading.

2. D.L. will be referred to throughout the remainder of this opinion as Dawn, which is a pseudonym that will be used to protect the child's privacy and for ease of reading.

The trial court conducted adjudication and disposition hearings concerning the petitions relating to Susan, Emily, and Wes beginning on 14 December 2010 and concluding on 4 January 2011. On 5 April 2011, the trial court entered an order finding that Susan, Emily, and Wes were neglected juveniles and ordering that they remain in DSS custody, subject to visitation with Respondent-Father and Respondent-Mother. Respondent-Father and Respondent-Mother noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Adjudication

[1] "The purpose of abuse, neglect and dependency proceedings is for the court to determine whether the juvenile should be adjudicated as having the status of abused, neglected or dependent." *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007). In reviewing an order concluding that a juvenile is neglected, this Court determines whether the trial court's findings of fact are supported by clear and convincing evidence and whether those findings of fact support the trial court's conclusions of law. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). On appeal, Respondent-Mother contends that the trial court erred by concluding that Susan, Emily, and Wes were neglected juveniles on the grounds that the trial court gave excessive weight to its prior determination that Dawn was an abused and neglected juvenile. We do not find Respondent-Mother's argument persuasive.

A neglected juvenile is one

> 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). "[T]his Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or discipline' " as a precondition for concluding that a particular juvenile is neglected. *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (citations omitted). "It is well established that the trial court need not wait

for actual harm to occur to the child if there is a substantial risk of harm to the child in the home." *In re T.S.*, 178 N.C. App. 110, 113, 631 S.E.2d 19, 22 (2006), *aff'd*, 361 N.C. 231, 641 S.E.2d 302 (2007). In predicting whether there is a substantial risk of future abuse or neglect, the court must consider "the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999). As a result, a trial court may consider "whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home" in determining whether a juvenile is neglected. N.C. Gen. Stat. § 7B-101(15). A determination of the weight to be afforded to evidence of prior abuse or neglect of another child is committed to the sound discretion of the trial court. *In re Nicholson and Ford*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994).

As its adjudication order reflects, the trial court properly considered the evidence tending to show that Dawn was an abused or neglected juvenile in determining whether Respondent-Father and Respondent-Mother had neglected Susan, Emily, and Wes. All three children witnessed the slow deterioration of their younger sister's health as a result of the failure of Respondent-Father and Respondent-Mother to seek and obtain medical treatment for her. Moreover, a careful examination of the trial court's adjudication order shows that it considered additional evidence bearing on the issue of neglect besides the prior abuse and neglect to which Dawn was subjected. Among other things, the trial court found that Susan, Emily, and Wes had never received any medical care while in their parents' home. In addition, the trial court found that Respondent-Father had beaten Wes with various implements for disciplinary purposes such that Wes experienced pain for several days and sustained deep bruising and scarring to his back. Although Respondent-Mother may not have inflicted these injuries, she failed to prevent this abuse from occurring. "It is settled law that nonfeasance as well as malfeasance by a parent can constitute neglect." *In re Adcock*, 69 N.C. App. 222, 224, 316 S.E.2d 347, 348 (1984) (citation omitted). Moreover, "[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). As a result, given that the trial court's findings concerning the neglect issue had ample evidentiary support, showed that the trial court considered all relevant factors in an appropriate manner, and adequately supported the trial court's con-

clusion that Susan, Emily, and Wes were neglected juveniles, we conclude that Respondent-Mother's challenge to the trial court's adjudication order lacks merit.

B. Disposition

1. Failure to Order that the Children be Returned Home

[2] "The district court has broad discretion to fashion a disposition from the prescribed alternatives in N.C. Gen. Stat. § 7B-903(a), based upon the best interests of the child." *In re B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008). For that reason, "[w]e review a dispositional order only for abuse of discretion." *Id.* A trial court's discretionary ruling "is to be accorded great deference and will be upset only upon a showing that that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

The trial court's findings of fact clearly establish that Susan, Emily, and Wes lived in an environment that was injurious to their welfare given that Respondent-Father and Respondent-Mother failed to take the children for medical treatment and inappropriately disciplined Wes. The trial court also found that returning the children to their parents' custody would be contrary to their health, safety and welfare. According to the trial court, Susan, Emily, and Wes currently reside with their maternal aunt, who was a licensed therapeutic foster parent prior to taking the children into her home. The trial court expressed concern, based upon reports that had been presented for its consideration at the dispositional hearing, that Respondent-Father "might allow his desire to reunite this family, which at this point appears to be very strong, to manifest itself [in] behavior that other folks might find threatening." As a result, the trial court determined that "what is best for these children is for them to be back in a home that is safe, and this Court will have to make sure that there is a level of safety in the home." In order to achieve that end, the trial court determined that the children should remain in DSS custody and have supervised visitation with their parents at least once each month.

In her brief before this Court, Respondent-Mother contends that the trial court erred in determining that it was contrary to the juveniles' health, safety and welfare to be returned to the parents' home. Similarly, Respondent-Father argues that the trial court's findings of fact do not support its determination that returning Susan, Emily, and Wes to the parents' custody would be contrary to the children's health, safety and welfare and argues that the evidence received for

dispositional purposes and the trial court's findings of fact demonstrate that the trial court should have made the opposite decision. After carefully examining the trial court's order, however, we hold, based on the information cited above, that the that returning the children to the parents' home was not in the children's best interests. As a result, we conclude that the parents' challenges to the substance of the trial court's dispositional order lack merit.

2. Need for Adequate Care or Supervision

[3] Finally, Respondent-Father contends that the trial court erred by placing the children in DSS custody without specifically determining that they needed more adequate care or supervision than they could receive in the parents' home. This contention has merit.

According to N.C. Gen. Stat. § 7B-903(a), the trial court may choose one or more of the following dispositional alternatives to the extent that they are in the best interests of the juvenile: (1) dismiss or continue the case or (2), "[i]n the case of any juvenile who needs more adequate care or supervision or who needs placement[:]" (a) require that the juvenile be supervised in the juvenile's own home by the department of social services; (b) place the juvenile in the custody of a parent, relative, private agency offering placement services, or some other suitable person; or (c) place the juvenile in the custody of the department of social services in the county of the juvenile's residence. N.C. Gen. Stat. § 7B-903(a). Thus, the relevant statutory language plainly and unambiguously indicates that the trial court's ability to adopt one of the dispositions outlined in N.C. Gen. Stat. § 7B-903(a)(2), including placing the juvenile in DSS custody, is limited to situations involving a "juvenile who needs more adequate care or supervision or who needs placement." We are required to give effect to clear and unambiguous statutory language, *In re A.R.G.*, 361 N.C. 392, 396, 646 S.E.2d 349, 351 (2007), and conclude, for that reason, that the relevant statutory language requires that a finding that the "juvenile . . . needs more adequate care or supervision or needs placement" be made as a precondition for the adoption of one of the dispositional alternatives outlined in N.C. Gen. Stat. § 7B-903(a)(2). The trial court erred by failing to include such a finding in its dispositional order was.

In seeking to persuade us to reach a contrary result, DSS and the guardian *ad litem* argue that a finding that Susan, Emily, and Wes need more adequate care or supervision or placement is implicit in the trial court's decision to leave the children in DSS custody. In

essence, DSS and the guardian *ad litem* argue that the fact that the trial court left the children in DSS custody demonstrates that the trial court determined that the children needed "more adequate care or supervision" or "placement." However, in the absence of the required finding, we are unable to determine whether the trial court utilized the required analysis in determining that Susan, Emily, and Wes should remain in DSS custody. As a result, we hold that the trial court erred by placing Susan, Emily, and Wes in DSS custody without making a required finding and remand this case to the Caswell County District Court for further proceedings not inconsistent with this opinion, including the entry of a new dispositional order.

III. Conclusion

Thus, we conclude that Respondent-Mother's challenge to the trial court's adjudication order lacks merit and that the trial court's adjudication order should be, and hereby is, affirmed. However, given that the trial court's dispositional order failed to contain a finding required for the adoption of one of the dispositional alternatives outlined in N.C. Gen. Stat. § 7B-903(a)(2), we conclude that the trial court's dispositional order should be, and hereby is, reversed and that this case should be, and hereby is, remanded to the Caswell County District Court for further proceedings not inconsistent with this opinion, including the entry of a new dispositional order.

AFFIRMED IN PART; REMANDED IN PART.

Judges BRYANT and ELMORE concur.

MARIE SALOMON, EMPLOYEE, PLAINTIFF v. THE OAKS OF CAROLINA, EMPLOYER, AND TRAVELERS, CARRIER, DEFENDANTS

No. COA11-511

(Filed 15 November 2011)

1. Workers' Compensation—injury by accident—unexpected and unusual event during routine activity

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff nurse assistant sustained a compensable injury by accident. The unexpected and unusual event was not changing a nursing home resident without assistance,

but rather the resident suddenly and without warning pushing back as plaintiff held him with one arm during a routine activity.

2. Workers' Compensation—disability—temporary total disability benefits—sufficiency of findings of fact—futility of job search

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff nurse assistant was entitled to temporary total disability benefits. The conclusory findings were insufficient to support the Commission's conclusion that plaintiff established her disability by showing her job search was reasonable but unsuccessful. The Commission failed to address plaintiff's evidence or the possible futility of her job search.

Appeal by Defendants from opinion and award entered 31 January 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 October 2011.

Hardison & Cochran, PLLC, by J. Jackson Hardison, for Plaintiff.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Jennifer V. Ruiz and M. Duane Jones, for Defendants.

STEPHENS, Judge.

Factual and Procedural History

Plaintiff Marie Salomon worked for Defendant-employer The Oaks of Carolina (a nursing home) as a certified nurse's assistant ("CNA") caring for elderly residents. On 8 March 2009, Plaintiff discovered one partially-paralyzed resident who had soiled himself and needed changing. Plaintiff testified that the normal procedure for moving or changing a resident would be to get assistance from another CNA or nurse, but that understaffing at the nursing home sometimes made this impossible. Plaintiff asked several other staff members to help her change the soiled resident, but after approximately fifteen minutes, concerned about the resident's comfort and health, she decided to proceed by herself. Working without assistance, Plaintiff had to hold up and support the resident with only one arm as she used her other arm to change him. As she supported him, the resident suddenly pushed back against Plaintiff, and she heard a crack and felt pain in her shoulder.

Plaintiff alleged a compensable injury by accident to her right upper arm and shoulder on 8 March 2009. By Industrial Commission Form 61 dated 8 July 2009, Defendant-employer denied Plaintiff's alleged injury. On 2 November 2009, Deputy Commissioner Philip A. Baddour, III, issued an opinion and award denying Plaintiff's claim. Plaintiff appealed to the Full Commission, which by opinion and award issued 31 January 2011, found that Plaintiff had sustained a compensable injury by accident and awarded temporary total disability benefits. Defendant-employer and Defendant-carrier Travelers (collectively, "Defendants") appeal, arguing that various findings of fact are not supported by competent evidence which in turn do not support the conclusions of law that Plaintiff sustained a compensable injury by accident and is entitled to temporary total disability payments. Specifically, Defendants contend that Plaintiff was injured not by accident but rather while performing her normal job duties in a customary manner, and that, even if her injury is compensable, Plaintiff failed to prove her disability was related to the compensable injury. We affirm in part and remand in part for additional findings.

Standard of Review

> Our review of an opinion and award by the Commission is limited to two inquiries: (1) whether there is any competent evidence in the record to support the Commission's findings of fact; and (2) whether the Commission's conclusions of law are justified by the findings of fact. If supported by competent evidence, the Commission's findings are conclusive even if the evidence might also support contrary findings. The Commission's conclusions of law are reviewable *de novo*.

Legette v. Scotland Mem'l Hosp., 181 N.C. App. 437, 442-43, 640 S.E.2d 744, 748 (2007) (internal citations omitted), *appeal dismissed and disc. review denied*, 362 N.C. 177, 658 S.E.2d 273 (2008).

Injury by Accident

[1] Defendants first argue that the Commission's conclusion that Plaintiff's injury was a compensable injury by accident is not supported by the findings of fact.[1] We disagree.

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1. Defendant's brief states that no competent evidence supports the Commission's findings of fact 2-4, 11, and 14. However, in their argument, Defendants do not actually contend these findings are unsupported, except to the extent the findings characterize Plaintiff's injury as an accident and her unassisted moving of residents as outside her normal job duties. Rather, as discussed below, Defendants suggest that the weight of evidence would have supported different findings.

> The terms "accident" and "injury" are separate and distinct concepts, and there must be an "accident" that produces the complained-of "injury" in order for the injury to be compensable. An "accident" is an unlooked for event and implies a result produced by a fortuitous cause. If an employee is injured while carrying on [the employee's] usual tasks in the usual way the injury does not arise by accident. In contrast, when an interruption of the employee's normal work routine occurs, introducing unusual conditions likely to result in unexpected consequences, an accidental cause will be inferred. The "essence" of an accident is its unusualness and unexpectedness . . . .
>
> Thus, in order to be a compensable "injury by accident," the injury must involve more than the employee's performance of his or her usual and customary duties in the usual way. Moreover, once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an "injury by accident" under the Workers' Compensation Act.

Gray v. RDU Airport Auth., ___ N.C. App. ___, ___, 692 S.E.2d 170, 174 (2010) (internal citations and quotation marks omitted).

Here, the parties do not dispute that portion of the Commission's finding of fact 2, that "[t]his resident was elderly and paralyzed on one side and therefore the normal and appropriate procedure was for two people to change the resident[,]" or the part of finding of fact 4, "that it was not uncommon for [D]efendant-employer to be short-staffed on weekends and because of the short-staffing, [P]laintiff sometimes moved residents without assistance due to lack of help." Based on these findings of fact, Defendants contend that, because regular understaffing at the nursing home frequently required Plaintiff to change residents by herself, doing so had become part of her normal work routine, even though the normal or preferred procedure required two staff members. We agree.

However, the unexpected and unusual event here was not changing a resident without assistance, but rather the resident suddenly and without warning "push[ing] back" as Plaintiff held him with one arm. As the Commission's unchallenged finding of fact 5 determined:

> *Because the resident unexpectedly pushed back as [P]laintiff was attempting to move him, [P]laintiff engaged in unusual physical exertion during the incident* as compared to changing

> the resident with the assistance of another staff person. Therefore, [P]laintiff's injury on March 8, 2009 did not occur under normal work conditions while she was performing her job in the usual manner.

(Emphasis added). Similarly, finding 14 states in pertinent part:

> Plaintiff's act of moving an elderly, partially paralyzed resident by herself . . . , *having to handle and hold the resident differently . . ., along with the resident's unexpected movement and [P]laintiff only having one arm to respond to the resident's sudden movement*, constituted an unlooked for and untoward event, which was an interruption of [P]laintiff's normal work routine.

(Emphasis added).

The Commission's finding that the resident's "push[ing] back" was "unexpected" is supported by Plaintiff's testimony on cross-examination that such resistance was unusual:

> Q. But it isn't unusual for a nursing home patient to be uncooperative or resistant, is it?
>
> A. Yes.
>
> Q. Is that yes, it is unusual, or yes, it's—is it unusual?
>
> A. Like, for what?
>
> Q. For a nursing home patient to push back or be resistant or uncooperative in [his] behaviors when you're assisting [him]?
>
> A. No, not all the time. No.

Plaintiff also testified that she had never "had any problems moving [residents] by herself[.]" She further characterized the specific incident when she was injured as sudden and unpredictable: ". . . while I change him [sic], turning him to change him, so suddenly—I think it's by accident for him."

We find the factual circumstances here analogous to those in *Konrady v. U.S. Airways, Inc.*, 165 N.C. App. 620, 626, 599 S.E.2d 593, 597 (2004). In *Konrady*, the plaintiff, a flight attendant, injured her knee when she "misstepped" as she exited a courtesy van. *Id.* at 622, 599 S.E.2d at 594. In affirming the Commission's conclusion that the plaintiff sustained an injury by accident, we opined:

> In deciding whether the Commission's findings are sufficient to support its conclusion that an accident occurred, the issue is not whether exiting vans is routine for Konrady, as [the] defendants contend, but whether something happened as she was exiting that particular van on that specific occasion that caused her to exit the van in a way that was not normal. Were there any unexpected conditions resulting in unforeseen circumstances? Here, the unexpected conditions found by the Commission included a step that was shorter than other steps and the overlapping of the step with the curb. The unforeseen circumstances found by the Commission were that the step down from the van was much shorter than Konrady anticipated, causing her to "misstep" and hit the ground harder than she expected.

Id. at 626, 599 S.E.2d at 597. Similarly, here the Commission found, based on competent evidence, that the resident's sudden "push[ing] back" was an unexpected condition which occurred during a routine activity and caused Plaintiff's injury. This finding in turn supports the Commission's conclusion that Plaintiff's injury occurred by accident. Defendants' argument is overruled.

Disability

[2] Defendants next argue that the findings of fact do not support the Commission's conclusion that Plaintiff was entitled to temporary total disability benefits. We agree.

In unchallenged findings and conclusions, the Commission determined that Plaintiff constructively refused suitable employment when her employment was terminated for reasons unrelated to her compensable injury. In such situations, an employee is entitled to disability benefits only "if [ ] she can demonstrate that work-related injuries, and not the circumstances of the employee's termination, prevented the employee from either performing alternative duties or finding comparable employment opportunities." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 494, 597 S.E.2d 695, 699 (2004) (citation omitted). Thus, Plaintiff's constructive refusal to work shifts the burden of proving disability from the employer to the employee. *Id.* An employee can meet this burden in four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain

> employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowe's Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations and quotation marks omitted).

Further, the Commission "must make specific findings of fact as to each material fact upon which the rights of the parties in a case involving a claim for compensation depend. Thus, the Commission must find those facts which are necessary to support its conclusions of law." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 172, 579 S.E.2d 110, 113 (citations and quotation marks omitted), *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003).

Here, when asked whether she had sought employment since being fired by Defendant-employer, Plaintiff testified:

> A. I look for a couple of places. I look on the internet. I went to nursing home. I have my friend who take [sic] me some places. Some places I don't even remember the name. So I went. Yes, I do.
>
> Q. Do you remember the names of any of the places you looked?
>
> A. I went to Smithfield Manor. I went to Carolina. That's the assisted living. I went a couple places.[2]

Findings of fact 15 and 16 address Plaintiff's proof of disability under the second prong of *Russell*:

> 15. Following [P]laintiff's termination, [P]laintiff has attempted to find other employment and has filed for and received unemployment benefits since August 4, 2009 in the amount of $329.00 per week. The Commission finds that [P]laintiff made a reasonable job search in an effort to find possible suitable employment but has been unsuccessful in her efforts.

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2. Plaintiff also testified that she had kept copies of some of the job applications she completed. Her counsel stated that these copies would be provided to Defendants, but no post-injury job applications from Plaintiff appear in the record.

> 16. The Commission further finds that as a result of the compensable injury by accident, [P]laintiff has been unable to earn the same or greater wages as she was earning in the same or any other employment since April 22, 2009.

These conclusory findings are insufficient to support the Commission's conclusion that Plaintiff has established her disability by showing her job search was "reasonable" but unsuccessful. *See Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 710, 599 S.E.2d 508, 515 (2004). In *Johnson*, the Commission's limited and conclusory findings "that 'plaintiff located a job lead on his own' and that 'plaintiff ha[d] made a reasonable effort to locate suitable employment[,]' " were insufficient standing alone to support the Commission's conclusions of law. *Id.*; *compare Freeman v. Rothrock*, 202 N.C. App. 273, 279, 689 S.E.2d 569, 573-74 (2010) (affirming the Commission's conclusion that the plaintiff established disability pursuant to the second *Russell* prong where the Commission made detailed findings of fact explaining the basis for its determination that the plaintiff's limited job search was reasonable). We see no meaningful distinction between the findings held insufficient to establish disability under the second *Russell* prong in *Johnson* and those here.

As Plaintiff notes, however, she also presented evidence in an attempt to establish disability under the third prong of *Russell*: "that [s]he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment". 108 N.C. App. at 765, 425 S.E.2d at 457. But the Commission failed to address Plaintiff's evidence or the possible futility of her job search. While we express no opinion regarding the sufficiency of Plaintiff's evidence on futility, the Commission "must make specific findings of fact as to each material fact upon which the rights of the parties in a case involving a claim for compensation depend." *Herbie's Place*, 157 N.C. App. at 172, 579 S.E.2d at 113.

Accordingly, we reverse this portion of the opinion and award and remand to the Commission for further proceedings not inconsistent with this opinion, including the making of adequate findings of fact addressing whether Plaintiff is disabled under the third method for establishing disability set forth in *Russell*.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges BRYANT and ELMORE concur.

JOHN ANDREWS PLAINTIFF v. BECKY ANDREWS, DEFENDANT

No. COA11-433

(Filed 15 November 2011)

Child Custody and Support—support—changing jobs—not in good faith

Plaintiff's sincere religious beliefs did not equate to good faith pertaining to his financial obligations to his children where he left his engineering job to start a church and stated that his only consideration was obedience to Jesus Christ. The trial court erred by concluding otherwise.

Appeal by defendant from order entered 8 November 2010 by Judge Anna E. Worley in Wake County District Court. Heard in the Court of Appeals 28 September 2011.

Marshall & Taylor, P.C., by Travis R. Taylor, for plaintiff-appellee.

Kilpatrick Townsend & Stockton LLP, by E. Danielle Thompson Williams and James J. Hefferan, Jr., for defendant-appellant.

HUNTER, Robert C., Judge.

Becky Andrews (now Wood) ("defendant") appeals from the trial court's order modifying the child support obligation of her former husband, John Andrews ("plaintiff"). After careful review, we reverse the trial court's order.

Background

Plaintiff and defendant were married in 1994 and have two children resulting from their marriage. In 2001, the parties separated and, on 6 November 2002 *nunc pro tunc* to 1 July 2002, entered into a consent order granting primary physical custody of the children to defendant and secondary custody, with visitation rights, to plaintiff. The consent order also required plaintiff to pay $1,496.75 per month in child support, and to maintain health, dental, and vision insurance for the benefit of their minor children, including payment of the insurance premiums and all health care expenses not covered or reimbursed by their insurance policies.

Plaintiff's child support obligation under the consent order was calculated in accordance with the North Carolina Child Support Guide-

lines (the "Guidelines"). At the time of the consent order, in 2002, plaintiff was employed as an engineer and earned approximately $105,000 annually. In 2004, plaintiff changed jobs, accepting a position as an engineer at EMC Corporation ("EMC") where his salary increased to approximately $172,000 in 2009. EMC also provided plaintiff with benefits such as health insurance.

In March 2010, plaintiff voluntarily resigned from his position at EMC, and did so without having secured other employment. In his exit interview at EMC, plaintiff stated that he was resigning in order to follow Jesus Christ. At the time of his resignation, plaintiff intended to start a church, but the church was not yet incorporated and there was no paid position to accept. Consequently, the prospective members of the church made a "love offering" of $1,000 to sustain plaintiff until payment of his salary could begin.

In mid-May, New Beginnings Chapel was established in Raleigh, North Carolina ("New Beginnings") and plaintiff accepted a position with the church as the senior pastor. Plaintiff's annual salary at New Beginnings is $52,800. New Beginnings does not provide plaintiff with health insurance. Consequently, plaintiff's premiums for health and dental insurance have approximately doubled while his income has been reduced by approximately 70%.

On 14 May 2010, plaintiff filed a motion to modify his child support obligation. Plaintiff's motion alleged there had been a substantial change in circumstances warranting a modification of his child support obligation under the parties' 2002 consent order. Plaintiff alleged the substantial change in circumstances on the basis that more than three years had passed since entry of the parties' consent order, and that there would be a 15% deviation between the amount of child support due under the consent order and the amount that would result from application of the Guidelines to the parties' current earnings.

Defendant moved to dismiss plaintiff's motion for failure to state a claim for which relief could be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Specifically, defendant argued plaintiff failed to allege a substantial change in circumstances that warranted modification of the child support order.

At a hearing on the motions, plaintiff testified that he could no longer maintain his child support obligation as required under the parties' consent order. When plaintiff was asked if he considered his child support obligation when he quit his job at EMC, he replied, "When I

considered leaving EMC my consideration was following Christ and that was all, my obedience to him."

The trial court denied defendant's motion to dismiss and entered an order reducing plaintiff's child support obligation from $1,496.75 per month to $873.75 per month. In its order, the trial court found, *inter alia*, that despite plaintiff's voluntary resignation, there was "no evidence of bad faith or an intentional disregard to his family and child support obligations." The trial court concluded, as a matter of law: that there was sufficient evidence to establish a presumption of a substantial change in circumstances based on the parties' current incomes and that the presumption warranted a modification to the existing child support order; that no request for a deviation from the Guidelines had been made and no evidence was offered of circumstances which could justify deviation; and that despite plaintiff's voluntary resignation from his job at EMC, plaintiff did so in good faith and without a disregard to his child support obligations. Defendant appeals from this order.

Discussion

Initially, we note defendant's frequent citation to unpublished opinions of this Court. With limited exceptions, the use of unpublished opinions is disfavored. Our Rules of Appellate Procedure permit such use to establish claim preclusion, issue preclusion, or the law of the case, or when "there is no published opinion that would serve as well." N.C. R. App. 30(e)(3) (2011). In the present case, the extensive use of unpublished opinions was not warranted and we have not considered those opinions in our analysis.

Defendant argues the trial court erred in modifying plaintiff's child support obligation despite evidence that plaintiff voluntarily quit his job without giving consideration to how he would meet his child support obligation required by the parties' consent order. We agree.

A trial court's award of child support will not be disturbed on appeal unless it is shown the decision was the result of an abuse of discretion. *Evans v. Craddock*, 61 N.C. App. 438, 440-41, 300 S.E.2d 908, 910 (1983). If the decision is supported by competent evidence, the decision will not be disturbed even if the record contains conflicting evidence. *Id.* Absent an abuse of discretion, however, "an error in law arising from the misapprehension of the appropriate legal standard by the trial court is nonetheless reviewable on appeal." *Anuforo v. Dennie*, 119 N.C. App. 359, 361, 458 S.E.2d 523, 525 (1995).

A child support order entered by a court of this State "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances." N.C. Gen. Stat. § 50-13.7(a) (2009). Our case law has interpreted this standard to require a showing of a "substantial change in circumstances affecting the welfare of the child." *Askew v. Askew*, 119 N.C. App. 242, 244, 458 S.E.2d 217, 219 (1995). Plaintiff sought a modification of his child support obligation based on the presumption that a substantial change in circumstances had occurred because the parties' consent order was more than three years old and the amount of the child support obligation under that order would be at least 15% greater than an award calculated under the Guidelines applied to the parties' current earnings. *See* 2008 Ann. R. N.C. 52 (providing that the modification of a child support order may be based on the presumption of a substantial change in circumstances and providing the requirements to establish the presumption); *Garrison v. Connor*, 122 N.C. App. 702, 705-06, 471 S.E.2d 644, 646-47 (explaining the intent behind the creation of a presumption of a substantial change in circumstances and validating its inclusion in the Guidelines by the Conference of Chief District Judges), *disc. rev. denied*, 344 N.C. 436, 476 S.E.2d 116 (1996).

However, our statutes do not require the trial court to adhere to the Guidelines if the court determines that application of the Guidelines would not meet or would exceed the reasonable needs of the child, or would be unjust or inappropriate. N.C. Gen. Stat. § 50-13.4(c) (2009). If a trial court determines that the party seeking the reduction in child support has acted in a manner that evidences a disregard for the child support obligation, the court may refuse to modify the support obligation utilizing the party's actual income. *Wolf v. Wolf*, 151 N.C. App. 523, 526, 566 S.E.2d 516, 518-19 (2002). Rather, the trial court may base the support obligation on the party's earning capacity. *Id.*

The 2006 revised version of the Guidelines, in effect at the time of the trial court's order, provides that

> [i]f the court finds that a parent's voluntary unemployment or underemployment is the result of the parent's *bad faith* or deliberate suppression of income *to avoid or minimize his or her child support obligation*, child support may be based on the parent's potential, rather than actual, income.

2008 Ann. R. N.C. 49 (emphasis added). Thus, as this Court has held, in order to impute income to a party when calculating a child support obligation, the trial court must find the party's actions resulting in

reduced income were made in "bad faith" to avoid the child support obligation, or with "a sufficient degree of indifference" to the same. *McKyer v. McKyer*, 179 N.C. App. 132, 146, 632 S.E.2d 828, 836 (2006), *disc. rev. denied*, 361 N.C. 356, 646 S.E.2d 115 (2007).

We note that our case law has interchangeably referred to a party's disregard for their child support obligation as a showing of "bad faith," *Cook v. Cook*, 159 N.C. App. 657, 661, 583 S.E.2d 696, 698 (2003), or an absence of "good faith," *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997). Additionally, the party seeking the reduction in child support bears the burden of showing its reduction in income was not the result of bad faith. *E.g.*, *Mittendorff v. Mittendorff*, 133 N.C. App. 343, 344, 515 S.E.2d 464, 466 (1999); *see King v. King*, 153 N.C. App. 181, 186, 568 S.E.2d 864, 866-67 (2002) (concluding the party moving for a reduction in her child support obligation failed to meet her burden of establishing her reduction in income was the result of good faith).

This Court has previously noted specific examples of bad faith that justify imputing income to a party, including:

> (1) failing to exercise his reasonable capacity to earn, . . . (3) acting in deliberate disregard for his support obligations, . . . (6) deliberately not applying himself to his business, . . . or (8) intentionally leaving his employment to go into another business.

Wolf, 151 N.C. App. at 526-27, 566 S.E.2d at 518-19. In *Wolf*, this Court affirmed the denial of the father's motion to reduce his child support obligation where the trial court determined the father's unemployment was voluntary and amounted to a " 'conscious and reckless disregard' " for his support obligation. 151 N.C. App. at 527, 566 S.E.2d at 519 (emphasis omitted). In *McKyer*, this Court affirmed the trial court's decision to impute income to the father where the father, after retiring from a career in professional football, took a job working one day per week, presented no evidence that he could not work more hours at the same job, and paid less than one-third of the ordered child support. 179 N.C. App. 132, 136, 147, 632 S.E.2d 828, 830, 837 (remanding in part for further findings as to the proper amount of income to be imputed). Similarly, in *Roberts v. McAllister*, we affirmed the imputation of income to the mother where she was voluntarily unemployed, had no intention of finding employment, and, though she had substantial financial assets, made negligible contributions to the support of her children. 174 N.C. App. 369, 379-80, 621 S.E.2d 191, 198-99 (2005) (reversing and remanding in part for findings to support

amount of child support awarded), *appeal dismissed*, 360 N.C. 364, 629 S.E.2d 608 (2006). There, the trial court concluded the mother's actions evidenced a " 'naïve indifference' " to her children's needs and amounted to a deliberate disregard to her child support obligation. *Id.* at 379, 621 S.E.2d at 198; *cf. Pataky v. Pataky*, 160 N.C. App. 289, 307-08, 585 S.E.2d 404, 416 (2003) (holding there was insufficient evidence to support the trial court's finding of bad faith by the father who quit his job in order to return to school where the father created a plan to meet his child support obligations while unemployed and exceeded his custody obligations prior to the mother filing a complaint seeking additional support), *aff'd in part*, *rev. dismissed in part per curiam*, 359 N.C. 65, 602 S.E.2d 360 (2004).

In the present case, we agree with the trial court's conclusion that there is no evidence to suggest plaintiff intentionally reduced his income to avoid his child support obligation. However, the evidence in the record does not support the trial court's finding that there was "no evidence" of bad faith or an intentional disregard of his child support obligation. On the contrary, the only evidence on this point was plaintiff's testimony that he acted without considering his ability to meet his child support obligation. When plaintiff was asked if he considered his child support obligation before quitting his job at EMC, without having secured other employment, he testified that his *only* consideration was his obedience to Jesus Christ.

While we do not question the sincerity of plaintiff's religious beliefs, we cannot equate such justification for his actions with good faith as it pertains to his financial obligations for his children. *See Shippen v. Shippen*, ___ N.C. App. ___, ___, 693 S.E.2d 240, 244 (2010) (concluding the appellant's voluntary reduction income, while based on his sincerely-held religious beliefs, could not excuse him of his duty to comply with a valid child support order). Thus, the trial court erred in concluding that plaintiff acted "in good faith, without a disregard for his child support obligation," and its order is reversed.

Reversed.

Judges STEELMAN and McCULLOUGH concur.

RONALD CROCKER AND PAULETTE CROCKER AS CO-ADMINISTRATORS OF THE ESTATE OF REAGAN ELIZABETH CROCKER, PLAINTIFFS V. H. PETER ROETHLING, M.D. AND WAYNE WOMEN'S CLINIC, P.A., DEFENDANTS

No. COA10-1214

(Filed 15 November 2011)

1. Medical Malpractice—expert witness—summary judgment

The trial court did not abuse its discretion in a medical malpractice action by excluding plaintiff's sole expert witness where there was ample support in the record for a finding that the witness was not qualified to testify. While the witness claimed on *voir dire* to have familiarity with smaller hospitals similar to Wayne Memorial, he had never practiced at these hospitals, he did not demonstrate that the rarely performed maneuver at issue in this case was the standard of care in Goldsboro, and a national standard of care cannot be applied to this case, contrary to the witness's testimony.

2. Appeal and Error—remand—scope—not exceeded

The trial court did not exceed the scope of a remand from the North Carolina Supreme Court by granting defendants' motion for summary judgment. Plaintiffs asserted that the remand was only for a *voir dire* examination of their expert witness, but plaintiffs did not recognize that the Supreme Court was reviewing a summary judgment for defendants. Once the *voir dire* was done and the trial court affirmed its earlier decision to exclude the testimony, it was proper for the court to reissue the summary judgment for defendant.

3. Trials—remand—law of the case—not applied

Contrary to plaintiffs' contention, the trial court in a medical malpractice case did not hold on remand that the law of the case doctrine required that summary judgment be granted for defendants. The court's statement that summary judgment would have to be granted referred to the exclusion of plaintiffs' only expert witness after the *voir dire* required by the remand.

4. Appeal and Error—preservation of issues—summary judgment—notice—appearance at hearing

Plaintiffs waived any argument on appeal that they did not receive proper notice of defendants' motion for summary judgment by participating in the summary judgment hearing and not objecting or moving for a continuance.

Appeal by Plaintiffs from order entered 23 February 2010 by Judge W. Russell Duke, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 12 April 2011.

Law Offices of Wade E. Byrd, P.A., by Wade E. Byrd, for Plaintiffs-Appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Samuel G. Thompson, William H. Moss, and Robert E. Desmond, for Defendants-Appellees.

BEASLEY, Judge.

Ronald and Paulette Crocker, as co-administrators of the Estate of Regan Elizabeth Crocker, (Plaintiffs) appeal from the trial court's grant of summary judgment to H. Peter Roethling, M.D. (Dr. Roethling) and Wayne Women's Clinic, P.A. (the clinic). For the following reasons, we affirm.

On 14 September 2001, Paulette Crocker (Mrs. Crocker) was admitted to Wayne Memorial Hospital (Wayne Memorial) for an induction of labor. Delivery was complicated by shoulder dystocia, an obstetrical emergency where the fetal shoulder becomes impacted against the maternal pubic bone. A procedure that obstetricians can perform to relieve this condition is the Zavanelli maneuver, where the fetal head is pushed back into the vagina and uterus, and the fetus is delivered by cesarean section. Dr. Roethling attempted several maneuvers to relieve the shoulder dystocia, but did not try the Zavanelli maneuver. Plaintiffs' infant daughter, Reagan Elizabeth Crocker, died on 28 September 2003 from injuries that she sustained during delivery.

On 9 September 2004, Plaintiffs filed a medical malpractice action against Dr. Roethling and the clinic (collectively Defendants). Dr. John Elliott, an Obstetrician/Gynecologist who specializes in high risk obstetrics, served as the sole expert witness for Plaintiffs. He contended that Dr. Roethling violated the applicable standard of care by not attempting the Zavanelli maneuver. Defendants moved for summary judgment on the basis that Dr. Elliott was incompetent to testify as an expert witness. The trial court granted summary judgment to Defendants on 1 March 2006. Plaintiffs appealed and this Court twice affirmed the order granting summary judgment. *See Crocker v. Roethling (Crocker I)*, 182 N.C. App. 528, 642 S.E.2d 549 (2007), *aff'd on reh'g*, 184 N.C. App. 377, 646 S.E.2d 442 (2007) (unpublished). On discretionary review, our Supreme Court voted to remand

for a *voir dire* examination of Plaintiffs' expert to determine the admissibility of the proposed expert testimony. *Crocker v. Roethling (Crocker II)*, 363 N.C. 140, 675 S.E.2d 625 (2009).

On 23 February 2010, the trial court held the *voir dire* hearing. Dr. Elliott stated that for 27 years he had practiced high risk obstetrics in Maricopa County, Arizona, an area with a population of approximately 4.5 million. He further testified that he had neither performed nor witnessed a Zavanelli maneuver, and was unaware of any of the other 14 high risk obstetricians in his practice ever having performed this maneuver. He also did not know whether a Zavanelli maneuver had ever been performed either in Goldsboro, or anywhere else in the state of North Carolina. However, based on his practice, his experiences as an expert witness reviewing approximately 600 malpractice cases from 45 states, and his belief "that there is a national standard of care for most things," Dr. Elliott stated that he was familiar with the standards of practice of a physician practicing in a hospital such as Wayne Memorial.

Upon the conclusion of *voir dire*, the trial court ruled that the expert was incompetent to testify and granted summary judgment to Defendants.

I.

[1] To prevail in a medical malpractice action, the plaintiff must show "(1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff." *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998).

Plaintiffs' burden with respect to the applicable standard of care is to show by the greater weight of the evidence that Dr. Roethling's care "was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action." N.C. Gen. Stat. § 90-21.12 (2009). To satisfy this burden, "plaintiff must establish the relevant standard of care through expert testimony." *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 672 (2003). "Although it is not necessary for the witness testifying . . . to have actually practiced in the same community as the defendant, the witness must demonstrate that he is familiar with the standard of care in the community . . . or the standard of care of similar communities." *Id.* at 196, 582 S.E.2d at

672 (internal citations omitted). If Plaintiffs are unable to satisfy this burden, summary judgment is properly granted. *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 478, 624 S.E.2d 380, 384 (2006).

"[T]he decision whether to admit expert testimony lies within the province of the trial court." *Crocker II*, 363 N.C at 155, 675 S.E.2d at 636 (citing N.C. Gen Stat. § 8C-1, Rule 104(a)). Accordingly, "a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004).

This Court has stated that the "similar community" standard with regards to the standard of care in medical malpractice cases "encompasses more than mere physician skill and training[.] It also encompasses variations in facilities, equipment, funding, and also the physical and financial environment of a particular community." *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 201, 605 S.E.2d 154, 159 (2004) (internal quotation marks and citations omitted). Dr. Elliott practices mainly at larger hospitals, one of which performs more than 6,000 deliveries per year, and is located in a metropolitan area with a population of 4.5 million people served by some 200 obstetricians. That hospital hardly seems comparable to Wayne County, and Goldsboro, with a population of approximately 100,000. Wayne Memorial has six labor and delivery suites compared to 36 at Dr. Elliott's tertiary referral hospital. While Dr. Elliott did claim to have familiarity with smaller hospitals similar to Wayne Memorial based on outreach education and consulting privileges, he never practiced medicine at these hospitals.

Further, Dr. Elliott has never performed a Zavanelli maneuver. He has never witnessed the maneuver. He was unaware of any of the other 14 high risk obstetricians with whom he practices ever having performed it. He did not know whether a Zavanelli maneuver had ever been performed either in Goldsboro or, for that matter, in the state of North Carolina. Quite simply, Dr. Elliott failed to demonstrate that this rarely-employed maneuver is the standard of care in Goldsboro, North Carolina.

Dr. Elliott argued that there is a national standard of care for shoulder dystocia, but that argument is unavailing. When the standard of care for a given procedure is "the same across the country, an expert witness familiar with that standard may testify despite his lack

of familiarity with the defendant's community." *Haney v. Alexander*, 71 N.C. App 731, 736, 323 S.E.2d 430, 434 (1984). "This Court, however, has recognized very few 'uniform procedures' to which a national standard may apply, and to which an expert may testify." *Henry v. Southeastern Ob-Gyn Assocs., P.A.*, 145 N.C. App. 208, 211, 550 S.E.2d 245, 247 (2001). This Court has been particularly reluctant to find a national standard for especially complex procedures. A national standard of care cannot be applied to this case because "an infant suffering from shoulder dystocia . . . involves medical procedures considerably more complicated than the taking of vital signs or the placement of bedpans." *Id.* We conclude that there is ample support in the record for a finding that Dr. Elliott was not qualified to testify in this case. The trial court, therefore, did not abuse its discretion in excluding his testimony.

II.

[2] Plaintiffs next argue that the trial court exceeded the scope of the mandate from the Supreme Court in *Crocker II* by granting Defendants' motion for summary judgment. We disagree.

It is well settled that upon appeal, a mandate from our Supreme Court is binding upon trial courts, and "must be strictly followed without variation or departure." *D&W, Inc. v. Charlotte*, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966). However, it is equally clear that "[e]xpressions contained in an appellate court decision must be interpreted in the context of the factual situation under review, or the framework of the particular case." *Campbell v. Church*, 51 N.C. App. 393, 394, 276 S.E.2d 712, 713 (1981) (citations omitted).

Plaintiffs assert that the majority opinion[1] in Crocker II remanded the case to the trial court only for a *voir dire* examination of Dr. Elliott, and so the trial court went too far in granting summary judgment to Defendants after finding Dr. Elliott was not properly qualified as an expert. Plaintiffs fail to recognize that the order the Supreme Court reviewed was one granting summary judgment to Defendants, and so this was the order that remained pending on remand. The Supreme Court instructed the trial court to conduct a *voir dire* to determine if Dr. Elliott's testimony should in fact be admitted. Once the *voir dire* was done, and the trial court affirmed its earlier decision to exclude the testimony, it was proper for the trial court to also re-issue the grant of summary judgment to Defendants. Plaintiffs' argument is overruled.

1. Because it had the narrower holding, Justice Martin's opinion controlled. *See Crocker II*, 363 N.C. at 154 n.1, 675 S.E.2d at 635 n.1 (Newby, J., dissenting).

III.

[3] Plaintiffs also claim that the trial court erred in holding that the law of the case doctrine required summary judgment be granted for Defendants. We disagree.

There is no evidence in the record that the trial court applied the law of the case doctrine in order to find that Defendants were entitled to summary judgment. As discussed in Section II, *supra*, the record shows that after review, including a *voir dire* hearing, the trial court determined that Dr. Elliott's expert testimony was properly excluded and accordingly again granted summary judgment to Defendants. Dr. Elliott was Plaintiffs' only expert witness, and so Plaintiffs could not make out their *prima facie* case without his testimony. The trial court's statement that Defendants' motion for summary judgment "will, of course, have to be granted" is not evidence that the trial court felt compelled by the law of the case doctrine to so hold. It is more properly interpreted as the trial court's recognition that since Dr. Elliott's testimony was properly excluded, the grant of summary judgment was properly entered previously.

IV.

[4] Plaintiffs' final argument is that the trial court's grant of summary judgment was improper, because Plaintiffs did not receive ten days' notice of Defendants' motion for summary judgment. This argument is without merit.

This Court has held that "by attending the hearing and participating without objection" a plaintiff waives the ten day procedural notice otherwise required for a summary judgment hearing by N.C. Gen. Stat. § 1A-1, Rule 56(c). *Anderson v. Anderson*, 145 N.C. App. 453, 456-57, 550 S.E.2d 266, 269 (2001). It is uncontroverted that Plaintiff participated in the summary judgment hearing, and that Plaintiffs' counsel neither objected nor moved for a continuance. As such, Plaintiffs have waived this argument.

Affirmed.

Judges MCGEE and STROUD concur.

IN RE S.C.R.

[217 N.C. App. 166 (2011)]

IN THE MATTER OF: S.C.R.

No. COA11-451

(Filed 15 November 2011)

1. **Child Abuse, Dependency, and Neglect—dependency and neglect—failure to make independent findings of fact**

The trial court erred in a child dependency and neglect case by failing to make its own independent findings of fact. The trial court did not satisfy the mandate to enter findings of fact by incorporating DSS's petition and entering an additional finding that the juvenile had special needs. The case was reversed and remanded for further findings of fact.

2. **Child Abuse, Dependency, and Neglect—dependency and neglect—erroneous dismissal of petition—adjudication proceeding distinguishable from termination of parental rights proceeding**

The trial court erred in a child dependency and neglect case when it dismissed the petition against respondent father on the grounds that he was not involved in any of the actions. An adjudication of abuse, neglect, or dependency pertains to the status of the child and not to the identity of any perpetrator of abuse or neglect of the child. An adjudication proceeding is distinguishable from a termination of parental rights proceeding.

3. **Child Abuse, Dependency, and Neglect—dependency and neglect—permanency planning hearing—insufficient notice**

The trial court erred in a child dependency and neglect case by adopting a permanent plan at disposition without sufficient notice to respondent father.

4. **Child Visitation—visitation plan—failure to address in dependency and neglect disposition order**

The trial court erred in a child dependency and neglect case by failing to include an appropriate visitation plan in its disposition order, even though visitation was discussed at the end of the dispositional hearing. Any dispositional order entered on remand must address visitation.

Appeal by respondent from adjudication order entered 1 December 2010 by Judge Alexander Lyerly and disposition order

entered 20 January 2011 by Judge William Leavell in Watauga County District Court. Heard in the Court of Appeals 31 October 2011.

Eggers, Eggers, Eggers & Eggers, by Kimberly M. Eggers and Stacy C. Eggers, IV, for petitioner-appellee Watauga County Department of Social Services.

Pamela Newell for guardian ad litem.

Annick Lenoir-Peek for respondent-appellant mother.

HUNTER, Robert C., Judge.

Respondent mother F.W. ("respondent") appeals from the trial court's order adjudicating her minor child S.C.R. dependent and neglected. She also appeals from the disposition order granting custody of the minor child to the Watauga County Department of Social Services ("DSS"), ordering DSS to cease reunification efforts, and setting a permanent plan of adoption or guardianship. Because the trial court improperly incorporated the allegations from the juvenile petition as its findings of fact, we reverse and remand for further proceedings.

Background

On 13 May 2010, DSS filed a juvenile petition alleging dependency and neglect based on lack of proper care and supervision. The petition alleged that on 12 May 2010, DSS received a referral that respondent left the home the previous day and had not returned. The maternal grandmother had to pick the child up at school. The next day, 13 May, the child became aggressive at school, such that "the school felt it was unsafe to release the child to anyone other than a custodial parent." The petition also alleged that DSS was unable to locate respondent after communicating with family members, and that no one knew respondent's whereabouts. The child's father was not a suitable option due to lack of cooperation on his case plan regarding a different child. DSS was granted non-secure custody, and the child was placed in a therapeutic foster home. An amended petition was filed on 17 June 2010 adding as a basis for neglect that the minor child was abandoned.

The adjudication hearing was held on 27 September 2010. The trial court adjudicated the minor child neglected and dependent, and granted DSS custody in an interim disposition in the adjudication order entered 1 December 2010. At a separate disposition hearing held on 20 December 2010, the trial court granted custody to DSS, ordered

DSS to cease reunification efforts with respondent, and authorized a permanent plan of guardianship or adoption. The court's disposition order was entered on 20 January 2011. Respondent appeals.

Standard of Review

"The role of this Court in reviewing a trial court's adjudication of neglect and abuse is to determine '(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact[.]' " *In Re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)) (quotation marks omitted), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.*

Discussion

I. Adjudication

A. Sufficiency of findings of fact

[1] Respondent first argues the findings of fact are insufficient to support an adjudication of either neglect or dependency where the trial court failed to make its own independent findings of fact. We agree.

The North Carolina Juvenile Code mandates that an "adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-807(b) (2009). "[T]he trial court's findings must consist of more than a recitation of the allegations" contained in the juvenile petition. *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (citing *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002)). "[T]he trial court must, through 'processes of logical reasoning,' based on the evidentiary facts before it, 'find the ultimate facts essential to support the conclusions of law.' " *Id.* (quoting *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003)). The findings need to be stated with sufficient specificity in order to allow meaningful appellate review. *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982).

Here, the trial court made the following findings on adjudication:

> a. The Juvenile is a special needs child and Respondent Mother understands that and the Court anticipates that she will provide support to mitigate these issues.

b. The Court incorporates each of the factual allegations set forth in the Petition as findings of fact as if set forth herein in their entirety.

c. Respondents Mother and Father were unable to provide for the proper care, supervision and discipline of the minor child and they lacked an appropriate child care arrangement.

The last finding is more properly considered a conclusion of law, leaving only two findings for our evaluation. *In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004) (noting that a finding of fact which is actually a conclusion of law will be treated as a conclusion of law on appeal), *disc. review denied*, 359 N.C. 321, 611 S.E.2d 413 (2005). We conclude that the findings of fact are insufficient to support an adjudication of either neglect or dependency.

In its second finding if fact, the trial court incorporated the allegations from the DSS petition as its findings of fact. This it cannot do, particularly without making sufficient additional findings of fact which indicate the trial court considered the evidence presented at the hearing. *O.W.*, 164 N.C. App. at 702, 596 S.E.2d at 853. In *O.W.*, this Court explicitly held that the trial court may not simply recite allegations from the petition as its findings of fact. *Id.* It therefore follows that a trial court may not incorporate wholesale the allegations in the petition as a substitute for making its own findings of fact. *Id.; see In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004) ("[T]he trial court may not delegate its fact finding duty [and] should not broadly incorporate . . . written reports from outside sources as its findings of fact.").

DSS argues that the allegations in the petition were undisputed by respondent. Assuming, *arguendo*, that each allegation was undisputed and was supported by the evidence, the trial court is not released from its obligation to enter "specific ultimate facts" based on the evidence presented at the hearing. *O.W.*, 164 N.C. App. at 704, 596 S.E.2d at 854. Moreover, the allegations in the petition merely set out a basic factual recitation of the events that led to the filing of the petition, such as the fact that respondent "left the home" on 11 May 2010 and could not be contacted by the school on 13 May 2010. The petition then stated that it was *DSS's position* that "this current abandonment and apparent lack of stability are harmful to [the child] dealing with his behavioral needs." It was for the trial court to ultimately determine, based on the evidence presented at the hearing, whether the actions of respondent constituted abandonment and whether the lack of stability was harmful to the child. The trial court made no

findings in this regard nor did it make findings linking any of respondent's actions to dependency or neglect.

The trial court did make one additional finding of fact beyond those incorporated from the petition; however, that lone finding is insufficient to allow us to "determine that the judgment is adequately supported by competent evidence." *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977). The fact that the child has special needs does not automatically render the child dependent or neglected. In sum, the trial court did not satisfy the mandate to enter findings of fact by incorporating DSS's petition and entering an additional finding that the juvenile has special needs. Consequently, we reverse the adjudication order and remand for further findings of fact.

B. Dismissal of petition pertaining to respondent father

[2] Although we reverse the adjudication order, we elect to address another argument raised by respondent pertaining to adjudication. Respondent contends that the trial court erred when it dismissed the petition against the father "on the grounds that he was not involved in any of the actions enumerated in the Petition." We agree.

"The purpose of abuse, neglect and dependency proceedings is for the court to determine whether the juvenile should be adjudicated as having the status of abused, neglected, or dependent." *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007). Adjudication and disposition proceedings do not involve the "culpability regarding the conduct of an individual parent." *Id.* Thus, the trial court should not have dismissed the petition as to the father, since an adjudication of abuse, neglect, or dependency pertains to the status of the child and not to the identity of any perpetrator of abuse or neglect of the child. We caution trial courts to carefully distinguish between an adjudication proceeding, and termination of parental rights proceedings, which "focus on whether the parent's individual conduct satisfies one or more of the statutory grounds which permit termination." *Id.*

II. Disposition

Since we reverse the adjudication order, the disposition order must also be reversed, obviating our need to address issues pertaining to it. In an effort to prevent repetition on remand, however, we choose to briefly note two of the issues raised by respondent.

A. Permanent plan

[3] Respondent argues the trial court erred by adopting a permanent plan at disposition without sufficient notice. This Court has previ-

ously held that "N.C. Gen. Stat. §§ 7B-507 and 907 do not permit the trial court to enter a permanent plan for a juvenile during disposition" without the statutorily required notice for a permanency planning hearing. *In re D.C.*, 183 N.C. App. 344, 356, 644 S.E.2d 640, 646 (2007). Here, the trial court authorized a permanent plan at the disposition hearing, seemingly without the required statutory notice to respondent. This was error and should be noted on remand.

B. Visitation

[4] Respondent also challenges the disposition order for failing to address visitation. The trial court did provide for visitation in its "Adjudication Order & Interim Disposition" entered on 1 December 2010. Following the disposition hearing, however, the trial court's order fails to address visitation at all. Pursuant to the Juvenile Code, "[a]ny dispositional order . . . under which the juvenile's placement is continued outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905(c) (2009). "An appropriate visitation plan must provide for a minimum outline of visitation, such as the time, place, and conditions under which visitation may be exercised." *In re E.C.*, 174 N.C. App. 517, 523, 621 S.E.2d 647, 652 (2005). Here, the trial court failed to include an appropriate visitation plan in its disposition order, even though visitation was discussed at the end of the disposition hearing. Any disposition order entered on remand must address visitation, whether it is granted or not, and if it is, the requisite detail as explained above must be included.

Conclusion

Since the trial court erred in adopting the petition allegations as its findings of fact, we reverse the adjudication order, and the disposition order upon which it rests, and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges THIGPEN and MCCULLOUGH concur.

DAVID ARENDAS, JR., A MINOR, BY AND THROUGH HIS NATURAL GUARDIAN, DAVID ARENDAS, SR., ET. AL., PLAINTIFFS V. NORTH CAROLINA HIGH SCHOOL ATHLETIC ASSOCIATION, INC., DEFENDANT

No. COA11-359

(Filed 15 November 2011)

Declaratory Judgments—reinstatement of high school basketball championship—standing—proper party—failure to allege particularized actual loss

The trial court did not err in a declaratory judgment action alleging negligence and seeking reinstatement of a high school basketball championship by granting defendant's motion to dismiss based on lack of standing. The high school, and not plaintiff individuals, was the proper party to bring this action. Plaintiffs were not members of defendant's association and therefore had no legally protected interest in the State Championship title. Further, plaintiffs failed to allege any particularized actual loss.

Appeal by plaintiffs from order entered 1 November 2010 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 12 September 2011.

Pinto Coates Kyre & Brown, PLLC by David L. Brown and Jon Ward, for plaintiff-appellants.

Maxwell, Freeman & Bowman, P.A., by James B. Maxwell, for defendant-appellee.

CALABRIA, Judge.

Members and coaches of the 2008-2009 men's basketball team at Northern Guilford High School ("NGHS") (collectively "plaintiffs"), appeal from an order granting North Carolina High School Athletic Association, Inc.'s ("defendant" or "defendant association") motion to dismiss. We affirm.

I. Background

According to the pleadings, the facts are as follows. Plaintiffs played or coached at NGHS during the 2008-2009 basketball season. Defendant is a voluntary, non-profit corporation. With the consent and approval of the North Carolina Department of Public Instruction, defendant administers the state's interscholastic athletic competitions in conformance with regulations adopted by the State Board of

Education. Defendant publishes its rules and regulations annually in the NCHSAA Handbook ("the Handbook").

In 2009, plaintiffs won the Men's Basketball State Championship for 3A schools ("the Championship"). Subsequent to the victory, Guilford County Schools ("GCS") conducted an investigation into residency issues of student-athletes at NGHS. The investigation revealed that at least two players on the Championship team, James Gant ("Gant") and Asad Lamot ("Lamot"), did not reside in the NGHS residential district during the time they participated on the team. A student's residency determines their eligibility to participate in interscholastic athletics for a public high school. According to the Handbook, the student must be a "resident" of the administrative district in which the school is located. In addition, the Handbook states "[a]ny high school which allows an ineligible student to participate by dressing for and/or participating in an athletic contest shall forfeit all contests in which the student dressed or participated."

In May 2009, after the investigation, GCS informed defendant that ineligible players had participated on the team and forwarded defendant the supporting documentation. After reviewing the documentation, defendant concluded that GCS had sufficient competent evidence to determine at least two NGHS student athletes who participated on the 2008-2009 Championship team were ineligible because they did not live in the Northern Guilford residential district as required. Pursuant to the rules, each student was declared ineligible for participation in interscholastic athletics for 365 days and defendant vacated the Championship.

Plaintiffs filed a complaint on 6 July 2010, alleging negligence and seeking, *inter alia*, a declaratory judgment reinstating the Championship. On 4 August 2010, defendant filed an answer and a motion to dismiss. On 29 September 2010, plaintiffs filed a voluntary dismissal without prejudice of all claims by plaintiffs Gant and Lamot. On 29 September 2010, plaintiffs moved for judgment on the pleadings as to their third claim for relief, reinstatement of the Championship. After a hearing on 6 October 2010, the trial court entered an order on 1 November 2010, concluding that plaintiffs lacked standing and granted defendant's motion to dismiss. Plaintiffs appeal.

II. Standing

Plaintiffs argue that the trial court erred in granting defendant's motion to dismiss pursuant to Rule 12(b)(1), finding that plaintiffs lacked standing to pursue the action. We disagree.

Standing is a "prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). "It is proper to conduct *de novo* review of a trial court's decision to dismiss a case for lack of standing." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002).

The first element of standing is " 'injury in fact'-an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Marriott v. Chatham Cty.*, 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007). There-fore, a party must have a legally protected interest to satisfy the standing requirements in North Carolina. Without a legally protected interest the judiciary cannot interfere, and without a justiciable controversy, a party cannot maintain standing. *See Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 165, 552 S.E.2d 220, 225 (2001) (citation omitted) (a party has standing when they have "a sufficient stake in an otherwise justiciable controversy that he or she may properly seek adjudication of the matter.").

North Carolina follows the well-established rule "that courts will not interfere with the internal affairs of voluntary associations." *Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors*, 134 N.C. App. 468, 470, 518 S.E.2d 28, 30 (1999). While the interaction between courts and voluntary associations has been rarely litigated in North Carolina, other jurisdictions have held that a court would provide due process protection when a member's property or civil rights were invaded by the voluntary association. *See Van Valkenburg v. Liberty Lodge No.* 300, 619 N.W.2d 604, 607 (Neb. Ct.App. 2000); *Taite v. Bradley*, 151 So.2d 474, 475 (Fla. Dist. Ct. App. 1963); *Tucker v. Jefferson Cty. Truck Growers' Ass'n*, 487 So.2d 240, 242 (Ala. 1986). Some courts have also recognized interference is appropriate if the voluntary association failed to adhere to its own rules. *See State Ex. Rel. National Jr. Col. Ath. Ass'n v. Luten*, 492 S.W.2d 404, 407 (Mo. Ct. App. 1973); *Van Valkenburg*, 619 N.W.2d at 607. While the judiciary typically only protects member's rights, some courts will also intervene when the rights of a non-member, *i.e.* a student, have been affected by a voluntary athletic association. *See Ind. High School Ath. Ass'n v. Carlberg*, 694 N.E.2d 222, 230 (Ind. 1997); *Revesz v. PA. Interscholastic Athletic*, 798 A.2d 830 (Pa. Commw. Ct. 2002).

In the instant case, there is no justification for judicial intervention on behalf of the plaintiffs. Plaintiffs have neither a legally protected

interest nor a right in the Championship awarded by defendant. The Championship was granted to NGHS by defendant's association. Therefore, when the Championship was revoked, it was the *school* that sustained the loss, not the players. NGHS is a member of defendant's association, but plaintiffs are not. Consequently, plaintiffs do not have a legally protected interest in any award granted by defendant's association to one of its members. As defendant's association Handbook outlined, the *school*, as a member of defendant's association, could have challenged defendant's ruling. However, NGHS did not appeal the decision. Since the school is the only party with a property interest in the Championship, plaintiffs' only recourse was to implore NGHS to act on their behalf to achieve relief from defendant's ruling.

Plaintiffs further contend that defendant failed to comply with its own rules in revoking the Championship, alleging defendant's actions were arbitrary and capricious. Courts in other jurisdictions that have reviewed challenges to an association's alleged arbitrary and capricious decision have done so on a limited basis. The party seeking review in such cases has been the party actually harmed by the association's decision. *See Ala. High School Athletic Ass'n v. Medders*, 456 So.2d 284, 287 (Ala. 1984) (court found association rule declaring student ineligible to participate was not arbitrary); *Brown ex rel. Brown v. Ass'n*, 125 P.3d 1219, 1225-26 (Okla. 2005)(when student was ejected from a game and suspended from further games court found the associations' actions were not arbitrary and capricious).

In the instant case, plaintiffs allege as a result of defendant's actions they sustained damages for loss of reputation. However, there is nothing in the record actually demonstrating how the revocation of the Championship resulted in a loss of reputation. Forfeiture of the Championship may constitute harm, however, plaintiffs fail to include any particularized and actual injury that has occurred. In North Carolina, the injury in fact must be particularized and actual, not hypothetical or conjectural. *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005). Plaintiffs speculated that the forfeiture of the Championship *could cause* possible harm in the form of lost scholarships, lost job opportunities, and lost college prospects. However, these possibilities were all hypothetical. If a party suffered a particularized, actual loss from the revocation of the Championship, it was the school, NGHS. Therefore, the only party capable of challenging defendant's decision to revoke the Championship is the school. Even if plaintiffs' contention that defend-

ant failed to follow its rules is correct, since the plaintiffs did not suffer a particularized actual loss, they do not have standing to challenge the defendant's decision on this basis.

III. Conclusion

Plaintiffs are not the proper party to bring this action as they were not members of defendant's association and therefore have no legally protected interest in the State Championship title. Without a legally protected interest or right, plaintiffs have no standing to bring this action. In addition, plaintiffs have failed to allege any particularized actual loss that would allow this Court to analyze defendant's decision on the basis of arbitrariness or capriciousness. We affirm.

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

EMMANUEL AFRICAN METHODIST EPISCOPAL CHURCH, AN UNINCORPORATED ASSOCIATION, PLAINTIFF v. REYNOLDS CONSTRUCTION COMPANY, INC., AND LEROY REYNOLDS, DEFENDANTS

No. COA11-498

(Filed 15 November 2011)

1. Appeal and Error—interlocutory orders and appeals—denial of arbitration—interlocutory—substantial right

An order denying a motion to arbitrate was interlocutory but immediately appealable because it involved a substantial right that would be lost if review was delayed.

2. Arbitration and Mediation—erroneous denial of arbitration—plain language of contract

The trial court erred by denying defendants' motion to compel arbitration of a construction dispute where plaintiff argued that the contracts simply provided arbitration as one option for dispute resolution. Both contracts contained plain and simple language that disputes be resolved by arbitration; moreover, a reasonable interpretation of the contract language was to require the parties to always first engage in mediation, then to proceed to arbitration unless all of the parties agreed to a waiver. There was no mutual agreement to waive arbitration in this case.

Appeal by defendants from order entered 14 September 2010 by Judge Abraham Penn Jones in Durham County Superior Court. Heard in the Court of Appeals 25 October 2011.

Perry, Perry, & Perry, P.A., by Robert T. Perry, for plaintiff-appellee.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Byron L. Saintsing and John M. Sperati, for defendant-appellants.

CALABRIA, Judge.

Reynolds Construction Company, Inc. ("RCC") and Leroy Reynolds ("Reynolds") (collectively "defendants") appeal from the trial court's order denying defendants' motion to compel arbitration of claims brought against them by Emmanuel African Methodist Episcopal Church ("plaintiff"). We reverse and remand.

I. Background

In November 2006, plaintiff entered into a contract with RCC whereby RCC would act as general contractor for the construction of plaintiff's "New Sanctuary & Fellowship Hall" ("the construction contract"). Plaintiff separately contracted with Reynolds to act as architect for the construction ("the architect contract") (collectively "the contracts" or "both contracts").

After construction was completed, plaintiff became dissatisfied over perceived defects and requested that defendants correct them. The parties were unable to resolve this dispute. As a result, plaintiff initiated an action against defendants based upon both contracts in Durham County Superior Court on 17 December 2009. After the action was initiated, the parties unsuccessfully attempted to mediate plaintiff's claims.

In response to plaintiff's complaint, defendants jointly filed "Motions to Dismiss or in the Alternative Motions to Compel Arbitration and Stay Proceedings Pending Arbitration." After a hearing, the trial court entered an order denying all of defendants' motions on 14 September 2010. Defendants appeal the portion of the trial court's order denying their motion to compel arbitration.[1]

1. Defendants did not attempt to appeal from the remainder of the trial court's order, which denied their motions to dismiss.

II. Interlocutory Appeal

[1] As an initial matter, we note that defendants appeal from an interlocutory order. Interlocutory orders are not typically appealable unless the order affects a substantial right. *See Harbour Point Homeowners' Ass'n, Inc. v. DJF Enters., Inc.*, 201 N.C. App. 720, 723, 688 S.E.2d 47, 50 (2010). However, "[o]ur court has long held that [t]he right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable." *Id.* (internal quotations and citation omitted). Thus, defendants' appeal is properly before this Court.

III. Arbitration Clauses

[2] Defendants argue that the trial court erred by denying their motion to compel arbitration. Specifically, defendants contend that the trial court erroneously failed to enforce the arbitration clauses of the contracts. We agree.

> The question of whether a dispute is subject to arbitration is an issue for judicial determination. A trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by the appellate court. [The determination of] [w]hether a dispute is subject to arbitration involves a two pronged analysis; the court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement.

Pressler v. Duke Univ., 199 N.C. App. 586, 590, 685 S.E.2d 6, 9 (2009) (internal quotations and citation omitted). In the instant case, the parties' dispute only involves the first prong of the arbitration analysis, whether plaintiff, RCC, and Reynolds had valid agreements to arbitrate pursuant to both contracts.

"[W]hether a dispute is subject to arbitration is a matter of contract law. Parties to an arbitration must specify clearly the scope and terms of their agreement to arbitrate. Moreover, a party cannot be forced to submit to arbitration of any dispute unless he has agreed to do so." *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 478, 583 S.E.2d 325, 330 (2003) (internal citations omitted). "The party seeking arbitration bears the burden of proving the parties mutually agreed to the arbitration provision." *King v. Owen*, 166 N.C. App. 246, 248, 601 S.E.2d 326, 327 (2004).

Defendants contend that both contracts included clear provisions requiring plaintiff to arbitrate its claims. Defendants cite Paragraph 7.2.1 of the architect contract, which states: "Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with Paragraph 7.1." Defendants also cite a similar arbitration provision in Paragraph 9.10.4 of the construction contract: "Claims, disputes, and other matters in question arising out of or relating to the Contract that are not resolved by mediation . . . shall be decided by arbitration . . . ." Thus, defendants are correct that the contracts both included plain and unambiguous language that the vast majority of disputes shall be resolved by arbitration.

Plaintiff argues that these arbitration clauses should not be controlling. Rather, plaintiff cites portions of each of the contracts which it believes indicate that arbitration is simply one option by which the parties may proceed through a dispute resolution. First, plaintiff cites Paragraph 7.1.1 of the architect contract, which states: "Any claim, dispute or other matters in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party." Plaintiff also cites Article 9.10.3 of the construction contract, which states, in relevant part:

> The parties shall endeavor to resolve their disputes by mediation . . . . . The request [for mediation] may be made concurrently with filing of a demand for arbitration but in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings . . . .

Plaintiff contends that the language in each contract referring to possible "legal or equitable proceedings" should be interpreted as giving each party a choice, after mediation has been unsuccessful, to either resolve disputes via arbitration or via the courts. However, interpreting the contracts in this manner would invalidate the plain language of the arbitration clauses of the contracts, which is not permitted by our relevant rules of contract interpretation.

> It is well settled that a contract is construed as a whole. The intention of the parties is gleaned from the entire instrument and not from detached portions. Individual clauses are to be considered in context. All parts of the contract will be given effect if possible. This Court has long acknowledged that an interpreta-

> tion which gives a reasonable meaning to all provisions of a contract will be preferred to one which leaves a portion of the writing useless or superfluous.

International Paper Co. v. Corporex Constructors, Inc., 96 N.C. App. 312, 316, 385 S.E.2d 553, 555-56 (1989)(citations omitted).

In the instant case, both contracts contain plain and unambiguous language that the claims, disputes, and other matters related to the respective contracts shall be resolved by arbitration, and our interpretation of these contracts must be guided by this clear language. *See Johnston County v. R. N. Rouse & Co.*, 331 N.C. 88, 95, 414 S.E.2d 30, 34 (1992)("[T]he courts must give effect to the plain and unambiguous language of a contract."). Thus, we interpret both contracts to require arbitration of disputes if demanded by one of the parties to the contract.

Plaintiff's contrary interpretation is impermissible because it would render the mandatory arbitration clauses in the contracts superfluous. *International Paper*, 96 N.C. App. at 316, 385 S.E.2d at 556. Moreover, there is another reasonable way to interpret the contracts while still giving effect to the mandatory arbitration provisions. North Carolina law permits *all parties to a contract* to waive agreements to arbitrate and instead seek relief in the courts. *See Hargett v. Delisle*, 229 N.C. 384, 385, 49 S.E.2d 739, 739 (1948). The references to "legal or equitable proceedings" in the mediation portions of the contracts can thus be interpreted to maintain mediation as a condition precedent to legal or equitable proceedings in those circumstances in which both parties mutually agree to waive arbitration. *See Auchter Co. v. Zagloul*, 949 So.2d 1189, 1194-95 (Fla.App. 1 Dist. 2007)(interpreting similar contractual language in the same fashion). In other words, the language relied on by plaintiff simply requires the parties to always first engage in mediation when a dispute arises from the contracts. After mediation, the parties could proceed to arbitration, but if all the parties agreed to waive arbitration, then the option of other legal or equitable proceedings was available.

In the instant case, since there was no mutual agreement by the parties to waive arbitration, the option of "legal or equitable proceedings" referenced in the contracts was not available to plaintiff. Instead, under the plain language of the contracts, plaintiff's disputes with defendants shall be resolved by arbitration. Consequently, the trial court erred in denying defendants' motion to compel arbitration.

IV. Conclusion

Plaintiff's interpretation of the contracts, which treats arbitration as simply one option by which to resolve disputes, fails to give effect to the plain language of the arbitration provisions in the contracts and must be rejected. The respective contracts between plaintiff and defendants, properly interpreted, each contained valid agreements to arbitrate. Accordingly, the trial court erred by denying defendants' motion to compel arbitration. We reverse the trial court's order and remand the case for the entry of an order compelling arbitration between plaintiff and defendants.

Reversed and remanded.

Judges McGEE and HUNTER, Robert C. concur.

IN RE: T.P.

No. COA11-645

(Filed 15 November 2011)

1. Child Abuse, Dependency, and Neglect—permanency planning hearing—findings—not supported by evidence

The evidence at a permanency planning hearing for a neglected child did not support a finding that respondent-mother was in a mental health hospital.

2. Child Abuse, Dependency, and Neglect—permanency planning hearing—findings—mother's circumstances—supported by evidence

The evidence at a permanency planning hearing for a neglected child supported findings concerning respondent-mother's living arrangements, employment, and educational efforts. Further, respondent-mother did not provide evidence that she was seeing her therapist and taking her medication until the day of the hearing.

3. Child Abuse, Dependency, and Neglect—permanency planning hearing—findings—father's circumstances—supported by evidence

The evidence at a permanency planning hearing for a neglected child supported a finding regarding respondent-father's incarceration, living arrangements after his release, and lack of stable employment.

4. Appeal and Error—preservation of issues—failure to object—permanency planning hearing—best interest of child standard

Respondent mother's failure to object at trial waived appellate review of whether the trial court improperly applied the best interest standard in a permanency planning order for a neglected child.

5. Child Abuse, Dependency, and Neglect—permanency planning hearing—best interest of child—supervised visitation with mother

The trial court did not err in a permanency planning order for a neglected child by finding that it was in the child's best interest to have only supervised visitation with respondent mother, even though a return of custody was an option, or by not concluding that a permanent plan could have been achieved with the parents. There was still significant instability in respondent's life.

6. Child Abuse, Dependency, and Neglect—permanency planning hearing—placement with relative—custody with relative for more than a year—different grandparents

The trial court did not err in a permanency planning hearing for a neglected child by waiving further review hearings after placements with the child's grandparents where the child had remained with a relative (first maternal, then paternal grandparents) for more than a year.

Appeal by respondent from order entered 8 March 2011 by Judge William C. Tucker in Richmond County District Court. Heard in the Court of Appeals 31 October 2011.

Deane, Williams & Deane, by Jason T. Deane, for petitioner-appellee, Richmond County Department of Social Services.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Tobias Rice Coleman, for guardian ad litem.

David A. Perez for respondent-appellant.

HUNTER, Robert C., Judge.

Respondent is the biological mother of T.P. ("Travis").[1] She appeals from the trial court's order granting legal and physical custody of Travis to his paternal grandparents. We affirm the order of the trial court.

On 16 September 2009, Richmond County Department of Social Services ("DSS") filed a juvenile petition alleging Travis was a neglected and dependent juvenile. The petition alleged respondent had difficulty providing Travis with a stable living environment. By order entered 16 November 2009, Travis was adjudicated dependent. Respondent retained legal custody of Travis on the condition that physical placement remain with the maternal grandparents. Respondent was ordered to comply with all activities and objectives of her case plan including obtaining stable housing, securing stable employment, and dealing with her mental health issues.

The trial court held a review hearing on 11 May 2010. At that time, respondent was not in compliance with her case plan. Also, due to the maternal grandmother's failing health, the trial court ordered DSS to complete a safety assessment and home study of Travis' paternal grandparents. Travis began living with his paternal grandparents on 12 June 2010.

The trial court held a permanency planning hearing on 17 August 2010. The trial court found respondent had not demonstrated or produced evidence that she could maintain consistency in housing, financial stability, or compliance with her mental health treatment. The trial court relieved DSS from efforts to reunite respondent and Travis. The permanent plan for Travis was relative placement, custody, and guardianship.

The matter came on for review on 22 February 2011. By order entered 8 March 2011, the trial court granted legal and physical custody of Travis to the paternal grandparents. The trial court also waived further review hearings pursuant to N.C. Gen. Stat. § 7B-906. Respondent appeals.

Respondent argues the trial court erred in concluding that it was in Travis' best interest that his legal and physical custody be placed with his paternal grandparents as such conclusion is not supported by proper findings of fact. Moreover, respondent argues the trial

1. Travis is a pseudonym used for ease of reading and to protect the identity of the child.

court's findings of fact are not supported by competent evidence. We disagree.

We review "whether there is competent evidence in the record to support the findings and [whether] the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004) (citations omitted).

Respondent argues the following findings of fact are not supported by competent evidence:

> 12. That at the March 23, 2010 review, the Respondent mother had left the boyfriend's residence and was at a mental health hospital for psychiatric treatment; that she did not have suitable housing, had not maintained her mental health treatment or medication, and was unemployed.
>
> . . . .
>
> 21. That it is unlikely that the minor child will be returned to either parent within a reasonable period of time because of the parents' unemployment; the dependency by the Respondent parents on family members for their own subsistence, especially housing provided by the maternal grandparents, [J.P. and M.P.]; the resumption of the Respondent mother and father to living together and being engaged; the Respondent mother's sporadic and interrupted enrollment in a GED program; and despite admitted mental health issues, the Respondent mother's failure to be forthcoming with information about her treatment and medication until the date of this hearing.
>
> . . . .
>
> 25. That the issues brought by the Department of Social Services through its Petition on the part of the Respondent mother still exist, to wit: her absence of stable employment; her long period of delay in addressing the mental health issues and receiving treatment and medication; the absence of stable housing; although it appears at this time to be stable, the financial arrangements incident to her home are not stable.

[1] First, we agree finding of fact 12 is not supported by competent evidence. The record shows that the 23 March 2010 hearing was actually continued because DSS and respondent's boyfriend had

"unconfirmed information" that respondent had checked herself into a hospital for mental health and psychiatric treatment.

[2] As for findings of fact 21 and 25, these findings are supported by evidence that shows respondent was living with respondent father who had been convicted of felony child abuse; respondent was unemployed or doing odd jobs; she relied on her family for housing and payment of the utilities; and she was not consistently enrolled in her GED program. Furthermore, respondent failed to provide evidence that she was seeing her therapist and taking her medications until the day of the 22 February 2011 hearing.

[3] The trial court also found:

> 26. That the issues brought by the Department of Social Services through its Petition on the part of the Respondent father still exist, to wit: absence of stable employment, absence of stable housing, and his inability to enter a Family Services Case Plan because of his long incarceration for felony child abuse.

Respondent argues this finding is erroneous. We disagree as this finding is supported by the social worker's testimony that she did not ask respondent father to enter into a case plan because he was incarcerated at the time the juvenile petition was filed; that respondent father left his grandparents' home to reside with respondent after being released from prison; and that respondent father did not have stable employment.

[4] Respondent also challenges the following findings of fact:

> 27. That the Respondent parents have acted inconsistently with their constitutionally protected status as parents through their lack of action in completing their Family Services Case Plans and, therefore, the Court is required to address the best interests of the minor child.
>
> 28. That the paternal grandparents, [V.P. and J.P.], are fit and proper relatives to have legal and physical custody of the minor child, [Travis], as demonstrated by the eight months of placement and significant progress the minor child has made socially and educationally.
>
> . . . .
>
> 30. That it is in the best interests of the minor child, [Travis], that his legal and physical custody be placed with his paternal grandparents, [V.P. and J.P.].

Specifically, respondent argues the trial court could not apply a best interest standard absent respondent being deemed unfit or having acted in a manner inconsistent with her constitutionally protected parental status.

This Court has stated that, "to apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status." *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009) (citing *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997)). However, "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). In this case, the trial court found respondent acted in a manner inconsistent with her protected status and that it was required to address the best interest of the child, and respondent did not raise an objection at trial. Consequently, respondent has waived review of this issue on appeal.

[5] Respondent further argues finding of fact 35 is erroneous because it was not in Travis' best interest for him to simply have supervised visitation with her when a return of custody to her was a viable option. Similarly, she attacks conclusion of law 6 arguing a permanent plan for Travis could have been achieved with respondent and respondent father within a reasonable period of time. We find respondent's arguments without merit as the evidence shows there still was significant instability in respondent's life.

[6] Lastly, respondent argues the trial court erred in waiving further review hearings pursuant to N.C. Gen. Stat. § 7B-906. The court may waive the holding of review hearings if the court finds by clear, cogent, and convincing evidence that:

> (1) The juvenile has resided with a relative or has been in the custody of another suitable person for a period of at least one year;
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests;
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months;
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion; and

> (5) The court order has designated the relative or other suitable person as the juvenile's permanent caretaker or guardian of the person.

N.C. Gen. Stat. § 7B-906(b) (2009). In this case, the trial court found:

> 32. That the minor child has resided with a relative for a period exceeding one year; that this placement is stable, and continuation of the placement is in the minor child's best interests; that neither the minor child's best interests nor the rights of any party require that review hearings be held every six months; that all parties are aware that the matter may be brought before the Court for review at any time by the filing of a motion for review or on the Court's own motion; and the permanent plan for the minor child has been relative placement, custody, and guardianship since August of 2010.

Respondent contends, in entering this finding, the trial court appears to assert that the relative with whom the juvenile has resided for at least one year does not have to be one person or one placement, but can be two. Respondent contends the only logical interpretation of the criteria found in section 7B-906 is that the relative placement be with one relative or one relative family unit. We do not agree. From birth until June 2010 Travis resided with his maternal grandparents. Thereafter, Travis resided with his paternal grandparents. Thus, he has remained with a relative (maternal and paternal grandparents) for more than one year. The trial court made the requisite findings prior to waiving further review hearings. The order of the trial court is affirmed.

Affirmed.

Judges THIGPEN and McCULLOUGH concur.

TERRI GINSBERG, PLAINTIFF v. BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, DEFENDANT

No. COA11-506

(Filed 15 November 2011)

Public Officers and Employees—university teaching assistant—tenure-track position—right to free speech—mere speculation

The trial court did not err by granting summary judgment in favor of defendant Board of Governors on plaintiff teaching assistant's claim alleging a violation of her rights to freedom of speech. Plaintiff failed to establish beyond mere speculation that her statements were the motivating factor in the university's decision to not hire her for a tenure-track position.

Appeal by plaintiff from order entered 4 November 2010 by Judge Shannon R. Joseph in Orange County Superior Court. Heard in the Court of Appeals 26 October 2011.

Rima N. Kapitan and Marty Rosenbluth, attorneys for plaintiff.

Attorney General Roy Cooper, by Special Deputy Attorney General Gary R. Govert, for defendant.

ELMORE, Judge.

Terri Ginsberg (plaintiff) appeals an order entered 4 November 2010 granting summary judgment in favor of the Board of Governors of the University of North Carolina (defendant). We affirm.

In December 2006, plaintiff interviewed with the Film Studies Department of North Carolina State University for a position as a Teaching Assistant Professor (TAP). The TAP position was for the term of one year, with the possibility of renewal. During the interview, plaintiff was informed that the department would later be seeking to hire a tenure-track Assistant Professor in film studies, to begin in the fall semester of 2008. Plaintiff was then offered the TAP position. On 16 August 2007, plaintiff began her TAP employment. Around this time, Dr. Akram Khater, Director of the Middle East Studies Program, encouraged plaintiff to apply for the tenure-track position of Assistant Professor in film studies.

Later that fall, plaintiff was asked to be a member of a committee to select films to be shown at the university's annual Middle Eastern

Film Series. On 24 October 2007, the film "Ticket to Jerusalem" was shown as part of that series. Plaintiff introduced the film by welcoming the audience on behalf of the Film Studies and Middle East Studies programs. Plaintiff concluded her introduction by stating that she was proud to be able to present the film to the audience, because the audience's presence "showed support for the airing of Palestinian cultural perspectives, especially those which promote Palestinian liberation." Other members of the committee felt as though plaintiff's statement conveyed the message to the audience that plaintiff believed that the audience's presence was a sign of their support of the Palestinian side of the Israeli-Palestinian political conflict. Dr. Marsha Orgeron, director of the Film Studies Program, felt as though plaintiff's statements were "counterproductive and potentially quite alienating." On 9 November 2007, Orgeron and Khater met with plaintiff. During that meeting, Khater expressed his concerns to plaintiff about her introductory statements. Khater explained that he was concerned about the effect her statements could have on the program and the purpose of the film series.

Also around this time, Orgeron served as the chair of a search committee for the tenure-track Assistant Professor position. The committee members were Orgeron, her husband Dr. Devin Orgeron, Dr. Jon Thompson, and Dr. Barbara Bennett. Plaintiff was initially on the list of applicants who would be considered for an interview. Plaintiff remained on the "first tier" list through November 2007. However, plaintiff was then moved further down the list, and eventually she was not included on the list of candidates who were screened for interviews. Orgeron explained that plaintiff was not screened for an interview because 1) plaintiff's area of research and interest in middle eastern film was not consistent with the area of focus desired by the department for the position, 2) plaintiff's experience and the quantity of her publications exceeded the scope of what would normally be expected of a beginning assistant professor in the department, and 3) the committee was concerned about the quality of the press of one of plaintiff's monographs. Ultimately, ten applicants were interviewed for the position. From those ten applicants, two candidates were brought to the university for an on-campus interview, and one of the candidates was hired.

On 8 October 2009, plaintiff filed suit against defendant alleging a violation of her rights to freedom of speech, religious liberty, and equal protection. On 10 September 2010, defendant filed a motion for summary judgment. On 4 November 2010, the trial court entered an

order granting defendant's motion for summary judgment. Plaintiff now appeals.

Plaintiff contends that the trial court erred in dismissing her speech claim by granting summary judgment in favor of defendant. "We review a trial court's order granting or denying summary judgment *de novo*. Under a *de novo* review, th[is] court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citations and quotations omitted). "Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The trial court must consider the evidence in the light most favorable to the non-moving party." *Crocker v. Roethling*, 363 N.C. 140, 142, 675 S.E.2d 625, 628 (2009) (quotations and citations omitted).

Plaintiff argues that there are questions of material fact regarding whether her constitutional right to freedom of speech was violated. We disagree. The core issue for this Court to review on appeal is whether there is any genuine issue of material fact that plaintiff's remarks were the cause of the university's decision to not hire plaintiff for the tenure-track position.

> In challenging an adverse employment decision for violation of constitutional rights, an employee establishes a prima facie case by showing that [the] protected activity was a substantial or motivating factor in the employer's decision. This prima facie showing shifts the burden to the employer to show, by a preponderance of the evidence, that the adverse decision would have been made in the absence of the protected activity.

Lenzer v. Flaherty, 106 N.C. App. 496, 509, 418 S.E.2d 276, 284 (1992) (citations omitted). "Although evidence of retaliation in a case such as this one may often be completely circumstantial, the causal nexus between protected activity and retaliatory discharge must be something more than speculation." *Id.* at 510, 418 S.E.2d at 284 (citation omitted).

Here, plaintiff argues that following her remarks, she had several negative interactions with other members of the faculty. Based on these interactions, plaintiff believes that she was not considered for the tenure-track position as a result of her remarks. However, plaintiff fails to establish any causal connection beyond mere speculation

between these interactions and the decision of the university to not hire her for the tenure-track position. In fact, the record does not show that plaintiff's remarks were a decisive factor in the committee's decision. The committee articulated several specific reasons why plaintiff was not hired for the position, none of which concerned plaintiff's remarks. Those reasons established in sum 1) that plaintiff's expertise was in a different area than the department desired for the position and 2) that plaintiff was overqualified for the position. Also, plaintiff remained on the "first tier" list of applicants through November 2007, weeks after her remarks were made. Furthermore, assuming *arguendo* that plaintiff was able to establish a prima facie case, it is apparent from the record that defendant has met its burden by showing that the adverse decision would have been made in the absence of the protected activity. Here, the university conducted an extensive and thorough search for the best candidate to fill the tenure-track position. Over the course of several weeks, the university narrowed the field of applicants to ten individuals. The university then conducted ten off-campus interviews, two on-campus interviews, and ultimately hired a candidate with different qualifications than plaintiff.

In sum, we conclude that plaintiff has failed to establish beyond mere speculation that her statements were the motivating factor in the university's decision to not hire her for a tenure-track position. Accordingly, we affirm the decision of the trial court.

Affirmed.

Judges BRYANT and STEPHENS concur.

IN RE J.L.H.

[217 N.C. App. 192 (2011)]

IN THE MATTER OF: J.L.H.

No. COA11-575

(Filed 15 November 2011)

Termination of Parental Rights—failure to appoint guardian ad litem for minor child—reversible error

The trial court erred by terminating respondent father's parental rights because it failed to appoint a guardian *ad litem* under N.C.G.S. § 7B-1108 for the minor child. The appointment of an attorney advocate was not sufficient to satisfy this requirement. The case was reversed and remanded for appointment of a guardian ad litem for the minor child and a new termination hearing.

Appeal by respondent father from order entered 9 March 2011 by Judge Louis F. Foy, Jr., in Onslow County District Court. Heard in the Court of Appeals 24 October 2011.

No brief filed on behalf of petitioner-appellee mother.

Ryan McKaig for respondent-appellant father.

BRYANT, Judge.

Respondent father appeals from the trial court's order terminating his parental rights to his minor child, Johnny[1]. Since the trial court failed to appoint a guardian *ad litem* for the minor child, we reverse and remand for a new termination hearing.

Facts and Procedural History

Respondent father and petitioner mother are the biological parents of Johnny, born on 26 September 2006. Respondent and petitioner were never married. On 1 April 2010, petitioner filed a petition to terminate respondent's parental rights, alleging as grounds: (1) neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1); (2) failure to establish paternity or legitimate the child pursuant to N.C. Gen. Stat. § 7B-1111 (a)(5); and, (3) willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). On 6 January 2011, respondent filed an answer denying that certain grounds existed to justify the termination of his parental rights.

The trial court conducted a termination hearing on 24 February 2011. Respondent, who was in the military, was not present at the

1. Pseudonyms have been used throughout to protect the identity of the juvenile.

hearing due to being stationed in another state, but was represented by counsel. After hearing testimony from petitioner, the trial court determined that grounds existed to terminate respondent's parental right as alleged in the petition. The trial court also determined that termination of respondent's parental rights was in the best interests of the minor child. From the order terminating his parental rights, respondent appeals.

On appeal, respondent argues that the trial court erred in failing to appoint a guardian *ad litem* for Johnny pursuant to N.C. Gen. Stat. § 7B-1108. We agree.

The Juvenile Code provides in pertinent part that:

> If an answer or response denies any material allegation of the petition or motion, the court *shall* appoint a guardian ad litem for the juvenile to represent the best interests of the juvenile, unless the petition or motion was filed by the guardian ad litem pursuant to G.S. 7B-1103, or a guardian ad litem has already been appointed pursuant to G.S. 7B-601.

N.C. Gen. Stat. § 7B-1108(b) (2009) (emphasis added). This Court has held that failure to appoint a guardian *ad litem* pursuant to this section amounts to reversible error. *In re J.L.S.*, 168 N.C. App. 721, 723, 608 S.E.2d 823, 824 (2005).

Based on the record before us, there is no indication the trial court appointed a guardian *ad litem* to represent the best interests of the minor child, even though respondent filed an answer to the petition to terminate his parental rights denying the material allegations contained in the petition. Further, despite the fact that respondent's answer to the termination petition was not filed until many months after the petition was filed, the late answer did not absolve the trial court of its duty to appoint a guardian *ad litem* for the minor child. *See In re J.L.S.* at 723, 608 S.E.2d at 825. In *In re J.L.S.*, the respondent filed a response to the termination petition on the day of the termination hearing, more than thirty days after the petition was filed. *Id.* This Court concluded that the best interests of the minor child must be protected, particularly in a private termination action where one parent seeks to terminate the parental rights of the other parent, as in the instant case. *Id.* Thus, this Court "refuse[d] to penalize the minor child" for the late filing of the response. *Id.* In keeping with the holding in *In re J.L.S.*, we conclude that the trial court erred by fail-

ing to appoint a guardian *ad litem* for the minor child after respondent filed a response denying the allegations in the termination petition.

Here, the record reflects the appointment of an attorney to serve as an attorney advocate for the juvenile. However, this Court has found that the appointment of an attorney advocate is not sufficient to satisfy the requirement of a guardian *ad litem* when one is required. *In re R.A.H.*, 171 N.C. App. 427, 431, 614 S.E.2d 382, 385 (2005) (stating that "[t]he functions of the guardian *ad litem* and the attorney advocate are not sufficiently similar to allow one to 'pinch hit' for the other when the best interest of a juvenile is at stake."). Accordingly, we reverse the order of the trial court terminating respondent's parental rights to J.L.H. and remand for appointment of a guardian *ad litem* for the minor child and a new termination hearing. *See In re J.L.S.* at 723, 608 S.E.2d at 825.

Reversed and remanded.

Judge Elmore and Ervin concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 NOVEMBER 2011)

BROOKSHIRE v. CNTY. OF BUNCOMBE No. 11-585	Transylvania (10CVS364)	Dismissed
CAPPS v. BLONDEAU No. 10-1077	Wake (07CVS16486)	Affirmed
EDWARDS v. SOUTHERN MAINT. No. 11-509	NC Ind. Comm. (650613)	Affirmed
EVANS v. NEILL No. 11-321	Cumberland (09CVS6428)	Affirmed
FAIRFIELD HARBOUR PROP. OWNERS ASS'N, INC. v. DREZ No. 11-205	Craven (10CVS1349)	Affirmed
FLANARY v. WILKERSON No. 10-1401	Johnston (08CVS1812)	New Trial
HARMON v. EASTERN DERMATOLOGY & PATHOLOGY, P.A No. 11-195	Bertie (09CVS250)	No Error
IN RE C.A. No. 11-554	Johnston (09JT114)	Affirmed
IN RE C.C.W., J.M.W., A.L.A., J.D.T. No. 11-617	Harnett (09J145-148)	Affirmed in part; vacated in part
IN RE J.M.G. No. 11-555	Haywood (09JT25)	Affirmed
IN RE J.P. No. 11-793	Watauga (06J41)	Vacated and Remanded
IN RE M.G. No. 11-589	Macon (10JA1)	Reversed and remanded
IN RE M.M.F. No. 11-587	Sampson (09JT34)	Affirmed
IN RE S.H. & S.M. No. 11-745	Wake (08JT639) (09JT195)	Affirmed
IN RE S.M.S. No. 11-746 (07JT62)	Cabarrus (07JT62)	Affirmed

IN RE Z.M. No. 11-473	Mecklenburg (08JA770)	Reversed and Remanded
KRUTCH v. WAKE MED. CTR No. 11-233	NC Ind. Comm. (495280)	Affirmed.
PETERS v. NORTH STATE PARTNERS, LLC No. 11-551	New Hanover (09CVS4356)	Dismissed
PREIS v. YOAS No. 11-177	New Hanover (09CVD3301)	Affirmed
SEIDNER v. TOWN OF OAK ISLAND No. 11-361	Brunswick (09CVS2496)	Affirmed in part. Vacated in part.
STATE v. ALSTON No. 11-169	Nash (07CRS54953) (07CRS8026)	Affirmed
STATE v. BLACK No. 11-354	Mecklenburg (08CRS208908)	Dismissed
STATE v. BLACK No. 11-252	Stanly (08CRS2711) (08CRS2713-14) (09CRS50093-94)	No error in part and remanded in part.
STATE v. BLACK No. 11-1082	Stanly (08CRS2711) (08CRS2713-14) (09CRS50093-94)	Affirmed
STATE v. BRASON No. 11-517	Wilkes (09CRS1501-1536)	Dismissed
STATE v. BURKE No. 11-544	Catawba (08CRS57419-20)	Affirmed
STATE v. BURNEY No. 11-597	Pitt (10CRS50740-41)	No Error
STATE v. CANIPE No. 11-334	Catawba (10CRS6495)	Affirmed
STATE v. CARLE No. 11-383	Catawba (09CRS52256-58)	No Error
STATE v. DAIL No. 11-384	Brunswick (10CRS50018) (10CRS50019)	Affirmed
STATE v. DOWELL No. 11-441 No Error	Forsyth (09CRS55665)	No Error

STATE v. ESTES No. 11-408	Avery (05CRS50421)	No Error
STATE v. FLEMING No. 11-316	New Hanover (07CRS63253) (08CRS3912)	No Error
STATE v. HART No. 11-538	Wilkes (09CRS54065-66) (09CRS54089)	No Error
STATE v. HOUSE No. 11-479	Mecklenburg (09CRS248059)	No Error
STATE v. ICENHOUR No. 11-360	Johnston (09CRS55100)	Affirmed
STATE v. JACKSON No. 11-70	Wake (09CRS202619) (09CRS51554)	No Error
STATE v. JOHNSON No. 11-399	Cabarrus (09CRS51863) (09CRS8151) (09CRS9763)	No Error
STATE v. LEE No. 11-429	Cleveland (08CRS2088) (09CRS1323)	No prejudicial error
STATE v. MCDONALD No. 11-8	Onslow (07CRS61485)	No Error
STATE v. MURRAY No. 11-270	Cumberland (09CRS17300) (09CRS54403)	No Error
STATE v. PAGE No. 11-278	Guilford (09CRS92959-61) (09CRS92963)	Affirmed
STATE v. PAGE No. 11-365	Gaston (10CRS56755-57)	No Error
STATE v. RAY No. 11-543	Caswell (10CRS421-422)	No Error
STATE v. RIVERA-OCANA No. 11-583	Mecklenburg (09CRS230059)	No Error
STATE v. SCRIVEN No. 10-1565	Scotland (09CRS52478-80)	No Error

STATE v. SHIPP No. 11-415	Alamance (10CRS53550) (10CRS53552-53) (10CRS53555-57) (10CRS53589) (10CRS53592-93)	No error in part; remanded in part for correction of clerical errors
STATE v. SMITH No. 11-362	Guilford (09CRS95759) (10CRS24016)	No Error
STATE v. SMITH No. 11-424	Robeson (07CRS57594)	No prejudicial error
STATE v. SOLOMON No. 11-513	Cabarrus (09CRS9699)	Affirmed
STATE v. STEELE No. 11-318	Durham (06CRS52356) (07CRS41064)	Dismissed
STATE v. STEPHENS No. 11-490	Robeson (08CRS57239)	No Error
STATE v. SURBER No. 11-241	Caldwell (10CRS1030-31)	No Error
STATE v. THOMAS No. 11-573	Alamance (10CRS50563-65)	No Error
STATE v. THOMPSON No. 11-582	Mecklenburg (06CRS257752) (06CRS257754)	No Error
STATE v. WILLIAMS No. 11-470	Mecklenburg (09CRS38741) (09CRS61949)	New Trial
STATE v. WOOD No. 11-464	Buncombe (08CRS430) (08CRS51137-38)	Affirmed
STATE v. YUCKEL No. 11-371	Cabarrus (09CRS53476)	No Error

IN RE: FIFTH THIRD BANK, NATIONAL ASSOCIATION—
VILLAGE OF PENLAND LITIGATION

No. COA11-310

(Filed 6 December 2011)

1. Appeal and Error—interlocutory orders and appeals—costs

Trial court orders taxing costs against plaintiffs were interlocutory but appealable where plaintiffs were ordered to immediately pay a significant amount of money.

2. Unfair Trade Practices—failed real estate investment—investment without input from bank

The trial court did not err by granting summary judgment for defendant bank on an unfair and deceptive trade practices claim arising from a failed real estate investment where plaintiff's decision to invest was made without any input from defendant, plaintiff obtained a loan from defendant in order to realize a profit, plaintiff was aware that the property was essentially undeveloped and that the extent of his profit would depend upon the successful construction and marketing of the project, and plaintiff realized that he was exposed to certain risks.

3. Unfair Trade Practices—violation of business policies and industry standards—not a per se unfair practice

The violation of internal business policies and general industry standards does not constitute a *per se* violation of the Unfair and Deceptive Trade Practices Act. Plaintiff's claim, which arose from a failed real estate investment, depended upon a showing that defendant bank violated banking laws but plaintiff did not identify specific statutes or regulations that defendant violated.

4. Unfair Trade Practices—real estate appraisals—no impact on investment decision

Allegedly defective real estate appraisals did not support a finding of liability pursuant to N.C.G.S. § 75-1.1 where the appraisals had no impact on plaintiffs' decision to participate in the investment.

5. Unfair Trade Practices—relationship between bank and developer—not an unfair and deceptive act

None of the facts alleged by plaintiffs, if true, demonstrated an inappropriate relationship between defendant bank and real estate developers sufficient to constitute a violation of the Unfair and Deceptive Trade Practices Act.

6. Unfair Trade Practices—real estate loans—unlicensed and unapproved personnel—no violation

The involvement of an unlicensed loan coordinator employed by the developers in the preparation of documentation and an appraiser who was not approved by defendant bank was not sufficient to establish the existence of an Unfair and Deceptive Trade Practice violation.

7. Unfair Trade Practices—real estate development—no duty by bank to monitor or investigate—no reliance on appraisals

Allegations that defendant bank did not investigate developers, monitor the progress of the development, ensure that the appraisals were accurate, or disclose allegedly unfavorable information to plaintiffs did not establish a valid claim against defendant pursuant to N.C.G.S. § 75-1.1. The undisputed evidence tended to show that plaintiffs' decision to invest did not rest on the appraised value of the unimproved land. Moreover, plaintiffs cited no authority tending to establish that defendant had a legal duty to investigate and monitor the activities of the developers and the progress of the development.

8. Estoppel—real estate loans—enforcement not estopped

Defendant bank was not estopped from seeking to enforce its contractual rights following the failure of a real estate investment where plaintiffs alluded to contracts being unenforceable when induced by fraud, but they dismissed their fraud claims prior to defendant's summary judgment hearing and did not adduce evidence tending to show fraud. Moreover, plaintiffs' claim that defendant led the borrowers to believe that plaintiffs' loans were true mortgages rather than personal loans based upon net worth and creditworthiness lacked any evidentiary support.

9. Unfair Trade Practices—conspiracy—bank and real estate developer—summary judgment

The trial court did not err by granting summary judgment for defendant bank on a claim that defendant engaged in a civil con-

spiracy with real estate developers where it was decided elsewhere that defendants had not engaged in unfair and deceptive trade practices.

10. Conspiracy—tortious acting in concert—summary judgment—no joint action

The trial court did not err by granting summary judgment for defendant-bank on a claim for tortious acting in concert with developers arising from a failed real estate development where plaintiffs did not produce any evidence of joint action between defendant and the developers or that defendant's involvement extended beyond the point of merely making loans to investors.

11. Costs—underlying summary judgment—properly granted

A challenge to a trial court decision taxing costs to plaintiffs was rejected where the sole basis of the challenge was that summary judgment was erroneously granted to defendant, but in fact it was determined on appeal that summary judgment was properly granted.

Appeal by plaintiffs from judgment entered 5 October 2010 and orders entered 19 November 2010 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 September 2011.

Fuller & Barnes, LLP, by Trevor M. Fuller and Michael D. Barnes, for plaintiffs-appellants.

McGuireWoods, LLP, by H. Landis Wade, Jr., Danielle E. Webb, and Steven N. Baker, for defendants-appellees.

ERVIN, Judge.

Plaintiffs Jerome E. Williams, Jr., M.D.; Jerome E. Williams, Jr., M.D., Consulting LLC; and Adelle A. Williams, M.D., appeal from orders granting summary judgment in favor of Defendant Fifth Third Bank with respect to Plaintiffs' claims against Defendant and Defendant's breach of contract claim against Plaintiffs and taxing the costs against Plaintiffs. On appeal, Plaintiffs contend that the record discloses the existence of genuine issues of material fact relating to their claims against Defendant and Defendant's breach of contract claim against Plaintiffs sufficient to defeat Defendant's summary judgment motion and that, given that the trial court erroneously granted summary judgment in favor of Defendant with respect to the

issue of liability, it also erred by taxing the costs against Plaintiffs. After careful consideration of Plaintiffs' challenges to the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders should be affirmed.

I. Factual Background

A. Substantive Facts

This appeal arises from loans obtained by Plaintiffs for the purpose of investing in a real estate development known as the Village of Penland. Plaintiff Jerome Williams, a cardiologist living in Charlotte, is the owner of Plaintiff Jerome E. Williams, Jr., M.D., Consulting LLC, and the husband of Plaintiff Adelle Williams, M.D.

In 2006, Dr. Williams learned of the existence of the Village of Penland, a residential and commercial development to be located in Mitchell County that was expected to consist of numerous homes, lodges, restaurants, and other amenities. Dr. Williams heard about the Village of Penland from Mike Khaldun, a real estate agent employed by "an investment realty real estate company." After meeting with Mr. Khaldun, Dr. Williams received information about the project from representatives of the developers.

Ultimately, Dr. Williams decided to invest in the Village of Penland project. Acting either individually or through Williams Consulting, Dr. Williams purchased twenty lots in the proposed development at a price of $125,000 per lot. Five of the lots purchased by Dr. Williams, which had a total purchase price of $625,000, were financed using credit extended by Defendant.[1] On 15 March 2006, Dr. Williams closed on a $500,000 loan provided by Defendant, a process which included the execution of a promissory note obligating him to repay that principal amount plus interest.

Unfortunately, the developers failed to use the money obtained from Plaintiffs and other investors to develop the Village of Penland. Ultimately, several individuals associated with the developers entered pleas of guilty to various federal criminal offenses arising from project-related activities. After the failure of the proposed development, Plaintiffs defaulted on their loan payments to Defendant. The present litigation arises from a dispute between the parties over the extent to which Plaintiffs are obligated to repay the loans that they obtained from Defendant.

1. The remaining fifteen lots obtained by Plaintiffs were purchased using credit extended by other lending institutions.

B. Procedural History

On 4 April 2008, Plaintiffs filed a complaint against Defendant[2] and others associated with their decision to invest in the Village of Penland, including the other lending institutions from which they borrowed money, the appraisers hired by these lending institutions, and various individuals associated with the developers. In their complaint, Plaintiffs asserted claims sounding in unfair and deceptive trade practices, fraud, constructive fraud, aiding and abetting fraud, fraud in the inducement, negligent misrepresentation, conversion, negligence, tortious action in concert, civil conspiracy, breach of fiduciary duty, breach of contract, breach of the duty of good faith and fair dealing, breach of a surety agreement, and violation of the statutory provisions governing mortgage lending.

On 23 June 2008, Defendant filed an answer in which it denied the material allegations set out in Plaintiffs' complaint, asserted various affirmative defenses, and counterclaimed for the amount owed under the promissory note.

On 23 April 2010, Defendant filed motions seeking summary judgment with respect to the claims asserted by Plaintiffs and with respect to its claim based on the promissory note executed by Plaintiffs. On 7 May 2010, Plaintiffs filed a motion seeking leave to amend their complaint "for the purpose of withdrawing certain claims" in order to "better reflect the evidence that has been developed through the discovery in this matter." On 24 May 2010, the trial court granted Plaintiffs' motion by means of an order stating that:

> . . . [Although Plaintiffs] have fourteen (14) claims against [Defendant, they] . . . seek[] to abandon all but two (2) claims against [Defendant] (Unfair and Deceptive Trade Practices, and Tortious Action in Concert and Civil Conspiracy), and to remove and abandon certain factual allegations against [Defendant], including allegations of fraud. . . . The claims, counterclaims and third-party claims abandoned by [Plaintiffs] . . . are dismissed with prejudice.

A hearing concerning Defendant's summary judgment motion was held on 28 May 2010. On 5 October 2010, the trial court granted Defendant's motion by means of an order which stated, in pertinent part, that:

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2. Plaintiffs initially named First Charter Bank, from whom the loans at issue in this case were procured, as a party defendant. Subsequently, Fifth Third Bank acquired First Charter. As a result, Fifth Third was substituted for First Charter as the named defendant in this case.

> . . . Prior to [this] hearing . . . Plaintiffs amend[ed] their pleadings to dismiss . . . all claims against [Defendant] except . . . (1) Tortious Action in Concert and Civil Conspiracy; and (2) Unfair and Deceptive Trade Practices. . . . [A]fter considering the arguments made and briefs submitted by counsel . . . [,] the Court concludes that there is no genuine issue as to any material fact with respect to the First Claim of the Counterclaim [or] the two remaining claims against [Defendant], entitling [Defendant] to Judgment as a matter of law as requested on the First Claim of the Counterclaim and Judgment as a matter of law . . . dismissing all remaining claims against [Defendant]. . . . The two remaining claims against [Defendant] of Tortious Action in Concert and Civil Conspiracy, and Unfair and Deceptive Trade Practices, are dismissed with prejudice[.]

As a result, the trial court awarded Defendant the principal amount due under the promissory note plus interest, attorney's fees, and the costs. On 25 October 2010, Defendant submitted a verified bill of costs seeking to have "reasonable and necessary" costs taxed to Plaintiffs pursuant to N.C. Gen. Stat. § 7A-305(d). On 19 November 2010, the trial court entered an order taxing costs against Plaintiffs in accordance with Defendant's motion. Plaintiffs noted an appeal to this Court from the 5 October 2010 and 19 November 2010 orders.

II. Legal Analysis

A. Appealability

[1] "A judgment is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). "As a general rule, interlocutory orders are not immediately appealable. However, 'immediate appeal of interlocutory orders and judgments is available in at least two instances': when the trial court certifies, pursuant to N.C. [Gen. Stat.] § 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. [Gen. Stat.] §§ 1-277(a) and 7A-27(d)(1)." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citing *Davis v. Davis*, 360 N.C. 518, 524, 631 S.E.2d 114, 119 (2006), and quoting *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999)).

Although Plaintiffs concede that their appeal has been taken from an interlocutory order, they assert that the "entry of Judgments in favor of the Bank . . . affects a substantial right by ordering [Plaintiffs] to make immediate payment of a significant amount of money[.]" In support of this contention, Plaintiffs cite *Estate of Redden v. Redden*, 179 N.C. App. 113, 116-17, 632 S.E.2d 794, 798 (2006), *remanded on other grounds*, 361 N.C. 352, 649 S.E.2d 638 (2007) (stating that "[t]he Order appealed affects a substantial right of [Defendant] by ordering her to make immediate payment of a significant amount of money," thereby giving this Court "jurisdiction over the Defendant's appeal pursuant to N.C. Gen. Stat. [§] 1-277 and N.C. Gen. Stat. [§] 7A-27(d)"), and *Wachovia Realty Investments v. Housing, Inc.*, 292 N.C. 93, 99, 232 S.E.2d 667, 671-72 (1977), in which the Supreme Court stated that:

> [T]he entry of the judgment that the plaintiff have and recover of Housing, Inc., $204,603.55 affects a substantial right of Housing, Inc. . . . As the Court of Appeals observed in its opinion, [N.C. Gen. Stat. §] 1-269 and [N.C. Gen. Stat. §] 1-289 provide for a stay of execution upon a money judgment, provided the judgment debtor gives a bond or makes a deposit, and [N.C. Gen. Stat. §] 1A-1, Rule 62(g), authorizes the court which rendered the judgment to stay its enforcement, pending its determination of other aspects of the litigation[.] . . . Either of those procedures would, however, even if successful, require Housing, Inc., to incur substantial expense. Thus, the existence of those procedures for staying execution on the judgment does not prevent the entry of the judgment from affecting a substantial right of the judgment debtor.

Defendant does not appear to dispute Plaintiffs' claim that the challenged orders affect a substantial right. As a result, we conclude that Plaintiffs are entitled to challenge the trial court's orders on an interlocutory basis.

B. Standard of Review

According to N.C. Gen. Stat. § 1A-1, Rule 56(c), summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." "A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his

or her claim." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations omitted). "The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citing *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002)). "[O]nce 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." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 401 (2000), *cert. denied*, 353 N.C 371, 547 S.E.2d 810, *cert. denied*, 534 U.S. 950, 122 S. Ct. 345, 151 L. Ed. 2d 261 (2001).

C. Substantive Legal Analysis

1. UDTPA Claim

[2] In their first challenge to the trial court's order, Plaintiffs contend that the trial court erred by granting summary judgment in favor of Defendant with respect to their unfair and deceptive trade practices claims. We disagree.

a. Nature of a UDTPA Claim

N.C. Gen. Stat. § 75-1.1(a) provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful," with treble damages available to a plaintiff who successfully asserts a claim pursuant to N.C. Gen. Stat. § 75-1.1. N.C. Gen. Stat. § 75-16. "In order to establish a violation of N.C. [Gen. Stat.] § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs," with "[t]he determination of whether an act or practice is an unfair or deceptive practice that violates N.C. [Gen. Stat.] § 75-1.1 [being] a question of law for the court." *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000) (citing *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998), and *Ellis v. Northern Star Co.*, 326 N.C. 219, 226, 388 S.E.2d 127, 131 (1990)).

"A practice is unfair [for purposes of establishing liability pursuant to N.C. Gen. Stat. § 75-1.1] when it offends established public policy as well as when the practice is immoral, unethical, oppressive,

unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981) (citing *Johnson v. Insurance Co.*, 300 N.C. 247, 263, 266 S.E. 2d 610, 621 (1980), *overruled in part on other grounds*, *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 569, 374 S.E.2d 385, 391-92 (1988)). Thus, "a violation of a regulatory statute which governs business activities 'may [in some circumstances] also be a violation of N.C. Gen. Stat. § 75-1.1.' While such a regulatory violation may offend N.C. [Gen. Stat.] § 75-1.1, the violation does not automatically result in an unfair or deceptive trade practice under that statute." *Walker v. Fleetwood Homes of N.C., Inc.*, 362 N.C. 63, 70, 653 S.E.2d 393, 398 (2007) (quoting *Drouillard v. Keister Williams Newspaper Services*, 108 N.C. App. 169, 172, 423 S.E.2d 324, 326 (1992), *disc. review denied*, 333 N.C. 344, 427 S.E.2d 617 (1993)). For that reason, a violation of a consumer protection statute may, in some instances, constitute a *per se* violation of the UDTPA.

b. Factual Basis for Plaintiffs' Claims

In his deposition, Dr. Williams acknowledged that his decision to purchase lots in the Village of Penland was "strictly an investment," since he had no intention of building on the lots in question. At the time that he decided to invest in the Village of Penland, Dr. Williams knew that none of the amenities described in the development package that he had received from the developers actually existed. In addition, Dr. Williams was aware that the necessary utility, water, and sewer permits had not been obtained. Dr. Williams recognized that "[a]ll real estate investments potentially may appreciate or may depreciate" and stated that:

> [It was] an investment program[.] . . . to provide an investment for the completion of [the Village of Penland.] . . . [When a] portion of the development was completed, . . . then you would potentially get a return on the investment. . . . [T]he investment was essentially the . . . loaning of one's ability [to obtain] credit[.] . . . [T]he timeline included year two after the investment, there would be a buy-back of the properties. And then after year five, if there is any realized growth, then that's when the return of your investment would occur.

As a result, the record clearly reflects that Dr. Williams knew that he "was investing in a pre-construction project at the earliest possible stage" by providing funds to facilitate the developers' ability to complete the project.

In making the decision to invest in the Village of Penland, Dr. Williams relied entirely on information provided by individuals and entities other than Defendant. Among other things, Dr. Williams repeatedly admitted that he had never spoken with any representatives of Defendant prior to deciding to invest in the Village of Penland, that he had not had any contact with Defendant prior to that point, that Defendant never made any representations that affected his decision to invest in the project, and that he "had no communication with anybody at [Defendant]" prior to making his investment decision. Dr. Williams acknowledged that Defendant had not been guilty of making any misrepresentations to him at any time.

Dr. Williams never visited the location at which the Village of Penland was to be built or examined photographs of the lots that he had purchased. Based upon his examination of the information packet provided to him by the developers, Dr. Williams knew that, although "every lot was $125,000," his lots had different sizes and were in different locations. Dr. Williams never discussed which lots he would actually purchase with the developers given his understanding that "the lots were grouped" and that he "didn't have a choice" about which lots would be assigned to him. Dr. Williams "didn't know whether the lots that [he] bought were on the side of a hill, the side of a creek, and had rocks and trees on them or just field and grass" and "had no idea what they looked like." Dr. Williams never procured an appraisal of the lots that he purchased in the Village of Penland, never discussed the appraised value of the lots with anyone, did not see the appraisals ordered by Defendant until after the date upon which the loan in question closed, and admitted that, rather than relying on the appraisals that Defendant had obtained, he "assumed" that Defendant's decision to extend credit to him was based, at least in part, upon the appraised value of the lots that he purchased.

In light of this undisputed evidence, we conclude that Dr. Williams' decision to invest in the Village of Penland was made without any input from Defendant; that he obtained a loan from Defendant in order to realize a profit stemming from the development of the Village of Penland; that he was aware that the property was essentially undeveloped when he decided to invest; that he realized that investing in the Village of Penland exposed him to certain risks; and that he understood that the extent to which he realized a profit as a result of his investment would depend upon the extent to which the developers successfully constructed and marketed the proposed project. On the other hand, it is equally clear that Dr. Williams' deci-

sion to invest in the Village of Penland did not rest upon the value of the undeveloped property at the time that he made his investment.

c. Validity of Plaintiffs' UDTPA Claim

[3] In challenging the trial court's decision to grant summary judgment in favor of Defendant with respect to Plaintiffs' unfair and deceptive trade practices claims, Plaintiffs contend that Defendant's "conduct was unfair because it violated public policy, as expressed in the banking laws and regulations, and was unethical." As part of their effort to persuade us of the merits of this position, Plaintiffs assert, based upon language contained in various decisions from this and other jurisdictions, that "the banking laws" are, in a general sense, intended to further the public interest and that, if Defendant violated "the banking laws," relevant industry standards, or its own internal policies, such actions would "contravene[] North Carolina public policy, and constitute[] unfair trade practices which violate the UDTPA." Plaintiffs do not, however, cite any authority tending to establish that a violation of general industry standards or Defendant's internal policies would automatically render Defendant liable under N.C. Gen. Stat. § 75-1.1, and we know of none. As a result, we hold that a violation of internal business policies and general industry standards does not constitute a *per se* violation of the UDTPA and that Plaintiffs' claim must stand or fall on the basis of their contention that Defendant is liable to Plaintiffs pursuant to N.C. Gen. Stat. § 75-1.1 for violating the "banking laws." We conclude, however, that Plaintiffs have failed to show that Defendant's alleged violations of "the banking laws" constitute a UDTPA violation.

A significant problem inherent in Plaintiffs' argument is the fact that, while they repeatedly assert that Defendant violated "the banking laws," Plaintiffs have failed to identify any specific statutes or regulations that Defendant allegedly violated.[3] To the extent that we have been able to divine the specific basis of Plaintiffs' allegations

3. In their brief, Plaintiffs have directed our attention to N.C. Gen. Stat. §§ 53-48, 53-104, 53-134, and 4 N.C.A.C. 3C.1001. A careful examination of these statutory provisions and administrative regulations reveals, however, that N.C. Gen. Stat. § 53-48 limits the overall size of loans to any single borrower, that N.C. Gen. Stat. § 53-104 subjects banks to regulation by the Commissioner of Banks, that N.C. Gen. Stat. § 53-134 makes certain violations of the banking laws misdemeanors, and that 4 N.C.A.C. 3C.1001 governs the manner in which appraisals of real property should be performed as part of the lending process. With the possible exception of 4 N.C.A.C. 3C.1001, none of the authorities upon which Plaintiffs rely in their brief appear to have any specific application to the claims that Plaintiffs have asserted against Defendant.

from the contents of their brief, Plaintiffs base their claim that Defendant violated "the banking laws" upon:

> 1. Various defects in the procedures utilized to procure and in the substance of the appraisals performed on the lots that Plaintiffs purchased and which were used as collateral for the loans that they obtained from Defendant.
>
> 2. Defendant's failure to investigate the developers or to monitor the progress of development activities at the Village of Penland either prior to or after Plaintiffs obtained their loans from Defendant.
>
> 3. A close association between Defendant and the developers or their agents, or the alleged improper involvement of Defendant in the developers' plans to build the Village of Penland.
>
> 4. Defendant's failure to ensure that the persons involved in processing Plaintiffs' loan applications and appraising the lots were appropriately independent and properly qualified or certified.
>
> 5. Defendant's failure to "disclose" the existence of various alleged defects in its loan administration procedures and appraisals or information in its possession about the developers or the Village of Penland project.

After carefully reviewing the record, we conclude that Plaintiffs have failed to demonstrate that the trial court should have denied Defendant's request for summary judgment with respect to their UDTPA claim based upon the evidence relating to these allegations.[4]

[4] As the principal basis for their claim against Defendant, Plaintiffs allege that, in a number of different respects, Defendant failed to ensure that the appraisals relating to the lots that Plaintiffs purchased using the proceeds of the loans obtained from Defendant were properly conducted. As we have discussed above, however, the undisputed evidence showed that these appraisals, which were procured by Defendant, had no impact on Plaintiffs' decision to invest in the Village of Penland. Instead, the record clearly establishes that Plaintiffs neither obtained their own appraisals nor saw the appraisals

4. The list of alleged violations of "the banking laws" discussed in the text is primarily based upon the information contained in expert witness depositions and affidavits that Plaintiffs submitted to the trial court in connection with the summary judgment hearing. The affiants who executed these affidavits criticized various practices and acts in which Defendant allegedly engaged on the grounds that they violated various federal banking regulations, industry practices, or internal bank policies.

obtained by Defendant until after closing the loans that they obtained from Defendant.[5] For that reason, we conclude that the record contains no evidence tending to show that Plaintiffs' decision to invest in the Village of Penland bore any relation to the appraised value of the lots which they purchased[6] or that Plaintiffs relied in any way upon the allegedly defective appraisals which Defendant procured when they decided to invest in the Village of Penland. Thus, given the complete absence of any evidence tending to show a causal connection between the allegedly defective appraisals and the injury that Plaintiffs claim to have suffered, we conclude that the allegedly defective appraisals do not support a finding of liability pursuant to N.C. Gen. Stat. § 75-1.1.[7]

[5] Plaintiffs also argue that there was an impermissibly close association between Defendant and the developers of the Village of Penland project. For example, Plaintiffs allege that Defendant "gave an air of legitimacy to the Penland development by virtue of its involvement in the developers' lot sales program" and that "it was

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5. Plaintiffs emphasize the fact that the loans to investors in the Village of Penland represented an opportunity for Defendant to develop customer relationships with "high net worth individuals," note that Defendant decided to extend credit to Plaintiffs based on their overall net worth rather than the appraised value of the lots that Plaintiffs purchased, and assert that Defendant "never disclosed to [Plaintiffs] the Bank's true business motivations in handling the loans" or basis for making them. We are unable to see how a lender's decision to loan money to a high income individual in the hope of obtaining additional business from that person or to extend credit based upon a particular borrower's net worth rather than upon the value of the collateral, regardless of whether those "facts" were disclosed to the borrower, would constitute an unfair and deceptive trade practice for purposes of N.C. Gen. Stat. § 75-1.1

6. The fact that the purchase price that Plaintiffs paid for the lots in question was identical and bore no apparent relation to the actual value of the relevant lots in their undeveloped state may cut against, instead of in favor of, Plaintiffs' position. The fact that each lot was appraised and priced at the same value may suggest that the investments in question amounted to a securities transaction not subject to the UDTPA, *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 275, 333 S.E.2d 236, 241 (1985) (stating that "securities transactions are beyond the scope of" N.C. Gen. Stat. § 75-1.1), rather than a loan. *Ahmed v. Porter*, 2009 U.S. Dist. LEXIS 73650 (W.D.N.C. 2009), *adopted by, claim dismissed by*, 2009 U.S. Dist. LEXIS 98839 (W.D.N.C. 2009). Although we decline to resolve the issues raised by Plaintiffs' appeal on the basis of such logic, which was not addressed by any party, we observe that the uniform pricing and appraisals could conceivably support a determination that the transactions at issue in this case were not, in fact, subject to the UDTPA.

7. We note that Plaintiffs have not shown that the appraisals ordered by Defendant were performed in an effort to comply with a consumer protection statute or were undertaken for Plaintiffs' protection or benefit. In fact, Plaintiffs' expert witnesses conceded that the allegedly defective appraisals were performed for the purpose of protecting lending institutions, rather than consumers, from insolvency.

clear the Bank had an agreement or working relationship with the developers with respect to the Penland lot loans[.]" In support of these conclusory allegations, Plaintiffs assert that Defendant made loans to various individuals who invested in the Village of Penland; that an employee of Defendant had lunch with the developers on one occasion; that an employee of the developers coordinated the loan applications submitted on behalf of potential investors and forwarded them to Defendant; and that Defendant was responsive to requests by the developers for greater efficiency in processing investors' loan applications. None of these facts, if true, evidence an improper relationship between Defendant and the developers or establish that there was any sort of a principal/agent relationship between the developers and Defendant. In addition, Plaintiffs have cited no authority tending to show that Defendant had an obligation to protect potential investors, such as Plaintiffs, by investigating the *bona fides* of project developers like those involved in the Village of Penland. As a result, we conclude that Plaintiffs have failed to demonstrate that Defendant had inappropriate ties to the developers sufficient to constitute a violation of the UDTPA.

[6] The fact that Defendant loaned Plaintiffs money despite the involvement of an unlicensed loan coordinator employed by the developers for the purpose of preparing and presenting the necessary documentation and the fact that the appraiser who appraised the lots in question "was not one of the Bank's approved appraisers" is equally insufficient to establish the existence of a UDTPA violation. As we have already noted, the record contains no evidence tending to show that Plaintiffs knew the identity of the appraiser; the extent to which the appraiser or loan coordinator possessed the qualifications needed to do their jobs properly; and the extent, if any, to which the background and qualifications of these individuals played any role in Plaintiffs' decision to invest in the Village of Penland. As a result, we conclude that, even if Plaintiffs' loans were procured through and administered with the assistance of one or more persons who were not properly certified or qualified, that set of facts does not establish that Defendant engaged in an unfair and deceptive trade practice or that any causal connection existed between the involvement of these individuals in the process leading to the extension of credit to Plaintiffs and the injury that Plaintiffs claim to have suffered.

[7] Finally, Plaintiffs assert that Defendant violated the UDTPA by failing to investigate the developers, to monitor the progress of the development, to ensure that the appraisals were accurate, or to "dis-

close" allegedly unfavorable information concerning the developers, the appraisals, or the development to Plaintiffs. We conclude that these allegations, even if true, do not establish that Plaintiffs have a valid claim against Defendant pursuant to N.C. Gen. Stat. § 75-1.1. As we have repeatedly noted, the undisputed evidence tends to show that Plaintiffs' decision to invest in the Village of Penland did not rest on the appraised value of the unimproved land, precluding a conclusion that any deficiencies in the appraiser's performance or valuations resulted in any injury to Plaintiffs. In addition, Plaintiffs have cited no authority tending to establish that Defendant had a legal duty to investigate and monitor the activities of the developers and the progress of the development or to communicate to Plaintiffs the results of any such investigation or any other deficiencies associated with the Village of Penland. As a result, we conclude that, given the facts disclosed in the present record, Defendant's alleged failure to investigate or disclose does not constitute a UDTPA violation.

Thus, for the reasons set forth above, we conclude that:

1. Plaintiffs failed to forecast evidence that Defendant engaged in unlawful activities that constitute a per se violation of the UDTPA.

2. Plaintiffs failed to forecast evidence that Defendant's alleged violation of "the banking laws," general industry standards or its own internal policies caused any injury to Plaintiffs or contravened the UDTPA.

3. Plaintiffs failed to forecast evidence that Defendant violated any statute or regulation designed to protect consumers, or that it violated an "established public policy."

As a result, the trial court did not err by granting summary judgment in favor of Defendant with respect to Plaintiffs' unfair and deceptive trade practices claim.

2. Breach of Contract Claim

[8] Secondly, Plaintiffs argue that the trial court erred by granting summary judgment in favor of Defendant with respect to its breach of contract claims and that Defendant should be "equitably estopped" from enforcing the contract evidenced by the loan agreement and promissory note. We do not believe that Plaintiffs' contentions have merit.

In their brief, Plaintiffs contend that Defendant should be equitably estopped from enforcing its contracts with Plaintiffs "because

of its banking law violations and culpable failures to disclose." For the reasons discussed above, we conclude that these alleged "actions and omissions" do not operate to estop Defendant from seeking to enforce its contractual rights. Although Plaintiffs allude to the fact that contracts are not enforceable when "induced by the fraud of the other party," they are not entitled to resist Defendant's contractual claim on fraud-related grounds given that they dismissed their claims of fraud prior to the hearing on Defendant's summary judgment motion and have failed to adduce evidence tending to show that Defendant engaged in actionable fraud. Similarly, Plaintiffs' claim that Defendant "led the Borrowers to believe" that its loans to Plaintiffs "complied with all applicable laws, were consistent with the Bank's internal policies and procedures, and were true mortgage loans, rather than personal loans based solely upon [Plaintiffs'] net worth and creditworthiness" lacks any evidentiary support, given the absence of proof that Defendant "led [Plaintiffs] to believe" any of the asserted facts. As a result, this aspect of Plaintiffs' challenge to the trial court's order lacks merit.

3. Tortious Acting in Concert and Civil Conspiracy

[9] Next, Plaintiffs argue that the trial court erred by entering summary judgment in favor of Defendant with respect to their claims for tortious acting in concert and civil conspiracy. Once again, we conclude that Plaintiffs' argument lacks merit.

"The elements of civil conspiracy are: '(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to plaintiff inflicted by one or more of the conspirators; and (4) pursuant to a common scheme.' " *Strickland v. Hedrick*, 194 N.C. App. 1, 19, 669 S.E.2d 61, 72 (2008) (quoting *Privette v. University of North Carolina*, 96 N.C. App. 124, 139, 385 S.E.2d 185, 193 (1989)). In their brief, Plaintiffs assert that "the Bank's joint conduct with the developers in handling the Bank's loans in an unlawful manner resulted in the Borrowers' losses: the Bank did a lawful act (making the loans) in an unlawful way (in violation of the UDTPA)." As a result of the fact that we have already concluded that Defendant is not liable to Plaintiffs for engaging in unfair and deceptive trade practices, we reject Plaintiffs' claim that Defendant participated in a civil conspiracy to engage in such unlawful practices as well.

[10] Similarly, Plaintiffs' challenge to the trial court's decision to grant summary judgment in favor of Defendant with respect to their

tortious acting in concert claim rests on a conclusory allegation that "the Bank and developers acted together in almost every phase of the handling of the Penland loans" and that a reasonable juror could therefore "infer joint action in concert on the part of the Bank and the developers." However, as we have discussed above, Plaintiffs have failed to produce any evidence of joint action between Defendant and the developers or that Defendant's involvement in the development activities associated with the Village of Penland extended beyond the point of merely making loans to investors such as the Plaintiffs. As a result, Plaintiffs' challenge to the trial court's decision to grant summary judgment in favor of Defendant with respect to this claim lacks merit as well.

4. Costs

[11] Finally, Plaintiffs argue that the trial court erred by taxing the amounts set forth in Defendant's verified bill of costs against them. The sole basis for this argument is that, "[s]ince the decision to grant summary judgment to the Bank constituted reversible error, the award of costs constitutes an abuse of discretion." In light of our determination that the trial court did not err by entering summary judgment in favor of Defendant, we reject Plaintiffs' challenge to the trial court's decision to tax costs to Plaintiffs as well.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court did not err by granting summary judgment in favor of Defendant with respect to Plaintiffs' unfair and deceptive trade practices, tortious acting in concert, and civil conspiracy claims and Defendant's claim based on the promissory note executed in favor of Defendant or by taxing the costs against Plaintiffs. As a result, the trial court's orders should be, and hereby are, affirmed.

AFFIRMED.

Judges STEPHENS and BEASLEY concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF v. PAMELA A. HUNTER, ATTORNEY, DEFENDANT

No. COA11-221

(Filed 6 December 2011)

1. Attorneys—malpractice—DisciplinaryHearing Commission calling own witness

The North Carolina State Bar Disciplinary Hearing Commission did not abuse its discretion in an attorney malpractice case by calling and questioning its own witness at the close of all evidence without a prior subpoena.

2. Attorneys—malpractice—failure to exercise due diligence

The North Carolina State Bar Disciplinary Hearing Commission did not err in an attorney malpractice case by determining that defendant attorney failed to exercise due diligence in the representation of two client matters in violation of Rule 1.3 of the Revised Rules of Professional Conduct.

Appeal by Defendant from Order of Discipline entered 2 June 2010 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 13 October 2011.

The North Carolina State Bar, by Deputy Counsel David R. Johnson and Counsel Katherine Jean, for Plaintiff-appellee.

N. Clifton Cannon, Jr., for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Pamela A. Hunter ("Defendant") appeals the order of the North Carolina State Bar Disciplinary Hearing Commission (the "Commission") imposing a censure on Defendant. Defendant contends the Commission erred at her hearing when it called and questioned a witness on its own motion at the conclusion of the evidence. Defendant also contends the Commission erred when it allegedly had *ex parte* communications with this witness. Defendant finally contends the Commission committed reversible error when it determined Defendant failed to exercise due diligence in the representation of certain client matters. For the following reasons, we disagree and affirm the Commission's order.

I. Factual & Procedural Background

Ms. Hunter has been a licensed attorney in North Carolina since 1978. Her law office is in Mecklenburg County. Ms. Hunter was censured by the Commission for her representation in two lawsuits.

A. Amini Lawsuit

Ramin Amini and his wife contracted Bruce Sisk to do construction work at their residence for $287,000.00. Mr. Sisk first furnished materials on 1 May 2006 and last furnished them on 17 May 2006. Mr. Amini testified that Mr. Sisk did not complete the job. On 7 September 2006, Mr. Sisk filed a claim of lien on the property for $314,620.00, listing "Bruce Sisk, Carter Management Associates [("CMA")]" as the "person claiming the lien." The claim of lien was filed by Mr. Sisk and CMA's attorney, Christopher Vann. Mr. Amini did not know who or what CMA was but knew of a man named Tom Carter who was involved in construction and was the consultant to the builder in another case Ms. Hunter handled for him. When Mr. Amini saw CMA on the lien, he assumed Mr. Sisk and CMA were working together and that Mr. Carter operated CMA. Mr. Amini took the claim of lien to Ms. Hunter, who recommended filing suit against Mr. Sisk and CMA for fraudulent lien and breach of contract.

On or about 10 October 2006, Ms. Hunter filed suit on behalf of Mr. Amini and his wife styled *Ramin Amini and wife, Sepidah Amini v. Bruce Sisk, Carter Management Associates, and Bruce Sisk d/b/a Carter Management Associates* (the "Amini lawsuit" or the "Amini matter"). That same day, a summons was issued. Ms. Hunter did not attempt to effect service via the sheriff but instead hired a private process server to obtain service. She testified that the private process server attempted several times to serve Mr. Sisk and CMA at 917 Zeb-Helms Road, Monroe, North Carolina 28112, an address provided to her by Mr. Amini. However, the server was unsuccessful and believed no one lived at that address. Ms. Hunter also testified she attempted service twice by certified mail, but both attempts were unsuccessful. Ms. Hunter claimed she searched the Secretary of State's database and records from the Department of Motor Vehicles to find CMA's address. She testified she also checked the Georgia Department of Motor Vehicles records off a tip but could not find a valid address for CMA. Ms. Hunter did not choose to serve via publication because she saw that as a last resort option. Ms. Hunter further stated she did not request Mr. Sisk and CMA's attorney, Mr. Vann, to accept service on his clients' behalf until after the summons expired.

Therefore, none of the defendants in the Amini matter was served within sixty days of the 10 October 2006 summons. Ms. Hunter also did not obtain an endorsement or an alias and pluries summons in the Amini matter within ninety days of the 10 October 2006 summons.[1] Accordingly, the summons lapsed on 9 January 2007.

On 27 October 2006, Mr. Sisk filed a complaint based upon the same facts as the Amini lawsuit styled *Bruce Sisk, Carter Management Services, Inc. v. Sepidah Amini, and husband Ramin Amini* (the "Sisk lawsuit" or the "Sisk matter") to perfect his claim of lien. Ann Tyson, Mr. Amini's assistant, testified she found the complaint and a signed return receipt in the mailbox at 9206 Sandpiper Drive, a house owned by Mr. Amini. She claimed she went to the courthouse, confirmed the complaint was legitimate, and obtained a copy of the complaint. Ms. Tyson testified she immediately called Mr. Amini, who told her to fax Ms. Hunter a copy of the complaint and that they would go and speak with Ms. Hunter about the complaint that same day. Ms. Tyson testified she faxed a copy of the complaint to Ms. Hunter and delivered her a copy in person with Mr. Amini. Mr. Amini testified that Ms. Hunter told him not to worry about the matter until he was served. Ms. Tyson claimed Ms. Hunter told her not to insult her integrity as an attorney and that she would handle the matter. Ms. Tyson also testified she investigated with the postal service about who signed for the complaint but was unable to obtain useful information because she was a layperson.

Ms. Hunter, however, denied this conversation ever took place or that she ever received a copy of the Sisk complaint. She testified that the disciplinary hearing was the first time she had ever heard that Mr. Amini ever received the Sisk complaint. However, Ms. Hunter did not check with Mr. Vann, Mr. Sisk and CMA's attorney, to see if he filed suit to enforce his clients' claim of lien. The trial court found that the Aminis did not engage Ms. Hunter to file a responsive pleading to the Sisk lawsuit.

On 23 February 2007, a default judgment was entered against the Aminis for failure to file a responsive pleading. Mr. Amini testified he received the notice of default judgment in the mail and took it to Ms. Hunter. Ms. Hunter testified that this was the first time she heard of the Sisk lawsuit. On 23 February 2007, default judgment was entered against the Aminis. That same day, Ms. Hunter filed a Motion for Relief

1. Expiration of the statute of limitations on the Aminis' claims was not imminent during the times relevant to Ms. Hunter's representation of the Aminis.

from Judgment in the Sisk matter on behalf of the Aminis, claiming the Aminis were never served with process in the Sisk lawsuit. She testified that if Mr. Amini or Ms. Tyson had faxed or brought her the Sisk complaint, she would have assumed Mr. Amini had been served and would not have filed the Motion for Relief from Judgment on the basis that service had not been properly effected. At the default judgment hearing, the Aminis denied receiving and signing for the complaint that was delivered to a house of theirs in Waxhaw. Both the trial court and this Court, however, found that the Aminis were properly served via certified mail on 25 November 2006, when the summons and complaint were delivered, received, and signed for. On 28 March 2007, the trial court issued an order denying the Aminis' Motion for Relief from Judgment. The Aminis entered notice of appeal through Ms. Hunter but had another attorney, Leslie Rawls, carry out the appeal.

In the meantime, Ms. Hunter finally obtained an alias and pluries summons and thereby revived the Amini matter on 24 July 2007. Accordingly, under the provisions of Rule 4(e) of the Rules of Civil Procedure, the Amini lawsuit was discontinued between 9 January, the expiration of the original summons, and 24 July 2007 and was thus deemed to have commenced on 24 July 2007. On 28 July 2007, Mr. Sisk was finally served with process in the Amini matter.

On 20 August 2007, Mr. Sisk filed a Motion to Dismiss the Amini lawsuit based on the default judgment in his favor in the Sisk lawsuit. Upon reviewing the motion, the trial court dismissed the Amini lawsuit without prejudice. The court specified the Aminis could not re-file the previously discontinued lawsuit until this Court resolved the Aminis' appeal of the denial of their Motion to Set Aside the Default Judgment in the Sisk lawsuit. On 4 March 2008, this Court affirmed the trial court's denial of the Aminis' Motion to Set Aside the Default Judgment in the Sisk lawsuit, focusing much attention on the fact that the Aminis never properly served Mr. Sisk or CMA in the Amini lawsuit.

B. Wilson Lawsuit

On 19 December 2006, Rickey L. Wilson filed a complaint styled *Rickey L. Wilson v. DI-RA, LLC d/b/a Camron Transportation* (the "Wilson lawsuit" or the "Wilson matter"). Mr. Amini is a principal of Camron Transportation ("Camron") and engaged Ms. Hunter to represent Camron in the Wilson lawsuit. Ms. Hunter filed a Response to Plaintiff's Request for Admissions on behalf of Camron but did not file an answer to the Wilson complaint. Ms. Hunter received a letter

dated 27 February 2007 from Mr. Wilson's attorney reminding her no answer had been filed. Still, no answer was filed.

On 19 March 2007, default judgment was entered against DI-RA, LLC d/b/a Camron in the Wilson matter. On 23 March 2007, Ms. Hunter filed a Motion for Relief and To Set Aside Entry of Default on behalf of Camron. Ms. Hunter, in her motion, did not take responsibility in the failure to timely file an answer to the Wilson complaint. Her motion was denied. On 23 August 2007, default judgment was entered against Camron in this matter. After the Aminis consulted other counsel, Ms. Hunter, by agreement, personally paid the obligation owed by DI-RA, LLC d/b/a Camron in the Wilson matter.

C. Disciplinary Hearing

On 14 September 2009, the North Carolina State Bar ("Plaintiff") filed a complaint against Ms. Hunter with the Commission regarding Ms. Hunter's representation in both the Amini and Wilson matters. The hearing was set for 9 April 2010 and conducted before a panel of the Commission consisting of Tommy W. Jarrett, Chair, Robert F. Siler, and Donald G. Willhoit. The panel found Ms. Hunter's conduct constituted grounds for discipline pursuant to N.C. Gen. Stat. § 84-28(b)(2). The panel found Ms. Hunter failed to act with reasonable diligence and promptness in violation of Rule 1.3 of the Revised Rules of Professional Conduct in handling both the Amini and Wilson matters. The panel entered an order of censure against Ms. Hunter on 2 June 2010 and served Ms. Hunter on 14 June 2010. Ms. Hunter entered timely notice of appeal on 12 July 2010.

II. Jurisdiction

Appellate review of State Bar orders is authorized under N.C. Gen. Stat. § 84-28(h) which provides that: "There shall be an appeal of right by either party from any final order of the Disciplinary Hearing Commission to the North Carolina Court of Appeals." N.C. Gen. Stat. § 84-28(h) (2009).

III. Analysis

Ms. Hunter argues the trial court erred when it called its own witness to testify who was not on the witness list of either party, who had not previously been identified or subpoenaed to offer testimony against Ms. Hunter, and with whom the court allegedly had *ex parte* communications. Furthermore, Ms. Hunter argues the trial court committed reversible error as a matter of law when it found Ms. Hunter

failed to exercise due diligence in the representation of two client matters. After careful review, we affirm the Commission's order.

A. Calling its own Witness

[1] Ms. Hunter's first four arguments concern the Commission's decision to call and question its own witness at the close of all the evidence. Because the analyses of these arguments overlap, we address them together. The standard of review for this Court's assessment of evidentiary rulings is abuse of discretion. *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004).

This Court has previously held it is within the Commission's discretion to ask questions of witnesses to clarify material matters. *State Bar v. Talman*, 62 N.C. App. 355, 362, 303 S.E.2d 175, 179 (1983). The Discipline and Disability Rules of the North Carolina State Bar provide that the North Carolina Rules of Evidence apply to hearings before the Commission. N.C. R. BAR Ch. 1, Subch. B, § .0114 (2010). Accordingly, the Commission has express authority to call its own witness pursuant to Evidence Rule 614, which provides:

> Rule 614. Calling and interrogation of witnesses by court.
>
> (a) Calling by court.—*The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross examine witnesses thus called.*
>
> (b) Interrogation by court.—*The court may interrogate witnesses, whether called by itself or by a party.*
>
> (c) Objections.—No objections are necessary with respect to the calling of a witness by the court or to questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled.

N.C. Gen. Stat. § 8C-l, Rule 614 (2009) (emphasis added).

Here, pursuant to statutory authority, the panel called Mr. Amini's assistant, Ms. Tyson, on its own motion, deeming the proper objections had been made and overruled by each party. Ms. Hunter's argument that the Commission called Ms. Tyson to testify *against* Ms. Hunter and therefore established the impression of judicial leaning is unfounded. Mr. Amini had testified that Ms. Tyson was the person who retrieved and faxed to Ms. Hunter the Sisk complaint. Therefore, we hold the Commission acted within its discretion in asking Ms. Tyson clarifying questions regarding receipt of the Sisk complaint.

The panel gave Ms. Hunter's counsel the opportunity to cross-examine Ms. Tyson, and counsel did so without requesting a recess to prepare or an opportunity to call a rebuttal witness. The only action Ms. Hunter's counsel took after Ms. Tyson testified was to request permission to recall Ms. Hunter to the stand, which was granted. Accordingly, there is nothing to suggest the trial court abused its discretion in calling and questioning Ms. Tyson or that Ms. Hunter was unfairly prejudiced thereby.

Ms. Hunter contends the elicited testimony of Ms. Tyson constituted an unfair surprise, preventing her from conducting an effective cross-examination of Ms. Tyson. "[The p]urpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991). Here, however, we find Ms. Tyson's testimony was not an unfair surprise because Ms. Hunter interacted with Ms. Tyson before trial and could have anticipated her testimony. Mr. Amini and another witness, Allen Patterson, both refer to Ms. Tyson in their testimonies. Ms. Hunter even admits at the hearing that she spoke with Ms. Tyson about trying to trace a receipt with the postal service showing service of the Sisk complaint on Mr. Amini, indicating she was aware of Ms. Tyson's existence and relation to the matter at hand. Therefore, she cannot now characterize Ms. Tyson's testimony an unfair surprise.[2]

Ms. Hunter further argues the Commission erred by not issuing a subpoena for Ms. Tyson before having her testify. Although the North Carolina State Bar Rules give the Commission the power to subpoena witnesses and compel their attendance, they do not *require* the Commission to do so before eliciting a witness's testimony. *See* N.C. R. BAR Ch. 1, Subch. B, § .0114(s) (2010). Thus, we hold the Commission did not err in calling Ms. Tyson to testify on its own motion without a prior subpoena.

Ms. Hunter also contends the Commission had prohibited *ex parte* communications with Ms. Tyson. Ms. Hunter argues the Commission's knowledge of the name, identity, and nature of the testimony to be proffered by Ms. Tyson "clearly establishes that there

2. Defendant also contends the Commission's calling of a witness who had not previously been identified or subpoenaed prevented Defendant from properly exercising her due process rights. However, Defendant cites no authority for this proposition as required under Rule 28 of the North Carolina Rules of Appellate Procedure, and, therefore, we need not address it.

was *ex parte* and prior communication by the trial court with this witness." We find this allegation to be completely without merit. Ms. Tyson was present in the courtroom for at least a portion of the hearing before she testified. In fact, during his testimony, Mr. Amini identified Ms. Tyson as his assistant and indicated she was present and available to testify that she faxed the Sisk complaint to Ms. Hunter. Ms. Tyson's first name, Ann, was listed on Plaintiff's exhibit 29, which was tendered but excluded from evidence before Ms. Tyson was called. Therefore, Ms. Tyson's identity and presence was not a secret to the panel and any allegation the Commission conducted *ex parte* communications with her because the Chair referred to her by full name is baseless.

B. Failure to Exercise Due Diligence Determination

[2] Ms. Hunter next argues the Commission committed reversible error and error as a matter of law in determining she failed to exercise due diligence in the representation of two client matters in violation of Rule 1.3 of the Revised Rules of Professional Conduct.

1. Standard of Review

Judicial review of a disciplinary order is limited to "matters of law or legal inference." N.C. Gen. Stat. § 84-28(h) (2009). In examining the record, the reviewing court applies the whole record test, which requires this Court to consider the evidence that supports the Commission's findings and "also take into account the contradictory evidence or evidence from which conflicting inferences can be drawn." *State Bar v. DuMont*, 304 N.C. 627, 643, 286 S.E.2d 89, 98 (1982). "Under the whole record test there must be substantial evidence to support the findings, conclusions[,] and result." *Id.* at 643, 286 S.E.2d at 98-99. "The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion." *Id.* However, the mere presence of contradictory evidence does not eviscerate challenged findings, and the reviewing court may not substitute its judgment for that of the committee. *See State Bar v. Leonard*, 178 N.C. App. 432, 439, 632 S.E.2d 183, 187 (2006), *disc. review denied*, 361 N.C. 220, 641 S.E.2d 693 (2007).

Our Supreme Court has set forth a three-step process to determine "if the lower body's decision has a 'rational basis in the evidence.' " *State Bar v. Talford*, 356 N.C. 626, 634, 576 S.E.2d 305, 311 (2003) (citation omitted). "(1) Is there adequate evidence to support the order's expressed finding(s) of fact? (2) Do the order's expressed finding(s) of fact adequately support the order's subsequent conclusion(s) of law? and (3) Do the expressed findings and/or conclusions

adequately support the lower body's ultimate decision?" *Id.* The Court also requires that the evidence used by the Commission in making its findings "rise to the standard of 'clear[, cogent,] and convincing.' " *Id.* at 632, 576 S.E.2d at 310 (citation omitted) (alteration in original).

Here, because Ms. Hunter did not challenge (and in fact stipulated to most of) the Commission's findings of fact, these facts are binding on appeal. *See State Bar v. Key*, 189 N.C. App 80, 87, 658 S.E.2d 493, 498 (2008). Accordingly, we review the record on appeal to ensure the Commission's conclusions of law are supported by its findings of fact, and ultimately support its determination that Ms. Hunter failed to act with due diligence.

2. Lack of Due Diligence in the Amini and Wilson Lawsuits

With regard to the Amini lawsuit, the evidence shows Ms. Hunter did not act with reasonable diligence in serving process on Mr. Sisk and CMA. Rule 1.3 provides: "A lawyer shall act with reasonable diligence and promptness in representing a client." N.C. Rev. R. Prof. Conduct 1.3 (2005). "Due diligence dictates that [a lawyer] use all resources reasonably available to her in attempting to locate defendants." *Fountain v. Patrick*, 44 N.C. App. 584, 587, 261 S.E.2d 514, 516 (1980). However, it does not require a party to explore every possibility of ascertaining the location of the defendants. *Jones v. Wallis*, ___ N.C. App. ___, ___, 712 S.E.2d 180, 184 (2011).

Here, Ms. Hunter made several mistakes with regard to serving the defendants in the Amini matter, Mr. Sisk and CMA. First, she improperly attempted service through a private process server instead of the county's sheriff.

> Service must generally be carried out by the sheriff of the county where service is to occur. While the clerk of the issuing court may appoint an alternative person to carry out service, that '[c]lerk is not required or authorized to appoint a private process server as long as the sheriff is not careless in executing process.'

B. Kelley Enters., Inc. v. Vitacost.com, Inc., ___ N.C. App. ___, ___, 710 S.E.2d 334, 339 (2011) (citation omitted); *see also* N.C. Gen. Stat. § 1A Rule 4(h) (2009). Here, there is no evidence indicating the Wake County Clerk of Court appointed the process server Ms. Hunter used in the Amini matter, nor is there any evidence that such an appointment would have been justified by neglect of the sheriff, especially when there is no indication Ms. Hunter ever contacted the sheriff to effect service.

The evidence further shows Ms. Hunter failed to use reasonable diligence in locating a valid address for Mr. Sisk and CMA. In attempting to serve the defendants, Ms. Hunter testified she relied on the name listed on the claim of lien: CMA. However, Ms. Hunter admitted at the disciplinary hearing that she sued the wrong party in the Amini matter. The proper party was Carter Management Services ("CMS"); CMA did not even exist. Thus, at the time she was attempting to serve the defendants in the Amini matter, Ms. Hunter could not find "CMA" in the Secretary of State's online database. She testified that a search of "Carter" resulted in over 500 hits. However, if Ms. Hunter had searched for "Carter Management," she would have found two results, one of which was the entity at issue.

Moreover, during the pendency of the Amini matter, Ms. Hunter represented Mr. Amini in several other suits, including one in which Mr. Amini was sued by CMS in Mecklenburg County. Ms. Hunter actually filed an answer to CMS's complaint in Mecklenburg County in a timely manner on 5 February 2007 and even had information regarding CMS sooner than that. However, she testified she did not "connect the dots" that it was CMS she should have sued and served in the Amini lawsuit and not CMA. She also testified she did not ask Mr. Amini anything about CMA beyond basic information when he initially asked her to file suit against the claim of lien. Had Ms. Hunter recognized that CMA was actually CMS, she would have been able to properly effect service.

Even if, however, Ms. Hunter could not locate a valid address to serve CMA, she should have obtained an endorsement or an alias or pluries summons to extend the life of the summons.

> When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension:
>
> (1) The plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. Return of the summons so endorsed shall be in the same manner as the original process. Such endorsement may be secured within 90 days after the issuance of summons or the date of the last prior endorsement, or
>
> (2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after

> the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.

N.C. Gen. Stat. § 1A-1, Rule 4(d) (2009). Here, Ms. Hunter knowingly chose not to obtain an endorsement or an alias or pluries summons within ninety days of the issuance of the original summons. Accordingly, the Amini summons lapsed on 7 January 2007. Under Rule 4(e) of the Rules of Civil Procedure, a lawsuit is discontinued if the summons expires and no alias or pluries summons is obtained. N.C. Gen. Stat. § 1A, Rule 4(e) (2009). It may be revived when a new summons is issued, but the lawsuit is then deemed by law to have been filed on the date the new summons is issued. *Id*. Because of Ms. Hunter's delay in reviving the lawsuit, the Amini lawsuit was discontinued between 9 January 2007, the expiration date of the original summons, and 24 July 2007, when Ms. Hunter finally filed for renewal. As a result, the Aminis lost their position as first to file because Mr. Sisk filed his suit to perfect his claim of lien on 27 October 2006, well before the new commencement date of the Amini suit on 24 July 2007. Accordingly, due to Ms. Hunter's delay, the only way the Aminis could present their claims was as compulsory counterclaims to the Sisk lawsuit. *See* N.C. Gen. Stat. § 1A-1, Rule 13 (2009) (If a claim arises out of the same transaction or occurrence as an opposing party's first filed claim, the claim must be filed as a compulsory counterclaim.).

The Aminis were precluded, however, from filing their claims as compulsory counterclaims due to the default judgment order entered against them in the Sisk matter on 23 February 2007 for failure to file a responsive pleading. Had Ms. Hunter properly responded to the Sisk complaint as she told Mr. Amini and Ms. Tyson she would, the default judgment would not have been entered against them, and the Aminis would have at least been able to file their claims against Mr. Sisk as compulsory counterclaims. Though it is true Ms. Hunter testified she never received the Sisk complaint or knew of the Sisk lawsuit until Mr. Amini brought her the notice of default judgment, we find there is substantial evidence in the form of the testimony of Mr. Amini and Ms. Tyson to show Ms. Hunter did receive the Sisk complaint.

The evidence shows Ms. Hunter filed a Motion for Relief from Judgment on behalf of the Aminis, claiming the Aminis were never served with process. However, she did not argue in her motion that the claim of lien was defective due to it listing CMA instead of CMS nor did she argue the Sisk lawsuit should have been filed as a compulsory counterclaim to the Amini suit since the Amini suit was a prior pending action under Rule 13(a)(1) of the North Carolina Rules

of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 13 (2009) (If a claim arises out of the same transaction or occurrence as an opposing party's claim, it must be filed as a compulsory counterclaim unless the claim was the subject of a *prior* pending action.). Ms. Hunter's motion was denied, and the Aminis were foreclosed from presenting their claims. The Aminis appealed the denial of their motion but hired another lawyer, Ms. Rawls, to handle the appeal.

The evidence further shows that when Ms. Hunter finally did serve Mr. Sisk and CMS on 28 July 2007, Mr. Sisk moved to dismiss the case based on his default judgment in the Sisk lawsuit. Unsurprisingly, the trial court dismissed the Amini matter without prejudice, refusing to allow the Aminis to revive their discontinued suit as a counterclaim to the Sisk lawsuit without the setting aside of the default judgment against the Aminis. The court based its decision, in part, on the Aminis'—and thereby Ms. Hunter's—failure to serve Mr. Sisk and CMA within the time required under Rule 4(e) and failure to obtain a timely extension of the summons. This Court's decision affirming the trial court's denial of the Aminis' Motion for Relief from Judgment precluded the Aminis' ability to pursue their suit as a counterclaim. However, had Ms. Hunter diligently filed for extension of the original summons before its expiration or filed an answer to the Sisk complaint, the Aminis would have had their claims heard, and, instead, *Mr. Sisk* would have had to file his claims as compulsory counterclaims.

Ms. Hunter failed to show any regret for the position she left the Aminis in due to her inadequate representation. At the disciplinary hearing, Ms. Hunter testified she did not believe it was necessary to keep a summons alive when expiration of the statute of limitations was not at issue. She did not take any responsibility for the Aminis' situation due to her failure to extend the summons in the Amini matter or file an answer in the Sisk matter. Therefore, we hold the Commission relied on clear, cogent, and convincing evidence in determining Ms. Hunter failed to act with reasonable diligence in her representation of the Amini matter.

With regard to the Wilson lawsuit, clear, cogent, and convincing evidence was presented at the hearing to show Ms. Hunter failed to act with reasonable diligence when she did not file an answer in the Wilson matter, even when opposing counsel informed her she had not done so. Ms. Hunter filed a Motion for Relief and To Set Aside Entry of Default on behalf of Camron; however, in her motion, she did not take responsibility for her failure to timely file an answer to the

Wilson complaint. Court has held that "[t]he neglect of a litigant's attorney will not be imputed to [the litigant] unless the litigant is guilty of inexcusable neglect." *Dishman v. Dishman*, 37 N.C. App. 543, 547, 246 S.E.2d 819, 823 (1978). The proper focus for the trial court is on "what may be reasonably expected of a party in paying proper attention to his case under all the surrounding circumstances." *Id.* at 547, 246 S.E.2d at 822. "When a litigant has not properly prosecuted his case because of some reliance on his counsel, the excusability of the neglect on which relief is granted is that of the litigant, not of the attorney." *Id.* at 547, 246 S.E.2d at 822-23. " 'The neglect of the attorney, although inexcusable, may still be cause for relief.' " *Norton v. Sawyer*, 30 N.C. App. 420, 423, 227 S.E.2d 148, 151 (quoting *Moore v. Deal*, 239 N.C. 224, 227, 79 S.E.2d 507, 510 (1954)), *disc. review denied*, 291 N.C. 176, 229 S.E.2d 689 (1976). A litigant "who employs counsel and communicates the merits of his case may reasonably rely on his counsel and [his] counsel's negligence will not be imputed to him unless he has ample notice either of counsel's negligence or of a need for his own action." *Dishman*, 37 N.C. App. at 548, 246 S.E.2d at 823.

Here, had Ms. Hunter diligently ensured an answer to the Wilson lawsuit was filed, a default judgment would not have been entered against her client. Ms. Hunter claims she relied on her staff's assurances that an answer had been filed, yet she did not verify those assurances. As an attorney, Ms. Hunter, and not her staff, is responsible for filing an answer in her clients' matters. Most importantly, Mr. Amini was not at fault for Ms. Hunter's failure to file an answer in the Wilson lawsuit and should not have suffered because of her mistake. It is true Ms. Hunter admitted fault at the disciplinary hearing and paid the obligation owed by DI-RA, LLC d/b/a Camron. However, had Ms. Hunter admitted fault in her Motion for Relief from Judgment, the trial court likely would have granted Ms. Hunter's motion because the neglect of a litigant's attorney will generally not be imputed to the litigant. Such an admission would likely have saved her client from having a default judgment entered against it. Therefore, we hold the Commission relied on clear, cogent, and convincing evidence in deter-mining Ms. Hunter failed to act with reasonable diligence in her representation of the Wilson matter.

In conclusion, we note the importance of diligence in representing clients:

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected

> by the passage of time or the change of conditions . . . . Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

N.C. Rev. R. Prof. Conduct 1.3, Cmt. 3 (2010). Because of Ms. Hunter's inaction, her clients were unable to present claims and defenses to the court in the Amini and Wilson matters. We note that any one of Ms. Hunter's negligent acts, standing alone, would generally not have been sufficient to constitute a failure to act with reasonable diligence. *See* N.C. Rev. R. Prof. Conduct 1.3, Cmt. 6 (2010) ("Generally speaking, a single instance of unaggravated negligence does not warrant discipline."). "Conduct that may constitute professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client diligently." *Id*. However, we hold Ms. Hunter's actions, together, as discussed above, constitute Ms. Hunter's failure to act with reasonable diligence in violation of Rule 1.3. Accordingly, we hold the trial court's conclusions of law support its ultimate determination that Ms. Hunter failed to exercise due diligence in her representation in the Amini and Wilson matters.

IV. Conclusion

For the foregoing reasons, the order of the Commission is

Affirmed.

Judges BEASLEY and THIGPEN concur.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS SPROUSE

No. COA11-518

(Filed 6 December 2011)

1. Sexual Offenses—anal intercourse—evidence of penetration—sufficient

The trial court did not err by denying defendant's motion to dismiss charges of statutory sex offense and sexual activity by a substitute parent where the charges were based on an alleged incident of anal intercourse, defendant contended that there was insufficient evidence of penetration, and the victim testified that there was slight penetration, that the incident was painful, and that she cleaned blood from herself afterwards.

2. Witnesses—sequestration denied—testimony not conformed

There was no abuse of discretion in the trial court's denial of a motion to sequester witnesses where the one instance of alleged conformation of testimony was not confirmed by examination of the testimony.

3. Appeal and Error—satellite-based monitoring—oral notice of appeal—not sufficient—certiorari granted

Defendant did not properly appeal from a lifetime satellite-based monitoring order where he gave only oral notice of appeal, but his petition for a writ of *certiorari* was granted.

4. Satellite-Based Monitoring—statutory rape—aggravated offense

The trial court's orders for lifetime satellite-based monitoring (SBM) based on defendant's convictions of statutory rape were affirmed, but orders for lifetime SBM for other offenses were reversed because they did not meet the definition of an aggravated offense. Statutory rape requires the victim to be incapable of consenting as a matter of law, and it has been held that intercourse with a person deemed incapable of consenting as a matter of law is a violent act.

5. Evidence—testimony—allegations substantiated—other evidence

There was error, but not plain error, in a prosecution for indecent liberties and other offenses in the admission of testimony that

the Department of Social Services had substantiated the allegations of abuse. There was other evidence of guilt and the jury would probably have reached the same result without the testimony.

Appeal by defendant from judgments entered 22 September 2010 and on Petition for Writ of Certiorari to review orders entered 22 September 2010 by Judge James U. Downs in Haywood County Superior Court. Heard in the Court of Appeals 12 October 2011.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for defendant appellant.

McCULLOUGH, Judge.

On 22 September 2010, William Thomas Sprouse ("defendant") was convicted of five counts of statutory rape, four counts of statutory sex offense, nine counts of taking indecent liberties with a child, and nine counts of sexual activity by a substitute parent. On appeal, defendant contends the trial court erred by (1) denying his motion to dismiss one count of statutory sex offense and one count of sexual activity by a substitute parent; (2) denying his motion to sequester witnesses; (3) ordering lifetime satellite-based monitoring; and (4) admitting certain testimony of a Department of Social Services ("DSS") social worker. We find no prejudicial error in defendant's trial, and we affirm the trial court's orders of lifetime satellite-based monitoring as to defendant's convictions for statutory rape. However, we reverse the trial court's lifetime satellite-based monitoring orders as to defendant's remaining convictions.

I. Background

The State's evidence at trial tended to show the following facts. The minor child victim in the present case, A.B., was born in Hendersonville, North Carolina, on 25 September 1992. A.B.'s mother first met defendant when she was pregnant with A.B., and defendant was present when A.B. was born. Thereafter, A.B.'s mother sporadically cohabitated with and dated defendant until October 2003.

In the summer of 2005, when A.B. was thirteen years old, she stopped living with her mother and came to live with defendant. At that time, defendant's girlfriend and future wife, Raquel Sprouse ("Raquel"), was also living with defendant. Raquel's two biological

daughters also lived in the home. A.B. agreed to live in defendant's home because of the other children living in the residence. In describing her relationship with defendant, A.B. testified, "He was like a dad to me."

Thereafter, in December of 2005, A.B. and defendant were watching television on a couch in their home when defendant began talking to A.B. about sex. Defendant told A.B. how to have sex and asked A.B. if she had ever had sex. Then defendant lifted the back end of A.B.'s shorts and proceeded to have vaginal intercourse with her. During the intercourse, A.B. told defendant "no" and "stop," and she tried to push herself away from defendant, but defendant pulled her back and told her it was okay and that it would not hurt. Defendant told A.B. not to tell anyone about the incident or he would kill himself or A.B. before he would rot in jail.

A few days later, A.B. was alone in the home with defendant and requested his permission to leave the house. After being asked his permission, defendant requested that A.B. "give him head." A.B. informed defendant that she didn't know what he meant, so defendant pushed A.B. down on her knees, inserted his penis into her mouth, and pushed her head, forcing her to perform oral sex on him.

Sometime between 25 December 2005 and 24 March 2006, A.B. again entered defendant's bedroom and asked for permission to go somewhere. Defendant responded that she could go if she would "give him [her] ass." Defendant then pushed A.B.'s head down into the pillows where no one could hear her and had anal sex with her. A.B. screamed for defendant to stop, and at some point, defendant let A.B. go. A.B. left defendant's bedroom and went into Raquel's youngest daughter's bedroom, where she cried from the pain that resulted from the incident. A.B. then went to the bathroom and wiped herself, noticing blood on the toilet paper.

During this same time period, A.B. again requested permission from defendant to go somewhere with Raquel's oldest daughter. Defendant told A.B. the only way she would be able to go was if she "sucked his dick." Defendant then forced A.B. to perform oral sex on him for approximately ten minutes until he ejaculated on her shirt. A.B. did not tell anyone about these first four incidents because she was scared. A.B. testified to multiple other sexual encounters with defendant that occurred during the time period from Christmas of 2006 to the end of May 2008.

At the end of May 2008, A.B. was thrown out of defendant's home because defendant did not like A.B.'s boyfriend. A.B. then went to live with her grandmother for a short while before moving in with her boyfriend and his mother, Diane Jones ("Jones"), who were neighbors of defendant. In November of 2008, A.B. told Jones that in order to get permission to go anywhere, she was forced to have sex with defendant. Jones confronted defendant with A.B.'s allegations, which defendant denied. A.B. then left Jones' home in December of 2008 due to DSS involvement with A.B.'s mother, and A.B. was placed with defend-ant's stepmother.

In March of 2009, A.B. ran away from defendant's stepmother's home and returned to Jones' home after having ingested multiple prescription pills in an attempt to overdose. Jones left shortly after A.B. arrived; A.B.'s boyfriend then broke up with A.B. and also left the premises. While sitting alone in Jones' home, A.B. noticed a gun sitting on her boyfriend's bedside table. A.B. picked up the gun to shoot herself, but the gun was not loaded. Police were called, and A.B. was then taken to Copestone, a mental health facility. During her stay at Copestone, A.B. was interviewed by Linda Opalewski ("Opalewski"), an investigative and assessment worker in the forensic unit at the Buncombe County Department of Social Services ("BCDSS"); during this interview, A.B. told Opalewski about defendant's sexual abuse. After interviewing A.B., on 1 April 2009, Opalewski contacted Detective James Marsh ("Detective Marsh") of the Haywood County Sheriff's Department and gave him a detailed statement concerning the disclosures A.B. had made to her during the interview at Copestone. Opalewski also gathered information, ran criminal record checks, and contacted witnesses based on her interview with A.B. After Opalewski completed her investigation, BCDSS concluded that A.B.'s claims of sexual abuse by defendant were substantiated.

On 8 April 2009, a social worker with the Haywood County Department of Social Services ("HCDSS") came to defendant's residence to discuss the allegations A.B. had made about him. On 13 April 2009, HCDSS returned to defendant's home, took Raquel's youngest daughter away for safety reasons, and placed her in kinship care. Shortly thereafter, defendant devised a plan for Raquel and him to tattoo each other's genitals and say the tattoos had been there for years to "blow [A.B.'s] story out of the water." Defendant used India ink and a sewing needle to put a tattoo of a rose on Raquel's vagina, and Raquel used the same items to put a tattoo of a bumblebee on defendant's penis.

After receiving the report from Opalewski, Detective Marsh interviewed A.B. about the allegations of sexual abuse against defendant and corroborated her story with certain other individuals. On 28 April 2009, defendant was arrested by Detective Marsh. After his arrest, defendant asked Detective Marsh if A.B. had informed him of defendant's penis tattoo. Detective Marsh then called A.B. to ask her about the tattoo, and she told him there was no tattoo on defendant's penis.

While in jail, defendant asked Raquel to contact several "friends" to serve as witnesses for him. Defendant specifically requested Raquel to convince one witness, Casey Burris ("Burris"), to testify that she had been a sexual partner of theirs and to verify that defendant and Raquel had gotten their tattoos six years prior. However, Burris met with Detective Marsh and informed him that Raquel was trying to get her to lie to the police about having seen the tattoos.

On 3 June 2009, Detective Marsh had Burris make a recorded pretextual phone call to Raquel. During the phone call, Burris told Raquel that if Raquel wanted Burris to lie about the tattoos, Burris would have to know what kind of tattoos Raquel and defendant had. Raquel stated the tattoos were a flower and a bumblebee. Based on the conversation, Detective Marsh obtained a search warrant and seized Raquel's cell phones, which contained text messages between Raquel and Burris as well as identifying information for the individuals being contacted by Raquel.

Thereafter, on 3 July 2009, Raquel contacted Detective Marsh and told him that she had put the bumblebee tattoo on defendant's penis just weeks before he was arrested. Nonetheless, defendant maintained that he had had the bumblebee tattoo since either the Fall of 2003 or the Spring of 2004. However, photographs taken of Raquel performing oral sex on defendant during a hotel stay in January 2007 showed that defendant had no tattoo on his penis as of that time.

Further, after defendant was arrested and charged, he also asked Raquel to contact Chris Gagner ("Gagner"), a member of the "Outlaws" motorcycle club, and ask Gagner to kill A.B. At first, Gagner requested the sum of $10,000 or defendant's motorcycle as the price for killing A.B., but Gagner then changed his mind and stated that he wanted "nothing to do with it."

On 15 June 2009, defendant was indicted on five counts of statutory rape, four counts of statutory sex offense, nine counts of indecent liberties, and nine counts of sexual activity by a substitute par-

ent. At trial, the State presented the testimony of A.B., Jones, Opalewski, Raquel, Burris, and Detective Marsh to establish the foregoing events. Defendant testified on his own behalf and denied ever engaging in any sexual acts with A.B.

On 22 September 2010, the jury returned a verdict of guilty on all charges. The trial court sentenced defendant to a minimum of 288 months and a maximum of 355 months for each of the five statutory rape offenses and each of the four statutory sex offenses, to run consecutively; the trial court consolidated the nine counts of indecent liberties with a child for judgment, sentencing defendant to a concurrent term of 19 to 23 months; and the trial court consolidated the nine counts of sexual activity by a substitute parent for judgment, sentencing defendant to a concurrent term of 29 to 44 months. The trial court also ordered defendant to enroll in lifetime satellite-based monitoring for all offenses. Defendant gave oral notice of appeal to this Court.

II. Motion to dismiss

[1] Defendant first contends the trial court erred in denying his motions to dismiss one charge of statutory sex offense under N.C. Gen. Stat. § 14-27.7A(a) and one charge of sexual activity by a substitute parent under N.C. Gen. Stat. § 14-27.7(a), for the period of 25 December 2005 to 24 March 2006. Defendant maintains that the trial court erred in denying the motions to dismiss because the State failed to establish the element of anal penetration.

When a defendant makes a motion to dismiss, the trial court must determine whether there is "substantial evidence" of (1) the essential elements of the offense charged, and (2) the defendant's being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Substantial evidence is " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' " and is a question of law for the trial court. *Id.* at 66, 296 S.E.2d at 652 (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). In making this determination, our courts must view the evidence in the light most favorable to the State and give the State "the benefit of all reasonable inferences" to be drawn therefrom. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

Defendant challenges one count each of the charges of statutory sex offense under N.C. Gen. Stat. § 14-27.7A(a) and sexual activity by a substitute parent under N.C. Gen. Stat. § 14-27.7(a). N.C. Gen. Stat. § 14-27.7A(a) (2009) provides: "A defendant is guilty of a Class B1

felony if the defendant engages in . . . a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person[.]" *Id.* Accordingly, a person guilty of this offense (1) engages in a sexual act other than vaginal intercourse, (2) with a child who is 13, 14, or 15 years old, and (3) the defendant is at least six years older than the child. *Id.* N.C. Gen. Stat. § 14-27.7(a) (2009) provides: "If a defendant who has assumed the position of a parent in the home of a minor victim engages in . . . a sexual act with a victim who is a minor residing in the home, . . . the defendant is guilty of a Class E felony." *Id.* Thus, a person guilty of this offense (1) assumes the position of a parent in the home of a person less than 18 years old and (2) engages in a sexual act (3) with a person less than 18 years old residing in the home. *Id.* A "sexual act" is defined by N.C. Gen. Stat. § 14-27.1(4) (2009) and includes "cunnilingus, fellatio, analingus, or anal intercourse." *Id.* All that is required for proof of anal intercourse is penetration, however slight. N.C. Gen. Stat. § 14-27.10 (2009).

In the present case, defendant states that he was charged with and convicted of a statutory sex offense and sexual activity by a substitute parent based on the alleged incident of anal intercourse that occurred between 25 December 2005 and 24 March 2006. Defendant maintains the State did not present proof of anal penetration sufficient to establish anal intercourse. We disagree.

At trial, A.B. testified as to two separate incidents of sexual contact during the time period from 25 December 2005 to 24 March 2006. First, A.B. testified there was an incident of "anal sex." A.B. testified that defendant "didn't like go all the way, just a little bit." A.B. testified that defendant pushed her down onto the bed and pressed her head down into the pillows "where nobody could hear [her]." A.B. testified defendant then "got behind [her]," "pushed [her] head down into the pillow," and "inserted his penis barely like not a lot, into [her] butt." A.B. testified that she started screaming for him to stop during the incident. She also testified that she went into an adjacent bedroom afterwards and cried "[b]ecause it hurt." A.B. testified that she then went into the bathroom to wipe herself and "there was blood on the toilet paper."

Defendant cites *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987), for the proposition that the State was required to prove actual penetration of A.B.'s anal opening, rather than merely her "butt," or buttocks. In *Hicks*, "[t]he *only* evidence introduced by the State tending to show the commission of any [sexual act] was [the victim]'s ambiguous testimony that defendant 'put his penis in the back of me.' " *Id.* at

90, 352 S.E.2d at 427 (emphasis added). Unlike *Hicks*, however, A.B. testified that defendant "inserted his penis . . . into [her] butt," however slight, that the incident was painful, and that A.B. wiped blood from the area immediately after the incident. A.B.'s testimony in the present case constituted more than one ambiguous statement, as was the case with the victim's testimony in *Hicks*. Taken as a totality, A.B.'s testimony was substantial evidence from which a jury could find that defendant penetrated the anal opening during the incident. *See State v. Estes*, 99 N.C. App. 312, 316, 393 S.E.2d 158, 160 (1990) (holding that child's testimony that the defendant put his penis in the "back" of her and that by "back" the child meant "where I go number two," taken as a totality, was sufficient to establish anal penetration). Thus, viewed in the light most favorable to the State, defendant's motions to dismiss the two charges based on this incident were properly denied.

III. Motion to sequester

[2] Defendant next contends the trial court abused its discretion in denying his motion to sequester witnesses. Defendant maintains this was prejudicial error because Raquel conformed her testimony to that of another witness at trial.

A denial of a motion to sequester witnesses is reviewed for an abuse of discretion. *State v. Call*, 349 N.C. 382, 400, 508 S.E.2d 496, 507 (1998). The trial court's denial of the motion "rests within the sound discretion of the trial court" and must not be overturned unless the defendant can show that "the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 400, 508 S.E.2d at 507-08.

In this case, defendant has shown no abuse of discretion. Defendant only points to one instance where Raquel allegedly conformed her testimony to that of a hotel clerk who had testified after she had originally testified, but before she was recalled by the State. During her original testimony, Raquel testified that the family had stayed with her father "for a day or two" before moving into an old fire station after their home had burned down on 16 December 2006. Subsequently, a hotel clerk testified that defendant had been a registered guest at his hotel on 2 January 2007, during that time period. After being recalled, Raquel testified that she and defendant had both stayed in the hotel on the evening of 2 January 2007, shortly after the house had burned down, and that they engaged in sexual intercourse and other sex acts while at the hotel. Raquel further testified that she remembered this particular stay at the hotel because she had just

found a bag of old photographs over the weekend which depicted her and defendant engaging in oral sex in the hotel on that date. The photographs were introduced as evidence that defendant did not have a tattoo on his penis as of 2 January 2007, contrary to his testimony. In light of her discovery of the photographs and her extensive testimony as to her memory of the timeline of those photographs, we fail to see how Raquel conformed her testimony to that of the hotel clerk.

As defendant has noted no other instance where he might have been prejudiced by the trial court's denial of his motion to sequester the witnesses, we hold the trial court did not abuse its discretion in doing so. Nonetheless, we note that our Supreme Court has stated "[t]he [better] practice should be to sequester witnesses on request of either party unless some reason exists not to." *State v. Anthony*, 354 N.C. 372, 396, 555 S.E.2d 557, 575 (2001) (alterations in original) (internal quotation marks and citation omitted).

IV. Satellite-based monitoring

A. Appealability

[3] Before we address the merits of defendant's third issue on appeal, we must first determine if his appeal from the trial court's lifetime satellite-based monitoring ("SBM") orders is properly before this Court. In the present case, defendant gave oral notice of appeal at the conclusion of the trial court proceedings. However, this Court has previously held that an " 'oral notice pursuant to N.C.R. App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court' in a case arising from a trial court order requiring a litigant to enroll in SBM." *State v. Cowan*, ___ N.C. App. ___, ___, 700 S.E.2d 239, 241 (2010) (quoting *State v. Brooks*, ___ N.C. App. ___, ___, 693 S.E.2d 204, 206 (2010)). Rather, a defendant seeking to challenge an order requiring his enrollment in SBM must give written notice of appeal in accordance with N.C.R. App. P. 3(a) in order to properly invoke this Court's jurisdiction. *Brooks*, ___ N.C. App. at ___, 693 S.E.2d at 206. Because defendant gave only oral notice of appeal in this case, he failed to properly appeal the trial court's SBM orders to this Court.

In recognition of his failure to properly appeal the trial court's SBM orders, defendant petitioned this Court for the issuance of a writ of certiorari authorizing appellate review of his SBM-related issues. "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[.]" N.C.R. App. P. 21(a)(1) (2011). Here,

through no fault of his own, defendant failed to timely file a written notice of appeal as to the trial court's SBM orders. Given these circumstances, we conclude that we should, in the exercise of our discretion, grant defendant's petition for writ of certiorari and review defendant's challenge to the trial court's SBM orders.

B. Lifetime satellite-based monitoring: Aggravated offense

[4] Defendant contends that the trial court erred in ordering lifetime SBM. Defendant maintains the lifetime SBM orders are in error because defendant's convictions were not for aggravated offenses.

When an SBM order is appealed, this Court reviews both the trial court's findings of fact to determine whether the findings are supported by competent record evidence, as well as the trial court's conclusions of law for legal accuracy and to determine whether those conclusions reflect a correct application of the law to the facts found. *State v. McCravey*, ___ N.C. App. ___, ___, 692 S.E.2d 409, 418, *disc. review denied*, 364 N.C. 438, 702 S.E.2d 506 (2010).

Here, the trial court found that all 27 of defendant's convictions were "aggravated offenses" as defined by N.C. Gen. Stat. § 14-208.6(1a) and ordered that upon completion of defendant's sentence, defendant was required to enroll in SBM for his natural life, pursuant to N.C. Gen. Stat. § 14-208.40A. N.C. Gen. Stat. § 14-208.6(1a) (2009) defines an "aggravated offense" as

> any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

Id. "[W]hen making a determination pursuant to N.C.G.S. § 14–208.40A [regarding the SBM requirement], the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction." *State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009), *disc. review denied*, ___ N.C. ___, 703 S.E.2d 738 (2010). Thus, our review is limited to comparing the statutory definition of "aggravated offense" to the elements of defendant's charges: statutory rape and statutory sex offense under N.C. Gen. Stat. § 14-27.7A(a); taking indecent liberties with a child under N.C. Gen. Stat. § 14-202.1; and sexual activity by a substitute parent under N.C. Gen. Stat. § 14-27.7(a).

First, this Court has already held that the offense of taking indecent liberties with a child is not an aggravated offense for purposes of lifetime SBM. *Davison*, 201 N.C. App. at 363, 689 S.E.2d at 516.

Next, the elements of statutory rape and statutory sex offense under N.C. Gen. Stat. § 14-27.7A(a) are: (1) vaginal intercourse or a sexual act; (2) with a child who is 13, 14, or 15 years old; and (3) the defendant is at least six years older than the child. In addition, the elements of sexual activity by a substitute parent under N.C. Gen. Stat. § 14-27.7(a) are: (1) the defendant assumes the position of a parent in the home of a person less than 18 years old; (2) defendant has vaginal intercourse or engages in a sexual act; (3) with a person less than 18 years old residing in the home. Notably, as defendant argues, none of the elements of these offenses include either the use of force or the threat of serious violence or that the victim be less than 12 years old, as required for aggravated offenses under N.C. Gen. Stat. § 14-208.6(1a).

However, in support of its argument that the trial court's lifetime SBM order was appropriate because the charge of statutory rape is an aggravated offense, the State relies on our opinion in *State v. Clark*, No. COA10-403 (N.C. Ct. App. Apr. 19, 2011). *Clark* analyzed whether the offense of first-degree rape, which requires that the victim be under the age of 13, qualified as an aggravated offense for purposes of lifetime SBM. *Id.*, slip op. at 19, 21. In *Clark*, this Court cited our Supreme Court for the proposition that "'rape is a felony which has as an element the use or threat of violence[.]' " *Id.*, slip op. at 25 (alteration in original) (quoting *State v. Holden*, 338 N.C. 394, 404, 450 S.E.2d 878, 883–84 (1994) (citations omitted)). Based on this reasoning, *Clark* specifically holds that "a child under the age of 13 is inherently incapable of consenting to sexual intercourse," and that "an act of sexual intercourse with a person deemed incapable of consenting as a matter of law is a violent act," thereby qualifying as an aggravated offense for lifetime SBM purposes. *Id.*, slip op. at 26.

Here, the State argues that a statutory rape offense, like the offense of first-degree rape involved in *Clark*, is also an "aggravated offense" because statutory rape requires the victim to be 13, 14, or 15 years old, and therefore statutorily incapable of consenting as a matter of law. We agree with the State and see no meaningful distinction between the two rape offenses for purposes of lifetime SBM. *See State v. Anthony*, 351 N.C. 611, 615-17, 528 S.E.2d 321, 323-24 (2000) (discussing the similarities in purpose behind the offenses of first-degree rape and statutory rape and holding that, under both offenses,

the child victim is statutorily incapable of consenting to sexual intercourse). In *Anthony*, our Supreme Court expressly noted "[t]he term 'statutory rape' has a particularized meaning as an offense committed against a victim legally incapable of giving consent to sexual intercourse because of age or other incapacity." *Id.* at 618, 528 S.E.2d at 324. Thus, given our recent holding in *Clark* that "an act of sexual intercourse with a person deemed incapable of consenting as a matter of law is a violent act," we must affirm the trial court's orders of lifetime SBM based on defendant's convictions of statutory rape. *Clark*, No. COA10-403, slip op. at 26. However, we reverse the trial court's lifetime SBM orders as to the remaining convictions, as they do not meet the definition of an aggravated offense.

V. Admission of testimony

[5] Finally, defendant contends the trial court committed plain error by allowing DSS social worker Opalewski to testify that there had been a substantiation of sex abuse of A.B. by defendant. Defendant maintains this was plain error because the testimony constituted impermissible opinion vouching for A.B.'s credibility and that without the testimony, it is probable that the jury would have reached a different result.

When an alleged evidentiary error is not preserved in a criminal case, this Court may apply plain error review. *State v. Hammett*, 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006). Plain error is found "only in exceptional cases where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *Id.* (internal quotation marks omitted). In order to establish that the trial court committed "plain error," the defendant must convince this Court that the alleged error "tilted the scales" against the defendant, *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986), and that absent the alleged error, "the jury probably would have returned a different verdict." *State v. Davis*, 321 N.C. 52, 59, 361 S.E.2d 724, 728 (1987).

Defendant cites the case of *State v. Giddens*, 199 N.C. App. 115, 681 S.E.2d 504 (2009), *aff'd*, 363 N.C. 826, 689 S.E.2d 858 (2010), in support of his argument that Opalewski's testimony constituted impermissible opinion testimony. In *Giddens*, as in the present case, a DSS social worker testified that her investigation had substantiated the defendant as the perpetrator of the abuse alleged by the two child

victims. *Id.* at 117-18, 681 S.E.2d at 506. This Court held that the DSS social worker's testimony was "clearly improper" because:

> [The DSS social worker]'s testimony that DSS had 'substantiated' Defendant as the perpetrator, and that the evidence she gathered caused DSS personnel to believe that the abuse alleged by the children did occur, amounted to a statement that a State agency had concluded Defendant was guilty. . . . Although [the DSS social worker] was not qualified as an expert witness, [the DSS social worker] is a child protective services investigator for DSS, and the jury most likely gave her opinion more weight than a lay opinion.

Id. at 121-22, 681 S.E.2d at 508. Thus, this Court concluded "it was error to admit [the DSS social worker]'s testimony regarding the conclusion reached by DSS." *Id.* at 122, 681 S.E.2d at 508. *Giddens* also found the error did in fact rise to the level of plain error in that case, because "without [the DSS social worker]'s testimony, the jury would have been left with only the children's testimony and the evidence corroborating their testimony." *Id.* at 123, 681 S.E.2d at 509.

We agree with defendant that given our holding in *Giddens*, the trial court committed error in admitting the challenged testimony of Opalewski. Here, Opalewski testified that "the department [DSS]'s decision was the substantiation of sex abuse of [A.B.] by [defendant]." As in *Giddens*, Opalewski based her testimony on a DSS investigation, which included interviewing collateral contacts, gathering information, and conducting criminal record checks. Thus, as in *Giddens*, Opalewski's testimony that DSS had substantiated the allegations of abuse in the present case was not properly admitted.

Nonetheless, we conclude the error does not rise to the level of plain error in the present case. Unlike *Giddens*, absent the challenged testimony, the present case involved more evidence of guilt against the defendant than simply the testimony of the child victim and the corroborating witnesses. Aside from the testimony of A.B. and the witnesses corroborating her testimony, the following evidence was presented at trial: testimony by Raquel that shortly after A.B. filed charges against defendant, defendant "manipulat[ed]" Raquel to tattoo his penis in order to "blow [A.B.'s] story out of the water"; defendant asked Raquel to contact Burris in an effort to get Burris to lie about having seen the tattoo during the time period associated with the allegations by A.B.; photographs of defendant's penis, coupled with Raquel's testimony, showed that he did not have a tattoo as of 2 January 2007, despite the fact that he testified he did have the tattoo

as early as 2003 or 2004; and defendant tried to have A.B. killed after charges were filed against him.

In its entirety, the additional evidence regarding defendant's actions after he was charged with the crimes in the present case, coupled with the extensive testimony by the victim and the other corroborating witnesses, leads us to conclude that without the challenged testimony of Opalewski, the jury probably would have reached the same verdict. Thus, although the trial court erroneously admitted the testimony of Opalewski, we are not convinced the error tilted the scales against defendant, and therefore does not rise to the level of plain error.

VI. Conclusion

We hold the State presented sufficient evidence of anal penetration such that the trial court properly denied defendant's motions to dismiss one count of statutory sex offense and one count of sexual activity by a substitute parent based on the anal sex incident during the time period of 25 December 2005 to 24 March 2006. We also find no abuse of discretion in the trial court's denial of defendant's motion to sequester witnesses. Having granted defendant's petition for a writ of certiorari as to the trial court's lifetime SBM orders, we affirm the trial court's lifetime SBM orders finding defendant's five convictions for statutory rape to be aggravated offenses in light of our holding in *Clark*. However, we reverse the trial court's orders requiring defendant to enroll in lifetime SBM for his remaining convictions, as those offenses do not meet the definition of an aggravated offense. Finally, we hold that, although it was error for the trial court to admit the testimony that DSS had substantiated the allegations of abuse in light of our decision in *Giddens*, the error does not rise to the level of plain error in the present case given the overwhelming evidence against defendant.

No prejudicial error in part, affirmed in part, and reversed in part.

Judges STEELMAN and ERVIN concur.

IN RE FORECLOSURE OF BASS

[217 N.C. App. 244 (2011)]

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY TONYA R. BASS IN THE ORIGINAL AMOUNT OF $139,988.00 DATED OCTOBER 12, 2005, RECORDED IN BOOK 4982, PAGE 86, DURHAM COUNTY REGISTRY, SUBSTITUTE TRUSTEE SERVICES, INC., AS SUBSTITUTE TRUSTEE

No. COA11-565

(Filed 6 December 2011)

1. Evidence—improper classification as findings of fact—conclusions of law

The trial court improperly classified multiple legal conclusions as findings of fact. The pertinent determinations each involved application of legal principles and were thus more properly classified as conclusions of law.

2. Mortgages—summary foreclosure proceeding—power of sale—failure to establish holder of note—facial invalidity of stamp on note

The trial court did not err by dismissing petitioner's summary foreclosure proceedings under a power of sale against respondent. Petitioner failed to establish that it was the holder of the note. The facial invalidity of a stamp on the note was competent evidence from which the trial court could conclude the stamp was unsigned and failed to establish negotiation from Mortgage Lenders to Emax.

Appeal by Petitioner from order entered 14 September 2010 by Judge Abraham Penn Jones in Durham County Superior Court. Heard in the Court of Appeals 27 October 2011.

K&L Gates, LLP, by A. Lee Hogewood, III and Brian C. Fork, for Petitioner-appellant.

Legal Aid of North Carolina, Inc., by E. Maccene Brown, Gregory E. Pawlowski, John Christopher Lloyd, and Andre C. Brown, for Respondent-appellee.

HUNTER, JR., Robert N., Judge.

U.S. Bank, National Association, as Trustee, c/o Wells Fargo Bank, N.A. ("Petitioner") appeals the trial court's order dismissing foreclosure proceedings against Respondent Tonya R. Bass. Petitioner assigns error to the trial court's determination that Petitioner is not the legal holder of a promissory note executed by

Respondent and therefore lacks authorization to foreclose on Respondent's property securing the note under a deed of trust. After careful review, we affirm.

I. Factual & Procedural Background

On 12 October 2005, Respondent executed an adjustable rate promissory note (the "Note") in favor of Mortgage Lenders Network USA, Inc. ("Mortgage Lenders"). The Note evidences Respondent's promise to pay Mortgage Lenders the principal amount of $139,988.00 plus interest in monthly installments of $810.75 beginning December 2005. The terms of the Note state that Respondent will be in default if she fails to "pay the full amount of each monthly payment on the date it is due." Respondent secured the Note with a Deed of Trust encumbering real property located at 4240 Amberstone Way in Durham. The Deed identifies Mortgage Lenders as the lender and Mitchell L. Hefferman as trustee. The Deed of Trust also sets forth a power of sale clause providing that Respondent's default on her monthly payment obligations under the terms of the Note and failure to cure such default could result in foreclosure of Respondent's property as described in the Deed of Trust.

The record indicates Respondent fell behind on her monthly payments under the Note and, to date, is current on payments only through July 2008. As discussed further *infra*, the Note was purportedly transferred several times before coming into Petitioner's possession. On or about 10 January 2008, Petitioner, as "holder of the Note evidencing the entire indebtedness secured by the [] Deed of Trust," filed an Appointment of Substitute Trustee with the Durham County Register of Deeds. The Appointment of Substitute Trustee purportedly removed Mr. Hefferman as trustee under the Deed of Trust and replaced him with Substitute Trustee Services, Inc. ("Substitute Trustee"). On 27 March 2009, Substitute Trustee commenced foreclosure proceedings against Respondent by filing a Notice of Foreclosure Hearing in Durham County Superior Court in accordance with North Carolina General Statutes § 45-21.16. The Notice of Fore-closure Hearing stated Petitioner's intent to foreclose "on the Note and Deed of Trust . . . because of [Respondent's] failure to make timely payments" on the Note.

On 8 April 2010, a foreclosure hearing was held before the Clerk of Durham County Superior Court. Upon consideration of the statutorily prescribed elements, see N.C. Gen. Stat. § 45-21.16(d) and discussion *infra*, the clerk of court entered an order permitting Substitute Trustee to proceed with foreclosure of Respondent's prop-

erty. Respondent timely appealed the clerk's order to the superior court, and foreclosure of Respondent's property was stayed pending outcome of the appeal. Respondent's appeal to the superior court was continued twice as she attempted, unsuccessfully, to negotiate a loan modification with Petitioner.

On 16 August 2010, this matter was heard before Superior Court Judge Abraham Penn Jones. Petitioner introduced evidence establishing: Respondent's default on her payment obligations under the Note, the Note was secured by the Deed of Trust, the Deed of Trust set forth a power of sale clause, and Respondent was properly served with notice of the foreclosure hearing. Petitioner also produced the original Note and Deed of Trust through the testimony of Erin Hirzel-Roesch, a Wells Fargo litigation specialist, and introduced copies of each document for examination by the court.

The Note as introduced before the trial court consists of five pages with a one-page "ALLONGE TO NOTE" ("the Allonge") attached as page six. The fifth page of the Note bears three stamps purportedly indorsing and transferring the Note among prior holders and, ultimately, to Petitioner. The first stamp reads "PAY TO THE ORDER OF EMAX FINANCIAL GROUP, LLC WITHOUT RECOURSE By: MORTGAGE LENDERS NETWORK USA, INC" and bears no handwritten signature. The second stamp reads "RESIDENTIAL FUNDING CORPORATION CHAD JONES VICE PRESIDENT" and bears the apparent handwritten signature of Chad Jones. The third stamp reads "PAY TO THE ORDER OF U.S. Bank National Association as Trustee WITHOUT RECOURSE Residential Funding Corporation by Judy Faber, Vice President" and bears the apparent handwritten signature of Judy Faber. The Allonge, dated 25 October 2005, states "Pay to the order of Without recourse: Residential Funding Corporation." The Allonge bears the apparent handwritten signature of "Michele Morales" and identifies Ms. Morales as "Manager of Sales and Acquisitions [at] Emax Financial Group, LLC."

Respondent did not testify or present evidence at the foreclosure appeal hearing. Respondent contended only that Petitioner "is not entitled to foreclose because [Petitioner is] not the proper holder of [the Note]." Specifically, Respondent asserted that the indorsement from Mortgage Lenders to Emax Financial Group, LLC ("Emax") was not a proper indorsement because "you have to have more than a stamp" and "We don't know who had authority [at Mortgage Lenders] to authorize the sale of (unintelligible) to [Emax]." Respondent also challenged the indorsement from Emax to Residential Fundings

Corporation ("Residential") because "[t]here is nothing on the last page of [the Note] to show how and where [Residential] got this commercial paper."

The trial court entered an order on 13 September 2010 dismissing Petitioner's foreclosure proceedings against Respondent. In its order, the trial court found as fact, *inter alia*, that the indorsement from Mortgage Lenders to Emax was not signed, and the indorsement from Emax to Residential did not indicate the source of the transfer. The trial court concluded as a matter of law that, in light of these ineffective indorsements, Petitioner was not the legal holder of the Note and was not authorized to appoint a substitute trustee to institute foreclosure proceedings against Respondent. Petitioner filed its Notice of Appeal with this Court on 3 November 2010.

II. Analysis

"There are two methods of foreclosure possible in North Carolina: foreclosure by action and foreclosure by power of sale." *Phil Mech. Const. Co., Inc. v. Haywood*, 72 N.C. App. 318, 321, 325 S.E.2d 1, 3 (1985). A foreclosure by action consists of a formal judicial proceeding; a foreclosure by power of sale, in contrast, is a "special proceeding[1]" "whereby '[t]he parties have agreed to abandon the traditional foreclosure by judicial action in favor of a private contractual remedy to foreclose.' " *In re Adams*, ___ N.C. App. ___ , ___ , 693 S.E.2d 705, 708 (2010) (citation omitted) (alteration in original); *In re Goforth Properties, Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 858 (1993) (" 'Historically, foreclosure pursuant to a power of sale in a deed of trust ha[s] been a private contract remedy.' " (citations omitted)).

A mortgagee or trustee seeking to exercise a power of sale under a deed of trust must establish four elements before the clerk of court in order to proceed with foreclosure: (1) a valid debt exists and the foreclosing party is the holder of the debt; (2) the debtor has defaulted on the debt; (3) the instrument evidencing the debt permits foreclosure; and (4) proper notice has been provided to all entitled parties.[2] *See* N.C. Gen. Stat. § 45-21.16(d) (2009); *In re Adams*, ___

1. "Since rights sought to be enforced under [the provisions of the North Carolina General Statutes governing foreclosure pursuant to a power of sale] are instituted by filing notice instead of a complaint and summons and are prosecuted without regular pleadings, they are properly characterized as 'special proceedings.' " *Id.* at 321, 325 S.E.2d at 2-3.

2. The North Carolina Legislature added a fifth consideration, which expired 31 October 2010, requiring the clerk to determine whether the underlying mortgage debt was a subprime home loan, and, if it was a subprime loan, whether written notice of

N.C. App. at ___ , 693 S.E.2d at 709. The scope of the foreclosure hearing before the clerk of court is strictly limited to these four issues because foreclosure under a power of sale provision in a deed of trust is intended to serve as "a means of avoiding lengthy and costly foreclosures by action." *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978). Our Courts have stressed, however, that "while a power of sale provision is meant to 'function as a more expeditious and less expensive alternative to a foreclosure by action,' 'foreclosure under a power of sale is not favored in the law, and its exercise will be watched with jealousy.' " *In re Adams*, ___ N.C. App. at ___ , 693 S.E.2d at 708 (citations omitted). The clerk of court's order authorizing or dismissing foreclosure is appealable to the superior court. N.C. Gen. Stat. § 45-21.16(d)(1) (2009). On appeal, the superior court reviews *de novo* the same four issues described *supra*. *See id.*

The superior court's order dismissing foreclosure is a final judgment, and, therefore, this Court exercises jurisdiction over Peti-tioner's appeal pursuant to North Carolina General Statutes § 7A-27(b) (2009). Our review of the trial court's order dismissing foreclosure is limited to determining "whether competent evidence exists to support the trial court's findings of fact and whether the conclusions [of law] reached [by the trial court in its order dismissing foreclosure] were proper in light of the findings [of fact]." *In re Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 50, 535 S.E.2d 388, 392 (2000). "Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*." *Holden v. John Alan Holden*, ___ N.C. App. ___ , ___ , 715 S.E.2d 201, 209 (2011).

[1] Before applying this standard in the instant case, we note the trial court incorrectly classified multiple legal conclusions as "findings of fact." This Court has recognized that "[t]he classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997). Nonetheless, proper classification is critical because it shapes this Court's review of the issues on appeal. Significant deference is afforded to the trial court's findings of fact under the "competent evidence" standard. *See State v. Hagin*, ___ , N.C. App. ___ ,

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the foreclosure proceedings was provided at least 45 days prior to filing notice of the foreclosure hearing with the superior court. *See* N.C. Gen. Stat. § 45-102 (2009); *In re Simpson*, ___ N.C. App. ___ , ___ , 711 S.E.2d 165, 169 (2011) (citing N.C. Gen. Stat. § 45-21.16 (2009)).

___ , 691 S.E.2d 429, 431, *review denied*, ___ N.C. ___ , 702 S.E.2d 500 (2010) ("The trial court's findings are conclusive 'if supported by any competent evidence even if there is evidence to the contrary that would support different findings.' " (citation omitted)). In contrast, we afford no deference to the trial court's conclusions of law. *See Goldston v. State*, 199 N.C. App. 618, 625, 683 S.E.2d 237, 242 (2009) ("Because we review questions of law *de novo*, we give no deference to the trial court's rulings . . . ."). Generally, "any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675 (internal citations omitted). A "determination reached through 'logical reasoning from the evidentiary facts' is more properly classified a finding of fact." *Id.* (citation omitted).

Here, the trial court found as fact *and* concluded as a matter of law the following: (1) purported prior holders of the Note, Mortgage Lenders and Emax, did not properly indorse and transfer the Note, (2) Petitioner is not the legal holder of the Note, (3) Petitioner did not have authority to appoint a substitute trustee because it was not the legal holder of the Note, and (4) Petitioner did not have authority to commence foreclosure proceedings against Respondent. We conclude that these determinations each involve application of legal principles and are more properly classified as conclusions of law. We reclassify these "findings of fact" as conclusions of law and apply our standard of review accordingly. *See N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) ("[C]lassification of an item within the order is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review.").

[2] Of the issues considered by the clerk of court and subsequently reviewed *de novo* by the trial court, the sole issue presented on appeal to this Court is whether Petitioner, as the party seeking foreclosure under a power of sale, is the holder of a valid debt. *See* N.C. Gen. Stat. § 45-21.16(d) (2009). Respondent is "entitled to demand strict proof of this element." *Liles v. Myers*, 38 N.C. App. 525, 528, 248 S.E.2d 385, 388 (1978).

This Court has described this inquiry as follows:

> In order to find that there is sufficient evidence that the party seeking to foreclose is the holder of a valid debt in accordance with N.C.G.S. § 45-21.16(d), this Court has determined that the following two questions must be answered in the affirmative:

> (1) 'is there sufficient competent evidence of a valid debt?'; and (2) 'is there sufficient competent evidence that [the party seeking to foreclose is] the holder of the notes [that evidence that debt]?'

In re Adams, ___ N.C. App. at ___ , 693 S.E.2d at 709 (alterations in original) (citations omitted). We note that the separation of this statutory requirement into two distinct inquiries is a simplification tool and does not alter our standard of review. This Court constructed the "sufficient competent evidence" standard to serve as guidance in the clerk of court's application of North Carolina General Statutes § 45-21.16(d). *See, e.g.*, *In re Burgess*, 47 N.C. App. 599, 603, 267 S.E.2d 915, 918 (1980) ("[W]e construe G.S. 45-21.16(d)(i) to permit the clerk to find a 'valid debt of which the party seeking to foreclose is the holder' if there is competent evidence that the party seeking to foreclose is the holder of some valid debt, irrespective of the exact amount owed."); *In re Simpson*, ___ N.C. App. at ___ , 711 S.E.2d at 171 ("[I]n order for the foreclosure to proceed, *the clerk of court* must find . . . the existence of a valid debt . . . ." (citing N.C. Gen. Stat. § 45-21.16(d) (2009)) (emphasis added) (internal quotation marks omitted)). Whether a party is the holder of a valid debt and whether a valid debt exists are questions of law. *See In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675 ("[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." (internal citations omitted)). As such, this Court must determine whether the trial court's conclusions with respect to these questions are supported by its findings and, in turn, whether such findings are supported by competent evidence. *See supra.*

In the case *sub judice*, the existence of a valid debt is not in dispute—Respondent concedes she has defaulted under the terms of the Note. The sole issue remaining is whether Petitioner is the legal holder of the Note evidencing Respondent's debt. This determination is critical because it "protect[s] [Respondent] from the threat of multiple judgments on the [Note]." *In re Simpson*, ___ N.C. App. at ___ , 711 S.E.2d at 171. Absent this requirement, the Note could be negotiated " 'to a third party who would become a holder in due course, bring a suit upon the [Note] . . . and obtain a judgment in her favor.' " *Id.* (quoting *Liles*, 38 N.C. App. at 527, 248 S.E.2d at 387). Requiring the foreclosing party to introduce "sufficient competent evidence" that it " 'is the holder of the note at the time of [the] suit reduces the possibility of such an inequitable occurrence.' " *Id.* (quoting *Liles*, 38 N.C. App. at 527, 248 S.E.2d at 387).

In determining whether the foreclosing party is the holder of a valid debt for purposes of North Carolina General Statutes § 45-21.16(d), this Court has applied the definition of "holder" as set forth in North Carolina's adoption of the Uniform Commercial Code ("UCC"). *See In re Connolly*, 63 N.C. App. 547, 550, 306 S.E.2d 123, 125 (1983). North Carolina General Statutes § 25-1-201 defines "holder" as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." N.C. Gen. Stat. § 25-1-201(b)(21) (2009). This Court has also defined "holder" under former North Carolina General Statutes § 25-1-201(20) as " 'a person who is in possession of . . . an instrument . . . issued or indorsed to him or to his order.' " *In re Connolly*, 63 N.C. App. at 550, 306 S.E.2d at 125 (citation omitted) (alterations in original). Any " 'individual, corporation, business trust, estate, trust . . . or any other legal or commercial entity' " can serve as the holder of a promissory note. *In re Simpson*, ___ N.C. App. at ___ , 711 S.E.2d at 171 (quoting N.C. Gen. Stat. § 25-1-201(b)(27) (2009)) (alteration in original).

A person may become the holder of an instrument: (1) through issuance of the instrument to that person or (2) through negotiation of the instrument to that person. *See* N.C. Gen. Stat. § 25-3-201(b) (2009); N.C. Gen. Stat. § 25-3-201 cmt. 1 (2009). Issuance of an instrument occurs through "first delivery" of the instrument by the maker of the instrument. N.C. Gen. Stat. § 25-3-105(a) (2009). The record before this Court establishes that Respondent issued the Note in favor of Mortgage Lenders. *See* N.C. Gen. Stat. § 25-3-103(a)(5) (2009) (defining "maker" as "a person who signs . . . a note as a person undertaking to pay"); N.C. Gen. Stat. § 25-1-201(b)(15) (2009) (defining "delivery" of an instrument as a "voluntary transfer of possession"); N.C. Gen. Stat. § 25-3-110(a) (2009) ("The person to whom an instrument is initially payable is determined by the intent of the person . . . signing as . . . the issuer of the instrument.").

The second method through which a person becomes the holder of an instrument, negotiation, occurs when a person other than the issuer transfers possession of the instrument to a person who becomes its holder. *See* N.C. Gen. Stat. § 25-3-201 (2009). Mortgage Lenders, as a party in possession of a promissory note made payable to its order was the original holder of the Note. In order for Mortgage Lenders to negotiate the Note, thereby conferring "holder" status upon a subsequent transferee, Mortgage Lenders was required to (1) indorse the Note and (2) transfer possession of the Note to the intended transferee. N.C. Gen. Stat. § 25-3-201(b) (2009) ("[I]f an

instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder.").

Petitioner contends the stamps on the fifth page of the Note and the accompanying Allonge establish: (1) Mortgage Lenders indorsed and negotiated the Note to Emax, (2) Emax indorsed and negotiated the Note to Residential, and (3) Residential indorsed and negotiated the Note to Petitioner. Petitioner further contends that because these stamps establish proper negotiation of the Note to Petitioner, and because Petitioner is currently in possession of the Note, the trial court erred in concluding that Petitioner is not the holder of the Note.

Petitioner produced the original Note at the de novo foreclosure hearing through the testimony of Ms. Hirzel-Roesch. However, "[p]roduction of an original note at trial does not, in itself, establish that the note was transferred to the party presenting the note with the purpose of giving that party the right to enforce the instrument." *In re Simpson*, ___ N.C. App. at ___ , 711 S.E.2d at 171. The critical question is whether the Note was properly negotiated through the chain of purported holders such that Petitioner is the holder of the Note.

We begin by examining the first stamp on page five of the Note. The stamp reads:

> PAY TO THE ORDER OF:
> EMAX FINANCIAL GROUP, LLC
> WITHOUT RECOURSE
> BY: MORTGAGE LENDERS NETWORK USA, INC.

Petitioner contends this stamp represents Mortgage Lender's indorsement of the Note for purposes of negotiating the Note to Emax. We cannot agree.

An indorsement is "a signature, other than that of a signer or maker . . . that alone or accompanied by other words [may be] made on an instrument for the purpose of . . . negotiating the instrument . . . ." N.C. Gen. Stat. § 25-3-204(a)(i) (2009). "[R]egardless of the intent of the signer, a signature and its accompanying words is an indorsement, unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement." N.C. Gen. Stat. § 25-3-204(a)(iii) (2009). North Carolina has adopted a broad definition of "signature" to include any mark, symbol, or initials, which may be "printed, *stamped*, or written." N.C. Gen.

Stat. § 25-1-201(b)(37) cmt. 37 (2009) (emphasis added) ("[A] compete signature is not necessary. . . . No catalog of possible situations can be complete and the court must use common sense and commercial experience in passing upon these matters.").

Notwithstanding this broad definition, a symbol will constitute a signature only where "the symbol was adopted by the party with the present intent to authenticate the writing." *Id.* Moreover, an indorsment "does not prove itself, but must be established . . . by proper testimony." Our Supreme Court has specifically held that a stamp may constitute a valid indorsement, but only if the stamp is executed by a person having the intent and authority to do so. *Mayers v. McRimmon*, 140 N.C. 640, 642, 53 S.E. 447, 448 (1906); *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 178, 237 S.E.2d 21, 29 (1977) (holding a stamp is sufficient to indorse a negotiable instrument if "done by a person authorized to indorse for the payee and with intent thereby to indorse").

At the foreclosure hearing, Petitioner did not introduce any evidence to establish that the stamp purportedly indorsing and transferring the Note from Mortgage Lenders to Emax is an authorized signature. Petitioner introduced only the Note itself, depicting, as the trial court found, a "stamp on the Promissory Note stat[ing] PAY TO THE ORDER OF: EMAX FINANCIAL GROUP, LLC, WITHOUT RECOURSE, BY: MORTGAGE LENDERS NETWORK USA, INC. This stamp is unsigned." Petitioner's sole witness, Ms. Hirzel-Roesch, admitted she had no personal knowledge of the transfers made by the purported prior holders of the Note beyond the information represented on the Note itself. Petitioner avers, however, that it was not required to produce additional evidence to establish the stamp's authenticity as an indorsement because a stamp falls within the broad statutory definition of "signature," and "[t]he language and location of the indorsement clearly and unambiguously show the stamp was made with the intention to transfer ownership of the note from Mortgage Lenders [] to Emax."

While it is true that a stamp *can* serve as a valid indorsement, our Supreme Court's rulings in *Mayers* and *Branch Banking & Trust Co*, *see supra*, clearly hold that the person placing the stamp must act with authorization and with the intent to indorse the instrument. *See supra*. The stamp at issue reflects only the name of an entity, Mortgage Lenders. Unlike the other stamps on the Note, no countersignature appears to indicate the capacity in which the signor acted in executing the stamp on behalf of Mortgage Lenders. This is a

troublesome omission, as "[a] corporation can only act through its agents," *Anderson v. Am. Suburban Corp.*, 155 N.C. 131, 71 S.E. 221, 222 (1911). Mortgage Lenders' liability on the Note turns on the authority (or lack thereof) of the individual executing the stamp, a determination impossible for this Court to make based solely upon the face of this stamp.

Petitioner contends that *Respondent* bears the burden of proving the stamp is an invalid signature. Petitioner cites North Carolina General Statutes § 25-3-308(a) as quoted in a recent decision of the United States Bankruptcy Court for the Middle District of North Carolina. The Court, considering the question of what evidence a subsequent holder of a promissory note must show to establish the authenticity of a prior indorsement stated "[i]f the validity of a signature is denied in the pleadings, the burden of establishing the validity is on the person claiming validity, but the signature is presumed to be authentic." *In re Vogler*, 2009 WL 4113704 at 2 (Bankr. M.D.N.C. 2009) (citing N.C. Gen. Stat. § 25-3-308(a)). Petitioner contends that in light of the presumption set forth under North Carolina General Statutes § 25-3-308(a), "[t]he indorsement stamp is presumed to be authentic, and that presumption cannot be overcome unless the Respondent presents evidence to contest such authenticity."

We note initially that a decision of the Bankruptcy Court is not binding on this Court. However, Petitioner's contention raises an apparent conflict among our General Statutes. On one hand, North Carolina General Statutes § 45-21.16(d) clearly places the burden upon Petitioner to prove it is the holder of a valid debt; North Carolina General Statutes § 25-3-308(a), however, presumes authenticity of a signature, apparently placing the burden upon Respondent to disprove the validity of an indorsement. We find Official Comment 1 under § 25-3-308 instructive. Official Comment 1 to North Carolina General Statutes § 25-3-308 states "[t]he question of the burden of establishing the signature arises only when it has been put in issue by specific denial." N.C. Gen. Stat. § 25-3-308(a) cmt. 1 (2009). Once put in issue, "[t]he burden is on the party claiming under the signature" to prove that the signature is valid. *Id.*

Petitioner contends Respondent did not raise objection to the stamp at issue and therefore the burden remained upon Respondent to introduce evidence invalidating the purported indorsement. Contrary to Petitioner's assertion, this Court's review of the transcript indicates that counsel for Respondent did in fact challenge the stamp's validity, stating: "you have to have more than a stamp" and

"we don't know who had authority [at Mortgage Lenders] to authorize the sale of (unintelligible) to [Emax]." We conclude that this challenge by Respondent before the trial court was a specific denial of the signature's authenticity, thereby placing the burden upon Petitioner to put on evidence establishing authorization.

Furthermore, Comment 1 to North Carolina General Statutes § 25-3-308 defines "presumed" to mean "that until some evidence is introduced which would support a finding that the signature is forged or unauthorized, the plaintiff is not required to prove that it is valid." *Id.* In contrast to the stamp at issue, a handwritten signature accompanies each of the other stamps on the Note introduced by Petitioner before the trial court. The stamp purporting to transfer the Note from Residential to Petitioner, for example, bears the apparent handwritten signature of Judy Faber, identified as Residential's vice president. This signature provides at least some evidence that this stamp was executed with the requisite intent and authority. Whether a stamp bearing an apparent handwritten signature is sufficient competent evidence of the purported indorsement, however, is not before this Court as Respondent challenges the only stamp *without* a handwritten signature. The omission of a handwritten signature with respect to the challenged stamp is competent evidence from which the trial court could conclude that this particular stamp was not executed by an authorized individual and is therefore facially invalid indorsement. Thus, even if Respondent had failed to object to the stamp, which it did not, the burden properly remained upon Petitioner to prove its validity.

We further note it would be illogical to place this particular burden upon Respondent, as Petitioner is in possession of the Note and is in the best position to prove or disprove the authenticity of the signatures included thereon. *See Bank of Statesville v. Blackwelder Furniture Co.*, 11 N.C. App. 530, 532, 181 S.E.2d 785, 786 (1971) (holding that the burden of establishing the authority behind an indorsement was properly placed on the bank because "as a purchaser of the instrument, [the bank] was in the best position to inform itself as to the authority of the seller-indorser"). Because we cannot presume the authenticity of this stamp as a signature, and because Petitioner offered no evidence establishing its authenticity other than the Note itself, the stamp is a valid signature only if it is self-authenticating. However, as our Supreme Court has explained:

> It is well settled by the decisions of this Court, as well as of other courts, and by approved text-writers, that words written on the

> back of a negotiable instrument, purporting to be an indorsement by which the instrument was negotiated, do not prove themselves. The mere introduction of a note, payable to order, with words written on the back thereof, purporting to be an indorsement by the payee, does not prove or tend to prove their genuineness.

Whitman, Inc. v. York, 192 N.C. 87, 133 S.E. 427, 430 (1926) (citations omitted). In the case *sub judice*, Petitioner has offered only a bare assertion that the challenged stamp is a facially valid indorsement. Absent an allonge, testimony, or other evidence indicating that the stamp is an authorized signature, it would be imprudent for this Court to accept Petitioner's position. We hold that the facial invalidity of this stamp is competent evidence from which the trial court could conclude the stamp is "unsigned" and fails to establish negotiation from Mortgage Lenders to Emax. Consequently, Petitioner has failed to establish it is the holder of the Note, and the trial court did not err in dismissing Petitioner's summary foreclosure proceedings against Respondent. For the foregoing reasons, the trial court's order is

Affirmed.

Judges THIGPEN and MCCULLOUGH concur.

STATE OF NORTH CAROLINA v. CHARLES LINDBERG GILLIKIN, III

No. COA11-607

(Filed 6 December 2011)

1. Jury—deadlocked jury—instruction—incomplete

Defendant was entitled to a new trial for second-degree rape and other offenses where the trial court's instructions to a deadlocked jury did not contain the substance of N.C.G.S. § 15A-1235(b). Nowhere in the instruction was there a suggestion that no juror was expected to surrender his honest conviction nor reach an agreement that may do violence to individual judgment. The error was not harmless because it was a close case, substantially determined by the credibility of the two primary witnesses.

2. Criminal Law—prosecutor's closing arguments—improper

Although a new trial was granted on other grounds, it was noted that the prosecutor's closing arguments were grossly improper in

that the prosecutor repeatedly engaged in abusive name-calling, expressed his opinion that defendant was a liar, and presented an undignified argument that was solely intended to inflame the passions of the jury. The trial court was commended for issuing a curative instruction *ex mero motu*.

Appeal by defendant from judgments entered 21 September 2010 by Judge Kenneth F. Crow in Carteret County Superior Court. Heard in the Court of Appeals 27 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General W. Wallace Finlator, Jr., for the State.

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

McCULLOUGH, Judge.

On 21 September 2010, Charles Lindberg Gillikin, III ("defendant"), was convicted of second-degree rape, false imprisonment, and misdemeanor larceny. On appeal, defendant contends he is entitled to a new trial for the following reasons: (1) the State's closing argument was *ex mero motu* error; (2) the State's cross-examination of defendant was plain error; (3) the State's cross-examination of defendant's father was plain error; (4) the admission of evidence presented by a State witness about defendant's bad character was plain error; (5) the trial court's re-instructions to the deadlocked jury unconstitutionally coerced guilty verdicts; (6) the trial court unconstitutionally coerced guilty verdicts by initially instructing the jurors that they had to be unanimous; and (7) the trial court's jury instruction on flight was not supported by the evidence. Defendant also contends he is entitled to a new sentencing hearing because the trial court erroneously considered defendant's lack of contrition in determining the severity of defendant's sentence. Because we agree with defendant that the trial court's re-instructions to the deadlocked jury unconstitutionally coerced guilty verdicts, we order a new trial for defendant.

I. Background

Beginning in December 2007, defendant and prosecutrix Trista Nicole Polk ("Polk") were involved in an off-and-on consensual sexual relationship until October 2009. A baby was born of the relationship in January 2009. In August 2009, Polk and the baby moved into an apartment on Bridges Street in Morehead City, North Carolina. Initially, defendant also lived in the Bridges Street apartment with

Polk and the baby. However, the couple quickly had an argument, and Polk pressed charges against defendant for assault. Defendant then moved into a living unit at a local Budget Inn hotel. Nonetheless, defendant and Polk continued to contact each other via telephone and text messaging. During the ensuing month of September 2009, defendant regularly visited the Bridges Street apartment to care for the baby while Polk was at work, and he occasionally spent the night in the apartment.

On the night of 30 September 2009, defendant received repeated calls and text messages from Polk while he was at a bar with his father. On the following night, 1 October 2009, Polk and defendant met, talked about their relationship, spent the night together in the Bridges Street apartment, and had consensual sexual relations. Defendant and Polk continued to communicate by telephone and text message over the weekend, 2-4 October 2009.

These legal proceedings commenced when Polk accused defendant of raping her on the night of 4 October 2009. Polk testified that on the evening of 4 October 2009 at around 7:30 p.m., she received a call from defendant asking her if he could stay the night in the Bridges Street apartment. Polk testified that she was grocery shopping when she received defendant's call. She reluctantly agreed to defendant's request and picked him up from a local bar. Polk testified that defendant was very intoxicated, and she and defendant got into an argument during the car ride. She stopped the car and asked defendant to get out of the car. Polk testified she then continued to the Bridges Street apartment where she began to put away the groceries she had just purchased and feed the baby.

Polk testified that defendant then came into the apartment through the unlocked front door, finished feeding the baby, and helped put the baby to bed in the baby's room. She and defendant then sat on the couch in the living room, and the two had an argument about their relationship. Polk testified that she became uncomfortable with defendant's presence and that she attempted to call a neighbor using her cell phone. However, Polk testified that defendant grabbed the cell phone out of her hand and put it in his pocket.

Polk testified that during the argument, defendant became increasingly angry. Polk testified that defendant then went into the kitchen, grabbed a butter knife, held it to her throat, and forced her to undress and lie on the floor in the living room. Polk testified that defendant attempted to have anal intercourse with her but was un-

successful, so defendant repositioned her on the floor and proceeded to have vaginal intercourse with her while holding the butter knife to her throat. Polk testified that after this first incident, she put her clothes back on and sat back on the couch to talk with defendant.

Polk testified that she and defendant began to argue again, during which the baby awoke and began to cry. She picked up the baby out of his bedroom and attempted to escape through a back sliding glass door, but defendant followed her, put a knife to her back, and forced her to come back inside the apartment. Once she was back inside the apartment, Polk laid the baby back down in his room and went into the kitchen, where defendant followed her. Polk testified that defendant then grabbed some more kitchen knives and asked her to play a game with him. Polk testified that defendant tried to slice his wrists with the knives and that he also asked Polk to stab him. Polk testified that she refused to stab defendant, so he told her he would make her angry enough to stab him. Polk testified that defendant then forced her to the floor in the kitchen, again holding a butter knife to her throat, and had vaginal intercourse with her against her will for a second time.

Polk testified that, following the incident in the kitchen, she got up and proceeded to sit in the living room with defendant and talk. Polk testified that during this time, defendant asked her for her car keys, which resulted in a struggle. However, defendant "gave up" trying to take the keys from Polk, and Polk held onto the keys, which contained a full canister of pepper spray. Polk testified that defendant then got up off the couch and went to the bathroom to turn on the water, instructing her that she would take a shower in order to wash off any evidence of the sexual encounters. Polk testified that when defendant came back to put her in the shower, she maced defendant in the face with the pepper spray multiple times. Polk testified that because defendant was blind from the pepper spray, he allowed Polk to leave the apartment with the baby. Polk then ran to a neighbor's apartment and called 911 to report the incident.

Morehead City Police Officer Heather Rose ("Officer Rose") responded to the call around 1:00 a.m. on 5 October 2009. Officer Rose interviewed Polk about the incident and took Polk to a local hospital for a sexual assault kit examination. The examination revealed that Polk had a small tear and redness in the rectal area, accompanied by small scratches and bruises on her left leg, left elbow, and right shoulder. Officer Rose issued arrest warrants for defendant, and defendant was located and arrested shortly thereafter.

Following his arrest, defendant continuously denied the charges, acknowledged he and Polk had vaginal intercourse on the night of 4 October 2009, and contended the sex was part of the couple's normal consensual sexual relationship. Defendant testified he and Polk had consensual sexual relations on both 1-2 October 2009. Defendant testified he then spent the night with another woman named Sarah on 3 October 2009. Cell phone records showed Polk sent at least seven unanswered text messages to defendant before he woke up the next morning.

Defendant testified that he and Polk continued to communicate by text message on 4 October 2009. Defendant testified that on the night of 4 October 2009, Polk came to pick him up from a local bar around 8:30 p.m., and the two got into an argument because he couldn't explain to her the reason for the unanswered phone calls and text messages from the previous night. Defendant testified that he asked Polk to stop the car so he could get out and walk because she was so angry. Defendant testified that upon arriving at the apartment, defendant fed the baby and put the baby to sleep while Polk carried in groceries.

Defendant testified that he and Polk then talked in the living room, where they started to make up and had consensual sexual relations. Defendant testified that he and Polk watched some television then started kissing again, which led to consensual sexual intercourse on the couch. Defendant testified that during the sexual intercourse, he accidentally called Polk by the name of Sarah, to which Polk became extremely angry. Defendant testified that Polk jumped up, started "ranting and raving," said she "ought to call the cops and say [defendant] raped [her]," and maced defendant in the face and eyes when defendant tried to leave. Defendant testified that he saw a cell phone lying on the couch, which he mistakenly thought was his, put the phone in his pocket, and left the apartment. After he left the Bridges Street apartment, defendant went to a nearby friend's house, told her he had had an argument with his girlfriend, and that she had maced him as a result of the argument. Defendant spent the night on his friend's couch, until he was arrested a few hours later.

On 2 November 2009, defendant was indicted for five felony offenses, including two counts of first-degree rape and one count each of first-degree kidnapping, first-degree burglary, and common law robbery. Defendant was tried by jury on 13 September 2010 on all offenses. At the close of trial, the jury returned verdicts finding defendant guilty of three lesser included offenses: second-degree rape, false imprisonment, and misdemeanor larceny. The trial court ordered life-

time sex offender registration and satellite-based monitoring and sentenced defendant to a minimum of 100 months' imprisonment for the rape charge and four months' imprisonment in each of the two misdemeanor offenses, to run consecutively, for a total of 108 months' minimum imprisonment. Defendant timely appealed to this Court.

II. Prejudicial re-instructions to the jury

[1] We first address defendant's argument that he is entitled to a new trial because the trial court's re-instructions to the deadlocked jury did not contain the substance of N.C. Gen. Stat. § 15A-1235(b) and unconstitutionally coerced guilty verdicts in violation of Article I, Section 24 of the North Carolina Constitution. We agree.

In their recent opinion in *State v. Wilson*, 363 N.C. 478, 681 S.E.2d 325 (2009), our Supreme Court announced that "[w]hile the failure to raise a constitutional issue at trial generally waives that issue for appeal, where the error violates the right to a unanimous jury verdict under Article I, Section 24, it is preserved for appeal without any action by counsel." *Id.* at 484, 681 S.E.2d at 330 (citation omitted). This is so because "the right to a unanimous jury verdict is fundamental to our system of justice." *Id.* at 486, 681 S.E.2d at 331. Furthermore, the proper standard of review for an alleged error that violates a defendant's right to a unanimous jury verdict under Article I, Section 24, is harmless error, under which "[t]he State bears the burden of showing that the error was harmless beyond a reasonable doubt." *Id.* at 487, 681 S.E.2d at 331. " 'An error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction.' " *Id.* (quoting *State v. Nelson*, 341 N.C. 695, 701, 462 S.E.2d 225, 228 (1995)).

In the present case, the jury began their initial deliberations and continued deliberating for approximately three hours. Following a lunch break, the jury again resumed its deliberations. After another hour of deliberations, the jury sent the following note to the court: "We cannot reach a unanimous decision on 4 of the 5 verdicts." Upon receiving the note, after consultation with defendant's counsel and the State, the trial judge brought the jury back into the courtroom. The trial judge then proceeded to give the following re-instruction:

> ,Jury foreperson], I read your note wherein it says your jury was not able to reach a unanimous verdict on four of the five counts so far. I understand that and I've share[d] that note with the parties.

> However, in a case such as this, it's not unusual. It's not unusual, quite frankly, in any case for jurors to have a hard time reaching a unanimous verdict on one charge, much less four or five or more.
>
> So what the Court is prepared to do is remind you—and if you look at the jury instructions—that it is your duty to find the truth in this case and reach a verdict.
>
> What I'm going to do is understand that you guys are having some difficulty back there but most respectfully, direct once again you go back into that jury room, deliberate until you reach a unanimous verdict on all charges. You've not been deliberating that long. I understand it's difficult and I understand sometimes it can be frustrating, but what I ask you to do is continue to be civil, professional, cordial with each other, exchange ideas, continue to deliberate and when you've reached a unanimous verdict, let us know.
>
> Thank you so much. Once again, I ask you [to] retire to your jury room to resume deliberations.

The jury then resumed their deliberations, and after approximately 90 minutes, the jury returned three guilty verdicts.

It has long been the rule in this State that " 'a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous.' " *State v. Boston*, 191 N.C. App. 637, 644, 663 S.E.2d 886, 891 (2008) (quoting *State v. Alston*, 294 N.C. 577, 593, 243 S.E.2d 354, 364 (1978)). In determining whether a trial court's instructions " 'force a verdict or merely serve as a catalyst for further deliberations,' " our Courts apply a totality-of-the-circumstances test, considering both " 'the circumstances under which the instructions were made and the probable impact of the instructions on the jury.' " *State v. Fernandez*, 346 N.C. 1, 21, 484 S.E.2d 350, 362-63 (1997) (quoting *State v. Peek*, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985)).

Section 15A-1235 of the North Carolina General Statutes addresses a trial court's obligations in connection with a deadlocked jury and "is now the proper reference for standards applicable to charges which may be given a jury that is apparently unable to agree upon a verdict." *State v. Easterling*, 300 N.C. 594, 608, 268 S.E.2d 800, 809 (1980). This statute provides in pertinent part:

(a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.

(b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:

(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b).

N.C. Gen. Stat. § 15A-1235(a)—(c) (2009).

We acknowledge that the plain language of subsection (c) of this statute is permissive rather than mandatory. *Fernandez*, 346 N.C. at 22, 484 S.E.2d at 363; *see also State v. Aikens*, 342 N.C. 567, 578, 467 S.E.2d 99, 106 (1996). Thus, it is " 'clearly within the sound discretion of the trial judge' " as to whether to re-instruct the jury on subsections (a) and (b) of the statute. *Fernandez*, 346 N.C. at 22, 484 S.E.2d at 363 (quoting *State v. Williams*, 315 N.C. 310, 326-27, 338 S.E.2d 75, 85 (1986)). Nonetheless, " 'whenever the trial judge gives the jury any of the instructions authorized by N.C.G.S. § 15A-1235(b), whether given before the jury initially retires for deliberation or *after the trial judge concludes that the jury is deadlocked*, he *must* give all of them.' " *Id.* at 23, 484 S.E.2d at 364 (emphasis added) (quoting *Williams*, 315 N.C. at 327, 338 S.E.2d at 85). This requirement is satisfied "as long as the trial court gives the substance of the four instructions found in N.C.G.S. § 15A-1235(b)." *Id.* Our Supreme Court has repeatedly em-

phasized that "[c]lear violations of the procedural safeguards contained in G.S. 15A-1235 cannot be lightly tolerated by the appellate division. Indeed, it should be the rule rather than the exception that a disregard of the guidelines established in that statute will require a finding on appeal of prejudicial error." *Easterling*, 300 N.C. at 609, 268 S.E.2d at 809-10; *see also Fernandez*, 346 N.C. at 23, 484 S.E.2d at 364.

In the present case, an examination of both the circumstances under which the re-instructions were given to the jury and the actual language of the re-instructions establishes that the trial judge's re-instructions in this case did not contain the substance of N.C. Gen. Stat. § 15A-1235(b) and, as a result, were coercive. Here, after approximately four hours of deliberations, the jury informed the court that it was deadlocked on four of the five charges against defendant. Thereafter, the trial judge proceeded to re-instruct the jury. The substance of the trial judge's re-instructions to the jury reflects subsection (a) of section 15A-1235, as well as a portion of subsection (b) of section 15A-1235. The trial judge instructed the jury to "exchange ideas," while also instructing the jury to "deliberate until you reach a unanimous verdict on all charges" and to "continue to deliberate and when you've reached a unanimous verdict, let us know." Nowhere in the trial court's re-instructions is there a suggestion to the jurors, as required by subsection (b) of section 15A-1235, that in that exchange of ideas and deliberation with each other, no juror is expected to "surrender his honest conviction" nor reach an agreement that may do "violence to individual judgment."

Indeed, we are unable to distinguish the re-instructions given by the trial judge in the present case from those found to be prejudicial error warranting a new trial in *State v. Roberts*, 270 N.C. 449, 154 S.E.2d 536 (1967). In *Roberts*, the trial court gave the following re-instruction to the jury, which was challenged by the defendant on appeal:

> Now, gentlemen, I instructed you previously the verdict of a jury must be unanimous. That is, all twelve of you must agree to a verdict, and until you do it cannot be accepted as a verdict by the court. For that reason, I am going to have to ask that you deliberate and consider the case further. . . . *I am going to ask that you again retire and consider the case until you reach a unanimous verdict. You may retire for that purpose.*

Id. at 451, 154 S.E.2d at 537. In reviewing the charge, our Supreme Court ordered a new trial for the defendant, holding:

> The learned trial judge inadvertently failed to instruct the jury that no one of them should surrender his conscientious convictions or his free will and judgment in order to agree with a majority of the jurors upon a verdict. The challenged instruction might reasonably be construed by the member of the jury unwilling to find the defendant guilty as charged as coercive, suggesting to him that he should surrender his well-founded convictions conscientiously held or his own free will and judgment in deference to the views of the majority and concur in what is really a majority verdict rather than a unanimous verdict.

Id. at 451, 154 S.E.2d at 537-38.

Here, the trial judge's instruction to "go back into that jury room [and] deliberate until you reach a unanimous verdict on all charges" is substantially the same language as the prejudicial instruction given in *Roberts*. This Court has recently reiterated that such language is "compelling, coercive language." *State v. Smith*, 188 N.C. App. 207, 218, 654 S.E.2d 730, 738 (2008). In addition, like *Roberts* and unlike *Smith*, the trial judge here "altogether failed to instruct the jury that no one was to surrender his personal beliefs in order to agree with a majority on a verdict." *Smith*, 188 N.C. App. at 218, 654 S.E.2d at 738. Accordingly, the trial judge neither gave all of the instructions contained in section 15A-1235(b), despite having given a piece of them, nor relayed the substance of those instructions to the jury. Given our Supreme Court's precedent in *Roberts*, *Easterling*, and *Fernandez*, we hold the trial judge's re-instructions in the present case are a clear violation of the statutory guidelines, necessitating a finding of prejudicial error.

Moreover, we are unable to see how the error was harmless in the present case. The State contends the error was harmless given the overwhelming evidence of defendant's guilt. However, the evidence against defendant consisted almost entirely of the prosecuting witness's testimony. Likewise, defendant's own testimony is the bulk of the evidence relied on by him to prove his innocence. Thus, the credibility of the two primary witnesses—prosecutrix Polk and defendant—substantially determined this case, necessarily making this a close case for the jury. *See, e.g.*, *State v. Hernendez*, 184 N.C. App. 344, 350, 646 S.E.2d 579, 584 (2007) (finding the credibility of the complaining witness in a rape case to be significant to the underlying case as a whole given the "he said, she said" nature of the case). Given the "he said, she said" nature of this case, we are not persuaded by the State's contention that there was such overwhelming evidence

against defendant as to render the trial court's error harmless. In light of these circumstances, and given that the jury was deadlocked on four of the five verdicts after nearly four hours of deliberation, we cannot say the trial judge's re-instructions to the jury demanding them to return a unanimous verdict and using such language three separate times without balancing the charge with the substance of the remaining instructions in section 15A-1235(b) did not contribute to the defendant's convictions. Therefore, under the circumstances of this case, we hold the trial judge's re-instructions to the jury were coercive and prejudicial error, entitling defendant to a new trial.

[2] Having ordered a new trial for defendant on this issue, we need not address defendant's remaining arguments on appeal. Nonetheless, we take this opportunity to comment on the grossly improper closing argument given by the prosecutor in this case.

In *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002), our Supreme Court expressly elaborated on the issue of improper closing arguments and the professional obligations of counsel. On this point, our Supreme Court emphasized the following pertinent rules and guidelines for closing arguments:

> "(a) During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record . . . ."
>
> N.C.G.S. § 15A-1230(a) (1999). . . .
>
> . . . .
>
> In considering the professional obligation of counsel, we call attention to Rule 12—"Courtroom decorum"—in the General Rules of Practice for the Superior and District Courts, which provides, in pertinent part: "Abusive language or offensive personal references are prohibited," "[t]he conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness," and "[c]ounsel are at all times to conduct themselves with dignity and propriety." Gen. R. Pract. Super. and Dist. Ct. 12, paras. 7, 8, 2, 2002 Ann. R. N.C. 10. . . . Rule 3.4(e) [of the Rules of Professional Conduct of the North Carolina State Bar] . . . requires that a lawyer shall not,

> "in trial, . . . state a personal opinion as to . . . the credibility of a witness, . . . or the guilt or innocence of an accused."

R. Prof. Conduct N.C. St. B. 3.4(e), 2002 Ann. R. N.C. 630.

Id. at 127-28, 558 S.E.2d at 104.

In the present case, the prosecutor violated each and every one of the above rules and guidelines. Not only did the prosecutor repeatedly engage in abusive name-calling of defendant and express his opinion that defendant was a liar and was guilty, the entire tenor of the prosecutor's argument was undignified and solely intended to inflame the passions of the jury. Indeed, the trial court recognized the gross improprieties, and we commend the trial court for issuing a curative instruction, *ex mero motu*, to the jury. Had the trial court not issued a curative instruction in this case, we would have been compelled to order a new trial for defendant on this basis as well.

III. Conclusion

For the foregoing reasons, we hold the trial court's reinstructions to the deadlocked jury did not comply with our statutory guidelines and, given the circumstances of the present case, were coercive and prejudicial error under our Supreme Court's precedent. Accordingly, defendant is entitled to a new trial.

New trial.

Judges HUNTER, JR. and THIGPEN concur.

SUZANNE FURR SMITH, INDIVIDUALLY AND SUZANNE FURR SMITH, AS EXECUTRIX UNDER THE WILL OF LEONARD GEORGE SMITH, PLAINTIFFS v. DEBORAH ANN SMITH MAREZ, STEFAN SMITH AND DIANE HILL, DEFENDANTS

No. COA11-475

(Filed 6 December 2011)

1. Conflict of Laws—choice of law provision—IRA agreements—New York

The IRA agreements contained a choice of law provision, and thus, the Court of Appeals applied New York law to the issues in this case.

2. Pensions and Retirement—IRA—change of beneficiary—contract interpretation

The trial court did not err in a declaratory judgment action to determine the rights and obligations of the parties to decedent's rollover IRA and traditional IRA under New York law by granting summary judgment in favor of plaintiff surviving spouse. Decedent did not properly designate a beneficiary on the beneficiary designation form and he revoked his prior beneficiary designations.

3. Pensions and Retirement—IRA—doctrine of dependent relative revocation—designation of beneficiaries—New York law

No New York cases have extended the application of the doctrine of dependent relative revocation to an issue of designation of beneficiaries of an IRA or an insurance policy.

4. Wills—incorporation by reference—IRA beneficiary designation forms—failure to strictly comply with requirements of IRA agreement

Even if the provisions of decedent's will were considered as incorporated by reference into the IRA beneficiary designation forms, decedent did not strictly comply with the requirements of the IRA agreements as required by New York law.

Appeal by defendants from order entered on or about 20 January 2011 by Judge Kenneth F. Crow in Superior Court, Brunswick County. Heard in the Court of Appeals 10 October 2011.

Trest & Twigg by Roy D. Trest, for plaintiffs-appellees.

Gary S. Lawrence and Andrea L. Hinshaw, for defendants-appellants.

STROUD, Judge.

Deborah Ann Smith Marez, Stefan Smith, and Diane Hill (collectively referred herein as "defendants") appeal from the trial court's order granting summary judgment in favor of Suzanne Furr Smith ("plaintiff"). For the following reasons, we affirm the trial court's order.

I. Background

On 2 December 2009, plaintiff, in her individual capacity and as executrix of the will of Leonard George Smith, filed a complaint against defendants alleging that the proceeds from Leonard George

Smith's ("decedent") "Rollover IRA" account were properly distributed to her and the proceeds from decedent's second "Traditional IRA" account should be distributed to her and that there was an actual controversy as to the ownership of these IRAs, as defendants contend that the proceeds from the two IRA accounts are the property of decedent's estate and not plaintiff. Plaintiff requested a declaratory judgment to determine "the rights and obligations of the parties to the above Rollover IRA account and the above Traditional IRA account." On 29 January 2010, defendants filed their answer, denying plaintiff's claims that plaintiff was entitled to the proceeds from the IRA accounts, and raising counterclaims that the decedent intended for the two IRA accounts to go to defendants in the percentages set forth in his "Last Will and Testament" or in the alternative, if the changes to his beneficiary forms were not effective, the distribution of the IRA accounts should be pursuant to the original designation forms, which gave defendants specific percentages of the IRA accounts. Defendants requested that "the Court declare the rights and obligations of the parties to the" IRA accounts and declare that "the Defendant's [sic] herein are the beneficiaries of the above referenced" IRA accounts. On or about 30 March 2010, plaintiff filed an answer denying defendants' counterclaims that the IRA accounts should be distributed pursuant to decedent's will or the original IRA designation forms. On or about 3 August 2010, plaintiff filed a motion for summary judgment.

The affidavits, depositions, and documents filed with that motion, along with the parties' stipulations and pleadings, tended to show that on 23 March 2006, Leonard George Smith executed a "Traditional IRA Adoption Agreement" and a "Rollover IRA Adoption Agreement[,]" with Pershing LLC as the custodian. On both IRAs, decedent made the following beneficiary designations to defendants: Stefan Smith, 37.50%; Deborah Marez, 37.50%; and Diane Hill, 25%. In 2007, decedent was diagnosed with cancer. On 15 November 2007, decedent executed his "Last Will and Testament" which bequeathed $100,000.00 to plaintiff and the residue of his estate to his children, including defendants, in the following percentages: Deboran [sic] Ann Smith Marez, 50%; Stefan Smith, 45%; Diane Hill, 5%; and Denise Smith, 0%[1]. It also appointed plaintiff as "Personal Representative of [his] estate[,]" and directed that his debts, expenses, and taxes be paid out of his residuary estate. On the same day, decedent executed

1. The will specifically states that it was the decedent's intention to exclude his daughter, Denise Smith.

new designation of beneficiary forms for the Pershing IRA accounts. In the space provided on each form for listing of beneficiaries, defendant wrote, "To be distributed pursuant to my Last Will and Testament[.]" In December 2007, decedent was informed that his cancer was terminal. Decedent married plaintiff on 16 December 2007. Decedent died on 29 February 2008. After decedent's death, Pershing distributed the proceeds of the Rollover IRA account to plaintiff.

On 27 January 2011, by written order, the trial court granted plaintiff's motion for summary judgment stating that "the Plaintiff is declared to be the owner of two IRA accounts held by the deceased Leonard George Smith with Pershing LLC as custodian[.]" On 9 February 2011, defendant gave notice of appeal from the trial court's 27 January 2011 order. On appeal, defendants contend that the trial court erred in its application of the law to the facts before it and granting summary judgment in favor of plaintiff or, in the alternative, summary judgment was in error as there was a genuine issue of material fact that needed to be resolved at trial.

II. Summary Judgment

We have stated that

> [s]ummary judgment may be granted in a declaratory judgment proceeding 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 . . . . On appeal, this Court's standard of review involves a two-step determination of whether (1) the relevant evidence establishes the absence of a genuine issue as to any material fact, and (2) either party is entitled to judgment as a matter of law.

Steiner v. Windrow Estates Home Owners Ass'n, ___ N.C. App. ___, ___, 713 S.E.2d 518, 521 (2011) (citation omitted).

Defendants contend that "the trial court erred in applying the law to the facts and granting summary judgment in favor of appellee." Specifically, defendants argue that the trial court erred in its interpretation of the IRA agreements and that the doctrine of dependent relative revocation is applicable to the facts before us.

A. Choice of Law

[1] We first note that the IRA agreements contain a choice of law provision, stating that "[t]he Plan shall be construed, administered,

and enforced according to the laws of the State of New York[.]" Our Courts have recognized the validity of a choice of law provision in a contract. *See Sawyer v. Market America, Inc.*, 190 N.C. App. 791, 794, 661 S.E.2d 750, 752 (holding that "where 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." (citation omitted)), *disc. review denied*, 362 N.C. 682, 670 S.E.2d 235 (2008). Therefore, we will apply New York law to the issues before us.

B. Contract Interpretation

[2] Defendants argue that the "ultimate goal" in resolving a controversy involving a change of beneficiary is "realization and effectuation of the parties' intent[.]" Defendants contend that "Decedent's clear intent was to name [defendants] as beneficiaries of the Pershing IRAs" by inserting "the phrase 'To be distributed pursuant to my Last Will and Testament[,]' " which gave decedent's residuary estate in percentages to defendants. As further evidence of decedent's intent, defendants argue that decedent had originally designated defendants as the beneficiaries of the IRA accounts and decedent's will was executed on the same day as he changed the beneficiary designations on his IRA accounts. Defendants further contend that decedent's beneficiary designation change substantially complied with the IRA agreements' provisions for changing beneficiaries, as the beneficiary designations form was accepted by Pershing. Plaintiff counters that the decedent's intentions as shown by statements in his will are not relevant, as the law required more than "substantial compliance" with the IRA agreements' requirements as to changing the beneficiary designation. Plaintiff argues that "Pershing [was] entitled to insist upon strict compliance for the terms of its IRA agreement[,]" which avoids "frequent and extended" litigation based on conflicting evidence as to the decedent's intentions. Plaintiff argues that based upon the IRA agreements, "no valid beneficiary was found to have been designated at the death of the accountholder" and the IRA proceeds should properly go to plaintiff by default.

New York Estates, Powers & Trusts Law § 13-3.2(e) (2010) states that

> (e) A designation of a beneficiary or payee to receive payment upon death of the person making the designation or another must be made in writing and signed by the person making the designation and be:

> (1) Agreed to by the employer or made in accordance with the rules prescribed for the pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust.
>
> (2) Agreed to by the insurance company or the savings bank authorized to conduct the business of life insurance, as the case may be.

Although New York Estates, Powers & Trusts Law § 13-3.2(e) does not expressly refer to IRAs, it has been applied to them, *see Storozynski v. Storozynski*, 10 A.D.3d 419, 419-20, 781 N.Y.S.2d 141, 142 (N.Y. App. Div. 2004). Even though New York Estates, Powers & Trusts Law § 13-3.2(e) addresses "[a] designation of a beneficiary[,]" New York courts have held that a *change* of beneficiary requires the same formalities. *Androvette v. Treadwell*, 73 N.Y.2d 746, 747, 536 N.Y.S.2d 43, 43-44 (1988). The parties do not dispute that the decedent's change of beneficiary forms were in writing and signed by the decedent but disagree as to whether the designations were "[a]greed to" by Pershing and "made in accordance with the rules prescribed for the [IRA policies] . . . ." *See* New York Estates, Powers & Trusts Law § 13-3.2(e).

The Court of Appeals of New York has stated that "[i]t is a rule of the common law, that if the terms of the contract violate no law or public policy, are sustained by sufficient consideration, and have been fairly entered into, a strict and exact compliance with them may be insisted upon[.]" *Roehner v. Knickerbocker Life Ins. Co.*, 63 N.Y. 160, 164 (1875) (citation omitted). We find no New York case that addresses the issue of the validity of a change of beneficiary form for an IRA. However, analogous New York cases which address this same issue of compliance with a life insurance policy's beneficiary change form have stated that "[t]he provisions in a policy of insurance as to the procedure for making a change of beneficiary are for the benefit of the insurer. If the insurer does not choose to require enforcement thereof, and the rights of the respective claimants alone are before the court, the intent of the insured should govern." *Kornacki v. Mutual Life Ins. Co.*, 195 A.D.2d 847, 849, 600 N.Y.S.2d 788, 789 (N.Y. App. Div. 1993) (citations and quotation marks omitted). The Court in *Lincoln Life & Annuity Co. of N.Y. v. Caswell*, 31 A.D.3d 1, 813 N.Y.S.2d 385 (2006), summarized the relevant law regarding changes of beneficiaries, stating that

> [o]ver the years, there has been some relaxation of the requirement of strict compliance with the procedures specified by an

> insurance policy for designating or changing beneficiaries. At first, it was held that "exact compliance with the provisions of the policy [would be excused] where the attempt at such compliance has been substantial and its full success prevented by some cause not within the control of the person attempting to make the change" *(Schoenholz v New York Life Ins. Co.*, 234 NY 24, 29-30 [1922] [citations omitted]). As the law has evolved, the courts, recognizing that a primary purpose of specifying a procedure for changing beneficiaries is to protect the insurer from double liability, have come to hold that exact compliance with the contractual procedure will be deemed waived where the insurer, faced with conflicting colorable claims to the same policy proceeds, pays the proceeds into court in an interpleader action so that the opposing claimants may litigate the matter between themselves (*see McCarthy*, 92 NY2d at 442 [noting that "the insurer who has brought the proceeds of the policy into court and requested the court to adjudicate the rights of contesting claimants may no longer insist upon strict compliance"]; *Cable v Prudential Ins. Co. of Am.*, 89 AD2d 636 [1982] ["strict compliance" with the policy's requirements for effecting a change of beneficiaries was "unnecessary" where the insurer had "paid the proceeds of the policy into the court leaving the parties to settle the controversy between themselves"]).

Id. at 5-6, 813 N.Y.S.2d at 388-89 (footnote omitted); *See also Considine v. Considine*, 255 A.D. 876, 877, 7 N.Y.S.2d 834, 835-36 (N.Y. App. Div. 1938) (stating that the provisions of an insurance policy regulating the way in which a change of beneficiary may be made are waived by an insurer when it has "interpleaded, paid the money into court and left the claimants to settle the controversy between themselves."). Further, the waiver of a right to strict compliance with the contract "requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable." *Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 N.Y.2d 175, 184, 451 N.Y.S.2d 663, 668 (1982) (citations omitted). The undisputed evidence in the record states that the proceeds from the Rollover IRA were distributed to plaintiff, but it is unclear as to whether the Traditional IRA was paid to plaintiff or is still held by Pershing[2]. However, it is clear that Pershing did not "pay[] the pro-

2. Plaintiff's affidavit as originally typed states that Pershing planned to pay the proceeds to plaintiff because of an improper designation of beneficiaries, but plaintiff crossed out and initialed this sentence. Plaintiff's complaint alleges that Pershing had not yet paid out the proceeds of the Traditional IRA. Other than this, the record includes no information as to what has become of the Traditional IRA.

ceeds [from either IRA] into court in an interpleader action so that the opposing claimants may litigate the matter between themselves." *See Lincoln Life & Annuity Co. of N.Y.*, 31 A.D.3d at 6, 813 N.Y.S.2d at 388. In addition, Pershing is not a party to this action and our record includes no affidavit or any other information from Pershing to indicate Pershing's position as to the IRAs or the change in beneficiary designation. Our record thus includes no indication that Pershing, as the holder of the accounts, has waived strict or "exact" compliance to the terms in the IRA agreements. In fact, our record does not indicate when Pershing actually received the change of beneficiary forms or if Pershing "[a]greed to" the change of beneficiary prior to decedent's death.[3] *See* New York Estates, Powers & Trusts Law § 13-3.2(e). Accordingly, even if we view the evidence in a light most favorable to defendants, there is no indication that Pershing has waived strict compliance with the terms of the IRA agreements. For these reasons, defendants' arguments regarding decedent's intent as indicated by the provisions of his will are irrelevant, as we must consider only whether decedent strictly complied with the requirements of the IRA agreement as to the change of beneficiary form.

The Pershing IRA agreements state that a "Beneficiary" is defined as "the person, persons, entity or entities (for instance, a trust), designated from time to time by a Participant . . . to receive benefits by reason of the death of the Participant[.]" The agreements also state that "[a] Participant may designate a Beneficiary or Beneficiaries of the Custodial Account at any time, and any such designation may be changed or revoked at any time, by written designation executed by the Participant in a form and manner prescribed by or acceptable to, and filed with, the Custodian." The designation of beneficiary change forms for the IRAs have blanks to be filled in providing information as to the beneficiary's name, gender, relationship to the participant, date of birth, social security number, address, and the percentage of the proceeds that the beneficiary would receive. On the original beneficiary designation forms, decedent listed the names of each defendant and filled in all of the other beneficiary information. In contrast, on both IRA beneficiary *change* forms, the decedent wrote, "To be distributed pursuant to my Last Will and Testament[.]" Also on the change of beneficiary forms, the decedent checked the box stating "CHANGE OF BENEFICIARY: I hereby revoke all prior beneficiary

3. Defendants argue that Pershing never notified decedent prior to his death that the change of beneficiary forms were not acceptable, so decedent had no opportunity to correct them. But the record also does not reveal if Pershing received the forms prior to decedent's death.

designations and designate the following beneficiary(ica) for my account[s].” As decedent did not fill out the information called for by Pershing’s beneficiary designation form, did not name any “person” or “entity” as a beneficiary, and did not designate any percentages for distribution, he did not strictly comply with the terms of the agreements for change of beneficiary designation. The agreements further state that “[t]he latest such designation, change or revocation shall control” and “[i]f there is no Beneficiary designation on file with the Custodian, . . . the Custodian shall distribute the Custodial Account to the survivors of the Participant in the following order of preference:

(i) The Participant’s surviving spouse, if any

(ii) The Participant’s children, if any, in equal shares per stirpes

(iii) The Participant’s estate[.]

Since the decedent did not properly designate a beneficiary on the beneficiary designation form, but he revoked his prior beneficiary designations, Pershing properly distributed the proceeds from the Rollover IRA, pursuant to the default terms, to plaintiff, the decedent’s “surviving spouse[.]” The default terms of the Traditional IRA policy would also distribute its proceeds to plaintiff, as the relevant IRA agreement terms are identical.

In the alternative, defendants, citing *John Hancock Mut. Life Ins. Co. v. McManus*, 247 A.D.2d 513, 513-14, 669 N.Y.S.2d 320, 321 (N.Y. App. Div. 1998), further argue that under New York law “[i]f an attempted change of beneficiary fails, then the prior beneficiaries are entitled to the proceeds[.]” Defendants argue that since the beneficiaries in the change of beneficiary forms were not valid, the beneficiary change forms themselves are invalid, and the IRA proceeds should be distributed pursuant to the original beneficiary designation forms, which gave the IRA proceeds to defendants in various percentages. In *John Hancock Mut. Life Ins. Co*, the Court agreed with the trial court’s finding “that the insured did not substantially comply with the requirements of her life insurance policies in order to effectuate a change of beneficiary” and that “the trial court properly concluded that a change of beneficiary had not been effected and that the surviving, named beneficiary was entitled to the proceeds.” 247 A.D.2d at 514, 669 N.Y.S.2d at 321. We note that this was an interpleader action requiring only substantial compliance, not strict compliance. Also the Court’s ruling was based on the specific terms of the policy in *John Hancock Mut. Life Ins. Co* but, as the exact terms of the insured’s policy were not included in the Court’s opinion, *see id.*,

we cannot make a comparison of that case to the terms of decedent's IRA agreements. Here, contrary to defendant's argument, decedent expressly revoked "all prior beneficiary designations[.]" Therefore, Pershing could not distribute the proceeds pursuant to decedent's original designations and defendant's argument is overruled.

C. Doctrine of Dependent Relative Revocation

[3] Defendants argue that the doctrine of dependent relative revocation is applicable to the facts before us as "Decedent would not have revoked the Original Designation Forms if he had known the New Designation Forms would fail[;]" there is no indication that decedent meant to give the IRA proceeds to plaintiff; and "the court [should] give effect to Decedent's clear intent to give the proceeds to [defendants]." But defendants concede that this doctrine has been "mainly applied in the law of wills" and does not cite to us any New York case which applies this doctrine to a designation of beneficiary form. Plaintiff counters that the doctrine has been "mainly applied under New York law in cases involving Will interpretation" and is inapplicable to the facts before us. New York courts have stated that

> [t]he doctrine of dependent relative revocation may be simply stated by saying that where the intention to revoke a will is conditional and where the condition is not fulfilled, the revocation is not effective. The doctrine is usually applied where the testator cancels a will with a present intention to make a new testamentary disposition, and the new disposition is not made, or if made, fails of effect for some reason.

Matter of Sharp, 68 A.D.3d 1182, 1183-84, 889 N.Y.S.2d 323, 324-25 (N.Y. App. Div. 2009) (citation, quotation marks, and brackets omitted). Although it appears that New York has adopted the doctrine of dependent relative revocation, it has only been in the context of the interpretation of wills. *See id.* at 1185, 889 N.Y.S.2d at 325 (holding that the trial court "improperly applied the doctrine of dependent relative revocation" to revive the decedent's will); *In re Macomber's Will*, 274 A.D. 724, 87 N.Y.S.2d 308 (N.Y. App. Div. 1949) (affirming the application of the doctrine of dependent relative revocation to the deceased's will). After careful search, we find no New York cases that have extended the application of this doctrine to an issue of designation of beneficiaries of an IRA or an insurance policy. We decline to

extend the application of this doctrine beyond established New York law.[4] Defendants' argument is overruled.

D. Incorporation by reference

[4] Defendants, in the alternative, contend that through the operation of the doctrine of incorporation by reference there exists a genuine issue of material fact as to "whether the [decedent's will] is identified beyond all reasonable doubt[.]" Defendants argue that decedent by listing his "Last Will and Testament" in the beneficiary change form specifically identified his 15 November 2007 will as the document to be incorporated by reference and since his will bequests his residuary to defendants by percentages this reference arguably satisfies Pershing's requirement that the beneficiary be a "person[.]" Defendants conclude that since this creates a genuine issue of material fact, summary judgment was in error, and this issue should be decided by a jury. Plaintiff raises no counter argument to this issue.

> The doctrine of incorporation by reference requires that the paper to be incorporated into a written instrument by reference must be so referred to and described in the instrument that the paper may be identified beyond all reasonable doubt. . . . That rule of law is grounded on the premise that the material to be incorporated is so well known to the contracting parties that a mere reference to it is sufficient.

Chiacchia v. National Westminster Bank, 124 A.D.2d 626, 628, 507 N.Y.S.2d 888, 889-90 (N.Y. App. Div. 1986) (citation omitted).

Even if we assume arguendo that decedent's will was sufficiently referenced to be incorporated into the beneficiary forms, the incorporation alone would not clarify decedent's beneficiaries and certainly would not constitute strict compliance with the terms of the IRA agreements. Defendants argue that the statement, "To be distributed pursuant to my Last Will and Testament" on the beneficiary change forms incorporates decedent's will. As noted above, the Pershing agreements state that a beneficiary is a "person" or "entity" designated "to receive benefits by reason of the death of the Participant[.]" Decedent's 15 November 2007 will names several devisees, specifically plaintiff and defendants. Defendants' argument points us solely to decedent's bequest of his residuary estate to defendants in percentages. However, the will also directs payment of decedent's debts

4. Plaintiff also raises an argument as to the doctrine of revival, but we will not address this argument, since the related doctrine of dependent relative revocation is inapplicable to the facts before us.

and expenses from his residuary estate, payment of taxes from his residuary estate, and makes a specific bequest of $100,000 to plaintiff. The will makes no mention of either IRA account, much less designates who is "to receive benefits" from the IRAs or the percentages that would go to those persons, as defendants argue. Therefore, even if the provisions of the will were considered as incorporated by reference into the beneficiary designation form, decedent did not strictly comply with the requirements of the IRA agreements, *see Lincoln Life & Annuity Co. of N.Y.*, 31 A.D.3d at 6, 813 N.Y.S.2d at 388, as decedent's will does not clearly point to which "person" or "entity" that is to receive the proceeds from the IRAs, as required by the agreements. In addition, there is no indication that decedent provided a copy of his will to Pershing when he completed the change of beneficiary forms, so there is no indication that Pershing "[a]greed to" a designation made in this manner. *See* New York Estates, Powers & Trusts Law § 13-3.2(e). Therefore, even if there were a genuine issue of fact as to whether decedent incorporated his will by reference into the beneficiary change forms, it is not a material issue because incorporating the will into the beneficiary change form still does not provide for a beneficiary designation as required by the Pershing IRA agreements. Accordingly, defendants' argument is overruled.

For the foregoing reasons, we affirm the trial court's order granting summary judgment in favor of plaintiff.

AFFIRMED.

Chief Judge MARTIN and Judge GEER concur.

NEAL B. WOLGIN, PLAINTIFF v. ELIZABETH HESLIP WOLGIN, DEFENDANT

No. COA11-148

(Filed 6 December 2011)

1. Appeal and Error—jurisdiction—notice of appeal—timing

The Court of Appeals had jurisdiction over a child custody case where an order modifying custody was entered; defendant filed a Rule 59 Motion for a new trial, tolling the time for appeal; the trial court rendered (but did not enter) a denial of the motion for a new trial; defendant entered notice of appeal from the cus-

tody order; the trial court entered a written order denying the motion for a new trial; and defendant gave notice of appeal from that order.

2. Trials—two-day limit for trial—not arbitrary

The trial court did not abuse its discretion in a child custody matter by denying defendant's motion for a new trial where defendant argued that the trial court had placed arbitrary time limits on the presentation of evidence. The length of the trial was discussed at the pretrial conferences, both parties agreed to a two-day trial, and defendant did not object at the close of her evidence to the limits enforced by the court. Moreover, the court was presented with adequate evidence to make a determination as to whether a custody modification was appropriate.

3. Evidence—cumulative exhibits—control—no abuse of discretion

The trial court did not abuse its discretion in a custody case by accepting exhibits which consisted of 562 e-mails but indicating that it would give them due consideration without reading each one.

4. Child Custody and Support—change in custody—disagreements between parties

The trial court did not err by relying on continual disagreements between the parties to change the physical custody provisions of a permanent custody order. Disagreements alone do not support a substantial change in circumstances, but the trial court here also considered the effect of those disagreements on the children, including the children's mental health, religious growth, and extracurricular activities

5. Child Custody and Support—custody—change—factors

The trial court did not err in a child custody action in the factors it considered in concluding that a change of physical custody was warranted. Case law did not support defendant's argument that her relocation and remarriage, a party's continued fitness, and the children's school transfer were impermissible factors.

Appeal by Defendant from orders entered 4 May 2010 and 8 September 2010 by Judge William A. Marsh in Durham County District Court. Heard in the Court of Appeals 25 May 2011.

Law Office of Laurel E. Solomon, PLLC, by Laurel E. Solomon, for Plaintiff-Appellee.

Lewis Phillips Hinkle, PLLC, by Elliot I. Brady, for Defendant-Appellant.

BEASLEY, Judge.

Defendant appeals the trial court's orders modifying physical custody and denying her Rule 59 Motion for a New Trial. For the following reasons, we affirm.

On 19 April 2007, the trial court entered a consent order for permanent custody awarding joint legal custody with primary physical custody to Defendant and secondary physical custody to Plaintiff. On May 13 2009, Plaintiff filed a motion to modify the 2007 permanent custody order (2007 order). Following a two-day hearing, the trial court entered an order modifying the 2007 order, and awarded primary physical custody to Plaintiff on 4 May 2010. On 14 May 2010, Defendant filed a Motion for a New Trial pursuant to N.C. Rules of Civil Procedure Rule 59. Before the trial court entered a written order on Defendant's Motion for a New Trial on 23 July 2010, Defendant filed notice of appeal from the custody order. On 8 September 2010, the trial court entered a written order denying Defendant's Motion for a New Trial and Defendant filed notice of appeal from the trial court's denial of her Motion for a New Trial that same day.

[1] Before we address Defendant's appeal on its merits, we are required to determine whether our Court properly has jurisdiction in this matter.

Pursuant to N.C. Rules of Appellate Procedure Rule 3(c), when a party enters notice of appeal in civil actions,

> a party must file and serve a notice of appeal:
>
> . . . .
>
> (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period; provided that
>
> (3) if a timely motion is made by any party for relief under Rule[] . . . 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party. . . .

Additionally, our Supreme Court has held that

> the general rule is that when an appeal is taken from the district court the latter court is divested of jurisdiction, except to take action in aid of the appeal, until the case is remanded to it by the appellate court. Hence during the pendency of an appeal it is generally held that the district court is without power to grant relief under Rule 59 [.]

Wiggins v. Bunch, 280 N.C. 106, 111, 184 S.E.2d 879, 881 (1971). Generally, "[t]his Court is without authority to entertain appeal of a case which lacks entry of judgment." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 (1997). A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. N.C. Gen. § 1A-1, Rule 58 (2009). In *Abels*, our Court announced an exception to this general rule which applies when judgments are rendered, but have not yet been entered. "[W]e believe rendering of an order commences the time when notice of appeal *may* be taken by filing and serving written notice[.]" *Id.* at 804, 486 S.E.2d at 738 (citing N.C.R. App. P. 3 (c)).

When Defendant *sub judice*, filed the Motion for a New Trial pursuant to Rule 59, the time for filing notice of appeal was tolled. Defendant first entered notice of appeal on 23 July 2010, after the trial court orally denied the motion on 22 July 2010, but before the trial court entered its written judgment on the motion. Though the trial court rendered its oral judgment on 22 July 2010, the entry of the notice of appeal on 23 July 2010 from the order entered 4 May 2010 preserved this issue for appellate review pursuant to *Abels*. Also, Defendant gave notice of appeal from the order denying the Rule 59 Motion on 8 September 2010, the same day that the written order denying of the Rule 59 Motion was entered, and this appeal is also properly preserved. *See Abels*, 126 N.C. App. at 804, 486 S.E.2d at 738 ("the full time, N.C.R. App. P. 3(c), for appeal as to both the original judgment and denial of the motion commenced to run and [must] be computed from the *entry* of [the trial court's] order [.]" (internal citations omitted)). We now address the appeal on its merits.

When the trial court entered the 2007 Order, both parties and the minor children resided in Durham County. In 2007, Hannah, five-years-old, was in kindergarten at Creekside Elementary in Durham and David, two-years-old, was in pre-school at Greenwood School in Durham. On 9 May 2009, Defendant remarried and she and the children relocated to Wake County. In April 2009, Defendant enrolled the

children at Laurel Park Elementary School, a year-round school in Wake County, which was set to begin on 7 July 2009. Plaintiff objected to the transfer and sought to keep the children enrolled in the Durham County Public School System. The parties corresponded several times concerning Defendant's relocation and her wish to change the children's school. The parties could not reach an amicable agreement. Subsequently, in May 2009, Defendant filed a "Request for Transfer" to remove the children from the Durham County Public School System to enroll them in the Wake County Public School System. Defendant did not inform Plaintiff that she filed the "Request for Transfer", though she had several e-mail discussions with him prior to enrolling the children.

On 13 May 2009, Plaintiff filed a motion to modify child custody, for appointment of a parenting coordinator, and for a preliminary injunction. In the motion, Plaintiff argued, *inter alia*, that Defendant's unilateral decision to enroll the children in a Wake County Public School warranted a modification of the 2007 Order. After a two-day hearing, the trial court entered a modification of the 2007 Order by written order entered 4 May 2010 (2010 Order), which changed Defendant's status as primary physical custodian and awarded both parties shared physical custody.

Defendant raises several issues on appeal and we address each in turn.

I. Rule 59 Motion for New Trial

[2] First, Defendant contends that the trial court abused its discretion by denying her Motion for a New Trial, which urged the court to re-open the evidence and allow Defendant to complete her testimony because the trial court placed arbitrary time limits on the presentation of evidence. We disagree.

It is well settled that "a motion for new trial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed absent a manifest abuse of that discretion." *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000). Similarly, "the manner of the presentation of evidence is a matter resting primarily within the discretion of the trial judge, [and] his control of the case will not be disturbed absent a manifest abuse of discretion." *State v. Harris*, 315 N.C. 556, 562, 340 S.E.2d 383, 387 (1986) (citations omitted). Pursuant to N.C. Gen Stat. § 8C-1, Rule 611(a) (2009), the trial court has the authority to

> exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Here, the trial court did not arbitrarily impose limitations on the presentation of evidence where (1) the length of the trial was discussed at pre-trial conferences and both parties agreed to a two-day trial; (2) the court made inquiry concerning the ability of both parties to present evidence within a two-day time frame and neither party objected during pre-trial conferences; (3) the court made several references to the time constrictions during the trial; and (4) at the close of Defendant's evidence, Defendant made no objection to time limits enforced by the trial court on the second day of trial.

Defendant relies on *Mishler v. Mishler*, 90 N.C. App. 72, 367 S.E.2d 385 (1988), to support her argument that the two-day trial limit was erroneous. Although *Mishler* addresses the court's authority to limit the presentation of evidence, the case *sub judice* is distinguishable.

In *Mishler*, our Court, in an equitable distribution case, held that the trial court erred where it limited the plaintiff's testimony as well as defendant's cross examination of the plaintiff on the issue of personal debt. *Id.* Unlike *Mishler*, the trial court *sub judice*, was presented with adequate evidence to make a determination as to whether modification of the custody order was appropriate. Therefore, Defend-ant's reliance on *Mishler* is not persuasive and we conclude the trial court did not abuse its discretion by designating two days for trial. This argument is overruled.

[3] Defendant also asserts that the trial court erred by refusing to review tall of the evidence. There is no merit to Defendant's argument.

Rule 403 of the North Carolina Rules of Evidence 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). "The exclusion of evidence under Rule 403 is a matter left to the sound discretion of the trial judge, and we will reverse a Rule 403 decision of the trial court only when the decision is arbitrary or unsupported by reason." *State v. Brockett*, 185 N.C. App. 18, 23, 647 S.E.2d 628, 633 (2007).

At trial, Defendant introduced Exhibits 13 and 14 which consisted of 562 e-mail correspondences. Defendant contends that the trial court's express admission that it would not review each e-mail is an abuse of the court's discretion. The trial court accepted the exhibits into evidence but admitted that while it would not read each e-mail introduced into evidence, it would give the e-mails "due consideration." The trial court further clarified its position by stating, "I will be able to ascertain the tone and tenor by looking at a representative portion of the e-mails so don't think I'm not going to look at them at all." Here, the trial court properly exercised its authority to limit the presentation of cumulative evidence. Accordingly, the trial court did not abuse its discretion by reviewing a representative portion of the e-mail correspondences and Defendant's argument is overruled.

II. Custody Modification Order

[4] Next, Defendant contends that "the trial court committed reversible error in relying on continual disagreements between the parties to change physical custody provisions of a permanent custody order from primary physical to 50-50 when the parties already had joint legal custody." Defendant further argues that the trial court failed to make a determination as to "whether and how the disagreements affect the welfare of the children." We disagree.

Our Supreme Court has held that "trial courts are vested with broad discretion in child custody matters." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). "When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "[T]he trial court's findings of fact are conclusive if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *Raynor v. Odom*, 124 N.C. App. 724, 729, 478 S.E.2d 655, 658 (1996) (citations omitted).

"It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody." *Shipman*, 357 N.C. at 473, 586 S.E.2d at 253 (internal quotation marks and citations omitted). Generally,

there must be evidence establishing a "nexus" between the changes and the welfare of the minor child. *Id.* at 478, 586 S.E.2d at 255.

Defendant asserts that the trial court erred in making Finding of Fact 16(B) which states,

> [t]he 2007 Order contemplated that the parties would be able to work out disagreements related to the children through co-parenting therapy. This has proven not to be true, and decisions regarding the children have not been made as a result, or the Defendant has made decisions unilaterally by default. As a result, Defendant unilaterally chose the children's current school, Hannah is still not in therapy, the children have missed celebrations of important Jewish holidays, and Hannah and David are attending dance and soccer at locations that are not conducive to Plaintiff's involvement, all of which affect the welfare of the minor children.

Disagreements "alone" between the parties, even with the appointment of a co-parenting therapist, do not constitute a substantial change in circumstances. *See Ford v. Wright*, 170 N.C. App. 89, 93, 611 S.E.2d 456, 460 (2005) (Disagreements **alone** do not support a substantial change in circumstance. The trial court must make "specific findings of instances where the parties' failure to communicate subsequent to the prior custody order had affected the welfare of the child."). (emphasis added).

Defendant argues that because the trial court found in Finding of Fact Number 16(B), that the parties had disagreements which impacted the children and Defendant made unilateral decisions, the trial court changed custody to punish Defendant. Defendant's argument is meritless.

> Child custody cannot be used as a tool to punish an uncooperative parent. Standing alone, such interference would normally only warrant a contempt citation. However, where, as here, such interference becomes so pervasive as to harm the child's close relationship with the noncustodial parent, there can be a conclusion drawn that the actions of the custodial parent show a disregard for the best interests of the child, warranting a change of custody.

Woncik v. Woncik, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986).

The trial court did not merely consider the parties' disagreements but also considered the effect of those disagreements on the children

and their well-being. Defendant fails to challenge Finding of Fact 7 which states that "[t]he parties have agreed that they shall discuss with each other all major decisions concerning the Minor Children and that they will engage the services of a co-parenting therapist to help them with such decisions, including, but not limited to school issues, health issues, and unusual schedule changes."

Defendant also does not challenge Finding of Fact 15(D) which provides:

> On May 15, 2009, the Defendant filed a Request for Transfer for each of the minor children with the Wake County Public School System. The Defendant did not advise the Plaintiff in advance of her filing of said document and, in fact, she waited until after the transfer had been granted to inform Plaintiff of same. In these Requests for Transfer documents, and accompanying letter, Defendant listed six potential schools in rank order of her preference. . . .

The trial court also found in Finding of Fact 15(E) that rather than directly discussing Plaintiff's preference with him that the children attend school in Durham,

> [t]he Defendant, through counsel, contacted the Durham County Office of Student Assignment on or about April 1, 2009, and requested that said Office notify her if the Plaintiff applied for a transfer of the children to the Creekside Elementary School attendance zone, indicating that she intended to enroll the children in Wake County Schools. She specifically requested that she be permitted to submit information in opposition to any such application of the Plaintiff.

The Defendant did not discuss her request with Plaintiff in advance of her submission, and had not mentioned two of the schools to Plaintiff as schools she was considering.

The trial court, in making these findings of fact, not only considered Defendant's failure to discuss her selection of the children's new school with Plaintiff, but in Findings of Fact 15 (I), (J), and (K), the trial court found that the change in school had a detrimental effect on Hannah's social adjustment, as her teachers at Creekside had begun to successfully address improvements in Hannah's social interaction with her peers.

In Finding of Fact 15 (L), the trial court found that the therapist, Ilene Sperling, informed the parties that

> "[t]he themes of [Hannah's] difficulties are related to the lack of communication between you both as parents and the challenges you are experiences [sic] with navigating custody issues and parenting together. The ability for you both to begin to resolve your communication together enough to create a custody agreement that you both support and agree on will help to remove Hannah from her questions and feelings of being in between parental conflict. . . ." However the Defendant ultimately changed her mind by March of 2009 and decided that Ilene Sperling was not qualified to provide therapy for Hannah. Plaintiff maintained that Hannah needed and would benefit from therapy. Hannah has never returned to therapy since the parties have not been able to agree on how to address this issue.

Clearly, the trial court did not conclude that a substantial change of circumstances existed merely because of the parties' disagreements, but instead found that the parties' disagreements had a profound effect on Hannah's mental health by Defendant's refusal to allow a therapist to address Hannah's mental health needs.

Further, as a result of the parties' inability to effectively communicate for the benefit of the children's welfare, the trial court found in Findings of Fact 15 (N), (O), (P), and (Q), that this inability hindered the children's religious growth. While

> the trial court cannot base its findings on the preferability [sic] of any particular faith or religious instruction, . . . [t]he welfare of the child is the paramount consideration which must guide the Court in exercising this discretion. Thus, the trial judge's concern is to place the child in an environment which will best promote the full development of his physical, mental, moral and spiritual faculties. . . .

Dean v. Dean, 32 N.C. App. 482, 483, 232 S.E.2d 470, 472 (1977) (internal quotation marks and citations omitted).

The children's lack of participation in holiday celebrations was not a change of circumstances from the 2007 Order. The schedule from the 2007 Order awarded Defendant physical custody during the specified holidays. However, while there was no actual change in circumstances from the 2007 Order as to Plaintiff's religious observances in Finding of Fact 15 (N), in conjunction with Findings of Fact 15 (O) and (P) which consider the children's "increased age" and ability "to more fully participate in and understand [religious] activities" and

"[t]he parties' inability to cooperate to change their schedule" to accommodate religious observances, the substantial change in circumstances is supported by the evidence.

The trial court further found in Finding of Fact 15(T) that the children's participation in extracurricular activities at locations that were inconvenient for Plaintiff constituted a substantial change in circumstances that affect the welfare of the children. We agree.

We have held that "[t]he welfare of the children is the determining factor in the custody proceedings[.]" *In re Poole*, 8 N.C. App. 25, 29, 173 S.E.2d 545, 548 (1970). In *Shipman*, our Supreme Court held that "before a child custody order may be modified, the evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection." *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255. The general rule is applied unless the substantial change of circumstances are determined to be self-evident. *Id.*

In choosing the location of extracurricular activities, the trial court found,

> [s]ince her relocation to Wake County, the Defendant has enrolled Hannah in dance and David in soccer in Wake County without first discussing this with the Plaintiff or soliciting his input. As a result, the children are attending these activities at locations which are even further from the Plaintiff's home than the Defendant's home or their school. When Plaintiff asked the Defendant whether she would consider a location which would work better for him, she informed him that she had already done all of the research and these were the most viable options.

As the trial court had, in its 2007 Order, considered that visitation with Plaintiff was in the children's best interest, the fact that Defendant was unyielding in determining the location and time of extracurricular activities focuses on the inconvenience to Plaintiff only to the extent that Plaintiff's time spent with the children would necessarily be curtailed (*i.e.*, for Plaintiff's travel time to the event). As the children benefit from time spent with Plaintiff, the trial court properly determined that Defendant's arrangements are not in the best interest of the children.

[5] In Defendant's final argument, she contends that the trial court committed reversible error by considering legally improper factors to

support its conclusion that a change of the physical custody provisions of the permanent custody order were warranted. We disagree.

Our Court has not set out "permissible factors" in determining whether there has been a substantial change in circumstances warranting a modification of a custody order, as Defendant suggests. Instead, we have held:

> courts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child.

Pulliam v. Pulliam, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998).

Defendant argues that the trial court's consideration of factors such as her relocation and remarriage, a party's continued fitness, and the children's school transfer are "impermissible factors." Our case law does not support this argument. In *Shipman*, our Supreme Court announced several factors that can be considered in determining whether a substantial change of circumstances has occurred. Factors include, but are not limited to (1) "a move on the part of a parent"; (2) the remarriage of a parent; (3) "a parent's cohabitation"; and (4) a child's mental health. *Shipman*, 357 N.C. at 478, 586 S.E.2d at 256. Moreover, our Courts have broad discretion, as stated in *Pulliam*, in weighing evidence that may impact the welfare of minors. We reject the notion that the trial court should have been restricted to certain "permissible factors" in its determination. Therefore, we conclude there was no error as to the factors that the trial court used to make its determination.

Defendant further argues that because she and her husband moved to Wake County, regardless of Plaintiff's wishes to keep the children enrolled in the Durham School System, the children's residency with Defendant necessitated the school system change. As school systems are accustomed to accommodating children who are in the joint custody of their parents and to accommodate children with mental or emotional problems, it is not uncommon for school systems to accommodate transfer requests.[1]

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1. 4132.2 Hardship Transfer

The Superintendent or designee may grant transfer requests in cases of substantial hardship if the Superintendent or designee finds that any of the following exist:

In summary, the trial court did not err in denying Defendant's Motion for a New Trial. Further, the trial court did not err in limiting the presentation of evidence. We also hold there was no error as to the factors used by the trial court in determining whether there was a substantial change in circumstances. Finally, we affirm the trial court's order because the findings of fact support a substantial change in circumstances warranting modification of custody.

Affirmed.

Judges BRYANT and GEER concur.

J.T. RUSSELL AND SONS, INC., PLAINTIFF v. SILVER BIRCH POND L.L.C., DEFENDANT

No. COA11-159

(Filed 6 December 2011)

1. Appeal and Error—preservation of issues—objection waived—introduction of other evidence

Plaintiff's hearsay objection was waived by the introduction without objection of evidence that was substantially the same in a contract action arising from a road paving project in a development.

2. Construction Claims—paving project—directed verdict

The trial court properly denied plaintiff's motion for a directed verdict in a contract action arising from a paving contract in a subdivision. Plaintiff contended that its paving work fully complied with the terms of the contract concerning the minimum thickness of the asphalt; however, the contract also had requirements for the thickness of the stone base and defendant provided sufficient evidence that plaintiff's paving work did not comply with this portion of the contract.

A. Serious physical, mental or emotional problems. The student must submit an affdavit from the student's physical, psychologist, or psychiatrist to support a request made under this ground.

. . . .

D. Other extreme or unusual circumstances that affect the student's academic achievement and/or behavior at school.

www.dpsnc.net, Student Transfers

3. Appeal and Error—preservation of issues—exceptional circumstances—erroneous damages award

Failure to preserve an issue for appeal was waived where the jury's erroneous damages award provided the requisite exceptional circumstances.

4. Damages and Remedies—award not supported by evidence—lump sum—remanded

A damages award in a contract action was vacated and remanded where all of defendant's evidence about damages totaled an amount that was considerably less than the amount of the verdict. The award was a lump sum and it could not be determined which type of damages led to the erroneous award.

5. Construction Claims—paving project in subdivision—damages—repairs—lost lot sales

In a contract action involving paving within a subdivision in which no payment was required until after the work was completed, the determination of defendant's repair costs must include an offset of the contract price defendant had originally agreed to pay. Defendant would otherwise have received the paving for free. The measure of damages for lost lot sales must be measured by defendant's net profits.

Appeal by plaintiff from judgment entered 11 October 2010, *nunc pro tunc* 10 September 2010 by Judge W. Robert Bell in Stanly County Superior Court. Heard in the Court of Appeals 29 August 2011.

Womble Carlyle Sandridge & Rice, PLLC, by Brent F. Powell and John F. Morrow, Jr., for plaintiff-appellant.

Crowe & Davis, P.A., by H. Kent Crowe, for defendant-appellee.

Hatch, Little & Bunn, LLP, by Harold W. Berry, Jr., for Carolina Asphalt Pavement Association, amicus curiae.

CALABRIA, Judge.

J.T. Russell and Sons, Inc. ("plaintiff") appeal from a judgment entered upon a jury verdict finding that plaintiff breached a contract with Silver Birch Pond, L.L.C. ("defendant") and requiring plaintiff to pay $370,765.82 for this breach. We find no error in part and award plaintiff a new trial on the issue of damages.

I. Background

Plaintiff is an asphalt paving contractor located in Albemarle, North Carolina. Defendant is a real estate developer. On 14 December 2007, plaintiff and defendant entered into a contract ("the paving contract") whereby plaintiff agreed to pave the roadways in a residential subdivision, Silver Birch Pond ("the subdivision"), in Lincoln County.

According to the terms of the paving contract, plaintiff was required to "Furnish & Install 8" ABC Stone Base" and "Furnish & Install 1.5" SF9.5A Asphalt Pavement." The contract further stated that the "stone and pavement thickness are minimum NCDOT Lincoln County Standards." The estimated price for the paving job was $148,000.00, which was subject to change based upon variations in the price of asphalt liquid base.

Plaintiff installed the asphalt roadways in the subdivision on 18 April 2008. The following day, one of plaintiff's employees removed four core samples ("the JTR cores") from the subdivision in order to determine if they complied with North Carolina Department of Transportation ("NCDOT") standards. Testing revealed that the asphalt depth of the JTR cores was 1.75 inches, 2 inches, 1.5 inches, and 1.5 inches. The JTR cores were not tested for stone base thickness.

On 21 April 2008, Michelle Richards ("Richards"), an engineer with plaintiff's on-site engineering firm Boyle Consulting Engineers ("Boyle"), took four additional core samples ("the 2008 Boyle cores"). The asphalt thickness of the 2008 Boyle cores measured 1.52 inches, 1.61 inches, 1.52 inches, and 1.75 inches. Richards initially certified the 2008 Boyle cores as compliant with NCDOT requirements. However, Richards had mistakenly believed that only a six-inch stone base was required, and her certification reflected this mistake. Wright & Associates, the engineering firm overseeing the development of the subdivision, notified Richards of the mistake and requested that she provide the appropriate certification for an eight-inch stone base.

In May 2008, plaintiff sent defendant a bill for its completed paving services. The bill included a slight adjustment for an increase in asphalt prices, which was contemplated by the paving contract. With this increase, the bill totaled $152,870.96. Defendant refused to pay plaintiff. Consequently, on 25 September 2008, plaintiff initiated an action against defendant for breach of contract for failure to pay for plaintiff's asphalt paving. Plaintiff sought the total amount due under the contract plus interest. On 3 December 2008, defendant filed an answer and counterclaim against plaintiff for breach of contract.

Subsequently, Richards and Bob Townsend ("Townsend"), an NCDOT technician for Boyle, took seven additional sample cores on 23 January 2009 ("the January 2009 Boyle cores"). When tested, four of the sample cores had an asphalt thickness of less than 1.5 inches and two of the cores had a stone base of less than eight inches. These results led to a site meeting between Richards, Townsend, Wright & Associates engineer Miles Wright ("Wright"), Silver Birch owner Bob Johnson ("Johnson") and NCDOT district engineer Jackie McSwain ("McSwain"). At that meeting, it was determined that three additional core samples would be taken to determine if the subdivision complied with NCDOT specifications.

Townsend extracted these three additional core samples on 8 May 2009 ("the May 2009 Boyle cores"). Testing indicated that one of the May 2009 Boyle cores had an asphalt thickness of less than 1.5 inches and another core had a stone base of less than eight inches. At this point, Richards determined that she could not certify the roadways in the subdivision as complying with NCDOT specifications.

Nonetheless, Wright & Associates submitted a certification to NCDOT on 5 June 2009 indicating that the roadways met NCDOT specifications. The certification included Richards' certification of the asphalt depth from the 2008 Boyle cores. Shortly thereafter, Wright sent a letter to Johnson retracting his certification on the basis of the asphalt thickness tests that had been more recently conducted.

Beginning 7 September 2010, the case was tried by a jury in Stanly County Superior Court. During the trial, Johnson testified, over objection, that several NCDOT personnel had informed him that asphalt thickness depth is measured as a minimum over the course of an entire roadway. Richards also testified, without objection, that, based upon her familiarity with NCDOT guidelines, asphalt depth was measured as a minimum and not as an average of core samples.

Defendant presented evidence regarding its alleged damages. Johnson testified about the estimated costs of repair, engineering costs, and the problems he encountered in selling lots due to the problems with the asphalt. Richards testified about the additional engineering costs that would result from the process of repairing the road. Finally, Ryan Waddle ("Waddle"), the loan officer who was handling defendant's development loan, testified about the amount of interest defendant had paid since the paving job was completed.

On 10 September 2010, the jury returned a verdict finding that defendant had not breached the paving contract and that plaintiff had

breached the contract. The jury awarded defendant $370,765.82 in damages. Plaintiff appeals.

II. Johnson's Testimony

[1] Plaintiff argues that the trial court erred by allowing Johnson to testify over a hearsay objection to a conversation he had with NCDOT personnel about minimum asphalt thickness. We disagree.

At trial, Johnson testified, over objection, that "more than one DOT person" told him that asphalt thickness "has to be a minimum . . . over the whole surface. It cannot be averaged out." Plaintiff contends that this testimony constituted inadmissible hearsay. However, Richards also testified, without objection, as follows:

> It is my understanding of the NCDOT that the stone thickness and the asphalt thickness is not an average, but a minimum. So if it says eight and an inch and a half, all the stones should be a minimum of eight, all the asphalt should be a minimum of an inch and a half. That's my interpretation, my understanding based on—I've done—I've done NCDOT certification roadways in nine different counties working under several—not just Jackie McSwain, but working with several other resident engineers. And that's always been their criteria, that it is a minimum standard.

Richards' testimony was substantially the same as Johnson's challenged testimony, and "it is the well-established rule that the admission of evidence without objection waives any prior or subsequent objection to the admission of evidence of a similar character." *Venters v. Albritton*, 184 N.C. App. 230, 240, 645 S.E.2d 839, 846 (2007). Accordingly, plaintiff has waived this argument, and it is overruled.

III. Directed Verdict

[2] Plaintiff argues that the trial court erred by denying its motion for directed verdict. We disagree.

Initially, we note that plaintiff did not make a specific argument in conjunction with its motion for directed verdict. N.C. Gen. Stat. § 1A-1, Rule 50(a) (2009) expressly requires that "[a] motion for a directed verdict shall state the specific grounds therefore." Moreover, this Court has held that "[i]f the [trial] court denies a motion for a directed verdict which fails to state the specific grounds for the motion, the moving party may not complain of the denial on appeal." *Pergerson v. Williams*, 9 N.C. App. 512, 516, 176 S.E.2d 885, 888 (1970) (quoting 2B Barron and Holtzoff, Federal Practice and Procedure, § 1073, p. 370). However, our Courts have also stated that

"[a]lthough the provision in Rule 50(a) that a motion for a directed verdict shall state the specific grounds therefore is mandatory, the courts need not inflexibly enforce the rule when the grounds for the motion are apparent to the court and the parties." *Heist v. Heist*, 46 N.C. App. 521, 523, 265 S.E.2d 434, 436 (1980) (citing *Anderson v. Butler*, 284 N.C. 723, 202 S.E.2d 585 (1974)), *overruled on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998).

In the instant case, it was clear that the determinative issue was whether plaintiff's paving job complied with the terms of the paving contract, and thus, we may review the trial court's ruling in this context.

> The standard of review for a motion for directed verdict is whether the evidence, considered in the light most favorable to the non-moving party, is sufficient to be submitted to the jury. A motion for directed verdict should be denied if more than a scintilla of evidence supports each element of the non-moving party's claim.

Weeks v. Select Homes, Inc., 193 N.C. App. 725, 730, 668 S.E.2d 638, 641 (2008) (citation omitted). "[T]he court must consider even 'incompetent' evidence in ruling on a motion for a directed verdict." *Hart v. Warren*, 46 N.C. App. 672, 678, 266 S.E.2d 53, 58 (1980). "This Court reviews a trial court's grant of a motion for directed verdict *de novo*." *Weeks*, 193 N.C. App. at 730, 668 S.E.2d at 641.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 369, 618 S.E.2d 867, 870 (2005) (internal quotations and citation omitted). In the instant case, the parties do not dispute the existence of a valid contract. Rather, defendant claimed that plaintiff breached the paving contract by failing to "Furnish & Install 8" ABC Stone Base" and "Furnish & Install 1.5" SF9.5A Asphalt Pavement," as required by the contract.

Plaintiff contends that its paving work fully complied with the terms of the paving contract. Plaintiff makes three specific contentions that it believes entitles it to relief: (1) that all of the JTR cores and the 2008 Boyle cores complied with the contract; (2) that the January 2009 Boyle cores and the May 2009 Boyle cores were not extracted pursuant to NCDOT regulations and should have been discarded; and (3) that even if use of the 2009 cores was appropriate, the minimum thickness of core samples is not, under NCDOT guidelines, measured as an absolute minimum over the entire roadway. Under plaintiff's interpretation of these guidelines, the minimum thickness must be determined by averaging core samples to obtain an average minimum.

Each of plaintiff's arguments focus solely on the paving contract requirements regarding the thickness of the asphalt. Plaintiff fails to address the second requirement of the paving contract regarding the thickness of the stone base, and defendant provided sufficient evidence that plaintiff's paving work did not comply with this portion of the paving contract.

Neither the JTR cores nor the 2008 Boyle cores were tested to determine whether the stone base was the requisite eight inches thick. As a result, neither set of core samples could establish whether or not plaintiff complied with the stone base requirements in the paving contract. The first attempt to test the thickness of the stone base was the taking of the January 2009 Boyle cores, which were entered into evidence at trial. The stone base for these seven cores measured eight inches for only five of the core samples; the remaining two samples measured seven inches and seven-and-one-half inches, respectively. Thus, whether measured as individual minimums or as an average minimum over the seven cores, the stone base of the January 2009 Boyle cores measured less than eight inches thick as required by the contract. Therefore, these samples provided more than a scintilla of evidence regarding plaintiff's failure to comply with one of the terms of the paving contract. Accordingly, the trial court properly denied plaintiff's motion for a directed verdict and submitted defendant's breach of contract claim to the jury. This argument is overruled.

IV. Damages

Plaintiff argues that the jury's award of damages were contrary to law and should be vacated. We agree and award plaintiff a new trial on this issue.

A. Preservation

[3] Initially, we note that at trial, plaintiff did not object to any evidence regarding damages or to the jury instructions on damages. Plaintiff also failed to make a damages argument as part of its directed verdict motion. Moreover, plaintiff did not make a motion for judgment notwithstanding the verdict, a motion for a new trial on the issue of damages, or a motion for remittitur. Consequently, plaintiff has failed to properly preserve this issue for appellate review. *See* N.C.R. App. P. 10(a) (1) (2011).

However, in "exceptional circumstances," an appellate court may "take th[e] extraordinary step" of invoking N.C.R. App. P. 2 "when

necessary to prevent manifest injustice to a party or to expedite decision in the public interest." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008)(internal quotations and citations omitted). After reviewing the jury's damages award in the instant case, we conclude that the requisite exceptional circumstances exist to invoke Rule 2 and excuse plaintiff's failure to preserve this issue.

B. Amount of Damages

[4] [D]amages are allowed for breach of contract as may reasonably be supposed to have been in the contemplation of the parties when the contract was made or which will compensate the injured party for the loss which fulfillment of the contract could have prevented or the breach of it has entailed[.]

Weyerhaeuser Co. v. Supply Co., 292 N.C. 557, 560-61, 234 S.E.2d 605, 607 (1977) (internal quotations and citations omitted). "[T]he party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 547-48, 356 S.E.2d 578, 586 (1987).

This Court has stated that

> [o]ur courts recognize two methods of measuring damages in construction contract cases, both of which are intended to put the injured party in as good a position as if the contract had been fully performed. The first method . . . awards the injured party the cost of repair necessary to make the [construction] conform to the contract specifications. The second method awards the injured party the difference in value between the [construction] contracted for and the [construction] actually received.

Kenney v. Medlin Const. & Realty, 68 N.C. App. 339, 343-44, 315 S.E.2d 311, 314 (1984).

In the instant case, defendant was seeking recovery under the first method. The trial court instructed the jury that plaintiff was seeking "the reasonable costs to the defendant of labor and materials necessary to correct the asphalt paving services to bring it into conformity with the requirements of the contract" as direct damages. The trial court also instructed the jury that defendant was seeking the

"[c]osts of additional engineering tests at the request of the North Carolina Department of Transportation" as incidental damages and "[i]nterest payments made on a development loan and two lost lot sales" as consequential damages.

A comparison of the trial court's jury instructions with defendant's evidence at trial reveals that defendant's evidence did not support the full amount of the jury's verdict. Johnson testified as to defendant's direct damages. Specifically, he stated that it would cost $124,250.00 to repair the subdivision asphalt and an additional $11,310.00 to repair and reseed the sides of the roads. Richards testified that repairing the roadways would also require an additional $4000.00 in engineering costs.

For incidental damages, Johnson testified that defendant had paid Boyle $6502.82 to perform additional testing after plaintiff completed its paving work. For consequential damages, Waddle, the loan officer handling defendant's loan, testified that defendant had paid $72,017.29 in interest since the paving had been completed. In addition, Johnson testified that he had to return the deposit for a single lot which had been contracted to sell for $45,000.00. There was no specific testimony regarding a contract on a second lost lot sale, but Johnson testified that the typical selling price of a lot would be between $30,000.00 and $60,000.00. Johnson also testified about defendant's business plan and expected profits on other lots. However, as noted above, the jury was only instructed to find damages on two lots.

The result of adding together all of defendant's evidence regarding the damages which were included in the jury instructions would total, at most, $323,080.11. This total is considerably less than the amount of the jury's verdict. Since the damages award was a lump sum award which did not specify the amounts the jury awarded for direct, incidental, and consequential damages, we cannot determine which type of damages led to the jury's erroneous award. As a result, we must vacate the damages award and remand for a new trial on the issue of damages.

C. Measure of Damages

[5] Plaintiff additionally argues that defendant's evidence of damages was not measured properly. "[T]he proper standard with which to measure . . . damages is a question of law." *Olivetti*, 319 N.C. at 548, 356 S.E.2d at 586. We agree with plaintiff that there were multiple

problems with the way in which defendant's damages were measured at the original trial that necessitate clarification of the appropriate standard.

First, the undisputed evidence at trial was that defendant was not required to pay anything on the contract until after plaintiff's work had been completed. As a result of this unusual arrangement, defendant has paid nothing to plaintiff for its paving work. Under these circumstances, awarding defendant damages for the costs of repairs to the asphalt would allow defendant to receive the asphalt paving for free. Such a result would fail to "put the injured party in as good a position as if the contract had been fully performed." *Kenney*, 68 N.C. App. at 343, 315 S.E.2d at 314. Instead, defendant would receive a windfall recovery in the form of free paved roads. Accordingly, on remand, the determination of defendant's repair costs must include an offset of the contract price defendant had originally agreed to pay.

In addition, the measure of damages for the two lost lot sales must be measured by defendant's net profits. *See Bowles Distributing Co. v. Pabst Brewing Co.*, 80 N.C. App. 588, 597, 343 S.E.2d 543, 548 (1986) ("[L]ost profits damages are usually defined as lost net profits, with all costs being deducted."). In the instant case, Waddle testified that under the terms of defendant's loan agreement, defendant was required to pay 85% of any lot sales towards its loan. Thus, the correct measure of defendant's lost profits on the two lots would be the 15% that defendant retained from the sale plus any corresponding benefit from the reduction of the loan principal.

V. Conclusion

Plaintiff waived any hearsay objection to Johnson's testimony regarding his conversations with NCDOT personnel. Defendant presented more than a scintilla of evidence to support submitting defendant's breach of contract claim to the jury. Plaintiff failed to properly preserve appellate review of the jury's damages award. Nevertheless, since the full damages award was not supported by the evidence presented at trial and the damages may have been measured incorrectly, we waive plaintiff's failure pursuant to N.C.R. App. P. 2 and award plaintiff a new trial on the issue of damages.

No error in part and new trial in part.

Chief Judge MARTIN and Judge BRYANT concur.

SOUTHERN SEEDING SERVICE, INC., PLAINTIFF v. W.C. ENGLISH, INC.; LIBERTY MUTUAL INSURANCE COMPANY; AND TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA, DEFENDANTS

No. COA11-381

(Filed 6 December 2011)

1. Contracts—construction—equitable adjustment and delay damages clauses—distinct

The trial court erred in a non-jury trial in a contract action arising from a road construction project by determining that one clause of the contract foreclosed relief under a different clause and that plaintiff was not entitled to an equitable adjustment. Equitable adjustment and delay damages clauses are often found in construction contracts and allocate distinct risks. The trial court's blending of the separate provisions failed to give effect to the contract as a whole and frustrated the intentions of the parties.

2. Construction Claims—road construction contract—payment bond—seeding subcontract

Breach of a seeding subcontract was within the terms of a payment bond on a road construction contract where the bond stated that it applied to "all persons supplying labor and materials in the prosecution of the project."

Appeal by Plaintiff from orders entered 13 July 2010 and 11 October 2010 and from judgment entered 8 September 2010 by Judge Shannon R. Joseph in Guilford County Superior Court. Heard in the Court of Appeals 27 September 2011.

Conner Gwyn Schenck, PLLC, by Timothy R. Wyatt and A. Holt Gwyn, for Plaintiff-appellant.

Ragsdale Liggett, PLLC, by William W. Pollock and Carrie Barbee, for Defendant-appellees.

HUNTER, JR., Robert N., Judge.

Southern Seeding Service, Inc. ("Plaintiff") appeals the trial court's dismissal of its breach of contract claim against W.C. English, Inc. ("English") and its claim for damages against Liberty Mutual Insurance Company ("Liberty Mutual") and Travelers Casualty & Surety Company of America ("Travelers Casualty") (collectively, "the Sureties"). Plaintiff also appeals the trial court's order denying its

motion to amend judgment and motion for a new trial. Plaintiff contends the trial court erred by (1) misconstruing "no damages for delay" and "equitable adjustment" clauses in the subcontract entered into between Plaintiff and English; and (2) concluding that Liberty Mutual and Travelers Casualty were not liable to Plaintiff as sureties on a statutorily required payment bond. After careful review, we reverse and remand.

I. Factual & Procedural Background

Plaintiff is a North Carolina corporation in the business of performing seeding, fertilizing, and mulching services. Plaintiff has conducted grassing work for various North Carolina Department of Transportation ("NCDOT") projects since 1958. On 15 July 2003, NCDOT opened bidding for a project located in Greensboro ("the Project"). NCDOT's project proposal described the Project as involving "widening, drainage, paving, [and] lighting" work in the Greensboro "Western Loop" area extending "from I-40 to North of Bryan Boulevard." NCDOT's proposal specified 1 July 2007 as the completion date for the Project.

NCDOT awarded the principal contract on the Project to APAC-Atlantic, Inc., Thompson—Arthur Division ("APAC"). As required by N.C. Gen. Stat. § 44A-26, APAC executed a Contract Payment Bond (the "payment bond") with NCDOT in the amount of $101,558,741.04, guaranteeing payment to all subcontractors and material suppliers on the Project. Liberty Mutual and Travelers Casualty signed as sureties on the payment bond.

APAC subcontracted the grading and grassing work for the Project to English. English, in turn, subcontracted a portion of the grassing work to Plaintiff. The subcontract, entered into between Plaintiff and English on 23 October 2003, included a $2,080 "unit price" for Plaintiff's seeding and mulching services, and listed other specific grassing tasks with accompanying unit prices. Term 1 of the subcontract, titled "Work," provides that Plaintiff must complete the work identified and described in Schedule A. Schedule A, Note 15 (hereinafter referred to as the "equitable adjustment clause" or "Note 15") provides the following:

> Unit prices herein quoted are based upon the assumption that the contract will be completed within time as specified in the specifications at time of bidding. Should our work be delayed beyond said time without fault on our part, unit prices herein quoted shall be equitably adjusted to compensate us for increased cost . . . .

A separate provision in the subcontract, Paragraph 7 (hereinafter referred to as the "no damages for delay clause" or "Paragraph 7") provides:

> Should [Plaintiff], without fault or neglect on its own part, be delayed in the commencement, prosecution, or completion of the Work by the fault or neglect of [English], [Plaintiff] shall be entitled to a reasonable extension of time, only. . . . In no event shall [Plaintiff] be entitled to compensation or damages for any delay in the commencement, prosecution, or completion of the Work except to the extent that [English] shall receive such compensation or damages from Owner or other third party.

Plaintiff commenced work on the Project on or about 26 September 2003. Throughout the Project, APAC expressed concern regarding English's inability to perform its grassing work in a timely manner. In a letter dated 13 July 2006, Plaintiff's president, Ralph Stout, Jr., complained to English that Plaintiff had been "put to extreme extra expense in [its] work due to the manner in which" English had managed the erosion control work. Mr. Stout further stated "[w]e did not bid this job to perform our work under emergency circumstances." When Plaintiff's work on the Project continued past the Project's scheduled completion date of 1 July 2007, Plaintiff informed English it was "keeping detailed records on all items, quantities, costs, etc. since July 1 [2007] in order to furnish the necessary information to make fair and equitable adjustments in [its] unit prices."

Due to what the NCDOT described as "thirteen supplemental agreements," the Project was not completed until 14 March 2008, 256 days beyond the Project's scheduled completion date. Plaintiff did not complete its work on the Project until 21 March 2008. In a letter dated 17 July 2008, Plaintiff notified APAC of its right to an equitable adjustment pursuant to Note 15 of the subcontract for increased costs incurred after 1 July 2007. On 18 November 2008, Plaintiff invoiced English for these costs in the amount of $194,941.39. Additionally, in a letter dated 8 December 2008, Plaintiff notified the Sureties that it would be seeking this payment pursuant to the payment bond if English failed to fully compensate Plaintiff for its work. English proposed to pay Plaintiff $2,300.00, which would cover Plaintiff's unit price increases incurred after 1 July 2007 but would not account for unit price increases incurred between the time Plaintiff commenced its work on the Project and 1 July 2007. Plaintiff rejected English's proposal.

On 23 September 2009, Plaintiff filed a complaint in Guilford County Superior Court alleging two claims for relief. Plaintiff's first claim alleges that English breached its subcontract with Plaintiff by failing to pay Plaintiff $194,941.39 under the equitable adjustment clause for the increases in its unit cost of labor and materials furnished for the Project after 1 July 2007. Plaintiff's second claim for relief alleges that Liberty Mutual and Travelers Casualty are liable to Plaintiff for payment under the payment bond because of English's failure to fully compensate Plaintiff for its work on the Project.

On 2 September 2010, following a bench trial, Judge Joseph entered judgment denying Plaintiff's requested relief. The trial court, "[g]iving effect to Paragraph 7 in conjunction with Note 15" and "construing the Subcontract as a whole," concluded "an equitable adjustment in unit prices *would* be permitted to the extent English receives compensation of increased unit prices for delays in the work from any outside source, including NC DOT or APAC." (Emphasis in original). However, "English was not obligated to equitably adjust [Plaintiff's] unit prices for increased cost, if any, arising from working past 1 July 2007" because "English had no contractual remedy against APAC to receive adjustment in unit prices for delay beyond the original completion date." The trial court dismissed Plaintiff's claim against the Sureties as moot. Judge Joseph subsequently denied Plaintiff's motion for a new trial and motion to amend judgment in an order entered 11 October 2010. Plaintiff filed its notice of appeal as to the trial court's judgment and order on 3 November 2010.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b), as Plaintiff appeals from final judgments of the Superior Court as a matter of right.

III. Analysis

A. Plaintiff's Breach of Contract Claim Against English

[1] We first address Plaintiff's contention that the trial court erred in dismissing its breach of contract claim against English. When reviewing a judgment from a bench trial, "our standard of review 'is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Town of Green Level v. Alamance County*, 184 N.C. App. 665, 668-69, 646 S.E.2d 851, 854 (2007) (citation omitted). The trial court's " '[f]indings of fact are binding on appeal if there is

competent evidence to support them, even if there is evidence to the contrary.' " *Id.* at 669, 646 S.E.2d at 854 (citation omitted). This Court reviews the trial court's conclusions of law *de novo*. *Id.*

On appeal, Plaintiff does not contest the trial court's findings of fact. Plaintiff challenges only the trial court's Conclusions of Law 30, 32, and 33, which are set forth in the trial court's judgment as follows:

> 30. The Court agrees with English that there is a potential conflict in the clauses: equitably adjusting bid unit prices to "compensate" [Plaintiff] for "increased cost" for "delay []" after 1 July 2007, as provided for in Note 15 of the Subcontract, would amount to "compensation . . . for any delay . . . of the Work," as prohibited by Paragraph 7 of the Subcontract. (Second alteration in original) (ellipses in original).
>
> . . . .
>
> 32. With this principle in mind, the Court observes that Paragraph 7 does allow for additional compensation to Southern Seeding "to the extent that [English] shall receive such compensation . . . from [NCDOT] or any third party." Giving effect to Paragraph 7 in conjunction with Note 15, construing the Subcontract as a whole, the agreement contemplated that an equitable adjustment in unit prices would be permitted to the extent English receives compensation of increased unit prices for delays in the work from any outside source, including [NCDOT] or APAC.
>
> 33. As it turned out, however, English had no contractual remedy against APAC to receive adjustment in unit prices for delay beyond the original completion date. Nor did APAC have a contractual remedy to receive adjustment to its unit prices from [NCDOT]. Further, beyond what has already been paid to [Plaintiff] for quantity overruns and additional work, there was not evidence that English in fact had received compensation for work delayed past 1 July 2007. Thus, [Plaintiff] seeks increased compensation in unit prices that English has not received and does not appear to be entitled to receive. Accordingly, English was not obligated to equitably adjust [Plaintiff's] unit prices for increased cost, if any, arising from working past 1 July 2007, as [Plaintiff] seeks.

We begin by noting that this case is one of contract interpretation. As this Court explained in *Int'l Paper Co. v. Corporex Constructors, Inc.*,

> [i]t is well settled that a contract is construed as a whole. The intention of the parties is gleaned from the entire instrument and not from detached portions. Individual clauses are to be considered in context. All parts of the contract will be given effect if possible. This Court has long acknowledged that an interpretation which gives a reasonable meaning to all provisions of a contract will be preferred to one which leaves a portion of the writing useless or superfluous.

96 N.C. App. 312, 316, 385 S.E.2d 553, 555-56 (1989).

Construction contracts often contain clauses with terms of art unique to the construction industry. A "no damages for delay" clause and an "equitable adjustment" clause are two examples of such terms of art. A " 'no damages for delay' clause [ ] often appear[s] in building or construction contracts, and [is] aimed to preclude claims on the part of the contractor or subcontractors for damages due to delay in commencing or completing the performance of such contracts." 67 Am. Jur. Proof of Facts 3d 339 (2002). This Court has defined "delay damages" to include a contractor's "extended 'general conditions' expenses, that is, the cost of keeping tools and equipment on the site for the extended period." *Bolton Corp. v. T.A. Loving Co.*, 94 N.C. App. 392, 404, 380 S.E.2d 796, 804 (1989). An equitable adjustment clause, on the other hand, allocates the risk of increased costs should unforeseen circumstances present "conditions which significantly differ from those indicated to exist in the contract." *S. J. Groves & Sons & Co. v. State*, 50 N.C. App. 1, 59, 273 S.E.2d 465, 495 (1980) (" 'Where parties labor under a mutual mistake as to vital facts, the contract, in the interests of fairness, should be flexible enough to permit an equitable adjustment.' " (citation omitted)). Moreover, our courts have consistently distinguished delay damages from damages incurred for increased costs arising out of the same delay circumstances. *See, e.g.*, *APAC-Carolina, Inc. v. Greensboro-High Point Airport Auth.*, 110 N.C. App. 664, 675, 678, 431 S.E.2d 508, 514, 516 (1993) (denying APAC's delay damages claim and separately rejecting APAC's request for a unit price increase because the contract contained no price-escalation provision); *Davidson & Jones, Inc. v. N.C. Dep't of Admin.*, 315 N.C. 144, 150-51, 337 S.E.2d 463, 466-67 (1985) (specifically distinguishing between damages sought for increased work and the damages for duration-related expenses).

In the case *sub judice*, the trial court's interpretation of Paragraph 7 and Note 15 lies at the heart of the challenged conclu-

sions of law, and, ultimately, led the trial court to its determination that English is not liable to Plaintiff for breach of the subcontract. The trial court's Conclusion of Law 30 states there "is a potential conflict" between Paragraph 7 and Note 15. The language in Paragraph 7 forecloses the possibility of Plaintiff collecting damages "for any delay in the commencement, prosecution, or completion of the Work except to the extent that [English] shall receive such compensation or damages from Owner or other third party." Note 15, on the other hand, provides that Plaintiff's bid for the Project was "based upon the assumption that the contract will be completed" by 1 July 2007 and affords Plaintiff an equitable adjustment should its Project costs increase after that date. Paragraph 7 is clearly a "no damages for delay" clause; Note 15 is clearly an "equitable adjustment" clause. These clauses allocate two distinct risks, and our Courts have consistently treated these provisions separately. *See supra*.

In its Conclusion of Law 32, the trial court "construe[d] the Subcontract as a whole" and determined that the language in Paragraph 7 limiting Plaintiff's delay damages "to the extent that [English] shall receive such compensation or damages from Owner or other third party" also limited Plaintiff's ability to seek an equitable price adjustment under Note 15. The trial court further reasoned (Conclusion of Law 33) that because English had no remedy against APAC or NCDOT, neither Paragraph 7 nor Note 15 afforded Plaintiff a remedy against English. The trial court's reasoning is flawed. As explained supra, Paragraph 7 and Note 15 allocate two distinct risks. The trial court's blending of these separate provisions fails to give effect to the contract as a whole and frustrates the intentions of the parties. *See Int'l Paper Co.*, 96 N.C. App. at 317, 385 S.E.2d at 556 ("When a court is asked to interpret a contract its primary purpose is to ascertain the intention of the parties."). While Plaintiff's relief under Paragraph 7 is limited to the extent English is compensated by APAC or NCDOT for Project delays, Note 15 does not set forth this limitation. Therefore, we cannot agree with the trial court's conclusion that Plaintiff was foreclosed from an equitable adjustment under Note 15 simply because it was foreclosed from delay damages under Paragraph 7. Such a reading fails to give effect to both contractual provisions and improperly shifts the risk of increased material costs to Plaintiff. Plaintiff seeks only an equitable adjustment under Note 15 to recover for market driven cost increases associated with material and labor costs incurred after 1 July 2007, the date originally intended for completion of the Project. The plain language of Note 15 affords Plaintiff

this relief, and the language of Paragraph 7 does not negate it. Accordingly, we hold that the trial court erred in determining that Paragraph 7 foreclosed Plaintiff's relief under Note 15 and further erred in concluding that Plaintiff is not entitled to an equitable adjustment. As we limit our holding to the specific conclusions of law challenged by Plaintiff on appeal (Conclusions of Law 30, 32, and 33), we reverse and remand to the trial court for further proceedings consistent with this opinion.

B. Plaintiff's Claim Against the Sureties on the Payment Bond

[2] We next address Plaintiff's contention that Liberty Mutual and Travelers Casualty are liable to Plaintiff as sureties on a payment bond executed between APAC and NCDOT. The trial court dismissed Plaintiff's claim against the Sureties as moot after concluding English had not breached its contract with Plaintiff. In light of our holding in part III(A) *supra*, we address Plaintiff's contention.

As our Supreme Court stated in *Interstate Equip. Co. v. Smith:*

> It has long been established that a third party, for whose benefit a contract has been made, may maintain an action for breach of that contract. This principle also applies to the intended beneficiaries of a contractor's or subcontractor's bond, and such a beneficiary may maintain an action against the surety on the bond.

292 N.C. 592, 595, 234 S.E.2d 599, 601 (1977) (citations omitted). N.C. Gen. Stat. § 44A-26(a) provides that a "contracting body" for any construction project exceeding $300,000 must require any "contractor or construction manager at risk" to obtain a payment bond. N.C. Gen. Stat. § 44A-26(a) (2009). As this Court has explained, "[c]ontractor payment bonds were designed for the protection of laborers and materialmen and are to be construed liberally for their benefit." *Symons Corp. v. Ins. Co. of N. Am.*, 94 N.C. App. 541, 544, 380 S.E.2d 550, 552 (1989) (citing N.C. Gen. Stat. § 44A-27 (2009)); *RGK, Inc. v. United States Fidelity & Guaranty Co.*, 292 N.C. 668, 235 S.E.2d 234 (1977); *Owsley v. Henderson*, 228 N.C. 224, 45 S.E.2d 263 (1947)). Moreover, "The payment bond shall be solely for the protection of the persons furnishing materials or performing labor for which a contractor, subcontractor, or construction manager at risk is liable." N.C. Gen. Stat. § 44A-26(a)(2) (2009).

In *Symons*, a subcontractor on a hotel construction project contracted with a supplier to provide equipment for the project. *Symons*,

94 N.C. App. at 541-42, 380 S.E.2d at 551. The subcontractor failed to pay the supplier for the costs of the equipment. *Id.* This Court held that the surety on a bond executed by the project's general contractor was liable to the supplier for these equipment costs. *Id.* at 546, 380 S.E.2d at 553; *see also Beachcrete, Inc. v. Water St. Ctr. Assocs., L.L.C.*, 172 N.C. App. 156, 159, 615 S.E.2d 719, 721 (2005) (permitting subcontractor to recover under payment bond, despite not being a party to the payment bond, where the bond "expressly state[d] that it was for 'the benefit of any subcontractor, materialman or laborer.' "); *Boatwright Distribution & Supply, Inc. v. N. State Mech., Inc.*, No. COA09-1077, 2010 WL 3464837 (N.C. Ct. App. Sept. 7, 2010) (unpublished) (holding that surety was liable to subcontractor on payment bond because payment bond applied to "any claimant who, among other things, supplied materials that were 'reasonably required for use in the performance of the Subcontract.' ").

In the instant case, NCDOT required APAC to obtain a payment bond in accordance with N.C. Gen. Stat. § 44A-26. This Court cannot agree with the trial court's conclusion that the payment bond applied "only to payment for labor and materials of the work provided in the contract between APAC and [NCDOT]" and that a "breach of the Subcontract is outside the terms of the bond." Like the plaintiffs in *Symons*, *Beachcrete*, and *Boatwright*, Plaintiff is a subcontractor seeking recovery based upon a payment bond executed by the general contractor on a construction project (here, APAC). The payment bond states that it applies to "all persons supplying labor and materials in the prosecution of the [Project][.]" The clear intent of the North Carolina Legislature, *see* N.C. Gen. Stat. § 44A-26(a)(2) *supra*, in addition to the case law cited *supra* render this language sufficient to hold Liberty Mutual and Travelers Casualty liable to Plaintiff as sureties on the payment bond.

Because we reverse the trial court's judgment as to Plaintiff's underlying claims for relief, we need not address the trial court's denial of Plaintiff's Motion for a New Trial and Motion to Amend Judgment.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's judgment in favor of Defendants and remand this matter to the trial for further proceedings consistent with this opinion.

Reversed and Remanded.

Judges MCGEE and ELMORE concur.

STATE OF NORTH CAROLINA v. MYRON KEITH BRITT

No. COA11-311

(Filed 6 December 2011)

1. Evidence—expert testimony—reversal of ruling on motion in limine—firearm toolmark identification

The trial court did not abuse its discretion in a first-degree murder case by reversing its ruling on a motion in *limine* that limited the expert testimony of two agents about firearm toolmark identification. The trial court evaluated the evidence prior to trial and found the experts' methodology sufficiently reliable and the experts better qualified than the jury to form an opinion.

2. Constitutional Law—effective assistance of counsel—statements opened door to additional evidence

Defendant did not receive ineffective assistance of counsel in a first-degree murder case based on his attorney's statements which opened the door to the admission of testimony of two agents that the two bullets were fired from the same gun. Defense counsel's words created an impression that the bullets did not come from the same gun. Further, defense counsel conducted a zealous cross-examination of the State's experts.

3. Evidence—prior crimes or bad acts—financial hardships and misconduct—false loan application information—altering tax returns—motive

The trial court did not err in a first-degree murder case by admitting several pieces of evidence relating to defendant's financial hardships and misconduct in the years preceding his wife's murder. Defendant's actions in submitting false information in a loan application and altering tax returns were relevant to show motive.

4. Evidence—letter—financial hardships—motive to kill

The trial court did not abuse its discretion in a first-degree murder case by admitting into evidence a letter defendant wrote to an acquaintance, written years before his wife's death, which detailed his financial hardships. The statements in the letter, viewed in conjunction with other evidence, supported the State's theory that defendant had a financial motive to kill his wife.

Appeal by defendant from judgment entered 30 July 2009 by Judge Gregory A. Weeks in Robeson County Superior Court. Heard in the Court of Appeals 7 November 2011.

Roy Cooper, Attorney General, by John G. Barnwell, Assistant Attorney General, and Robert C. Montgomery, Special Deputy Attorney General, for the State.

David L. Neal, for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from a judgment entered upon a jury verdict finding him guilty of the first-degree murder of his wife, Nancy Melton Britt, and sentencing him to life imprisonment without parole. We find no error in his trial.

The evidence at trial tended to show that defendant and Nancy Britt were married in 1976, and lived in Lumberton until 1992 when they moved to Cary. Nancy Britt was a teacher and defendant was a licensed contractor who had his own business, Britt Home Builders. Nancy Britt had two sisters who lived in Lumberton, Judy Ivey and Donna Madrey. Donna Madrey was severely disabled, requiring full-time care, due to an aneurysm and stroke suffered at some time in the past; Judy Ivey was her caretaker. On the evening of 22 August 2003, Nancy Britt drove to Lumberton to care for Ms. Madrey while Ms. Ivey traveled out of town for the weekend. Nancy Britt arrived at about 6:50 p.m. and Ms. Ivey left shortly thereafter. Ms. Ivey spoke by telephone with Nancy Britt about 10:00 p.m. that evening.

Sometime after 3:00 a.m. on 23 August 2003, Lumberton 911 received a call from Ms. Ivey's residence; the caller was unable to communicate. Lumberton Police officers responded and found the rear entrance open, heard Ms. Madrey inside saying "help, hurt, help, hurt," and then discovered Nancy Britt's body lying in a hallway. She had been shot one time in the upper right abdomen. The officers found a single, spent .25 caliber shell casing on the floor of the bedroom in which Nancy Britt was staying. The officers found no evidence of forced entry and the contents of the house did not appear to have been disturbed. Nancy Britt was still wearing her jewelry; her pocketbook and cell phone were still in the bedroom. Ms. Madrey was unable to provide any information as to what had happened. At autopsy, a .25 caliber Winchester expanding metal point bullet and fragment were recovered from Nancy Britt's body.

The State also produced evidence that defendant had borrowed a .25 caliber semi-automatic pistol from his brother, Dickie Britt, approximately five weeks before Nancy Britt's death. After Nancy Britt's death, Dickie Britt called defendant and asked about the gun. Defendant told Dickie that the gun "was in a safe place" and, when Dickie suggested he turn it over to law enforcement to exonerate himself, defendant said "he would have to think about it." Dickie Britt then told law enforcement officers about the gun and related an incident which had occurred about two years previously when the gun had accidentally discharged at their mother's home and the bullet had lodged in a baseboard. The bullet, a .25 caliber Hornady, jacketed, hollow point bullet, was recovered from the baseboard by agents of the State Bureau of Investigation and Lumberton police officers.

When he was interviewed initially by law enforcement officers shortly after Nancy Britt's death, defendant denied that either he or Nancy had a gun or had ever had a gun in their house; he also denied that he had any financial problems. After receiving the information about the gun from Dickie Britt, Agent Trent Bullard of the State Bureau of Investigation again interviewed defendant. Defendant again denied having a gun, but when confronted with his brother's statement, defendant admitted having gotten the gun from Dickie, but told Agent Bullard that he had thrown it in Jordan Lake the very next day after getting it from Dickie. Scuba divers searched the area of the lake in which defendant said he had thrown the gun, but found no firearms. A live, unfired .25 caliber Winchester expanding metal point cartridge was found under the driver's seat of defendant's automobile during a search by S.B.I. agents on 4 September 2003.

S.B.I. Agents Theresa Tanner and Peter Ware, both of whom were permitted to testify as expert witnesses in forensic firearms identification, conducted independent examinations of the bullet taken from Nancy Britt's body and the bullet taken from the baseboard of defendant's mother's house. Based upon the lands and grooves in each bullet, as well as individual microscopic striations and marks present on both of them, both agents reached independent opinions that the bullets had been fired by the same firearm.

The State also offered evidence tending to show that as early as 1998 or 1999, defendant experienced financial difficulties and, around that time, wrote a letter to an acquaintance regarding his substantial financial losses in the stock market and his dire personal financial situation. There was also evidence tending to show that defendant submitted altered federal and state income tax returns for the Britts' per-

sonal taxes and those of his company to BB&T in connection with an application for a loan in December 2002, which substantially increased the mortgage indebtedness on their home. Defendant also took out life insurance policies on Nancy's life totaling $815,000, including a $325,000 policy in 1998, and a $400,000 policy in May 2003, less than four months before her death. Defendant was the named beneficiary of each of the policies.

Defendant offered evidence through a financial analyst that Britt Home Builders was a viable business which earned a profit in all but two years of its existence. Through Nancy's teaching income and defendant's draws from the business, the couple had sufficient income to meet their obligations, enjoyed good credit, and had $34,000 in the bank and $200,000 equity in their home. He also offered evidence tending to show that he and Nancy had a good marriage and seemed happy; no one who testified had noticed anything out of the ordinary during the summer of 2003.

On the night of 22 August, the Britts' daughter had driven defendant's automobile to babysit and returned home about 11:00 p.m. When she arrived, defendant was watching television; she went to bed and did not hear the garage door open or her father leave after that. The teenage daughter of the Britts' next door neighbor was hosting a sleepover that night; she and her guests were up most of the night in a room across from the Britt's garage. They did not hear the garage door open or close and did not see anyone come or go from the Britt residence.

Defendant also offered the testimony of John Dillon, a former chief of the F.B.I.'s firearms and toolmark unit, and William Conrad, a private consultant on firearms identification, both of whom were permitted to testify as experts in the field of firearms examination. Both witnesses testified that they examined the bullet removed from Nancy Britt's body, compared it to the bullet recovered from defendant's mother's home, and found there were insufficient microscopic points of comparison between the two bullets to conclude they had been fired from the same gun.

Prior to trial, defendant moved in limine to exclude Agent Tanner and Ware's firearm identification testimony. After a pretrial hearing, the trial court denied the motion, but stated that, in its discretion, it would limit any testimony by the State's witnesses to statements that the bullets were "consistent," rather than that they had been fired from the same weapon to the exclusion of all others. At trial, however, after defense counsel stated in his opening statement that defend-

ant's experts would testify as to their "opinion that you cannot make a match, that there [are] simply not enough points of comparison on the two bullets," the trial court reversed its earlier ruling in limine and permitted the State's experts to testify to their opinions that both bullets were fired from the same gun.

On appeal, defendant contends the trial court improperly admitted (I) the expert testimony of S.B.I. Agents Tanner and Ware, and (II) evidence of defendant's financial situation. We disagree.

I.

[1] Defendant contends the trial court erred when he reversed his ruling on the motion in limine that limited the expert testimony of Agents Tanner and Ware. Defendant argues that the firearm identification procedures used by the agents were unreliable and they were unqualified to testify as expert witnesses.

A motion in limine seeks pretrial determination of the admissibility of evidence to be introduced at trial. *Hamilton v. Thomasville Med. Assocs., Inc.*, 187 N.C. App. 789, 792, 654 S.E.2d 708, 710 (2007). "The decision of whether to grant [a motion in limine] rests in the sound discretion of the trial judge." *State v. Hightower*, 340 N.C. 735, 746-47, 459 S.E.2d 739, 745 (1995). A trial court has discretion to determine whether to exclude evidence that could confuse or mislead the jury, and the "trial judge's ruling may be reversed for an abuse of discretion only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *State v. Rupe*, 109 N.C. App. 601, 612, 428 S.E.2d 480, 487 (1993). Before trial, the court made findings of fact which supported admitting, but limiting, the expert testimony of Agents Tanner and Ware. Although the court found the testimony sufficiently reliable and the experts qualified, it prohibited them from testifying the bullets were fired from the same weapon to the exclusion of all others. After defense counsel's opening statement, however, the court reversed its ruling, finding it would not be unfairly prejudicial or misleading for the two agents to state that the bullets were fired from the same weapon, in light of the projected testimony of the defense experts that there was insufficient evidence of a "match."

Reversing its ruling on the motion in limine was not an abuse of discretion because the court evaluated the evidence prior to trial and found the experts' methodology sufficiently reliable and the experts qualified. To determine if proffered expert testimony is admissible

under North Carolina Rule of Evidence 702, a trial court must conduct a three-step inquiry to ascertain whether: (1) the expert's method of proof is reliable; (2) the witness presenting the evidence qualifies as an expert; and (3) the evidence is relevant. *State v. Morgan*, 359 N.C. 131, 160, 604 S.E.2d 886, 903-04 (2004). Here, defendant challenges only the first two prongs of this inquiry.

First, defendant argues forensic toolmark identification, in general, is unreliable. In assessing reliability of an offered method of proof, a trial court should review precedent "for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 459, 597 S.E.2d 674, 687 (2004). Once the trial court determines the expert's methods are sufficiently reliable, any doubt as to the "quality of the expert's conclusions go to the weight of the testimony rather than its admissibility." *Id.* at 461, 597 S.E.2d at 688. Courts in North Carolina have upheld the admission of expert testimony on firearm toolmark identification for decades. *See, e.g.*, *State v. Felton*, 330 N.C. 619, 638, 412 S.E.2d 344, 356 (1992); *State v. Anderson*, 175 N.C. App. 444, 450, 624 S.E.2d 393, 398 (2006). Although not binding on this Court, a federal district court in Massachusetts recently revisited and closely examined the reliability of toolmark identification in *United States v. Monteiro*, 407 F. Supp. 2d 351, 372 (2006), and found the methodology reliable. Thus, the trial court's ruling that toolmark identification is sufficiently reliable was consistent with precedent and not manifestly unsupported by reason.

The court may deviate from precedent, however, if the defendant offers new evidence challenging the reliability of the methodology. *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687. In the instant case, however, defendant did not introduce any "new" or "compelling" evidence to the trial court. *Id.* During the pretrial hearing, attorney for the State asserted, "[t]hey haven't presented any evidence regarding the unreliability of the firearm identification," to which the court responded, "I agree with you on that." The court noted that it had "read a lot of material [regarding firearm identification] because [it] knew this issue was coming up." The court, therefore, correctly followed precedent and admitted the expert testimony regarding toolmark analysis of ballistics.

Defendant further argues Agents Tanner and Ware were not qualified to testify as expert witnesses based on a lack of evidence verifying Agent Tanner's training and a shared lack of credentials. For an expert witness to offer opinion testimony, he must have "acquired

such skill through study or experience so as to make him better qualified than the jury to form an opinion on the subject matter." *State v. Alston*, 294 N.C. 577, 584, 243 S.E.2d 354, 360 (1978). "It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession." *State v. Evangelista*, 319 N.C. 152, 163-64, 353 S.E.2d 375, 383 (1987).

The State presented evidence of the qualifications and experience of S.B.I. Agents Tanner and Ware at the pretrial hearing. Although the State did not present verification of Agent Tanner's training, and neither Agent Tanner or Agent Ware were members of a professional organization, Agents Tanner and Ware explained how firearm toolmark identification works and how they conducted their investigations such that they were better qualified than the jury to form an opinion in the instant case. The trial court assessed all the evidence regarding the credentials and methodology of Agents Tanner and Ware and found them competent to testify as experts. Thus, the ruling was not manifestly unsupported by reason, and the trial court did not abuse its discretion by allowing Agents Tanner and Ware to testify.

[2] Defendant next contends that his attorney's statements, which "opened the door" to the admission of the testimony of Agents Tanner and Ware that the two bullets were fired from the same gun, amounted to ineffective assistance of counsel. To succeed in an ineffective assistance of counsel claim, defendant must first show counsel's performance was deficient, meaning that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the U.S. Constitution. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984); *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). Second, the defendant must show the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693.

In this case, defense counsel's use of the word "match" was not an attempt to mischaracterize defendant's evidence; rather, his words, when spoken to the jury, simply created an impression that the bullets did not come from the same gun. While this assertion allowed more persuasive expert testimony to be introduced, defense counsel conducted a zealous cross examination of the State's experts. Moreover, the court gave an amplified instruction to the jury, directing the jurors to consider the witness' training, qualifications, and experience or lack thereof, as well as the reasons given for their opinion and the facts that support their opinion, in determining how much

weight, if any, to give to the expert's testimony. Thus, counsel's statement was not so egregious as to render his performance deficient, depriving defendant of counsel as guaranteed by the Constitution. Because we find defendant has not shown counsel was deficient, we need not determine if defendant was prejudiced by his actions.

II.

[3] Defendant also assigns error to the court's admission of several pieces of evidence related to his financial hardships and misconduct in the years preceding his wife's murder.

Defendant first contends evidence of the false information submitted in his 2002 mortgage application was inadmissible character evidence and, relying on *State v. al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002), too far removed from Nancy's death in both character and temporal proximity to be relevant in this case. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive . . . ." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009). Rule 404(b) is a "general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, [applicable unless] its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Our Court has held "[we] review a trial court's determination to admit evidence under [Rule 404(b)] . . . for an abuse of discretion." *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907, *appeal dismissed and disc. review denied*, 360 N.C. 653, 637 S.E.2d 192 (2006).

The trial court carefully examined the evidence, finding that defendant's action in submitting false information in the loan application was relevant to show motive, and admitted the evidence under North Carolina Rule of Evidence 404(b). Although seemingly unrelated, when viewed in conjunction with other evidence of the Britts' financial hardships, defendant's fraudulent conduct in altering his tax returns supported the State's theory that defendant had a financial motive to murder his wife which grew over a period of several years. The trial court gave a limiting instruction to the jury, instructing it to consider the evidence only for purpose of motive. Furthermore, the trial court suppressed evidence of defendant's previous conviction for unrelated larceny charges in 1999, concluding it was duplicative of evidence already admitted and more prejudicial than probative.

The court, therefore, properly exercised its discretion in admitting some 404(b) evidence and excluding other such evidence.

[4] Defendant next contends that a letter he wrote years before his wife's death to an acquaintance which detailed his financial hardships was more prejudicial than probative, and therefore, should not have been admitted into evidence. The court admitted the letter under Rule 401 and 403, and thus, its ruling will be given great deference on appeal. *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991). Relevant evidence is that which has any tendency, however slight, to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. N.C. Gen. Stat. § 8C-1, Rule 401 (2009); *State v. Freeman*, 313 N.C. 539, 546, 330 S.E.2d 465, 472 (1985). In criminal cases, every circumstance that is calculated to throw any light on the supposed crime is admissible. *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or misleading the jury . . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (2009). The jury is to determine the weight of such evidence. *Hamilto*n, 264 N.C. at 287, 141 S.E.2d at 513.

The trial court admitted as relevant to a contested issue in the case: whether defendant's precarious financial situation, as detailed in the letter, motivated him to murder his wife. The court made a reasoned decision based on arguments from each party that the probative value of the evidence exceeded the prejudice to the defendant under Rule 403. In particular, the letter contained statements disclosing that defendant's wife was not aware of their financial problems, that he had very little money left in his trading account and for his son's college tuition, and that his business was encountering difficulty competing with national builders. These statements, viewed in conjunction with other evidence, support the State's theory that defendant had a financial motive to kill his wife. Thus, admitting the letter was not an abuse of discretion.

No Error.

Judges STROUD and ERVIN concur.

DEWEY D. MEHAFFEY, EMPLOYEE, PLAINTIFF v. BURGER KING, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA10-1421

(Filed 6 December 2011)

1. Workers' Compensation—retroactive payments for attendant care—preapproval required

The Industrial Commission erred in a workers' compensation case by awarding retroactive payments to plaintiff's wife for the attendant care she provided because the services were not preapproved.

2. Workers' Compensation—ongoing attendant care—hospital bed—mobility scooter—weight of testimony for Commission

The Industrial Commission did not err in a workers' compensation case by awarding plaintiff ongoing attendant care, a hospital bed, and a mobility scooter. The fact that other doctors who treated plaintiff disagreed with the recommending doctor that the Commission used to base its findings of fact did not mean those recommendations were not supported by competent evidence. The Commission solely determines the weight to award testimony.

3. Workers' Compensation—home and vehicle modifications—effect a cure or give relief

The Industrial Commission did not err in a workers' compensation case by awarding plaintiff home and vehicle modifications. Although defendants asserted that no physicians testified that these modifications were required to effect a cure or give relief, they were required to enable plaintiff to use the wheelchair and scooter that were required for relief.

Appeal by Defendants from Opinion and Award entered 18 August 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 April 2011.

The Sumwalt Law Firm, by Mark T. Sumwalt and Vernon Sumwalt, and Grimes and Teich, by Henry E. Teich, for Plaintiff-Appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Jeremy T. Canipe and M. Duane Jones, for Defendant-Appellants.

BEASLEY, Judge.

Burger King and its insurance carrier, Liberty Mutual Insurance Company, (collectively Defendants) appeal from an Opinion and Award entered by the North Carolina Industrial Commission (the Commission) granting Dewey D. Mehaffey (Plaintiff) compensation for past and future attendant care, and payment of expenses for medical care and equipment. For the reasons stated herein, we affirm in part and reverse in part.

On 13 August 2007, Plaintiff sustained an admittedly compensable knee injury while working as a manager at Defendant Burger King. On 25 September 2007, Plaintiff underwent surgery on his injured knee. When he did not improve after the operation, his surgeon, Dr. Angus Graham, worried that Plaintiff was developing chronic regional pain syndrome, also known as reflex sympathetic dystrophy (RSD). Dr. Graham referred Plaintiff to chronic pain management specialist, Dr. Eugene Mironer, who performed an unsuccessful lumbar sympathetic block in January 2008. Plaintiff then saw Dr. John Stringfield, his board-certified family physician, who again recommended Plaintiff see a chronic pain specialist, and also referred Plaintiff to a psychiatrist for depression. On 9 June 2008, psychiatrist Dr. Kenneth Leetz evaluated Plaintiff and concluded that his depression was directly related to his injury and the resulting RSD.

Dr. Mironer's records indicate that, as of 20 June 2008, Plaintiff was using a walker. Dr. Mironer wrote Plaintiff a prescription for a walker, but Defendants did not approve the prescription. Defendants did approve a trial spinal cord stimulator, which Dr. Mironer implanted on 11 August 2008, but was not successful. During a follow-up visit to Dr. Mironer's office, Plaintiff requested a hospital bed and physician's assistant Carla Norman referred him to his primary care physician to address "equipment needs and attendant care." When Plaintiff presented to Dr. Stringfield in December 2008 and April 2009, he received prescriptions for a hospital bed, a motorized wheelchair, and a mobility scooter, none of which were authorized by Defendants.

From 15 November 2007 through 14 August 2008, Plaintiff's wife, who is not trained as a Certified Nursing Assistant (CNA), provided some attendant care while continuing to work outside the home. On 15 August 2008, she had to stop working to provide full-time care to Plaintiff.

In March and May 2009, Judy Clouse, a nurse consultant with the Commission, made recommendations that Defendants compensate Plaintiff for: 10 psychological sessions; evaluations by an RSD spe-

cialist, by rehabilitation specialist Dr. Margaret Burke, and by wheelchair specialist CarePartners Seating Clinic; 8 daily hours of attendant care for 5 days per week; and the purchase or rental of a hospital bed. Defendants approved an evaluation by CarePartners, but did not authorize either the motorized or manual wheelchair that the clinic recommended. Nor did Defendants authorize the attendant care recommended by Ms. Clouse. While Defendants did allow for the rehabilitation evaluation, Dr. Burke declined the referral due to Plaintiff's "extremely limited rehabilitation potential" and deferred to Dr. Stringfield's recommendations on equipment needs and prescriptions. Defendants, however, refused to authorize any of Dr. Stringfield's recommendations or prescriptions.

On 5 June 2009, Dr. Stringfield recommended 16 hours of attendant care services per day, retroactive to the date of Plaintiff's RSD diagnosis on 15 November 2007. RSD specialist, Dr. James North, evaluated Plaintiff on 1 July 2009 and recommended various treatments, some of which required at least one week of in-hospital observation. Due to the distance from his home to Dr. North's office, Plaintiff declined further treatment by Dr. North, despite Defendants' offering to provide transportation and hotel accommodations to facilitate these treatments. Dr. North also opined that use of a wheelchair would be counterproductive to Plaintiff's recovery and stated that there is no medical basis for providing a hospital bed to a patient with RSD, opinions in which Dr. Mironer concurred.

By a Form 33 dated 6 April 2009, Plaintiff requested a hearing to determine Defendants' liability for additional medical expenses and treatment, including attendant care. In an opinion and award filed 29 January 2010, Deputy Commissioner J. Brad Donovan awarded Plaintiff compensation for attendant care services provided by his wife, payment of medical expenses incurred or to be incurred, including transportation expenses, and reasonable attorneys' fees. On appeal from the deputy commissioner's award, the Commission reviewed the matter.

In its Opinion and Award, the Commission explicitly gave the most weight to Dr. Stringfield's recommendations regarding equipment issues, and found the hospital bed and mobility scooter were "equipment reasonably required at this time to effect a cure for [P]laintiff's condition." The Commission did not approve the power wheelchair, however, as the doorways in Plaintiff's home are too narrow to accommodate its width. It instead found that Plaintiff was

"entitled to home modifications that would allow mobility and accessibility within his current residence." Once handicap access housing was provided, Defendants would be responsible for a power wheelchair and backup manual wheelchair. Plaintiff was also entitled to vehicle modifications or Defendants' provision of handicap accessible transportation for medical appointments and other authorized purposes.

The Commission also awarded retroactive compensation for Plaintiff's wife's attendant care at a rate of $12.50 an hour, for 4 hours per day from 15 November 2007 through 14 August 2008, and for 16 hours per day beginning 15 August 2008. Plaintiff was further awarded compensation for 16 hours per day of future attendant care by his wife, subject to reduction by any hours provided by a CNA, as the Commission also entitled Plaintiff up to 8 hours per day of CNA assistance. Lastly, the Commission approved Dr. Stringfield as an authorized treating physician.

Defendants filed notice of appeal dated 13 September 2010.

I.

[1] Defendants first argue that the retroactive payments awarded to Plaintiff's wife, for the attendant care she provided, were improper because the services were not pre-approved.

Appellate review of an opinion and award of the Commission "is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). The Commission's conclusions of law "are reviewable *de novo* by this Court." *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997).

In support of their argument, Defendants rely on our Supreme Court's decision in *Hatchett v. Hitchcock Corp.*, 240 N.C. 591, 83 S.E.2d 539 (1954), which reversed an award of retroactive payments for attendant care services to the mother of a plaintiff with a broken leg. This award was reversed because the care was not pre-approved by the Commission, nor was it rendered in response to a sudden emergency,[1] and thus the plaintiff was not entitled to recover for those services.

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1. It is uncontroverted that the attendant care provided by Plaintiff's wife was not in response to a sudden emergency, so the question here is only whether retroactive compensation can be awarded for attendant care services given without pre-approval.

In response, Plaintiff directs our attention to *Godwin v. Swift and Co.*, 270 N.C. 690, 155 S.E.2d 157 (1967). In *Godwin*, our Supreme Court upheld an award of retroactive payments for attendant care given to the blind and partially paralyzed plaintiff by his family, despite the fact that such services were rendered without pre-approval. In so holding, the Supreme Court stated that "[w]hile some of the charges did not have the prior approval of the Commission, they were so approved before a payment or demand for payment was made," and that this constituted a "substantial, if not a technical, compliance with the Commission's rules." *Godwin*, 270 N.C. at 694, 155 S.E.2d at 160. Plaintiffs contend that *Godwin* overruled *Hatchett* in so far as *Hatchett* requires pre-approval for attendant care services. We cannot agree with this contention.

The Supreme Court's opinion in *Godwin* distinguished the two cases by noting that they involved two very different injuries (a severe brain and spinal cord injury versus a broken leg) and were brought under different sections of the statute (N.C. Gen. Stat. § 97-29 in *Godwin* and N.C. Gen. Stat. §§ 97-25, 97-26 in *Hatchett*). At no point in the *Godwin* opinion does the Supreme Court expressly, or implicitly, overrule *Hatchett*. In fact, by concluding that the approval of attendant care services prior to payment or demand for such constituted a "substantial" compliance with the rules, the Supreme Court did not overrule *Hatchett*.

In addition, the holding in *Hatchett* is specifically based upon both the statutes and an Industrial Commission rule which was applicable in 1949 and 1950, providing as follows:

> 'In cases of urgent necessity a special graduate or registered nurse may be furnished for not to exceed seven days. Written authority must be obtained in advance for all services in excess of seven days. *Fees for practical nursing service by a member of claimant's family or anyone else will not be honored unless written authority has been obtained in advance.*'

Hatchett, 240 N.C. at 593, 83 S.E.2d at 541 (emphasis added). The Industrial Commission has now adopted fee schedules and utilization guidelines as directed by the applicable statutes. Section 14 of the Workers' Compensation Medical Fee Schedule addresses "practical nursing services by members of the immediate family of the injured" as follows:

> When deemed urgent and necessary by the attending physician, special duty nurses may be employed. Such necessity must be

> stated in writing when more than seven days of nursing services are required. Except in unusual cases where the treating physician certifies it is required, fees for practical nursing services by members of the immediate family of the injured will not be approved unless written authority for the rendition of such services for pay is first obtained from the Industrial Commission.

N.C. Indus. Comm'n, The North Carolina Workers' Compensation Medical Fee Schedule, Hospital and Ambulatory Surgical Center Section 14. The quoted portion of the current Section 14 contains essentially the same rule as applied by the Supreme Court in *Hatchett*. In fact, the relevant portion of the current rule is almost identical to the rule in effect at the time of *Hatchett*. The rule specifically addresses "practical nursing services by *members of the immediate family*," which is obviously the situation presented in this case.

In the instant case, as in *Hatchett*, Plaintiff did not receive preapproval for the attendant care services provided by his wife. Plaintiff brought his claim for retroactive payment for those services under N.C. Gen. Stat. §§ 97-25 and 97-26, the same sections of the statute as the plaintiff in *Hatchett*. Therefore, *Hatchett* controls the resolution of this issue. Accordingly, Defendant is not required to reimburse Plaintiff for the attendant care services provided by his wife. To the extent that the Full Commission's order holds otherwise, we reverse.

II.

[2] Defendants next argue that the Commission erred in awarding Plaintiff ongoing attendant care, a hospital bed, and a mobility scooter because the evidence did not support the findings of fact that the Commission relied on to reach this conclusion. We disagree.

It is well-established that the Commission's findings of fact are "conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. . . . The court does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965).

Several of the Commission's findings of fact support the conclusion that Plaintiff is entitled to compensation for ongoing attendant

care, a hospital bed, and a mobility scooter. The Commission noted that a physician's assistant in the office of Dr. Mironer referred Plaintiff to his primary care physician to address both equipment needs and attendant care. Plaintiff's primary care physician, Dr. Stringer, prescribed a hospital bed, a motorized wheelchair, a mobility scooter, and sixteen hours of attendant care services. Additionally, certified life planner Bruce Holt evaluated Plaintiff and opined that he needs attendant care for at least sixteen hours per day. The Commission explicitly stated that Dr. Stringfield's recommendations were entitled to greater weight than those of Plaintiff's other doctors regarding the need for a hospital bed, mobility scooter, and power wheelchair, and found that this equipment was reasonably required to effect a cure for or give relief to Plaintiff's condition. Evidently, the Commission also gave much weight to Mr. Holt's recommendation for attendant care, as it found that Plaintiff requires attendant care for an average of sixteen hours per day.

The fact that other doctors who treated Plaintiff disagreed with Dr. Stringfield does not mean that the Commission's findings of fact based on those recommendations are not supported by competent evidence. The Commission soley determines how much weight to award testimony and it is not for this Court to second guess those determinations. Thus, we hold that the Commission's findings of fact are conclusive on appeal and we affirm the conclusions of law they support.

III.

[3] Defendants' final argument is that the Commission erred when awarding Plaintiff home and vehicle modifications, because the evidence did not show, and the Commission did not find, that home and vehicle modifications were reasonably required to effect a cure or give relief. We disagree.

As discussed in Section II, supra, the Commission's findings that Plaintiff reasonably required a mobility scooter and a wheelchair to effect a cure or give relief are conclusive on appeal because they are supported by competent evidence. The home modifications were awarded by the Commission because Plaintiff's home could not accommodate a wheelchair. The vehicle modifications were awarded because without them, Plaintiff's wife would only be able to transport his scooter in fair weather, as she must strap it to the back of her vehicle. The Commission found that Plaintiff was entitled to modifications that would allow him to travel regardless of the weather conditions. Defendants assert that no physicians testified that these mod-

ifications were required to effect a cure or give relief, but it is clear that they are required to enable Plaintiff to use the wheelchair and scooter that *are* required for relief. Thus, we find this argument without merit.

Affirmed in part, reversed in part.

Judges MCGEE and STROUD concur.

IN RE: PETITION FOR REINSTATEMENT OF MICHAEL H. McGEE, PETITIONER

No. COA11-471

(Filed 6 December 2011)

Attorneys—discipline—suspension of license—petition to reinstate denied—collateral attack

The Disciplinary Hearing Commission of the North Carolina State Bar (Bar) correctly denied petitioner's motion to amend the records of the Bar to state that his law license had been reinstated and to strike portions of the Bar's record reflecting otherwise. Petitioner did not file a proper petition for reinstatement; further, a prior order refusing reinstatement became final when petitioner did not timely appeal and may not be collaterally attacked.

Appeal by petitioner from order entered 3 February 2011 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 12 October 2011.

Michael H. McGee, pro se.

North Carolina State Bar, by Deputy Counsel David R. Johnson and Counsel Katherine Jean, for respondent-appellee.

ERVIN, Judge.

Petitioner Michael H. McGee appeals from an order denying his motion to amend the records of the North Carolina State Bar to state that his law license had been reinstated and to strike portions of the North Carolina State Bar's record reflecting otherwise. On appeal, Petitioner argues that the Disciplinary Hearing Commission was required, as a matter of law, to reinstate his law license at the end of his five year period of suspension and should, for that reason, amend

the applicable North Carolina State Bar records by removing from public view any documents that are inconsistent with that determination. After carefully reviewing Petitioner's challenges to the DHC's order in light of the record and the applicable law, we conclude that the DHC did not err by denying Petitioner's motion.

I. Factual and Procedural Background

Petitioner, "a 1971 graduate of the University of North Carolina School of Law, was admitted to the North Carolina Bar and practiced law in North Carolina until his suspension on 1 October 2004. . . . [As justification for that action, t]he DHC concluded that [Petitioner had] engaged in criminal acts that adversely reflect[ed] on his honesty, trustworthiness, or fitness as a lawyer . . . and entered an Order of Discipline suspending [him] from the practice of law for five years. . . . [Petitioner] did not appeal the decision of the DHC. Instead, [he] filed suit against the North Carolina Bar and individually against various persons involved in his multiple disciplinary hearings[.] . . . The suit was dismissed . . . for failure to state a claim upon which relief could be granted. . . . [I]n November 2007, [Petitioner] petitioned for a stay of suspension as well as the removal of his two orders of discipline from the public record. Following an evidentiary hearing held in February 2008, the DHC concluded that [Petitioner] did not meet his burden of showing that a stay of suspension was warranted and issued an order denying reinstatement in March 2008. . . . The DHC also denied [Petitioner's] petition to remove his past orders of discipline from the public record. [Petitioner's] subsequent motion for a new trial, alleging retaliation against him for his prior federal lawsuit and various other errors with the DHC's decision, was also denied. [Petitioner] appealed the DHC's decision to this Court in April 2008." *N.C. State Bar v. McGee*, 197 N.C. App 231, 676 S.E.2d 668, *appeal dismissed*, ___ N.C. ___, 683 S.E.2d 215 (2009) (unpublished) (*McGee I*). In *McGee I*, we held that Petitioner's failure to note an appeal from the DHC's disciplinary order precluded him from raising issues that should properly have been asserted in such an appeal by means of a subsequent motion, that his failure to appeal the two earlier orders of discipline also barred him from attempting to have the relevant orders stricken from the record, and that Petitioner's remaining arguments were devoid of merit.

On appeal, Petitioner admits that, "[a]t the conclusion of his five-year period of suspension, [he] . . . filed a petition for reinstatement. The [North Carolina State] Bar denied reinstatement in a published

decision dated February 11, 2010." Petitioner did not appeal the denial of his reinstatement petition. Instead, on 17 November 2010, Petitioner filed a motion asking the DHC to "[a]mend the records of the NC State Bar to restore the petitioner's license to practice law, effective retroactively to a date five years to the day from the date of his suspension," and to "[s]trike from the public records of the NC State Bar . . . all documents and records showing or finding that the petitioner was or had been denied the restoration of his license to practice law at any time after a date five years from the date of his suspension[.]" On 1 February 2011, the DHC conducted a hearing, consisting of a telephone conference call, for the purpose of addressing Petitioner's motion. On 3 February 2011, the DHC entered an order denying Petitioner's motion and concluding, in pertinent part, that

> Petitioner has not filed a proper petition for reinstatement[.] . . . Instead, Petitioner is seeking an Order directing his reinstatement without his first satisfying the conditions precedent as required in the Order of Discipline entered by the DHC. In addition, Petitioner is seeking an Order requiring the North Carolina State Bar to change its public records to reflect reinstatement effective at the end of the fifth year of his suspension.
>
> . . . A lawyer seeking reinstatement from a suspension that contains conditions precedent must satisfy those conditions even if reinstatement is sought more than five years after the effective date of the suspension.
>
> . . . .
>
> The [DHC] has no authority to direct the State Bar to strike any document or record from the public records of the State Bar relating to the denial of petitioner's reinstatement to the practice of law. . . .

Petitioner noted an appeal to this Court from the DHC's order.

II. Legal Analysis

A. Final Order

The North Carolina State Bar is an agency of the State of North Carolina. N.C. Gen. Stat. § 84-15. N.C. Gen. Stat. § 84-28.1(b) provides that the DHC "may hold hearings in discipline, incapacity and disability matters, make findings of fact and conclusions of law after these hearings, [and] enter orders necessary to carry out the duties delegated to it by the Council. . ." According to N.C. Gen. Stat. § 84-28(h),

appeals from disciplinary orders entered by the DHC are subject to the same procedures that govern appeals in civil cases:

> There shall be an appeal of right by either party from any final order of the Disciplinary Hearing Commission to the North Carolina Court of Appeals. Review by the appellate division shall be upon matters of law or legal inference. The procedures governing any appeal shall be as provided by statute or court rule for appeals in civil cases. . . .

N.C.R. App. P. 18(b)(2) provides that appeals from administrative agencies, such as the North Carolina State Bar, must be filed within thirty days after receipt of the final agency decision. As a result, upon denial of a petition for the reinstatement of a suspended law license, the petitioner must note an appeal from the underlying order within thirty days. In the absence of such an appeal, the order denying reinstatement becomes final. *See Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986) (noting that "[p]laintiff did not appeal the adverse determination," causing "the judgment [to] bec[o]me final"), and *Clayton v. N.C. State Bar*, 168 N.C. App. 717, 719, 608 S.E.2d 821, 822 (holding that, since "plaintiff did not appeal the . . . order of discipline which ordered his disbarment, it became a final order"), *cert. denied*, 359 N.C. 629, 615 S.E.2d 867 (2005) (citing *CBP Resources, Inc. v. Mountaire Farms of N.C., Inc.*, 134 N.C. App. 169, 171, 517 S.E.2d 151, 154 (1999)).

B. Collateral Attack on a Final Order

"A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid." *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969) (citation omitted). "A collateral attack on a judicial proceeding is 'an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it.' " *Regional Acceptance Corp. v. Old Republic Surety Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003) (quoting *Hearon v. Hearon*, 44 N.C. App. 361, 362, 261 S.E.2d 9, 10 (1979)).

A final order is generally not subject to collateral attack. "If the court had jurisdiction of the subject-matter and the parties, it is altogether immaterial how grossly irregular or manifestly erroneous its proceedings may have been; its final order cannot be regarded as a nullity, and cannot, therefore, be collaterally impeached." *Starnes v. Thompson*, 173 N.C. 466, 469, 92 S.E. 259, 260 (1917) (citation omit-

ted). The prohibition against collateral attacks on a final judgment is applicable to a petitioner's failure to appeal a DHC order. *See*, *e.g.*, *McGee I* (stating that the petitioner's "failure to appeal the payment of cost requirement following entry of the order of discipline forecloses our review of the condition's reasonableness now," given that, "[w]hen a party fails to appeal a ruling on a particular issue, he is then bound by that failure and may not revisit the issue in subsequent litigation") (citing *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231, *disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001)), and *N.C. State Bar v. Wood*, ___ N.C. App ___, ___, 705 S.E.2d 782, 786 (2011) (holding that, since the defendant "never appealed the . . . order of discipline," he "cannot now challenge the findings of fact and conclusions of law contained in [this] order[ ]").

C. Petitioner's Motion

In denying Petitioner's motion, the DHC noted that "Petitioner [had] not filed a proper petition for reinstatement." We agree.

According to N.C. Gen. Stat. § 84-23(a):

> . . . [The N.C. State Bar shall] formulate and adopt rules of professional ethics and conduct; investigate and prosecute matters of professional misconduct; grant or deny petitions for reinstatement; . . . and formulate and adopt procedures for accomplishing these purposes.

Acting pursuant to its rulemaking authority, the State Bar has adopted 27 N.C.A.C. § 01B.0125(b), which sets out a detailed procedure for obtaining reinstatement of a suspended attorney's law license and provides, in pertinent part, that:

> (1) No attorney who has been suspended may have his or her license restored but upon order of the commission or the secretary after the filing of a verified petition as provided herein
>
> . . . .
>
> (3) Any suspended attorney seeking reinstatement must file a verified petition[.] . . . The petitioner will have the burden of proving the following by clear, cogent and convincing evidence:
>
> (A) compliance with Rule .0124 of this subchapter;
>
> (B) compliance with all applicable orders of the commission and the council;

> (C) abstention from the unauthorized practice of law during the period of suspension;
>
> . . . .
>
> (E) abstention from conduct during the period of suspension constituting grounds for discipline under [N.C. Gen. Stat. §] 84-28(b);
>
> . . . .
>
> (J) payment of all membership fees, Client Security Fund assessments and late fees due and owing to the North Carolina State Bar[.]
>
> . . . .
>
> (7) . . . [A] hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the rules of evidence applicable in superior court.
>
> (8) The hearing panel will determine whether the petitioner's license should be reinstated and enter an appropriate order which may include additional sanctions in the event violations of the petitioner's order of suspension are found . . . [and which] must include . . . findings of fact and conclusions of law in support of its decision[.]

As a result, in order to obtain the reinstatement of his license to practice law, Petitioner was required to petition for such relief in the form and subject to the substantive rules set out in 27 N.C.A.C. § 01B.0125(b) and was not entitled to attempt to short-circuit these requirements through the use of some other procedural device.

As the record clearly reflects, Petitioner's motion completely fails to address any of the substantive criteria that must be satisfied in order to obtain the reinstatement of a license to practice law, the reasons that led to the suspension of Petitioner's law license, or Petitioner's present fitness to practice law. Given that set of circumstances, Petitioner has failed to request reinstatement of his license to practice law in the manner required by 27 N.C.A.C. § 01B.0125(b). As a result, the DHC correctly determined that Petitioner's motion was not a petition for reinstatement, so that he had not properly sought restoration of his license to practice law.

Aside from the procedural and substantive deficiencies inherent in the approach embodied in Petitioner's motion, his motion also represents an impermissible collateral attack on the DHC's order refus-

ing to reinstate Petitioner's law license. As we have already noted, Petitioner unsuccessfully sought restoration of his law license approximately one year before filing the motion that is at issue in this case. When Petitioner failed to seek appellate review of the denial of his reinstatement petition in a timely manner, the order refusing to reinstate his license to practice law became final and thus is insulated from collateral attack. *Clayton*, 168 N.C. App. at 719, 608 S.E.2d at 822. The motion that led to the entry of the DHC order that is before us in this case requests the DHC to "correct the record" by "amend[ing] the records" of the N.C. State Bar to reflect that Petitioner's license to practice law had been restored and to "strike from the public records" all indications that his license to practice law remained suspended after the expiration of the five year suspension period. As justification for the requested relief, Plaintiff asserts that, as a matter of law, the DHC was prohibited from attaching any conditions to the restoration of his law license at the end of his five year period of suspension. The argument advanced in Petitioner's motion could and should have been made at the time that Petitioner sought reinstatement of his law license or in the course of an appeal taken from the denial of his reinstatement petition. As a result, Petitioner's motion is also an impermissible collateral attack on the denial of his reinstatement petition. *See Wood*, ___ N.C. App at ___, 705 S.E.2d at 786 (stating that "Defendant failed to timely appeal the 6 August 2007 order of the DHC, and this order is not properly before this Court"). Thus, for the reasons set forth above, the DHC's order denying Petitioner's motion should be, and hereby is, affirmed.

AFFIRMED.

Judges STEELMAN and McCULLOUGH concur.

ULDARICA M. KEETON, EMPLOYEE, PLAINTIFF v. CIRCLE K, EMPLOYER, CONSTITUTION STATE SERVICE COMPANY, CARRIER, DEFENDANTS

No. COA11-632

(Filed 6 December 2011)

1. Workers' Compensation—refusal of suitable employment—findings of fact—conclusions of law

The Industrial Commission did not err in a workers' compensation case by its findings of fact and conclusions of law regarding refusal of suitable employment. Because the issue of plaintiff's refusal of employment was before both the special deputy commissioner and deputy commissioner, the full Commission properly considered that issue and made relevant findings of fact and conclusions of law.

2. Workers' Compensation—suitable employment—constructive refusal—voluntariness

The Industrial Commission did not err in a workers' compensation case by concluding plaintiff's termination was not considered constructive refusal of suitable employment under *Seagraves*, 123 N.C. App. 288. The evidence tending to show that plaintiff never contacted his employer during medical leave or in the more than 18 weeks following the expiration of medical leave and that she was actively seeking alternate employment was sufficient to show that plaintiff voluntarily ended her employment.

3. Workers' Compensation—suitable employment—manager position

The Industrial Commission did not err in a workers' compensation case by finding and concluding that the Market Manager position in Winston-Salem was suitable employment.

4. Workers' Compensation—return to work—reasonable effort

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff did not make a reasonable effort to return to the Market Manager position in Winston-Salem. There was competent evidence showing that plaintiff made no effort to return to this job.

Appeal by Plaintiff from opinion and award entered 10 March 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 November 2011.

Oxner Thomas + Permar, pllc, by Louis A. Waple and Kristin P. Henriksen, for Plaintiff.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones and Neil P. Andrews, for Defendants.

STEPHENS, Judge.

On 28 August 2009, Defendant-employer Circle K and Defendant-carrier Constitution State Service Company ("Defendants") filed with the North Carolina Industrial Commission a Form 24 application to terminate Plaintiff Uldarica M. Keeton's disability benefits, which commenced on 20 October 2008 after Keeton sustained a compensable injury in the course of her employment with Circle K. On 7 October 2009, Special Deputy Commissioner Emily M. Baucom entered an administrative decision and order disapproving Defendants' application. Defendants appealed by requesting an evidentiary hearing.

On 3 December 2009, the matter was heard before Deputy Commissioner Myra L. Griffin. Deputy Commissioner Griffin entered a 4 August 2010 opinion and award, in which she concluded, *inter alia*, that Keeton "failed to prove that any disability or inability to earn wages she has had . . . is related to her [prior compensable] injury by accident." Keeton appealed Deputy Commissioner Griffin's opinion and award to the Full Commission.

The evidence before the Full Commission tended to show the following: Before her injury, Keeton was a Circle K Market Manager in Charlotte whose primary duty was "to supervise the day-to-day operations of each [Circle K] store in [her] market." On 9 June 2008, while traveling to a Circle K store, Keeton was injured in a motor vehicle accident. Defendants admitted compensability, and Keeton sought treatment "for complaints of left knee pain, low back pain and headaches." Thereafter, Keeton "was diagnosed with a lumbar strain, knee contusion, and face/scalp contusion, and was released to return to her regular activity." Following her release, Keeton continued treatment, was referred for physical therapy, and underwent "an MRI scan of the brain." Keeton was subsequently discharged from treatment and again instructed to return to regular activity.

Keeton returned to work at Circle K, and on 25 September 2008, she was transferred to the Winston-Salem market. Keeton traveled to the Winston-Salem market one time before seeking medical treatment on 2 October 2008 for complaints of worsening headaches and low back pain, allegedly associated with her commute from Charlotte to

Winston-Salem. Keeton went on medical leave on 13 October 2008, and disability compensation commenced on 20 October 2008. Thereafter, Keeton "neither returned to Winston-Salem to work as the Market Manager, nor did she contact [Circle K] regarding returning to work in any other capacity," and in June 2009 she "was terminated by [Circle K] for failure to return to work from medical leave."

Between October 2008 and January 2010, Keeton received the following medical advice and treatment: (1) based on an MRI, x-rays, an EMG, and nerve conduction studies, Dr. Theodore Belanger noted "a small central disc protrusion at the L5-S1 level," assigned work restrictions of "no lifting greater than 20 pounds, no prolonged bending, stooping, squatting, kneeling or twisting, and no driving for more than one hour," and assigned "a five percent permanent partial disability rating" to Keeton's back; (2) based on an MRI, an EMG, and a nerve conduction study, Dr. John Welshofer noted "a desiccated disc with central disc bulge at L5-S1" and opined that Keeton's "sitting intolerance was related to pressure in the disc in the low back"; (3) Dr. T. Kern Carlton diagnosed Keeton with a lumbar strain, concussion, and central disc protrusion and placed her on "light duty restrictions which included lifting 20 pounds occasionally"; and (4) a Functional Capacity Evaluation ("FCE") revealed that Keeton was capable of "lifting up to 35 pounds occasionally," "carrying up to 35 pounds occasionally," and "pushing and pulling up to 45 pounds of force." Drs. Belanger, Welshofer, and Carlton each opined that the Circle K Market Manager position in Winston-Salem was suitable employment for Keeton.

Based on the foregoing evidence, the Full Commission found, *inter alia*, that (1) the Market Manager position in Winston-Salem fell within Keeton's permanent restrictions; (2) Keeton did not make a reasonable effort to return to the Market Manager position in Winston-Salem; and (3) Keeton's "refusal of this position was not justified." Therefore, the Full Commission concluded Keeton "is not entitled to any compensation at any time during the continuance" of her unjustified refusal to return to her job. The Full Commission determined that Keeton "is not entitled to payment by [D]efendants of any disability compensation after August 28, 2009, and compensation shall be suspended so long as [Keeton] continues to refuse to accept suitable employment offered by [Circle K]." From the opinion and award of the Full Commission, Keeton appeals.

[1] On appeal, Keeton first argues that the Full Commission's findings of fact and conclusions of law regarding "refusal of suitable

employment" were improper because that issue was not "raised by Defendants in the pre-trial agreement." We disagree. The parties stipulated that the issue of "[w]hether [D]efendants' Form 24 [a]pplication should have been approved" was before the Industrial Commission. In her denial of Defendants' Form 24 application, Special Deputy Commissioner Baucom (1) noted Keeton's contention "that she is physically unable to return to her former position"; (2) noted Defendants' contention that Keeton's physical restrictions "do not impair [her] ability to obtain employment"; (3) found that "the documentation is insufficient to show that [Keeton] is no longer totally disabled"; and (4) concluded that Defendants were not entitled to suspend or terminate Keeton's disability compensation. In our view, the foregoing tends to indicate that in denying Defendants' Form 24 application, Special Deputy Commissioner Baucom considered both the suitability of Keeton's prior employment with Circle K and Keeton's failure to return to that employment. As such, review of Special Deputy Commissioner Baucom's order would necessarily include consideration of Keeton's alleged "refusal of suitable employment." Furthermore, in her review of Special Deputy Commissioner Baucom's order, Deputy Commissioner Griffin found that the Market Manager position was suitable employment for Keeton and that "[Keeton's] refusal of this position was not justified." Because the issue of Keeton's refusal of employment was before both Special Deputy Commissioner Baucom and Deputy Commissioner Griffin, we conclude that the Full Commission properly considered that issue and made relevant findings of fact and conclusions of law. Keeton's argument is overruled.

[2] Keeton next argues that the Full Commission erred in not following this Court's holding in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996). Specifically, Keeton claims that there was no "actual refusal" of employment by Keeton such that her termination by Circle K should be considered "constructive refusal of suitable employment" under *Seagraves*. We disagree.

Section 97-32 provides:

> 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 (2009). This Court has previously held that in applying section 97-32, "the first question is whether the plaintiff's employment was voluntarily or involuntarily terminated." *White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 665, 606 S.E.2d 389, 395 (2005). "If the termination is voluntary and the 'employer meets its burden of showing that a plaintiff unjustifiably refused suitable employment, then the employee is not entitled to any further benefits under [sections] 97-29 or 97-30." *Id.* (quoting *Whitfield v. Lab. Corp. of Am.*, 158 N.C. App. 341, 354-55, 581 S.E.2d 778, 787 (2003)). On other hand, it is only if the departure is determined to have been *involuntary* that the question becomes "whether the termination amounted to a constructive refusal of suitable work under [*Seagraves*]." *Id.* at 665-66, 606 S.E.2d at 395.

In this case, the Full Commission found—and Keeton does not dispute—that after Keeton began medical leave on 13 October 2008, she never returned to work at Circle K and never contacted Circle K "regarding returning to work in any other capacity." Testimony from Keeton's supervisor shows that a Circle K employee's job is protected during a period of medical leave for up to 12 weeks. Although Circle K ultimately terminated Keeton's employment in June 2009, that termination came (1) more than 30 weeks after Keeton's last contact with Circle K, and (2) more than 18 weeks after Keeton's protected medical leave expired. Further, Keeton testified that during the time she was out of work but not yet terminated from employment, she was contacting "staffing agencies and recruiters" to "keep [her] options open and see what was out there." The foregoing evidence—tending to show that Keeton never contacted Circle K during medical leave or in the more than 18 weeks following the expiration of medical leave and that she was actively seeking alternate employment—is sufficient to show that Keeton voluntarily ended her employment at Circle K. This voluntariness obviated any consideration by the Full Commission of "constructive refusal" under *Seagraves*. *White*, 167 N.C. App. at 665-66, 606 S.E.2d at 395. Keeton's argument is overruled.

[3] Keeton next argues that the Full Commission erred "in finding and concluding that the Market Manager position in Winston-Salem was suitable employment." We are unpersuaded. First, the testimony of Drs. Belanger, Welshofer, and Carlton all support the finding that the Winston-Salem position was suitable. Second, despite any alleged contradiction of the doctors' testimony by the FCE, findings of fact by the Full Commission are conclusive on appeal when supported by competent evidence even where evidence exists that would support a

contrary finding. *Johnson v. S. Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004). Because the Full Commission's finding is supported by competent evidence, we conclude that the Full Commission did not err in finding that the Winston-Salem position was suitable. Further, we conclude that this finding justifies a similar conclusion of law. Keeton's argument is overruled.

[4] Finally, Keeton argues that the Full Commission erroneously found that Keeton "did not make a reasonable effort to return to the Market Manager position in Winston-Salem." As such, Keeton contends, the Full Commission's conclusion that Keeton "unjustifiably refused to return to her job" was erroneous. As discussed *supra*, there is competent evidence showing that Keeton made no effort to return to her job at Circle K. Accordingly, the Full Commission's finding that Keeton "did not make a reasonable effort to return" is supported by competent evidence and, thus, binding on appeal. *See id.* The only question, then, is whether the finding that Keeton failed to return to work supports the conclusion that Keeton *unjustifiably* refused to return to work.

Keeton contends that her refusal to return to work was justified because "there is no evidence to establish that [she] knew or should have known that she could at least attempt a trial return to work as a market manager until the completion of the treating physicians' depositions, nearly a year after her June 2009 termination." Keeton argues that prior to the treating physicians' evaluation of the Winston-Salem Market Manager position, she believed she could not return to work and, therefore, her refusal to work was justified. The upshot of Keeton's argument on this issue is that a refusal of suitable employment is "justified" if the employee believes she is unable to perform the available work. For obvious reasons, we decline to hold that the Full Commission must base its determination of whether an employee's refusal is justified solely on that employee's lay opinion that she is unable to perform the work available.

Per section 97-32, it is left to "the opinion of the Industrial Commission" whether an employee's refusal of suitable employment is justified. N.C. Gen. Stat. § 97-32. In this case, the Full Commission concluded as follows:

> The medical evidence, including the testimony of Drs. Belanger, Carlton and Welshofer, establishes that the Market Manager position in Winston-Salem was a suitable position for [Keeton]. Therefore, [Keeton] unjustifiably refused to return to her job,

> which was suitable employment available to her, when she stopped reporting to work following her initial visit to the stores in the Winston-Salem market.

This conclusion was supported by the following findings by the Full Commission: after Keeton was terminated, Drs. Belanger, Carlton, and Welshofer reviewed the Winston-Salem Market Manager position and opined that the position was suitable as long as Keeton was permitted to take short breaks during driving and was not required to lift more than 20 pounds; before Keeton was terminated, Keeton was assigned work restrictions of "no lifting greater than 20 pounds, no prolonged bending, stooping, squatting, kneeling or twisting, and no driving for more than one hour"; a Circle K market manager has "the option of performing physical work; however, they are not required to do so" and "have the authority to delegate physical work." These findings, which were adequately supported by the evidence in the record, combined with the absence of any evidence that short driving breaks were prohibited by Circle K, adequately support the Full Commission's conclusion that Keeton unjustifiably refused suitable employment with Circle K. Accordingly, Keeton's argument that the Full Commission erroneously concluded that Keeton's refusal was unjustified is overruled.

We conclude that the Full Commission appropriately determined that Keeton is not entitled to further benefits based on its conclusions that Keeton's employment termination was voluntary and that Circle K met its burden of showing that Keeton unjustifiably refused suitable employment. *White*, 167 N.C. App. at 665, 606 S.E.2d at 395. The Full Commission's opinion and award is

AFFIRMED.

Chief Judge MARTIN and Judge ELMORE concur.

MUSSA v. PALMER-MUSSA

[217 N.C. App. 339 (2011)]

JUMA MUSSA, PLAINTIFF v. NIKKI PALMER-MUSSA, DEFENDANT

No. COA11-209

(Filed 6 December 2011)

Annulment—motion to dismiss improperly granted—bigamy—improper solemnization—religious dissolution—voidable marriage

The trial court erred by dismissing plaintiff's complaint for annulment. Defendant's prior marriage to another man, which was invalid for want of proper solemnization, was merely voidable until annulled in a direct action by a proper tribunal. There is no authority supporting the dissolution of a marriage by religious means that can be deemed to be the equivalent of a judicial determination regarding the validity of a marriage. Thus, any marriage between plaintiff and defendant was bigamous.

Judge BRYANT dissenting.

Appeal by plaintiff from order entered 27 July 2010 by Judge Christine Walczyk in Wake County District Court. Heard in the Court of Appeals 29 August 2011.

Steven K. Griffith, for plaintiff-appellant.

Nikki Palmer-Mussa, pro se, for defendant-appellee.

CALABRIA, Judge.

Juma Mussa ("plaintiff") appeals from an order dismissing plaintiff's complaint for annulment. We reverse and remand.

I. Background

On 27 November 1997, plaintiff and Nikki Palmer-Mussa ("defendant") were married in Raleigh, North Carolina. The parties separated on 3 February 2009. The parties had three children together.

Earlier in 1997, defendant participated in a wedding ceremony with Khalil Braswell ("Mr. Braswell"). At the ceremony, defendant and Mr. Braswell consented to become husband and wife. Neither defendant nor Mr. Braswell obtained a marriage license, as they only sought to comply with Islamic marriage requirements. After the ceremony, the couple lived together in Maryland, but the marriage was never consummated.

Defendant divorced Mr. Braswell in the manner required by Islamic law by returning the dowry and declaring that she was divorced from her husband. At the time this took place, defendant believed she was divorced since the marriage was entered into under Islamic law and ended under Islamic law. However, defendant never sought a judicial divorce or annulment and Mr. Braswell was still alive.

After returning to North Carolina, defendant met plaintiff. Shortly after meeting, the parties decided to marry and remained married for twelve years. During the marriage, the parties purchased property as husband and wife, filed joint tax returns and defendant was listed as plaintiff's wife on his insurance policy.

On 4 December 2008, defendant filed a complaint for divorce from bed and board, in another action. As a result of those proceedings, the court granted defendant child support, post-separation support and attorney's fees. On 3 December 2009, plaintiff filed a complaint for annulment based on bigamy. Plaintiff alleged his marriage to defendant was void *ab initio*, pursuant to N.C. Gen. Stat. § 51-3, as defendant had been married to Mr. Braswell earlier in 1997, had never obtained an annulment or divorce from Mr. Braswell and Mr. Braswell was still living. On 2 February 2010, defendant filed an answer, affirmative defenses, motions to dismiss and a motion for attorney's fees.

At a trial on the matter, there was a dispute regarding the timing of defendant's disclosure regarding her previous marriage. Defendant stated she disclosed her previous marriage prior to their marriage, but plaintiff claimed he learned of the previous marriage after he and defendant married. The court entered an order on 27 July 2010 granting defendant's motion to dismiss plaintiff's claim for annulment. Defendant's request for attorney's fees was preserved for future determination.

II. Standard of Review

The proper standard of review for an involuntary dismissal is "(1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment." *Woodridge Homes Ltd. Partnership v. Gregory*, ___ N.C. App. ___, 697 S.E.2d 370, 375 (2010) (citations omitted). The trial judge's "findings of fact are conclusive on appeal if supported by competent evidence" but the "trial court's conclusions of law are reviewable de novo on appeal." *Riley v. Ken Wilson Ford, Inc.*, 109 N.C. App. 163, 168, 426 S.E.2d 717, 720 (1993).

III. Bigamy

Plaintiff argues that the trial court erred by granting defendant's motion to dismiss. We agree.

Plaintiff contends that the first marriage was merely voidable, and since the previous marriage with Mr. Braswell had not been annulled nor was there a divorce judgment, defendant was still married to Mr. Braswell when she married plaintiff, therefore, the marriage between plaintiff and defendant was void. The dispositive issue is whether the defendant's first marriage was void *ab initio* or merely voidable because of the status of the person who performed the ceremony. Mr. Braswell's friend, Kareem, who performed the ceremony, was not an imam, an Islamic religious leader. His primary profession was construction. He was not even a member of the church staff or employed by the church.

The law recognizes a distinction between void and voidable marriages. *Pridgen v. Pridgen*, 203 N.C. 533, 536, 166 S.E. 591, 593 (1932). "[A] void marriage is a nullity and may be impeached at any time." *Id.* at 537, 166 S.E. at 593. However, "[a] voidable marriage is valid for all civil purposes until annulled by a competent tribunal in a direct proceeding." *Id.* It is a long-standing rule in North Carolina that the only marriage that is absolutely void is a bigamous marriage. *Watters v. Watters*, 168 N.C. 411, 412, 84 S.E. 703, 704 (1915); *Fulton v. Vickery*, 73 N.C. App. 382, 387, 326 S.E.2d 354, 358 (1985).

When defendant married Mr. Braswell in 1997, the 1977 version of N.C. Gen. Stat. § 51-1 was in effect which stated:

> The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained minister of any religious denomination, minister authorized by his church, or of a magistrate, and the consequent declaration by such minister or officer that such persons are husband and wife, shall be a valid and sufficient marriage.

State v. Lynch, 301 N.C. 479, 486-87, 272 S.E.2d 349, 353-54 (1980). In her answer, defendant admitted that both she and Mr. Braswell participated in a ceremony, consented to take each other as husband and wife, and that each had "plainly expressed his or her consent freely and seriously in the presence of the other." "Upon proof that a marriage ceremony took place, it will be presumed that it was legally per-

formed and resulted in a valid marriage." *Kearney v. Thomas*, 225 N.C. 156, 163, 33 S.E.2d 871, 876 (1945).

The trial court found that there was insufficient evidence to find Kareem "had the status of either 'an ordained minister' or a 'minister authorized by his church' "...or that "Kareem was a magistrate." Based on the findings, the trial court concluded as a matter of law that because there was no marriage license and "insufficient evidence that the marriage ceremony met the requirements for a valid marriage," defendant did not marry Mr. Braswell. Since there was no marriage, the trial court reasoned, there was no need for an annulment, a divorce or the death of either party to terminate the marriage.

While the evidence presented at trial supported the trial court's finding that Kareem was not authorized to conduct the marriage within the statutory requirements, the court's finding does not support its' conclusion of law that defendant and Mr. Braswell were not married. The well-established law in North Carolina confirms that only bigamous marriages are void and all other marriages are voidable. *See Fulton*, 73 N.C. App. at 387, 326 S.E.2d at 358. Furthermore, the Court has uniformly held "that a marriage, without a license as required by statute, is valid." *Sawyer v. Slack*, 196 N.C. 697, 700, 146 S.E. 864, 865 (1929). Therefore, even though defendant and Mr. Braswell did not have a marriage license and the ceremony failed to meet statutory requirements, the marriage is merely voidable.

As stated in *Pridgen*, a voidable marriage is valid until a tribunal annuls the marriage in a direct proceeding. *Pridgen*, 203 N.C. at 537, 166 S.E. at 593. In the instant case, defendant admitted that neither a divorce nor an annulment was granted by a court in North Carolina, or any other state, and that Mr. Braswell was still living. While defendant claimed she and Mr. Braswell were divorced according to the laws of Islam, there is no authority supporting the dissolution of a marriage by religious means that can be deemed to be "the equivalent of a judicial determination" regarding the validity of a marriage. *See Fulton*, 73 N.C. App. at 386-87, 326 S.E.2d at 357 (divorce is a creature of statute). Therefore, at the time of defendant's marriage to plaintiff, she was still married to Mr. Braswell and thus any marriage between plaintiff and defendant was bigamous, and consequently void.

Defendant cites to *Lynch* to support her argument that since her marriage to Mr. Braswell failed to meet the statutory requirements, that the marriage is invalid and her marriage to plaintiff is not bigamous. In *Lynch*, the defendant was charged with the crime of bigamy.

Lynch, 301 N.C. at 479, 272 S.E.2d at 349. The prior marriage was performed by the bride's father who had received a certificate of ordination as minister in the Universal Life Church, Inc. *Id.* at 480-81, 272 S.E.2d at 350. The Court held that the State had failed to prove a prior marriage because "[a] ceremony solemnized by a . . . layman...who bought for $10.00 a mail order certificate giving him 'credentials of minister'. . . is not a ceremony of marriage to be recognized for purposes of a bigamy prosecution in the State of North Carolina." *Id.* at 488, 272 S.E.2d at 354-55.

Despite the similarities to the instant case, in *Lynch* the State had the burden to prove the person performing the marriage ceremony had statutory authority beyond a reasonable doubt. *See Id.* at 486, 272 S.E.2d at 353; 1 Suzanne Reynolds, *Lee's North Carolina Family Law* § 3.8, at 146 (5th ed. 1993). By holding the State failed to meet this burden, rather than annul the marriage, the Court refused to allow the bigamy conviction to stand. *Id.* Therefore, the holding in *Lynch* does not conflict with the general rule that a voidable marriage must be annulled by a direct action. *Id.* Furthermore, no civil case in North Carolina dealing with the issue of bigamy has chosen to follow *Lynch* since it was decided in 1980. Therefore, we hold that defendant's marriage to Mr. Braswell, which is invalid for want of proper solemnization, is merely voidable until annulled in a direct action by a proper tribunal.

IV. Conclusion

Defendant's marriage to Mr. Braswell was voidable, but defendant never took any action to terminate the marriage. As such, the marriage was still valid when defendant married plaintiff. Therefore, the marriage between plaintiff and defendant is void.

Reversed and Remanded.

Chief Judge MARTIN concurs.

Judge BRYANT dissents in a separate opinion.

BRYANT, Judge, dissenting.

Because I do not believe that North Carolina law allows the presumption of validity conferred upon a marriage to be successfully challenged absent direct evidence, I respectfully dissent.

I agree with the majority that the plaintiff presented insufficient evidence to support the conclusion that the marriage ceremony participated in by defendant and Braswell in early 1997 met the statutory criteria set out under N.C. Gen. Stat. § 51-1 (1997) requiring the participation of "an ordained minister of any religious denomination," a "minister authorized by his church," or "a magistrate." N.C.G.S. § 51-1 (1997). Therefore, I agree with the trial court's conclusion "there is insufficient evidence that the marriage ceremony met the requirements for a valid marriage, [thus,] the Court cannot find that Defendant married Mr. Braswell as contemplated by the statute." *See Lynch*, 301 N.C. at 488, 272 S.E.2d at 354 ("Whether defendant is married in the eyes of God, of himself or of any ecclesiastical body is not our concern. Our concern is whether the marriage is one the State recognizes."). However, the dispositive issue is not whether defendant's first marriage was void *ab initio* or merely voidable but, rather, whether plaintiff met his burden of proof establishing that defendant's first marital union was valid and remained in existence at the time defendant married plaintiff.

"Upon proof that a marriage ceremony took place, it will be presumed that it was legally performed and resulted in a valid marriage." *Kearney*, 225 N.C. at 163, 33 S.E.2d at 876 (citation omitted). "[P]roof of the second marriage adduced by the defendant, if sufficient to establish it before the jury, raises a presumption of its validity, upon which property rights growing out of its validity may be based." *Id.* at 163-64, 33 S.E.2d at 876-77. "[W]hen the plaintiff attempts to assert a property right which is dependent upon the invalidity of a marriage, he must, as the attacking party, make good his cause by proof." *Id.* at 163, 33 S.E.2d at 876. "The laws of evidence do not recognize a presumption on a presumption. The facts upon which a presumption is based must be proved by direct evidence." *Id.* (citation omitted).

Here, the record establishes that plaintiff and defendant were married on 27 November 1997. A marriage license was obtained, and the validity of the marriage ceremony is uncontested. Three children were produced from the union.

Because the validity of the current marriage was not raised as an issue before the trial court, North Carolina law confers upon it a presumption of validity. *See id.* If such a presumption is to be successfully countered, it must be by direct evidence, not a presumption. *See id.*

Plaintiff's direct evidence failed to establish the existence of a valid prior marriage as a result of the early 1997 ceremony. Therefore,

plaintiff's claim that his marriage to defendant was void *ab initio* cannot prevail. Further, though perhaps not a part of plaintiff's direct evidence, the record reflects that the early 1997 Islamic marriage plaintiff alleges was valid ended in divorce in a manner recognized under Islamic law. Accordingly, I dissent.

JOHN WORKS, PLAINTIFF v. PAULA WORKS, DEFENDANT

No. COA11-423

(Filed 6 December 2011)

1. Divorce—alimony—imputed income—no finding of bad faith

The trial court erred and an alimony award was remanded where the court reduced the alimony award based on imputed income without a finding that defendant had depressed her income in bad faith.

2. Divorce—alimony—child support obligation—imputed income—no finding of bad faith

The trial court erred and an alimony matter was remanded where the court reduced the wife's alimony award to account for her child support obligation after imputing income to her. There was no finding that the wife had depressed her income in bad faith.

3. Divorce—alimony—duration—findings required

The trial court erred by setting the duration of an alimony award as seven years without setting out its reasons. The matter was remanded for specific findings as to its reasons for the specified duration.

4. Divorce—alimony—husband's needs and expenses—evidence and finding—not in agreement

The trial court erred in an alimony action in its determination of the husband's monthly financial needs and expenses, and the matter was remanded, where the court's finding was derived from the husband's affidavit, but the affidavit and the finding did not correlate.

5. Divorce—alimony—findings—defendant's ability as homemaker

There was sufficient evidence in an alimony action to support a finding that the condition of the home called into question defendant's ability as a homemaker.

6. Divorce—alimony—findings—husband's future work

The evidence in an alimony action was sufficient to support a finding that the husband's work was not guaranteed in subsequent years.

Appeal by defendant from order entered 11 August 2010 by Judge Jacquelyn L. Lee in Lee County District Court. Heard in the Court of Appeals 14 November 2011.

No brief, for plaintiff–appellee.

Doster, Post, Silverman & Foushee, P.A., by Jonathan Silverman, for defendant–appellant.

MARTIN, Chief Judge.

Defendant Paula Works ("wife") appeals from the trial court's 11 August 2010 order awarding her $1,000.00 per month in alimony from plaintiff John Works ("husband") for a period of eighty-four consecutive months. We vacate the order and remand for further proceedings.

Husband and wife were married on 17 October 1991 and separated on 4 December 2008. Two children were born of the marriage; at the date of separation, the children were fourteen and twelve years old, respectively. Husband filed a complaint seeking both temporary and permanent custody of the minor children. Wife filed an Answer and Counterclaim seeking permanent custody of the minor children, post separation support, alimony, and an unequal equitable distribution of the marital assets in her favor. Wife's counterclaim alleged that husband engaged in acts of marital misconduct prior to the date of separation. In his reply to wife's counterclaim, husband admitted to "engag[ing] in illicit sexual behavior," but asked the court to deny the relief sought by wife.

On 11 August 2010, the trial court entered an order on wife's counterclaim for alimony, in which it determined that wife is a dependent spouse within the meaning of N.C.G.S. § 50 16.1A(2) and that husband is a supporting spouse within the meaning of N.C.G.S. § 50 16.1A(5).

After considering the factors set out in N.C.G.S. §50 16.3A(b) and making findings with respect to these factors, the trial court determined that wife is entitled to alimony. In calculating its award, the court imputed income to wife in the amount of $1,256.00 per month, and further reduced her monthly alimony award by $232.00 "for [wife's] share of support for the minor children," and by an additional $45.00 for wife's contribution toward the children's monthly private school expenses. The court then determined that wife is entitled to $1,000.00 per month in alimony for a period of eighty-four consecutive months. Wife appealed.

I.

[1] Wife first contends the trial court erred by reducing her monthly alimony award by $1,256.00 based on the court's finding that wife "has the ability to earn at least minimum wage." Wife argues that the court erroneously reduced her award based on this imputed income because it failed to first find that she depressed her income in bad faith. We agree.

"Alimony is ordinarily determined by a party's actual income, from all sources, at the time of the order. To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed her income in bad faith." *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) (citing *Wachacha v. Wachacha*, 38 N.C. App. 504, 507–08, 248 S.E.2d 375, 377–78 (1978)); *see* 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 9.26, at 340 (5th ed. 1999) [hereinafter *Lee's Family Law*]. "In the context of alimony, bad faith means that the spouse is not living up to income potential in order to avoid or frustrate the support obligation." *Lee's Family Law* § 9.26, at 341. "Bad faith for the dependent spouse means shirking the duty of self-support . . . ." *Id.*; *see also id.* § 9.26, at 340 ("[T]he limitation on use of earning capacity applies to both dependent and supporting spouses."). The trial court might also find bad faith, "or the intent to avoid reasonable support obligations, from evidence that a spouse has refused to seek or to accept gainful employment; willfully refused to secure or take a job; deliberately not applied himself or herself to a business or employment; [or] intentionally depressed income to an artificial low." *Lee's Family Law* § 9.26, at 340–41; *see Bowes v. Bowes*, 287 N.C. 163, 171–72, 214 S.E.2d 40, 45 (1975).

Here, the trial court found that wife's work experience outside the home after the children were born was limited. The court found that wife did not work during the first four years of her younger child's life, and worked a series of minimum wage jobs intermittently in the years that followed. Wife also briefly pursued interests in real estate and hospital office clerical administration, but did not complete the training necessary to find success in these endeavors. Thus, the trial court found that wife "is unemployed, has no recurring income, and has been a homemaker who stayed home with the parties' two minor children while [husband] worked outside the home"; that wife "has failed to seek employment since August 2009"; and that wife "has also failed to obtain any additional training to help her in any employment search." However, the trial court did not find that wife "ha[d] depressed her income in bad faith." *See Kowalick*, 129 N.C. App. at 787, 501 S.E.2d at 675. Therefore, we conclude that the trial court's findings were not sufficient to support its imputation of a monthly income of $1,256.00 to wife. Accordingly, we remand this matter to the trial court with instructions that it determine whether wife depressed her income in bad faith, or, if not, to determine the amount of husband's monthly alimony obligation to wife without imputing the $1,256.00 monthly income to her.

II.

[2] Wife next contends the trial court erred by reducing her monthly alimony award by $232.00 to account for her child support obligation, which the court determined after applying the then effective[1] North Carolina Child Support Guidelines to wife's imputed monthly income of $1,256.00. Wife argues that the court erred by calculating her child support obligation based on imputed monthly income without first determining that she deliberately depressed her income in bad faith to avoid her obligation. Again, we agree.

As with a trial court's consideration of a claim for alimony, "[a] party's earning capacity may be used to calculate the [party's child support obligation] if he deliberately depressed his income or deliberately acted in disregard of his obligation to provide support." *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997). "However, before using the earnings capacity rule there must be a showing that the actions which reduced a party's income were not

1. At the time this order was entered on 11 August 2010, the North Carolina Child Support Guidelines that were applicable were those with the effective date of 1 October 2006.

taken in good faith." *Id.* Thus, where the trial court "finds that the decrease in a party's income is substantial and involuntary, without a showing of deliberate depression of income or other bad faith, the trial court is without power to impute income, and must determine the party's child support obligation based on the party's actual income." *Ellis v. Ellis*, 126 N.C. App. 362, 364–65, 485 S.E.2d 82, 83 (1997).

Here, just as the trial court failed to find that wife deliberately depressed her income with respect to her alimony obligation as a dependent spouse before it imputed income to her, the trial court also did not find that wife had depressed her income in bad faith in disregard of her obligation to support her minor children. Thus, the trial court erred in imputing a monthly income of $1,256.00 to wife before applying the North Carolina Child Support Guidelines. Therefore, we remand this matter to the trial court with instructions that it determine whether wife depressed her income in bad faith, or, if not, to determine the amount of wife's monthly child support obligation without imputing the $1,256.00 of monthly income to her. We further instruct the trial court to adjust the amount of any reduction in husband's alimony obligation to wife, if necessary, to accommodate any changes in the court's calculation of wife's child support obligation.

III.

[3] Wife next contends the trial court erred by setting the duration of the alimony award as eighty four consecutive months from 1 March 2010, without setting forth its reasons for the specified duration of the award. Again, we agree.

N.C.G.S. § 50 16.3A(b) provides, in relevant part, that the trial court "shall exercise its discretion in determining the amount, duration, and manner of payment of alimony," and that the "duration of the award may be for a specified or for an indefinite term," based on the court's consideration of sixteen relevant factors. N.C. Gen. Stat. § 50 16.3A(b) (2009). In making such determinations, the statute provides that the trial court "*shall set forth . . . the reasons* for its amount, duration, and manner of payment." N.C. Gen. Stat. § 50 16.3A(c) (emphasis added). In the present case, the trial court failed to set forth the reasons for its determination that wife is entitled to alimony only for a specified period of eighty-four consecutive months or seven years. Thus, in accordance with the statutory requirements of N.C.G.S. § 50 16.3A(c), we must remand this matter to the trial court with instructions that it make specific findings with respect to its reasons for the specified duration of its alimony award. *See*, *e.g.*,

Friend–Novorska v. Novorska, 131 N.C. App. 867, 870–71, 509 S.E.2d 460, 462 (1998) (holding that the trial court violated N.C.G.S. § 50 16.3A(c) by failing to set forth the reasoning to support the duration of a thirty month alimony award, and ordering the trial court to "make specific findings justifying that award, both as to amount and duration" on remand), *appeal after remand*, 143 N.C. App. 387, 545 S.E.2d 788 (2001).

IV.

[4] Wife next contends the trial court's finding that husband has reasonable financial needs and expenses totaling $6,652.02 per month is not supported by competent evidence. Again, we must agree.

It is well established that "[t]he amount of alimony is determined by the trial judge in the exercise of [her] sound discretion and is not reviewable on appeal in the absence of an abuse of discretion," *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982), and that "[a] ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Nevertheless, according to the trial court's own Findings of Fact 36 and 38, both husband's and wife's "needs and expenses as shown on his [and her] Financial Affidavit[s] . . . [were] incorporated herein by reference." Our review of the financial affidavit filed by husband prior to the hearing in February 2010 shows that husband's current living expenses were identified as $8,691.03, not $6,652.02, as indicated in the challenged Finding of Fact 23. Because the amount attributed to husband for his current living expenses in Finding of Fact 23 does not correlate with the amount listed in the affidavit from which the court indicated this amount was derived, we must remand this matter to the trial court with the instructions that it either (1) make findings to support its determination that husband's monthly reasonable financial needs and expenses totaled $6,652.02, or (2) correct any clerical error with respect to the amount of husband's monthly reasonable financial needs and expenses that may have occurred when reducing the order to writing.

V.

[5] Wife next contends there was insufficient evidence to support the trial court's Finding of Fact 34(l), which found:

> [Wife] stayed home after the birth of the minor children and continued to stay home and not work a full-time job after the minor

> children were both in school. [Wife's] ability to be a homemaker is in question as a result of the condition of the home. This is not a favorable factor for [wife].

Specifically, wife argues that, as a result of reviewing photographs of the parties' home taken immediately prior to the date of separation, the court erroneously attributed the unfavorable condition of the home to wife alone, even though both parties were residing in the home at this time. Nevertheless, wife does not challenge Finding of Fact 13, which found:

> [Wife] had been unable to keep the house clean and tidy since the parties lived in Massachusetts. She began hoarding items, accumulated a tremendous amount of clutter, and kept the former marital residence in total disarray. The kitchen countertops were covered with clutter, plants were left in the sink, and living areas were so filled with clutter that it was difficult to walk or sit. The children's beds, on occasion, did not have sheets on the mattresses and toys, clothes, and clutter were tossed throughout the rooms. [Husband] attempted to clean and straighten the house only to be met with extreme resistance from [wife].

After reviewing the record before us and the court's unchallenged findings of fact, *see Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal."), we conclude that there was sufficient evidence to support the trial court's Finding of Fact 34(l). Accordingly, we overrule this issue on appeal.

VI.

[6] Finally, wife contends there was insufficient evidence to support the portion of Finding of Fact 27 that found, "While [husband] has worked at Johnston Community College as an instructor for the past several years, this work is not guaranteed for him in 2010 or subsequent years." Our review of the record shows that husband's testimony supports this finding and there is no evidence in the record to contradict his testimony. However, wife appears to suggest, without the support of relevant legal authority, that the trial court abused its discretion because "[t]here was no testimony given that [husband] . . . would not have the same employment available to him in 2010 or subsequent years." Because we conclude that wife's unsupported assertion is meritless, we decline to address this issue further. Moreover, we

decline to consider the remaining assertions raised in wife's brief for which wife failed to present supporting legal authority. *See* N.C.R. App. P. 28(b)(6).

Vacated and remanded with instructions.

Judges ELMORE and STEPHENS concur.

IN THE MATTER OF THE FORECLOSURE OF THAT NORTH CAROLINA DEED OF TRUST BY CARVER POND I LIMITED PARTNERSHIP TO UNITED GENERAL TITLE INSURANCE COMPANY, TRUSTEE FOR RED CAPITAL COMMERCIAL FUNDING, LLC AS RECORDED IN THE DURHAM COUNTRY REGISTRY IN BOOK 5710 AT PAGE 308

No. COA11-367

(Filed 6 December 2011)

1. **Deeds—foreclosure—holder of loan documents—surviving corporation after merger**

   The trial court did not err in a foreclosure case by finding that Bank of America was the holder of the pertinent loan documents. Bank of America, as the surviving corporation after a merger, succeeded by operation of law to LaSalle's status as owner and holder of the loan documents.

2. **Receivership—foreclosure—promissory note in default—appointment of receiver—bank had no authority to direct receiver**

   The trial court did not err in a foreclosure case by finding that a promissory note was in default. Once a receiver was appointed, Bank of America had no authority to direct the receiver to make payments on the debt. The receiver's failure to make a distribution to Bank of America in April and May 2010 was not attributable to Bank of America.

Appeal by respondent from order entered 4 November 2010 by Judge Michael R. Morgan in Durham County Superior Court. Heard in the Court of Appeals 29 September 2011.

Law Office of James C. White, P.C., by James C. White and Michelle M. Walker, for respondent-appellant.

Kilpatrick Townsend & Stockton LLP, by Alan D. McInnes and James H. Pulliam, for petitioner-appellee.

THIGPEN, Judge.

Respondent Carver Pond I Limited Partnership ("Carver Pond") appeals from the trial court's order authorizing James Trachtman to act as substitute trustee and to proceed with foreclosure under a power of sale. We must determine whether the trial court erred by finding that Bank of America, National Association ("Bank of America") is the holder of the debt and that the promissory note was in default. Because we conclude the trial court's findings of fact are supported by competent evidence, we affirm.

Carver Pond owns Carver Pond Apartments, located at 4001 Meriwether Drive in Durham, North Carolina. On 9 August 2007, Carver Pond executed a Promissory Note in which it promised to pay a principal amount of $8,100,000.00 plus interest to Red Capital Commercial Funding ("Red Capital"). To secure the loan evidenced by the Promissory Note, Carver Pond executed a Deed of Trust, Security Agreement and Assignment of Lease and Rents (the "Deed of Trust") on Carver Pond Apartments (the Promissory Note and the Deed of Trust are collectively referred to as the "Loan Documents"). On the same date, Red Capital assigned the Loan Documents to Nomura Credit & Capital, Inc., which later assigned them to LaSalle Bank National Association ("LaSalle") on 30 August 2007. On 17 October 2008, LaSalle merged with Bank of America.

After Carver Pond failed to make three monthly payments of $51,624.41 in January through March of 2010, Bank of America sought the appointment of a receiver to administer Carver Pond Apartments. On 5 April 2010, Hawthorne Residential Partners LLC ("Hawthorne") was appointed as receiver to take possession of, manage, and operate Carver Pond Apartments. Although Hawthorne transferred $264,772.00 to Bank of America on 27 July 2010, Hawthorne failed to make payments to Bank of America in April and May 2010. On 4 June 2010, Bank of America sent a letter to Carver Pond stating that Carver Pond was in default for failing to make monthly payments for January through May of 2010. The 4 June 2010 letter also stated that Bank of America accelerated the loan and demanded payment of $8,646,619.64, the entire amount due under the Loan Documents.

On 21 June 2010, Bank of America filed a Notice of Foreclosure Hearing. After a hearing on 22 July 2010, the clerk of Durham County

Superior Court entered an Order Authorizing Foreclosure of Deed of Trust on 14 September 2010. On appeal from the 14 September 2010 order, the trial court heard arguments and entered an Order Authorizing Foreclosure Sale on 4 November 2010. In its order, the trial court found that Bank of America "is the successor by merger to LaSalle"; the "Loan Documents evidence a valid debt of which Bank of America is the holder"; the Note is in default as Carver Pond made no payments since December 2009; and the actions of the receiver appointed by the court "are not those of the Holder; therefore, the Holder did not take advantage of any alleged nonperformance by the Receiver." Based on these findings of fact, the trial court authorized the substitute trustee to proceed with the foreclosure sale. Carver Pond appeals from this order.

On appeal, Carver Pond argues the trial court erred in finding that (I) Bank of America is the holder of the Loan Documents and (II) the Promissory Note was in default.

In reviewing a trial court's order allowing a foreclosure sale pursuant to N.C. Gen. Stat. § 45-21.16(d) (2009), our standard of review is "whether competent evidence exists to support its findings of fact and whether the conclusions reached were proper in light of the findings." *In re Foreclosure of a Deed of Trust Executed by Bigelow*, 185 N.C. App. 142, 144, 649 S.E.2d 10, 12 (2007) (quotation omitted). At the time this foreclosure proceeding was commenced, a clerk of court was required to find five elements to authorize a foreclosure sale:

> (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), and (v) that the underlying mortgage debt is not a subprime loan as defined in G.S. 45-101(4)[.]

N.C. Gen. Stat. § 45-21.16(d) (2009). "On appeal from a determination by the clerk that the trustee is authorized to proceed, the judge of the district or superior court having jurisdiction is limited to determining *de novo* the same . . . issues resolved by the clerk." *In re Adams*, ___ N.C. App. ___, ___, 693 S.E.2d 705, 709 (2010) (quotation and quotation marks omitted).

I. Bank of America as Holder of the Loan Documents

[1] In its first argument on appeal, Carver Pond contends the trial court erred in finding that Bank of America is the holder of the Loan Documents. We disagree.

For the trial court to find sufficient evidence that a petitioner is the holder of a valid debt in accordance with section N.C. Gen. Stat. § 45–21.16(d), the following two questions must be answered in the affirmative: "(1) is there sufficient competent evidence of a valid debt?; and (2) is there sufficient competent evidence that the party seeking to foreclose is the holder of the notes that evidence that debt?" *In re David A. Simpson*, P.C., ___ N.C. App. ___, ___, 711 S.E.2d 165, 170 (2011) (quotation marks and citations omitted). "Our General Statutes define the 'holder' of an instrument as 'the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.' " *Id.* at ___, 711 S.E.2d at 171 (quoting N.C. Gen. Stat. § 25–1–201(b)(21) (2009)). "Furthermore, a 'person' means an individual, corporation, business trust, estate, trust . . . or any other legal or commercial entity." *Id.* (quotation and quotation marks omitted).

Carver Pond cites *In re Adams*, ___ N.C. App. ___, 693 S.E.2d 705 (2010), in support of its argument that evidence of Bank of America's merger with LaSalle is not sufficient evidence that Bank of America is the current holder of the Loan Documents. *Adams*, however, does not address whether evidence of a merger is sufficient evidence that a petitioner is the holder of a note. We find *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 271 S.E.2d 54 (1980), instructive.

In *Econo-Travel*, the plaintiff alleged in its complaint "that it became the owner and holder of the note sued upon by merger with [the] indorsee [of the note] Econo-Travel Corporation." *Id.* at 204, 271 S.E.2d at 58. Although our Supreme Court held that the plaintiff failed to establish a genuine issue as to whether it was the owner and holder of the note because it failed to introduce evidence of a merger, the court noted that "if the alleged merger had occurred, then plaintiff, as the surviving corporation, would have succeeded by operation of law to Econo-Travel Corporation's status as owner and holder of the promissory note, and would have had standing to enforce the note in its own name." *Id.* Furthermore, pursuant to N.C. Gen. Stat. § 55-11-06(a)(2) (2009), when a merger between two corporations occurs, "[t]he title to all real estate and other property owned by each merging corporation is vested in the surviving corporation without reversion or impairment."

Here, the record on appeal contains three documents which evidence the merger between LaSalle and Bank of America. The first document is an Affidavit of Noteholder executed by the Servicer

which states Bank of America is successor by merger to LaSalle. The second document is a certified statement from the assistant secretary of Bank of America attesting that "[e]ffective October 17, 2008, LaSalle Bank National Association . . . merged into and under the charter and title of Bank of America, National Association[.]" The third document is a letter from the Comptroller of the Currency Administrator of National Banks officially certifying that LaSalle merged with Bank of America and authorizing Bank of America "to operate the former main and branch offices of LaSalle" as "branches of Bank of America[.]"

We conclude the three documents in the record are sufficient evidence of the merger between LaSalle and Bank of America. Furthermore, we note that Carver Pond does not dispute that a valid merger occurred between LaSalle and Bank of America; rather, Carver Pond contends that the documents evidencing the merger are not evidence that the Loan Documents were transferred from LaSalle to Bank of America. However, following *Econo-Travel*, we hold that Bank of America, as the surviving corporation after the merger, succeeded by operation of law to LaSalle's status as owner and holder of the Loan Documents. *Econo-Travel*, 301 N.C. at 204, 271 S.E.2d at 58 (stating "if the alleged merger had occurred, then plaintiff, as the surviving corporation, would have succeeded by operation of law to Econo-Travel Corporation's status as owner and holder of the promissory note"). Accordingly, the evidence of the merger between LaSalle and Bank of America is competent evidence that Bank of America is the holder of the Loan Documents.

II. Promissory Note in Default

[2] Carver Pond next contends the trial court erred in finding that the Promissory Note was in default because Bank of America's actions prevented payment of the debt. We disagree.

Carver Pond cites *In re Foreclosure of a Deed of Trust Executed by Bigelow*, 185 N.C. App. 142, 649 S.E.2d 10 (2007), for the proposition that "a mortgage holder cannot demonstrate default if the mortgage holder's own actions prevented performance of the unsatisfied obligation." Although the court in *Bigelow* upheld the trial court's finding that there was no default because the mortgage holder wrongly refused to accept payment from the homeowners, *id.* at 146-47, 649 S.E.2d at 13, we find *Bigelow* distinguishable because it did not involve a receiver. Our Supreme Court has explained the role of a receiver as follows:

> With respect to the court, the parties to the suit in which he is appointed, creditors and other interested persons, and the property in receivership, the position of the receiver is that of an officer of the court. He may be considered a "quasi-trustee," holding legal title and possession as the agent of the court for the beneficial owners. *He is not appointed for the benefit of either party and does not derive his authority from either one.* The parties have no authority over him and have no right to determine what liability he may or may not incur. The receiver is a representative and protector of the interests of creditors and shareholders alike in the property of the receivership.

Lowder v. All Star Mills, Inc., 309 N.C. 695, 701, 309 S.E.2d 193, 198 (1983) (citation omitted) (emphasis added), *rehearing denied*, 310 N.C. 749, 319 S.E.2d 266 (1984).

Here, the parties agree that Carver Pond failed to make monthly payments in January, February, and March 2010, and the trial court appointed Hawthorne as receiver by order dated 5 April 2010. Although Hawthorne transferred $264,772.00 to Bank of America on 27 July 2010, Hawthorne failed to make payments to Bank of America in April and May 2010. Thus, on 4 June 2010, Bank of America sent a letter to Carver Pond stating that Carver Pond was in default for failing to make monthly payments in January through May of 2010 and demanding payment for the entire loan amount.

Carver Pond contends that after the appointment of the receiver, Bank of America had the authority to direct Hawthorne to apply excess funds to the mortgage debt, and Bank of America's failure to do so made further payment by Carver Pond impossible. However, as *Lowder* explains, a receiver is an "officer" and "agent" of the court who "is not appointed for the benefit of either party and does not derive his authority from either one." *Id.* Once Hawthorne was appointed as receiver, Bank of America had no authority to direct Hawthorne to make payments on Carver Pond's debt. Therefore, Hawthorne's failure to make a distribution to Bank of America in April and May 2010 is not attributable to Bank of America. Accordingly, we conclude there is competent evidence to support the trial court's finding of fact that the Promissory Note is in default.

AFFIRMED.

Judges GEER and STROUD concur.

S.T. WOOTEN CORPORATION, PLAINTIFF v. FRONT STREET CONSTRUCTION, LLC; HILLSBOROUGH RESIDENTIAL ASSOCIATES; EYC HILLSBOROUGH, LLC; K & S HILLSBOROUGH RESIDENTIAL, LLC; COLONIAL BANK, N.A.; AND DAWN HELMS SHARFF, TRUSTEE, DEFENDANTS

No. COA11-649

(Filed 6 December 2011)

1. Reformation of Instruments—deed of trust—superior lienholder—restoration to same position—unknown mistake

The trial court did not err by ordering reformation of a deed of trust declaring defendant bank's deed of trust superior to plaintiff's lien. The reformation of the deed would not prejudice the subcontractors. It would merely restore them to the position they assumed they would be in when they performed the work as junior to the lender. Further, plaintiff was not prejudiced because by its own admission, it did not know of the mistake in the deed.

2. Reformation of Instruments—deed of trust—misrepresentation—unclean hands—collateral misconduct—scrivener's error

The trial court did not err by concluding that defendant bank did not have unclean hands based on its alleged misrepresentation regarding defendant Hillsborough Residential Associates' line of credit. The bank's alleged misconduct was only collaterally related to reformation of the deed of trust. The error was due to a scrivener's error, and the trial court had discretionary authority to correct such errors in reformation.

Appeal by plaintiff from order entered 24 November 2010 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 7 November 2011.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Peter J. Marino, Matthew G.T. Martin, and Tobias R. Coleman, for plaintiff-appellant.

Nicholls & Crampton, P.A., by W. Sidney Aldridge, for defendants-appellees.

MARTIN, Chief Judge.

In October 2006, the Harlton Tate McKee Revocable Trust ("McKee Trust") sold certain real property in Orange County to

Hillsborough Residential Associates ("Hillsborough"). The deed, recorded on 4 October 2006, mistakenly described the estate conveyed as "one-half fee simple interest" in the property rather than the entire undivided fee simple interest contemplated by both parties.

In February 2007, Colonial Bank made a construction loan in the amount of $14 million to Hillsborough to fund Hillsborough's development of the property. The deed of trust securing the loan described as collateral for the loan the full undivided interest in the property. Hillsborough contracted with Front Street, a general contractor, to develop the property. In August 2007, plaintiff S.T. Wooten Corporation, a prospective subcontractor, inquired of Colonial Bank to ascertain whether the credit extended by the bank to Hillsborough was sufficient to cover the cost of the proposed work on the property. After being advised that the loan was sufficient to fund the development, on 12 September 2007, plaintiff entered into a contract with Front Street to provide site work and horizontal infrastructure on the property, and began work two days later.

Meanwhile, McKee Trust and Hillsborough realized, at some point, that the original deed contained the scrivener's error, and recorded a corrected deed on 2 November 2007 conveying a full undivided fee simple interest in the property to Hillsborough. Neither plaintiff nor Colonial Bank had knowledge of the error in the deed at that time. Upon learning of the error and recordation of the corrected deed, Colonial Bank re-recorded its original deed of trust in September 2008.

On 13 May 2009, plaintiff completed its work on the property. When payment was not forthcoming, plaintiff filed a claim of lien on the real property on 9 September 2009. Plaintiff also filed suit for money owed, and contended that its lien had priority over the deed of trust to Colonial Bank with regard to the one-half interest in the property not conveyed to Hillsborough in the original deed. Colonial Bank answered and asserted a counterclaim seeking reformation of the 2006 deed from McKee Trust to Hillsborough and a declaratory judgment decreeing that its deed of trust was superior to plaintiff's lien on the property. Colonial Bank moved for summary judgment. The court granted Colonial Bank's motion for summary judgment, reforming the deed and declaring Colonial Bank's deed of trust superior to plaintiff's lien. Plaintiff appeals.

On appeal, plaintiff contends that established precedent requires a declaration that plaintiff's lien is superior to Colonial Bank's deed

of trust, at least with respect to the one-half undivided interest in the property which was not originally conveyed to Hillsborough, and that Colonial's equitable claim for reformation of the 2006 deed from McKee Trust to Hillsborough is barred by Colonial Bank's unclean hands. We reject both arguments.

"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) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

I.

[1] Citing *Lowery v. Wilson*, 214 N.C. 800, 200 S.E. 861 (1939), plaintiff contends it is protected from a reformation claim and, as against a mortgage containing an incorrect description, has the same priority status as a purchaser in good faith. In *Lowery*, our Supreme Court held that a mortgagee of a recorded mortgage, which contained an error as to the amount secured thereby, was not entitled to reformation of the mortgage as against judgment creditors, who occupy the same position as a purchaser in good faith for value. *Id.* at 806, 200 S.E. at 865. We believe plaintiff's reliance on *Lowery* is misplaced, however, as the Court applied the registration statutes in reaching its decision and explicitly acknowledged that parol trusts and those created by *operation of law* are not governed by the registration statutes. *Id.* at 804, 200 S.E. at 864.

A constructive trust is a trust created by operation of law. *E.g.*, *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 171, 684 S.E.2d 41, 49 (2009). When a grantor, through a mutual mistake, conveys less to a grantee than was intended, the grantor holds the remaining portion of the property not conveyed in constructive trust for the grantee. *Arnette v. Morgan*, 88 N.C. App. 458, 461-62, 363 S.E.2d 678, 680 (1988). This is precisely the situation between McKee Trust and Hillsborough. Thus, general equity principles regarding reformation apply in this case, rather than the registration statutes. *See id.* at 462, 363 S.E.2d at 680.

> The general rule is that reformation will not be granted if prejudice would result to the rights of a bona fide purchaser for value without notice or someone occupying a similar status. . . . Where the issue is raised of whether the party resisting reformation is entitled to the protection given a bona fide purchaser for value

> without notice, the burden is on the resisting party to prove good faith payment of new consideration.

Id. at 462, 363 S.E.2d at 680-81.

We agree with defendants that the present case is controlled by this Court's decision in *Noel Williams Masonry v. Vision Contractors of Charlotte, Inc.*, 103 N.C. App. 597, 406 S.E.2d 605 (1991). In *Williams Masonry*, defendant Vision Contractors obtained a construction loan from a lending institution for development of a piece of property. *Id.* at 599, 406 S.E.2d at 606. The loan was secured by a deed of trust, but when the deed of trust was recorded, an attachment describing the collateral property was inadvertently omitted. *Id.* Vision Contractors subsequently hired three subcontractors, who supplied materials and services. *Id.* at 599-600, 406 S.E.2d at 606-07. When Vision Contractors later defaulted on its payments to the subcontractors, each filed liens for money owed. *Id.* at 600, 406 S.E.2d at 607. Upon discovering that the deed of trust failed to contain the legal description, the lending institution rerecorded it. *Id.* The subcontractors brought an action to establish the priority between the deed of trust and their liens. *Id.* The trial court reformed the deed of trust to include the description and related the reformation back to the date of recording of the original deed of trust, reestablishing the lender's priority. *Id.* at 601, 406 S.E.2d at 607.

On appeal, this Court, relying on *Arnette*, determined that the subcontractors should not be given the status of bona fide purchasers for value, because there was no evidence that the subcontractors had provided service and materials in reliance on the defective deed of trust. *Id.* at 603, 406 S.E.2d at 608. Thus, the reformation of the deed of trust would not prejudice the subcontractors; it would merely restore them to the position they assumed they would be in when they performed the work, i.e., junior to the lender. *Id.*

Williams Masonry and the instant case are remarkably similar. As a result of the scrivener's error in the deed, McKee Trust held, by operation of law, the half of the property mistakenly not conveyed in constructive trust for Hillsborough. Plaintiff contracted with Front Street assuming that Colonial, as the lender financing the project, had a superior interest in the property. Plaintiff began work in September 2007, but did not learn of the scrivener's error until sometime in 2009. Thus, it did not begin work or furnish new materials in reliance upon the error in the original deed. Moreover, because plaintiff, by its own admission, did not know of the mistake in the deed, plaintiff is not

prejudiced by reformation of the deed to reflect the original intent of the parties. Just as in *Williams Masonry*, reforming the deed will put plaintiff in the position it expected to be in when it contracted to do the work originally. The trial court did not err in ordering reformation of the deed.

II.

[2] Plaintiff, however, contends Colonial Bank had unclean hands due to its alleged misrepresentation regarding Hillsborough's line of credit, so that it is not entitled to the equitable remedy of reformation of the October 2006 deed. We disagree.

Reformation is an equitable remedy, and in order to enjoy this remedy, "he who comes into equity must come with clean hands." This "maxim applies to the conduct of a party with regard to the specific matter before the court [for] which the party seeks equitable relief and does not extend to that party's general character." *Creech v. Melnik*, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998). The inequitable action need not rise to the level of fraud, though it can, *Stelling v. Wachovia Bank and Trust Co.*, 213 N.C. 324, 327, 197 S.E. 754, 756 (1938); rather "[t]he clean hands doctrine denies equitable relief only to litigants who have acted in bad faith, or whose conduct has been dishonest, deceitful, fraudulent, unfair, or overreaching in regard to the transaction in controversy." *Collins v. Davis*, 68 N.C. App. 588, 592, 315 S.E.2d 759, 762 (1984), *aff'd*, 312 N.C. 324, 321 S.E.2d 892 (1984).

Where, however, the alleged misconduct giving rise to the assertion of unclean hands arises out of matters which are merely collateral to the transaction for which equitable relief is sought, the equitable remedy is not barred. *United Artists Records, Inc. v. Eastern Tape Co.*, 19 N.C. App. 207, 213, 198 S.E.2d 452, 456 (1973). Applying those principles to the present case, while the evidence, viewed in the light most favorable to plaintiff, could show that Colonial Bank made a misrepresentation regarding the amount of funds it extended to Hillsborough, Colonial Bank's alleged misconduct is only collaterally related to the transaction in controversy, namely, reformation of the deed from McKee Trust to Hillsborough. The error in the deed was due to a scrivener's error, and the court's discretionary authority to correct such errors in reformation has long been recognized. *Citifinancial Mortgage Co. v. Gray*, 187 N.C. App. 82, 89, 652 S.E.2d 321, 324 (2007) (citing *Crawford v. Willoughby*, 192 N.C. 269, 271, 134 S.E. 494, 495 (1926)). Plaintiff did not forecast any evidence to show that Colonial caused the scrivener's error or even had knowledge of

it until after it made its representation to plaintiff. Furthermore, plaintiff admits that it did not rely on the erroneous description which was corrected by the reformation and that it was not concerned with Colonial Bank's collateral for the line of credit. Rather, plaintiff's reliance was only upon Colonial Bank's assertion regarding the amount of credit extended to Hillsborough without regard to the manner in which the credit was secured. While it is true that Colonial Bank benefits from reformation of the deed, this benefit is only incidental to the reformation of the transaction between third parties, McKee Trust and Hillsborough, which is wholly unrelated to any representation made by Colonial Bank to plaintiff. Therefore, we hold that since Colonial's alleged wrongdoing is collateral to the transaction in controversy, the trial court did not abuse its discretion in reforming the October 2006 deed. *See Roberts v. Madison County Realtors Assoc.*, 344 N.C. 394, 401, 474 S.E.2d 783, 788 (1996).

Affirmed.

Judges STROUD and ERVIN concur.

STATE OF NORTH CAROLINA v. JOSEPH ROBERT HARRISON SURETY: BRAXTON D. EGGERS, AGENT FOR INTERNATIONAL FIDELITY INSURANCE COMPANY JUDGMENT CREDITOR: WATAUGA COUNTY BOARD OF EDUCATION

No. COA11-343

(Filed 6 December 2011)

1. Bail and Pretrial Release—date of bond forfeiture—deferred prosecution agreement—final judgments

A 24th District administrative order regarding deferred prosecution agreement cases in which no forfeiture of bond had been ordered by a court referred to final judgments of forfeiture. Thus, no forfeiture bond had been ordered in this case as of the date of the 18 August 2010 24th District administrative order, and the order applied to defendant's deferred prosecution agreement.

2. Bail and Pretrial Release—applicability of pretrial release administrative order to district courts

A district court judge did not err in a bond forfeiture case by failing to follow an administrative order regarding pretrial release

applicable to counties within the senior resident superior court judge's district because there was no evidence of record that the senior resident superior court judge entered the administrative order in a manner consistent with N.C.G.S. § 15A-535(a) or after consultation with the chief district court judge.

Appeal by the surety from order entered 25 January 2011 by Judge R. Gregory Horne in Watauga County District Court. Heard in the Court of Appeals 29 September 2011.

Eggers, Eggers, Eggers & Eggers, PLLC, by Stacy C. Eggers, IV, for surety-appellant.

Miller & Johnson, PLLC, by Nathan A. Miller, for judgment creditor-appellee.

THIGPEN, Judge.

The senior resident superior court judge of the 24th Judicial District issued an administrative order regarding conditions of pretrial release applicable to counties within the senior resident superior court judge's district. The order was issued without consulting with the chief district court judge or other district court judges within the district. A district court judge within the judicial district did not follow the administrative order. We must decide whether the district court judge erred by not following the administrative order. We conclude that since the administrative order was issued in contravention of N.C. Gen. Stat. § 15A-535(a) (2009), the district court judge did not err.

The facts of this case are not disputed. On 18 February 2009, Joseph Robert Harrison ("Defendant") was charged with four misdemeanors in Watauga County. Defendant's bond was set at $2,500.00, and Braxton D. Eggers, the agent for the International Fidelity Insurance Company ("the Surety") executed a Surety Appearance Bond on his behalf. On 18 May 2009, Defendant entered into a deferred prosecution agreement with the following conditions: (1) Defendant was placed on unsupervised probation for twelve months; (2) Defendant was required to abide by the regular conditions of unsupervised probation; and (3) Defendant was required to pay court costs and fines in the amount of $308.50. Defendant failed to comply with the terms of the agreement to defer prosecution by failing to appear on 28 May 2010, and an order for his arrest was entered. On 4 June 2010, the Watauga County Clerk of Court's Office sent the Surety a bond forfeiture notice. On 25 October 2010, the Surety filed a

motion to set aside the forfeiture, attaching copies of an administrative order of the 24th Judicial District Senior Resident Superior Court Judge James L. Baker ("the 24th District administrative order"),[1] and an administrative order of Senior Resident Superior Court Judge Robert F. Floyd, Jr., and Chief District Court Judge J. Stanley Carmical in Judicial District 16B ("the District 16B administrative order"). Both orders decreed that "the obligations of a bondsman or other surety pursuant to any appearance bond for pretrial release are, and shall be, terminated immediately upon the entry of the State and the Defendant into a formal Deferred Prosecution Agreement[.]" The Surety's motion stated that the forfeiture must be set aside pursuant to N.C. Gen. Stat. § 15A-544.5(b)(2) (2009), which states that "a forfeiture shall be set aside" if "[a]ll charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave, as evidenced by a copy of an official court record, including an electronic record." The Watauga County Board of Education ("the Judgment Creditor") timely filed an objection to the Surety's motion.

On 25 January 2011, the district court entered an order denying the motion to set aside the forfeiture. From this order, the Surety appeals.

I: Background

The 24th District administrative order in the matter of appearance bonds and deferred prosecution agreements is central to this appeal. The order decrees, in pertinent part, the following:

IT IS THEREFORE ORDERED:

1. *That the obligations of a bondsman or other surety pursuant to any appearance bond for pretrial release are, and shall be, terminated immediately upon the entry of the State and a Defendant into a formal Deferred Prosecution Agreement*, approved by a court, concerning the underlying criminal charges referred to in the Appearance Bond for Pretrial Release.

2. That this order shall be applied both prospectively and retroactively, as to Deferred Prosecution Agreement cases in which no forfeiture of bond has as of this date been ordered by a court.

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1. Watauga County is in the 24th Judicial District.

3. That in such cases regarding Deferred Prosecution Agreements in which a forfeiture of bond has been ordered, sureties or bondsmen shall have the right to petition a court for appropriate remedy, and this order may be presented in support of the sureties' position.

4. That this order shall remain in effect indefinitely unless modified, amended, or vacated by future court order.

5. This order shall be effective from the date of execution. (Emphasis added)

The 24th District administrative order was signed by only the senior resident superior court judge. The order was not signed by the chief district court judge.

I: Date of Forfeiture

[1] Preliminarily, we address the Judgment Creditor's contention that the date of forfeiture was 4 June 2010, and that 4 June 2010 is the applicable date to consider in the context of the 18 August 2010 24th District administrative order, which states, "this Order shall be applied both prospectively and retroactively, as to Deferred Prosecution Agreement cases in which no forfeiture of bond has as of this date been ordered by a court." The date of entry of forfeiture was 4 June 2010; however, the final judgment of forfeiture would have been 2 November 2010, had the Surety not filed a motion to set aside the forfeiture. *See* N.C. Gen. Stat. § 15A-544.6 (2009) (providing, "[a] forfeiture entered under G.S. 15A-544.3 becomes a final judgment of forfeiture without further action by the court and may be enforced under G.S. 15A-544.7, on the one hundred fiftieth day after notice is given under G.S. 15A-544.4, if: (1) No order setting aside the forfeiture under G.S. 15A-544.5 is entered on or before that date; and (2) No motion to set aside the forfeiture is pending on that date"). Moreover, the trial court did not enter an order on the Surety's 25 October 2010 motion to set aside forfeiture until 25 January 2011. Both the original date of final judgment of forfeiture, 2 November 2010, and the date of the trial court's denial of the Surety's motion to set aside forfeiture, 25 January 2011, were after the 18 August 2010 24th District administrative order. Therefore, to accept the Judgment Creditor's interpretation of the 24th District administrative order would be tantamount to denying the Surety the period of time to file a motion to set aside the forfeiture. We believe a proper interpretation of the 24th District administrative order is that the phrase—"as to Deferred Prosecution

Agreement cases in which no forfeiture of bond has as of this date been ordered by a court"—refers to final judgments of forfeiture. This did not occur until 25 January 2011. Therefore, no forfeiture of bond had been ordered as of the date of the 18 August 2010 24th District administrative order, and the 24th District administrative order applied to Defendant's deferred prosecution agreement.

I: Applicability of Order to District Courts

[2] On appeal, the Surety argues the district court erred by entering an order denying its motion to set aside the forfeiture for two reasons: (1) the district court's order is inconsistent with the 24th District administrative order regarding appearance bonds and deferred prosecution agreements, and "one trial level judge may not overrule another"; and (2) the district court erred by concluding an order to defer prosecution is not a final disposition for purposes of appearance bonds on pretrial release. We find neither of these arguments dispositive of the issue presented on appeal. Rather, because there is no evidence of record that Senior Resident Superior Court Judge James L. Baker entered the administrative order in a manner consistent with N.C. Gen. Stat. § 15A-535(a), we conclude the district court was not obligated to follow the administrative order in this case, and therefore did not err in failing to do so.

N.C. Gen. Stat. §§ 7A-41.1(c), 7A-146, and 15A-535(a) (2009) are pertinent to our analysis of the question presented in this case. N.C. Gen. Stat. § 7A-41.1(c) states, in pertinent part, the following:

> (c) Senior resident superior court judges and regular resident superior court judges possess equal judicial jurisdiction, power, authority and status, but all duties placed by the Constitution or statutes on the resident judge of a superior court district, including the appointment to and removal from office, which are not related to a case, controversy or judicial proceeding and which do not involve the exercise of judicial power, shall be discharged, throughout a district as defined in subsection (a) of this section or throughout all of the districts comprising a set of districts so defined, for each county in that district or set of districts, by the senior resident superior court judge for that district or set of districts.

Id. Likewise, "[t]he chief district judge, subject to the general supervision of the Chief Justice of the Supreme Court, has administrative supervision and authority over the operation of the district courts and magistrates in his district." N.C. Gen. Stat. § 7A-146.

With regard to the senior resident superior court judge and the chief district court judge's roles in establishing the bond policy and conditions of pre-trial release, N.C. Gen. Stat. § 15A-535(a) states, in pertinent part, the following:

> [T]he senior resident superior court judge for each district or set of districts as defined in G.S. 7A-41.1(a) in consultation with the chief district court judge or judges of all the district court districts in which are located any of the counties in the senior resident superior court judge's district or set of districts, must devise and issue recommended policies to be followed within each of those counties in determining whether, and upon what conditions, a defendant may be released before trial and may include in such policies, or issue separately, a requirement that each judicial official who imposes condition (4) or (5) in G.S. 15A-534(a) must record the reasons for doing so in writing.

Id.

In this case the 24th District administrative order was modeled after the District 16B administrative order. In the District 16B administrative order, the order itself shows that the policy regarding deferred prosecution agreements was devised in "consultation with the chief district court judge[.]" N.C. Gen. Stat. § 15A-535(a). Chief District Court Judge J. Stanley Carmical's signature is on the order. However, there is no signature of the chief district court judge on the 24th District administrative order. While N.C. Gen. Stat. § 15A-535(a) does not require a signature of the chief district court judge, the statute expressly requires "consultation with the chief district court judge or judges of all the district court districts in which are located any of the counties in the senior resident superior court judge's district or set of districts[.]" *Id.* In this case, there is no evidence in the record of either. Because the evidence, or lack thereof, shows that the senior resident superior court judge did not comply with N.C. Gen. Stat. § 15A-535(a) when entering the 24th District administrative order, we believe the district court judge in this case was not obligated to follow it, and the order is not binding on district courts in the 24th Judicial District. We emphasize that nothing in this opinion precludes Senior Resident Superior Court Judge James L. Baker from entering a similar administrative order that complies with N.C. Gen. Stat. § 15A-535(a). However, we point out that the duty of the senior resident superior court judge to promulgate and issue policies pur-

suant to N.C. Gen. Stat. § 15A-535(a), is to be done after consultation with the chief district court judge.

AFFIRMED.

Judges GEER and STROUD concur.

STATE OF NORTH CAROLINA v. JOHN KENNEDY OLIVER, JR.

No. COA11-546

(Filed 6 December 2011)

1. Motor Vehicles—unauthorized use—not a lesser-included offense of possession of stolen vehicle

Unauthorized use of a motor vehicle is not a lesser-included offense of possession of a stolen vehicle.

2. Motor Vehicles—possession of stolen vehicle—knowledge of theft—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of possession of a stolen vehicle where defendant argued that he did not have reason to believe the car was stolen. He contended that he had entered into numerous similar transactions in which drug addicts rented their vehicles to fund their habits, but the evidence allowed the jury to infer that defendant knew that the car was stolen.

Appeal by defendant from judgment entered 10 November 2010 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General Sueanna P. Sumpter, for the State.

Gilda C. Rodriguez for defendant appellant.

McCULLOUGH, Judge.

John Kennedy Oliver, Jr. ("defendant"), appeals from his conviction of possession of a stolen vehicle. Defendant pled guilty to habitual felon status and the trial court sentenced him to 77 to 102 months in prison. For the following reasons, we find no error.

I. Background

Joseph Haubenhoffer initially noticed that his 2002 silver Audi A6 had been stolen around 10:00 a.m. on the morning of 11 December 2009. His car was not in his driveway where he had parked it and locked it the previous night, following his usual routine of eating dinner and walking his dogs with his wife. Upon his realization that his car had been stolen, Mr. Haubenhoffer called the police and his insurance company.

Officer Eric Riley responded to Mr. Haubenhoffer's call. Mr. Haubenhoffer told Officer Riley that the car had been there the night before and gave him a description of the vehicle. Mr. Haubenhoffer also told Officer Riley that he still had both sets of keys to the car and his wife was the only other person with permission to use the car.

After talking to Mr. Haubenhoffer, Officer Riley went to an area of Charlotte known for crack houses, where he had previously found stolen vehicles. He testified that some are found abandoned while others are found being driven. Once an officer attempts to pull over a stolen vehicle, the perpetrator usually takes off and ends up wrecking the vehicle. Around 1:00 p.m. on 11 December 2009, Officer Riley located the 2002 Audi. He pulled the car over and found defendant in the driver seat with two passengers. Defendant did not attempt to evade Officer Riley and there was no visible damage to the car. Defendant was operating the vehicle with a valet key, which is a plastic fabricated key. Defendant told Officer Riley that he did not have a driver's license, but produced an identification card. He also could not produce the registration, but said the vehicle belonged to somebody named Joe. Officer Riley subsequently arrested defendant.

Mr. Haubenhoffer received a call letting him know that his car had been found. Upon inspecting the car, he noticed that personal items were missing, the gas tank was empty, and the interior was covered with trash and cigarette butts. Also, he had never seen the valet key. At trial, Officer Riley testified he had seen people rent their cars at crack houses in exchange for money to buy crack cocaine. He further testified that sometimes when the cars are not returned on time they are reported stolen.

Detective Mark Michalec interviewed defendant and summarized the interview in a written statement, signed by defendant. According to the statement, defendant was hanging out in front of Urban Ministries with two friends around 11:00 p.m. or midnight on 10 December 2009

when a man known as "Left Eye" pulled up in a silver Audi, asking if anyone wanted to rent it. Defendant said he would, and Left Eye told him it belonged to a man named Joseph, with whom he worked. He showed defendant a registration with the name Joseph and a surname defendant could not pronounce. The two agreed that defendant would return the vehicle the next evening around 7:00 p.m., in front of Urban Ministries. After getting the car, defendant drove around with a friend and then went to his girlfriend's house.

The next morning, he drove by Urban Ministries around 9:00 a.m. looking for Left Eye. According to defendant's statement, at this point he thought the car was stolen, but at trial defendant testified he did not think the car was stolen until Detective Michalec suggested it. While at Urban Ministries, defendant saw two friends and agreed to give them a ride. Defendant planned on leaving the car at his aunt's house after dropping his friends off, but was stopped by police before doing so.

Marquis Teeter, a friend of defendant, testified that he was with defendant when he rented the car. They were sitting across from Urban Ministries when Left Eye pulled up in the Audi with a Caucasian passenger. Left Eye told defendant the car belonged to the passenger. Mr. Teeter did not think the car was stolen because they are often rented to buy crack. The car did not appear to be damaged and Left Eye had a key. That evening, Mr. Teeter drove around with defendant until defendant dropped him off at his hotel. Mr. Teeter ran into defendant the next morning and asked him for a ride to his mother's house, but on the way there they were stopped by police.

Defendant testified at trial to a similar story to the one in his statement and testified to by Mr. Teeter. Left Eye produced the registration and defendant agreed to rent the car for $50.00 until 7:00 p.m. the next day. Defendant dropped Left Eye and the Caucasian man off at a drug house, drove around with Mr. Teeter, and then went to his girlfriend's house. He denied looking for Left Eye the next morning and testified that he frequently went to Urban Ministries. He never thought the car was stolen because Left Eye had a key. He planned on seeing his aunt after dropping his girlfriend and Mr. Teeter off, but never had an intention of abandoning the vehicle. Defendant further testified that he did not read the whole statement prepared by Detective Michalec before signing it because he was "a little shook up" at the time.

Defendant had a long list of prior convictions, but none dealing with theft crimes. He was indicted by a grand jury on 4 January 2010. The indictment was amended on 1 March 2010 to update the description of the vehicle. At the same time he was indicted for being an habitual felon. He was tried on 8 November 2010. Defendant made a motion to dismiss at the end of the State's evidence, which was denied. Defendant renewed his motion at the end of all evidence and the trial court again denied it. A jury found him guilty of possession of a stolen motor vehicle and he pled guilty to being an habitual felon. On 10 November 2010, Judge Foust entered a judgment and commitment order sentencing defendant to 77 to 102 months in prison. Defendant gave oral notice of appeal in open court.

II. Analysis

A. Lesser included Offense

[1] Defendant raises two issues on appeal. Defendant's first issue is that the trial court erred in failing to instruct the jury on the alleged lesser included offense of unauthorized use of a motor vehicle. Defendant contends unauthorized use of a motor vehicle is a lesser included offense of possession of a stolen vehicle. We disagree.

> A trial court must give instructions on all lesser included offenses that are supported by the evidence, even in the absence of a special request for such an instruction; and the failure to so instruct constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense.

State v. Bumgarner, 147 N.C. App. 409, 417, 556 S.E.2d 324, 330 (2001) (internal quotation marks and citation omitted). "As a lesser included offense, all of the essential elements of the lesser crime must also be essential elements included in the greater crime." *State v. Hinton*, 361 N.C. 207, 210, 639 S.E.2d 437, 439 (2007) (internal quotation marks and citation omitted). "However, when the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, the trial court is not required to submit and instruct the jury on any lesser included offense." *State v. Boykin*, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984).

Defendant contends all the essential elements of unauthorized use of a stolen vehicle are essential elements of possession of a stolen vehicle. During the pendency of defendant's appeal, our Supreme Court addressed this very issue of whether unauthorized use of a motor vehicle is a lesser included offense of possession of a

stolen vehicle. *See State v. Nickerson*, ___ N.C. ___, 715 S.E.2d 845 (2011). Due to our Supreme Court's recent decision, we see no need to further discuss this issue. *Id.* Consequently, the trial court did not err in not instructing the jury on the crime of unauthorized use of a stolen vehicle as it is not a lesser included offense of possession of a stolen vehicle.

B. Motion to Dismiss

[2] Defendant next argues the trial court erred in denying his motion to dismiss the charge of possession of a stolen vehicle. Defendant contends the State failed to prove that he knew or had reason to know that the car was stolen. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo.*" *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (quoting *State v. Barnes*, 334 N.C. 67, 75-76, 430 S.E.2d 914, 918-19 (1993)) (internal quotation marks and citations omitted).

Defendant argues that he did not have reason to believe the vehicle was stolen because he had entered into numerous similar trans-

actions in the past where drug addicts rented their vehicles to fund their habits. Defendant also notes that he did not run or attempt to evade police when pulled over and he actually had a key to the vehicle. He contends that "[w]hether [he] knew or should have known that the vehicle was stolen must necessarily be prove[n] through inferences to be drawn from the evidence." *State v. Baker*, 65 N.C. App. 430, 436, 310 S.E.2d 101, 107 (1983) (internal quotation marks and citation omitted). However, the evidence allows the jury to infer that defendant knew that the car was stolen. Defendant's signed statement states that he "drove to the Urban Ministries to see if [he] saw Left Eye. If [he] didn't see him [he] figured that [the car] was stolen. [He] didn't' see him there so it must have been stolen." Defendant was also found in the car and admitted to having driven it around for the night. Viewing the evidence in the light most favorable to the State, the evidence is sufficient to show the essential elements of the crime of possession of a stolen vehicle and for a jury to believe that defendant was the perpetrator of the crime. Therefore, the trial court did not err in denying defendant's motion to dismiss.

III. Conclusion

Based on the foregoing, we find no error on behalf of the trial court. The crime of unauthorized use of a stolen vehicle is not a lesser included offense of the crime of possession of a stolen vehicle. Also, the State presented sufficient evidence for the issue to be presented to the jury.

No error.

Judges HUNTER, JR. and THIGPEN concur.

WILLIAMSON v. WILLIAMSON

[217 N.C. App. 375 (2011)]

DONALD LEE WILLIAMSON, PLAINTIFF v. MELANIE FOSTER WILLIAMSON, DEFENDANT

No. COA10-323

(Filed 6 December 2011)

1. Divorce—equitable distribution—value of business

An equitable distribution order was remanded for a determination of the value of the parties' business where the Court of Appeals could not determine how the trial court arrived at the value it found.

2. Divorce—equitable distribution—value of marital residence

The trial court erred in an equitable distribution action in its valuation of the parties' marital home where the record was devoid of any evidence of the value of the residence at the date of separation.

3. Divorce—equitable distribution—post separation expenses

An equitable distribution order was remanded for more specific findings where plaintiff was credited with an amount for post separation expenses, but it was not clear whether all of the payments were for the benefit of the marital estate.

Appeal by Defendant from order entered 1 October 2009 by Judge J. Gary Dellinger in Catawba County District Court. Heard in the Court of Appeals 12 October 2010.

Crowe & Davis, P.A., by H. Kent Crowe, for Plaintiff-Appellee.

LeCroy and Willcox, PLLC, by M. Alan LeCroy, for Defendant-Appellant.

BEASLEY, Judge.

Defendant appeals from the trial court's equitable distribution order entered 1 October 2009 and its order entered 20 May 2010, awarding Defendant alimony and dismissing her counterclaim for attorney's fees. We remand for further findings.

Plaintiff and Defendant were married on 22 February 1975 and had three children before separating on 26 July 2007. Shortly after separating, Plaintiff filed a complaint on 1 November 2007 for equitable

distribution, possession of certain real and personal property, and an injunction barring Defendant from damaging, destroying, or conveying Plaintiff's business and personal assets. Defendant counterclaimed for divorce from bed and board, post-separation support, alimony, custody, child support, attorney's fees, and equitable distribution.

The parties were granted an absolute divorce on 9 October 2008, and, on 10 October 2008, a "Memorandum of Judgment/Order for PSSU" was entered, detailing the parties' agreement as to post-separation support. Regarding the equitable distribution claim, the parties filed respective affidavits, a pretrial order was entered 12 February 2009, and the matter was heard on 21 and 22 April 2009. An order distributing the marital property equally between Plaintiff and Defendant was entered on 1 October 2009. Defendant appealed the equitable distribution order on 7 October 2009 despite the fact that her alimony counterclaim was pending. This Court filed an opinion on 18 January 2011 dismissing the appeal as interlocutory. Defendant filed a Rule 31 Petition for Rehearing on the grounds that the 20 May 2010 alimony order cured the interlocutory nature of *Williamson*. We granted Defendant's petition on 7 February 2011, construing it as a motion for withdrawal of the opinion and now reach the merits of Defendant's equitable distribution appeal.

[1] Defendant argues that the trial court erred in its valuation and distribution of Williamson Machine Company, Inc. We agree.

We have consistently reiterated that there is no single best method for assessing the value of a marital business interest, and our appellate courts have recognized various approaches. *See Sharp v. Sharp*, 116 N.C. App. 513, 527, 449 S.E.2d 39, 46 (1994) (citation omitted). Still, "the approach utilized must be sound," and "the trial court must determine whether the methodology underlying the testimony in support of the value of a marital asset is sufficiently valid and whether that methodology can be properly applied to the facts in issue." *Robertson v. Robertson*, 174 N.C. App. 784, 786-87, 625 S.E.2d 117, 119 (2005) (internal quotation marks and citations omitted). "The trial court's findings of fact regarding the value of a [] business should be specific, and the trial court should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied." *Id.* at 786, 625 S.E.2d at 119 (internal quotation marks and citations omitted).

In the case *sub judice*, Plaintiff and Defendant started Williamson Machine Company Inc. during their marriage. Williamson Machine

Company Inc. was incorporated in 1981 and 51% of the stock was issued to Plaintiff and 49% to Defendant. At the equitable distribution hearing, the value of the company was determined by the trial court. The trial court determined that Plaintiff was an expert in machine equipment and relied on his valuation of the company.

> The Plaintiff testified and the Court finds that the net fair market value of Williamson Machine Company, Inc., as of the date of [the] parties separation is $26,500.00. Mr. Williamson's value is based on the liquidated value of the corporation as of the date of separation.

Although the trial court indicated in its finding of fact that it relied on Plaintiff's valuation of the company, a careful review of the record shows that Plaintiff did not value the company at $26,500.00.

> Q. So what is your market value that you say for the entire business assets of everything?
>
> A. Approximately 30,000, 25 to 30 thousand dollars as an estimate.

Also, Plaintiff gives conflicting testimony regarding the value of the business.

> Q. So you would sell this business, 25 to 30 thousand 25 dollars, lock, stock and barrel?
>
> A. I would sell the assets in place on the floor of the business for 25 to 30 thousand dollars.
>
> Q. Well, that's not the same as the market value, correct?
>
> [PLAINTIFF'S COUNSEL]: Objection, Your Honor.
>
> THE COURT: Overruled—sustained because I think he has—
>
> . . .

On direct examination, Plaintiff states a different value of the company.

> Q. So 15,000 for the debt, 3,000 for the disassembly, minus—taken away from the value of the equipment would leave you with about how much?
>
> A. Twelve thousand dollars.
>
> Q. Now, on your affidavit, your amended affidavit, you said that you thought that Williamson Machine Company, Inc., had a value of about $25,000.

A. Yes.

Q. That's about seven or eight thousand dollars more than you just testified to. Why would you attribute those seven or eight thousand additional dollars?

A. I really have no answer for that.

Q. But your contention is that the business is worth 25,000 now?

A. I would say that would be a fair estimation, yes.

Additionally, the trial court stated that Plaintiff used a liquidated value approach to value the business and then identified the components of the valuation, which included:

> the net fair market value of the machinery owned by the company, the net fair market value of the 1998 Ford F-150 truck on the date of separation, the net fair market value of the office equipment on the date of separation, the value of the accounts receivable on the date of separation and the value of the cash on hand on the date of separation less the unpaid balance owed by the company on the BB&T loan on the date of separation.

In reviewing the valuation, this Court is unable to determine how the trial court arrived at the value of $26,500.00. "The purpose for the requirement of specific findings of fact that support the court's conclusion of law is to permit the appellate court on review to determine from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of the law." *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986). Accordingly, we remand for further findings as to the value of Williamson Machine Company, Inc. We note that the trial court has the authority to reject both parties valuation of the company and independently value the company as long as it uses specific and clear methodology. We remand for the trial court to properly determine the valuation of the parties' machine business.

[2] Next, Defendant contends that the trial court committed reversible error in its valuation and distribution of the marital home when it concluded that the gross fair market value of the home was $189,000. We agree.

"A trial court's findings of fact in an equitable distribution case are conclusive if supported by any competent evidence. 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." *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 419, 588 S.E.2d 517, 521 (2003) (internal quotation marks and citations omitted). "The trial court must make a finding on the value of the marital asset on the date of separation." *Cooper v. Cooper*, 143 N.C. App. 322, 327, 545 S.E.2d 775, 778 (2001).

In the case s*ub judice*, the trial court relied on Plaintiff's testimony that the marital residence had a gross fair market value of $189,000.00. Here, the trial court did not rely on competent evidence of the marital home's value *at the time of separation* because the record is devoid of any evidence as to the value of the residence at the date of separation. Therefore, we remand for further proceedings to determine the value of the marital residence at the date of separation.

[3] Finally, Defendant argues that the trial court erred by crediting Plaintiff $23,222.33 for post separation expenses he paid on behalf of the support and maintenance of the Defendant. We agree.

"A spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse (from non-marital or separate funds) *for the benefit of the marital estate*." *Walter v. Walter*, 149 N.C. App. 723, 731, 561 S.E.2d 571, 576-77 (2002) (emphasis added). "To accommodate post-separation payments, the trial court may treat the payments as distributional factors . . . , or provide direct credits for the benefit of the spouse making the payments[.]" *Id.* at 731, 561 S.E.2d at 577 (citations omitted). "[T]he trial court may, in its discretion, weigh the equities in a particular case and find that a credit or distributional factor would be appropriate under the circumstances." *Id.* at 732, 561 S.E.2d at 577. "[O]ur Supreme Court impliedly approved the use of a credit as a means of taking into consideration post separation payments made towards *marital debts*[.]" *Wirth v. Wirth*, 193 N.C. App. 657, 664, 668 S.E.2d 603, 609 (2008) (citations omitted and emphasis added).

Defendant asserts that the trial court abused its discretion by crediting Defendant for spousal payments that were not for the benefit of the marital estate. The trial court found

> [s]ubsequent to the date of the parties separation, the Plaintiff continued to maintain health insurance for the Defendant, pay medical bills for the Defendant, paid Sam's Club account for the Defendant, paid cable tv cost for the Defendant at Direct Television, paid utility bills for the Defendant, paid telephone service, water service, and paid long distance service for the

> Defendant. In total the Plaintiff paid $23,222.33. The Plaintiff made these payments with the expectation that he would receive credit for them in the parties equitable distribution of marital property and did not intend them as a gift to the Plaintiff.
>
> . . . .
>
> The Plaintiff should receive credit . . . in the sum of $23,222.33 for the advancements he paid to or on behalf of the Defendant between the date of separation and the date of the hearing.

Based on the Findings of Fact, it is unclear whether all of the debts were paid for the benefit of the marital estate, especially where Defendant's health insurance was included in the total credit. The trial court is limited to crediting Plaintiff for payments made for the benefit of the marital estate regardless of whether Plaintiff made payments "with the expectation that he would receive credit for them in the parties equitable distribution of marital property[.]" We remand for more specific findings and proper classification of the $23,222.33 advancement.

Accordingly, we vacate the judgment and remand on the foregoing grounds.

Vacated and Remanded.

Judges MCGEE and HUNTER, JR. concur.

STATE OF NORTH CAROLINA v. GREGORY MARK BROWN

No. COA11-659

(Filed 6 December 2011)

Forgery—evidence not sufficient—elements of uttering and false pretenses not satisfied

The trial court erred by not dismissing charges for uttering a forged instrument and obtaining property by false pretenses where there was insufficient evidence of forgery. The evidence cited by the State may have indicated some sort of wrongdoing, but did not demonstrate forgery.

Appeal by defendant from judgment entered on or about 2 February 2011 by Judge W. Erwin Spainhour in Superior Court, Cabarrus County. Heard in the Court of Appeals 7 November 2011.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Seth P. Rosebrock, for the State.

Daniel M. Blau, for defendant-appellant.

STROUD, Judge.

Defendant appeals his convictions for uttering a forged instrument, attempting to obtain property by false pretenses, and obtaining the status of habitual felon. As the State failed to present substantial evidence of forgery, we vacate defendant's convictions.

I. Background

The State's evidence tended to show that on 17 February 2009, Ms. Alice Bolder was working as a teller in the drive-thru at Fifth Third Bank in Kannapolis, North Carolina when she was given a check made out to defendant that "looked very strange." Ms. Bolder notified her supervisor who called the police. Defendant provided a written statement to Officer Gohlke of the Kannapolis Police Department:

> On February 16, 2009, I was in Charlotte and a light skinned black dude I know as "J" gave me a check for $655.20 written on a check from HP Invent in Statesville, NC. Previously he asked me if I had an account at Fifth Third Bank. I told him I did. "J" gave me the check and I asked him if the money was in there and he said it was. "J" told me that if I cashed it for him, I could keep $50 from it. I am not sure if "J" really works for HP. "J" said he would call me later and get his money. I don't know "J['s]" number.

(Original in all caps.)

On or about 18 May 2009, defendant was indicted for uttering a forged instrument, obtaining property by false pretenses, and obtaining the status of habitual felon. Defendant was tried by a jury and found guilty of all of the charges. The trial court determined defendant had a prior record level of III, and defendant was sentenced to 70 to 93 months imprisonment. Defendant appeals.

II. Motion to Dismiss

Defendant contends that "the trial court erred by denying Mr. Brown's motion to dismiss the charges at the close of all the evi-

dence, where the evidence was insufficient to prove Mr. Brown guilty of either uttering a forged instrument or attempted obtaining property by false pretenses." (Original in all caps.)

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.

State v. Johnson, ___ N.C. App. ___, ___, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

"The essential elements of the crime of uttering a forged check are (1) the offer of a forged check to another, (2) with knowledge that the check is false, and (3) with the intent to defraud or injure another." *State v. Hill*, 31 N.C. App. 248, 249, 229 S.E.2d 810, 810 (1976).

> To sustain a conviction for obtaining property by false pretenses, the State must establish: (1) A false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another person.

State v. Wright, 200 N.C. App. 578, 586, 685 S.E.2d 109, 115 (2009) (citation, quotation marks, and brackets omitted). Defendant does not contest the evidence as to each element of the charged offenses but only argues that "the State was required to prove that Mr. Brown's check was actually forged in order to secure a conviction for either offense" and that "[t]he State did not meet its burden in this case because it did not present any evidence that Mr. Brown's check was actually forged."

While Chapter 14, Article 21 of our General Statutes entitled "Forgery" does not define the word "forgery," our case law has stated that "[t]he books abound in definitions of forgery" and though "[i]t would be difficult to frame a definition to include all possible cases . . . as a rule the false writing must purport to be the writing of a party other than the one who makes it and it must indicate an

attempted deception of similarity." *State v. Lamb*, 198 N.C. 423, 425, 152 S.E. 154, 155 (1930).

The State directs our attention to five pieces of evidence that it claims show forgery. The first piece of evidence is that "the Defendant presented a HP payroll check at Fifth Third Bank to be cashed[,]" but the fact that defendant presented a check to be cashed does not demonstrate that the check was forged. Second, the State notes that Ms. Bolder found the check "to be 'very strange' . . . due to a number of discrepancies in the format and content of the payroll check[;]" while "strangeness" may be circumstantial evidence of some wrongdoing, it does not specifically provide evidence of forgery. Third, the State argues that the check "appear[ed] to be a HP payroll check," but defendant admitted he "did not work for HP[,]" but the fact that defendant did not work for HP is not evidence that the check was not from HP. Fourth, the State directs this Court's attention to defendant's admission

> that, although the check was made payable to the Defendant, it was not his check, and he was not entitled to retain all the proceeds of the same; the Defendant indicated that he had been approached by a third-party and offered fifty dollars . . . from the proceeds of the check if he would cash the same.

While such statements by defendant may be circumstantial evidence of some sort of wrongdoing on the part of defendant, they are not evidence of forgery, i.e., that the writing was false in that it was not a check from HP. *See id.* Lastly, the State contends that "most importantly, the Defendant admitted that he knew the check was not good." After a thorough review of the transcript, we find no such admission by defendant. During defendant's trial, the State's attorney repeatedly asked Officer Gohlke whether defendant "acknowledged that he knew the check was no good[,]" but Officer Gohlke ultimately testified that the statements regarding the check being "no good" were his own words "summarizing" defendant's statements; defendant had only actually "acknowledged that someone else gave him the check and that he didn't work for HP[.]" While Ms. Bolder's determination that the check was strange and defendant's admissions regarding how he obtained the check are both circumstantial evidence of some sort of malfeasance, they are not specifically evidence of forgery. As there was insufficient evidence of forgery, the elements of uttering a forged instrument were not shown by the State. *See Hill*, 31 N.C. App. at 249, 229 S.E.2d at 810. Furthermore, without evidence of forgery, we find no other facts in the record upon which the State could establish the

essential element of "false pretenses" for purposes of the crime of obtaining property by false pretenses. *Wright*, 200 N.C. App. at 586, 685 S.E.2d at 115. Accordingly, the trial court erred in denying defendant's motion to dismiss.

III. Conclusion

For the foregoing reasons, we vacate. As we are vacating defendant's convictions, we need not address his other issues on appeal.

VACATED.

Chief Judge MARTIN and Judge ERVIN concur.

THE VUE-CHARLOTTE, LLC, AND THE VUE NORTH CAROLINA, LLC, PLAINTIFFS V. MARY G. SHERMAN AND RICHARD G. SHERMAN, II, DEFENDANTS; GHOLAM JAFARI AND NOSRAT GHASEMI, PLAINTIFFS V. THE VUE-CHARLOTTE, LLC AND THE VUE NORTH CAROLINA, LLC, DEFENDANTS

No. COA11-594; 11-595

(Filed 6 December 2011)

Damages and Remedies—specific performance—liquidated damages—breach of contract—default section of agreement

The trial court did not err in a breach of an agreement to purchase condominiums case by concluding that, as a matter of law, plaintiff companies were precluded from enforcing the parties' purchase agreements by specific performance. Viewing the agreements as a whole, the most reasonable interpretation was that plaintiffs were limited to the remedy of liquidated damages as stated in the default section.

Appeals by Plaintiffs in 10 CVS 24133 and Defendants in 10 CVS 17943 from orders in each action entered 19 April 2011 by Judge F. Lane Williamson in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 October 2011.

Higgins Law Firm, PLLC, by Sara W. Higgins, for Plaintiffs in 10 CVS 24133 and Defendants in 10 CVS 17943.

McIntosh Law Firm, by James C. Fuller and Prosser D. Carnegie, for Defendants in 10 CVS 24133.

Richardson Law Group, by Celie B. Richardson, for Plaintiffs in 10 CVS 17943.

STEPHENS, Judge.

The appeals by The VUE-Charlotte, LLC and The VUE North Carolina, LLC (collectively, "The VUE"), who are Plaintiff-appellants in 11-594 and Defendant-appellants in 11-595, raise identical issues of law.[1] Therefore, we have consolidated the appeals for decision pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 40.

The appeals arise from The VUE's claims before the trial court that Mary G. Sherman and Richard G. Sherman, Defendant-appellees in 11-594, and Gholam Jafari and Nosrat Ghasemi, Plaintiff-appellees in 11-595 (collectively, "Purchasers"), breached their agreements to purchase condominiums from The VUE and that The VUE is entitled to specific performance of the agreements. The purchase agreements at issue are identical in all respects relevant to the issues on appeal.

Although the procedural postures of the two appeals differ,[2] the dispositive issue on appeal in each case is the same: whether the trial court erred in interpreting the agreements to limit The VUE's remedy for Purchasers' breach to liquidated damages and to preclude The VUE from enforcing the agreements by specific performance.

"Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment

1. We note that each order from which The VUE appeals is an interlocutory order that does not dispose of all claims before the trial court. However, in each order, the trial court concluded that the order constitutes a final judgment on The VUE's claim for specific performance and that there is no just reason to delay appeal. As such, the trial court certified each order for immediate appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). Because we agree that each order is a final judgment on "one or more but fewer than all of the claims" in each case, and because the trial court appropriately certified each order for appeal, this Court has jurisdiction to hear the appeals.

2. In 10 CVS 24133, the parties brought this issue before the trial court by filing cross-motions for judgment on the pleadings. In 10 CVS 17943, the issue was brought before the trial court by Plaintiff-purchasers' partial motion for summary judgment. Our review in each case is *de novo*. *See Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (trial court's ruling on motion for judgment on pleadings reviewed *de novo*), *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005); *see also Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) (trial court's ruling on motion for summary judgment reviewed *de novo*).

of its execution." *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973). The intention of the parties is to be ascertained from "the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Id.* at 410, 200 S.E.2d at 624 (quoting *Electric Co. v. Ins. Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948)). Where, as here, a contract is "in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact," the intention of the parties is a question of law, *id.*, and a ruling on that issue by the trial court is reviewed *de novo*. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000) (a matter of contract interpretation raising a question of law is reviewed *de novo*).

Per section 13 of the parties' agreements entitled "Default":

> If [Purchasers] [are] in Default twenty (20) days after receipt from [The VUE] of written notice thereof, *[The VUE] may declare this Agreement terminated and, may retain all Deposits, as liquidated and agreed upon damages which [The VUE] shall be deemed to have sustained and suffered as a result of such Default* . . . . The provisions herein contained for liquidated and agreed upon damages are bona fide provisions for such and are not a penalty, the parties understanding and agreeing that [The VUE] will have sustained damages if a Default occurs, which damages will be substantial but will not be capable of determination with mathematical precision and, therefore, the provision for liquidated and agreed upon damages has been incorporated in this Agreement, as a provision beneficial to both parties.

(Emphasis added).

Purchasers contend that this provision allowing The VUE to retain Purchasers' deposits as liquidated damages precludes The VUE from seeking specific performance of the purchase agreements. Purchasers further support this contention with the following excerpt from the same section of the agreements that outlines Purchasers' remedies for The VUE's default:

> If [The VUE] is [] in default ten (10) days after [Purchasers] send[] [The VUE] notice thereof (or such longer time as may reasonably be necessary to cure the default if same cannot be reasonably cured within ten (10) days), *[Purchasers] will have such rights as may be available in equity and/or under applicable law.*

(Emphasis added). Purchasers argue, and the trial court found, that because the agreements provide only that The VUE may recover liquidated damages in the event of Purchasers' default, but provide that Purchasers are entitled to any available equitable remedies in the event of The VUE's default, there are no remedies available to The VUE other than the liquidated damages. We agree.

Acknowledging that specific performance of a contract for sale of land is generally available to a seller, *see Deans v. Layton*, 89 N.C. App. 358, 371, 366 S.E.2d 560, 568, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 276 (1988), and that the liquidated damages provision does not, by its mere existence, preclude specific performance, *see Crawford v. Allen*, 189 N.C. 434, 440, 127 S.E. 521, 525 (1925) ("Even if the provision in the contract, relative to liquidated damages is enforceable, it does not affect the equity of [the defendant] to specific performance."), we conclude that, in this case, The VUE may not specifically enforce the agreements. The purchase agreements clearly state that in the event of Purchasers' default, The VUE is entitled to liquidated damages. In distinction, the "Default" section specifically preserves for Purchasers all equitable and legal remedies in the event of The VUE's default. Viewing the agreements as a whole, we conclude that the most reasonable interpretation is that The VUE is limited to the remedy stated in the "Default" section. Accordingly, we hold that the trial court did not err in concluding that the only remedy available to The VUE is liquidated damages.

Nevertheless, The VUE contends that the trial court's interpretation of the agreements impermissibly inserts language into the agreements and "turns 'may' into 'shall' and *requires* The VUE to exercise a *permissive* remedy." (Emphasis in original). This is incorrect. Rather than interpreting the agreements to provide that, upon default, The VUE *shall terminate* the agreements and *shall retain* the deposits, the trial court interpreted the agreements to provide that The VUE *shall have the right* to terminate the agreements and *shall have the right* to retain the deposits upon default. That provision, along with the other provision in the "Default" section of the agreements providing that, upon default, Purchasers *shall have such rights* as may be available in equity or under applicable law, constitute the entirety of the agreements' statement of the parties' rights in the event of default. Accordingly, rather than impermissibly inserting language omitted by the parties, as The VUE suggests, the trial court's interpretation of the agreements precludes insertion of additional rights—*i.e.*, the right of specific performance—not provided in the agreements.

We hold that the trial court did not err by concluding that, as a matter of law, The VUE is precluded from enforcing the parties' purchase agreements by specific performance.

AFFIRMED.

Judges BRYANT and ELMORE concur.

DONALD LEE WILLIAMSON, PLAINTIFF v. MELANIE FOSTER WILLIAMSON, DEFENDANT

No. COA10-1217

(Filed 6 December 2011)

1. Divorce—alimony—calculation of regular income—tax refunds and bonuses not included

The trial court erred in an alimony case by its finding of fact number 28 because the trial court erroneously included defendant wife's 2009 tax refund in the calculation of her regular income. Tax refunds and bonuses are not to be included in the calculation of regular income.

2. Divorce—alimony—expected decrease in income—consideration of present income

The trial court did not err in an alimony case by failing to consider defendant wife's expected decrease in pay when calculating her income. The trial court must consider defendant's present income and not future changes.

3. Divorce—alimony—reliance on findings of fact in equitable distribution order—burden of proving income

The trial court did not abuse its discretion in an alimony case by its findings of fact concerning plaintiff husband's income. The trial court had the authority to rely on the findings of fact from the equitable distribution order. Further, plaintiff did not have the burden of presenting evidence of his income since the burden of proving dependency was upon the spouse asserting the claim for alimony.

4. Evidence—password protected emails—right to privacy—failure to show prejudicial error

The trial court did not err in an alimony case by excluding certain email communications. The admission would have violated plaintiff's right to privacy since defendant wrongfully obtained the email from a password protected email account. Further, defendant failed to show prejudicial error resulted from the exclusion of the emails.

5. Evidence—prior crimes or bad acts—illicit sexual behavior—credibility

The trial court did not err in an alimony case by failing to find and conclude that plaintiff engaged in illicit sexual behavior where defendant testified that plaintiff admitted to an affair. The Court of Appeals refused to reweigh the evidence when the trial court was in the best position to weigh the evidence and determine the credibility of witnesses.

6. Attorney Fees—alimony—failure to tender evidence supporting claim

The trial court did not err in an alimony case by dismissing defendant's claim for attorney fees. Defendant did not tender any attorney fees affidavit nor any evidence to support her claim that she was entitled to an award of attorney fees.

Appeal by Defendant from order entered 20 May 2010 by Judge J. Gary Dellinger in Catawba County District Court. Heard in the Court of Appeals 9 March 2011.

Crowe & Davis, P.A., by H. Kent Crowe, for Plaintiff-Appellant.

LeCroy and Willcox, PLLC, by M. Alan LeCroy, for Defendant-Appellee.

BEASLEY, Judge.

Defendant appeals the trial court's alimony order entered 20 May 2010, awarding Defendant alimony and dismissing her counterclaim for attorney's fees.

Plaintiff and Defendant were married on 22 February 1975 and separated on 26 July 2007. On 1 November 2007, Plaintiff filed a complaint requesting, *inter alia*, equitable distribution. On 25 January 2008, Defendant filed an answer and a counterclaim that included a cause

of action for permanent alimony. After the 22 February 2010 alimony hearing, the trial court entered its order on 20 May 2010. The trial court ordered Plaintiff to pay alimony and dismissed Defendant's claims for attorney's fees. Defendant filed notice of appeal on 15 June 2010.

Defendant asserts (1) the trial court's findings of fact concerning the income and expenses of the parties were not supported by competent evidence; (2) the trial court improperly excluded evidence; (3) the trial court failed to find that Plaintiff engaged in illicit sexual behavior; and (4) the trial court improperly dismissed Defendant's claim for attorney's fees. For the following reasons, we reverse in part and affirm in part.

"Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion." *Bookholt v. Bookholt*, 136 N.C. App. 247, 249-50, 523 S.E.2d 729, 731 (1999) (citation omitted). "When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004) (internal quotation marks and citation omitted).

[1] First, Defendant argues that the trial court's Finding of Fact 28 is not supported by competent evidence because the trial court erroneously included her 2009 tax refund in the calculation of her regular income. We agree.

Finding of Fact 28 states,

> [i]n the Defendant's affidavit she reported that she had gross income $342.82 per week, which amounts to $1,485.55 per month and that she receives $690.00 per month as child support, giving her total gross monthly income of $2,175.55. The Court has not deducted any withholdings from the Defendant's reported gross monthly income because the Defendant testified that she received a refund amounting to all of the taxes that had been withheld from her income during 2009.

Defendant argues that the inclusion of her tax refund was error based on our Court's decision in *Edwards v. Edwards*, 102 N.C. App. 706, 403 S.E.2d 530 (1991). Defendant contends that *Edwards* prohibits the trial court from including tax refunds in the calculation of a party's income where there is no evidence that such refunds are reg-

ular income. We agree. The trial court, in determining alimony, must assess the parties' present incomes, respectively. *Whedon v Whedon*, 58 N.C. App. 524, 527, 294 S.E.2d 29, 31 (1982). Tax refunds and bonuses are not to be included in the calculation of regular income. *Edwards*, 102 N.C. App. at 710. 403 S.E.2d at 532. Because the trial court improperly calculated Defendant's tax refund as a part of her regular income, we reverse and remand.

[2] Defendant also contends that the trial court erred by failing to consider her expected decrease in pay when calculating her income. Pursuant to N.C. Gen. Stat. § 50-16.2A(b) (2009), the trial court is required to consider Defendant's *"present* employment income." (emphasis added) Defendant cites no authority in support of her contention that the trial court was required to consider her future change in pay. As stated above, we hold that the trial court must properly consider Defendant's present income. Therefore, Defendant's argument is without merit.

[3] Next, Defendant challenges the trial court's findings of fact concerning Plaintiff's income. Defendant argues that the trial court abused its discretion by rejecting Defendant's evidence of income and relying on evidence presented at the previous equitable distribution hearing. We disagree.

In Finding of Fact 37, the court found that

> [d]uring the alimony hearing, neither the Plaintiff nor the Defendant offered any evidence of the Defendant's earnings except for the Defendant's affidavit stating that on her knowledge, information and belief the Plaintiff earned $7,000 per month in gross income. This Court finds that the Plaintiff's testimony at previous hearings that he earned $1,250.00 per week gross to be more persuasive than the Defendant's affidavit filed on her information and belief without supporting evidence as to the basis of her knowledge, information and belief. The Plaintiff has a gross weekly salary of $1,250.00 and a gross monthly salary of $5,416.67. At a state income tax rate of 7% and a federal income tax rate of 28%, the Plaintiff's net earnings are $3,683.34.

The trial court may take "judicial notice of previous orders in the cause". *Devaney v. Miller*, 191 N.C. App. 208, 212, 662 S.E.2d 672, 675 (2008). (internal quotation marks and citations omitted). Moreover, "it is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented dur-

ing the trial." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994). A careful review of the record shows that the trial court, in the previous equitable distribution order, found that Defendant's gross income was $1,250.00 per week. Here, the court had the authority to rely on the findings of fact from the equitable distribution order where it determined that Defendant's evidence presented during the alimony hearing was not credible. We reject Defendant's contention that Plaintiff had the burden of presenting evidence of his income because "[t]he burden of proving dependency is upon the spouse asserting the claim for alimony[.]" *Loflin v. Loflin*, 25 N.C. App. 103, 212 S.E.2d 403 (1975). Therefore, Defendant's argument is overruled.

[4] Defendant also asserts that the trial court erred by excluding e-mail communications. The trial court found that the admission of the e-mail violated Plaintiff's right to privacy because Defendant wrongfully obtained the e-mail from a password protected e-mail account. Even assuming the exclusion of the e-mail was error, "[t]he burden is on the appellant not only to show error but to show that if the error had not occurred there is a reasonable probability that the result of the trial would have been favorable to him." *Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E.2d 488, 492 (1967) (internal quotation marks and citations omitted). Defendant has failed to show prejudicial error; therefore, Defendant's argument is overruled.

[5] Defendant further argues that the trial court failed to find and conclude that Plaintiff engaged in illicit sexual behavior where Defendant testified that Plaintiff admitted to an affair. Because "[t]he trial court is in the best position to weigh the evidence, determine the credibility of witnesses and the weight to be given their testimony," we refuse to re-weigh the evidence on appeal. *Goodson v. Goodson*, 145 N.C. App. 356, 362, 551 S.E.2d 200, 205 (2001). Moreover, Defendant does not cite any authority for this argument. Accordingly, Defendant's argument is meritless.

[6] Finally, Defendant contends that the trial court committed error by dismissing Defendant's claim for attorney's fees. Defendant does not contest the trial court's finding that she "did not tender any attorney fees affidavit or any evidence to support her claim that she is entitled to an award of attorney fees [.]"

> While there is statutory authority providing for attorney fees in . . . alimony actions, this authority does not override a party's basic constitutional rights to notice and due process considerations. Defendant failed to file proper pleadings in the cause, therefore, the issue of attorney fees was not properly before the lower court.

Spencer v. Spencer, 133 N.C. App. 38, 44-45, 514 S.E.2d 283, 288 (1999) (internal quotation marks omitted). Accordingly, Defendant's final argument is meritless.

Affirmed in part; Reversed in part.

Judges MCGEE and HUNTER, JR.concur.

UNITRIN AUTO AND HOME INSURANCE COMPANY, PLAINTIFF v. GREGORY SCOTT RIKARD, EXECUTOR OF THE ESTATE OF DELBERT RIKARD AND CAROLYN RIKARD, DEFENDANTS

No. COA11-713

(Filed 6 December 2011)

Insurance—underinsured motorist coverage—selection or rejection—default amount

The trial court did not err in an action arising from an automobile accident by concluding that plaintiff provided defendants with multiple opportunities to select or reject underinsured motorist (UIM) coverage and its judgment that the applicable amount of UIM coverage was the default amount rather than the maximum amount.

Appeal by Defendants from judgment entered 23 February 2011 by Judge Richard L. Doughton in Cleveland County Superior Court. Heard in the Court of Appeals 9 November 2011.

Brotherton Ford Yeoman Berry & Weaver, PLLC, by Joseph F. Brotherton and Steven P. Weaver, for Plaintiff.

Cerwin Law Firm, P.C., by Todd R. Cerwin, for Defendants.

STEPHENS, Judge.

This appeal arises from a car accident which occurred on 25 November 2008 near Shelby. On that date, the car in which seventy-two-year-old Delbert Rikard and his seventy-year-old wife, Carolyn (collectively, "the Rikards"), were traveling was struck head-on by a car owned by Martha Bennett Allen and driven by Bristol Michelle Leonhardt. The Rikards were seriously injured and endured lengthy hospitalizations, incurring damages in excess of the available liability

limits of Allen's and Leonhardt's insurance policies. The Rickards then sought additional coverage from Plaintiff Unitrin Auto and Home Insurance Company ("Unitrin").

Unitrin insured the Rikards under a combined auto and homeowners liability insurance policy with effective dates of 26 January 2008 through 26 January 2009 ("the policy"). The declarations page of the policy provides combined uninsured/underinsured ("UM/UIM") motorist coverage of $50,000 per person and $100,000 per accident. Delbert Rikard first obtained insurance coverage from Unitrin in 2003. Thereafter, Unitrin mailed the Rikards annual renewal packets, each of which contained a declarations page. The declarations page for the policy listed seven attached endorsements including Endorsement AK3847, titled "UM/UIM Rejection/Selection." Endorsement AK3847 appears in the policy blank and uncompleted. Each time he received a renewal packet, Delbert Rickard paid the premium bill which arrived by separate mailing and received proof of insurance cards for his vehicles, but never read the policy endorsements or signed Endorsement AK3847.

On 2 September 2009, Unitrin filed a complaint against the Rickards, seeking a declaration of the limits of UIM coverage available to them under the policy. Unitrin asserted that, because the Rickards never selected a higher UIM amount, the statutory default amount applied. The Rickards contended that, because Unitrin never properly notified them of their option to select a higher UIM amount, they were entitled to the maximum coverage amount.

On 3 May 2010, Unitrin moved for summary judgment, which motion the court denied. On 28 November 2010, Delbert Rickard died, and on 19 January 2011, the trial court entered a consent order substituting Defendant Gregory Scott Rikard, Delbert Rickard's son and executor of his estate, as a defendant in this action. Following a bench trial, the court entered judgment on 23 February 2011, concluding, *inter alia*, that Unitrin "provided [the Rikards] with multiple opportunities to select or reject underinsured motorist coverage" by including Endorsement AK3847 in Unitrin's annual policy renewal mailings. As a result, the court concluded that the statutory default amount of UIM coverage applied under the policy. Defendants appeal, contending this conclusion is not supported by the court's findings of fact. We affirm.

On appeal from a bench trial, we review only "whether there is competent evidence to support the trial court's findings of fact and

whether the findings support the conclusions of law and ensuing judgment." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (citation omitted), *disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001).

The Financial Responsibility Act (the "Act") mandates that an insured must be notified of the option to select UIM coverage "in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 [$25,000 and $50,000] nor greater than one million dollars." N.C. Gen. Stat. § 20-279.21(b)(4) (2008).[1] The Act also contains a default provision: "If the named insured . . . does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury [and property damage] liability coverage for any one vehicle in the policy." *Id.* Further,

> [w]here the insurer attempts to notify the insured of the $1,000,000.00 maximum UM/UIM coverage, but there is neither a valid rejection of that coverage nor a selection of different coverage limits, an insured is entitled to the highest limit of bodily injury liability coverage on the insured's policy. However, if there is a *total failure* by the insurer to notify the insured that he or she may purchase up to $ 1,000,000.00 in UM/UIM coverage, then the insured is entitled to $1,000,000.00 in coverage.

Nationwide Prop. & Cas. Ins. Co. v. Martinson, ___ N.C. App. ___, ___, 701 S.E.2d 390, 396 (2010) (internal citations and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 706 S.E.2d 256 (2011).[2]

In *Martinson*, the insurance company presented evidence it had mailed the insureds a UM/UIM selection/rejection form. *Id.* at ___, 701 S.E.2d at 397-98. However, the insureds claimed they never received or saw the form prior to the accident for which they sought UM coverage. *Id.* We held "[t]he mailing of the selection/rejection form was sufficient to preclude a holding that a total failure to notify

1. Effective 1 February 2010, N.C. Gen. Stat. § 20-279.21 was amended. The amended version of the statute is not at issue here.

2. In *Martinson*, we considered subsection (b)(3) of N.C. Gen. Stat. § 20-279.21 which concerns UM coverage, rather than subsection (b)(4) which concerns UIM coverage. However, the relevant sentence in each subsection (setting default coverage when an insured neither accepts nor rejects UM/UIM limits) is identical except for the words "uninsured" and "underinsured."

occurred." *Id.* at ___, 701 S.E.2d at 399. In light of the identical operative language in subsections (b)(3) and (b)(4), we explicitly extend the reasoning of *Martinson* to questions of UIM coverage and conclude that the findings of fact here fully support the challenged conclusion of law.

Defendants do not challenge the trial court's findings of fact and concede they are supported by competent evidence. Finding of fact 7 states that the Rickards renewed their policy with Unitrin on five occasions prior to the 25 November 2008 accident. Finding 18 states that a UM/UIM selection/rejection form was included in each renewal packet Unitrin mailed to the Rickards. These findings fully support the trial court's conclusion that Unitrin "provided [the Rikards] with multiple opportunities to select or reject underinsured motorist coverage" and its judgment that the applicable amount of UIM coverage is the default amount, rather than the maximum amount. Accordingly, the trial court's judgment is

AFFIRMED.

Judges BRYANT and ELMORE concur.

IN THE MATTER OF: M.M.

No. COA11-929

(Filed 6 December 2011)

Pleadings—termination of parental rights petition—verification—date of signature

A termination of parental rights order was affirmed where respondent mother argued that the Youth and Family Services designee signed the verification of the petition before the petition existed. Respondent did not point to any evidence in the record to support her assertion and did not cite any case law supporting her contention that the trial court lacked jurisdiction when the verification predated the filing of the termination petition.

Appeal by respondent-mother from order entered 11 May 2011 by Judge Elizabeth Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 7 November 2011.

Senior Associate Attorney Kathleen Marie Arundell for Mecklenburg County Department of Social Services, Youth and Family Services Division, petitioner-appellee.

Pamela Newell for Guardian ad Litem appellee.

Robin E. Strickland for respondent-mother appellant.

McCULLOUGH, Judge.

Respondent-mother appeals from an order terminating her parental rights to her daughter, M.M. She contends the trial court lacked subject matter jurisdiction to terminate her parental rights. We affirm.

On 7 October 2010, Mecklenburg County Department of Social Services, Youth and Family Services Division ("YFS"), filed a petition to terminate respondent-mother's parental rights, alleging that grounds existed to terminate her rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2009) (neglect); N.C. Gen. Stat. § 7B-1111(a)(2) (failure to make reasonable progress); and N.C. Gen. Stat. § 7B-1111(a)(3) (failure to pay reasonable child care costs). Counsel for YFS signed the petition to terminate on 5 October 2010. A YFS social worker, as designee for YFS, signed the verification before a notary on 1 October 2010. After holding a termination hearing, the trial court concluded that all three grounds existed to terminate respondent-mother's parental rights, and that it was in the best interest of M.M. to terminate respondent-mother's parental rights. Respondent-mother appeals.

Respondent-mother contends the trial court lacked subject matter jurisdiction to terminate her parental rights because the petition to terminate her parental rights was not properly verified. Respondent-mother asserts that since the YFS designee signed the verification four days before YFS counsel signed the petition, the termination petition was improperly verified, thereby violating Rule 11(b) of the North Carolina Rules of Civil Procedure.

A petition to terminate parental rights "shall be verified by the petitioner or movant." N.C. Gen. Stat. § 7B-1104 (2009). In juvenile proceedings, "verified petitions for the termination of parental rights are necessary to invoke the jurisdiction of the court over the subject matter." *In re Triscari Children*, 109 N.C. App. 285, 288, 426 S.E.2d 435, 437 (1993). Rule 11 of the Rules of Civil Procedure requires a petitioner to attest "that the contents of the pleading verified are true

to the knowledge of the person making the verification." N.C. Gen. Stat. § 1A-1, Rule 11(b) (2009).

Respondent-mother argues that the YFS designee could not have attested that the contents of the termination petition were true since the petition, signed by counsel on 5 October 2010, was not in existence when the YFS designee signed the verification on 1 October 2010. Respondent-mother, however, fails to point to any evidence in the record to support her assertion that the petition "was not yet in existence at the time [the YFS designee] verified it." Respondent-mother also fails to cite any case law supporting her contention that the trial court lacks jurisdiction when the verification predates the filing of the termination petition. *See Skinner v. Skinner*, 28 N.C. App. 412, 414-15, 222 S.E.2d 258, 260-61 (trial court erred in striking verification where no evidence impeached the statements therein), *disc. review denied*, 289 N.C. 726, 224 S.E.2d 674 (1976). Respondent-mother's contention is without merit.

Accordingly, we affirm the trial court's termination of respondent-mother's parental rights to M.M.

Affirmed.

Judges HUNTER (Robert C.) and THIGPEN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 DECEMBER 2011)

ALLISON v. DAVIDSON No. 11-217	McDowell (09CVS398)	Affirmed in part, vacated in part and remanded for a new trial on the issue of damages
CALDWELL CNTY. DSS v. HOWE No. 11-314	Caldwell (09CVD1085)	Affirmed
CLARK v. GOODYEAR TIRE & RUBBER CO. No. 11-717	Ind. Comm. (580989)	Affirmed
CNTY. OF CUMBERLAND v. BARTON No. 11-631	Cumberland (10CVD4694)	Appeal Dismissed
EDGEWATER SERVS., INC. v. EPIC LOGISTICS, INC. No. 11-176	Wake (05CVS1971)	Affirmed
IN RE C.T. No. 11-781	Jones (09JT17)	Affirmed
IN RE E.C.G., L.J.G., S.M.G., D.A.G. No. 11-732	Caldwell (09JA122-125)	Affirmed
IN RE G.N. No. 11-731	Wake (09JT158)	Affirmed
IN RE J.B. No. 11-504	Durham (09JB356)	Affirmed
IN RE J.D. No. 11-733	Wake (07JT705)	Reversed and Remanded
IN RE J.S.K. & C.D.K. No. 11-774	Forsyth (10J255-256)	Reversed and Remanded
IN RE M.C. No. 11-153	Durham (09JB269)	No Error
IN RE M.D.M. No. 11-886	Greene (09JT33)	Reversed
IN RE R.X.M. No. 11-913	Gaston (09JT344)	Affirmed the issue of damages
MARTIN v. OSI REST. PARTNERS, LLC No. 11-226	Forsyth (09CVS1319)	Affirmed in part; reversed and remanded in part.

MCKINNEY v. MCKINNEY No. 11-496	Guilford (02CVD8173)	Affirmed in part Vacated in part and Remanded
NATIONWIDE MUT. INS. CO. v. ERIE INS. CO. No. 11-559	Wake (10CVS4043)	Affirmed
NELSON v. BROWN No. 11-535	Orange (09CVS664)	Dismissed
RUSSO v. RUSSO No. 11-162	Craven (08CVD504)	Affirmed
SIMPSON v. RAYMER No. 11-499	Cabarrus (09CVS4609)	Affirmed
SMITH v. N.C. DEP'T OF CORR. No. 11-606	Ind. Comm. (TA-20179)	Affirmed
SPARKS OIL CO., INC. v. BROWN No. 11-820	Rockingham (10CVD667)	Affirmed in part; Dismissed in part
STATE v. BARKER No. 11-630	Guilford (09CRS102492)	No Error
STATE v. CHATMAN No. 11-701	Pitt (06CRS61617)	No Error
STATE v. CHAVIS No. 11-388	Robeson (09CRS8987-88)	No Prejudicial Error
STATE v. CHILDERS No. 11-593	Hoke (08CRS52927-28)	No Error
STATE v. CLARK No. 11-75	Cleveland (09CRS1457-59)	No Error
STATE v. CORBITT No. 11-542	Forsyth (09CRS61680-81) (10CRS11453)	Affirmed
STATE v. COSTNER No. 11-489	Cleveland (08CRS52051-52)	No Error
STATE v. CULROSS No. 11-462	Wake (08CRS8004)	Remanded for resentencing
STATE v. FINCH No. 11-174	Buncombe (09CRS64830) (09CRS64832) (10CRS42) (10CRS43)	No Error
STATE v. GUTIERREZ No. 11-411	Gaston (09CRS20351)	No Error

STATE v. HENDERSON No. 11-351	Johnston (10CRS52828) (10CRS52829)	No Error
STATE v. HINNANT No. 11-696	Wilson (10CRS50043)	No Error
STATE v. JACKSON No. 11-344	Watauga (09CR50318) (09CR50320)	Affirmed
STATE v. JACKSON No. 11-776	Mecklenburg (09CRS244523-524)	Remanded
STATE v. KEEL No. 11-624	Pitt (05CRS18750)	Affirmed
STATE v. KEELS No. 11-350	Robeson (06CRS54284)	No Error
STATE v. MCGILL No. 11-416	Cleveland (10CRS51132)	No Error
STATE v. MITCHELL No. 11-228	Guilford (09CRS71936)	No Error
STATE v. NICKERSON No. 09-1511-2	Orange (08CRS6360) (08CRS55883)	No Error
STATE v. PERRY No. 11-455	Martin (09CRS50497-99)	Vacated and Remanded
STATE v. PHILLIPS No. 11-242	Burke (06CRS2789)	No Error
STATE v. PRESTWOOD No. 11-340	Catawba (08CRS54875)	Dismissed in part, No Error, in part
STATE v. REID No. 11-243	Wake (09CRS205753) (09CRS54364)	No prejudicial error
STATE v. ROSS No. 11-238	Forsyth (07CRS55743-44)	No Prejudicial Error
STATE v. STROUD No. 11-72	Mecklenburg (06CRS244166) (08CRS46152)	Reverse and remand for a new trial
STATE v. WIEBE No. 11-341	Buncombe (08CRS708271)	No Error
STATE v. WILSON No. 11-794	Onslow (09CRS54843-44)	No prejudicial error

TIMBER INTEGRATED INVS. v. WELCH No. 11-628	Haywood (06CVS905)	Dismissed
VARIETY WHOLESALERS, INC. v. PRIME APPAREL, LLC No. 11-191	Vance (09CVS1249)	Affirmed

PHELPS STAFFING, LLC, PLAINTIFF v. S.C. PHELPS, INC.; SHEILA PHELPS; CHARLES T. PHELPS; MOYSES ROA MATA; AND C T PHELPS, INC., DEFENDANTS, S.C. PHELPS, INC., THIRD PARTY PLAINTIFF v. OMAR EL-KAISSI, THIRD PARTY DEFENDANT

No. COA11-472

(Filed 20 December 2011)

1. Appeal and Error—notice of appeal—designation of court—intent of appeal fairly inferred from notice

Defendant's motion to dismiss plaintiff's appeal in a breach of a non-compete clause case was denied. Plaintiff's failure to designate the Court of Appeals in its notice of appeal was not fatal to the appeal where plaintiff's intent to appeal could be fairly inferred, and defendants were not misled by plaintiff's mistake.

2. Appeal and Error—preservation of issues—failure to argue

Plaintiff's additional claims that it failed to present in its brief were deemed abandoned under N.C. R. App. P. 28(a).

3. Trials—findings of fact—reclassified as conclusion of law—application of legal principles

The trial court's finding of fact that neither Ms. nor Mr. Phelps, individually or together, entered into competition with plaintiff in any form, direct or indirect, at any time up to and including the present, was reclassified as a conclusion of law since it involved application of legal principles.

4. Employer and Employee—breach of non-compete clause—no legal nexus—assumed risk

The trial court did not err by determining that neither Ms. Phelps nor Mr. Phelps breached their obligations under the non-compete clause of the parties' agreement. There was no legal nexus between CTP's profits and the benefits CTP had conferred upon Ms. Phelps. Further, third-party defendant assumed the risk that Mr. Phelps might enter into competition with plaintiff since he made a business decision and proceeded with consummation of the agreement even though Mr. Phelps gave no assurance that he would not enter into competition with plaintiff.

Appeal by Plaintiff from order entered 13 May 2010 and memorandum of decision and judgment entered 18 August 2010 by Judge Howard E. Manning, Jr. in Franklin County Superior Court. Heard in the Court of Appeals 27 October 2011.

Harris & Hilton, P.A., by Nelson G. Harris, for Plaintiff-appellant.

Edmundson & Burnette, L.L.P., by J. Thomas Burnette and James T. Duckworth, III, The Law Office of Thomas H. Clifton, PLLC, by Thomas H. Clifton, Davis, Sturges & Tomlinson, by Conrad Boyd Sturges, III, and J.P. Williamson, Jr., for Defendant-appellees.

HUNTER, JR., Robert N., Judge.

This controversy centers upon the sale of a contract labor staffing business and the alleged breach of a non-compete clause in the asset sale agreement. The purchaser of the business, Phelps Staffing, LLC ("Plaintiff"), appeals the trial court's order and memorandum of decision and judgment denying Plaintiff's claims for relief against six named defendants, including, *inter alia*, the seller of the business, Sheila Phelps, and her husband, Charles Phelps. Plaintiff contends the trial court erred by concluding (1) Ms. Phelps did not breach her obligations under the non-compete clause of the asset sale agreement; and (2) Mr. Phelps was not bound by the asset sale agreement and, therefore, did not breach the non-compete clause by entering into competition with Plaintiff. After careful review, we affirm.

I. Factual Background & Procedural History

The facts of this case are not in dispute. Ms. Phelps incorporated S.C. Phelps, Inc. ("SCP") in 1996. She has served as the president and sole shareholder of SCP since its incorporation. SCP engaged in the business of providing contract labor to local businesses. Ms. Phelps handled SCP's payroll, bookkeeping, and workers' compensation matters. Phelps used his prior experience and contacts in the labor staffing industry to recruit customers and contract laborers for SCP.[1] While Mr. Phelps did not draw a salary for his work through 2006 due to apparent tax issues,[2] he was, however, provided with approximately $250,000 in cash out of the proceeds of the business. In addition, SCP paid various personal expenses on behalf of Mr. and Ms. Phelps including mortgage payments on their primary residence, rental payments on their beach cottage, utility bill payments at both residences, and personal vehicle expenses such as automotive insurance.

1. The record before this Court indicates Mr. Phelps operated a contract labor business as a sole proprietor for at least two years prior to the incorporation of SCP.

2. The trial court determined that SCP was incorporated in Ms. Phelps' name because Mr. Phelps owed taxes to the Internal Revenue Service and the North Carolina Department of Revenue.

SCP thrived as Mr. Phelps continued to acquire new customers. These customers included Arcola Lumber Company, Cal-Maine Foods, Carolina Egg Companies, Coastal Supply, Inc., and Flippo Lumber Company. Moyses Roa Mata, another employee of SCP, assisted Mr. Phelps in recruiting the contract labor workers.

Ms. Phelps first attempted to sell SCP in 2000. The sale fell through, however, because Mr. Phelps refused to sign a non-competition agreement. In 2001, SCP leased a new office space on Bickett Boulevard. Ms. Phelps hired Crystal Powell to assist with SCP's payroll, taxes, and workers' compensation matters. Ms. Powell's role and responsibilities increased as Ms. Phelps' involvement with the business diminished.

Mr. Phelps' role with SCP also increased and, by 2006, he was the primary manager of the business and began drawing a weekly salary of $1,000. In March 2007, Mr. Phelps formed a new company, C. T. Phelps, Inc. ("CTP"). Ms. Phelps held no ownership interest in CTP, nor was she otherwise affiliated with CTP as Mr. Phelps' partner, agent, or employee. Around this time, Ms. Phelps told Mr. Phelps she was ready to get out of the contract labor business and wanted to sell SCP. Mr. Phelps agreed it was a good time to sell, and SCP was listed for sale later that year.

Omar El-Kaissi expressed an interest in acquiring SCP. Through discussions with Mr. and Ms. Phelps, Mr. El-Kaissi learned that Ms. Phelps was the sole owner of SCP and that SCP had been paying some of the Phelps' personal expenses. Mr. El-Kaissi informed Mr. and Ms. Phelps that he wanted both of them to sign a non-compete agreement as part of his asset purchase of SCP. Ms. Phelps agreed to sign on behalf of herself and SCP, but Mr. Phelps stated he would not sign a non-compete agreement.

Nevertheless, the transaction proceeded. On 10 December 2007, Ms. Phelps, acting on her own behalf and on behalf of SCP, and Mr. El-Kaissi, acting on behalf of Plaintiff, entered into an "Asset Purchase Agreement" (the "Agreement"). Pursuant to the Agreement, Plaintiff agreed to purchase all of SCP's assets including, *inter alia*, the business's good will, inventory, equipment, files, customer lists, and client information. Plaintiff agreed to pay a purchase price of $1.4 million, plus an additional $100,000 to be paid over a ten-year period pursuant to the terms of a promissory note. Mr. Phelps negotiated the sale on SCP's behalf and persuaded Mr. El-Kaissi to personally guarantee payment of the $100,000 note within twelve months of the Agreement.

The Agreement specifies $25,000 of the purchase price as consideration for the inclusion of a non-compete clause. Pursuant to this clause, SCP and Ms. Phelps agreed and covenanted "not [to] directly and/or indirectly Compete with Buyer . . . either by himself [sic] or through any entity owned or managed, in whole or in part, by the Seller for a period of [5 years][3] from the date of this Agreement within the Prohibited Territory."[4] The clause further provides, for the same five-year period, "Seller, Shelia [sic] Phelps and Charles Phillips[5] shall not jeopardize the present and future operations of the Business by requesting any present or future client, customer, or vendor of Buyer to curtail, amend, or cancel its business with Buyer." Moreover, the Agreement defines "Confidential Information" broadly and states:

> Seller, Shelia [sic] Phelps and Charles Phillips agree to hold in confidence and shall not, except pursuant to written authorization from the Buyer or as required by a governmental entity: (i) directly or indirectly reveal, report, publish, disclose or transfer the Confidential Information or any part thereof to any person or entity; (ii) use any Confidential Information or any part thereof for any purpose other than the benefit of the Buyer; or (iii) assist any person or entity other than the Buyer to secure any benefit from the Confidential Information or any part thereof for a period of two (2) years after the date of Closing . . . .

Mr. Phelps was present at the execution of the Agreement but he did not sign the Agreement. Mr. Phelps did not sign a non-compete agreement relating to the asset sale of SCP, nor did he give any written or oral assurance that he would not compete with Plaintiff's business. Plaintiff initially retained Ms. Powell and Mr. Mata as employees; however, both refused to sign a non-compete agreement. Ms. Powell left Plaintiff to assist Ms. Phelps with accounting work at SCP in February 2008. Plaintiff terminated Mr. Mata's employment in October 2008 after Mr. El-Kaissi discovered Mr. Mata had been diverting Plaintiff's customers to a competing business.[6]

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3. The non-competition provision initially prescribed a three-year effective period. Upon further negotiation, the parties extended this period to five years..

4. The "Prohibited Territory" includes Hanover, Brunswick, Sussex, Caroline, Spotsylvania, and Amelia Counties in Virginia; Franklin, Warren, Vance, and Nash Counties in North Carolina; McDuffie County in Georgia; and Darke County in Ohio.

5. As the trial court noted, it is unclear why the name "Charles Phillips" appears in the Agreement. Charles Phillips is Ms. Phelps' son. He never met Mr. El-Kaissi and took no part in the execution of the Agreement.

6. It is unclear from the trial court's factual findings whether this "competing entity" was CTP.

Ms. Phelps split the proceeds from the asset sale of SCP with Mr. Phelps, transferring $759,263.41 into Mr. Phelps' account in June 2008. Mr. and Ms. Phelps separated approximately one month later. After their separation, Ms. Powell continued to do accounting work for Mr. Phelps and Ms. Phelps separately and continued to pay the Phelps' personal expenses out of SCP's business account. These expenses included mortgage payments on the Phelps' primary residence, rental payments on a beach cottage at Emerald Isle, utility payments for their primary residence and the beach cottage, personal vehicles, and automobile insurance. In August 2008, Mr. Phelps transferred $50,000 to SCP, which Ms. Powell applied towards payment of these expenses. In addition, Ms. Powell performed accounting work for Mr. Phelps' business, CTP. She was not being paid for this work but was drawing unemployment benefits from SCP. CTP began operating its business at the Bickett Boulevard office location in August 2008. SCP, however, paid the rent on that office space through January 2009.

Mr. Phelps maintained contact with SCP's former customers throughout 2008. In October of that year, Mr. Phelps informed Ms. Powell of his intent to return to the contract labor staffing business. He asked her to acquire new computer software to assist the accounting work for CTP. Ms. Powell obliged and installed new accounting software on a computer purchased by Mr. Phelps for CTP. Without Ms. Phelps' permission or participation, all of SCP's old business, financial, and accounting data sets were installed into the accounting software on CTP's new computer.

In December 2008, Mr. Phelps began competing with Plaintiff. Mr. Phelps contacted SCP's former customers, Arcola Lumber Company, Cal-Maine Foods, Carolina Egg Companies, Coastal Supply, Inc., and Flippo Lumber Company. At the time, these companies were engaged in business with Plaintiff. Mr. Phelps persuaded some of these companies to conduct business with CTP, and, in addition, "flipped" many of the contract laborers who were then working for Plaintiff. Mr. Mata assisted Mr. Phelps in recruiting and transferring the laborers from Plaintiff to CTP. Plaintiff contends that because many of these workers did not fill out job applications with CTP,[7] Mr. Phelps must have obtained their personal information, such as social security numbers, from SCP's old records.

7. The record indicates many of these laborers were in fact unaware they had been "flipped" prior to receiving their first paycheck from CTP in January 2009.

In February 2009, CTP began paying the rent for its office space and the various personal expenses (rent and utilities for the beach house, mortgage and insurance payments) that had formerly been paid by SCP. CTP also took over operation and payments on a fax machine and copier formerly used by SCP.

On 13 April 2009, Plaintiff filed a complaint in Franklin County Superior Court naming Ms. Phelps, SCP, Mr. Phelps, CTP, Mr. Mata, and Ms. Powell as Defendants. In its complaint, Plaintiff asserted claims against Ms. Phelps and SCP for breach of the confidentiality and non-competition clauses set forth in the Agreement (first and second claims for relief); against Ms. Phelps and SCP for breach of contract relating to payments of workers' compensation premiums made by Plaintiff, post-closing, which Plaintiff contended should have been paid by Ms. Phelps and SCP (third claim for relief); against all Defendants for violations of the Trade Secrets Protection Act (fourth and fifth claims for relief); against all Defendants for civil conspiracy (sixth claim for relief); against all Defendants for tortious interference with contractual relations (seventh claim for relief); and against all Defendants for unfair and deceptive trade practices (eighth claim for relief). Ms. Phelps and SCP counterclaimed against Plaintiff and impleaded third party Defendant Mr. El-Kaissi, alleging breach of contract for failure to pay the $100,000 promissory note in its entirety within one year of the Agreement.

On 19 January 2010, Ms. Phelps and SCP filed a motion for summary judgment. Ms. Powell and Mr. Mata filed motions for summary judgment on 30 April 2010. Neither Mr. Phelps nor CTP moved for summary judgment with respect to Plaintiff's claims. On 13 May 2010, the trial court entered an order: (1) granting Ms. Powell's motion for summary judgment as to all claims; (2) granting summary judgment in favor of Ms. Phelps, SCP, and Mr. Mata with respect to the Trade Secrets Act claim and the tortious interference with contractual relations claim; and (3) granting summary judgment in favor of Mr. Mata with respect to the unfair and deceptive trade practices claim.

On 7 June 2010, the trial court heard the claims not resolved by its 13 May 2010 order. The court permitted Plaintiff to amend its complaint to claim: (1) Mr. and Ms. Phelps operated SCP as a partnership and, accordingly, Mr. Phelps was bound by the non-competition clause set forth in the Agreement; (2) Mr. Phelps acted as the agent of SCP in competing with Plaintiff; (3) Mr. Phelps was the alter ego of SCP; and (4) as the true owner and alter ego of SCP, Mr. Phelps is bound by the terms of the non-competition clause.

On 18 August 2010, the trial court entered a memorandum of decision and judgment awarding Plaintiff $8,478.00 relating to the unpaid workers' compensation premiums (Plaintiff's third claim for relief) and denying relief with respect to Plaintiff's remaining claims. The trial court also concluded that Ms. Phelps and SCP were equitably estopped from accelerating the obligation of Mr. El-Kaissi and Plaintiff due under the promissory note.

II. Jurisdiction & Scope of Review

On 17 September 2010, Plaintiff filed a timely notice of appeal with this Court. Plaintiff's notice of appeal provides as follows:

> PLEASE TAKE NOTICE THAT Plaintiff Phelps Staffing, LLC, by and through the undersigned counsel, hereby appeals the Memorandum of Decision And Judgment filed August 18, 2010, and any and all interlocutory decisions of Court previously made and reflected in that Memorandum of Decision And Judgment.

On 21 December 2010, Defendants filed a motion with the trial court alleging jurisdictional default and seeking to dismiss Plaintiff's appeal to this Court. Defendants contended in their motion that Plaintiff's notice of appeal failed to comport with the requirements of Rule 3(d) of the North Carolina Rules of Appellate Procedure because it did not designate this Court as the court to which Plaintiff directed its appeal. Defendants further contended Plaintiff had failed to prepare and deliver the trial transcript in a timely manner as required by Rule 7(b)(1) of the North Carolina Rules of Appellate Procedure. The trial court denied Defendants' motion to dismiss in an order entered 9 February 2011. Defendants appealed the trial court's order by filing a notice of appeal with this Court on 1 March 2011. However, Defendants did not file an appellate brief and, on 2 August 2011, this Court entered an order granting Plaintiff's motion to dismiss Defendants' appeal.

On 25 July 2011, Defendants filed a motion to dismiss Plaintiff's appeal with *this* Court, again asserting jurisdictional default based upon Plaintiff's allegedly defective notice of appeal. In its motion, Defendants cite two defects in Plaintiff's notice of appeal: (1) the notice does not designate the court to which Plaintiff directs its appeal, and (2) Plaintiff's intent to appeal the trial court's 13 May 2010 order cannot be fairly inferred from the language of the notice. Defendants aver these defects render Plaintiff's notice of appeal insufficient to confer appellate jurisdiction upon this Court.

[1] "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." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). Rule 3(d) governs the content of a notice of appeal and requires that "[t]he notice of appeal . . . shall designate the judgment or order from which appeal is taken and the court to which appeal is taken." N.C. R. App. P. 3(d). "The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737 (1997). However, "[m]istakes by appellants in following all the subparts of Appellate Procedure Rule 3(d) have not always been fatal to an appeal." *Stephenson v. Bartlett*, 177 N.C. App. 239, 242, 628 S.E.2d 442, 444 (2006). It is well established " 'that 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.' " *Smith v. Indep. Life Ins. Co.*, 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979) (citation omitted) (emphasis added).

In the instant case, Plaintiff's notice of appeal fails to designate "the court to which appeal is taken." This defect is obvious, as Plaintiff's notice of appeal does not designate *any* court as the proper venue for its appeal. Plaintiff's error is a complete omission of the content requirement as set forth in Rule 3(d). However, this Court has liberally construed this requirement and has specifically held that a plaintiff's failure to designate this Court in its notice of appeal is not fatal to the appeal where the plaintiff's intent to appeal can be fairly inferred and the defendants are not misled by the plaintiff's mistake. *See Stephenson*, 177 N.C. App. at 243, 628 S.E.2d at 444-45 (permitting plaintiff to proceed with appeal to this Court despite designating the North Carolina Supreme Court in its notice of appeal). The "fairly inferred" doctrine ensures that a violation of Rule 3(d) results in dismissal only where the appellee is prejudiced by the appellant's mistake. Here, Plaintiff timely filed its notice of appeal with this Court. Defendants could fairly infer Plaintiff's intent to appeal to this Court, as this Court is the only court with jurisdiction over Plaintiff's appeal. Furthermore, Defendants concede they were not misled or prejudiced by Plaintiff's error. Therefore, we conclude Plaintiff's mistake in failing to name this Court in its notice of appeal does not warrant dismissal of Plaintiff's appeal.

Plaintiff also appears to be playing fast and loose with Rule 3(d)'s mandate that a notice of appeal must "designate the judgment or order from which appeal is taken." N.C. R. App. P. 3(d). In its notice, Plaintiff states its intent to appeal the trial court's memorandum of decision and judgment. However, Plaintiff further declares its intent to appeal "any and all interlocutory decisions made and reflected" therein. This ambiguous "catchall" language is problematic in light of the multitude of claims resolved by the trial court in two separate rulings. However, even if this ambiguity raises an issue as to whether Plaintiff's intent to appeal the trial court's 13 May 2010 order can be fairly inferred, Plaintiff has rendered this a moot issue by challenging only the trial court's dismissal of Plaintiff's breach of contract claims against Sheila and Charles Phelps. The trial court disposed of both of these claims in its memorandum of decision and judgment, and Plaintiff's intent to appeal these claims is clearly set forth in its notice of appeal. Whether this Court has jurisdiction over the claims adjudicated by the trial court in its 13 May 2010 order is immaterial, as those claims are not before this Court. Accordingly, we deny Defendants' motion to dismiss and proceed to address the merits of Plaintiff's appeal.

[2] Before reaching the merits, however, we must consider the scope of Plaintiff's appeal. In both its appellate brief and its oral arguments before this Court, Plaintiff assigns error only to the trial court's dismissal of Plaintiff's breach of contract claims against Mr. and Ms. Phelps. Specifically, Plaintiff alleges that Mr. and Ms. Phelps breached the non-competition clause of the Agreement. Thus, Plaintiff has abandoned its remaining claims against Mr. and Ms. Phelps and has abandoned all claims against Defendants SCP, CTP, Ms. Powell, and Mr. Mata. *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned."). As the trial court's memorandum of decision and judgment was a final judgment of the superior court, this Court exercises jurisdiction over Plaintiff's appeal pursuant to North Carolina General Statutes § 7A-27(b) (2009).

III. Analysis

[3] When reviewing a judgment from a bench trial, "our standard of review 'is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Town of Green Level v. Alamance County*, 184 N.C. App. 665, 668-69, 646 S.E.2d 851, 854

(2007) (citation omitted). The trial court's " '[f]indings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary.' " *Id.* at 669, 646 S.E.2d at 854 (citation omitted). This Court reviews the trial court's conclusions of law *de novo*. *Id.*

Plaintiff challenges one factual finding of the trial court. The trial court found "that neither Sheila nor S.C. Phelps, individually or together, entered into competition with Plaintiff in any form, direct or indirect, at any time up to and including the present." Plaintiff asserts this is not a finding of fact, but rather a conclusion of law.

As this Court has recognized, "[t]he classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997). Generally, "any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." *Id.* (internal citations omitted). A "determination reached through 'logical reasoning from the evidentiary facts' is more properly classified a finding of fact." *Id.* (citation omitted). We agree with Plaintiff that the trial court's determination concerning whether Ms. Phelps and SCP entered into competition with Plaintiff involves application of legal principles and is appropriately classified as a conclusion of law. We therefore reclassify this determination as a conclusion of law and apply our standard of review accordingly. *See N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) ("[C]lassification of an item within the order is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review."). We now address the merits of Plaintiff's appeal.

A. Sheila Phelps

[4] Plaintiff contends the trial court erred in determining Ms. Phelps did not breach her obligations under the non-compete clause of the Agreement. We initially note that covenants not to compete "are disfavored by the law." *Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 655, 670 S.E.2d 321, 327 (2009); *see also Kennedy v. Kennedy*, 160 N.C. App. 1, 9, 584 S.E.2d 328, 333 (2003) ("Covenants not to compete restrain trade and are scrutinized strictly."). Nonetheless, a covenant not to engage in a particular business is a valid and enforceable contract provided the geographic and durational restrictions are reasonably necessary to protect the interest of the covenantee. *See Sineath v. Katzis*, 218 N.C. 740, 754, 12 S.E.2d 671, 680 (1941).

The parties in the instant case do not dispute the validity of the non-compete clause contained in the Agreement. Plaintiff's challenge rests upon its assertion that the trial court's findings of fact do not support its conclusion of law that Ms. Phelps did not breach her obligations under the Agreement. Specifically, Plaintiff contends Ms. Phelps breached the non-compete clause by (1) holding a pecuniary interest in Plaintiff's competitor, CTP, and (2) providing financial and other support to CTP.

Plaintiff cites our Supreme Court's ruling in *Finch Brothers v. Michael*, 167 N.C. 322, 83 S.E. 458 (1914), as support for its proposition that a party violates a non-compete agreement by holding a pecuniary interest in a competitor of the party protected by the agreement. In *Finch*, the court stated:

> the defendant has no pecuniary interest in the [competing entity], either directly or indirectly, as member, manager, agent, or otherwise, for he is only a creditor of the partnership, which is a very different thing from conducting the business or being interested therein. In a sense, he may be considered as having some concern for its success as its creditor, but this is all, and is not sufficient to constitute a breach of his contract, either under the sale of the good will or the restrictive covenant.

167 N.C. at 324, 83 S.E. at 460. The court's language makes clear that holding a pecuniary interest in a competitor of the protected party is not a *per se* breach of a covenant not to compete. Black's Law Dictionary defines a financial or "pecuniary interest" as "an interest involving money or its equivalent; esp., an interest in the nature of an investment." BLACK'S LAW DICTIONARY 829, 1167 (8th ed. 2004). Clearly, both a creditor and a manager of a business have a pecuniary interest in the business, yet, only the interest held by the latter constitutes a breach of a non-compete agreement. *See Finch*, 167 N.C. at 324, 83 S.E. at 460. Therefore, it is the *nature* of the pecuniary interest taken by the covenantor that is critical in determining whether the covenantor has breached its agreement to refrain from entering into competition with the covenantee. Serving as a creditor does not amount to a breach because, as the court implied in *Finch*, a creditor's interest does not constitute a stake in the competing entity's success sufficient to constitute a breach. *See id.* On the other hand, taking stock in, organizing, or managing a corporation formed to compete with the protected party is a clear breach of the covenantor's promise not to compete. *Sineath*, 218 N.C. at 755, 12 S.E.2d at 681; *see also Kramer v. Old*, 119 N.C. 1, 25 S.E. 813 (1896) (holding

defendants breached non-compete covenant by forming and holding stock in competing corporation).

In the case *sub judice*, Ms. Phelps covenanted under the Agreement not to "directly and/or indirectly Compete with [Plaintiff] . . . through any entity owned or managed, in whole or in part, by [Ms. Phelps], for a period of [5 years] from the date of [the] Agreement within the Prohibited Territory." The trial court found as fact that CTP has been competing with Plaintiff since December 2008. The trial court also determined that CTP has been paying some of Ms. Phelps' personal expenses since February 2009. In light of these factual findings, which Defendant does not dispute, Plaintiff contends the trial court erred by concluding as a matter of law that Ms. Phelps did not breach her obligations under the Agreement. We cannot agree, as Ms. Phelps' "interest" in CTP is not the type of prohibited pecuniary interest contemplated by the precedent of our Courts.

The record indicates that Ms. Phelps has held no stock or other financial stake in CTP since its incorporation in 2007. Nor has Ms. Phelps participated as a manager, employee, or agent of CTP. In fact, it appears Ms. Phelps had been attempting to disassociate herself from the contract labor staffing business for years prior entering into the Agreement with Plaintiff. Plaintiff asserts Ms. Phelps "shares in the profits" of CTP because CTP has paid her personal expenses, including mortgage payments, credit card payments, and utility bills. This contention is without merit, as there is no legal nexus between CTP's profits and the benefits CTP has conferred upon Ms. Phelps. Ms. Phelps has no entitlement to these payments. Quite the opposite, these payments are entirely within the discretion of Mr. Phelps. We note that many of the payments at issue, such as the mortgage payments, have been made for the benefit of *both* Mr. and Ms. Phelps, who, until 2008, lived together as a married couple for many years. Furthermore, this Court fails to see how Ms. Phelps' receipt of these benefits assists CTP in competing with Plaintiff. Nor do we see how Plaintiff is injured by these payments.[8] We hold Ms. Phelps' "interest" in CTP does not amount to direct or indirect competition with Plaintiff, and the trial court correctly concluded that Ms. Phelps' receipt of these payments does not amount to a breach of her obligations under the Agreement.

8. While not necessary to our holding, we note that Plaintiff's claim for damages appears speculative in this respect.

Plaintiff further contends Ms. Phelps breached the non-compete clause by providing financial and other assistance to CTP. Plaintiff cites the trial court's findings that (1) SCP made office rental payments on CTP's behalf through January 2009, (2) SCP transferred confidential data sets to CTP when Ms. Powell installed the accounting software on CTP's computer, (3) CTP took over payments on SCP's fax machine and copier, and (4) CTP used SCP's fax number and phone number when it began competing with Plaintiff. Plaintiff concludes: "The bottom line is that, at the very least, paying the rent for a competitor must be direct or indirect assistance."

Plaintiff's argument is misplaced. Ms. Phelps, through SCP, leased the office space located at Bickett Boulevard to conduct SCP's business. Plaintiff asserts that SCP made these payments "from August 2008 through the end of January 2009, when C T Phelps was in direct competition with Plaintiff." Plaintiff's recitation of the trial court's factual findings is inaccurate. The trial court found that Mr. Phelps *intended* to return to the contract labor staffing business in October 2008, and Mr. Phelps did not actually begin competing with Plaintiff until December 2008. At most, SCP made rental payments on CTP's behalf while CTP was competing with Plaintiff from December 2008 through January 2009. In light of the relationship between Mr. and Ms. Phelps, one month represents a reasonable period for transition of the office space from SCP to CTP. CTP assumed payments on the lease in February 2009, after the transition was complete. This is competent evidence from which the trial court could conclude that Ms. Phelps made these rental payments to further SCP's business, not to assist CTP in competing with Plaintiff.

Furthermore, we conclude that Ms. Phelps did not breach her obligations under the Agreement when Ms. Powell transferred SCP's old data sets to CTP through installation of accounting software on a CTP computer. As the trial court found and Plaintiff concedes, Ms. Phelps did not participate and had no knowledge of this transaction. Plaintiff's remaining contentions on this issue are without merit. Accordingly, we hold the trial court correctly concluded Ms. Phelps did not breach her obligations under the non-compete clause of the Agreement.

B. Charles Phelps

The parties agree Mr. Phelps did not sign the Agreement. Nonetheless, Plaintiff urges this Court to find that Mr. Phelps, as the "true owner" of SCP, was bound by the non-compete clause and

breached said clause by entering into competition with Plaintiff. Plaintiff cites a Montana Supreme Court decision, *Bolz v. Myers*, 651 P.2d 606 (Mont. 1982), in support of its position. We initially note that *Bolz* is not binding authority upon this Court. More importantly, we conclude *Bolz* is distinguishable from the instant case and is therefore unpersuasive.

In *Bolz*, Defendant Mason Myers met with Plaintiff Dale Bolz to negotiate the purchase of a hearing aid center by Mr. Bolz. *Id*. at 608. Mr. Myers' wife, Merle, and son, Michael, were present at this meeting. *Id*. Later, when the parties executed the sale of the hearing aid center, only Merle and Michael signed as sellers. *Id*. Mr. Myers did not sign the purchase agreement, which included a non-compete clause. *Id*. The Montana Supreme Court held that Mr. Myers was the true owner of the business and was therefore bound by the purchase agreement. *Id*. at 612.

We agree with Plaintiff that there are factual similarities between *Bolz* and the case before this Court. However, we cannot agree with Plaintiff's assertion that the facts of *Bolz* "are, obviously, virtually identical in substance" to the facts found by the trial court in the instant case. Two critical facts distinguish *Bolz* from the instant case. First, "Bolz expressed a concern as to what would keep Myers from going into competition with him, and Myers *gave him an oral assurance that he had no intent to do so.*" *Id*. at 608 (emphasis added). Second, the *Bolz* court determined based upon a series of proposed contracts exchanged between the parties that the parties considered Mr. Mason the owner of the business. *Id*.

Here, Mr. El-Kaissi knew through negotiations with Mr. and Ms. Phelps that Ms. Phelps was the sole owner of SCP. Mr. El-Kaissi also knew Mr. Phelps had a background in the contract labor business and might pose a threat to his business. Mr. El-Kaissi demonstrated his concern when he asked Mr. Phelps to sign a non-compete agreement in conjunction with the sale of SCP. Mr. Phelps stated he was unwilling to sign a non-compete agreement. Unlike the defendant in *Bolz*, Mr. Phelps gave no assurance that he would not enter into competition with Plaintiff. Mr. El-Kaissi made a business decision and proceeded with consummation of the Agreement. Based on these facts, we must agree with the trial court's conclusion that Mr. El-Kaissi assumed the risk that Mr. Phelps might enter into competition with Plaintiff. Plaintiff's assignment of error is overruled.

IV. Conclusion

For the foregoing reasons, we hold there was sufficient competent evidence from which the trial court could conclude that neither Ms. Phelps nor Mr. Phelps breached the Agreement. The trial court's memorandum of decision and judgment is hereby

Affirmed.

Judges THIGPEN and MCCULLOUGH concur.

CONNIE CHANDLER, Employee, Plaintiff, by her Guardian Ad Litem, CELESTE M. HARRIS v. ATLANTIC SCRAP & PROCESSING, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Carrier, Defendants

No. COA11-618

(Filed 20 December 2011)

1. **Workers' Compensation—unpaid award—family provided care services—interest denied**

   The Industrial Commission erred as a matter of law in a workers' compensation action by denying plaintiff interest on an award of unpaid attendant care. Such interest is mandatory under N.C.G.S. § 97-86.2 and an interest award to family members who were taking care of plaintiff instead of directly to plaintiff was upheld in *Palmer v. Jackson*, 161 N.C. App. 642.

2. **Workers' Compensation—attendant care services—family members—other employment**

   The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff was entitled to attendant care services provided by her husband. An award of attendant care services provided by the victim's family member does not require preauthorization and the family member does not have to give up other employment to be compensated.

3. **Workers' Compensation—attendant care services—family member—rate of compensation**

   There was competent evidence in a workers' compensation case to support the Industrial Commission's determination of the rate at which plaintiff's husband should be compensated for providing attendant care services.

4. Workers' Compensation—attorney fees—claim unreasonably defended

The Industrial Commission did not abuse its discretion in a workers' compensation case by determining that defendants unreasonably defended plaintiff's claim and awarding attorney fees pursuant to N.C.G.S. § 97-88.1.

Appeal by plaintiff and cross-appeal by defendants from opinions and awards entered 25 February 2010 and 7 February 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 October 2011.

Walden & Walden, by Daniel S. Walden, for plaintiff appellant, cross-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Matthew J. Ledwith, for defendant appellees, cross-appellants.

McCULLOUGH, Judge.

Plaintiff Connie Chandler ("plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission (the "Commission") declining to award interest to plaintiff on an award of unpaid attendant care services. Defendants Atlantic Scrap & Processing ("Atlantic Scrap") and Liberty Mutual Insurance Company ("Liberty Mutual," collectively, "defendants") cross-appeal the Commission's decision awarding plaintiff compensation for attendant care services and attorneys' fees pursuant to N.C. Gen. Stat. § 97-88.1 (2009). We reverse the Commission's order declining to award interest to plaintiff, and we otherwise affirm the Commission's order awarding plaintiff compensation for attendant care services and attorneys' fees. We also grant plaintiff's motion for attorneys' fees incurred during the pendency of this appeal pursuant to N.C. Gen. Stat. § 97-88 (2009).

I. Background

Plaintiff began working for Atlantic Scrap, a metal recycling facility, in 1994. Plaintiff was hired to clean Atlantic Scrap's three buildings. On 11 August 2003, plaintiff began her work duties with Atlantic Scrap at 7:00 a.m. As plaintiff was walking down a flight of concrete steps, she accidentally fell backwards, striking the posterior portion of her head and neck on the steps. When EMS personnel arrived at the scene, plaintiff was confused and agitated and had a

bruise with swelling on the back of her head. Plaintiff's primary complaints at that time were headache and neck pain. Upon arriving at the hospital, plaintiff related to the treating physician that she went up a flight of stairs to begin her work when she slipped and fell, hitting her head on the stairs. Plaintiff also mistakenly stated that the month was January and that it was cold outside, despite that the month was August, and plaintiff was unaware of the year. Nonetheless, all radiological tests were negative. Plaintiff was determined to have sustained a concussion or closed head injury, a neck injury, and a right partial rotator cuff tear, all due to her fall.

After her fall, during the period from 13 August 2003 through November of that year, plaintiff treated with her primary care physician, Dr. Norman Templon ("Dr. Templon"). Plaintiff's primary symptoms from her fall continued to be global headaches, right shoulder pain, neck pain, dizziness, and insomnia. Plaintiff also developed depression due to her injuries.

In October 2003, plaintiff's husband, Lester Chandler ("Mr. Chandler"), advised Dr. Templon that plaintiff had been having significant memory problems, sensitivity to light, and some nausea and vomiting almost every day since her fall. On 31 October 2003, a brain MRI revealed that plaintiff had evidence of small vessel ischemic changes in her white matter. By November 2003, plaintiff had constant occipital headaches and frequent crying spells.

In November 2003, Dr. Templon diagnosed plaintiff as suffering from cognitive impairments secondary to post-concussive syndrome. Dr. Templon referred plaintiff to neuropsychologist Cecile Naylor ("Dr. Naylor") for evaluation of plaintiff's cognitive functioning and memory. On 3 December 2003, testing by Dr. Naylor revealed that plaintiff had selective deficit in verbal memory, impaired mental flexibility, depression, and a low energy level.

On 23 December 2003, Dr. Templon recommended that plaintiff also see a neurologist. Defendants directed plaintiff to see neurologist Carlo P. Yuson ("Dr. Yuson"). Plaintiff presented to Dr. Yuson on 14 January 2004, complaining primarily of frequent headaches and memory problems since her fall. Dr. Yuson diagnosed plaintiff as suffering from post-concussive syndrome from her fall, along with depression secondary to her fall. Plaintiff continued to see Dr. Yuson throughout March, April, and May 2004, presenting the following continuing symptoms: severe headaches, memory problems, dizziness, crying spells, insomnia, cognitive problems, and depression. Dr. Yuson

recommended that plaintiff be re-evaluated concerning her cognitive functioning and memory problems.

On 3 May 2004, Liberty Mutual assigned Nurse Bonnie Wilson ("Nurse Wilson") to provide medical case management services for plaintiff's claim. Nurse Wilson arranged for plaintiff's cognitive functioning and memory to be re-evaluated by Dr. Naylor. Plaintiff presented to Dr. Naylor for testing on 28 June 2004, tearful and clinging to Mr. Chandler. Testing revealed the following: (1) plaintiff's intellectual functioning had fallen from the borderline to impaired range; (2) plaintiff's memory functioning revealed a sharp decline into the impaired range in all areas; (3) plaintiff had a significant compromise in her conversational speech, *i.e.*, plaintiff only spoke when spoken to, her responses were often short and often fragmented and confused, and plaintiff had difficulty responding to questions. Plaintiff also exhibited the following symptoms: (1) inability to answer questions; (2) fearful and reliant on Mr. Chandler; (3) hears people in the home without any basis; (4) is afraid to go anywhere alone, even in her own home; (5) is easily upset; (6) has significant confusion, as her speech makes no sense; (7) has poor concentration and memory; (8) her moods change quickly; (9) is incapable of performing even simple tasks of daily living; (10) is unable to cook anything; (11) takes naps during the day due to frequent insomnia at night; (12) has decreased appetite and poor energy; (13) cries easily; and (14) feels worthless. All of these test results and symptoms indicated that as of 28 June 2004, plaintiff suffered from severe and global cognitive deficits in higher cortical functioning, all as a result of her 11 August 2003 fall at work.

Beginning on or before 28 June 2004, plaintiff has been incapable of being alone and has been unable to perform most activities of daily living without assistance from Mr. Chandler. Plaintiff has required constant supervision and attendant care services on a 24-hours-a-day/7-days-a-week basis, including at night, due to her severe cognitive impairments, insomnia, paranoia, and fear of being alone. Mr. Chandler has provided the required constant attendant care services to plaintiff for the period beginning at least 28 June 2004 and continuously thereafter, without any compensation for his services.

On 20 July 2004, Dr. Naylor reported plaintiff's severe cognitive and memory impairments to Nurse Wilson, discussing Dr. Naylor's written evaluation report and conclusions with Nurse Wilson. Dr. Naylor informed Nurse Wilson that plaintiff's cognitive and mental condition had greatly deteriorated since prior testing in early Decem-

ber 2003 and that plaintiff was no longer capable of caring for herself and needed constant supervision, which out of necessity was being provided by Mr. Chandler. On 23 August 2004, plaintiff was determined to have reached maximum medical improvement in relation to her traumatic brain injury resulting from her fall. On 21 September 2004, defendants filed a Form 60 Employer's Admission of Employee's Right to Compensation for a "concussion to the back of the head," reporting payment of temporary total disability compensation at $239.37 per week from the date of 11 August 2003.

On 27 October 2004, plaintiff presented to Dr. Yuson, accompanied by Nurse Wilson. Dr. Yuson notified Nurse Wilson that, in his opinion, plaintiff would never get any better mentally than she was as of 23 August 2004, when plaintiff was determined to have reached maximum medical improvement. Dr. Yuson again discussed Dr. Naylor's 20 July 2004 report with Nurse Wilson, including that plaintiff required constant attendant care services due to her cognitive and emotional impairments resulting from her fall. However, defendants elected not to secure attendant care services or pay Mr. Chandler for the attendant care services he provided to plaintiff.

In the period from January 2005 through October 2007, plaintiff's cognitive and emotional condition continued to slowly become worse, regressing to that of a four-year-old child due to her brain injury from her fall at work. In April 2008, Dr. Yuson opined in a written note that plaintiff was permanently totally disabled due to her brain injury from her fall at work.

In March 2009, Dr. Yuson again noted that plaintiff had continued to get worse in her cognitive and emotional conditions. On 3 April 2009, occupational therapist and life care planner Vickie Pennington ("Ms. Pennington") prepared a life care plan concerning plaintiff. Ms. Pennington's recommendations concerning plaintiff's care included, *inter alia*, that plaintiff needs constant attendant care for her lifetime, that plaintiff needs attendant care services in her home rather than in an institution or outside facility, and that it is not healthy or reasonable or best for plaintiff that Mr. Chandler continue to care for plaintiff exclusively. Dr. Yuson reviewed Ms. Pennington's life care plan, which he opined was medically necessary and reasonable for plaintiff.

On 27 August 2008, plaintiff filed a Form 33 Request that Claim be Assigned for Hearing, seeking "payment of attendant care services by [her husband] Lester Chandler beginning [20 July 2004] forward," and

an award of permanent total disability. On 12 April 2009, defendants filed a Form 33R response denying plaintiff's claim for the following reasons: (1) plaintiff's "current medical condition" was not causally related to her accident; (2) plaintiff was not permanently and totally disabled; and (3) plaintiff was not entitled to payment for attendant care services "rendered prior to written approval of the Commission, which has yet to be obtained."

An initial hearing was held before Deputy Commissioner Robert Wayne Rideout, Jr. ("Deputy Commissioner Rideout") on 13 April 2009. Plaintiff presented the testimony of Ms. Pennington and Mr. Chandler, as well as the deposition testimony of Dr. Yuson. Defendants presented no evidence or testimony at the hearing. On 10 August 2009, Deputy Commissioner Rideout filed his opinion and award, finding and concluding that plaintiff's injuries were caused by her August 2003 fall at work; that plaintiff is permanently totally disabled; and that plaintiff is entitled to have defendants provide all medical compensation due to her accident, including the constant around-the-clock attendant care services provided by Mr. Chandler for the period beginning 28 June 2004 and the services set out in the life care plan. Deputy Commissioner Rideout also concluded that defendants had defended the matter without reasonable ground and ordered defendants to pay attorneys' fees for plaintiff's attorney pursuant to N.C. Gen. Stat. § 97-88.1. Deputy Commissioner Rideout awarded Mr. Chandler the rate of $15.00 per hour for the constant attendant care services he has provided to plaintiff for the period beginning 28 June 2004 and each day thereafter.

On 25 August 2009, defendants appealed Deputy Commissioner Rideout's opinion and award to the Full Commission. On 20 November 2009, plaintiff moved the Commission to award interest on the past due attendant care pursuant to N.C. Gen. Stat. § 97-86.2 (2009), to be paid by defendants directly to Mr. Chandler. On 25 February 2010, the Commission filed its opinion and award, generally affirming Deputy Commissioner Rideout's opinion and award, but changing the hourly rate for attendant care services payable to Mr. Chandler to $11.00 per hour for 15 hours per day, rather than $15.00 per hour for 24 hours per day. The Commission declined to award interest to Mr. Chandler "in its discretion."

On 26 February 2010, plaintiff filed a motion to amend the Commission's 25 February 2010 opinion and award, this time seeking an order of mandatory payment of interest to plaintiff, instead of to

Mr. Chandler, pursuant to N.C. Gen. Stat. § 97-86.2. On 7 February 2011, the Commission filed an order declining to award plaintiff the interest. Plaintiff and defendants filed timely notices of appeal to this Court.

II. Standard of Review

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008). "A finding of fact is conclusive and binding on appeal so long as there is some evidence of substance which directly or by reasonable inference tends to support the findings, . . . even though there is evidence that would have supported a finding to the contrary." *Byrd v. Ecofibers, Inc.*, 182 N.C. App. 728, 731, 645 S.E.2d 80, 81 (2007) (omission in original) (internal quotation marks and citations omitted). Thus, "[t]his 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Richardson*, 362 N.C. at 660, 669 S.E.2d at 584 (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). We review the Commission's conclusions of law de novo. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

III. Plaintiff's appeal

A. *Interest on award of unpaid medical expenses*

[1] Plaintiff's sole issue on appeal is whether the Commission erred as a matter of law in denying interest to plaintiff on the award of unpaid attendant care, accruing from the date of the initial hearing until paid by defendants. Plaintiff contends payment of such interest by defendants is mandatory pursuant to N.C. Gen. Stat. § 97-86.2. We agree.

N.C. Gen. Stat. § 97-86.2 provides:

> In any workers' compensation case in which an order is issued either granting or denying an award to the employee and where there is an appeal resulting in an ultimate award to the employee, the insurance carrier or employer *shall* pay interest on the final award or unpaid portion thereof from the date of the initial hearing on the claim, until paid at the legal rate of interest provided in G.S. 24-1.

Id. (emphasis added). "It is well established that 'the word "shall" is generally imperative or mandatory.' " *Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979)). Thus, the statutory language of N.C. Gen. Stat. § 97-86.2 confers no "degree of discretion" on the Commission in determining an interest award "given the presence of the circumstances delineated in the relevant statutory language." *Puckett v. Norandal USA, Inc.*, No. COA10-805 (N.C. Ct. App. May 3, 2011), slip op. at 15.

In *Childress v. Trion, Inc.*, 125 N.C. App. 588, 481 S.E.2d 697 (1997), this Court reiterated the three goals of awarding interest to workers' compensation claimants, as announced by our Supreme Court: " '(a) [T]o compensate a plaintiff for loss of the use value of a damage award or compensation for delay in payment; (b) to prevent unjust enrichment to a defendant for the use value of the money, and (c) to promote settlement.' " *Id.* at 592, 481 S.E.2d at 699 (quoting *Powe v. Odell*, 312 N.C. 410, 413, 322 S.E.2d 762, 764 (1984)). In Childress, we explained that "[a]ll of these goals are met by the payment of interest on an award of medical expenses to workers' compensation claimants." *Id.* Therefore, "any award of medical compensation for the plaintiff's benefit is covered by G.S. 97-86.2." *Id.* at 591, 481 S.E.2d at 699.

The term "medical expenses" encompasses attendant care services rendered by an injured worker's family members. *See London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 480, 525 S.E.2d 203, 208 (2000) ("Our Supreme Court has . . . authorized payment to family members for attendant care provided to an injured family member."). Moreover, this Court has expressly upheld an award of interest on a plaintiff's outstanding medical expenses in the form of attendant care services where the Commission awarded the benefits directly to the family members who were taking care of the plaintiff, instead of to the plaintiff himself. *See Palmer v. Jackson*, 161 N.C. App. 642, 649, 590 S.E.2d 275, 279 (2003). In *Palmer*, this Court stated that "the fact that the money is going directly to the two relatives who are taking care of a worker in a vegetative state, rather than the worker himself, does not preclude the Full Commission from awarding interest." *Id.*

In the present case, after the initial hearing on 13 April 2009, Deputy Commissioner Rideout awarded plaintiff the cost of attendant care services, from which defendants appealed to the Full Commission. The Commission likewise awarded plaintiff the costs of attend-

ant care services, although the Commission modified the award amount. According to the statutory mandate, the Commission was required to determine an award of interest to plaintiff on the amount of unpaid attendant care services, accruing from the date of the initial hearing in this matter, to be paid by defendants. *See Puckett*, No. COA10-805, slip op. at 16 (requiring the Commission to comply with the applicable statutory language regarding interest calculations, "which does not give the Commission any discretion in making the required determination"). Further, because we see no meaningful distinction in the facts of *Palmer* and the facts of the present case, we hold the Commission may award such interest to Mr. Chandler given plaintiff's significant cognitive impairments. *See Palmer*, 161 N.C. App. at 649, 590 S.E.2d at 279. Therefore, we must reverse the Commission's order denying such interest and remand the matter to the Commission on this issue.

IV. Defendants' appeal

A. Award to plaintiff for attendant care services

[2] Defendants' first argument on appeal is that the Commission erred in awarding plaintiff compensation for attendant care services. Defendants contend that pursuant to the Commission's "Medical Fee Schedule," plaintiff was required to obtain written authority from the Commission to recoup fees associated with the rendition of attendant care services by Mr. Chandler. Defendants further contend they were not advised of plaintiff's attendant care needs, and nevertheless, Mr. Chandler was not forced to give up other employment to care for plaintiff. Defendants' arguments have no merit.

First and foremost, in *Boylan v. Verizon Wireless*, 201 N.C. App. 81, 685 S.E.2d 155 (2009), this Court expressly rejected defendants' argument "that plaintiff never requested prior approval for such services in violation of the fee schedule established by the Industrial Commission pursuant to N.C. Gen. Stat. § 97-26(a) and was therefore not entitled to attendant care benefits." *Id.* at 85, 685 S.E.2d at 158. Rather, in *Boylan*, this Court upheld the Commission's ordering the defendants to pay benefits for attendant care services provided to the plaintiff by her family members, reasoning that N.C. Gen. Stat. § 97-90(a) is the applicable statute requiring preauthorization for medical fees and that, based on our prior holding in *Ruiz v. Belk Masonry Co.*, 148 N.C. App. 675, 559 S.E.2d 249 (2002), an award of attendant care benefits provided by the injured plaintiff's family member did not require preauthorization under that statute. *Boylan*, 201 N.C. at 86, 685 S.E.2d at 158-59.

Furthermore, we do not read our case law as imposing a requirement that, in order for an injured plaintiff's family member to be compensated for providing attendant care services, the family member must have given up other employment to render the services to the injured plaintiff. To the contrary, our holding in *Ruiz* upheld an award of attendant care benefits to the injured plaintiff's brother, where the brother continued to hold employment for 4-5 hours per day, five days a week. *Ruiz*, 148 N.C. App. at 680-81, 559 S.E.2d at 253.

Finally, defendants' argument that they were given no notice of plaintiff's need for attendant care services is also without merit. On this issue, defendants do not specifically challenge any of the Commission's findings of fact, and therefore, they are binding on this Court.

The Commission made the following pertinent findings of fact:

> 15. On May 3, 2004 carrier Liberty Mutual assigned its Nurse Bonnie Wilson to provide medical case management services in plaintiff's claim. Nurse Wilson arranged for plaintiff to be reevaluated by Dr. Naylor on June 28, 2004.
>
> 16. On June 28, 2004 Dr. Naylor re-evaluated plaintiff's cognitive functioning and memory. Plaintiff was tearful and clinging to her husband. . . .
>
> . . . .
>
> 18. On July 20, 2004, Dr. Naylor gave her written evaluation report concerning plaintiff's severe cognitive and memory impairments to carrier's nurse Bonnie Wilson and also discussed the report and its conclusions with her. Dr. Naylor informed Ms. Wilson that plaintiff's cognitive and mental condition had greatly deteriorated since prior testing in early December 2003, and that plaintiff was no longer capable of caring for herself and needed constant supervision which out of necessity was being provided by her husband.
>
> 19. By at least July 20, 2004, the carrier was well aware that plaintiff required constant attendant care services, and that plaintiff's husband was providing constant attendant care services to plaintiff without any compensation for his services.
>
> . . . .

24. On October 27, 2004, plaintiff saw Dr. Yuson, with Ms. Wilson in attendance. By this date, Dr. Yuson notified Ms. Wilson that, in his opinion, plaintiff would never get any better mentally than she was as of August 23, 2004. At this meeting, Dr. Yuson discussed Dr. Naylor's July 20, 2004 report with Ms. Wilson, including that plaintiff required constant attendant care services due to her cognitive and emotional impairments resulting from her fall.

25. On October 27, 2004, the carrier was well aware that plaintiff required constant attendant care services as provided by her husband due to her traumatic brain injury resulting from her August 11, 2003 fall. Defendants elected not to secure attendant services or pay plaintiff's husband for the attendant care services he provided plaintiff.

. . . .

28. By early December 2004, Dr. Yuson again notified defendant Liberty Mutual that plaintiff required constant supervision due to her cognitive and emotional impairments resulting from her brain injury due to her fall.

Significantly, defendants argue only that Nurse Wilson, as a medical professional, is not an agent of defendants and cannot be considered such for purposes of notice. Nonetheless, defendants neglect Finding of Fact number 28, in which the Commission expressly found as a fact that plaintiff's treating physician notified Liberty Mutual regarding plaintiff's need for constant supervision. As defendants do not challenge this finding of fact on appeal, it is binding on this Court, and supports the Commission's conclusion that defendants had notice of plaintiff's required attendant care services, which out of necessity, were being provided by Mr. Chandler. Thus, the Commission did not err in concluding that plaintiff was entitled to compensation for the attendant care services being provided by her husband, Mr. Chandler.

B. Amount of compensation for attendant care services

[3] Defendants argue that the Commission erred in determining that plaintiff's husband should be compensated at a rate of $11.00 per hour, for 15 hours per day. In particular, defendants take issue with the following finding of fact:

> 38. Based on a review of the evidence of record, the Full Commission, in its discretion, finds that the reasonable hourly rate of pay for plaintiff's husband to be compensated for providing the necessary attendant care services to plaintiff in the period beginning June 28, 2004 and thereafter is eleven dollars ($11.00) per hour, for fifteen hours per day.

Defendants argue this finding of fact is not supported by competent evidence in that the rate determination did not reflect the cost of care for an unskilled health care provider in the area where plaintiff actually lived and that the number of hours of compensation is unreasonable, given the time that plaintiff sleeps.

We hold there is competent evidence to support the Commission's finding in this regard. At the hearing, Ms. Pennington was certified as an expert "in the field of rehabilitation management with individuals with closed head brain trauma," including "a specialty in life care planning" and expert knowledge on the "cost for attendant care." Ms. Pennington testified that she had contacted three home health care agencies based in the Charlotte, North Carolina, area. However, Ms. Pennington testified that all three agencies provide services regionally, including the relevant area where plaintiff lives. Ms. Pennington testified that the base rate of the three agencies for attendant care with no special skills would be $17.00 per hour, with holidays and weekends averaging between $20.00 and $21.00 per hour. Ms. Pennington further testified that one of the home health care agencies paid an attendant $10.00 to $14.00 per hour. Ms. Pennington also testified that an attendant performing the kinds of services provided by Mr. Chandler could expect to receive more than $10.00 per hour in the area where plaintiff lives. Thus, the rate of $11.00 per hour, determined by the Commission, was supported by competent evidence in the record.

In addition, although there is ample evidence in the record to support the Commission's finding of fact that plaintiff required "constant supervision and attendant care services, that is, on a 24 hours a day, 7 days a week basis, including at night," the Commission could also reasonably find that Mr. Chandler should be compensated for such required care at least 15 hours per day, given the testimony by Dr. Yuson that plaintiff needs attendant care services "definitely when she's awake" and the testimony by Mr. Chandler that plaintiff suffers from insomnia, that her sleep periods may vary depending on whether she takes her medication, and that she requires supervision when she wakes during the night to go to the bathroom. Thus, this

finding is likewise supported by competent evidence in the record. Defendants' arguments on this issue therefore have no merit.

C. Attorneys' fees

[4] Finally, defendants argue the Commission erred in awarding plaintiff attorneys' fees pursuant to N.C. Gen. Stat. § 97-88.1. We disagree.

N.C. Gen. Stat. § 97-88.1 provides the Commission with discretionary authority to assess costs and attorneys' fees for prosecuting or defending a hearing without reasonable grounds. *Id.* ("If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them."). " '[T]he Commission's determination [of matters within its sound discretion] will not be reviewed on appeal absent a showing of manifest abuse of discretion.' " *Sprinkle v. Lilly Indus., Inc.*, 193 N.C. App. 694, 702, 668 S.E.2d 378, 383 (2008) (alteration in original) (quoting *Lynch v. M.B. Kahn Constr. Co.*, 41 N.C. App. 127, 131, 254 S.E.2d 236, 238 (1979)), *disc. review denied*, 363 N.C. 130, 673 S.E.2d 363 (2009).

In the present case, we find no abuse of discretion in the Commission's determination that defendants unreasonably defended plaintiff's claim. Most notably, defendants filed a Form 60 on 21 September 2004, accepting plaintiff's 11 August 2003 "concussion to the back of the head" as compensable. As detailed in the Commission's unchallenged findings of fact, prior to defendants' filing the Form 60, plaintiff's treating physicians had documented that plaintiff's extensive cognitive impairments were attributable to her 11 August 2003 fall and concussion, that plaintiff required constant attendant care services as a result, and that plaintiff had reached maximum medical improvement. Nonetheless, defendants defended against plaintiff's claim for permanent total disability compensation and attendant care services. Defendants challenged any causal connection between plaintiff's condition and her compensable fall, as well as whether plaintiff's husband was entitled to any attendant care benefits. Given the extensive medical documentation of plaintiff's condition and its causal relationship with plaintiff's 11 August 2003 fall, defendants' acceptance of plaintiff's claim via filing of a Form 60 after plaintiff had reached maximum medical improvement, and the recent holdings of this Court expressly establishing that attendant

care benefits may be awarded to an injured worker's family member without preauthorization, we find no abuse of discretion by the Commission in determining that defendants unreasonably defended plaintiff's current claim. For the same reasons, we grant plaintiff's current motion for attorneys' fees incurred during the pendency of this appeal.

V. Conclusion

We hold the Commission's award to plaintiff of attendant care benefits for the services rendered by her husband at the rate of $11.00 per hour for 15 hours per day is both supported by the competent evidence in the record and the Commission's findings of fact. Because our case law expressly allows for an award of such benefits to family members, the Commission did not err in its award. We further hold the Commission did not abuse its discretion in determining that defendants have unreasonably defended against plaintiff's current claim, thereby awarding attorneys' fees pursuant to N.C. Gen. Stat. § 97-88.1. For these reasons, we affirm the Commission's opinion and award as to those issues.

However, because N.C. Gen. Stat. § 97-86.2 provides for a mandatory allowance of interest when the statutory conditions are present, as in the present case, we must reverse the Commission's order denying such interest award. We remand to the Commission for a determination as to the proper award of interest to plaintiff on the unpaid portion of attendant care services pursuant to the terms of N.C. Gen. Stat. § 97-86.2.

Affirmed in part, reversed in part, and remanded.

Judges HUNTER, JR., and THIGPE

GREGORY SCOTT MILLER, SARAH R. MILLER AND COLIE W. MILLER, JR., PLAINTIFFS V. ROGER RUSSELL AND WIFE, LINDA RUSSELL, DEFENDANTS

No. COA11-667

(Filed 20 December 2011)

1. Specific Performance—option contract—failure to exercise option according to terms

The trial court erred by granting summary judgment in favor of plaintiffs by requiring specific performance of an option contract. Plaintiffs Sarah Miller and Gregory Scott Miller did not exercise the option according to its terms before the option expired. Thus, the case was remanded to the trial court for an order granting summary judgment in favor of defendants on this issue.

2. Deeds—option contract—statute of frauds—consideration not required—failure to show fraud, duress, or misrepresentation

The trial court did not err by granting summary judgment in favor of defendants as to tract 3. The statute of frauds barred plaintiffs' claim to tract 3 based upon any alleged agreement that it would be conveyed along with tracts 1 and 2 under the option contract. Further, there is no legal requirement that a deed be supported by consideration. Plaintiffs' forecast of evidence did not show that defendants obtained the deed to tract 3 by fraud, duress, or misrepresentation.

Appeal by plaintiffs and defendants from order entered 24 March 2011 by Judge Benjamin G. Alford in Superior Court, Craven County. Heard in the Court of Appeals 7 November 2011.

Ayers & Haidt, P.A., by James M. Ayers II, for plaintiffs-appellants.

White & Allen, P.A., by Moses D. Lasitter, for defendants-appellants.

STROUD, Judge.

Gregory Scott Miller, Sarah R. Miller, and Colie W. Miller, Jr. (referred to collectively as "plaintiffs") appeal and Roger Russell and Linda Russell ("defendants") cross appeal from a trial court's order granting partial summary judgment in favor of plaintiffs and partial summary judgment in favor of defendants. For the foregoing reasons, we affirm in part and reverse in part the trial court's order.

I. Background

On 23 July 2010, plaintiffs filed a complaint against defendants alleging that defendants had breached the terms of an option to purchase contract by refusing plaintiffs' request to purchase two parcels of real property ("Tracts 1 and 2") previously conveyed to defendants by plaintiff Colie W. Miller, Jr., and for "failure of consideration" as to a third parcel of property ("Tract 3") conveyed by plaintiff Colie W. Miller, Jr. to defendants. Plaintiffs alleged that they entered into an agreement with defendants wherein plaintiffs were to deed three tracts of property to defendants in exchange for defendants loaning money to plaintiff Gregory Scott Miller and receiving an option to repurchase the three tracts of real property by 10 October 2010; it was discovered that only two tracts had been deeded to defendants, so plaintiff Colie Miller, Jr. subsequently deeded a third tract to defendants, pursuant to the parties' agreement; contrary to the parties' agreement, defendants never added this third tract to the option to repurchase; and when plaintiff Sarah Miller attempted to exercise the option as to Tracts 1 and 2, defendants, in violation of the terms of the option, would not re-convey those tracts to plaintiff Sarah Miller. Plaintiffs requested "specific performance of the option to re-convey the land referenced in [the option contract;]" "an Order re-conveying Tract 3, (the one-half acre tract) because there was no consideration to support the conveyance and because it is part of the [option contract;]" and costs and attorney fees. Included with the complaint was a copy of the deed from plaintiff Colie W. Miller, Jr. conveying Tract 1 and 2 to defendants, the option contract, a deed from Colie W. Miller, Jr. conveying Tract 3 to defendants, and the 1990 deed which conveyed all three tracts to plaintiff Colie W. Miller, Jr. On the same date, plaintiffs filed a notice of *lis pendens* describing the nature of the complaint and the properties involved. On 17 September 2010, defendants filed their "answer and counterclaim[,]" moving for dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6); raising the affirmative defenses of the statute of frauds and estoppel; denying plaintiffs' allegations as to an agreement between the parties; denying plaintiffs' claims for breach of the option contract and for reconveyance of Tract 3; and raising the counterclaim that plaintiffs' complaint and *lis pendens* constituted a slander of title. On 1 October 2010, plaintiffs filed a reply denying defendants' allegations in the counterclaim. On 17 February 2011, plaintiffs filed a motion for summary judgment. Defendants filed their motion for summary judgment on 23 February 2011.

The affidavits, depositions, and documents filed with those motions, along with the parties' pleadings, tended to show that on 16 October 2008 plaintiff Colie W. Miller, Jr. executed a deed conveying to defendants for "valuable consideration paid" two parcels, Tracts 1 and 2, containing approximately 11.37 acres of land and recorded in Book 2766 at Page 261 of the Craven County Registry. On the same date, plaintiffs Gregory Miller and Sarah Miller and defendants executed an "option to purchase" contract which permitted plaintiffs Sarah Miller and Gregory Miller to exercise the option to purchase Tracts 1 and 2 within two years for $31,526.00, plus interest. The option contract provided that at "any time during the option period, Buyer[1] may exercise this option by hand delivery or written notice by certified or registered mail, return receipt requested and the sum of $1000.00 as earnest money to Sellers at [defendants' counsel's mailing address]." This option contract was recorded in Book 2766 at Page 265 of the Craven County Registry. On 30 January 2009, plaintiff Colie W. Miller, Jr. executed a deed conveying to defendants for "valuable consideration paid" a third parcel of property, Tract 3, and that deed was recorded in Book 2790 at Page 378 of the Craven County Registry. On or about 28 June 2010, plaintiff Sarah Miller executed documents for a loan to be used for the purpose of the purchase of Tracts 1 and 2 pursuant to the option contract. Plaintiffs' affidavits state that "[a] closing date of June 28, 2010 was scheduled" and their counsel Steven Bell "notified the Defendants [sic] counsel that a closing was imminent and asked that the Defendants produce a deed to Plaintiff Sarah R. Miller for the property[,]" but "[t]he Defendants refused . . . to re-convey said property in accordance with the terms of [the option contract]." On 28 June 2010, plaintiffs' counsel, Mr. Bell, sent "VIA EMAIL" a letter to Mr. Moses Lassiter, defendants' counsel, regarding the "Option for Gregory Miller and Sarah Miller" stating that "my client is closing on the two parcels that were included in the option[,]" and plaintiff Sarah Miller "reserves her rights to all legal remedies allowed by contract or by law relative to the third parcel." On 7 October 2010, plaintiffs' counsel sent "VIA EMAIL" another letter to defendants' counsel regarding the "Option for Sarah Miller" stating that defendants had refused to sign the deed conveying Tracts 1 and 2 to plaintiff Sarah Miller, as required by the option contract, and plaintiff Sarah Miller was again "coming in tomorrow" to tender the purchase price and "is willing to close on the two parcels included in the option[.]"

1. The contract identified "buyer" as Sarah Miller and Gregory Miller.

On 24 March 2011, the trial court, by written order, granted plaintiffs' motion for summary judgment, which granted specific performance of the option contract and conveyance of Tracts 1 and 2, and granted defendants' motion for summary judgment on plaintiffs' claim regarding of Tract 3. The specific terms of the summary judgment order are "That Plaintiffs' Motion for Summary Judgment as to the real property described in Book 2766 at Page 261 of the Craven County Registry is allowed." We first note that the terms of the summary judgment order appear to go beyond specific performance of the option contract, as it appears to require defendants to convey Tracts 1 and 2 to all three plaintiffs, as requested in plaintiffs' complaint, even though plaintiff Colie Miller, Jr. was not a party to the option contract, and only plaintiff Sarah Miller attempted to exercise the option.[2] On 18 April 2011, defendants filed notice of appeal from the trial court's 24 March 2011 order. Plaintiffs filed notice of appeal on 19 April 2011 from the trial court's order.

II. Standard of review

The standard of review from a motion for summary judgment is well established:

> Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' N.C. Gen. Stat. § 1A-1, Rule 56(c). 'A trial court's grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party.' *Sturgill v. Ashe Memorial Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

Mitchell v. Brewer, ___ N.C. App. ___, ___, 705 S.E.2d 757, 764-65 (2011) (quoting *Liptrap v. Coyne*, 196 N.C. App. 739, 741, 675 S.E.2d 693, 694 (2009)), *disc. review denied*, 365 N.C. 188, 707 S.E.2d 243 (2011). On appeal, defendants contend that the trial court erred in granting summary judgment in favor of plaintiffs and ordering specific performance of the option contract to convey Tracts 1 and 2 to

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2. In addition to the allegation and prayer in plaintiffs' complaint, their motion for summary judgment and memorandum in support of the motion also request that all three properties be re-conveyed to all three "plaintiffs," although plaintiffs Sarah Miller and Gregory Miller had never owned the 3 tracts and plaintiff Colie Miller Jr. was not a party to the option contract.

plaintiffs. On cross appeal, plaintiffs contend that the trial court erred in denying their motion for summary judgment to void the conveyance of Tract 3 to defendants and granting summary judgment in favor of defendants. We will address defendants' appeal first.

III. Defendants' appeal

[1] Defendants contend that plaintiffs, "as the party seeking specific performance, have failed to show that they have done all of the essential and material acts required to exercise the option" and "[a]s such, the acceptance is not effective, the option has not transformed into a contract to sell, and no specific performance should be granted." Specifically, defendants argue that plaintiffs did not follow the option contract's "clear and unambiguous" terms regarding how to exercise the option before the option expired and, therefore, they should not be required to convey Tracts 1 and 2 to plaintiffs. Plaintiffs counter that summary judgment in their favor was not in error because they[3] "complied with the material requirements of the option," by tendering "the full option price, inclusive of all interest . . . prior to the expiration of the option" and filed their "Complaint and Notice of Lis Pendens, seeking specific performance . . . before the option expired." Plaintiffs conclude that "[a]s such, the acceptance was clearly effective, the option was transformed into a contract to sell, and specific performance was properly granted by the Trial Court."

This Court has stated that "[t]he issue of contract interpretation is a question of law." *Lee v. Scarborough*, 164 N.C. App. 357, 360, 595 S.E.2d 729, 732, *disc. review denied*, 359 N.C. 189, 607 S.E.2d 273, 274 (2004). "An option contract is not a contract to sell, but a continuing offer to sell [] land which is irrevocable until the expiration of the time limit of the option." *Lagies v. Myers*, 142 N.C. App. 239, 248, 542 S.E.2d 336, 342 (citations and quotation marks omitted), *disc. review denied*, 353 N.C. 526, 549 S.E.2d 218 (2001).

> Generally, the same principles of construction applicable to all contracts apply to option contracts. *See Catawba Athletics v. Newton Car Wash*, 53 N.C. App. 708, 711-12, 281 S.E.2d 676, 678-79 (1981). "[T]he ultimate test in construing any written agreement is to ascertain the parties' intentions in light of all the relevant circumstances." *Davis v. McRee*, 299 N.C. 498, 502, 263 S.E.2d 604, 606 (1980) (emphasis in original). If the option terms are

3. Plaintiffs' brief makes no distinction between the three plaintiffs' rights, claims, or relief sought, despite the fact that only Sarah Miller attempted to exercise the option and Colie Miller, Jr. was not a party to the option contract.

> clear and unambiguous, "it must be enforced as it is written, and the court may not disregard the plainly expressed meaning of its language." *Catawba Athletics*, 53 N.C. App. at 712, 281 S.E.2d at 679 (citation omitted). For the language of the contract reflects the intent of the parties, and we therefore presume that the language means what it purports to mean. *Williamson v. Bullington*, 139 N.C. App. 571, 534 S.E.2d 254, 256 (2000).

Id. at 247, 542 S.E.2d at 341-42 (emphasis in original). Additionally,

> "options, 'being unilateral in their inception, are constructed strictly in favor of the maker, because the other party is not bound to perform[], and is under no obligation to buy.' " *Catawba Athletics*, 53 N.C. App. at 712, 281 S.E.2d at 679 (quoting *Winders v. Kenan*, 161 N.C. 628, 633, 77 S.E. 687, 689 (1913)). . . . Furthermore, the option must be exercised strictly "in accord with all of the terms specified in the option." *Catawba Athletics*, 53 N.C. App. at 712, 281 S.E.2d at 679 (citations omitted); *see also Theobald v. Chumley*, 408 N.E.2d 603, 605 (Ind. Ct. App. 1980) ("since the optionee is the sole party capable of consummating the option, courts require strict adherence to the option's terms"). The plaintiff has the burden of demonstrating that he exercised the option in accordance with the option's terms. *Parks v. Jacobs*, 259 N.C. 129, 129 S.E.2d 884 (1963)."

Id. at 248-49, 542 S.E.2d at 342. *See Kidd v. Early*, 289 N.C. 343, 361, 222 S.E.2d 392, 405 (1976) (stating that in the context of an option contract, "[t]he acceptance must be in accordance with the terms of the contract.") Further,

> " '[t]he doctrine is fundamental that either of the parties seeking a specific performance against the other must show, as a condition precedent to his obtaining the remedy, that he has done, or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms.' . . . 'The party seeking aid of the court, as actor, must not only show that he has complied with the terms so far as they can and ought to be complied with at the commencement of the suit, he must also show that he is able, ready, and willing to do those other acts which the contract stipulates for as a part of its specific performance.' "

Carr v. Good Shepherd Home, Inc., 269 N.C. 241, 243-44, 152 S.E.2d 85, 88 (1967) (quoting *Hudson v. Cozart*, 179 N.C. 247, 252, 102 S.E. 278, 281 (1920) (citation and quotation marks omitted)).

Here, two of the plaintiffs, Sarah and Gregory Miller, were specifically identified as the "Buyer" under the option contract, which set the term for exercise of the option as "a period of two years and shall exist and continue until twelve o'clock on the 10th day of October 2010." (emphasis in original). Not only does the option contract set the purchase price as $31,526.00, plus interest, it also includes specific directions as to how to exercise the option:

> 2. Exercise. At any time during the option period, Buyer may exercise this option by hand delivery or written notice by certified or registered mail, return receipt requested and the sum of $1000.00 as earnest money to Sellers at [defendants' counsel's law firm mailing address]."

Neither party makes any argument that the option contract is ambiguous, and we find no ambiguity in the terms of the option contract. The record shows that plaintiff Sarah Miller alone attempted to exercise the option. Plaintiff Gregory Miller did not attempt to exercise the option, and plaintiff Colie Miller Jr. was not a party to the option contract. Plaintiff Sarah Miller obtained financing to purchase the property, pursuant to the terms of the option contract and "[a] closing date of June 28, 2010 was scheduled[.]" Although plaintiffs' affidavits also note that their counsel, Steven Bell "notified the Defendants [sic] counsel that a closing was imminent and asked that the Defendants produce a deed to Plaintiff Sarah R. Miller for the property[,]" the only communications between Mr. Bell and Mr. Lasitter, defendants' counsel, were two letters dated 28 June 2010 and 7 October 2010 which were sent "VIA EMAIL[.]" There is no indication in the record that any plaintiff or their counsel ever sent "by hand delivery or written notice by certified or registered mail, return receipt requested" notification of an intention to exercise the option or tendered the $1,000.00 earnest money to defendants' counsel's address.[4] We also note that only one of the two persons to whom the option was granted, plaintiff Sarah Miller, attempted to exercise the option; there is also no evidence that plaintiff Gregory Scott Miller consented to Sarah Miller's separate exercise of the option at or prior to the time of the attempted exercise of the option. Strictly construing the terms

4. In fact, the draft closing statement prepared by counsel for plaintiff Sarah Miller states that no earnest money was paid.

of the option, plaintiffs failed to meet their burden to show that they "exercised the option in accordance with the option's terms[.]" *See Lagies*, 142 N.C. App. at 248, 542 S.E.2d at 342. Thus, plaintiffs were not entitled to specific performance of the option contract, as no plaintiff, including Sarah Miller, demonstrated "strict adherence to the option's terms[.]" *See id.* at 248, 542 S.E.2d at 342; *Carr*, 269 N.C. at 243-44, 152 S.E.2d at 88. Accordingly, the trial court erred in granting summary judgment in favor of plaintiffs by requiring specific performance of the option contract. Therefore, we reverse the trial court's ruling granting summary judgment in favor of plaintiffs. As plaintiffs Sarah Miller and Gregory Scott Miller did not exercise the option according to its terms before the option expired, we remand to the trial court for an order granting summary judgment in favor of defendants as to this issue.

IV. Plaintiffs' appeal

[2] Plaintiffs argue they "are entitled to summary judgment with regard to the third tract because the pleadings and affidavits establish that there is no genuine issue of material fact." Although their arguments are conflated, plaintiffs present two bases for their claim as to Tract 3: (1) that there was an agreement that Tract 3 would be included in the land to be re-conveyed along with Tracts 1 and 2 under the option contract, but it was omitted from the option contract; and/or (2) that there was no consideration to support the original conveyance of Tract 3 from Colie Miller, Jr. to defendants. Thus, under one theory, plaintiffs argue that Tract 3 should be conveyed to plaintiffs Sarah Miller and Gregory Miller because it should have been included under the option contract and, under the other theory, plaintiffs claim that Tract 3 should be returned to plaintiff Colie Miller Jr. for lack of consideration. Defendants counter that we should uphold the trial court's decision to grant summary judgment in their favor based upon the statute of frauds and because a valid deed does not require consideration. Defendants argue that "the deed stands alone as the embodiment of the agreement made as to the third tract of land[,]" and there is no other evidence regarding the conveyance other than the deed that "escapes the mandates of the Statute of Frauds." Lastly, defendants argue that if there was a mistake in the deed it was not a mutual mistake and "a unilateral mistake is not a basis for rescission of the deed."

A. Statute of Frauds

Defendants are correct that the statute of frauds bars plaintiffs' claim as to Tract 3 based upon any alleged agreement that Tract 3

would be conveyed along with Tracts 1 and 2 under the option contract. N.C. Gen. Stat. § 22-2 (2009) states that "[a]ll contracts to sell or convey any lands . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." Thus,

> an oral contract to convey or to devise real property is void by reason of the statute of frauds (G.S. 22-2). . . . Upon a plea of the statute, it may not be specifically enforced and no recovery of damages for the loss of the bargain can be predicated upon its breach. . . .

Carr v. Good Shepherd Home, Inc., 269 N.C. 241, 245, 152 S.E.2d 85, 89 (1967) (citation and quotation marks omitted). Plaintiffs' complaint, their memorandum of law in support of their motion for summary judgment, the letters from plaintiffs' counsel Steven Bell to defendants' counsel, and plaintiffs' affidavits all claim that Tract 3 was to be part of the option contract but was left out of the documentation and that Tract 3 was not intended to be a gift to defendants. Thus plaintiffs allege an oral agreement between the parties as to the conveyance of Tract 3 which was not reduced to writing or signed by the parties. The option contract makes no mention of Tract 3. We also note that only plaintiffs Sarah Miller and Gregory Miller were parties to the option contract, but Colie W. Miller, Jr., the sole owner of Tract 3 prior to its conveyance to defendants, was not. Plaintiffs Sarah Miller and Gregory Miller have never had any ownership interest in Tract 3. Even viewing the evidence in the light most favorable to plaintiffs, they have at best demonstrated only an oral agreement regarding the conveyance of Tract 3 which is unenforceable based upon the statute of frauds. *See* N.C. Gen. Stat. § 22-2; *Carr*, 269 N.C. at 245, 152 S.E.2d at 89.

B. Consideration

Plaintiffs also argue that there was "no consideration" for the deed to tract 3, and that a deed without consideration should be rescinded. However, in their complaint, plaintiffs' second claim is for "failure of consideration[,]" although plaintiffs also alleged that they "received no consideration for the conveyance of [tract 3].[5] These two terms are not identical.

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5. In their memorandum in support of a motion for summary judgment, plaintiffs argued that they were "entitled . . . to have the third tract of land re-conveyed as a result of the *lack of consideration*." (emphasis added).

> Failure of consideration differs from lack of consideration in that it refers to something subsequent to the agreement, and not to something inherent in the agreement itself. Failure of consideration, like lack of consideration, is not generally considered a sufficient ground for equitable cancellation of an instrument in the absence of some additional circumstance independently justifying this relief, such as fraud, duress, or mistake. But, as in the case of lack of consideration, where there is a failure of consideration equity will seize upon the slightest circumstance of an inequitable nature for the purpose of administering justice in the particular case.

Hinson v. Jefferson, 24 N.C. App. 231, 238, 210 S.E.2d 498, 502 (1974) (quoting 13 Am. Jur. 2d § 22), *affirmed and modified on other grounds*, 287 N.C. 422, 215 S.E.2d 102 (1975). Even though these issues are also conflated, we will address plaintiffs' apparent claims for failure of consideration and lack of consideration.

1. Failure of consideration

Our Supreme Court has stated that "[f]ailure of consideration is a defense to an action brought upon a contract against the party who has not received the performance for which he bargained. It also entitles such party to sue to recover that which he has paid for the performance for which he bargained." *Gore v. George J. Ball, Inc.*, 279 N.C. 192, 199, 182 S.E.2d 389, 393 (1971) (citations omitted).

Plaintiffs raised "failure of consideration" by alleging that they had "not received the performance for which [they had] bargained." *See Gore*, 279 N.C. at 199, 182 S.E.2d at 393. Specifically, as to failed performance by defendants, plaintiffs' complaint alleges that plaintiffs agreed to convey three tracts of real property to defendants in exchange for a loan to plaintiff Gregory Scott Miller and the option to repurchase the three tracts. Plaintiffs further allege that defendants refused to give them an option to repurchase the third tract after plaintiff Colie W. Miller, Jr. had conveyed it, as defendants had initially agreed. In support of this allegation plaintiffs submitted individual affidavits and two letters "VIA EMAIL" from plaintiffs' counsel to defendants' counsel, stating that Tract 3 "was suppose to be part of the agreement[.]" However, any consideration would be part of an oral agreement between the parties for the conveyance of real property, and, as noted above, an oral agreement regarding the conveyance of Tract 3 would be unenforceable based upon the statute of frauds. Therefore, this claim has no merit.

2. Lack of consideration

As noted above, plaintiffs also alleged that there was "no consideration" for the deed to Tract 3, alluding to a claim for lack of consideration. The deed itself states that Tract 3 was deeded "for valuable consideration paid" by defendants. But

> [n]umerous appellate decisions of this Court and our Supreme Court have stated, that recitals in a deed are presumed to be correct, that is only a presumption and the law does not stop there. Under suitable circumstances our law has long permitted deed recitals of all kinds to be overcome by proof, including even the recital that it is a deed; and deed recitals of consideration have been overcome by proof in many cases. *See Penninger v. Barrier*, 29 N.C. App. 312, 224 S.E.2d 245, rev. denied, 290 N.C. 552, 226 S.E.2d 511 (1976); *Harris v. Briley*, 244 N.C. 526, 94 S.E.2d 476 (1956).

Patterson v. Wachovia Bank & Trust Co., N.A., 68 N.C. App. 609, 613-14, 315 S.E.2d 781, 784 (1984); *see Burnett v. Burnett*, 122 N.C. App. 712, 715, 471 S.E.2d 649, 651-52 (1996) (noting that "[a] mere recital of consideration, however, does not compel a finding that consideration was received, if other evidence reveals that no consideration was in fact received." (citations omitted)). Plaintiffs' affidavits aver that there was no consideration for the deed to Tract 3, and the record reveals that there are no revenue stamps on the Tract 3 deed. However, there is no legal requirement that a deed be supported by consideration: "[A] deed in proper form is good and will convey the land described therein without any consideration, except as against creditors or innocent purchasers for value." *Philbin Invest., Inc. v. Orb Enterprises, Ltd.*, 35 N.C. App. 622, 626, 242 S.E.2d 176, 178-79 (quoting *Smith v. Smith*, 249 N.C. 669, 676, 107 S.E.2d 530, 535 (1959)), *disc. review denied*, 295 N.C. 90, 244 S.E.2d 260 (1978).[6] Therefore, even if there was no consideration for Tract 3, this fact does not lead to the conclusion that the deed should be rescinded, as a lack of consideration, as noted above in *Hinson*, "is not generally considered a sufficient ground for equitable cancellation of an instrument in the absence of some additional circumstance independently justifying this relief, such as fraud, duress, or mistake[.]" 24 N.C. App. at 238, 210 S.E.2d at 502. Given the lack of "additional circumstances[,]" the record before us does not justify relief. *See id.*

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6. There is no argument that plaintiffs are "creditors or innocent purchasers for value[.]" *See Philbin Invest.*, Inc., 35 N.C. App. at 626, 242 S.E.2d at 178-79.

Plaintiffs' forecast of evidence does not show that defendants obtained the deed to Tract 3 by fraud, duress, or misrepresentation. As to mistake, this Court has held that a writing may not be revoked because of a mistake of one of the parties in the absence of fraud or misrepresentation. *See Potter v. Miller*, 191 N.C. 814, 817, 133 S.E. 193, 194 (1926). "A mutual mistake exists when both parties to a contract proceed under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement." *Smith v. First Choice Servs.*, 158 N.C. App. 244, 249, 580 S.E.2d 743, 748 (citation and quotation marks omitted), *disc. review denied*, 357 N.C. 461, 586 S.E.2d 99 (2003). There is no indication in the forecast of evidence that there was a mutual mistake as to the omission of Tract 3. Even if there was a lack of consideration, plaintiffs failed to forecast "additional circumstances independently justifying" relief. *See Hinson*, 24 N.C. App. at 238, 210 S.E.2d at 502. Accordingly, plaintiffs' argument is overruled. We therefore affirm the trial court's order granting summary judgment in favor of defendants as to Tract 3.

For the foregoing reasons, we affirm in part and reverse in part the trial court's order.

AFFIRMED in part and REVERSED in part.

Chief Judge MARTIN and Judge ERVIN concur.

HIGH ROCK LAKE PARTNERS, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, AND JOHN DOLVEN, PETITIONERS v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RESPONDENT

No. COA11-309

(Filed 20 December 2011)

1. Administrative Law—petition for judicial review—not timely—good cause shown

The trial court did not abuse its discretion by accepting High Rock's untimely petition for judicial review of Department of Transportation's denial of a driveway permit application. An untimely petition may be accepted for review under N.C.G.S. § 150(b)-45(b) for good cause shown.

2. Highways and Streets—driveway permit—conditions—statute not applicable

Petitioners' argument that the conditions imposed by DOT for granting a driveway permit were in excess of the authority granted to DOT by N.C.G.S. § 136-18(29) was overruled because that statute does not address the improvements involved in this case (a railroad crossing one-quarter mile away from the driveway connection point).

3. Highways and Streets—driveway permit—conditions—no constitutional violation

The trial court did not err by concluding that there was no constitutional violation in a Department of Transportation condition to a driveway permit a quarter mile from railroad tracks requiring that petitioner obtain the approval of the North Carolina Railroad (NCRR) and Norfolk Southern Corporation (NS). NCRR owned an easement over a section of the road, and NS operated and managed the crossing. The sovereign may restrict the right of entrance to reasonable and proper points to protect others who may be using the highway.

4. Administrative Law—judicial review—motion to supplement the record

The trial court did not err by denying petitioners' motion for leave to supplement the record where the deposition testimony that petitioner sought to include was not necessary for a determination of the issues brought forward on appeal.

Appeal by petitioners from judgment entered 24 November 2010 by Judge F. Lane Williamson in Mecklenburg County Superior Court and cross-appeal by respondent from order entered 8 May 2008 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 September 2011.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, for petitioners.

Roy Cooper, Attorney General, by James M. Stanley, Jr. and Scott K. Beaver, Assistant Attorneys General, for respondent.

MARTIN, Chief Judge.

Petitioners, High Rock Lake Partners, LLC (High Rock) and John Dolven, appeal from the superior court's judgment affirming the deci-

sion of the DOT Driveway Permit Appeals Committee (the committee) and denying High Rock's motion to supplement the record. Respondent, the North Carolina Department of Transportation (DOT), cross-appeals from the interlocutory order entered 8 May 2008 finding " 'good cause' shown for the Petitioner to file an untimely Petition for Judicial Review from the Department's Final Agency Decision."

On 12 August 2005, the predecessor entity to High Rock purchased a parcel of real property (the property) consisting of approximately 188 acres, located on High Rock Lake in Davidson County. The property is a peninsula. Vehicular access is provided by Secondary Road 1135 (SR 1135), known locally as Southern Railroad Station Road, which is part of the state highway system maintained by DOT. SR 1135 crosses railroad tracks.

Norfolk Southern Corporation (NS) operates a regional hump station abutting the property. According to the developer, North Carolina Railroad Company (NCRR), a railroad company chartered by the North Carolina General Assembly, owns an easement over the railroad crossing, subject to DOT's right-of-way on SR 1135. According to DOT, NCRR owns a right-of-way that is intersected by SR 1135, but "DOT has no recorded right-of-way agreement for right-of-way for SR 1135 within the NCRR rail corridor." According to DOT, "NS maintains the surface of the actual railroad crossing immediately approaching and over the railroad tracks." According to the developer, NS operates and manages the railroad crossing and related rail lines under an agreement with NCRR.

On 9 September 2005, High Rock submitted an application to Davidson County for preliminary plat approval of a proposed subdivision development on the property to contain 60 "single-family," "residential lots." On 20 September 2005, the Davidson County Planning and Zoning Board held a meeting regarding the preliminary plat and, on 4 October 2005, met again and denied approval. High Rock appealed to the Davidson County Board of Commissioners. The commissioners held a public hearing on the matter in November 2005, continued the hearing, reconvened on 12 December 2005, and approved the preliminary plat based on High Rock meeting all the County requirements for subdivision approval.

Meanwhile, on 6 October 2005, High Rock submitted a Driveway Permit Application to DOT, requesting to connect a drive to SR 1135 to access the proposed subdivision. The aforementioned railroad

crossing is located approximately one-quarter mile from petitioners' proposed connection with SR 1135. In December 2005, DOT District Engineer Chris Corriher denied High Rock's application. By letter dated 11 January 2006, High Rock appealed to DOT Division Engineer Pat Ivey. By letter dated 3 March 2006, subject to the following conditions, Ivey approved the application:

> Widen the [SR 1135] railroad crossing of the North Carolina Railroad Company (NCRR) corridor from its existing width of approximately 14 feet to 24 feet to allow for safe passage of two-way traffic traversing the railroad. Said widening shall include additional right-of-way acquisition, relocation and acquisition of the flashers and gates and paving of the crossing and approaches to accommodate enhanced safety devices at the crossing.
>
> Obtain all required licenses and approvals from the owning railroad, NCRR, to widen the crossing and approaches on their right of way.
>
> Obtain all necessary agreements and approvals from the operating railroad, Norfolk Southern Railway Company (NSR), necessary to revise and acquire the automatic flashers, gates and enhanced devices that will enable the crossing to remain at the current 'Sealed Corridor' level of safety consistent with the USDOT designation of the corridor for development of high-speed intercity passenger rail service. This may include, but not be limited to, the installation of a median separator or gate configuration per NCDOT and NSR specifications.
>
> Widen [SR 1135] from the railroad crossing to the new subdivision entrance to safely accommodate two-way vehicular traffic.
>
> All expenses and costs associated with the subject improvements shall be borne by the applicant.

Included with a letter dated 17 March 2006, High Rock provided NS a copy of Ivey's decision and asked if it and NCRR would "cooperate with [High Rock] and the DOT as to the improvements described in the DOT Letter? If so, what will it involve? If not, then why?" NS responded by letter dated 3 April 2006, stating in relevant part that, "any proposal to widen or improve the existing crossing that does not include a grade separation would be unacceptable."

By letter dated 30 March 2006, High Rock appealed to the committee. The committee met on 5 May 2006. By letter dated 12 June 2006, the committee voted unanimously to uphold the conditions.

On 17 September 2007, High Rock filed a Petition for Judicial Review in Mecklenburg County Superior Court under N.C.G.S. § 150B-43. On 25 November 2007, DOT filed a response to High Rock's petition. On 20 June 2008, High Rock filed a Motion for Joinder of Necessary Party, John Dolven, M.D., stating that Dolven had acquired the property following a foreclosure proceeding and that High Rock had assigned its Driveway Permit and Appeal Rights to Dolven while reserving its right to remain a party in the case. The same day, High Rock filed a Motion for Leave to Supplement the Record. DOT filed responses contesting both motions. On 1 November 2010, on remand from this Court's decision in *High Rock Lake Partners, LLC v. North Carolina Department of Transportation*, ___ N.C. App. ___, 693 S.E.2d 361 (2010), which vacated an order of the superior court denying High Rock's motion for joinder/intervention, Judge L. Lane Williamson entered an order joining Dolven as a party petitioner to the action.

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[1] We first address DOT's contention addressed on its cross-appeal: that the superior court erred by granting High Rock's untimely Petition for Judicial Review. DOT argues, essentially, that by allowing High Rock's untimely petition, the superior court applied an erroneous definition to the term "good cause" contained in N.C.G.S. § 150B-45.

"To obtain judicial review of a final decision under . . . Article [4 of the Administrative Procedure Act], the person seeking review must file a petition within 30 days after the person is served with a written copy of the decision." N.C. Gen. Stat. § 150B-45(a) (2009). "A person who fails to file a petition within the required time waives the right to judicial review under this Article. For *good cause shown*, however, the superior court *may* accept an untimely petition." N.C. Gen. Stat. § 150B-45(b) (emphasis added). The determination of whether good cause exists is addressed to the sound discretion of the trial judge. *See Frye v. Wiles*, 33 N.C. App. 581, 583, 235 S.E.2d 889, 891 (1977) (stating that the determination of whether good cause exists to vacate an entry of default is addressed to the sound discretion of the trial judge). We will not disturb "[t]he judge's exercise of that discretion" "unless a clear abuse of discretion is shown." *See id.*

The parties agree that if Davidson County had been High Rock's place of residence, High Rock's petition would have been timely. The Davidson County Superior Court dismissed High Rock's petition and High Rock refiled in the correct county, Mecklenburg. There, the

superior court, "in its discretion," concluded that, under N.C.G.S. § 150B-45, there was "good cause shown" "to accept Petitioner's untimely New Petition." In support of its decision, the superior court made the following relevant findings:

> 12. Petitioner was diligent in its attempts to have the merits of the DOT's final agency decision litigated and decided by the Superior Court of North Carolina.
>
> 13. . . . [T]here is little material harm to the DOT from any delay in having the petition untimely filed in Mecklenburg County.
>
> 14. If the Respondents' motion to dismiss related to the timeliness of the New Petition is granted, the Petitioner will suffer a grave injustice by being unable to prosecute this action as to the merits of the DOT's final agency decision and the potential *res judicata* effect of such dismissal.

These findings and the superior court's conclusion do not demonstrate "a clear abuse of discretion." *See Frye*, 33 N.C. App. at 583, 235 S.E.2d at 891. Thus, we decline to disturb the trial court's order accepting High Rock's Petition for Judicial Review.

We now address petitioners' issues on appeal. N.C.G.S. § 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:

> (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.G.S. §§] 150B–29(a), 150B–30, or 150B–31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2009) (amended by Section 27 of Session Law 2011-398 and applying to contested cases commenced on or after 1 January 2012). Appellate review of a superior court order regarding an agency decision involves "examin[ing] the trial court's order for

error of law." *McAdams v. N.C. Dep't of Transp.*, ___ N.C. App. ___, ___, 716 S.E.2d 77, 82 (2011). "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." *Id.* at ___, 716 S.E.2d at 82. "Where the party alleges the agency violated subsections one through four of N.C. Gen. Stat. § 150B-51, the court engages in *de novo* review, reviewing for errors of law." *Comm'r of Labor v. Weekley Homes, L.P.*, 169 N.C. App. 17, 20, 609 S.E.2d 407, 411, *motion to dismiss appeal allowed, disc. review denied*, 359 N.C. 629, 616 S.E.2d 227 (2005).

[2] Petitioners first contend the conditions imposed by DOT were in excess of DOT's authority under N.C.G.S. § 136-18(29). We therefore limit our review of this issue to determining whether DOT exceeded its authority under N.C.G.S. § 136-18(29).

Reviewing petitioners' "legal arguments concerning the Department's statutory and constitutional authority to impose conditions on the issuance of the driveway permit" de novo, the superior court concluded the following:

> 4. The Court rejects the Petitioners' argument that the Department acted in excess of its statutory authority in conditioning the issuance of the Driveway Permit upon the Petitioners' construction of improvements to the railroad crossing offsite on SR 1135, as well as the argument that the Department cannot require offsite improvements not specifically mentioned in N.C. Gen. Stat. 136-18(29).
>
> 5. The Court concludes that N.C. Gen. Stat. 136-18(29), which in the Court's opinion is ambiguous, must be construed *in pari materia* with N.C. Gen. Stat. 136-18(5) and N.C. Gen. Stat. 136-93, which include a broad grant of general powers to the Department to regulate the State Highway System and to enact rules, regulations and ordinances governing the use of the State Highway System.
>
> 6. While the Court has given some deference to the Depart-ment's interpretation of the scope of its regulatory authority, the Court does not rely upon this interpretation as determinative.
>
> 7. . . . [T]he conditions in the Driveway Permit that are contingent upon the Petitioner's obtaining the approval of the owning and operating railroads to widen the crossing that is

> located on the railroads' property are not an unlawful or unconstitutional delegation.
>
> 8. The court concludes that the Department did not exceed its statutory powers in issuing the conditional Driveway Permit to the Petitioners and that the Department's actions were not unconstitutional.
>
> . . . .
>
> 11. The Court finds that the Department did not act arbitrarily and capriciously by including conditions in the Driveway Permit that were based upon valid safety concerns supported by substantial evidence of record.

Questions of law are reviewed de novo. *See Weekley Homes*, 169 N.C. App. at 20, 609 S.E.2d at 411. Our review of the superior court's determination is also de novo. *See id.*

Petitioners mainly argue for application of the following principle:

> [W]here one statute deals with the subject matter in detail with reference to a particular situation and another statute deals with the same subject matter in general and comprehensive terms, the particular statute will be construed as controlling in the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto, especially when the particular statute is later enacted.

N.C. Bd. of Exam'rs v. N.C. State Bd. of Educ., 122 N.C. App. 15, 19, 468 S.E.2d 826, 829 (1996) (emphasis omitted), *aff'd in part*, *disc. review improvidently allowed in part*, 345 N.C. 493, 480 S.E.2d 50 (1997). Petitioners contend N.C.G.S. § 136-18(29) deals with DOT's authority with respect to driveway connections and N.C.G.S. §§ 136-18(5) and 136-93 deal with DOT's authority generally. Petitioners contend N.C.G.S. § 136-18(29) is therefore controlling, N.C.G.S. § 136-18(29) does not authorize the conditions in this case, and DOT exceeded its authority by imposing the conditions. We hold N.C.G.S. § 136-18(29) does not apply to the conditions in this case.

In upholding the conditions imposed by Ivey, the committee referenced the following, excerpted from its Policy for Street and Driveway Access to North Carolina Highways:

> At those locations where it is determined by NCDOT that a street or driveway connection requires improvements to existing highway facilities to provide for safe and efficient traffic operation,

> the applicant may be fully responsible for roadway improvements. These improvements may include, but are not limited to, separate turn lanes, deceleration lanes, acceleration lanes, lane tapers and transitions, right-of-way to contain new widening, and traffic signals. Generally, these improvements are necessitated by the development and will be used primarily by traffic destined for establishments within the development, or traffic affected by the development.
>
> The NCDOT may require the applicant to provide offsite roadway improvements on public facilities in order to mitigate any negative traffic impacts created by the proposed development. Boundaries for offsite improvements, including intersections and public roadways to be considered, will be identified in the [Traffic Impact Study] or determined by the District Engineer.

Its decision then states that, "[s]ince the increase in traffic at the crossing is caused solely by the proposed development, and widening of the crossing is necessary to protect the safety of the traveling public, our Committee agreed with the Division Engineer's decision."

Section 136-18(29), which has not previously been interpreted by our Courts, provides the following:

> (29) The Department of Transportation may establish policies and adopt rules about the size, location, direction of traffic flow, and the construction of driveway connections into any street or highway which is a part of the State Highway System. The Department of Transportation may require the construction and public dedication of acceleration and deceleration lanes, and traffic storage lanes and medians by others for the driveway connections into any United States route, or North Carolina route, and on any secondary road route with an average daily traffic volume of 4,000 vehicles per day or more.

N.C. Gen. Stat. § 136-18(29) (2009).

The first sentence of N.C.G.S. § 136-18(29) does not apply to the conditions. The conditions in this case do not involve the actual "driveway connection." They do not involve the "size," "location," or "direction of traffic flow" of a driveway connection. Nor do they involve the "construction" of a driveway connection. The challenged conditions require improvements to a portion of a road and a railroad crossing located approximately one-quarter mile from the portion of SR 1135 where the proposed "driveway connection" will be located.

The second sentence of N.C.G.S. § 136-18(29) is similarly inapplicable to the conditions. The conditions in this case clearly do not involve acceleration or deceleration lanes, traffic storage lanes, or medians.

Petitioners attempt to convince this Court that the holding in *National Medical Enterprises, Inc. v. Sandrock*, 72 N.C. App. 245, 324 S.E.2d 268 (1985), is instructive here. In *Sandrock*, a county sought to lease hospital facilities to a for-profit company. *Id.* at 246, 324 S.E.2d at 269. There, "a general statute cover[ed] the lease or rental of surplus property by a . . . county for less than ten years" and provided, "Any property owned by a [county] may be leased or rented for such terms and upon such conditions as the [commissioners] may determine . . . ." *Id.* at 248-49, 324 S.E.2d at 270-71 (alterations in original). Another statute, part of the Municipal Hospital Facilities Act, specifically addressed the leasing of hospital facilities. *Id.* at 248, 324 S.E.2d at 270-71. It provided, "A [county] may lease any hospital facilities to any nonprofit association . . . ." *Id.* at 248, 324 S.E.2d at 271 (alteration in original). This Court applied the rule of statutory construction that

> [w]here one statute deals with the subject matter in detail with reference to a particular situation and another statute deals with the same subject matter in general and comprehensive terms, the particular statute will be construed as controlling the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto . . . .

Id. at 249, 324 S.E.2d at 271 (internal quotation marks omitted). We added, "Where there are two provisions in a statute, one of which is special or particular and the other general, which, if standing alone, would conflict with the particular provision, the special will be taken as intended to constitute an exception to the general provisions, as the General Assembly is not to be presumed to have intended a conflict." *Id.* (internal quotation marks omitted). Then, applying the provisions of the statute specifically addressing the leasing of hospital facilities, we held "[t]he inclusion of statutory authority to lease to nonprofit associations . . . operates to exclude authority to lease to for-profit corporations." *Id.* at 249-50, 324 S.E.2d at 271.

However, unlike the more specific statute at issue in *Sandrock*, which addressed the leasing of hospital facilities and therefore governed the lease of the hospital in that case, N.C.G.S. § 136-18(29) does not address improvements away from a driveway connection. Thus, the holding in *Sandrock* does not support petitioners' argument.

Because we hold N.C.G.S. § 136-18(29) does not address the improvements, petitioners' argument is overruled. *See State ex rel. Utils. Comm'n v. Empire Power Co.*, 112 N.C. App. 265, 272, 435 S.E.2d 553, 556 (1993) ("[S]ections 62-110.1 and 62-82 do not provide the Commission with complete instructions for the process of awarding and denying certificates to applicants. Therefore, the Commission may turn to the more general sections of Chapter 62, specifically, N.C. Gen. Stat. § 62-31 (1989) and N.C. Gen. Stat. § 62-60 (1989), for guidance in interpreting the process not addressed in sections 62-82 and 62-110.1."), *disc. review denied*, 335 N.C. 564, 441 S.E.2d 125 (1994).

We note petitioners also state "[t]here is no statute setting forth standards for DOT's authority to impose upon Petitioners the duty to make improvements to the Railroad Crossing on SR 1135 located well away from the proposed driveway connection point." Petitioners contend N.C.G.S. §§ 136-18(5) and 136-93 fail "to specify any standards or conditions curtailing DOT's perceived ability to impair an abutter's property right of access" and suggest the General Assembly abdicated its power to make laws to DOT. In response, we note, "[t]he general purpose of the Department of Transportation is to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and *safe transportation of people and goods as provided for by law*." N.C. Gen. Stat. § 143B-346 (2009) (emphasis added). In N.C.G.S. § 136-18(5), the General Assembly gave DOT the power:

> (5) To make rules, regulations and ordinances for the use of . . . the State highways, and to prevent their abuse by individuals, corporations and public corporations, by trucks, tractors, trailers or other heavy or destructive vehicles or machinery, or by any other means whatsoever, and to provide ample means for the enforcement of same . . . .

N.C. Gen. Stat. § 136-18(5) (2009). It also provided, in N.C.G.S. § 136-93, that,

> No opening or other interference whatsoever shall be made in any State road or highway . . . except in accordance with a written permit from the Department of Transportation or its duly authorized officers, *who shall exercise complete and permanent control over such roads and highways*. . . .

N.C. Gen. Stat. § 136-93 (2009) (amended by Section 1 of Session Law 2011-397 and applying to permit applications or renewals submitted

or offenses occurring on or after 1 September 2011) (emphasis added). The Policy on Street and Driveway Access to North Carolina Highways, from which DOT derived its power to impose the conditions in this case, states, "WHEREAS, GS 136-18(5) and GS 136-93 grants [sic] the Board of Transportation authority to make rules, regulations, and ordinances for use on the State highways; and including street and driveway access to State highways . . . ." With the foregoing in mind, and having carefully examined the authorities petitioners cite in brief, we find no merit to their suggestion.

[3] Petitioners next contend the superior court erred in concluding the condition of obtaining the approval of NCRR and NS did not deprive them of the use of their property in violation of the North Carolina and United States Constitutions, relying on broad principles extrapolated from *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 73 L. Ed. 210 (1928) and *Bulova Watch Company, Inc. v. Brand Distributors*, 285 N.C. 467, 206 S.E.2d 147 (1974). "While [an] abutting [property] owner has a right of access, the manner in which that right may be exercised is not unlimited . . . . To protect others who may be using the highway, the sovereign may restrict the right of entrance to reasonable and proper points." *State Highway Comm'n v. Raleigh Farmers Mkt., Inc.*, 263 N.C. 622, 625, 139 S.E.2d 904, 906, *reaffirmed by* 264 N.C. 139, 141 S.E.2d 10 (1965). Although DOT conditioned the driveway permit on approval from NCRR and NS, NCRR has a property interest in the section of SR 1135 that intersects with the railroad tracks; NCRR owns an easement or a right-of-way over that section. According to the developer, NS operates and manages the crossing. *Compare Bulova*, 285 N.C. at 471-77, 206 S.E.2d at 145-48 (holding a statute an unconstitutional delegation of legislative power where the statute essentially allowed a private corporation to restrict the right of one not a party to a contract from selling its product based simply on the product carrying the private corporation's trade name, where nothing in the record suggested that any non-party had acquired any product through breach of the contract between the corporation and the supplier). Furthermore, petitioners fail to raise as an issue in their brief on appeal a challenge to the merits of the condition imposed by NS—the developer does not dispute that its proposed development, a 60-home subdivision estimated to increase the average daily traffic from 32 to approximately 600, necessitates the grade separation required by NS. *Compare Roberge*, 278 U.S. at 121-22, 73 L. Ed. at 213-14 (holding that an ordinance restricting an owner's use of its property by requiring consent

of neighboring landowners for that use, *which was otherwise an acceptable use of the property and not an issue of public safety*, was an unconstitutional delegation of power to neighboring landowners and, further, noting it was "not suggested that the [owner's] proposed [use] would be a nuisance" to neighboring landowners). The broad principles upon which petitioners rely for their argument are not persuasive. This issue is overruled.

Because we hold N.C.G.S. § 136-18(29) does not apply to the conditions DOT imposed, we do not address petitioners' arguments that (1) DOT's regulating "in excess of its statutory authority" was arbitrary and capricious and in violation of due process and, (2) petitioners are entitled to have the railroad crossing conditions stricken from the driveway permit as a result of unauthorized conditions.

[4] Finally, petitioners contend the superior court abused its discretion by denying High Rock's Motion for Leave to Supplement the Record under N.C.G.S. 150B-47, which provides, "The court may require or permit subsequent corrections or additions to the record when deemed desirable." *See* N.C. Gen. Stat. § 150B-47 (2009) (amended by Section 24 of Session Law 2011-398 and applying to contested cases commenced on or after 1 January 2012). After the Mecklenburg County Superior Court accepted High Rock's untimely petition, High Rock filed a Motion for Leave to Supplement the Record with transcripts of deposition testimony by Stephen Patrick Ivey, Christopher T. Corriher, Paul C. Worley, and John H. Corbett. According to High Rock, the testimony would have "assist[ed] th[e] [trial] [c]ourt in clarifying and explaining the relevancy and meaning of many of the documents previously submitted as part of the DOT record." However, the deposition testimony is not necessary for a determination of the issues petitioners bring forward on appeal. This issue is overruled.

Affirmed.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA v. TRAVIS LYNCH

No. COA11-801

(Filed 20 December 2011)

Evidence—victim's prior convictions—admissible

The trial court erred in a prosecution for robbery and kidnapping by denying the introduction of a defense exhibit consisting of the victim's criminal records where the victim's testimony was critical, he had minimized the number and severity of his past convictions, and defendant sought to present only evidence of the victim's convictions and did not inquire into the details of the crimes.

Judge BRYANT dissenting.

Appeal by defendant from judgments entered 3 February 2011 by Judge Allen Baddour in Superior Court, Chatham County. Heard in the Court of Appeals 30 November 2011.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kimberley A. D'Arruda, for the State.

Robert H. Hale, Jr. & Associates, by Daniel M. Blau, for defendant-appellant.

STROUD, Judge.

Travis Lynch ("defendant") appeals from a conviction for robbery with a dangerous weapon and second-degree kidnapping. For the following reasons, we grant defendant a new trial.

I. Background

On 16 November 2009, defendant was indicted on one count of robbery with a dangerous weapon and one count of second-degree kidnapping. Defendant was tried on these charges at the 31 January 2011 Criminal Session of Superior Court, Chatham County. The State's evidence presented at trial tended to show that on 18 June 2009, defendant was driving Michael Nicholas "Nick" White, Rashad Farrar, and Rashad's sister, Tiffany Farrar, to Siler City, North Carolina when Nick and Rashad began talking about robbing James Tinnin, who owned a clothing store in Liberty, North Carolina and also sold clothes and shoes from his van. Defendant told Nick to get a gun and, after the robbery, they would go back to defendant's apartment.

Rashad called Mr. Tinnin to tell him that he wanted to buy some clothes from him. Defendant then dropped Rashad and Tiffany off at a barber shop in Siler City to meet Mr. Tinnin. Mr. Tinnin arrived at the barber shop in his van and Rashad purchased some shoes from him. Tiffany told Mr. Tinnin that a guy she knew wanted to buy some clothes from him, but Mr. Tinnin would have to drive them to his house, which was only five minutes away. Mr. Tinnin, following directions from Rashad and Tiffany, drove twenty minutes to a house located down a dirt driveway. Defendant was at the house sitting on the porch. Mr. Tinnin parked the van, went up to meet defendant, and asked defendant his clothing sizes. As Mr. Tinnin began searching in the back of his van for clothes, defendant grabbed Mr. Tinnin from behind and pulled him away from his van. Mr. Tinnin then noticed Nick coming around from the side of the house pointing a rifle at Mr. Tinnin's head. Defendant dragged Mr. Tinnin beside the house, while Nick continued pointing the rifle at Mr. Tinnin. Defendant then threw Mr. Tinnin on the ground and told him to stay down. Nick and Rashad then began taking clothes out of Mr. Tinnin's van and putting them in the trunk of defendant's car, which was parked at a neighboring house.

After about five minutes, Mr. Tinnin noticed that the man holding the rifle had walked off so he walked back around the house and saw all four individuals "taking stuff out of the van." Mr. Tinnin yelled at them to stop and defendant, Tiffany, and Rashad ran away with items from the van in their arms. Nick then turned around and pointed the gun back at Mr. Tinnin. Mr. Tinnin ran back down the driveway towards the highway and called 911. As he was in the road talking to the 911 operator, he saw Tiffany and Rashad leave in a car from the neighboring house. Defendant, Rashad, Nick, and Tiffany then went back to defendant's apartment and later divided up the items taken from Mr. Tinnin's van. Mr. Tinnin testified that he did not have a gun on his person or in the van. Tiffany Farrar later gave a statement to the sheriff's office regarding the events that occurred, stating that defendant was a participant in the kidnapping and robbery of Mr. Tinnin.

Defendant testified that when Mr. Tinnin, Rashad, and Tiffany arrived in Mr. Tinnin's van, he was sitting on the porch talking on his cell phone to his girlfriend. Mr. Tinnin, Rashad, and Tiffany exited the van and began arguing. When defendant approached the van to see what the argument was about, Mr. Tinnin reached in his van for a gun. Defendant grabbed Mr. Tinnin and pulled him away from the van to keep him from the weapon. Defendant testified that he then let Mr. Tinnin go and he, Rashad, Nick, and Tiffany ran through the woods to

his car and left the scene, as he was afraid for his safety. Defendant denied having a conversation with Nick or Rashad about robbing Mr. Tinnin; trying to kidnap or rob Mr. Tinnin; seeing Nick point a gun at Mr. Tinnin; or taking anything from Mr. Tinnin's van.

On 3 February 2011, a jury found defendant guilty of both charges. The trial court sentenced defendant to a term of 51 to 71 months imprisonment for the robbery with a dangerous weapon conviction and a consecutive term of 20 to 33 months imprisonment for the second-degree kidnapping conviction. Defendant gave oral notice of appeal in open court and on 7 February 2011 filed written notice of appeal from the 3 February 2011 convictions. On appeal, defendant contends that he should get a new trial because (1) the trial court violated his constitutional rights to a unanimous jury verdict as to the second-degree kidnapping charge; (2) his trial counsel did not provide him with effective assistance of counsel; (3) the trial court erred by giving an instruction as to aiding and abetting; (4) the trial court erred in not giving an instruction as to self-defense with respect to the charge of second-degree kidnapping; (5) the trial court committed prejudicial error by refusing to admit certified copies of the victim/witness's criminal records for impeachment of credibility purposes; and (6) the trial court committed plain error and prejudicial error by admitting irrelevant and prejudicial images from a magazine into evidence. We find issue five dispositive.

II. Mr. Tinnin's Criminal Record

Defendant contends that "the trial court erred by refusing to admit certified true copies of Mr. Tinnin's criminal records, where the records were critical to impeach Mr. Tinnin's credibility and Rule 609(a) required the trial court to admit the records." Defendant argues that Rule 609(a) "permitted defense counsel to impeach Mr. Tinnin by admitting certified true public records of his prior convictions without calling any additional witnesses[;]" the trial court "erred by refusing to admit Defendant's Exhibit 1" which contained copies of Mr. Tinnin's prior convictions; and this error was prejudicial to defendant as he was not permitted to show that Mr. Tinnin, the alleged victim and the State's "most important witness[,]" "had misrepresented his [prior criminal] record to the jury[;]" and had this exhibit been admitted, "there is a reasonable possibility that the jury would have reached a different verdict." The State, citing *State v. Bell*, 338 N.C. 363, 383, 450 S.E.2d 710, 720 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995), counters that "[i]t is not necessary for this Court to decide if there was any error in this case, because any error com-

mitted by the trial court in not allowing the introduction of a certified copy of Mr. Tinnin's criminal record at trial was not prejudicial[,]" because Mr. Tinnin had testified as to his prior convictions and this evidence "allowed the jury to evaluate Mr. Tinnin's credibility and there was no reasonable possibility that a different result would have been reached."

N.C. Gen. Stat. § 8C-1, Rule 609(a) (2009) "Impeachment by evidence of conviction of crime" states that

> [f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.[1]

Our Supreme Court has held that the admission of evidence pursuant to Rule 609(a) is not in the discretion of the trial court as

> [t]he language of Rule 609(a) ("shall be admitted") is mandatory, leaving no room for the trial court's discretion. Moreover, while N.C. R. Evid. 609(b) requires a balancing test of the probative value and prejudicial effect of a conviction more than ten years old, this provision is explicitly absent from 609(a). Indeed, the official comments to Rule 609(a) reveal an unequivocal intention to diverge from the federal requirement of a balancing test. N.C.G.S. § 8C-1, Rule 609 official commentary, para. 4 ("Subdivision (a) also deletes the requirement in Fed. R. Evid. 609(a) that the court determine that the probative value of admitting evidence of the prior conviction outweighs its prejudicial effect to the defendant.").

State v. Brown, 357 N.C. 382, 390, 584 S.E.2d 278, 283 (2003), *cert. denied*, 540 U.S. 1194, 158 L.Ed. 2d 106 (2004).

The record shows that defense counsel asked Mr. Tinnin questions during cross examination regarding his prior criminal record. At the close of defendant's case, defense counsel requested to admit defendant's exhibit 1, which consisted of three prior judgments and a misdemeanor conviction record showing Mr. Tinnin's prior convictions in 2003, 2006, and 2010 in Guilford and Randolph Counties. Defense counsel stated that Mr. Tinnin's testimony regarding his prior

1. The ten year time limit in N.C. Gen. Stat. § 8C-1, Rule 609(b) is not applicable because the oldest prior conviction in defendant's exhibit 1 was from 2003.

convictions "was not quite accurate or candid . . . [and] the jury should have a right to know the full—the full scope of those convictions." Without discussion, the trial court denied defense counsel's request. The record shows that all four documents contained in defendant's exhibit 1 were certified as true copies of the original documents by the Superior Court Clerks in Guilford and Randolph Counties. The judgments and misdemeanor conviction record contained in defendant's exhibit 1 show prior convictions for twelve felonies and two misdemeanors. As defense counsel was requesting the introduction of the certified "public record[s]" showing Mr. Tinnin's prior convictions "for the purpose of attacking the credibility of a witness," *see* N.C. Gen. Stat. § 8C-1, Rule 609(a), and the language of Rule 609(a) "is mandatory," *see Brown*, 357 N.C. at 390, 584 S.E.2d at 283, the trial court erred in denying defense counsel's request to allow defendant's exhibit 1 into evidence.

We have stated that "[e]ven where the trial court improperly excludes certain evidence, . . . a defendant is not entitled to a new trial unless he can establish prejudice as the result of this error." *State v. Black*, 111 N.C. App. 284, 290, 432 S.E.2d 710, 715 (1993) (citation and quotation marks omitted). The test for prejudicial error is whether

> there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

N.C. Gen. Stat. § 15A 1443(a)(2009).

Defendant testified that he did not participate in any kidnapping or robbery of Mr. Tinnin and, in fact, defendant grabbed Mr. Tinnin because Mr. Tinnin was reaching for a weapon. The only two witnesses who gave statements to the sheriff's office and testified that defendant was a participant in the kidnapping and robbery of Mr. Tinnin were Mr. Tinnin and Tiffany Farrar. However, Tiffany Farrar also admitted that on the morning of 18 June 2009 she had twice snorted at least a gram of cocaine; that she was under the influence of cocaine the whole day; that she could not remember exactly what was said that day because she was under the influence of cocaine; that she frequently used cocaine and was probably under the influence of cocaine when she gave her statement to the sheriff's office;

that several parts of her trial testimony were not included in her statement to the sheriff's office; and that she was testifying in hopes of receiving probation or a lesser sentence for her own involvement in the events that occurred on 18 June 2009. Thus, Mr. Tinnin's testimony and his credibility were crucial to the State's argument that defendant participated in the kidnapping and robbery of Mr. Tinnin. But there are several discrepancies in Mr. Tinnin's testimony regarding his prior convictions and his prior convictions shown in the certified documents contained in defendant's exhibit 1.

As noted above, on cross-examination, Mr. Tinnin was questioned by defense counsel regarding his prior convictions in 2003, 2006, and 2010. Mr. Tinnin admitted that in 2003 he had been convicted of trafficking cocaine, but claimed that a 2003 conviction for maintaining a dwelling/vehicle for controlled substance in Guilford County was actually the same as his conviction for trafficking. Mr. Tinnin admitted to two 2006 convictions for trafficking in cocaine by possession and a 2006 conviction for PWISD marijuana; denied 2006 convictions for maintaining a dwelling place for controlled substances, felony possession of cocaine, and possession of marijuana; and stated that he did not remember if he had been convicted in 2006 for PWISD cocaine or two counts of felony counterfeit trademark. Mr. Tinnin admitted that he had been convicted in 2010 of misdemeanor use of a counterfeit trademark.[2] In contrast, the certified copies of the judgments and misdemeanor conviction record contained in defendant's exhibit 1 showed that Mr. Tinnin had the following prior convictions: (1) in 2003, a conviction for trafficking by manufacture 200-400 grams of cocaine and maintaining a vehicle/dwelling place for controlled substance; (2) in 2006, in two separate judgments, convictions for two counts of felony criminal use of a counterfeit trademark, two counts of trafficking in cocaine by possession, two counts of maintaining a dwelling place to keep a controlled substance, two counts of PWISD marijuana, one count of PWISD of cocaine, one count of felony possession cocaine, and one count of misdemeanor possession of marijuana up to ½ oz; and (3) in 2010, one conviction for misdemeanor criminal use of a counterfeit trademark. Although Mr. Tinnin's testimony as to his 2010 conviction was accurate, his testimony did not accurately represent his 2006 and 2003 prior convictions. Mr. Tinnin only admitted to four of his twelve prior felony convictions

2. A conviction for misdemeanor criminal use of a counterfeit trademark pursuant to N.C. Gen. Stat. § 80-11.1(b)(1) (2009) is a class 2 misdemeanor and would be admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 609(a).

and one of his two misdemeanor convictions. The trial court's denial of defense counsel's motion to allow into evidence defendant's exhibit 1 prevented defense counsel from drawing into question Mr. Tinnin's credibility by showing that he had misrepresented to the jury his prior criminal record by greatly minimizing the number and severity of his prior convictions. Although most of the prior convictions were drug related crimes, Mr. Tinnin testified that he could not remember if he had been convicted in 2006 of two counts of felony criminal use of a counterfeit trademark. But defendant's exhibit 1 shows that he was twice convicted of this crime in 2006 in Guilford County and again in 2010 he pled guilty to the misdemeanor criminal use of a counterfeit trademark in Randolph County. Unlike the drug offenses, the crimes involving the use of a counterfeit trademark show a pattern of deception and dishonesty which is especially relevant to defendant's attempt to attack Mr. Tinnin's credibility. Defendant's exhibit 1 further erodes Mr. Tinnin's credibility because it shows fourteen prior convictions, over twice as many as he acknowledged in his testimony. In contrast, defendant testified that he had never been convicted of anything more than a traffic offense and his prior record level worksheet shows no prior convictions. Given the impeachment of Tiffany Farrar's testimony and the critical nature of Mr. Tinnin's testimony, "there [was] a reasonable possibility that" the jury would have reached a different result had defendant's exhibit 1 been admitted. *See* N.C. Gen. Stat. § 15A 1443(a).

The State cites *State v. Bell* in support of its argument that defendant was not prejudiced by the exclusion of Mr. Tinnin's prior convictions, but we find *State v. Bell*, 338 N.C. 363, 450 S.E.2d 710, distinguishable from the case before us. In response to the defendant's contention that the trial court erred in refusing "to allow questioning of . . . the State's key witness, regarding his prior convictions and several prior acts of misconduct allegedly committed by him[,]" the Court in *Bell* held as to the witness's prior convictions that "the trial court properly restricted defendant's questioning of [the State's key witness] on his prior convictions for breaking and entering and larceny to the time and place of the convictions and the penalties imposed thereon." *Id.* at 381-82, 450 S.E.2d at 720. The defendant in *Bell* was restricted as to the *nature* of his questioning regarding prior convictions, not whether he *could* impeach the witness regarding his prior convictions pursuant to Rule 609(a). Here, the defendant sought to present only evidence as to Mr. Tinnin's convictions and the time and place of these convictions, and not to inquire into the details of

these crimes. The other incidents which the defendant sought to question the witness about in *Bell* were not prior convictions but some "particular alleged specific act[s] of misconduct[,]" pursuant to N.C. Gen. Stat. § 8C-1, Rule 608(b), which is not at issue in this case. *Id*. at 382-83, 450 S.E.2d at 720-21. In addition, although the *Bell* court found that the trial court erred by excluding evidence of one act of misconduct which was relevant to the "veracity of the witness[,]" the exclusion of this one incident of "misrepresentation[]" was not prejudicial because the evidence of the State's key witness's prior convictions was "sufficient evidence to evaluate [the witness's] credibility, including proof of bias." *Id*. at 383, 450 S.E.2d at 721. Here, the jury did not have sufficient or accurate evidence as to the number and severity of Mr. Tinnin's prior convictions. Instead of supporting the State's argument that defendant was not prejudiced by the exclusion of Mr. Tinnin's prior criminal record, *Bell* tends to support defendant's argument that he was prejudiced.

Because defendant was prejudiced by the trial court's error in denying the introduction of defendant's exhibit 1 into evidence, we grant defendant a new trial. As we have granted defendant the relief he requested, we need not address the other issues raised in his appeal.

NEW TRIAL.

Judge CALABRIA concurs.

Judge BYRANT dissents in a separate opinion.

Judge Bryant, dissenting.

The majority grants defendant a new trial by finding prejudice in the trial court's denial of a defense exhibit containing a witness's record of convictions. Because the record does not contain evidence that would establish prejudicial error, I respectfully dissent.

First, assuming it was error for the trial court to deny, pursuant to N.C.G.S. § 8C-1, Rule 609(a), defendant's request to admit certified public records of Mr. Tinnin's prior convictions, that error was not prejudicial.

It is well established that

> [e]ven where the trial court improperly excludes certain evidence, moreover, a defendant is not entitled to a new trial unless he can establish prejudice as the result of this error. The test for

> prejudicial error is whether a different result would have been reached if the error had not been committed.

State v. Black, 111 N.C. App. 284, 290, 432 S.E.2d 710, 715 (1993) (citations omitted).

The majority contends that "the jury did not have sufficient or accurate evidence as to the number and severity of Mr. Tinnin's prior convictions," and therefore, defendant was prejudiced such that defendant should be granted a new trial. I disagree with the majority's reasoning and the result they reach.

Defendant was charged and convicted by a jury of robbery with a dangerous weapon and second-degree kidnapping. Mr. Tinnin was the prosecuting witness for the state and the victim of the crimes for which defendant was charged. On the witness stand under cross-examination by defendant, Mr. Tinnin admitted to his prior convictions of maintaining a dwelling/vehicle for the use of controlled substances; trafficking in cocaine by manufacturing; trafficking in cocaine by possession; possession with intent to sell or deliver marijuana; and, misdemeanor use of a counterfeit trademark. However, defendant did not attempt to impeach Mr. Tinnin directly during his cross examination. Instead, after defendant had rested his case, defendant was allowed to mark the exhibit for identification, then attempted to have it admitted.

Defendant's Exhibit 1 includes *four documents* certified as true copies of Mr. Tinnin's criminal record. These four documents represent four judgments dated 20 May 2003, 11 September 2006, 12 September 2006, and 11 March 2010. These four judgments represent twelve to thirteen felonies[1] and two misdemeanors. Mr. Tinnin plead guilty to all of the offenses, including guilty pleas to a total of ten felonies and one misdemeanor on two consecutive days. All of these offenses can be placed in three basic categories: possession of drugs (cocaine and marijuana); maintaining a car or dwelling for use of controlled substances; and use of a counterfeit trademark. The majority opinion strongly emphasizes what it sees as prejudice because the "jury did not have sufficient or accurate evidence as to the number and severity of Mr. Tinnin's prior convictions." However, on the wit-

1. The criminal records in Defendant's Exhibit 1 are confusing. In addition to the four judgments noted by the majority and in this dissent, a separate page of the exhibit indicates a felony trafficking in cocaine offense, which offense may or may not represent a conviction. Therefore, it is difficult to tell whether defendant was convicted of twelve or thirteen felonies; perhaps that was the reason defendant did not impeach Mr. Tinnin with the record during Mr. Tinnin's testimony on cross examination.

ness stand, under cross examination, Mr. Tinnin admitted to three *types* of convictions represented by the four judgments; he simply did not admit to each of the fourteen or fifteen individual convictions. Further, based on Mr. Tinnin's responses to questions on cross examination, it is likely that, had defendant attempted to use the exhibit to impeach Mr. Tinnin's credibility during cross examination rather than simply attempting to admit it later, Mr. Tinnin might have admitted all the convictions. At the very least Mr. Tinnin would have had an opportunity to see that the record in Exhibit 1 contained not only the fact that four judgments were entered on four different dates, but that each judgment contained multiple convictions.

Even if one views Mr. Tinnin's testimony as the only critical testimony at trial, the record cannot support a determination that Mr. Tinnin's credibility would have been impeached to the point of total erosion by admission of the exhibit. There is no reasonable possibility that the jury, which apparently believed Mr. Tinnin notwithstanding his criminal record of drug possession, drug trafficking, maintaining a vehicle/residence for drugs, and use of a counterfeit trademark, would not have believed him had they known that he had plead guilty to additional crimes of the same type as he admitted at trial.

However, Mr. Tinnin's testimony was not the only critical testimony. While Mr. Tinnin was the chief prosecuting witness and the victim of the crimes charged against defendant, Mr. Tinnin's testimony was only a portion of the evidence before the jury. Prior to Mr. Tinnin's testimony the jury heard from two law enforcement officers from the Chatham County Sheriff's Office—Patrol Sergeant Brian Phillips and Detective Sergeant David Green, who responded to Mr. Tinnin's 911 call for assistance, reporting he had been robbed. Those officers testified at trial to Mr. Tinnin's demeanor as Mr. Tinnin described what he had just experienced—very nervous, agitated, incredulous (like he couldn't believe this had happened to him). They also testified to their observations at the crime scene: Mr. Tinnin's van facing the front of the house; rear hatch door open; sliding door open; lots of boxes, clothes, DVDs, CDs, etc. visible through the open doors. In addition to the officers' testimony of their observations of Mr. Tinnin shortly after the crime occurred, the jury also heard the statement Mr. Tinnin gave to Patrol Sergeant Phillips while at the scene, a statement consistent with Mr. Tinnin's trial testimony.

For these reasons I believe the majority's opinion that the trial court erred and prejudice occurred in the denial of the introduction of Defendant's Exhibit 1 is not supported by this record. Further, the

majority holds that the instant case is distinguishable from *State v. Bell*, 338 N.C. 363, 450 S.E.2d 710 (1994), because *Bell* held that the trial court properly restricted the defendant's impeachment of a witness by prior convictions under 608(a) but erred in restricting defendant's impeachment by specific instances of conduct under 608(b). However, where the error is not constitutional, the test for improper exclusion of evidence is the prejudicial error test: whether "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. . ." *Bell*, 338 N.C. at 383, 450 S.E.2d at 721 (citing N.C.G.S. § 15A-1443(a)). See also *Black*, 111 N.C. App. at 293, 432 S.E.2d at 710.

For the foregoing reasons, I respectfully dissent.

STATE OF NORTH CAROLINA v. BRIDGETTE LEIGH MABRY

No. COA11-108

(Filed 20 December 2011)

1. Appeal and Error—appealability—mitigated sentence

The General Assembly intended to change the law when it amended N.C.G.S. § 15A-1444(a1) to allow an appeal as of right for a sentence that does not fall within the presumptive range. A mitigated-range sentence does not fall within the presumptive range, and thus, defendant had a right to appeal the sufficiency of the evidence supporting the sentence.

2. Sentencing—mitigating factors—good character or reputation—testimony from family members

The trial court did not err in a multiple first-degree statutory sex offense and multiple taking indecent liberties case by failing to find that defendant has been a person of good character or reputation in the community in which defendant lived. All of the testimony regarding defendant's good character or reputation came from individuals having a close family relationship with defendant or from defendant herself.

3. Sentencing—mitigating factors—supported family

The trial court did not err in a multiple first-degree statutory sex offense and multiple taking indecent liberties case by failing

to find that defendant supported her family. The testimony was conflicting about whether defendant supported her family through her veteran's benefits.

4. Sentencing—mitigating factors—support system in community

The trial court did not err in a multiple first-degree statutory sex offense and multiple taking indecent liberties case by failing to find that defendant had a support system in the community. There was no testimony regarding whether defendant intended to utilize whatever support structure existed.

5. Sentencing—mitigating factors—positive employment history—gainfully employed

The trial court did not err in a multiple first-degree statutory sex offense and multiple taking indecent liberties case by failing to find that defendant had a positive employment history or was gainfully employed. There was a lack of details regarding defendant's employment history or the quality of her performance.

6. Sentencing—calculation of prior record points—prayer for judgment—constitutionality

Although defendant contended she was entitled to a new sentencing hearing in a multiple first-degree statutory sex offense and multiple taking indecent liberties case based on the trial court assigning a prior record point for defendant's 1995 prayer for judgment, this constitutional argument had already been decided against defendant.

7. Sentencing—mitigating factors—maximum mitigated-range sentence

The trial court did not abuse its discretion in a multiple first-degree statutory sex offense and multiple taking indecent liberties case by finding a mitigated factor and then sentencing defendant to the maximum mitigated-range sentence.

Appeal by defendant from judgment entered 28 September 2010 by Judge Tanya T. Wallace in Stanly County Superior Court. Heard in the Court of Appeals 1 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Menard, for the State.

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

GEER, Judge.

Defendant Bridgette Leigh Mabry appeals from a mitigated-range sentence of 230 to 285 months imprisonment imposed following a resentencing hearing. Defendant primarily argues in this appeal that the trial court erroneously failed to find four statutory mitigating sentencing factors. Because none of the four mitigating factors was established by evidence that was both uncontradicted and manifestly credible and because we find defendant's remaining arguments unpersuasive, we affirm.

Facts

Defendant was indicted in 2005 and 2007 for 11 counts of first degree statutory sex offense and 11 counts of taking indecent liberties with her two minor daughters. A full description of the underlying facts is set forth in this Court's prior opinion in *State v. Mabry*, 195 N.C. App. 598, 673 S.E.2d 800, 2009 N.C. App. LEXIS 220, at *1-2, 2009 WL 511986, at *1-2 (Mar. 3, 2009). A jury convicted defendant of all the charges on 5 September 2007. *Id.*, 2009 N.C. App. LEXIS 220, at *1-2, 2009 WL 511986, at *1-2.

At sentencing, defendant stipulated to having one prior record point for a misdemeanor larceny charge that had been resolved through a prayer for judgment continued ("PJC"). The trial judge sentenced defendant as a prior record level II to a single presumptive-range sentence of 240 to 297 months in prison. *Id.*, 2009 N.C. App. LEXIS 220, at *2, 2009 WL 511986, at *2. This Court, on appeal, vacated eight of defendant's convictions, upheld the remaining 14 convictions, and remanded for resentencing. *Id.*, 2009 N.C. App. LEXIS 220, at *30, 2009 WL 511986, at *11.

Following a resentencing hearing, the trial court sentenced defendant to 230 to 285 months imprisonment. Defendant again appealed. In an unpublished opinion, *State v. Mabry*, ___ N.C. App. ___, 698 S.E.2d 202, 2010 N.C. App. LEXIS 1262, at *1-2, 2010 WL 2817047, at *1-2 (July 20, 2010), this Court concluded that one prior record level point could be imposed based on the PJC. *Id.*, 2010 N.C. App. LEXIS 1262, at *7-8, 2010 WL 2817047, at *2. Because, however, the record did not include a prior record level worksheet showing how the trial court had determined that defendant was a prior record level II for sentencing purposes, this Court remanded for a second resentencing hearing. *Id.*, 2010 N.C. App. LEXIS 1262, at *7, 2010 WL 2817047, at *2.

At the second resentencing hearing, defendant requested that the trial court find five mitigating factors: (1) defendant was honorably discharged from the United States Armed Services; (2) defendant has been a person of good character or has a good reputation in the community in which defendant lives; (3) defendant has supported her family; (4) defendant has a support system in the community; and (5) defendant has a positive employment history or was gainfully employed. The trial court—after finding only one mitigating factor (that defendant was honorably discharged) and no aggravating factors—sentenced defendant as a prior record level II in the mitigated range to 230 to 285 months imprisonment. Defendant timely appealed to this Court.

I

[1] The State contends that "[d]efendant's appeal should be dismissed because she does not have a right to a direct appeal from a sentence in the mitigated range . . . ." The State relies on N.C. Gen. Stat. § 15A-1444(a1) (2009), which provides:

> A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing *only if the minimum sentence of imprisonment does not fall within the presumptive range* for the defendant's prior record or conviction level and class of offense. Otherwise, a defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

(Emphasis added.) According to the State, under this statute, a defendant may contest the sufficiency of the evidence supporting his or her sentence only if sentenced in the aggravated range.

Prior to 1995, N.C. Gen. Stat. § 15A-1444(a1) (1993) (emphasis added) entitled a defendant to appeal "as a matter of right the issue of whether his sentence is supported by evidence introduced at the trial and sentencing hearing *only if the prison term of the sentence exceed[ed] the presumptive term* set by G.S. 15A-1340.4, and if the judge was required to make findings as to aggravating or mitigating factors pursuant to this Article." This Court held, based on the plain language of this version of the statute, that a defendant with a sentence in the mitigated range did not have a right to appeal. *See State v. Knight*, 87 N.C. App. 125, 131, 360 S.E.2d 125, 129 (1987) ("[D]efend-

ant attempts to assert, on this direct appeal, error relating to his sentence. He is not entitled to do so because the sentence which he received is less than the presumptive term . . . .").

In 1993, however, the General Assembly amended N.C. Gen. Stat. § 15A-1444(a1), effective January 1, 1995. 1993 N.C. Sess. Laws 538 sec. 27. That amendment—resulting in the version at issue in this appeal—deleted the reference to a "sentence exceed[ing] the presumptive term" and instead provided a right to appeal "if the minimum sentence of imprisonment does not fall within the presumptive range." *Id.* We must determine whether the General Assembly intended this new language to have the same effect as the prior language of limiting appeals regarding the sufficiency of the sentencing evidence to aggravated-range sentences.

A fundamental principle of statutory construction is that " '[w]e presume that the legislature acted with full knowledge of prior and existing law and its construction by the courts.' " *State v. Anthony*, 351 N.C. 611, 618, 528 S.E.2d 321, 324 (2000) (quoting *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992)). Therefore, in this case, we presume the General Assembly knew, when amending N.C. Gen. Stat. § 15A-1444(a1), that this Court had construed the prior version of the statute so as to preclude an appeal from a mitigated-range sentence.

The State's position in this appeal would require us to construe the current version of N.C. Gen. Stat. § 15A-1444(a1) in precisely the same way that the pre-1995 statute was construed. In order to adopt this construction, we would have to conclude that the General Assembly—knowing the existing state of the law—did not intend its amendment to change that law.

It is, however, equally well established that "[i]t must be presumed, where the Legislature has amended a statute, that it intended to add to or to change the existing enactment." *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 590, 264 S.E.2d 56, 62 (1980). We must, therefore, also presume, in this case, that the General Assembly intended to change the law when it amended N.C. Gen. Stat. § 15A-1444(a1) to allow an appeal as of right for a sentence that does not fall within the presumptive range—omitting the requirement that the sentence "exceed" the presumptive range.

"Changes made by the legislature to statutory structure and language are indicative of a change in legislative intent . . . ." *Electric Supply Co. of Durham, Inc. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403

S.E.2d 291, 295 (1991). We cannot conclude that, although the General Assembly significantly changed the pertinent language of N.C. Gen. Stat. § 15A-1444(a1), it did not intend to make any change in the effect of the statute. Instead, we must presume that when the General Assembly deleted the language limiting appeals to those "exceed[ing]" a presumptive-range term, the legislature intended to change that limitation.

The plain language of the amended version of N.C. Gen. Stat. § 15A-1444(a1) precludes an appeal only when the sentence is "within the presumptive range." Since a mitigated-range sentence by definition does not fall "within the presumptive range," a defendant receiving a mitigated sentence must, under the plain language of the statute, have a right to appeal the sufficiency of the evidence supporting his or her sentence. *See Campbell v. First Baptist Church of the City of Durham*, 298 N.C. 476, 482, 259 S.E.2d 558, 563 (1979) ("The duty of a court is to construe a statute as it is written. It is not the duty of a court to determine whether the legislation is wise or unwise, appropriate or inappropriate, or necessary or unnecessary.").

Our construction of N.C. Gen. Stat. § 15A-1444(a1) to allow defendant's appeal in this case is also consistent with the well-established principle that "criminal statutes are to be construed strictly against the state and liberally in favor of the defendant." *State v. McGaha*, 306 N.C. 699, 702, 295 S.E.2d 449, 451 (1982). The State's construction would require us to interpret N.C. Gen. Stat. § 15A-1444(a1) in its favor by in effect restoring to the statute the excluded requirement that the sentence exceed the presumptive range. This Court, however, has "no power to add to or subtract from the language of the statute." *Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525, 528 (1950).

As the sole authority for its position, the State cites an unpublished opinion of this Court, *State v. Howze*, 151 N.C. App. 599, 2002 N.C. App. LEXIS 2264, 2002 WL 1544229 (July 16, 2002), which concluded that a defendant sentenced in the mitigated range has no right to appeal the sufficiency of the evidence supporting his or her sentence. Unpublished opinions are not, however, controlling authority and cannot bind later panels of this Court. Moreover, the opinion contains no discussion of the General Assembly's 1993 amendment to the statute—apparently, that change in statutory language was not called to the attention of the Court—and cites no authority supporting its construction of the statute. We, therefore, do not find the opinion persuasive.

We hold that a defendant may, pursuant to N.C. Gen. Stat. § 15A-1444(a1), appeal the issue of the sufficiency of the evidence to support his or her sentence even though he or she was sentenced in the mitigated range. The State's motion to dismiss is denied.

II

Defendant contends that the trial court erroneously failed to find four statutory mitigating factors: (1) defendant has been a person of good character or has had a good reputation in the community in which defendant lives; (2) defendant supports defendant's family; (3) defendant has a support system in the community; and (4) defendant has a positive employment history or was gainfully employed.

Under N.C. Gen. Stat. § 15A-1340.16(a) (2009), "the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists." A defendant proves a mitigating factor " 'when the evidence is substantial, uncontradicted, and there is no reason to doubt its credibility.' " *State v. Johnson*, 196 N.C. App. 330, 336, 674 S.E.2d 727, 731 (quoting *State v. Kemp*, 153 N.C. App. 231, 241, 569 S.E.2d 717, 723 (2002)), *appeal dismissed*, 363 N.C. 378, 679 S.E.2d 395 (2009).

As this Court has previously explained, " '[a] trial judge is given wide latitude in determining the existence of . . . mitigating factors, and the trial court's failure to find a mitigating factor is error only when no other reasonable inferences can be drawn from the evidence.' " *Id.* (quoting *State v. Norman*, 151 N.C. App. 100, 105-06, 564 S.E.2d 630, 634 (2002)). An appellate court may reverse a trial court for failing to find a mitigating factor only when the evidence offered in support of that factor "is both uncontradicted and manifestly credible." *State v. Jones*, 309 N.C. 214, 220, 306 S.E.2d 451, 456 (1983).

[2] Defendant first contends that the trial court erred in failing to find that "defendant has been a person of good character or has had a good reputation in the community in which the defendant lives." N.C. Gen. Stat. § 15A-1340.16(e)(12). At the sentencing hearing, defendant presented two witnesses as to her character and reputation: defendant's 18-year-old son, Andrew, and her first cousin, Donna Brooks. Defendant also testified on her own behalf regarding her good character, explaining that she attended Bible study in prison and took classes.

This evidence is similar to the evidence presented in *State v. Murphy*, 152 N.C. App. 335, 567 S.E.2d 442 (2002), in which the defend-

ant submitted 24 letters regarding his character to the trial court. This Court noted:

> The individuals who wrote the letters included family members, close friends, fellow church members, members of the community with whom defendant had worked, and prisoners with whom defendant had been incarcerated. These letters paint a picture of a devoted family man with three children who was active in his church and his community. Specifically, they show that defendant was active in the PTA, volunteered his time to coach youth athletic teams, once served as president of the high school athletic club, served on the board of the homeowners' association, ran for a seat on the town council, sponsored refugees from Africa, and was an active member of Bible study while serving time in prison.

Id. at 344-45, 567 S.E.2d at 448. The Court pointed out that although the letters provide "uncontradicted evidence of defendant's good character, this evidence does not rise to the level of being manifestly credible." *Id*. at 345, 567 S.E.2d at 449. The Court concluded that the relationship between those making statements of good character and the defendant was a factor the trial court could consider in deciding credibility. *Id*. at 346, 567 S.E.2d at 449.

In this case, all of the testimony regarding defendant's good character or reputation came from individuals having a close family relationship with defendant or from defendant herself. These sources are not so manifestly credible that the trial court was required to find that defendant has been a person of good character and has a good reputation in her community.

[3] Defendant next contends that the trial court erred in failing to find that "defendant supports the defendant's family." N.C. Gen. Stat. § 15A-1340.16(e)(17). On this issue, defendant's son answered affirmatively when defendant's attorney asked whether defendant, through her veteran's benefits, had "assisted you and the family in trying to maintain certain expenses, seeing that things get paid and that sort of thing." Defendant's son, however, also testified that Donna Brooks has the power of attorney for defendant's veteran benefits, and Ms. Brooks testified that the veteran's benefits check "goes to basically do upkeep or [sic] [defendant's] personal possessions we have stored." At best, Ms. Brooks testified that she—Ms. Brooks and not defendant—had used the veteran's benefits to help defendant's family to the best of Ms. Brooks' ability and time. Thus, Ms. Brooks'

testimony conflicted with defendant's son's testimony about whether defendant supported her family through her veteran's benefits.

While defendant claims on appeal also to have supported her family before her conviction, defendant argued to the trial court solely "that through her veteran's benefits, [defendant] has tried to support her family with what limited means she has." Defendant's son affirmed that everything he had testified about at the second resentencing hearing "is things that have happened since the trial." Defendant's evidence did not so clearly establish that defendant supports her family such that no other reasonable inference could be drawn. The sentencing judge thus did not err in refusing to find this mitigating factor.

[4] Defendant next contends that the trial court erred in failing to find that "defendant has a support system in the community." N.C. Gen. Stat. § 15A-1340.16(e)(18). Defendant's son testified that defendant had the support of her mother, her cousin, and four family friends. Defendant's cousin testified that defendant had the support of defendant's cousin, son, and mother. Defendant's mother testified that defendant had a support system in the community, but did not elaborate as to what that system was. The close family friend who testified knew defendant from "[w]hen she used to live with me and my daddy." However, he did not specifically indicate that defendant had any support system in the community. Additionally, there did not appear to be any testimony regarding whether defendant intended to utilize whatever support structure existed and, if so, how.

In *Kemp*, 153 N.C. App. at 241, 569 S.E.2d at 723, the defendant's "sister-in-law testified that there was a large support structure available to [the defendant] in the community." This Court, however, found that this "evidence did not demonstrate that [defendant] was engaged in this support structure or intended to utilize it. Furthermore, no evidence was presented indicating what this support structure consisted of. Testimony demonstrating the existence of a large family in the community and support of that family alone is insufficient to demonstrate the separate mitigating factor of a community support system." *Id.* at 241-42, 569 S.E.2d at 723.

In this case, as in *Kemp*, defendant presented testimony of the support of her family. While her son claimed that four family friends also supported defendant, only one testified, and defendant's mother referred in only conclusory fashion to a community support system. Further, defendant did not establish that she was engaged in that sup-

port structure or explain how she would use the system of support. Under *Kemp*, this evidence, although relevant to the mitigating factor, was not sufficient to require the trial court to find that defendant had a support system in the community.

[5] Defendant's last contention regarding potential mitigating factors is that the trial court erred in failing to find that "defendant has a positive employment history or is gainfully employed." N.C. Gen. Stat. § 15A-1340.16(e)(19). On this issue, defendant testified that she served in the Navy from 1988 to 1995. Defendant testified she also worked as a waitress and bartender, as a paid tutor while attending community college, and then in the mobile home industry, with a second job as a waitress. Defendant explained that she then went on medical leave due to a car accident and was arrested while on leave. During the time that she was on house arrest, defendant worked with her landlord cleaning houses "on a limited basis." She also completed a dental class while in prison and was working as a dental lab worker. Defendant's other witnesses generally corroborated some parts of this employment history, but provided no specific details regarding defendant's employment history.

With the exception of the honorable discharge in 1995, none of defendant's evidence on this mitigating factor indicates whether defendant's employment history was positive. Further, the employment history testimony does not necessarily establish continuous employment, the numbers of hours defendant was working, or what she was paid. Given the lack of details regarding defendant's employment history or the quality of her performance, we cannot conclude that the trial court was required to find either that defendant had a positive employment history or that she was gainfully employed within the meaning of N.C. Gen. Stat. § 15A-1340.16(e)(19). *See State v. Hughes*, 136 N.C. App. 92, 102, 524 S.E.2d 63, 69 (1999) (holding that trial court was not required to find N.C. Gen. Stat. § 15A-1340.16(e)(19) mitigating factor when defendant only presented evidence he held various jobs up until date of his arrest, but provided no other evidence of positive employment history).

In sum, based on our review of the record, we cannot conclude that the evidence on these four mitigating factors was both uncontradicted and manifestly credible. We, therefore, hold that defendant has failed to demonstrate that the trial court erred in not finding these mitigating factors.

III

[6] Defendant next contends that she is entitled to a new sentencing hearing because the trial court erroneously assigned a prior record point based on defendant's 1995 PJC. Defendant makes both a statutory argument (that a PJC does not count as a "prior conviction" under the Structured Sentencing Act) and a constitutional argument (that the point imposed for the PJC is "in violation of her State and Federal Constitutional rights to fundamental fairness under the Due Process Clause of the Fourteenth Amendment, a speedy trial, the law of the land, a jury trial in Superior Court, and appeal").

Defendant concedes that her statutory argument was already rejected by this Court in her prior appeal, but contends that this Court never addressed her constitutional arguments. Our review of the opinion indicates that this Court addressed and rejected both the statutory and the constitutional arguments.

In the prior appeal, defendant's sixth argument stated: "Defendant is entitled to a new sentencing hearing because the trial court may have assigned a prior record point based on a 1995 prayer for judgment continued in violation of state law." Defendant's seventh argument stated: "Defendant is entitled to a new sentencing hearing because the trial court may have assigned a prior record point based on a 1995 prayer for judgment continued in violation of her state and federal constitutional rights."

With respect to the PJC, this Court held:

> In Defendant's sixth and seventh arguments, she contends the trial court erred by using a misdemeanor larceny conviction, for which Defendant received a prayer for judgment continued (PJC), as the basis for elevating her prior record level from a prior record level I to a level II. We disagree.
>
> We address this argument because Defendant may decide to raise it again on resentencing. . . . Defendant's *sixth and seventh arguments* are without merit.

Mabry, 2010 N.C. App. LEXIS 1262, at *7-8, 2010 WL 2817047, at *3 (emphasis added). While the opinion does not specifically analyze the constitutional questions, the opinion expressly rejects as "without merit" defendant's seventh argument that asserted the unconstitutionality of using the PJC for prior record level purposes. Since defendant's constitutional argument has already been decided, this Court cannot revisit the issue.

IV

[7] Finally, defendant contends that the trial court abused its discretion when the court found that defendant should be sentenced to a mitigated-range term of imprisonment but nonetheless gave defendant the same sentence as the presumptive-range term previously imposed. In defendant's first resentencing, the trial court sentenced her in the presumptive range to a term of 230 to 285 months imprisonment. The sentence resulting from the second resentencing hearing was also 230 to 285 months, although it was identified as a mitigated-range sentence.[1] Defendant claims the trial court abused its discretion as "mitigation must count for something" and "[s]entencing so oblivious to found mitigation 'eviscerates' our State's statutory sentencing scheme . . . ."

Our Supreme Court has explained that "the weight to be given any factor is within the sound discretion of the sentencing judge. The judge is not required to engage in a numerical balancing process. By the same token, our appellate courts should not attempt to second guess the sentencing judge with respect to the weight given to any particular factor. . . . It is only the sentencing judge who is in a position to re-evaluate the severity of the sentence imposed in light of the adjustment" *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983). *See also Jones*, 309 N.C. at 219, 306 S.E.2d at 455 ("The sentencing judge, even when required to find factors proved by uncontradicted, credible evidence, may still attribute whatever weight he deems appropriate to the individual factors found when balancing them and arriving at a prison term.").

In this case, when defendant was initially sentenced, the first trial judge consolidated all of the charges into a single judgment rather than sentencing defendant to multiple, potentially consecutive terms of imprisonment. On appeal, this Court upheld the jury's conviction with respect to seven counts of first degree statutory sexual offense and seven counts of indecent liberties with a child. The second trial judge, on remand for resentencing, apparently concluded that the circumstances were such that, even in the absence of a finding of mitigating factors, defendant should be given the lowest possible presumptive-range sentence.

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1. The 230 to 285 month sentence falls at the bottom of the presumptive range and the top of the mitigated range for defendant's class of offenses and prior record level. Because of the overlapping of the ranges, the sentence is both a valid presumptive-range sentence and a valid mitigated-range sentence.

At the second resentencing hearing, the third trial judge found as the sole mitigating factor that defendant had been honorably discharged from the Navy. The trial court was entitled to determine, as it apparently did, that an honorable discharge, which occurred 10 years before the indictment and 15 years before the sentencing hearing was not entitled to significant weight given the nature of the offenses. While defendant, when testifying at the second resentencing hearing, continued to maintain her innocence and to suggest that the charges were manufactured by her former husband, she had been convicted by a jury of the very serious offenses.

We do not believe that it was manifestly unreasonable for the third trial judge to decide, given the seriousness of the offenses, that the single mitigating factor of an honorable discharge years earlier did not warrant a further sentence reduction beyond the reduction that had effectively already occurred at each prior sentencing hearing. We cannot say that the sentence imposed below was " 'so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Cannon*, 341 N.C. 79, 87, 459 S.E.2d 238, 243 (1995) (quoting *State v. Weddington*, 329 N.C. 202, 209, 404 S.E.2d 671, 676 (1991)). Consequently, we hold that the trial court did not abuse its discretion by finding a mitigating factor and then sentencing defendant to the maximum mitigated-range sentence.

No error.

Judges STROUD and THIGPEN concur.

JOAN F. TRIVETTE AND TERRY TRIVETTE, HUSBAND AND WIFE, PLAINTIFFS V. PETER EDWARD YOUNT, DEFENDANT

No. COA11-446

(Filed 20 December 2011)

1. Appeal and Error—interlocutory orders and appeals—denial of 12(b)(6) motion and motion for summary judgment—Workers' Compensation immunity

The trial court's order denying defendant's motion to dismiss pursuant to Rule 12(b)(6) and defendant's motion for summary judgment was interlocutory, but was immediately appealable. The

denial of a motion to dismiss based on asserted immunity under the Workers' Compensation Act affects a substantial right.

2. Workers' Compensation—immunity—Pleasant exception

The trial court correctly denied defendant's motion to dismiss a negligence action pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) by invoking workers' compensation immunity. Although defendant, a school principal, claimed to be the employer of plaintiff, an office assistant, defendant was plaintiff's immediate supervisor and thus a co-employee rather than an employer. Since plaintiffs alleged willful, wanton, and recklessly negligent conduct against a co-employee, they may proceed under the *Pleasant* exception to the Workers' Compensation Act.

3. Workers' Compensation—immunity—summary judgment denied

The trial court correctly denied a motion for summary judgment in an action by an office assistant at a school against the principal arising from a practical joke. When viewed in the light most favorable to plaintiffs, the evidence indicated that defendant was aware of the risks posed by his joke but proceeded to act at defendant's expense. The jury could reasonably have concluded that defendant's joke manifested a reckless disregard for plaintiff's safety.

Judge ELMORE dissenting.

Appeal by Defendant from order entered 16 November 2010 by Judge Richard D. Boner in Catawba County Superior Court. Heard in the Court of Appeals 27 September 2011.

Law Offices of Amos & Kapral, LLP, by Stephen M. Kapral, Jr., and T. Dean Amos, for Plaintiff-appellees.

Doughton & Hart PLLC, by Thomas J. Doughton and Amy L. Rich, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Peter Edward Yount ("Defendant") appeals the trial court's order denying his motion to dismiss and denying his motion for summary judgment. On appeal, Defendant contends the trial court erred by (1) exercising subject matter jurisdiction over this matter, as Plaintiffs' remedy is limited to relief under the Workers' Compensation Act and

(2) denying Defendant's motion for summary judgment because even if the trial court's jurisdiction was proper, Defendant's conduct as alleged does not constitute willful, wanton, and reckless negligence. After careful review, we affirm.

I. Factual & Procedural Background

In October 2008, Defendant was employed as the principal of William Lenoir Middle School. Joan Trivette worked as an office assistant in the school's front office. Ms. Trivette's duties included answering telephones and performing general secretarial work for Defendant.

On 23 October 2008, a student discharged a fire extinguisher in one of the school's classrooms. Upon investigation, Defendant determined the safety pin had been removed from the fire extinguisher. To avoid further incident, Defendant directed the school custodian to place the fire extinguisher in the front office of the school. The following day, Defendant placed the fire extinguisher on or near Ms. Trivette's desk. According to Ms. Trivette, Defendant began joking around and pretended to spray Ms. Trivette with the fire extinguisher. Suddenly, the fire extinguisher discharged, spraying Ms. Trivette with a powder-like chemical substance. Defendant admits handling the fire extinguisher at the precise moment it discharged, but asserts he intended only to move the fire extinguisher into his office for "safety precautions," and, further, he was not joking around with the fire extinguisher, nor did he point it at Ms. Trivette.

A few days after the incident, Ms. Trivette experienced a sharp pain in her chest and sought medical treatment. It was determined that Ms. Trivette had inhaled some of the powder-like substance emitted from the fire extinguisher, causing damage to her lungs and aggravating a preexisting neuromuscular condition.[1] Prior to the incident, Ms. Trivette was an active bike rider and bowled regularly with the school's bowling team. Presently, Ms. Trivette has difficulty with basic activities, such as vacuuming, showering, and styling her own hair.

On 23 March 2010, Ms. Trivette and her husband Terry Trivette (collectively, "Plaintiffs") filed a complaint against Defendant alleging gross negligence and loss of consortium. The complaint alleges

1. Ms. Trivette was diagnosed with myasthenia gravis in 1991. Prior to the incident in question, she had been in remission and off medication since 1996.

Defendant's actions aggravated Ms. Trivette's pre-existing medical condition and caused her serious permanent bodily injury. The complaint further alleges Ms. Trivette has incurred medical and other expenses, lost wages, and a decreased earning capacity as a result of Defendant's conduct.

Defendant filed an answer to Plaintiffs' complaint on 2 June 2010. In his answer, Defendant raises several defenses: (1) Plaintiffs failed to state a claim upon which relief could be granted, as Defendant was immune from suit pursuant to governmental or sovereign immunity; (2) the trial court lacked personal jurisdiction over Defendant and also lacked subject matter jurisdiction; (3) Plaintiffs' claims were barred by the doctrines of waiver, laches, or estoppel; (4) Plaintiffs failed to mitigate their damages; and (5) Plaintiffs failed to state aggravating factors to support an award of punitive damages.

On 26 August 2010, Plaintiffs amended their complaint to allege that Defendant and the Caldwell County Board of Education waived the defense of sovereign immunity by purchasing insurance. On 28 September 2010, Defendant filed an answer to the amended complaint, raising an additional defense: Ms. Trivette sustained her injuries while working within the scope of her employment, and, therefore, Plaintiffs' claims were barred by the exclusivity of the North Carolina Worker's Compensation Act.

On 8 October 2010, Defendant filed a motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, asserting: (1) the trial court lacked subject matter jurisdiction over Plaintiffs' claims, as the North Carolina Workers' Compensation Act provided Plaintiffs' exclusive remedy, and (2) Defendant was entitled to summary judgment because, viewing the facts in the light most favor to Plaintiffs, no genuine issue of material fact existed and Defendant's alleged conduct, as a matter of law, did not amount to willful, wanton, and reckless negligence. The trial court denied Defendant's motion in an order entered 16 November 2010. Defendant filed a Notice of Appeal with this Court on 13 December 2010.

II. Jurisdiction

[1] We note at the outset the trial court's order denying Defendant's motion to dismiss pursuant to Rule 12(b)(1) and motion for summary judgment pursuant to Rule 56(c) is interlocutory. An 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." *N.C. Dept. of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995) (citation omitted). The trial court's order in the case at bar is interlocutory because it did not address and dispose of Plaintiffs' loss of consortium claim.

The general rule is that an interlocutory order is not immediately appealable to this Court. *See Barrett v. Hyldburg*, 127 N.C. App. 95, 98, 487 S.E.2d 803, 805 (1997). An exception to this rule lies where the order affects a substantial right. *See* N.C. Gen. Stat. § 1-277(a) (2009); N.C. Gen. Stat. § 7A-27(d)(1) (2009). "A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (quotation marks and citation omitted). "The burden is on the appealing party to establish that a substantial right will be affected." *Id.* "Whether an interlocutory appeal affects a substantial right is determined on a case by case basis." *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 803 (2002).

In *Burton v. Phoenix Fabricators & Erectors, Inc.*, the plaintiffs brought wrongful death actions against the defendant-employer alleging the defendant's intentional tortious conduct resulted in the death of their husbands, who had been employed by the defendant. 194 N.C. App. 779, 781, 670 S.E.2d 581, 582, *review denied*, 363 N.C. 257, 676 S.E.2d 900 (2009). The defendant moved to dismiss the plaintiffs' suit pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, contending the trial court lacked subject matter jurisdiction as plaintiffs' remedy was limited to relief under the Workers' Compensation Act. *Id.* at 781, 676 S.E.2d at 583. The trial court denied the defendant's motion. *Id.* This Court affirmed the trial court's ruling in *Burton v. Phoenix Fabricators & Erectors, Inc.*, 185 N.C. App. 303, 648 S.E.2d 235 (2007). Upon review, however, our Supreme Court specifically held that the trial court's denial of a defendant-employer's motion to dismiss based on asserted immunity under the Worker's Compensation Act "affects a substantial right and will work injury if not corrected before final judgment." *Burton v. Phoenix Fabricators & Erectors, Inc.*, 362 N.C. 352, 352, 661 S.E.2d 242, 242-43 (2008). Accordingly, we must conclude the trial court's order in the instant case affects a substantial right and this Court exercises jurisdiction over Defendant's appeal pursuant to North Carolina General Statutes §§ 1-277(a) and 7A-27(d)(1).

III. Analysis

A. Subject Matter Jurisdiction

[2] Defendant first contends the trial court erred in denying his Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, as Plaintiffs' relief is limited to a claim under the Workers' Compensation Act. We disagree.

Rule 12(b)(1) permits a party to contest, by motion, the jurisdiction of the trial court over the subject matter in controversy. *See* N.C. R. Civ. P. 12(b)(1). "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). "Pursuant to the *de novo* standard of review, 'the court considers the matter anew and freely substitutes its own judgment for that of the [trial court].' " *Blow v. DSM Pharm., Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009), *review denied*, 363 N.C. 853, 693 S.E.2d 917 (2010) (citation omitted) (alteration in original).

The purpose of the North Carolina Worker's Compensation Act ("the Act") is to "provide certain limited benefits to an injured employee regardless of negligence on the part of the employer, and simultaneously to deprive the employee of certain rights he had at the common law." *Brown v. Motor Inns of Carolina, Inc.*, 47 N.C. App. 115, 118, 266 S.E.2d 848, 849 (1980). According to the Act, "every employer and employee . . . shall be presumed to have accepted the provisions of [the Act] respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of his employment and shall be bound thereby." N.C. Gen. Stat. § 97-3 (2009).

The facts before this Court establish Ms. Trivette sustained injuries while working within the scope of her employment as an office assistant at William Lenoir Middle School. Consequently, the Act is applicable to Ms. Trivette's injuries.

"Where the employer and the employee are subject to . . . the Act, the rights and remedies therein granted to the employee exclude all other rights and remedies in his favor against the employer." *Bryant v. Dougherty*, 267 N.C. 545, 548, 148 S.E.2d 548, 551 (1966). "An employee cannot elect to pursue an alternate avenue of recovery, but is required to proceed under the Act with respect to compensable injuries." *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 580, 364 S.E.2d 186, 188 (1988). Our Supreme Court, however, has carved out

two exceptions to the exclusivity of the Act. First, an employee may pursue a common law action against his employer where the "employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct." *Woodson v. Rowland*, 329 N.C. 330, 340, 407 S.E.2d 222, 228 (1991). Second, an employee may recover in a civil action against a co-employee for injuries received as a result of the co-employee's intentional or willful, wanton and reckless conduct (hereinafter referred to as "the *Pleasant* exception"). *Pleasant v. Johnson*, 312 N.C. 710, 713, 325 S.E.2d 244, 247 (1985).

Plaintiffs' claim alleges Ms. Trivette's injuries were the result of Defendant's willful, wanton, and reckless conduct. The pivotal issue, therefore, is whether Defendant was properly classified as Ms. Trivette's employer or co-employee at the time of the incident. If Defendant was Ms. Trivette's employer, Plaintiffs' remedy is limited to relief under the Act, as Plaintiffs have not alleged intentional conduct in their complaint. On the other hand, if Defendant and Ms. Trivette were co-employees, Plaintiffs may proceed with their common law cause of action against Defendant directly under the *Pleasant* exception.

Defendant contends that "as the top person [in] the school system," he must be classified as Ms. Trivette's employer. We note that our General Statutes define a school principal as "[t]he executive head of the school." *See* N.C. Gen. Stat. § 115C-5(7) (2009). However, "executive" is not synonymous with "employer." Nor can we agree with Defendant's assertion he is the "top person" in the school system. Our General Statutes carefully delineate a hierarchy of administrators within the public school system. The State Board of Education heads our public school system, *see* N.C. Gen. Stat. § 115C-10 (2009), and the local county school board has "general control and supervision of all matters pertaining to the public school in their respective administrative units." N.C. Gen. Stat. § 115C-36 (2009). The local school board has the power to elect and remove a superintendent of schools. N.G. Gen. Stat. § 115C-271 (2009). The superintendent recommends principals for election by the local school board. N.C. Gen. Stat. § 115C-284(a) (2009).

Moreover, the powers and duties of a secondary school principal are set forth in exhaustive detail in North Carolina General Statutes § 115C-288. None of these powers vests a secondary school principal

with the authority to employ any person in *any* position. *See* N.C. Gen. Stat. § 115C-288 (2009). A principal's responsibilities include supervision of the teachers at the school and "any other part of the instructional program." N.C. Gen. Stat. § 115C-287.1(a)(3) (2009). While "any other part of the instructional program" is not defined by statute, this language clearly vests Defendant with supervisory responsibilities extending beyond supervision of teachers at the school. These responsibilities reasonably include supervision of an office assistant, such as Ms. Trivette.

We note it is well established that both a principal and the teachers under the principal's supervision are considered employees of the local school board. *See* N.C. Gen. Stat. § 115-325C et seq. (2009); *Taylor v. Crisp*, 286 N.C. 488, 212 S.E.2d 381 (1975); *Warren v. Buncombe County Bd. of Educ.*, 80 N.C. App. 656, 659, 343 S.E.2d 225, 227 (1986) ("Under the law[,] public school teachers are hired, promoted, dismissed, and disciplined by their employer, *the local school board.*" (Emphasis added)). In light of this precedent, we cannot conclude that Defendant was Ms. Trivette's employer. The school board, which is responsible for paying the salaries of *all* school employees, *see* N.C. Gen. Stat. § 115C-47(21) (2009), is properly classified as the employer of both Defendant and Ms. Trivette.

We conclude Defendant is more properly classified as Ms. Trivette's "immediate supervisor." Our courts have defined an immediate supervisor as a "co-employee" for purposes of workers' compensation. *See Abernathy v. Consol. Freightways Corp.*, 321 N.C. 236, 240-41, 362 S.E.2d 559, 561-62 (1987) (supervisor of injured employee classified as co-employee); *McCorkle v. Aeroglide Corp.*, 115 N.C. App. 651, 653, 446 S.E.2d 145, 147-48 (1994). The facts indicate Ms. Trivette worked directly under Defendant's supervision performing secretarial tasks, further supporting the conclusion that Defendant was her immediate supervisor. Because Defendant is Ms. Trivette's immediate supervisor, not her employer, Defendant and Ms. Trivette are co-employees for purposes of workers' compensation.

The dissent relies primarily upon the fact that Defendant hired Ms. Trivette as evidence that Defendant is Ms. Trivette's employer. We are unaware of any authority establishing that the power to hire is dispositive on this issue. Furthermore, it is seldom true in today's world that the "hiring" party—that is, the party physically extending the invitation of employment through an interview process or otherwise—is the legal employer. The employer often delegates the task of hiring

to mid-level management. This is precisely what happened in the instant case, as Defendant acted on behalf of the school board in hiring Ms. Trivette.

In sum, Ms. Trivette and Defendant are co-employees for purposes of workers' compensation. As Plaintiffs have alleged Defendant's conduct was willful, wanton, and recklessly negligent, Plaintiffs may proceed with their claim against Defendant directly under the *Pleasant* exception. Accordingly, we hold the trial court correctly denied Defendant's motion to dismiss.

B. Summary Judgment

[3] Defendant further contends the trial court erred in denying his motion for summary judgment pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure. Again, we disagree.

A motion for summary judgment is appropriately granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A–1, Rule 56(c) (2009). "Summary judgment is a somewhat drastic remedy and should be granted cautiously, especially in actions alleging negligence as a basis of recovery." *Dumouchelle v. Duke Univ.*, 69 N.C. App. 471, 473, 317 S.E.2d 100, 102 (1984). "The party moving for summary judgment has the burden of establishing the lack of any triable issue." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). On appeal, this Court must review the entire record, viewing all evidence in the light most favorable to the non-moving party. *Id.*

Defendant asserts he is entitled to summary judgment because no genuine issue of material fact remains, and, viewing the evidence in the light most favorable to Plaintiffs, his conduct did not amount to willful, wanton, and reckless negligence as a matter of law.

" 'Wanton' and 'reckless' conduct is such conduct 'manifesting a reckless disregard for the rights and safety of others.' " *Dunleavy v. Yates*, 106 N.C. App. 146, 155, 416 S.E.2d 193, 198 (1992) (citation omitted). " 'Willful negligence' is 'the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed.' " *Id.* (citation omitted).

Our Supreme Court's ruling in *Pleasant* is particularly instructive, as the facts of that case are analogous to the facts presented in the instant case. In *Pleasant*, the plaintiff was walking across a parking lot towards his work site when the defendant, his co-employee, struck and seriously injured the plaintiff with his truck. 312 N.C. at 711, 325 S.E.2d at 246. At trial, the defendant testified he had been "joking" and intended only "to scare the plaintiff by blowing the horn and by operating the truck close to him." *Id.* Our Supreme Court concluded these facts demonstrated willful, wanton, and recklessly negligent conduct and allowed the plaintiff to proceed with his claim outside the Act. *Id.* at 717-18, 325 S.E.2d at 250 ("It would be a travesty of justice and logic to permit a worker to injure a co-employee through such conduct, and then compel the injured co-employee to accept moderate benefits under the Act.").

In the case *sub judice*, Defendant discovered that a student had removed the safety pin from a fire extinguisher. Exercising caution, Defendant instructed the custodian to move the fire extinguisher away from the students and into the school's front office. The following day, despite knowing the safety pin was missing, and despite having acknowledged the risks posed by the fire extinguisher by moving it into the front office, Defendant placed the fire extinguisher on Ms. Trivette's desk. Viewing the evidence in the light most favorable to Plaintiffs, Defendant then picked up the fire extinguisher and pretended to spray Ms. Trivette in a joking manner. Ms. Trivette stated in her affidavit that she warned Defendant "to stop joking around and to put the extinguisher down before it went off." After urging Defendant to replace the safety pin and to remove the fire extinguisher from her desk, Defendant replied: "Oh, you're being such a baby, nothing is going to happen." The fire extinguisher discharged, spraying Ms. Trivette's body and face. The spray aggravated Ms. Trivette's preexisting neuromuscular condition causing extensive injury.

The evidence when viewed in the light most favorable to Plaintiffs indicates Defendant was aware of the risks posed by his "joke," but proceeded to act at Ms. Trivette's expense. This is evidence from which a jury could reasonably conclude Defendant's practical joke manifested a reckless disregard for Ms. Trivette's safety, thereby constituting willful, wanton, and recklessly negligent conduct. Therefore, summary judgment is not appropriate at this stage of the proceedings and the trial court correctly denied Defendant's motion.

IV. Conclusion

For the foregoing reasons, the trial court's order is

Affirmed.

Judges MCGEE concurs.

Judge ELMORE dissents in a separate opinion.

ELMORE, Judge, dissenting.

I respectfully disagree with the majority's conclusion that defendant should be classified as Ms. Trivette's co-employee. As a result, I would reverse and remand the trial court's order, with instructions to grant defendant's motion to dismiss.

The majority states that defendant's argument on appeal is that he is "the top person in the school system." In turn, the majority provides a detailed hierarchy of the administrators within the public school system, in an attempt to refute defendant's claim. However, it is clear from defendant's brief filed with this Court, that the majority has misstated defendant's argument. In his brief, defendant does not argue that he is the top person in the *school system*; rather, he argues that as principal, he is the top person in the *school* in which he is employed. Defendant further argues that as principal of his school, he is an officer and agent of the school board, and thus, he is properly classified as Ms. Trivette's employer. I agree with defendant's argument.

As the majority has noted, our General Statutes define a school principal as "[t]he executive head of the school." *See* N.C. Gen. Stat. § 115C-5(7) (2009). This Court has further established that a school principal is a public officer. *See Gunter v. Anders*, 114 N.C. App. 61, 67-68, 441 S.E.2d 167, 171 (1994). In *Gunter*, this Court reviewed whether the principal and the superintendent of a particular school system were considered officers or employees of the school board for purposes of liability. We held in *Gunter* that both superintendents and principals are properly classified as public officers, not employees. Furthermore, in *Abell v. Nash County Bd. of Education*, 71 N.C. App. 48, 53, 321 S.E.2d 502, 506 (1984), this Court established that "[b]y statute and under traditional common-law principles, then, the superintendent and principal are agents of the board." Thus, as principal of his school, defendant was both an officer and agent of the school board.

An agent may also be referred to as an "alter-ego." *See State ex rel. Utilities Com. v. Southern Bell Tel. & Tel. Co.*, 326 N.C. 522, 523, 391 S.E.2d 487, 488 (1990) (where the Supreme Court was reviewing whether one company acted as the agent or alter-ego of another company). Therefore, defendant, as an agent of the school board, may also be classified as an "alter-ego" of the school board. This Court has established that one way to determine whether an individual is a co-employee or employer for purposes of Workers' Compensation is to determine whether that person is the "employer in person [or] a person who is realistically the alter ego of the [employer.]" *Dunleavy v. Yates Constr. Co.*, 106 N.C. App. 146, 154, 416 S.E.2d 193, 198 (1992). Here, defendant was an officer, agent, and alter-ego of the employer, the school board. Thus, defendant should be classified as Ms. Trivette's employer at the time of the incident.

As the majority has indicated, the exclusivity of the Workers' Compensation Act does not apply to common law actions by an employee against her employer when that action is based on the intentional conduct of the employer. *Woodson v. Rowland*, 329 N.C. 330, 340-41, 407 S.E.2d 222, 228 (1991). Here, plaintiffs have not alleged intentional conduct in their complaint. Therefore, I believe that plaintiffs' relief is limited to a claim under the Workers' Compensation Act. The decision of the trial court should be reversed, and this case should be remanded to the trial court with instruction to grant defendant's motion to dismiss.

IN RE: FORECLOSURE OF DEED OF TRUST FROM JAMES L. YOPP III AND WIFE, TINA M. YOPP TO VICKI L. PARRY DATED 12/21/2007, AND RECORDED 12/28/2007, IN BOOK 5264, ON PAGE 140, BY FRANCES S. WHITE, SUBSTITUTE TRUSTEE

No. COA11-753

(Filed 20 December 2011)

1. Civil Procedure—affidavits—Rule 56(e)—made to best of personal knowledge

An affidavit was properly admitted even though respondents argued that it contained opinion testimony because the statements were made to the best of the affiant's personal knowledge. This was merely a self-imposed limitation to the affiant's personal knowledge.

2. Civil Procedure—affidavits—opinion—disregarded

The trial court did not abuse its discretion by admitting an affidavit which contained an opinion about the identity of the owner and holder of a promissory note and deed of trust. Statements in affidavits as to opinions, beliefs, or conclusions of law were to no effect.

3. Evidence—internet print-out—not authenticated—other evidence

Although an internet print-out showing the merger of two banks was not authenticated and was inadmissible in a foreclosure action, respondents waived their exception because other evidence of the merger was admitted without objection.

4. Mortgages and Deeds of Trust—holder of note—bank merger

The trial court properly concluded that petitioner was the holder of a note and authorized the trustee to proceed with the foreclosure sale where the only inference that could have been drawn from the evidence was that petitioner-bank had merged with another bank and was in physical possession of note at the time of the hearing.

Appeal by respondents from order entered 22 February 2011 by Judge Russell J. Lanier, Jr. in Superior Court, New Hanover County. Heard in the Court of Appeals 16 November 2011.

Guthrie, Davis, Henderson & Staton, P.L.L.C., by John H. Hasty and Justin N. Davis, for petitioner-appellee Capital One, N.A.

Shanklin & Nichols, LLP, by Kenneth A. Shanklin, for respondent-appellants.

STROUD, Judge.

James L. Yopp, III and Tina M. Yopp ("respondents") appeal from an order authorizing Frances S. White, as substitute trustee, to proceed with a foreclosure sale of certain real property as permitted by the deed of trust. For the following reasons, we affirm the trial court's order.

I. Background

On 20 January 2010, Capital One, N.A., ("petitioner") caused Frances S. White, substitute trustee, to file a "Notice of Hearing" with

the Clerk of Superior Court, New Hanover County requesting to proceed with the foreclosure and sale on a real estate security interest described in a "Deed of Trust originally executed by James L. Yopp III and wife, Tina M. Yopp, . . . for the benefit of Chevy Chase Bank F.S.B." The notice further stated that the deed of trust was given to secure a promissory note made and executed by respondents in the amount of $2,415,000.00 ("the note"); Chevy Chase Bank, F.S.B. was the original holder of the deed of trust and note; petitioner was the current holder of the deed of trust and note; respondents were in default on the note; the real estate secured by the deed of trust was located in New Hanover County at 7156 River Road, Wilmington, North Carolina 28412; the deed of trust was recorded on 28 December 2007 in Book 5264, on Page 140 of the New Hanover County Public Registry; the proposed foreclosure sale was for 8 April 2010 at 3:30 p.m.; and a hearing was set on 18 March 2010 before the clerk. On 6 October 2010, petitioner filed an "Affidavit and Statement of Account" from James J. Cox, Vice President with Capital One, N.A. and a copy of the note listing Chevy Chase Bank, F.S.B. as the lender, signed by both respondents, and indorsed "Pay to the Order of _____ _____ [blank] Without Recourse To Chevy Chase Bank, F.S.B" followed by the signature of "Darlene K. Opalski[,] Assistant Vice President[,]" of Chevy Chase Bank. On the same date, respondents filed "objections to foreclosure affidavits and motion to dismiss" arguing that petitioner was not the "holder" of the promissory note and deed of trust and the affidavits filed in support of the notice did not comply with N.C. Gen. Stat. § 1A-1, Rule 56. On 15 October 2010, by written order, the clerk "found that the Substitute Trustee [could] proceed at foreclosure under the terms of the above-described Deed of Trust and give notice of and conduct a foreclosure sale as by statute provided[;]" it further noted that respondents objected to the foreclosure affidavits; and denied their motion to dismiss. On the same date, the substitute trustee filed a "notice of foreclosure sale" setting the date of the sale as 5 November 2010.

On 20 October 2010, respondents filed notice of appeal to Superior Court, New Hanover County from the clerk's 15 October 2010 order. A *de novo* hearing for respondents' appeal was held on 7 February 2011. On 14 February 2011, respondents filed a "Notice of Filing of True Copies of Original Documents Regarding Chevy Chase Bank F.S.B Tendered in Open Court Before The Honorable Russell J. Lanier, Jr. Regarding Appeal of James L. Yopp, III and Tina M. Yopp" which listed exhibits tendered by petitioner at the foreclosure hear-

ing in support of the foreclosure with copies of those documents, including the promissory note and Mr. Cox's affidavit. On 22 February 2011, the trial court, by written order, found *inter alia*, that "**Capital One, N.A.** is the holder of the note sought to be foreclosed and said note evidences a valid debt owed by [respondents]" and ordered "that the Substitute Trustee can proceed to foreclose under the terms of the above-described Deed of Trust and give notice of and conduct a foreclosure sale as by statute provided." (Emphasis in original.) On 21 March 2011, respondents filed notice of appeal from the trial court's 22 February 2011 order.

II. Mr. Cox's Affidavit

Respondents first contend that the trial court committed reversible error in allowing into evidence an affidavit by James J. Cox, Vice President at Capital One, N.A. as (1) it contained opinion testimony in violation of N.C. Gen. Stat. § 1A-1, Rule 56(e) and (2) contained an incompetent and inadmissible legal conclusion that petitioner is the "holder" of the note. This Court has stated that

> [a] principle tenet of evidence is that "all relevant evidence is admissible." N.C.R. Evid., Rule 402 (2000). Whether or not evidence should be excluded is a matter within the discretion of the trial court. *Reis v. Hoots*, 131 N.C. App. 721, 727, 509 S.E.2d 198, 203 (1998). The trial court's ruling will be reversed only upon a showing that it was so arbitrary that it could not be the result of a reasoned decision. *Id.* at 727, 509 S.E.2d at 203; *Sitton v. Cole*, 135 N.C. App. 625, 626, 521 S.E.2d 739, 740 (1999).

Sterling v. Gil Soucy Trucking, Ltd., 146 N.C. App. 173, 177, 552 S.E.2d 674, 677 (2001).

A. Inadmissible Opinion

[1] Respondents argue that Mr. Cox's affidavit was admitted in error as it contained opinion testimony in violation of N.C. Gen. Stat. § 1A-1, Rule 56(e) because it makes statements as "to the best of [Mr. Cox's] knowledge" and "is not a statement of the affiant's actual personal knowledge under North Carolina law." Petitioner responds that Mr. Cox's affidavit was given upon his personal knowledge from review of petitioner's business records and as such is competent evidence.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2009) states that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall

show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 43(e) (2009) states, in pertinent part, that "[w]hen a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties . . . ." Although Rule 56(e) applies to summary judgment motions, "this Court has held the N.C. R. Civ. Pro. 56(e) requirement that affidavits must be based upon personal knowledge applies to Rule 43(e)." *Lemon v. Combs*, 164 N.C. App. 615, 621, 596 S.E.2d 344, 348 (2004). Indeed, "it is a general legal principle that affidavits must be based upon personal knowledge." *Id.* at 622, 596 S.E.2d at 348.

Respondents point us to the following portions of Mr. Cox's affidavit in which he states that his affirmations are "to the best of [his] knowledge":

> 1. That Capital One, NA is the servicer for Capital One, N.A. and that *to the best of my knowledge* am familiar with records of Capital One, N.A. relating to its loan in the original principal amount of $2,415,000.00 to James L. Yopp III and wife, Tina M. Yopp (hereinafter called the "Grantor"), as evidenced by a Promissory Note of Grantor, a copy of which is attached hereto as Exhibit A, and secured by the above Deed of Trust from Grantor, dated 12/21/2007, and recorded 12/28/2007, in Book 5264, on Page 140, in the Office of the Register of Deed for New Hanover County, North Carolina, a copy of which is attached as Exhibit B, both copies of which are true copies of the respective documents.
>
> . . . .
>
> 10. *To the best of my knowledge and belief*, based on the records from Mortgagee, the mortgagors holding an interest in the above-described property were not members of the Armed Forces of the United States of America and had not been members of any such entities for at least three (3) months prior to the date of the Trustee's Sale the subject hereof.

(Emphasis added.) Respondents argue that "*To the best of my knowledge*" denotes that Mr. Cox based his affirmations on his personal opinion. In *Faulk v. Dellinger*, 44 N.C. App. 39, 259 S.E.2d 782 (1979), the "affidavit in opposition to the motion for summary judgment" stated that

> *To the best of my knowledge*, Mr. Tilley is the only one who owns cows within a radius of two miles on either side of the point in the

> road where the accident occurred, with the exception of one man who owns a single milk cow and this cow is not black in color.

Id. at 41, 259 S.E.2d at 783-84 (emphasis in original). The defendant argued "that by couching the statement in the affidavit by the phrase 'to the best of my knowledge' [the opposing party had] presented facts not made upon personal knowledge[.]" *Id.* at 42, 259 S.E.2d at 784. The Court held that this was not a statement of opinion or "a situation of manufactured fact but merely a self-imposed limitation to the affiant's personal knowledge which is all the rule requires." *Id.* Here, like *Faulk*, Mr. Cox put a "self-imposed limitation to the affiant's personal knowledge[,]" *see Faulk*, 44 N.C. App. at 42, 259 S.E.2d at 784, that based on the documents he had reviewed his affirmations were true. Accordingly, Mr. Cox's statements were based on his personal knowledge and respondents' argument is overruled.

B. Inadmissible Legal Conclusions

[2] Respondents also argue that Mr. Cox's affidavit should have been excluded by the trial court because it contains inadmissible conclusions of law, specifically that Capital One, N.A. is the owner and holder of the indebtedness. Petitioner responds that the statement in Mr. Cox's affidavit that petitioner was the "holder" of the indebtedness was merely a factual statement that it was in possession of the promissory note.

> The relevant portions of Mr. Cox's affidavit state the following:
>
> 3. That Capital One, N.A. is the *owner and holder* of the entire indebtedness secured by the Deed of Trust and said account is serviced by Capital One, NA.
>
> . . . .
>
> 7. That Capital One, N.A. is the *owner and holder* of said Note and Deed of Trust and has instructed the Substitute Trustee to institute foreclosure proceedings and to sell the real property described in said Deed of Trust pursuant to the power of sale contained therein.

(Emphasis added.) In the context of a foreclosure power of sale pursuant to N.C. Gen. Stat. §. 45-21.16, the term "holder" is "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." *In re Foreclosure of a Deed of Trust Executed by Hannia M. Adams & H. Clayton Adams*, ___ N.C. App. ___, ___, 693 S.E.2d 705, 709 (2010)

(quoting N.C. Gen. Stat. § 25-1-201(b)(21) (2009)). Whether an entity is a "holder" has been held to be "a legal conclusion that is to be determined by a court of law on the basis of factual allegations." *In re Foreclosure by David A. Simpson, P.C.*, ___ N.C. App. ___, ___, 711 S.E.2d 165, 173-74 (2011). However, this Court has noted that "[s]tatements in affidavits as to opinion, belief, or conclusions of law are of no effect[.]" *Lemon v. Combs*, 164 N.C. App. 615, 622, 596 S.E.2d 344, 349 (2004) (quoting 3 Am. Jur. 2d, *Affidavits* § 13); *In re Simpson*, ___ N.C. App. at ___, 711 S.E.2d at 173-74 (disregarding the affiant's "conclusion as to the identity of the 'owner and holder' of the [promissory note and deed of trust"). Therefore, as we disregard Mr. Cox's conclusion of law in his affidavit that Capital One, N.A. is the owner and holder of the promissory note, *see id.*, we overrule respondents' argument that this one legal conclusion resulted in the whole affidavit being admitted in error. Accordingly, we hold that the trial court did not abuse its discretion in allowing into evidence Mr. Cox's affidavit. *See Sterling*, 146 N.C. App. at 177, 552 S.E.2d at 677.

III. Internet Printout

[3] Respondents next contend that the trial court committed reversible error in admitting over respondents' objections the tender of exhibit P9, which consisted of "internet printouts[,]" as this exhibit was not duly authenticated as a public record to show the purported merger of Chevy Chase Bank, F.S.B, into Capital One, N.A. Respondents argue that the original promissory note was with Chevy Chase Bank, F.S.B. and the only evidence that Chevy Chase Bank, F.S.B merged with Capital One, N.A., giving it assigned rights and standing to enforce the note, was the internet printout, which was admitted without proper authentication. Petitioner responds that exhibit P9 was admissible as "public records of the Federal Deposit Insurance Corporation, the United States National Information Center, and the Federal Reserve," and even if it was error to admit these internet printouts, "the error was harmless and in no way prejudicial to Appellants because of the other evidence establishing the merger [between Chevy Chase Bank, F.S.B. and Capital One, N.A.]"

As noted above, we review the trial court's decision to admit this evidence for an abuse of discretion. *Sterling*, 146 N.C. App. at 177, 552 S.E.2d at 677. Here, it is clear from the record that exhibit P9 consists of a printout of documents from the internet, and petitioner's trial counsel admitted this fact at the hearing, stating that they were "public information" showing that Chevy Chase Bank, F.S.B had "merged without assistance into Capital One." Respondents' counsel

objected to the admission of exhibit P9. The documents contained in exhibit P9 show that Chevy Chase Bank, F.S.B. merged with Capital One, N.A.

Respondent is correct that exhibit P9 was not authenticated as a public record and was inadmissible; the mere fact that a document is printed out from the internet does not endow that document with any authentication whatsoever. *See Rankin v. Food Lion*, ___ N.C. App. ___, ___, 706 S.E.2d 310, 314-15 (2011) (concluding that "two documents included in the record, both of which appear[ed] to be printouts of internet website pages" were inadmissible hearsay and "were properly ignored by the trial court[.]"). However, exhibit P8, the "Non-'Home Loan' Certificate" which was admitted without objection, stated that "Capital One, N.A. was "Successor by merger to . . . Chevy Chase Bank, FSB[.]" Our Supreme Court has stated that "[a]n exception is waived when other evidence of the same import is admitted without objection." *Rushing v. Polk*, 258 N.C. 256, 260, 128 S.E.2d 675, 679 (1962) (citation omitted). As evidence of the merger was admitted in exhibit P8 without respondents' objection, respondents waived their exception as to the introduction of the documents contained in exhibit P9. Accordingly, respondents' argument is overruled.

IV. Holder of the Promissory Note

[4] In their last argument, respondents, relying on *In re Simpson*, ___ N.C. App. ___, 711 S.E.2d 165, argue that petitioner "has failed to prove in the instant case that it was the holder of the Note under North Carolina law and entitled to proceed with foreclosure of Respondents' home." Respondents argue that since the evidence does not support a conclusion that petitioner was the "holder" of the note and the trial court failed to make any findings supporting its conclusion that petitioner was the holder of the note, petitioner does not have standing to seek foreclose pursuant to the deed of trust. Petitioner responds that the evidence presented to the trial court established that it is the "holder" of the promissory note because the note was indorsed by Chevy Chase F.S.B.; petitioner merged with Chevy Chase, assuming all of its rights as to the note; and at the hearing, petitioner had physical possession of the original promissory note.

We have stated that "the trial court in the appeal of a foreclosure action is to conduct a *de novo* hearing to determine the same four issues determined by the clerk of court: (1) the existence of a valid debt of which the party seeking foreclosure is the holder, (2) the existence of default, (3) the trustee's right to foreclose under the instru-

ment, and (4) the sufficiency of notice of hearing to the record owners of the property." *In re Trust of Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 49-50, 535 S.E.2d 388, 392 (2000) (citation omitted).[1] Here, respondents challenge only the first requirement. This Court further stated that

> [i]n order to find that there is sufficient evidence that the party seeking to foreclose is the holder of a valid debt in accordance with N.C.G.S. § 45-21.16(d), this Court has determined that the following two questions must be answered in the affirmative: (1) "is there sufficient competent evidence of a valid debt?"; and (2) "is there sufficient competent evidence that [the party seeking to foreclose is] the holder[] of the notes [that evidence that debt]?" *See In re Cooke*, 37 N.C. App. 575, 579, 246 S.E.2d 801, 804-05 (1978); *In re Foreclosure of Connolly v. Potts*, 63 N.C. App. 547, 550, 306 S.E.2d 123, 125 (1983) ("A party seeking to go forward with foreclosure under a power of sale must establish, *inter alia*, by competent evidence, the existence of a valid debt *of which he is the holder.*" (citing N.C. Gen. Stat. § 45-21.16(d); *In re Foreclosure of Burgess*, 47 N.C. App. at 603, 267 S.E.2d at 918).

In re Adams, ___ N.C. App. at ___, 693 S.E.2d at 709 (emphasis in original). Respondents do not challenge the existence of a "valid debt" but only whether petitioner is the "holder" of the note. *See id.* "The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings." *In re Azalea*, 140 N.C. App. at 50, 535 S.E.2d at 392 (citation omitted).

In *Simpson*, this Court held that there was no competent evidence to support the trial court's conclusion that the trustee was the owner and holder of a mortgagor's adjustable rate note and deed of trust. ___ N.C. App. at ___, 711 S.E.2d at 174-75. In *Simpson*, this Court stated that

> the definition of "holder" under the Uniform Commercial Code ("UCC"), as adopted by North Carolina, controls the meaning of

1. We have noted that "[t]he General Assembly added a fifth requirement, which expired 31 October 2010: 'that the underlying mortgage debt is not a subprime loan,' or, if it is a subprime loan, 'that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed[.]" *In re Simpson*, ___ N.C. App. at ___, 711 S.E.2d at 169 (citation omitted). However, this requirement is not at issue in this case.

> the term as it used in section 45-21.16 of our General Statutes for foreclosure actions under a power of sale. *See* [*Connolly v. Potts*, 63 N.C. App. 547, 550, 306 S.E.2d 123, 125 (1983)]; [*In re Adams*, ___ N.C. App. at ___, 693 S.E.2d at 709]. Our General Statutes define the "holder" of an instrument as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." N.C. Gen. Stat. § 25-1-201(b)(21) (2009); *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 203, 271 S.E.2d 54, 57 (1980). Furthermore, a " '[p]erson' means an individual, corporation, business trust, estate, trust . . . or any other legal or commercial entity." N.C. Gen. Stat. § 25-1-201(b)(27) (2009).

Id. at ___, 711 S.E.2d at 171. Petitioner argued that "its production of the original Note with the Allonge at the *de novo* hearing, as well as its introduction into evidence true and accurate copies of the Note and Allonge . . . 'plainly evidences the transfers' of the Note to Petitioner." *Id.* This Court, in overruling this argument, stated that

> [u]nder the UCC, as adopted by North Carolina, "[a]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." N.C. Gen. Stat. § 25-3-203(a)(2009). Production of an original note at trial does not, in itself, establish that the note was transferred to the party presenting the note with the purpose of giving that party the right to enforce the instrument, as demonstrated in *Connolly*, 63 N.C. App. at 551, 306 S.E.2d at 125, and *Smathers v. Smathers*, 34 N.C. App. 724, 726, 239 S.E.2d 637, 638 (1977) (holding that despite evidence of voluntary transfer of promissory notes and the plaintiff's possession thereof, the plaintiff was not the holder of the note under the UCC as the notes were not drawn, issued, or indorsed to her, to bearer, or in blank. "[T]he plaintiff testified to some of the circumstances under which she obtained possession of the notes, but the trial court made no findings of fact with respect thereto.")

Id. The Court further noted that "the trial court's findings of fact do not address who had possession of Mr. Gilbert's note at the time of the *de novo* hearing" and even if it did "this [would] . . . not [be] sufficient evidence that Petitioner is the 'holder' of the Note" as

> the Note was not indorsed to Petitioner or to bearer, a prerequisite to confer upon Petitioner the status of holder under the UCC. *See* N.C. Gen. Stat. § 25-1-201(b)(21) (requiring that, to be a holder,

> a person must be in possession of the note payable to bearer or to the person in possession of the note).

Id. at ___, 711 S.E.2d at 172. The Court also noted that as "the indorsement [on the Allonge] does not identify Petitioner and is not indorsed in blank or to bearer, it cannot be competent evidence that Petitioner is the holder of the Note." *Id.* at ___, 711 S.E.2d at 173. This Court also held that petitioner's two affidavits from GMAC Mortgage employees were "not competent evidence to support the trial court's conclusion that" petitioner was the holder of the note, as one alleged no facts as to who possessed the note; the affiants' statement that petitioner was "the owner and holder" of the note was a conclusion of law, which in an affidavit are "of no effect[;]" and the other affiant "provide[d] no basis upon which we can conclude he had personal knowledge" that petitioner "had possession of the note[.]" *Id.* at ___, 711 S.E.2d at 174-75. The Court in reversing the trial court's ruling "conclude[d] [that] the record is lacking of competent evidence sufficient to support that Petitioner is the owner and holder of Mr. Gilbert's note and deed of trust." *Id.* at ___, 711 S.E.2d at 175.

Here, the trial court's order concludes that "**Capital One, N.A.**, is the holder of the note sought to be foreclosed[,]" but like *Simpson* fails to make any findings as to who had actual physical possession of the note at the time of the hearing. (Emphasis in original.) Unlike *Simpson*, petitioner here does not argue that it is the holder of the note through indorsement or transfer but by virtue of its merger with the original holder of the note and indorser of the note in blank, Chevy Chase, F.S.B. N.C. Gen. Stat. § 53-17 (2009) states that

> [w]henever any bank, trust company, savings association, or savings bank, organized under the laws of North Carolina or the United States, and doing business in this State, shall consolidate or merge with or shall sell to and transfer its assets and liabilities to any other bank, trust company, savings association, or savings bank doing business in this State, as provided by the laws of North Carolina or the United States, all the then existing fiduciary rights, powers, duties and liabilities of such consolidating or merging or transferring institution, including the rights, powers, duties and liabilities as executor, administrator, guardian, trustee, and/or any other fiduciary capacity, whether under appointment by order of court, will, deed, or other instrument, shall, upon the effective date of such consolidation or merger or sale and transfer, vest in, devolve upon, and thereafter be performed by, the transferee institution or the consolidated or merged institution,

> and such latter institution shall be deemed substituted for and shall have all the rights and powers of the transferring institution.

However, the trial court also failed to make any findings of fact as to merger and the transfer of rights to petitioner to support its conclusion that petition was the "holder" of the note. "[W]hen a court fails to make appropriate findings or conclusions, this Court is not required to remand the matter if the facts are not in dispute and only one inference can be drawn from them." *Green Tree Financial Servicing Corp. v. Young*, 133 N.C. App. 339, 341, 515 S.E.2d 223, 224 (1999). There is no dispute that petitioner had physical possession of the note at the hearing and submitted into evidence a copy of that note. Even though respondents challenge the internet printouts regarding the merger between Chevy Chase Bank, F.S.B. and Capital One, N.A. and we held they were inadmissible, respondents make no challenge to the content in exhibit P8, the "Non-'Home Loan' Certificate" which stated that "Capital One, N.A. was "Successor by merger to . . . Chevy Chase Bank, FSB[.]" Therefore, the only inference that can be drawn from the evidence is that petitioner, Capital One, N.A., merged with Chevy Chase Bank and was in physical possession of the note at the time of the hearing. *See id*. Because of the merger, petitioner was "substituted for" and had "all the rights and powers of the transferring institution[,]" Chevy Chase F.S.B., had before the merger. *See* N.C. Gen. Stat. § 53-17, As Chevy Chase Bank was the indorser of the note in blank, petitioner received those rights in the merger. *See id*. Thus, the trial court properly concluded that petitioner was the "holder" of the note. *See Simpson*, ___ N.C. App. at ___, 711 S.E.2d at 171 (defining "holder" as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." (citation omitted)).[2] Accordingly, we affirm the trial court's order authorizing the substitute trustee to proceed with the foreclosure sale.

AFFIRMED.

Judges BRYANT and CALABRIA concur.

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2. Also like *Simpson*, Mr. Cox in his affidavit stated that petitioner was the "owner and holder" of the promissory note. But as we have stated above, this was a conclusion of law in the affidavit which in an affidavit is "of no effect[,]" and "not competent evidence to support the trial court's conclusion that" petitioner was the holder of the note. *Simpson*, ___ N.C. App. at ___, 711 S.E.2d at 174-75.

JENNIFER RAY, ADMINISTRATRIX OF THE ESTATE OF MICKELA NICHOLSON; LINDA JUDGE, ADMINISTRATRIX OF THE ESTATE OF MARIANNE DAUSCHER; AND EILEEN AND ROGER LAYAOU, CO-ADMINISTRATORS OF THE ESTATE OF MICHAEL LAYAOU, PLAINTIFFS V. N.C. DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA11-17

(Filed 20 December 2011)

Immunity—public duty doctrine—failure to repair roadway

The public duty doctrine was not applicable to a negligence action against the State for a failure to repair a defective section of a roadway rather than a failure to inspect or prevent harm from a third party.

Judge HUNTER, Robert C., dissenting.

Appeal by Plaintiffs from Order entered 13 July 2010 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 17 August 2011.

Zaytoun Law Firm, PLLC, by Robert E. Zaytoun, and McGrath Podgorny, PA, by Mark R. McGrath, for Plaintiffs-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar, for Defendant-appellee.

Paterson Harkavy LLP, by Burton Craige, and Jonathan R. Reich, for North Carolina Advocates for Justice, amicus curiae.

HUNTER, JR., Robert N., Judge.

Plaintiffs appeal from the 13 July 2010 Order of the North Carolina Industrial Commission, which held that the public duty doctrine applied to bar Plaintiffs' claims and that those claims were therefore dismissed under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiffs argue that the public duty doctrine does not apply and that the Full Commission erred in dismissing their case. We agree.

I. Factual & Procedural Background

On 31 August 2002, Mickela S. Nicholson was driving her vehicle on RP 1010, a state-maintained road, in Johnston County. Plaintiffs' claim for damages alleges her car went off the side of the roadway due to an eroded section of pavement near the shoulder. While get-

ting back onto the roadway, Ms. Nicholson's vehicle went out of her control, crossing the center line where she collided head-on with a vehicle driven by Carlos Ortega Valdivia. Ms. Nicholson and the three passengers in her vehicle, Marianne Dauscher, Michael Layaou, and Steven Carr, were all killed in the collision.

In July and August 2004, the estates of Ms. Nicholson, Mr. Layaou, and Ms. Dauscher (collectively "Plaintiffs") filed claims against the North Carolina Department of Transportation ("Defendant" or "DOT") with the North Carolina Industrial Commission for damages under the Tort Claims Act. Plaintiffs alleged that the defective roadway was a proximate cause of the accident and that Defendant knew or should have known of the defect. Defendant moved to dismiss Plaintiffs' claims, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, based on the public duty doctrine. On 16 July 2009, Chief Deputy Commissioner Stephen T. Gheen denied Defendant's motion. Defendant appealed to the Full Commission. On 13 July 2010, the Full Commission granted Defendant's motion to dismiss. Commissioner Danny Lee McDonald wrote a concurring opinion expressing his view that the Full Commission was bound by precedent, even if the result was unjust. Plaintiffs appeal the Full Commission's Order.

II. Jurisdiction & Standard of Review

This Court has jurisdiction to hear this appeal pursuant to N.C. Gen. Stat. § 143-293 (2009).

"The [Industrial] Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004). Because we consider only the question of law whether the affirmative defense of the public duty doctrine applies, we review this conclusion of the Industrial Commission *de novo*.

III. Analysis

Plaintiffs argue the Full Commission erred in dismissing their case based on their application of the public duty doctrine. We agree.

The State Tort Claims Act ("STCA") provides for claims against the State which arise

> as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person,

> would be liable to the claimant in accordance with the laws of North Carolina.

N.C. Gen. Stat. § 143-291(a) (2009). Such claims are heard and decided upon by the Industrial Commission. *Id.*

Our Courts have repeatedly found that the Department of Transportation may be liable for claims for negligent roadway maintenance brought under the STCA. *See, e.g.*, *Jordan v. Jones*, 314 N.C. 106, 331 S.E.2d 662 (1985); *Norman v. N.C. Dep't of Transp.*, 161 N.C. App. 211, 588 S.E.2d 42 (2003); *Smith v. N.C. Dep't of Transp.*, 156 N.C. App. 92, 576 S.E.2d 345 (2003); *Phillips v. N.C. Dep't of Transp.*, 80 N.C. App. 135, 341 S.E.2d 339 (1986); *Zimmer v. N.C. Dep't of Transp.*, 87 N.C. App. 132, 360 S.E.2d 115 (1987).

In *Zimmer*, the plaintiff was driving on an alternate roadway selected by the DOT as a detour. 87 N.C. App. at 132, 360 S.E.2d at 115-16. His tractor-trailer rounded a sharp curve. *Id.* The rear tires of the trailer dropped off the pavement, and the truck overturned and crashed down an embankment, causing serious injury to the plaintiff. *Id.* at 133, 360 S.E.2d at 116. The plaintiff alleged the DOT was negligent in designating the detour, failing to correct hazardous conditions, and failing to provide warnings of the hazardous conditions. *Id.* This Court found the State had waived its immunity for such claims and that the Industrial Commission was the appropriate tribunal to hear the claim. *Id.* at 137, 360 S.E.2d at 118. However, we recognize that *Zimmer* and the other cases cited *supra* did not consider whether the public duty doctrine applies in a state tort claim action. *See Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 480, 495 S.E.2d 711, 715 (1998).[1]

The Restatement of Torts (*Third*) explains the policy behind doctrines such as the public duty doctrine:

> Courts employ no-duty rules to defer to discretionary decisions made by officials from other branches of government, especially decisions that allocate resources or make other policy judgments. . . . For example, courts often hold that police have no duty of reasonable care in deciding how to allocate police protection throughout a city. This no-duty limitation requires analysis of whether the challenged action involves a discretionary determi-

1. In cases prior to 1991, the public duty doctrine was not considered because it had not yet been adopted by our Supreme Court. In *Norman* and *Smith*, both decided in 2003, the public duty doctrine was not pled as an affirmative defense.

nation of the sort insulated from review or instead is a ministerial action that does not require deference.

Restatement of Torts (Third): Liability for Physical and Emotional Harm § 7 (2010).

Our Supreme Court first recognized the common law rule known as the public duty doctrine in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991). The public duty doctrine states, "[A] municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals." *Id.* at 370, 410 S.E.2d at 901. The rationales behind the rule are that it "recognizes the limited resources of law enforcement" and that a public agency cannot be a guarantor of safety involving the actions of others over which it has no control. Thus, the Court refused "to judicially impose an overwhelming burden of liability for failure to prevent every criminal act." *Id.* at 370-71, 410 S.E.2d at 901. The Court recognized two exceptions to the doctrine (1) where there is a special relationship between the injured party and the police and (2) where the police create a special duty by promising protection. *Id.* at 371, 410 S.E.2d at 902.

In *Stone*, our Supreme Court applied the public duty doctrine to claims against the North Carolina Department of Labor for failure to inspect a chicken processing plant in Hamlet. 347 N.C. 473, 495 S.E.2d 711. A fire started in the chicken processing plant, and more than one hundred workers were injured or killed. *Id.* at 477, 495 S.E.2d at 713. Following the fire, numerous previously undiscovered violations of the Occupational Safety and Health Act of North Carolina were revealed. *Id.* The plaintiffs brought a common law negligence action against the State for failing to inspect the plant prior to the fire. *Id.* The Court reasoned that the public duty doctrine was necessary "to prevent 'an overwhelming burden of liability' on governmental agencies with 'limited resources.' " *Id.* at 481, 495 S.E.2d at 716 (quoting *Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901).

In *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998), our Supreme Court applied the public duty doctrine to a negligence action after a go-kart's brakes failed, injuring a minor. Although the Department of Labor inspected the park, the plaintiff alleged the inspector negligently failed to inform the amusement park manager of the rules regarding seat belts and of the park's violations of those rules. *Id.* The Court declined to apply a special relationship exception to the public duty doctrine, reasoning that to do so would

make the defendant "a virtual guarantor of the safety of every go-kart subject to its inspection" and would expose it to "an overwhelming burden of liability." *Id.* at 199, 499 S.E.2d at 751.

In *Myers v. McGrady*, 360 N.C. 460, 628 S.E.2d 761 (2006), our Supreme Court applied the public duty doctrine to a claim brought by the estate of a passenger who was killed in a motor vehicle collision. *Id.* Thick smoke from a nearby forest fire, combined with fog, obscured the road. *Id.* A driver stopped a vehicle to change drivers, and the stopped vehicle was rear-ended, resulting in a four-vehicle collision. *Id.* The plaintiff alleged the Division of Forest Resources was negligent in managing the forest fire. *Id.* In applying the public duty doctrine, the Court said fire fighting decisions "concern the allocation of limited resources" and are "not generally the type of decisions for which the State is liable to private citizens in tort. *Id.* at 468, 628 S.E.2d at 767. The Court said it would not "judicially impose overwhelming liability . . . for failure to prevent personal injury resulting from forest fires." *Id.*

The extension of the public duty doctrine in North Carolina, however, has not been unlimited and does not foreclose all tort claims against state agencies. "In all cases where the public duty doctrine has been held applicable, the breach of the alleged duty has involved the governmental entity's negligent control of an external injurious force or of the effects of such a force." *Strickland v. Univ. of N.C. at Wilmington*, ___ N.C. App. ___, ___, 712 S.E.2d 888, 892 (2011). In decisions applying the public duty doctrine, our Supreme Court has stated it will not impose a burden of liability for failure to prevent the acts of third parties or failure to protect the general public from harm from an outside force. *See Braswell*, 330 N.C. at 370, 410 S.E.2d at 901 (refusing to "judicially impose an overwhelming burden of liability for failure to *prevent* every criminal act" (emphasis added)); *Stone*, 347 N.C. at 481, 495 S.E.2d at 716 (refusing to "judicially impose an overwhelming burden of liability on defendants for failure to *prevent* every employer's negligence that results in injuries or deaths to employees" (emphasis added)); *Myers*, 360 N.C. at 468, 628 S.E.2d at 767 (choosing not to "judicially impose overwhelming liability on [state agencies] for failure to *prevent* personal injury resulting from forest fires" (emphasis added)).

The decision to maintain the roads in a safe condition is a duty of the DOT and is not discretionary. *See* N.C. Gen. Stat. § 143B-346 (2009) ("The general purpose of the Department of Transportation is

to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of people and goods as provided for by law."). In order to recover, Plaintiffs must show Defendant "knew, or by ordinary diligence, might have known of the defect, and the character of the defect was such that injury to travellers using its street . . . in a proper manner might reasonably be foreseen." *Smith v. Hickory*, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960).

In the present case, Plaintiffs do not contend Defendant failed to prevent harm or protect them from harm by a third party or outside force. Plaintiff alleges Defendant "knew, or in the exercise of reasonable care should have known of the dangerously defective section of roadway" and that "[t]he defective roadway features were the proximate cause of the collision." This case does not involve a failure to inspect or to police, but a failure to repair a defective section of roadway. There is no "hazard[] created by others" or important discretionary decision which requires the government to be protected under the public duty doctrine. The requirement that the defendant knew or should have known of the defect limits liability and alleviates concerns of an "overwhelming burden of liability" in allowing claims. We hold the public duty doctrine inapplicable in these circumstances.

We note that in 2007, the General Assembly passed "AN ACT TO LIMIT THE USE OF THE PUBLIC DUTY DOCTRINE AS AN AFFIRMATIVE DEFENSE FOR CLAIMS UNDER THE STATE CLAIMS ACT IN WHICH THE INJURIES OF THE CLAIMANT ARE THE RESULT OF THE ALLEGED NEGLIGENT FAILURE OF CERTAIN PARTIES TO PROTECT CLAIMANTS FROM THE ACTION OF OTHERS." N.C. Session Law 2008-170; *see* N.C. Gen. Stat. § 143-299.1A (2009). This Act does not apply to the present case, as it applies only to claims arising on or after 1 October 2008. As we hold the public duty doctrine does not apply in this case under current law, there is no need to consider whether this statute changed or merely clarified the common law.

IV. Conclusion

For the foregoing reasons, we hold the public duty doctrine does not apply and the case is therefore

Reversed and remanded.

Judge STROUD concurs in the result only.

Judge HUNTER, Robert C. dissents in a separate opinion.

HUNTER, Robert C., Judge, dissenting.

As I discern no meaningful distinction between the present case and *Myers v. McGrady*, 360 N.C. 460, 628 S.E.2d 761 (2006), I must conclude plaintiffs' negligence claims are barred by the public duty doctrine and I respectfully dissent.[1]

The public duty doctrine "provides that when a governmental entity owes a duty to the general public, particularly a statutory duty, individual plaintiffs may not enforce the duty in tort." *Id.* at 465-66, 628 S.E.2d at 766. In *Myers*, the plaintiff and third-party plaintiffs (collectively "the plaintiffs") filed claims of negligence against a division of the North Carolina Department of Environment and Natural Resources ("DENR"), a state agency, "for failure to control a naturally occurring forest fire or failing to make safe a public highway adjacent to the fire." *Id.* at 462, 628 S.E.2d at 763 (footnote omitted).

In concluding the public duty doctrine barred the plaintiffs' claims in *Myers*, our Supreme Court recognized our statutes provided that the DENR " 'may take such action as it may deem necessary to provide for the prevention and control of forest fires in any and all parts of this State.' " *Id.* at 467, 628 S.E.2d at 766-67 (quoting N.C. Gen. Stat. § 113-51(a) (2005) (emphasis omitted)). To execute this duty, the Secretary of the agency may appoint forest rangers, who in turn, " 'shall prevent and extinguish forest fires and shall have control and direction of all persons and equipment while engaged in the extinguishing of forest fires.' " *Id.* at 467-68, 628 S.E.2d at 767 (quoting N.C. Gen. Stat. § 113-55 (2005) (emphasis omitted)).

Thus, the agency and its divisions must make discretionary decisions for the "allocation of limited resources to address statewide needs . . . made in furtherance of a statutory duty to the citizens of North Carolina at large." *Myers*, 360 N.C. at 468, 628 S.E.2d at 767. The *Myers* Court reasoned that because our statutes impose a duty on the DENR "to protect the citizens of North Carolina as a whole," the agency did not owe a specific duty to the plaintiffs. *Id.* at 468-69, 628 S.E.2d at 767 (further noting that two common law exceptions to the public duty doctrine were not raised by the plaintiffs and that the statutes at issue did not create a duty to protect a particular class of individuals, which could bar application of the doctrine); *see Multiple*

1. I note that with the enactment of N.C. Gen. Stat. § 143-299.1A, the General Assembly limited the scope of the public duty doctrine. However, as section 143-299.1A applies only to claims arising on or after 1 October 2008, it does not impact my analysis of plaintiffs' claims. 2008 N.C. Sess. Laws ch. 170, § 2.

Claimants v. N.C. Dep't of Health & Human Servs., 361 N.C. 372, 374, 646 S.E.2d 356, 358 (2007) (discussing the "special relationship" and "special duty" exceptions to the public duty doctrine).

Here, the nature of the Department of Transportation's duty is no different. Mandated by statute and recognized by our courts, the DOT owes a " 'duty to the general public . . . to plan, design, locate, construct and maintain the public highways in the State of North Carolina, with reasonable care.' " *Phillips v. N.C. Dep't of Transp.*, 200 N.C. App. 550, 560, 684 S.E.2d 725, 732 (2009) (quoting finding by the North Carolina Industrial Commission and concluding it was consistent with the duty of the DOT as prescribed by section 143B-346 of our General Statutes); *see* N.C. Gen. Stat. § 136-45 (2009) (providing that the DOT "shall take over, establish, construct, and maintain a statewide system of hard-surfaced and other dependable highways . . . to relieve the counties and cities and towns of the State of this burden"). The majority acknowledges the DOT's directive, but concludes the DOT has no underlying discretionary decision process that warrants protection by the public duty doctrine.

Our courts, however, have previously recognized the discretion the DOT must exercise to determine how best to design and maintain our roads. *See Drewry v. N.C. Dep't of Transp.*, 168 N.C. App. 332, 338, 607 S.E.2d 342, 346-47 ("The [DOT] is vested with broad discretion in carrying out its duties and the discretionary decisions it makes are not subject to judicial review 'unless [their] action is so clearly unreasonable as to amount to oppressive and manifest abuse.' " (citation omitted) (second alteration in original), *disc. review denied*, 359 N.C. 410, 612 S.E.2d 318 (2005). Additionally, as our Supreme Court recognized the limited resources of the North Carolina Department of Labor in *Stone v. N.C. Dep't of Labor*, 347 N.C. 437, 481, 495 S.E.2d 711, 716, *cert. denied*, 119 S. Ct. 540, 142 L. Ed. 2d 449 (1998), it cannot reasonably be doubted that the DOT has finite resources, which necessitates discretionary decisions for the allocation of those resources. Thus, I conclude the justification for the public duty doctrine applies in the present case: "By limiting liability, the rule recognizes that the legislative and executive branches must often allocate limited resources for the benefit of the public at large and permits governmental entities to carry out statutory responsibilities without incurring risk of overwhelming liability." *Myers*, 360 N.C. at 466, 628 S.E.2d at 766. Or, as expressed by our Supreme Court in *Stone*, "[i]t is better to have such laws, even haphazardly enforced, than not to have them at all." 347 N.C. at 481, 495 S.E.2d at 716 (citation and quotation marks omitted).

In addition to concluding the DOT exercises no discretion in fulfilling its statutory duty, the majority concludes the public duty doctrine does not apply here because plaintiffs allege the DOT's negligence was its failure to repair the highway, not a failure to prevent harm by an outside force, a "hazard[] created by others." Failure to prevent harm from an external force is a feature common to all claims justifying application of the public duty doctrine. *See Strickland v. Univ. of N.C. at Wilmington*, ___ N.C. App. ___, ___, 712 S.E.2d 888, 892 (2011) ("In all cases where the public duty doctrine has been held applicable, the breach of the alleged duty has involved the governmental entity's negligent control of an external injurious force or of the effects of such a force." (footnote omitted)).

The *Strickland* Court concluded the public duty doctrine was not applicable in that case, and held the defendants liable, in part because the defendant-police department's breach of duty was in negligently providing the "injurious force" (inaccurate information regarding the suspect of a criminal investigation), which caused the police to fatally wound the victim. *Id.* It was not a case of negligently failing *to prevent* harm from an external injurious force. *Id.*

I conclude the injurious force at issue here is distinguishable from that in *Strickland* and is more closely aligned with the force in *Myers*. In *Myers*, the plaintiffs alleged the defendants negligently failed to control a forest fire or to make safe the highway obscured by smoke from the fire. 360 N.C. at 462, 628 S.E.2d at 763. Here, plaintiffs' allege the DOT negligently failed to repair a "defectively eroded" section of a highway made worse by other vehicles. In both situations, external natural forces—compounded here by external manmade forces—caused conditions that State agencies failed to control, with tragic consequences.

Furthermore, while in both instances the State agencies failed to prevent plaintiffs' harm, causation is not the relevant focus in determining if the public duty doctrine applies. "Indeed, this Court has held that the public duty doctrine only applies to duty and not causation . . . ." *Strickland*, ___ N.C. App. at ___ n.4, 712 S.E.2d at 893 n.4 (citing *Drewry*, 168 N.C. App. at 337–38, 607 S.E.2d at 346–47). As the name suggests, the defendant's duty—or more accurately, the lack of a duty to the plaintiff—is the determinative factor in applying the public duty doctrine. *Estate of Burgess v. Hamrick*, ___ N.C. App. ___, ___, 698 S.E.2d 697, 701, *disc. review denied*, ___ N.C. ___, 703 S.E.2d 444 (2010) ("In a claim for negligence, there must exist a 'legal

duty owed by a defendant to a plaintiff, and in the absence of any such duty owed the injured party by the defendant, there can be no liability. . . . '[W]hen the public duty doctrine applies, the government entity, as the defendant, owes no *legal* duty to the plaintiff.' " (citations omitted)). Here, plaintiffs do not argue that the two common law exceptions to the application of the public duty doctrine apply.

Therefore, because the DOT owes a recognized duty to the general public and not to plaintiffs individually, I must conclude plaintiffs have failed to state claims in negligence. *See Myers*, 360 N.C. at 463, 628 S.E.2d at 764 ("If the plaintiff alleges negligence by failure to carry out a recognized public duty, and the State does not owe a corresponding special duty of care to the plaintiff individually, then the plaintiff has failed to state a claim in negligence.") Accordingly, I would affirm the order of the Industrial Commission.

STATE OF NORTH CAROLINA v. SHANNON ELIZABETH CRAWLEY

No. COA11-93

(Filed 20 December 2011)

1. Evidence—cell phone records—authentication—circumstantial evidence

The trial court did not err in a first-degree murder case by admitting defendant's and an officer's cell phone records into evidence over defendant's objection based on alleged insufficient authentication. A witness's testimony, taken together with the circumstances, established sufficient circumstantial evidence to authenticate the documents, and any question of credibility was left to the jury.

2. Appeal and Error—preservation of issues—failure to make motion to reopen case for rebuttal

Although defendant contended that the trial court erred in a first-degree murder case by allowing the jury to review cell phone records and hear audiotapes during their deliberation without providing defendant an opportunity to present a rebuttal, defendant waived this argument. Defendant did not make a motion to reopen the case and did not explain what rebuttal would have been provided had the opportunity been given.

Appeal by Defendant from judgment entered 22 February 2010 by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 17 August 2011.

Attorney General Roy Cooper, by Buren R. Shields, III, for the State.

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

HUNTER, JR., Robert N., Judge.

Shannon Elizabeth Crawley ("Defendant") appeals from a judgment entered upon a jury verdict finding her guilty of first-degree murder. We find no error.

I. Factual & Procedural History

On 2 April 2007, the Durham County Grand Jury indicted Defendant for the murder of Denita Monique Smith. A jury trial began 8 February 2010 in Durham County Superior Court, the Honorable Judge Ronald Stephens presiding. The State's evidence at trial tended to show the following.

At approximately 8:10 a.m. on 4 January 2007, Michael Hedgepeth, the maintenance director for the Campus Crossings Apartments in Durham ("Campus Crossings"), heard a shot fired and saw a woman running from the back to the front of the 1100 building of the complex. Mr. Hedgepeth testified that the woman's route was an unusual one because there was a more convenient exit to the parking lot. As Mr. Hedgepeth drove toward the 1100 building, he saw a young woman, possibly the same woman as before, driving away from the building in a burgundy SUV. Mr. Hedgepeth testified the young woman was hysterical about the gunshot; she told him it was because she was afraid of guns. The young woman told Mr. Hedgepeth she stayed at the 1200 building, so he told her to go wait for him there while he called the police.

Mr. Hedgepeth saw the young woman in the SUV once more in the parking lot of Campus Crossings while he was on the phone with police but did not see her after that. Police arrived at Campus Crossings in response to Mr. Hedgepeth's 911 call, but they left without filing a report because they were unable to ascertain the source of the gunshot.

At approximately 10:00 a.m. that morning, Corey Smith,[1] a Campus Crossings resident, was coming out of his apartment to go to work when he saw someone's belongings scattered down the staircase. At first, he thought someone did not make it up the stairs for some reason, but at the bottom of the stairs, he discovered a body. After seeing that the body was not breathing, Mr. Smith called 911 on his cell phone. Based on instructions from the 911 operator, he checked a purse on the stairs for identification and found out it was the body of Denita Smith, a Campus Crossings resident and student pursuing a master's degree at North Carolina Central University. Mr. Smith then went to the clubhouse at Campus Crossings to notify Mr. Hedgepeth.

Corolla Lauck, a paramedic and one of the first people at the scene, determined at her arrival that Ms. Smith was already dead. Once police arrived, Mr. Hedgepeth gave investigators a description of the woman he saw earlier that morning. Mr. Hedgepeth described the woman as a black female, 5'10", with a ponytail, who was driving a burgundy SUV.

Edith Crawley-Kearns,[2] Ms. Smith's best friend, received a phone call from her brother who lived at Campus Crossings asking whether she had heard from Ms. Smith, since he knew something was going on at the complex. After trying to call Ms. Smith without getting an answer, Ms. Crawley-Kearns called Jermeir Stroud ("Officer Stroud"), Ms. Smith's fiancé. Officer Stroud was a Greensboro police officer and had been engaged to Ms. Smith since November 2006. Officer Stroud told Ms. Crawley-Kearns that he had heard something was going on at Campus Crossings and that he was on his way to Durham since he had not heard from Ms. Smith. Upon his arrival at the scene, Officer Stroud was told of Ms. Smith's death, and, after providing his information to investigators, he spent the rest of the day with his family and Ms. Smith's family.

The next day, Officer Stroud found out that police were looking for someone with a red Ford Explorer in connection with the murder. Officer Stroud had been in a romantic relationship with Defendant in 2004-2005 and knew that she drove a red Ford Explorer. Officer Stroud called Jack Cates of the Durham Police Department, who asked him to return to Durham to speak with investigators. Officer Stroud told Investigator Shawn Pate about Defendant, and

1. Mr. Smith is not related to Denita Smith.

2. Ms. Crawley-Kearns is not related to Defendant.

Investigator Pate headed to Greensboro, where Defendant worked, to meet with Defendant.

On 5 January 2007, Defendant told Investigator Pate that she did not know Ms. Smith and had only seen her once two weeks prior in church and in pictures at Officer Stroud's house. She stated that on the morning of 4 January 2007, she was late to work because she took her child to a doctor's appointment. She told Investigator Pate that she had never owned a gun or had a gun.

Five months later, however, on 30 May 2007, Defendant told Investigator Pate that she wanted to talk about what happened on 4 January 2007. She said that on 3 January 2007, she came home and found Officer Stroud in her bedroom. He indicated that he had a weapon and that she should be quiet. He then drove her to Durham to Campus Crossings. They then drove back to Greensboro, and Officer Stroud left. Defendant said that on 4 January 2007, the same thing happened and that Officer Stroud threatened to harm her children if she would not come with him. When they got to Campus Crossings, Officer Stroud got out of the vehicle. Defendant heard arguing and got out of the vehicle. She was about three or four feet in front of the vehicle when she heard a gunshot. Officer Stroud came back to the vehicle and got into the driver's seat. Defendant tried to get in the passenger seat behind the driver, but the back seat was locked, so Officer Stroud jumped into the back from the driver's seat, and Defendant got into the driver's seat. Defendant said it was then that she ran into Mr. Hedgepeth and that Mr. Hedgepeth could not see Officer Stroud because he was crouched in the back of the vehicle. Defendant was later charged with first-degree murder.

On 20 June 2008, while out on bond, Defendant told Charlotte law enforcement that Officer Stroud came to Charlotte and raped her between 2:30 and 5:30 a.m. Defendant alleged that Officer Stroud had cut her clothes off of her with a knife, held a knife to her throat, cut her thigh, penetrated her vagina with the knife, and ejaculated.

Pamela Zinkann, a detective in the sexual assault unit of the Charlotte/Mecklenburg Police Department, testified that based on the alleged time of the rape and Officer Stroud's cell phone records, Officer Stroud would have had to travel from Charlotte to Greensboro at approximately 120 miles per hour without stopping for red lights to have committed the rape. A rape kit was analyzed, and the results were negative for semen. There were lacerations to Defendant's neck and thigh, as well as abrasions to the outer labia. However,

despite Defendant's contentions to Detective Zinkann that she needed stitches and had been penetrated by a knife, both a nurse and a physician's assistant testified that there were no injuries requiring stitches and that there were no injuries to the vaginal canal.

On 21 June 2008, Defendant suggested to Detective Zinkann that law enforcement search Officer Stroud's trash can at his residence to look for the knife. On or about 23 June 2008, Officer Stroud put trash in his trash can for the first time since the alleged rape. At the bottom of his otherwise empty trash can, he saw a knife. Officer Stroud called the Greensboro Police Department about the knife. Brandon Inscore, one of Officer Stroud's neighbors, told Detective Zinkann that he heard a thump and saw a vehicle drive away from Officer Stroud's trash can on 19 June 2008. Another neighbor, Jessica Hopkins, told Detective Zinkann that on 19 June 2008, she saw someone throw something into Officer Stroud's trash can and drive off. Evidence of this incident was introduced at trial but is not at issue on appeal.

Dr. Cynthia Gardner, a forensic pathologist, testified at trial that Ms. Smith was killed by a distant range gunshot wound to the head. During the autopsy, Dr. Gardner recovered a bullet from Ms. Smith's body. Agent Scott Jones, a forensic firearms analyst at the State Bureau of Investigation ("SBI"), examined the bullet. Using factors such as size, shape, and rifling characteristics, Agent Jones determined that the bullet most likely came from a revolver and that its caliber was in the .38 family. A search of the FBI general rifling characteristics database revealed eight possible firearms which could have fired the shot, including a Taurus.

Ronald Simpson, Defendant's co-worker, testified that he sold Defendant a .38 Taurus Special revolver in October 2006 in the parking lot of the 911 Center where they worked. Defendant testified that she had disposed of the gun shortly after receiving it by throwing the gun in one dumpster and the ammunition in another dumpster. Officer Stroud testified that the only two weapons he owned were a .40 caliber Sig Sauer he carries while on duty and a .40 caliber Glock 23 model pistol he carries while off duty. Agent Jones testified that a .40 caliber weapon is not designed to fire a .38 caliber bullet and that he was not sure whether it was possible for a .38 caliber bullet to be fired from a .40 caliber weapon. Michael Gurdziel, a forensic chemist at the SBI, testified that an analysis of a lift taken from the driver's seat of Defendant's vehicle tested positive for gunshot residue.

During the trial, the State called Ryan Harger, a custodian of records for Sprint/Nextel, a telecommunications company which transmitted electronically recorded cell phone records to the Durham Police Department during its investigation. Over objection, Mr. Harger indicated that the records which were transmitted to the police included the date and time of a call, the numbers called, the length of the call, and the cell phone towers that were used to make or receive the call. At the trial, a screen was set up and Mr. Harger was asked if he recognized information on the screen as being the same information sent from Sprint/Nextel to the Durham police. Mr. Harger then identified a screen print that contained subscriber information for the accounts of Defendant and Officer Stroud. The subscriber history for Defendant was identified for the date Ms. Smith was killed and the date Defendant alleged she was assaulted by Officer Stroud. Next, Mr. Harger identified a cell site list that contained the latitude and longitude of each tower site. Mr. Harger then explained how a cell phone transmits its signals from a cell phone to a cell tower to another telephone. Each cell tower is given an urban area network code to identify the urban area in which the cell phone tower is located. In addition, each cell tower has one, two, or three sets of antennas which can be directed to an area within the cell phone tower's coverage area to better facilitate calls from certain geographic areas. Mr. Harger identified the call record, which has columns containing, *inter alia*, the following information: the telephone number making and receiving the call, the date of the call, the time the call began, the duration of the call in seconds, whether the call is inbound or outbound, any 911 calls made, and the phone receiving the call. Additional columns contain the cell site which received the cell signal when the call was originated and terminated, including the local site name and the number of the switch on the tower which received the call.

The State then had Mr. Harger examine the computer records on the screen for Defendant's and Officer Stroud's cell phones for the time period in which the killing took place. Afterwards, Mr. Harger was handed a CD which contained the Sprint/Nextel records shown on the computer screen. He then verified the information between the computer screen records and the records on the CD to be the same. Based on this testimony, the State then introduced the CD as Exhibit 120.

On cross-examination, Defendant elicited the fact that Mr. Harger did not create the CD himself and could not confirm the accuracy of

the information in the exhibit, but only that he believed it to be accurate. On redirect, the State asked if he believed the records to be accurate, to which he answered that he did believe they were accurate.

The State then called Durham Police Detective Chappell, who was assigned by the investigation department to "extrapolate" cell phone calls with cell tower locations to determine when and where a cell phone call was made or received. Based upon the electronic records received from Sprint/Nextel, Detective Chappell plotted the information on a map. This information was made into an exhibit and introduced as part of Exhibit 121. This exhibit was created in part by copying and pasting sections of the Nextel records into the chart created by Detective Chappell. These calls and the towers which received them were then geographically put on a map for the dates of the death and alleged assault. A separate color point was used to locate the cell phone numbers for Defendant and Officer Stroud.

The effect of the summary of the cell phone records was to demonstrate to the jury that on the day before the killing of the decedent, Defendant's cell phone was making cell phone calls from Durham near the Campus Crossing Apartments. All of the calls made that day from Officer Stroud's cell phone were relayed through towers located around Greensboro.

On 22 February 2010, the jury found Defendant guilty of first-degree murder. Defendant was sentenced to life imprisonment without the possibility of parole. On 23 February 2010, Defendant timely filed written notice of appeal to this Court.

II. Jurisdiction & Standard of Review

Defendant appeals from a final judgment in superior court where she was convicted of a non-capital offense. Therefore, we have jurisdiction over her appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2009).

A trial court's determination as to whether a document has been sufficiently authenticated is reviewed de novo on appeal as a question of law. *State v. Owen*, 130 N.C. App. 505, 510, 503 S.E.2d 426, 430, *disc. review denied*, 349 N.C. 372, 525 S.E.2d 188 (1998).

III. Analysis

[1] Defendant first contends the trial court erred by admitting Defendant and Officer Stroud's cell phone records into evidence over Defendant's objection for insufficient authentication. We disagree.

Rule 901 of our Rules of Civil Procedure requires authentication or identification "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 (2009). Rule 901 does not require the proponent of evidence to conclusively prove that tendered documents or electronic evidence is definitively a record, only that the evidence is relevant for the jury to conclude that it is authentic. Our Supreme Court "has held that '[t]he competency, admissibility, and sufficiency of the evidence is a matter for the court to determine. The credibility, probative force, and weight is a matter for the jury.' " *State v. Wiggins*, 334 N.C. 18, 34, 431 S.E.2d 755, 764 (1993) (citation omitted). In *Wiggins*, the Court stated, "It was not error for the trial court to admit the [evidence] if it could reasonably determine that there was sufficient evidence to support a finding that 'the matter in question is what its proponent claims.' " *Id.* (quoting N.C. Gen. Stat. § 8C-1, Rule 901). The Court then explained that Defendant would be "free to introduce any competent evidence relevant to the weight or credibility of [the witness's] testimony." *Id.* (citing N.C. Gen. Stat. § 8C-1, Rule 104(e)).

Business records stored electronically are admissible if

> (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.

State v. Springer, 283 N.C. 627, 636, 197 S.E.2d 530, 536 (1973). The authenticity of such records may be established by circumstantial evidence. *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985). "There is no requirement that the records be authenticated by the person who made them." *Id.* If the records themselves show they were made at or near the time of the transaction, the witness does not need to testify from personal knowledge that they were made at that time. *Id.*

Defendant argues the cell phone records were not properly authenticated because defense counsel's cross examination of Mr. Harger revealed that Mr. Harger himself did not provide the records to the police and that he could not know for certain if a particular document was, in fact, from Sprint/Nextel. However, Mr. Harger's testimony, taken together with the circumstances, establishes sufficient

circumstantial evidence to authenticate the documents, and any question of credibility is left to the jury. Mr. Harger, a custodian of records for Sprint/Nextel for 10 years, testified that he is familiar with Sprint/Nextel records and that he has testified in other cases. He stated that Sprint/Nextel transmitted records to the Durham Police Department and that he believed it was by e-mail. He testified that the records were kept in the normal course of business and that the documents he saw were the same as those normally sent to law enforcement in connection with a case.

According to Mr. Harger's testimony, Exhibit 120 included a response letter from Sprint, a screen print of Sprint's database, a directory of cell sites, and call detail records. Although Mr. Harger did not send the documents to the Durham Police Department, he testified that he believed them to be accurate and that he was familiar with each type of document. This was sufficient evidence to show that the records were, as the State claimed, records from Sprint/Nextel, and any question as to the accuracy or reliability of such records is a jury question.

Assuming, *arguendo*, Mr. Harger's testimony did not authenticate the records, this error was not prejudicial, as Detective Chappell's testimony sufficiently authenticated Exhibit 121, which also contained Sprint/Nextel phone records for Defendant and Officer Stroud. *See State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001) ("Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial."). Detective Chappell testified that he received the records from Sprint/Nextel pursuant to a court order in this matter and that they were the same records that Mr. Harger testified to. Detective Chappell then testified as to how he mapped out the relative locations of Defendant and Officer Stroud based on the cell phone records provided by Sprint/Nextel.

Under Rule 901, "[t]estimony of [a] [w]itness with [k]nowledge" sufficiently conforms to the methods of authentication and identification provided for under the Rule. N.C. R. Evid. § 8C-1, Rule 901(b)(1) (2009). Detective Chappell's testimony as to the same records as Mr. Harger sufficiently satisfied the "witness with knowledge" standard provided for under Rule 901(b). *Id.* Because Detective Chappell's testimony authenticated the phone records, any possible error in admitting the records during Mr. Harger's testimony was not prejudicial.

[2] Defendant also alleges that the trial court erred by allowing the jury to review cell phone records and hear audiotapes during their deliberation because they contained material not put before the jury during the presentation of evidence, which Defendant did not have the opportunity to address with rebuttal evidence or in closing argument. We find Defendant has waived this argument.

During jury deliberations, the jury asked to review the evidence, including the cell phone records and audio tapes of Defendant's phone conversations with Officer Stroud. Defense counsel objected to the cell phone records, asking that the court

> limit the jury's consideration of all the information on those CDs that was not the subject of a direct—or question or cross-examination question under oath, on the grounds that there was a lot of information that was not provided to the jury in the State's case.
>
> And it would be improper now to enter that evidence without—after the case is the over and after the State has rested. I do understand that the CDs themselves were admitted under evidence and that that was done through a witness under oath. And I would do my objections on the grounds that at the time that there was no proper foundation for that person to enter those records. But you've already ruled on that as well. So that's what I wanted to put on record.

Defense counsel also objected to the audio tapes, stating that "everything after the first call on that tape was not played to the jury during the trial."

Defense counsel later clarified his exception, stating,

> Because there are substantially new materials that I did not have the opportunity to address in my closing argument. The other of those calls on there, as you may know, these tapes were handed over to her attorneys who it sounds like, I don't know, there were some mixed—the way some started and the way some stopped. She was not asked about those or had the opportunity to address those on direct or on cross or redirect. And I was not—did not have an opportunity to address the Court—the jury about. Especially all the new material we have heard in these tapes regarding, you know, this meeting and why didn't you show up and why didn't you—was there someone in the car, you know, there wasn't. And all of that, the

> jury's hearing for the first time. And the State's evidence is closed. And none of that was authenticated or foundation laid. And I didn't have the opportunity to address it in closing.
>
> And I think it violates her Sixth Amendment right to counsel to now have stuff played for the jury that was not put in the State's evidence and published to—and they had the opportunity to publish that entire tape during the case—State's case. And she—they were asked, is there anything else you want to show to the jury. And it's not until we've closed and it's done that they're now hearing about it. And I was—move for a mistrial.

Defendant argues that it was error for the trial court to permit the jury to hear this evidence without providing Defendant an opportunity to present a rebuttal. Defendant, however, did not make a motion to reopen the case and did not explain what rebuttal would have been provided if the opportunity was given.[3] Absent a motion to reopen the case, we cannot rule on the trial court's failure to allow an opportunity for rebuttal. *See* N.C. R. App. P. 10(a)(1) (requiring a party to make a request, objection, or motion at the trial and obtain a ruling upon that request, objection, or motion to preserve it for appellate review). This argument has been waived.

IV. Conclusion

For the foregoing reasons we find

No error.

Judges HUNTER, Robert C., and STROUD concur.

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3. Defendant cites to *State v. Thompson*, 19 N.C. App. 693, 200 S.E.2d 208 (1973) in her argument. In *Thompson*, however, the defendant requested permission to recall a witness and that request was denied. *Id.* at 695, 200 S.E.2d at 210. Here, we have no such request to introduce evidence or reopen the case.

STATE OF NORTH CAROLINA v. DAVID WAYNE CLOWERS

No. COA11-590

(Filed 20 December 2011)

1. Evidence—alcohol test documents—other evidence without objection

There was no prejudicial error in a prosecution for driving while impaired from the introduction of an exhibit consisting of an Intoxilyzer machine test ticket, a rights form, and an affidavit and report from a chemical analyst. The chemical analyst testified without objection to essential information contained in the disputed exhibit.

2. Motor Vehicles—driving while impaired—sufficiency of evidence

There was sufficient evidence in a driving while impaired prosecution that defendant was operating a motor vehicle where a witness observed a moving car, watched it stop in the median, continued to watch until the police arrived, and did not see the driver or anyone else leave the car.

3. Motor Vehicles—driving while impaired—administration of alcohol test to defendant—evidence sufficient

The direct and circumstantial evidence presented by the State was sufficient to show that an identification technician administered an Intoxilyzer test to defendant. The technician did not directly identify defendant as the person to whom he administered the test but he testified about the administration of the test and an officer identified defendant as the person the officer arrested and transported to the jail for the test.

4. Criminal Law—defenses—automatism—voluntary consumption of alcohol and anxiety drug

The defense of automatism was not available to a driving while impaired defendant where there was no evidence that his consumption of alcohol was involuntary and defendant testified that his ingestion of an anxiety drug was voluntary.

5. Motor Vehicles—driving while impaired—citation—willfulness language—surplusage

The trial judge did not err in a driving while impaired case by denying defendant's requested instruction on willfulness where

the uniform citation included the word "willfully." Willfulness is not an element of the crime and "willfully" was disregarded as surplusage.

Appeal by defendant from judgment entered on 1 September 2010 by Judge Ripley E. Rand in Superior Court, Wake County. Heard in the Court of Appeals 7 November 2011.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John W. Congleton, for the State.

Wayne Buchanan Eads for defendant-appellant.

STROUD, Judge.

David Wayne Clowers ("defendant") appeals from a conviction for driving while impaired. For the following reasons, we find no error in defendant's trial.

I. Background

On 21 September 2008, defendant was charged by a uniform citation in Raleigh, North Carolina with driving while "subject to an impairing substance." Following his conviction in District Court, Wake County, defendant appealed to Superior Court. Defendant was tried on this charge at the 31 August 2010 Criminal Session of Superior Court, Wake County. The State's evidence tended to show the following: on 21 September 2008, Ms. Raynetta McMurrian was driving down Capital Boulevard in Raleigh, North Carolina around 2:00 a.m., and she called the police after she observed a red car in front of her swerving from one lane to another. Ms. McMurrian then observed the red car cross over into oncoming traffic lanes and then turn right into a grass median, hit something in the median, and come to a stop. She then pulled over on the side of the road, "less than a hundred feet" behind the red car, and waited until police arrived. Ms. McMurrian stated that she could only see one person in the red car but no one got out of the car and the car did not attempt to move off of the median. When a police officer arrived at the scene, Ms. McMurrian talked to him and then left the scene.

Officer N. S. Horner with the Raleigh Police Department responded to the scene around 2:16 a.m. on 21 September 2008. Officer Horner testified that she "came into contact with [defendant] in the median on Capital Boulevard between Spring Forest Road and Millbrook Road[,]" in Raleigh and Officer Downs, also with the Raleigh

Police Department, was talking through the window to defendant, who was sitting in the driver's seat of a red car. Officer Horner testified that she arrived eight minutes after the call went out and Officer Downs had arrived at the scene before her. Officer Horner testified that there were no other persons in the car with defendant and no one in the median other than defendant, Officer Downs, and herself. Officer Horner noticed that the front left corner of the red car was touching a speed limit sign in the median and the car appeared to be scratched or dented. Also, she observed skidmarks or impressions in the grass and mud "leading from the rear tires to the northbound lanes of Capital Boulevard, but the vehicle was facing southbound." Officer Downs and Officer Horner asked defendant to exit the car and Officer Horner noticed that he had "red, glassy eyes" and "a strong odor of alcohol about his person." She stated that defendant "had extreme difficulty trying to get out of the vehicle and was unable to stand on his own." Based on these observations, Officer Horner believed that defendant may have been driving while impaired and Officer Downs administered a field sobriety test to defendant. Defendant was unable to perform parts of the sobriety test and because of defendant's condition, they were unable to complete the field test for fear the defendant "would walk into and fall into traffic." Based on their observations and his performance on the sobriety test, defendant was placed under arrest and Officer Downs transported defendant to the Wake County Jail for an Intoxilyzer test.

Jacob Sanok, a senior identification technician with Wake County, City-County Bureau of Identification (CCBI), testified that on 21 September 2008 he came into contact with defendant. Mr. Sanok testified that he read defendant his rights regarding a request to submit to a chemical analysis to determine his alcohol concentration and defendant indicated that he understood those rights. Mr. Sanok then conducted a chemical analysis of defendant's breath using the Intoxilyzer machine at 4:00 a.m. Mr. Sanok testified that the lower of the two Intoxilyzer tests showed that defendant had .25 grams of alcohol per liter of breath. The State introduced into evidence the rights form; Mr. Sanok's "Affidavit and Revocation Report of Chemical Analyst[,]" showing that Mr. Sanok performed the Intoxilyzer test on defendant and defendant's alcohol concentration was greater than 0.15; and the printout from the Intoxilyzer test showing the test subject "Clowers, David W." had a reported alcohol concentration of .25g/210L[.]" Mr. Sanok gave defendant a copy of the Intoxilyzer results.

At the close of the State's evidence, defendant moved to dismiss the charge for lack of sufficient evidence. The trial court denied defendant's motion. Defendant testified in his own defense that on the day in question he was on the medication Alprazolam to treat an anxiety disorder. Defendant stated that he took Alprazolam as needed to treat panic attacks and to help calm him down. Defendant stated that on the night of 20 September 2008 he left his residence around 10 p.m. to go to a party in Raleigh and "had a few drinks." Although he testified that it was not a habit of his to drink excessive amounts of alcohol, he had planned to stay overnight at the party if he had "more than a couple of drinks." Defendant stated that he did not remember anything after having a few drinks until "regaining consciousness" the next day while lying on a bench in a jail cell. He said he did not remember driving the car or taking the Intoxilyzer test. Defendant also testified that he drove a 1997 red Mustang. At the close of his evidence, defendant renewed his motion to dismiss which was subsequently denied by the trial court.

On 1 September 2010, the jury found defendant guilty of driving while impaired and found the aggravating factor that "defendant had an alcohol concentration of at least 0.15 within a relevant time after driving." The trial court balanced the aggravating and mitigating factors and found a Level Four punishment should be imposed and sentenced defendant to a term of 120 days, which was suspended and defendant placed on unsupervised probation for 18 months. Other conditions of defendant's probation included surrender of his driver's license, community service, and monetary penalties. On 9 September 2010, defendant gave written notice of appeal from the judgment entered 1 September 2010.

II. Admission of evidence

[1] Defendant first contends that "the trial court committed reversible error by admitting State's exhibit 4 into evidence over" his objection. Defendant argues that exhibit 4, which consisted of an Intoxilyzer machine test ticket, a rights form for persons requested to submit to a chemical analysis to determine their alcohol concentration, and an affidavit and report from chemical analyst Jacob Sanok, should not have been admitted as (1) it contained hearsay declarations and (2) no proper foundation was laid for the admission of this evidence. Defendant argues that he was prejudiced by the introduction of exhibit 4 because "the only link tying [him] . . . to the chemical tests of September 21, 2008, was the information written or typed on

those documents that made up Exhibit 4" and without that evidence he would not have been convicted or sentenced based on the aggravating factor that his alcohol concentration was greater than 0.15.

The trial transcript shows that defense counsel raised several objections during Mr. Sanok's testimony. In response to two of those objections, the trial court conducted a bench conference with the prosecutor and defense counsel. But there is no indication in the transcript as to the arguments raised in response to those objections during the bench conferences. Later during Mr. Sanok's testimony, defense counsel raised an objection when the State attempted to admit the documents contained as part of the State's exhibit 4 and the trial court asked the jury to go to the jury room so he could discuss defense counsel's objection. The only argument raised by defense counsel during that conference was to clarify which documents were to be included in State's exhibit 4. The trial court then overruled defense counsel's objection and the State's examination of Mr. Sanok continued. The grounds for defense counsel's objections during Mr. Sanok's testimony were not apparent from the context and the record contains no specific objection or argument by defense counsel that exhibit 4 contained hearsay statements or that the State failed to make a proper foundation before entering exhibit 4 into evidence, so we conclude that defendant only lodged a general objection to the admission of exhibit 4. However, "a general objection is ineffective" unless "there is no purpose for which the evidence could have been admissible[.]" *State v. McKoy*, 317 N.C. 519, 524-25, 347 S.E.2d 374, 377-78 (1986) (citation omitted). The chemical analyst, Mr. Sanok testified without objection to the essential information contained in State's exhibit 4. It is well established that "[w]here evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) (citation omitted). Therefore, regardless of the grounds for defend- ant's objection, defendant lost the benefit of the objection to the introduction of State's exhibit 4 by his failure to object to other portions of Mr. Sanok's testimony, *see id.*, and any error that the trial court might have committed by allowing the admission of State's exhibit 4 into evidence did not prejudice defendant. Defendant's argument is overruled.

III. Insufficiency of the evidence

Next, defendant contends that the trial court erred in denying his motion to dismiss for insufficiency of the evidence.

> A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

State v. Johnson, ___ N.C. App. ___, ___, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted). In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and "the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996) (citation omitted). Our Supreme Court has further noted that

> "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then " 'it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.' " *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (alteration in original) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)).
>
> [*State v. Barnes*, 334 N.C. 67, 75-76, 430 S.E.2d 913, 918-19 (1993)]. "Both competent and incompetent evidence must be considered." *State v. Lyons*, 340 N.C. 646, 658, 459 S.E.2d 770, 776 (1995). . . . When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence. *See* [*State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982)].

State v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455-56, *cert denied*, 531 U.S. 890, 148 L.Ed. 2d 150 (2000).

N.C. Gen. Stat. § 20-138.1(a) (2009) states that "[a] person commits the offense of impaired driving if he drives any vehicle upon

any highway, any street, or any public vehicular area within this State: . . . . (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration[.]"[1] *See State v. Ray*, 54 N.C. App. 473, 474, 283 S.E.2d 823, 824 (1981) (To convict a person for driving while impaired, "the State must show that the defendant (1) [drove or operated] a vehicle, (2) upon a highway within the State, (3) while under the influence of [an] intoxicating [substance]." (citation and quotation marks omitted)). Defendant argues that the State failed to show sufficient evidence that he was operating a motor vehicle on the day in question or that he was the person upon whom the Intoxilyzer test was performed.

A. Operating a motor vehicle

[2] Defendant argues that the State's evidence merely provides "a strong suspicion" that he was operating a motor vehicle on the day in question, since no witness identified him as the driver. The direct and circumstantial evidence presented by the State shows that defendant was driving the red car on the day in question. At trial, Ms. McMurrian testified about her observations of the red car, which continued from her first sighting of the car until the car stopped in the median and the police arrived. She did not observe the driver or anyone else exit the car and the car did not move. She talked to a male police officer who arrived at the scene and then left. Only two officers responded to the scene. Officer Horner testified that she arrived eight minutes after the call went out and Officer Downs, who had arrived at the scene before her, was talking to the driver who was still seated in the car. So it could reasonably be inferred, *see Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455-56, that Ms. McMurrian talked to Officer Downs before leaving the scene. The red car was observed continuously during the relevant time period, first by Ms. McMurrian and then by Officer Downs and Officer Horner. There is no evidence that any person fled from the red car before Officer Horner arrived. Officer Horner testified that when she arrived Officer Downs was talking to defendant, who was sitting

1. Pursuant to N.C. Gen. Stat. § 20-179 (2009), the trial court may weigh certain aggravating factors, if admitted to or found by a jury, against certain mitigating factors in determining the defendant's sentence following a conviction for driving while impaired pursuant to N.C. Gen. Stat. § 20-138.1(a). Here, the jury not only found defendant guilty of driving while impaired it also found the aggravating factor that "defendant had an alcohol concentration of at least 0.15 within a relevant time after driving." This aggravating factor was weighed by the trial court against certain mitigating factors and defendant was sentenced at a "Level Four punishment[.]"

in the driver's seat of the red car. Viewing this direct and circumstantial evidence in the light most favorable to the State, *see Davis*, 130 N.C. App. at 679, 505 S.E.2d at 141, there is a reasonable inference, *see id.*; *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455-56, that defendant was driving the red car on the morning in question. Therefore, defendant's argument is overruled.

B. Intoxilyzer test

[3] Defendant argues that the State never identified him as the person who took the Intoxilyzer test, and therefore, the State never showed that he had a sufficient alcohol concentration for a conviction for driving while impaired or for the aggravating factor that was used to increase his sentence. Mr. Sanok testified that he came into contact with defendant on 21 September 2008. Specifically, Mr. Sanok testified that he read defendant his rights for a person requested to submit to a chemical analysis to determine alcohol concentration and defendant indicated that he understood those rights; Mr. Sanok also stated that he administered the Intoxilyzer tests to defendant, and gave defendant a copy of the Intoxilyzer test. Further, the State introduced into evidence the rights form signed by defendant; Mr. Sanok's "Affidavit and Revocation Report of Chemical Analyst[,]" showing that Mr. Sanok performed the Intoxilyzer test on defendant; and the printout from the Intoxilyzer test showing that "Clowers, David W." had a reported alcohol concentration of ".25g/210L[.]" Even though in his testimony Mr. Sanok did not directly identify defendant as the person to whom he administered the Intoxilyzer test, Officer Horner identified defendant in the courtroom as the person Officer Downs arrested and transported to the Wake County Jail to submit to the Intoxilyzer test. We hold that the direct and circumstantial evidence presented by the State was sufficient to show that Mr. Sanok did administer the Intoxilyzer test to defendant on the morning in question and that the test showed that defendant had an alcohol concentration of .25. Accordingly, the trial court properly sent the charge to the jury and defendant's arguments are overruled.

IV. Jury Instructions

Lastly, defendant contends that the trial court erred in denying his request for jury instructions as to (1) the defense of automatism or unconsciousness and (2) the definition of willfulness. At trial, defense counsel requested an instruction as to automatism or unconsciousness and willfulness. The trial court denied those requested instructions. "[R]equested instructions need only be given in sub-

stance if correct in law and supported by the evidence." *State v. Morgan*, 359 N.C. 131, 169, 604 S.E.2d 886, 909 (2004) (citation omitted), *cert. denied*, 546 U.S. 830, 163 L.Ed. 2d 79 (2005). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense . . . , 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) (citation and quotation marks omitted).

A. Automatism or unconsciousness instruction

[4] Defendant argues that an instruction as to automatism or unconsciousness should have been given as he testified that he blacked out and has no memory of what happened on the night in question. Defendant further contends that even though unconsciousness through voluntary consumption of alcohol or drugs does not support an instruction as to automatism or unconsciousness, here his unconsciousness could have been the result of the effects of voluntary consumption of alcohol combined with the effects of Alprazolam, a drug that he had been prescribed to control his panic attacks.

As noted above the essential elements of driving while impaired are "the defendant (1) [drove or operated] a vehicle, (2) upon a highway within the State, (3) while under the influence of intoxicating [substance]." *Ray*, 54 N.C. App. at 474, 283 S.E.2d at 824. Our Supreme Court, in describing the defense of unconsciousness or automatism, stated that

> [i]f a person is in fact unconscious at the time he commits an act which would otherwise be criminal, he is not responsible therefor. The absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability. . . . Unconsciousness is a complete, not a partial, defense to a criminal charge.

State v. Williams, 296 N.C. 693, 698-99, 252 S.E.2d 739, 743 (1979) (citations and quotation marks omitted). However, in limiting the application of this defense, the Court further stated that this defense

> does not apply to a case in which the mental state of the person in question is due to . . . voluntary intoxication resulting from the use of drugs or intoxicating liquor, but applies only to cases of the unconsciousness of persons of sound mind as, for example, somnambulists or persons suffering from the delirium of fever, epilepsy, a blow on the head or the involuntary

> taking of drugs or intoxicating liquor, and other cases in which there is no functioning of the conscious mind and the person's acts are controlled solely by the subconscious mind.

Id. at 699, 252 S.E.2d at 743 (citation and emphasis omitted). Here, even though defendant testified that it was not his intention to drink alcohol in excess on the night in question, there was no evidence that his consumption of alcohol was involuntary. Further, despite the possible side effect of Alprazolam, defendant testified that his ingestion of the anxiety drug was also voluntary. Therefore, the defense of automatism was not available to defendant. *See id.* Therefore, the trial court did not err in denying defendant's requested jury instruction as to automatism or unconsciousness as the evidence, even viewed in the light most favorable to the defendant, *see Oliver*, 334 N.C. at 520, 434 S.E.2d at 205, did not support that instruction. *See Morgan*, 359 N.C. at 169, 604 S.E.2d at 909.

B. Willfulness instruction

[5] Defendant argues that the trial court should have instructed the jury on the definition of "willfulness" because the charging officer did not cross out the word "willfully" on the driving while impaired citation and therefore, willfulness was an additional element of the crime that the State was charging him with.

As noted above, the essential elements of the crime of driving while impaired are "the defendant (1) [drove or operated] a vehicle, (2) upon a highway within the State, (3) while under the influence of intoxicating [substance]." *Ray*, 54 N.C. App. at 474, 283 S.E.2d at 824; *see* N.C. Gen. Stat. § 20-138.1(a). Therefore, willfulness is not an element of the crime. This Court has held that

> [a]n indictment must set forth each of the essential elements of the offense. Allegations beyond the essential elements of the offense are irrelevant and may be treated as surplusage and disregarded when testing the sufficiency of the indictment. To require dismissal, any variance must be material and substantial and involve an essential element.

State v. Pelham, 164 N.C. App. 70, 79, 595 S.E.2d 197, 203 (citations omitted), *appeal dismissed and disc. review denied*, 359 N.C. 195, 608 S.E.2d 63 (2004). Here, the uniform citation for driving while impaired stated that "defendant did unlawfully and willfully operate a (motor) vehicle on a (street, highway) . . . . 5. While subject to an impairing substance. G.S. 20-138.1." As the inclusion of "willfully"

was "beyond the essential elements of the offense" we disregard this as "surplusage[.]" *See id*. The trial court did not err in denying defendant's requested instruction as to willfulness, as that instruction would not have been supported by law. *See Morgan*, 359 N.C. at 169, 604 S.E.2d at 909.

For the foregoing reasons, we find no error in defendant's trial.

NO ERROR.

Chief Judge MARTIN and Judge ERVIN concur.

JERRY GRIMSLEY, PLAINTIFF v. GOVERNMENT EMPLOYEES INSURANCE COMPANY, DEFENDANT

No. COA11-835

(Filed 20 December 2011)

1. Trials—summary judgment—no evidence of impermissibly overruling another judge's previous order

In the absence of an enforceable order denying summary judgment for plaintiff, it could not be concluded that a trial judge's order granting summary judgment for plaintiff impermissibly overruled another superior court judge's previous order.

2. Insurance—UIM coverage limit—alleged non-receipt of selection/rejection form

The trial court erred by denying defendant insurance company's motion for summary judgment and by granting summary judgment for plaintiff in an action seeking a declaration that the underinsured coverage limit under plaintiff's policy was $1,000,000 at the time of his injury. Plaintiff's evidence of alleged non-receipt of the selection/rejection form did not contradict defendant's evidence that it mailed the form, and thus, did not raise a genuine issue of fact regarding the mailing sufficient to preclude summary judgment for defendant.

Appeal by Defendant from order entered 28 February 2011 by Judge J. Gregory Bell in Robeson County Superior Court. Heard in the Court of Appeals 14 November 2011.

Musselwhite, Musselwhite, Branch and Grantham, by J.W. Musselwhite and Stephen C. McIntyre, for Plaintiff.

York Williams & Lewis, LLP, by Thomas E. Williams and David R. DiMatteo, for Defendant.

STEPHENS, Judge.

As a result of an automobile collision between Plaintiff Jerry Grimsley and another driver, Grimsley was injured and incurred "significant damages" that exceeded the limits of the other driver's liability insurance. Grimsley filed an underinsured motorist ("UIM") claim with his automobile insurance provider, Defendant Government Employees Insurance Company ("GEICO"), seeking coverage for the remainder of Grimsley's damages. GEICO denied full coverage of the claim and informed Grimsley that, according to his policy with GEICO, Grimsley's UIM coverage was limited to $100,000. Thereafter, Grimsley filed the present action in Robeson County Superior Court, seeking a declaration that the UIM coverage limit under Grimsley's policy was $1,000,000 at the time of his injury.

After GEICO responded to Grimsley's complaint, both parties moved for summary judgment. The motions were heard by Judge Ola M. Lewis; however, no order disposing of the motions was entered by Judge Lewis. Thereafter, GEICO amended its answer and filed a "Motion for Relief from Order or Ruling and Motion for Summary Judgment." GEICO's motions were heard by Judge J. Gregory Bell, who entered an order denying GEICO's motion for summary judgment and granting summary judgment for Grimsley. GEICO appeals.

[1] As an initial matter, GEICO argues that Judge Bell's order granting summary judgment for Grimsley was improper because that order overruled Judge Lewis' order purportedly denying summary judgment for Grimsley and, thus, violated the rule that one superior court judge may not reconsider and grant a motion for summary judgment previously denied by another superior court judge. *See, e.g.*, *Hastings v. Seegars Fence Co.*, 128 N.C. App. 166, 168, 493 S.E.2d 782, 784 (1997). This argument is unavailing, however, because Judge Lewis' purported order was never entered and was, therefore, ineffective. *West v. Marko*, 130 N.C. App. 751, 755-56, 504 S.E.2d 571, 573-74 (1998) (holding that an order is not enforceable until it is entered). In the absence of an enforceable order denying summary judgment for Grimsley, we cannot conclude that Judge Bell's order granting summary judgment for Grimsley impermissibly overruled another superior court judge's previous order. This argument is overruled.

[2] GEICO next argues that Judge Bell erred by denying GEICO's motion for summary judgment and by granting summary judgment for Grimsley. Specifically, GEICO contends that the evidence before the trial court showed that Grimsley would be unable to prevail on his claim that his UIM coverage limit was $1,000,000 at the time of his injury. Therefore, GEICO urges, Judge Bell should have granted summary judgment for GEICO. For the following reasons, we agree.

In his complaint, Grimsley asserted that he was entitled to $1,000,000 in UIM coverage based on GEICO's alleged violation of N.C. Gen. Stat. § 20-279.21. Although the statute has since been amended, the version of section 20-279.21 applicable in this case required North Carolina automobile liability insurance policies to include UIM coverage "in an amount not to be less than [a baseline set by section 20-279.5] nor greater than one million dollars [] as selected by the policy owner." N.C. Gen. Stat. § 20-279.21(b)(4) (2007). That version of section 20-279.21 further provided that an insured may reject UIM coverage or "select different coverage limits" by completing a "form promulgated by the [North Carolina Rate] Bureau"—a "selection/rejection form"—but if the insured does not reject UIM coverage and does not select different coverage limits, the amount of UIM coverage "shall be equal to the highest limit of bodily injury and property damage liability coverage for any one vehicle in the policy." *Id. In Williams v. Nationwide Mut. Ins. Co.*, 174 N.C. App. 601, 621 S.E.2d 644 (2005), this Court interpreted section 20-279.21 to provide that where the insurer offers the insured neither an *opportunity to reject* UIM coverage, nor an *opportunity to select* a different coverage—denominated by this Court to be a "total failure" by the insurer—the insurer has violated the statute's requirement that the amount of UIM coverage be "selected by the policy owner." *Id.* at 605-06, 621 S.E.2d at 647. The result of such a violation, this Court held, is that the insured is entitled to "the highest available limit of UIM coverage of $1,000,000." *Id.* Relying on our holding in *Williams*, Grimsley asserts that because neither he nor his wife "received or executed a [s]election/[r]ejection form," there was a total failure by GEICO to provide "a meaningful opportunity to select or reject [UIM] coverage" and, thus, Grimsley was entitled to UIM coverage in the amount of $1,000,000.

Since *Williams*, however, this Court has held that regardless of whether an insured "received or executed" a selection/rejection form, the insurer's timely *mailing* of a selection/rejection form to the insured will preclude a finding of a "total failure on the part of [the

insurer] to inform the insured of available coverage that would require adherence to *Williams*." *Nationwide Prop. & Cas. Ins. Co. v. Martinson*, ___ N.C. App. ___, ___, 701 S.E.2d 390, 397-98 (2010) (emphasis omitted). Accordingly, Grimsley cannot prevail on his claim and GEICO is entitled to summary judgment if the evidence before the trial court—including "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009)—viewed in the light most favorable to Grimsley, *e.g.*, *In re Kitchin v. Halifax County*, 192 N.C. App. 559, 569, 665 S.E.2d 760, 767 (2008), shows that GEICO *mailed* a selection/rejection form to Grimsley such that there was no total failure by GEICO to notify Grimsley that he may purchase up to $1,000,000 in UIM coverage. *See Martinson*, ___ N.C. App. at ___, 701 S.E.2d at 398-99 (granting summary judgment to insurer where evidence showed no total failure by insurer because insurer mailed selection/rejection form to insured).

In this case, the following evidence was before the trial court: Grimsley's wife testified at her deposition that she received a mailing from GEICO in October 2007, but that the mailing did not include a selection/rejection form. GEICO, however, submitted an affidavit from an "underwriting analyst" who asserted that (1) a selection/rejection form, along with various other policy documents, was printed and mailed to Grimsley's address on 2 October 2007; (2) GEICO's computerized mailing system, "as part of GEICO's regular practice, stored an image of each document" printed and mailed to Grimsley; and (3) although Grimsley did not return the selection/rejection form, "GEICO did receive signed selection/rejection forms back from [other of the 370 new] North Carolina policies that were printed on [2 October 2007] and mailed on that date." GEICO also submitted an affidavit from an "output manager" at the mail center from which Grimsley's policy documents were mailed. The output manager averred that she "[is] familiar with the organizational practices, equipment and procedures that GEICO uses to produce, print, package and send policy documents to its policyholders as part of its regular business activities," and she asserted that (1) the mail center operates "a computer-driven system that uses bar code technology to accurately read, sort and package the pages of documents GEICO mails to policyholders"; (2) if a document is not properly printed or packaged, the system stops processing and alerts operators to the error; (3) "[h]ad there been any error in the production, packaging or mailing of . . . the selection/rejection form, an error message would have alerted GEICO's associates to the problem, and it would have

been addressed"; and (4) based upon her knowledge "of the organizational practices, equipment and procedures" and her review "of the [a]ffidavit of [the underwriting analyst]," she believes "[the] policy documents, including a selection/rejection form . . . were properly printed, inserted and mailed to [Grimsley] . . . on [2 October 2007]." Along with these affidavits, GEICO submitted archived copies—or stored "images"—of the documents mailed to Grimsley, including a copy of the selection/rejection form. GEICO's output manager also testified at her deposition that the archive of documents mailed to Grimsley includes a selection/rejection form.

While GEICO contends that the foregoing evidence conclusively establishes that GEICO mailed a selection/rejection form to Grimsley, Grimsley argues that this evidence was insufficient to warrant summary judgment for GEICO because (1) "there is direct evidence in the record that [Grimsley] did not receive the selection/rejection form"; and (2) there is no "personal testimony by a specific employee that the mailing of the selection/rejection form occurred, that the proper form was in the mailing, and that the envelope containing the form was addressed properly and contained proper postage."

Regarding Grimsley's first argument, the "direct evidence" to which Grimsley refers is Grimsley's wife's assertion that the mailing from GEICO did not include a selection/rejection form. However, Grimsley's evidence only addresses his receipt of the selection/rejection form, and does not address whether the form was actually sent. *See Martinson*, ___ N.C. App. at ___, 701 S.E.2d at 397-98 (insured's claim that she did not *receive* selection/rejection form does not serve as evidence contradicting insurance company's assertion that it *mailed* the form where insurance company's assertion is supported by testimony from employees and electronic documentation). Accordingly, Grimsley's evidence of alleged non-receipt of the selection/rejection form does not contradict GEICO's evidence that it mailed the form and, thus, does not raise a genuine issue of fact regarding the mailing sufficient to preclude summary judgment for GEICO.

As for Grimsley's second argument—that summary judgment would be improper because GEICO did not offer any "personal testimony" by an employee who mailed the Grimsley's selection/rejection form—Grimsley cites this Court's decisions in *Martinson*, *supra*, and *Hart v. Perez*, No. COA09-1157, 2011 N.C. App. LEXIS 216 (Feb. 15, 2011) (unpublished), for the proposition that, absent "personal testimony" by the employee who physically mailed the selection/rejection

form, an insurer cannot conclusively establish that the selection/rejection form was mailed to the insured. While Grimsley is correct that in both *Martinson* and *Perez* an employee of the insurer testified that he or she properly mailed the selection/rejection form, neither decision can be read to hold that such "personal testimony" is the *only* way to establish the mailing of a selection/rejection form.

Moreover, in our view, such a holding would be impractical because it ignores the necessity and ubiquity of mass mailings conducted by large insurance companies, who are required by law to regularly mail documents to their many customers and who, by virtue of their size, are able to take advantage of economies of scale and provide services to potential insureds—like the Grimsleys—who are seeking more insurance coverage at lower cost. Were we to require "personal testimony" to establish the mailing of a selection/rejection form, larger insurance companies would be required to abandon use of computerized mailing systems and hire workers to personally perform each step in the mailing process, which changes would result in an obvious decrease in efficiency, an arguable decrease in reliability, and a certain increase in the cost of insurance coverage. *Cf. Hotaling v. Chubb Sovereign Life Ins. Co.*, 241 F.3d 572, 581 (7th Cir. 2001) ("[I]n today's technologically advanced world [mass] mailings: (1) are routinely performed by computers; and (2) frequently contain a large volume of notices mailed at a single time. If we were to require testimony from a company's mailing clerk, insurance companies would basically be forced to abandon the use of computers in mass mailings. This would inevitably increase costs which, as we all know, would be passed on to the consumer in the form of higher premiums.").

Further, assuming a GEICO employee had physically mailed the selection/rejection form to Grimsley and would be available to testify on the matter, because GEICO mailed nearly 400 sets of policy documents along with Grimsley's documents, it is certain that the employee would not remember specifically mailing Grimsley's documents and that that employee's "personal testimony" would amount to little more than a statement of the general practice at the mailing facility. Because similar evidence of GEICO's general mailing practices is before this Court, even in the absence of such "personal testimony," we see no reason to impose an excessive burden on insurance companies by adopting Grimsley's rule that "personal testimony" by the employee who physically mailed the selection/rejection form is necessary to establish that the insurer mailed the form to the insured. Rather, we hold that evidence of general practices at a computerized

mailing facility, so long as such evidence is sufficiently reliable, can be used to establish proper mailing of a selection/rejection form.[1]

In our view, GEICO's evidence in this case, viewed in the light most favorable to Grimsley, is sufficient to establish that GEICO properly mailed a selection/rejection form to Grimsley. Initially, we note that because Grimsley's wife testified that she received a mailing from GEICO shortly after the date GEICO asserts it mailed the set of documents that included the selection/rejection form, there is no issue of fact as to whether GEICO mailed a properly addressed set of policy documents. As such, the only issue is whether that set of documents included a selection/rejection form.

As evidenced by the affidavits submitted by GEICO, GEICO's computerized mailing system employed a number of safeguards to ensure accurate mailings: document archival, print scanners to assess printing quality, barcode sequencing to make certain all necessary documents are printed and sorted properly, scales to make sure that all mailings are the appropriate weight, process-stopping procedures and alerts to operators if errors are detected, and a log to track the occurrence of errors. In our view, GEICO has clearly established the reliability of its computerized mailing system. Further, Grimsley has offered no evidence—beyond his impertinent invitation to this Court to take judicial notice of the fallibility of any "computer system developed by humankind"—to dispute the accuracy and reliability of GEICO's computerized mailing practice. Accordingly, we conclude that GEICO's evidence of the general practice at its computerized mailing facility, along with the copies of the documents mailed to Grimsley and the affidavits asserting that the selection/rejection form was included, is sufficient to establish that GEICO mailed a selection/rejection form to Grimsley. Therefore, we conclude that Grimsley was not entitled to $1,000,000 in UIM coverage pursuant to *Williams* because there was not a total failure on the part of GEICO to inform Grimsley of available coverage options. *See Martinson*, ___ N.C. App. at ___, 701 S.E.2d at 398-99.

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1. This holding comports with the decisions of courts in various other jurisdictions. *See*, *e.g.*, *Hotaling*, 241 F.3d at 576, 579-81 (approving trial court's determinations that (1) insurer could prove it mailed notice to insured by introducing general-practice evidence regarding insurer's "almost fully automated system of mailing premium notices and other correspondence to the holders of its [policies]"; and (2) "there was no need for [insurer] to offer either a copy of the actual [] notice sent to [insured] or the testimony of an individual who specifically recalled sending a notice to [insured]"); *Federal Kemper Life Assurance Co. v. Ellis*, 28 F.3d 1033, 1040 (10th Cir. 1994) ("Proof of customary and usual computer procedures is sufficient to show adherence to usual and customary procedures of proper mailing."); *Russell v. Nationwide*

Nevertheless, Grimsley argues that he was entitled to $1,000,000 in UIM coverage at the time of his injury because of a GEICO agent's "affirmative misrepresentation" to Grimsley's wife that Grimsley "did not have the freedom to select UIM coverage different than bodily injury limits." Grimsley contends that this conduct by GEICO negates any "opportunity to select or reject" UIM coverage GEICO may have provided and "constitutes behavior by an insurer more culpable than that of merely failing to provide an insured with an opportunity to select or reject UIM coverage" such that, "pursuant to this Court's precedent, [Grimsley] was properly granted [$1,000,000] in UIM coverage." We are unpersuaded.

Assuming *arguendo* that a GEICO agent misrepresented to Grimsley's wife the availability of coverage in an amount other than that initially purchased, we cannot conclude that such a misrepresentation would entitle Grimsley to $1,000,000 in UIM coverage.

Although in *Williams* this Court held that an insured not provided *the opportunity* to reject UIM coverage or select different UIM coverage limits is entitled to $1,000,000 in UIM coverage, 174 N.C. App. at 605-06, 621 S.E.2d at 647, that holding was supplemented by our decision in *Martinson*, in which we held that the insurer's *act of mailing* the selection form satisfied the requirement that the insured be given an opportunity to select or reject UIM coverage up to $1,000,000, *regardless of whether the insured received the form. Martinson*, ___ N.C. App. at ___, 701 S.E.2d at 397-98. The obvious implication from our decision in *Martinson* is that the determination of whether an "opportunity to select or reject" is given to the insured depends on whether the insurer mailed a selection/rejection form and is unaffected by the insured's receipt of the form. Logically, then, because the fact that an insured never received, and thus, never read the selection/rejection form is irrelevant to the question of whether the insured had an "opportunity to select or reject," so too is the fact that an insured would not have comprehended the meaning of the form—*i.e.*, not have understood the form to indicate the insured's "freedom to select UIM coverage different than bodily injury limits." Thus, the effect of the selection/rejection form on the insured upon receipt has no bearing on whether the insured was provided an "opportunity to select or reject." It is on this point that Grimsley's argument fails.

Life Ins. Co., *No.* 09-1788, 2010 U.S. App. LEXIS 23449, at *17 (4th Cir. Nov. 12, 2010) (unpublished) ("[W]e find that computerized evidence can, as a matter of law, establish proof of proper mailing if it is sufficiently reliable.").

Grimsley's theory is that even if GEICO mailed a selection/rejection form to him after the alleged misrepresentation, because he relied on the GEICO agent's representation and believed that $1,000,000 in UIM coverage was not available, Grimsley never had a "meaningful opportunity" to reject UIM coverage or to select $1,000,000 in UIM coverage. According to Grimsley, upon receiving a selection/rejection letter allegedly contradicting the GEICO agent's representation,

> [t]he rational purchaser [Grimsley] would, in the least, be misled as to UIM coverage, and in the most would not believe that a form allegedly included [] in a stack of pre-printed materials [] would outweigh and somehow overrule explicit representations which were made to the purchaser during a personal conversation between the purchaser and the insurance agent.

The crux of Grimsley's argument is that the determination of whether Grimsley was provided an opportunity to reject UIM coverage or select different UIM coverage should be based on the effect of the selection/rejection form on Grimsley upon receipt, rather than on the actual mailing of the form. However, as discussed *supra*, the effect of the selection/rejection form on Grimsley, or his comprehension of the form, has no bearing on the question of whether he was given an opportunity to reject UIM coverage or to select up to $1,000,000 in UIM coverage. As we held in *Martinson*, the mailing of the selection/rejection form is sufficient to satisfy the section 20-279.21 requirement that the insurer provide the insured an opportunity to reject UIM coverage or to select different UIM coverage limits. This is so regardless of what a GEICO agent allegedly told Grimsley's wife about UIM coverage limits and regardless of Grimsley's hypothesized understanding of the form.

Because Grimsley was given an opportunity to reject UIM coverage or to select different coverage limits, and, thus, there was no total failure on the part of GEICO to inform Grimsley of available coverage, we conclude that Grimsley was not entitled to $1,000,000 in UIM coverage at the time of his injury. Consequently, we reverse the trial court's order granting summary judgment for Grimsley and remand to the trial court for entry of summary judgment for GEICO.

REVERSED and REMANDED.

Chief Judge MARTIN and Judge ELMORE concur.

LINDA SHAW, WIDOW OF CURRY SHAW, DECEASED EMPLOYEE, PLAINTIFF v. US AIRWAYS, INC., EMPLOYER, AMERICAN PROTECTION INSURANCE CO., CARRIER, DEFENDANTS

No. COA11-284

(Filed 20 December 2011)

1. Workers' Compensation—death benefits—statute of limitations

Plaintiff widow's claim for death benefits in a workers' compensation case was not untimely or barred by the statute of limitations under N.C.G.S. § 97-38. There was no determination of decedent employee's final determination of disability prior to the Commission's opinion and award determining that his death was the proximate result of his compensable injury.

2. Workers' Compensation—death—proximately resulted from compensable injury—methadone

The Industrial Commission did not err in a workers' compensation case by concluding that decedent employee's death proximately resulted from the 12 July 2000 compensable injury. The toxic build-up of methadone prescribed to manage decedent's pain resulting from a compensable injury to a reasonable degree contributed to his death.

Appeal by defendants from opinion and award entered 17 December 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 September 2011.

The Sumwalt Law Firm, by Vernon Sumwalt and Mark T. Sumwalt, for plaintiff-appellee.

Littler Mendelson, P.C., by Kimberly A. Zabroski, for defendant-appellant.

BRYANT, Judge.

Because there was no determination of disability by the Commission, plaintiff's claim for death benefits was not barred pursuant to N.C. Gen. Stat. § 97-38. Further, because there was competent evidence in the record to support the Commission's findings of fact determining that Curry Shaw's death proximately resulted from a compensable injury, we affirm the Commission's opinion and award.

On 12 July 2000, plaintiff Curry Shaw worked as a fleet-services worker for defendant US Airways. While lifting a piece of luggage from a baggage carousel, Shaw suffered an injury to his lower back. In August, US Airways filed an Employer's Report of Injury to Employee. On 24 August 2000, US Airways and its insurance carrier filed a Form 60, Employer's Admission of Employee's Right to Compensation Pursuant to N.C. Gen. Stat. § 97-18(b). On the form, US Airways acknowledged that temporary total compensation in the amount of $550.36 per week was paid to Shaw. On 16 April 2003, US Airways and its insurance carrier, American Protection Insurance Company (collectively "defendants") filed a Form 62 again acknowledging that temporary total disability compensation at a rate of $550.36 per week was being paid to Curry Shaw.

Contesting the calculation of the average weekly wage, Shaw filed a Form 33, Request that Claim be Assigned for Hearing, and, on 25 May 2005, the matter was heard before Deputy Commissioner Phillip A. Holmes.

On 3 October 2005, Deputy Commissioner Holmes filed an opinion and award making the following pertinent findings based on the stipulation of the parties: (1) "The date of the admittedly compensable injury in this claim [was] July 12, 200[0]"; and (6) "[s]ince August 5, 200[0], Defendants have paid $550.36 each week to Plaintiff for total disability, based on an assumed weekly wage of $825.55 during the fifty-two weeks preceding July 12, 2000." The matter of the calculation of Shaw's average weekly wage was further considered by the Full Commission (the Commission), this Court, and our Supreme Court: *Shaw v. U.S. Airways, Inc.*, 186 N.C. App. 474, 652 S.E.2d 22 (2007), *rev'd*, 362 N.C. 457, 665 S.E.2d 449 (2008). The opinion of our Supreme Court, *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 665 S.E.2d 449 (2008), was filed 27 August 2008. On 25 September 2008, Curry Shaw died.

On 8 April 2009, Curry Shaw's wife, Linda Shaw, filed a Form 18, Notice of Accident to Employer and Claim of Employee, Representative, or Dependent, claiming, on her husband's behalf, "death as a consequence of compensable injury." The same day, Shaw filed a Form 33, Request that Claim be Assigned for Hearing.

On 17 June 2009, the matter was heard before Deputy Commissioner Philip A. Baddour, III. And, on 7 June 2010, the deputy commissioner filed an opinion and award concluding that Curry Shaw's death was the proximate result of his 12 July 2000 compens-

able injury and that his wife, Linda Shaw, was entitled to death benefits at a rate of $550.36 per week for the rest of her life, unless she remarries. Defendants appealed to the Full Commission (the Commission).

On 17 December 2010, the Commission entered an opinion and award finding that the case had been the subject of prior litigation resulting in the Supreme Court decision *Shaw v. US Airways, Inc.*, 362 N.C. 457, 665 S.E.2d 449 (2008), but noted that "[t]he prior litigation did not produce a final determination of decedent's disability." The Commission concluded that on 12 July 2000, Curry Shaw suffered an admittedly compensable injury, and, as a direct and natural result, he experienced back pain. To help manage the pain, Curry Shaw's authorized treating physician, Dr. Douglas Pritchard, prescribed methadone. Curry Shaw took methadone in increasing dosages for over four-and-a-half years prior to his death. The Commission concluded that Curry Shaw died of methadone toxicity—a direct result of his methadone use and a proximate result of his original compensable back injury. The Commission further concluded that Curry Shaw "was paid temporary total disability pursuant to a Form 60 and subsequent Forms 62 until his death. At the time of [Curry Shaw's] death no 'final determination of disability' had been made within the meaning of N.C. Gen. Stat. § 97-38" and, therefore, "plaintiff's claim for death benefits [was] not barred by N.C. Gen. Stat. § 97-38."

Defendants were ordered to pay death benefits to Linda Shaw in the amount of $550.36 per week continuing for the remainder of her life or until remarriage. Defendants appeal.

On appeal, defendants raise two issues: Did the Commission err in concluding that (I) Shaw's claim for death benefits was timely filed; and (II) Shaw's death proximately resulted from the 12 July 2000 compensable injury.

Standard of Review

> On appeal of cases from the Industrial Commission, our review is limited to two issues: Whether the Commission's findings of fact are supported by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact. Because it is the fact-finding body, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The Commission's findings of fact are conclusive on appeal if they are supported by any competent evidence.

> Accordingly, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.

Johnson v. Lowe's Cos., 143 N.C. App. 348, 350, 546 S.E.2d 616, 617-18 (2001) (citations and quotations omitted).

I

[1] Defendants argue that plaintiff's claim for death benefits is barred by the statute of limitations. Curry Shaw died on 25 September 2008. Defendants note, and we agree, that this occurred more than six years after the date of Curry Shaw's 12 July 2000 injury. However, defendants argue that more than two years passed after entry of Deputy Commissioner Holmes' opinion and award making the uncontested finding that defendants paid Curry Shaw $550.36 each week for temporary total disability. Defendants contend that this uncontested finding amounts to a final determination of disability and, as a result, Linda Shaw's 8 April 2009 claim for death benefits was untimely and barred by the statute of limitations under N.C. Gen. Stat. § 97-38. We disagree.

Under North Carolina General Statutes, section 97-38,

> If death results proximately from a compensable injury or occupational disease and within six years thereafter, or within two years of *the final determination of disability*, whichever is later, the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation equal to sixty-six and two-thirds percent (66 2/3%) of the average weekly wages of the deceased employee at the time of the accident . . . .

N.C. Gen. Stat. § 97-38 (2009). As noted by the Commission in the opinion and award entered 17 December 2010, defendants paid temporary total disability to Curry Shaw pursuant to a Form 60 and subsequent Form 62. Entry of these forms raises only a presumption of disability, not a final determination. *See Treat v. Mecklenburg County*, 194 N.C. App. 545, 669 S.E.2d 800 (2008).

> Under the Workers' Compensation Act, disability is defined by a diminished capacity to earn wages, not by physical infirmity. Thus, the employee has the burden "to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment." *Russell v.*

> *Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) . . . .

Knight v. Wal-Mart Stores, Inc., 149 N.C. App. 1, 7, 562 S.E.2d 434, 439 (2002) (citations omitted).

There is nothing in the record to indicate that Shaw was paid anything other than temporary total benefits pursuant to Forms 60 and 62. *See Estate of Apple v. Commercial Courier Express, Inc.*, 165 N.C. App. 514, 598 S.E.2d 625 (2004) (finding that a Form 21 was not a final determination of disability).

Therefore, as there was no determination of Curry Shaw's final determination of disability prior to the Commission's 17 December 2010 opinion and award determining that his death was the proximate result of his 12 July 2000 compensable injury, Linda Shaw's 8 April 2009 claim for death benefits was not untimely and not barred by the statute of limitations under N.C. Gen. Stat. § 97-38. Accordingly, defendants' argument is overruled.

II

[2] Next, defendants argue that the Commission erred in concluding that Curry Shaw's death proximately resulted from the 12 July 2000 compensable injury. Defendants contend that (A) the Commission's finding that Curry Shaw took methadone in "substantial compliance" with his authorized physician's prescription is unsupported; (B) Curry Shaw's death was caused by a non-work related fatty liver disease; and (C) the medical expert testimony presented fails to support a conclusion of proximate cause.

Workers Compensation death benefits are governed by section 97-38 of the North Carolina General Statutes. *Booker-Douglas v. J. & S. Truck Serv.*, 178 N.C. App. 174, 177, 630 S.E.2d 726, 729 (2006). "For death benefits to be awarded under this statute, a compensable injury must be the proximate cause of the employee's death." *Id.* (citation omitted).

A

Defendants contend that the Commission's finding that Curry Shaw took methadone in "substantial compliance" with his authorized physician's prescription is not supported by the evidence of record. We disagree.

Here, the Commission made the following contested finding of fact: "The greater weight of the evidence shows that decedent more

likely than not took his methadone in substantial compliance with Dr. Pritchard's prescription."

Because our review is limited to two issues: Whether the Commission's findings of fact are supported by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact, we look to the record evidence for competent evidence in support of the Commission's finding. *See Lowe's Cos.*, 143 N.C. App. at 350, 546 S.E.2d at 617-18.

Linda Shaw gave the following testimony before Deputy Commissioner Philip A. Baddour, III:

> Q. Dr. Pritchard is a pain management doctor? Is that accu rate?
>
> A. Yes, he is.
>
> Q. Did Dr. Pritchard provide medications for Curry?
>
> A. Yes, he did.
>
> Q. Was methadone one of those medications?
>
> A. Yes, it was.
>
> . . .
>
> Q. How was Curry in taking his medications?
>
> A. Very careful. Every morning he would get up, and he would count out the number of pills that he should be taking during the day. He put them in a small bottle, and then he would take them as he needed them. You know, if there were a couple left over that day, that was great. Then the next morning he would add whatever he had to make it up to that full amount again for a day, but he would never go past what he was supposed to take during one day. He was very careful about that.

Further, the deposition of Dr. Pritchard provided the following testimony:

> Q. . . . [O]ne of the issues we have in this Workers' Compensation claim is whether Curry Shaw took methadone as a consequence of his work-related injury. Did he, in fact, take that medication because of his back injury?
>
> A. Yes, he did.

Q. Generally speaking, how many years had he taken methadone?

A. Probably at least four or five years he had been on methadone.

. . .

Q. And over the years that Mr. Shaw had taken methadone, had he ever had any problems in terms of abuse or overuse at all?

A. No.

Q. What goes into monitoring a patient in terms of how they use methadone? Is there a way to check what levels?

A. Yes, you can do levels, and sometimes we'll do that. Urine drug screens are another way that we can do that. So there are various ways you can measure it. Another one is compliance, whether they're compliant with medicines and if they're taking the correct number of pills. If you give them 90 pills, take one three times a day, and they are out in two weeks, obviously that's non-compliance. So compliance is an issue. Urine drug screens are another, which actually lets you measure quantitative levels of some of these medicines.

Q. . . . Curry Shaw started on methadone somewhere back in May of 2004, give or take?

A. Yes, that's about right.

Q. So he was on methadone from that point in time all the way 'til the time he passed away in September of 2008?

A. Yes.

Q. During those four and a half years or so over four years, had he ever been non-compliant with his methadone?

A. No.

Q. Had he ever been non-compliant with the other pain medications that he was taking?

A. No.

As the record contains competent evidence in support of the Commission's finding that Curry Shaw "took his methadone in sub-

stantial compliance with Dr. Pritchard's prescription," we are compelled to uphold the finding of fact.

B

Defendants contend that Curry Shaw's death was caused by an "insidious development of non work-related fatty liver disease." Specifically, defendants argue that if Curry Shaw adhered to the prescribed amounts of methadone, yet died as a result of methadone toxicity, his death was attributable to the inability of his liver to properly detoxify the methadone from his system and was not the natural consequence of his compensable injury. Therefore, defendant's contend the Commission improperly awarded death benefits for a non-work related medical condition. We disagree, and note that defendants failed to provide any legal authority for their argument.

With regard to the cause of Curry Shaw's death, the Commission made the following finding of fact:

> 17. The greater weight of the medical evidence further shows that decedent's insidious development of fatty liver disease gradually impaired his liver's metabolic efficiency so that his regular ingestion of methadone caused his death by methadone toxicity, even though he was taking therapeutic levels of methadone as prescribed. The severe fatty liver disease was a contributing factor in decedent's death, because as the disease worsened, it decreased decedent's metabolism of and tolerance to methadone, since his liver could no longer efficiently detoxify the methadone.

This Court has previously held

> the "work-related injury need not be the sole cause of the problems to render an injury compensable." *Hoyle v. Carolina Associated Mills*, 122 N.C. App. 462, 465, 470 S.E.2d 357, 359 (1996). "If the work-related accident 'contributed in some reasonable degree' to [the] plaintiff's disability, [he] is entitled to compensation." *Id.* at 466, 470 S.E.2d at 359 (citing *Kendrick v. City of Greensboro*, 80 N.C. App. 183, 187, 341 S.E.2d 122, 124, *disc. review denied*, 317 N.C. 335, 346 S.E.2d 500 (1986)).

Goforth v. K-Mart Corp., 167 N.C. App. 618, 622, 605 S.E.2d 709, 712 (2004).

> [Furthermore,] when a pre-existing, nondisabling, non-job-related condition is aggravated or accelerated by an accidental

> injury arising out of and in the course of employment . . . so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent.

Ard v. Owens-Illinois, 182 N.C. App. 493, 498, 642 S.E.2d 257, 260-61 (2007) (citation omitted and emphasis removed).

To assert that Curry Shaw's death was *solely* the result of a non-work related liver disease is an untenable argument. The toxic build-up of methadone prescribed to manage Curry Shaw's pain resulting from a compensable injury to a reasonable degree contributed to his death. Therefore, defendants' argument that Curry Shaw's death was solely attributable to his liver disease and was in no way the natural consequence of his compensable injury is overruled.

C

Lastly, defendants contend that the Commission's determination that Curry Shaw's death was proximately caused by his compensable injury is unsupported by medical expert testimony. Specifically, defendants argue that the evidence fails to support a direct or immediate relationship between Curry Shaw's death and the compensable injury he sustained over eight years earlier. We disagree.

The Commission made the following findings of fact:

> 4. . . . Dr. Pritchard began prescribing methadone to address decedent's back pain.
>
> . . .
>
> 10. . . . Toxicological measurements taken during the autopsy were . . . positive for methadone.
>
> . . .
>
> 11. All of [the] laboratory measurements upon autopsy confirmed that decedent died as the result of methadone toxicity. All of the forensic pathologist and medical examiners testifying in this case agreed that these levels of methadone were toxic and that decedent's cause of death was methadone toxicity.
>
> 12. Based on the toxic levels of methadone in decedent's system, Dr. Maryanne Gaffney-Kraft of the North Carolina Medical Examiner's Office amended decedent's death certificate in April 2009 to reflect that the cause of his death was acute

> methadone toxicity and that the manner of his death was accidental. Dr. Kraft is associate chief medical examiner and an expert in the field of forensic pathology and medical examination. Dr. Kraft testified that . . . [in] her expert opinion [] the methadone levels found in decedent's body were consistent with therapeutic dose for a man who had been taking methadone at the levels he was for four years. Dr. Kraft believed and the Full Commission finds that because plaintiff was prescribed methadone to treat his back pain, then the back pain was an indirect cause of death.

Curry Shaw's authorized treating physician, Dr. Pritchard, testified that he prescribed methadone to Shaw as a consequence of his work-related back injury and that, pursuant to Dr. Pritchard's prescription, Shaw used an increasing dosage of methadone for over four years. Following Shaw's death, an autopsy was performed and the results reviewed by Associate Chief Medical Examiner for the State of North Carolina Maryanne Gaffney-Kraft, D.O. Dr. Gaffney-Kraft provided the following testimony by deposition.

> Q. Do you have an opinion to reasonable degree of medical certainty in the field of medicine, which you practice, as to the cause of Mr. Curry Shaw's death?
>
> A. Yes, I do.
>
> Q. A. The cause of death of Mr. Curry Shaw is acute methadone toxicity.
>
> . . .
>
> It means that Mr. Curry had a level of methadone in his system, which is considered toxic, that causes death. The level, again, based on the blood work that was sent in with the—with the autopsy, we interpret that based on therapeutic levels, toxic levels, that we have through the state and through our toxicologist, and based on the level that he had, his level was considered in a toxic range, which means it would have caused his death.

Gaffney-Kraft, D.O., further testified that samples were taken from Shaw's aortic blood, his femoral blood, and his liver. Shaw had a level of 1.9 milligrams per liter of methadone in his femoral blood, 3.3 milligrams per liter in his aorta, and 8.0 milligrams per kilogram in his liver. Gaffney-Kraft testified that these levels were consistent with Curry Shaw's prescribed dosage and duration of methadone use. The

medical examiner found no other grounds on which to base Curry Shaw's death.

> Q. If we were to ask you to [] assume that [Curry Shaw] was taking methadone because of his back pain and his back injury, could you—or do you have an opinion as to whether the back pain was an indirect cause of his death?
>
> A. Yes. If he was prescribed methadone to treat back pain, then the back pain would have to be an indirect cause of death.

As there is competent evidence from a witness admitted as an expert in the fields of forensic pathology and medical examination to support the Commission's finding of a direct relationship between the compensable injury Curry Shaw sustained on 12 July 2000 and his death, defendants' argument is overruled.

Affirmed.

Chief Judge MARTIN and Judge CALABRIA concur.

RAYMOND MALLOY, Employee, Plaintiff v. DAVIS MECHANICAL, INC., Employer, and STONEWOOD INSURANCE COMPANY, Carrier, Defendants

No. COA11-476

(Filed 20 December 2011)

1. Workers' Compensation—findings of fact—improper consideration of medical records produced after mediation agreement reached

The Industrial Commission erred in a workers' compensation case by its finding of fact 14. The Commission was not permitted to consider any medical records produced after the mediation agreement was reached. The order was reversed and remanded for reconsideration based on the circumstances, and evidence pertaining to those circumstances that existed at the time the mediation agreement was signed.

2. Workers' Compensation—mediation agreement—improper consideration of child support lien

The Industrial Commission erred in a workers' compensation case by considering plaintiff's child support lien when determin-

ing whether the mediation agreement was fair and just. On remand, the Commission was not permitted to consider plaintiff's outstanding child support lien with regard to its fair and just determination.

3. Appeal and Error—preservation of issues—workers' compensation mediation agreement—issue not considered—case remanded

Although defendants contended the Industrial Commission erred in a workers' compensation case by determining that the mediation agreement was not "fair and just," the Court of Appeals did not address this issue since the Commission's determination may change on remand after properly considering the circumstances that existed at the time the mediation agreement was signed.

4. Appeal and Error—preservation of issues—motion to reconsider and amend—issue not considered—case remanded

Although defendants contend the Industrial Commission erred in a workers' compensation case by denying their motion to reconsider and amend the opinion and award since the findings of fact related to medical records and testimony tended to resolve the issue of compensability, the Court of Appeals did not address this argument since the case was remanded for a full reconsideration by the Commission.

Appeal by defendants from opinion and award entered 29 December 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 October 2011.

The Law Offices of William K. Goldfarb, by William K. Goldfarb, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Bambee B. Blake and Ginny P. Lanier, for defendants-appellants.

HUNTER, Robert C., Judge.

Davis Mechanical, Inc. ("Davis") and Stonewood Insurance Company (collectively "defendants") appeal from the Industrial Commission's opinion and award in which the Commission determined that the mediated settlement agreement reached between defendants and Raymond Malloy ("plaintiff") was not fair and just. Defendants argue that the Commission erred in its determination, or, alternatively, that the Commission erred in denying defendants'

motion to reconsider and amend the opinion and award. After careful review, we reverse and remand.

Background

On the date of injury, plaintiff was employed as a truck driver for Davis. Plaintiff's job required him to deliver animal feed to farms and leave receipts for the purchaser. On 19 August 2008, plaintiff inadvertently disturbed a hornet's nest while placing a receipt in a customer's mailbox. He was stung approximately 29 times. Plaintiff subsequently suffered an allergic reaction and was hospitalized on 20 August 2008. Plaintiff was in the hospital for seven days, during which time he had recurrent seizures brought on by "significant envenomation associated with his hornet bites[.]" Plaintiff continues to have seizures and has not returned to work since 19 August 2008.

Plaintiff received temporary total disability benefits from defendants from 18 September 2008 through 8 October 2008.[1] Defendants subsequently denied plaintiff's claim and plaintiff requested a hearing before the Commission.

On 21 April 2009, the parties participated in a mediation. Plaintiff was represented by counsel. At the mediation, plaintiff presented medical records and bills which showed that plaintiff had incurred $56,216.33 in medical expenses related to his hospitalization and seizure condition. His personal insurance carrier paid a significant portion of these medical expenses; however, plaintiff was responsible for paying $11,525.00 out of pocket. The parties agreed to settle the matter for a total lump sum of $10,000.00. The mediation agreement, or "clincher" agreement, explicitly stated that defendants were "not undertaking to pay any medical expenses[.]" The agreement further stated that plaintiff's settlement would be held in trust by plaintiff's attorney because it was subject to a child support lien. The terms of the signed mediation agreement were incorporated into an "Agreement of Final Settlement and Release" and sent to plaintiff for his signature. Plaintiff refused to sign the agreement. On 4 June 2009, defendants requested an expedited hearing before the Commission, seeking enforcement of the mediation agreement. Plaintiff's counsel withdrew from the matter and plaintiff retained a new attorney.

On 22 December 2009 and 19 January 2010, this matter was heard before the Deputy Commissioner. The only issue for resolution was whether the mediation agreement was enforceable. On 20 May 2010,

1. These payments were made without prejudice per Form 63.

the Deputy Commissioner issued an opinion and award concluding that: (1) the mediation agreement contained the necessary language and substance required by N.C. Gen. Stat. § 97-17 (2009) and Rule 502 of the North Carolina Workers' Compensation Rules; (2) there was insufficient evidence that plaintiff lacked the mental capacity to enter into the mediation agreement; and (3) the mediation agreement was not fair and just. Consequently, the Deputy Commissioner held that the mediation agreement was unenforceable.

Defendants appealed to the Full Commission, and, on 20 December 2010, the Commission entered an opinion and award affirming the opinion and award of the Deputy Commissioner with minor modifications. The Commission ultimately concluded:

> After careful review of the facts and the applicable law, the Full Commission concludes that the Compromise Settlement Agreement entered into by the parties in this case is not "fair and just" to plaintiff and the agreement therefore cannot be approved. The Mediated Settlement Agreement sum of $10,000.00 is not fair and just to plaintiff considering plaintiff's claim in the most favorable manner, as well as the extent of his outstanding medical expenses and outstanding child support lien.

Defendants timely appealed to this Court.

Standard of Review

"[O]ur role in reviewing decisions of the Commission is strictly limited to the two-fold inquiry of (1) whether there is competent evidence to support the Commission's findings of fact; and (2) whether these findings of fact justify the Commission's conclusions of law." *Foster v. Carolina Marble and Tile Co.*, 132 N.C. App. 505, 507, 513 S.E.2d 75, 77, *disc. review denied*, 350 N.C. 830, 537 S.E.2d 822 (1999). "The Commission's findings will not be disturbed on appeal if they are supported by competent evidence even if there is contrary evidence in the record. However, the Commission's conclusions of law are reviewable *de novo* by this Court." *Hawley v. Wayne Dale Constr.*, 146 N.C. App. 423, 427, 552 S.E.2d 269, 272, *disc. review denied*, 355 N.C. 211, 558 S.E.2d 868 (2001) (internal citations omitted).

Discussion

I.

Defendants argue that: (1) finding of fact 14 was unsupported by the evidence; (2) the Commission improperly relied on a medical record that was generated after the mediation; (3) the Commission

improperly considered plaintiff's child support obligation; and (4) the Commission erred in concluding as a matter of law that the mediation agreement was not fair and just. We hold that finding of fact 14 was supported by the evidence; however, we agree with defendants that the Commission improperly considered the medical record and plaintiff's child support obligation. Consequently, we remand this case to the Commission for reconsideration of whether the mediation agreement is fair and just based on the evidence available at the time of the mediation.

"The Commission recognizes . . . two forms of voluntary settlements, namely, the compensation agreement in uncontested cases, and the compromise or 'clincher' agreement in contested or disputed cases." *Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 430, 444 S.E.2d 191, 193 (1994); *Chaisson v. Simpson*, 195 N.C. App. 463, 474, 673 S.E.2d 149, 158 (2009) ("A clincher or compromise agreement is a form of voluntary settlement recognized by the Commission and used to finally resolve contested or disputed workers' compensation cases." (citation and quotation marks omitted)). It is well established that "[c]ompromise agreements are governed by the legal principles applicable to contracts generally." *Dixie Lines v. Grannick*, 238 N.C. 552, 556, 78 S.E.2d 410, 414 (1953); *see Lemly v. Colvard Oil Co.*, 157 N.C. App. 99, 103, 577 S.E.2d 712, 715 (2003) ("Compromise settlement agreements, including mediated settlement agreements, are governed by general principles of contract law." (citation and quotation marks omitted)).

Pursuant to N.C. Gen. Stat. § 97-17(a) and Rule 502, all settlement agreements must be approved by the Commission. The Commission must undertake a "full investigation" to determine that a settlement agreement "is fair and just[.]" *Vernon*, 336 N.C. at 432, 444 S.E.2d at 195. "The conclusion the agreement is fair and just must be indicated in the approval order of the Commission and must come after a full review of the medical records filed with the agreement submitted to the Commission." *Lewis v. Craven Reg'l Med. Ctr.*, 134 N.C. App. 438, 441, 518 S.E.2d 1, 3 (1999), *aff'd per curiam*, 352 N.C. 668, 535 S.E.2d 33 (2000).

[1] Here, defendants first argue that the Commission's finding of fact 14 was not supported by competent evidence. Finding 14 states:

> The Compromise Settlement Agreement prepared by defendants and provided to plaintiff pursuant to the April 21, 2009 Mediated Settlement Agreement obligated plaintiff to "bear responsibility for the unpaid bills arising out of this incident."

> Furthermore, the Compromise Settlement Agreement represents the unpaid medical bills to be "approximately $11,525.00 as evidenced by the attached medical bill chart which is marked as Exhibit 1 and hereby incorporated by reference." However, hearing testimony and other evidence indicates that the actual amount may be higher, in addition to the fact that plaintiff has continued to incur medical expenses. Plaintiff's settlement proceeds were also subject to a child support lien in excess of $11,000.00.

Defendants contend that the finding inaccurately states that there was an inconsistency between Exhibit 1 and what was presented at the hearing. Defendants misinterpret the finding, which merely recognizes that plaintiff has incurred additional medical bills since the mediation agreement was signed. The evidence supports this finding. At the hearing, plaintiff submitted documentation that his medical expenses had increased to $86,422.56 and that he owed $12,131.50 out of pocket. Defendants' argument that this finding is unsupported by the evidence is without merit; however, as discussed *infra*, the Commission improperly considered evidence, including medical expenses, compiled after the mediation.

Defendants further argue that the Commission improperly found as fact that Dr. Steven Karner wrote a letter on 4 May 2009, after the mediation, in which he stated that plaintiff's "return to work for the foreseeable future is unlikely." Defendants contend that the Commission is not permitted to consider any medical records produced after the mediation agreement is reached. We agree.

The Commission reviewed medical records, evidence of medical expenses, and depositions of medical experts generated after the mediation occurred, but prior to the hearing, that pertained to plaintiff's condition after the mediation agreement was signed. We hold that the Commission improperly examined this evidence in relation to its fair and just determination.[2] The Commission is charged with conducting a "full investigation" to determine that a settlement agreement "is fair and just," *Vernon*, 336 N.C. at 432, 444 S.E.2d at 195, but this type of investigation is limited to the circumstances that existed at the time of the settlement agreement. In *Lewis*, 134 N.C. App. at

2. It is clear from the Commission's findings that it properly considered the depositions and medical evidence regarding plaintiff's mental competency *at the time of the mediation.* The Commission found that, "there is insufficient evidence to find by the greater weight that plaintiff lacked the requisite mental capacity to execute the Mediated Settlement Agreement on April 21, 2009."

441, 518 S.E.2d at 3, this Court recognized that the Commission must review the medical records filed *with the settlement agreement*. In *Chaisson*, 195 N.C. App. at 483, 673 S.E.2d at 164 (emphasis added), we held "that, based on the evidence available to the parties *at the time of the settlement negotiation*, the Commission correctly concluded that the parties' decision to settle plaintiff's claim for $97,500 was fair and just . . . ." Moreover, N.C. Gen. Stat. § 97-17 (b)(2) states that the settlement agreement must contain a list of medical expenses "to the date of the settlement agreement." Consequently, the Commission is required to evaluate the settlement or mediation agreement based strictly on the evidence available at the time the agreement was reached. To hold otherwise would potentially permit either party to avoid their contractual obligation should new circumstances arise prior to approval by the Commission. *See Glenn v. McDonald's*, 109 N.C. App. 45, 49, 425 S.E.2d 727, 730 (1993) (stating that the Commission may not "set aside an agreement merely because one party to the agreement acquired new information or evidence"). We must, therefore, reverse the Commission's order and remand for reconsideration based on the circumstances, and evidence pertaining to those circumstances, that existed at the time the mediation agreement was signed. Dr. Karner's 4 May 2009 letter should not be considered on remand.

[2] Additionally, defendants argue that the Commission should not have considered plaintiff's child support lien when determining whether the mediation agreement was fair and just. We agree. The mediation agreement stated: "Upon approval of the clincher by NCIC, all monies payable to Raymond Malloy personally will be held in trust with Plaintiff's attorney pending the result of a petition to the court . . . requesting an order on disbursal concerning his child support arrearage and the lien attaching to this settlement." Undoubtedly, this type of arrangement is not unusual where there is a lien that attaches to any award a plaintiff may receive in a civil action. It does not appear that the parties were contracting to pay plaintiff's child support arrears. Plaintiff has not cited a case or statute, nor have we found one, that would suggest that the Commission should consider the non-medical debts of the plaintiff when examining the mediation or settlement agreement. We fail to see how plaintiff's child support obligation relates to the fair and just determination. On remand, the Commission is not permitted to consider plaintiff's outstanding child support lien with regard to its fair and just determination.

[3] Finally, defendants argue that the Commission erred in ultimately determining that the mediation agreement was not "fair and just." We

need not address this issue since the Commission's determination may change on remand after properly considering the circumstances that existed at the time the mediation agreement was signed.[3] Nevertheless, we wish to emphasize several points.

First, the Commission in this case "consider[ed] plaintiff's claim in the most favorable manner[.]" We do not believe this is the correct standard since plaintiff's claim was a contested claim. There is a difference between an uncontested claim and a contested claim. Where a claim is uncontested by the employer and there are multiple remedies (such as temporary disability benefits and permanent disability benefits), "[t]he employee is allowed to select the more favorable remedy" when reaching a settlement. *Kyle v. Holston Group*, 188 N.C. App. 686, 696, 656 S.E.2d 667, 673 (quoting *Effingham v. Kroger Co.*, 149 N.C. App. 105, 113-14, 561 S.E.2d 287, 293 (2002)), *disc. review denied*, 362 N.C. 359, 662 S.E.2d 905 (2008); *see Lewis*, 134 N.C. App. at 441, 518 S.E.2d at 3 ("The agreement is fair and just only if it allows the injured employee to receive the most favorable disability benefits to which he is entitled."). In that situation, the Commission is, in a sense, considering the plaintiff's claim in the most favorable manner in order to ensure that the plaintiff is receiving the maximum remedy possible in an uncontested claim. When a claim is contested, however, the plaintiff is not able to select the more favorable remedy. In that situation, the plaintiff is faced with the possibility of receiving *no compensation* if he or she proceeds to a hearing on compensability and does not prevail. The plaintiff must scrutinize the validity of his or her claim and determine if a settlement would be in his or her best interest. Consequently, because this is a contested claim, we hold that the Commission in this case improperly "consider[ed] plaintiff's claim in the most favorable manner[.]"

Rule 502 states that before the Commission accepts a compromise settlement agreement, it must determine whether the agreement is "fair and just and in the best interest of all parties . . . ." I.C. Rule 502(1) (2011); N.C. Gen. Stat. § 97-17(b)(1); *see Chaisson*, 195 N.C. App. at 482-83, 673 S.E.2d at 163-64 (applying Rule 502 and holding that the compromise agreement "was fair and just and in the best interest of the parties"). On remand, the Commission must review the mediation agreement and determine if it is fair and just and in the best interest

3. To be clear, we are not holding that the Commission is never permitted to review medical records or depositions of medical experts that were generated after the mediation. That evidence is properly considered so long as it pertains to the circumstances that existed at the time the contract was signed.

of all parties, as required by statute and Rule 502; however, plaintiff's claim should not be considered "in the most favorable manner[.]"

We recognize that the fair and just determination is somewhat subjective in nature. Neither the statutory Workers' Compensation Act nor the Workers' Compensation Rules provide a specific procedure or guideline for deciding what is fair and just. While Rule 502 sets forth what must be contained in a compromise agreement, it does not specify how the Commission should go about its fair and just determination. The Commission must necessarily take into account the validity of the plaintiff's claim, despite the fact that the issue of compensability is not before it. In many instances, the amount of the settlement reached reflects how the parties perceive the viability of the plaintiff's claim. The Commission is not blind to this reality, but it must determine for itself whether the settlement is fair and just based on the evidence before it.

Next, we further recognize that a situation may arise where the compromise agreement reached does not fully compensate a plaintiff for his or her medical expenses. Such a settlement may still be deemed fair and just considering the fact that the plaintiff may not have been able to obtain any compensation at all had he or she pursued a hearing on compensability.

Finally, we wish to point out that our Courts have disapproved of employers settling cases with plaintiffs who were "unrepresented and unaware" of the law at the time of settlement. *Kyle*, 188 N.C. App. at 696, 656 S.E.2d at 674. Plaintiff, in this case, was represented by able counsel who testified that workers' compensation cases comprise 30 to 40% of his practice, and that he assisted plaintiff in weighing the decision to proceed to a hearing on compensability or accept the mediated $10,000.00 settlement offer.

II.

[4] Defendants also argue that the Commission erred in denying their motion to reconsider and amend the opinion and award. Defendants claim that the findings of fact related to medical records and testimony tended to resolve the issue of compensability. We need not address this argument since we remand for a full reconsideration by the Commission.

Reversed and Remanded.

Judges McGEE and CALABRIA concur.

JUDY ST. JOHN, PLAINTIFF, v. TAMMY BRANTLEY, DEFENDANT; JUDY ST. JOHN, PLAINTIFF, v. VICKY BRANTLEY, DEFENDANT

No. COA11-635; NO. COA11-643[1]

(Filed 20 December 2011)

1. Evidence—prior crimes or bad acts—relevancy

The trial court did not err in a stalking case by considering defendants' actions prior to 10 December 2010 because they were taken with knowledge of plaintiff's role in the charges against Tammy Brantley and were highly relevant.

2. Stalking—civil no-contact order—engaging in criminal behavior

Although not required for issuance of a civil no-contact order, the trial court did find that defendants engaged in criminal behavior toward plaintiff.

3. Stalking—intimidating witness—harassment—unlawful conduct

Defendants' actions to intimidate plaintiff, a witness in a pending criminal case, were harassment under N.C.G.S. § 14-277.3A(b)(2), which in turn constituted stalking and unlawful conduct.

4. Stalking—civil no-contact order—intimidating a witness—specific intent

The trial court did not err by concluding that intimidating a witness in a criminal trial encompassed all three definitions and fully reflected the specific intent required under N.C.G.S. § 50C-1(6) for a civil no-contact order.

5. Stalking—civil no-contact order—statutorily-required findings

The trial court made the required findings under N.C.G.S. § 50C-1(6) to enter the no-contact orders.

6. Evidence—prior crimes or bad acts—motive

The trial court did not err in a stalking case by considering the circumstances surrounding defendant Tammy Brantley's alleged assault on her sister and plaintiff's role in the subsequent

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1. Pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure and based on the identity of the legal issues raised, COA11-635 and COA11-643 are consolidated for decision on appeal.

criminal charges because it explained defendants' motive in harassing plaintiff.

Appeal by Defendants from orders entered 24 February 2011 by Judge Charles M. Vincent in Pitt County District Court. Heard in the Court of Appeals 28 November 2011.

The Foster Law Firm, P.A., by Jeffery B. Foster, for Plaintiff.

Sutton Law Offices, P.A., by David C. Sutton, for Defendants.

STEPHENS, Judge.

On 10 December 2010, Plaintiff Judy St. John filed complaints for civil no-contact orders against Defendants Tammy Brantley and Vicky Brantley, who are sisters. On the same date, the trial court issued *ex parte* temporary civil no-contact orders restraining Defendants from contacting or harassing Plaintiff. Following a hearing on 16 February 2011, on 24 February 2011, *nunc pro tunc* 16 February 2011, the court entered one-year civil no-contact orders against both Defendants.

At the request of Plaintiff, Defendants, and the State, the court heard the civil no-contact matters and a related misdemeanor criminal case against Tammy at the same time. The evidence tended to show the following: Plaintiff lives across the street from the home where Defendants live with their mother. Defendants had a volatile relationship with each other as reported by Plaintiff and other neighbors. On 23 September 2010, Plaintiff heard Tammy screaming at Vicky and threatening to kick her out of the house. Later that morning, Tammy came outside and began shouting about "[s]ocial [s]ervices" and said "that bitch across the street had called [social services,]" referring to Plaintiff. Plaintiff had not called the Pitt County Department of Social Services ("DSS") on that occasion, but did call on 24 September to report her concerns that Tammy was mistreating Vicky and might have been locking her out of their house overnight.

On 2 October 2010, Plaintiff looked out her front window and saw Tammy push her sister off their front porch. Tammy then began singing "Christian songs" loudly as she beat her sister with an object Plaintiff could not identify. Plaintiff called the Greenville Police Department ("GPD"), but could not wait for their arrival due to a doctor's appointment. As Plaintiff left for her appointment, she saw a neighbor who was planning to go to Defendants' home and tell them to be quiet. Plaintiff told him she had called police. As Plaintiff and

her neighbor spoke, Defendants were "screaming at [them]." On her way to the appointment, Plaintiff saw several other neighbors who had heard the commotion, and Plaintiff also told them that she had already called police.

Plaintiff called a GPD detective about the incident a few days later. After speaking with Plaintiff, the detective obtained a warrant and arrested Tammy on 8 October 2010 for misdemeanor assault. Plaintiff's name did not appear on the warrant. Defendants denied any assault took place and the criminal charge was dismissed. The charge was reinstated on 8 November 2010, leading again to Tammy's arrest. Plaintiff was listed as the complainant on the second warrant, which was issued 10 December 2010.

Plaintiff testified that after her call to police, Defendants began harassing her. On 3 October, Plaintiff received a message on her Facebook account with the subject line, "Did you know you are committing a sin?" On 11 October, Vicky came to Plaintiff's home and threatened to sue Plaintiff for libel. Vicky also reported that a police officer had told Defendants that Plaintiff had a recording of the 2 October assault. Plaintiff responded that she did not have a recording, but had given police a statement about the assault. On 12 October, Vicky returned to Plaintiff's home to tell her she knew Plaintiff was going to testify against Tammy. Later that day, both Defendants came to Plaintiff's house. They told Plaintiff they had seen young men on her carport, knew who the men were but would not identify them to Plaintiff, and stated they did not want Plaintiff to think Defendants were responsible if anything in Plaintiff's carport was damaged. Plaintiff believed that Defendants were planning to vandalize her property and wanted to plant a false cover story about the alleged young men. Plaintiff planned to have motion-sensor lights installed outside her home and moved her grill from her porch because she feared Defendants might use it to set her house on fire.

On 10 December, Vicky rang Plaintiff's doorbell. When Plaintiff would not answer, Tammy pounded on the door and yelled loudly at Plaintiff. Later that day, Tammy returned, screaming "I know you're in there," and pounding on Plaintiff's door until pictures on the wall shook. Plaintiff testified, "I believe if I had opened the door she would have pushed through and beat me." On 11 December, Tammy knocked on Plaintiff's door again and when Plaintiff refused to answer, Tammy stood on Defendants' porch and screamed loudly about committing suicide. The following day, Tammy followed Plaintiff in her car when Plaintiff was running errands. Plaintiff testified she did "not feel safe"

and stated, "I think if I go outside, except to get in my car, Tammy will try to harm me."

In each of the orders, the trial court made detailed findings of fact about the behaviors Defendants engaged in against Plaintiff, as well as the criminal charges Tammy faced and Plaintiff's role as a witness in that matter. The court specifically found that Defendants' behavior "constitute[d] the unlawful conduct of intimidating a witness in a pending criminal case[.]" Based on these findings, the court concluded that Defendants "committed acts of unlawful conduct against [P]laintiff." Defendants appeal, arguing that the trial court erred in entering the no-contact orders. We disagree and affirm.

Discussion

"A trial judge, sitting without a jury, acts as fact finder and weigher of evidence. Accordingly, if [the court's] findings are supported by competent evidence, they are binding on appeal, although there may be evidence that may support findings to the contrary." *S. Bldg. Maint. v. Osborne*, 127 N.C. App. 327, 331, 489 S.E.2d 892, 895 (1997) (citation omitted). Here, Defendant does not challenge the content of any findings of fact, and thus, they are binding on appeal.

"Upon a finding that the victim has suffered unlawful conduct committed by the respondent, the court may issue temporary or permanent civil no-contact orders as authorized in this Chapter." N.C. Gen. Stat. § 50C-5(a) (2009). Two types of "unlawful conduct" can support the entry of a civil no-contact order under section 50C-5(a): nonconsensual sexual conduct[2] or stalking. N.C. Gen. Stat. § 50C-1(7) (2009). The statute further defines stalking as

> [o]n more than one occasion, following or otherwise harassing, as defined in G.S. 14-277.3A(b)(2) [the criminal stalking statute], another person without legal purpose with the intent to do any of the following:
>
> a. Place the person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.
>
> b. Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment and that in fact causes that person substantial emotional distress.

2. Here, there are no allegations of sexual conduct by Defendants.

N.C. Gen. Stat. § 50C-1(6). This Court has emphasized that entry of a civil no-contact order requires not only findings of fact that show the defendant harassed the plaintiff, but also that the "defendant's harassment was accompanied by the specific intent" described in section 50C-1(6)(a) or (b). *Ramsey v. Harman*, 191 N.C. App. 146, 149, 661 S.E.2d 924, 926 (2008). As for behavior that constitutes harassment, section 50C-1(6) refers to the definition contained in our criminal stalking statute: "Knowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14-277.3A(b)(2) (2009).

Relevancy of Findings

[1] Defendants first argue that most of the court's findings are irrelevant because they pertain to Defendants' actions prior to 10 December 2010 when the second warrant for Tammy's arrest was issued. We disagree.

Because Plaintiff's name did not appear on the first warrant, issued on 8 October 2010, Defendants contend they could not have known Plaintiff would be a witness against Tammy and thus cannot have been harassing her for purposes of witness intimidation. However, at the hearing, Plaintiff testified that she told Vicky on 11 October that she had called the police and made a written report about the assault. In addition, as the court found in finding of fact 7, the following day, Vicky told Plaintiff that Defendants knew Plaintiff was going to testify against them. Thus, Defendants' actions prior to 10 December were taken with knowledge of Plaintiff's role in the charges against Tammy and were highly relevant. This meritless argument is overruled.

Requirement of Criminal Conduct by Defendants

[2] Defendants next argue that because Plaintiff did not testify that Defendants committed "criminal conduct" against her, Defendants cannot have engaged in "unlawful conduct" as required for issuance of a civil no-contact order. As noted *supra*, "unlawful conduct" under section 50C-1(a) does not require commission of a crime against a plaintiff. Instead, "unlawful conduct" includes harassment which the defendant intends to cause the plaintiff "reasonable fear" for her safety or "substantial emotional distress[.]" N.C. Gen. Stat. § 50C-1(6). Further, we note that in unchallenged finding of fact 16, the court found that Defendants' behavior "constitute[d] the unlawful conduct of intimidating a witness in a pending criminal case," which is a Class

H felony in this State. N.C. Gen. Stat. § 14-226(a) (2009). Thus, although not required for issuance of a civil no-contact order, the trial court here *did* find that Defendants engaged in criminal behavior toward Plaintiff.[3] This meritless argument is overruled.

Statutory Basis for Civil No-contact Orders

[3] Defendants also argue that "intimidating a witness in a pending criminal case" does not fall into either of the two categories of behavior defined as unlawful conduct sufficient to support entry of a civil no-contact order. We disagree.

As discussed above, under Chapter 50C, unlawful conduct includes stalking, *see* N.C. Gen. Stat. § 50C-1(7), which in turn includes harassment as defined in our criminal stalking statute. See N.C. Gen. Stat. § 50C-1(6). The criminal stalking statute defines harassment as "[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14-277.3A(b)(2). We hold that, although Chapter 50C does not specifically use the term "witness intimidation," the definitions of "unlawful conduct" contained therein are more than broad enough to encompass such behavior.

Here, Defendants' "knowing conduct" was directed at Plaintiff and terrorized her. In addition, not only was Defendants' conduct toward Plaintiff without any legitimate purpose, the trial court specifically found that Defendants undertook their course of conduct for an *illegitimate* and criminal purpose, to wit, to discourage Plaintiff from testifying in Tammy's pending criminal case. Thus, Defendants' actions to intimidate Plaintiff were "harassment" under section 14-277.3A(b)(2), which in turn constituted "stalking" and thus "unlawful conduct" under Chapter 50C. The plain language of Chapter 50C does not require *any* particular purpose behind a defendant's stalking or harassment, beyond an intent to frighten a plaintiff or cause her severe emotional distress. Nor does Chapter 50C require that the trial court use the term "harassment" or "stalking" in its findings of fact to support a civil no-contact order. Rather, the court need only find "that the victim has suffered unlawful conduct committed by the [defendant.]" N.C. Gen. Stat. § 50C-5(a). The court so found here. Accordingly, this meritless argument is overruled.

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3. At the conclusion of the hearing, the trial judge remarked, "It's a wonder that they weren't charged with a felony of harassing or intimidating a witness." [T130]

Specific Intent

[4] In a related argument, Defendants assert that the court's findings that they "intimidate[d] a witness in a pending criminal case" were insufficient to support the no-contact orders because witness intimidation does not reflect the specific intent required of Defendants under section 50C-1(6). We disagree.

In making this contention, Defendants rely on *Ramsey*, *supra*, in which this Court reversed a civil no-contact order where the trial court found that the defendant had harassed the plaintiff, but made no findings about the defendant's intent. 191 N.C. App. at 148-49, 661 S.E.2d at 925-26. We held that a mere finding of harassment is insufficient because

> [t]he statute requires the trial court to further find [the] defendant's harassment was accompanied by the specific intent to either: (1) place the person in fear for their safety, or the safety of their family or close personal associates or (2) cause the person substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment and in fact cause that person substantial emotional distress.

Id. at 149, 661 S.E.2d at 926 (citing N.C. Gen. Stat. § 50C-1(6)).

Here, in contrast to *Ramsey*, the court found that Defendants intimidated Plaintiff because she was to be a witness in the criminal case against Tammy. "Intimidate" means "to make timid or fearful[,]" "inspire or affect with fear[,]" and "to compel action or inaction (as by threats)[.]" Webster's Third New International Dictionary (unabridged 2002). Intimidating a witness in a criminal trial, as the court found occurred here, encompasses all three of these definitions and fully reflects the specific intent required under section 50C-1 (6). This meritless argument is overruled.

Lack of Required Findings

[5] Defendants next argue that the trial court erred in entering the no-contact orders because the orders lacked statutorily-required findings. We disagree.

Defendants contend that the no-contact orders were erroneously entered because there were no findings that Plaintiff suffered substantial emotional distress and that the evidence would not support any such findings. However, under the statute, entry of a civil no-contact order is proper, not only based on findings that the plaintiff has

suffered substantial emotional distress, but also when a defendant harasses a person with the intent to "[p]lace the person in reasonable fear . . . for the person's safety[.]" N.C. Gen. Stat. § 50C-1(6)(a).

Here, Plaintiff testified in detail about her fear of Defendants, including, *inter alia*, that Plaintiff: (1) "believe[d] if I had opened the door [Tammy] would have pushed through and beat me[,]" (2) did "not feel safe[,]" and (3) worried that "if I go outside, except to get in my car, Tammy will try to harm me." In finding of fact 9, the court found that Plaintiff had installed motion-sensor lighting outside her home and moved her grill out of fear that Defendants were planning to vandalize or burn down her house. In finding of fact 11, the court found that when Defendants had pounded on Plaintiff's door and yelled at her, "Plaintiff was afraid[.]" In finding of fact 16, the court found that Defendants' actions were undertaken in order to intimidate Plaintiff because she planned to testify in Tammy's criminal trial. These findings comport with the statute's requirements and support entry of the no-contact orders. This meritless argument is overruled.

Reliance on Inadmissible Evidence

[6] Defendants last argue that the court's findings about the circumstances surrounding Tammy's alleged assault on her sister were based on evidence barred by Rule 404(b). We disagree.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Because Defendants did not object to Plaintiff's testimony about Tammy's assault on Vicky, they have waived their right to appellate review of this issue. Further, even if Defendants had preserved this issue, they would not prevail.

Under Rule 404(b),

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009). Evidence about Tammy's assault on Vicky and Plaintiff's role in the subsequent criminal

charges explained Defendants' motive in harassing Plaintiff, and thus was not barred by Rule 404(b). Defendants' argument lacks merit and is overruled. The trial court's civil no-contact orders are

AFFIRMED.

Chief Judge MARTIN and Judge ELMORE concur.

STATE OF NORTH CAROLINA v. BRANDON JASON BROWN

No. COA11-709

(Filed 20 December 2011)

1. Appeal and Error—writ of certiorari—mootness—right to appeal denial of motion to suppress—notice—specificity

Defendant preserved his right to appeal a motion to suppress in a driving while impaired case, and thus, the Court of Appeals dismissed his petition for writ of *certiorari* as moot. While it would have been easiest if defendant had stated in the transcript of plea that he was reserving his right to appeal the court's denial of his motion to suppress under N.C.G.S. 15A-979(b), defendant's notice was sufficiently specific to avoid waiver of appellate review.

2. Search and Seizure—motion to suppress evidence—impairment—fruit of illegal Terry stop—reasonable articulable suspicion

The trial court erred in a driving while impaired case by denying defendant's motion to suppress evidence of his alleged impairment because the evidence was the fruit of an illegal stop. The officer's reasoning for pulling over defendant's vehicle did not amount to the reasonable, articulable suspicion necessary to warrant a *Terry* stop.

Appeal by defendant from judgment entered 27 January 2011 by Judge James U. Downs in Henderson County Superior Court. Heard in the Court of Appeals 10 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General Jess D. Mekeel, for the State.

William B. Gibson for defendant appellant.

McCULLOUGH, Judge.

Brandon Jason Brown ("defendant") appeals from the denial of his motion to suppress evidence of his alleged impairment. For the reasons discussed herein, we agree with defendant and reverse.

I. Background

On the night of 6 November 2009, around 9:00 or 10:00 p.m., two black males entered a Dollar General Store located on Highway 64 East in Henderson County, fired shots, robbed the store, and fled on foot. In response to the armed robbery, Sergeant Lowell Griffin ("Sgt. Griffin") of the Henderson County Sheriff's Department continued to survey the Edneyville area surrounding the Dollar General in search of the two suspects. Around 2:00 a.m. the same night, after searching for almost four hours, Sgt. Griffin backed his cruiser into "T.J. Trail," a rural road intersecting with Highway 64 not far from the Dollar General.

Soon thereafter, Sgt. Griffin noticed lights of an oncoming vehicle coming down Highway 64. The vehicle came to a stop on the side of Highway 64 near a wooded area between the Dollar General and Sgt. Griffin on T.J. Trail. Sgt. Griffin rolled his window down and heard yelling and a car door slam. He then observed the car "accelerate rapidly" past him. Sgt. Griffin decided to follow the vehicle under the suspicion that the suspects could be in the car. After following the vehicle for over a mile, Sgt. Griffin activated his blue lights and pulled the vehicle over.

Sgt. Griffin called for backup and then approached the driver's side of the car. As soon as he reached the back of the car he could tell that the occupants were Caucasian. Upon reaching the driver's side window, he also immediately "smelled the odor of alcohol from within the vehicle" and asked defendant, who was driving, to exit the car. Sgt. Griffin and Deputy Terry Patterson had defendant separately blow into two Alco-sensors, which both showed a positive indication for alcohol. They subsequently placed defendant under arrest.

Defendant filed a Notice of Intention to Move to Suppress the stop on 17 June 2010. He filed a motion to suppress on 11 October 2010 and the case was tried later the same day before the Honorable

Mack Brittain in Henderson County District Court. The trial court denied the motion and defendant pled guilty. The trial court imposed a 60-day suspended sentence under Level V. Defendant appealed the denial of his motion to suppress to superior court.

On 14 January 2011 in superior court, defendant filed a pretrial motion to suppress the stop and any fruits thereof as unconstitutional. The trial court held a pretrial hearing on 24 January 2011, regarding the motion in which Sgt. Griffin stated, "my thought process at that point was that the vehicle was possibly picking up robbery suspects, and I wanted to investigate the vehicle for that reason." Sgt. Griffin did not have a tag number or vehicle description for a getaway car for the robbery suspects. Sgt. Griffin also testified in the pretrial hearing that he was not investigating the vehicle for "a Chapter 20 violation" at the time, but once defendant exited the car he ruled him out as a robbery suspect and the investigation turned to defendant "for suspicion of driving while impaired." The trial court denied defendant's motion to suppress and the case came to trial on 27 January 2011.

At trial, the State presented evidence and upon completion of the State's evidence, defendant made a motion to dismiss which the trial court denied with defendant's exception noted. Defendant renewed his motion to suppress, which the trial court denied. Defendant subsequently withdrew his plea of not guilty and entered a plea of guilty. At this point defense counsel stated that he "would ask the Court to allow me to say to the record that [defendant] would like to preserve any appellate issues that may stem from the motions in this trial." The trial court answered by stating, "All right, let me do some findings in this last one[,]" referring to the renewed motion to suppress. The trial court proceeded to orally enter findings of fact regarding its denial of defendant's renewed motion to suppress and then questioned defendant pursuant to a Transcript of Plea. Defendant provided a factual basis for the plea and the trial court again imposed a 60-day suspended sentence under Level V. Defendant gave oral notice of appeal in open court.

II. Analysis

[1] Defendant raises a single issue on appeal of whether or not the trial court erred in denying his motion to suppress evidence of his alleged impairment based on the grounds that the evidence was obtained as a result of an illegal stop and subsequent arrest in violation of his rights to be free from unreasonable searches and seizures

guaranteed by the Fourth and Fourteenth Amendments to the United States and North Carolina Constitutions. However, we must first address the preliminary matter of whether defendant preserved his right to appeal the issue and in the alternative whether we should grant his Petition for Writ of Certiorari. We believe defendant did preserve his right to appeal and consequently dismiss his Petition for Writ of Certiorari as moot.

The State contends that defendant did not preserve the issue regarding his motion to suppress because pursuant to N.C. Gen. Stat. § 15A-979(b) (2009), a defendant must give notice of his intent to appeal the motion to suppress to the trial court and prosecution prior to the finalization of plea negotiations. *See State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979). If a defendant does not give specific notice of his intent to appeal a motion to suppress, then the defendant has waived the right to appellate review. *State v. Brown*, 142 N.C. App. 491, 493, 543 S.E.2d 192, 193 (2001). The State argues the language used by trial counsel in preserving defendant's right to appeal the motion to suppress was not specific enough to put the trial court and prosecution on notice.

In *State v. Pimental*, 153 N.C. App. 69, 75, 568 S.E.2d 867, 871 (2002), our Court held that the defendant did not preserve his right to appeal a motion to suppress after giving a guilty plea where the defendant stated that he wished to "preserve[] his right to appeal any and all issues which are so appealable pursuant to North Carolina statutory law and North Carolina case law and pursuant to this plea agreement." On the other hand, in the case at bar, defense counsel made the statement "that [defendant] would like to preserve any appellate issues that may stem from the motions in this trial," immediately following an attempt to make a renewed motion to suppress at the end of the State's evidence. Defendant had only made five motions throughout the trial and two of them were motions to suppress in regard to the stop. The other motions were: (1) a motion to suppress with respect to the arrest, which was never addressed; (2) a motion to dismiss at the end of the State's evidence, which in most trials is a formality; and (3) a quasi-motion for mistrial along with the renewed motion to suppress. Following defense counsel's request to preserve his right to appeal any issues from the motions, the trial court reentered substantially similar facts as he did when he initially denied defendant's pretrial motion to suppress. Clearly, the trial court understood which motion defendant intended to appeal and decided to make its findings of fact as clear as possible for the record.

The State also contends that defendant's renewed motion to suppress during trial was improper because a motion to suppress may not be renewed during trial unless "additional pertinent facts have been discovered." N.C. Gen. Stat. § 15A-975(c) (2009). Consequently, the State argues defendant may not appeal the renewed motion because no new facts were discovered during the trial. While we agree with the State on that specific point, we do not believe it has an impact on defendant's appeal. The only issue is whether defendant's preservation of his right to appeal was with sufficient specificity, and we believe that it was.

As briefly discussed above, the State attempts to rely on our Court's decision in *Pimental* where we held that the defendant did not give notice of his intent to appeal the denial of his motion to suppress with sufficient specificity. *See Pimental*, 153 N.C. App. 69, 568 S.E.2d 867. However, our case can be distinguished from *Pimental*. One difference is that in *Pimental*, the defendant gave the purported notice in the Transcript of Plea, while in our case defendant gave notice to the trial court and prosecution prior to the finalization of plea negotiations. *Id*. at 75-76, 568 S.E.2d at 871. *See also Reynolds*, 298 N.C. at 396-97, 259 S.E.2d at 853 (where our Supreme Court found a lack of specificity in the defendant's notice because the suppression and sentencing hearings were before separate judges and the sentencing judge noted that he "did not anticipate such an appeal").

Even further, in *Pimental* the defendant failed to object on numerous occasions to the trial court's denial of his motion to suppress. The record did not contain any written rulings or findings of fact relating to the trial court's denial of the defendant's motions, while in the case at hand, defendant objected to each denial of his motion to suppress, and the trial court entered similar findings regarding the denial on two occasions. *Pimental*, 153 N.C. at 75-76, 568 S.E.2d at 871. While we do note, as in *Pimental*, that it would have been easiest if defendant stated in the Transcript of Plea that he was " 'reserving his right to appeal the Court's denial of his motions to suppress pursuant to N.C.G.S. § 15A-979(b),' " we do not believe defendant's notice lacked specificity to warrant a waiver of appellate review. The trial court clearly understood defendant intended to appeal the denial of his motion to suppress as it reentered findings of fact regarding the motion, albeit based on an improper renewed motion. Defendant had already appealed his motion to suppress from the district court to superior court. Defense counsel also made defendant's intention to appeal clear by entering his notice concurrently

with the changing of defendant's plea from not guilty to guilty. *See State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995) (defendant must notify the State and trial court prior to pleading guilty). We believe defendant's concurrent notice satisfied the holding of *McBride*. *Id*. Even more, the lack of motions for defendant to appeal, the objection to the motion to suppress, and the amount of discussion spent on the motion to suppress also made it clear as to which motion defendant intended to appeal. Therefore, defendant gave sufficient notice of his intent to appeal the denial of his motion to suppress to maintain his right to appellate review, and we must now address his sole issue on appeal.

[2] Defendant argues the trial court erred in denying his motion to suppress evidence of his alleged impairment because the evidence was the fruit of an illegal stop. We agree.

In reviewing the denial of a motion to suppress our Court

> "is strictly limited to a determination of whether the court's findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court's conclusions of law." *In re Pittman*, 149 N.C. App. 756, 762, 561 S.E.2d 560, 565 (citation omitted), *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003). "[I]f so, the trial court's conclusions of law are binding on appeal." *State v. West*, 119 N.C. App. 562, 565, 459 S.E.2d 55, 57, *disc. review denied*, 341 N.C. 656, 462 S.E.2d 524 (1995). "If there is a conflict between the [S]tate's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal." *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E.2d 540, 548 (1982).

State v. Veazey, 201 N.C. App. 398, 400, 689 S.E.2d 530, 532 (2009), *disc. review denied*, 363 N.C. 811, 692 S.E.2d 876 (2010). "[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997). We review the trial court's conclusions of law *de novo*. *State v. Johnson*, ___ N.C. App. ___, ___, 693 S.E.2d 711, 714 (2010).

Defendant contends Sgt. Griffin lacked the reasonable suspicion necessary to justify a *Terry* stop. *See Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968).

> In *Terry*, [the United States Supreme Court] held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. *Terry, supra*, at 30. While "reasonable suspicion" is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 109 S. Ct. 1581 (1989). The officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch' " of criminal activity. *Terry, supra*, at 27.

Illinois v. Wardlow, 528 U.S. 119, 123-24, 145 L. Ed. 2d 570 (2000). "The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). We "must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion to make an investigatory stop exists." *Id.* (quoting *U.S. v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)).

In the present case, Sgt. Griffin testified that defendant pulled off to the side of Highway 64 in a wooded area and Sgt. Griffin subsequently heard some yelling and car doors slamming. Defendant, after a short amount of time, accelerated rapidly past Sgt. Griffin, but not to a speed warranting a traffic violation. However, Sgt. Griffin thought defendant may have been picking up the robbery suspects, so he decided to investigate. After following defendant for almost a mile without any traffic violations, Sgt. Griffin decided to pull over defendant based on his suspicion that the vehicle may have contained the robbery suspects. Sgt. Griffin did not have any information regarding what direction the suspects fled the Dollar General, nor did he have a description of a getaway vehicle. Defendant argues this did not amount to reasonable suspicion because armed robbers would not be hiding in the woods near the scene four hours after the crime and then proceed to yell and slam car doors while attempting to remain unnoticed.

Defendant cites to a few of our Court's recent decisions in arguing that Sgt. Griffin's beliefs did not amount to reasonable suspicion. In *State v. Choplek*, ___ N.C. App. ___, 704 S.E.2d 563 (2011), our Court recently held that a deputy's stop was based on an " 'unparticularized suspicion or hunch' " and not the requisite reasonable suspi-

cion where there were no traffic violations. *Id.* at ___, 704 S.E.2d at 566 (citation omitted). The deputy only stopped the defendant because he was driving a work truck late at night in a partially developed subdivision during a time when numerous copper thefts had been reported in the county. Defendant also cites to *State v. Murray*, 192 N.C. App. 684, 666 S.E.2d 205 (2008), where we held that the stop of a vehicle in an area where break-ins of businesses had occurred did not reach the level of necessary reasonable suspicion, but was only based on the officer's " 'unparticularized suspicion or hunch.' " *Id.* at 687, 666 S.E.2d at 208 (citation omitted). In that case the businesses were closed, there were no residences in the area, and it was in the early hours of the morning. *Id.* at 689, 666 S.E.2d at 208.

On the other hand, the State argues we should view the totality of the circumstances and any "rational inferences which the officers were entitled to draw from [the] facts" of the situation. *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (1979). The State would have us rely on our decision in *State v. Covington*, 138 N.C. App. 688, 532 S.E.2d 221 (2000). However, in *Covington*, the facts tend to show that following a break-in, officers received a report that the suspects had left the scene of the crime heading in a particular direction on a particular street, so the officers set up a stop point three hundred yards from the scene on the specific street given. *Id.* at 689-90, 532 S.E.2d at 222. The facts of *Covington* are distinguishable because the officers had an idea of which direction the suspects fled, while in the case at hand, the only information was that the suspects fled on foot. The State also attempts to rely on *State v. Thompson*, but that case can also be distinguished because there the officers relied on reports that a van had been used during break-ins in the area and they witnessed suspicious activity involving a van in the same area. *Thompson*, 296 N.C. at 707, 252 S.E.2d at 779. If we were to decide in the State's favor, we could potentially set a precedent allowing law enforcement to pull over any citizen driving without exhibiting any traffic violations in the vicinity of a break-in or robbery with the most minimal suspicion of involvement in the crime. We are reluctant to allow such unfettered discretion and must consequently agree with defendant's argument that Sgt. Griffin's reasoning for pulling over defendant's vehicle did not amount to the reasonable, articulable suspicion necessary to warrant a *Terry* stop.

III. Conclusion

As a result, we must reverse the decision of the trial court in denying defendant's motion to suppress the evidence of his impair-

ment due to Sgt. Griffin's lack of reasonable, articulable suspicion. Sgt. Griffin's reasoning must be based on more than an " 'unparticularized suspicion or hunch.' " *See Choplek*, ___ N.C. App. at ___, 704 S.E.2d at 566 (citation omitted).

Reversed.

Judges HUNTER, JR., and THIGPEN concur.

MARK W. WHITE, PLAINTIFF v. ROBERT J. TREW, DEFENDANT

No. COA11-337

(Filed 20 December 2011)

1. Appeal and Error—interlocutory orders and appeals—sovereign immunity—substantial right

An appeal from the denial of a motion to dismiss based on sovereign immunity was from an interlocutory order but affected a substantial right and was immediately appealable.

2. Libel and Slander—university annual review—individual capacity—maliciousness

The trial court properly denied a motion to dismiss a libel claim arising from an annual review by a professor at a state university where defendant raised sovereign immunity. Plaintiff's complaint made clear that he sought compensation from defendant, not the university, so that plaintiff was suing defendant in his individual capacity. Although the annual review was written in the course of defendant's official duties, plaintiff alleged maliciousness.

3. Libel and Slander—university annual review—statutory grievance process

Plaintiff-professor was not barred from filing a libel suit based on his annual review even though the statutory grievance process had not been concluded. The administrative remedy provided by N.C.G.S. § 126-25 did not bar plaintiff from this libel suit because the relief sought in the suit (compensation) was different from the statutory remedy provided (removal of the information from his file).

4. Libel and Slander—university annual review—internal circulation—publication

The trial court did not err by denying defendant's motion to dismiss a libel action where plaintiff was a university professor, defendant was the department head, and plaintiff filed the action over an annual review. There was a publication in that the review was shown to the Dean and to in-house counsel, who were distinct and independent of the process by which the statements were produced.

Appeal by defendant from order entered 22 December 2010 by Judge W. Osmond Smith III in Wake County Superior Court. Heard in the Court of Appeals 13 September 2011.

Stevens Martin Vaughn & Tadych, PLLC, by C. Amanda Martin, and Everett Gaskins Hancock LLP, by James M. Hash, for plaintiff.

Attorney General Roy Cooper, by Assistant Attorney General Brian R. Berman, for defendant.

ELMORE, Judge.

On 14 November 2007, Mark W. White (plaintiff) filed a libel suit against Robert J. Trew (defendant) alleging that defendant had published factually false and inaccurate information about plaintiff in plaintiff's "annual review." Defendant filed a motion to dismiss the complaint, which was denied on 22 December 2010. Defendant appeals, alleging that sovereign immunity shields him from personal liability and that a required element of the libel claim has not been met. After careful consideration, we affirm the decision of the trial court.

I. Background

Plaintiff was a tenured associate professor in the Department of Electrical and Computer Engineering at North Carolina State University (NCSU). Defendant is a tenured full professor in the same department and, during the time period relevant to this case, served as the department head.

During his time as department head, defendant wrote an "annual review" of plaintiff. In this review, defendant stated that plaintiff was not meeting the expectations of the department and provided accounts of instances that led defendant to this conclusion. Defendant then passed the annual review on to the Dean of Engineering and in-house counsel at NCSU. Plaintiff objected to sev-

eral of these accounts, alleging that they were inaccurate. Plaintiff sent a "rebuttal letter" to defendant that addressed these alleged falsities. Defendant received this letter, read it, but did nothing to amend the review.

This annual review serves as a job evaluation and, as such, is part of plaintiff's personnel file at NCSU. When defendant took no action in response to the alleged inaccuracies, plaintiff filed a grievance petition with the NCSU grievance committee on 14 November 2007. Plaintiff later filed this libel suit on 11 September 2008.

II. Interlocutory Appeal

[1] Defendant appeals the trial court's denial of his motion to dismiss, which is itself an interlocutory order. "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) (citation omitted). Such orders are normally not immediately appealable, but a party may appeal an interlocutory order that "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Dep't of Transp. v. Rowe*, 351 N.C. 172, 174–75, 521 S.E.2d 707, 709 (1999) (quotations and citations omitted). "[T]his Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999) (citations omitted); *see also Anderson v. Town of Andrews*, 127 N.C. App. 599, 601, 492 S.E.2d 385, 386 (1997) (holding that an appeal from the denial of a 12(b)(6) motion to dismiss affected a substantial right because the defendant raised the defense of sovereign immunity). Because defendant is attempting to appeal a motion to dismiss based on sovereign immunity, defendant's appeal affects a substantial right and is therefore immediately appealable. Accordingly, we review it.

III. Arguments

Defendant presents three arguments on appeal. First, defendant argues that his actions were covered by sovereign immunity because they were performed in his official capacity as an employee of the State of North Carolina. Second, defendant argues that this suit should be barred because plaintiff failed to fully exhaust the administrative remedy available to him under N.C. Gen. Stat. § 126-25. Finally, defendant argues that plaintiff cannot prove a required ele-

ment of his libel claim, publication, because communication among employees and agents of an employer is not "publication" for the purposes of defamation. As to each of defendant's arguments, we disagree.

A. Dismissal Based on Sovereign Immunity

[2] Defendant argues that the suit was filed against defendant in his official capacity, not in his individual capacity, and thus, because sovereign immunity bars intentional tort claims brought against the State and its employees in their official capacities, sovereign immunity bars this claim. We reject this argument.

We review the trial court's denial of defendant's motion to dismiss *de novo*. *Transportation Services of N.C., Inc. v. Wake Cnty. Bd. Educ.*, 198 N.C. App. 590, 593, 680 S.E.2d 223, 225 (2009).

Determining whether a plaintiff sued a defendant in his official or individual capacity is of prime importance in a libel suit against a public employee because

> [s]uits against the State, its agencies and its officers for alleged tortious acts can be maintained only to the extent authorized by the Tort Claims Act, and that Act authorizes recovery only for negligent torts. Intentional torts committed by agents and officers of the State are not compensable under the Tort Claims Act.

Kawai Am. Corp. v. University of N.C. at Chapel Hill, 152 N.C. App. 163, 166, 567 S.E.2d 215, 217 (2002) (quotations and citations omitted). Libel is an intentional tort. *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 115, 314 S.E.2d 775, 779 (1984). If a defendant is sued in his official capacity, the State is the actual party being sued and sovereign immunity bars the claim.

Sovereign immunity does shield public employees from most activities undertaken in their official capacities because those employees are seen as agents of the State, but such immunity only extends so far. Public employees "remain *personally* liable for any actions which may have been corrupt, malicious or perpetrated outside and beyond the scope of official duties." *Locus v. Fayetteville State University*, 102 N.C. App. 522, 526, 402 S.E.2d 862, 865 (1991). A public employee who acts in this way is no longer acting as an agent of the State and, therefore, is no longer protected by sovereign immunity. *Id.* He may be sued for such conduct in his individual capacity. *Id.*

Defendant alleges that the complaint filed by plaintiff can only be read to sue defendant in his official capacity, which if true, would make the State the actual party to the suit. Sovereign immunity would then apply and the suit would be barred. Defendant argues that this is the case because (1) plaintiff failed to clearly indicate in his complaint whether he was suing defendant in an official or individual capacity and (2) plaintiff must be suing defendant in his official capacity because all of defendant's actions took place during his official duties.

When a complaint against a public official does not clearly indicate what capacity the defendant is being sued in, the complaint may be treated as a suit against a defendant solely in his official capacity. *E.g.*, *Johnson v. York*, 134 N.C. App. 332, 337, 517 S.E.2d 670, 673 (1999). Here, plaintiff's intent to sue defendant in his individual capacity is clear from the pleadings.

The phrase "individual capacity" need not appear in a complaint in order for an action to be brought against a public employee in his individual capacity. *See*, *e.g.*, *Epps v. Duke University*, 116 N.C. App. 305, 310, 447 S.E.2d 444, 448 (1994) (the plaintiffs made "no distinction" in their complaint against a medical examiner as to the capacity in which they intended to sue him, so the court examined the allegations of the complaint and determined that the plaintiffs intended to sue the defendant in his individual capacity only). Instead:

> The crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant is named in an official capacity. If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities.

Meyer v. Walls, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997) (quotations and citations omitted).

Plaintiff, in his complaint, makes it clear that he seeks monetary compensation not from NCSU, but from defendant himself. Plaintiff repeatedly seeks to "have and recover from Dr. Trew damages for reputational harm" that defendant's alleged actions caused. Accordingly,

we conclude that plaintiff sought to sue defendant in his individual capacity and drafted the complaint in such a way that clearly indicated this intent to sue defendant in his individual capacity.

Defendant further argues that, regardless of plaintiff's intent, all of plaintiff's allegations involve actions directly related to defendant's official duties. Defendant argues that the action involved—the writing of an annual review of an employee—is an action that can only be performed in one's official capacity and, therefore, defendant can only be sued in his official capacity for any tortious conduct that may have occurred as part of that review process. This is not the case.

Public officials are only protected from liability when they act without "malice or corruption." *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976). If they act maliciously or beyond the scope of their official duties, they may be sued in their individual capacities for such actions. *Thompson v. Town of Dallas*, 142 N.C. App. 651, 656, 543 S.E.2d 901, 905 (2001).

Plaintiff alleges that defendant acted maliciously when defendant wrote the annual review. Even if the writing of a review is an activity defendant could have only carried out in his official capacity, because plaintiff alleges that defendant carried out this activity maliciously, defendant is not protected by sovereign immunity and plaintiff properly sued him individually.

Whether defendant acted with malice is an area of dispute between the parties, but, because this is an interlocutory appeal and we are at an early stage of the proceedings, we need not decide whether defendant did, in fact, act with malice. We need only decide whether the motion to deny was properly granted based on the pleadings, and we conclude that it was.

B. Dismissal Based on Plaintiff's Election of Remedies

[3] Defendant next argues that the trial court erred by denying defendant's motion to dismiss because plaintiff elected to pursue the remedy available to him under N.C. Gen. Stat. § 126-25 by filing a grievance with the NCSU grievance committee. Because plaintiff has not exhausted this administrative remedy, defendant argues that plaintiff is barred from bringing this suit.

Section 126-25 allows any government employee to seek the removal of information he objects to from his personnel file by following the grievance procedure of the department in which he is employed. N.C. Gen. Stat. § 126-25 (2009). If an employee is dissatis-

fied with how his individual department handles the matter, he may appeal the decision to the State Personnel Commission. *Id*. The only remedy made available under this statute is the removal and destruction of such material. *Id*. Plaintiff filed such a petition with the NCSU grievance committee on 14 November 2007. He filed this suit on 11 September 2008; at that point in time, the grievance process had not been concluded.

"[W]hen an *effective* administrative remedy exists, that remedy is exclusive." *Johnson v. First Union Corp.*, 128 N.C. App. 450, 456, 496 S.E.2d 1, 5 (1998) (quotations and citation omitted; alteration in original). Thus, administrative "relief must be exhausted before recourse may be had [in] the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979) (citations omitted). "However, when the relief sought differs from the statutory remedy provided, the administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court." *Johnson*, 128 N.C. App. at 456, 496 S.E.2d at 5. Section 126-25 does not provide a remedy for damage caused by the objected-to information placed in a personnel file. N.C. Gen. Stat. § 126-25 (2009).

In this case, plaintiff seeks compensation from defendant for damage caused by defendant's alleged false statements. Plaintiff's complaint does not ask to have the information removed from his file. The relief plaintiff seeks is different from the statutory remedy provided, so the administrative remedy provided by section 126-25 does not bar plaintiff from pursuing this libel suit.

C. Dismissal Based on Lack of Publication

[4] Defendant last argues that the trial court should have granted his motion to dismiss because statements made in communications among employees and agents of an employer are not "published" for the purposes of defamation. He asserts that, because the annual review was only made available to faculty and administrators of NCSU, it was not published.

"There is no basis for an action for libel unless there is a publication of the defamatory matter to a person or persons other than the defamed person." *Arnold v. Sharpe*, 296 N.C. 533, 539, 251 S.E.2d 452, 456 (1979). To be published, the defamatory material must be "communicated to and understood by a third person." *West v. King's Dep't Store, Inc.*, 321 N.C. 698, 703, 365 S.E.2d 621, 624 (1988) (citation omitted). Defendant argues that, in an employment context, agents and employees of a single employer are not considered third persons to the employer or to each other. Defendant cites to *Satterfield v.*

McLellan Stores, 215 N.C. 582, 2 S.E.2d 709 (1939), as authority for this position. In *Satterfield*, a manager wrote a note to a stenographer to fill out a separation notice for the plaintiff based on the plaintiff's alleged misconduct. *Id.* at 583-84, 2 S.E.2d at 710. The plaintiff's theory was that the note was published to a third person when it was given to the stenographer. *Id.* at 584, 2 S.E.2d at 710. The Supreme Court held that "the stenographer [was] not a third person within the contemplation of law with respect to publication of a libelous matter." *Id.* at 585, 2 S.E.2d at 711.

Defendant argues that this holding should be read to say that employees of the same employer can never be third persons to statements made by other employees. That is not how we interpret this holding. Our Supreme Court, in deciding *Satterfield*, cited to a New York case when making its decision. That case, *Owen v. Ogilvie Publishing Co.*, involved almost the exact same fact pattern. *Id.* (citing *Owen v. Ogilvie Publ'g Co.*, 35 N.Y.S. 1033 (1898)). A manager dictated a libelous letter to a stenographer who then sent it to the plaintiff, and the court held that the stenographer did not qualify as a third person for purposes of publication because "[t]he manager could not write and publish a libel alone." *Id.* at 467 (citing *Owen*, 35 N.Y.S. at 1034). In making this decision, the New York court stated:

> We do not deny but that there can be publication of a libel by a corporation by reading the libelous matter to a servant of such corporation, or delivering it to be read. Where the duties devolved upon such servant are distinct and independent of the process by which the libel was produced, he might well stand in the attitude of a third person through whom a libel can be published. But such rule may not be applied where the acts of the servants are so intimately related to each other as is disclosed in the present record, and the production is the joint act of both.

Id. at 467 (citing *Owen*, 35 N.Y.S. at 1034-35). Our Supreme Court recited this language in its opinion, and then concluded, "the reasoning in the New York case is consonant with our views." *Satterfield*, 215 N.C. at 582, 2 S.E.2d at 711. Given this language, we decline to interpret the holding as broadly as defendant wishes us to. Instead, we read the holding to say that intra-office communications can be published in terms of defamation if the individual who reads the communications is independent of the process by which the communications were produced.

Here, defendant produced the annual review on his own. He did not use the services of the Dean of Engineering or in-house counsel in drafting the review. Those parties only became involved after the review had been finished. Following the language endorsed by *Satterfield*, they were "distinct and independent of the process by which the statements were produced." As a result, we hold that giving the review to the Dean and the staff of the office of general counsel constitutes publication for the purposes of libel.

IV. Conclusion

We hold that the trial court did not err by denying defendant's motion to dismiss.

Affirmed.

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

TYSON DAVIS, BY AND THROUGH HIS GUARDIAN BETTY GHOLSTON AND BETTY GHOLSTON INDIVIDUALLY, PLAINTIFFS v. CUMBERLAND COUNTY BOARD OF EDUCATION, DEFENDANT

No. COA10-1559

(Filed 20 December 2011)

Premises Liability—bleachers—gap between seat and floorboard

Summary judgment was properly granted for defendant school board in a premises liability action arising from injuries to a six-year-old who fell through the bleachers at a football game. Defendant introduced evidence that the bleachers were in compliance with the building code and that defendant had no notice of any prior problems with the bleachers, which shifted the burden to plaintiff. Plaintiff pointed to no evidence of what a reasonable school board would have done other than changes to the bleachers after the accident, which were not admissible.

Appeal by plaintiffs from order entered 30 June 2010 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 8 June 2011.

Shanahan Law Group, PLLC, by Kieran J. Shanahan and Melissa L. Pulliam, for plaintiffs-appellants.

McAngus, Goudelock & Courie, PLLC, by Mary M. Webb and Webster G. Harrison, for defendant-appellee.

GEER, Judge.

Plaintiff Betty Gholston, on her own behalf and as guardian for Tyson Davis, appeals from the trial court's order granting summary judgment to defendant, Cumberland County Board of Education ("the Board"), in this premises liability action. Tyson Davis, who was six years old at the time, was severely and tragically injured when he fell through bleachers located on the premises of the Board's Seventy-First High School. Because the Board presented evidence that it was not negligent—in that the bleachers complied with the North Carolina Building Code ("the Building Code") and it had no notice of any prior problems with the bleachers—and because plaintiff presented no admissible evidence that a reasonable and prudent school board would have done anything different with respect to the bleachers, we hold that the trial court properly granted the Board summary judgment.

Facts

On 20 October 2006, Tyson Davis attended a football game with his father at Seventy-First High School in Fayetteville, North Carolina. Tyson sat with his father near the top of the school's aluminum bleachers. The bleachers were damp with condensation, and Tyson, while walking down them, slipped and fell through the 18-inch to 24-inch gap between the bleacher seat and the floorboard. Tyson fell approximately 10 feet and struck his head on the concrete, fracturing his skull. He underwent surgery to have permanent metal plates and screws inserted into his head.

Plaintiff filed suit against the Board on 7 October 2009, alleging that the Board breached its duty to ensure that the bleachers and its premises were reasonably safe for all invitees by failing to cover the openings between the seats of the bleachers or take any other measures to protect invitees from the danger presented by the openings. Plaintiff further alleged that the Board breached its duty to warn of the risk and danger associated with the bleachers.

Defendant filed an answer on 8 December 2009 generally denying plaintiff's claim and asserting the defenses of contributory negligence

and sovereign immunity. After conducting discovery, defendant filed a motion for summary judgment on 28 May 2010.

The Board presented an affidavit from an engineer attesting that the bleacher seatboards and floorboards met the Building Code requirements and standards at the time they were originally constructed and installed and when they were modified in 1985 to replace the wooden seatboards and footboards with aluminum seatboards and footboards. Further, at the time Tyson fell in 2006, "the bleachers were compliant with the appropriate North Carolina Building Code given the date(s) of installation and modification."

Additionally, Mickey Stoker, the school's athletic director in 2006, submitted an affidavit stating that he inspected the bleachers twice a year for safety and maintenance. According to Mr. Stoker, at the time of the accident, the bleachers were in a safe condition and did not require any repairs. Mr. Stoker had been the athletic director for six years and, during this period, there had never been any problems with the bleachers and he was unaware of anyone falling through the bleachers and injuring themselves prior to 20 October 2006.

In response to the motion for summary judgment, plaintiff submitted the affidavit of Tyrone Davis, Tyson's father. Mr. Davis described the bleachers, what occurred on 20 October 2006, how Tyson came to fall to the concrete under the bleachers, and the fact that a number of children of Tyson's age were present in the bleachers.

The trial court entered an order granting summary judgment for the Board on 30 June 2010. Plaintiff timely appealed to this Court.

I

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). This Court reviews the trial court's grant of summary judgment de novo. *Nationwide Mut. Fire Ins. Co. v. Mnatsakanov*, 191 N.C. App. 802, 805, 664 S.E.2d 13, 15 (2008).

Our Supreme Court has explained the burdens applicable to a motion for summary judgment:

> The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

DeWitt v. Eveready Battery Co., 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (internal citations and quotation marks omitted).

Once the moving party meets its burden, "then the nonmovant must produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (internal quotation marks omitted), *overruled in part on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). In order to meet this burden, the nonmoving party " 'may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in [Rule 56] must set forth specific facts showing that there is a genuine issue for trial.' " *Id.* (quoting N.C.R. Civ. P. 56(e)).

As our Supreme Court explained in *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002) (internal citation omitted), a premises liability case, "[a]ctionable negligence occurs when a defendant owing a duty fails to exercise the degree of care that a reasonable and prudent person would exercise under similar conditions, or where such a defendant of ordinary prudence would have foreseen that the plaintiff's injury was probable under the circumstances." Under this standard, a premises' owner " 'must use the care a reasonable man similarly situated would use to keep his premises in a condition safe for the foreseeable use by [a lawful visitor]—but the standard varies from one type of establishment to another because different types of businesses and different types of activities involve different risks to the [lawful visitor] and require different conditions and surroundings for their normal and proper conduct.' " *Id.* at 474, 562 S.E.2d at 893 (quoting *Hedrick v. Tigniere*, 267 N.C. 62, 67, 147 S.E.2d 550, 554 (1966)).

The question presented by this case is, therefore, whether the Board exercised the care that a reasonable school board would have exercised with respect to bleachers at an athletic field under similar circumstances. *See id.* at 475, 562 S.E.2d at 893-94 (holding that

"defendant landowner had a duty to exercise such reasonable care as a landowning proprietor, running a motion-picture studio while maintaining a significant degree of control over the daily operations of its licensees, would exercise under the circumstances").

In support of its motion for summary judgment, the Board presented evidence that its bleachers complied with the Building Code and that their athletic director was unaware of anyone having ever fallen through the bleachers or of any other problems with the bleachers. While plaintiff argues vigorously that "[w]hether a building or structure meets the standards of the North Carolina Building Code, N.C. Gen. Stat. § 143-138 et al., is not determinative of the issue of negligence[,]" this Court has held that evidence whether a structure conforms to the Building Code is "relevant and admissible." *Thomas v. Dixson*, 88 N.C. App. 337, 343, 363 S.E.2d 209, 213 (1988). Further, "[w]hether or not a building meets these standards, though not determinative of the issue of negligence, *has some probative value as to whether or not defendant failed to keep his [premises] in a reasonably safe condition.*" *Id.* (emphasis added).

Consequently, the fact that the bleachers complied with the Building Code was evidence that the Board kept the bleachers in a reasonably safe condition. *See also Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 68, 376 S.E.2d 425, 428 (1989) (explaining that " 'compliance with a statutory standard [such as the Building Code] is *evidence* of due care,' " although " 'it is not conclusive on the issue' " (quoting W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* § 30 (5th ed. 1984))).

Even though the Board's evidence of compliance with the Building Code does not conclusively establish due care, that evidence, when combined with the Board's evidence of a lack of notice of any prior problems with its bleachers, was sufficient to shift the burden on summary judgment to plaintiff. *See Roumillat*, 331 N.C. at 63-64, 414 S.E.2d at 342 ("Under N.C. R. Civ. P. 56(e), after defendant met its burden by showing that plaintiff could not come forward with a forecast of evidence that defendant knew or should have known of the presence of [the hazardous condition] and, having sufficient time to do so, negligently failed to remove it, the burden then was upon the plaintiff to make a contrary showing.").

For plaintiff to meet her burden, she was required to come forward with evidence suggesting that a reasonable school board would have acted differently with respect to bleachers for a high school

athletic field. *See McLaurin v. East Jordan Iron Works, Inc.*, 666 F. Supp. 2d 590, 600 (E.D.N.C. 2009) (holding that defendant's evidence on summary judgment that it met the industry standard was sufficient to shift burden to plaintiff to "come forward with evidence that suggests what a reasonable person would do in similar circumstances"), *aff'd sub nom. McLaurin v. Vulcan Threaded Prods., Inc.*, 410 F. App'x 630 (4th Cir. 2011). It is not sufficient for a plaintiff to "argue that if the defendant had only done something differently, the plaintiff's injuries would not [have] result[ed]. What matters . . . is not just whether something different could have been done; rather, what matters is whether a reasonable person in similar circumstances would have done something different." *Id.*

In this case, plaintiff has asserted that "[i]n failing to ensure that any gap in the bleachers was small enough to reasonably protect the safety of children of Appellant's age and size, Appellee failed to exercise the degree of care of a reasonable and prudent person." Although plaintiff cites to no evidence following that assertion, plaintiff then concludes: "As such, a genuine issue of material fact exists as to the safety of the bleachers and it was error for the Trial Court to grant Appellee's motion for summary judgment."

Plaintiff argues on appeal that the Board should either have warned of the gap in the bleachers or restricted the use of the bleachers based upon age or size. Alternatively, plaintiff contends that if a warning would not have sufficed, the Board "had a duty to take the appropriate precautions to ensure the protection of its lawful visitors. . . . which were to install varying riser plates to minimize the gap between the bleachers."

Although plaintiff includes no cite to the record regarding her contention that the Board was required to warn of the gap or restrict the use of its bleachers, she relies upon the Board's interrogatory answers in support of its contention that the Board was required to install riser plates to minimize the gap. Plaintiff's interrogatory had asked the Board to describe all actions "that were taken in response to the accident." The Board objected that this interrogatory called for evidence of a subsequent remedial measure contrary to Rule 407 of the Rules of Evidence, but nonetheless responded:

> Without waiving said objection, for the bleachers in question, a 6" x 1" riser plate was added to 14 rows and a 6" x 2" footboard to 14 rows and the riser plate ran continuously across the steps. 180' of 10" riser plate was added at the back and

> additional railing behind the top was added for 42" compliance. Fencing and stiffeners for the front walkway were added and approximately 30 feet of footboard was replaced.

Plaintiff also cites to a table setting out the changes made by the Board to bleachers following the accident.

Plaintiff makes no attempt on appeal to address the admissibility of this evidence under Rule 407, which provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment.

The Board's interrogatory answer falls squarely within Rule 407—plaintiff is relying upon the subsequent measures to prove the Board's negligence. *See Smith v. N.C. Dep't of Natural Res. & Cmty. Dev.*, 112 N.C. App. 739, 746, 436 S.E.2d 878, 883 (1993) (holding that evidence of signs, railings, and stairways constructed around waterfall after fatality were inadmissible under Rule 407). Since the evidence is inadmissible, it cannot support reversal of the summary judgment order.

Plaintiff points to no other evidence regarding what a reasonable school board would have done under the circumstances. In contrast to the plaintiff in *Collingwood*, plaintiff in this case presented no expert affidavits or other evidence regarding whether the Building Code provided inadequate protection or whether a reasonable owner in the Board's circumstances would have known that it needed to take further steps to make the bleachers safe. *Compare Collingwood*, 324 N.C. at 70, 376 S.E.2d at 429 (holding that defendant not entitled to summary judgment despite evidence that apartment complex complied with Building Code and industry standard because plaintiff presented affidavits from Chief of Fire Department and Inspector and statistical study that "would permit rational jurors applying the standard of a reasonable and prudent owner under the same or similar circumstances to reach differing conclusions as to whether defendant took appropriate fire safety precautions in the design and construction" of apartment complex).

In addition, plaintiff presented no evidence that other schools or boards of education in fact did anything differently than the Board here. *See Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 162, 516 S.E.2d 643, 646 (1999) (finding issue of fact precluding summary judgment when plaintiff presented evidence "that other stores in the area did not stack their merchandise as high as Defendant stacked its merchandise"). Further, plaintiff has made no attempt to counter the Board's evidence of no notice of any problem—she has pointed to no evidence of any similar occurrence with the Board's bleachers or with any other school's bleachers. *See Williams v. Walnut Creek Amphitheater P'ship*, 121 N.C. App. 649, 652, 468 S.E.2d 501, 503 (1996) (holding that prior incidents of injury to patrons are proper to consider in determining breach of duty).

The affidavit of Tyson's father, Tyrone Davis, is not sufficient to defeat summary judgment. The fact that Tyson slipped through a gap and was severely injured does not, without more, provide evidence of negligence. *See Roumillat*, 331 N.C. at 68, 414 S.E.2d at 345 (holding that "[n]egligence is not presumed from the mere fact of injury"); *Dawson v. Carolina Power & Light Co.*, 265 N.C. 691, 694-95, 144 S.E.2d 831, 834 (1965) (holding that "[n]o inference of actionable negligence on defendant's part arises from the mere fact" that plaintiff was injured when she slipped and fell due to water or mud inside defendant's office when plaintiff failed to present evidence that prudent storekeepers under similar conditions had mat at entrance of store or office on rainy days).

Because plaintiff presented only evidence of Tyson's fall and his injuries and did not present any admissible evidence that a reasonable school board would have, under the circumstances, done anything differently than the Board did, plaintiff failed to meet her burden in opposing the Board's motion for summary judgment. She did not present a forecast of evidence sufficient to establish a *prima facie* case of negligence against the Board. Accordingly, we affirm the order granting the Board summary judgment.

Affirmed.

Judges BRYANT and BEASLEY concur.

DURHAM HOSIERY MILL LIMITED PARTNERSHIP, PLAINTIFF v.
INEZ MORRIS, DEFENDANT

No. COA11-515

(Filed 20 December 2011)

1. Landlord and Tenant—summary ejectment—burden of persuasion

The trial court erred in a summary ejectment action by requiring plaintiff to establish a breach of the lease agreement by clear, cogent, and convincing evidence rather than by the preponderance of the evidence. On remand, the trial court may, in its discretion, receive additional evidence.

2. Appeal and Error—preservation of issues—waiver—considered on remand

The waiver issue was not reached in a summary ejectment action because the trial court applied the wrong burden of persuasion on the issue of breach of the lease agreement. On remand, the trial court should consider defendant's affirmative defense of waiver applying the appropriate burden of proof.

Appeal by plaintiff from judgment entered 29 November 2010 by Judge Marcia H. Morey in Durham County District Court. Heard in the Court of Appeals 12 October 2011.

The Banks Law Firm, P.A., by Adam M. Shestak, for plaintiff-appellant.

Legal Aid of North Carolina, Inc., by Roger M. Cook, Terry C.J. Reilly, Theodore O. Fillette, III, and Andrew Cogdell, for defendant-appellee.

STEELMAN, Judge.

In a summary ejectment action, the plaintiff's burden of persuasion is by the preponderance of the evidence as set forth in N.C. Gen. Stat. § 42-30. The trial court erred in requiring the plaintiff to prove its case by clear, cogent, and convincing evidence.

I. Factual and Procedural Background

Durham Hosiery Mill Limited Partnership ("DHM") owns and operates the Durham Hosiery Mill Apartments (the "Apartments"), a

section 8 housing community in Durham, North Carolina. Defendant Inez Morris leases and lives in Unit 251-D (the "Unit") at the Apartments under the terms of a written lease agreement (the "Lease Agreement"). Under the terms of the Lease Agreement, DHM may terminate the lease if Morris permits anyone to "reside" in the Unit without securing prior permission from DHM. Beginning in September of 2009, DHM began to suspect that Morris's grandson, Jarrell Gadsen, and her daughter, April Green, were residing at the Unit. Morris had not sought permission for Gadsen and Green to reside there. After complying with the required notice requirements, DHM commenced a summary ejectment action in the small claims court of Durham County on 12 February 2010. DHM continued to accept rent payments from Morris through May of 2010.

Following a hearing, the magistrate dismissed DHM's complaint on 25 February 2010. DHM appealed to district court for a trial *de novo*. Morris's evidence at trial was that Gadsen and Green were spending most of the day at the Unit, but not sleeping there. Evidence presented at trial indicated Gadsen and Green were seen at the apartment during all hours of the day and night. Both were seen at the complex in one set of clothes and then leaving the complex later in a different set of clothes. Green testified that five days a week, she and Gadsen would be dropped off at her mother's residence around 6:00 a.m. and would be picked up around 11:15 p.m. Green was seen in sleepwear on several occasions. A DHM employee indicated video footage showed Gadsen and Green entering the Unit at night and not exiting the Unit until the next morning. The testimony of Morris and Green at trial conflicted with their previous answers to interrogatories. Mail addressed to Green was delivered to her at the Unit.

The trial court concluded that neither Gadsen nor Green resided at the Unit and that Morris was not in material breach of the lease. The trial court announced its decision in open court, and on 29 November 2010, filed a written judgment setting forth findings of fact and conclusions of law. This judgment dismissed the summary ejectment action. In its written order, the trial court also concluded that, while DHM had knowledge of Morris's alleged breach during the time it had accepted her lease payments, DHM did not waive its right to terminate the lease.

DHM appeals.

II. Standard of Review

A trial court's findings of fact are binding on appeal if supported by competent evidence. *CDC Pineville, LLC v. UDRT of N.C.*, LLC, 174 N.C. App. 644, 650, 622 S.E.2d 512, 517 (2005). Unchallenged findings of fact are also binding on appeal. *Id.* However, we review questions of law *de novo*. *Id.*

III. Burden of Persuasion in Summary Ejectment Cases

[1] DHM argues that the trial court incorrectly required it to establish a breach of the Lease Agreement by clear, cogent, and convincing evidence. We agree.

A. Burden of Persuasion Applied by the Trial Court

The trial court's judgment does not state the plaintiff's burden of persuasion that was applied below.[1] In open court, the trial court announced its reasoning and decision:

> After hearing all the evidence and all the testimony, there are things that are very questionable about a lot of building blocks add [sic] up to have the appearance that your daughter and your grandson may have been living there. *I don't have it beyond clear and cogent*, [sic] *convincing evidence that they were, in fact, living there.*
>
> Your daughter's testimony, almost every day of the week they were bringing Jarell in to go to school. They appear at Durham Hosiery about 5:30 to 6:00 in the morning. They stay until eleven o'clock at night. Housing Authority almost had videotapes, but those are not here. We couldn't see them. We heard the evidence of Mr. Moranski that testified the things he saw [sic], *but it's not clear and convincing to me that they were residing there overnight*, which would be against the contract of your tenancy with them.

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1. The term "burden of proof" "includes both the *burden of persuasion* and the *burden of production*." Black's Law Dictionary 223 (9th ed. 2009). The burden of persuasion refers to "[a] party's duty to convince the fact-finder to view the facts in a way that favors that party." *Id.* At times, however, courts refer to the burden of proof when they are actually discussing the burden of persuasion. *See id.* This distinction has been articulated in this jurisdiction, although at times North Carolina authorities refer to the burden of production as the "burden of going forward." *See* N.C. Gen. Stat. § 8C-1, Rule 301 (2009) (indicating the "burden of persuasion" and the "burden of going forward" are subsets of the "burden of proof"). For further discussion on this point, *see Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 729–30, 693 S.E.2d 640, 648–49 (2009) (Timmons-Goodson, J., dissenting) (compiling authorities and discussing this distinction).

> It is a close case though. I do have concerns. I have concerns that the mail was there. I have concerns about the tax return. I have concerns that Ms. Green used the Durham address to get benefit [sic] for Durham residents at the CET training. I have concerns that just yesterday we got a new answer to the interrogatories that listed more addresses.
>
> It's a senior citizen establishment. I never heard much evidence about that, but I think they are trying to enforce very strictly the terms and the covenants and the conditions of people who live there and not for them to be in jeopardy of violating any HUD requirements because they're on the line to have all that taken away from the federal benefits [sic].
>
> So after hearing everything, *I need to find convincingly that you're in breach of the lease agreement* by allowing people not on the contract to reside with you. I don't find that, so I'm not going to order the eviction. I do not find you're living there. I think you were there, your grandson was there a considerable amount of time [sic]. But I think the findings I would have to find is [sic] that you were there at least over 14 calendar days spending the night. I don't have it. (Emphasis added.)

The general rule is that the trial court's written order controls over the trial judge's comments during the hearing. *See Fayetteville Publ'g Co. v. Advanced Internet Techs, Inc.*, 192 N.C. App. 419, 425, 665 S.E.2d 518, 522 (2008). However, where the judgment is devoid of any statement of the burden of persuasion applied by the trial court; the trial court unequivocally stated that it was holding DHM to a clear, cogent, and convincing burden of persuasion; and the court also stated that this burden was critical to its decision, we must conclude that the trial court applied that standard.

B. The Plaintiff's Burden of Persuasion

N.C. Gen. Stat. § 42-25.6 (2009) provides that residential tenants may only be evicted in accordance with the procedures set forth in Chapter 42, Articles 3 and 7.[2] Article 3 governs summary ejectment in the instant case. A tenant may be removed in a summary ejectment action when the tenant has "done or omitted any act by which, according to the stipulations of his lease, his estate has ceased." *Id.* § 42-26(a)(2). Article 3 provides for an initial hearing before a magis-

2. Article 7 provides for the expedited procedure for evicting drug traffickers and other criminals. Article 7 does not apply to this case.

trate. *See id.* § 42-31 ("If the defendant by his answer denies any material allegation in the oath of the plaintiff, the magistrate shall hear the evidence and give judgment as he shall find the facts to be.").

> [I]f (i) the plaintiff *proves his case by a preponderance of the evidence*, (ii) the defendant admits the allegations of the complaint, or (iii) the defendant fails to appear on the day of court, and the plaintiff requests in open court a judgment for possession based solely on the filed pleadings where the pleadings allege defendant's failure to pay rent as a breach of the lease for which reentry is allowed and the defendant has not filed a responsive pleading, the magistrate shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding the jurisdictional amount established by G.S. 7A-210(1), be claimed in the oath of the plaintiff as due and unpaid, the magistrate shall inquire thereof, and if supported by a preponderance of the evidence, give judgment as he may find the fact to be.

Id. § 42-30 (emphasis added). This statute, requiring the plaintiff to "prove[] his case by a preponderance of the evidence," establishes the burden of persuasion in summary ejectment actions brought before a magistrate.

The nonprevailing party may appeal the magistrate's decision to the district court for a trial *de novo*. *See id.* § 42-34; *id.* § 7A-228. In the absence of law stating that the burden of persuasion at the trial *de novo* should be different, the district court must apply the same standard as the magistrate. *Cf. Joyner v. Garrett*, 279 N.C. 226, 236, 182 S.E.2d 553, 560 (1971) (stating that the burden of proof in a trial *de novo* remains on the party that shouldered that burden in the original proceeding). We hold that, on appeal from a magistrate's summary ejectment ruling, the landlord must establish the alleged breach of the lease by a preponderance of the evidence.

In her brief, Morris appears to concede the applicable burden of persuasion in a summary ejectment action is the preponderance-of-the-evidence standard, Def.'s Br. 9, but then goes on to argue that a summary ejectment plaintiff must satisfy a "remedial standard" imposed by *Morris v. Austraw*, 269 N.C. 218, 152 S.E.2d 155 (1967), and *Charlotte Housing Authority v. Fleming*, 123 N.C. App. 511, 473 S.E.2d 373 (1996). She asserts that a "landlord must prove by prepon-

derance of the evidence that it had clear proof of the acts or omissions of the tenant which constitute the breach of the lease." Def.'s Br. 12. The standard Morris asks us to adopt creates a more stringent burden of persuasion than is set forth in N.C. Gen. Stat. § 42-30. Our review of *Austraw* and *Fleming* reveals that our courts have not adopted a burden of persuasion more stringent than that found in N.C. Gen. Stat. § 42-30.

"[I]n North Carolina, a preponderance of the evidence quantum of proof applies in civil cases unless a different standard has been adopted by our General Assembly or approved by our Supreme Court." *Adams v. Bank United of Tex. FSB*, 167 N.C. App. 395, 401, 606 S.E.2d 149, 154 (2004) (citing *In re Thomas*, 281 N.C. 598, 603, 189 S.E.2d 245, 248 (1972); N.C. Gen. Stat. § 7B-805 (2003)). This Court has applied this rule in the face of valid reasons for adopting a higher standard of proof. *See id.* at 402, 606 S.E.2d at 154. The language in *Austraw* that Morris relies on is clearly *dicta*, and the Court of Appeals panel in *Fleming*, which relied upon *Austraw*, could not have modified the burden of persuasion, based upon *dicta* of the Supreme Court, to be more stringent than that provided by statute.

In *Austraw*, a summary ejectment case, the Supreme Court held that the lease in question did not provide that the defendant's leasehold estate would terminate upon his breach of a particular lease provision. 269 N.C. at 223, 152 S.E.2d at 159. Before reaching this conclusion, the Court noted that the following statement of law was found in an American Jurisprudence:

> Generally, unless there is an express stipulation for a forfeiture, the breach of a covenant in a lease does not work a forfeiture of the term. Moreover, the settled principle of both law and equity that contractual provisions for forfeitures are looked upon with disfavor applies with full force to stipulations for forfeitures found in leases; such stipulations are not looked upon with favor by the court, but on the contrary are strictly construed against the party seeking to invoke them. As has been said, the right to declare a forfeiture of a lease must be distinctly reserved; *the proof of the happening of the event on which the right is to be exercised must be clear*; the party entitled to do so must exercise his right promptly; and the result of enforcing the forfeiture must not be unconscionable.

Id. (quoting 32 Am. Jur. *Landlord and Tenant*, § 848, at 720–21 (1941) (internal quotation marks omitted) (emphasis added).

This language is clearly *dicta* because it was unnecessary to the resolution of the case. *See Trs. of Rowan Technical Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby."). Furthermore, the Supreme Court did not purport to adopt this language and announce it as the law of North Carolina with this quotation. Rather, the Court introduced the quotation by stating, "This is said in 32 Am. Jur., Landlord and Tenant, § 848." *Austraw*, 269 N.C. at 223, 152 S.E.2d at 159. Therefore, we conclude the Supreme Court's decision in *Austraw* did not modify the burden of persuasion for establishing a breach of a lease provision in summary ejectment actions.

Moreover, even if the quotation in *Austraw* is not *dicta*, the General Assembly added the language "plaintiff proves his case by a preponderance of the evidence" to N.C. Gen. Stat. § 42-30 in 1973 *after Austraw* was decided in 1967. *See* ch. 10, sec. 1, 1973 N.C. Sess. Laws 5, 5. This is not a constitutional issue over which our courts have the final say. Therefore, the General Assembly abrogated any deviation from the default burden of persuasion that might have occurred in *Austraw*.

Morris also directs us to our decision in *Fleming*. In that case, the dispositive issue was whether the Charlotte Housing Authority presented sufficient evidence to establish that an individual was a guest of the defendant-tenant in order to demonstrate a breach of the lease agreement. *Fleming*, 123 N.C. App. at 513, 473 S.E.2d at 374–75. We cited *Austraw* for the following proposition:

> In order to evict a tenant in North Carolina, a landlord must prove: (1) That it distinctly reserved in the lease a right to declare a forfeiture for the alleged act or event; (2) that there is clear proof of the happening of an act or event for which the landlord reserved the right to declare a forfeiture; (3) that the landlord promptly exercised its right to declare a forfeiture[;] and (4) that the result of enforcing the forfeiture is not unconscionable.

Id. at 513, 473 S.E.2d at 375 (citing *Austraw*, 269 N.C. at 223, 152 S.E.2d at 159). Following this statement, the opinion draws no connection between the "clear proof" language and the facts of the case before concluding that the plaintiff's evidence was insufficient. *See id.* at 513–15, 152 S.E.2d at 375–76. The opinion does not state that *Austraw* established a different burden of persuasion in summary ejectment cases. More importantly, the *Fleming* Court could not have

relied on *Austraw* to apply a heightened burden of persuasion for the reasons stated above. Reading our decision in *Fleming* as creating a heightened burden of persuasion would bring that case into conflict with the well-established rule that this Court may not modify the burden of persuasion in a civil case. *Adams*, 167 N.C. App. at 401, 606 S.E.2d at 154.

We hold that neither *Austraw* nor *Fleming* created a heightened burden of persuasion for plaintiffs in summary ejectment cases. The burden of persuasion is as set forth in N.C. Gen. Stat. § 42-30. The trial court erred in applying the clear, cogent, and convincing standard to DHM's summary ejectment action. The order of the trial court must be vacated and this matter must be remanded to the trial court.

IV. Waiver

[2] Because the trial court applied the wrong burden of persuasion on the issue of breach of the lease agreement, we do not reach the waiver issue. Waiver is an affirmative defense. *See* N.C. Gen. Stat. § 1A-1, Rule 8(a)(c) (2009) (describing waiver as an affirmative defense). Upon remand, Morris will bear the burdens of persuasion and production to establish waiver. *See Wells v. Clayton*, 236 N.C. 102, 106, 72 S.E.2d 16, 19 (1952) ("The defendant has the burden of proving an affirmative defense, or a controverted counterclaim."). *See generally supra* note 1 (explaining the distinction between the burdens of proof, persuasion, and production).

V. Conclusion

The trial court erred in requiring DHM to demonstrate a breach of the lease agreement by clear, cogent, and convincing evidence rather than by the preponderance of the evidence. On remand, the trial court shall apply the proper burden of persuasion. The trial court may, in its discretion, receive additional evidence. On remand, the trial court shall consider Morris's affirmative defense of waiver, applying the appropriate burden of proof.

VACATED and REMANDED.

Judges ERVIN and MCCULLOUGH concur.

ROBERT LEE ARCHIE, JR., EMPLOYEE, PLAINTIFF v. EDWARD KIRK, D/B/A KIRK CONTRACTING, EMPLOYER; LAMAR ADVERTISING, INC., CONTRACTOR; CAP CARE GROUP, INC., CONTRACTOR; EMPLOYER; AND LIBERTY MUTUAL INSURANCE CO., ZURICH NORTH AMERICA, AND BUILDERS MUTUAL INSURANCE, CARRIERS, DEFENDANTS

No. COA11-436

(Filed 20 December 2011)

1. Workers' Compensation—employer-employee relationship—occasional sign hanging

The Industrial Commission did not err in a workers' compensation case by concluding that an employer–employee relationship existed between plaintiff and defendant Kirk. Considering the circumstances in which the matter arose as well as the manner in which plaintiff was paid, the supervision of plaintiff, and the furnishing of equipment, plaintiff's performance of his duties in hanging billboard signs for Kirk lacked the independence necessary for classification as an independent contractor.

2. Workers' Compensation—appeal—no direct ruling by Industrial Commission

Arguments in a workers' compensation case about whether all of plaintiff's medical problems stemmed from his work-related injury were not properly before the Court of Appeals where there was no indication of a direct ruling by the Industrial Commission.

Appeal by defendants Edward Kirk, d/b/a Kirk Contracting, and Liberty Mutual Insurance Company from opinion and award entered 15 December 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 October 2011.

Davis and Hamrick, L.L.P., by Ann C. Rowe, for defendant-appellants.

Daggett Shuler, Attorneys at Law, by Griffis C. Shuler, for plaintiff-appellee.

BRYANT, Judge.

Because plaintiff lacked the independence necessary to determine he was an independent contractor, we affirm the Commission's conclusion that an employer-employee relationship existed between defendant and plaintiff. Further, because the Commission did not

make a direct ruling on the specific medical conditions for which plaintiff was to receive compensation, defendants' contentions are not properly before us.

On 10 June 2009, Deputy Commissioner Robert W. Rideout heard testimony to determine whether an employer-employee relationship existed between plaintiff Robert Archie and defendant Edward Kirk (Kirk) and whether plaintiff suffered a compensable injury and was entitled to benefits.

Kirk was self-employed. He contracted with advertising companies to change billboard advertisements. The work was unsteady: billboard advertisements could be changed as often as every ninety days or as infrequently as every two years. He often required the help of only one person, though a large billboard may take a few hours and require more than two people.

Kirk met plaintiff through a friend, and plaintiff had been helping Kirk hang billboard signs since 2004. Plaintiff never submitted an employment application or references nor did he sign an employment contract. No one who aided Kirk in hanging billboards ever submitted an application or signed an employment contract, and Kirk did not keep personnel records. Before starting a job, Kirk would call plaintiff to ask if he was available. Kirk paid plaintiff either $9.00 to $10.00 per hour or $40.00 per billboard sign, and the payment method varied by the job. Kirk transported plaintiff to the job site and provided the necessary tools—a helmet, harness, rope, hammers, screws, bolts, and a utility knife. Sometimes before arriving at a job site, Kirk stopped and bought supplies. Occasionally, a job required more than two people, but, most of the time, plaintiff and Kirk worked alone. Plaintiff testified that if Kirk hired other people to hang a billboard sign, "[Kirk] would be down on the ground supervising [them]." It was not often that plaintiff would hang a billboard without Kirk present. Kirk testified that plaintiff knew how to take the billboard signs down and put them up; he didn't need any special instruction.

On 10 October 2006, plaintiff assisted Kirk with a billboard located in Madison, Rockingham County. Including plaintiff, Kirk hired three people for the job, which was to remove an old sign on the billboard in preparation for installing a new sign. The billboard was thirty-to-forty feet high and at one end was a "power pole," approximately an arm's length away. Plaintiff went up on top of the billboard wearing the harness and hard hat Kirk provided. The billboard sign to be removed was fastened by metal poles. As plaintiff was holding one

of the metal poles, it touched an adjacent power line, and plaintiff was electrocuted. His leg caught and was trapped at the top of the billboard. His body from his chest to his kneecaps caught on fire. Plaintiff was air-lifted to Wake Forest University Baptist Medical Center where he received treatment for flame and electrical burns resulting from having been shocked with 7200 volts of electricity. Plaintiff remained in the hospital for two months.

On 15 August 2007, plaintiff filed a Form 18, Notice of Accident to Employer and Claim of Employee, Representative, or Dependent, with the Industrial Commission. Plaintiff's workers' compensation claim was denied, and plaintiff filed a request that the matter be assigned for hearing.

On 11 June 2010, the deputy commissioner filed an opinion and award concluding that plaintiff was an employee of Kirk and that defendants Kirk and Liberty Mutual Insurance Company were responsible for temporary total disability benefits, as well as, past and future medical bills. Co-defendants Lamar Advertising, Inc. and Zurich Insurance Company, Cap Care Group, and Builders Mutual Insurance Company were dismissed as parties. Defendants Kirk and Liberty Mutual Insurance Company (defendants) filed an application for review by the Full Commission (the Commission).

On 14 December 2010, the Commission filed an opinion and award ordering defendants to pay plaintiff temporary total disability compensation at a rate of $266.68 per week from 10 October 2006 through 14 December 2010 and continuing until further order. The Commission also ordered defendants to pay plaintiff's past and future medical expenses related to the injury. Defendants appeal.

On appeal, defendants contend that the Commission erred by (I) concluding that Kirk had three or more employees on 10 October 2006 and that an employer-employee relationship existed between Kirk and plaintiff; (II) concluding that plaintiff was not an independent contractor; and (III) concluding that plaintiff met his burden of proof entitling him to temporary total disability compensation and medical expenses, including future medical expenses.

I & II

[1] Defendants contend that the Commission erred when it concluded that it had jurisdiction over plaintiff's claims premised upon findings that Kirk had three or more regular employees on 10 October

2006 and that an employer-employee relationship existed between plaintiff and Kirk at that time. We disagree.

"One who seeks to avail himself of the [Workers' Compensation] Act must come within its terms and must be held to proof that he is in a class embraced in the Act." *Hayes v. Bd. of Trustees*, 224 N.C. 11, 20, 29 S.E.2d 137, 142 (1944) (citations omitted).

> To be entitled to maintain a proceeding for workers' compensation, the claimant must be, in fact and in law, an employee of the party from whom compensation is claimed. The issue of whether the employer-employee relationship exists is a jurisdictional one. An independent contractor is not a person included within the terms of the Workers' Compensation Act, and the Industrial Commission has no jurisdiction to apply the Act to a person who is not subject to its provisions.

Youngblood v. North State Ford Truck Sales, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988) (citations omitted).

> The finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.
>
> . . .
>
> Whether an employer-employee relationship existed at the time of the injury is to be determined by the application of ordinary common law tests. Under the common law, an independent contractor exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work. In contrast, an employer-employee relationship exists where the party for whom the work is being done retains the right to control and direct the manner in which the details of the work are to be executed.

McCown v. Hines, 353 N.C. 683, 686, 549 S.E.2d 175, 177 (2001) (citations and quotations omitted).

> [T]he factors traditionally reviewed by our courts in determining whether a person is an independent contractor: whether the person (1) is engaged in an independent business, calling,

> or occupation; (2) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (3) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (4) is not subject to discharge because he adopts one method of doing the work rather than another; (5) is not in the regular employ of the other contracting party; (6) is free to use such assistants as he may think proper; (7) has full control over such assistants; and (8) selects his own time.

Coastal Plains Util., Inc. v. New Hanover Cty., 166 N.C. App. 333, 346, 601 S.E.2d 915, 923-24 (2004) (citation omitted). "No particular one of these factors is controlling in itself, and all the factors are not required. Rather, each factor must be considered along with all other circumstances to determine whether the claimant possessed the degree of independence necessary for classification as an independent contractor." *McCown*, 353 N.C. at 687, 549 S.E.2d at 178 (citations omitted).

The record before us shows that though Kirk sometimes paid plaintiff a lump sum amount, plaintiff was often paid by the hour, *see Youngblood*, 321 N.C. at 384, 364 S.E.2d at 437-38 ("Payment of a fixed contract price or lump sum ordinarily indicates that the worker is an independent contractor, while payment by a unit of time, such as an hour, day, or week, is strong evidence that he is an employee[.]" (citations omitted)). The record also tends to indicate defendant exercised little supervision over plaintiff. However, on this point we note the Supreme Court's statement regarding supervision:

> [T]he fact that a claimant is skilled in his job and requires very little supervision is not in itself determinative. If the employer has the right of control, it is immaterial whether he actually exercises it. Nonexercise can often be explained by the lack of occasion for supervision of the particular employee, because of his competence and experience.

Id. at 387, 364 S.E.2d at 439 (citations omitted).

Further, the record shows that plaintiff was regularly, albeit intermittently, hired by Kirk from 2004 until 10 October 2006. Kirk transported plaintiff to job sites, and when plaintiff arrived, Kirk provided the tools to be used on the job: a helmet, harness, rope, hammers, screws, bolts, and a utility knife. *See id.* at 385, 364 S.E.2d at 438 ("when valuable equipment is furnished to the worker, the relationship is almost invariably that of employer and employee.").

Considering these factors in combination with the circumstances from which this matter arose, plaintiff's performance of his duties in hanging billboard signs for Kirk lacked the independence necessary for classification as an independent contractor. *See id.* (holding that a company's hire of an equipment salesman to train the company's employees over a five-day period established an employer-employee relationship where the company paid a wage per day, provided all necessary tools and equipment, exercised control over the salesman's schedule, and retained the right to discharge the salesman at any time); *compare McCown*, 353 N.C. 683, 549 S.E.2d 175 (holding that a roofer was an independent contractor where the evidence showed he had a specialized skill; provided his own equipment; was to receive a lump sum payment for the job rather than an hourly wage; exhibited discretion in how the work was to be completed; lacked regular employment by any one employer; and had only a self-imposed daily work schedule). Therefore, we hold that an employer-employee relationship existed between Kirk and plaintiff on 10 October 2006, and defendants' argument contesting the Commission's jurisdiction for lack of an employer-employee relationship is overruled. *McCown*, 353 N.C. at 686, 549 S.E.2d at 177.

III

[2] Defendants next argue that the Commission erred in finding that plaintiff carried his burden of proof establishing compensability and temporary total disability entitling him to compensation for disability, as well as, previously incurred and future medical expenses. Specifically, defendants contend that the evidence does not support the finding and subsequent conclusion that all of plaintiff's medical problems stem from the 10 October 2006 injury. Plaintiff received treatment for diabetes, vision problems, and hypertension, conditions from which he suffered prior to 10 October 2006. Further, defendants argue that plaintiff receives ongoing treatment for bilateral hand pain, sinusitis, acute gastroenteritis, cellulitis of the left hand, subungual hematoma of the left thumb or a blood blister, but failed to establish a causal connection to the 10 October 2006 injury.

"[O]n appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Group*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted).

In its award, the Commission ordered that

> 2. Defendant-Employer Edward Kirk, d/b/a Kirk Contracting shall pay for [plaintiff]'s past medical expenses related to his injury of October 10, 2006, *when the same have been presented and approved for payment by the Industrial Commission in accordance with the Act and administrative regulation.* Plaintiff's treatment by his medical care providers, including, but not limited to, his treating physicians for his burns and electrical injuries . . . are hereby approved and authorized.
>
> 3. Defendant-Employer Edward Kirk, d/b/a Kirk Contracting shall pay for [plaintiff]'s reasonable future medical expenses for his medical condition related to his injury of October 10, 2006, at the direction of [plaintiff's treating physicians].

(Emphasis added).

The Commission concluded that plaintiff was not an independent contractor and that the greater weight of evidence established he was an employee of Edward Kirk. The medical evidence established that plaintiff was temporarily totally disabled on 10 October 2006 as a result of a compensable injury. Furthermore, "[plaintiff] ha[d] carried his burden in the case on compensability and disability as to Defendant Edward Kirk d/b/a Defendant Contracting and its Carrier Liberty Mutual Insurance Company." The Commission concluded that "Defendant-Employer Edward Kirk, d/b/a Kirk Contracting is responsible for payment of all of [plaintiff]'s past medical treatment reasonably related to his compensable injury by accident of October 10, 2006[,]" and that "[plaintiff] is entitled to have Defendant-Employer Edward Kirk, d/b/a Kirk Contracting pay all ongoing and future medical expenses related to [plaintiff]'s condition from the accident of October 10, 2006."

Although the Commission concluded that "Defendant-Employer Edward Kirk, d/b/a Kirk Contracting shall pay for [plaintiff]'s past medical expenses related to his injury of October 10, 2006, *when the same have been presented and approved for payment by the Industrial Commission in accordance with the Act and administrative regulation*[,]" the record does not indicate that the Commission reached a conclusion as to whether plaintiff's treatments for diabetes, vision loss, hypertension, bilateral hand pain,

sinusitis, acute gastroenteritis, cellulitis of the left hand, subungual hematoma of the left thumb or a blood blister were to be encompassed in the award. Therefore, because there is no indication of a direct ruling as to these medical treatments these arguments are not properly before us. 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 . . . . It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."); *see also*, *Maxim Healthcare/Allegis Group*, 362 N.C. at 660, 669 S.E.2d at 584. Accordingly, we dismiss defendants' arguments on this issue. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Affirmed in part; dismissed in part.

Judges ELMORE and STEPHENS concur.

STATE OF NORTH CAROLINA v. ALVIN STEVENSON JOHNSON

No. COA11-677

(Filed 20 December 2011)

1. Drugs—trafficking—cocaine—constructive possession

The trial court did not err by denying defendant's motion to dismiss the drug trafficking charges. The evidence was sufficient to establish that defendant constructively possessed the cocaine found inside the car.

2. Criminal Law—prosecutor's argument—defendant the devil

The trial court did not err by failing to intervene *ex mero motu* during the State's closing argument when the prosecutor called defendant the devil in front of the jury. The prosecutor used this phrase to illustrate the type of witnesses which were available in a case such as this one instead of characterizing defendant as the devil.

3. Constitutional Law—effective assistance of counsel—claim dismissed without prejudice

Defendant's claim for ineffective assistance of counsel was dismissed without prejudice to defendant's right to file a motion for appropriate relief so that an evidentiary hearing may be held to determine whether defendant consented to his counsel's admission of guilt to the charge of resisting a public officer.

Appeal by defendant from judgments entered on or about 10 September 2008 by Judge Jerry R. Tillett in Superior Court, Currituck County. Heard in the Court of Appeals 30 November 2011.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Brandon L. Truman, for the State.

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

STROUD, Judge.

Defendant appeals his convictions for trafficking in cocaine by possession, trafficking in cocaine by transportation, possession with intent to sell or deliver cocaine, and resisting a public officer. Defendant claims that the trial court erroneously denied his motion to dismiss; the trial court erred in failing to intervene *ex mero motu* during the State's improper closing argument; and he received ineffective assistance of counsel. We conclude that the trial court did not err in denying defendant's motion to dismiss, find no error as to the trial court failing to intervene ex mero motu into the State's closing argument, and dismiss defendant's claim for ineffective assistance of counsel so that defendant may file a motion for appropriate relief for a full evidentiary hearing to be conducted on the issue.

I. Background

The State's evidence tended to show that around midnight on 26 October 2006, Sergeant Eric Brinkley of the Currituck County Sherriff's Office was on patrol duty when he recognized a Pontiac vehicle at a 7-Eleven that "did not have a North Carolina state inspection sticker on the windshield." Sergeant Brinkley called for backup, followed the vehicle, and "turned [his] blue lights and sirens on[;] the vehicle proceeded to go to the side of the road and then back onto the road again and proceed[ed] . . . approximately a quarter mile down

the road further." Sergeant Brinkley finally stopped the vehicle which had three males in it. Defendant was the only person in the backseat.

Deputy Randy Jones arrived at the scene and "his canine [K-9] made a positive alert for the presence of narcotics in th[e] vehicle." Deputy Jones looked in the vehicle and found "a plastic sandwich baggy with [an] off-white rock-like substance in it" in "[t]he passenger rear seat area floorboard where [defendant's] feet would be." Sergeant Brinkley "went to search" defendant, when he "got down to around his sock and feet area" he "felt a lump in [defendant's] sock that shouldn't have been there. Something was out of place." Defendant "took off running through a field. [Defendant] jumped the ditch that [they] were parked near and went through the field. [Sergeant Brinkley] caught [defendant] about thirty [30] yards into th[e] field." Sergeant Brinkley tackled defendant and "one of [defendant's] shoes . . . had come off and right there beside his shoe was a small bag of white powder." Upon searching defendant, Sergeant Brinkley found "a sandwich baggy with a larger amount of white powder inside of it."

Defendant was indicted for trafficking in cocaine by possession ("trafficking by possession"), trafficking in cocaine by transportation ("trafficking by transportation"), possession with intent to sell or deliver cocaine ("PWISD"), possession of cocaine, and resisting a public officer. During defendant's trial, Mr. Robert Hall, the other passenger in the Pontiac vehicle, testified that he had sold defendant the cocaine found in the vehicle and in defendant's sock "for [defendant] to sell it." Mr. Hall further testified that he and defendant had previously "sold crack together[.]" After defendant's trial, the jury found him to be guilty of both trafficking charges, PWISD, and resisting a public officer. The trial court determined defendant had a prior record level of III and sentenced him consecutively to 35 to 42 months imprisonment for each of his trafficking convictions, 10 to 12 months imprisonment for his conviction for PWISD, and 60 days imprisonment for resisting a public officer. Defendant appeals.

II. Motion to Dismiss

[1] Defendant first contends that the trial court erred in denying his motion to dismiss the trafficking charges "because the evidence was insufficient to establish that he constructively possessed the cocaine found inside the car which was necessary to reach a trafficking weight." (Original in all caps.)

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.

State v. Johnson, ___ N.C. App. ___, ___, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted). "To establish trafficking by possession, the State must show that a defendant (1) knowingly possessed a given controlled substance; and (2) that the amount possessed was greater than 28 grams." *State v. Wiggins*, 185 N.C. App. 376, 386, 648 S.E.2d 865, 872, *disc. review denied*, 361 N.C. 703, 653 S.E.2d 160 (2007), *disc. review denied*, ___ N.C. ___, 674 S.E.2d 421 (2009). The elements for trafficking by transportation are that defendant "(1) knowingly [transported] a given controlled substance; and (2) that the amount [transported] was greater than 28 grams." *Id; see* N.C. Gen. Stat. § 90-95(h)(3) (2005).

Defendant argues that

> [i]n order to prove that [he] possessed a trafficking amount of cocaine, the State had to add the weight of the cocaine found on . . . [defendant] to the weight of the cocaine found inside the car. However, the State did not present incriminating circumstances sufficient to establish . . . [defendant]'s intent and capability to maintain dominion and control over the cocaine in the car, thereby establishing that he constructively possessed that cocaine.

Thus, defendant does not contest his possession of the cocaine found near his shoe or found on his person; defendant only contends that the State did not establish that he possessed the cocaine in the vehicle. We disagree.

> Possession can be actual or constructive. When the defendant does not have actual possession, but has the power and intent to control the use or disposition of the substance, he is said to have constructive possession. However, unless the defendant has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred.

State v. Doe, 190 N.C. App. 723, 730, 661 S.E.2d 272, 276 (2008) (citations, quotation marks, and brackets omitted).

In *Doe*,

> Raleigh Police Detective A.H. Pennica ("Detective Pennica") obtained information from confidential informants that a drug purchase had been arranged with an individual known as "Goyo." "Goyo" was later identified as Alfredo Lara ("Lara"). The drug purchase was scheduled to occur at approximately 9:00 p.m. in the parking lot of the building on 2800 Trawick Road. Lara was to deliver a quarter kilo of cocaine, which equals approximately nine ounces. The informants told Detective Pennica that Lara and a second person would deliver the drugs.
>
> Detective Pennica drove to the location and parked directly across the street to observe the transaction. Detective Pennica required one informant to stay behind with him to contact the second informant via telephone. The second informant was instructed to approach Lara's vehicle and to signal to the first informant when he had observed the cocaine. After Detective Pennica received the signal, drug enforcement officers stationed next to the parking lot were ordered to "takedown" the vehicle. Three subjects, Lara, defendant, and the second informant occupied the vehicle.
>
> Raleigh Police Sergeant Mike Glendy ("Sergeant Glendy") removed defendant from the front passenger seat, handcuffed and searched his person. Sergeant Glendy found three small bags of cocaine located inside defendant's front right pocket. Meanwhile, officers searched the vehicle and recovered a small brown paper bag containing nine ounces of cocaine on the floorboard of the back seat near the center console.
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> After officers had recovered the drugs and secured the scene, defendant and Lara were transported to their residence. Upon arrival, defendant signed a form consenting to a search of his bedroom. Officers discovered six and a half grams of cocaine located inside a cowboy boot inside of defendant's closet.
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> After a three day trial, a jury found defendant to be guilty of: (1) trafficking in cocaine by possession; (2) trafficking in cocaine by transportation; (3) conspiracy to traffic in cocaine

> by possession; (4) possession with intent to sell or deliver cocaine; and (5) maintaining a dwelling for the keeping or selling of controlled substances.

Doe, 190 N.C. App. at 726-27, 661 S.E.2d at 274-75 (quotation marks omitted). As to defendant's trafficking in cocaine by possession charge, this Court determined:

> defendant did not have exclusive possession over the vehicle in which the cocaine was located; therefore other incriminating circumstances must have been present before defendant could be found to have constructive possession. At trial, Lara testified that: (1) defendant obtained the nine ounces of cocaine recovered from the vehicle from a third-party; (2) the cocaine was located in defendant's jacket or under the passenger seat where he was sitting prior to police intervention; and (3) defendant presented the cocaine to the confidential informant. Other testimony tended to show nine ounces of cocaine was recovered from the floorboard in the back seat, more toward the passenger side of the floorboard. Viewed in the light most favorable to the State, sufficient evidence was presented for the jury to infer defendant was in constructive possession of the cocaine recovered from the vehicle.

Id. at 730, 661 S.E.2d at 276-77 (citation and quotation marks omitted). This Court went on to state as to defendant's trafficking in cocaine by transportation charge that

> [t]ransportation is defined as any real carrying about or movement from one place to another. Lara testified that he and defendant often delivered cocaine together because he was the one that knew of the informant. Lara also testified that he and defendant had driven to their residence after work on 2 March 2006, arranged the drug purchase with one of the confidential informants, and later drove to the parking lot where the purchase was to occur with the cocaine located inside the vehicle. Viewed in the light most favorable to the State, sufficient evidence was presented to submit the charge of trafficking in cocaine by transportation to the jury.

Doe, 190 N.C. App. at 730-31, 661 S.E.2d at 277 (citation and quotation marks omitted).

Here, as to the trafficking by possession charge, the "other incriminating circumstances" tend to show that a co-occupant in the vehicle

testified that the cocaine belonged to defendant; the cocaine was found in the vehicle "where [defendant]'s feet would have been[;]" and, cocaine was also found on defendant's person; we view this evidence to be sufficient to show constructive possession. *See id.* at 730, 661 S.E.2d at 276-77. As to the trafficking by transportation charge, the "other incriminating circumstances" tend to show that Sergeant Brinkley saw the Pontiac at the 7-Eleven and followed the moving vehicle containing defendant and his cocaine down the road; we also view this as sufficient evidence to establish that defendant transported the cocaine. *See id.* at 730-31, 661 S.E.2d at 276-77. Accordingly, the trial court did not err in denying defendant's motion to dismiss the trafficking charges, and this argument is overruled.

III. State's Closing Argument

[2] Defendant also contends that "the trial court failed to intervene *ex mero motu* during the State's closing argument when the prosecutor disparaged . . . [defendant]'s character by calling him the devil in front of the jury." (Original in all caps.) "The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu.*" *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002).

Defendant directs this Court's attention to the prosecutor stating during closing argument, "I submit to you that when you try the devil, you have to go to hell to get your witness." But in context the prosecutor said,

> Think about the type of people who are in that world and who would be able to testify and witness these type of events. I submit to you that when you try the devil, you have to go to hell to get your witness. When you try a drug case, you have to get people who are involved in that world. Clearly the evidence shows that Robert Hall was in that world. He's an admitted drug dealer and admitted drug user.

As our Supreme Court has already stated on this issue, "We do not believe the district attorney was characterizing [the defendant] as the devil. He used this phrase to illustrate the type of witnesses which were available in a case such as this one." *State v. Willis*, 332 N.C. 151, 171, 420 S.E.2d 158, 167 (1992). Just as in *Willis*, this argument is overruled. *See id.*

IV. Ineffective Assistance of Counsel

[3] Defendant next contends that his "trial attorney rendered ineffective assistance of counsel *per se* by admitting . . . [his] guilt to the charge of resisting a public officer during his closing argument without . . . [defendant]'s consent." (Original in all caps.) During closing arguments defendant's attorney stated,

> He's also charged with resisting, delaying, or obstructing the officer. You've heard that they have this dog alert, that that indicates the presence of narcotics. They got . . . [defendant] out of the car. They took him around to the back of the car to conduct a search of his person. And when the officer started getting down to his lower legs, he took off running across the field. He didn't obey their instructions. They had to tackle him out there and hit him with the flashlights to settle him down.
>
> Well, that certainly slowed down the officers in the performance of their duties, the elements are there. They were officers of the law. They were discharging a duty of their office. We are not contending they were doing anything unlawful at the time and he didn't obey. He delayed them. He obstructed them, he resisted them. Once again, I can't tell you what to do. But I have to submit to you that the Judge is going to tell you if you conclude that he was an officer of the law and he was discharging the lawful duty of his office, this gentlemen without justification was resisting and delaying and obstructing him.
>
> The Judge will tell you it's your duty to return a verdict of guilty of that charge. And once again, I'm not going to insult you or waste your time by trying to convince you otherwise. That would be a ridiculous thing to do.

Our Supreme Court has stated "that ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985), *cert. denied*, 476 U.S. 1123, 90 L.Ed. 2d 672 (1986); *see State v. Maready*, ___ N.C. App. ___, ___, 695 S.E.2d 771, 775-79 (concluding that the *Harbison* standard controls in non-capital cases), *disc. review denied and appeal dismissed*, 364 N.C. 329, 701 S.E.2d 246-47 (2010). In order for defendant to be convicted of resisting a public officer the State must have shown that (1) defendant "willfully and

unlawfully resist[ed], delay[ed] or obstruct[ed] a public officer in (2) discharging or attempting to discharge a duty of his office[.]" N.C. Gen. Stat. § 14-223 (2005).

Defendant's attorney stated, "[T]he elements are there. They were officers of the law. They were discharging a duty of their office. We are not contending they were doing anything unlawful at the time and he didn't obey. He delayed them. He obstructed them, he resisted them[;]" such statements cannot be construed in any other light than "admit[ting] the defendant's guilt[.]" *Harbison*, 315 N.C. 175, 180, 337 S.E.2d at 507-08. However, from the record before us, it is unclear whether defendant consented to the admission of guilt of this offense, which is minor in comparison to his other charges, by his attorney. As such, we dismiss this issue without prejudice in order for defendant to file a motion for appropriate relief so that a full evidentiary hearing may be held on this issue. *See Maready*, ___ N.C. App. at ___, 695 S.E.2d at 779-80 (noting this Court had previously remanded the case for an evidentiary hearing regarding the defendant's consent).

V. Conclusion

For the foregoing reasons, we find no error as to the trial court's denial of defendant's motion to dismiss; we find no error as to the trial court's failure to intervene *ex mero motu* into the State's closing argument; and we dismiss defendant's claim for ineffective assistance of counsel, without prejudice to defendant's right to file a motion for appropriate relief so that an evidentiary hearing may be held to determine whether he consented to his counsel's admission of guilt to the charge of resisting a public officer.

NO ERROR in part; DISMISSED in part.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA v. SELVYN MARTIN ABBOTT

No. COA11-658

(Filed 20 December 2011)

Indictment and Information—amendment—substantial alteration—larceny by employee—owner of property

The trial court erred in a larceny by employee case by allowing the State to amend the bill of indictment by deleting the word "Incorporated," because this amendment constituted a substantial alteration of the charge against him. The indictment was defective for failure to accurately set forth the owner of the pertinent property. The judgment was vacated and the State's indictment against defendant was dismissed.

Appeal by Defendant from judgment entered 3 September 2009 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 10 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General Lisa K. Bradley, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliot Walker, for Defendant-appellant.

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

Selvyn Martin Abbott ("Defendant") appeals his conviction for larceny by employee. On appeal, Defendant contends: (1) the trial court erred by allowing the State to amend the bill of indictment; (2) the trial court erred by entering judgment against Defendant where the amended indictment failed to allege a victim capable of owning property; (3) the trial court committed plain error by failing to instruct the jury on "temporary deprivation" in its charge to the jury; and (4) the trial court erred by denying Defendant's motion to dismiss at the close of the evidence. After careful review, we vacate the trial court's judgment and dismiss the State's indictment against Defendant.

I. Factual & Procedural Background

The State's evidence at trial tended to show the following. In August 2008, Neil Schulman owned and operated a "full service sign shop" in Wilmington. The shop designed, carved, printed, and repaired

signs. Mr. Schulman operated the shop as a sole proprietorship under the name "Cape Fear Carved Signs." The shop had a workshop area and was equipped with a video surveillance system. Mr. Schulman's son, Keith Yow, and Shannon MacKay, a graphic designer, also worked at the shop.

On or about 11 August 2008, Mr. Schulman hired Defendant to perform mechanical work on some of the shop's equipment. Defendant was entrusted with some of the tools and had access to the tools in the workshop area of the shop but did not have permission to remove the tools from the shop. That same week, Mr. Schulman left on a trip to Florida.

On the afternoon of 14 August 2008, while Mr. Schulman was in Florida, Ms. MacKay observed Defendant leaving the shop "rolling like a suitcase kind of thing behind him." Bill Wesley Robinson, who worked at a muffler shop across the street from Cape Fear Carved Signs, also observed Defendant remove a black and yellow bag from the shop. Mr. Robinson found Defendant's behavior suspicious and telephoned "James," who operated a scooter shop immediately adjacent to the sign shop. Mr. Robinson observed as James confronted Defendant. Mr. Yow arrived at the sign shop around this time and approached James and Defendant. Mr. Yow inspected the bag Defendant had been carrying and discovered the bags contained tools from the sign shop. Defendant explained he was taking the tools home to charge their batteries, which struck Mr. Yow as odd because the tools could have been charged right there at the sign shop. Mr. Yow escorted Defendant home, then returned to the shop to determine if any tools were missing.

Upon returning from his trip to Florida, Mr. Schulman was informed of Mr. Yow's encounter with Defendant. Mr. Schulman investigated to see if any tools were missing. He discovered that a nail bag, a brand new nail gun set, a brand new wrench set, and two drills were missing. Mr. Schulman also discovered that several of the shop's security cameras had been disabled.

On 11 September 2008, Defendant was arrested for the offense of larceny by employee. On 15 December 2008, a New Hanover County Grand Jury returned a true bill of indictment against Defendant on one charge of larceny by employee. The indictment states that Defendant "being the employee of Cape Fear Carved Signs, Incorporated," embezzled and converted to his own use certain tools "valued at $2,420.00 . . . kept for his employer's use, with the intent to steal and to defraud his employer."

This case came on to be tried at the 31 August 2009 Criminal Session of New Hanover County Superior Court, the Honorable Judge Phyllis M. Gorham presiding. When the case was called, the State moved to amend the bill of indictment by striking the word "Incorporated" from its language. The prosecutor explained, "we've just been apprised that at the time of this incident, on the date of the alleged offense, the business had not yet been incorporated. It was a sole proprietorship." The prosecutor further stated that "the essence of the offense is not the holding of the property by the entity, but it's rather, the larceny. So this is not a substantial change." The trial court agreed and, over Defendant's objection, granted the State's motion to amend the indictment.

Following a two-day trial, the jury returned its verdict finding Defendant guilty as charged. Judge Gorham determined Defendant had a prior record level of IV and sentenced Defendant to imprisonment for a period of ten to twelve months. Defendant entered notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b), as Defendant appeals from the Superior Court's final judgment as a matter of right.

III. Analysis

Defendant first contends the trial court erred by allowing the State to amend the bill of indictment by deleting the word "Incorporated," as this amendment constituted a substantial alteration of the charge against him. We agree.

"It is well settled that 'a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.' " *State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994) (citation omitted). Lack of jurisdiction in the trial court due to a fatally defective indictment requires the appellate court to arrest judgment or vacate any order entered without authority. *State v. Hicks*, 148 N.C. App. 203, 205, 557 S.E.2d 594, 596 (2001). The issue of subject matter jurisdiction may be raised at any time, even for the first time on appeal. *See State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000). The subject matter jurisdiction of the trial court is a question of law, which this Court reviews *de novo* on appeal. *Ales v. T.A. Loving Co.*, 163 N.C. App. 350, 352, 593 S.E.2d 453, 455 (2004).

A true bill of indictment represents the grand jury's formal accusation that the defendant has committed the charged offense. Thus, "[a] bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2009). Our Supreme Court "has interpreted prohibited amendments to mean 'any change in the indictment which would substantially alter the charge set forth in the indictment.' " *Abraham*, 338 N.C. at 340, 451 S.E.2d at 144 (quoting *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984)).

In the case *sub judice*, the indictment states:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully, and feloniously did, being the employee of Cape Fear Carved Signs, Incorporated located at 418 Kentucky Avenue, Wilmington, North Carolina, go away with, embezzle, and convert to his own use one (1) DeWalt right angle drill, three (3) Senco nail guns, eight (8) assorted DeWalt power tools, one (1) Craftsman wrench set, one (1) Senco nail gun bag, and one (1) DeWalt XRP drill, all valued at $2,420.00 in total, which had been delivered to be kept for his employer's use, with the intent to steal and to defraud his employer. This act was done without his employer's consent and contrary to the trust and confidence reposed in him by his employer. The defendant was over 16 years old at the time of this offense.

The issue for this Court is whether the striking of the word "Incorporated" substantially alters the larceny by employee charge against Defendant.

In *State v. Cathey*, the larceny indictment alleged the defendant "unlawfully, willfully, and feloniously did steal, take and carry away . . . the personal property of Faith Temple Church of God." 162 N.C. App. 350, 352, 590 S.E.2d 408, 410 (2004). The trial court permitted the State to amend the indictment to replace "Faith Temple Church of God" with "Faith Temple Church—High Point, Incorporated." *Id.* at 352, 590 S.E.2d at 410. Absent this amendment, the trial court was without jurisdiction because " '[a]n indictment for larceny which fails to allege the ownership of the property either in a natural person or a legal entity capable of owning property is defective.' " *Id.* at 352, 590 S.E.2d at 410 (quoting *State v. Roberts*, 14 N.C. App. 648, 649, 188 S.E.2d 610, 611-12 (1972)). This Court held that the "owner of the property in question is an essential element of larceny," and, there-

fore, replacing "Faith Temple Church of God" with "Faith Temple Church—High Point, Incorporated" constituted a substantial alteration of the charge in the indictment. *Id.* at 353-54, 590 S.E.2d at 410-11.

Here, the original indictment alleged the ownership of stolen property in "Cape Fear Carved Signs, Incorporated." This language represents that Cape Fear Carved Signs, as a corporate entity, owned the property allegedly stolen by Defendant. Although a corporation is a legal entity entitled to own property, Cape Fear Carved Signs was not incorporated at the time of the alleged theft; Mr. Schulman operated the sign shop as a sole proprietorship. Thus, Mr. Schulman, not Cape Fear Carved Signs, Incorporated, owned the property in question. As the owner of the property in question is an essential element of larceny, we hold the State's amendment to correct this error was a substantial alteration of the charge in the indictment. We further hold the trial court erred by allowing the amendment and failing to dismiss the indictment against Defendant. Accordingly, we vacate the judgment of the trial court and dismiss the State's indictment against Defendant.

We note the State does not contend the amendment was not a substantial alteration of the charge in the indictment. Nor does the State contend the indictment was not defective. Instead, the State argues Defendant "waived his ability to contest any and all alleged defects in the amended indictment because he did not move to dismiss it at trial." This argument is without merit. The case cited by the State in support of its position, *State v. Frogge*, involved a defendant who was challenging the indictment on the basis of an irregularity in the array of the grand jury. 351 N.C. 576, 584, 528 S.E.2d 893, 898 (2000). A challenge to the array of the grand jury must be made, by motion, at or before the time of arraignment. N.C. Gen. Stat. §§ 15A-952(b)-(c) (2009); 15A-955(1) (2009) (providing the court may dismiss an indictment on the motion of the defendant if "[t]here is ground for a challenge to *the array*." (Emphasis added)). Otherwise, the defendant waives this objection. N.C. Gen. Stat. § 15A-952(e) (2009). Thus, because the defendant in *Frogge* failed to raise this challenge before the trial court, our Supreme Court, citing sections 15A-952(e) and 15A-955(1) of our General Statutes, held the defendant had waived his "objection to the impropriety of [the] indictment by not making a motion to dismiss the indictment." *Frogge*, 351 N.C. at 584, 528 S.E.2d at 898.

Here, Defendant is not challenging the array of the grand jury. Defendant has taken issue with the indictment's failure to correctly

recite the owner of property allegedly stolen by Defendant. As discussed *supra*, the owner of the property in question is an essential element of the offense for which Defendant has been charged. This defect is jurisdictional, and the well-established rule holds true: where an indictment confers subject matter jurisdiction upon the trial court, any defect in the indictment that would deprive the trial court of its jurisdiction over the matter in controversy may be challenged *at any time*.

IV. Conclusion

We hold the indictment was defective for failure to accurately set forth the owner of the property in question. The trial court erred in allowing the State to correct this error, as the amendment to the indictment substantially altered the charge against Defendant. For the foregoing reasons, we dismiss the State's indictment against Defendant without prejudice, and the trial court's judgment must be

Vacated.

Judges THIGPEN and MCCULLOUGH concur.

CATHERINE MANONE, PLAINTIFF v. LAURA FAYE COFFEE, DEFENDANT

No. COA11-450

(Filed 20 December 2011)

Appeal and Error—notice of appeal—not timely—judgment picked up at courthouse

The trial court properly granted a motion to dismiss an appeal as untimely where a custody order granting joint custody was entered on 16 August 2010; defendant picked up the custody order at the court house on 19 August, within three days of its entry; and defendant did not file and serve notice of appeal until 20 September. The service requirements of Rule 3(c) of the Rules of Appellate Procedure are not applicable but the remainder of the Rule applies. This case was unique in that it was not clear from the record which party was required to serve a copy of the judgment and because defendant was both the appealing party and the party who complied with the service requirements.

MANONE v. COFFEE

[217 N.C. App. 619 (2011)]

Appeal by defendant from order entered 20 December 2010 by Judge William A. Marsh, III, in Durham County District Court. Heard in the Court of Appeals 29 September 2011.

Tharrington Smith, LLP, by Jill Schnabel Jackson and H. Suzanne Buckley, for plaintiff.

Sharpe, Mackritis & Dukelow, P.L.L.C., by Lisa M. Dukelow, for defendant.

THIGPEN, Judge.

Following the filing of a custody order on 16 August 2010, a staff member from defense counsel's office picked up the order from the court house[1] on 19 August 2010. The next day, the defendant's attorney mailed a copy of the order to the plaintiff and filed a certificate of service. The defendant filed notice of appeal on 20 September 2010. We must determine whether the trial court erred by dismissing the defendant's appeal as not timely filed. We conclude the defendant received actual notice of the entry and content of the order when the order was picked up from the court house; therefore, pursuant to Rule 3(c)(1) of the North Carolina Rules of Appellate Procedure, she had thirty days from the date the order was entered to file a notice of appeal. Because the defendant did not file notice of appeal within that time, her appeal was not timely, and, we affirm.

On 10-14 May 2010, the trial court heard Catherine Manone ("Plaintiff") and Laura Faye Coffee's ("Defendant") respective claims for child custody. On 16 August 2010, the trial court filed an order granting joint legal and physical custody ("Custody Order") of the minor children to Plaintiff and Defendant. On 19 August 2010, a staff member of Defendant's counsel obtained the Custody Order from the court house and faxed a copy to Plaintiff's counsel. On 20 August 2010, Defendant's counsel filed a Certificate of Service certifying that a copy of the Custody Order was mailed to Plaintiff's attorney and to Defendant. On 20 September 2010, Defendant filed Notice of Appeal of the Custody Order.

On 6 October 2010, Plaintiff filed a Motion to Dismiss Appeal. After a hearing on 3 November 2010, the trial court entered an order on 20 December 2010 granting Plaintiff's motion to dismiss and dis-

1. It is not clear from the record from whom or where at the trial court the staff member picked the order up. The defendant merely states in her brief that a staff member from her attorney's office "went to the court house . . . and located a copy of the order."

missing Defendant's appeal "as not timely filed." Defendant appeals from the 20 December 2010 order.

On appeal, Defendant contends the trial court erred by entering the 20 December 2010 order and holding that Defendant's appeal was not timely filed. We disagree.

"Failure to give timely notice of appeal in compliance with . . . Rule 3 of the North Carolina Rules of Appellate Procedure is jurisdictional, and an untimely attempt to appeal must be dismissed." *Booth v. Utica Mut. Ins. Co.*, 308 N.C. 187, 189, 301 S.E.2d 98, 99-100 (1983) (citations omitted). Rule 3(c) of the North Carolina Rules of Appellate Procedure provides that a party in a civil action must file and serve a notice of appeal:

> (1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or
>
> (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period[.]

N.C. R. App. P. 3(c)(1) & (2). Rule 58 of the North Carolina Rules of Civil Procedure states, in relevant part:

> [A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5.

N.C. Gen. Stat. § 1A-1, Rule 58 (2009). "[T]he purposes of the requirements of Rule 58 are to make the time of entry of judgment easily identifiable, and to give fair notice to all parties that judgment has been entered." *Durling v. King*, 146 N.C. App. 483, 494, 554 S.E.2d 1, 7 (2001) (citations omitted). Rule 5(b) of the North Carolina Rules of Civil Procedure lists various methods of service, including delivering a copy, mail, and telefacsimile, and states that a "certificate of service shall accompany every pleading and every paper required to be served on any party or nonparty to the litigation[.]" N.C. Gen. Stat. § 1A-1, Rule 5(b) (2009).

Rule 58 directs "[t]he party designated by the judge" or "the party who prepares the judgment" to "serve a copy of the judgment upon all other parties within three days after the judgment is entered." In this case, it is not clear from the record which party was designated by the judge or which party prepared the judgment;[2] thus, it is not clear which party was to serve a copy of the order upon the other party. We note, however, Defendant does not argue on appeal that Plaintiff was responsible under Rule 58 to serve a copy of the Custody Order on Defendant or that Defendant's time to appeal was tolled because Plaintiff failed to serve Defendant as required by Rule 58. Rather, Defendant contends her appeal was timely because neither party complied with the service requirements of Rule 58 until Defendant filed the certificate of service on 20 August 2010; thus, her time for filing notice of appeal did not begin to run until 20 August 2010.

Defendant cites *Frank v. Savage*, ___ N.C. App. ___, 695 S.E.2d 509 (2010), and *Davis v. Kelly*, 147 N.C. App. 102, 554 S.E.2d 402 (2001), in support of her argument that her notice of appeal is timely because there was no compliance with the Rule 58 service requirements until Defendant filed a certificate of service on 20 August 2010. In both *Frank* and *Davis*, this Court held that the non-appealing party's failure to comply with the certificate of service requirement tolled the appealing party's time for taking an appeal. *See Frank*, ___ N.C. App. at ___, 695 S.E.2d at 511-12 (holding that the plaintiffs' appeal was timely because the defendants' certificate of service did not show the name or service address of any person upon whom the order was served); *Davis*, 147 N.C. App. at 105, 554 S.E.2d at 404 (holding that the plaintiff's failure to comply with the certificate of service requirements tolled the defendant's time for filing and serving notice of appeal, and the defendant's appeal was therefore, timely). We find these cases distinguishable because in the instant case, Defendant is both the appealing party and the party who served a copy of the Custody Order on Plaintiff and filed the certificate of service. Additionally, the appealing party in *Davis* and *Frank* did not obtain a copy of the judgment until the non-appealing party served a

2. The record on appeal does not contain a transcript from the hearing on child custody, and therefore does not indicate if the trial court designated a party to prepare the order or which party prepared it. At the hearing on Defendant's motion to dismiss Plaintiff's appeal, Plaintiff's attorney told the trial court, "[Defendant's attorneys] prepared the judgment in this case." Defendant's attorney explained, however, "I don't know how it came to be who design—who prepared the judgment, but I know that when the order was signed . . . your case coordinator or whoever it was gave it to [Plaintiff's attorney]."

copy on them. In this case, Defendant went to the court house to pick up the Custody Order.

Although *Huebner v. Triangle Research Collaborative*, 193 N.C. App. 420, 667 S.E.2d 309 (2008), is also factually distinguishable from the present case, we find this Court's discussion of actual notice instructive. In *Huebner*, the plaintiff filed notice of appeal on 11 September 2007 from an order and judgment entered approximately three years earlier on 12 August 2004. *Id.* at 422, 667 S.E.2d at 310. The defendants never served the plaintiff with a copy of the order and judgment, but it was clear the plaintiff had actual notice of the order and judgment because he filed a Rule 60(b) motion on 27 October 2004 that "exactly tracked" the language in the order and judgment. *Id.* at 422-23, 667 S.E.2d at 311. Because the plaintiff had actual notice of the entry and content of the order and judgment and because almost three years had passed since the plaintiff had filed his Rule 60(b) motion and the entry of an order denying the motion, this Court held that the "plaintiff has waived the benefit of Rule 3(c) by failing to take timely action with regard to his notice of appeal." *Id.* at 425, 667 S.E.2d at 312-13. Additionally, this Court noted "we do not believe the purposes of Rule 58 are served by allowing a party with actual notice to file a notice of appeal and allege timeliness based on lack of proper service[.]" *Id.* at 425, 667 S.E.2d at 312.

In reaching our holding, we note that the facts of this case are unique in that it is not clear from the record which party was required to serve a copy of the judgment pursuant to Rule 58, and because Defendant is both the appealing party and the party who complied with the service requirements of Rule 58. However, following the language in *Huebner* regarding actual notice and considering the purposes of the service requirements of Rule 58, we hold that when a party receives actual notice of the entry and content of a judgment, as was done in this case by obtaining the Custody Order directly from the court house, the service requirements of Rule 3(c) of the Rules of Appellate Procedure are not applicable. At that point, the party has been given "fair notice . . . that judgment has been entered[,]" *Durling*, 146 N.C. App. at 494, 554 S.E.2d at 7 (citations omitted), and the party's actual notice essentially substitutes for the service requirements. Although we hold the service requirements of Rule 3(c) are not applicable, we further hold the remainder of Rule 3(c) shall continue to apply.

In this case, Defendant had actual notice of the entry and content of the Custody Order when a staff member from defense counsel's

office picked the Custody Order up from the court house on 19 August 2010 and faxed a copy of the Custody Order to Plaintiff's attorney. Although defense counsel contends she herself did not receive the Custody Order until 20 August 2010, notice is effective when the attorney's office, not the individual attorney, receives an order or judgment. *See Cornell v. Western and Southern Life Ins. Co.*, 162 N.C. App. 106, 111, 590 S.E.2d 294, 298 (2004) (holding that the defendants received notice of the opinion and award "when the notice was received by Womble, Carlyle, Sandridge, & Rice, P.L.L.C., not when the law firm routed it to the individual attorney within the firm to whom the case had been assigned").

Once Defendant received actual notice of the Custody Order by picking it up from the court house, the portion of Rule 3(c) requiring service pursuant to Rule 58 was not applicable to her. Here, the Custody Order was entered on 16 August 2010, and Defendant picked the Custody Order up from the court house on 19 August 2010, within three days of the date the Custody Order was entered. Therefore, under Rule 3(c)(1), Defendant was required to file and serve a notice of appeal within thirty days of 16 August 2010, the date the Custody Order was entered. Defendant had until 15 September 2010 to timely file and serve notice of appeal, but did not do so until 20 September 2010. Thus, we conclude Defendant's appeal was not timely, and the trial court did not abuse its discretion by granting Plaintiff's motion to dismiss Defendant's appeal.

AFFIRMED.

Judges GEER and STROUD concur.

MALINDA FRALEY and DAVID FRALEY, Co-Administrators of the Estate of ATLAS FRALEY, Plaintiffs v. JAMES GRIFFIN, in his individual capacity, Defendant

No. COA11-300

(Filed 20 December 2011)

1. Appeal and Error—denial of summary judgment—public official immunity—immediately appealable

Orders denying summary judgment based on public official immunity affect a substantial right and are immediately appealable.

2. Immunity—public official—EMT—position not created by statute

An emergency medical technician (EMT) was not entitled to public official immunity where he did not establish that the position of EMT was created by statute. The statutes cited by defendant neither provide a clear statutory basis for the position of EMT nor allow a person or organization created by statute to delegate statutory duties to EMTs.

3. Immunity—public official—EMT—ministerial work

An EMT was not entitled to public official immunity because he was required to follow an established treatment protocol and his work was ministerial in this context.

Appeal by defendant from order entered 12 November 2010 by Judge Carl R. Fox in Orange County Superior Court. Heard in the Court of Appeals 12 September 2011.

Twiggs, Beskind, Strickland & Rabenau, P.A., by Donald R. Strickland, Karen M. Rabenau, and Jesse H. Rigsby, IV, for plaintiff-appellees.

Teague Campbell Dennis & Gorham, L.L.P., by Henry W. Gorham, Carrie E. Meigs, and Leslie B. Price, for defendant-appellant.

Glenn, Mills, Fisher & Mahoney, P.A., by William S. Mills and Carlos Mahoney, for North Carolina Advocates for Justice, amicus curiae.

Walker, Allen, Grice, Ammons & Foy, L.L.P., by Jerry A. Allen, Jr., for The North Carolina Association of Rescue and EMS and North Carolina Association of EMS Administrators, amici curiae.

CALABRIA, Judge.

James Griffin ("defendant") appeals from the trial court's order denying defendant's motion for summary judgment on the basis of public official immunity. We affirm.

I. Background

On 12 August 2008, Atlas Fraley ("Atlas") returned home after a high school football practice and called 911. Atlas told the operator

that he was seventeen years old and experiencing full body cramps and dehydration. He also told the dispatcher that he was home alone as his parents were at work. The operator dispatched defendant, an emergency medical technician ("EMT") employed by Orange County Emergency Services ("OCES"), to Atlas' home.

When defendant arrived at Atlas' home, he noted that Atlas was in obvious discomfort and could not sit still. Defendant conducted a brief examination of Atlas and determined his condition was not serious and that his pain was not severe. Defendant advised Atlas to orally hydrate and watched him do so successfully. Defendant then gave Atlas oral and written instructions to contact his parents and 911 if his symptoms worsened and left Atlas home alone. Defendant proceeded to respond to other emergency calls. A few hours later, Atlas' parents arrived home and found him lying on their living room floor. Atlas was unresponsive and not breathing. When OCES personnel arrived, Atlas was pronounced dead. A later autopsy could not definitely determine Atlas' cause of death.

On 28 January 2010, Atlas' parents, as co-administrators of his estate ("plaintiffs"), initiated a wrongful death action in Orange County Superior Court against defendant, in both his official and individual capacities, OCES, and Orange County, North Carolina. After determining that Orange County had not waived its sovereign immunity for their claims, plaintiffs dismissed all claims with the exception of those against defendant in his individual capacity.

On 29 October 2010, defendant filed a motion for summary judgment on the basis of, *inter alia*, public official immunity. After a hearing, this motion was denied by the trial court on 12 November 2010. Defendant appeals.

II. Public Official Immunity

[1] As an initial matter, we note that the trial court's order denying defendant's motion for summary judgment is interlocutory, and thus, not generally subject to immediate appeal. *Snyder v. Learning Servs. Corp.*, 187 N.C. App. 480, 482, 653 S.E.2d 548, 550 (2007). "Orders denying summary judgment based on public official immunity, however, affect a substantial right and are immediately appealable." *Dempsey v. Halford*, 183 N.C. App. 637, 638, 645 S.E.2d 201, 203 (2007). Thus, defendant's appeal is properly before this Court.

Defendant's sole argument on appeal is that the trial court erred by denying his motion for summary judgment. Defendant asserts that,

as an EMT for Orange County, he is entitled to public official immunity. We disagree.

> It is well established that [p]ublic officers are shielded from liability unless their actions are corrupt or malicious[;] however, public employees can be held personally liable for mere negligence. In distinguishing between a public official and a public employee, our courts have held that (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties. Additionally, an officer is generally required to take an oath of office while an agent or employee is not required to do so.

Murray v. County of Person, 191 N.C. App. 575, 579-80, 664 S.E.2d 58, 61 (2008)(internal quotations and citations omitted).

A. Position Created by Statute

[2] Defendant first contends that the position of EMT is created by statute. This Court has noted that cases which have recognized the existence of a public officer did so when either the officer's position had "a clear statutory basis" or the officer had been "delegated a statutory duty by a person or organization created by statute." *Farrell v. Transylvania Cty. Bd. of Educ.*, 199 N.C. App. 173, 177-79, 682 S.E.2d 224, 228-29 (2009). Defendant contends that N.C. Gen. Stat. §§ 131E-155, 131E-158, 143-507, and 143-517 (2009) support his argument that the position of EMT is created by statute.

N.C. Gen. Stat. § 131-155 simply contains the definitions which are to be applied in Article 7 of Chapter 131E, which governs the "Regulation of Emergency Medical Services." N.C. Gen. Stat. § 131E-155 (6) defines an EMT as used in that article and differentiates EMTs from other positions defined in the statute such as "emergency medical dispatcher," N.C. Gen. Stat. § 131E-155 (5), and "mobile intensive care nurse," N.C. Gen. Stat. § 131E-155 (15). The existence of this statutory definition does not constitute creating the position of EMT. *See Farrell*, 199 N.C. App. at 177, 682 S.E.2d at 228 (N.C. Gen. Stat. § 115C-325 (a)(6) "defines a 'teacher' as used in that section, as opposed to a 'career employee,' 'case manager,' or 'school administrator;' it does not create the position of public school teacher.").

Likewise, the remaining statutes cited by defendant do not create the position of EMT. N.C. Gen. Stat. § 131E-158 regulates the opera-

tion of all ambulances, either public or private, by requiring "[e]very ambulance when transporting a patient . . . [to] be occupied . . . by . . . at least one emergency medical technician . . . [and] one medical responder." N.C. Gen. Stat. § 143-507 establishes "a comprehensive Statewide Emergency Medical Services System in the Department of Health and Human Services," and N.C. Gen. Stat. § 143-517 requires each North Carolina county to "ensure that emergency medical services are provided to its citizens." These various statutes operate to create and regulate different aspects of emergency medical services in North Carolina. None of these statutes, either singly or in combination, operate to create the position of EMT. Since the statutes cited by defendant neither provide a clear statutory basis for the position of EMT nor allow a person or organization created by statute to delegate any statutory duties to EMTs, defendant has failed to establish that the position of EMT was created by statute.

B. Discretion

[3] Defendant also contends that his work involves the exercise of discretion and cannot be characterized as ministerial work. Our Supreme Court has explained that "[d]iscretionary acts are those requiring personal deliberation, decision and judgment. Ministerial duties, on the other hand, are absolute and involve merely [the] execution of a specific duty arising from fixed and designated facts." *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999)(internal quotations and citations omitted). However, the mere use of judgment, by itself, is not enough to elevate an employee's ministerial duties to discretionary acts. There is some inherent use of judgment involved in virtually every position of employment. As our Supreme Court has stated:

> Of course, a mere employee doing a mechanical job, as were the defendants here, must exercise some sort of judgment in plying his shovel or driving his truck—but he is in no sense invested with a discretion which attends a public officer in the discharge of public or governmental duties, not ministerial in their character.

Miller v. Jones, 224 N.C. 783, 787, 32 S.E.2d 594, 597 (1945).

In the instant case, defendant, as an EMT, was required to follow an established treatment protocol, which the North Carolina Administrative Code defines as "a document . . . specifying the diagnostic procedures, treatment procedures, medication administration,

and patient-care-related policies *that shall be completed by EMS personnel or medical crew members based upon the assessment of a patient.*" 10A N.C.A.C. § 13P.0102 (73) (2010)(emphasis added). Thus, defendant, as an EMT, was required to execute the specific protocols which were indicated by "fixed and designated facts." *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127. Moreover, defendant could not deviate from these written protocols without the approval of a physician. *See* 10A N.C.A.C. § 13P.0401 (5)(b) (2010)("Only physicians may deviate from written treatment protocols[.]"). Consequently, defendant's work must be characterized as ministerial in the context of determining public official immunity.

Since defendant's position was not created by statute and his duties were best characterized as ministerial, as that term has been defined by our Supreme Court, he is not entitled to public official immunity. *See Farrell*, 199 N.C. App. at 179, 682 S.E.2d at 229. This argument is overruled.

III. Conclusion

Defendant is not entitled to public official immunity and may be held personally liable for any harm caused by his negligence in his position as an EMT. Thus, the trial court properly denied defendant's motion for summary judgment. The trial court's order is affirmed.

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

WILLIAM C. PORTER, PLAINTIFF v. NELL B. PORTER, DEFENDANT

No. COA11-899

(Filed 20 December 2011)

Divorce—equitable distribution—separation agreement—continuing effect

The trial court erred by ordering equitable distribution in contravention of the express terms of a Separation Agreement entered into in 1988 as part of an earlier separation. The parties specifically agreed that the agreement provisions regarding settlement of property rights would continue in full force and effect should the parties reconcile and resume the marital relationship.

PORTER v. PORTER

[217 N.C. App. 629 (2011)]

Appeal by plaintiff from order entered 17 February 2011 by Judge Napoleon B. Barefoot, Jr. in Brunswick County District Court. Heard in the Court of Appeals 28 November 2011.

Gailor, Wallis & Hunt, P.L.L.C., by Stephanie T. Jenkins, Stephanie J. Gibbs, and Carrie J. Buell, for plaintiff–appellant.

Wright, Worley, Pope, Ekster & Moss, P.L.L.C., by Paul J. Ekster and Rick W. Scott, and Stiller and Disbrow, by Jason Disbrow, for defendant–appellee.

MARTIN, Chief Judge.

Plaintiff William C. Porter ("husband") appeals from the trial court's 17 February 2011 equitable distribution order. We vacate the order and remand for additional proceedings consistent with this opinion.

Husband and defendant Nell B. Porter ("wife") were married on 28 April 1968; no children were born of the marriage. On 29 March 1988, the parties separated and signed a Separation Agreement and Property Settlement ("the Agreement"). Sometime after this separation, the parties reconciled and resumed their marital relationship until they separated again on 15 June 2005.

Husband filed an action for absolute divorce from wife. Wife counterclaimed, seeking an unequal equitable distribution of the marital and divisible assets in her favor and seeking attorney's fees. Husband's reply to wife's counterclaims alleged that the Agreement is "a complete bar to [wife's] claim to any of [husband's] property, both real and personal, and [is] a complete bar to [wife's] claim for equitable distribution." On 7 March 2007, the court granted husband's claim for absolute divorce from wife, and further ordered that the 1988 Agreement "is incorporated into this divorce judgment and is made a part hereof, fully enforceable as provided by law." The court also decreed that the "pending claims for equitable distribution are held open for disposition by the [c]ourt at a later date." At a later hearing on wife's counterclaim for equitable distribution, after considering the parties' sworn testimony, stipulations, and the record before it, the trial court distributed assets valued at $769,100.00 to husband, and distributed assets valued at $706,207.33[1] to wife, and

1. The trial court found that the assets awarded to wife were valued at $706,207.33 as of the date of separation, and valued at $700,957.00 as of the date of trial.

ordered that the parties share the costs of the action equally. Husband appealed.

Husband's only contention on appeal is that the trial court erred by considering wife's counterclaim for equitable distribution because such a claim was barred by the terms of the Agreement. We must agree.

"The [Equitable Distribution Act] provides for a judicial determination of the distribution of the property accumulated during the marriage, a distribution reflecting the contribution of each party to the family, whether that contribution be in the form of wages brought in or domestic services provided." *Hagler v. Hagler*, 319 N.C. 287, 289, 354 S.E.2d 228, 232 (1987). However, "[u]nder [N.C.G.S. § 50 20(d)], [b]efore, during or after marriage[,] the parties may by written agreement . . . provide for distribution of the marital property or divisible property, or both, in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties." *McIntyre v. McIntyr*e, 188 N.C. App. 26, 30, 654 S.E.2d 798, 801 (third alteration and omission in original) (internal quotation marks omitted), *aff'd per curiam*, 362 N.C. 503, 666 S.E.2d 749 (2008); *see also Hagler*, 319 N.C. at 290, 354 S.E.2d at 232 ("Our statutes . . . contain a mechanism whereby the parties to a marriage may forego equitable distribution and decide themselves how their marital estate will be divided upon divorce."). "These agreements are favored in this [S]tate, as they serve the salutary purpose of enabling marital partners to come to a mutually acceptable settlement of their financial affairs." *Hagler*, 319 N.C. at 290, 354 S.E.2d at 232.

Moreover, " '[w]henever the parties bring [a] separation agreement[] before the court for the court's approval, it will no longer be treated as a contract between the parties.' " *Jones v. Jones*, 144 N.C. App. 595, 599, 548 S.E.2d 565, 567 (2001) (quoting *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983)). Instead, " '[a]ll separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments.' " *Id.* (*quoting Walters*, 307 N.C. at 386, 298 S.E.2d at 342). Thus, "where the court incorporates the terms of a separation agreement into its judgment, the agreement is superseded by the court's order." *Id.* at 598, 548 S.E.2d at 567 (citing *Mitchell v. Mitchell*, 270 N.C. 253, 256, 154 S.E.2d 71, 73 (1967)).

In the present case, the parties separated and entered into the Agreement on 29 March 1988, which provided, in relevant part:

6. Husband hereby relinquishes and releases all his right, title and interest in and to all the personal property or estate of the Wife; he does further renounce his right to administer upon her estate in case of her death intestate and does hereby release, renounce and relinquish his right to become a distributee in the estate of said Wife. Husband does hereby further release and relinquish all his right and interest in and to any and all real or personal property owned by Wife or that she may hereafter own.

   Without limitation of the foregoing, Husband hereby specifically discharges, releases, relinquishes and surrenders any and all claims, demands, and rights of inheritance, descent, distribution, curtesy, and Statutory Share in or to all real and personal property of Wife, whether now owned or hereafter acquired by her, and all rights and claims growing out of the marital relationship or otherwise, including any right of election to take against the will of Wife.

7. Wife hereby relinquishes and releases all her right, title and interest in and to all the personal property or estate of the Husband; she does further renounce her right to administer upon his estate in case of his death intestate and does hereby release, renounce and relinquish her right to become a distributee in the estate of said Husband. Wife does hereby further release and relinquish all her right and interest in and to any and all real or personal property owned by Husband or that he may hereafter own.

   Without limitation of the foregoing, Wife hereby specifically discharges, releases and surrenders any and all claims, demands and rights of inheritance, descent, distribution, dower, and Statutory Share in and to all real and personal property of Husband, whether now owned or hereafter acquired by him, and all rights and claims growing out of the marital relationship or otherwise, including any right of election to take against the will of Husband.

8. It is stipulated and agreed between the parties that should either of the parties file for and obtain a divorce in any lawful Court of the United States that both parties consent for this Separation Agreement and Property Settlement to be incorporated into the Divorce Judgment with the same force and effect as if the Separation Agreement and Property Settlement

had been entered as a Judgment of the Court, either prior to, simultaneous with, or subsequent to the obtaining of the divorce.

. . . .

10. Each of the parties hereto acknowledges that this Separation Agreement and Property Settlement has been entered into of his or her own volition, with full knowledge of the facts, and full information as to the legal rights of equitable distribution and distributive award contained in North Carolina General Statute Section 50 20, and that the parties hereto deem this Agreement to be a reasonable, equitable, and fair distribution of the marital property and any property not specifically provided for under this Agreement shall be deemed to be separate property to be solely owned by the party holding title to the same.

. . . .

13. In the event of the reconciliation and resumption of the marital relationship between the parties, the provisions of this agreement for settlement of property rights shall nevertheless continue in full force and effect without abatement of any term or provision thereof, except as otherwise provided by written agreement duly executed by each of the parties after the date of reconciliation.

Thus, according to the express terms of the Agreement, and with "full information as to the legal rights of equitable distribution and distributive award contained in North Carolina General Statute Section 50 20," husband and wife agreed that each would relinquish "any and all claims" to "any and all real or personal property owned by [the other party] or that [said party] may hereafter own." In other words, the parties exercised the "broad contractual freedom" afforded them under North Carolina law by entering into their 1988 Agreement and foregoing their right to seek equitable distribution of the marital estate. *See* 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 14.50c, at 14 145 (5th ed. 2002) [hereinafter *Lee's Family Law*]. Additionally, the parties specifically contemplated and agreed that, were they to reconcile and resume the marital relationship after entering into the Agreement in 1988, the provisions of the Agreement regarding "settlement of property rights shall . . . continue in full force and effect without abatement of any term or provision thereof."

Thus, the Agreement "makes the parties' intent clear" that the provisions regarding ownership of property acquired after husband and wife entered into the 1988 Agreement were to remain unaffected by any later reconciliation and resumption of the marital relationship. *See Lee's Family Law* § 14.50c, at 14 146. Accordingly, we conclude that the trial court erred by ordering equitable distribution of the property in contravention of the express terms of the now-court-ordered Agreement. Therefore, we vacate the trial court's order for equitable distribution and remand with instructions to distribute the property in accordance with the terms of the parties' Agreement, which provided that "any property not specifically provided for under this Agreement shall be deemed to be separate property to be solely owned by the party holding title to the same." Our decision renders it unnecessary to consider the parties' remaining arguments.

Vacated and remanded.

Judges ELMORE and STEPHENS concur.

STATE OF NORTH CAROLINA v. OMAR SHARIFF MCDOWELL

No. COA11-28

(Filed 20 December 2011)

Burglary and Unlawful Breaking or Entering—breaking or entering—goods of value in vehicle—evidence not sufficient

The trial court erred by denying defendant's motion to dismiss for insufficient evidence a charge of breaking or entering a motor vehicle where there was no evidence that the vehicle contained anything of value other than the components installed in the truck, a necessary element of the offense.

Appeal by defendant from judgment entered 14 July 2010 by Judge Forrest D. Bridges in Cleveland County Superior Court. Heard in the Court of Appeals 17 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General David Efird, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for defendant-appellant.

GEER, Judge.

Defendant Omar Shariff McDowell appeals from his conviction of breaking or entering a motor vehicle. Because we agree with defendant that the State failed to present evidence that the vehicle contained any items of value apart from objects installed in the vehicle, this Court's decision in *State v. Jackson*, 162 N.C. App. 695, 592 S.E.2d 575 (2004), requires that we reverse.

Facts

The evidence presented at trial tended to show the following facts. On the night of 27 July 2008, Christopher Thompson was monitoring his security camera when he noticed someone come over the fence around his yard. Thompson went outside to check the locked Ford F-150 truck parked in his driveway that he and his next-door neighbor, Thomas Moton, jointly owned and used. Thompson found defendant, whom he knew, inside the truck although neither Thompson nor Moton had given defendant permission to use the truck.

When Thompson ordered defendant out of the truck, defendant replied, "[I]t's me, Omar. I'm running from the police. That's why I'm in your truck." Defendant then fled the scene, and Thompson called the police, who quickly apprehended defendant. Thompson immediately identified defendant as the individual in the truck and informed the police "that it appeared that there was nothing missing" because "[h]e didn't have time. I was on him too quick."

Defendant was indicted for and found guilty of felony breaking or entering a motor vehicle and for being a habitual felon. The trial court sentenced defendant to a presumptive-range term of 121 to 155 months imprisonment. Defendant timely appealed to this Court.

Discussion

Defendant first argues that the trial court erred in denying his motion to dismiss. In ruling on a defendant's motion to dismiss, the trial court must determine whether the State presented substantial evidence (1) of each essential element of the offense and (2) of defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

The evidence, when viewed in the light most favorable to the State, must be sufficient to "give rise to a reasonable inference of

guilt." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). A motion to dismiss should be granted, however, when " 'the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt.' " *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (quoting *Stone*, 323 N.C. at 452, 373 S.E.2d at 433).

Defendant was charged with breaking or entering a motor vehicle in violation of N.C. Gen. Stat. § 14-56 (2009). "For the State to successfully obtain a conviction for breaking and entering a motor vehicle, the State must prove the following five elements beyond a reasonable doubt: (1) there was a breaking or entering by the defendant; (2) without consent; (3) into a motor vehicle; (4) *containing goods*, *wares*, *freight*, *or anything of value*; and (5) with the intent to commit any felony or larceny therein." *Jackson*, 162 N.C. App. at 698, 592 S.E.2d at 577.

Defendant challenges the sufficiency of the evidence on the fourth element. Our Supreme Court has noted that "even items of trivial value satisfy this element of the offense," such as a vehicle registration card, a hubcap key, a C.B. radio, papers, cigarettes, or a shoe bag. *State v. McLaughlin*, 321 N.C. 267, 270, 362 S.E.2d 280, 282 (1987). Nevertheless, when there is no evidence "even . . . that the victim's vehicle contained items of trivial value that belonged to the victim or to anyone else," then a conviction for breaking and entering a motor vehicle must be reversed. *Id.*

In *Jackson*, 162 N.C. App. at 698, 592 S.E.2d at 577, this Court further clarified that the items of value must be separate from the vehicle itself and cannot include "accouterments of a vehicle's interior" such as "seats, carpeting, visors, handles, knobs, cigarette lighters, and radios." The Court explained:

> In [prior decisions], the trivial effects found in the vehicle which were sufficient to go to the jury on the fourth element were effects not inherently a part of the functioning vehicle. The one common feature of the items mentioned in these cases was that they were akin to the cargo of the vehicle: "goods, wares, freight, or anything of value." *See* N.C. Gen. Stat. § 14-56.
>
> Adopting the State's reading of N.C. Gen. Stat. § 14-56, and specifically the fourth element of that offense, [to include accouterments of a vehicle's interior] would render that ele-

> ment redundant and superfluous. . . . The statute clearly requires that the larceny element of the breaking and entering pertain to objects within the vehicle, separate and distinct from the functioning vehicle.

Id. at 698-99, 592 S.E.2d at 577. In *Jackson*, the Court concluded that when the State pointed only to the keys for the car and the parts of the car, the State presented insufficient evidence of the fourth element. *Id.* at 699, 592 S.E.2d at 578.

In this case, the State at trial, arguing in opposition to defendant's motion to dismiss, pointed only to testimony by Moton that the truck contained tape players and speakers. Moton was asked whether he knew what was inside the vehicle, and he responded that when Moton and Thompson acquired the truck, tape players and speakers were already installed in the truck. In addition, Thompson and one of the officers testified only that nothing had been removed from the truck.

There was no testimony that the truck contained anything of even trivial value other than components installed in the truck. Under *Jackson*, the tape player and speakers—part of the functioning truck—are not sufficient to prove element four of the offense of breaking and entering a motor vehicle. *Id.*, 592 S.E.2d at 577.

The State, on appeal, argues that Thompson's statements—that defendant did not have time to take anything out of the truck and that it appeared nothing was missing—constituted sufficient evidence of element four. The State reasons that the jury could infer that something of value must have been in the truck because otherwise Thompson would have said there was nothing to take, and "[o]bviously, there had to be something in the truck if in fact 'nothing was missing' after an examination by Mr. Thompson." Since Thompson could have been referring to the fact that the tape player and speakers and other installed components of the truck had not been removed, Thompson's testimony at best gives rise to a suspicion or conjecture that the truck contained items sufficient to meet the fourth element of breaking and entering a motor vehicle. It is not evidence sufficient to survive a motion to dismiss.

As the State presented insufficient evidence that the truck contained goods, wares, freight, or anything of value—as defined by *McLaughlin* and *Jackson*—the trial court erred in failing to grant defendant's motion to dismiss. We must, therefore, "reverse defendant's guilty verdict under N.C. Gen. Stat. § 14-56" and also the jury's

finding that defendant was a habitual felon. *Id.* at 700, 592 S.E.2d at 578. *See also id.* at 699, 592 S.E.2d at 578 ("We cannot remand this case for resentencing under a lesser included offense, because there are no such offenses within N.C. Gen. Stat. § 14-56."). Because we find that the trial court erred in denying defendant's motion to dismiss, we do not reach defendant's other arguments.

Reversed.

Judges BRYANT and BEASLEY concur.

STATE OF NORTH CAROLINA v. HUEY DEWAYNE SELF

No. COA11-839

(Filed 20 December 2011)

1. Satellite-Based Monitoring—subject matter jurisdiction—notification procedure

The trial court had subject matter jurisdiction to conduct a satellite-based monitoring (SBM) determination hearing. N.C.G.S. § 14-208.40B(b), which governs the notification procedure for an offender when there was no previous SBM determination at sentencing, does not require the North Carolina Department of Correction to either file a complaint or issue a summons in order to provide a defendant with adequate notice of an SBM determination hearing.

2. Appeal and Error—preservation of issues—constitutional issue already settled

Our Supreme Court has previously rejected the argument that the imposition of lifetime satellite-based monitoring constituted an unconstitutional *ex post facto* punishment.

Appeal by defendant from order entered 9 February 2011 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 30 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Y. Harper, for the State.

Jon W. Myers, for defendant-appellant.

CALABRIA, Judge.

Huey Dewayne Self ("defendant") appeals the trial court's order requiring him to enroll in satellite-based monitoring ("SBM") for the remainder of his natural life. We affirm.

I. Background

On 28 November 1983, defendant was convicted of the offense of third degree criminal sexual conduct in Charleston County, South Carolina. On 14 October 2004, defendant pled guilty to one count of attempted second degree sexual offense and one count of assault on a female. The trial court sentenced defendant to an active term of imprisonment of a minimum of 71 months to a maximum of 95 months in the North Carolina Department of Correction ("NCDOC").

Defendant was released from NCDOC on 16 July 2010. Prior to his release, NCDOC notified defendant, via a letter delivered by defendant's probation officer, that he would be subject to an SBM determination hearing. An SBM determination hearing was conducted on 9 February 2011 in Buncombe County Superior Court. The trial court found that defendant was a recidivist and ordered defendant to enroll in SBM for the remainder of his natural life. Defendant appeals.

II. Subject Matter Jurisdiction

[1] Defendant argues that the trial court lacked subject matter jurisdiction to conduct an SBM determination hearing because NCDOC did not file a complaint or issue a summons to defendant as required by the North Carolina Rules of Civil Procedure. We disagree.

Defendant is correct that our Supreme Court has held that the SBM program is a civil regulatory scheme. *See State v. Bowditch*, 364 N.C. 335, 352, 700 S.E.2d 1, 13 (2010). However, contrary to defendant's contention, SBM hearings are not required to be initiated pursuant to the North Carolina Rules of Civil Procedure. The Rules of Civil Procedure "govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature *except when a differing procedure is prescribed by statute.*" N.C. Gen. Stat. § 1A-1, Rule 1 (2009)(emphasis added). As this Court has previously stated, "our General Assembly devised a separate procedure for determining eligibility for SBM and clearly granted the Superior Courts subject matter jurisdiction to conduct these determinations pursuant to specific statutory procedures." *State v. Jarvis*, ___ N.C. App. ___, ___, 715 S.E.2d 252, 257 (2011).

N.C. Gen. Stat. § 14-208.40B (b) (2009), which governs the notification procedure for an offender when there was no previous SBM determination at sentencing, does not require NCDOC to either file a complaint or issue a summons in order to provide a defendant with adequate notice of an SBM determination hearing. Moreover, defendant does not contend that the letter from NCDOC failed to comply with the notification provisions of N.C. Gen. Stat. § 14-208.40B (b). Accordingly, we must conclude that NCDOC properly initiated defendant's SBM determination hearing, and that, as a result, the trial court had jurisdiction to conduct the hearing. This argument is overruled.

III. *Ex Post Facto*

[2] Defendant argues that the imposition of lifetime SBM constitutes an unconstitutional *ex post facto* punishment. As defendant concedes, our Supreme Court has previously rejected this precise argument. *See Bowditch*, 364 N.C. at 352, 700 S.E.2d at 13 (holding that the SBM program is a civil regulatory scheme that does not implicate constitutional protections against *ex post facto* laws). Since this Court is bound by *Bowditch*, defendant's argument must be overruled.

IV. Conclusion

N.C. Gen. Stat. § 14-208.40B (b) does not require NCDOC to file a complaint or issue a summons in order to initiate an SBM determination hearing. The SBM program, as a civil regulatory scheme, does not violate the constitutional prohibition against *ex post facto* punishment. The trial court's order is affirmed.

Affirmed.

Judges BRYANT and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 DECEMBER 2011)

APPLEWOOD PROPS., LLC v. NEW SOUTH PROPS., LLC No. 11-353	Gaston (06CVS5528)	Dismissed
BORYLA-LETT v. PSYCHIATRIC SOLUTIONS OF N.C., INC. No. 11-621	Wake (07CVS11882)	Dismissed
DANIUS v. RODGERS No. 11-586	Mecklenburg (09CVS29776)	Affirmed
GRUNDMEYER v. CORN PRODS. INT'L No. 11-602	N.C. Ind. Comm. (886709)	Affirmed in Part, Reversed in Part and Remanded
IN RE A.C.R. No. 11-782	Dare (06JT18)	Affirmed
IN RE CAFOLLA No. 11-867	Forsyth (10CRS29905)	Affirmed
IN RE D.B. & S.B. No. 11-895	Wake (09JT821-22)	Affirmed
IN RE D.G. & L.G. No. 11-747	Cleveland (08JT9-10)	Affirmed
IN RE K.A. No. 11-1046	Watauga (11J3)	Reversed in part and affirmed in part; affirmed.
IN RE M.H. No. 11-768	Person (09J61)	Affirmed
JDAVIS ARCHITECTS, PLLC v. LAKE RALEIGH/DAVIS LLC No. 11-737	Wake (09CVS11447)	Dismissed
MORALES v. GREENSBORO CONTRACTING CORP. No. 11-376	Ind. Comm. (549768)	Reversed
MORGAN v. CADIEU No. 11-564	Mecklenburg (10CVS5505)	Affirmed
QUIROZ v. METROPOLS STATUARY, INC. No. 11-466	Ind. Comm. (W08110)	Affirmed
STATE v. BERRIER No. 11-707	Davidson (10CRS54301)	No Error
STATE v. BONILLA No. 11-574	Caldwell (07CRS52158)	No Error

STATE v. BOSTICK No. 11-669	Anson (08CRS24) (08CRS700074)	No Error
STATE v. BRANCH No. 11-592	Wake (10CRS205709)	No Error
STATE v. BRICE No. 11-698	Guilford (08CRS98970)	No Error
STATE v. CARDENAS-ZAVALA No. 11-599	Catawba (06CRS57194)	No Error
STATE v. CHAMBERLAIN No. 11-611	Pitt (10CRS50591)	Affirmed
STATE v. DOUGLAS No. 11-516	Guilford (,) (,) (08-106912-16,) (08-106918-20,) (08-106923-24)	Affirmed
STATE v. FREEMAN No. 11-691	Wake (08CRS70078) (09CRS10285)	Vacated
STATE v. GAMBLE No. 11-491	Edgecombe (09CRS53263)	No Error
STATE v. GIBSON No. 11-465	Pitt (06CRS15170-75) (06CRS57348-50)	No Error
STATE v. HICKS No. 11-295	Nash (08CRS57974-76)	No Error
STATE v. LOPEZ No. 11-697	Buncombe (10CRS343-344) (10CRS56463)	Affirmed
STATE v. MARCUS No. 11-95	Mecklenburg (07CRS15169-72) (07CRS15175)	No Error
STATE v. MCINTYRE No. 11-657	New Hanover (08CRS53953)	Affirmed; remanded for remanded for correction of clerical error
STATE v. MEDLEY No. 11-625	Cumberland (08CRS50799)	Affirmed and remanded for correction of clerical error

STATE v. MILLER No. 11-431	Buncombe (08CRS55652) (09CRS7)	No Error in part, Vacated and Remanded, in part.
STATE v. ODUM No. 11-610	Gaston (07CRS20169) (07CRS20171)	Affirmed; remanded for correction of clerical error
STATE v. PAIGE No. 11-935	Wake (10CRS6640) (10CRS6641)	No Error
STATE v. PALACIOS No. 11-507	Guilford (10CRS66769-72)	No Error
STATE v. PASCASIO No. 11-527	Forsyth (08CRS59333)	No Error
STATE v. PEREZ-ROMAN No. 11-545	Craven (07CRS56160) (08CRS5220)	No error in part; remanded in part
STATE v. RICHARDSON No. 11-285	Durham (06CRS59344)	No Error
STATE v. SMITH No. 11-296	Wake (09CRS48279)	No Error
STATE v. TATE No. 11-676	Gaston (10CRS19054) (10CRS62633)	Dismissed
STATE v. TYREE No. 11-537	Pitt (07CRS2193-94)	Affirmed
STATE v. WHITE No. 11-417	Guilford (06CRS24464) (06CRS76209) (06CRS77149) (06CRS77153) (06CRS77340)	Reversed and Remanded
STATE v. WOOD No. 11-702	Halifax (08CRS55313)	Dismissed
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TAYLOR-BUTLER v. FOOD LION, INC. No. 11-539	Carteret (10CVS1187)	Affirmed

THE CHARLOTTE-MECKLENBURG HOSPITAL v. N.C. DHHS No. 11-339	Office of Admin. Hearings (09DHR6116)	Affirmed
UNDERWOOD v. UNDERWOOD No. 11-519	Mitchell (09CVD348)	Affirmed in Part and Reversed in Part
WEAVER v. THOMAS No. 11-514	Cleveland (04CVD1341)	Affirmed
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TRIALS

Findings of fact—reclassified as conclusion of law—application of legal principles—The trial court's finding of fact that neither Ms. nor Mr. Phelps, individually or together, entered into competition with plaintiff in any form, direct or indirect, at any time up to and including the present, was reclassified as a conclusion of law since it involved application of legal principles. **Phelps Staffing, LLC v. S.C. Phelps, Inc., 403.**

Remand—law of the case—not applied—Contrary to plaintiffs' contention, the trial court in a medical malpractice case did not hold on remand that the law of the case doctrine required that summary judgment be granted for defendants. The court's statement that summary judgment would have to be granted referred to the exclusion of plaintiffs' only expert witness after the *voir dire* required by the remand. **Crocker v. Roethling, 160.**

Summary judgment—no evidence of impermissibly overruling another judge's previous order—In the absence of an enforceable order denying summary judgment for plaintiff, it could not be concluded that a trial judge's order granting summary judgment for plaintiff impermissibly overruled another superior court judge's previous order. **Grimsley v. Gov't Emps. Ins. Co., 530.**

Two-day limit for trial—not arbitrary—The trial court did not abuse its discretion in a child custody matter by denying defendant's motion for a new trial where defendant argued that the trial court had placed arbitrary time limits on the presentation of evidence. The length of the trial was discussed at the pretrial conferences, both parties agreed to a two-day trial, and defendant did not object at the close of her evidence to the limits enforced by the court. Moreover, the court was presented with adequate evidence to make a determination as to whether a custody modification was appropriate. **Wolgin v. Wolgin, 278.**

UNFAIR TRADE PRACTICES

Conspiracy—bank and real estate developer—summary judgment—The trial court did not err by granting summary judgment for defendant bank on a claim that defendant engaged in a civil conspiracy with real estate developers where it was decided elsewhere that defendants had not engaged in unfair and deceptive trade practices. **In re Fifth Third Bank, 199.**

Failed real estate investment—investment without input from bank—The trial court did not err by granting summary judgment for defendant bank on an unfair and deceptive trade practices claim arising from a failed real estate investment where plaintiff's decision to invest was made without any input from defendant, plaintiff obtained a loan from defendant in order to realize a profit, plaintiff was aware that the property was essentially undeveloped and that the extent of his profit would depend upon the successful construction and marketing of the project, and plaintiff realized that he was exposed to certain risks. **In re Fifth Third Bank, 199.**

Real estate appraisals—no impact on investment decision—Allegedly defective real estate appraisals did not support a finding of liability pursuant to N.C.G.S. § 75-1.1 where the appraisals had no impact on plaintiffs' decision to participate in the investment. **In re Fifth Third Bank, 199.**

Real estate development—no duty by bank to monitor or investigate—no reliance on appraisals—Allegations that defendant bank did not investigate developers, monitor the progress of the development, ensure that the appraisals were

WORKERS' COMPENSATION

WORKERS' COMPENSATION—Continued

Employer-employee relationship—occasional sign hanging—The Industrial Commission did not err in a workers' compensation case by concluding that an employer–employee relationship existed between plaintiff and defendant Kirk. Considering the circumstances in which the matter arose as well as the manner in which plaintiff was paid, the supervision of plaintiff, and the furnishing of equipment, plaintiff's performance of his duties in hanging billboard signs for Kirk lacked the independence necessary for classification as an independent contractor. **Archie v. Kirk, 598.**

Findings of fact—improper consideration of medical records produced after mediation agreement reached—The Industrial Commission erred in a workers' compensation case by its finding of fact 14. The Commission was not permitted to consider any medical records produced after the mediation agreement was reached. The order was reversed and remanded for reconsideration based on the circumstances, and evidence pertaining to those circumstances that existed at the time the mediation agreement was signed. **Malloy v. Davis Mech., Inc., 549.**

Home and vehicle modifications—effect a cure or give relief—The Industrial Commission did not err in a workers' compensation case by awarding plaintiff home and vehicle modifications. Although defendants asserted that no physicians testified that these modifications were required to effect a cure or give relief, they were required to enable plaintiff to use the wheelchair and scooter that were required for relief. **Mehaffey v. Burger King, 318.**

Immunity—Pleasant exception—The trial court correctly denied defendant's motion to dismiss a negligence action pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) by invoking workers' compensation immunity. Although defendant, a school principal, claimed to be the employer of plaintiff, an office assistant, defendant was plaintiff's immediate supervisor and thus a co-employee rather than an employer. Since plaintiffs alleged willful, wanton, and recklessly negligent conduct against a co-employee, they may proceed under the *Pleasant* exception to the Workers' Compensation Act. **Trivette v. Yount, 477.**

Immunity—summary judgment denied—The trial court correctly denied a motion for summary judgment in an action by an office assistant at a school against the principal arising from a practical joke. When viewed in the light most favorable to plaintiffs, the evidence indicated that defendant was aware of the risks posed by his joke but proceeded to act at defendant's expense. The jury could reasonably have concluded that defendant's joke manifested a reckless disregard for plaintiff's safety. **Trivette v. Yount, 477.**

Injury by accident—unexpected and unusual event during routine activity—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff nurse assistant sustained a compensable injury by accident. The unexpected and unusual event was not changing a nursing home resident without assistance, but rather the resident suddenly and without warning pushing back as plaintiff held him with one arm during a routine activity. **Salomon v. The Oaks of Carolina, 146.**

Maximum compensation rate—calculation of average weekly wage—The Industrial Commission erred in a workers' compensation case by awarding plaintiff the maximum compensation rate for 2007 when he was disabled and last worked and earned wages in 1997. The case was remanded to the Commission for reconsideration of the amount of weekly disability benefits to which plaintiff was entitled. **Mauldin v. A.C. Corp., 36.**

WORKERS' COMPENSATION—Continued

Mediation agreement—improper consideration of child support lien—The Industrial Commission erred in a workers' compensation case by considering plaintiff's child support lien when determining whether the mediation agreement was fair and just. On remand, the Commission was not permitted to consider plaintiff's outstanding child support lien with regard to its fair and just determination. **Malloy v. Davis Mech., Inc., 549.**

Occupational disease—asbestosis—The Industrial Commission erred in a workers' compensation case by concluding that defendant Argonaut Insurance was the responsible carrier for plaintiff's asbestosis. The record did not contain evidence supporting the Commission's finding that plaintiff was last injuriously exposed to asbestos for 30 days, as required by N.C.G.S. § 97-57, during a seven month period while Argonaut was the insurance carrier. **Mauldin v. A.C. Corp., 36.**

Occupational disease—laryngeal cancer—The Industrial Commission erred in a workers' compensation case by finding and concluding defendant Argonaut Insurance was the carrier responsible for compensation related to plaintiff's laryngeal cancer. The case was remanded for the Commission to make findings of fact regarding whether plaintiff's exposure to asbestos during Argonaut's policy period proximately augmented his laryngeal cancer. **Mauldin v. A.C. Corp., 36.**

Occupational disease—lymph node cancer—pleural plaquing—The Industrial Commission did not err in a workers' compensation case by awarding compensation for lymph node cancer and pleural plaquing even though plaintiff did not file a claim for either disease. The Commission may award compensation for all conditions within the chain of causation flowing from a compensable condition. **Mauldin v. A.C. Corp., 36.**

Ongoing attendant care—hospital bed—mobility scooter—weight of testimony for Commission—The Industrial Commission did not err in a workers' compensation case by awarding plaintiff ongoing attendant care, a hospital bed, and a mobility scooter. The fact that other doctors who treated plaintiff disagreed with the recommending doctor that the Commission used to base its findings of fact did not mean those recommendations were not supported by competent evidence. The Commission solely determines the weight to award testimony. **Mehaffey v. Burger King, 318.**

Presumption of continuing disability—not applicable—A workers' compensation plaintiff with a back injury was not entitled to a presumption of continuing disability related to alleged mysofascial pain syndrome and fibromyalgia where defendant's admission of compensability related only to back issues arising from plaintiff's accident and did not relate in any way to plaintiff's alleged mysofascial pain syndrome and fibromyalgia. The Industrial Commission's prior award was also clearly unrelated to plaintiff's alleged mysofascial pain syndrome and fibromyalgia. **Thompson v. FedEx Ground/RPS, Inc., 126.**

Refusal of suitable employment—findings of fact—conclusions of law—The Industrial Commission did not err in a workers' compensation case by its findings of fact and conclusions of law regarding refusal of suitable employment. Because the issue of plaintiff's refusal of employment was before both the special deputy commissioner and deputy commissioner, the full Commission properly considered that issue and made relevant findings of fact and conclusions of law. **Keeton v. Circle K, 332.**