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

HIEN NGUYEN, MATTHEW BROWN, RYAN CHILDREY, ROMAINE WATKINS, AND
DAVID GREGORY, PLAINTIFFS v. JAYCEON TAYLOR, ENGEL THEDFORD,
MICHAEL KIMBREW, JOHN DOE A/K/A DJ SKEE, ANTHONY TORRES, BLACK
WALL STREET RECORDS, LLC, BLACK WALL STREET PUBLISHING,
LLC, BUNGALO RECORDS, INC., GENERAL GFX, GRIND MUSIC, INC.,
JUMP OFF FILMS, LIBERATION ENTERTAINMENT, INC., JOHN DOE #2,
WWW.STOPSNITCHINSTOPLYIN.COM, UNIVERSAL HOME VIDEO, INC., AND
YOUTUBE, INC., DEFENDANTS

No. COA11-369

(Filed 21 February 2012)

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

Although defendant Taylor contended the trial court erred by granting summary judgment in favor of plaintiffs even though the motion was allegedly untimely, defendant waived this issue by failing to appear and object at the time the trial court considered the motion.

**2. Pleadings—failure to answer or object—requests deemed
admitted**

The trial court did not err by granting summary judgment against defendant Taylor because he failed to answer or otherwise object to any of the requests. Consequently, each of plaintiffs' requests were deemed admitted, and defendant's admissions sufficiently established each element of defamation *per se*, appropriation, and unfair and deceptive practices.

NGUYEN v. TAYLOR

[219 N.C. App. 1 (2012)]

3. Constitutional Law—right to jury trial—waiver—failure to appear

The trial court did not err by conducting a bench trial to determine plaintiffs' damages even though defendant Taylor specifically demanded a jury trial in his answer. Since defendant did not appear at trial, he waived his right to a jury trial.

4. Damages and Remedies—compensatory damages—amount

The trial court did not abuse its discretion in a defamation *per se*, appropriation, and unfair and deceptive practices case by awarding one million dollars in compensatory damages to each plaintiff police officer. Defendant Taylor's action of creating a heavily edited version of a video recording making it appear as though defendant was wrongfully arrested caused plaintiffs significant harm in their personal lives and in their careers as police officers, this harm will continue throughout the remainder of plaintiffs' careers, and defendant profited from the harm he caused plaintiffs in an amount exceeding ten million dollars.

5. Damages and Remedies—punitive damages—aggravating factors—standard of proof

The trial court did not abuse its discretion in a defamation *per se*, appropriation, and unfair and deceptive practices case by awarding each plaintiff two million dollars in punitive damages from defendant Taylor. However, while the trial court's judgment concluded, based upon defendant's admission, that he acted with actual malice and personal ill will toward plaintiffs, it failed to state whether this finding of an aggravating factor was by clear and convincing evidence as required by N.C.G.S. § 1D-15(b). The judgment was remanded to the trial court to consider whether the evidence of that aggravating factor met the required standard of proof, and so that the judgment could be amended to reflect its determination on this issue.

6. Attorney Fees—unfair trade practices—sufficient findings of fact

The trial court's judgment included sufficient findings of fact to support its conclusion of law that defendant Taylor was liable for unfair and deceptive practices, which permitted the trial court to award attorney fees under N.C.G.S. § 75-1.1.

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[219 N.C. App. 1 (2012)]

7. Judgments—motion to set aside entry of default—agreement for extension of time—failure to file answer

The trial court did not abuse its discretion by refusing to set aside entry of default against defendant Bungalo. Although defendant, due to an agreement with plaintiffs' counsel, was granted an extension of time, an answer was never filed. Further, plaintiffs then waited an additional three weeks to file a motion for entry of default.

8. Damages and Remedies—punitive damages—improper use of co-defendants' admissions

The trial court erred by its punitive damages award. The trial court improperly used the admissions of defendant's co-defendants regarding profits and ability to pay to determine the amount of punitive damages to award against defendant. Defendant's failure to participate in the instant case did not relieve plaintiffs of their burden to prove their damages. Defendant was granted a new trial on the issue of punitive damages.

Appeal by defendants Jayceon Taylor and Bungalo Records, Inc. from judgment entered 20 September 2010 by Judge A. Moses Massey in Guilford County Superior Court. Heard in the Court of Appeals 11 October 2011.

Cranfill Sumner & Hartzog LLP, by Dan M. Hartzog and Dan M. Hartzog Jr., for plaintiff-appellees.

Osborne Law Firm, P.C., by Curtis C. Osborne, for defendant-appellant Jayceon Taylor.

Blanco Tackaberry & Matamoros, P.A., by Peter J. Juran, for defendant-appellant Bungalo Records, Inc.

CALABRIA, Judge.

Jayceon Taylor ("Taylor") and Bungalo Records, Inc. ("Bungalo") appeal the trial court's judgment which, following a bench trial, awarded five million dollars in compensatory damages and ten million dollars in punitive damages to Hien Nguyen, Matthew Brown, Ryan Childrey, Romaine Watkins, and David Gregory (collectively "plaintiffs"). We affirm in part, vacate in part, and remand.

NGUYEN v. TAYLOR

[219 N.C. App. 1 (2012)]

I. Factual and Procedural Background

The events which led to the filing of the instant case have previously been chronicled by this Court in *Nguyen v. Taylor*, 200 N.C. App. 387, 684 S.E.2d 470 (2009) (“*Nguyen I*”). The factual and procedural history relevant to the instant appeal is as follows: On 28 October 2005, plaintiffs, who were officers with the Greensboro Police Department, arrested Taylor at the Four Seasons Mall in Greensboro, North Carolina and charged him with criminal trespass, communicating threats, and disorderly conduct. An individual in Taylor’s entourage recorded the arrest with a video camera. A heavily edited version of that video recording, which made it appear as though Taylor was wrongfully arrested, was included as a bonus feature on a documentary DVD released by Taylor and others, entitled “Stop Snitchin’ Stop Lyin’ ” (“the DVD”). Bungalo was involved in the production of the DVD and also provided internet marketing services for it.

On 30 October 2006, plaintiffs filed a complaint against Taylor, Bungalo, Engel Thedford, Michael Kimbrew, DJ Skee, Anthony Torres, Black Wall Street Records, LLC, Black Wall Street Publishing, LLC, General GFX, Grind Music, Inc., Jump Off Films, Liberation Entertainment, Inc., John Doe #2, www.stopsnitchinstoplyin.com, Universal Home Video, Inc., and Youtube, Inc. The complaint included claims against Taylor, individually, for a statement he allegedly made to the news media after his arrest. It also included claims against Taylor, Bungalo, and other defendants for defamation, wrongful appropriation of a likeness, and unfair and deceptive practices. Plaintiffs’ claims were based upon (1) the edited footage of Taylor’s arrest contained in the DVD; (2) a description on the back of the DVD case which stated that it included the “[e]ntire footage of [Taylor] being wrongfully arrested in North Carolina; and (3) a statement on the website www.stopsnitchinstoplyin.com which referred to the video of the arrest as the “[e]ntire footage of [Taylor] being wrongfully arrested and brutalized by the Police in North Carolina.”

Bungalo was served with plaintiffs’ complaint on 10 November 2006. Bungalo’s counsel then contacted plaintiffs’ counsel, who agreed to extend the time to file a responsive pleading until 2 January 2007. However, Bungalo failed to file an answer. As a result, plaintiffs filed a motion for default on 23 January 2007, and on 24 January 2007, default was entered against Bungalo by the Guilford County Clerk of Superior Court. On 30 January 2007, Bungalo’s counsel contacted plaintiffs’ counsel in an attempt to have the default set aside, but

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plaintiffs' counsel refused. On 21 March 2007, Bungalo filed a motion to have the default set aside, and the motion was denied by Judge Edwin G. Wilson, Jr. on 21 May 2007. On 30 November 2007, plaintiffs sent discovery requests to Bungalo, but Bungalo refused to comply with the requests on the basis of the default.

On 18 June 2008, Taylor and other defendants filed a motion to dismiss all of plaintiffs' claims pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. On 5 August 2008, the trial court entered an order which granted defendants' motion in part and denied it in part. After the entry of this order, the remaining claims against Taylor were (1) defamation, based upon the edited footage contained in the DVD; (2) appropriation; and (3) unfair and deceptive practices. Plaintiffs appealed the trial court's order. On 20 October 2009, this Court, in *Nguyen I*, dismissed plaintiffs' appeal as interlocutory.

While plaintiffs' appeal was pending, the trial court entered a stay of all proceedings. On 18 December 2009, plaintiffs sent Taylor "Requests for Admission," and Taylor did not respond as required by N.C. Gen. Stat. § 1A-1, Rule 36 (2011).

Plaintiffs voluntarily dismissed, without prejudice, their claims against Universal Home Video, Inc., and Youtube, Inc. In addition, plaintiffs reached a settlement and voluntarily dismissed their claims against DJ Skee.

The case was set for trial on 13 September 2010. On 23 August 2010, plaintiffs moved for summary judgment against Taylor on the basis of his failure to respond to the requests for admission. The motion was heard on the day of trial. Taylor did not appear. The trial court entered summary judgment against Taylor and proceeded to trial on the issue of damages.

The bench trial on damages was conducted on 14 September 2010. At trial, each plaintiff testified regarding the negative effects of the DVD. They testified that people consistently recognized them as a result of appearing in the DVD and explained the problems this created. These included, *inter alia*, problems with their jobs and their fear for their own safety and for the safety of their families. On 20 September 2010, the trial court entered a judgment in favor of plaintiffs against Taylor, Bungalo, Engel Thedford, Michael Kimbrew, Anthony Torres, Black Wall Street Records, LLC, Black Wall Street Publishing, LLC, General GFX, Grind Music, Inc., and Jump Off Films. Plaintiffs were each awarded one million dollars in compensatory

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damages and two million dollars in punitive damages. The defendants involved in this judgment were jointly and severally liable for the damages awarded.

Plaintiffs subsequently voluntarily dismissed, without prejudice, their claims against the defendants who remained after the 20 September 2010 judgment: John Doe #2, www.stopsnitchinstoplyin.com, and Liberation Entertainment, Inc.

Taylor and Bungalo were the only defendants to file notice of appeal.

II. Jaceyon Taylor

Taylor raises numerous issues on appeal. He argues: (1) that the trial court erred by holding a summary judgment hearing on the day of trial; (2) that the trial court erred by granting summary judgment to plaintiffs against Taylor; (3) that the trial court erred by conducting a bench trial to determine damages, when Taylor had demanded a jury trial; (4) that the trial court erred by relying upon unanswered requests for admission to determine plaintiffs' damages; (5) that the trial court's findings were insufficient to support its verdict, because the findings did not indicate which tort gave rise to which damages; (6) that the trial court erred in awarding five million dollars in compensatory damages to plaintiffs, as these damages were not supported by competent evidence; (7) that the trial court erred in awarding punitive damages; and (8) that the trial court erred by awarding plaintiffs attorneys' fees.

A. Timing of Summary Judgment Motion

[1] Taylor first argues that the trial court erred in granting summary judgment to plaintiffs because plaintiffs' summary judgment motion was untimely. Specifically, Taylor contends that plaintiffs failed to comply with a pretrial administrative scheduling order entered in the case that required plaintiffs to file their motion 14 days prior to trial. We disagree.

Although Taylor was properly served with plaintiffs' motion,¹ he failed to appear at the summary judgment hearing. Since he was not in court, he did not object at the time the trial court considered the motion. Accordingly, he has waived appellate review of this issue. *See*

1. The parties have stipulated that "[a]ll documents included [in the record on appeal] were properly filed and served." This includes plaintiffs' summary judgment motion.

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N.C.R. App. P. 10(a)(1) (2011) (“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.”). This argument is overruled.

B. Evidence Supporting Summary Judgment

[2] Taylor next argues that there was insufficient evidence to support the trial court’s entry of summary judgment against him. We disagree.

Summary judgment shall be rendered “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) (2011). In the instant case, the trial court properly relied upon Taylor’s admissions in granting summary judgment to plaintiffs. Plaintiffs sent Taylor requests for admission pursuant to N.C. Gen. Stat. § 1A-1, Rule 36 (2011). This rule provides, in relevant part:

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 60 days after service of the summons and complaint upon him.

N.C. Gen. Stat. § 1A-1, Rule 36(a). After Taylor was served with plaintiffs’ requests for admission,² he failed to answer or otherwise object to any of the requests. Consequently, each of plaintiffs’ requests were deemed admitted.

Our Supreme Court has stated that “[f]acts that are admitted under Rule 36(b) are sufficient to support a grant of summary judgment.

2. Taylor has not stipulated that plaintiffs’ “Requests for Admission” were properly served. However, the requests were attached to plaintiffs’ motion for summary judgment, which Taylor stipulated was properly served. As noted above, Taylor did not respond to the summary judgment motion and filed no objections to the requests for admission in response to that motion.

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ment.” *Goins v. Puleo*, 350 N.C. 277, 280, 512 S.E.2d 748, 750 (1999). In the instant case, Taylor’s admissions sufficiently established each element of defamation *per se*, appropriation, and unfair and deceptive practices.

1. Defamation *Per Se*

In general, “[t]o be actionable, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed.” *Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993). Moreover,

North Carolina has long recognized the harm that can result from false statements that impeach a person in that person’s trade or profession — such statements are deemed defamation *per se*. The mere saying or writing of the words is presumed to cause injury to the subject; there is no need to prove any actual injury.

Cohen v. McLawhorn, ____ N.C. App. ____, ____, 704 S.E.2d 519, 527 (2010)(internal quotations and citations omitted). In the instant case, Taylor admitted that the DVD was edited to give the impression that he did nothing wrong during his arrest, in an attempt to defame plaintiffs. Taylor additionally admitted that the edited footage “was intentionally misleading” and that he intended to “characterize the Plaintiffs’ actions [in arresting him] as illegal” even though he “knew the Plaintiffs’ actions were legal.” Finally, Taylor admitted that he intended to “defame the Plaintiffs with the DVD,” and that he intended to “injure the Plaintiffs in their trades or professions.” Based upon these admissions, the trial court properly granted summary judgment to plaintiffs on their defamation *per se* claim.

2. Appropriation

North Carolina recognizes a claim for invasion of privacy by means of “appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness[.]” *Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 322, 312 S.E.2d 405, 411 (1984). In the instant case, Taylor admitted that he appropriated plaintiffs’ likenesses for his own advantage. As a result, the trial court properly granted plaintiffs summary judgment on their appropriation claim against Taylor.

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3. Unfair or Deceptive Practices

“The elements of a claim for unfair or deceptive [] practices in violation of N.C. Gen. Stat. § 75-1.1 (2003) are: (1) an unfair or deceptive act or practice or an unfair method of competition; (2) in or affecting commerce; (3) that proximately causes actual injury to the plaintiff or to his business.” *RD&J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 748, 600 S.E.2d 492, 500 (2004). In the instant case, Taylor admitted that the DVD “was commercially released for worldwide distribution” and that he was “involved in all aspects of the filming, editing, directing, producing, and financing, and distribution of the DVD.” He also admitted that he “ma[de] [plaintiffs] unwitting performers in [his] commercial DVD” and “defam[ed] [plaintiffs] while profiting at their expense.” In addition, he admitted that the use of plaintiffs in the DVD directly increased the DVD sales. Based upon these admissions, the trial court properly granted plaintiffs summary judgment against Taylor on their unfair and deceptive practices claim.

Taylor’s admissions were sufficient to establish each of plaintiffs’ claims against him. Accordingly, the trial court did not err in granting plaintiffs summary judgment against Taylor on their claims for defamation *per se*, appropriation, and unfair and deceptive practices. This argument is overruled.

C. Demand for Jury Trial

[3] Taylor argues that the trial court erred by conducting a bench trial to determine plaintiffs’ damages when Taylor specifically demanded a jury trial in his answer. However, “[a] party may waive his right to jury trial by . . . failing to appear at the trial[.]” *Carolina Forest Ass’n v. White*, 198 N.C. App. 1, 16, 678 S.E.2d 725, 735 (2009). Since Taylor did not appear at trial, he waived his right to a jury trial. This argument is overruled.

D. Compensatory Damages

[4] Taylor argues that, for a variety of reasons, the trial court’s award of compensatory damages was erroneous. We disagree.

1. Division of Damages

Taylor first argues that the trial court’s judgment was inherently deficient because it failed to specify which portion of its damages award was attributable to each of plaintiffs’ claims. However, Taylor fails to cite any authority in support of this argument, and so it is deemed abandoned pursuant to N.C.R. App. P. 28 (b)(6) (2011).

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2. Use of Admissions

Taylor also contends that the trial court erred by using Taylor's admissions to make its findings of fact. As previously noted, Taylor failed to respond to plaintiffs' requests for admission, and as a result, all of plaintiffs' requests were deemed admitted under N.C. Gen. Stat. § 1A-1, Rule 36(a). "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." N.C. Gen. Stat. § 1A-1, Rule 36(b). This Court has explained that an admission under Rule 36 "is not evidence, but it, instead, serves to remove the admitted fact from the trial by formally conceding its existence." *J.M. Parker & Sons, Inc. v. William Barber, Inc.*, ___ N.C. App. ___, ___, 704 S.E.2d 64, 69 (2010) (internal quotations and citation omitted).

In the instant case, plaintiffs entered Taylor's admissions into evidence during the damages trial. Consequently, the admissions were conclusively established facts for purposes of that trial. Thus, the trial court did not err by making findings of fact based upon Taylor's admissions. This argument is overruled.

3. Award of Consequential Damages

Taylor next contends that there was insufficient evidence to support the trial court's award of one million dollars in compensatory damages per plaintiff. "The burden of proving damages is on the party seeking them. As part of its burden, the 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) (internal citation omitted). In the instant case, Taylor was found liable for defamation *per se*, appropriation, and unfair and deceptive practices.

For a defamation claim, "[c]ompensatory damages include (1) pecuniary loss direct or indirect, *i.e.*, special damages; (2) damages for physical pain and inconvenience; (3) damages for mental suffering; and (4) damages for injury to reputation." *Roth v. News Co.*, 217 N.C. 13, 23, 6 S.E.2d 882, 889 (1940)(internal quotations and citations omitted). While our Courts have not precisely defined the measure of damages for an appropriation claim, the Restatement (Second) of Torts identifies the following types of damages for all invasion of privacy actions:

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- (a) the harm to [the plaintiff's] interest in privacy resulting from the invasion;
- (b) [the plaintiff's] mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and
- (c) special damage of which the invasion is a legal cause.

Restatement (Second) of Torts, § 652H. For the harm specific to the tort of appropriation, the Restatement notes that “[o]ne whose name, likeness or identity is appropriated to the use of another . . . may recover for the loss of the exclusive use of the value so appropriated.” *Id.*, cmt. (a).³ Finally, for an unfair or deceptive practices claim, this Court has stated:

Unfair and deceptive trade practices and unfair competition claims are neither wholly tortious nor wholly contractual in nature and the measure of damages is broader than common law actions. The measure of damages used should further the purpose of awarding damages, which is to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money.

Richardson v. Bank of Am., N.A., 182 N.C. App. 531, 562, 643 S.E.2d 410, 429 (2007)(internal quotations and citations omitted).

The damages in the instant case were awarded after a bench trial. “In a bench trial in which the [trial] court sits without a jury, the standard of review is whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts.” *Hinnant v. Philips*, 184 N.C. App. 241, 245, 645 S.E.2d 867, 870 (2007) (internal quotations and citation omitted). “The trial court’s award of damages at a bench trial is a matter within its sound discretion, and will not be disturbed on appeal absent an abuse of discretion.” *Helms v. Schultze*, 161 N.C. App. 404, 414, 588 S.E.2d 524, 530 (2003).

The trial court made the following relevant findings of fact regarding plaintiffs’ damages:

37. As a result of Defendants’ actions, Plaintiffs have been substantially injured. The Plaintiffs are consistently recognized as

3. The Restatement also notes that for the second and third types of damages, an invasion of privacy action closely parallels a defamation action. *See* Restatement (Second) of Torts, § 652H, cmts. (b) & (d).

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being the officers who arrested [Taylor]. They are often accused of racism by those who recognize them as a result of the DVD, which undermines their authority as police officers. They have legitimate fears for their own safety, as well as for the safety of their families.

39. The DVD and the statements made by the Defendants continue to be widely available across the world, and the footage remains readily available on the internet. As a result, it is likely that the Plaintiffs will continue to be damaged by these materials wherever they go and for the remainder of their careers.

Taylor did not challenge these findings, and thus, they are binding on appeal. See *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). In addition, based upon Taylor's admissions, the trial court found that "Taylor . . . made in excess of TEN MILLION DOLLARS (\$10,000,000.00) in profits on the sale of the DVD, the vast majority of which [he] attribute[d] to the use of Plaintiffs' likeness[es] and the defamatory statements." Thus, the trial court's binding findings of fact are that Taylor's actions have caused plaintiffs significant harm in their personal lives and in their careers as police officers, that this harm will continue throughout the remainder of plaintiffs' careers, and that Taylor profited from the harm he caused plaintiffs in an amount exceeding ten million dollars. In light of these findings, we cannot say the trial court abused its discretion by awarding each plaintiff one million dollars in compensatory damages. This argument is overruled.

E. Punitive Damages

[5] Taylor next argues that the trial court erred in awarding each plaintiff two million dollars in punitive damages.

Under N.C. Gen. Stat. § 1D-15(a) (2009), "[p]unitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud[;] (2) Malice[; or] (3) Willful or wanton conduct." The plaintiff "must prove the existence of an aggravating factor by clear and convincing evidence." N.C. Gen. Stat. § 1D-15(b).

Springs v. City of Charlotte, ____ N.C. App. ____, ____, 704 S.E.2d 319, 325-26 (2011). In the instant case, Taylor admitted that he "had personal ill-will and malice towards each of the Plaintiffs in this

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action and that this ill-will and malice motivated [his] actions.” Pursuant to N.C. Gen. Stat. § 1A-1, Rule 36(b), Taylor’s admission conclusively established and formally conceded the existence of an aggravating factor. *J.M. Parker & Sons*, ___ N.C. App. at ___, 704 S.E.2d at 69.

However, while the trial court’s judgment concluded, based upon Taylor’s admission, that he “acted with actual malice and personal ill will towards the Plaintiffs,” it failed to state whether this finding of an aggravating factor was by “clear and convincing evidence,” as required by N.C. Gen. Stat. § 1D-15(b). As a result, we must remand the judgment to the trial court so that it may consider whether the evidence of that aggravating factor met the required standard of proof, and so that the judgment may be amended to reflect its determination on this issue.

Taylor additionally contends that, even if punitive damages were appropriate, the amount of punitive damages awarded by the trial court constituted an abuse of discretion.

In determining the amount of punitive damages, if any, to be awarded, the trier of fact:

- (1) Shall consider the purposes of punitive damages set forth in G.S. 1D-1; and
- (2) May consider only that evidence that relates to the following:
 - a. The reprehensibility of the defendant’s motives and conduct.
 - b. The likelihood, at the relevant time, of serious harm.
 - c. The degree of the defendant’s awareness of the probable consequences of its conduct.
 - d. The duration of the defendant’s conduct.
 - e. The actual damages suffered by the claimant.
 - f. Any concealment by the defendant of the facts or consequences of its conduct.
 - g. The existence and frequency of any similar past conduct by the defendant.
 - h. Whether the defendant profited from the conduct.
 - i. The defendant’s ability to pay punitive damages, as evidenced by its revenues or net worth.

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N.C. Gen. Stat. § 1D-35 (2011). In the instant case, the trial court's judgment specifically indicated that it had considered the purpose of punitive damages. In addition, the judgment concluded that "Defendants' conduct and motives . . . were reprehensible," that "the Defendants either were or should have been aware of the likelihood of serious harm to the Plaintiffs," and that "the Defendants made in excess of FORTY MILLION DOLLARS (\$40,000,000) from the DVD, and have the ability to pay the punitive damages awarded."⁴ Thus, the trial court's judgment complied with N.C. Gen. Stat. § 1D-35 in determining the punitive damages award, and we find no abuse of discretion in the amount awarded. This argument is overruled.

F. Attorneys' Fees

[6] Finally, Taylor argues that the trial court erred in awarding plaintiffs attorneys' fees. Specifically, Taylor contends that there are no findings included in the trial court's judgment that Taylor's actions affected commerce, and without these findings the judgment failed to establish Taylor's liability for unfair or deceptive practices. Contrary to Taylor's assertion, the trial court specifically found as fact that the DVD which defamed plaintiffs was commercially released. The trial court's judgment included sufficient findings of fact to support its conclusion of law that Taylor was liable for unfair and deceptive practices, which permitted the trial court to award attorneys' fees under N.C. Gen. Stat. § 75-1.1 (2011). This argument is overruled.

III. Bungalo Records, Inc.

Bungalo raises two issues on appeal. First, Bungalo argues that the trial court erred by denying Bungalo's motion to set aside the entry of default. Second, Bungalo argues that the trial court erred by awarding plaintiffs a fifteen million dollar judgment against Bungalo.

A. Entry of Default

[7] Bungalo contends that the trial court abused its discretion by refusing to set aside the entry of default. We disagree.

An entry of default may be set aside for 'good cause shown.' *Williams v. Jennette*, 77 N.C. App. 283, 287, 335 S.E.2d 191, 194 (1985). "Whether 'good cause' exists depends on the facts and circumstances of each particular case, and the trial court's determination will not be disturbed on appeal unless a clear abuse of discretion is shown." *Old*

4. Defendants Black Wall Street Records, LLC, Black Wall Street Publishing, LLC, and Jump Off Films each admitted that they, like Taylor, made in excess of ten million dollars in profits from the DVD.

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Salem Foreign Car Serv., Inc. v. Webb, 159 N.C. App. 93, 97, 582 S.E.2d 673, 676 (2003). “The defendant carries the burden of showing good cause to set aside entry of default.” *Luke v. Omega Consulting Grp., LC*, 194 N.C. App. 745, 748, 670 S.E.2d 604, 607 (2009).

In its brief, Bungalo contends that its “failure to answer was inadvertent, due to a conversation in which [Bungalo’s counsel] mistakenly believed that Plaintiffs’ counsel agreed to an extension of time in which to file an answer.” However, the conversation referenced by Bungalo did not occur until 30 January 2007, after default had been entered. Thus, this conversation could not provide a basis for setting aside the default.

Bungalo was served with plaintiffs’ complaint on 10 November 2006. Under the Rules of Civil Procedure, an answer is due within 30 days of service of a complaint. *See* N.C. Gen. Stat. § 1A-1, Rule 12(a)(1) (2011). Although Bungalo, due to an agreement with plaintiffs’ counsel, was granted an extension of time until 2 January 2007, an answer was never filed. Plaintiffs then waited an additional three weeks, until 23 January 2007, to file a motion for entry of default. Thereafter, Bungalo did not file its motion to set aside the default until 21 March 2007. Under these circumstances, we find no abuse of discretion in the trial court’s denial of Bungalo’s motion to set aside default. This argument is overruled.

B. Judgment

[8] Bungalo argues that the evidence presented at the damages trial did not support an award of fifteen million dollars in compensatory and punitive damages against Bungalo. We agree that the punitive damages award against Bungalo was improper, and grant Bungalo a new trial on the issue of punitive damages.

1. Bungalo’s Liability

Bungalo first argues that because it was not mentioned by name during the evidentiary portion of the damages trial, plaintiffs failed to establish that Bungalo’s actions were the proximate cause of their damages. We disagree.

“The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff’s complaint and is prohibited from defending on the merits of the case.” *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991)(internal citation omitted). Thus,

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as a result of the entry of default against Bungalo, all of plaintiffs' allegations against Bungalo were deemed to have been admitted. These included allegations that Bungalo was involved in the production and distribution of the DVD which caused the harm to plaintiffs.

The sole purpose of the damages trial was to determine the harm to plaintiffs caused by the production and distribution of the DVD. Since Bungalo admitted, by virtue of its default, its involvement in this process, any damages proven at the trial would be attributable to Bungalo as well as the other defendants who were also involved with the DVD. The fact that Bungalo was not mentioned specifically by name during the damages trial did not affect its responsibility for the amount of damages that were established at the damages trial. All of the defendants who were involved with the DVD, including Bungalo, proximately caused plaintiffs' damages. This argument is overruled.

2. Disclaimer on DVD

Bungalo next argues that the trial court abused its discretion by failing to reduce the amount of plaintiffs' damages attributable to Bungalo. Specifically, Bungalo contends that a disclaimer mentioned on the DVD, which stated that Bungalo "disclaims all liability of any kind arising out of the content, comments, and the information contained and referenced within the DVD," should have reduced the amount of its liability for plaintiffs' damages.

Once default was entered against Bungalo, it had "no further standing to contest the merits of plaintiff[s'] right to recover. [Its] only recourse [wa]s . . . to contest the amount of the recovery." *Spartan Leasing*, 101 N.C. App. at 460, 400 S.E.2d at 482. Contrary to Bungalo's assertions to the contrary, the disclaimer is relevant only to the merits of plaintiffs' claims against Bungalo; it does not affect the amount of plaintiffs' damages which were attributable to the DVD. This argument is overruled.

3. Rule 9(k)

Bungalo argues that plaintiffs' complaint was legally insufficient to support an award of punitive damages because it did not comply with N.C. Gen. Stat. § 1A-1, Rule 9(k) (2011). This rule requires, *inter alia*, that "the aggravating factor that supports the award of punitive damages shall be averred with particularity." *Id.*

In the instant case, plaintiffs' complaint does not specifically allege malice as an aggravating factor supporting the award of punitive damages. However, this Court has previously held that a com-

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plaint which included an allegation of defamation *per se*, together with an allegation that the defendant made a statement “with knowledge that the statement was false,” and a demand for punitive damages, met the Rule 9(k) particularity requirement. *Ausley v. Bishop*, 150 N.C. App. 56, 64-65, 564 S.E.2d 252, 258, *rev'd on other grounds*, 356 N.C. 422, 572 S.E.2d 153 (2002)(per curiam). The allegations in plaintiffs' complaint cannot be materially distinguished from the complaint in *Ausley*. Accordingly, plaintiffs' complaint sufficiently complied with the requirements of Rule 9(k). This argument is overruled.

4. Punitive Damages

Finally, Bungalo argues that the evidence presented at the damages trial was insufficient to support an award of punitive damages. As previously noted, the trial court's judgment indicates that it awarded punitive damages because (1) “Defendants' conduct and motives . . . were reprehensible;” (2) “the Defendants either were or should have been aware of the likelihood of serious harm to the Plaintiffs;” and (3) “the Defendants made in excess of FORTY MILLION DOLLARS (\$40,000,000) from the DVD, and have the ability to pay the punitive damages awarded.”

The allegations in plaintiffs' complaint, which were deemed admitted as a consequence of Bungalo's default, supported the first two factors considered by the trial court. However, the trial court improperly considered evidence of Bungalo's co-defendants' profits and ability to pay punitive damages when it awarded punitive damages against Bungalo. The trial court's conclusion that defendants made in excess of forty million dollars from the DVD was based solely upon the admissions of Taylor, Black Wall Street Records, LLC, Black Wall Street Publishing, LLC, and Jump Off Films. This Court has long held that “[f]acts admitted by one defendant are not binding on a co-defendant.” *Barclays American v. Haywood*, 65 N.C. App. 387, 389, 308 S.E.2d 921, 923 (1983). Thus, the trial court improperly used the admissions of Bungalo's co-defendants to determine the amount of punitive damages to award against Bungalo.

Moreover, under N.C. Gen. Stat. § 1D-35(2), the trier of fact “[m]ay consider *only* that evidence that relates to[,]” *inter alia*, “[w]hether the defendant profited from the conduct” and “[t]he defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.” (Emphasis added). This statute does not permit the trier of fact to solely consider the co-defendants' profits and ability to

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pay when awarding punitive damages against a particular defendant. Since the trial court's judgment reflects that this is precisely what occurred in the instant case, we must vacate the portion of the judgment awarding punitive damages against Bungalo and remand for a new trial on that issue.

Plaintiffs concede that they presented no evidence of Bungalo's profits or its ability to pay punitive damages. They attribute this failure to Bungalo's "refus[al] to provide information requested in discovery about its ability to pay" and Bungalo's "refusal to participate in the lawsuit." However, Bungalo's failure to participate in the instant case does not relieve plaintiffs of their burden to prove their damages. The Rules of Civil Procedure provide the appropriate methods and remedies by which to address Bungalo's failure to provide any required discovery materials. These remedies do not include allowing the trier of fact to assume facts which are not presented as evidence. On remand, plaintiffs are free to utilize the relevant discovery rules to obtain the information they seek.

IV. Conclusion

By failing to appear, Taylor waived his ability to contest the timing of the summary judgment hearing and waived his right to a jury trial on damages. The trial court properly granted plaintiffs summary judgment against Taylor for their claims of defamation *per se*, appropriation, and unfair or deceptive practices. At the damages trial, the court properly considered unanswered requests for admissions. By operation of Rule 36 these requests became conclusively established facts. The trial court's findings of fact were based upon competent evidence and supported its conclusions of law, which in turn supported its award of compensatory damages against Taylor. However, the trial court's finding regarding the aggravating factor which supported the award of punitive damages against Taylor failed to indicate that the aggravating factor was established by clear and convincing evidence. We remand the judgment to the trial court so that it may consider whether the evidence of that aggravating factor met the required standard of proof and then amend the judgment to reflect its determination. Nevertheless, assuming an award of punitive damages was proper, the amount of punitive damages awarded did not constitute an abuse of discretion. Finally, the trial court's findings of fact and conclusions of law established Taylor's liability for unfair or deceptive practices, and thus, supported the trial court's award of attorneys' fees.

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The trial court did not abuse its discretion in refusing to set aside Bungalo's default. The entry of default against Bungalo and the evidence provided by plaintiffs at the damages trial established that Bungalo proximately caused their damages. The trial court did not abuse its discretion in awarding plaintiffs one million dollars each in compensatory damages against Bungalo.

Plaintiffs' complaint contained sufficient allegations to comply with the requirements of Rule 9(k) and permitted the trial court to award plaintiffs punitive damages. However, the trial court erred by considering only evidence of Bungalo's co-defendants' profits and ability to pay when determining the amount of punitive damages owed by Bungalo. As a result, the portion of the trial court's judgment which awarded punitive damages against Bungalo is vacated and the case is remanded for a new trial solely on that issue.

Affirmed in part, vacated in part, and remanded.

Judges McGEE and HUNTER, Robert C. concur.

HOWARD H. PIERCE, SR., PLAINTIFF v. THE ATLANTIC GROUP, INC, D/B/A/ DZ ATLANTIC, DAY & ZIMMERMANN LLC OF PENNSYLVANIA AND DAY & ZIMMERMAN LLC D/B/A/ DZ ATLANTIC GROUP AND/OR DZ ATLANTIC, AND DUKE ENERGY CAROLINAS, LLC, DEFENDANTS

No. COA11-494

(Filed 21 February 2012)

1. Employer and Employee—wrongful discharge—Retaliatory Employment Discrimination Act—initiation of inquiry

The trial court did not err by dismissing plaintiff's complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) for violation of the Retaliatory Employment Discrimination Act. Plaintiff called defendant Duke's ethics hotline to report the retaliatory treatment he had been receiving and not to report a concern regarding occupational health and safety in the context of his employment with defendant Atlantic. These allegations were insufficient to constitute the initiation of an inquiry pursuant to N.C.G.S. § 95-241(a).

2. Employer and Employee—wrongful discharge—failure to show violation of law or public policy

The trial court did not err by dismissing plaintiff's wrongful discharge claim. Plaintiff's allegations failed to show that defendants ever violated their Occupational Safety and Health Administration obligations, including 13 N.C. Admin. Code 07F .0901, *et seq.*, and plaintiff's assertions that defendants' termination of his employment violated law or public policy based on provisions of the administrative code that were yet to become effective did not remedy this deficiency in plaintiff's pleadings.

3. Emotional Distress—negligent infliction of emotional distress—intentional infliction of emotional distress

The trial court did not err by dismissing plaintiff's claims of negligent and intentional infliction of emotional distress. Plaintiff's statement that he began to experience serious on and off the job stress that severely affected his relationship with his wife and family members was insufficient to support these claims.

4. Libel and Slander—libel per se—failure to allege email or report susceptible of two meanings—libel per quod

The trial court did not err by dismissing plaintiff's defamation claim. Plaintiff's complaint, alleging that defendant falsely contended that plaintiff falsified his time card or reported plaintiff to the Nuclear Regulatory Commission did not set forth a cause of action for libel *per se*. Further, plaintiff's complaint was insufficient to state a claim because the complaint did not allege that the email or report were susceptible of two meanings. Finally, plaintiff's allegation that the alleged defamation damaged plaintiff's economic circumstances did not fairly inform defendants of the scope of plaintiff's libel *per quod* claim.

Appeal by plaintiff from order entered 3 February 2011 by Judge Robert F. Floyd, Jr., in Robeson County Superior Court. Heard in the Court of Appeals 27 October 2011.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, and Behan Law, by Kathleen A. Behan, for the plaintiff.

Little Mendelson, P.C., by Jerry H. Walters, Jr., and Julie K. Adams, for defendant, The Atlantic Group, Inc. d/b/a/ DZ Atlantic.

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Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Robert M. Bisanar and Michael L. Wade, Jr., for defendant, Duke Energy Carolinas, LLC.

THIGPEN, Judge.

The employment of Howard H. Pierce, Sr., (“Plaintiff”) was terminated by The Atlantic Group, Inc., *et al.*, (“Defendant Atlantic”). Defendant Atlantic is an engineering, construction and maintenance contractor providing services to Duke Energy Carolinas, LLC, (“Defendant Duke Energy”) (together, “Defendants”). Plaintiff filed a complaint alleging the following: In terminating Plaintiff’s employment, Defendants violated the Retaliatory Employment Discrimination Act; Plaintiff was wrongfully discharged in violation of public policy and N.C. Gen. Stat. § 95-126, *et seq.*, which governs the occupational health and safety of North Carolina employees; Defendants’ actions amounted to negligent and intentional infliction of emotional distress; and Defendants defamed Plaintiff. On appeal, we must determine whether the trial court erred by dismissing Plaintiff’s complaint pursuant to Defendants’ Rule 12(b)(6) motion. We affirm the order of the trial court.

I: Factual and Procedural Background

The record tends to show the following: Plaintiff was hired by Defendant Atlantic in 2001, and held numerous positions with Defendant Atlantic, including supervisor, certified crane operator, and rigger. Over the course of eight years with Defendant Atlantic, Plaintiff was promoted from the position of rigger to lifting rigger supervising coordinator. Plaintiff’s pay was, over time, increased to the rate of forty-four dollars per hour. Plaintiff reported to both Defendant Atlantic and Defendant Duke Energy.

In February 2009, Plaintiff received a memorandum from Defendant Duke Energy alerting employees that new regulations, 13 N.C. Admin. Code 07F .0901, *et seq.*, would affect crane operators and riggers, requiring them to be certified. The regulations were scheduled to take effect on 1 October 2009.¹ Plaintiff brought the memorandum to the attention of his supervisors and proposed a process by which the operators could be trained and certified in a way which would not interfere with the operations of the plant during its busiest times. Plaintiff did not receive a response to his proposal. Plaintiff,

1. We also note that 13 N.C. Admin. Code 07F .0901, *et seq.*, was repealed on 1 February 2011.

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however, continued to raise the issue of certification on a weekly basis, but Plaintiff's proposal and concerns were not addressed.

In late March 2009, Defendant Atlantic asked Plaintiff to take a twenty-eight day vacation break from his position at the McGuire Duke Energy Nuclear Power Plant ("McGuire") where he was currently working. On 30 March 2009, Plaintiff began his vacation, expecting to return to his former position as supervisor at a pay rate of forty-four dollars per hour, as he was assured by a staffing employee with Defendant Atlantic, Ms. Angie Green ("Ms. Green"). Shortly after beginning his vacation, Plaintiff received a phone call from Ms. Green, who asked Plaintiff whether he would be willing to assist Defendant Atlantic in staffing a fueling outage at Oconnee Nuclear Power Plant ("Oconnee"). Plaintiff agreed to assist on the condition that Ms. Green contact his supervisors at both Defendant Atlantic and Defendant Duke Energy to ensure that he would not lose his supervisory level position and salary upon his return to McGuire. Ms. Green agreed. Ms. Green later contacted Plaintiff, explaining that his supervisors had approved, but for purposes of the Oconnee assignment, Plaintiff would only be paid twenty-seven dollars per hour. Plaintiff accepted the temporary pay reduction.

Several weeks into the Oconnee assignment, Ms. Green contacted Plaintiff, requesting that Plaintiff return to McGuire as an advanced rigger rather than a supervisor, at a pay rate of twenty-eight dollars per hour. Plaintiff was informed that this demotion would be temporary until the conclusion of the "fall outage" period, at which time Plaintiff would return to his prior position.

Plaintiff continued to be concerned about the certification of the operators as required by 13 N.C. Admin. Code 07F .0901, *et seq.*, and "feared that Defendants' explanations for his demotion in pay were a pretext in order to remove him from a supervisor position." Plaintiff was told that since he was no longer a supervisor, "the issue of the certification was not his to address."

On 24 August 2009, Plaintiff called Defendant Duke Energy's "ethics hotline" and reported the alleged "retaliatory treatment" he had received. Plaintiff believed the hotline was a confidential resource. However, Plaintiff was asked to provide his identity and the names of "persons who concerned him." Plaintiff named Mike Henline ("Henline") of Defendant Atlantic, Jimmy Shelton ("Shelton") of Defendant Duke Energy, Donny Lawing ("Lawing") of Defendant Duke Energy, Maurice Horn ("Horn") of Defendant Duke Energy, and

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Joe Bates (“Bates”) of Defendant Duke Energy. Plaintiff called the hotline on multiple other occasions after his first call.

During September of 2010, Plaintiff felt that “workplace conditions became increasingly adverse.” Specifically, Plaintiff felt that his schedule was being arbitrarily changed and interrupted, such that he could not get sufficient hours to support his family.

On Friday, 19 September 2010, Plaintiff was advised that on Monday, 21 September 2010, Plaintiff would begin on the nightshift. As a result of the change, Plaintiff filled out his timecard on Friday morning—rather than Monday morning, as was his usual practice—estimating the hours he was required to work on Friday based on his instructions from Shelton. Shortly after filling out his timecard, Plaintiff learned that his wife had possibly had a heart attack, and she had been transported to the hospital. Plaintiff left the plant to go to the hospital and called Mr. Leroy Price (“Price”) to explain his absence. Price advised Defendant to “see to his wife, and . . . the time card issues would be resolved the following week.”

On the evening of 19 September 2009, a “Site Maintenance Lifting Coordinator” for Defendant Duke Energy sent an email to Defendant Atlantic stating, “I have document proof that [Plaintiff] has falsified his timesheet . . . [Henline] is in the process of pulling [Plaintiff’s] badge.” However, at Plaintiff’s request, Henline later corrected Plaintiff’s timecard and initialed his corrections. Henline assured Plaintiff that “he would suffer no adverse consequences from the mistakes in completing the card.”

On Monday, 21 September 2009, Plaintiff called Henline and was told not to report for his shift but to come in the next day. Plaintiff was told “he would be written up but that the timecard would be corrected.” On 23 September 2009, Plaintiff was again told not to come in but to report the next morning. When Plaintiff arrived on 24 September 2009, Henline and Bates terminated Plaintiff’s employment, asked him to return his badge, and removed Plaintiff from the premises. Plaintiff reviewed the documents regarding his termination and discovered that the basis of his termination was “falsification of a time-card[.]”

Defendant Duke Energy reported Plaintiff to the Nuclear Regulatory Commission, barring Plaintiff from “unescorted access to facilities around the nation.” Plaintiff alleges this “permanently damag[ed] his reputation and his ability to obtain suitable similar employment.”

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Plaintiff appealed his termination in human resources, but his appeal was unsuccessful. On 16 August 2010, Plaintiff filed a complaint against Defendants. Both Defendant Duke Energy and Defendant Atlantic filed motions for an extension of time to file their answers, and both Defendants received a thirty day extension. Defendant Duke Energy filed their answer on 12 October 2010 and alleged that Plaintiff's complaint failed to state a claim upon which relief may be granted. Defendant Atlantic also filed an N.C. Gen Stat § 1A-1, 12(b)(6) motion to dismiss Plaintiff's complaint on 20 October 2010.

On 17 November 2010, Plaintiff filed a motion to amend the complaint. In Plaintiff's amended complaint, also filed 17 November 2010, he realleges the following: Defendants violated the Retaliatory Employment Discrimination Act; Plaintiff was wrongfully discharged in violation of public policy and N.C. Gen. Stat. § 95-126, *et seq.*, which governs the occupational health and safety of North Carolina employees; Defendants' actions amounted to negligent and intentional infliction of emotional distress; and Defendants defamed Plaintiff. Defendant Duke Energy filed an additional N.C. Gen Stat § 1A-1, 12(b)(6) motion to dismiss on 28 November 2010.

On 3 February 2011, the trial court entered an order granting Defendants' N.C. Gen Stat § 1A-1, 12(b)(6) motion to dismiss Plaintiff's complaint. From this order, Plaintiff appeals.

II: Standard of Review

"On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Stunzi v. Medlin Motors, Inc.*, ___ N.C. App. ___, ___, 714 S.E.2d 770, 773 (2011) (quotation omitted). "The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Id.* (quotation omitted). Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Id.* at ___, 714 S.E.2d at 773-74.

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III: Motion to Dismiss

In Plaintiff's argument on appeal, he contends the trial court erred by dismissing his complaint against Defendants pursuant to Defendants' N.C. Gen Stat § 1A-1, 12(b)(6) motion. Specifically, Plaintiff argues that the allegations in each of the five counts in Plaintiff's complaint, treated as true, are sufficient in this case to state a claim upon which relief may be granted. We address each count in turn, and ultimately conclude the trial court did not err by dismissing Plaintiff's complaint.

A: Retaliatory Employment Discrimination Act

[1] Plaintiff first contends the trial court erred by dismissing Plaintiff's allegation that Defendants violated the Retaliatory Employment Discrimination Act ("REDA"). We disagree.

N.C. Gen. Stat. § 95-241(a) (2011) provides that "[n]o person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to . . . [f]ile a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to . . . Article 16 of this Chapter[,]" the Occupational Safety and Health Act of North Carolina ("OSHA"), N.C. Gen. Stat. § 95-126 (2011), *et. seq.*

"In order to state a claim under REDA, a plaintiff must show (1) that he exercised his rights as listed under N.C. Gen. Stat. § 95-241(a), (2) that he suffered an adverse employment action, and (3) that the alleged retaliatory action was taken because the employee exercised his rights under N.C. Gen. Stat. § 95-241(a)." *Wiley v. UPS, Inc.*, 164 N.C. App. 183, 186, 594 S.E.2d 809, 811 (2004) (citation omitted). An adverse action includes "the discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges, and benefits of employment." N.C. Gen. Stat. § 95-240(2) (2011). "If plaintiff presents a prima facie case of retaliatory discrimination, then the burden shifts to the defendant to show that he 'would have taken the same unfavorable action in the absence of the protected activity of the employee.'" *UPS, Inc.*, 164 N.C. App. at 186, 594 S.E.2d at 811. (quoting N.C. Gen. Stat. § 95-241(b)). "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 187, 594 S.E.2d at 811 (quotation omitted).

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In this case, the parties do not dispute that Plaintiff “suffered an adverse employment action[.]” *Id.* at 186, 594 S.E.2d at 811. However, the parties dispute whether Plaintiff “exercised his rights as listed under N.C. Gen. Stat. § 95-241(a)” and whether “the alleged retaliatory action was taken because the employee exercised his rights under N.C. Gen. Stat. § 95-241(a).” *Id.*

Plaintiff contends he exercised his rights as listed under N.C. Gen. Stat. § 95-241(a) by “initiat[ing] any inquiry. . . with respect to” OSHA. N.C. Gen. Stat. § 95-241(a). Specifically, Plaintiff states that he initiated an inquiry when he “submitted a proposed plan that would provide certification of the crane operators in compliance with the upcoming regulatory change.” Plaintiff further contends, “[t]hereafter, [Plaintiff] complained to his [Defendant Atlantic] and [Defendant Duke Energy] supervisors weekly of [Defendants] failure to begin certifying crane operators.” Plaintiff’s complaint alleges the following with regard to Plaintiff’s initiation of an inquiry pursuant to N.C. Gen. Stat. § 95-241(a):

34. Defendants’ decision to terminate [Plaintiff’s] employment was in retaliation for his making complaints and providing information with regard to an ongoing workplace situation with regard to Occupational Safety and Health issues affecting nuclear power facilities in North Carolina operated by Defendants, including but not limited to the McGuire Nuclear Facility.

35. By communicating with his supervisors on numerous occasions concerning safety and health and training issues, and with the Duke Ethics Hotline, [Plaintiff] exercised his rights as listed under N.C. Gen. Stat. § 95-241(a).

Our Courts have not defined or addressed what it means to “initiate [an] inquiry” pursuant to N.C. Gen. Stat. § 95-241(a) with respect to OSHA.² *Id.* We find the logic of several decisions of federal courts persuasive authority as to the definition of initiating an inquiry. *See State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) (stating that federal decisions, with the exception of the United States Supreme Court, are not binding upon this Court; however, State courts should treat “decisions of the United States Supreme Court as

2. Plaintiff does not allege or argue that he “[f]ile[d] [or threatened to file] a claim or complaint,” or that he “testif[ied] or provide[d] information[.]” N.C. Gen. Stat. § 95-241(a)(1). Rather, Plaintiff contends that he exercised his rights under N.C. Gen. Stat. § 95-241(a) by “initiat[ing] [an] inquiry[.]” Therefore, we limit our review to the question of whether the allegations in Plaintiff’s complaint are sufficient to set forth a cause of action pursuant to REDA, because Plaintiff “initiat[ed] [an] inquiry[.]”

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binding and accord[] to decisions of lower federal courts such persuasiveness as these decisions might reasonably command”); *see also Signature Dev., LLC v. Sandler Commer. at Union, L.L.C.*, ___ N.C. App. ___, ___, 701 S.E.2d 300, 307 (2010) (stating, “[a]lthough, as an unpublished case, [it] does not establish binding legal precedent, we are persuaded by [the] Court’s reasoning in that case”).

The United States District Court for the Middle District of North Carolina addressed the question of what it means to initiate an inquiry pursuant to N.C. Gen. Stat. § 95-241(a) in the context of OSHA in *Jurrisen v. Keystone Foods, LLC*, 2008 U.S. Dist. LEXIS 63901, 15-16 (2008). The Court stated:

As noted, REDA states that no person shall take any retaliatory action against an employee because the employee “file[s] a claim or complaint, *initiate[s] any inquiry, investigation, inspection, proceeding or other action, or testifies*] or provide[s] information to any person with respect to . . . [OSHANC].” N.C. GEN. STAT. § 95-241(a) (emphasis added). By its plain language, it is clear that REDA does not limit protected activities to the sole act of filing a formal claim under OSHANC. At the other end of the spectrum, however, courts have held that merely talking to an internal supervisor about potential safety concerns is not a “protected activity” under REDA.

Id.; *see also, e.g., Delon v. McLaurin Parking Co.*, 367 F. Supp. 2d 893, 902, *aff’d*, 146 Fed. Appx. 655 (2005) (“The complaint that Plaintiff made to [a manager] [i]s not . . . protected under REDA[;] [r]ather, it was merely a complaint to a manager about a supervisor”); *Cromer v. Perdue Farms, Inc.*, 900 F. Supp. 795, 801 n.6 (1994), *aff’d*, 1995 U.S. App. LEXIS 25327 (1995) (explaining that “North Carolina has never recognized a cause of action for wrongful discharge in favor of employees who orally complained to their employers about unsafe working conditions” and noting that the plaintiff “did not initiate a complaint with the Occupational Safety and Health Review Commission or threaten to initiate any such complaint”); *Whitings v. Wolfson Casing Corp.*, 173 N.C. App. 218, 222, 618 S.E.2d 750, 753 (2005) (holding the plaintiff’s act of requesting that her employer pay for a medical evaluation of a work-related injury was not a protected activity under the North Carolina Workers’ Compensation Act).

In *Jurrisen*, the plaintiff’s complaint contained the following allegations that the defendant retaliated against the plaintiff:

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Defendant retaliated against Plaintiff “for the exercise of his rights of protection under [REDA], specifically that he ‘provide[d] information with respect to’ [OSHANC]”; that “Defendants’ decision to terminate Plaintiff’s employment was, *inter alia*, in retaliation of his providing information with respect to an ongoing investigation with regard to Occupational Safety and Health issues affecting [Defendants’] facility in North Carolina”; and that “[b]y communicating with Defendants’ auditor regarding food and occupational health and safety, Plaintiff exercised his rights as listed under N.C. Gen. Stat. 95-241(a).”

Jurrissen, 2008 U.S. Dist. LEXIS 63901, 17-18. The Court in *Jurrissen* concluded that “[t]hese allegations, drawing all inferences in favor of Plaintiff, conceivably constitute the act of ‘initiat[ing] any inquiry, investigation, inspection, proceeding or other action, or testif[ying] or provid[ing] information to any person with respect to . . . [OSHANC].’ ” *Id.* (citing N.C. Gen. Stat. § 95-241(a)).

However, in *Delon*, 367 F. Supp. 2d 893, the Court held that a plaintiff’s criticism of his supervisor to a division manager “was not one of the enumerated list that is protected under REDA[;] [r]ather, it was merely a complaint to a manager about a supervisor.” *Id.*, 367 F. Supp. 2d at 902.

We believe the facts of this case are more closely aligned with *Delon* than *Jurrissen*. In *Jurrissen*, the plaintiff alleged that he specifically communicated with the defendant’s internal auditor about an “ongoing investigation into defendant’s health and safety practices.” *Jurrissen*, 2008 U.S. Dist. LEXIS 63901. However, in *Delon*, there was no evidence of an investigation, and all communications were between the plaintiff and his supervisors or managers. In the present case, Plaintiff spoke only to his supervisors about his concerns regarding the certification of riggers. Plaintiff also called Defendant Duke Energy’s ethics hotline; however, Plaintiff’s complaint clearly states that Plaintiff called the ethics hotline to “report[] the retaliatory treatment he had been receiving”—not to report a concern regarding occupational health and safety in the context of his employment with Defendant Atlantic. We do not believe the foregoing allegations are sufficient to constitute the initiation of an inquiry pursuant to N.C. Gen. Stat. § 95-241(a). Therefore, we conclude the trial court did not err in granting Defendants’ N.C. Gen Stat § 1A-1, 12(b)(6) motion to dismiss Plaintiff’s REDA claim.

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B: Wrongful Discharge

[2] In Plaintiff's second argument on appeal, he contends the trial court erred in dismissing Plaintiff's claim for wrongful discharge. We disagree.

"North Carolina is an employment-at-will state." *Kurtzman v. Applied Analytical Indus.*, 347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997), *rehearing denied*, 347 N.C. 586, 502 S.E.2d 594 (1998). "This Court has repeatedly held that in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party." *Id.*

The doctrine of employment-at-will, however, "is not without limits[,] and a valid claim for relief exists for wrongful discharge of an employee at will if the contract is terminated for an unlawful reason or a purpose that contravenes public policy." *Ridenhour v. IBM*, 132 N.C. App. 563, 567, 512 S.E.2d 774, 777, *disc. review denied*, 350 N.C. 595, 537 S.E.2d 481 (1999) (quotation omitted). "Public policy is defined as the principle of law that holds no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Id.* at 568, 512 S.E.2d at 778 (quotation omitted). "There is no specific list of what actions constitute a violation of public policy." *Id.* However, wrongful discharge claims have been recognized in North Carolina "where the employee was discharged (1) for refusing to violate the law at the employers request, . . . (2) for engaging in a legally protected activity, or (3) based on some activity by the employer contrary to law or public policy[.]" *Id.* at 568-69, 512 S.E.2d at 778.

"Under certain circumstances, notice pleading is not sufficient to withstand a motion to dismiss; instead a claim must be pled with specificity. . . . One such circumstance is when an at-will employee brings a wrongful termination claim upon the theory of a violation of public policy." *Gillis v. Montgomery County Sheriff's Dep't*, 191 N.C. App. 377, 379, 663 S.E.2d 447, 449, *disc. review denied*, 362 N.C. 508, 668 S.E.2d 26 (2008) (citation omitted).

[T]he public-policy exception was designed to vindicate the rights of employees fired *for reasons* offensive to the public policy of this State. This language contemplates a degree of intent or wilfulness on the part of the employer. In order to support a claim for wrongful discharge of an at-will employee,

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the termination itself must be motivated by an unlawful reason or purpose that is against public policy.

Garner v. Rentenbach Constructors, Inc., 350 N.C. 567, 571-72, 515 S.E.2d 438, 441 (1999) (quotation omitted). “To prevail on a claim for unlawful termination in violation of public policy a plaintiff must identify a specified North Carolina public policy that was violated by an employer in discharging the employee.” *McDonnell v. Tradewind Airlines, Inc.*, 194 N.C. App. 674, 677-78, 670 S.E.2d 302, 305, *disc. review denied*, 363 N.C. 128, 675 S.E.2d 657 (2009) (quotation omitted).

In this case, Plaintiff made the following allegations in his complaint regarding his wrongful discharge:

43. Defendants’ termination of [Plaintiff’s] employment was for unlawful reasons and purposes that contravene the public policy of North Carolina, as contained in the North Carolina General Statutes.

44. Defendant’s termination of [Plaintiff’s] employment for raising the issues outline[d] above also contravenes the general policies set forth in N.C. Gen. [Stat.] § 95-126[,] *et [seq.,]* of the North Carolina General Statutes governing the occupational health and safety of North Carolina employees, including, but not limited to the important public policies of: (a) reducing the number of occupational health and safety hazards in the workplace, (b) encouraging/requiring employees to cooperate with occupational health and safety audits, inspections, and investigations.

45. Defendants’ termination of [Plaintiff’s] employment for raising the issues outlined above contravenes the important public policies set forth in N.C. Gen. Stat. §§ 95-240 through 95-245 that prohibit the termination of employees in retaliation for the employee’s good faith expression of concern over his employer’s occupational health and safety practices.

Plaintiff cites to REDA and provisions of OSHA in support of his wrongful discharge claim.

Plaintiff specifically alleges that his termination contravenes the following public policies: “(a) reducing the number of occupational health and safety hazards in the workplace, (b) encouraging/requiring employees to cooperate with occupational health and safety audits, inspections, and investigations.” Defendants’ alleged violations of the

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foregoing policies, according to Plaintiff's complaint, stems from the following lack of action: "[Plaintiff] brought [the prospective 13 N.C. Admin. Code 07F .0901, *et seq.*] to the attention of his supervisors and proposed a process by which the operators could be trained and certified in a way that would not interfere with the operators of the plant during its busiest times[;] [Plaintiff] did not receive any response to his proposal." Other than allegations that Defendants did not accept Plaintiff's proposal for certifying operators, Plaintiff's complaint is devoid of allegations that Defendants failed to "reduc[e] the number of occupational health and safety hazards in the workplace" or "encourag[e]/requir[e] employees to cooperate with occupational health and safety audits, inspections, and investigations[.]" Plaintiff does not allege that Defendants directed him to violate any policy expressed in OSHA, or that Defendants engaged in some activity contrary to any effective law or policy expressed in OSHA. Moreover, Plaintiff does not allege that his workplace was unsafe. Plaintiff does not allege that Defendants ordered him to work in violation of 13 N.C. Admin. Code 07F .0901, *et seq.*, which required crane operators and riggers to be certified. In fact, the record shows that 13 N.C. Admin. Code 07F .0901, *et seq.*, was not effective until 1 October 2009, which was after Plaintiff's employment was terminated. Plaintiff's allegations wholly fail to show that Defendants ever violated their OSHA obligations, including 13 N.C. Admin. Code 07F .0901, *et seq.*, and Plaintiff's assertions that Defendants' termination of his employment violated law or public policy based on provisions of the administrative code that were yet to become effective does not remedy this deficiency in Plaintiff's pleadings. We do not believe that public policy required Defendants to accept Plaintiff's proposal for compliance with 13 N.C. Admin. Code 07F .0901, *et seq.* As long as Defendants complied with 13 N.C. Admin. Code 07F .0901, *et seq.*, in a timely fashion, which Plaintiff does not allege Defendants failed to do, the fact that Defendants complied with 13 N.C. Admin. Code 07F .0901, *et seq.*, by implementing a process of compliance different from the process proposed by Plaintiff does not violate public policy. Thus, Plaintiff has failed to "identify a specified North Carolina public policy that was *violated* by an employer in discharging the employee[.]" *McDonnell*, 194 N.C. App. at 678, 670 S.E.2d at 305 (emphasis added). We conclude the trial court did not err by dismissing Plaintiff's claim of wrongful discharge.

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C: Negligent and Intentional Infliction of Emotional Distress

[3] In Plaintiff's next argument on appeal, he contends the trial court erred in dismissing his claim of negligent and intentional infliction of emotional distress. We disagree.

To state a claim for negligent infliction of emotional distress, a plaintiff must allege that "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . . , and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics & Gynecology Assoc., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *rehearing denied*, 327 N.C. 644, 399 S.E.2d 133 (1990).

Intentional infliction of emotional distress requires "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). Defendants' conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible grounds of decency." *Lorbacher v. Housing Auth.*, 127 N.C. App. 663, 676, 493 S.E.2d 74, 81-82 (1997).

Both negligent and intentional infliction of emotional distress require that the emotional distress be severe. Defendants' conduct must "cause[] mental distress of a very serious kind." *Trought v. Richardson*, 78 N.C. App. 758, 763, 338 S.E.2d 617, 620, *disc. review denied*, 316 N.C. 557, 344 S.E.2d 18 (1986) (quotation omitted). "[S]evere emotional distress" has been defined as "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97.

In this case, only one allegation in Plaintiff's complaint describes Plaintiff's alleged emotional distress: "[Plaintiff] began to experience serious on and off the job stress, severely affecting his relationship with his wife and family members." This, we do not believe, is sufficient to state a claim for negligent or intentional infliction of emotional distress. *See Johnson*, 327 N.C. at 304, 395 S.E.2d at 97 (defining severe emotional distress); *see also Johnson v. Bollinger*, 86 N.C. App. 1, 6, 356 S.E.2d 378, 382 (1987) (affirming the trial court's dismissal of the plaintiff's claim of intentional infliction of emotional distress when the plaintiff's "complaint on its face reveal[ed] the

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absence of facts sufficient” to support an element of the tort). Therefore, we conclude the trial court did not err by dismissing Plaintiff’s claims of negligent and intentional infliction of emotional distress.

D. Defamation

[4] In Plaintiff’s final argument on appeal, he contends the trial court erred by dismissing his defamation claim. We disagree.

“In North Carolina, the term defamation applies to the two distinct torts of libel and slander.” *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 898 (2002), *cert. denied*, 540 U.S. 965, 124 S. Ct. 431, 157 L. Ed. 2d 310 (2003). “In general, libel is written while slander is oral.” *Phillips v. Winston-Salem/Forsyth County Bd. of Educ.*, 117 N.C. App. 274, 277, 450 S.E.2d 753, 756 (1994), *disc. review denied*, 340 N.C. 115, 456 S.E.2d 318 (1995). In this case, Plaintiff’s complaint alleges two written communications were defamatory.

“In order to recover for [libelous] defamation, a plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff’s reputation.” *Tyson v. L’Eggs Products, Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987). “[T]he words attributed to defendant [must] be alleged ‘substantially’ in *haec verba*, or with sufficient particularity to enable the court to determine whether the statement was defamatory.” *Stutts v. Duke Power Co.*, 47 N.C. App. 76, 84, 266 S.E.2d 861, 866 (1980). North Carolina courts recognize three classes of libel:

(1) Publications which are obviously defamatory and which are termed libels *per se*; (2) publications which are susceptible of two reasonable interpretations, one of which is defamatory and the other is not, and (3) publications which are not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances. This type of libel is termed libel *per quod*.

Tyson, 84 N.C. App. at 11, 351 S.E.2d at 840 (quotation omitted).

In the present case, we must now examine whether Plaintiff’s complaint sets forth a cause of action for each of the foregoing types of libel. In Plaintiff’s complaint, he alleges the following:

54. [Plaintiff] incorporates and realleges the allegations set forth in paragraphs 1 through 53 of the Complaint.

55. By falsely contend[ing] that [Plaintiff] intentionally falsified his time card[,] the Defendants, acting through their supervisory employees and agents, damaged [Plaintiff's] reputation and economic circumstances.

56. By reporting [Plaintiff] to the Nuclear Regulatory Commission and facilitating his being barred from nuclear plants around the country, Defendants, acting through the supervisory employees and agents, further damaged [Plaintiff's] reputation and economic circumstances.

57. These acts were undertaken with malice and for no proper purpose.

58. These acts and statements were false and known by Defendants to be false.

59. Defendants to this day have failed to cure this oral and written defamation and continue to perpetuate those defamatory allegations in these proceedings.

Plaintiff alleges two defamatory publications: (1) an email from a "Site Maintenance Lifting Coordinator" at Defendant Duke Energy to Defendant Atlantic regarding Plaintiff's allegedly falsified timesheet; and (2) a report from Defendant Duke Energy to the Nuclear Regulatory Commission barring Plaintiff from unescorted access to nuclear facilities. We must examine each of the two foregoing allegations of libel in the context of the three recognized types of libel in North Carolina.

i: Libel *per se*

We do not believe that Plaintiff's complaint, alleging that Defendant "falsely contend[ed]" that Plaintiff "falsified his time card[,] or reported Plaintiff to the Nuclear Regulatory Commission sets forth a cause of action for libel *per se* sufficient to survive Defendants' Rule 12(b)(6) motion. "[P]ublications or statements which are susceptible of but one meaning, when considered alone without innuendo, colloquium, or explanatory circumstances, and that tend to disgrace and degrade the party or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided are defamatory *per se*." *Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993) (quotation omitted). Plaintiff does not put forth any allegations tending to show that Defendants' alleged defamatory publications hold Plaintiff "up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided[.]" *Id.*

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Moreover, “North Carolina cases have held consistently that alleged false statements made by defendants, calling plaintiff ‘dishonest’ or charging that plaintiff was untruthful and an unreliable employee, are not actionable *per se*.” *Duke Power Co.*, 47 N.C. App. at 82, 266 S.E.2d at 865 (citation omitted). Therefore, we conclude the trial court did not err by dismissing Plaintiff’s claim of libel *per se*.

ii: Publications Susceptible of Two Interpretations

We further believe Plaintiff’s complaint is insufficient to state a claim for defamation within the second class because the complaint does not allege that the email or report are susceptible of two meanings. *See Tyson*, 84 N.C. App. at 11, 351 S.E.2d at 840 (holding, “the complaint is insufficient to state a claim for libel within the second class because the complaint does not allege that the letter is susceptible of two meanings”). We therefore conclude the trial court did not err by dismissing Plaintiff’s claim of the second type of defamation.

iii: Libel *Per Quod*

To state a claim of libel *per quod*, Plaintiff must allege special damages. *Ellis v. Northern Star Co.*, 326 N.C. 219, 231, 388 S.E.2d 127, 134, *rehearing denied*, 326 N.C. 488, 392 S.E.2d 89 (1990). “Facts giving rise to special damages must be alleged so as to fairly inform defendant of the scope of plaintiff’s demand.” *Stanford v. Owens*, 46 N.C. App. 388, 398, 265 S.E.2d 617, 624, *disc. review denied*, 301 N.C. 95, ___ S.E.2d. ___ (1980). We do not believe that Plaintiff’s allegation that the alleged defamation “damaged . . . [Plaintiff’s] economic circumstances” fairly informs Defendants of the scope of Plaintiff’s demand. Therefore, we conclude the trial court did not err by dismissing Plaintiff’s claim of libel *per quod* pursuant to Defendants’ Rule 12(b)(6) motion.

For the foregoing reasons, we affirm the order of the trial court dismissing Plaintiff’s complaint in its entirety.

AFFIRMED.

Judges HUNTER, JR. and McCULLOUGH concur.

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IMT, INC., DBA THE INTERNET BUSINESS CENTER, PLAINTIFF V. CITY OF LUMBERTON, DEFENDANT CITY OF LUMBERTON, PLAINTIFF V. G&M COMPANY, LLC, DBA INTERNET CAFÉ SWEEPSTAKES AND WINNERS CHOICE, DEFENDANT CITY OF LUMBERTON, PLAINTIFF V. DANIEL PAUL STORIE D/B/A SWEEP-NET INTERNET BUSINESS CENTER, DEFENDANT EZ ACCESS OF N.C., LLC, PLAINTIFF V. CITY OF LUMBERTON, DEFENDANT

No. COA11-813

(Filed 21 February 2012)

1. Gambling—privilege license tax—games of chance—sweepstakes

The trial court did not err by granting summary judgment in favor of the City and denying the same for appellants even though appellants contended they did not operate “games of chance” as required under the pertinent local municipal ordinance instituting a privilege license tax applicable to for-profit businesses where persons utilized electronic machines to conduct games of chance. The ordinance imposed a privilege tax on electronic machines that conducted “games of chance” including sweepstakes.

2. Gambling—games—no payment requirement

The trial court did not err by granting summary judgment in favor of the City and denying the same for appellants even though appellants contended their games did not require payment as the local municipal ordinance required. The ordinance applied to appellants because they accepted payment in exchange for customers’ use of computers that conducted games of chance.

3. Taxation—privilege license tax—cyber-gambling

The trial court did not err by granting summary judgment in favor of the City and denying the same for appellants even though appellants contended the local municipal ordinance instituting a privilege license tax was unconstitutional. The City properly taxed businesses for the privilege of carrying out cyber-gambling through the use of computer terminals as authorized by N.C.G.S. § 160A-211.

4. Taxation—rule of uniformity—cyber-gambling establishments

The trial court did not err by granting summary judgment in favor of the City and denying the same for appellants even though appellants contended the local municipal ordinance violated the

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rule of uniformity by taxing similarly situated taxpayers differently. The tax was applied to every single cyber-gambling establishment that utilized computer or gaming terminations to carry on its business. Further, the state endorsed lotteries reasonably constituted a separate classification from appellants' unendorsed legal businesses, and the City's privilege license tax did not need to be imposed upon them.

5. Constitutional Law—discriminatory tax—rational basis

The trial court did not err by granting summary judgment in favor of the City and denying the same for appellants even though appellants contended there was no rational basis for a discriminatory tax. The other businesses being taxed lesser amounts for privilege license purposes were different classes of business.

6. Taxation—privilege license tax—constitutionality

The trial court did not err by granting summary judgment in favor of the City and denying the same for appellants even though appellants contended the local municipal ordinance was unconstitutional because it imposed an unjust and inequitable taxation scheme. Appellants provided no evidence that the City's privilege license tax would completely deprive appellants of all profit associated with their businesses. Further, factual elements were missing to prove the City's privilege license tax was prohibitive.

7. Gambling—cyber-gambling—Internet Tax Freedom Act

The trial court did not err by granting summary judgment in favor of the City and denying the same for appellants even though appellants contended the local municipal ordinance was preempted by the Internet Tax Freedom Act since it applied to businesses engaged in promotional activity using the internet. The ordinance never mentioned internet-based sweepstakes or made a distinction regarding electronic commerce, but instead imposed the tax for cyber-gambling establishments that used a computer or gaming terminal in provision of games of chance.

Judge HUNTER, Robert C., dissenting.

Appeal by Plaintiff IMT, Inc. d/b/a The Internet Center ("IMT") from judgment entered 6 June 2011. Appeal by Defendant G&M Company, Inc. d/b/a Internet Café Sweepstakes and Winner's Choice ("G&M") from judgment entered 10 May 2011. Appeal by Defendant Daniel Paul Storie d/b/a Sweep-Net Internet Business Center

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(“Storie”) from judgment entered 10 May 2011. Appeal by Plaintiff E.Z. Access of N.C., LLC (“E.Z.”) from judgment entered 6 June 2011. All judgments were entered by Judge Robert Frank Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 16 November 2011.

The Law Offices of Lonnie M. Player, Jr., PLLC, by Lonnie M. Player, Jr., for Appellants.

James C. Bryan for Appellee.

HUNTER, JR., Robert N., Judge.

This appeal is the result of four separate cases that were appealed and have been consolidated pursuant to Rule 11(d) of the Rules of Appellate Procedure. Appellants¹ argue (1) the trial court erred by granting summary judgment in favor of the City of Lumberton (the “City”) (“Appellee”) and denying Appellants’ summary judgment motion and (2) the ordinance at issue is unenforceable against Appellants for various reasons. We disagree and affirm the judgment of the trial court.

I. Factual & Procedural Background

Appellants operate businesses within the municipal limits of the City where they sell blocks of internet usage time at competitive rates to customers. When a customer purchases time, the customer receives a free sweepstakes entry. The sweepstakes entry has a predetermined prize, which can be revealed by using computers on Appellants’ business premises. However, the customer is not required to redeem or reveal the predetermined cash value of the free sweepstakes entry. Customers can also receive a sweepstakes entry without purchasing anything by mailing a request to an address displayed in Appellants’ businesses. Customers opting for the “no purchase necessary” mail-off entry get the same free, predetermined opportunity to win as offered to Appellants’ customers who purchase internet usage time.

The City is entitled to create and annually collect privilege license taxes pursuant to N.C. Gen. Stat. § 160A-211 and N.C. Gen. Stat. § 105-109(e), respectively. For the fiscal year of 2009 to 2010, the City imposed a municipal privilege tax upon Appellants of \$12.50. On 1 July 2010, the City enacted an ordinance instituting a privilege

1. “Appellants” include: IMT, G&M, Storie, and E.Z.

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license tax applying to, in pertinent part, “[a]ny for-profit business or enterprise, whether as a principal or accessory use, where persons utilize electronic machines . . . to conduct games of chance, including . . . sweepstakes” (the “Ordinance”). The Ordinance taxes such enterprises in the amount of \$5,000 per business location and \$2,500 per gaming or computer terminal within the business. Under the Ordinance, the City is entitled to collect the tax in a civil proceeding, free of any claim for homestead or personal property exemption. The City is also entitled to collect a five percent penalty per month (up to a maximum of 25 percent) for failure to pay privilege license taxes, free of any claim for homestead or personal property exemption.

Each Appellant opened its business before the effective date of the Ordinance. Since opening, IMT has had 55 computer terminals at one location; G&M has had 28 computer terminals at one location; Storie has had 40 computer terminals at one location; and E.Z. has had at least one computer terminal at one location. The City mailed each Appellant notice regarding the new privilege tax.

Appellant IMT’s privilege license taxes for 2010 to 2011 amounted to \$137,525. IMT’s failure to pay the entire tax on time resulted in late payment penalties. After 1 December 2010, IMT made a \$133,581.61 payment under protest, leaving a balance due of \$6,323.75. On 17 November 2010, IMT filed a complaint against the City regarding the privilege license tax. The City filed its counterclaim on 17 December 2010. Both parties filed motions for summary judgment and consented to consideration of those motions out of district, session, and term. Judge Floyd, Jr., by clerical error, granted summary judgment in favor of IMT, denying the City’s summary judgment motion. Upon a consent motion to correct the judgment, Judge Floyd, Jr. issued a corrective judgment entered 6 June 2011, granting summary judgment for the City and denying the same for IMT. IMT entered timely notice of appeal on 14 June 2011.

Appellant G&M also failed to pay part or all of the privilege license tax to the City and had a balance of \$90,000 on 1 November 2010, including principal in the amount of \$75,000 and penalties in the amount of \$15,000. On 17 November 2010, the City filed a complaint against G&M for failure to pay the privilege license tax. G&M filed its counterclaims on 3 January 2011. Both parties filed for summary judgment on 14 January 2011 and consented to consideration of those motions out of district, session, and term. Judge Floyd, Jr. entered judgment 10 May 2011 granting summary judgment for the City and

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denying the same for G&M. G&M entered timely notice of appeal on 1 June 2011.

Appellant Storie also failed to pay part or all of the privilege license tax to the City and had a balance of \$126,000 on 1 November 2010, including principal in the amount of \$105,000 and \$21,000 in penalties. On 17 November 2010, the City filed a complaint against Storie for failure to pay the privilege license tax. Storie filed his counterclaims on 21 January 2011. Both parties filed for summary judgment and consented to consideration of those motions out of district, session, and term. Judge Floyd, Jr. entered judgment 10 May 2011 granting summary judgment for the City and denying the same for Storie. Storie entered timely notice of appeal on 1 June 2011.

Appellant E.Z. paid the amount owed on the privilege tax of \$110,000 under protest. On 4 January 2011, E.Z. filed a complaint against the City regarding the privilege license tax. Both parties filed motions for summary judgment on 14 January 2011 and consented to consideration of those motions out of district, session, and term. Judge Floyd, Jr., by clerical error, granted summary judgment in favor of E.Z., denying the City's summary judgment motion. Upon a consent motion to correct the judgment, Judge Floyd, Jr. issued a corrective judgment entered 6 June 2011, granting summary judgment for the City and denying the same for E.Z. E.Z. entered timely notice of appeal on 14 June 2011.

II. Jurisdiction & Standard of Review

Appellants appeal from the final judgments of a superior court and appeal therefore lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

This Court's standard of review of a trial court's summary judgment order is *de novo*. *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007). The reviewing court must determine whether there is a genuine issue of material fact and whether the moving party was entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980). Where, as here, the parties have cross motions for summary judgment, and there is no dispute as to any material fact, the sole issue on appeal is whether the trial court properly concluded that one party was entitled to judgment as a matter of law or if judgment should have been entered in favor of the opposing party. *See McDowell v. Randolph Cty.*, 186 N.C. App. 17, 20, 649 S.E.2d 920, 923 (2007).

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III. Analysis

Appellants contend the trial court erred in granting summary judgment for the City and denying the same for Appellants because the Ordinance in question is unenforceable under several distinct legal theories. We disagree that the statute is unenforceable under Appellants' contentions and affirm the judgments of the trial court.

[1] Appellants first argue the Ordinance does not apply to them because they do not operate "games of chance" as required under the Ordinance. We disagree. Where a statute is clear and unambiguous, the plain meaning of the words will be applied without judicial construction. *Wiggs v. Edgecombe Cty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007). Here, the Ordinance clearly imposes the privilege license tax on electronic machines that conduct "games of chance," including "sweepstakes." Appellants admit they conduct sweepstakes but argue that their games are not "games of chance" because their prizes are predetermined. However, the Ordinance clearly states that the tax applies regardless of whether "the value of such distribution is determined by electronic games played or by predetermined odds." Appellants nevertheless claim that *American Treasures, Inc. v. State*, 173 N.C. App. 170, 178, 617 S.E.2d 346, 351 (2005), holds that where something of inherent value is sold, a sweepstakes entry revealing a predetermined outcome is an ancillary benefit to the sale and is not a "game of chance." We disagree with Appellants' interpretation of *American Treasures*. However, we do not expound upon this point as we find *American Treasures* to be inapplicable to the case *sub judice* because it concerns construing "games of chance" in a criminal statute found in Chapter 14, Article 37 of the North Carolina General Statutes. Unlike *American Treasures*, this case deals with a local municipal ordinance that on its face defines "games of chance" to include sweepstakes, whether or not the resulting prize is predetermined. Therefore, under the clear and unambiguous language of the Ordinance, we hold the Ordinance applies to Appellants because they conduct games of chance.

[2] Appellants also argue the Ordinance does not apply to Appellants because their games do not "require payment" as the Ordinance requires. Appellants correctly assert that payment is a component of the definition of a cyber-gambling establishment under the Ordinance. However, Appellants incorrectly assert that the offering of a free entry to the sweepstakes somehow negates the applicability of the tax. The plain and unambiguous language of the Ordinance states it applies to cyber-gambling

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businesses or enterprises [that] have as a *part* of [their] operation the running of one or more games or processes with any of the following characteristics: (1) payment, directly or as an intended addition to the purchase of a product, whereby the customer receives one or more electronic sweepstakes tickets, cards, tokens or similar items entitling or empowering the customer to enter a sweepstakes, and without which item the customer would be unable to enter the sweepstakes; or (2) payment, directly or as an intended addition to the purchase of a product, whereby the customer can request a no purchase necessary free entry of one or more sweepstakes tickets or other item entitling the customer to enter a sweepstakes. (Emphasis added.)

Nowhere does the Ordinance require payment for *every* sweepstakes entry; the plain and unambiguous language of the Ordinance simply requires that such an establishment “have as a part of its operation” games requiring payment. Therefore, we hold the Ordinance applies to Appellants because they accept payment in exchange for customers’ use of computers that conduct games of chance.

[3] Appellants next make a series of arguments regarding the constitutionality of the Ordinance. Appellants first argue the Ordinance is unconstitutional because it unlawfully classifies property for taxation, a power specifically reserved for the General Assembly. Appellants argue the privilege license tax is problematic because it taxes each “computer terminal” within each cyber-gambling business \$2,500 per terminal, thus creating classifications of personal property and taxing them differently. We disagree.

Under N.C. Gen. Stat. § 160A-211, the City has the authority to levy privilege license fees, imposed for the privilege of carrying on a certain business. N.C. Gen. Stat. § 160A-211 (2011). Property is often used to carry on a certain business, and when the privilege of carrying on that business is taxed, the tax may also be levied on the property used to carry on that particular trade, profession, or business. *See, e.g., State v. Hughes*, 193 N.C. 847, 847, 137 S.E. 819, 820 (1927) (upholding a tax on gasoline dealers for the privilege of dealing gasoline, which taxed such dealers for each tank wagon operated on the streets); *Southeastern Express Co. v. City of Charlotte*, 186 N.C. 668, 674, 120 S.E. 475, 478 (1923) (upholding Charlotte’s tax for the privilege of having a delivery service company, which taxed such companies \$75 per business and \$25 per motor vehicle used to carry on the business). Such a tax on the property is not considered a separate

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property tax but is incidental to the tax on the privilege of conducting a certain business. *See F. S. Royster Guano Co. v. Town of Tarboro*, 126 N.C. 68, 71, 35 S.E. 231, 232 (1900) (holding that “[t]he privilege tax levied by the town was not a tax on the goods, but a tax on the privilege of manufacturing guano within the corporate limits of the town”). Basing a privilege license tax on the units of property a business has is common and will not invalidate a privilege license fee ordinance. *See Lenoir Drug Co. v. Town of Lenoir*, 160 N.C. 571, 573, 76 S.E. 480, 481 (1912) (upholding the municipality’s privilege license fee for each soda fountain operated by a business). Here, the City is not taxing individual computer terminals for the sake of taxing computers. The City is taxing businesses for the privilege of carrying out cyber-gambling through the *use* of computer terminals, and we hold such a tax is authorized by N.C. Gen. Stat. § 160A-211.

[4] Appellants next argue the Ordinance violates the rule of uniformity by taxing similarly situated taxpayers differently. Appellants argue that the City is taxing only a specific type of computer terminal that conducts “games of chance” while excluding all other computer terminals located in other businesses from taxation, and this violates the rule of uniformity. We disagree.

Article V, Section 2 of the North Carolina Constitution provides “[n]o class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.” N.C. Const. Art. V, § 2(2). “[A] tax is ‘uniform’ when it operates with equal force and effect in every place where the subject of it is found . . . and with reference to classification it is ‘uniform’ when it operates without distinction or discrimination upon all persons composing the described class.” *Hajoca Corp. v. Clayton*, 277 N.C. 560, 569, 178 S.E.2d 481, 487 (1971) (citation omitted) (alteration in original). This uniformity standard applies to license taxes. *Id.* at 567, 178 S.E.2d at 486. Here, the City is taxing the business activity of cyber-gambling that uses computer or gaming terminals to carry on the business. Any tax on the computer terminals is incidental to the main purpose of the privilege license fee: to tax the privilege of conducting the particular business of cyber-gambling. With this understanding, we hold the tax to be uniform, as it applies to every single cyber-gambling establishment that utilizes computer or gaming terminals to carry on its business.

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Appellants further argue the Ordinance does not apply uniformly because it unlawfully exempts certain property from taxation.² Appellants argue the Ordinance unlawfully exempts from taxation lotteries endorsed by this state that also conduct “games of chance.” However, there is no requirement that the City levy a privilege license tax on all particular trades; it may levy the tax based on classifications within a particular class of the trade. *See State v. Rippey*, 80 N.C. App. 232, 234, 341 S.E.2d 98, 99 (1986) (citation omitted). “As long as a classification is not arbitrary or capricious, but rather [is] founded upon a rational basis, the distinction will be upheld by the Court.” *Id.* (citation omitted) (alteration in original). The North Carolina lotteries are distinct businesses that would not be legal without the state’s endorsement. *See* N.C. Gen. Stat. § 14-290 (2011) (prohibiting lotteries except for the state endorsed lottery under Chapter 18C of the General Statutes). The only lotteries endorsed by the state are those whose net revenues are transferred to the state’s Education Lottery Fund. N.C. Gen. Stat. § 18C-164 (2011). Appellants’ games of chance do not provide net revenues to this fund. Therefore, the state endorsed lotteries reasonably constitute a separate classification from Appellants’ unendorsed legal businesses, and the City’s privilege license tax need not be imposed upon them. Appellants also argue the Ordinance violates the rule of uniformity by taxing Appellants’ electronic gaming operations but “exclud[ing] from taxation the electronic machines used in the operation of promotional sweepstakes promulgated by third parties such as Food Lion, McDonald’s, Subway and others.” However, Appellants provide no support or evidence for this contention, and thus, we need not address it.

[5] Appellants next contend that assuming *arguendo* the City had the authority to enact a taxing scheme that classifies, exempts and imposes disparate tax treatment upon businesses like Appellants’ businesses, there is no rational basis for such a discriminatory tax, and, as such, it is unconstitutional. “License taxes must bear equally and uniformly upon all persons engaged in the same class of business or occupation or exercising the same privileges.” *C.D. Kenny Co. v. Town of Brevard*, 217 N.C. 269, 272, 7 S.E.2d 542, 543 (1940) (citation omitted). Where there is no rational basis for the distinction between merchants, the tax is not uniform and violates this State’s Constitution. *Id.* at 272, 7 S.E.2d at 544. Appellants refer to the list of other businesses subjected to a privilege license tax by the City and

2. We again note the City’s tax is a privilege license tax and not a property tax. Since there is no taxation of property, there can be no improper exemption. However, in that the Ordinance incidentally taxes property, we address this argument.

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note that they are assessed fees of \$500 or less, while cyber-gambling establishments are charged \$5,000 per location and an additional \$2,500 per gaming terminal within the location. Appellants argue that the Ordinance disparately imposes a tax on cyber-gambling establishments in an amount “far and above the amount assessed against any other municipal taxpayer.” However, this argument misses the mark completely. As discussed *supra*, we hold the City’s privilege license tax on cyber-gambling establishments uniformly applies to all persons engaged in the cyber-gambling business. The 43 other businesses being taxed lesser amounts for privilege license purposes are different classes of business and include, *inter alia*, businesses selling knives, movie theaters, pawnbrokers, beer and wine wholesalers, automobile dealerships, bowling alleys and even a circus. To compare the privilege license tax amount Appellants are subjected to with the amounts incredibly distinct businesses are subjected to and to claim disparate tax treatment requiring a rational basis is an invalid and misleading argument that we reject.

[6] Appellants next argue the Ordinance is unconstitutional because it imposes an unjust and inequitable taxation scheme. “[T]he power to tax involves the power to destroy.” *M’Culloch v. State*, 17 U.S. 316, 431, 4 L. Ed. 579, 607 (1819). Article V, Section 2(1) of our Constitution provides, “The power of taxation shall be exercised in a just and equitable manner.” N.C. Const. Art. V, § 2(1). To be just and equitable, a privilege license tax must not be so high as to amount to a prohibition of the particular business. *State v. Razook*, 179 N.C. 708, 710, 103 S.E. 67, 68 (1920). The privilege license tax should reasonably relate to the profits of the business. *Nesbitt v. Gill*, 227 N.C. 174, 180, 41 S.E.2d 646, 650 (1947). The fee may be higher for more profitable businesses. *Clark v. Maxwell*, 197 N.C. 604, 607, 150 S.E. 190, 192 (1929). Here, Appellants claim the Ordinance “imposes a tax that is between 6000 and 11000 times higher than the previous year’s tax and far exceeds the amount levied against any other municipal taxpayer.” Appellants further argue, “It is not hard to project that the tax scheme will completely deprive Appellants of all profit associated with their lawful business.” Besides these widespread assertions, however, Appellants provide no evidence that the City’s privilege license tax would completely deprive Appellants of all profit associated with their businesses. *See Razook*, 179 N.C. at 711, 103 S.E. at 68 (where our Supreme Court could not hold that a \$400 tax on a business in 1920 was prohibitive “in the absence of evidence to that effect”). There does not appear to be a sufficient record of proof to show governmental action was taken to deprive Appellants of a constitutional right.

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Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the “dominant” or “primary” one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265, 50 L. Ed. 2d 450, 464-65 (1977).

“If, however, it be conceded that the courts have power to declare a municipal ordinance levying a license tax on business invalid on the ground that the tax imposed is so oppressive and unreasonable as to amount to confiscation, rather than taxation, they will not determine the question by mere inspection of the amount of the tax imposed. All presumptions and intendments are in favor of the validity of the tax; * * * in other words, the mere amount of the tax does not prove its invalidity.”

Razook, 179 N.C. at 711, 103 S.E. at 69 (citation omitted); see *State v. Danenberg*, 151 N.C. 718, 722, 66 S.E. 301, 303 (1909) (holding that “in the absence of positive evidence to the contrary, [privilege license taxes] are presumed to be reasonable”). In *Dannenberg*, our Supreme Court noted that in determining whether an ordinance imposing a privilege license tax is reasonable, evidence regarding the effect on the business of complying with the ordinance is typically unhelpful because negligence, incompetence, or other considerations could play into the success of the licensee’s business. *Id.* Instead, in fixing a proper license tax, the Court suggested presenting evidence on revenue, regulation, and cost thereof. *Id.* Additionally,

[t]he territory and population to be supplied is an important consideration in estimating the value of the right conferred. It is worth a great deal more to be permitted to conduct a business of this kind in a large city than in a small town, and a license tax that would be within the bounds of reason when imposed in [a big city] might be unreasonable and prohibitive if imposed in a small place. Other considerations that may properly enter into the matter are the cost of police surveillance and the propriety of reducing the number of [businesses] in order that such surveillance and supervision may be more effective and less costly.

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Id.

Here, the record is devoid of evidence of the profits, net revenues, regulation, and cost thereof for Appellants' businesses before and after the privilege license tax was instituted. Nor was any evidence presented regarding the territory and target population of Appellants' businesses. The only evidence Appellants presented is the new amount of the privilege license tax on Appellants' businesses in comparison to the privilege license tax on Appellants' businesses in previous years as well as in comparison to the privilege license tax on other businesses. As stated in *Razook*, such evidence does not prove the tax's invalidity. *See Razook*, 179 N.C. at 711, 103 S.E. at 69. Because Appellants presented no additional evidence that the privilege license tax was prohibitive on their particular businesses, Appellants' argument is dismissed. We emphasize that this opinion does not stand for the proposition that a taxing mechanism similarly punitive to the one at bar would pass constitutional muster if evidence of the prohibitive intent of the tax was shown. We find the City's privilege license tax here constitutional only because factual elements are missing to prove the City's privilege license tax is prohibitive.

[7] Appellants finally contend the Ordinance is unconstitutional because, as it applies to businesses engaged in promotional activity using the internet, it is preempted by the Internet Tax Freedom Act. Appellants argue the Ordinance constitutes discriminatory treatment in violation of the Act, which provides: "No state or political subdivision thereof shall impose any of the following taxes during the period beginning November 1, 2003 and ending November 1, 2014: (1) taxes on internet access. (2) multiple discriminatory taxes on electronic commerce." ITFA § 1101(a), 47 U.S.C.A. § 151 (2007). First, the tax at issue here is not a tax on internet access. The tax is a fee a business must pay for providing games of chance through the use of a gaming terminal. In this case, the gaming terminals happen to be computers that provide access to the internet. Not once does the Ordinance describing the tax even mention internet access; it is just happenstance that Appellants' gaming terminals providing games of chance also provide access to the internet. Other cyber-gambling establishments are subject to the privilege license tax even if their gaming terminals do not provide access to the internet. Thus, the privilege license tax is not a tax on internet access. Next, the Ordinance does not impose multiple discriminatory taxes on electronic commerce. Appellants claim the Ordinance "taxes only internet-based sweepstakes, not similar sweepstakes offered by traditional means." This

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contention is false. The Ordinance never mentions “internet-based” sweepstakes or makes a distinction regarding electronic commerce; it only imposes the tax for cyber-gambling establishments that use a computer or gaming terminal in provision of games of chance. Thus, we hold the privilege license tax enacted by the Ordinance does not violate the ITFA.

IV. Conclusion

For the foregoing reasons, we hold the trial court did not err in granting summary judgment for the City. Therefore, the judgments of the trial court are

Affirmed.

Judge GEER concurs.

Judge HUNTER, Robert C., dissents in a separate opinion.

HUNTER, Robert C., Judge, dissenting.

The majority dismisses appellants’ claims that the license tax imposed by the City of Lumberton (the “City”) pursuant to Lumberton City Code section 12-60.1 (the “Ordinance”) is invalid as it is an unjust and inequitable taxation scheme. I conclude these claims should survive summary judgment and I must respectfully dissent.

As the majority notes, to be “just and equitable,” as required by Art. V, § 2(1) of our state constitution, a license tax must not be “so high as to amount to a prohibition of the particular business.” *State v. Razook*, 179 N.C. 708, 710, 103 S.E. 67, 68 (1920). The *Razook* Court recognized that while a municipality may have the legislative authority to levy a license tax on a class of business, it may not do so for the purpose of prohibiting the business altogether. 179 N.C. at 711, 103 S.E. at 68. Consequently, our courts may “declare a municipal ordinance levying a license tax on business invalid on the ground that the tax imposed is so oppressive and unreasonable as to amount to confiscation, rather than taxation.” *Id.* at 711, 103 S.E. at 69 (citation and quotation marks omitted). The defendant in *Razook* alleged that a municipal ordinance imposing a license tax on his business was unreasonable and excessive, and thus invalid. *Id.* In rejecting his argument, our Supreme Court noted that defendant provided no evidence *at trial* that the tax was intended to prohibit his business. *Id.*

Unlike *Razook*, the present case is not an appeal from the entry of judgment following a trial. We review the trial courts’ entry of sum-

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mary judgment. The parties' motions for summary judgment required they produce only a "preview" or "forecast" of their evidence. *Loy v. Lorm Corp.*, 52 N.C. App. 428, 437, 278 S.E.2d 897, 903-04 (1981) (citation and quotation marks omitted). Appellants submitted verified pleadings that the trial courts could treat as affidavits in support of their motions for summary judgment. *Wein II, LLC v. Porter*, 198 N.C. App. 472, 477, 683 S.E.2d 707, 711 (2009). When "different material conclusions can be drawn from the evidence, summary judgment should be denied." *Spector United Emp. Credit Union v. Smith*, 45 N.C. App. 432, 437, 263 S.E.2d 319, 322 (1980).

Here, the license tax imposed by the City upon appellants for fiscal year 2009-2010 was \$12.50 per business. For fiscal year 2010-2011, the Ordinance taxes appellants in the amount of \$5,000.00 per business location and \$2,500.00 per gaming or computer terminal. Appellants' verified pleadings stated that the resulting license taxes levied for 2010-2011 were \$75,000.00 against appellant G&M, \$105,000.00 against appellant Storie, \$110,000.00 against appellant E.Z., and \$137,525.00 against appellant IMT. Thus, the Ordinance imposes a license tax that is between 6,000 and 11,000 times higher than the tax imposed on appellants in the previous year. This is in stark contrast to the modest annual license tax imposed on any other business, such as: campgrounds and trailer parks, \$12.50; bicycle dealers, \$25.00; restaurants, \$0.50 per customer seat with a minimum tax of \$25.00; pinball machines or "similar amusements," \$25.00; bowling alleys, \$10.00 per alley; movie theaters, \$200.00 per room.

Granted, "the mere amount of the tax does not prove its invalidity." *Razook*, 179 N.C. at 711, 103 S.E. at 69 (citation omitted). However, the discrepancy between the tax imposed by the Ordinance upon Cyber Gambling establishments and all other businesses, while not conclusive evidence of the inequity of the tax, makes summary judgment improper.

Pursuant to our standard of review of the trial courts' summary judgment orders, I conclude appellants' evidence of the grossly dissimilar tax rates creates a genuine issue of material fact as to whether the license tax is unjust and inequitable. Accordingly, I would reverse the trial courts' orders and remand for trial.

STATE v. HEMPHILL

[219 N.C. App. 50 (2012)]

STATE OF NORTH CAROLINA v. WILLIAM EDWARD HEMPHILL, JR.

No. COA11-639

(Filed 21 February 2012)

1. Search and Seizure—motion to suppress evidence and statements—reasonable articulable suspicion—flight—investigatory stop—pat-down for dangerous items

The trial court did not err in an attempted felonious breaking or entering, possession of implements of housebreaking, and resisting a public officer case by denying defendant's motions to suppress evidence collected and defendant's statements. Defendant's flight, combined with the totality of circumstances, was sufficient to support a reasonable articulable suspicion and an investigatory stop. Once the officer felt a screwdriver and wrench during the pat-down of defendant, he was justified in removing these items as they constituted both a potential danger to the officer and were further suggestive of criminal activity being afoot.

2. Confessions and Incriminating Statements—motion to suppress pre-Miranda statements—admission of guilt

Although the trial court erred in an attempted felonious breaking or entering, possession of implements of housebreaking, and resisting a public officer case by failing to grant defendant's motion to suppress his pre-*Miranda* statements that he was breaking into Auto America and that he ran from an officer because he did not want to be caught, defendant was not prejudiced because defendant admitted his guilt after having been given his *Miranda* rights.

3. Constitutional Law—effective assistance of counsel—failure to object

Defendant did not receive ineffective assistance of counsel in an attempted felonious breaking or entering and possession of implements of housebreaking case based on his attorney's failure to object to the admission of the tools and defendant's statements at trial. The screwdriver and wrench were properly seized pursuant to a constitutional stop and frisk, and defendant was not prejudiced by the admission of his pre-*Miranda* statements.

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4. Indictment and Information—misdemeanor resisting an officer—general description of actions sufficient

The trial court did not err by failing to dismiss the charge of misdemeanor resisting an officer even though defendant contended the indictment for this charge was fatally defective. An indictment for resisting arrest must only include a general description of defendant's actions, and the indictment's general language was sufficient to put defendant on notice that the events surrounding his arrest would be brought out at trial.

Judge HUNTER, Robert C., concurring in result in separate opinion.

Appeal by Defendant from judgments entered 2 December 2010 by Judge Richard D. Boner in Superior Court, Mecklenburg County. Heard in the Court of Appeals 8 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State.

M. Alexander Charms for Defendant-Appellant.

McGEE, Judge.

Charlotte-Mecklenburg Police Officer Charles Adkins (Officer Adkins) was dispatched to Auto America, a used car sales business, on 10 February 2010, at approximately 10:10 p.m., in response to an anonymous call reporting suspicious activity involving two African American men, one wearing a white “hoodie.” Auto America was closed for the day and the gate was closed. Officer Adkins saw Defendant, wearing a white hoodie, peering around a white van. Officer Adkins was in a marked patrol car, and was wearing his standard police uniform. Officer Adkins testified:

As soon as [Defendant] saw me, he began to run. He ran around the left side of the business and continued to run behind the business. As soon as he took off, I chased after him.

. . . .

As soon as he started running, I began to run after him, and I yelled out—I gave him several verbal commands to stop. I identified myself as a police officer and told him to stop.

He continued to run. He ran around the building. We ran through the car lot, all the parked cars there, and he ran in

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front of a Mexican restaurant and behind a dumpster there where I caught him.

Defendant “was trying to hide behind a dumpster” when Officer Adkins caught up with him. Officer Adkins had his Taser out, and put Defendant on the ground. While restraining Defendant with handcuffs, Officer Adkins asked Defendant why he was running. Defendant replied that he was breaking into Auto America and did not want to get caught. When Officer Adkins conducted a pat-down search, he recovered a ten-inch screwdriver from Defendant’s back left pocket and a small wrench from Defendant’s back right pocket. Officer Adkins walked Defendant back to the patrol car and advised Defendant of his *Miranda* rights. Additional officers arrived on the scene, and located a sledgehammer behind the white van where Officer Adkins had originally spotted Defendant. Near the sledgehammer, the officers found an approximately “three-foot by three-foot . . . hole in the wall that went about two feet deep, and it actually punctured through the wooden paneling inside of what appeared to be an office.” Officer Adkins then questioned Defendant about the sledgehammer and the hole in the wall of Auto America. Defendant “stated that he brought the tools earlier in the day and that he hid them so that he could break into the business that night.”

Defendant was charged with attempted felonious breaking and entering, possession of implements of housebreaking, and resisting a public officer. Defendant was also charged with having attained habitual felon status. At trial, Defendant moved to suppress both evidence collected and Defendant’s statements, arguing that the initial detention of Defendant was unconstitutional. Defendant’s motions were denied. A jury found Defendant guilty of attempted felonious breaking or entering, possession of implements of housebreaking, resisting a public officer, and of having attained habitual felon status. Defendant appeals.

I. Motions to Suppress

[1] Defendant argues that the trial court erred in denying his motions to suppress. We disagree.

A. Standard of Review

“[T]he scope of appellate review of an order [on a motion to suppress evidence] is strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively

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binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." Defendant does not challenge any of the trial court's findings of fact in the order denying his motion to suppress. Defendant assigns error solely to the trial court's denial of his motion. Accordingly, the only issues for review are whether the trial court's findings of fact support its conclusions of law and whether those conclusions of law are legally correct.

State v. Stanley, 175 N.C. App. 171, 174-75, 622 S.E.2d 680, 682 (2005) (citations omitted).

B. Discussion

Following the hearing on Defendant's motions to suppress, the trial court made the following findings of fact:

1. On February 10th, 2009, Charles Adkins, an officer of the Charlotte-Mecklenburg Police Department, was dispatched to a business located at 6802 South Boulevard in Charlotte, North Carolina. The business was a used car lot.
2. The officer arrived at the business at approximately 10:10 p.m. in response to a suspicious persons call from an unknown citizen. When the officer arrived, the business was closed.
3. The parking lot of the business was lighted. Officer Adkins saw the [D]efendant peering around a white van parked at the business. He described the [D]efendant as a heavysset black male wearing a white hoody.
4. When Officer Adkins saw the [D]efendant, the [D]efendant began to run. Officer Adkins gave chase. The [D]efendant ran down the side of the office of the used car lot and behind the building toward an adjacent business.
5. Officer Adkins yelled for the [D]efendant to stop and identified himself as a police officer. The [D]efendant continued to run.
6. Officer Adkins pursued the [D]efendant approximately one-eighth of a mile to a dumpster located at the adjacent business. The [D]efendant was observed trying to hide behind the dumpster.
7. Officer Adkins subdued the [D]efendant on the ground and handcuffed him. While handcuffing the [D]efendant, Officer Adkins asked the [D]efendant why he ran. The [D]efendant

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responded, "I didn't want to get caught because I was breaking into the business."

8. Officer Adkins patted down the [D]efendant's person and felt objects in his pockets. The objects were removed from the [D]efendant's person. They were a wrench and a screwdriver.

9. The officer took the [D]efendant to his patrol car where he was secured. Other police officers arrived at the scene.

10. Office[r] Adkins and another police officer found a large sledgehammer near the van where the [D]efendant had been observed previously, and the officers saw a large hole in a wall of the office building at the used car lot.

11. Officer Adkins returned to the patrol car and gave the [D]efendant the Miranda rights warning. The [D]efendant indicated he understood the rights and was willing to speak with the officer.

12. In response to questions, the [D]efendant said that he had ridden a bus to the used car lot. The [D]efendant stated that he had brought tools to the location earlier in the day and had hidden them so that he could use them to break into the business.

13. Having placed the [D]efendant under arrest, the officer took the [D]efendant to jail.

14. The [D]efendant never requested an attorney at any time during the questioning by Officer Adkins.

Based upon the foregoing findings of fact, the trial court made the following conclusions of law:

1. When Officer Adkins subdued the [D]efendant behind the dumpster, the officer had a reasonable articulable suspicion that criminal activity had taken place. Based upon the totality of the circumstances observed by the officer, including the time of day, the business where the [D]efendant was observed, the [D]efendant's actions behind the van and the fact that the [D]efendant attempted to flee, refusing to heed the officer's directive to stop, Officer Adkins was justified in detaining the [D]efendant and in handcuffing the [D]efendant.

2. Officer Adkins was justified in patting down the [D]efendant for his safety under the circumstances. The removal of the screwdriver and wrench from the [D]efendant's person were

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the result of the pat-down during an investigative detention based upon a reasonable articulable suspicion.

3. At the time the [D]efendant made the statement[,] “I didn’t want to get caught because I was breaking into the business,” the [D]efendant had not been arrested and was being detained for investigation. Therefore, the Miranda warnings were not required at that point.

4. The subsequent statements made by the [D]efendant in response to the officer’s questions were made after the administration of the Miranda warnings and were made freely, voluntarily and with knowledge of the [D]efendant’s right to remain silent.

5. The detention of the [D]efendant, the seizure of the screwdriver and wrench, and the statements obtained from the [D]efendant on February 10th, 2009 did not violate any of the rights of the [D]efendant under the Constitution of the United states of America or the Constitution of the State of North Carolina.

6. The [D]efendant’s statements made to Officer Adkins and the evidence seized from the [D]efendant are admissible at the trial of this action.

Based upon the foregoing findings of fact and conclusions of law, it is therefore ordered that the [D]efendant’s motions to suppress evidence are hereby denied.

We hold that the trial court’s findings of fact support its conclusions of law and ruling that Officer Adkins had a reasonable articulable suspicion that criminal activity was afoot at the time Officer Adkins detained Defendant. The unchallenged findings of fact show that Officer Adkins was informed after 10:00 p.m. that there had been a report of suspicious activity at Auto America at a time Auto America was closed for business. When Officer Adkins arrived at Auto America he saw Defendant, who generally matched the description of one of the individuals reported, peering from behind a van parked at Auto America. When Defendant spotted Officer Adkins, Defendant ran away from him. Defendant ignored Officer Adkins when he shouted for Defendant to stop, and Officer Adkins ran after Defendant for about an eighth of a mile. When Officer Adkins caught up with Defendant, Defendant was attempting to hide behind a dumpster. When considered together and in context, these facts were suf-

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ficient to raise a reasonable suspicion that criminal activity was afoot, and that Defendant was involved. *See State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 723 (1992); *State v. Willis*, 125 N.C. App. 537, 541-42, 481 S.E.2d 407, 410-11 (1997).

The United States Supreme Court, in discussing the significance of the flight of a defendant, stated:

Headlong flight—wherever it occurs—is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer’s conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.

Illinois v. Wardlow, 528 U.S. 119, 124-25, 145 L. Ed. 2d 570, 576-77 (2000) (citation omitted). The Court further stated:

“[R]efusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.” But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not “going about one’s business”; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual’s right to go about his business or to stay put and remain silent in the face of police questioning.

Id. at 125, 145 L. Ed. 2d at 577 (citation omitted). In the present case, Defendant’s flight, combined with the totality of the circumstances, was sufficient to support a reasonable articulable suspicion and the investigatory stop. *See State v. Jones*, 304 N.C. 323, 329, 283 S.E.2d 483, 486 (1981); *Willis*, 125 N.C. App. at 541-42, 481 S.E.2d at 410-11.

Defendant argues that the stop was unconstitutional, but does not specifically argue that the pat-down of Defendant incident to the stop was unconstitutional, even if the stop itself was constitutional. We hold that once Officer Adkins felt the screwdriver and wrench during the pat-down, he was justified in removing these items as they constituted both a potential danger to Officer Adkins, and were further suggestive of criminal activity being afoot at Auto America.

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II. *Miranda* Warnings

[2] Defendant also contends that his response to Officer Adkins's questioning while Defendant was on the ground and being restrained with handcuffs should have been suppressed because Officer Adkins had not "mirandized" Defendant at that time. We agree.

"It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" "The determination of whether a defendant was in custody, based on those findings of fact, however, is a question of law and is fully reviewable by this Court."

State v. Johnston, 154 N.C. App. 500, 502, 572 S.E.2d 438, 440 (2002) (citations omitted).

The concurring opinion confuses Fourth Amendment analysis concerning the permissible scope of an investigatory detention with the appropriate Fifth Amendment analysis required to determine whether *Miranda* warnings are required. The subjective intent of Officer Adkins is of no consequence in the relevant Fifth Amendment analysis. Nor is the reasonableness of Officer Adkins's actions in the context of detaining Defendant for investigatory or "*Terry* stop" purposes.

The *Miranda* Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444, 86 S.Ct. 1602. "[T]he appropriate inquiry in determining whether a defendant is in 'custody' for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828 (citations omitted). The United States Supreme Court has consistently held that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Id.* at 341, 543 S.E.2d at 829 (quoting *Stansbury v. California*, 511 U.S. 318, 323, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994)). "A policeman's unarticulated plan has no bearing on the question of whether a suspect was 'in custody' at a particular time; the only relevant

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inquiry is how a reasonable man in the suspect's position would have understood his situation." *Buchanan*, 353 N.C. at 341-42, 543 S.E.2d at 829 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)).

Johnston, 154 N.C. App. at 502-03, 572 S.E.2d at 440-41.

As [the United States Supreme Court has] repeatedly emphasized, whether a suspect is "in custody" is an objective inquiry. "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest."

J.D.B. v. N. Carolina, ___ U.S. ___, ___, 180 L. Ed. 2d 310, 322 (2011) (citation omitted).

Officer Adkins's actions in detaining and handcuffing Defendant were reasonable under Fourth Amendment principles. However, Officer Adkins's questioning of Defendant must be analyzed under Fifth Amendment principles. The only exception carved out of the *Miranda* rule for custodial interrogation is the public safety exception as recognized in *New York v. Quarles*, 467 U.S. 649, 81 L. Ed. 2d 550 (1984). Officer Adkins's asking Defendant why Defendant ran did not implicate *Quarles* and, therefore, did not constitute the kind of question exempted from the *Miranda* requirements.

We hold that a reasonable person in Defendant's position, having been forced to the ground by an officer with a taser drawn and in the process of being handcuffed, would have felt his freedom of movement had been restrained to a degree associated with formal arrest. See *State v. Crudup*, 157 N.C. App. 657, 659-61, 580 S.E.2d 21, 24-25 (2003). The concurring opinion relies on *Crudup*, but we find that *Crudup* supports our position. This Court held in *Crudup*:

Under the facts of this case, we conclude, as a matter of law, that defendant was in "custody." The record reveals that defendant was immediately handcuffed and detained as a possible burglary suspect. While handcuffed, defendant was questioned while four officers, including Officer Marbrey, surrounded him.

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Most assuredly, defendant's freedom of movement was restrained to the degree associated with a formal arrest. A reasonable person under these circumstances would believe that he was under arrest.

Id. at 659-60, 580 S.E.2d at 24 (citations omitted). We do not find that the number of officers involved, or the degree to which the handcuffing of Defendant had been completed, distinguishes the facts in *Crudup* from those before us.

We further hold that Officer Adkins's questioning of Defendant at that time constituted an interrogation. *Id.* Therefore, the trial court should have granted Defendant's motion to suppress Defendant's statements that he was breaking into Auto America and that he ran from Officer Adkins because he did not want to be caught.

However, we also hold that Defendant was not prejudiced by the trial court's failure to suppress his statements. The trial court found as fact that, after Defendant was formally arrested and given his *Miranda* rights, Defendant stated that

he had ridden a bus to [Auto America]. . . . [D]efendant stated that he had brought tools to the location earlier in the day and had hidden them so that he could use them to break into [Auto America].

Because Defendant admitted his guilt after having been given his *Miranda* rights, we cannot say that the failure to suppress his pre-*Miranda* statement was prejudicial or harmful. *State v. Tuttle*, 33 N.C. App. 465, 470, 235 S.E.2d 412, 415 (1977).

III. Ineffective Assistance of Counsel

[3] Defendant further argues that his attorney was ineffective because his attorney failed to object to the admission of the tools and Defendant's statements at trial. We disagree.

Having determined that the screwdriver and wrench were properly seized pursuant to a constitutional stop and frisk, and that Defendant was not prejudiced by the admission of his pre-*Miranda* statements, we further hold that Defendant's counsel was not ineffective when Defendant's counsel failed to object to the admission of this evidence at trial.

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IV. Resisting an Officer

[4] Finally, Defendant argues that the trial court erred in not dismissing the charge of misdemeanor resisting an officer because the indictment for this charge was fatally defective. We disagree.

N.C. Gen. Stat. § 14-223 states: “If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor.” N.C. Gen. Stat. § 14-223 (2011). An indictment charging a violation of N.C.G.S. § 14-223 must, *inter alia*, “state in a general way the manner in which [the] accused resisted or delayed or obstructed such officer.” *State v. Fenner*, 263 N.C. 694, 700, 140 S.E.2d 349, 353 (1965) (citations omitted). Defendant argues that the indictment in this case failed to state with sufficient particularity the manner in which Defendant resisted, delayed or obstructed Officer Adkins. The indictment at issue stated in relevant part that Defendant resisted Officer Adkins “by not obeying [Officer Adkins’s] command.”

“An indictment for resisting arrest must only include a general description of the defendant’s actions.” *State v. Baldwin*, 59 N.C. App. 430, 434, 297 S.E.2d 188, 191 (1982) (citation omitted). In *Baldwin*, the indictment charged

that [the] defendant “unlawfully and wilfully did resist, delay and obstruct [the officer] . . . by struggling with [the officer] and attempting to get free of [the officer’s] grasp.” This indictment was notice to the defendant that he should expect the facts surrounding the arrest to be brought out at trial, including his abusive language.

Id. at 435, 297 S.E.2d at 191-92; *see also State v. Lynch*, 94 N.C. App. 330, 333-34, 380 S.E.2d 397, 399 (1989). Likewise in the present case, the indictment’s general language was sufficient to put Defendant on notice that the events surrounding his arrest would be brought out at trial. The only evidence presented at trial concerning a command given by Officer Adkins was Officer Adkins’s command for Defendant to stop running, which Defendant failed to heed. We hold that the indictment for resisting arrest was not fatally defective.

No prejudicial error.

Judge CALABRIA concurs.

Judge HUNTER, Robert C., concurs in the result with separate opinion.

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HUNTER, Robert C., Judge, concurring in result.

I concur with the majority that Defendant is not entitled to a new trial based on a violation of his *Miranda* rights. However, I disagree with the majority's conclusion that Defendant was in custody at the time Officer Adkins asked Defendant why he was running. Because I conclude Defendant was not in custody, he was not subject to custodial interrogation, and was not entitled to a *Miranda* warning at the time he stated that he tried "to break[] into the business." Accordingly, I would affirm the trial court's denial of Defendant's Motion to Suppress.

Upon review of a trial court's ruling on a motion to suppress, the standard of review is whether the trial court's findings of fact are "supported by competent evidence" and, if so, whether the conclusions of law are "legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citation and internal quotation marks omitted). If a defendant does not challenge a trial court's findings of fact on appeal but "assigns error solely to the trial court's denial of his motion," as in the present case, this Court's review is limited to "whether the trial court's findings of fact support its conclusions of law and whether those conclusions of law are legally correct." *State v. Stanley*, 175 N.C. App. 171, 175, 622 S.E.2d 680, 682 (2005).

Based on the evidence in the record, I would affirm the trial court's denial of Defendant's Motion to Suppress because: (1) the trial court's conclusion of law that Defendant was not arrested but only detained for investigation at the time he made the inculpatory statement¹ is supported by the findings of fact and reflects a correct application of our case law; and (2) Defendant was not in custody for purposes of *Miranda* at the time he made the inculpatory statement.

Based on Officer Adkins' testimony at the hearing on Defendant's Motion to Suppress, the trial court made the following findings of fact:

6. Officer Adkins pursued [Defendant] approximately one-eighth of a mile to a dumpster located at the adjacent business. [Defendant] was observed trying to hide behind the dumpster.

1. Although Defendant made multiple inculpatory statements, my use of "the inculpatory statement" refers to the statement made by Defendant before he was given a *Miranda* warning: "I didn't want to get caught because I was breaking into the business."

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7. Officer Adkins subdued [Defendant] on the ground and handcuffed him. While handcuffing [Defendant], Officer Adkins asked [Defendant] why he ran. [Defendant] responded, “I didn’t want to get caught because I was breaking into the business.”

During the hearing, Officer Adkins testified that at the time he caught Defendant, he had his Taser out but put it away once Defendant put his hands up in the air.

Consequently, the trial court made the following conclusion of law:

3. At the time [Defendant] made the statement “I didn’t want to get caught because I was breaking into the business,” [Defendant] had not been arrested and was being detained for investigation. Therefore, the Miranda warnings were not required at that point.

The first issue that must be addressed is whether Defendant was arrested during the investigatory stop. Our case law recognizes the “expan[sion]” of “the permissible scope of a *Terry* stop” whereby police officers are authorized to use reasonable means of detaining suspects during an investigative stop without escalating the stop into an arrest. *State v. Campbell*, 188 N.C. App. 701, 708-09, 656 S.E.2d 721, 727 (2008) (citation and quotation marks omitted); *see also State v. Carrouthers*, 200 N.C. App. 415, 419, 683 S.E.2d 781, 784 (2009) (*Carrouthers I*) (noting that police officers are authorized to “engage in conduct and use forms of force” associated with an arrest during an investigatory stop to maintain the status quo or to ensure personal safety without that conduct constituting a *de facto* arrest (citation and quotation marks omitted)). In *Campbell*, this Court concluded that the police officers were authorized to handcuff the defendant during an investigatory stop in order to maintain the status quo based on the defendant’s known risk of flight. 188 N.C. App. at 708-09, 656 S.E.2d at 727; *see also State v. Carrouthers*, ____ N.C. App. ____, ____, 714 S.E.2d 460, 466 (2011) (*Carrouthers II*) (noting that the officer’s handcuffing of the defendant was a “safety-related detainment,” due to the presence of additional passengers in the defendant’s car, and did not escalate the *Terry* stop into an arrest).

I agree with the majority’s conclusion that the investigatory stop of Defendant was valid under the Fourth Amendment based on the totality of the circumstances. Officer Adkins’ decision to handcuff Defendant after catching him was a reasonable means to maintain the

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status quo and prevent Defendant from trying to flee before Officer Adkins had a chance to investigate further. Additionally, it would have been reasonable to believe another suspect was present because the anonymous caller that reported suspicious activity at the Auto Mart stated that there were two men at that location. Therefore, even though Officer Adkins handcuffed Defendant during the investigatory stop, the handcuffing of Defendant did not escalate the stop into an arrest.

The second issue to be determined is whether Defendant was in custody at the time he made the inculpatory statement since custody encompasses not only a formal arrest but also situations where there is a restraint on a defendant's freedom of movement "of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (1997). The majority correctly notes that determination of whether a defendant was in custody for *Miranda* purposes requires a determination of whether, based on the totality of the circumstances, "there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828 (citation omitted). The majority concludes that because a reasonable person in Defendant's position would have felt his freedom of movement restrained to a degree associated with an arrest, he was in custody and, thus, entitled to a *Miranda* warning.

Generally, *Terry* stops are not "subject to the dictates of *Miranda*." *Berkemer v. McCarty*, 468 U.S. 420, 440, 82 L. Ed. 2d 317, 334 (1984); see also *Maryland v. Shatzer*, ___ U.S. ___, ___, 175 L. Ed. 2d 1045, 1058 (2010) (noting that "the temporary and relatively nonthreatening detention involved in a traffic stop or *Terry* stop . . . does not constitute *Miranda* custody" (internal citation omitted)). During a valid investigatory stop, a police officer may "ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer*, 468 U.S. at 439, 82 L. Ed. 2d at 334.

The case of *United States v. Leshuk*, 65 F.3d 1105, (4th Cir. 1995) provides guidance. A hunter found a marijuana cultivation site in a rural area. *Id.* at 1106. After he reported it to the sheriff's office, the hunter assisted two deputy sheriffs in locating the defendant. *Id.* at 1107. The hunter found the defendant, ordered him to put his hands

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up, and briefly held the defendant by his arm. *Id.* at 1107, 1110.² The deputies asked the defendant a few questions regarding his purpose for being at that location and his identity. *Id.* at 1107.

Even though the defendant argued that he was in custody for *Miranda* purposes because a reasonable person in his position would have believed that he was in custody and not free to leave, the court held that this “objective belief . . . does not necessarily transform a lawful *Terry* stop into a custodial interrogation[.]” *Id.* at 1109. The court distinguished *Terry* stops from custodial interrogation as follows: “[i]nstead of being distinguished by the absence of any restriction of liberty, *Terry* stops differ from custodial interrogation in that they must last no longer than necessary to verify or dispel the officer’s suspicion.” *Leshuk*, 65 F.3d at 1109. Furthermore, the court noted that it has “concluded [in other cases] that drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning, or using or threatening to use force does not necessarily elevate a lawful stop into a custodial arrest for *Miranda* purposes,” and these same principles should apply to determine whether a defendant was in custody. *Id.* at 1109-10. Therefore, the court affirmed the trial court’s holding that the defendant was not entitled to a *Miranda* warning because: (1) the “actions of the deputies and the turkey hunter amounted to a limited *Terry* stop necessary to protect their safety, maintain status quo, and confirm or dispel their suspicions”; (2) their actions were “reasonable precautions”; and (3) the questions were reasonably related to the investigatory stop. *Id.* at 1110; *see also United States v. Nunez-Betancourt*, 766 F. Supp. 2d 651, 660 (2011) (citing *Leshuk* and concluding that a brief yet total restriction of the defendant’s liberty was a valid and reasonable means of protecting the officers’ safety during a *Terry* stop).

As in *Leshuk*, even though a reasonable person in Defendant’s position may not have felt free to leave once Officer Adkins placed Defendant in handcuffs, Defendant was not in custody because Officer Adkins’ actions were reasonable means of protecting his personal safety and maintaining the status quo. Furthermore, Defendant’s detention lasted only long enough for the officer to confirm his suspicion that Defendant was engaged in criminal activity.

2. The court noted that it included the actions of the hunter in its analysis since a reasonable person would have believed that the hunter was a law enforcement officer. *Leshuk*, 65 F.3d at 1113 n.3.

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The circumstances surrounding the stop in the present case are distinguishable from cases where our courts have found a defendant was in custody after a valid investigatory stop. In *State v. Washington*, the defendant was in custody during an investigatory stop when he was placed in the back seat of the patrol car and questioned by officers. 102 N.C. App. 535, 536-38, 402 S.E.2d 851, 852-53 (Greene, J. dissenting), *rev'd per curiam for reasons stated in dissent*, 330 N.C. 188, 410 S.E.2d 55 (1991). Similarly, in *State v. Crudup*, 157 N.C. App. 657, 659-60, 580 S.E.2d 21, 24 (2003), we held that the defendant was in custody after an investigatory stop because he was handcuffed and surrounded by four police officers at the time of questioning. In *State v. Johnston*, 154 N.C. App. 500, 503, 572 S.E.2d 438, 441 (2002), we concluded that the defendant was in custody where, after police officers stopped the defendant's car, the defendant was told he was in "secure custody" and "ordered out of his vehicle at gun point, handcuffed, placed in the back of a patrol car, and questioned by detectives." Additionally, in *In re L.I.*, ___ N.C. App. ___, ___, 695 S.E.2d 793, 798 (2010), we concluded that because the defendant was handcuffed and placed in the back of a police officer's patrol car, he was in custody for *Miranda* purposes.

However, in all of these cases, the police officers were not detaining the defendants in order to maintain the status quo because all defendants were cooperating with police at the time they were detained. In *Washington*, *Johnston*, and *In re L.I.*, the police officers asked the defendants to exit their vehicles and immediately placed them in the back of their police patrol cars even though the defendants did not attempt to flee or give any sign that they would not cooperate. *Washington*, 102 N.C. App. at 536, 402 S.E.2d at 852; *Johnston*, 154 N.C. App. at 440, 572 S.E.2d at 501; *In re L.I.*, ___ N.C. App. at ___, 695 S.E.2d at 796. Similarly, in *Crudup*, the police responded to the report of a break-in and saw the defendant leaving the location of the alleged crime. 157 N.C. App. at 658, 580 S.E.2d at 23. The officers immediately placed the defendant in handcuffs even though he made no attempt to flee; this Court held the defendant was in custody. *Id.*

Furthermore, it was not necessary for the police officers' personal safety to detain the defendants during the investigatory stops in *Washington* and *Crudup*. In *Washington*, the police officers were not aware of a specific threat to their safety at the time they placed the defendant in the back of the patrol car. 102 N.C. App. at 536, 402 S.E.2d at 852. Similarly, in *Crudup*, the police officers were responding to a

call of a possible break-in but had no information to suggest the presence of multiple suspects. 157 N.C. App at 658, 580 S.E.2d at 23.

Conversely, when Officer Adkins handcuffed Defendant, it was a reasonable means of protecting the officer's personal safety and maintaining the status quo by preventing Defendant from fleeing again. Defendant was detained pursuant to an investigatory stop and was not in custody. Therefore, I would hold that Defendant was not entitled to a *Miranda* warning at the time he made the inculpatory statement. To hold otherwise would require *Miranda* warnings anytime an officer needed to restrain a suspect during an investigatory stop in order to maintain the status quo or protect his or her safety. Accordingly, I would affirm the trial court's denial of Defendant's Motion to Suppress.

TOWN OF NAGS HEAD, PLAINTIFF v. CHERRY, INC., DEFENDANT

No. COA11-931

(Filed 21 February 2012)

1. State—public trust rights—standing

The trial court erred by denying defendant's motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1). Regardless of plaintiff's attempt to argue that nuisance is the basis of its claims, the potential destruction of defendant's dwelling based upon the claim that it was located within a public trust area was actually an attempt to enforce the State's public trust rights. Only the State acting through the Attorney General has standing to bring an action to enforce the State's public trust rights in accord with N.C.G.S. § 113-131.

2. Nuisance—unrepaired dwelling—town ordinance

The trial court did not err by granting partial summary judgment in favor of plaintiff based upon Town Ordinance § 16-31(6)(b). Defendant would have promptly performed the necessary repairs to its dwelling if plaintiff had not refused to issue the required permits. The case was remanded for further proceedings on the issue of whether the dwelling was a nuisance under the town ordinance, and if so, to determine appropriate relief.

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[219 N.C. App. 66 (2012)]

Appeal by defendant from orders entered on or about 24 January 2011 by Judge Quentin T. Sumner in Superior Court, Dare County. Heard in the Court of Appeals 12 January 2012.

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

Vandeventer Black LLP, by Norman W. Shearin and Wyatt M. Booth, for defendant-appellant.

STROUD, Judge.

Defendant appeals trial court orders denying its motions to dismiss and granting partial summary judgment in favor of plaintiff. For the following reasons, we reverse the trial court's order denying defendant's motion to dismiss pursuant to Rule of Civil Procedure 12(b)(1) and reverse the trial court's order granting partial summary judgment and remand for further proceedings.

I. Background

On 19 April 2010, plaintiff filed a verified complaint alleging that defendant owned a "Dwelling" that "[s]ince at least October 6, 2008 . . . has been damaged to such an extent that the condition of the Dwelling was unsafe for human habitation causing the Dwelling to be condemned by the Town's building inspector[.]" Plaintiff further alleged:

The Town's Manager inspected the Dwelling . . . and determined at the time of his inspection:

- a. That the Dwelling was in a deteriorated and damaged condition;
- b. That the Dwelling was disconnected from utilities;
- c. That the Dwelling was disconnected from approved means of sewage disposal;
- d. That components of the Dwelling's on-site sewage disposal system were visibly damaged or missing;
- e. That the Dwelling was located in its entirety on the wet sand beach as evidenced by the high tide swash line and tidal pools located westward of the Dwelling;
- f. That the Dwelling restricted vehicle access along the public trust beach area;

- g. That the Dwelling restricted pedestrian access along the public trust beach area;
- h. That the Dwelling had incurred storm and/or erosion damage;
- i. That the Dwelling was located wholly or partially on land subject to the public trust and within the public trust beach area; and
- j. That there did not appear to be an opportunity for relocation of the Dwelling on its lot in a manner complying with relevant federal, state and local laws and regulations.

Plaintiff further alleged that “[a]t all times subsequent to the Town Manager’s inspection, the condition of the Dwelling has remained the same or has deteriorated due to weather, lack of use, lack of repair and damage caused by erosion, coastal storms, hurricanes and tropical storms.” The Town Manager “declared the Dwelling to be a public nuisance . . . and provided Defendant eighteen (18) days to abate the nuisance by demolishing and/or removing the Dwelling.” Plaintiff requested, *inter alia*,

[a]n order of abatement . . . commanding Defendant[] to immediately, and at [its] sole expense, bring the Property in compliance with all applicable regulations and laws by demolishing, repairing or otherwise taking corrective action regarding the Dwelling . . . or commanding the Defendant[] to immediately allow the Town to enter upon the Property and take such action at the Defendants’ sole expense.

On 7 July 2010, defendant filed a motion to dismiss pursuant to Rules of Civil Procedure 12(b)(1) and (6), answered plaintiff’s complaint, and counterclaimed for inverse condemnation. On 26 July 2010, plaintiff filed motions to dismiss defendant’s counterclaim. On 8 October 2010, defendant voluntarily dismissed its counterclaim. On or about 15 October 2010, plaintiff filed a motion for summary judgment. On 29 November 2010, plaintiff filed an amended/renewed motion for summary judgment.

On 6 December 2010, the trial court heard defendant’s motions to dismiss and plaintiff’s motions for summary judgment. Plaintiff provided two separate bases for declaring defendant’s Dwelling a nuisance predicated upon Town of Nags Head Code of Ordinances

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(“Town Ordinance”) § 16-31(6):¹ (1) “when there is a damaged structure or debris from [a] damage[d] structure where it can reasonably be determined that there is a likelihood of personal or property injury” and (2) “any structure regardless of the condition—it can be a brand new structure or any debris from a damaged structure which is located in whole or in part in a public trust area or on public land[.]” Town Ordinance § 16-31(6) provides in pertinent part,

The existence of any of the following conditions associated with storm-damaged or erosion—amaged structures or their resultant debris shall constitute a public nuisance.

. . . .

- b. Damaged structure or debris from damaged structures where it can reasonably be determined that there is a likelihood of personal or property injury;
- c. Any structure, regardless of condition, or any debris from damaged structure which is located in whole or in part in a public trust area or public land.

Town of Nags Head, N.C., Code § 16-31(6) (2007). Town Ordinance § 16-33 further provides that “[u]pon a determination that conditions constituting a public nuisance exist, the town manager . . . shall order the prompt abatement thereof” Town of Nags Head, N.C., Code § 16-33(a) (2007). “Abatement of a public nuisance shall consist of taking whatever appropriate steps are reasonably necessary to remove the condition or conditions which result in the declaration of a public nuisance.” Town of Nag’s Head, N.C., Code § 16-33(b) (2007).

On 24 January 2011, the trial court entered orders denying defendant’s motions to dismiss and granting plaintiff’s motion for partial summary judgment as to the claim of abatement. The trial court stated that “Plaintiff’s claim for public nuisance and order of abatement is GRANTED” and ordered that defendant “at its sole expense, abate the public nuisance . . . by demolishing or removing the structure” and if defendant failed to take such action within 20 days “Plaintiff may enter upon the Property and abate the public nui-

1. Neither party contests the applicability of Town Ordinance 16-31(6) which addresses only “[s]torm or erosion damaged structures and resulting debris.” Town of Nags Head, N.C., Code § 16-31(6) (2007).

sance[.]” Defendant appeals the orders denying its motions to dismiss and the order granting partial summary judgment.²

II. Public Trust

[1] Defendant first contends that the trial court erred in denying its motion to dismiss pursuant to Rule 12(b)(1). As to the public trust doctrine, defendant contends that

the public trust doctrine is a common law right in the public that is held by the State of North Carolina and is enforceable only by the State in its sovereign capacity. The Town has no authority under the common law or under N.C. Gen. Stat. § 77-20 to enforce the State’s common law rights, and therefore lacks the requisite subject matter jurisdiction to bring any action predicated on enforcement of the public trust doctrine.

Although the trial court’s order does not state the specific basis for its ruling, it would appear that it was most likely based upon town ordinance § 16-31(6)(c), since the trial court ordered demolition of the Dwelling. *See* Town of Nag’s Head, N.C., Code § 16-31(6)(c). If the Dwelling was a nuisance because of its location in a public trust area, then the only way to abate the nuisance would be removal of the Dwelling, while conditions such as damage to the Dwelling could most likely be repaired. To the extent that plaintiff seeks removal of the Dwelling as a nuisance according to Town Ordinance § 16-31(6)(c), we must first consider plaintiff’s standing to enforce the public trust rights of the State.

Plaintiff claims that it is not seeking to enforce the State’s public trust rights, arguing that

[t]he Town is not attempting to enforce the State’s public trust rights with this action, but even if it were, it would have authority to do so as a governmental agency. The Defendant relies on *dicta* in multiple cases which seem to imply that the State of North Carolina must bring an action to enforce public

2. In its verified complaint, plaintiff also requested monetary relief due to civil penalties incurred by defendant in failing to abate the Dwelling; this request was not addressed in the trial court’s order granting partial summary judgment in favor of plaintiff. However, as this is a final order as to the claim of abatement and the trial court certified its order pursuant to North Carolina Rule of Civil Procedure 54(b) as a final order, we will address defendant’s appeal. *See Stinchcomb v. Presbyterian Med. Care*, ___ N.C. App. ___, ___, 710 S.E.2d 320, 323 (“[A]n interlocutory order may be immediately appealed (1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C. R. Civ. P. 54(b)[.]” (citation and quotation marks omitted)), *disc. review denied*, ___ N.C. ___, 717 S.E.2d 376 (2011).

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trust rights via the Attorney General. No case in North Carolina has held such against an action brought by anything other than private individuals and entities. Even if determined not to be *dicta*, the Town acts as a governmental agency and exercises the police power of the State.

(Citations and quotation marks omitted.)

“The standard of review on a motion to dismiss under Rule 12(b)(1) is *de novo*.” *Fairfield Harbour v. Midsouth Golf, LLC*, ___ N.C. App. ___, ___, 715 S.E.2d 273, 280 (2011) (citation and quotation marks omitted).

This Court has previously described the public trust doctrine as applicable to land adjoining bodies of water:

The public trust doctrine is a common law principle providing that certain land associated with bodies of water is held in trust by the State for the benefit of the public. As this Court has held, public trust rights are those rights held in trust by the State for the use and benefit of the people of the State in common. They include, but are not limited to, the right to navigate, swim, hunt, fish and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State’s ocean and estuarine beaches and public access to the beaches.

As such, the public trust doctrine cannot give rise to an assertion of ownership that would be available to any private litigants in like circumstances. *Any party, public or private, can assert title to land on the strength of a deed, but only the State, acting in its sovereign capacity, may assert rights in land by means of the public trust doctrine.* Indeed, as the United States Supreme Court has stated, the public trust doctrine uniquely implicates a state’s sovereign interests.

Fabrikant v. Currituck Cty., 174 N.C. App. 30, 41-42, 621 S.E.2d 19, 27 (2005) (emphasis added) (citations, quotation marks, ellipses, and brackets omitted).

The state is the sole party able to seek non-individualized, or public, remedies for alleged harm to public waters. Under the public trust doctrine,

the State holds title to the submerged lands under navigable waters, but it is a title of a different character than that which it holds in other lands. It is a title held in trust for the

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people of the state so that they may navigate, fish, and carry on commerce in the waters involved.

Only the state, through the Attorney General, is authorized to bring in a representative capacity for and on behalf of the using and consuming public of this State actions deemed to be advisable in the public interest.

Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 118-19, 574 S.E.2d 48, 54 (2002) (citing N.C. Gen. Stat. § 114-2(8)(a) (2001)) (emphasis added) (citations and quotation marks omitted), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). Although public trust rights first developed as a common law doctrine, these rights have been recognized in our General Statutes. *See* N.C. Gen. Stat. § 113-131 (2009); *Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27. N.C. Gen. Stat. § 113-131 entitled, “Resources belong to public; stewardship of conservation agencies; grant and delegation of powers; injunctive relief[.]” provides:

(a) The marine and estuarine and wildlife resources of the State belong to the people of the State as a whole. *The Department and the Wildlife Resources Commission are charged with stewardship of these resources.*

(b) *The following powers are hereby granted to the Department and the Wildlife Resources Commission and may be delegated to the Fisheries Director and the Executive Director:*

(1) Comment on and object to permit applications submitted to State agencies which may affect the public trust resources in the land and water areas subject to their respective management duties so as to conserve and protect the public trust rights in such land and water areas;

(2) Investigate alleged encroachments upon, usurpations of, or other actions in violation of the public trust rights of the people of the State; and

(3) Initiate contested case proceedings under Chapter 150B for review of permit decisions by State agencies which will adversely affect the public trust rights of the people of the State or initiate civil actions to remove or restrain any unlawful or unauthorized encroachment upon, usurpation of, or any other viola-

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tion of the public trust rights of the people of the State or legal rights of access to such public trust areas.

(c) *Whenever there exists reasonable cause to believe that any person or other legal entity has unlawfully encroached upon, usurped, or otherwise violated the public trust rights of the people of the State or legal rights of access to such public trust areas, a civil action may be instituted by the responsible agency for injunctive relief to restrain the violation and for a mandatory preliminary injunction to restore the resources to an undisturbed condition. The action shall be brought in the superior court of the county in which the violation occurred. The institution of an action for injunctive relief under this section shall not relieve any party to such proceeding from any civil or criminal penalty otherwise prescribed for the violation.*

(d) *The Attorney General shall act as the attorney for the agencies and shall initiate actions in the name of and at the request of the Department or the Wildlife Resources Commission.*

(e) In this section, the term “public trust resources” means land and water areas, both public and private, subject to public trust rights as that term is defined in G.S. 1-45.1.

N.C. Gen. Stat. § 113-131 (emphasis added).

One of plaintiff’s requested forms of relief, and the one which the trial court presumably granted, is to have defendant’s Dwelling destroyed based on the fact that it is located in a public trust area; plaintiff claims that it is merely addressing a public nuisance and “not attempting to enforce the State’s public trust rights[.]” Before the trial court, plaintiff’s attorney stated,

We are not suing in trespass. We are not suing to quiet title. We are not suing to do anything like that. What we are doing is very similar to if someone had put a big house in the middle of the highway in Nags Head, we would consider that a nuisance and we would want it moved out of the road even though that’s the DOT’s right-of-way. It’s the same sort of situation.

We disagree. As to this portion of plaintiff’s argument, plaintiff claims it has the right to remove the Dwelling based solely upon public trust rights. This is not a case involving access to the shoreline across pri-

vate property, protecting property which has already been determined to be a public trust area, or a myriad of other such similar situations; this is a case where a governmental agency is attempting to take private property from an individual, destroy the Dwelling, and claim the land on the basis that it currently lies within a public trust area. Plaintiff's analogy regarding the presence of a house in the middle of a highway is not accurate, as in this case the house was already lawfully constructed on its current location prior to the plaintiff's assertion of public trust rights. If a house were lawfully constructed and *then* the State decided to construct a highway through the middle of the house, the State would first have to condemn the property and pay just compensation to the landowner. *See generally Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 4, 637 S.E.2d 885, 889 (2006) ("The right to take private property for public use, the power of eminent domain, is one of the prerogatives of a sovereign state. The right is inherent in sovereignty; it is not conferred by constitutions. Its exercise, however, is limited by the constitutional requirements of due process and payment of just compensation for property condemned. Both the state and federal constitutions limit the State's power of eminent domain. North Carolina's Constitution protects the rights of property owners through the Law of the Land Clause, which provides that no person shall be deprived of his property, but by the law of the land. In other words, although the State can condemn land for public use, the owner must be justly compensated." (citations, quotation marks, brackets, and ellipses omitted)). Plaintiff does not contest that the Dwelling was originally lawfully constructed in its current location and that the mean high water line has changed to some extent since it was constructed; only the alleged change after the construction of the Dwelling gives rise to plaintiff's asserted rights.³ Regardless of plaintiff's attempt to argue that nuisance is the basis of its claims, the potential destruction of defendant's Dwelling based upon the claim that it is located within a public trust area is actually an "attempt[] to enforce the State's public trust rights[.]"

Second, we note that the language in *Fabrikant* and *Neuse* heavily emphasizes the sovereignty of the *State* as being the only body which can affirmatively bring an action to assert rights under the public

3. We need not address plaintiff's arguments regarding changes in the mean high water line and the location of defendant's Dwelling in reference to it, as plaintiff does not have standing to bring such an argument to enforce rights under the public trust doctrine.

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trust doctrine. See *Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27; *Neuse River Found., Inc.*, 155 N.C. App. at 118-19, 574 S.E.2d at 54. Our case law clearly reflects that affirmative actions regarding public trust property must be taken by the State “through the Attorney General[.]” *Neuse River Found., Inc.*, 155 N.C. App. at 119, 574 S.E.2d at 54; contrast *Fish House, Inc. v. Clarke*, 204 N.C. App. 130, 136-37, 693 S.E.2d 208, 212-13 (determining that an entity besides the State could use the public trust doctrine as a defense in an action, but emphasizing that only the State may use the doctrine offensively), *disc. review denied*, 364 N.C. 324, 700 S.E.2d 750 (2010). Regardless of whether the statements in both *Fabrikant* and *Neuse* were dicta, the clear mandate of N.C. Gen. Stat. § 113-131 is that “[t]he Attorney General shall act as the attorney” “[w]henver there exists reasonable cause to believe that any person or other legal entity has unlawfully encroached upon, usurped, or otherwise violated the public trust rights of the people of the State[.]” N.C. Gen. Stat. § 113-131(c), (d). In addition, it is entirely reasonable to grant this power to the State only, in order to minimize conflicts between municipalities or other local governments and the state agencies which have been granted the responsibility of managing and protecting “public trust rights of the people of the State or legal rights of access to such public trust areas[.]” N.C. Gen. Stat. § 113-131(c).

Just such a conflict between the requirements of state law and the local ordinance seems to exist in this case. See N.C. Gen. Stat. § 113-131, Town of Nags Head, N.C., Code § 16-31, -33. As plaintiff’s attorney conceded before the trial court, the Attorney General “may be—I don’t think that I would disagree that they are probably the only party that can assert an interest in land based on the public trust.” An interest in land is exactly what plaintiff seeks here. Plaintiff is not merely seeking public access to the shoreline across defendant’s property; plaintiff is seeking to demolish defendant’s Dwelling and to prevent defendant from making any economic use of the property whatsoever. Because only the *State*, acting through the Attorney General, has standing to bring an action to enforce the *State’s* public trust rights in accord with N.C. Gen. Stat. § 113-131, we conclude that this claim must be dismissed. N.C. Gen. Stat. § 113-131; *Neuse River Found., Inc.*, 155 N.C. App. at 119, 574 S.E.2d at 54. Accordingly, we reverse the order of the trial court denying defendant’s motion to dismiss pursuant to Rule 12(b)(1).⁴

4. As we are dismissing defendant’s claim for “abatement” of the alleged public nuisance under the public trust doctrine pursuant to Rule 12(b)(1), we need not address defendant’s motion to dismiss pursuant to Rule 12(b)(6).

III. Personal or Property Injury

[2] Defendant also contends that the trial court erred in granting partial summary judgment in favor of plaintiff based upon Town Ordinance § 16-31(6)(b). Defendant contends that “[t]here is a question of material fact as to whether the cottage posed a likelihood of personal or property injury.” Plaintiff contends that it “has produced substantial, material and uncontroverted evidence that the condition of the Cottage can reasonably be determined to be likely to cause personal or property injury.” Plaintiff then directs this Court’s attention to its verified complaint and two affidavits from Cliff Ogburn (“Mr. Ogburn”), Town Manager.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The standard of review from a grant or denial of summary judgment is *de novo*. Because summary judgment is a drastic remedy that eliminates the need for a full trial, summary judgment should be granted cautiously.

Matthews v. Food Lion, LLC, ____ N.C. App. ____, ____, 695 S.E.2d 828, 830 (2010) (citations and quotation marks omitted).

As we have already noted, plaintiff’s verified complaint states that the Town’s Manager inspected the Dwelling and concluded:

- a. That the Dwelling was in a deteriorated and damaged condition;
- b. That the Dwelling was disconnected from utilities;
- c. That the Dwelling was disconnected from approved means of sewage disposal;
- d. That components of the Dwelling’s on-site sewage disposal system were visibly damaged or missing;
-
- h. That the Dwelling had incurred storm and/or erosion damage[.]

Mr. Ogburn averred that

8. The wave action and tides associated with the November Storm caused significant damage to the [Dwelling].

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9. Since at least October 6, 2008, the [Dwelling] has been damaged to such an extent that its condition made it unsafe for human habitation and it has been condemned by the Town's building inspector pursuant to N.C.G.S. § 160A-426. The Defendant has not taken any corrective action to remedy the issues with the [Dwelling] which caused [it] to be declared unsafe for human habitation and condemned by the Town's building inspector.

10. Since the November Storm, if not earlier, the [Dwelling] was and remains in a deteriorated, decaying and damaged condition which includes, but is not limited to, having unsupported decking, missing exterior stairways or other means of ingress and egress, having weakened or failing structural components or other portions of the [Dwelling] which could injure passersby or their property without warning.

11. Since the November Storm, if not earlier the dilapidated condition of the [Dwelling] has caused or contributed to blight, is dangerous to children, and has attracted persons intent on criminal activities or other nuisance activities.

....

13. Since the November Storm, if not earlier, the Cottage was and remains disconnected from electricity, water service and other utilities.

14. Since the November Storm, if not earlier, the [Dwelling] was and remains disconnected from any form of sewage disposal, approved or otherwise.

15. Since the November Storm, if not earlier, the [Dwelling] had and continues to have components of its on-site sewage disposal system which are damaged, destroyed, missing or otherwise rendered inoperable.

16. Since the November Storm, if not earlier, the [Dwelling] had components of its on-site sewage disposal system which were visible and accessible to the public causing blight and causing the public to have concern over whether the Atlantic Ocean in the vicinity of the Property could be enjoyed safely.

....

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22. Since the November Storm, if not earlier, the [Dwelling] has been and remains completely blocking public or emergency vehicle access to and travel along the ocean beaches.

....

27. Due to the condition and location of the [Dwelling], each such weather event has the immediate potential to cause additional erosion and storm damage to the Property and the [Dwelling] and thereby to create an increased risk of injury or danger to the citizens, residents and visitors of the Town and their property by causing all or part of the [Dwelling] to collapse, fall or otherwise become an instrument of destruction or a dangerous projectile.

28. This risk of imminent damage, destruction and danger extends beyond the weather event itself as portions of structures such as the [Dwelling] remain in the Atlantic Ocean and on the ocean beaches causing continued and dangerous conditions for those members of the public exercising their rights to enjoy the Atlantic Ocean and ocean beaches.

....

30. The condition and location of the [Dwelling] significantly interferes with the public health, the public safety, the public peace, the public comfort and the public convenience.

Mr. Ogburn's second affidavit stated that the statements in his first affidavit "remain true and accurate[, and t]o the extent conditions have changed on the Property, they have changed in a manner showing further deterioration of the [Dwelling] and further erosion of the Property."

On the other hand, Lance Goldner ("Mr. Goldner"), president of defendant, averred in his affidavit that:

5. On November 12-14, 2009, the Property was affected by wave action resulting from what is now known as Nor'Easter Ida. As a result of this wave action, the [Dwelling] on the Property lost its wooden access steps, the drain lines for its septic field, and also lost its electrical and water connections. Otherwise the [Dwelling] is in habitable condition and is not suffering from any structural defects that would make it unsafe.

....

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7. . . . I have been making efforts to have the [Dwelling] repaired, but these efforts have been blocked by the Town.

8. I attempted to obtain a building permit to repair the [Dwelling], but was told by Town officials that I would first need to obtain a CAMA permit, which is also issued by the Town.

9. I obtained an Improvement Permit from the Dare County Health Department to repair the septic system

10. I sought a CAMA permit from the Town for repair of the septic system, and was denied on November 22, 2010 on the purported basis that my repair of the septic field constituted a “replacement” of the system. . . .

11. The septic tank on the property is not cracked and can be reused and only needs to be buried in the ground. Otherwise all that is needed is to reinstall the septic drain lines

Furthermore, we note that when plaintiff issued its “Declaration of Nuisance Structure, Order of Abatement and Warning Citation” to defendant it stated, “No development permits will be issued for this structure.” Thus, plaintiff’s own evidence lends credence to Mr. Goldner’s statement that he has attempted to repair the Dwelling but has been prevented from doing so by plaintiff.

In summary, Mr. Ogburn averred that

the [Dwelling] was and remains in a deteriorated, decaying and damaged condition which includes, but is not limited to, having unsupported decking, missing exterior stairways or other means of ingress and egress, having weakened or failing structural components or other portions of the [Dwelling] which could injure passersby or their property without warning.

In contrast, Mr. Goldner claimed that “the cottage is in habitable condition and is not suffering from any structural defects that would make it unsafe[,]” and plaintiff has refused to allow defendant to make repairs which are needed.

Viewing the evidence in the light most favorable to defendant, as we must for purposes of summary judgment, *Fairfield Harbour Property Owners Ass’n, Inc.*, ___ N.C. App. at ___, 715 S.E.2d at 281, it appears that the main defects in the dwelling are the lack of con-

nections to a septic tank, electricity, and water and some exterior damage to stairs, but it is structurally sound and in need of relatively minor repairs, which defendant would have promptly performed if plaintiff had not refused to issue the required permits. Mr. Ogburn's first affidavit, in paragraphs 27 and 28, also seems to rely heavily on the risk that *future* storm events will cause more damage to the Dwelling and it will then pose a greater danger; yet these statements express his opinion about what may happen in the future, and certainly if a future storm event does further undermine the Dwelling, plaintiff may seek relief on the basis of this new condition.

Town Ordinance § 16-31(6)(b) does not state that any possibility “of personal or property injury” created by the condition of the Dwelling is a violation, but instead a “reasonabl[e] . . . likelihood” of injury. Town of Nags Head, N.C., Code § 16-31(6)(b). Although this is not a negligence case, the determination of what is reasonably likely to cause “personal or property injury”, *id.*, either now or in the future, is similar to the determination of negligence, which also requires a determination of reasonableness; summary judgment is rarely appropriate “in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case.” *See generally Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979). In this case, there is a material question of fact as to whether the condition of the Dwelling creates a “reasonabl[e] . . . likelihood of personal or property injury” and the evidence forecast by the parties is conflicting. Town of Nags Head, N.C., Code § 16-31(6)(b); *see Matthews*, ___ N.C. App. at ___, 695 S.E.2d at 830. In addition, if defendant were allowed to repair the Dwelling, as Mr. Goldner's affidavit states that it would have done if not prevented by plaintiff, the Dwelling may not pose any risk of “personal or property injury[.]” Town of Nags Head, N.C., Code § 16-31(6)(b). Accordingly, the trial court erred in granting summary judgment in favor of plaintiff.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's order denying defendant's motion to dismiss pursuant to Rule 12(b)(1) and reverse the trial court's partial summary judgment order and remand for further proceedings consistent with this opinion solely as to the issue of whether the Dwelling is a nuisance under Town Ordinance § 16-31(6)(b) and if so, to determine appropriate relief.

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[219 N.C. App. 81 (2012)]

REVERSED and REMANDED in part.

Judges STEPHENS and BEASLEY concur.

IN THE MATTER OF: APPEAL OF: OCEAN ISLE PALMS LLC FROM THE DECISION OF THE BRUNSWICK COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION AND TAXATION OF REAL PROPERTY FOR TAX YEAR 2010

No. COA11-1127

(Filed 21 February 2012)

1. Taxation—property assessments—negotiated reduction on prior assessment—not a waiver of current appeal

The Property Tax Commission did not err by granting summary judgment in favor of Ocean Isle on its 2010 appeal from tax assessments based on Ocean Isle negotiating reductions in its 2008 tax assessments and choice not to appeal from those assessments. The adjustments were better characterized as unilateral actions by the County based on the information provided by Ocean Isle rather than a negotiation between the parties.

2. Taxation—property assessments—carry forward provision—wrongful tax valuations

The Property Tax Commission did not err by failing to find and conclude that the 2010 tax assessments were correctly carried forward from 2009 as required by N.C.G.S. § 105-286. Nothing in the statute or our case law suggested that the carry forward provision was intended to immunize wrongful tax valuations from appeal or to convert them from wrongful to correct.

3. Taxation—property assessments—Schedule of Values—summary judgment improper

The Property Tax Commission erred by granting summary judgment in favor of Ocean Isle on its 2010 appeal from tax assessments because there were genuine issues of material fact as to whether the County's 2007 Schedule of Values was misapplied for the condition factor to undeveloped lots that had been sold. A county's schedules, rules, and standards for tax revaluations must be applied in a uniform and equitable manner that determines the true value of property.

IN RE OCEAN ISLE PALMS, LLC

[219 N.C. App. 81 (2012)]

Judge BEASLEY concurring in part and dissenting in part.

Appeal by Brunswick County from order entered 24 June 2011 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 26 January 2012.

Nelson Mullins Riley & Scarborough LLP, by Charles H. Mercer, Jr., and Reed J. Hollander, and The Coastal Companies, by Elaine R. Jordan, for Taxpayer Ocean Isle Palms LLC.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker, Jamie Schwedler, and Brenton W. McConkey, and Jana Berg, Esq., for Brunswick County.

STEPHENS, Judge.

Factual Background and Procedural History

This appeal arises from a dispute over adjustments to the 2007 tax revaluations of certain residential lots in Brunswick County (“the County”). For many years, the County has used the sales prices of comparable residential lots to set tax value base rates. Prior to 2005, few residential lots in the County were sold without infrastructure such as roads and water and sewer lines in place. Because so few lots were sold without infrastructure (which would presumably have lower values than more developed lots), the County developed the practice of discounting the tax value of such undeveloped lots. If a lot lacked any infrastructure, its value was generally assessed at 20% of that of an otherwise comparable developed lot. As infrastructure was added over time, the value would be stepped up to 40%, 60%, or 80% of sales values, depending on the degree of infrastructure completion. These discounting rates were reflected on tax record cards as a “condition factor” expressed in decimal form.

In 2005 and 2006, sales practices began to change in the County, with more developers selling residential lots without infrastructure. On 6 May 2006, Taxpayer Ocean Isle Palms, LLC (“Ocean Isle”) began selling lots in a large residential subdivision of approximately 400 lots divided into several phases. Between 6 May 2006 and 1 January 2007, Ocean Isle sold 180 lots in the subdivision at an average lot price of about \$275,000, despite the lack of basic infrastructure in the subdivision.

As required by statute, the County conducted a general reappraisal in 2007. For this reappraisal, the County adopted a Schedule

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of Values which employed the same sales comparison method as in previous years, including the application of condition factors. As in past years, the 2007 Schedule of Values does not explicitly explain or limit how the “condition factor” may be determined. In 2007, Ocean Isle lots were valued using the Schedule of Values, including the application of the condition factor, resulting in assessed values of \$55,000 per lot (20% of their \$275,000 average sales price).

In late 2007 or early 2008, the County’s tax assessor ordered his staff to stop using the condition factor to discount the value of undeveloped lots. At the assessor’s direction, the valuations of Ocean Isle’s undeveloped lots were recalculated in 2008 to remove the condition factor, resulting in a change of tax value from \$55,000 in 2007 to \$275,000 in 2008.

Upon seeing the new valuations, Ocean Isle contacted the assessor’s office and presented information about two items it contended should reduce the tax value of the lots. The sales prices of lots in the subdivision had included two years of prepaid bank interest paid from loan proceeds that Ocean Isle did not receive and \$500 in attorney fees paid by Ocean Isle. In addition, Ocean Isle produced evidence that some of the lots contained wetlands or were otherwise not fully developable. Based on this information, the County reduced the 2008 assessments for Ocean Isle’s lots by about 15% to \$233,375 per lot. Undevelopable lots received further adjustments in valuation.

These values were carried forward in 2009 and 2010. Ocean Isle did not appeal from the adjusted revaluations in 2008 or 2009. However, Ocean Isle appealed the 2010 valuations to the County’s Board of Equalization and Review (“the Board”), which heard testimony and received evidence on 22 June 2010. The Board declined to change the valuation of Ocean Isle’s lots. On 26 July 2010, Ocean Isle timely appealed to the North Carolina Property Tax Commission (“the Commission”) from the Board’s decision. Before the Board and the Commission, Ocean Isle contended that the 2010 values were improper because the 2008 adjustments to the 2007 general revaluations had not been made for a statutorily-permitted reason. On 18 March 2011, Ocean Isle moved for summary judgment before the Commission. On 21 April 2011, the County moved for summary judgment. Following a 26 May 2011 hearing, the Commission, sitting as the State Board of Equalization and Review, entered an order granting Ocean Isle’s motion for summary judgment. The order concluded that the 2008 adjustments had been unlawful and directed the County

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to use the 2007 revaluations for the 2010 tax year. The County appeals.

Discussion

On appeal, the County argues that the Commission erred (1) in granting summary judgment in favor of Ocean Isle because Ocean Isle negotiated reductions in its 2008 assessments and then chose not to appeal from those assessments, barring it from raising issues related to those assessments in its 2010 appeal and (2) in failing to find and conclude that the 2010 assessments were correctly carried forward from 2009 as required by statute. In the alternative, the County argues that summary judgment was improper because there were genuine issues of material fact as to whether the County's Schedule of Values was misapplied in 2007 and 2008. For the reasons discussed herein, we reverse and remand.

Standard of Review

North Carolina General Statute section 105-345.2

governs the extent of review for appeals from the Property Tax Commission Subsection (a) provides that the appellate court shall review the record and exception and assignments of error in accordance with the Rules of Appellate Procedure. Subsection (b) provides that the appellate court shall (1) decide all relevant questions of law, (2) interpret constitutional and statutory provisions, and (3) determine the meaning and applicability of the terms of any Commission action.

In re McElwee, 304 N.C. 68, 73-74, 283 S.E.2d 115, 119 (1981). We review questions of law *de novo* and the sufficiency of the evidence to support the Commission's decision under the whole-record test. *In re The Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

Here, the County appeals from the Commission's order granting summary judgment in favor of Ocean Isle. Rule 56(c) of the North Carolina Rules of Civil Procedure provides that

[s]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. Furthermore, when considering a summary judgment motion, all inferences of fact . . . must

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be drawn against the movant and in favor of the party opposing the motion.

Craig v. New Hanover Cty Bd. of Educ., 363 N.C. 334, 337, 678 S.E.2d 351, 353 (2009) (citations and quotation marks omitted). However, “[t]he North Carolina Rules of Civil Procedure do not apply to proceedings before the Commission[,]” 17 N.C.A.C. 11.0209, and our review reveals no statutory or case law authority specifically permitting the Commission to rule on summary judgment. Nevertheless, this Court has recognized that

[t]he duties of the Commission are quasi-judicial in nature and require the exercise of judgment and discretion. The Commission has the authority and responsibility to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence.

In re Philip Morris U.S.A., 130 N.C. App. 529, 532, 503 S.E.2d 679, 681 (citations and quotation marks omitted), *cert. denied*, 349 N.C. 359, 525 S.E.2d 456 (1998). In addition, we note that this Court has held in a pair of unpublished cases that the Commission does have such authority. *See In re Brooks*, ___ N.C. App. ___, 716 S.E.2d 441, 2011 N.C. App. LEXIS 2228 (2011); *In re Richard*, 184 N.C. App. 187, 645 S.E.2d 899, 2007 N.C. App. LEXIS 1335 (2007). The County’s appeal raises questions of law, to wit, issues of statutory interpretation and the propriety of summary judgment where there exist alleged issues of material fact. Therefore, we review the Commission’s summary judgment order *de novo*.

Propriety of the 2008 Adjustments

[1] The County first argues that the Commission erred in granting summary judgment in favor of Ocean Isle because Ocean Isle negotiated reductions in its 2008 assessments and then chose not to appeal from those assessments, barring it from raising issues related to those assessments in its 2010 appeal. We disagree.

“Subchapter II of chapter 105 of our General Statutes, the ‘Machinery Act’ [], provides the statutory parameters for the listing and appraisal of property and the assessment and collection of property taxes by counties and municipalities.” *In re Allred*, 351 N.C. 1, 4, 519 S.E.2d 52, 54 (1999). Counties of our State must conduct county-wide revaluations of real property every eight years or sooner,

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depending on the county. N.C. Gen. Stat. § 105-286(a) (2011).¹ In the years following a scheduled revaluation, counties are required to carry forward the revaluations unchanged, unless there exists a lawful basis for change pursuant to N.C. Gen. Stat. § 105-287(a) (2011).² Taxpayers may seek review of valuations through their county boards of equalization and review. *See* N.C. Gen. Stat. § 105-322(g)(2) (2011) (“On request, the board of equalization and review shall hear any taxpayer who owns or controls property taxable in the county with respect to the listing or appraisal of the taxpayer’s property or the property of others.”). Taxpayers can appeal the decisions of their county boards of equalization and review to the North Carolina Property Tax Commission, so long as they comply with the relevant time limitations and other requirements:

General Statute section 105-290 sets out the time limit for appeals from a board of equalization and review to the Property Tax Commission: Time Limits for Appeals.—A notice of appeal . . . from a board of equalization and review shall be filed with the Property Tax Commission within 30 days after the date the board mailed a notice of its decision to the property owner. To perfect an appeal from the county board, an appellant must file a written notice of appeal with the clerk of the board of county commissioners and with the Property Tax Commission within 30 days after the county board has mailed notice of its decision pursuant to G.S. 105-322(g)(2)d.

In re La. Pac. Corp., ___ N.C. App. ___, ___, 703 S.E.2d 190, 193 (2010) (internal citations and quotation marks omitted).

We begin by noting that no evidence in the record indicates that Ocean Isle “negotiated” the reductions made to the 2008 valuations. Instead, the record reveals that Ocean Isle attended an “informal conference” at the assessor’s office in 2008 and was told that values would only be adjusted on lots if the assessor had incorrect sales price information. As a result, Ocean Isle provided information about the prepaid bank interest and attorney fees included in the sales prices, as well as about the undevelopable wetland lots. Based on that information, the County made adjustments. These adjustments are

1. The County conducted general reappraisals in 2007 and 2011.

2. At the time the assessment challenged by Ocean Isle became effective on 1 January 2008, the applicable statute was section 105-286(c). This section was repealed effective 1 July 2009 and replaced by section 105-287(a). This repeal and replacement shifted the effective language of section 105-286(c) to section 105-287(a), but made no substantive change to the relevant case law discussed herein.

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better characterized as unilateral action by the County based on the information provided by Ocean Isle rather than a “negotiation” between the parties. In any event, we conclude that Ocean Isle’s provision of this information had no effect on its right to appeal the 2010 tax values.

We also reject the County’s contention that Ocean Isle’s failure to appeal from the 2008 adjustments in that year or in 2009 somehow bars it from bringing an appeal to the valuations carried forward for tax year 2010. There is no dispute that Ocean Isle timely appealed the 2010 tax values to the Board or that it timely appealed the Board’s decision to the Commission. Further, Ocean Isle is not challenging its valuations from 2008 and 2009 or seeking a refund of the taxes paid based on those valuations. Instead, it timely challenges the 2010 assessments in the manner and within the time provided by statute. The County cites no case or statute, and we have likewise found none, which prevents a taxpayer from challenging a current year assessment on the basis of an erroneous or unlawful act which allegedly occurred in a prior tax year.

While, as noted by both parties, the case involved a different procedural posture and predates the enactment of the Machinery Act in 1971, we find the following language from *In re Pine Raleigh Corp.* both instructive and persuasive:

Appellee moved before the State Board to dismiss petitioner’s appeal on the theory that not having sought review in 1960 [when the tax appraisal took place], it was concluded and could not seek a review in 1961. State Board denied the motion to dismiss. It proceeded to hear evidence on which it could act in determining the value of the property. We are of the opinion and hold that the State Board acted correctly in refusing to dismiss the appeal from the County Board for the reasons urged. Once real estate has been appraised for taxation, it continues to be listed at that figure until reappraised, unless some good reason warrants a change in value. Some specific conditions justifying a change in value are enumerated in G.S. 105-279. When that section is read and considered, as it must be, with G.S. 105-295, it is, we think, apparent that the Legislature intended to authorize County Board of Equalization and Review, when requested so to do, to correct any unjust and inequitable assessment. If it refuses to act, the taxpayer may appeal to the State Board of Assessment. *The Legislature never contemplated that an injustice done a taxpayer must*

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continue for a period of years merely because he failed at the first opportunity to bring the injustice to the attention of the authority having the power to correct.

258 N.C. 398, 401, 128 S.E.2d 855, 857 (1963) (emphasis added). Thus, in *In re Pine Raleigh Corp.*, as here, the taxpayer did not appeal the valuation in the year when it took place, but rather waited until that value had been carried forward to a subsequent tax year. *Id.* In response, the county board of equalization and review asserted that the taxpayer was barred from challenging the tax value that had been carried forward. *Id.* (summarizing the board's argument as the taxpayer "not having applied to the State Board in 1960 when the property was appraised, could not seek a reduction in 1961 based on past income, a fact known in 1960[.]"). Although not binding, we agree with the reasoning of the Supreme Court and its assessment of the General Assembly's intent in providing for appeal to the State Board of Assessment, whose role is now occupied by the Property Tax Commission, of erroneous valuations even during non-revaluation years. Accordingly, we hold that Ocean Isle was entitled to raise issues relating back to the 2008 adjustments to the 2007 revaluations in support of its timely challenge to the 2010 assessments.

The flavor of the County's arguments is that Ocean Isle has "gotten away with something" by sitting on its rights to the detriment of the County. We note that Ocean Isle quite literally paid for its decision not to immediately challenge the 2008 assessments as adjusted, having paid taxes in 2008 and 2009 based on assessments which the Commission has now held were erroneous. The fact that sections 105-290 and 105-322 limit challenges to the current tax year will continue to serve as powerful encouragement for taxpayers to challenge any allegedly improper assessments as soon as possible. Further, as noted by Ocean Isle, the County's interpretation of the statutes would work a severe hardship on taxpayers who purchase property during non-revaluation years. A new property owner who discovered an error in the previous revaluation would have no opportunity to challenge it and would be saddled with the injustice until the next revaluation. We reject the County's interpretation.

[2] The County's second argument is that the Commission erred in failing to find and conclude that the 2010 assessments were correctly carried forward from 2009 as required by statute. However, the Commission's findings of fact 16 and 17 state that the County adjusted the 2007 revaluations in 2008 and then carried the 2008

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adjusted values forward in 2009 and 2010. In addition, conclusion of law 1 quotes the “carry-forward” requirement of section 105-286(c).

Rather than a failure by the Commission to make certain findings and conclusions on this point, the County’s true contention appears to be that, having been carried forward in accord with section 105-286, the improper valuations from 2008 are now proper and thus immune from challenge. We cannot agree. To adopt the County’s argument would limit taxpayers’ right to challenge revaluations to the year immediately following a revaluation because any wrongful revaluation carried forward would be transformed from unlawful to lawful. Nothing in section 105-287 or in our case law suggests that the carry forward provision is intended to immunize wrongful tax valuations from appeal or to convert them from wrongful to correct. As noted *supra*, the result would be that “an injustice done a taxpayer [would] continue for a period of years merely because [the taxpayer] failed at the first opportunity to bring the injustice to the attention of the authority having the power to correct.” *Id.* at 401, 128 S.E.2d at 857. The County’s argument is overruled.

Propriety of Summary Judgment

[3] In the alternative, the County argues that summary judgment was improper because there were genuine issues of material fact as to whether the County’s 2007 Schedule of Values was misapplied. We agree.

In non-revaluation years (such as 2008 for the County), adjustments to valuations can be made only for one of the six reasons specified in section 105-287(a). Here, the County asserted that its 2008 adjustments to Ocean Isle’s valuations were to “[c]orrect an appraisal error resulting from a misapplication of the schedules, standards, and rules used in the county’s most recent general reappraisal[.]” N.C. Gen. Stat. § 105-287(a)(2).

There is no dispute that, in all respects pertinent to this appeal, the 2007 Schedule of Values is no different from earlier schedules of values used by the County in previous general reappraisals. The 2007 Schedule of Values still permitted appraisers to use the condition factor to discount the tax value of lots and to use their experience and expertise to determine the true value of lots. What did change in 2007 was the nature of the comparison sales to which the condition factor was applied—before 2007, the comparison sales were largely of developed lots, while during the 2007 reappraisal, the comparison sales were of undeveloped lots. According to the County,

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the appraiser erred in applying the “condition factor” to Ocean Isle’s undeveloped lots in 2007 because the resulting tax values were not the true values of the lots. *See* N.C. Gen. Stat. § 105-283 (2011) (“All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words “true value” shall be interpreted as meaning market value . . .”).³

Our case law provides little explicit guidance in determining what constitutes “an appraisal error resulting from a misapplication of the schedules, standards, and rules[.]” N.C. Gen. Stat. § 105-287(a)(2). However, our General Statutes are clear that property tax appraisals should reflect the property’s true value. *See* N.C. Gen. Stat. § 105-283; *see also In re Bosley*, 29 N.C. App. 468, 471-72, 224 S.E.2d 686, 688, *disc. review denied*, 290 N.C. 551, 226 S.E.2d 509 (1976) (noting that the purpose of section 105-283 is to “provide that all property shall be appraised at market value, and that all the various factors which enter into the market value of property are to be considered by the assessors in determining this market value for tax purposes”). The requirement that real property be appraised at its true value is “to assure, as far as practicable, a distribution of the burden of taxation in proportion to the true values of the respective taxpayers’ property holdings” *In re King*, 281 N.C. 533, 539, 189 S.E.2d 158, 161 (1972). This

[e]quality of appraisal, with resulting equity in taxation, is fundamental in the Machinery Act. There may be reasonable variations from market value in appraisals of property for tax purposes if these variations are uniform. A uniform and dependable method of property appraisal which gives effect to the various factors that influence the market value of property and results in equitable taxation does not violate the appraisal provisions of the Machinery Act.

In re Bosley, 29 N.C. App. at 472, 224 S.E.2d at 688. The County’s 2007 Schedule of Values echoed these principles in stating that the ultimate goal of its guidelines was to “ensure the uniform, consistent, accurate and efficient valuation” of property. We believe this language, along with that of the Machinery Act and case law quoted *supra*, must provide the context for all of the specific guidelines and rules in the 2007 Schedule of Values.

3. The County’s 2007 Schedule of Values quotes the language of section 105-283 as the basis for the County’s appraisal standards.

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Thus, while we agree with Ocean Isle that the 2007 Schedule of Values provided no specific guidance about how the condition factor was to be applied, leaving that determination in the discretion of the appraiser, that discretion was not unbounded. Rather, the appraiser was required to use his experience and expertise to apply the condition factor in a way that “ensure[d] the uniform, consistent, accurate and efficient valuation” of property. If an appraiser instead applies a Schedule of Values in a manner which results in uneven, inconsistent, and inaccurate tax values, we hold that the appraiser has misapplied the schedule, causing an appraisal error which can, in turn, be corrected as provided for in section 105-287(a)(2).

In light of this holding, we believe the Commission erred in granting summary judgment because there were disputed issues of fact about whether the application of the condition factor in 2007 to undeveloped lots that had been sold resulted in uniform, consistent, and accurate assessments of the lots’ true values. The parties presented conflicting evidence about whether the Ocean Isle lots were appraised at their true value in 2007. The county’s appraiser stated that application of the condition factor resulted in accurate determinations of the lots’ true values at \$55,000, but the County presented the affidavit of a licensed appraiser placing the true values between \$255,000 and \$295,000. The Commission made no finding of fact about the true value of Ocean Isle’s lots. While we recognize that “[t]here may be reasonable variations from market value in appraisals of property for tax purposes[,]” those variations must be “uniform.” *In re Bosley*, 29 N.C. App. at 472, 224 S.E.2d at 688. Here, the County presented evidence that application of the condition factor to undeveloped lots in 2007 varied between appraisers and subdivisions, suggesting an uneven and inconsistent, rather than uniform, valuation of property. Such a result would prevent the “distribution of the burden of taxation in proportion to the true values” of taxpayer’s property. *In re King*, 281 N.C. at 539, 189 S.E.2d at 161. Following a hearing, the Commission shall make the findings of fact necessary to resolve these disputed facts and such conclusions of law as result therefrom.

To be clear, we see nothing erroneous about the inclusion of the condition factor in the County’s 2007 Schedule of Values nor in its grant of discretion to appraisers to use their experience and expertise to determine the true value of properties. We also emphasize that mere differences of opinion among appraisers about the exact true value of property are to be expected and *do not* constitute a misapplication of a county’s schedule of values. However, the use of proce-

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dures permitted by a schedule of values in a manner which results in lots being valued far below or far above their true values and in a manner inconsistent with the valuation of other lots in the same county *is* a misapplication of the schedule. Simply put, a county's schedules, rules, and standards for tax revaluations must be applied in a uniform and equitable manner that determines the true value of property.

Accordingly, we reverse the Commission's order and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judge STROUD concurs.

Judge BEASLEY concurs in part and dissents in part.

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

While I agree with the majority's resolution of the first two issues, I write separately because I would also affirm the Commission's grant of summary judgment to Ocean Isle. Therefore, I respectfully dissent.

I do not believe there are any genuine issues of material fact regarding whether the County's 2007 Schedule of Values was misapplied. The record is clear that the County used the "condition factor" method of appraisal for decades prior to this action, and that the decision of whether to apply a factor, and if so what factor, has always been in the sound discretion of the County's appraiser. The County appraiser applied this method in 2007 to value the Ocean Isle lots at prices ranging from \$45,000 to \$60,000 per parcel. The County then proffered an affidavit of another licensed appraiser, Ray Real, who contended that the lots are in fact worth around \$200,000 more each. Real essentially asserted that the lots are worth between \$255-295,000 before the condition factor was applied. Thus, the parties are not actually arguing about whether this was a *misapplication* of the County's Schedule of Values. Rather, they disagree as to whether the use of a condition factor was proper going forward.

The County did not dispute that the condition factor method had been employed for decades, so to argue now that it was a "misapplication" of its Schedule of Values is unavailing. Instead, the County is actually arguing for a new standard appraisal practice to be imple-

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mented. Because that is not a circumstance covered by N.C. Gen. Stat. § 105-287(a)(2) (2011), the Commission properly found that Ocean Isle was entitled to judgment as a matter of law and I would affirm that finding.

STATE OF NORTH CAROLINA v. JASON TIMOTHY GETTYS

No. COA11-810

(Filed 21 February 2012)

1. Evidence—testimony—substantially similar evidence already presented

The trial court did not err in a first-degree murder case by overruling defendant's objection to his girlfriend's testimony that she did not press defendant for information on what happened on the pertinent night because she did not want to anger him or get beaten. There was substantially similar evidence presented at trial that was unchallenged on appeal. Further, there was no probability that the jury would have reached a different outcome in light of the other evidence presented at trial.

2. Homicide—first-degree murder—felony murder rule—robbery with dangerous weapon

The trial court did not err by refusing to dismiss the first-degree murder charge under the felony murder rule. The evidence viewed in the light most favorable to the State revealed that there was substantial evidence of each element of robbery with a dangerous weapon and that defendant was the perpetrator.

3. Homicide—first-degree murder—failure to instruct on lesser-included offense of voluntary manslaughter

The trial court did not err in a first-degree murder case by refusing to instruct the jury on the lesser-included offense of voluntary manslaughter. Defendant was not prejudiced because the jury had the option of convicting him of second-degree murder.

4. Jury—divided jury—Allen instruction—pattern jury instructions

The trial court did not err or commit plain error in a first-degree murder case by giving an *Allen* charge to the divided jury. The pattern jury instructions fairly apprised the jurors of their

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duty to reach a consensus after open-minded debate and examination without sacrificing their individually held convictions merely for the sake of returning a verdict.

Appeal by defendant from judgment entered 13 December 2010 by Judge Beverly T. Beal in Burke County Superior Court. Heard in the Court of Appeals 13 December 2011.

Attorney General Roy Cooper, by Assistant Attorney General LaToya B. Powell, for the State.

Parish & Cooke, by James R. Parrish for defendant-appellant.

STEELMAN, Judge.

Defendant failed to establish that it was plain error to admit his girlfriend's statement that she was scared he would beat her. The trial court did not err in submitting the charge of felony first-degree murder to the jury because there was sufficient evidence of the underlying robbery. Defendant was not prejudiced by the trial court's refusal to instruct on the lesser included offense of voluntary manslaughter because the trial court submitted the charge of second-degree murder to the jury. Defendant failed to establish that it was plain error to give the pattern jury instructions *Allen* charge after the trial court inquired into the numerical split of the jury.

I. Background

Late on the evening of 29 December 2006, James Timothy Gettys ("defendant") returned home. He gave Donna Baker, his girlfriend, some cash, suggesting it was from the paycheck he received and cashed that day. He then told Baker, "I think I killed somebody." He also related that he had hit a man with a rock several times. Defendant contacted the Morganton police and arranged a meeting. Just before midnight, defendant met with Officer James Coward at a gas station. Defendant informed Officer Coward that he thought he might have killed someone during a narcotics dispute. He told Officer Coward where the altercation occurred, and they traveled to that location.

The Morganton police found the body of Steven Drew Snoddy face down in a ditch. A wrecked pickup truck was also at the scene. A chain was attached to Snoddy's trousers that had been connected to his wallet, but his wallet was not there when the police discovered his body. Snoddy's trousers were slightly pulled down.

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On 1 February 2007, defendant was indicted for murder. Defendant's trial began on 29 November 2010. The State proceeded under two theories of first-degree murder: (1) premeditation and deliberation and (2) felony murder based upon a robbery. At the close of evidence, the trial court submitted four options to the jury: premeditated and deliberate first-degree murder, first-degree felony murder, second-degree murder, and not guilty. The trial court refused to instruct the jury on voluntary manslaughter as a lesser included offense of first-degree murder.

The evidence presented at trial tended to show that defendant and Snoddy were involved in a physical altercation on the side of the road. Defendant testified at trial that, in the course of the fight, he struck Snoddy three or four times in the head with a rock. He claimed that he had no plans to harm Snoddy before they got into the altercation. He also denied taking Snoddy's wallet. The jury found defendant guilty of first-degree murder under the felony murder rule but not guilty of premeditated and deliberate first-degree murder. Defendant was sentenced to life imprisonment without the possibility of parole.

Defendant appeals.

II. Baker's Testimony

[1] In his first argument, defendant contends that the trial court erred in overruling his objection to Baker's testimony that she did not press defendant for information on what happened that night because she did not want "to get him pissed off and beat [her] ass." We disagree.

A. Standard of Review

Defense counsel objected after Baker testified that she was afraid defendant would beat her, but counsel did not move to strike the testimony. Defense counsel did not provide a specific basis for the objection. Once a witness responds to a question, any objection to that response is waived absent a motion to strike. *See State v. Burgin*, 313 N.C. 404, 409, 329 S.E.2d 653, 657 (1985). ("The one objection made was lodged after the witness responded to the question. Defendant made no motion to strike the answer, and therefore waived the objection."). Furthermore, an appellant may not argue error on appeal if his "underlying objection fails to present the nature of the alleged error to the trial court." *State v. Catoe*, 78 N.C. App. 167, 168, 336 S.E.2d 691, 692 (1985). Because this issue was not preserved, we only review for plain error. *State v. Wilson*, 203 N.C. App. 547, 551, 691 S.E.2d 734, 738 (2010).

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Under the plain error standard of review, defendant has the burden of showing: (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.

Id. (citations omitted) (internal quotation marks omitted).

B. Analysis

After the altercation between defendant and Snoddy, defendant went to Baker's residence. He was living with her at the time. He gave Baker \$298 in cash. Defendant had received his paycheck that day, and it appears that it was the couple's expectation that defendant give some or all of his paycheck to Baker. Baker was disturbed by defendant's demeanor and conduct. She testified that defendant's shirt was dirty "and he was pale as a ghost." Baker testified, "[I]t was a little odd because he had worked overtime . . . [the] Saturday before so it should have showed up on the check" She then explained, "I wasn't going to push the issue about the money or anything because I didn't want him to get pissed off and beat my ass" Later in the trial, Detective Calvin Daniels recounted his interview of Baker. He testified, "She stated that she didn't want to push the issue because she didn't want him to get pissed off and fight with her." Our review of the transcript indicates Detective Daniel's description of Baker's statement differed from the language employed by Baker at trial because the prosecutor asked the detective not to use Baker's "literal language." Defendant did not object to this testimony or move to strike it.

Defendant contends that Baker's statement at trial was irrelevant, that the danger of unfair prejudice substantially outweighed the statement's probative value, and that the statement was inadmissible character evidence. *See generally* N.C. Gen. Stat. § 8C-1, Rules 401 to 404 (2011). Assuming *arguendo* that the admission of this evidence was in error, we conclude that the alleged error does meet the high burden for plain error. There was other evidence suggesting Baker believed defendant would assault her if she questioned him concerning the money—namely, Detective Daniel's testimony, which defendant does not challenge on appeal. Therefore, there was evidence that is unchallenged on appeal that is substantially similar to Baker's statement. Moreover, in light of the other evidence presented at trial, including defendant's admission that he struck Snoddy several times in the head with a rock, it is not probable that the jury would have

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arrived at a different outcome in this case but for the admission of Baker's statement. *See Wilson*, 203 N.C. App. at 551, 691 S.E.2d at 738 (stating standard for plain error); *see also State v. Towe*, ___ N.C. App. ___, ___, 707 S.E.2d 770, 774 ("We must determine whether, absent the alleged error, the 'jury probably would have returned a different verdict.'" (quoting *State v. Davis*, 321 N.C. 52, 59, 361 S.E.2d 724, 728 (1987))), *disc. review allowed*, 365 N.C. 202, 709 S.E.2d 599 (2011).

This argument is without merit.

III. Motion to Dismiss

[2] In his second argument, defendant contends that the trial court erred in refusing to dismiss the first-degree murder charge under the felony murder rule because there was insufficient evidence that defendant robbed Snoddy. We disagree.

A. Standard of Review

We review the denial of a motion to dismiss *de novo*, analyzing the defendant's argument under the same framework employed by the trial court. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

When a defendant moves for dismissal, the trial court must determine whether there is substantial evidence of each essential element of the offense charged (or of a lesser offense included therein), and of the defendant being the one who committed the crime. If that evidence is present, the motion to dismiss is properly denied. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

In ruling on a motion to dismiss, the evidence must be considered by the court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. Contradictions and discrepancies must be resolved in favor of the State, and the defendant's evidence, unless favorable to the State, is not to be taken into consideration. The test of the sufficiency of the evidence on a motion to dismiss is the same whether the evidence is direct, circumstantial, or both. All evidence actually admitted, both competent and incompetent, which is favorable to the State must be considered.

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State v. Bullard, 312 N.C. 129, 160, 322 S.E.2d 370, 387–88 (1984) (citations omitted) (internal quotation marks omitted).

B. Analysis

Under the felony murder rule, first-degree murder includes a killing that is “committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon.” N.C. Gen. Stat. § 14-17 (2011). In this case, it was the State’s theory that defendant killed Snoddy while robbing him with a dangerous weapon. The elements of robbery with a dangerous weapon are: “(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened.” *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). Evidence tending to show that the defendant took the victim’s property immediately after killing him is sufficient to allow the jury to conclude the killing occurred during the commission of a robbery. *State v. Wooten*, 295 N.C. 378, 386, 245 S.E.2d 699, 704 (1978). Defendant concedes that the State presented substantial evidence that defendant killed Snoddy but contends there was not substantial evidence that the killing occurred in the course of an alleged robbery.

Defendant and Snoddy were co-workers at Environmental Inks. They were friends and had used cocaine and marijuana together on several occasions. The day of the altercation was payday at Environmental Inks. Lewis Lincoln, who shared a cell in the Burke County Jail with defendant in 2007, testified at trial concerning conversations that he had with defendant. Lincoln testified that defendant stated that on the day of the altercation, he had used the money from his paycheck to purchase drugs.

Joshua White was socializing with Snoddy at Snoddy’s residence on the night of the altercation. White testified that defendant, who was “pale and jittery,” approached the house on foot. Defendant asked Snoddy if he could borrow \$50. When Snoddy replied that he did not have the money, defendant requested a ride, and Snoddy agreed. White also testified that there was a chain hanging from Snoddy’s pants pocket as if it was connected to a wallet. Snoddy and defendant left in a Dodge pickup truck; Snoddy was driving.

Michael Longpre, a retired Morganton police officer at the time of trial, led the investigation of Snoddy’s death. Longpre testified that

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Snoddy had cashed his paycheck after work and that Snoddy's wallet was not discovered at his residence. Snoddy's paycheck was in the amount of "\$290 and . . . 70-something cents."

Special Agent Charles Morris, of the State Bureau of Investigation, testified that when Snoddy's body was discovered, the wallet-chain was still attached to his trousers, but the wallet was gone, and his trousers were partially pulled down over his buttocks. The clasp that had connected the chain to the wallet was bent.

Baker testified that on the night defendant returned home after the altercation, he gave her \$298 and his pay stub before he told her that he thought he killed someone. According to Baker, she and defendant had previously had arguments over money because defendant never brought home any money to "help" Baker.

When considered in the light most favorable to the State, this evidence tends to show that defendant spent his paycheck on drugs and that defendant felt he needed to give Baker money. In light of defendant's admission that he bludgeoned Snoddy to death with a rock, there was substantial evidence from which the jury could conclude that (1) defendant struck Snoddy with the rock in order to take the wallet so he could give Baker some money when he returned home and (2) that the killing and the taking occurred as part of a continuous transaction. *Cf. State v. Barden*, 356 N.C. 316, 351–53, 572 S.E.2d 108, 131–32 (2002) (concluding the act of striking the victim in the head and then removing the victim's wallet was a continuous transaction for the purpose of armed robbery). Defendant does not argue that the rock was not a dangerous weapon. *See generally State v. Marshall*, 188 N.C. App. 744, 749, 656 S.E.2d 709, 713 (2008) ("A dangerous or deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm." (quoting *State v. Wiggins*, 78 N.C. App. 405, 406, 337 S.E.2d 198, 199 (1985)) (internal quotation marks omitted)).

Defendant argues that he testified that, on the day of the altercation, he also had \$250 that his mother had given him for Christmas. But "the defendant's evidence, unless favorable to the State, is not to be taken into consideration" for the purpose of a motion to dismiss. *Bullard*, 312 N.C. at 160, 322 S.E.2d at 388. Defendant also points out that Lewis did not testify that defendant told Lewis that he (defendant) struck Snoddy in order to rob him. Rather, Lincoln testified that defendant claimed to have struck Snoddy after being attacked.

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However, when all of the evidence is viewed in the light most favorable to the State, the trial court correctly held that the State presented substantial evidence of each element of robbery with a dangerous weapon and that defendant was the perpetrator.

This argument is without merit.

IV. Lesser Included Offense

[3] In defendant's third argument, he contends that the trial court erred in refusing to instruct the jury on the lesser included offense of voluntary manslaughter. We disagree.

A. Standard of Review

A trial court's decision not to give a requested lesser included offense instruction is reviewed *de novo* on appeal. *State v. Debiase*, ___ N.C. App. ___, ___, 711 S.E.2d 436, 441 *disc. review denied*, ___ N.C. ___, 717 S.E.2d 399 (2011).

B. Analysis

Defendant's argument is foreclosed by the Supreme Court's decision in *State v. Price*, 344 N.C. 583, 476 S.E.2d 317 (1996). Defendant was convicted of first-degree felony murder after the trial court instructed the jury it could find defendant (1) guilty of premeditated and deliberate first-degree murder; (2) guilty of first-degree felony murder; (3) guilty of second-degree murder; or (4) not guilty. The defendant in *Price* was also convicted of first-degree murder under the felony murder rule after the same four options were submitted to the jury. *Id.* at 590, 476 S.E.2d at 321. The defendant in *Price* argued on appeal that the trial court erred in failing to submit the charge of voluntary manslaughter to the jury. *Id.* at 589, 476 S.E.2d at 320. The Supreme Court held that, assuming *arguendo* that the evidence supported a charge of voluntary manslaughter, the trial court's error did not prejudice the defendant:

[W]e conclude that the verdict of first-degree murder based on felony murder shows clearly that the jurors were not coerced, for they had the right to convict defendant of second-degree murder. That they did not indicates their certainty of his guilt of the greater offense. The failure to instruct them that they could convict of voluntary manslaughter therefore could not have harmed the defendant.

Id. at 592, 476 S.E.2d at 322. *See generally id.* at 589, 476 S.E.2d at 320 (providing background on the law governing lesser included offenses

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and stating the general rule that “[a] defendant is entitled to have the jury consider all lesser included offenses supported by the indictment and raised by the evidence”). Under *Price*, even if there was evidence supporting the charge of voluntary manslaughter in this case, defendant was not prejudiced by the trial court’s refusal to submit voluntary manslaughter to the jury because the jury had the option of convicting him of second-degree murder.

This argument is without merit.

V. Allen Charge

[4] In defendant’s fourth argument, he contends (1) that the trial court incorrectly gave supplemental instructions after inquiring into the numerical division of the jury and (2) that the trial court’s supplemental jury instructions did not comport with N.C. Gen. Stat. § 15A-1235 (2011). We disagree.

A. Standard of Review

The decision to *give* an *Allen* charge¹ is discretionary and therefore reviewed for abuse of discretion. *State v. Fernandez*, 346 N.C. 1, 22–23, 484 S.E.2d 350, 363–44 (1997). The propriety of the trial court’s *formulation* of the charge is determined by reference to N.C. Gen. Stat. § 15-1235(b). *Id.* at 22, 484 S.E.2d at 363 (citing *State v. Easterling*, 300 N.C. 594, 608, 268 S.E.2d 800, 809 (1980)). Whether the *Allen* charge provides the instructions required by N.C. Gen. Stat. § 15-1235(b) is a question of law we review *de novo*. *See id.* at 22–23, 484 S.E.2d at 363–64 (according no deference to the trial court’s decision when determining whether an instruction “contained the substance of the statutory instructions”); *cf. Edwards v. Wall*, 142 N.C. App. 111, 115, 542 N.C. App. 258, 262 (2001) (stating that questions of statutory interpretation are reviewed *de novo*). Defendant failed to object to the trial court’s *Allen* charge. He concedes he must not only establish that the trial court erred, but that the alleged errors amounted to plain error. *Wilson*, 203 N.C. App. at 551, 691 S.E.2d at 738. *See* Section II.A for the plain error standard of review.

B. Analysis

To determine whether a defendant is entitled to a new trial as a result of the trial court’s *Allen* charge, the relevant question is whether the charge was coercive.

1. The term “Allen charge” is derived from the case of *Allen v. United States*, in which the United States Supreme Court approved the use of jury instructions that encouraged the jury to reach a verdict, if possible, after the jury requested additional instructions from the trial court. *See* 164 U.S. 492, 501–02, 41 L. Ed. 528, 530–31 (1896).

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[I]t has long been the rule in this State that in deciding whether a court's instructions force a verdict or merely serve as a catalyst for further deliberations, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury.

State v. Peek, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985). Section 15A-1235(b) is the legislatively-approved version of the *Allen* charge. “[E]very variance from the procedures set forth in [N.C. Gen. Stat. § 15A-1235] does not require the granting of a new trial.” *Id.* “Clear violations” of these safeguards generally require a finding of prejudicial error. *Id.* (quoting *Easterling*, 300 N.C. at 609, 268 S.E.2d at 809–10). In this case, defendant must establish it is probable that the jury would have reached a different outcome but for a faulty *Allen* charge (or that the alleged error otherwise resulted in a miscarriage of justice). *See supra* Section II.A.

First, we address the trial court's decision to give an *Allen* charge. During the jury's second day of deliberations, the jury sent a note to the trial judge stating that the jurors could not agree on a verdict. The trial judge inquired as to the numerical division, instructing the jury foreperson not to tell him whether the division was in favor of guilty or not guilty. The foreperson informed the judge that the jury was divided eleven to one. The trial court then gave the jury additional instructions based on N.C. Gen. Stat. § 15A-1235(b). Defense counsel stated he had no objection to these instructions. The jury found defendant guilty of first-degree felony murder almost two hours later.

“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)” of section 15A-1235. N.C. Gen. Stat. § 15A-1235(c) (emphasis added). The word “may” makes the instruction discretionary. *See Fernandez*, 346 N.C. at 22–23, 484 S.E.2d at 363–644.

Defendant contends the decision to give the instruction in this case was improper because the trial judge first inquired into the numerical division of the jury. However, this does not suggest that the instruction was coercive, as defendant contends. The judge informed the foreperson not to reveal whether the majority favored a guilty or not-guilty verdict. The judge made this inquiry at a logical point in deliberations: after he received a note stating that the jury was deadlocked. *Cf. State v. Yarborough*, 64 N.C. App. 500, 502-03, 307 S.E.2d 794, 795–96 (1983) (concluding there was no coercion and no error

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when “the trial judge made his inquiry as to the numerical split at a natural break in the jury’s deliberations, after a full morning’s deliberations, and clearly stated that he did ‘not want to know that so many jurors have voted in one fashion and so many in another’ ”). The trial court did not abuse its discretion by deciding to give an *Allen* charge, much less commit plain error.

We now turn to the substance of the *Allen* charge given by the trial court. Our Supreme Court has stated that “no ‘clear violation’ of the statute will be found to exist as long as the trial court gives the substance of the four instructions found in [N.C. Gen. Stat.] § 15A-1235(b).” *Fernandez*, 346 N.C. at 23, 484 S.E.2d at 364. In other words, the instructions contained in the statute are “guidelines” and need not be given verbatim. *State v. Jeffries*, 57 N.C. App. 416, 421, 291 S.E.2d 859, 862 (1982). In *Fernandez*, the Supreme Court approved instructions that deviated from the statutory language because “[t]he instructions fairly apprised the jurors of their duty to reach a consensus after open-minded debate and examination without sacrificing their individually held convictions merely for the sake of returning a verdict.” 346 N.C. at 23, 484 S.E.2d at 364.

The statutory *Allen* charge, contained in N.C. Gen. Stat. § 15A-1235(b), provides as follows:

(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.

Id. § 15A-1235(b).

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In this case, the trial judge gave the following instruction:

Now, members of the jury, your foreperson informs me that you have been unable to agree upon a verdict. You are reminded that it is your duty to do whatever you can to reach a verdict. You should reason the matter over together as reasonable men and women in an effort to reconcile your differences if you can without the surrender of conscientious convictions. No juror should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

I'm going to ask you to resume your deliberations and continue your efforts to reach a verdict. I ask you to think about the evidence again, to see what conclusions you reach from it, your analysis of it, to share that, to articulate that, and to see if you can do so—if you can reach a verdict with this guidance I just gave you.

Defendant argues that the discrepancies between the statute and the instructions given at trial amount to plain error. The relevant portion of the instructions given at trial was nearly identical to the North Carolina Pattern Jury Instructions. *See* N.C.P.I.—Crim. 101.40, Failure of Jury to Reach a Verdict (Supp. 2010).

The pattern jury instructions differ in several respects from the statute. The pattern instructions state that it is the jurors' duty to do "whatever [they] can to reach a verdict," whereas the statute states that they should "deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment." N.C. Gen. Stat. § 15A-1235(b)(1). The pattern instructions do not state that "[e]ach juror must decide the case for himself," but they do remind jurors that they should not "surrender an honest conviction as to the weight or effect of the evidence . . . for the mere purpose of returning a verdict." N.C.P.I.—Crim. 101.40.

After comparing N.C. Gen. Stat. § 15A-1235(b) to the pattern instructions, we hold that the pattern jury instructions "fairly apprised the jurors of their duty to reach a consensus after open-minded debate and examination without sacrificing their individually held convictions merely for the sake of returning a verdict," *Fernandez*, 346 N.C. at 23, 484 S.E.2d at 364, and therefore, the pattern jury instructions provide the substance of each of the guidelines

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contained in the statute. The instructions given at trial contained the substance of the pattern jury instructions. In fact, they were nearly identical. Therefore, we also hold that the trial court did not err, much less commit plain error, by providing the instruction set forth above.

This argument is without merit.

VI. Conclusion

Defendant received a fair trial, free from error.

NO ERROR.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. PERRY ROSS SCHIRO

No. COA11-1092

(Filed 21 February 2012)

1. Search and Seizure—motion to suppress—gun—vehicle search—consent—contraband in car panels

The trial court did not err in an accessory after the fact to first-degree murder case by denying defendant's motion to suppress the evidence seized from his vehicle, including a gun. A reasonable person would not have considered defendant's statements that the officers were "tearing up" his car to be an unequivocal revocation of his consent. Further, it was reasonable for a detective to believe contraband could have been hidden behind the car panels after having found marijuana and a stolen license plate in the front section of the vehicle.

2. Accomplices and Accessories—accessory after the fact to first-degree murder—motion to dismiss—sufficiency of evidence—knowledge that gun in vehicle used in murder

The trial court did not err by denying defendant's motion to dismiss the charge of accessory after the fact to first-degree murder based on alleged insufficiency of the evidence that defendant knew the gun found in his vehicle had been used in a murder.

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The totality of the evidence gave rise to a reasonable inference that defendant knew precisely what had taken place.

3. Evidence—prior crimes or bad acts—other thefts and break-ins—corroboration—motive—opportunity—intent—knowledge

The trial court did not err in an accessory after the fact to first-degree murder case by admitting evidence of other thefts and break-ins, including alleged crimes committed after the time of the charged offense. The evidence was admissible to corroborate the testimony of several other witnesses and was relevant to show defendant's motive, opportunity, intent, and knowledge because the shooter in the first-degree murder case had incriminating evidence against defendant in having been involved in a break-in.

4. Constitutional Law—right to unanimous verdict—jury instruction—failure to distinguish between two murder theories

The trial court did not err in an accessory after the fact to first-degree murder case by instructing the jury that it was immaterial that the verdict sheet did not distinguish between the two murder theories of the underlying felony even though defendant contended that it allowed the jury to return a non-unanimous verdict. The indictment stated the "felony of murder" and not the "felony murder rule." Further, it would not have affected the jury unanimously finding defendant guilty of knowingly and willingly assisting the shooter in attempting to escape detection and/or arrest by hiding the firearm.

Appeal by defendant from judgment entered 14 January 2011 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 10 January 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance, for the State.

M. Alexander Charns for defendant appellant.

McCULLOUGH, Judge.

Perry Ross Schiro ("defendant") appeals from his conviction of accessory after the fact to first-degree murder for attempting to hide the murder weapon. We find no error.

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I. Background

On the morning of Friday, 21 September 2007, in Carthage, North Carolina, Michael Graham Currie and Sherrod Harrison broke into the home of Emily Haddock, who was home sick from school. Currie proceeded to shoot Haddock twice in the head with a .22 caliber handgun, resulting in her death. Defendant, Currie, Harrison, Ryan White, and Van Roger Smith, Jr., were all initially charged with first-degree murder. Defendant's charge for first-degree murder was dropped a few days before trial. Currie ultimately escaped being tried for capital murder by confessing and agreeing to testify against defendant. Currie, however, did receive a sentence of life without parole. Currie gave two statements to police on 22 October 2007, but in neither statement did he tell police anything about conveying to defendant that the gun had been used in a murder. Currie allegedly did not alert authorities to having told defendant about the gun until he began discussing his plea bargain with the district attorney. Furthermore, in a 26 June 2009 letter to the district attorney, Currie falsely claimed defendant was the one "who broke in and shot and killed Emily Haddock." However, Currie admitted to the fallacy at trial. Defendant did not testify at trial, but he had previously provided law enforcement with a signed statement.

Currie obtained the murder weapon during a 20 September 2007 break-in of David Ball's home with Harrison, where they also stole other goods. The gun had a distinct look to it; mainly that it had a gold trigger. After the shooting, Currie held onto the gun, but then gave it to Harrison. Not much later he got the gun back from Harrison and gave it to White, telling him that he could do "[w]hatever he wanted" with it. Prior to giving the gun to White, though, Currie had been handling it in front of defendant and others while wearing white gloves, which they found to be strange. Defendant and Currie stayed in a hotel in Spring Lake, North Carolina, over the weekend. While there Currie called White and told him to give the gun to defendant.

Defendant went by White's house to pick up the gun and subsequently shot the gun once inside of a Wendy's bag. Defendant then returned to the hotel with the gun. Currie testified that while he and defendant were in the hotel room he told defendant "where the gun was from" and at some point before they were locked up "that Sherrod [Harrison] did that shooting." Furthermore, he testified that he "told [defendant] the next night at the hotel—Sunday night I told him what happened. I told him me and Sherrod were involved and Ryan had the gun." Defendant also learned at some point before being

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arrested that a Moore County detective was looking for Currie. Currie had told defendant to toss the gun somewhere Currie could find it, so Currie could get rid of it.

Defendant left the hotel early Monday morning with the gun in a Nike bag. At some point that morning, defendant went by Jamel Allen's house where he put the gun in a sock and hid it in the trunk of his car. He then went to eat with some friends where they discussed needing to stay away from Currie because he was acting weird and wearing white gloves. He stated that had he known at the time that Haddock had been shot, he would have thought Currie was involved in the shooting. Soon thereafter, he and White got in the car to ride around looking for Currie, but they could not find him and thus returned to White's house. About five minutes later, the Harnett County Sheriff's Office pulled up and started questioning defendant about his car and Currie's whereabouts. Detective Lieutenant Joe Webb asked defendant for the keys to his car, so defendant told his little brother to give them to Lieutenant Webb. Lieutenant Webb and Detective Justin Toler then opened defendant's trunk to find the gun hidden in the wheel well.

The trial court held a pretrial hearing regarding defendant's motion to suppress the evidence seized from the car. Conflicting evidence was presented regarding the consent necessary to search the vehicle. Detective Toler testified that the search was based on consent, but his report stated it was incident to arrest. Upon hearing all the evidence, the trial court denied defendant's motion. The trial court entered oral findings of fact and conclusions of law.

In summary, the trial court found that upon determining that the license plate on defendant's car was stolen, officers placed defendant under arrest and Lieutenant Webb accompanied defendant to the rear of defendant's car. Detective Toler searched the driver's side of the car where he found a marijuana bud under the seat. He continued to search the backseat where he found a vanity license plate containing the words "HOTT CHIC," which belonged to a stolen Lexus found on 24 September 2007, after being wrecked and burned. Lieutenant Webb asked defendant for consent to search the rest of his vehicle, to which defendant acquiesced. Another patrol car arrived and defendant was placed in the passenger seat, about 10-15 feet away from the trunk of his car. Lieutenant Webb obtained the keys and opened defendant's trunk to search it. While authorities were searching his vehicle, defendant complained to Lieutenant Darren Ritter, who was sitting in the patrol car with defendant, that they were "tearing up"

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his car. Both rear quarter panels of the trunk were fitted with carpet/cardboard type interior trim, which were loose. Detective Toler found the gun behind the right rear quarter panel. Defendant was within range to verbally withdraw consent. Defendant told Lieutenant Ritter that he was a convicted felon, that his fingerprints should not be on the gun, and that he did not know anything about the gun. Lieutenant Ritter testified that defendant was visibly sweating and shaking.

The trial court found that the search of the driver's area of the vehicle was lawful subsequent to defendant's arrest. Additionally, the search of the interior was lawful after finding the marijuana and the search of the trunk was based on voluntary consent. Furthermore, the search of the entire vehicle was justified based on the interest of seeking evidence of contraband and crime after finding the license plate from the stolen car along with marijuana.

Moreover, at trial, the State presented evidence that defendant had been involved in the theft of the Lexus connected to the license plate "HOTT CHIC." Olivia Marie Elliott-Priest, a friend of Currie and defendant, testified that she had seen defendant driving around in a white Lexus, which she had never seen him in. Defendant usually drove a green Cadillac. She also testified to defendant and Currie having arrived at her house earlier in the week late at night, after having wrecked the Lexus about two minutes away. White had then picked defendant and Currie up in defendant's Cadillac.

Another issue arose at trial regarding the admission of evidence and testimony pertaining to defendant's involvement in the robbery of David Wayne Oakley's house. Defendant filed a motion *in limine* to prevent mention of these details. The trial court initially sustained an objection to the admission of the evidence due to hearsay, but eventually let the evidence in based on its corroborating other testimony and showing the chain of circumstances of the weekend. The robbery included the taking of nearly a dozen guns and over one thousand rounds of ammunition. Mr. Oakley's neighbor, John Vincent Gallant, III, testified to having seen defendant outside Mr. Oakley's house and telling him to leave. Major Jeffrey Huber testified that he found a rifle and a pair of black bootie socks in the area where Mr. Gallant had seen defendant.

Defendant pled not guilty to the charges, but a jury found him guilty on 3 January 2011. The trial court sentenced defendant to 116 to 149 months in prison. Defendant appeals.

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II. Analysis

A. Motion to Suppress

[1] Defendant raises four issues on appeal with the first being that the trial court erred in denying his motion to suppress the evidence seized from his vehicle. Defendant contends the gun obtained during the search of his vehicle was the result of an illegal search and seizure. For the following reasons, we disagree.

When reviewing an appeal from the denial of a motion to suppress, the findings of fact are binding if supported by competent evidence and the conclusions of law are reviewed *de novo*. *State v. Barnhill*, 166 N.C. App. 228, 230-31, 601 S.E.2d 215, 217 (2004). The State has the burden of showing the constitutionality of a search. *State v. Cooke*, 306 N.C. 132, 136, 291 S.E.2d 618, 620 (1982). Furthermore, the review of a search should be for constitutional errors, which the State has the burden of proving are “harmless beyond a reasonable doubt.” N.C. Gen. Stat. § 15A-1443(b) (2011).

Defendant first argues that warrantless searches are presumed to be unconstitutional. In arguing so, defendant notes that “[a] search and seizure ‘conducted outside the judicial process, without prior approval by a judge or magistrate, [is] *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.’” *State v. Summey*, 150 N.C. App. 662, 666, 564 S.E.2d 624, 627 (2002) (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372, 124 L. Ed. 2d 334, 343-44 (1993) (citations omitted)). Here, authorities did not obtain a search warrant, court order, written waiver, or acknowledgment to search defendant’s vehicle. However, an officer may conduct a search and seizure based on consent. N.C. Gen. Stat. § 15A-221(a) (2011). Consent refers to “a statement to the officer, made voluntarily and in accordance with the requirements of G.S. 15A-222, giving the officer permission to make a search.” N.C. Gen. Stat. § 15A-221(b). Moreover, “consent . . . must be freely and intelligently given, without coercion, duress or fraud, and the burden is upon the State to prove that it was so, the presumption being against the waiver of fundamental constitutional rights.” *State v. Vestal*, 278 N.C. 561, 578-79, 180 S.E.2d 755, 767 (1971).

In the case at hand, officers testified to receiving consent from defendant to search his vehicle. Defendant even showed officers which key opened the trunk of his car. Defendant, alternatively, contends he revoked his consent while sitting, arrested, in a nearby patrol car when he “said several times, ‘They’re—man, they’re tearing

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up my trunk.’ ” Defendant correctly notes that a person may withdraw his or her consent to a search. *State v. Hagin*, 203 N.C. App. 561, 564, 691 S.E.2d 429, 433, *disc. review denied*, 364 N.C. 438, 702 S.E.2d 500 (2010). “The scope of a valid consent search is measured against a standard of objective reasonableness where the court asks ‘what would the typical reasonable person have understood by the exchange between the officer and the suspect?’ ” *Id.* at 564, 691 S.E.2d at 432 (quoting *Florida v. Jimeno*, 500 U.S. 248, 251, 114 L. Ed. 2d 297, 302 (1991)). A reasonable person would not have considered defendant’s statements that the officers were “tearing up” his car to be an unequivocal revocation of his consent. Similarly, in *State v. Morocco*, 99 N.C. App. 421, 430, 393 S.E.2d 545, 550 (1990), our Court held that the trial court did not err in determining that the defendant did not revoke his consent to search his vehicle when he made the ambiguous statement that a tote bag found in his car had nude photographs of his wife. Had defendant, in the case at bar, desired to revoke his consent he should have made it in a clearer statement that a reasonable person would have considered to be a revocation.

Defendant also argues the trial court erred in failing to note that law enforcement records stated that the search was incident to arrest, and at the same time failing to note that the search was based upon consent. Defendant contends the search was not allowed as incident to an arrest, pursuant to *Arizona v. Gant*, 556 U.S. 332, 173 L. Ed. 2d 485 (2009). Furthermore, in *Gant* the Court set out a two-prong test under which “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” *Id.* at 351, 173 L. Ed. 2d at 501. We agree that the search of defendant’s trunk was not valid as incident to arrest, but we do not think the trial court erred in failing to address law enforcement’s noting that the search was incident to arrest. The trial court thoroughly addressed the motion to suppress and determined that the search was valid based on defendant’s consent and lack of revocation.

Finally, defendant claims the officers’ search of his trunk was excessive in taking off the rear quarter panels. Defendant argues his case is similar to *State v. Johnson*, 177 N.C. App. 122, 627 S.E.2d 488, *disc. review allowed, vacated and remanded*, 360 N.C. 541, 634 S.E.2d 889 (2006), where “a plastic wall panel was removed by a law enforcement officer from the interior of defendant’s van, thereby

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facilitating discovery of the cocaine. '[A]n individual consenting to a vehicle search should expect that search to be thorough[; however,] he need not anticipate that the search will involve the destruction of his vehicle, its parts or contents.' " *Id.* at 125, 627 S.E.2d at 490-91 (citations omitted) (quoting *United States v. Strickland*, 902 F.2d 937, 942 (11th Cir. 1990)). We, however, believe defendant's case can be distinguished in that here the trial court found "that both the left and right quarter panels of the interior of the trunk were fitted with carpet/cardboard type interior trim" and that they "were loose." Additionally, the trial court found that "Detective Toler was easily able to pull back the carpet/cardboard type trim . . . covering the right rear quarter panel where he observed what appeared to be a sock with a pistol handle protruding from the sock." In *Johnson*, the search of the van appears to be much more invasive than the one in the case at hand. *See id.* at 123-24, 627 S.E.2d at 489-90. There, the officers had to pull back multiple glued down side panels of the van, while in the case at hand Detective Toler merely had to pull back a loose carpet/cardboard panel. *See id.* We do not believe Detective Toler's actions amount to the destruction present in *Johnson*. *See id.* Furthermore, it was reasonable for Detective Toler to believe contraband could be hidden behind the panels after having found marijuana and a stolen license plate in the front section of the vehicle. Consequently, the trial court did not err in denying defendant's motion to suppress, as it was based on voluntary consent given by defendant.

B. Motion to Dismiss

[2] Defendant next contends the trial court erred in denying his motion to dismiss based on insufficiency of the evidence. Specifically, defendant argues the State did not present sufficient evidence, that defendant knew the gun found in his vehicle had been used in a murder, for him to be convicted as an accessory after the fact to first-degree murder. 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. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of

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the defendant as the perpetrator of it, the motion should be allowed.” *Id.* The evidence is viewed in the light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

In order to prove a person was an accessory after the fact under G.S. 14-7 [] three essential elements must be shown: (1) a felony was committed; (2) the accused knew that the person he received, relieved or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felon personally.

State v. Earnhardt, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982).

Defendant argues all the evidence presented by the State merely amounts to speculation that defendant knew the gun was used in Emily Haddock’s murder and is not substantial evidence of the third element of the offense. First, defendant testified and put in his statement that he thought Haddock had been beaten to death, not shot. He further stated he told friends that he would kill whoever beat Haddock to death because he had a sister of a similar age. Defendant also notes that Currie’s testimony was based on a plea bargain and was conflicting in certain areas. Defendant did not destroy the gun and was cooperative with law enforcement. Defendant admitted to having fired the gun in a Wendy’s bag, which he argues is not something a felon would do if he knew the gun was a murder weapon.

The State, on the other hand, contends there is substantial direct evidence through Currie and defendant’s statements for the jury to find that defendant knew the gun had been used in a murder. As mentioned above, Currie testified to having told defendant that the gun was used in Haddock’s murder sometime before they were arrested. He testified that it could have been while they were in the hotel together over the weekend. Detective Toler found the gun in the trunk of defendant’s car where defendant had hidden it in a sock in the wheel well. “It is not necessary that the aid be effective to enable the felon to escape all or part of his punishment.” *State v. Martin*, 30 N.C. App. 166, 169, 226 S.E.2d 682, 684 (1976) (internal quotation marks and citation omitted). Defendant was not successful in helping Currie escape punishment, but he did knowingly aid Currie by hiding the murder weapon. They even discussed Currie getting the gun back, so he could properly dispose of it. Defendant had seen Currie handling the gun over the weekend with white gloves on. Consequently, “[t]he totality of the evidence . . . is such to give rise to a *reasonable inference* that defendant knew precisely what had taken place.”

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Earnhardt, 307 N.C. at 68, 296 S.E.2d at 653. The trial court did not err in denying defendant's motion to dismiss as the evidence was sufficient to constitute more than speculation and to be presented to the jury.

C. Admission of Other Crimes

[3] Defendant's third argument on appeal is that the trial court erred in admitting evidence of other thefts and break-ins, including alleged crimes committed after the time of the charged offense. We disagree.

Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). Additionally, "Rule 404(b) . . . allows for the admission of prior bad acts to show a defendant's 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.'" *State v. Renfro*, 174 N.C. App. 402, 405, 621 S.E.2d 221, 223 (2005) (quoting N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003)), *aff'd*, 360 N.C. 395, 627 S.E.2d 463 (2006).

Defendant filed a motion *in limine* to preclude the mention of any prior bad acts because he believed the State's use of the prior bad acts would be for the purpose of showing his bad character. The trial court did not specifically address defendant's motion prior to trial, but dealt with issues pertaining to prior bad acts as they came up and defendant objected. Defendant objected to two specific instances with the first being the State's questioning of Officer Toler regarding the breaking in of David Oakley's house on the Saturday night after Haddock's death. In the situation in question, some guns and ammunition were stolen from Mr. Oakley's house and a gun, along with two black socks and a tire tool, were found outside of his house. The State wanted Detective Toler to testify regarding what was found outside of Mr. Oakley's house. However, Detective Toler was not the officer that found the evidence outside of Mr. Oakley's home, so the trial court sustained defendant's objection to Detective Toler testifying regarding this evidence. Consequently, this testimony and evidence does not appear to raise an issue.

Nonetheless, an issue regarding the same evidence came up the next day when the State presented John Gallant, Mr. Oakley's neighbor, to testify about having seen defendant outside Mr. Oakley's house where the gun, socks, and tire tool were found. At this point,

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defendant objected to the admission of this testimony based on it not falling under an exception to Rule 404(b). The State argued that the evidence should be admitted to show defendant's opportunities to gain knowledge about Currie's use of the gun. The State had already presented evidence of defendant's interaction Friday night with Currie, in which they wrecked the stolen Lexus and burned it. The State desired to present evidence of the break-in of Mr. Oakley's house to show that the two were together on Saturday, and then also present evidence that they were together Sunday night for a full chain of events of the weekend.

Evidence of prior bad acts may be admitted for corroboration. *See State v. Alston*, 80 N.C. App. 540, 543, 342 S.E.2d 573, 575 (1986). Moreover, the same evidence may be admitted "to establish the context or chain of circumstances of a crime[.]" *See State v. Agee*, 326 N.C. 542, 547, 391 S.E.2d 171, 174 (1990). The State argues the evidence in question was admissible to corroborate the testimony of several other witnesses who testified regarding defendant and Currie's actions on Saturday night. The State also contends the evidence was relevant to show defendant's motive, opportunity, intent, and knowledge; specifically, that it gave defendant motive to aid Currie in hiding the murder weapon because Currie now had incriminating evidence against defendant in having been involved in the break-in of Mr. Oakley's house. We believe the trial court properly admitted Mr. Gallant's testimony for the purposes argued by the State and, additionally, any unfair prejudice was outweighed by the evidence's probative value. Thus, defendant's argument is without merit.

D. Jury Instructions

[4] Defendant's final argument is that the trial court erred by instructing the jury that it was immaterial that the verdict sheet did not distinguish between the two murder theories of the underlying felony. Defendant contends the trial court's instructions allowed the jury to return a non-unanimous verdict. We disagree.

"A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires[.]" N.C.R. App. P. 10(a)(2) (2011). 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 occurs when the error is " 'so basic, so prejudicial, so lacking in its

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elements that justice cannot have been done[.]’ ” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). “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).

Defendant claims the trial court erred by instructing the jury that it could convict defendant “either on the basis of malice, premeditation and deliberation and/or the felony murder rule” even though the indictment only alleged “the felony murder rule.” However, a closer reading of the indictment shows that it actually states the “felony of murder” and not “felony murder rule.” The indictment correctly cites to N.C. Gen. Stat. § 14-17, which describes the crime of murder, a felony. The underlying felony “need not be set out as fully and specifically as would be required in an indictment for the actual commission of that felony. It is enough to state the offense generally and to designate it by name.” *State v. Sauls*, 294 N.C. 722, 725, 242 S.E.2d 801, 804 (1978) (internal quotation marks and citation omitted). Here, the indictment stated the underlying felony as “the felony of murder” and cited to the proper statute for the charge of murder. While this may not have been the best wording of the indictment, we do not believe it specified the felony murder rule. Consequently, the trial court did not err in instructing the jury that Currie could be found guilty “either on the basis of malice, premeditation and deliberation and/or the felony murder rule.” That would not affect the jury unanimously finding defendant guilty of knowingly and willingly assisting Currie in attempting to escape detection and/or arrest by hiding the firearm. Consequently, the trial court did not err in its instructions to the jury.

III. Conclusion

Accordingly, we find no error on behalf of the trial court. The trial court did not err in denying defendant’s motions to suppress and dismiss; in allowing the admission of testimony regarding the break-in of Mr. Oakley’s home; and in instructing the jury on the various theories of murder for which Currie could be convicted.

No error.

Judges HUNTER (Robert C.) and THIGPEN concur.

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NANCY L. SHERA AND HERBERT K. SHERA, SR., PLAINTIFFS v. N.C. STATE
UNIVERSITY VETERINARY TEACHING HOSPITAL, DEFENDANT

No. COA11-1102

(Filed 21 February 2012)

**Tort Claims Act—veterinary malpractice—wrongful death—
replacement value damages for deceased companion animal—
lost investment valuation method not recognized**

The Industrial Commission did not err in a Tort Claims Act case by awarding plaintiffs damages based on the replacement value, rather than intrinsic value, of their deceased companion animal killed as a result of defendant's veterinary malpractice. Plaintiffs' emotional bond with their pet was something that is not recognized as compensable under North Carolina law, nor is the lost investment valuation method.

Appeal by plaintiffs from opinion and award entered 13 June 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 24 January 2012.

Gerber Animal Law Center, by Calley Gerber, for plaintiff appellants.

Attorney General Roy Cooper, by Assistant Attorney General Olga Vysotskaya, for the State, defendant appellee.

Charlene Edwards Law Office, by Charlene Edwards, for Amicus Curiae Animal Legal Defense Fund.

Jordan Price Wall Gray Jones & Carlton, by Jon P. Carr, for Amicus Curiae North Carolina Veterinary Medical Association, American Kennel Club, Cat Fanciers' Association, Animal Health Institute, American Pet Products Association, Pet Industry Joint Advisory Council, and American Veterinary Medical Association.

McCULLOUGH, Judge.

Plaintiffs Nancy L. Shera and Herbert K. Shera ("plaintiffs") appeal from an opinion and award of the Full Commission awarding plaintiffs damages based on the replacement value, rather than intrinsic value, of their deceased companion animal. We affirm.

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I. Background

In August 1994, plaintiffs purchased a five-week-old female Jack Russell Terrier puppy and named her Laci. The purchase price for Laci was \$100.00. In late 1994-1995, plaintiffs had Laci spayed so that she could not produce any offspring. Plaintiffs also took Laci to obedience training, which she completed successfully. Plaintiffs developed a sentimental attachment to Laci, stating that Laci had the ability to sense when plaintiffs were overloaded with stress and to comfort and calm them during those times.

In the spring of 2003, Laci was diagnosed with hepatocellular carcinoma, a type of liver cancer. Plaintiffs sought treatment from Veterinary Specialty Hospital (“VSH”) in Cary, North Carolina, whose staff removed the tumor. Thereafter, plaintiffs sought treatment at the North Carolina State University Veterinary Teaching Hospital (“defendant”), who offered comprehensive oncology treatment. On 23 September 2003, Laci completed her cancer treatments, and by 7 October 2003, Laci’s cancer was determined to be in remission.

In March 2007, Laci exhibited symptoms of poor appetite, vomiting, and difficulty with urination. On 31 March 2007, Laci was admitted to defendant for multi-systemic organ disease and multiple life-threatening symptoms, including a severe form of pancreatitis, ascites, electrolyte derangements, and other serious veterinary issues. Upon admission, Laci had exhibited trouble urinating, eating, and rising. On 1 April 2007, Laci was transferred to the intermediate care ward, where she underwent various tests and procedures until 5 April 2007, when she was moved to the intensive care unit for observation.

On 5 April 2007, defendant’s staff determined that Laci required a nasoesophageal tube to assist with feeding. However, defendant’s staff erroneously placed the feeding tube into Laci’s trachea and lungs, instead of her esophagus and stomach. On the following morning, 6 April 2007, Laci went into cardiac arrest, and she did not respond to emergency medications or attempts at resuscitation. During defendant’s internal review of the death, the improper placement of the feeding tube was discovered and determined to have been the proximate cause of Laci’s death. Laci was 12 years and 9 months old at the time of her death. On 9 April 2007, defendant notified plaintiffs of the erroneous feeding tube placement which resulted in Laci’s death.

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On 11 May 2009, plaintiffs filed the present action against defendant with the North Carolina Industrial Commission (“the Commission”) pursuant to the Tort Claims Act. In their complaint, plaintiffs alleged their beloved companion animal, Laci, was killed as a result of defendant’s veterinary malpractice. Plaintiffs sought economic damages “representing the intrinsic value of Laci,” as well as “the intrinsic value of the unique human-animal bond between Laci and [plaintiffs], borne from the time, labor, attention, and care given to Laci by [plaintiffs.]” Plaintiffs also sought reimbursement of the amounts paid by plaintiffs for defendant’s veterinary services, mileage and other out-of-pocket expenses such as hotel lodging as a result of plaintiffs’ travel associated with Laci’s veterinary care, and cremation expenses. In addition, plaintiffs sought “noneconomic damages, including emotional distress and loss of enjoyment of life[.]” On 12 June 2009, defendant responded by filing a partial motion to dismiss and an answer, admitting negligence and requesting a hearing solely on the issue of damages.

The sole issue of damages was first heard by Deputy Commissioner George T. Glenn, II (“Deputy Commissioner Glenn”), on 23 August 2010. Defendant conceded the erroneous placement of the feeding tube at the hearing, and on 19 November 2010, Deputy Commissioner Glenn filed an opinion and award awarding damages to plaintiffs in the amount of \$2,755.72. Plaintiffs appealed Deputy Commissioner Glenn’s opinion and award to the Full Commission.

On 13 June 2011, the Commission filed its opinion and award, modifying Deputy Commissioner Glenn’s opinion and award and awarding plaintiffs damages in the amount of \$3,105.72. Included in the Commission’s award is a reimbursement of the cost of Laci’s treatment from 31 March 2007 through 6 April 2007 in the amount of \$2,755.72 and the market value of Laci represented by the replacement cost of a Jack Russell Terrier dog in the amount of \$350.00. In its conclusions of law, the Commission declined to expand the intrinsic value category of damages by applying it to the loss of a pet animal in the present case. Plaintiffs timely appealed the Commission’s opinion and award to this Court on 4 July 2011.

II. Standard of Review

“Under the Tort Claims Act, when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission’s findings of fact, and (2) whether the Commission’s findings of fact justify its conclu-

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sions of law and decision.” *Smith v. N.C. Dep’t of Transp.*, 156 N.C. App. 92, 97, 576 S.E.2d 345, 349 (2003) (internal quotation marks and citations omitted); *see also* N.C. Gen. Stat. § 143-293 (2011). Most pertinent to this appeal, “[w]e review the Full Commission’s conclusions of law *de novo*.” *Holloway v. N.C. Dep’t of Crime Control & Pub. Safety*, 197 N.C. App. 165, 169, 676 S.E.2d 573, 576 (2009).

III. Discussion

Both plaintiffs and defendant agree that under North Carolina law, companion animals, specifically dogs, are considered “species of property.” *Jones v. Craddock*, 210 N.C. 429, 431, 187 S.E. 558, 559 (1936). As such, our Courts have long held that a civil action for the negligent injury to or loss of a dog is maintainable. *E.g., id.* (“Even in the days of Blackstone, while it was declared that property in a dog was ‘base property,’ it was nevertheless asserted that such property was sufficient to maintain a civil action for its loss.”).

In *Carolina Power & Light Co. v. Paul*, 261 N.C. 710, 136 S.E.2d 103 (1964), our Supreme Court announced that “North Carolina is committed to the general rule that the measure of damages for injury to personal property is the difference between the market value of the damaged property immediately before and immediately after the injury.” *Id.* at 710-11, 136 S.E.2d at 104. In cases where the personal property at issue “is not commonly traded and has no ascertainable market value, a jury may infer the market value of the . . . property from evidence of the replacement cost.” *State v. Helms*, 107 N.C. App. 237, 240, 418 S.E.2d 832, 833 (1992). In the present case, the Commission adhered to these well-established legal principles, which are undisputed by both plaintiffs and defendant.

Here, the Full Commission concluded that North Carolina law treats companion animals as personal property and uses the difference in market value as the measure of damages for injury to personal property in negligence actions. The Commission also concluded that plaintiffs’ pet dog is not easily subjected to the standard diminished market valuation and therefore, because the item has no ascertainable market value, the market value of plaintiffs’ pet dog may be determined based on evidence of the replacement cost of the item. Based on these conclusions, the Commission arrived at the replacement value of plaintiffs’ deceased pet, a Jack Russell Terrier dog, based on the evidence presented at the hearing, and awarded that amount to plaintiffs as compensatory damages. The Commission acknowledged that our Courts have recognized an alternative intrinsic

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sic value measure of damages that may be appropriate under certain circumstances, but the Commission concluded “the courts have not recognized intrinsic value as the proper measure for damages for the loss of an animal” and declined “to expand the intrinsic value category of damages by applying it to the instant case.”

On appeal, plaintiffs challenge only the Commission’s conclusion of law declining to apply an intrinsic valuation method to compensate plaintiffs for the negligently caused death of their pet. Plaintiffs argue that in a case such as this, where the injured or destroyed “property” is a companion animal, such as their beloved pet dog, the market value measure of damages is “inapt.” Specifically, plaintiffs argue there exists no “market” for adult spayed or neutered companion animals in our society. In addition, plaintiffs argue that the replacement value of a companion animal is not an adequate measure of the loss given the unique nature of the human-animal bond formed between pet owners and their pets. Rather, plaintiffs argue that because companion animals are “sentient beings,” a “unique” and special kind of personal property, the measure of damages in a negligence case involving the loss of a companion animal should be the “actual” or “intrinsic” value of the animal. Plaintiffs contend this type of damages has been recognized under our law, as the Commission acknowledged, and that companion animals, in particular plaintiffs’ dog Laci, qualify for this type of valuation. Accordingly, plaintiffs contend the Commission erred in not applying the actual or intrinsic value measure in the present case.

Plaintiffs cite the case of *Freeman, Inc. v. Alderman Photo Co.*, 89 N.C. App. 73, 365 S.E.2d 183 (1988), in support of their contention that actual or intrinsic value as a measure of damages in negligence cases has been recognized under North Carolina law. In *Freeman*, the plaintiff, an architectural firm renting office space from the defendant, lost hundreds of architectural drawings, work papers, and surveys as a result of the defendant’s negligent repairing of the building roof. *Id.* at 73, 365 S.E.2d at 184. At trial, the evidence showed most of the lost drawings would never be used, so the trial court instructed the jury on the property’s “actual” or “intrinsic value, that is, its value to its owner,” rather than the property’s replacement value, as to the measure of damages. *Id.* at 76-77, 365 S.E.2d at 185-86. This Court upheld the trial court’s “actual value” instruction, which allowed the jury to consider the evidence that many of the lost drawings were useless and did not warrant replacement. *Id.* at 77, 365 S.E.2d at 186. Thus, the “actual value” instruction in *Freeman* was applied to limit,

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rather than enhance, the plaintiff's recovery by preventing a windfall to the plaintiff in the form of compensation for useless property.

Despite its limiting application in *Freeman*, plaintiffs steadfastly argue that companion animals warrant the same actual value instruction on damages, as enunciated in *Freeman* and set forth currently under North Carolina's Civil Pattern Jury Instruction 810.66. Plaintiffs contend that when the evidence in the case of a negligently destroyed companion animal meets the criteria of N.C.P.I. Civil 810.66 (gen. civ. vol. 2000), that measure of damages should be applied. N.C.P.I. Civil 810.66 instructs that actual or intrinsic value should be used "where damages measured by market value would not adequately compensate the plaintiff and repair or replacement would be impossible . . . or economically wasteful . . . [,]" as was the case in *Freeman*. *Id.* N.C.P.I. Civil 810.66 then lists several factors to be considered by the fact finder in determining the "actual value" of a plaintiff's property, including, in relevant part, the original cost of the property, the age of the property, the condition of the property just before it was damaged, the uniqueness of the property, the cost of replacing the property, the opinion of the plaintiff as to its value, the opinion of any experts as to its value, and any other factors supported by the evidence. *Id.* Nonetheless, N.C.P.I. Civil 810.66 dictates that the fact finder must not consider "any fanciful, irrational or *purely emotional* value" that the specific property may have had. *Id.* (emphasis added).

Here, plaintiffs argue the uncontroverted evidence produced at the hearing showed the irreplaceable uniqueness of Laci, thereby warranting the application of the actual value measure of damages. In their arguments on appeal, plaintiffs stress Laci served a "therapeutic" purpose to her owners and was vital to Mr. Shera's heart condition therapy, which is simply not replaceable by purchasing another Jack Russell Terrier dog. Accordingly, plaintiffs argue that because the evidence meets the criteria for the application of N.C.P.I. Civil 810.66, the Commission should have applied the actual value measure of damages and considered the additional factors. Despite these arguments on appeal, however, the uncontroverted evidence produced at the hearing does not establish any particular "therapeutic" purpose served by Laci, and the Commission made no such finding of fact. Rather, plaintiffs' testimony at the hearing continuously reflects the understandable emotional and sentimental connection plaintiffs had formed with their pet:

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Q. Can you tell us what your life was like with Laci?

[Mrs. Shera]. Laci was a family member. She brought so much joy to our home. My husband is a heart patient, and she brought him such comfort. And if you know anything about that, that is one of the things that a beloved pet can do. They can calm the situation down, help a person. Laci was just very special. She was very, very special to the whole family.

. . . .

Q. Were there any special tasks that Laci performed for you?

[Mrs. Shera]. Like I said, she was just very helpful in stressful situations. . . .

Q. Did she perform any special tasks for you?

[Mrs. Shera]. Yes. Laci was my best friend. She was my absolute best friend.

Q. When you say “best friend,” . . . what did she do for you?

[Mrs. Shera]. She was a great comfort to me.

. . . .

[Mrs. Shera]. . . . Laci was unique. Laci was unique. She had her own personality. She fit into the family right away and just had her own special way about her.

. . . .

[Mrs. Shera]. Laci was strong. Laci was intuitive. She was very intelligent. She knew when there was stress in the house with my husband’s health situations, and she was an aide in that respect.

Q. When you say “she was an aide,” what would she do?

[Mrs. Shera]. She would calm the situation down.

Q. How did she do that?

[Mrs. Shera]. She would go to [Herb], she would go to me, and she would just try to keep everything calm.

. . . .

Q. Has your life changed as a result of losing Laci?

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[Mrs. Shera]. There's a big void, and it's the way it happened. . . . She was that special, needed, loved, cherished, and it's just a big void.

. . . .

Q. Did [Laci] perform any special tasks for you?

[Mr. Shera]. She was very calming. It's been mentioned before I've got coronary problems ongoing, currently being treated for them, and she was very calming—a calming influence on me. When she was around, I was comfortable. I was calm, didn't worry about things, and she just—you know, she'd come and sit on the couch with you. She was just a loving companion.

. . . .

Q. Was there any market value for Laci?

[Mr. Shera]. You can't put a value on a child. No, it's impossible. There was only one Laci. There's only one dog that went through all she went through with flying colors. How can you put a value on that?

Thus, the evidence does not reveal why the specific *item of property* at issue—plaintiffs' pet dog—is not replaceable. The testimony reveals no absolute unique tasks or functions that Laci performed for plaintiffs, aside from her calming presence, that could not be performed by another pet dog. Rather, the substance of the testimony supports only the fact that plaintiffs' *emotional bond* with their pet is irreplaceable—something that is not recognized as compensable under our law, and in particular N.C.P.I. Civil 810.66, which plaintiffs seek to apply here. Although plaintiffs point to the “purely academic” discussion of whether “the sentimental value of property” may be recovered as compensation for a defendant's tortious act in our Supreme Court's decision in *Thomason v. Hackney*, 159 N.C. 298, 303-05, 74 S.E. 1022, 1024-25 (1912), our case law has been consistent in denying recovery for sentimental value of negligently lost or destroyed personal property, as reflected in N.C.P.I. Civil 810.66. *Cf. City of Kings Mountain v. Cline*, 19 N.C. App. 9, 13, 198 S.E.2d 64, 67 (1973) (“[S]entimental value[] is not such value as will support a monetary compensation.”).

Despite the overwhelming sentimental nature of plaintiffs' testimony at the hearing, plaintiffs point to the amount of money they invested in Laci's care throughout her lifetime as objective evidence

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of Laci's actual value to them as owners. Relying on this evidence as the measure of Laci's actual value, plaintiffs seek damages in excess of \$28,000.00 for the negligent loss of their pet dog. However, plaintiffs fail to adequately explain how amounts spent on the dog's care prior to 31 March 2007, when Laci was admitted to defendant's care and negligently killed, were proximately related in any way to defendant's negligent act on 6 April 2007 and plaintiffs' resulting injury. In fact, the evidence shows Laci was successfully treated for cancer in 2003-2004 by both VSH and defendant, and plaintiffs testified at the hearing that the amounts they expended on Laci's oncology treatment was worth it for "every extra minute" they were able to spend with their pet thereafter. We fail to see how such expenditures prior to defendant's negligent acts can be considered in any way in a damages award, regardless of the valuation method employed. Notably, were this an action for the wrongful death of a child, plaintiffs could recover only the "[e]xpenses for care, treatment and hospitalization *incident to the injury resulting in death,*" rather than the cost of medical care expended over the child's lifetime. N.C. Gen. Stat. § 28A-18-2 (2011) (emphasis added). North Carolina law has not yet recognized a lost investment valuation method in wrongful death cases, whether human child or pet animal. *Cf. Wycko v. Gnodtke*, 361 Mich. 331, 339-40, 105 N.W.2d 118, 122-23 (1960).

Our review of the record, therefore, reveals no definitive evidence to support the application of an actual or intrinsic value measure of damages in this case, were we to conclude that our law permits such measure of damages in cases of negligent loss of companion animals. Our research reveals that *Freeman* is the only decision in our State upholding the application of an actual or intrinsic value measure of damages, despite the availability of such measure in appropriate circumstances. *Cf. Blum v. Worley*, 121 N.C. App. 166, 169, 465 S.E.2d 16, 19 (1995) (stating instructions on damage to "intrinsic value" of land are appropriate "in certain circumstances" where evidence supports such an instruction). Indeed, evidence that is "purely speculative or conjectural" or "too ephemeral," in addition to being purely sentimental as we have already noted, cannot support such an instruction. *Id.* at 170, 465 S.E.2d at 19. We note similar limitations are placed on damages awards in wrongful death actions as well. *See, e.g., Bailey v. Gitt*, 135 N.C. App. 119, 121, 518 S.E.2d 794, 795 (1999) ("[C]laims for certain kinds of damages [in a wrongful death action] can be dismissed by the trial court as too speculative.").

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The current law in North Carolina is clear that the market value measure of damages applies in cases involving the negligent destruction of personal property, whether sentient or not. Although the actual value measure of damages exists under our law, such damages awards have proven to be the rare exception and have never been applied to either enhance a damages award or to the recovery of damages for the loss of companion animals. This is surely due in part to the fact that a multitude of companion animals are available in our society, and although the replacement of the unique human-animal bond between an owner and his or her pet is impossible, replacement of the type of property—a companion animal—currently is possible under our law. Although “[t]he measure of damages used should further the purpose of awarding damages, which is to restore the victim to his original condition, to give back to him that which was lost *as far as it may be done by compensation in money[.]*” *Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 85, 590 S.E.2d 15, 19 (2004) (emphasis added) (internal quotation marks and citations omitted), the sentimental bond between a human and his or her pet companion can neither be quantified in monetary terms or compensated for under our current law. Plaintiffs recognize this fact in both their testimony and their brief, and the evidence presented to the Commission in the present case, consisting entirely of plaintiffs’ own testimony and past veterinary bills, does not support plaintiffs’ argument that the actual or intrinsic value measure of damages, as exists currently under our law, is applicable in the present case. Thus, while we recognize, as we have in past cases, that there exists an actual or intrinsic value measure of damages under our law, were we to apply an actual or intrinsic value measure of damages in the case of companion animals to compensate owners for the value of their emotional bond with their pet, as the facts of this case present, we would in effect be expanding that category of damages beyond what is currently recognized under our law, as the Commission properly concluded here.

We sincerely empathize with plaintiffs’ loss of their beloved pet Laci. Unfortunately for plaintiffs, however, this Court is not in the position to expand the law. Rather, such considerations must be presented to our Supreme Court or our Legislature, who have the power to rectify any inequities in both the labeling of companion animals as mere property and the current market valuation of companion animals in negligence cases. Certainly the numerous policy considerations presented by the issue raised in this case—how to value the loss of the human-animal bond between a pet owner and his or her

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companion animal—is more appropriately addressed to our Legislature. This Court is an error-correcting court, not a law-making court. Here, as stated previously, the Commission did not err in its reasoning or its conclusions of law as to the proper measure of damages for plaintiffs’ pet dog under our current negligence laws. Accordingly, we must affirm the Commission’s opinion and award.

Affirmed.

Judges HUNTER (Robert C.) and THIGPEN concur.

ORANGE COUNTY, A NORTH CAROLINA COUNTY, PETITIONER-APPELLEE V. TOWN OF HILLSBOROUGH, HILLSBOROUGH BOARD OF ADJUSTMENT RESPONDENT-APPELLANTS

ORANGE COUNTY, NORTH CAROLINA, PLAINTIFF-APPELLANT V. TOWN OF HILLSBOROUGH, HILLSBOROUGH BOARD OF ADJUSTMENT, AND MARGARET W. HAUTH, HILLSBOROUGH ZONING OFFICER IN HER OFFICIAL CAPACITY, DEFENDANT-APPELLEE

No. COA11-375

No. COA11-386

(Filed 21 February 2012)

1. Zoning—denial of zoning compliance permit—arbitrary and capricious

The trial court did not err by concluding that the Hillsborough Board of Adjustment’s final order denying issuance of a zoning compliance permit was arbitrary and capricious based on appellants’ decision to deny approval of alternative parking for the Justice Center because it did not “adequately address the parking needs of the Justice Facility.” The trial court properly remanded to appellants for approval of the 2006 site plan and ordered that a zoning compliance permit be issued to Orange County.

2. Estoppel—acceptance of benefits—county not subject to same extent as individual or private corporation

The trial court did not err by concluding that Orange County was not estopped from challenging the validity of the zoning ordinance, thereby avoiding the parking condition of site plan approval, based on its acceptance of the benefits of the condi-

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tional site plan approval by commencing construction of the addition to the Justice Center. A county is not subject to an estoppel to the same extent as an individual or a private corporation. Enforcing the doctrine of estoppel on Orange County would impair Orange County's mandated government function under N.C.G.S. § 7A-302 of providing courtrooms, office space for juvenile court counselors and support staff, and related judicial facilities for each county where a district court has been established.

3. Appeal and Error—issue not reached—prior holding in same case precluded

Although appellants contended that Orange County's own representatives conceded that their parking proposals did not meet the parking requirements under the Zoning Ordinance, this issue was not reached based on the prior holding that Orange County produced competent, material, and substantial evidence supporting the issuance of a zoning compliance permit.

4. Appeal and Error—issues not addressed—prior holding in another case precluded

In light of the Court of Appeals' holding in case number COA11-375, it was not necessary to reach the issues presented on appeal in case number COA11-386.

Appeals by respondents Town of Hillsborough and Hillsborough Board of Adjustment (collectively "appellants") and petitioner Orange County from an order entered 12 November 2010 by Judge Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 12 October 2011. Pursuant to N.C. R. App. P. 40, these cases involving common issues of law, were consolidated for hearing.

Brough Law Firm, by Robert E. Hornik, Jr., for Town of Hillsborough and Hillsborough Board of Adjustment.

John L. Roberts and Michael R. Ferrell for Orange County.

BRYANT, Judge.

Where the trial court properly applied the whole record test in determining that the Hillsborough Board of Adjustment's final order denying a Zoning Compliance Permit to Orange County was arbitrary and capricious, and where the doctrine of estoppel is not applicable, we affirm the order of the trial court.

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[219 N.C. App. 127 (2012)]

Facts and Procedural History

The issues presented in this case arise from the Orange County Justice Center Expansion Project. Orange County is the owner of contiguous property along East Margaret Lane from South Churton Street to South Cameron Street (“East Campus Property”) in Hillsborough, North Carolina. The following buildings are located on the East Campus Property: the Hillsborough Courthouse (“Justice Center”); the Orange County District Attorney’s Office; the Link Government Services Center; and, the Government Services Annex. East Campus Property is zoned Office/Institutional and the permitted use for the district includes the construction of government facilities and office buildings pursuant to the Town of Hillsborough Zoning Ordinance (Zoning Ordinance). According to Section 3.4 of the Zoning Ordinance, if a plan for a government facility in the Office/Institutional zone exceeds 10,000 square feet, it must be approved by a conditional use permit.

In 2006, Orange County began planning a 38,000 square feet expansion to the Justice Center. On 8 November 2006, the Town of Hillsborough’s Board of Adjustment (hereinafter “HBOA”) conditionally approved the site plan for the addition to the Justice Center with the condition being that Orange County submit an acceptable plan for remote parking facilities pursuant to the Zoning Ordinance. The requirement for conditional approval was “that presentation of acceptable remote parking facilities and process documents covering the operation” must be received. No deadline for compliance was included in this conditional approval.

The Zoning Ordinance Section 6.6 requires, among other things, that government facilities provide one space per employee, plus one space per 300 square feet of gross floor area of the building. At the 8 November 2006 HBOA meeting, Orange County stated that the Zoning Ordinance required 125 additional parking spaces, for a total of 552.¹ At that time, Orange County proposed to fulfill the additional parking space requirement through a bid placed on a park and ride lot and shuttle located at Durham Technical Community College.

In May 2007, Orange County commenced construction of the Justice Center. Over the next three years Orange County spent over \$12.5 million on the Justice Center Expansion Project. On 10 March

1. The HBOA’s 12 May 2010 Final Order and review of the parking plan indicated 125 additional parking spaces were needed for the expansion project, making the total number of spaces required under the ordinance 438 as opposed to 552.

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2010, Orange County sought approval from the HBOA for a parking plan and Zoning Compliance Permit, which would have allowed the issuance of a Certificate of Occupancy for the addition to the Justice Center. Meanwhile, Orange County stated that the 2006 park and ride lot and shuttle plan from 2006 was no longer a feasible option and substituted alternative remote parking plans. The HBOA held hearings on 10 March, 14 April, 28 April, and 12 May 2010 to consider granting the Zoning Compliance Permit.

During these public hearings the HBOA noted that Orange County had a parking deficit of 168 spaces at the Justice Center. To address this deficit, Orange County offered the following solutions: recognize forty (40) street parking spaces on East Margaret Lane and South Cameron Street and nine spaces on the west campus; encourage Orange County employees to park in the county's controlled parking spaces in the Eno River Parking deck; and, encourage court visitors to utilize public transportation by commuting to and from the park and ride lot at Durham Technical Community College. On 28 April 2010, Orange County presented a revised alternative parking plan that offered modifications to building operations that would address peak traffic situations and discourage county employees from parking in the Justice Center, among other things.

On 12 May 2010 the HBOA entered a final order denying Orange County's request for approval of alternative parking for the Justice Center because it did not "adequately address the parking needs of the Justice Facility" and refused to grant the Zoning Compliance Permit. On 26 May 2010, the Hillsborough Zoning Officer issued a Notice of Violation against Orange County for occupying the Justice Center without a Certificate of Occupancy.

On 28 May 2010, Orange County filed a complaint against the Town of Hillsborough (hereinafter "Hillsborough") requesting a declaratory judgment: compelling Hillsborough to issue a Compliance Permit for the Justice Center; declaring that Hillsborough is without authority a) to deny Orange County's Compliance Permit, b) to require Orange County to comply with the parking provisions in the zoning Ordinance, c) to condition approval of the Certificate of Occupancy on its compliance with the parking provisions in the Zoning Ordinance, and d) to interfere in any other way with Orange County's duty to provide adequate court facilities pursuant to N.C. Gen. Stat § 7A-302; and, declaring the failure to issue the Compliance Permit as unconstitutional, unlawful, and unenforceable.

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On 27 July 2010, Hillsborough filed a motion for summary judgment arguing that Orange County was and is required to comply with the off-street parking requirements of the Zoning Ordinance. On 26 August 2010, Orange County also filed a motion for summary judgment seeking a determination that the Zoning Ordinance is not, in its entirety, applicable to North Carolina and its counties and that Hillsborough had attempted to unlawfully expand their authority pursuant to N.C.G.S. § 160A-392.

The cases-10 CVS 908 and 1082-were joined for a hearing which was held on 3 September 2010. On 12 November 2010 the trial court issued an order denying Orange County's summary judgment motion and granting Hillsborough's summary judgment motion. Orange County appeals this 12 November 2010 Order in 10 CVS 908.

Previously, on 28 June 2010 Orange County filed a Petition for Review in the Nature of Certiorari in Orange County Superior Court to reverse the HBOA's order denying a Zoning Compliance Permit. On 12 November 2010, the trial court granted Orange County's petition and issued a Writ of Certiorari to the HBOA reversing and remanding the HBOA's denial of Orange County's application for a Zoning Compliance Permit with directions to approve the application. The trial court made the following conclusions of law:

7. For purposes of these proceedings, the only condition at issue is whether presentation of acceptable remote parking facilities and process documents covering the operation thereof were received.
8. This is a two-pronged analysis: first, were acceptable remote parking facilities presented?; and second, were process documents covering the operation thereof received?
9. The first prong of the analysis garnered little attention by the parties; the Court finds that the remote parking facilities themselves, located at Durham Tech, were acceptable to Respondent Board. Were this not the case, Respondent Board would not have granted the conditional Site Plan approval.
10. The second prong, as a matter of law under a plain reading of the terms, requires "receipt" of documents, rather than, for example, successful implementation of a remote parking plan.

...

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13. [T]he Court concludes that the relevant inquiry is whether a document was provided by Petitioner and received by Respondent Board.

14. The March 4, 2010, April 8, 2010, and April 22, 2010 letters from [an engineer for Orange County] to [the Planning Director for the HBOA] are “process documents” within the meaning of the conditional Site Plan Approval, in that they outlined the operation of the remote parking facility. . . .

15. When taken as a whole, the record is replete with competent, material, and substantial evidence regarding the presentation and receipt of the process document supporting the remote parking facility, and thus substantial compliance with the original requirements set forth by Respondent Board.

16. When taken as a whole, the record is devoid of competent, material, and substantial evidence that other, additional requirements were necessary prior to Site Plan approval.

17. The decision of Respondent Board is not supported by competent, material, and substantial evidence in the whole record.

18. The decision of Respondent Board is arbitrary and capricious.

From this order, the Town of Hillsborough and the HBOA (collectively “appellants”) appeal in 11-375.

11-375 (10 CVS 1082):

Orange County, a North Carolina County

v.

Town of Hillsborough and the Hillsborough Board of Adjustment

Appellants advance the following three issues on appeal: whether (I) the trial court erred by concluding that HBOA’s 12 May 2010 final order was arbitrary and capricious; (II) Orange County should be estopped from avoiding the condition of site plan approval because it has received the benefits of that approval; and (III) Orange County’s own representatives conceded that its alternative parking plan did not satisfy the zoning requirements.

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I

[1] Appellants first argue that the trial court erred by concluding that their decision and order to deny issuance of a Zoning Compliance Permit was arbitrary and capricious. The HBOA argues Orange County was subject to the parking requirements pursuant to N.C. Gen. Stat. § 160A-392 and sections of Hillsborough’s Zoning Ordinance, and that no parking plan presented by Orange County satisfied these requirements. We disagree.

N.C. Gen. Stat. § 160A-381 (2011) grants the HBOA the power to issue special use permits or conditional use permits in particular circumstances. It also allows the HBOA to impose “reasonable and appropriate conditions and safeguards upon these permits.” N.C.G.S. § 160A-381(c).

Orange County, in an argument counter to that of appellants, contends that appellants are without authority to regulate parking because parking is not a building within the meaning of N.C. Gen. Stat. § 160A-392. Orange County cites to *Nash-Rocky Mount Bd. of Educ. v. Rocky Mount Bd. of Adjust*, 169 N.C. App. 587, 610 S.E.2d 255 (2005), for the contention that a parking lot is not considered a “building” or a “use of a building” pursuant to N.C.G.S. § 160A-392.

In *Nash-Rocky Mount*, the school board contacted the city of Rocky Mount about adding an additional parking lot for school buses at Rocky Mount Senior High School. *Id.* at 587, 610 S.E.2d at 257. The city informed the school board that it would need to obtain a special use permit in order to use the parking lot. *Id.* at 588, 610 S.E.2d at 257. Following a hearing, the city’s board of adjustment denied the request for a special use permit stating that surrounding properties would be adversely affected and that the parking lot would “endanger the public health, safety, or general welfare of the neighborhood.” *Id.* Our Court held that N.C.G.S. § 160A-392 “did not give the municipality jurisdiction to regulate land simply because it was utilized in connection with the building.” *Id.* at 593, 610 S.E.2d at 260. Accordingly, our Court concluded that “because the parking lot is not a ‘building’ under the applicable version of N.C. Gen. Stat. § 160A-392 . . . the Board of Adjustment lacked jurisdiction to issue or deny a special use permit concerning that land[.]” *Id.*

The instant case can be distinguished from *Nash-Rocky Mount*. The school board in *Nash-Rocky Mount* sought to build a new parking lot for school buses at an already existing building (Rocky Mount Senior High School) whereas Orange County is attempting to build an

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addition to a courthouse. N.C.G.S. § 160A-392 (2011) states that local zoning regulations “are hereby made applicable to the erection, construction, and use of *buildings* by the State of North Carolina and its political subdivisions.” (emphasis added). Therefore, N.C.G.S. § 160A-392 grants appellants the authority to apply zoning ordinances to the construction or use of the addition to the courthouse. The trial court did not err in finding that Orange County had to be in compliance with the applicable zoning ordinances, particularly, Zoning Ordinance Section 6.6 which requires this type of facility to provide a specific number of parking spaces based on the number of employees and the size of the facility.

Next, we review the trial court’s 12 November 2010 order, remanding to the HBOA for approval of the 2006 Site Plan and issuance of the Zoning Compliance Permit. A trial court’s task when reviewing the grant or denial of a conditional use permit by a town board includes:

- (1) Reviewing the record for errors of law;
- (2) Insuring that procedures specified by law in both statute and ordinance are followed,
- (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
- (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
- (5) Insuring that decisions are not arbitrary and capricious.

Coastal Ready-Mix Concrete Co. v. Board of Comm’rs, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980).

Where, as here, Orange County questioned whether appellants’ decision was arbitrary or capricious, we must apply the “whole record” test. *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citation omitted).

When utilizing the whole record test, however, the reviewing court must examine all competent evidence (the “whole record”) in order to determine whether the agency decision is supported by ‘substantial evidence. The “whole record” test does not allow the reviewing court to replace the [b]oard’s

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judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.

Id. at 14, 565 S.E.2d at 17-18 (internal quotation marks and citations omitted).

“On an appeal to this court from a superior court’s review of a municipal zoning board of adjustment, the standard of review is limited to ‘(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.’ *Fantasy World, Inc. v. Greensboro Bd. Of Adjustment*, 162 N.C. App. 603, 609, 592 S.E.2d 205, 209 (2004) (citation omitted). Therefore, we must now consider whether the trial court exercised the “whole record test” in making its order and whether it applied that standard properly.

In Orange County’s petition for writ of certiorari to the superior court, Orange County alleged that the HBOA’s “decisions, findings and conclusion are legally and factually erroneous, are not supported by competent, material and substantial evidence, and were arbitrary and capricious.” The trial court reviewed, pursuant to a writ of certiorari, the HBOA’s denial of Orange County’s Application for a Zoning Compliance Permit based on its rejection of Orange County’s parking plans. The trial court noted that it had “considered the full record” in determining whether Orange County had satisfied the special conditions attached to the Site Plan Approval.

HBOA’s decision “may be reversed as arbitrary or capricious if [it is] patently in bad faith, or whimsical in the sense that [the decision] indicate[s] a lack of fair and careful consideration or fail[s] to indicate[] any course of reasoning and the exercise of judgment.” *Mann*, 356 N.C. at 16, 565 S.E.2d at 19 (internal quotation marks and citations omitted). However,

[w]hen an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

Humble Oil & Refining Co. v. Bd. of Aldermen, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974).

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In its 12 November 2010 order, the trial court made the following conclusions of law:

7. For purposes of these proceedings, the only condition at issue is whether presentation of acceptable remote parking facilities and process documents covering the operation thereof were received.

8. This is a two-pronged analysis: first, were acceptable remote parking facilities presented?; and second, were process documents covering the operation thereof received?

9. [Under] [t]he first prong of analysis . . . the [c]ourt finds that the remote parking facilities themselves, located at Durham Tech, were acceptable to [appellants]. Were this not the case, [appellants] would not have granted the conditional Site Plan approval.

. . .

14. [Under the second prong of the analysis], [t]he March 4, 2010, April 8, 2010, and April 22, 2010, letters from [the Planning Director for appellants] and [the Value Engineer/Asset Management and Purchasing Services for Orange County] are “process documents” within the meaning of the conditional Site Plan Approval, in that they outlined the operation of the remote parking facility. . . .

15. When taken as a whole, the record is replete with competent, material, and substantial evidence regarding the presentation and receipt of the process document supporting the remote parking facility, and thus substantial compliance with the original requirements set forth by [the HBOA].

16. When taken as a whole, the record is devoid of competent, material, and substantial evidence that other, additional requirements were necessary prior to Site Plan approval.

17. The decision of [the HBOA] is not supported by competent, material, and substantial evidence in the whole record.

18. The decision of [the HBOA] is arbitrary and capricious.

As evidenced in its order, the trial court applied the appropriate scope of review, which is the whole record test. We also hold that the trial court properly applied that scope of review in finding and concluding that HBOA’s denial of Orange County’s application for zoning

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approval was not supported by substantial evidence. A review of the whole record indicates that appellants conditioned site plan approval on submission of a written plan for a remote parking facility, or “presentation of acceptable remote parking facilities and process documents covering the operation thereof[,]” after Orange County presented the proposal of the Durham Tech park-and-ride lot. Based on the manner in which the HBOA granted the conditional site plan approval, Orange County’s proposal of the Durham Tech lot was an acceptable, satisfactory alternative to fulfilling the requirements of the Zoning Ordinance. Thereafter, Orange County sent three letters throughout 2010 to the HBOA, outlining the remote parking facility and details of its operation. Orange County’s alternative proposals included the usage of the 125 space park-and-ride lot at Durham Tech, usage of the Chapel Hill Transit Route 420 bus, use of an underutilized 94 space county lot, and requiring employees that were assigned county-owned vehicles to park personal vehicles off-site.

Based on the foregoing, acceptable remote parking facilities were presented to appellants and process documents covering the operation thereof were received. We agree with the trial court’s conclusion that appellants’ decision to deny approval of alternative parking for the Justice Center because it did not “adequately address the parking needs of the Justice Facility” and refusal to grant the Zoning Compliance Permit was arbitrary and capricious under these circumstances. Accordingly, we hold that the trial court did not err by remanding to appellants for approval of the 2006 site plan and ordering that a zoning compliance permit be issued to Orange County.

II

[2] In their second argument, appellants contend that Orange County should be estopped from challenging the validity of the Zoning Ordinance, thereby avoiding the parking condition of Site Plan Approval, because it had accepted the benefits of the conditional Site Plan Approval by commencing construction of the addition to the Justice Center.

Appellants argue that our Court’s reasoning in *Goforth Properties, Inc. v. Town of Chapel Hill*, 71 N.C. App. 771, 323 S.E.2d 427 (1984) is controlling. In *Goforth*, we held that “acceptance of benefits under a statute or ordinance precludes an attack upon it.” *Id.* at 773, 323 S.E.2d at 429. However, the facts in *Goforth* are distinguishable from the case before us. In *Goforth*, the plaintiff corporations paid money to the Town of Chapel Hill in order to construct a restaurant that

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would have otherwise been illegal under the town's ordinances because it could not physically meet the necessary number of off-street parking spaces required under the town's ordinance. *Id.* at 774, 323 S.E.2d at 429.

However, in the instant case, we are dealing with a county and not a private corporation. Appellants do not cite any authority applicable to counties but rather only cite to authority applicable to private entities. It is well established that “[c]ounties are subdivisions of the State, established for the more convenient administration of justice and to assure a large measure of self-government. A county is not subject to an estoppel to the same extent as an individual or a private corporation.” *Washington v. McLawhorn*, 237 N.C. 449, 454, 75 S.E.2d 402, 405-06 (1953). There are two instances where one can have a successful estoppel claim against a county: (1) if the county acted in a governmental capacity and estoppel is necessary to prevent loss to another; and (2) if an estoppel will not impair the exercise of the governmental powers of the county. *Id.* at 454, 75 S.E.2d at 406 (citation omitted).

We reject appellants' argument because enforcing the doctrine of estoppel on Orange County would impair Orange County's mandated government function, pursuant to N.C. Gen. Stat. § 7A-302 (2011), of providing courtrooms, office space for juvenile court counselors and support staff, and related judicial facilities for each county where a district court has been established.

III

[3] Last, appellants argue that Orange County's own representatives conceded that their parking proposals did not meet the parking requirements under the Zoning Ordinance. However, based on our holding in issue *I* that Orange County produced competent, material, and substantial evidence supporting the issuance of zoning compliance permit, we do not reach this issue.

11-386:

*Orange County North Carolina**v.*

*Town of Hillsborough, Hillsborough Board of Adjustment and
Margaret W. Hauth, Hillsborough Zoning Officer in her
official capacity.*

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[4] In 11-386, Orange County's sole issue on appeal is whether the trial court erred by granting summary judgment in favor of Hillsborough and denying Orange County's motion for summary judgment.

In light of our holding in 11-375, it is not necessary to reach the issues presented on appeal in 11-386.

Affirmed.

Judges ELMORE and STEPHENS concur.

STATE OF NORTH CAROLINA v. ENDY RAFAEL LOPEZ

No. COA11-957

(Filed 21 February 2012)

1. Search and Seizure—motion to suppress—traffic stop—reasonable suspicion—voluntary consent

The trial court did not err in a trafficking in cocaine by possession and transportation case by denying defendant's motion to suppress the evidence. An officer had reasonable suspicion to search defendant's vehicle based solely upon what he observed during a traffic stop after defendant was lawfully stopped for speeding. Defendant voluntarily gave his consent to a search of the entire vehicle, which included under the hood and in the air filter compartment of the vehicle.

2. Drugs—cocaine trafficking—motion to dismiss—knowing possession or transportation—driving vehicle

The trial court did not err by denying defendant's motion to dismiss the cocaine trafficking charges based on alleged insufficient evidence to show that defendant knowingly possessed or transported cocaine. The evidence that defendant was driving the vehicle which contained cocaine was alone enough to show that defendant's possession was knowing.

Judge BEASLEY concurring in separate opinion.

Appeal by defendant from order entered 30 March 2011 by Judge James E. Hardin, Jr. and judgments entered on or about 6 April 2011

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[219 N.C. App. 134 (2012)]

by Judge Stuart Albright in Superior Court, Guilford County. Heard in the Court of Appeals 12 January 2012.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Andrew O. Furuseth, for the State.

David L. Neal, for defendant-appellant.

STROUD, Judge.

Defendant was convicted of trafficking cocaine by possessing 400 grams or more of cocaine and trafficking cocaine by transporting 400 grams or more of cocaine. Defendant appeals, arguing the trial court erred in denying his motion to suppress and motion to dismiss. For the following reasons, we affirm the trial court's denial of defendant's motion to suppress and find no error in the trial court's denial of defendant's motion to dismiss.

I. Background

In April of 2010, defendant was indicted for various drug offenses. On or about 7 December 2010, defendant filed a motion to suppress:

1. Any statement(s) or other information gleaned from an unnamed person or from unnamed persons who allegedly provided information to law enforcement officers causing the officers to conduct an investigation leading to the stop and subsequent search of a vehicle defendant was allegedly operating on or about December 10, 2009 in Guilford County, North Carolina; and
2. Any evidence obtained during a search of a Honda Civic automobile which defendant was allegedly operating on or about December 10, 2009 in Guilford County, North Carolina.

On 30 March 2011, the trial court entered an order denying defendant's motion to suppress based, *inter alia*, upon the following findings of fact:

16. Officer M.P. O'Hal was a uniformed officer of the Greensboro Police Department who had received narcotics interdiction and arrest training in his capacity as a K-9 handler and instructor during his 10 ½ year career with the Greensboro Police Department. During his career, he had also been certi-

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fied as a radar operator for speeding enforcement purposes, although his certification had expired because of a change in duties. Also, at that time he had received training in estimating the speed of moving vehicles.

17. Officer O’Hal was on patrol in the vicinity of the surveillance being conducted by the detectives and received a communication from Sergeant Koonce instructing him to stop the white Honda driven by the defendant and related that there was a large quantity of cocaine in the vehicle. Officer O’Hal was in uniform, but he was operating an unmarked Chevrolet Tahoe on the night in question; and

18. Officer O’Hal followed the white Honda for about 2 ½ to 3 miles. He paced it for about ½ mile and utilizing his speedometer, which was regularly calibrated, he formed the opinion that the Honda was traveling approximately 70 mph in a 60 mph zone. He conducted a “routine traffic stop” for that infraction and to investigate possible illegal narcotics activities.

19. He approached the vehicle on the passenger side and informed the driver, later identified as the defendant, Endy Lopez, that he had stopped him for speeding and asked hi[m] for a valid license or identification to which, the defendant [responded] that he did not know that he was speeding and that he was going to Winston for a construction job and just got off work. Not being able to produce a valid driver’s license, the defendant, Endy Lopez, produced a Mexican identification card and informed the officer that he did not have a valid operator’s license in North Carolina or in any other state.

20. Officer O’Hal continued asking Mr. Lopez questions about where he was going and what he was doing for the purpose of conducting a narcotics investigation, based upon his training and experience in that regard. Officer O’Hal noticed that the defendant was very well kept, had clean hands, and that his clothing was clean and “lightly dressed” for the conditions. In Officer O’Hal’s opinion, the cleanliness of the vehicle, the defendant’s clothing and his hands w[ere] not consistent with his response to questions indicating that he was employed in the construction business.

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21. The defendant was very polite and cooperative during the stop, but became visibly nervous by breathing rapidly when questioned further. His heart appeared to be beating rapidly, he exchanged glances with his passenger and both individuals looked at an open plastic bag in the back seat of the vehicle. Officer O’Hal noticed that the passenger, Garcia, was looking nervous and continuing to look into the back seat. Officer O’Hal also observed dryer sheets protruding from the open bag which also contained a yellow box of clear plastic wrap. Due to his training and experience in narcotics investigations, Officer O’Hal is aware that items such as these are used to package drugs and conceal their identity.

22. Officer O’Hal returned to his patrol vehicle and confirmed by radio communication that Mr. Lopez did not have a valid operator’s license. At this point, Officer O’Hal was able to determine that Garcia had an identification card from Virginia. Officer O’Hal then went back to the vehicle the defendant was operating and asked him whether he had anything illegal on his person or in the vehicle.

23. Officer O’Hal asked about the car and the defendant stated that it was not his car and that he was not sure of his friend’s name. Officer O’Hal then asked whether the defendant had “any weapons, brass knuckles, or drugs?” Officer O’Hal followed by asking permission to search the vehicle by saying “do you mind if I search the vehicle?” Mr. Lopez responded, “No, I don’t mind.” Officer O’Hal asked “do you understand?” to which the defendant gave the positive response, “I do.” In an attempt to confirm this permission, Officer O’Hal followed and asked “do you have a pistol?” The defendant stated, “O.K. you can look” whereupon Officer O’Hal conducted a search of the vehicle. . . .

24. After searching the passenger compartment of the vehicle, Officer O’Hal went to the front of the vehicle. As Officer O’Hal did this, he saw that the defendant appeared to grow very nervous and concerned. Officer O’Hal stated that he is aware th[r]ough his training and experience that contraband is often concealed in the air intake of vehicles. After he got to the front of the vehicle, Officer O’Hal opened the hood, which he knew the defendant had opened a few minutes earlier, and observed that the air intake compartment appeared to be cleaner tha[n] the rest of the parts in the engine compartment.

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He released several clips or latches which secured the top of the air filter compartment and removed the top disclosing a large quantity of powder cocaine wrapped in clear plastic.

25. The evidence shows that the encounter lasted a total of between 12-13 minutes. During the period of the stop and search, the defendant was polite and cooperative and did not appear to have any difficulty understanding English. The evidence also shows that the defendant did not limit the scope of Officer O’Hal[’s] search of the vehicle nor did he revoke his permission or consent at any time prior to, during, or after the search. Additionally, there is no evidence before the court that the passenger, Garcia, exercised control over the vehicle or in any way limited the search of the vehicle or revoked the permission given to search by the defendant.

Defendant was arrested, indicted, and received a trial by jury. The jury found defendant guilty of trafficking in cocaine by the unlawful possession of 400 grams or more of cocaine (“trafficking by possession”) and trafficking in cocaine by the unlawful transportation of 400 grams or more of cocaine (“trafficking by transportation”). The trial court entered judgments sentencing defendant to 175 to 219 months imprisonment for each conviction. Defendant appeals.

II. Motion to Suppress

[1] Defendant argues that the trial court erred in denying his motion to suppress. Defendant does not specifically challenge any finding of fact made by the trial court but rather generally argues that reasonable suspicion to extend the traffic stop to a search cannot be based upon (1) information from a confidential informant because the informant’s information was not corroborated or (2) Officer O’Hal’s personal observations once the stop was made. Furthermore, defendant contends that even if there was reasonable suspicion to extend the traffic stop, the State did not demonstrate that defendant’s consent for the search was voluntary. Finally, defendant argues that even if defendant’s voluntary consent is established, it did not extend to under the hood of the vehicle.

Defendant concedes that he “failed to object to the admission of the evidence[,]” and thus we may only review this argument for plain error.

As a result of the fact that [the defendant] did not object to the admission of the evidence in question at trial, we review the

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denial of his suppression motion utilizing a plain error standard of review. Plain error is an error that is so fundamental as to result in a miscarriage of justice or denial of a fair trial. In order to establish plain error, [the defendant] is required to show not only that there was error, but that absent the error, the jury probably would have reached a different result.

State v. Ellison, ___ N.C. App. ___, ___, 713 S.E.2d 228, 233-34 (2011) (citations, quotation marks, and footnote omitted). “But before a ruling can be plain error, it must be error.” *State v. Wade*, ___ N.C. App. ___, ___, 714 S.E.2d 451, 459 (2011). In reviewing a motion to suppress for errors,

[i]t is well established that the standard of review in evaluating a trial court’s ruling on a motion to suppress is that the trial court’s findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. In addition, findings of fact to which defendant failed to assign error are binding on appeal. Once this Court concludes that the trial court’s findings of fact are supported by the evidence, then this Court’s next task is to determine whether the trial court’s conclusions of law are supported by the findings. The trial court’s conclusions of law are reviewed *de novo* and must be legally correct.

State v. Campbell, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724 (2008) (citations, quotation marks, and brackets omitted).

Although much of defendant’s argument focuses on the confidential informant, we need not address these issues as we conclude that Officer O’Hal had a reasonable suspicion to search defendant’s vehicle based solely upon what he observed during the traffic stop. As to the traffic stop, defendant does not raise any arguments regarding the legality of the stop and does not contest the trial court’s binding finding of fact that Officer O’Hal personally observed defendant driving approximately 10 mph above the speed limit and pulled the vehicle defendant was driving over, at least in part, for that reason. *See State v. Jacobs*, 162 N.C. App. 251, 254, 590 S.E.2d 437, 440 (2004) (noting that unchallenged findings of fact are binding on appeal). Instead, defendant contends that the traffic stop was a pretext to search for drugs; however, this is irrelevant in light of the fact that defendant was lawfully stopped for speeding. *See State v. Parker*, 183 N.C. App. 1,

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11, 644 S.E.2d 235, 243 (2007) (“Because Detective Darisse acted with probable cause to believe that defendant committed a traffic infraction, his initial stop of defendant’s car did not violate the Fourth Amendment. It is irrelevant to the validity of the stop that Detective Darisse’s primary reason for following defendant was that he had received a complaint that defendant was trafficking methamphetamine or that Detective Darisse did not subsequently issue defendant a citation for speeding.” (citations and quotation marks omitted)).

Once a stop has been lawfully made,

the scope of the detention must be carefully tailored to its underlying justification. Once the original purpose of the stop has been addressed, in order to justify further delay, there must be grounds which provide the detaining officer with additional reasonable and articulable suspicion or the encounter must have become consensual. Where no grounds for a reasonable and articulable suspicion exist and where the encounter has not become consensual, a detainee’s extended seizure is unconstitutional.

State v. Jackson, 199 N.C. App. 236, 241–42, 681 S.E.2d 492, 496 (2009) (citations and quotation marks omitted).

Our Supreme Court has stated that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if the officer lacks probable cause. This Court has further noted that

Reasonable suspicion requires that the stop be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. All the State is required to show is a minimal level of objective justification, something more than an unparticularized suspicion or hunch. A court must consider the totality of the circumstances in determining whether the officer possessed a reasonable and articulable suspicion to make an investigatory stop.

Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.

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State v. Brown, ____ N.C. App. ____, ____, 713 S.E.2d 246, 248 (2011) (citations, quotation marks, ellipses, and brackets omitted).

Here, defendant does not contest the findings of fact that establish: (1) defendant informed Officer O’Hal he did not have a valid driver’s license in North Carolina or in any other state; (2) defendant told Officer O’Hal he worked construction and had “just got[ten] off work” but “defendant was very well kept, had clean hands, and . . . his clothing was clean” leading Officer O’Hal to conclude that “defendant’s clothing and his hands w[ere] not consistent with his response to questions indicating he was employed in the construction business[;]” (3) defendant “became visibly nervous by breathing rapidly[;] . . . his heart appeared to be beating rapidly[;] he exchanged glances with his passenger and both individuals looked at an open plastic bag in the back seat of the vehicle[;]” (4) Officer O’Hal “observed dryer sheets protruding from the open bag which also contained a yellow box of clear plastic wrap. Due to his training and experience in narcotics investigations, Officer O’Hal is aware that items such as these are used to package drugs and conceal their identity[;]” (5) “Officer O’Hal . . . confirmed by radio communication that . . . [defendant] did not have a valid operator’s license[;]” and (6) “Officer O’Hal asked about the car and the defendant stated that it was not his car and that he was not sure of his friend’s name.”

We first note that Officer O’Hal’s initial questions regarding defendant’s license, where defendant was going to and coming from, and defendant’s occupation were all within the scope of the traffic stop. See *State v. Aubin*, 100 N.C. App. 628, 633, 397 S.E.2d 653, 656 (1990) (“We recognize that an investigative stop and inquiry must be reasonably related in scope to the initial justification for it. In *Jones*, this Court refused to adopt a rule which would limit an officer’s ability to investigate suspicious matters uncovered during an investigatory stop. In *Morocco*, Trooper Lowry asked about the driver’s vehicle and registration in the patrol car while filling out a warning ticket. We held that such polite conversation was not improper. In this case, Trooper Lowry asked defendant about his plans for returning the car, whether he still lived in Quebec, what he did for a living and how the weather was in Florida. As in *Morocco*, this conversation did not exceed permissible police behavior. Lowry’s investigation was reasonable in subject matter and scope.” (citation and quotation marks omitted)), *disc. review denied and appeal dismissed*, 328 N.C. 334, 402 S.E.2d 433, *cert. denied*, 502 U.S. 842, 116 L.Ed. 2d 101 (1991). We conclude that Officer O’Hal had a reasonable suspicion to detain

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defendant based upon defendant's driving an unnamed "friend's" car without a valid driver's license, defendant's questionable story regarding his work and where he was going, defendant's nervous demeanor, and Officer O'Hal's observation of the presence of dryer sheets, which cover odor, and plastic wrap, which through his experience he knew was often used to package drugs. *See Brown*, ___ N.C. App. at ___, 713 S.E.2d at 248; *see also State v. Campbell*, 359 N.C. 644, 664, 617 S.E.2d 1, 14 (2005) ("Defendant had no driver's license with him and did not know the name of his friend to whom the car belonged. These [and other] articulable facts were sufficient to give rise to a reasonable suspicion in the mind of a trained police officer that defendant was involved in criminal activity."), *cert. denied*, 547 U.S. 1073, 164 L.Ed. 2d 523 (2006); *State v. Hernandez*, ___ N.C. App. ___, ___, 704 S.E.2d 55, 62 (2010) (noting that lack of a driver's license and providing an inconsistent story were factors to be considered in determining whether reasonable suspicion exists); *State v. Euceda-Valle*, 182 N.C. App. 268, 274-75, 641 S.E.2d 858, 863 ("We hold that the trial court's findings of fact support its legal conclusion that law enforcement had a reasonable suspicion necessary to conduct the exterior canine sniff of the vehicle. Defendant was extremely nervous and refused to make eye contact with the officer. In addition, there was smell of air freshener coming from the vehicle, and the vehicle was not registered to the occupants. And there was disagreement between defendant and the passenger about the trip to Virginia. We conclude that these facts support a basis for a reasonable and cautious law enforcement officer to suspect that criminal activity is afoot."), *disc. review denied or cert. denied*, 361 N.C. 698, 652 S.E.2d 923 (2007); *Jacobs*, 162 N.C. App. at 258, 590 S.E.2d at 442 ("Defendant's nervousness was, therefore, properly considered as one of several factors justifying further detention.")

As we have determined that Officer O'Hal had reasonable suspicion for further detaining defendant and thus requesting to search the vehicle defendant was driving, we must turn to defendant's argument regarding whether his consent to search the vehicle was voluntary. But defendant's argument regarding the involuntariness of his consent is based solely upon defendant's contention that Officer O'Hal did not have reasonable suspicion to detain him. Defendant contends that "[b]y the time consent was sought, [he] was being wrongfully detained, and, as such, his 'consent' was tainted by the illegality of the extended detention." As we have already concluded that Officer O'Hal did have reasonable suspicion upon which to further detain defendant, this argument is without merit.

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Lastly, defendant contends that even if he voluntarily consented to Officer O’Hal searching the vehicle he was driving, the consent did not extend to under the hood of the vehicle. Defendant argues that his “consent for Officer O’Hal to look in the car does not reasonably extend to opening the hood, dismantling the air filter compartment, and opening the compartment.”

The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect? . . .

The scope of a search is generally defined by its expressed object.

Florida v. Jimeno, 500 U.S. 248, 251, 114 L.E. 2d 297, 302-03 (1991) (citations and quotation marks omitted).

Officer O’Hal asked, “do you mind if I search the vehicle?” Thus, the “expressed object” was the vehicle. *Id.* at 251, 114 L.Ed. 2d at 303. Citing *Jimeno*, defendant contends that “[j]ust as consent to search a car does not extend to opening a closed case inside a trunk, consent to search here did not extend to opening the hood, disassembling the air filter compartment, and opening the air filter.” However, a “closed case” is an object separate and apart from the vehicle; whereas both the hood and air filter compartment are part of the vehicle.

As the Supreme Court stated in *Jimeno*,

[T]he terms of the search’s authorization were simple. Respondent granted Officer Trujillo permission to search his car, and did not place any explicit limitation on the scope of the search. . . .

. . . .

A suspect may of course delimit as he chooses the scope of the search to which he consents. . . . The community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.

Id. at 251-52, 114 L.Ed. 2d at 303 (citations, quotation marks, and brackets omitted).

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Here too, “the terms of the search’s authorization were simple” and defendant did not specifically exclude the hood of the vehicle nor did defendant object when Officer O’Hal began his search under the hood of the vehicle. *Id.* at 251, 114 L.Ed. 2d at 303. As Officer O’Hal received voluntary consent to search the vehicle, we conclude that this consent extended to a search under the hood of the vehicle. *See Aubin*, 100 N.C. App. at 634, 397 S.E.2d at 654-57 (determining there was no error in the trial court’s denial of defendant’s motion to suppress where a trooper searched a vehicle with consent including “the back seat area, including lifting the bottom portion of the seat up and out of position” and noting that “in *State v. Belk*, 268 N.C. 320, 150 S.E.2d 481 (1966), the Court held that defendant’s consent to the officer’s search of his trunk implied consent to search any part of his car. It found support for this holding in the fact that none of the defendants objected to the search once it was begun. In this case, defendant gave oral consent to a search of his car for contraband. He did not object in any way to what Trooper Lowry was doing. It was reasonable for Lowry to lift up the corner of the back seat in the progress of his search”).

In summary, we conclude that Officer O’Hal lawfully stopped defendant based upon his personal observations of defendant speeding. Once Officer O’Hal stopped the vehicle, he personally observed the circumstances which created reasonable suspicion of criminal activity for further detaining defendant. Officer O’Hal then requested consent to search the vehicle defendant was driving, and defendant voluntarily gave his consent to a search of the entire vehicle, without restrictions, which included under the hood and in the air filter compartment of the vehicle. Accordingly, we conclude that the trial court did not err in denying defendant’s motion to suppress, and therefore defendant certainly has not demonstrated plain error. Therefore, this argument is overruled.

III. Motion to Dismiss

[2] Defendant also contends that “the court erred by denying the defendant’s motion to dismiss the cocaine trafficking charges because the evidence was insufficient to show that [defendant] ‘knowingly’ possessed or transported cocaine[.]” (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 perpetra-

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tor 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, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted). To establish both trafficking by possession and trafficking by transportation the State must show that defendant knowingly possessed or transported, respectively, the requisite amount of cocaine. *See State v. Baldwin*, 161 N.C. App. 382, 391, 588 S.E.2d 497, 504 (2003) (“Trafficking in cocaine by possession and trafficking in cocaine by transportation . . . require the State to prove that the substance was knowingly possessed and transported.”); *see also* N.C. Gen. Stat. § 90-95(a), (h3) (2009).

Here, defendant contests only that the cocaine “was *knowingly* possessed and transported.” *Baldwin*, 161 N.C. App. at 391, 588 S.E.2d at 504 (emphasis added). However,

the courts in this State have held consistently that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Moreover, power to control the automobile where a controlled substance was found is sufficient, in and of itself, to give rise to the inference of knowledge and possession sufficient to go to the jury.

State v. Dow, 70 N.C. App. 82, 85, 318 S.E.2d 883, 886 (1984) (citation and quotation marks omitted). As the evidence showed defendant was driving the vehicle which contained cocaine, this alone was enough to show that defendant’s possession was knowing and to support the denial of the defendant’s motion to dismiss. *See id.*

IV. Conclusion

For the foregoing reasons, we conclude that the trial court properly denied defendant’s motion to suppress and motion to dismiss.

AFFIRMED in part; NO ERROR in part.

Judge Stephens concurs.

Judge Beasley concurs in a separate opinion.

BEASLEY, Judge.

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[219 N.C. App. 151 (2012)]

Though unpublished, because of the decision in *State v. Burrell*, 186 N.C. App. 132, 650 S.E.2d 66 (2007) where the facts and circumstances are parallel to those *sub judice*, I must concur.

STATE OF NORTH CAROLINA v. JAMIE DAQUAN LOWERY

No. COA11-673

(Filed 21 February 2012)

1. Evidence—doctor testimony not admitted—medical diagnosis or treatment exception inapplicable

The trial court did not err in a first-degree murder case by denying defendant's motion to admit the testimony of a doctor stating that defendant confessed to the killing only because one of the interviewing officers told him that he would receive the death penalty if he did not confess. Defendant saw the doctor for the purpose of preparing a defense, and the statement defendant sought to admit was not shown to be pertinent to medical diagnosis or treatment.

2. Constitutional Law—right to confront witnesses—private conversations with attorneys—attorney-client privilege

The trial court did not violate defendant's constitutional right to confront the witnesses against him in a first-degree murder case by refusing to permit defense counsel to cross-examine two coparticipants regarding conversations they had with their attorneys. The coparticipants' private conversations with their attorneys were protected by the attorney-client privilege. Further, defendant was permitted to inform the jury that the coparticipants were testifying under an agreement with the State and were provided a charge concession.

3. Sentencing—life imprisonment without parole—not cruel and unusual punishment

Although defendant contended that the trial court erred in a first-degree murder case by sentencing defendant to life imprisonment without the possibility of parole since it allegedly violated the 8th Amendment's prohibition against cruel and unusual punishment, the Court of Appeals has previously rejected defendant's argument.

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[219 N.C. App. 151 (2012)]

4. Jury—refusal to remove jury foreperson—failure to renew challenge during trial

The trial court did not err in a first-degree murder case by refusing to remove the jury foreperson from the jury. Defense counsel failed to renew his challenge as required by N.C.G.S. § 15A-1214(h)(2) since he did not attempt to renew the challenge until after the jury returned its verdict. Removal for cause must be requested during the trial.

5. Evidence—curtailing cross-examination—precluding doctor's testimony

The trial court did not err in a first-degree murder case by curtailing defendant's cross-examination of witnesses about privileged attorney-client conversations and precluding a doctor's testimony since defendant saw the doctor in preparation of his defense.

Appeal by defendant from judgment entered 9 February 2011 by Judge Claire Hill in Robeson County Superior Court. Heard in the Court of Appeals 30 November 2011.

Attorney General Roy Cooper, by Senior Deputy Attorney General Robert T. Hargett and Special Deputy Attorney General Melissa L. Trippe, for the State.

William H. Dowdy for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Jamie Daquan Lowery appeals from a judgment entered 9 February 2011 after a jury found him guilty of first degree murder pursuant to the felony murder rule. Defendant argues on appeal that: (1) the trial court erred in denying his motion to admit the testimony of Brad Fisher, Ph.D.; (2) that his constitutional right to confront the witnesses against him was violated when the trial court refused to permit defense counsel to cross examine witnesses regarding conversations they had with their attorneys; (3) the sentence of life imprisonment without the possibility of parole constituted cruel and unusual punishment; (4) the trial court erred in denying his motion to remove the jury foreperson; and (5) the trial court denied his right to present a full and complete defense. After careful review, we find no error.

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Background

On 2 July 2008, Alfred Parnell was shot twice and killed while seated in his truck, which was located near a dumpster area behind a grocery store in Robeson County, North Carolina. It is undisputed that on 2 July 2008, defendant, Joshua Goodson, and Nicholas Blackmon drove to the same dumpster area behind the grocery store where Parnell was parked. Both Goodson and Blackmon were questioned by police in July 2008 and denied any knowledge regarding Parnell's death. However, the two men later cooperated with the investigation and testified against defendant at trial. Goodson and Blackmon admitted before the jury that they had each received a "charge concession," and, according to its terms, had not been charged in connection with Parnell's death. They further testified that they did not know that they would receive a charge concession when they agreed to cooperate with the investigation.

Goodson testified that defendant and Blackmon were passengers in his car on 2 July 2008. He stated that he pulled up to the dumpster area behind the grocery store and placed some bags in a dumpster. He then pulled into the parking lot of the grocery store and went inside. As he was going inside, he saw defendant get out of the car and walk back to the dumpster area. When Goodson returned to the car, he saw defendant "jogging" back to the car "from the road." Defendant then made the statement: "'[M]an, I be trippin.'" However, defendant did not make any incriminating statements related to Parnell's death. Goodson claimed that he did not see defendant with a weapon that day and that he was unaware that Parnell had been shot until he was later informed by his brother, a Lumberton police officer.

Blackmon testified that after Goodson parked the car at the grocery store, defendant exited the car and stated: "'I'm going to get his ass.'" When defendant returned to the car, he said that he shot Parnell because "'he wouldn't give it up.'" Blackmon also testified that he did not see defendant with a weapon that day.

Defendant was arrested on 5 August 2008. He was 16 years old at the time. In his initial interview with the police, he denied killing Parnell; however he later confessed to the shooting. On 9 February 2011, a jury convicted defendant of first degree murder pursuant to the felony murder rule, the underlying felony being robbery with a dangerous weapon. The trial court sentenced defendant to life imprisonment without the possibility of parole. Defendant timely appealed to this Court.

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Discussion

I.

[1] First, defendant argues that the trial court erred in denying his motion to admit the testimony of Dr. Fisher. Defendant claims that Dr. Fisher would have testified that defendant told Dr. Fisher that he confessed to the killing only because one of the interviewing officers told him that he would receive the death penalty if he did not confess. Defendant claims that while his statement to Dr. Fisher constituted hearsay, it was admissible pursuant to Rule 803(4) of the North Carolina Rules of Evidence. Defendant's argument is without merit.

A trial court's determination concerning the extent to which an out-of-court statement constitutes inadmissible hearsay is subject to *de novo* review. *State v. Miller*, 197 N.C. App. 78, 87–88, 676 S.E.2d 546, 552, *disc. review denied*, 363 N.C. 586, 683 S.E.2d 216 (2009). Rule 803(4), the medical-diagnosis exception to the hearsay rule, states:

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

N.C. Gen. Stat. § 8C-1, Rule 803(4) (2009). Consequently, statements made for the purpose of obtaining medical diagnosis or treatment do not constitute inadmissible hearsay. *Id.*

In evaluating whether a statement is admissible pursuant to Rule 803(4), the trial court must determine that (1) “the declarant intended to make the statements at issue in order to obtain medical diagnosis or treatment” and that (2) “the declarant's statements were reasonably pertinent to medical diagnosis or treatment.” *State v. Hinnant*, 351 N.C. 277, 289, 523 S.E.2d 663, 670–71 (2000), *cert. denied*, 544 U.S. 982, 161 L. Ed. 2d 737 (2005). In making such a determination, the trial court must consider “all objective circumstances of record surrounding declarant's statement[.]” *Id.* at 287–89, 523 S.E.2d at 670.

Here, it is evident that defendant was not seeking a diagnosis of his condition for the purpose of obtaining treatment. “Rather, the record clearly shows that the defendant's statements . . . were made for the purpose of preparing and presenting a defense to the crimes for which he stood accused.” *State v. Jones*, 339 N.C. 114, 145, 451 S.E.2d 826, 842 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). At oral arguments in this case, defendant's appellate coun-

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sel admitted that defendant saw Dr. Fisher with the hope that any mental illness he may have had could be diagnosed and used as a defense to the crimes charged. Even though defendant may have wanted continued treatment if he did, in fact, have a mental illness, his primary objective was to present the diagnosis as a defense.

As stated in *Jones*, “[a] person’s motivation to speak truthfully is much greater when he seeks diagnosis or treatment of a medical condition than when he seeks diagnosis in order to prepare a defense to criminal charges.” *Id.* Defendant’s motivation in this case was to prepare a defense to the crimes charged; therefore, the statements “lacked the indicia of reliability based on the self-interest inherent in obtaining appropriate medical treatment.” *State v. Stafford*, 317 N.C. 568, 574, 346 S.E.2d 463, 467 (1986). Consequently, we hold that defendant did not satisfy the first prong of the test set out in *Hinnant*.

As for the second prong of the *Hinnant* test, defendant has made no argument as to how his statement that he only confessed because an officer told him he would receive the death penalty if he did not confess was “reasonably pertinent to medical diagnosis or treatment.” *Hinnant*, 351 N.C. at 289, 523 S.E.2d at 671. Defendant does not contend that his statement had anything to do with a mental illness he may have had at the time. *See State v. Gattis*, 166 N.C. App. 1, 8-9, 601 S.E.2d 205, 210 (2004) (holding that exculpatory statement made by defendant to a nurse and recorded in the nurse’s notes was not admissible under Rule 803(4) because it was not reasonably pertinent to diagnosis and treatment).

It is relevant to acknowledge that defendant never sought to suppress his confession. Rather, defendant sought to admit a statement that would have cast doubt on the veracity of his confession without his having to take the stand or challenge the validity of the confession in any way. To hold that this statement was admissible, without any greater showing, would set a harmful precedent that would allow a defendant to improperly introduce exculpatory statements to the jury under the auspices of Rule 803(4). A defendant would only have to make the exculpatory statement to a medical professional and then claim that he saw the medical professional for the purposes of diagnosis or treatment. Clearly, defendant seeks to expand Rule 803(4) far beyond what was intended by the legislature or what is allowed by our caselaw.

In sum, because defendant saw Dr. Fisher for the purpose of preparing a defense, and the statement defendant sought to admit

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was not shown to be pertinent to a medical diagnosis or treatment, we hold that defendant's statement to Dr. Fisher was not admissible under Rule 803(4). Therefore, the trial court did not err in denying defendant's motion to admit Dr. Fisher's testimony.

II.

[2] Next, defendant argues that his constitutional right to confront the witnesses against him was violated when the trial court refused to permit defense counsel to cross examine Blackmon and Goodson regarding conversations they had with their attorneys in July 2008. Specifically, defendant sought to inquire as to conversations concerning the State's charge concession should Blackmon and Goodson testify against defendant. Defendant claims that, contrary to their trial testimony, these two witnesses knew that the State was offering a charge concession when they agreed to testify.

This Court reviews *de novo* whether the right to confrontation was violated. *State v. Hurt*, ___ N.C. App. ___, ___, 702 S.E.2d 82, 87 (2010). The Confrontation Clause, applied to the states by the Fourteenth Amendment, protects the fundamental right of an accused "to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. "It aims to ensure the evidence is reliable 'by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.'" *State v. Jackson*, ___ N.C. App. ___, ___, 717 S.E.2d 35, 38 (2011) (quoting *Maryland v. Craig*, 497 U.S. 836, 845, 111 L. Ed. 2d 666, 678 (1990)). "The elements of confrontation include the witness's: physical presence; under-oath testimony; cross-examination; and exposure of his demeanor to the jury." *Id.* "Confrontation means more than being allowed to confront the witness physically. Our cases construing the confrontation clause hold that a primary interest secured by it is the right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315, 39 L. Ed. 2d 347, 353 (1974) (citation, quotation marks omitted, and alteration omitted).

Here, defendant sought to question the witnesses about conversations they had with their attorneys, and defendant claims that his confrontation rights were violated because he was not permitted to do so. We hold that Goodson's and Blackmon's private conversations with their attorneys were protected by the attorney-client privilege and the trial court did not err in denying defendant's motion to seek information protected by this privilege.

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It is well established that:

A privilege exists if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

State v. Murvin, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981). Defendant does not explicitly argue that the communications between the witnesses and their attorneys do not meet this test. Rather, defendant claims that Blackmon and Goodson had no 6th Amendment right to counsel when they met with detectives in July 2008, and, therefore, their communications with their attorneys were not privileged. Defendant confuses the issue. Goodson and Blackmon had not been arrested when they were questioned by police. The two men sought advice of counsel and their respective counsel had discussions with the State that resulted in Goodson and Blackmon agreeing to testify against defendant. As a result, they were never charged with a crime in connection with the killing. Therefore, the issue is not whether Blackmon and Goodson availed themselves of their 6th Amendment right to counsel; rather, the issue is whether the attorney-client privilege prohibited defense counsel from inquiring about the men's private conversations with their attorneys. As stated *supra*, the privilege applies in this instance.

Still, defendant claims that Blackmon and Goodson waived any privileges they may have had when they took the stand to testify. Again defendant confuses the issue, citing cases that pertain to a waiver of a defendant's 5th Amendment rights when he or she takes the stand to testify. Here, Blackmon and Goodson agreed to testify regarding the events surrounding the death of Mr. Parnell. Pursuant to N.C. Gen. Stat. § 15A-1054 (2009), defendant was made aware of the charge concessions and was permitted to inquire about them in order to reveal any ulterior motivation on the part of Goodson and Blackmon. However, the private communications that occurred between the two men and their attorneys regarding their respective agreements with the State were not admissible and the attorney-client privilege was not waived when they took the stand to testify in accordance with their agreements.

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Defendant briefly argues that any privileges Blackmon and Goodson may have had should “give way” because such privileges were “in derogation of the search for truth.” Defendant cites *Davis*, 415 U.S. at 319, 39 L. Ed. 2d at 355, where the United States Supreme Court held that the defendant was denied his Confrontation Clause rights when the trial court refused to allow him to question a witness about his prior adjudication of juvenile delinquency, which was inadmissible under state law, and his probation status. Defendant argues that, like the defendant in *Davis*, he should have been permitted to ask the witnesses about matters that are generally inadmissible to reveal the witnesses’ “bias and prejudice.” *Id.* at 311, 39 L. Ed. 2d at 351. This case is inapposite. In *Davis*, the Court held that “the State’s desire that [the witness] fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself.” *Id.* at 320, 39 L. Ed. 2d at 356. In the present case, defendant asks this Court to vitiate the attorney-client privilege, not merely the right to testify without embarrassment.

Despite defendant’s claim that the attorney-client privilege should “give way,” to a criminal defendant’s right to question a witness about private conversations with his or her attorney, our Supreme Court has recognized the vital importance of the privilege, stating:

The attorney-client privilege is unique among all privileged communications. In practice, communications between attorney and client can encompass *all* subjects which may be discussed in any other privileged relationship and indeed all subjects within the human experience. As such, it is the privilege most beneficial to the public, both in facilitating competent legal advice and ultimately in furthering the ends of justice.

In re Miller, 357 N.C. 316, 333, 584 S.E.2d 772, 785 (2003). Defendant has not presented any caselaw that would suggest that the attorney-client privilege should be nullified so that a defendant can question a witness about confidential conversations for the purpose of impeachment. Granted, defendant was unable to prove his theory that the witnesses were aware of the charge concessions offered by the State when they agreed to testify; however, defendant was permitted to inform the jury that Goodson and Blackmon were testifying pursuant to an agreement with the State and were provided a charge concession. It is unlikely that any questioning regarding conversations between the two men and their attorneys would have produced any

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additional information that would have aided the jury in the “search for truth.”

Finally, defendant claims that the North Carolina Code of Professional Responsibility’s requirement of candor to the tribunal “outweighed Goodson’s and Blackmon’s attorneys’ obligation to assist them[.]” This argument is irrelevant to the matter at hand. Defendant has not cited any authority that would require Goodson’s and Blackmon’s attorneys to come forth during the trial and inform the trial court that the witnesses did, in fact, know that the State was offering them a charge concession when they agreed to testify.

In sum, the trial court did not err in refusing to allow defendant to question the witnesses about their conversations with their attorneys during charge concession negotiations. These conversations were protected by the attorney-client privilege. Moreover, defendant was allowed to inquire before the jury regarding the agreements ultimately reached with the State. The witnesses’ potential bias and/or ulterior motives for testifying were made known to the jury. Consequently, assuming, *arguendo*, that defendant should have been permitted to engage in this line of questioning, we hold that any such error was harmless beyond a reasonable doubt. *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997) (“However, even when a defendant objects, this constitutional error will not merit a new trial where the State shows that the error was harmless beyond a reasonable doubt.”).

III.

[3] Next, defendant argues that the trial court erred in sentencing him to life imprisonment without the possibility of parole because the sentence violated the 8th Amendment’s prohibition against cruel and unusual punishment. This Court has rejected defendant’s argument in *State v. Lee*, 148 N.C. App. 518, 525, 558 S.E.2d 883, 888, *appeal dismissed*, 355 N.C. 498, 564 S.E.2d 228, *cert. denied*, 537 U.S. 955, 154 L. Ed. 2d 305 (2002). The Court stated that the “[d]efendant’s punishment is severe but it is not cruel or unusual in the constitutional sense.” *Id.* (citation and quotation marks omitted). This panel is bound by the holding in *Lee*.

Defendant cites *Graham v. Florida*, ___ U.S. ___, ___, 176 L. Ed. 2d 825, 850 (2010), where the United States Supreme Court held that “[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.” This

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holding is not controlling in the case *sub judice* because defendant was convicted of committing a homicide.

IV.

[4] Defendant claims that the trial court erred in refusing to remove the jury foreperson from the jury. During jury selection, defendant had exhausted his peremptory challenges, but asked the trial court to “strike” Tonya Howell for cause. The transcript of the jury *voir dire* is not available, but according to defendant’s trial counsel’s affidavit, Ms. Howell stated that she knew the Robeson County District Attorney, Johnson Britt. She revealed, *inter alia*, that Mr. Britt was her son’s soccer coach, that she had spoken with him on over 20 occasions, and that she was pleased with the way Mr. Britt had handled various criminal cases involving her son. The trial court denied defense counsel’s request to strike Ms. Howell for cause. Ms. Howell subsequently served as the jury foreperson. After the jury returned its verdict, defendant renewed his challenge.

The decision “ [w]hether to allow a challenge for cause in jury selection is . . . ordinarily left to the sound discretion of the trial court which will not be reversed on appeal except for abuse of discretion.’ ” *State v. Stephens*, 347 N.C. 352, 365, 493 S.E.2d 435, 443 (1997) (quoting *State v. Locklear*, 331 N.C. 239, 247, 415 S.E.2d 726, 731 (1992)), *cert. denied*, 525 U.S. 831, 142 L. Ed. 2d 66 (1998).

N.C. Gen. Stat. § 15A-1214(h) (2009) sets forth the requirements for preservation of the trial court’s denial of a request to strike a juror for cause, stating:

(h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:

- (1) Exhausted the peremptory challenges available to him;
- (2) Renewed his challenge as provided in subsection (i) of this section; and
- (3) Had his renewal motion denied as to the juror in question.

N.C. Gen. Stat. § 15A-1214(i) states:

- (i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:

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- (1) Had peremptorily challenged the juror; or
- (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

The judge may reconsider his denial of the challenge for cause, reconsidering facts and arguments previously adduced or taking cognizance of additional facts and arguments presented. If upon reconsideration the judge determines that the juror should have been excused for cause, he must allow the party an additional peremptory challenge.

It appears from the record that defense counsel in this case failed to renew his challenge as required by N.C. Gen. Stat. § 15A-1214(h)(2). Defendant did not attempt to renew the challenge until after the jury returned its verdict. Clearly, N.C. Gen. Stat. § 15A-1214(h)-(i) contemplates removal for cause *during the trial*. Defendant has, therefore, waived this argument on appeal. *See State v. Sanders*, 317 N.C. 602, 608, 346 S.E.2d 451, 456 (1986) (stating that the “statutory method for preserving a defendant’s right to seek appellate relief when a trial court refuses to allow a challenge for cause is mandatory and is the only method by which such rulings may be preserved for appellate review”); *accord State v. Morgan*, 359 N.C. 131, 148, 604 S.E.2d 886, 896-97 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005).

V.

[5] Finally, defendant argues that “the trial court’s curtailment of appellant’s cross-examination of witnesses and preclusion of Dr. Fisher’s testimony, violated [defendant’s] presentation of a full and complete defense. Because the trial court did not err in excluding Dr. Fisher’s testimony and refusing to allow defendant to inquire about privileged attorney-client conversations, the trial court did not limit defendant’s right to present a complete defense.

No Error.

Judges GEER and HUNTER, Robert N., Jr. concur.

STATE v. ALSHAIF

[219 N.C. App. 162 (2012)]

STATE OF NORTH CAROLINA v. SHAMAKH ALSHAIF

No. COA11-817

(Filed 21 February 2012)

Criminal Law—guilty plea—attorneys not required to advise client of immigration consequences

The trial court did not err in an assault with a deadly weapon inflicting serious injury case by concluding that the United States Supreme Court's decision in *Padilla v. Kentucky*, was inapplicable to defendant's case since it was a new rule of constitutional law that was not retroactively applicable on collateral review. Prior to *Padilla*, neither our state courts nor federal courts required counsel to advise a client of the immigration consequences of a guilty plea. *Padilla* did not establish a watershed rule of criminal procedure and did not fall within either of the *Teague* exceptions.

Appeal by Defendant from judgment entered 6 February 2007 and order entered 17 November 2010 by Judge Robert F. Floyd, Jr. in Superior Court, Robeson County. Heard in the Court of Appeals 15 November 2011.

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

McKinney Justice Perry & Coalter, PA, by J. Scott Coalter, for Defendant-Appellant.

McGEE, Judge.

Shamakh Alshaif (Defendant) pleaded guilty to one count of assault with a deadly weapon inflicting serious injury (AWDWISI) on 6 February 2007. Defendant received a suspended sentence of twenty-five to thirty-nine months and was placed on thirty-six months of supervised probation. Defendant filed a motion for appropriate relief (MAR) on 5 October 2010, arguing that his guilty plea was not intelligently and voluntarily made and that he had received ineffective assistance of counsel. The trial court denied Defendant's MAR in an order entered 17 November 2010. Defendant petitioned this Court for a writ of certiorari, which was granted by an order entered 2 May 2011.

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[219 N.C. App. 162 (2012)]

I. Facts

Defendant, a lawful permanent resident of the United States, worked as a cashier at a convenience store in Maxton, North Carolina. A customer entered the store to purchase beer and cigarettes on 30 January 2006. An argument occurred between Defendant and the customer and Defendant shot the customer in the arm. Defendant was arrested on 31 January 2006 and charged with AWDWISI, and was indicted on that charge on 19 June 2006.

Defendant was represented by attorney David Branch (Mr. Branch). Defendant met with Mr. Branch several times and informed Mr. Branch of his lawful permanent resident status. Defendant stated in an affidavit filed with his MAR that Mr. Branch never advised him of the immigration consequences of a conviction for AWDWISI. Instead, Mr. Branch advised Defendant to plead guilty to AWDWISI. Defendant further stated in his affidavit that Mr. Branch never told him that “a conviction for AWDWISI was an ‘aggravated felony’ for immigration purposes” that would render Defendant deportable and would have other adverse consequences for Defendant’s immigration status.

After Defendant completed his probationary sentence, he was arrested by agents of the U.S. Department of Homeland Security on 7 July 2010. Defendant was served with a notice to appear at removal proceedings. Defendant’s MAR also included an affidavit from attorney Jeremy McKinney (Mr. McKinney), in which Mr. McKinney stated that Defendant had “been charged with removability solely due to a Robeson County, NC conviction for Felony Assault with a Deadly Weapon.” Mr. McKinney also stated that Defendant was “not only clearly deportable, but [was] also ineligible for any relief from removal[,] . . . [and was] ineligible to re-seek permanent residency.” Mr. McKinney further stated: “If [Defendant’s] conviction is not vacated, I have no doubt [Defendant] will be ordered deported[.]”

Defendant argued in his MAR that Mr. Branch’s counsel was ineffective on the grounds stated in *Padilla v. Kentucky*, ___ U.S. ___, 176 L. Ed. 2d 284 (2010). The trial court denied Defendant’s MAR, finding that *Padilla* was inapplicable to Defendant’s case because *Padilla* was decided after Defendant’s conviction and that the rule announced in *Padilla* was a “new rule” and, therefore, was not retroactively applicable. Defendant appeals.

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II. Issues on Appeal

Defendant raises three issues on appeal: (1) whether the trial court erred in ruling that the holding of the United States Supreme Court in *Padilla* was not retroactively applicable to his case; (2) whether the trial court erred in determining that Defendant did not receive ineffective assistance of counsel; and (3) whether the trial court erred in determining that Defendant's guilty plea was made freely, voluntarily, and understandingly.

III. Applicability of PadillaA. Standard of Review

We must first determine whether *Padilla* announced a "new rule," or merely applied an already applicable rule to a new set of facts. If we determine *Padilla* announced a new rule, then we must determine whether that new rule is applicable retroactively. North Carolina applies the test established by the United States Supreme Court in *Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334 (1989), to determine "retroactivity for new federal constitutional rules of criminal procedure on state collateral review." *State v. Zuniga*, 336 N.C. 508, 513, 444 S.E.2d 443, 446 (1994).

The United States Supreme Court has stated that "[a] new rule is defined as 'a rule that . . . was not "dictated" by precedent existing at the time the defendant's conviction became final.'" *Whorton v. Bockting*, 549 U.S. 406, 416, 167 L. Ed. 2d 1, 11 (2007)' (citations omitted). Under the *Teague* test,

new rules of criminal procedure may not be applied retroactively . . . unless they fall within one of two narrow exceptions. [*Teague*,] 489 U.S. at 310, 103 L. Ed. 2d at 356. Under the first exception, a new rule will be applied retroactively if it "place[s] an entire category of primary conduct beyond the reach of the criminal law," or "prohibit[s] the imposition of a certain type of punishment for a class of defendants because of their status or offense." *Sawyer v. Smith*, 497 U.S. 227, 241, 111 L. Ed. 2d 193, 211 (1990). Under the second exception, a new rule will be applied retroactively if it is a "watershed rule[] of criminal procedure' implicating the fundamental 'fairness and accuracy of the criminal proceeding.'" *Saffle v. Parks*, 494 U.S. 484, 495, 108 L. Ed. 2d 415, 429 (1990) (quoting *Teague*, 489 U.S. at 311, 103 L. Ed. 2d at 356).

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Zuniga, 336 N.C. at 511-12, 444 S.E.2d at 445.

B. The Rule Created by *Padilla*

In *Padilla*, the United States Supreme Court addressed the issue of whether the Sixth Amendment guarantee of effective assistance of counsel required defense counsel to advise an immigrant defendant of the possibility of deportation before the immigrant defendant entered a guilty plea. The defendant in *Padilla* was a Honduran native who had been a lawful permanent resident of the United States for over forty years and had served in the United States military during the Vietnam War. *Padilla*, ___ U.S. at ___, 176 L. Ed. 2d at 289-90. The defendant had entered a guilty plea to the transportation of “a large amount of marijuana[,]” and was subject to removal from the United States as a result thereof. *Id.* at ___, 176 L. Ed. 2d at 290. In a post-conviction proceeding, the defendant claimed “that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he ‘did not have to worry about immigration status since he had been in the country so long.’” *Id.* at ___, 176 L. Ed. 2d at 290. The Supreme Court granted *certiorari* in order to determine whether the defendant’s “counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country.” *Id.* at ___, 176 L. Ed. 2d at 290.

After a review of the history of immigration law in the United States, the Supreme Court began its discussion by concluding the following:

These changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

Id. at ___, 176 L. Ed. 2d at 292-93. Citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), the Supreme Court further concluded that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. [And, therefore,] *Strickland* applies to [the defendant’s] claim.” *Padilla*, ___ U.S. at ___, 176 L. Ed. 2d at 294.

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The Supreme Court then applied the *Strickland* test to determine whether the performance of attorneys who failed to advise about the possibility of removal “‘fell below an objective standard of reasonableness.’” *Id.* at ___, 176 L. Ed. 2d at 294 (quoting *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693). The Court observed that “[t]he first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: ‘The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” *Padilla*, ___ U.S. at ___, 176 L. Ed. 2d at 294 (citation omitted). The Court also observed that

“[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable[,]” . . . [and] may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

Id. at ___, 176 L. Ed. 2d at 294 (citations omitted).

The Supreme Court stated that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.” *Id.* at ___, 176 L. Ed. 2d at 294. The Court also observed in *Padilla* that “[i]n the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for [the defendant’s] conviction.” *Id.* at ___, 176 L. Ed. 2d at 295. Conceding that “[t]here will . . . undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain[,]” the Court noted that “[t]he duty of the private practitioner in such cases is more limited.” *Id.* at ___, 176 L. Ed. 2d at 296. The Court concluded that “[w]hen the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” *Id.* at ___, 176 L. Ed. 2d at 296. However, “when the deportation consequence is truly clear, as it was in [*Padilla*], the duty to give correct advice is equally clear.” *Id.* at ___, 176 L. Ed. 2d at 296.

The Court then rejected the Solicitor General’s request “to conclude that *Strickland* applie[d] to [the defendant’s] claim only to the extent that he has alleged affirmative misadvice.” *Id.* at ___, 176 L. Ed. 2d at 296. The Court ultimately held that “counsel must

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inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.” *Id.* at ___, 176 L. Ed. 2d at 299.

Padilla was a seven to two decision, accompanied by a concurring opinion authored by Justice Alito and joined by Chief Justice Roberts. A dissenting opinion was authored by Justice Scalia and was joined by Justice Thomas. In his concurring opinion, Justice Alito wrote that he agreed with the majority to the extent that an attorney “must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney.” *Id.* at ___, 176 L. Ed. 2d at 299 (Alito, J., concurring). However, Justice Alito did not “agree with the Court that the attorney must attempt to explain what those consequences may be.” *Id.* at ___, 176 L. Ed. 2d at 299-300 (Alito, J., concurring). Justice Alito further observed that:

Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction. *See, e.g., United States v. Gonzalez*, 202 F.3d 20, 28 (CA1 2000) (ineffective-assistance-of-counsel claim fails if “based on an attorney’s failure to advise a client of his plea’s immigration consequences”); *United States v. Banda*, 1 F.3d 354, 355 (CA5 1993) (holding that “an attorney’s failure to advise a client that deportation is a possible consequence of a guilty plea does not constitute ineffective assistance of counsel”); *see generally Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 699 (2002) (hereinafter *Chin & Holmes*) (noting that “virtually all jurisdictions”—including “eleven federal circuits, more than thirty states, and the District of Columbia”—“hold that defense counsel need not discuss with their clients the collateral consequences of a conviction,” including deportation).

Id. at ___, 176 L. Ed. 2d at 300 (Alito, J., concurring).

C. Analysis

We begin by noting that the question of whether *Padilla* created a new rule and, if so, whether the rule is retroactively applicable

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under *Teague*, has been addressed by several state appellate courts, federal district courts, and federal circuit courts of appeal. *Compare Chaidez v. United States*, 655 F.3d 684, 689 (7th Cir. 2011) (holding retroactivity jurisprudence demonstrated “considerations [that] convince us that *Padilla* announced a new rule”); *United States v. Orocio*, 645 F.3d 630, 641 (3d Cir. 2011) (“We therefore hold that, because *Padilla* followed directly from *Strickland* and long-established professional norms, it is an ‘old rule’ for *Teague* purposes and is retroactively applicable on collateral review.”); *United States v. Chang Hong*, No. 10-6294, ___ F.3d ___, ___, 2011 WL 3805763, *7 (10th Cir. 2011) (“We disagree [with *Orocio*] and believe *Padilla* marked a dramatic shift when it applied *Strickland* to collateral civil consequences of a conviction—a line courts had never crossed before.”). *See also Com. v. Clarke*, 949 N.E.2d 892, 903 (Mass. 2011) (holding that *Padilla* “is the definitive application of an established constitutional standard on a case-by-case basis, incorporating evolving professional norms (on which the standard relies) to new facts. It is not the creation of a new constitutional rule.”); and *Barrios-Cruz v. State*, 63 So.3d 868, 873 (Fla.App. 2 Dist. 2011) (“While we recognize that *Padilla* represents an important development enumerating both a new right for defendants and a new duty for counsel, we do not find that it rises to the level of those rare ‘fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding.’”).

In determining whether *Padilla* is retroactively applicable, we find the reasoning of the Tenth Circuit in *Chang Hong* persuasive and join with those courts holding that *Padilla* announces a new rule of constitutional law and is not retroactively applicable on collateral review. Under *Teague*, a rule is new if it “‘breaks new ground,’ ‘imposes a new obligation on the States or the Federal Government,’ or was not ‘dictated by precedent existing at the time the defendant’s conviction became final.’” *Graham v. Collins*, 506 U.S. 461, 467, 122 L.Ed.2d 260, 269 (1993) (quoting *Teague*, 489 U.S. at 301, 103 L. Ed. 2d at 349). A rule is old if a “court considering [the defendant’s] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.” *O’Dell v. Netherland*, 521 U.S. 151, 156, 138 L. Ed. 2d 351, 358 (citation omitted).

In *Chang Hong*, the Tenth Circuit Court of Appeals conceded that *Padilla* was “grounded in *Strickland*,” but nonetheless concluded that *Padilla* created a new rule. *Chang Hong*, ___ F.3d at ___, 2011

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WL 3805763 at *7. The Tenth Circuit noted that “[b]efore *Padilla*, most state and federal courts had considered the failure to advise a client of potential collateral consequences of a conviction to be outside the requirements of the Sixth Amendment.” *Id.* at ____, 2011 WL 3805763 at *6. The court further observed that “[a]ll of these courts . . . thought the rule in *Padilla* was not dictated or compelled by Court precedent. It goes without saying these are some of the ‘reasonable jurists’ we must survey to determine if *Padilla* is a new rule.” *Id.* at ____, 2011 WL 3805763 at *6.

The Tenth Circuit also analyzed the concurring and dissenting opinions in *Padilla*:

Padilla, a 7–2 decision, generated both a strong concurrence and dissent. In a concurrence, Justice Alito (joined by Chief Justice Roberts) stated “the Court’s decision marks a major upheaval in Sixth Amendment law” and noted the majority failed to cite any precedent for the premise that a defense counsel’s failure to provide advice concerning the immigration consequences of a criminal conviction violated a defendant’s right to counsel. *Padilla*, [__ U.S. at __, 176 L. Ed. 2d at 304] (Alito, J., concurring in judgment); *see also id.* at [__, 176 L. Ed. 2d at 300] (noting the majority’s “dramatic departure from precedent”); *id.* at [__, 176 L. Ed. 2d at 304] (“[T]he Court’s view has been rejected by every Federal Court of Appeals to have considered the issue thus far.”); *id.* at [__, 176 L. Ed. 2d at 305] (“The majority seeks to downplay its dramatic expansion of the scope of criminal defense counsel’s duties under the Sixth Amendment.”).

Similarly, Justice Scalia in a dissent (joined by Justice Thomas), argued the Sixth Amendment right to counsel does not extend to “advice about the collateral consequences of conviction” and that the Court, until *Padilla*, had limited the Sixth Amendment to advice directly related to defense against criminal prosecutions. *Id.* at [__, 176 L. Ed. 2d at 308] (Scalia, J., dissenting); *see also id.* at [__, 176 L. Ed. 2d at 308-09] (“There is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand.”). We take the concurrence and dissent as support for our conclusion that reasonable jurists did not find the rule in *Padilla* compelled or dictated by the Court’s prior precedent.

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Id. at ____, 2011 WL 3805763 at *6.

The Tenth Circuit concluded its analysis by noting the following: “While the Supreme Court had never foreclosed the application of *Strickland* to collateral consequences of a conviction, it had never applied *Strickland* to them either.” *Id.* at ____, 2011 WL 3805763 at *7. The Tenth Circuit concluded that “a reasonable jurist at the time of [the defendant’s] conviction would not have considered Supreme Court precedent to compel the application of *Strickland* to the immigration consequences of a guilty plea. Indeed, we as a court did not feel so compelled prior to *Padilla*.” *Id.* at ____, 2011 WL 3805763 at *7.

Persuaded by the reasoning of *Chang Hong*, we conclude that *Padilla* announced a new rule. Prior to *Padilla*, neither our state courts nor federal courts had interpreted *Strickland* as requiring counsel to advise a client of the immigration consequences of a guilty plea. *See e.g., Padilla*, ___ U.S. at ____, 176 L. Ed. 2d at 300 (Alito, J., concurring) (“Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction.”). We are aware that *Strickland* is a fact-specific test, and must naturally evolve over time as practical norms and underlying legal consequences change. *Id.* at ____, 176 L. Ed. 2d at 294-95. However, we find that *Padilla* was an application of *Strickland* that would have been unreasonable to expect attorneys to have foreseen—especially those attorneys unfamiliar with immigration law. We therefore hold that *Padilla* announced a new rule.

D. The *Teague* Exceptions

Having determined that *Padilla* announced a new rule, we must determine whether one of the exceptions set forth under *Teague* applies. “A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a ‘watershed rul[e] of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.” *Whorton*, 549 U.S. at 416, 167 L. Ed. 2d at 10-11 (citation omitted).

“The rule in *Padilla* is procedural, not substantive. It regulates the manner in which a defendant arrives at a decision to plead guilty.” *Chang Hong*, ___ F.3d at ____, 2011 WL 3805763 at *8. We agree with the Tenth Circuit and therefore proceed to analyze the second exception under *Teague*: whether *Padilla* created a “watershed rule of criminal procedure.” The Supreme Court has noted that “[t]his excep-

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tion is ‘extremely narrow,’ . . . [and] observed that it is ‘“unlikely”’ that any such rules ‘“ha[ve] yet to emerge[.]”’” *Whorton*, 549 U.S. at 417, 167 L. Ed. 2d at 11-12 (citations omitted). The Supreme Court has also observed that “in the years since *Teague*, [it has] rejected every claim that a new rule satisfied the requirements for watershed status.” *Id.* at 418, 167 L. Ed. 2d at 12.

In *Whorton*, the Supreme Court noted that “[i]n order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent ‘an “‘impermissibly large risk’”’ of an inaccurate conviction. Second, the rule must ‘alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.’” *Id.* (citations omitted).

Again, we find the reasoning of *Chang Hong* to be sound:

Padilla does not concern the fairness and accuracy of a criminal proceeding, but instead relates to the deportation consequences of a defendant’s guilty plea. The rule does not affect the determination of a defendant’s guilt and only governs what advice defense counsel must render when his noncitizen client contemplates a plea bargain. *Padilla* would only be at issue in cases where the defendant admits guilt and pleads guilty. In such situations, because the defendant’s guilt is established through his own admission—with all the strictures of a Rule 11 plea colloquy—*Padilla* is simply not germane to concerns about risks of inaccurate convictions or fundamental procedural fairness.

Chang Hong, ___ F.3d at ___, 2011 WL 3805763 at *9. We therefore conclude that *Padilla* did not establish a watershed rule of criminal procedure and thus does not fall within either of the *Teague* exceptions.

IV. Conclusion

Padilla raises the question of the extent to which attorneys can be expected to anticipate the expansion of their obligations under *Strickland* and the Sixth Amendment. We conclude that *Padilla* was a significant departure from prior requirements and hold that the decision therefore created a new rule, the retroactive application of which would be unreasonable. We therefore hold that the trial court did not err by concluding that *Padilla* was inapplicable to Defendant’s case. Having rejected Defendant’s argument concerning *Padilla*, we need not address Defendant’s remaining arguments

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which were based thereon. We therefore affirm the trial court's denial of Defendant's MAR.

Affirmed.

Judges STEELMAN and ERVIN concur.

CHARISSA YOUNG, PLAINTIFF v. KIMBERLY-CLARK CORPORATION, FRED HART,
INDIVIDUALLY, AND BRETT SAMUELS, INDIVIDUALLY, DEFENDANTS

No. COA11-1020

(Filed 21 February 2012)

1. Appeal and Error—interlocutory orders and appeals—substantial right—compelling discovery

Plaintiff's appeal from an interlocutory discovery order requiring her to produce information and documents, which she claimed were protected by various privileges, affected a substantial right and was immediately appealable.

2. Discovery—medical records—emotional distress claim—waiver

The superior court did not abuse its discretion in a wrongful termination case by ordering the production of plaintiff's medical records that allegedly involved purely physical conditions unrelated to her mental or emotional condition. Plaintiff's arguments were speculative and hypothetical. Further, the statutory privileges accorded communications between a patient and various medical providers is impliedly waived if the patient brings a claim for emotional distress since this type of claim places her medical condition at issue.

3. Discovery—names of persons contacted by counsel—work-product doctrine inapplicable—identification

The trial court did not err in a wrongful termination case by requiring plaintiff to disclose the names of persons contacted by her counsel even though plaintiff contended it violated the work-product doctrine and her right against disclosure of trial witnesses until prior to trial. Contrary to plaintiff's assertion, the order only required plaintiff to comply with her already existing

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discovery obligations and merely required identification of the persons contacted.

4. Discovery—tax returns—mitigation defense—loss of past and future earnings—certification

The trial court did not err in a wrongful termination case by ordering plaintiff to disclose her tax returns even though plaintiff contended the information contained in them was available from other sources. Information from the tax returns was relevant to the subject matter as it related to both the mitigation defense of the party seeking discovery and plaintiff's claim for loss of past and future earnings. Further, plaintiff's own certification as to her income was available only on the income tax returns themselves.

Appeal by plaintiff from order entered 28 February 2011 by Judge Gary M. Gavenus in Superior Court, Haywood County. Heard in the Court of Appeals 9 February 2012.

Law Offices of Glen C. Shults, by Glen C. Shults, for plaintiff-appellant.

Goldsmith, Goldsmith & Dews, P.A., by C. Frank Goldsmith, Jr., for defendants-appellees.

STROUD, Judge.

Charissa Young ("plaintiff") appeals from an order compelling discovery of medical records and information, identification of persons contacted by plaintiff or her counsel as to her claim, and plaintiff's federal and state income tax returns. For the reasons stated below, we affirm.

I. Background

Plaintiff was employed by defendant Kimberly-Clark Corporation from "in or about 1991" until June 2008, when plaintiff alleges that she was wrongfully terminated by defendant Kimberly-Clark, as a result of her filing a workers' compensation claim for a compensable injury she suffered on 5 December 2007. Plaintiff filed a complaint against the Kimberly-Clark Corporation; Fred Hart, individually; and Brett Samuels, individually (collectively referred to herein as "defendants") on 30 June 2009, alleging claims against defendant Kimberly-Clark for violation of the Retaliatory Employment Discrimination Act (N.C. Gen. Stat. § 95-240 *et seq.*) and wrongful discharge in violation of public policy and claims against all three defendants for gross negli-

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gence, negligent infliction of emotional distress, and tortious interference with a contract. Plaintiff sought damages including both past and future “lost wages, bonus payments, employment benefits, and interest” as well as “compensatory damages for emotional distress and/or pain and suffering[.]” On 3 January 2011, defendant Kimberly-Clark filed a motion to compel discovery from plaintiff “regarding Plaintiff’s health care providers and her physical and mental health;” identification of “all individuals from whom Plaintiff has obtained a statement or affidavit and . . . all Kimberly-Clark employees who have been contacted in connection with Plaintiff’s claim;” and “copies of Plaintiff’s tax returns from January 1, 2007 to the present.” On 28 February 2011, the trial court entered an order allowing in part and denying in part defendant Kimberly-Clark’s motion to compel discovery from plaintiff. Plaintiff timely appealed from this order.

II. Interlocutory order

[1] The order compelling discovery is an interlocutory order, and interlocutory orders are normally not immediately appealable. *Mims v. Wright*, 157 N.C. App. 339, 341, 578 S.E.2d 606, 608 (2003).

Orders that are interlocutory are subject to immediate appeal when they affect a substantial right of a party. [*Mims v. Wright*, 157 N.C. App. 339, 341, 578 S.E.2d 606, 608 (2003)] “ [W]hen, as here, a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right. . . .” *Id.* (quoting *Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999)).

Midkiff v. Compton, 204 N.C. App. 21, 24, 693 S.E.2d 172, 174, *cert. denied*, 364 N.C. 326, 700 S.E.2d 922 (2010).

Because plaintiff claims that the discovery order requires her to produce information and documents which are protected by various privileges, the order affects a substantial right and is immediately appealable. *See Sharpe v. Worland*, 351 N.C. 159, 165-66, 522 S.E.2d 577, 580-81 (1999).

III. Standard of Review

When reviewing a trial court’s ruling on a discovery issue, our Court reviews the order of the trial court for an abuse of discretion. *Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 737, 294 S.E.2d 386, 388 (1982) (noting that ordinarily, orders relat-

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ing to discovery are addressed to the discretion of the trial court and are to be reviewed for abuse of discretion). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Midkiff, 204 N.C. App. at 24, 693 S.E.2d at 175. On appeal plaintiff argues that the trial court erred in ordering her to produce (1) her medical records; (2) the names of persons contacted by her counsel; and (3) her tax returns.

IV. Medical records

The trial court’s order compelling discovery addressed defendant’s request for production of plaintiff’s medical records as follows:

1. Interrogatories 4 and 5, Document Production Requests 15 and 16. These requests seek information and records concerning plaintiff’s medical treatment (including treatment for mental or emotional conditions) within the ten years prior to service of the requests. Plaintiff refused to provide any such information except for the period after December 5, 2007, when she injured her knee at work. The Court finds defendant’s requests to be proper and to be within the scope of discovery as set forth in Rule 26, N.C.R. Civ. P., as plaintiff has placed her mental and emotional health in issue by asserting a claim for infliction of emotional distress and by seeking emotional distress damages in other claims in this action, and her medical records may reasonably be sources of information on that issue. In addition, plaintiff’s medical condition is relevant to her ability to earn income from other employment. However, the Court, in its discretion, finds that five years from service of the requests, rather than the ten years sought by defendant, is a reasonable period for the scope of defendant’s request, absent a showing that a longer period is necessary for the discovery of such information. Defendant’s motion to compel discovery as to these requests is, therefore, ALLOWED, and plaintiff is ORDERED to answer fully Interrogatories 4 and 5, and to produce the documents requested in Document Production Requests 15 and 16 (or to execute a release permitting defendant to obtain them), except that such answers and production shall cover the period beginning five years prior to service of the requests. Plaintiff shall answer the inter-

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rogatories and produce the requested documents or executed release as soon as possible, so as not to delay further this litigation, and in any event within ten days from the entry of this order.

[2] Plaintiff first argues that the “superior court erred in ordering the production of plaintiff’s medical records that involve purely physical conditions, which are unrelated to her mental or emotional condition.” Plaintiff contends that the trial court failed to draw a distinction between records regarding “purely physical conditions that caused no emotional distress” and physical conditions which did cause emotional distress. Plaintiff notes that “[t]he medical records would *presumably* show whether Young experienced any emotional distress for any of the physical or emotional conditions for which she sought treatment, and only those records should be produced.” (emphasis added). She argues at length about the failure of the trial court to make any “finding of a causal or historical relationship between Plaintiff’s emotional distress claims and the records ordered to be produced.” Defendants counter that the trial court did not abuse its discretion in compelling plaintiff to produce her medical records as she waived the patient-physician privilege when she brought an action which placed her medical condition at issue.

Even if we assume *arguendo* that the trial court could make any sort of clear distinction between “purely physical conditions” and physical conditions which cause emotional distress based merely upon perusal of medical records—a proposition we sincerely doubt—we first note that in order for the trial court to make this type of determination as to the information which may be revealed in plaintiff’s medical records, plaintiff would have had to produce the records to the trial court for *in camera* review; this she did not do. Plaintiff’s arguments in this regard are speculative and hypothetical. In addition, our Court has held specifically that the statutory privileges accorded communications between a patient and various medical providers is impliedly waived if the patient brings a claim for emotional distress, as this type of claim places her medical condition at issue.

North Carolina has created by statute a privilege for communications between a physician and patient. *See* N.C. Gen. Stat. § 8-53 (2005) (for doctors); *see also* N.C. Gen. Stat. § 8-53.3 (2005) (for psychologists); N.C. Gen. Stat. § 8-53.7 (2005) (for social workers); N.C. Gen. Stat. § 8-53.8 (2005) (for counselors). “It is the purpose of such statutes to induce the patient to make full

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disclosure that proper treatment may be given, to prevent public disclosure of socially stigmatized diseases, and in some instances to protect patients from self-incrimination.” *Sims v. Charlotte Liberty Mut. Insurance Co.*, 257 N.C. 32, 36, 125 S.E.2d 326, 329 (1962). The privilege “extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe.” *Smith v. John L. Roper Lumber Co.*, 147 N.C. 62, 64, 60 S.E. 717, 718 (1908).

This patient-physician privilege is not absolute, however, and may be waived, either by express waiver or by waiver implied from the patient’s conduct. *Mims v. Wright*, 157 N.C. App. 339, 342, 578 S.E.2d 606, 609 (2003). We have recognized that a patient impliedly waives this privilege when she opens the door to her medical history by bringing an action, counterclaim, or defense that places her medical condition at issue. *Id.* at 342-43, 578 S.E.2d at 609. Here, by bringing a claim for emotional distress, which alleges that defendants’ actions caused decedent to withdraw from her college studies and caused an overall loss in decedent’s enjoyment of life, we find that plaintiff has placed decedent’s mental health and history of substance abuse at issue. Thus, plaintiff has impliedly waived the patient-physician privilege conferred by § 8-53 *et seq.*

Spangler v. Olchowski, 187 N.C. App. 684, 691, 654 S.E.2d 507, 512-13 (2007). The trial court did not abuse its discretion by ordering plaintiff’s production of the requested medical records for a period beginning five years prior to service of the discovery request.¹ Plaintiff’s argument is without merit.

V. Attorney work product

[3] Plaintiff next argues that the trial court’s order “requiring plaintiff to disclose the names of persons contacted by her counsel violates the work-product doctrine, and plaintiff’s right against disclosure of

1. Defendant Kimberly Clark does not raise any argument as to the limitation of discovery to a period of five years, instead of ten years as requested. However, this opinion should not be construed as setting any particular time limitation upon the discovery of medical information, as the determination of the time period is well within the discretion of the trial court, and the proper time period may differ based upon the particular claims raised in a case and the conditions suffered by the person whose records are sought.

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trial witnesses until prior to trial.” Defendants counter that plaintiff’s argument “inaccurately characterizes” the trial court’s order because the order does not require her to disclose information protected by the attorney work product doctrine but “only requires [her] to comply with her already existing discovery obligations.” The trial court’s order regarding this issue states as follows:

2. Interrogatories 17 and 18. These interrogatories ask the plaintiff for information about current or former employees of the defendant that she or anyone on her behalf (such as her counsel) has contacted regarding her claims in this action, and about any persons from whom she has obtained any verbal or written statement or affidavit. Plaintiff objected to these questions and refused to answer them insofar as they seek information obtained by her counsel, contending that such information is protected by the attorney work product doctrine. The Court notes that in Interrogatory 2, defendant asked plaintiff to identify all persons having knowledge or information relating to the subject matter of this action, and plaintiff answered that interrogatory and agreed to supplement her response as additional information is obtained. The Court finds that supplemental answers to Interrogatory 2 will satisfy defendant’s need for most, if not all, of the information requested in Interrogatories 17 and 18. Therefore defendant’s motion to compel answers to Interrogatories 17 and 18 is DENIED, except that plaintiff is ORDERED to supplement her answers to Interrogatory 2 by providing the information requested in that interrogatory as to all persons having knowledge or information relating to the subject matter of this action, including persons contacted by plaintiff or her counsel; regardless of whether the information supports one side or the other.

Plaintiff, citing generally Wright, Miller & Marcus, *Federal Practice & Procedure: Civil* § 2028, argues that “[t]he work-product doctrine protects from disclosure the identities of persons contacted by a party’s counsel, absent showing of a particular need.” Even if this treatise were a binding authority for this Court—and it is not—plaintiff’s argument mischaracterizes the content of Section 2028. Plaintiff cites no applicable authority in support of this argument and her argument entirely ignores the definition of the work product doctrine as set forth by North Carolina’s courts. In *Boyce & Isley, PLLC v. Cooper*, 195 N.C. App. 625, 673 S.E.2d 694, *disc. review denied*, 363

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N.C. 651, 686 S.E.2d 512 (2009), this Court clearly stated the circumstances under which the attorney work product doctrine applies:

In order to successfully assert protection based on the work product doctrine, the party asserting the protection . . . bears the burden of showing (1) that the material consists of documents or tangible things, (2) which were prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant . . . or agent.

[*Isom v. Bank of Am., N.A.*, 177 N.C. App. 406, 412-13, 628 S.E.2d 458, 463 (2006)] (citations and internal quotation marks omitted; second alteration in original).

Although not a *privilege*, the exception is a “qualified immunity” and extends to all materials prepared “in anticipation of litigation or for trial by or for another party or by or for that other party’s consultant, surety, indemnitor, insurer, or agent.” The protection is allowed not only [for] materials prepared after the other party has secured an attorney, but those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation. Materials prepared in the ordinary course of business are not protected, nor does the protection extend to *facts* known by any party.

Willis v. Power Co., 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976) (citations omitted). “[N]o discovery whatsoever of [work product containing] the ‘mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party’ concerning the litigation at bar . . . is permitted under [N.C.R. Civ. P. 26(b)(3)].” *Id.* at 36, 229 S.E.2d at 201 (citation omitted). However, documents that constitute work product but that do not contain or reflect the aforementioned input of an attorney or other representative may be discoverable “[u]pon a showing of ‘substantial need’ and ‘undue hardship’ involved in obtaining the substantial equivalent[.]” *Id.* “In the interests of justice, the trial judge may require *in camera* inspection and may allow discovery of only parts of some documents.” *Id.*

Id. at 637-38, 673 S.E.2d at 702 (emphasis in original). The portion of the trial court’s order which is at issue in this appeal required plaintiff to identify “all persons having knowledge or information relating to the subject matter of this action, including persons contacted by

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plaintiff or her counsel” The identification of a person is clearly not (1) a “document[] or tangible thing[], (2) which [was] prepared in anticipation of litigation or for trial, and (3) by or for another party or its representatives which may include an attorney, consultant . . . or agent.” *See id.* The trial court’s order does not require the production of any witness statements which may have been taken by plaintiff’s counsel or any information at all beyond identification of the persons contacted. Therefore, we find no abuse of discretion.

Plaintiff, citing *King v. Koucouliotes*, 108 N.C. App. 751, 425 S.E.2d 462 (1993), also argues that “[u]nder North Carolina law, a party may discover the names of the opposing party’s *trial witnesses* at the pre-trial conference, and even earlier in the litigation upon a showing of particular need[,]” and that as defendant Kimberly Clark has shown no particular need, it is not entitled to discovery. (Emphasis added.) This is true, but irrelevant. The trial court’s order does not require plaintiff to identify persons she may call as witnesses at trial; it requires identification of persons contacted, “regardless of whether the information supports one side or the other.” This argument is also without merit.

VI. Income tax returns

[4] The last portion of the trial court’s order challenged by plaintiff provides as follows:

3. Document Production Request 9. This request asked plaintiff to produce documents reflecting her income from January 1, 2007, through the conclusion of this action, including her state and federal income tax returns. The Court finds that this request is proper, reasonable in scope, and reasonably calculated to lead to the discovery of admissible evidence, inasmuch as plaintiff’s earnings from other employment are relevant to the issue of whether she has mitigated her alleged damages, and the inclusion of income from the year 2007 is necessary to provide a baseline against which to measure income received in subsequent years from sources other than her employment with defendant Kimberly-Clark Corporation. Therefore it is ORDERED that plaintiff’s motion is ALLOWED as to Document Production Request 9, and plaintiff shall provide the requested documents, or execute a release permitting defendant to obtain them, within ten days from the entry of this order.

Plaintiff argues that the trial court “erred in ordering plaintiff to disclose her tax returns because the information contained in them is

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available from other sources.”² Defendants respond that plaintiff’s “state and federal tax returns are relevant and discoverable.” Plaintiff cites various federal cases addressing the “policy against disclosure of federal income tax returns” and notes that she “has not found any North Carolina case law addressing the same issue with respect to state tax returns.” The only North Carolina authority cited in support of this argument is N.C. Gen. Stat. § 105-259(b) (2009), which restricts “[a]n officer, an employee, or an agent of the State who has access to tax information in the course of service to or employment by the State may not disclose the information to any other person except as provided in this subsection[.]” This statute is clearly inapplicable in this situation, as *plaintiff* is the person who has been directed to disclose her own income tax returns.

N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2009) provides that

In General.—Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it grounds for objection that the examining party has knowledge of the information as to which discovery is sought.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other

2. Plaintiff does not raise any argument or objection in this appeal as to production of her “W-2 forms, payroll check stubs, bank deposit slips, bank statements, unemployment and workers’ compensation documents, and state or federal welfare or disability benefits documents” which were also included in the request for production No. 9, but addresses only her “federal and state income tax returns for the years 2007, 2008 and 2009 (upon preparation of same)[.]” We note that the request for production also requests all documents relating to the “amount and source of income received by, or accruing to, Plaintiff from January 1, 2007, and *continuing to the conclusion of this lawsuit,*” (emphasis added) so as of the issuance of this opinion, the trial court’s order would also apply to plaintiff’s income tax returns for 2010 and 2011.

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source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

Plaintiff has alleged that defendants' actions have caused her to suffer "substantial damage, including but not limited to pain and suffering, emotional distress, and loss of wages, tenure, bonuses, medical and other benefits, job security, as well as damage to her professional reputation and career." Defendants have alleged, as one of their twenty-one affirmative defenses, that plaintiff is barred from recovery "to the extent that Plaintiff failed to mitigate her damages, if any. Any damages alleged by Plaintiff must be offset by interim earnings, severance pay, unemployment compensation, workers['] compensation and any other pay or benefits, as required by law." Thus, information regarding plaintiff's earnings is entirely "relevant to the subject matter involved in the pending action" and it relates both to "the . . . defense of the party seeking discovery[,]," specifically defendant's defense of mitigation of damages, and "to the claim . . . of any other party," specifically plaintiff's claim for loss of past and future earnings. *See id.* The availability of information from another source is not a ground for objection under Rule 26(b)(1), which sets forth limitations on the extent of discovery. Plaintiff's argument that her tax returns are not discoverable because "the information contained in them is available from other sources" is nonsensical. In fact, Rule 26(b) provides that it is "not ground for objection that . . . the examining party has knowledge of the information as to which discovery is sought." *Id.* If the fact that defendant Kimberly Clark may already have knowledge of the information is not a ground for objection, certainly the fact that the information is available elsewhere is no ground for objection. In fact, contrary to plaintiff's argument, an income tax return does contain information which is uniquely available on the return itself, as the taxpayer is required to sign the income tax return under penalty of perjury, certifying that the information in the return is true and complete. Federal income tax forms 1040, 1040A, and 1040EZ all require the taxpayer to sign a similar declaration: "Under penalties of perjury, I declare that I have

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examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.” See 26 U.S.C. § 6065 (2009) (requiring that “any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury”). The plaintiff’s own certification as to her income is available *only* on the income tax returns themselves. The trial court did not abuse its discretion by ordering production of plaintiff’s federal and state income tax returns.

For the reasons stated above, the trial court properly exercised its discretion in setting the limits upon discovery as stated in its order, and the order allowing in part and denying in part defendant Kimberly Clark’s motion to compel discovery is affirmed.

AFFIRMED.

Judges STEPHENS and BEASLEY concur.

ESTATE OF RONALD B. LIVESAY, DECEASED, BY E.K. MORLEY, ADMINISTRATOR CTA, PLAINTIFF V. BRENDA LIVESAY, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE OF THE RONALD LIVESAY AND BRENDA LIVESAY FAMILY TRUST, DATED MARCH 26, 1998, CANDACE LIVESAY (A MINOR) RON LIVESAY, JR. (A MINOR), AND SANDRA REED, TRUSTEE OF A DEED OF TRUST EXECUTED BY BRENDA LIVESAY, TRUSTEE OF THE RONALD LIVESAY FAMILY TRUST, DATED JULY 2, 2007 IN THE AMOUNT OF \$403,849.36 AND RECORDED ON JULY 2, 2007 IN BOOK 1948 AT PAGE 778 OF THE HENDERSON COUNTY REGISTER OF DEEDS OFFICE, DEFENDANTS

No. COA11-973

(Filed 21 February 2012)

Pleadings—Sanctions—Rule 11—failure to sign complaint—prompt remedial measures—two dismissal rule

The trial court erred in a case regarding administration of a family trust by dismissing plaintiff’s complaint with prejudice for failure to sign and verify the complaint under N.C.G.S. § 1A-1, Rule 11. Plaintiff’s prompt remedial measures of filing an amended signed complaint, once plaintiff discovered the mistake, conferred subject matter jurisdiction on the trial court to enable

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it to deal with the substantive issues raised in the pleadings. The two dismissal rule did not apply because both dismissals were involuntary.

Appeal by Plaintiff from order entered 7 March 2011 by Judge James U. Downs in Henderson County Superior Court. Heard in the Court of Appeals 11 January 2012.

Smith Moore Leatherwood LLP, by L. Cooper Harrell and Corinne B. Jones, for Plaintiff-appellant.

Gary A. Dodd and Charles R. Brewer, for Defendant-appellee Brenda Livesay, et al.

McLean Law Firm, P.A., by Russell L. McLean, III, and Bazzle & Carr, PA, by Eugene M. Carr, III, for Defendant-appellee Ron Livesay, Jr., et al.

HUNTER, JR., Robert N., Judge.

Administrator CTA E.K. Morley appeals on behalf of the estate of Ronald B. Livesay (“Plaintiff”) from an order dismissing his complaint with prejudice for failure to sign and verify the complaint under Rule 11 of the North Carolina Rules of Civil Procedure. For the following reasons, we reverse.

I. Factual & Procedural Background

On 13 September 2010, Plaintiff filed the complaint in this action concerning allegations regarding the administration of a family trust. Plaintiff signed the General Civil Action Cover Sheet but failed to sign, date, or verify the complaint. Summons were issued, and all Defendants were served on 15 September 2010 with the exception of Sandra Reed, on whom service of process was obtained by publication. On 13 October 2010, all Defendants except Ms. Reed filed a joint motion for an extension of time to file their answer or other responsive pleadings and motions. The trial court granted Defendants’ motion, extending the time allotted to respond to 12 November 2010.

On 25 October 2010, during a review of the court file, Plaintiff’s counsel realized the complaint was not signed, dated, or verified. On that afternoon, Plaintiff’s counsel signed and verified a duplicate copy of the original complaint and filed the duplicate copy with the trial court and served it on the parties via certified U.S. mail. The duplicate copy was titled “Amendment to Complaint,” but it was an exact copy of the original with the only difference being that the

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duplicate copy was signed and verified. The duplicate copy was successfully served via certified U.S. mail on all of the parties except Ms. Reed, on whom service by publication was later effected. When Plaintiff's counsel filed and served the signed and verified duplicate complaint, no responsive pleadings had been filed or served, and neither Defendants, the clerk of court, nor the trial court had called the lack of signature and verification to Plaintiff's attention.

On 9 November 2010, Defendants filed a motion to dismiss with prejudice based on Rules 12(b)(1), (2), (4), (5), and (6). Judge James U. Downs conducted a hearing on 7 March 2011 and dismissed the action with prejudice. In his order, Judge Downs stated, "Inasmuch as this case was filed following a previous dismissal without prejudice, this dismissal should be with prejudice." From the bench, Judge Downs also identified Rule 12(b)(1)—lack of subject matter jurisdiction—as the grounds for dismissal. Plaintiff filed timely notice of appeal 1 April 2011.

II. Jurisdiction

As Plaintiff appeals from the final judgment of a superior court, an appeal lies of right with this court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011). Plaintiff's appeal of the trial court's dismissal is also authorized by N.C. Gen. Stat. § 1-277(a) (2011), which provides for appeal of a judicial order that discontinues an action.

III. Analysis

Plaintiff argues the trial court erred by dismissing the action for failure to sign and verify the complaint because the failure was an oversight that was quickly corrected. We agree.

"Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130, *disc. review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001). "Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act. Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question [and] . . . is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). Without a proper complaint or summons under Rule 3 of the Rules of Civil Procedure, an action is not properly instituted and the court does not have juris-

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diction. *Boyd v. Boyd*, 61 N.C. App. 334, 336, 300 S.E.2d 569, 570 (1983). N.C. Gen. Stat. § 1A-1, Rule 3, provides as follows:

A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be prima facie evidence of the date of filing.

A civil action may also be commenced by the issuance of a summons when

(1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and

(2) The court makes an order stating the nature and purpose of the action and granting the requested permission.

....

If the complaint is not filed within the period specified in the clerk's order, the action shall abate.

N.C. Gen. Stat. § 1A-1, Rule 3(a) (2011). N.C. Gen. Stat. § 1A-1, Rule 4, provides as follows: "Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days." An unsigned or unverified complaint is an invalid complaint over which the trial court lacks subject matter jurisdiction. *See Freight Carriers v. Teamsters Local*, 11 N.C. App. 159, 162, 180 S.E.2d 461, 463, *cert. denied*, 278 N.C. 701, 181 S.E.2d 601 (1971) (holding that a complaint unsigned by the attorney under Rule 11(a) is not a valid complaint). Rule 11, however, contemplates a very specific exception to Rules 3 and 4. Rule 11 provides, "If a pleading, motion, or other paper is not signed, it shall be stricken *unless it is signed promptly after the omission is called to the attention of the pleader or movant.*" N.C. Gen. Stat. § 1A-1, Rule 11(a) (2011) (emphasis added).

No North Carolina appellate opinion addresses this Rule 11 exception, however, we gain guidance from this Court's holdings in several juvenile proceedings. In *Matter of Green*, the failure of a petitioner to sign and verify a petition related to a juvenile case resulted in dismissal of the action because the petition was fatally defective and insufficient to vest the court with subject matter jurisdiction. 67 N.C. App. 501, 504, 313 S.E.2d 193, 195 (1984). However, *Green* was distinguished in *In re L.B.*, where this Court noted that in *Green* the petition was never signed or verified, while in *L.B.*, the petition was

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signed and verified two days after the order for non-secure custody was filed. *In re L.B.*, 181 N.C. App. 174, 186-87, 639 S.E.2d 23, 29 (2007). In *In re T.R.P.*, 173 N.C. App. 541, 546, 619 S.E.2d 525, 529 (2005), *aff'd*, 360 N.C. 588, 636 S.E.2d 787 (2006), this Court again vacated a juvenile order because “the Petition was neither signed nor verified by the director or an authorized representative of the director.” However, the *T.R.P.* Court left open the possibility that the Department of Social Services could take remedial action, which, in turn, could provide the trial court with the subject matter jurisdiction it was lacking. Specifically, the *T.R.P.* Court stated, “[a]s there is no evidence in the record *suggesting later filings sufficient to invoke jurisdiction* as to the review order, the trial court erred in proceeding on the matter due to lack of subject matter jurisdiction.” *Id.* at 547, 619 S.E.2d at 529 (emphasis added).

Although the above cases discuss juvenile petitions, one of these cases does specifically refer to Rule 11(a), stating,

Rule 11(a) contemplates the omission of a signature as a simple oversight, which can be easily corrected when pointed out, and then the case may proceed on its course, dealing with the substantive issues raised by the pleadings. Only if the pleading is not signed ‘promptly’ even after omission is pointed out does Rule 11(a) provide for the pleading to be stricken.

In re D.D.F., 187 N.C. App. 388, 395-96, n. 1, 654 S.E.2d 1, 5, n. 1 (2007).

Moreover, federal cases interpreting the federal version of Rule 11 also allow an unsigned pleading to be fixed in a prompt manner once the omission is relayed to the erring party. *See e.g.*, *Clark v. Countrywide Home Loans, Inc.*, 09-CV-01998-OWW-GSA, 2010 WL 697232 (E.D. Cal. Feb. 25, 2010) (where the court issued an order requiring the plaintiff to file a signed, amended complaint by 18 March 2010 to replace the original unsigned complaint as the operative pleading); *In re Fosamax Products Liab. Litig.*, 1:09-CV-07255-JFK, 2010 WL 1685726 (S.D.N.Y. Apr. 26, 2010) (where despite the Judge’s order to show cause requiring the plaintiff to submit a signed, amended complaint, the plaintiff did not submit the amended complaint within the fifteen day period prescribed by the court, and the court struck the original complaint). In interpreting Federal Rule 11, these decisions indicate that a pleading that was once unsigned can be remedied with an amended, signed version of that pleading. We note that while federal court opinions provide no binding authority on this Court, they are persuasive authority. Thus,

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relying on these federal court opinions as well as the text of Rule 11 and this Court's opinions in the referenced juvenile proceedings, we hold that Rule 11 allows prompt remedial measures to fix the lack of signature and/or verification of the original pleading, thereby rectifying the omission and restoring to the trial court subject matter jurisdiction to allow it to deal with the substantive issues raised by the pleadings.

Here, the original summons and complaint were filed 13 September 2010. The complaint was unsigned, undated, and unverified. On 25 October 2010, 42 days after the original complaint was filed, Plaintiff's counsel realized the omission and filed an amendment to the complaint under Rule 15's provision providing for amendments as of right to a pleading when no responsive pleading has been filed. Applying the exception present in Rule 11, we hold Plaintiff's prompt remedial measures of filing an amended, signed complaint once Plaintiff discovered the mistake conferred subject matter jurisdiction on the trial court to enable it to deal with the substantive issues raised in the pleadings.

We note that Rule 11 contemplates the specific situation where a pleading is unsigned and *the court or the opposing party* points out the omission to the erring party. N.C. Gen. Stat. § 1A-1, Rule 11 (2011). Here, however, neither the trial court, the clerk of court, nor the opposing party noticed the error in the original complaint nor pointed it out to Plaintiff as specified under Rule 11. Plaintiff realized on his own that the original complaint was unsigned, undated, and unverified 42 days after the original complaint was filed, and Plaintiff corrected the omission on his own accord the day he realized the mistake. Because the trial court did not notify Plaintiff of the error and thus did not set an amount of time within which Plaintiff must correct the error, we look to Rules 11 and 15 to determine if Plaintiff corrected the omission in a timely manner.

Defendants argue that even if the amended pleading rectified Plaintiff's error in the original complaint, the original summons expired after no valid complaint was filed within five days of the issuance of the summons, thereby requiring Plaintiff's action to abate. However, as Rule 11(a) provides for a specific exception to Rules 3 and 4 regarding commencement of an action and service of process, prompt action taken to correct a lack of signature prevents the original pleading from being "stricken," thereby restoring the original pleading once it has been signed. Furthermore, Rule 15 provides:

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(a) Amendments.—*A party may amend his pleading once as a matter of course at any time before a responsive pleading is served* or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

N.C. Gen. Stat. § 1A-1, Rule 15(a) (2011) (emphasis added). Here, although Plaintiff amended his pleading with the dated, signed, and verified complaint 42 days after the original complaint was filed, he did so before Defendants served any responsive pleadings (as Defendants had filed and the court had allowed a motion to extend the time allotted to file a responsive pleading). Thus, we hold Plaintiff's amended pleading was filed and served in a prompt and timely manner under Rules 11 and 15.

Rule 15 also provides guidance on whether the cause of action in the amended pleadings relates back to the commencement of the action in the original pleading.

(c) Relation back of amendments.—*A claim asserted in an amended pleading is deemed to have been interposed* at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (2011). The comment to the Rule provides:

“[A] cause of action in an amended pleading will be deemed to relate back to the commencement of the action if the original pleading gave notice of the transactions, occurrences, or series of transactions or occurrences to be proved under the amended pleading. The amended pleading will therefore relate back if the new pleading merely amplifies the old cause of action, or now even if the new pleading constitutes a new cause of action, provided that the defending party had originally been placed on notice of the events involved.”

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N.C. Gen. Stat. § 1A-1, Rule 15, cmt. (2011) (quoting Wachtell, N.Y. Practice Under the C.P.L.R. (1963), p. 141). Here, because the new, amended pleading is exactly the same as the old pleading except that the new pleading is signed, the new pleading merely amplifies the old cause of action and therefore relates back to the old pleading. Consequently, the original summons that issued the same day as the original pleading remains valid. Therefore, we hold the remedial measures Plaintiff took to rectify the signature omission in the original complaint were sufficient under Rules 11 and 15 to prevent the original pleading from being stricken and the action from being dismissed.

Finally, Defendants argue the trial court properly dismissed the case with prejudice under the two dismissal rule. Under the two dismissal rule, there are two elements: (1) the plaintiff must have filed the notices to dismiss under Rule 41(a)(1)(i), since this Court has held that the two dismissal rule does not apply where the plaintiff's dismissal is by stipulation or by order of court, *Parrish v. Uzzell*, 41 N.C. App. 479, 483-84, 255 S.E.2d 219, 221 (1979); and (2) the second suit must have been "based on or including the same claim" as the first suit. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2011); *City of Raleigh v. Coll. Campus Apartments, Inc.*, 94 N.C. App. 280, 282, 380 S.E.2d 163, 164-65 (1989), *aff'd*, 326 N.C. 360, 388 S.E.2d 768 (1990). Here, the two dismissal rule does not apply because both dismissals were involuntary (the first ordered by the court for failure to join a necessary party and the second ordered by the court for failure to verify the pleading).

IV. Conclusion

For the foregoing reasons, we hold the trial court erred in dismissing Plaintiff's claims with prejudice. The order of the trial court is

Reversed.

Judges STEELMAN and GEER concur.

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VERAN RAWLS, EMPLOYEE, PLAINTIFF v. YELLOW ROADWAY CORPORATION,
EMPLOYER, SELF-INSURED (GALLAGHER BASSETT SERVICES, INC., SERVICING
AGENT), DEFENDANT

No. COA11-971

(Filed 21 February 2012)

1. Workers' Compensation—disability—sufficiency of findings of fact

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff worker was disabled from 22 June 2007 through 20 June 2010 based on findings of fact 55 and 57.

2. Workers' Compensation—injuries—sufficiency of finding of fact

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff's accident on 24 February 2005 resulted in left temporal lobe intracerebral hemorrhage, right temporal lobe contusion, subarachnoid hemorrhage, and post-traumatic brain injury concussion syndrome based on finding of fact 36.

3. Workers' Compensation—disability—doctor testimony—credibility

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff was disabled based upon the opinion of a doctor. Contradictions in the testimony go to its weight, and the Commission is the sole judge of the credibility of witnesses.

4. Workers' Compensation—failure to apportion disability—no scientific basis

The Industrial Commission did not err in a workers' compensation case by failing to apportion plaintiff's disability. Finding of fact 56 revealed that there was really no scientific basis to apportion plaintiff's disability.

Appeal by defendants from opinion and award entered 23 March 2011 by the Full Commission. Heard in the Court of Appeals 11 January 2012.

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Henry N. Patterson, Jr. and Narendra K. Ghosh of Patterson Harkavy LLP, attorneys for plaintiff.

Henry C. Byrum, Jr. of Stiles, Byrum & Horne, LLP, attorney for defendants.

ELMORE, Judge.

Yellow Transportation and Gallagher Basset Services, Inc. (together defendants) appeal from an opinion and award entered by the Full Commission in favor of Veran Rawls (plaintiff). The Commission awarded plaintiff total disability compensation from 24 February 2005 and continuing. After careful consideration, we affirm the decision of the Commission.

I. Background

Plaintiff was employed by Yellow Transportation as an over-the-road truck driver for thirty-six years. He planned to retire on 21 April 2005. Towards the end of his career, plaintiff was scheduled to drive from Charlotte to Tampa, Florida three times a week, beginning at midnight on Sunday nights. On 23 February 2005, plaintiff drove from Charlotte to Tampa. At approximately 12:30 AM on 24 February 2005 he began his return trip to Charlotte. Plaintiff experienced a headache all day on 24 February. As plaintiff arrived in Charlotte, he was travelling on Interstate 77 towards his home terminal off Harris Boulevard. As plaintiff took the exit for Harris Boulevard, he blacked out and his truck veered off the road. Plaintiff suffered a head injury, and he was admitted to the neurologic intensive care unit at Presbyterian Hospital. The admitting physician determined that plaintiff had fainted.

While at the hospital, plaintiff was examined by several specialists. Dr. William Maggio, a neurosurgeon, ordered an MRI of plaintiff's brain. The MRI showed contusions in the left temporal lobe and right parietal lobe of his brain. Dr. Roy Majors, an orthopedic surgeon, also examined plaintiff. He noticed pain and swelling in plaintiff's right shoulder, and he recommended that plaintiff participate in physical therapy.

After being released from the hospital, plaintiff continued to experience 1) severe headaches, 2) right shoulder pain, 3) poor memory and concentration, 4) and issues with his balance. He initially sought treatment for these ailments from his primary care physician, Dr. Harold Albright. Dr. Albright had treated plaintiff for headaches

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and some dizziness a few weeks prior to the accident. Following the accident, Dr. Albright treated plaintiff several times from 7 March 2005 through 26 July 2005. Dr. Albright determined that plaintiff was unable to return to work during that time period.

Plaintiff also sought treatment from Dr. Erik Borresen, a board-certified neurologist. Dr. Borresen opined that following the accident plaintiff could drive a standard car, but that plaintiff could not drive a commercial truck. Dr. Borresen also opined that plaintiff's 24 February 2005 accident was the result of a stroke.

Then, on 24 August 2005 plaintiff had a seizure while backing his car from his driveway. He was admitted to Presbyterian Hospital where he was examined by Dr. Michael Amira, a neurologist. Plaintiff was also examined again by both Dr. Albright and Dr. Borresen following the seizure. Dr. Albright opined that the seizure could have occurred as a result of the 24 February 2005 accident. Dr. Borresen opined that the most likely cause of the seizure was the 24 February 2005 accident.

In February 2006, Yellow Transportation arranged for an independent medical examination of plaintiff at Wake Forest University Baptist Medical Center by Dr. Charles Tegeler, professor in the Neurology Department. Dr. Tegeler opined that plaintiff's accident on 24 February 2005 was the result of either 1) fainting or 2) a stroke. Dr. Tegeler concluded that the accident caused plaintiff to have a traumatic brain injury, and that plaintiff had some impairment of his memory as a result of this injury. Dr. Tegeler also confirmed that it was reasonable to assume that plaintiff had suffered a seizure on 24 August 2005, when he was attempting to drive his car. Dr. Tegeler further concluded that it was highly probable that the accident on 24 February 2005 caused the seizure. Finally, Dr. Tegeler opined that plaintiff was capable of employment in some capacity at the time of the examination in February 2006. He also opined that plaintiff probably could have returned to work as early as August 2005, but not as a commercial truck driver.

Later that year, in November 2006, plaintiff hired John McGregor, a vocational rehabilitation counselor, to complete an assessment of whether he would be able to return to any kind of work. McGregor concluded that plaintiff was not a candidate for vocational rehabilitation services. McGregor stated that he could not find any cost-effective return to work option for plaintiff, and that he believed retirement was the best option for plaintiff.

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Also around this time, in December 2006, plaintiff returned to see Dr. Majors for treatment regarding pain in his right shoulder. Dr. Majors determined that the injury to plaintiff's right shoulder was caused by the 24 February 2005 accident. Dr. Majors performed surgery on that shoulder in January 2007, and plaintiff was then placed in physical therapy. By June 2007, Dr. Majors concluded that plaintiff had achieved "maximum medical improvement."

On 23 March 2010, Deputy Commissioner George T. Glenn entered an Opinion and Award, granting plaintiff compensation at the rate of \$704.00 per week from 24 February 2005 through the present and continuing until such time as plaintiff returns to work or until further order of the Commission. Defendants appealed this decision to the Full Commission. On 28 September 2010, the Full Commission entered an Interlocutory Opinion and Award. In that opinion, the Commission found that the evidence of record was insufficient to permit a determination as to whether plaintiff was able to work after 22 June 2007. Accordingly, the Commission reversed, in part, the decision of Commissioner Glenn. The Commission limited the scope of plaintiff's award to compensation from 24 February 2005 through 22 June 2007. The Commission also reopened the record for the taking of additional evidence concerning plaintiff's ability to work.

As a result, Dr. P. Jeffrey Ewert, a clinical neuropsychologist, performed an evaluation of plaintiff on 17 June 2010 and 20 June 2010. Dr. Ewert also reviewed plaintiff's post-injury medical records. Dr. Ewert opined that plaintiff was not competitively employable as a result of the 24 February 2005 accident. Dr. Alexander A. Manning, a clinical neuropsychologist, also examined plaintiff. He performed his examinations on 21 December 2010 and 6 January 2011. Dr. Manning opined that plaintiff was unemployable as a result of the 24 February 2005 accident.

On 23 March 2011, the Full Commission issued a final Opinion and Award. The Commission found that "as a result of the injuries plaintiff sustained from his February 24, 2005 injury by accident, plaintiff has been unable to work from February 24, 2005, through present and continuing." Accordingly, the Commission awarded total disability benefits to plaintiff from 24 February 2005 through the present and continuing until plaintiff returns to suitable employment or upon further order. Defendants now appeal.

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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. This court’s duty goes no further than to determine whether the record contains any evidence tending to support the finding.” *Richardson v. Maxim Healthcare/Allegis Group*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (quotations and citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

III. Arguments**A. Plaintiff’s disability**

[1] Defendants raise four issues on appeal. First, defendants argue that the Commission erred in finding that plaintiff was disabled from 22 June 2007 through 20 June 2010. Specifically, defendants challenge findings of fact 55 and 57.

Finding of fact 55 summarizes Dr. Ewert’s evaluation of plaintiff. Defendants argue that finding of fact 55 is not supported by competent evidence, because Dr. Ewert’s testimony failed to establish that 1) he “performed an evaluation of plaintiff on June 17 and June 20, 2010,” 2) he “reviewed plaintiff’s post-injury medical records,” 3) he opined that plaintiff’s cognitive impairment was due to “plaintiff’s February 24, 2005 accident which resulted in closed head injury, left temporal lobe intracerebral hemorrhage (sic), right temporal lobe contusion, and subarachnoid hemorrhage (sic),” and 4) he “opined that plaintiff is not competitively employable.” Upon review of Dr. Ewert’s testimony, we disagree.

Dr. Ewert testified that, under his direction, plaintiff was examined twice. First, Dr. Ewert himself conducted a “clinical interview” with plaintiff, and next a member of his staff conducted a series of tests on plaintiff. These examinations occurred on 17 June and June 20, 2010. Dr. Ewert also confirmed that he examined “a series of [plaintiff’s] medical records” as well as a “summary of [plaintiff’s] accident and subsequent care.” Dr. Ewert further testified that plaintiff was suffering from a cognitive disorder and that “he has this disorder due to his closed head injury, the left temporal lobe, which was cerebral hemorrhage, the right temporal parietal lobe contusion subarachnoid hemorrhage.” Finally, Dr. Ewert testified that “I don’t believe [plaintiff is] competitively employable.” We conclude that this

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testimony supports the specific sections of finding of fact 55 to which defendants take issue. Accordingly, we conclude that finding of fact 55 is supported by competent evidence.

Defendants also challenge finding of fact 57 which states that “plaintiff has been unable to work from February 24, 2005, through present and continuing.” Defendants argue that this finding of fact is contrary to the Commission’s prior findings in the Interlocutory Opinion and Award. They argue that the only new evidence the Commission reviewed after entering the Interlocutory Opinion and Award was the testimony of Dr. Ewert and the testimony of Dr. Manning. Therefore, they contend that the Commission must have based finding of fact 57 only on the testimonies of Dr. Ewert and Dr. Manning. As such, they argue that finding of fact 57 was not supported by competent evidence, because neither Dr. Ewert nor Dr. Manning offered an opinion about plaintiff’s inability to work between 22 June 2007 and the time they saw him in June 2010. We disagree.

In their brief defendants, argue that the Commission, in its Interlocutory Opinion and Award, found that “plaintiff had failed to prove disability after 22 June 2007.” However, that argument is not supported by the record. In fact, the Commission found in its Interlocutory Opinion and Award that “[t]he evidence of record is *insufficient* to determine whether plaintiff was able to work after June 22, 2007.” The Commission then concluded that “the Full Commission requires additional evidence before rendering a decision on the issue of temporary total disability from June 22, 2007, and continuing.” That additional evidence was provided, in part, by the professional opinions of Dr. Ewert and Dr. Manning. Both doctors performed evaluations of plaintiff, and both doctors reviewed a collection of plaintiff’s medical records. Dr. Ewert opined that “I don’t believe [plaintiff is] competitively employable.” Dr. Manning also opined that “[t]he severity of [plaintiff’s] neuropsychological impairment would preclude any form of gainful employment.” After reviewing this new evidence, as well as the evidence already of record, the Commission then entered its Final Opinion and Award, finding that plaintiff has been unable to work from 24 February 2005, through the present and continuing. Thus, we are not persuaded by defendants’ argument that the Commission’s finding of fact 57 was based *only* on the testimonies of Dr. Ewert and Dr. Manning.

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B. Plaintiff's injuries

[2] The next issue defendants raise on appeal is that the Commission erred in finding that plaintiff's accident on 24 February 2005 resulted in left temporal lobe intracerebral hemorrhage, right temporal lobe contusion, subarachnoid hemorrhage, and post-traumatic brain injury concussion syndrome. In essence, defendants challenge finding of fact 36 concerning Dr. Tegeler's diagnosis of plaintiff's injuries. They argue that this finding was not supported by competent evidence. We disagree.

Page four of Dr. Tegeler's report dated 13 July 2006 states that in his opinion, plaintiff has suffered from a "[traumatic] brain injury related to a truck accident with resulting left temporal lobe intracerebral hemorrhage, right temporoparietal lobe contusion and subarachnoid hemorrhage and a post traumatic brain injury concussion syndrome." Thus, the language of the Commission's finding of fact 36 closely mirrors the language of Dr. Tegeler's report. Accordingly, we conclude that finding of fact 36 was supported by sufficient evidence.

C. Dr. Ewert's opinion

[3] The next issue defendants raise on appeal is that the Commission erred in finding that plaintiff was disabled based upon the opinion of Dr. Ewert. Defendants assert that Dr. Ewert based his opinion on an incorrect diagnosis of plaintiff's injuries. We disagree.

Dr. Ewert testified that plaintiff suffered from a "cognitive disorder" that was "due to his closed head injury, the left temporal lobe, which was cerebral hemorrhage, the right temporal parietal lobe contusion subarachnoid hemorrhage." Defendants argue that the record does not support a finding that plaintiff suffered from the injuries mentioned by Dr. Ewert. However, these are the same injuries detailed in finding of fact 36. As we have already discussed, finding of fact 36 was supported by competent evidence. As such, we are unable to agree that Dr. Ewert based his opinion on incorrect information.

Defendants further assert that Dr. Ewert's testimony was, at times, inconsistent regarding plaintiff's injuries. However, "[c]ontradictions in the testimony go to its weight, and the Commission may properly refuse to believe particular evidence." *Harrell v. J. P. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (1980). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). Accordingly, we

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conclude that the Commission did not err in finding that plaintiff was disabled based upon the opinion of Dr. Ewert.

D. Apportionment

[4] The final issue defendants raise on appeal is that the Commission failed to apportion plaintiff's disability. We disagree.

An employee is entitled to full compensation without apportionment "when the nature of the employee's total disability makes any attempt at apportionment between work-related and non-work-related causes speculative." *Errante v. Cumberland County Solid Waste Management*, 106 N.C. App. 114, 119, 415 S.E.2d 583, 586 (1992) (citation omitted). Here, the Commission's finding of fact 56 states that "Dr. Manning attempted to apportion the contributing factors for plaintiff's impairment, but he conceded that there is no scientific basis on which to apportion these contributing factors." Defendants assert that finding of fact 56 is not supported by Dr. Manning's testimony. Upon review of his testimony, we disagree with defendants.

Dr. Manning testified that if he "had to put a percentage on" the portion of plaintiff's disability that did not derive from his work-related accident, he would say "maybe 70 percent of it." However, Manning also testified "[t]hat's a quick assessment on my part. I don't think I've ever done that in the past, quite frankly." Manning further testified that "there's really no scientific basis to apportion" plaintiff's disability. We conclude that this testimony is sufficient to support the Commission's finding of fact 56. As such, the Commission did not err by failing to apportion plaintiff's disability.

IV. Conclusion

In sum, we affirm the decision of the Full Commission.

Affirmed.

Judges BRYANT and ERVIN concur.

TADDEI v. VILL. CREEK PROP. OWNERS ASS'N, INC.

[219 N.C. App. 199 (2012)]

ARTHUR C. TADDEI AND ELIZABETH A. TADDEI, PLAINTIFFS V. VILLAGE CREEK
PROPERTY OWNERS ASSOCIATION, INC. AND ALLEN E. RENZ, DEFENDANTS

No. COA11-650

(Filed 21 February 2012)

1. Deeds—property owners—amendment of restrictive covenants

The trial court did not err by concluding the amendments made to the property owners' restrictive covenants were lawfully based on paragraph 3 of the covenants. The covenants were properly amended, prior to the expiration of the first 20-year term, according to the language of Paragraph 3.

2. Deeds—amended restrictive covenants—resubdividing property

The trial court did not err by ruling that the provision for changes, division or combination of lots in the 2007 amended covenants was valid and reasonable. Neither plaintiffs' brief nor their complaint made it clear what remedy plaintiffs sought with regard to individual lot owners who resubdivided their property under the original covenants and whose resubdivision was now valid under the amended covenants.

3. Fiduciary Relationship—breach of fiduciary duty—property owner association president—differing opinions—personal interest in outcome

The trial court did not err by granting summary judgment in favor of defendant property owner association president on the issue of breach of fiduciary duty. The evidence presented by plaintiffs did not indicate that defendant breached his fiduciary duty and merely showed that he had a differing opinion from plaintiffs on a number of issues regarding the covenants and Village Creek. Defendant's personal interest in the outcome of the amendment vote did not make this a "voidable" transaction as described in N.C.G.S. § 55A-8-31(a).

Appeal by plaintiffs from order entered 1 November 2010 by Judge Jerry R. Tillett in Chowan County Superior Court. Heard in the Court of Appeals 30 November 2011.

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*Barry Nakell for plaintiffs-appellants.**Hornthal, Riley, Ellis & Maland, L.L.P., by M.H. Hood Ellis, for defendants-appellees.*

HUNTER, Robert C., Judge.

Arthur and Elizabeth Taddei (“plaintiffs”) appeal from a judgment entered 1 November 2010 granting summary judgment in favor of the Village Creek Property Owners Association, Inc. (“VCPOA”) and VCPOA President Allen E. Renz (“Renz”) (“collectively defendants”). Plaintiffs argue that the Amended Covenants enacted by the lot owners of Village Creek are invalid; that resubdivision of lots is not permissible in Village Creek; and that plaintiffs produced sufficient evidence of a breach of fiduciary duty by Renz, and, therefore, summary judgment was not appropriate as to that cause of action. After careful review, we affirm the trial court’s order.

Background

Village Creek is a residential subdivision located in Chowan County, North Carolina. The subdivision was developed in 1986 by Chowan Storage Company and originally contained 45 lots. A Declaration of Restrictive Covenants for Village Creek was filed on 3 July 1986 and was later modified and amended by the Village Creek Amended Declaration of Restrictive Covenants (“the Covenants”). Pursuant to Section 23 of the Covenants, which provided for the incorporation of a homeowners association in which all lot owners would be members, the VCPOA was incorporated on 16 April 1987.

Renz moved to Village Creek in July 2000 and purchased a house one lot away from the Thompson family. Renz and the Thompsons each bought one half of the lot that separated them and then combined each half with their respective lots.

Plaintiffs moved to Village Creek in September 2002. In 2005, plaintiffs learned that multiple lot owners, like Renz, were only required to pay assessments on a per-unit-owned basis and not on a per-lot-owned basis. In other words, multiple lot owners were only paying dues based on a single lot ownership, even though they technically owned more than one lot. Plaintiffs filed a lawsuit against the VCPOA and the multiple lot owners, which resulted in entry of a Consent Judgment stating that the Covenants required that assessments be paid on a per-lot-owned basis. Renz had become president of the VCPOA by the time the Consent Judgment was entered.

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On 2 December 2006, the VCPOA Board of Directors, including Renz in his role as president, sent a letter to lot owners informing them that for the first time in 20 years they had a right to amend the Covenants. Among the areas for possible amendment were the method of assessment and the subdividing of lots. First, the Board made it clear that they felt that the manner in which they were now required to assess fees pursuant to the Consent Judgment was “unfair in terms of value received by the homeowners relative to the expense actually incurred on their behalf by the Association.” Second, the Board acknowledged that the Covenants prohibited the subdivision of lots, but that subdividing had occurred in the past. The VCPOA Board of Directors recommended that the Covenants be amended to “retain the prohibition of building homes on anything less than a full lot,” while simultaneously “validat[ing] the legitimacy of previously-combined lots or portions of lots and permit combination of lots or portions of lots in the future” The letter indicated that a vote of a majority of lot owners was necessary to amend the Covenants. On 6 December 2006, plaintiffs responded with a letter accusing the VCPOA of violating the terms of the Consent Judgment and stating that plaintiffs would challenge any change in the Covenants that were enacted without 100% approval of the property owners.

Despite plaintiffs’ objections, the VCPOA continued with the covenant amendment process. A special meeting was held in March 2007 where a majority of lot owners consented to and approved the Amended Covenants. The Amended Covenants specified that assessments would be levied on an original platted lot basis and allowed subdivision of lots prospectively. On 4 April 2007, the Amended Covenants were filed with the Chowan County Register of Deeds. On 31 October 2007, plaintiffs filed a complaint alleging: (1) breach of contract against VCPOA; (2) a derivative proceeding against VCPOA; and (3) breach of fiduciary duty against Renz. Both parties filed motions for summary judgment, and, on 1 November 2010, the trial court granted summary judgment in favor of plaintiffs in part and in favor of defendants in part. The trial court determined that: (1) the amended covenants were properly adopted; (2) the provisions in the amended covenants changing the manner of making assessments were not reasonable, and, therefore, were invalid; (3) “the provisions for changes, divisions, or combination of lots” were reasonable and valid; and (4) Renz did not breach his fiduciary duty. The trial court ruled in favor of defendants “as to all other issues regarding the 2007 Amended and Restated Declaration.”

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On 3 December 2010, plaintiffs appealed from the portions of the judgment that granted summary judgment in favor of defendants. Defendants did not appeal.

Standard of Review

“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) (citation and quotation marks omitted).

Discussion

I.

[1] We first address plaintiffs’ argument that the amendments made to the Covenants are invalid pursuant to Paragraph 33 of the Covenants. Paragraph 33 states:

Notwithstanding any provision contained herein, Declarant, its successors or assigns, reserves the right to amend, modify or vacate any restriction or covenant herein contained if and only if the restriction or covenant shall be in conflict with an ordinance or other official action by the Town of Edenton and then only to the extent necessary to bring the applicable restriction and covenant into conformity with said ordinance or action of the Town of Edenton.

There is no indication that the Amended Covenants approved in 2007 were for this purpose. However, Paragraph 3 of the Covenants states:

These covenants and restrictions shall be binding upon the owners and the lands of Village Creek for a period of twenty (20) years from the date of recording of this instrument. They shall be extended automatically for successive periods of ten (10) years unless, prior to the expiration of any term, an instrument executed by the majority of the then owners of lots in Village Creek has been recorded with the Chowan County Register of Deeds revoking or modifying this instrument.

This paragraph presents another method by which the Covenants may be modified. Plaintiffs contend that Paragraph 3 is subject to the limitation in Paragraph 33, stating amendments may be made “if and only if the restriction or covenant shall be in conflict with an ordi-

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nance or other official action by the Town of Edenton” This narrow reading of the Covenants ignores the portion of Paragraph 3 which states that the Covenant’s restrictions may be amended prior to the expiration of any term.

Generally, restrictive covenants are contractual in nature and a deed incorporating covenants “implies the existence of a valid contract with binding restrictions.” *Moss Creek Homeowners Ass’n, Inc. v. Bisette*, 202 N.C. App. 222, 228, 689 S.E.2d 180, 184 (2010). Restrictive covenants should be strictly construed and any ambiguities should be resolved in favor of the unrestrained use of land. *Id.* at 228, 689 S.E.2d at 184-85. Nonetheless, effect must be given to the intention of the parties and strict construction may not be used to defeat the plain and obvious meaning of a restriction. *Id.* at 228, 689 S.E.2d at 185.

The plain and unambiguous language in Paragraph 3 of the Covenants states that prior to the expiration of any term, the restrictions in the Covenants may be modified if a majority of lot owners file an instrument with the Chowan County Register of Deeds modifying the Covenants. Here, the Covenants were amended pursuant to the procedure set out in Paragraph 3 prior to the expiration of the first 20-year term and were to be effective at the beginning of the next term.

The Amended Covenants, dated 15 March 2007, were signed by a majority of Village Creek lot owners, which satisfies the requirement for modification in Paragraph 3 of the Covenants. These Amended Covenants were then filed with the Chowan County Register of Deeds on 4 April 2007, satisfying the other modification requirement in Paragraph 3. As a result, the Covenants were properly amended, prior to the expiration of the first 20-year term, according to the language of Paragraph 3 quoted above. Consequently, we affirm the trial court’s ruling that the Covenants were lawfully amended based on the language of Paragraph 3.

II.

[2] Next, plaintiffs seem to argue that lots should not have been resubdivided prior to 2007 because Paragraph 7 of the original Covenants prohibited resubdivision of lots in Village Creek, particularly with regard to resubdivision by individual owners as opposed to the developer. Paragraph 7 of the Covenants stated the following prior to the 2007 amendment: “No lots may be resubdivided. Two or more adjacent lots may be made into one lot for one residential structure with the setback above stated to apply to outside, perimeter lot

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lines of said lots as combined.” Despite the clear language of Paragraph 7, lots in Village Creek were still resubdivided. Between 1989 and 2003, seven of the original lots were resubdivided, the first three of these were resubdivided by the developer, Chowan Storage Company. In 2007, Paragraph 7 of the Covenants was modified to allow for the division and combination of lots subject to some limitations. It is clear that resubdivision of lots going forward is valid so long as it is done pursuant to the methods described in Paragraph 7 of the Amended Covenants.

Plaintiffs do not argue that the trial court erred in determining that amended Paragraph 7 is valid and reasonable. Plaintiffs appear to be challenging the resubdivision that occurred in violation of the original Covenants prior to 2007. Plaintiffs do not make it clear exactly what remedy they seek with regards to the lots that have already been resubdivided. Plaintiffs’ brief merely makes the argument that Paragraph 7 of the original Covenants did not allow for lots to be resubdivided, which is likely true but no longer an issue under the Amended Covenants. Plaintiffs’ complaint asked the trial court for an “order remedying and setting aside any resubdivision of lots” without alleging a specific claim or cause of action pertaining to the prior resubdivision of lots. The lot owners who resubdivided prior to 2007 were not parties to this action.

In sum, neither the plaintiffs’ brief nor their complaint makes it clear what remedy plaintiffs sought with regard to individual lot owners who resubdivided their property under the original Covenants and whose resubdivision is now valid under the Amended Covenants. The trial court did not rule on the validity of prior resubdivisions. As such, we affirm the trial court’s ruling that “the provision for changes, division or combination of lots in the 2007” Amended Covenants is “valid” and “reasonable.”

III.

[3] Plaintiffs’ final argument is that sufficient evidence was presented regarding Renz’s alleged breach of his fiduciary duty such that summary judgment was improperly entered in favor of Renz. Specifically, plaintiffs claim that Renz included misleading and false statements in his communications about amending the Covenants because he had a personal economic interest in the outcome. While the debate over amending the Covenants was ongoing, Renz was the president of the VCPOA, which was a non-profit corporation. The duties of directors and officers of a non-profit corporation are set out

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in the North Carolina Nonprofit Corporation Act, N.C. Gen. Stat. § 55A-8 *et seq.* (2009).

According to N.C. Gen. Stat. § 55A-8-30(a) (2009), a director must discharge his duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances and in a manner the director reasonably believes to be in the best interests of the corporation. In doing so, a director may rely on information, opinions, and statements provided by legal counsel or other professionals. N.C. Gen. Stat. § 55A-8-30(b)(2). If a director performs his duties in compliance with this statute then he is not liable for any actions taken as director. N.C. Gen. Stat. § 55A-8-30(d).

The majority of plaintiffs' evidence regarding this issue consists of statements from letters that Renz sent to Village Creek owners in his role as president of the VCPOA. Plaintiffs contend that Renz did not fully explain the situation in his letters; that he misled lot owners as to the issues; and that he explained matters in a way that would benefit his own economic interests while discounting opposing opinions.

While the allegations made by plaintiffs certainly indicate that plaintiffs and Renz were on separate sides of the issues, they do not establish a genuine issue of material fact. None of the examples suggest that Renz was not acting in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances and in a manner the director reasonably believed to be in the best interests of the corporation. Indeed, many of the examples cited by plaintiffs highlight the differences of opinion that plaintiffs and Renz had with regard to interpretation of the Covenants and how Village Creek should be run in the future.

Nothing indicates that Renz was not acting in good faith or did not have the best interests of Village Creek in mind when he promoted his point of view. Plaintiffs were not prohibited from sharing their viewpoint, as evidenced by a letter plaintiffs sent to other lot owners expressing concerns and displeasure with Renz and the proposed Amended Covenants. Further, Renz received a legal opinion prior to proceeding with the plan to amend the Covenants and there is no indication that the procedure for amendment stated in the Covenants was not properly followed.

Plaintiffs are correct in pointing out that Renz had a personal economic interest in the amendments because he was a multiple lot owner; however, if a conflict of interest exists, a transaction is not voidable because of the conflict where "[t]he material facts of the

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transaction and the director's interest were disclosed or known to the members entitled to vote and they authorized, approved, or ratified the transaction" or the "transaction was fair to the corporation." N.C. Gen. Stat. § 55A-8-31(a).

Here, there is evidence that those who voted to approve the Amended Covenants were aware that Renz was a multiple lot owner and therefore had an interest in the outcome of the votes. In a letter from plaintiffs to all Village Creek property owners, Renz is referred to as a "multiple lot owner." Further, in a letter written by Renz to property owners prior to the vote, he indicated that he was a multiple lot owner.

Knowing of Renz's personal interest and other material facts, the property owners still voted to amend the covenants. Further, there is no indication that this vote was not "fair to the corporation," namely the VCPOA. Based on these facts, Renz's personal interest in the outcome of the amendment vote does not make this a "voidable" transaction as described in N.C. Gen. Stat. § 55A-8-31(a).

In sum, the evidence presented by plaintiffs does not indicate that Renz breached his fiduciary duty and merely shows that he had a differing opinion from plaintiffs on a number of issues regarding the Covenants and Village Creek. As such, we affirm the trial court's grant of summary judgment in favor of Renz.

Conclusion

Based on the foregoing, we hold that the trial court did not err in granting summary judgment in favor of defendants on the above issues. We affirm the trial court's order.

Affirmed.

Judges GEER and HUNTER, Robert N., Jr. concur.

TECHNOCOM BUS. SYS., INC. v. N.C. DEP'T OF REVENUE

[219 N.C. App. 207 (2012)]

TECHNOCOM BUSINESS SYSTEMS INCORPORATED, PETITIONER v. NORTH CAROLINA DEPARTMENT OF REVENUE, RESPONDENT

No. COA11-655

(Filed 21 February 2012)

Taxation—use tax liability—offset by erroneously collected sales tax

The North Carolina Revenue Law under N.C.G.S. § 105-164.41 authorized petitioner to offset its use tax liability with sales taxes erroneously paid by its customers.

Appeal by respondent from order entered 7 January 2011 by Judge Ben F. Tennille in Wake County Superior Court. Heard in the Court of Appeals 9 November 2011.

Attorney General Roy A. Cooper, by Assistant Attorney General Tenisha S. Jacobs, for respondent-appellant.

The Wooten Law Firm, by Louis E. Wooten, and Everett Gaskins Hancock LLP, by E.D. Gaskins, Jr., for petitioner-appellee.

BRYANT, Judge.

Where sales taxes were erroneously collected on optional maintenance agreements and paid to the North Carolina Department of Revenue, pursuant to N.C. Gen. Stat. § 105-164.11(a), Technocom's use tax liability should be offset by the erroneously collected sales tax. Therefore, we affirm the ruling of the trial court.

Facts and Procedural History

On 26 September 2008, the North Carolina Department of Revenue ("the Department") issued a Notice of Final Determination ("Final Determination") to Technocom Business Systems, Incorporated, ("Technocom"), a corporation in the business of selling and leasing office equipment. The Final Determination was the result of an audit performed on Technocom for the period between 1 June 2002 and 31 August 2005.

In the course of its business, Technocom purchases and uses parts, supplies, and materials to fulfill its optional maintenance agreements. It is under these maintenance agreements that Technocom services the equipment that it sells or leases to its customers. Regarding Technocom's tax liability under these maintenance agreements, the Department made the following conclusion:

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North Carolina imposes a State and local use tax on tangible personal property purchased inside or outside the State for storage, use or consumption in this State. . . . Use tax is payable by the person who purchases, leases or rents tangible personal property or who purchases a service.

[Technocom's] use of parts, supplies and materials to fulfill its optional maintenance agreements during the audit period constitutes a taxable use of tangible personal property within the meaning of N.C. Gen. Stat. § 105-164.3(49)¹. [Technocom] did not pay sales tax or accrue use tax on these items, and the Department has assessed [Technocom] for the appropriate use tax in its proposed assessment and this final determination.

Between 1 June 2002 and 31 August 2005, Technocom collected sales tax on its optional maintenance agreements. The Department held that these agreements were not subject to sales tax because they did not involve services necessary to complete the sale of tangible personal property under N.C. Gen. Stat. § 105-164.3(37)². Technocom stated to the Department that its sales and use tax liability should be offset by the sales tax it collected on its maintenance agreements. In response, the Department stated that it could not refund or credit Technocom pursuant to N.C. Gen. Stat. § 105-164.11(a)³ because there was no proof Technocom had refunded its customers the sales tax it erroneously collected on its optional maintenance agreements.

On 18 November 2008, Technocom filed a petition for contested case hearing in the Office of Administrative Hearings ("OAH"). Thereafter, on 1 May 2009, Technocom also filed a motion for partial summary judgment and the Department filed a motion for summary judgment. By order entered on 16 November 2009, an administrative law judge granted summary judgment in favor of the Department and sustained the Final Determination. The order concluded that no provision of the Revenue Act allowed Technocom to offset its use tax liability with sales tax it erroneously collected from its customers.

The Department, in a final agency decision, upheld the 16 November 2009 decision of the administrative law judge. On 18 March

1. N.C.G.S. § 105-164.3(49) defines "use" under Article 5 of the General Statutes.

2. N.C.G.S. § 105-164.3(37) defines the meaning of "sales price" under Article 5 of the general statutes.

3. N.C.G.S. § 105-164.11(a) is titled, "Excessive and erroneous collections."

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2010, Technocom filed a petition for judicial review of the final agency decision in Wake County Superior Court.

Following a hearing held 10 December 2010, the superior court reversed the decision of the OAH and the Final Determination of the Department in a 4 January 2011 order. The superior court, in pertinent part, stated:

Transactions that do not generate a windfall and that do not result in the unfair treatment of customers are not included in the meaning of “exempt or nontaxable sales” in Section 105-164.11(a). Because the transactions at issue here are not “exempt or nontaxable sales,” Section 105-164.11(a) is not applicable. The general provision contained in Section 105-164.41 governs the outcome, and Technocom is entitled to a credit against the sales tax paid to the Department during the audit period.

The superior court remanded the case to the OAH with instructions to grant partial summary judgment in favor of Technocom, “leaving open the amount of the tax credit to which [Technocom] is entitled” for the OAH’s determination. Pursuant to the superior court’s order, the administrative law judge entered an order on 3 March 2011 stating the following:

1. [Technocom] is GRANTED partial summary judgment on the following legal issue:

Whether the North Carolina Revenue Laws authorize Technocom to offset its use tax liability on the parts and supplies it provided to customers . . . with the sales taxes based on the sales of those same Service Agreements it had previously remitted in error to the Department[.]

2. Petitioner is entitled to a tax credit of \$192,457.33 on the parts and supplies [Technocom] previously charged, collected and remitted North Carolina sales tax on when it provided such items to its customers . . . if the Order entered in this matter on 4 January 2011 is affirmed on appeal.

3. No further proceedings at OAH are required in this matter as there is no dispute about the amount of credit [Technocom] would be entitled to if the Order is affirmed on appeal.

TECHNOCOM BUS. SYS., INC. v. N.C. DEP'T OF REVENUE

[219 N.C. App. 207 (2012)]

The Department appeals the superior court's 4 January 2011 order.

The sole issue on appeal is whether the North Carolina Revenue Laws authorize Technocom to offset its use tax liability with sales taxes erroneously paid by its customers. The Department argues that no provision in the North Carolina Sales and Use Tax Act ("Act"), N.C. Gen. Stat. §§ 105-164.1 *et seq.*, permits Technocom to claim such a credit against its use tax liability.

An appellate court reviewing a superior court order regarding an agency decision examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly. When, as here, a petitioner contends the [superior court's] decision was based on an error of law, de novo review is proper.

Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 361 N.C. 531, 535, 648 S.E.2d 830, 834 (2007) (internal quotation marks and citations omitted).

Because this appeal centers on a close reading of the Act, we must seek "[t]he principal goal of statutory construction [which] is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation omitted). "If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so." *Id.*

[T]he Act, with certain exceptions and in pertinent part, imposes upon persons engaged in the business of selling tangible personal property at retail in this state a state sales tax at a rate of three percent of the sales price of each item sold. The Act also imposes a complementary state use tax "upon the storage, use or consumption in this state of tangible personal property purchased within and without this state for storage, use or consumption within this state" at a rate of three percent of the cost of such property "when the same is not sold but used, consumed, distributed or stored for use or consumption in this State. . . ."

In re Assessment of Additional N.C. & Orange County Use Taxes, etc., 312 N.C. 211, 214, 322 S.E.2d 155, 158 (1984) (citation omitted).

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The first purpose of the Act is to generate revenue for the state. *Id.* This is accomplished by a sales tax which is

imposed upon the retail merchant as a privilege tax for the right to engage in that business. The tax is, however, designed to be passed on to the consumer. The second purpose of the sales and use tax scheme is to equalize the tax burden on all state residents. This is achieved through imposition of the use tax in certain situations where the sales tax is not applicable.

Id. at 214-15, 322 S.E.2d at 158.

“While a sales tax and a use tax in many instances may bring about the same result, they are different in conception.” *Colonial Pipeline Co. v. Clayton*, 275 N.C. 215, 222, 166 S.E.2d 671, 676 (1969). “A sales tax is assessed on the purchase price of property and is imposed at the time of sale. A use tax is assessed on the storage, use or consumption of property *and takes effect only after such use begins.*” *Id.* at 223, 166 S.E.2d at 677.

The General Assembly has defined a “sale” as a “transfer for consideration of title or possession of tangible personal property . . . for consideration of a service.” N.C.G.S. § 105-164.3(36) (2009). A sale may include such things as a “lease or rental” or a “transaction in which the possession of property is transferred but the seller retains title or security for the payment of the consideration.” *Id.* The sales tax collected on the “sales price” includes the “total amount or consideration for which tangible personal property . . . or services are sold, leased, or rented.” N.C.G.S. § 105-164.3(37) (2009). A sales price includes “charges by the retailer for any services *necessary* to complete the sale.” *Id.* (emphasis added). A “use”, on the other hand, is the “exercise of any right, power, or dominion whatsoever over tangible personal property . . . by the purchaser of the property or service.” N.C.G.S. § 105-164.3(49) (2009).

In the instant case, Technocom does not dispute that it improperly collected sales tax on amounts charged under its optional maintenance agreements and that Technocom should have paid a use tax in connection with the parts and supplies it provided under those agreements. However, it does argue that pursuant to N.C. Gen. Stat. § 105-164.41, the Department is required to issue Technocom a credit against “any” tax. Technocom asserts that the Department should credit the sales taxes made in error against the use tax assessment levied by the Department, particularly, whereas here, the Department

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seeks to treat the transactions at issue as a “use” for tax purposes but as a “sale” for refund purposes.

N.C.G.S. § 105-164.41, titled “Excess payments; refunds[,]” states that “[if] it appears that an amount of tax has been paid in excess of that properly due, then the amount in excess shall be credited against any tax or installment thereof then due from the taxpayer[.]” N.C.G.S. § 105-164.41 (2009). On the other hand, N.C. Gen. Stat. § 105-164.11 (2009), titled “Excessive and erroneous collections[,]” provides guidance in situations where excessive and erroneous collections are made and, specifically, prohibits the relief sought by Technocom. N.C.G.S. § 105-164.11 provides the following:

When the tax collected for any period is in excess of the total amount that should have been collected, the total amount collected must be paid over to the Secretary. When tax is collected for any period on *exempt or nontaxable sales* the tax erroneously collected shall be remitted to the Secretary and no refund shall be made to a taxpayer unless the purchaser has received credit for or has been refunded the amount of tax erroneously charged.

N.C.G.S. § 105-164.11 (2009) (emphasis added).

The rules of “[s]tatutory construction require[] that a more specific statute controls over a statute of general applicability.” *Stewart v. Johnston County Bd. Of Educ.*, 129 N.C. App. 108, 110, 498 S.E.2d 382, 384 (1998). “When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control.” *Trustees of Rowan Technical College v. J. Hyatt Associates, Inc.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985) (citation omitted).

N.C.G.S. § 105-164.41 is the more general statute, applying to any situation where the amount of tax has been paid in excess of that properly due. However, although N.C.G.S. § 105-164.11 is a more specific and particular statute, it does not apply to the instant case, as the Department would have us hold. N.C.G.S. § 105-164.11 only applies to taxes collected on “exempt or nontaxable sales.” As previously stated, a sale is the transfer of tangible personal property for a consideration to be paid. In its February 2010 Final Agency Decision, the Department concluded that the optional maintenance agreements

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at issue constituted a taxable use of tangible personal property within the meaning of N.C.G.S. § 105-164.3(49) and not a sale. Accordingly, the Department held that the agreements were subject to use taxes and not sales taxes. Therefore, N.C.G.S. § 105-164.11 does not apply. We hold that the general provision in N.C.G.S. § 105-164.41 governs the outcome, entitling Technocom to a credit against the sales tax paid to the Department during the audit period. Based on the foregoing, the order of the trial court is affirmed.

Affirmed.

Judges ELMORE and STEPHENS concur.

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UNG CHUL AHN, DEFENDANTS AND THIRD PARTY PLAINTIFFS v. JAE CHEOL SONG,
THIRD PARTY DEFENDANT

No. COA11-710

(Filed 21 February 2012)

1. Jurisdiction—supplemental hearing—principal matter on appeal

The trial court had jurisdiction in a breach of contract, negligent misrepresentation, and unfair or deceptive practices case to conduct a supplemental hearing and issue an order when the principal matter was on appeal. The supplemental hearing did not concern the subject matter of the suit and was intended to aid in the security of plaintiff's rights while the appeal was pending.

2. Injunctions—enjoining from transferring, removing, or disposing assets—statutory exemptions

The trial court did not err in a breach of contract, negligent misrepresentation, and unfair or deceptive practices case by enjoining defendant individual from transferring, removing, or disposing assets. The prohibition was within the authority conferred by N.C.G.S. § 1-358. Further, the order did not prohibit defendant from filing an amended motion or subsequent motion to claim statutory exemptions.

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Appeal by defendant Ung Chul Ahn from order entered 17 February 2010 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 November 2011.

Rayburn Cooper & Durham, P.A., by Ross R. Fulton, Daniel J. Finegan, and Nader S. Raja, for plaintiff-appellee.

Baucom Claytor Benton Morgan & Wood, P.A., by M. Heath Gilbert, Jr., for defendant-appellant.

BRYANT, Judge.

Because the trial court's 17 February 2011 supplemental order was entered while jurisdiction over the suit was vested in the appellate courts but did not concern the subject matter of the suit and aided in securing plaintiff's rights while the appeal was pending, we hold the trial court retained jurisdiction for such orders. Also, because the trial court's order prohibiting defendant from transferring, disposing, or removing property in which he had an interest was authorized under N.C. Gen. Stat. § 1-358, we affirm the trial court's 17 February 2011 supplemental order.

On 26 January 2010, a Civil Superior Court in Mecklenburg County entered judgment in the matter between plaintiff Songwooyarn Trading Company, defendants Sox Eleven, Inc. and Ung Ahn, and third-party defendant Jae Song. The claims before the court included breach of contract, negligent misrepresentation, and unfair or deceptive practices. The trial court ordered that plaintiff "shall have and recover the principal amount of \$164,318.32 from defendant Sox Eleven, Inc." and \$1,022,041.00 from defendant Ahn.

Defendant Ahn timely appealed the trial court's order to this Court. However, defendant Ahn acknowledges that he "did not obtain a stay of execution of the judgment in the matter [pursuant to N.C. Gen. Stat. § 1-289] and as a result, the plaintiff was afforded the right to pursue execution of assets" On 21 June 2011, in *Songwooyarn Trading Co., Ltd. v. Sox Eleven, Inc.*, ___ N.C. App. ___, 714 S.E.2d 162 (2011) (*Songwooyarn Trading I*), this Court affirmed the trial court's judgment, and our North Carolina Supreme Court denied defendant Ahn's petition for discretionary review on 9 November 2011. *Songwooyarn Trading Co., Ltd. v. Sox Eleven, Inc.*, 2011 N.C. LEXIS 929 (N.C. No. 30P11) (9 November 2011).

On 5 April 2010, prior to this Court rendering an opinion in *Songwooyarn Trading I*, defendant Ahn filed a Motion to Claim

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Exempt Property (Statutory Exemptions) in the trial court seeking to set aside as exempt from judgment certain real property located in Los Angeles, as well as personal property. Plaintiff contested the motion, specifically contending that the motion failed to set out a complete listing of the debtor's non-exempt assets, impermissibly undervalued the debtor's property, and attempted to claim exemptions beyond those permitted by North Carolina law. Following a hearing on the matter, the trial court, on 18 June 2010, found that defendant Ahn had failed to adhere to the statutory requirements for claiming exempt property but allowed defendant an opportunity to re-file the motion.

On 2 July 2010, defendant Ahn re-filed the motion to claim exempt property. Plaintiff filed an Objection to Second Motion to Claim Exempt Property, again contending that defendant Ahn's motion failed to provide a complete listing of defendant's non-exempt assets and where values were provided, the property was undervalued.

On 4 October 2010, defendant Ahn filed responses to plaintiff's previously submitted interrogatories to discover assets and request for production of documents. On 3 November 2010, plaintiff subpoenaed documents relating to defendants Sox Eleven, Inc., and Ahn from: Bank of America, N.A.; Weekender for Active Lifestyles, Inc.; American Express Company; and RBC Bank. Plaintiff also subpoenaed documents from Bank of America N.A. related to Young Sin Ahn, defendant Ahn's wife. On 10 November 2010, defendant Ahn filed a motion to quash and modify in supplemental proceedings to quash the subpoenas issued to Bank of America, N.A., Weekender Active Lifestyles, Inc., and American Express Company. Defendant Ahn further moved to modify the subpoena issued with regard to accounts held by his wife, Young Ahn. On 12 November 2010, defendant filed Amended Responses to Interrogatories to Discover Assets Pursuant to N.C. Gen. Stat. § 1-352.1 and Request for Production of Documents Pursuant to N.C. Gen. Stat. § 1-352.1.

On 22 December 2010, plaintiff filed a motion for supplemental relief,

[requesting an order] prohibiting the Defendant and Judgment Debtor Ung Chul Ahn ("Debtor") from transferring or otherwise disposing of his assets, including certain rental proceeds arising from real property, or other sources, and requiring Debtor and Young Ahn to deposit one-half of all rental income or other proceeds derived from such property with the Clerk of Court.

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The same day, plaintiff filed a motion to compel subpoena responses and a motion to compel responses to post-judgment discovery.

The matter came on for hearing on 15 February 2011. On 17 February 2011, the trial court entered an order prohibiting defendant Ahn from transferring, disposing, or removing property or assets within North Carolina unless the property is declared as exempt on defendant Ahn's 2 July 2010 motion to claim exempt property. Further, the trial court ordered that Bank of America, Weekender for Active Lifestyles, Inc., American Express Company, and RBC Bank shall comply with the subpoenas issued to produce documents related to defendants Sox Eleven, Inc., and Ahn. The trial court further specified that the order encompassed requests for documents related to accounts held jointly between defendant Ahn and his wife, Young Ahn, but the order did not reach accounts held by Young Ahn individually. Defendant Ahn appeals.

On appeal, defendant raises the following two issues: Whether the trial court (I) lacked jurisdiction to conduct a hearing and issue an order in supplemental proceedings; and (II) erred in its order restricting the transfer, removal or disposal of assets.

I

[1] Defendant first contends that the trial court lacked jurisdiction to conduct a supplemental hearing and issue an order when the principal matter was on appeal. Defendant argues that the supplemental proceedings addressing plaintiff's motions to obtain defendant's bank records, to limit defendant's statutory exemptions, and to freeze all assets in which defendant had an interest was held while the principal matter was pending appeal, and, therefore, the trial court was *functus officio*, without jurisdiction to enforce its order. We disagree.

Under North Carolina General Statutes, section 1-294, "[w]hen an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from." N.C. Gen. Stat. § 1-294 (2011).

[W]hile it is true the general rule is that once an appeal is perfected, the lower court is divested of jurisdiction, *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E.2d 879 (1971), the lower court nonetheless retains jurisdiction to take action which aids the

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appeal, *id.* at 111, 184 S.E.2d at 881, and to hear motions and grant orders, so long as they do not concern the subject matter of the suit and are not affected by the judgment appealed from. N.C.G.S. § 1-294 (1983)

Faulkenbury v. Teachers' & State Employees' Retirement System, 108 N.C. App. 357, 364, 424 S.E.2d 420, 422, *disc. review denied in part*, 334 N.C. 162, 432 S.E.2d 358, *aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993). "Likewise, . . . a trial court may ordinarily 'suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise . . . it considers proper for the security of the rights of the adverse party' while an appeal is pending . . ." *Ross v. Ross*, 194 N.C. App. 365, 368, 669 S.E.2d 828, 831 (2008) (citing N.C. Gen. Stat. § 1A-1, Rule 62(c) (2007)).

Defendant Ahn appealed from the 26 January 2010 judgment against him on claims of breach of contract, negligent misrepresentation, and unfair or deceptive practices. Following defendant Ahn's motions to exempt property from the reach of judgment creditors through statutory safe harbors and plaintiff's attempts to compel discovery from Ahn and the production of documents related to defendants Sox Eleven, Inc., and Ahn via subpoena, the trial court held a supplemental hearing on 15 February 2011. On 17 February 2011, the trial court entered an order prohibiting defendant Ahn from transferring, disposing, or removing property or assets within North Carolina unless the property was declared exempt on defendant Ahn's 2 July 2010 motion to claim exempt property. Further, the trial court ordered that the entities subpoenaed for production of documents related to defendants Sox Eleven, Inc. and Ahn shall comply with the subpoenas.

On 21 June 2011, this Court affirmed the trial court's 26 January 2010 judgment, *Songwooyarn Trading I*, and, on 9 November 2011, our Supreme Court denied defendant Ahn's petition for discretionary review. *Songwooyarn Trading Co.*, 2011 N.C. LEXIS 929 (N.C. No. 30P11) (9 November 2011).

The trial court's 17 February 2011 supplemental order, entered during the pendency of the appeal of the 26 January 2010 trial court order while jurisdiction was vested in the appellate courts, did not concern the subject matter of the suit and was intended to aid in the security of plaintiff's rights while the appeal was pending. We hold the trial court retained jurisdiction to enter a supplemental order.

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Faulkenbury, 108 N.C. App. at 364, 424 S.E.2d at 422; *Ross*, 194 N.C. App. at 368, 669 S.E.2d at 831. Accordingly, defendant Ahn's argument is overruled.

II

[2] Defendant Ahn argues that the trial court erred by enjoining him from transferring, removing, or disposing of assets. Defendant first contends that the trial court's supplemental order is too broad in that it restricts transactions regarding all property in which defendant has an interest, including property held as tenancy by the entirety, and is too limiting in that it restricts defendant Ahn's exemptions to those declared in the 2 July 2010 motion to claim exemptions. We disagree.

In support of his argument defendant Ahn cites North Carolina General Statutes, section 1-315(a)(1), "[t]he following property of the judgment debtor, not exempted from sale under the Constitution and laws of this State, may be levied on and sold under execution . . . Goods, chattels, and real property belonging to him." N.C. Gen. Stat. § 1-315(a)(1) (2011). However, here, the trial court's order does not compel the sale of any property but, rather, prohibits the transfer, disposal, or removal of property or assets within North Carolina by defendant Ahn unless the property is declared exempt in defendant Ahn's 2 July 2010 motion to claim exempt property.

Under North Carolina General Statutes, section 1-358, "[t]he court or judge may, by order, forbid a transfer or other disposition of, or any interference with, the property of the judgment debtor not exempt from execution." N.C. Gen. Stat. § 1-358 (2011). We hold that the trial court's prohibition on defendant Ahn's transfer, disposal, or removal of property or assets is squarely within the authority conferred by N.C. Gen. Stat. § 1-358.

As for defendant Ahn's contention that the trial court order is too restrictive in that it recognizes as exempt only that property which was claimed in defendant Ahn's 2 July 2010 motion to claim exemptions, we note that the order does not prohibit defendant Ahn from filing an amended motion or subsequent motion to claim statutory exemptions. Accordingly, defendant Ahn's arguments are overruled.

Affirmed.

Judges CALABRIA and STROUD concur.

IN RE D.T.L.

[219 N.C. App. 219 (2012)]

IN THE MATTER OF: D.T.L., T.S.L., AND A.M.L., JUVENILES

No. COA11-1090

(Filed 21 February 2012)

1. Termination of Parental Rights—failure to provide support—no decree or custody agreement requiring payment

The trial court erred by concluding that grounds existed to terminate respondent father's parental rights to his minor children because he failed to provide support for them. There was no decree or custody agreement which required respondent to pay for the care, support, and education of the juveniles.

2. Termination of Parental Rights—willful abandonment—six-month statutory period—institution of civil custody action

The trial court erred by concluding that grounds existed to terminate respondent father's parental rights to his minor children because he willfully abandoned them. During the relevant six-month statutory period, respondent was released from incarceration and petitioner mother obtained a domestic violence protection order prohibiting respondent from contacting either petitioner or the juveniles. Further, respondent's institution of a civil custody action undermined the finding that he willfully abandoned his children.

Appeal by respondent from order entered 15 June 2011 by Judge A. Elizabeth Keever in Cumberland County District Court. Heard in the Court of Appeals 6 February 2012.

No brief filed for petitioner-mother appellee.

Assistant Appellate Defender J. Lee Gilliam, for respondent-father appellant.

Melinda C. Flinn for guardian ad litem appellee.

McCULLOUGH, Judge.

Respondent appeals from an order terminating his parental rights to his minor children, D.T.L., T.S.L., and A.M.L. ("the juveniles"). Because neither of the grounds found by the trial court to terminate respondent's parental rights are supported by its findings of fact, we reverse the trial court's order.

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Respondent is the biological father and petitioner is the biological mother of the juveniles, although they never married. Respondent and petitioner were living together in 2006, when the Robeson County Department of Social Services (“RCDSS”) received a report of domestic violence in the home. After investigating the report, RCDSS informed petitioner that she risked the removal of the juveniles from her custody due to domestic violence and misuse of drugs and alcohol in the home. In response, petitioner severed her relationship with respondent and left his home in February 2006.

In January 2007, respondent was arrested for trafficking cocaine and conspiracy. In October 2007, respondent entered a guilty plea to conspiracy to traffic cocaine and was sentenced to a term of 35 to 42 months’ imprisonment. Respondent was released from incarceration in September 2010.

Shortly after respondent’s release, petitioner sought and obtained a domestic violence protection order against respondent. The order prohibited respondent from contacting either petitioner or the juveniles. On 19 November 2010, respondent filed a child custody complaint against petitioner, seeking joint custody of the juveniles. In his complaint, respondent asked the court to grant petitioner “primary” custody of the juveniles, and allow him to have “secondary” custody of the juveniles with “reasonable and liberal visitation.” Petitioner filed an answer and counterclaim to respondent’s complaint on 8 February 2011. That same day, petitioner also filed a petition to terminate respondent’s parental rights to the juveniles. In her petition, petitioner alleged grounds existed to terminate respondent’s parental rights in that he: (1) willfully failed to pay for the care, support and education of the juveniles; (2) willfully abandoned the juveniles; and (3) neglected the juveniles.

After a hearing on 23 May 2011, the trial court entered an order terminating respondent’s parental rights to the juveniles. The trial court found grounds existed to terminate respondent’s parental rights in that he willfully failed to pay for the care, support, and education of the juveniles and he willfully abandoned the juveniles. Respondent appeals.

“The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law.” *In re Shepard*, 162 N.C. App. 215, 221-22, 591 S.E.2d 1, 6 (2004) (quoting *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984)). “Findings of fact supported by competent

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evidence are binding on appeal even though there may be evidence to the contrary.” *In re S.R.G.*, 195 N.C. App. 79, 83, 671 S.E.2d 47, 50 (2009). However, “[t]he trial court’s conclusions of law are fully reviewable *de novo* by the appellate court.” *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (internal quotation marks and citation omitted).

[1] Respondent first argues the trial court erred in concluding grounds existed to terminate his parental rights because he failed to provide support to the juveniles. We agree.

Grounds exist to terminate parental rights where:

One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, *as required by said decree or custody agreement*.

N.C. Gen. Stat. § 7B-1111(a)(4) (2011) (emphasis added). In applying N.C. Gen. Stat. § 7A-289.32(5), the identical predecessor to N.C. Gen. Stat. § 7B-1111(a)(4), this Court held that, “[i]n a termination action pursuant to this ground, petitioner must prove the existence of a support order that was enforceable during the year before the termination petition was filed.” *In re Roberson*, 97 N.C. App. 277, 281, 387 S.E.2d 668, 670 (1990).

Here, the petition did not allege that there was a decree or custody agreement which required respondent to pay for the care, support, and education of the juveniles. Moreover, no evidence was introduced at the hearing that any such decree or agreement existed, and the trial court did not find that any decree or agreement existed. Accordingly, we hold the trial court erred in concluding this ground existed to terminate respondent’s parental rights.

[2] Respondent next argues the trial court erred in concluding grounds existed to terminate his parental rights to the juveniles because he willfully abandoned the juveniles. We agree.

A trial court may terminate parental rights upon concluding that “[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion” N.C. Gen. Stat. § 7B-1111(a)(7) (2011). “Whether a bio-

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logical parent has a willful intent to abandon his child is a question of fact to be determined from the evidence.” *In re Adoption of Searle*, 82 N.C. App. 273, 276, 346 S.E.2d 511, 514 (1986). “Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.” *Id.* at 275, 346 S.E.2d at 514. This Court has further held:

A judicial determination that a parent willfully abandoned her child, particularly when we are considering a relatively short six month period, needs to show more than a failure of the parent to live up to her obligations as a parent in an appropriate fashion; the findings must clearly show that the parent’s actions are wholly inconsistent with a desire to maintain custody of the child.

In re S.R.G., 195 N.C. App. at 87, 671 S.E.2d at 53.

Here, the trial court’s ultimate finding of fact regarding the ground of abandonment states that “[r]espondent has failed to maintain contact with the Juveniles since March 2007. He has wilfully abandoned the Juveniles.” However, this ultimate finding is not supported by clear, cogent and convincing evidence. Petitioner filed her petition to terminate respondent’s parental rights on 8 February 2011, thus the relevant six-month statutory period was from 8 August 2010 to 8 February 2011. Respondent was released from incarceration in September 2010, and on 6 October 2010, petitioner obtained a domestic violence protection order which prohibited respondent from contacting either petitioner or the juveniles. On 19 November 2010, respondent filed a custody action against petitioner in which he asked the court to award “primary” custody to petitioner and grant him “secondary” custody and “reasonable and liberal visitation.” Respondent’s institution of a civil custody action undermines the trial court’s finding and conclusion that he willfully abandoned the juveniles. Having been prohibited by court order from contacting either petitioner or the juveniles, respondent’s filing of a civil custody action clearly establishes that he desired to maintain custody of the juveniles and cannot support a conclusion that he had a willful determination to forego all parental duties and relinquish all parental claims to the juveniles. Accordingly, we hold the trial court erred in concluding respondent willfully abandoned the juveniles pursuant to N.C. Gen. Stat. § 7B-1111(a)(7).

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Because we hold the trial court erred in concluding that grounds existed to terminate respondent's parental rights pursuant to both N.C. Gen. Stat. § 7B-1111(a)(4) and (7), we reverse the trial court's order terminating respondent's parental rights.

Reversed.

Chief Judge MARTIN and Judge BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 FEBRUARY 2012)

BALD HEAD ASS'N v. CURNIN No. 11-23	Brunswick (09CVS2664)	Affirmed
BESS v. COUNTY OF CUMBERLAND No. 11-1044	Cumberland (10CVS9673)	Reversed
DICKASON v. HAYES No. 11-847	Mecklenburg (04CVD21910(PBM))	Affirmed
ECS CAROLINAS, LLP v. PERRY No. 11-682	Durham (09CVD1594)	Affirmed in part and remanded
FIA CARD SERVS., N.A. v. CAMPBELL No. 11-711	Gaston (10CVD5564)	Reversed and Remanded
IN RE C.S. No. 11-1168	Columbus (08JT54)	Affirmed
IN RE C.W. No. 11-1157	Sampson (08JB123)	Affirmed
IN RE K.M. No. 11-837	Mecklenburg (08JT821)	Affirmed
IN RE T.B.C. No. 11-1072	Onslow (10J37)	Affirmed
IN RE V.M. No. 11-972	Wake (07JT820-821)	Affirmed
IN RE W.W. No. 11-1249	Scotland (09J101)	Affirmed
N.C. STATE BAR v. STAPLES No. 11-1040	N.C. State Bar (10DHC35)	Affirmed
PENDERGRAPH, v. N.C. DEP'T OF REVENUE No. 11-848	Wake (09CVS19607)	Affirmed
STATE v. BROWN No. 11-671	Cleveland (09CRS55210-11)	No Error
STATE v. COLMAN No. 11-1247	Pitt (07CRS56811) (07CRS56816) (07CRS56854)	Affirmed
STATE v. COLON No. 11-924	Cumberland (09CRS54409)	No Error

STATE v. FEARRINGTON No. 11-1030	Orange (10CRS50942)	Dismissed
STATE v. GORDON No. 11-977	Stanly (08CRS52908) (09CRS358)	No error at trial; remanded for resentencing
STATE v. GRAVES No. 11-785	Rockingham (10CRS55)	Affirmed
STATE v. GUTHRIE No. 11-896	Onslow (09CRS52593) (09CRS53286)	No Error
STATE v. HARE No. 11-818	Wake (08CRS85093) (10CRS653)	No Error
STATE v. HUFFMAN No. 11-1103	Catawba (10CRS5452)	No Error
STATE v. LITTLETON No. 11-224	Onslow (08CRS59629)	No Error
STATE v. MARQUEZ No. 11-729	Greene (08CRS51102)	Affirmed in part, vacated in part.
STATE v. MONTI No. 11-836	Pasquotank (09CRS51029) (09CRS51030-31) (09CRS51032) (09CRS51060) (09CRS51061)	New Trial
STATE v. MOSES No. 11-976	Mecklenburg (09CRS204857) (10CRS12669)	No Error
STATE v. PAGAN No. 11-843	Mecklenburg (09CRS243119)	No Error
STATE v. SLOAN No. 11-795	Mecklenburg (09CRS204182) (09CRS204183) (09CRS204186) (09CRS24362)	No Error
STATE v. SPRINGS No. 11-799	Catawba (10CRS1318)	Affirmed
STATE v. STUCKEY No. 11-1113	Cumberland (09CRS61153) (09CRS61545)	Reversed and remanded for rehearing

STATE v. TAPIA No. 11-461	Forsyth (10CRS55393-94) (10CRS55398)	No Error
STATE v. WATSON No. 11-1037	Wake (08CRS29122)	Affirmed in part; No error in part
STATE v. WEMYSS No. 11-947	Sampson (09CRS53129)	No Error
STATE v. WRIGHT No. 11-833	Rockingham (09CRS54518)	No Error
STATE v. YOUNG No. 11-720	Cleveland (09CRS3226)	Reversed and Remanded

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JEFFREY A. AND LISA S. HILL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS V. STUBHUB, INC. D/B/A “STUBHUB!” AND/OR “STUBHUB.COM”, JUSTIN HOLOHAN, AND “JOHN DOE SELLERS 2” ET. AL., DEFENDANTS

No. COA11-685

(Filed 6 March 2012)

1. Appeal and Error—appealability—interests of justice—online ticket broker

The Court of Appeals granted *certiorari* in the interests of justice in an appeal from a summary judgment for plaintiffs in an action challenging an online marketplace for tickets as violating ticket resale statutes and being an unfair trade practice.

2. Brokers—online tickets—exemption from liability—exceptions

In order for a website to lose the benefit of the exemption from liability granted by 47 U.S.C. § 230 (which provided an exemption for information provided by another content provider), the website must effectively control the content posted by third parties or take other actions which essentially ensure the creation of unlawful material.

3. Brokers—online ticket sales—exemption from liability—unlawful activity

The trial court erred by using an erroneous “entire website” approach and granting summary judgment for plaintiffs in an action against an online ticket broker where defendants claimed the immunity created by 47 U.S.C. § 230. Focusing upon the specific content at issue in this case, the undisputed evidence established that defendant simply functioned as a broker, effectively putting a buyer and seller into contact with each other to facilitate a sale at a price established by the seller. The fact that defendant may have been on notice that its website could be used to make unlawful sales and that certain of defendant’s practices may have provided incentives for the overpricing of certain tickets did not support a decision stripping defendant of its immunity under the federal statute.

4. Brokers—online ticket sales—fees—defendant neither a seller nor an agent—dependent services

The trial court erred by determining that the fees charged by an online ticket broker violated N.C.G.S. § 14-33 where the undis-

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puted evidence established that defendant was neither a ticket seller nor the ticket seller's agent. Defendant provided an independent brokerage function so that its fees related to its own services rather than the services provided by the seller.

Appeal by defendant from judgment entered 4 March 2011 by Judge Ben F. Tennille in Guilford County Superior Court. Heard in the Court of Appeals 4 December 2011.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jeffrey E. Oleynik and Charles E. Coble, and the Law Offices of Jeffrey K. Peraldo, PA, by Kara W. Edmunds and Jeffrey K. Peraldo for Plaintiffs Jeffrey A. and Lisa S. Hill.

K&L Gates, LLP, by John H. Culver III, and Molly L. McIntosh; Weil, Gotshal & Manges LLP, by David J. Lender; and Cooley Godward Kronish LLP, by Michael G. Rhodes, for Defendant StubHub, Inc.

Wilmer Cutler Pickering Hale & Dorr LLP, by Patrick J. Carome, Samir Jain, Daniel P. Kearney, Jr., and Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., and Robert T. Numbers II, for Amicus Curiae Center for Democracy & Technology; Computer & Communications Industry Association; Consumer Electronics Association; Ebay, Inc.; Electronic Frontier Foundation; Internet Commerce Coalition; NetChoice; NetCoalition; Public Knowledge; TechAmerica; and TechNet.

ERVIN, Judge.

Defendant StubHub appeals from an order granting summary judgment in favor of Plaintiffs Jeffrey A. and Lisa S. Hill with respect to their claim that Defendant engaged in unfair or deceptive trade practices by violating the provisions of N.C. Gen. Stat. § 14-344. On appeal, Defendant argues that Plaintiffs' "ticket scalping" claim is barred by 47 U.S.C. § 230 and that Defendant did not violate the "fee" provisions of N.C. Gen. Stat. § 14-344. After careful consideration of Defendant's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be reversed.

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I. BackgroundA. Substantive Facts

Defendant operates an online marketplace that enables third parties to buy and sell tickets to sporting contests, concerts, and similar events. Among other things, Defendant serves as an intermediary between buyers and sellers in order to facilitate transactions in which the identities of the buyer and the seller are not disclosed to each other. As part of that process, sellers are provided with prepaid FedEx™ labels for shipping tickets; a guarantee of payment even if the buyer uses an invalid or fraudulent credit card; and the assurance that Defendant will assist in resolving any customer service issues that might arise. On the other hand, buyers are assured that they will receive valid tickets, or tickets of the same or equal value, in a timely manner.

In order to consummate a transaction using Defendant’s website, a person must first create a user account, a process that requires the person to provide personal information and agree to abide by the terms and conditions set out in a User Agreement. The User Agreement requires the user to agree to refrain from “us[ing] this Site for unlawful purposes or in an unlawful manner” and “to comply with all applicable local, state[,] federal and international laws, statutes and regulations regarding use of the Site and the selling of tickets,” including regulations governing the “selling value of the tickets.”¹

In the event that a ticket sale occurs, Defendant charges both parties for its services, with 10% of the ticket price deducted from the proceeds that would otherwise be payable to the seller and 15% of the ticket price, plus a shipping fee, added to the buyer’s total cost. Defendant calculates the total amount due and provides the buyer with that information, processes the buyer’s payment, and remits the amount at which the ticket sold, less Defendant’s fee, to the seller. As a result, the seller does not receive the buyer’s credit card information and the buyer does not learn the identity of the seller.

In September, 2007, Plaintiffs decided to buy tickets to a “Miley Cyrus as Hannah Montana” concert to be held at the Greensboro Coliseum in November, 2007. After unsuccessfully attempting to

1. In addition, Defendant provided notice that ticket scalping is illegal in North Carolina and reminded potential buyers that the price of tickets sold through its website might exceed face value. However, Defendant also instructed potential sellers not to show the face value of the tickets that they were attempting to resell.

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purchase tickets to this event using the Coliseum's website, Ms. Hill purchased four tickets to the concert through Defendant's website for \$149.00 each. In addition to the aggregate ticket price, Plaintiffs paid a shipping charge of \$11.95 and a fee for Defendant's services of \$59.60, increasing the total amount of her order to \$667.55. Tickets to the Hannah Montana concert had a face value of \$56.00 apiece.

The tickets that Ms. Hill purchased were sold by Justin Holohan, an accountant living in Massachusetts who had sold hundreds of tickets using Defendant's website. Mr. Holohan owned the tickets in question and selected the sale price. Mr. Holohan did not remember if he used any pricing information function available through Defendant's website to arrive at the price he selected for the tickets purchased by Ms. Hill.

At the time that he registered to use Defendant's website, Mr. Holohan provided various items of personal information and agreed to abide by Defendant's User Agreement. In the event that a prospective buyer offered to purchase a ticket that Mr. Holohan had listed on Defendant's website, he would receive an email from Defendant asking if he wanted to accept the offer. If Mr. Holohan accepted the buyer's offer, he would print out a prepaid FedExTM label and use that label to ship the tickets to the purchaser. Defendant functioned as an intermediary between the purchasers and Mr. Holohan, collected credit card information from buyers, and provided him with a marketplace in which he could sell tickets "to an anonymous party."

B. Procedural History

On 17 October 2007, Plaintiffs filed a complaint, both individually and as representatives of a proposed class consisting of "all others similarly situated," against Defendant; "John Doe Seller 1," the individual who sold the Hannah Montana tickets to Ms. Hill; and "John Doe Sellers 2," other sellers of tickets using Defendant's website. In their complaint, which was subsequently amended on two occasions to assert additional factual allegations concerning the manner in which Defendant's website operated and to substitute Mr. Holohan for "John Doe Seller 1," Plaintiffs alleged that they had purchased four tickets to the Hannah Montana concert at substantially in excess of face value and that the Defendant's fee exceeded \$3.00 per ticket. As a result, Plaintiffs claimed that they were entitled to recover compensatory and punitive damages based upon Defendant's alleged violation of N.C. Gen. Stat. § 14-344, a statute making it unlawful to sell a ticket for more than \$3.00 over its face value; Defendant's deci-

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sion, along with the other defendants, to participate in a civil conspiracy to violate N.C. Gen. Stat. § 14-344; tortious action in concert by Defendant and the other defendants; and the fact that Defendant had allegedly engaged in an unfair and deceptive trade practice in violation of N.C. Gen. Stat. § 75-1.1.

On 21 April 2008, Defendant moved for dismissal of Plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on the grounds that "Section 230 of the Communications Decency Act (47 U.S.C. § 230) preempts the application of state law and provides a complete immunity to Plaintiffs' claims." On 21 July 2008, the trial court entered an order dismissing all of Plaintiffs' claims except for their unfair and deceptive trade practices claim.

On 3 September 2008, Defendant filed an answer to Plaintiffs' complaint in which it denied the material allegations set out in that pleading and asserted various affirmative defenses, including a contention that Plaintiffs' claim was barred by 47 U.S.C. § 230. On 25 October 2010, Plaintiffs filed a motion for summary judgment. On 4 March 2011, the trial court entered an order determining that Defendant was not entitled to immunity from liability pursuant to 47 U.S.C. § 230, that Defendant had violated N.C. Gen. Stat. § 14-344, that Defendant's conduct constituted an unfair and deceptive trade practice, and that Plaintiffs were entitled to judgment in their favor in an undetermined amount with respect to the individual claims that they had lodged against Defendant pursuant to N.C. Gen. Stat. § 75-1.1. Defendants noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Appealability

[1] According to N.C. Gen. Stat. § 1A-1, Rule 54(a), a "judgment is either interlocutory or the final determination of the rights of the parties." "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950)). Given that the trial court's order granted summary judgment in favor of Plaintiffs with respect to their individual claims without making a specific damage award or addressing Plaintiffs' request for class certification, the order from which Defendant has attempted to appeal is clearly interlocutory in nature.

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As a general proposition, “there is no right of immediate appeal from interlocutory orders and judgments.” *Travco Hotels, v. Piedmont Natural Gas Co.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992) (citing *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990)). However, immediate appellate review of an interlocutory order is available “when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies that there is no just reason for delay” pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) or when “the interlocutory order affects a substantial right under N.C. Gen. Stat. § 1-277(a) and N.C. Gen. Stat. § 7A-27(d). *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (citing *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998), and *Ostereicher v. Stores*, 290 N.C. 118, 121-22, 225 S.E.2d 797, 800 (1976)). Although the trial court appears to have attempted to include a certification pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) in its summary judgment order and although Defendant contends that the trial court’s order is immediately appealable on “substantial right” grounds pursuant to N.C. Gen. Stat. § 1-277(a) and N.C. Gen. Stat. § 7A-27(d), we need not determine whether the trial court’s summary judgment order is appealable as a matter of right since we have decided to assert jurisdiction over this case on other grounds.

On 24 March 2011, Defendant filed a petition for *certiorari* requesting that, in the event that we concluded that the trial court’s summary judgment order was not immediately appealable, we grant *certiorari* because the principal issue before the Court was the extent, if any, to which Defendant was immune from liability pursuant to 47 U.S.C. § 230; because immediate review in this instance would promote judicial economy; and because the present case involves issues of first impression in North Carolina. Although Plaintiffs opposed Defendant’s request for the issuance of a writ of *certiorari*, we conclude, in the exercise of our discretion, that granting the requested writ of *certiorari* would further the interests of justice in this case. *Stetser v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 12, 598 S.E.2d 570, 578-79 (2004) (granting *certiorari* review given “the significant impact of this lawsuit, the importance of the issues involved and the need for efficient administration of justice”). As a result, we conclude that the requested writ of *certiorari* should be issued and that Defendant’s challenges to the trial court’s summary judgment order should be reviewed on the merits.

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B. Standard of Review

A trial court properly grants summary judgment “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 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). “[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). A trial court’s decision to grant a summary judgment motion is reviewed on a *de novo* basis. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). As a result of the fact that the record does not, as the parties appear to agree, disclose the presence of any genuine issue of material fact, the ultimate question for our consideration is whether the trial court appropriately concluded that Plaintiffs were entitled to judgment as a matter of law with respect to their individual unfair and deceptive trade practices claim.

C. Substantive Legal Issues1. Introduction

The undisputed record evidence establishes that the face value of each of the tickets at issue here was \$56 and that each ticket that Mr. Holohan sold to Ms. Hill cost \$149, a figure that substantially exceeded the limitation on secondary sales set out in N.C. Gen. Stat. § 14-344 (providing that “[a]ny person, firm, or corporation shall be allowed to add a reasonable service fee to the face value of the tickets sold” in an amount “not [to] exceed three dollars (\$3.00) for each ticket” and that “[a]ny person, firm or corporation which sells or offers to sell a ticket for a price greater than the price permitted by

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this section . . . shall be guilty of a Class 2 misdemeanor”);² that Mr. Holohan owned the tickets, established the sale price, and received the sales proceeds, less Defendant’s 10% service charge; and that Plaintiffs paid a shipping charge and service fee to Defendant. According to Plaintiffs, the trial court correctly determined that Defendant violated N.C. Gen. Stat. § 14-344 on the grounds that (1) Defendant sold the tickets for an amount in excess of the statutorily prescribed maximum and that (2) Defendant charged an excessive buyer’s fee. In response, Defendant contends that it did not sell the tickets to Ms. Hill, so that it was not subject to limitations on the amount of permissible fees set out in N.C. Gen. Stat. § 14-344. In addition, Defendant argues that it may not be held liable to Plaintiffs based upon the price at which Mr. Holohan chose to sell his tickets in light of the immunity provisions set out in 47 U.S.C. § 230. In response, Plaintiffs argue that Defendant should be deemed responsible for developing the relevant content that appeared on its website, which consists of the price at which Mr. Holohan elected to sell his tickets, so that the exemption from liability created by 47 U.S.C. § 230 does not apply. In granting summary judgment in favor of Plaintiffs, the trial court determined that Defendant was at least partially responsible for the sale price that Mr. Holohan established and had, for that reason, been “stripped of any immunity” arising under 47 U.S.C. § 230 and that Defendant was subject to the fee limitations set out in N.C. Gen. Stat. § 14-344. After carefully scrutinizing the record and studying the applicable law, we conclude (1) that a proper inquiry into the extent to which Defendant is entitled to claim immunity from liability pursuant to 47 U.S.C. § 230 must focus upon the specific content at issue in this case, which is the price at which Mr. Holohan sold the tickets to Ms. Hill; (2) that, after construing the provisions of 47 U.S.C. § 230 in light of the facts of this case, Defendant is entitled to immunity from any liability arising from the ticket price established by Mr. Holohan; and (3) that Defendant did not “sell” the tickets to Ms. Hill or act as the seller’s agent, thereby falling outside the scope of the fee limitation provision set out in N.C. Gen. Stat. § 14-344. As a result, we conclude that the trial court’s order should be reversed and that this case should be remanded to the trial court for the entry of summary judgment in favor of Defendant.

2. After Plaintiffs initiated the present case, the General Assembly amended N.C. Gen. Stat. § 14-344 and added N.C. Gen. Stat. § 14-344.1 to exempt internet ticket sales accompanied by a ticket assurance guarantee from the strictures otherwise established by that statutory provision.

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2. 47 U.S.C. § 230(c)(1)

[2] The central issue before the trial court was the extent, if any, to which Plaintiffs' claims were barred by 47 U.S.C. § 230, which provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." As a result, the proper resolution of this case hinges upon the manner in which 47 U.S.C. § 230 should be interpreted.

In the event that issues arising in a case pertain to federal statutes, we are bound by the Supreme Court of the United States' interpretation of the federal statutes involved. *Boulogny, Inc. v. Steelworkers*, 270 N.C. 160, 174, 154 S.E.2d 344, 356 (1967) ("a decision of the Supreme Court of the United States, construing an act of Congress, is conclusive and binding on this court. On the other hand, "North Carolina appellate courts are not bound, as to matters of federal law, by decisions of federal courts other than the United States Supreme Court." *Enoch v. Inman*, 164 N.C. App. 415, 420-21, 596 S.E.2d 361, 365 (2004) (citing *Security Mills v. Trust Co.*, 281 N.C. 525, 529, 189 S.E.2d 266, 269 (1972)). However, although they are "not binding on North Carolina's courts, the holdings and underlying rationale of decisions rendered by lower federal courts may be considered persuasive authority in interpreting a federal statute." *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 488, n.4, 687 S.E.2d 690, 695 n.4 (2009) (citing *Security Mills*, 281 N.C. at 529, 189 S.E.2d at 269), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 400 (2010). As a result of the fact that the United States Supreme Court has not yet addressed the scope of the immunity from liability made available by 47 U.S.C. § 230 and the fact that neither this Court nor the Supreme Court of North Carolina have, as of the present date, had a chance to construe 47 U.S.C. § 230, we will look to decisions of the lower federal courts and other state courts that we deem persuasive in attempting to properly interpret the relevant statutory language.

As the United States Court of Appeals for the Fourth Circuit has noted:

. . . Congress carved out a sphere of immunity from state lawsuits for providers of interactive computer services[.] . . . [47 U.S.C.] § 230 prohibits a "provider or user of an interactive computer service" from being held responsible "as the publisher or speaker of any information provided by another information content provider." § 230(c)(1).

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Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc., 591 F.3d 250, 254 (4th Cir. 2009) (citing *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937, 118 S. Ct. 2341, 141 L. Ed. 2d 712 (1998)).

Although this court has not previously interpreted [47 U.S.C. § 230], we do not write on a blank slate. The other courts that have addressed these issues have generally interpreted Section 230 immunity broadly, so as to effectuate Congress’s “policy choice . . . not to deter harmful online speech through the . . . route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.” . . . In light of these policy concerns, we too find that Section 230 immunity should be broadly construed.

Universal Communication v. Lycos, Inc., 478 F.3d 413 418-19 (1st Cir. 2007) (quoting *Zeran* at 330-31 and citing *Carafano v. Metroplash.com, Inc.*, 339 F.3d 1119, 1123-24 (9th Cir. 2003), and *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 985, n.3, (10th Cir. 2000), *cert. denied*, 531 U.S. 824, 121 S. Ct. 69, 148 L. Ed. 2d 33 (2000)).

“The language of § 230 sets forth three criteria to qualify for the immunity provided. First, immunity is available only to a ‘provider or user of an interactive computer service.’ 47 U.S.C.A. § 230(c)(1). Second, the liability must be based on the defendant having acted as a ‘publisher or speaker.’ *Ibid.* Third, immunity can be claimed only with respect to ‘information provided by another information content provider.’” *Milgram v. Orbitz Worldwide, Inc.*, 419 N.J. Super. 305, 317, 16 A.3d 1113, 1120-21 (2010). According to 47 U.S.C. § 230(f)(3), “[t]he term ‘information content provider’ means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” As the Fourth Circuit explained in *Nemet Chevrolet*:

Assuming a person meets the statutory definition of an “interactive computer service provider,” the scope of § 230 immunity turns on whether that person’s actions also make it an “information content provider.” . . . Congress thus established a general rule that providers of interactive computer services are liable only for speech that is properly attributable to them.

Nemet at 254 (citing *Lycos*, 478 F.3d at 419; *Doe v. MySpace, Inc.*, 528 F.3d 413, 418-19 (5th Cir. 2008), *cert. denied*, 555 U.S. 1031, 129 S. Ct. 600, 172 L. Ed. 2d 456 (2008), *Chicago Lawyers’ for Civil Rights v.*

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Craigslist, 519 F.3d 666, 672 (7th Cir. 2008); and *Zeran*, 129 F.3d at 330-31). Given that the record clearly establishes that Defendant operates an “interactive computer service” and that Plaintiff’s claim is predicated on the theory that Defendant should be held responsible for content, in the form of a ticket price that substantially exceeded face value, published on its website, the relevant issue is whether Defendant functioned as an “information content provider” with respect to the ticket price at issue here.

In *Fair Housing Coun., San Fernando v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008), a leading case concerning the scope of the exemption from liability granted by 47 U.S.C. § 230, which is cited extensively in the trial court’s order, the defendant operated a website that matched people offering to rent spare rooms with persons looking for a place to live. In order to search or post information on the site, the user was required to answer a series of questions, with the only available responses being a set of options provided by the website addressing the user’s gender, sexual orientation, family status, and roommate preferences as they related to these criteria. The user’s responses to these questions became part of his or her profile, which could be supplemented with material generated exclusively by the user in a box marked “Additional Comments.” A number of fair housing councils sued the defendant on the grounds that both the questionnaire and certain of the users’ additional comments violated applicable fair housing statutes by allowing users to discriminate on the basis of gender, sexual orientation or family status. In evaluating the issues raised by the fair housing council’s complaint, the United States Court of Appeals for the Ninth Circuit initially noted that:

A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is “responsible, in whole or in part” for creating or developing, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content.

Roommates, 521 F.3d at 1162-63 (citing *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1262-63 (N.D. Cal. 2006), *aff’d* 376 F. Appx. 775 (9th Cir. 2010)). In addition, the Ninth Circuit stated that:

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[We] interpret the term “development” as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.

Roommates at 1167-68. As a result, in the Ninth Circuit’s view, a proper analysis of a defendant’s request for immunity based upon 47 U.S.C. § 230 necessarily hinges upon the extent to which the website “materially contributed” to the development of unlawful content.

In analyzing the specific claims that the fair housing councils asserted against the website at issue in *Roommates*, the Ninth Circuit held that the website was not exempt from liability with respect to the information that was posted in response to the specific questions posed to persons seeking housing on the grounds that, since the website selected the questions and limited the range of possible answers, it became an information content provider with respect to the information generated in response to those questions.

[T]he part of the profile that is alleged to offend the Fair Housing Act and state housing discrimination laws—the information about sex, family status and sexual orientation—is provided by subscribers in response to Roommate’s questions, which they cannot refuse to answer if they want to use defendant’s services. By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information.

Roommates at 1166. On the other hand, the Ninth Circuit determined that the website was entitled to immunity with respect to any claims arising from information set out in the “Additional Comments” box, since the users had the unlimited ability to determine the content of the material that was posted in that location. As a result of the general acceptance by other federal and state courts of the rubric deemed appropriate in *Roommates*, the appellate cases addressing immunity claims arising under 47 U.S.C. § 230 have analyzed the specific content alleged to be unlawful rather than examining the entire website on a more generic basis.

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According to our research, there have been approximately 300 reported decisions addressing immunity claims advanced under 47 U.S.C. § 230 in the lower federal and state courts. All but a handful of these decisions find that the website is entitled to immunity from liability. The limited number of decisions which decline to find immunity pursuant to 47 U.S.C. § 230 include *Roommates*, which we have discussed above, and another decision upon which the trial court placed particular emphasis, *FTC v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009).

In *Accusearch*, the defendant operated a website that solicited requests to purchase the phone records of third parties, with those records having been obtained through the efforts of paid “researchers.” In determining that the website was not entitled to immunity from liability pursuant to 47 U.S.C. § 230 with respect to that material, the United States Court of Appeals for the Tenth Circuit held that a website “[wa]s ‘responsible’ for the development of offensive content only if it in some way specifically encourages development of what is offensive about the content.” *Accusearch* at 1199.

[T]he offending content was the disclosed confidential information . . . Accusearch was responsible for the development of that content[.] . . . Accusearch solicited requests for such confidential information and then paid researchers to obtain it. . . . Accusearch knew that its researchers were obtaining the information through fraud or other illegality.

Id. In concluding that the website was not immune from liability under 47 U.S.C. § 230, the Tenth Circuit emphasized the fact that obtaining the personal phone records of third parties is almost always unlawful.³ As a result, the relevant portion of the website’s business consisted of paying “researchers” to illegally obtain information and providing the illegally obtained information to its customers, a set of actions which deprived the website of the ability to rely on the immunity provided by 47 U.S.C. § 230.

The analysis utilized in other decisions holding websites liable despite the immunity provisions of 47 U.S.C. § 230 is similar to that deemed appropriate in *Accusearch* and *Roommates*. For example, in *Jones v. Dirty World Entm’t Recordings, LLC*, 2012 U.S. Dist. LEXIS

3. The exceptions to this general rule, which apply to situations such as provision of emergency services, billing for telecommunications services, and emergency situations involving a risk of death, would not be likely to stimulate an inquiry from a private person.

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2525 *11 (E.D. Ky. Jan. 10, 2012), the website operator was found to have participated in the development of defamatory posts by appending a “tagline” to the postings of others and adding his own comments, actions “which a jury could certainly interpret as adopting the preceding allegedly defamatory comments.” In other words, once again, liability was predicated upon the website’s decision to affirmatively adopt or ensure the presentation of unlawful material. As a result, we conclude that “‘[n]ear-unanimous case law holds that Section 230(c) affords immunity to ICSs against suits that seek to hold an ICS liable for third-party content’ ” and that “courts consistently have held that [47 U.S.C.] § 230(c)(1) offers broad immunity for ICSs to stimulate robust avenues of speech.” *Collins v. Purdue University*, 703 F. Supp. 2d 862, 877 (N.D. Ind. 2010) (quoting *Chicago Lawyers’ Comm., Civ. Rights v. Craigslist, Inc.*, 461 F.Supp.2d 681, 689 (N.D. Ill. 2006) (listing a large number of cases upholding a finding of immunity pursuant to 47 U.S.C. § 230), *aff’d*, 519 F.3d 666 (7th Cir. 2008)), *partial summary judgment granted on other grounds by Collins v. Purdue Univ.*, 2011 U.S. Dist. LEXIS 31013 (N.D. Ind. Mar. 23, 2011).

The reported decisions construing the immunity provisions of 47 U.S.C. § 230 have rejected a number of efforts to expand the range of factual situations in which a website is deprived of the immunity from liability provided by that statutory provision. For example, in *Zeran*, the plaintiff was the victim of a hoax in which

an unidentified person posted a message on an AOL bulletin board advertising “Naughty Oklahoma T-Shirts.” The posting described the sale of shirts featuring offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Those interested in purchasing the shirts were instructed to call “Ken” at Zeran’s home phone number[.] . . . As a result of this anonymously perpetrated prank, Zeran received a high volume of calls, comprised primarily of angry and derogatory messages, but also including death threats. . . . [When a radio station publicized the post,] Zeran was inundated with death threats and other violent calls from Oklahoma City residents.

Zeran, 129 F.3d at 329. Mr. Zeran sued AOL, arguing that it was liable for failing to remove the post after Zeran had provided specific notice of the website’s defamatory nature. On appeal, the Fourth Circuit upheld the website’s immunity claim, stating that:

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[Zeran] contends that interpreting [47 U.S.C.] § 230 to impose liability on service providers with knowledge of defamatory content on their services is consistent with the statutory purposes[.] Zeran fails, however, to understand the practical implications of notice liability in the interactive computer service context. . . . Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.

Zeran at 333. As a result, “[i]t is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider’s own speech.” *Lycos*, 478 F.3d at 420 (citing *Zeran*, 129 F.3d at 332-33) (other citation omitted).

Similarly, the decisions construing 47 U.S.C. § 230 have generally held that, if the tools provided by a website may be used to generate either lawful or unlawful content depending on decisions made by the user, these tools are “neutral” and do not implicate the website in the development of unlawful content. Thus, in *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117 (E.D. Cal. 2010), the district court held that Google was immune from plaintiff’s claims that Google’s website had unlawfully used plaintiff’s trademarked name “Styrotrim” as a suggested keyword in Google’s “AdWords” program, which allows advertisers to bid on the words that appear as suggested search terms when a user began a search. Although the plaintiff argued that, by providing the keyword suggestion tool, Google became an “information content provider,” the district court held that:

. . . Defendant does not provide the content of the “Sponsored Link” advertisements. It provides a space and a service and thereafter charges for its service. By suggesting keywords to competing advertisers Defendant merely helps third parties to refine their content. . . . Defendant’s keyword suggestion tool hardly amounts to the participation necessary to disqualify it of CDA immunity. Rather it is a “neutral tool,” that does nothing more than provide options that advertisers could adopt or reject at their discretion, thus entitling the operator to immunity.

Jurin, 695 F. Supp. 2d at 1123 (citing *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1197-98 (N.D. Cal. 2009)).

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Moreover, the fact that a website operates a commercial business or makes a profit has no relevance to the immunity determination. As one district court has recently explained:

The complained-of actions taken by Backpage to increase the revenues it derives from its website, *e.g.*, touting its website as a “highly tuned marketing site” and instructing posters of ads on how to best increase the impact of those ads, do[] not defeat § 230 immunity. “[T]he fact that a website elicits online content for profit is immaterial; the only relevant inquiry is whether the interactive service provider ‘creates’ or ‘develops’ that content.” . . . In the instant case, to find Backpage to be not immune from suit based on M.A.’s allegations about how it structured its website in order to increase its profits would be to create a for-profit exception to § 230’s broad grant of immunity. This the Court may not do.

M.A. v. Vill. Voice, 2011 U.S. Dist. LEXIS 90588 at *23-24 (E.D. Mo. 2011) (quoting *Goddard v. Google*, 2008 U.S. Dist. LEXIS 101890, at *3 (N.D. Cal. 2008), and citing *Lycos* 478 F.3d at 420-21 (stating that a website operator did not become an information content provider “merely because the ‘construct and operation’ of the web site might have some influence on the content of the postings”) and *Carafano*, 339 F.3d at 1124 (stating that a questionnaire employed by a dating service website to facilitate the creation of profiles did not transform the website into an information content provider since all content selection decisions were made by posters and since no profile would have any content in the absence of creative activity by the poster) (other citation omitted).

Similarly, the fact that a website acted in such a manner as to encourage the publication of unlawful material does not preclude a finding of immunity pursuant to 47 U.S.C. § 230. For example, in *Ascentive, LLC v. Opinion Corp.*, 2011 U.S. Dist. LEXIS 143081 (E.D.N.Y. Dec. 13, 2011), the plaintiff claimed that “[the defendant] acted as an ‘information content provider’ by, among other things, (1) encouraging negative complaints; (2) inviting consumers to post public complaints on its website; (3) displaying those negative postings as prominently as possible . . . ; and (4) increasing the prominence of [the defendant’s] webpages by various allegedly improper means, including by using plaintiffs’ [trade]marks.” *Ascentive* at *69. In rejecting this contention, the district court held that:

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[T]here is simply “no authority for the proposition that [encouraging the publication of defamatory content] makes the website operator responsible, in whole or in part, for the ‘creation or development’ of every post on the site. . . . Unless Congress amends the [CDA], it is legally (although perhaps not ethically) beside the point whether defendants refuse to remove the material, or how they might use it to their advantage.”

Ascentive at *69. (quoting *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 933 (D. Ariz. 2008) (holding that “ripoffreport.com” was not an information content provider even though the defendants allegedly encouraged defamatory reviews by others for their own financial benefit)).

Finally, the decisions construing 47 U.S.C. § 230 have declined invitations to exempt the “negligent publishing” of offensive or unlawful content from the protections afforded by 47 U.S.C. § 230. For example, in *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967-68 (N.D. Ill. 2009), the plaintiff, who served as the Sheriff of Cook County, sued Craigslist on the basis of allegations that the website’s adult section constituted a public nuisance. After noting that “Sheriff Dart’s complaint could be construed to allege ‘negligent publishing,’ ” the district court rejected any contention that negligence sufficed to overcome the immunity granted by 47 U.S.C. § 230, noting that “[a] claim against an online service provider for negligently publishing harmful information created by its users treats the defendant as the ‘publisher’ of that information.” (citing *Chicago Lawyers’ Committee*, 461 F. Supp. 2d 681, and *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (other citation omitted)). As a result, the reported decisions construing 47 U.S.C. § 230 have treated the relevant statutory language as creating a broad exemption from liability even when the substantive facts underlying a plaintiff’s claim are compelling. *See, e.g., M.A.*, 2011 U.S. Dist. LEXIS 90588 (holding that immunity was available pursuant to 47 U.S.C. § 230 despite the fact that a minor was subjected to sex trafficking as the result of ads placed on defendant’s website) and *Barnes*, 570 F.3d at 1098 (holding that immunity was available pursuant to 47 U.S.C. § 230 based upon a website’s failure to remove defamatory postings despite the fact that the “case stems from a dangerous, cruel, and highly indecent use of the internet for the apparent purpose of revenge”).

Thus, after carefully reviewing decisions such as *Roommates* and *Accusearch*, in which websites were deprived of the opportunity to claim immunity under 47 U.S.C. § 230, we conclude that:

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Those cases . . . are easily distinguishable [from the present case]. In *Roommates.com*, the non-parties providing the data were required to post actionable material to the defendant website as a condition of use, and the website’s “work in developing the discriminatory questions, discriminatory answers and discriminatory search mechanism [was] directly related to the alleged illegality of the site.” . . . This case also differs considerably from *Accusearch Inc.*, where the defendant website paid researchers to obtain information for the site to disseminate that “would almost inevitably require [the researcher] to violate the Telecommunications Act or to circumvent it by fraud or theft.” There is no comparable allegation against [Defendant].

Shiamili v Real Estate Group of New York, 17 N.Y.3d 281, 292, 952 N.E.2d 1011, 1019 (2011) (quoting *Roommates*, 521 F3d at 1172 and *Accusearch Inc.*, 570 F3d at 1191-92). For that reason, we further conclude that, in order to lose the benefit of the exemption from liability granted by 47 U.S.C. § 230 based upon content actually posted by third parties, an analysis of the results reached in persuasive decisions from other jurisdictions establishes that, in order to “materially contribute” to the creation of unlawful material, a website must effectively control the content posted by those third parties or take other actions which essentially ensure the creation of unlawful material. Although the record might support a determination that Defendant encouraged the posting of “market-based” prices on its website or was cognizant of the risk that tickets sold on its website would be priced in excess of face value, such evidence does not suffice to support a conclusion that Defendant’s website essentially ensured that unlawful content would be posted.

3. Analysis of Trial Court’s Order

[3] Although the trial court concluded that Defendant was “in total control of the transaction” and stated that “[t]he only thing [that Defendant] does not do is enter the actual price or make the final price decision for most sellers,” the undisputed evidence establishes that Mr. Holohan was the owner of the Hannah Montana tickets that Ms. Hill purchased and that Mr. Holohan, rather than Defendant, set the price of the tickets. The trial court did not determine, and the record does not indicate, that Defendant priced the tickets, directed or required Mr. Holohan to charge a particular ticket price, or acted as Mr. Holohan’s agent in making that determination. As a result, we

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conclude, consistently with the undisputed evidence and the language of the trial court's order, that Defendant was not "responsible, in whole or in part," for creating or developing the content at issue here, which is the price at which Mr. Holohan sold his tickets, and, for that reason, that Defendant is immune from liability pursuant to 47 U.S.C. § 230 as the result of claims based upon that particular content.

A careful review of the trial court's order reflects that, instead of focusing upon the specific content at issue in this case, the trial court determined that Defendant's website, considered as a whole, was not entitled to immunity from liability pursuant to 47 U.S.C. § 230. As part of this process, the trial court placed considerable emphasis on certain business practices in which Defendant engaged and certain features of Defendant's website that the trial court believed to encourage the reselling of tickets at a price substantially above face value. Reduced to its essence, the trial court's analysis rests upon the belief that, since Defendant's "business model" and various features of Defendant's website tended to provide incentives for the selling of tickets at a price above face value, the website, viewed in its entirety, was not immune from liability pursuant to 47 U.S.C. § 230. We conclude, however, that the trial court's "entire website" approach was fatally flawed in a number of respects.

In the course of adopting this erroneous "entire website" approach, the trial court discussed the features that Defendant made available to ticket sellers who sold large numbers of tickets and addressed the impact that actions taken by such "large sellers" might have on ticket prices. However, the undisputed record evidence establishes that Mr. Holohan was not a "large seller," so those features had no impact on the generation of the allegedly unlawful content. Similarly, the trial court discussed contracts between Defendant and musical performers despite the fact that such agreements had nothing to do with the present transaction. As a result, this aspect of the trial court's reasoning simply had no bearing on the required immunity analysis.

The trial court also predicated its determination that Defendant was not entitled to take advantage of the immunity made available by 47 U.S.C. § 230 based, at least in part, upon the nature of the various customer service features that were made available through Defendant's website. According to the trial court, Defendant "controlled" the transaction by acting as an intermediary between buyer and seller. In addition, the trial court noted that Defendant offered

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both buyers and sellers certain guarantees and assumed responsibility for handling the mechanics required to complete the transaction. The extent to which the features made available by Defendant are worth the fee that Defendant charges for its services is a decision which must be made by each individual buyer and seller. However, none of these features had any impact on the extent to which Mr. Holohan had complete control over the price at which he chose to resell the Hannah Montana tickets at issue here, rendering those features irrelevant for purposes of determining the extent to which Defendant was entitled to immunity pursuant to 47 U.S.C. § 230.

In addition, the trial court discussed the pricing tools available to users of Defendant's website and suggested that these tools encouraged sellers to price tickets unlawfully. A number of the tools mentioned in the trial court's order were only available to large volume sellers, such as assistance in uploading tickets in bulk or calculating the desired price, and had no bearing on Mr. Holohan's pricing decisions for that reason. However, certain other features upon which the trial court relied were more widely available, such as the information that Defendant provided to sellers concerning the prices at which tickets to the same event had been sold by others. The pricing feature in question is, however, a prototypically "neutral tool," since that feature merely provided additional information to sellers without suggesting, much less requiring, that they should adjust the prices that they were charging for certain tickets. As a result, none of these aspects of the trial court's factual analysis operated to deprive Defendant of the immunity established by 47 U.S.C. § 230.

Aside from its reliance upon information that did not bear upon the price that Mr. Holohan charged Ms. Hill for tickets to the Hannah Montana concert, the trial court's decision rests upon certain legal conclusions that are inconsistent with the decisions reached by other courts whose reasoning we find persuasive. For example, the trial court stated that "[c]onscious disregard by an internet service provider of known and persistent violations of law by content providers may impact the courts' determinations of the service provider's claim to immunity, especially where the ISP profits from the violations," and that the use of Defendant's "website to scalp tickets in violation of North Carolina law was a predictable consequence of [Defendant's] business model." As we have already demonstrated, however, the prevailing tendency among decisions construing the relevant statutory language is to hold that the immunity provided by 47 U.S.C. § 230 is (1) not defeated by evidence tending to show that

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the website had notice of the unlawful posting; (2) not affected by the fact that a website attempts to earn a profit; and (3) not subject to any liability on the basis of “reasonable foreseeability” or “willful blindness” analysis. Thus, the fact that Defendant may have been on notice that its website could be used to make unlawful sales and that certain of Defendant’s practices may have provided incentives for the overpricing of certain tickets does not support a decision stripping Defendant of its immunity under 47 U.S.C. § 230.

In its order, the trial court also placed considerable reliance upon *NPS, LLC v. StubHub, Inc.*, 25 Mass L. Rep. 478, 2009 Mass. Super. LEXIS 97 (2009), a decision rendered by a trial court judge in Massachusetts. In *NPS*, the trial court denied Defendant’s motion for summary judgment directed toward the plaintiff’s intentional interference with advantageous relations claim. In that case, although denying that it had acted on the basis of an improper motive, the defendant “essentially concede[d]” that it had knowingly induced season ticket holders to breach their contract with the plaintiff, a professional football team. Aside from the fact that the evidentiary and procedural context present in *NPS* is substantially different from that before the Court in this case, we simply do not find the reasoning employed by *NPS* persuasive, believe that it is inconsistent with the decisions concluding that knowledge of unlawful content does not strip a website of the immunity from liability granted under 47 U.S.C. § 230,, and decline to follow it in deciding the present case.⁴

Finally, the trial court discussed a hypothetical situation in reaching its decision that we believe to be readily distinguishable from the facts of this case. In its order, the trial court stated that, “if a StubHub employee offered to sell another person’s tickets to the ACC Tournament at scalper’s prices in front of the coliseum, that employee would have violated the statute even though they did not set the price for the owner.” However, unlike the situation posited in the trial court’s hypothetical, the present record contains no indication that Defendant acted as Mr. Holohan’s agent in setting the challenged ticket price. Instead, the undisputed evidence establishes that Defendant simply functioned as a broker, effectively putting a buyer and a seller into contact with each other in order to facilitate a sale

4. Similarly, the decision of the United States Court of Appeals for the Seventh Circuit in *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363 (7th Cir. 2010), has no real bearing upon the proper resolution of this case given that the issue before the Seventh Circuit in that case was the extent, if any, to which Defendant was required to remit certain taxes rather than the extent, if any, to which Defendant was liable for allegedly unlawful third party content.

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at a price established by the seller. As a result, for all of these reasons, we conclude that Defendant was entitled to claim the benefit of the immunity created by 47 U.S.C. § 230 and that this immunity operates to bar Plaintiffs' individual claim stemming from the price at which Ms. Hill purchased tickets to the Hannah Montana concert.

4. Fees Charged by Defendant

[4] In addition, the trial court concluded that Defendant was liable to Plaintiffs for violating N.C. Gen. Stat. § 14-344 based upon the fees that Defendant charged buyers such as Ms. Hill. Although Plaintiffs argue that Defendant should be held liable for collecting excessive fees as either the seller of the tickets or as the seller's agent, we conclude that the record does not establish that Defendant possessed either seller or agent status and cannot, for that reason, be held liable to Plaintiffs on fee-related grounds.

According to the version of N.C. Gen. Stat. § 14-344 applicable to this case, a person or entity is "allowed to add a reasonable service fee to the face value of the tickets sold" that "may not exceed three dollars (\$3.00) for each ticket," with any person or entity "sell[ing] or offer[ing] to sell a ticket for a price greater than" the permissible price subject to a criminal sanction. The plain language of N.C. Gen. Stat. § 14-344 imposes liability upon either the seller or, presumably, the seller's agents.⁵ As we have already indicated, the undisputed record evidence shows that Mr. Holohan sold the tickets in question, that Defendant provided an independent brokerage function rather than acting as Mr. Holohan's agent, and that the fees that Defendant charged related to its own services rather than services provided by Mr. Holohan. As a matter of fact, the user agreement to which Mr. Holohan agreed as a prerequisite for selling tickets on Defendant's website specifically states that "no agency, partnership, joint venture, employer-employee or franchisor-franchisee relationship is intended or created by this Agreement." As a result, we conclude that the undisputed evidence establishes that Defendant was neither a ticket seller nor the ticket seller's agent; that the fees that Defendant charges are not, for that reason, subject to the strictures of N.C. Gen. Stat. § 14-344; and that the trial court erred by making a contrary

5. Although Plaintiffs argue that the reference to "[a]ny person, firm or corporation" in that portion of N.C. Gen. Stat. § 14-344 authorizing the assessment of service charges demonstrates that the reach of the relevant statutory provision extends beyond sellers and their agents, we do not believe that the language in question can be read in that manner given that N.C. Gen. Stat. § 14-344 only sanctions the assessment of fees associated with the sale or resale of tickets.

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determination in the course of granting summary judgment in favor of Plaintiffs.

III. Conclusion

Thus, for the reasons set forth above, we conclude that, under 47 U.S.C. § 230, Defendant is entitled to immunity from Plaintiffs' claim stemming from the sale of tickets to the Hannah Montana concert at a price in excess of face value and that the fees that Defendant charges for its services did not violate N.C. Gen. Stat. § 14-344. In view of the fact that Plaintiff's unfair and deceptive trade practices claim hinged upon determinations that Defendant was not entitled to immunity pursuant to 47 U.S.C. § 230 and that Defendant charged fees in excess of those authorized by N.C. Gen. Stat. § 14-344, we further conclude that the trial court erred by granting summary judgment in favor of Plaintiffs with respect to their individual claims in reliance upon N.C. Gen. Stat. § 75-1.1 and that the trial court should, instead, have granted summary judgment in favor of Defendant with respect to those claims. As a result, the trial court's order should be, and hereby is, reversed and this case should be, and hereby is, remanded to Guilford County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED.

Judges BEASLEY and THIGPEN concur.

STATE OF NORTH CAROLINA v. JERRY LAMONT LINDSEY

No. COA11-612

(Filed 6 March 2012)

1. Motor Vehicles—speeding to elude arrest—identification of defendant—not sufficient

Defendant's motion to dismiss the charge of felony speeding to elude arrest should have been granted where the pursuing officer never saw the driver as the vehicle fled from him. Some evidence must exist of a driver's identity; here, there was sufficient time between the officer losing track of the van he was pursuing and another officer seeing a van crash that the absence of identification of the fleeing driver was determinative. Even if

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the van that fled the original officer was the same van that crashed some minutes later, the State presented no evidence identifying the person driving that van and no evidence of that van's activities during the intervening time.

2. Drugs—felony possession—constructive possession—evidence not sufficient

The trial court erred by denying defendant's motion to dismiss charges of felony possession of cocaine and marijuana where the drugs were found near trash receptacles in a parking lot after defendant fled from an automobile crash. Defendant was not in a place where he exercised any control, he was not seen taking any actions consistent with disposing of the drugs, there was no physical evidence linking him to the drugs recovered, and there were no drugs found in his van, although a large amount of cash and a wrapper that could be used to smoke tobacco or marijuana were recovered from the van.

Judge STEELMAN concurs in part and dissent in part.

Appeal by Defendant from judgments entered 13 May 2010 by Judge Timothy S. Kincaid in Superior Court, Caldwell County. Heard in the Court of Appeals 29 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General Tenisha S. Jacobs, for the State.

James N. Freeman, Jr. for Defendant.

McGEE, Judge.

Jerry Lamont Lindsey (Defendant) was convicted of felonious operation of a motor vehicle to elude arrest, possession of cocaine, and possession of marijuana on 13 May 2010. Defendant argues that the trial court erred by (1) denying his motion to dismiss all charges against him; (2) denying his motion to continue; and (3) denying his counsel's motion to withdraw. We reverse the trial court's denial of Defendant's motion to dismiss.

I. Factual Background

Officer Ty Lee (Officer Lee) of the Lenoir Police Department responded to a call concerning a van that was sitting in the middle of Glendale Road, near Harper Avenue on 1 February 2009, at approxi-

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mately 3:00 a.m. When Officer Lee arrived at the scene, he noticed a “bluish”-colored van with the letter “W” as the first letter of the license tag, sitting idle. The van’s headlights were not on. As Officer Lee approached the van, the van began “heading north on Glendale.” Officer Lee then turned on his blue lights and “attempted . . . to make a traffic stop,” but the van “accelerated and took off.”

Officer Lee continued to pursue the van and, based on his observations, the van “was going at least 55 to 65” miles per hour in an area where the posted speed limit was twenty-five miles per hour. After the van “narrowly [missed a] car that was pulling out” onto the street, Officer Lee lost sight of the vehicle. Officer Lee never saw the driver of the van.

During the pursuit, Officer Lee kept in contact with communications and other officers, relaying the description of the van. Several minutes after Officer Lee relayed the description of the van to other officers, Detective Taft Love (Detective Love) stopped a similar “bluish” van near a Wal-Mart. Detective Love noted that the driver of the van was nervous. Detective Love noticed bumper stickers on the van, and he asked Officer Lee if there were bumper stickers on the van Officer Lee had been pursuing. Officer Lee told Detective Love that he did not believe that van had any bumper stickers, and Detective Love determined that the “bluish” van he stopped was not the same van Officer Lee had attempted to stop earlier.

Sergeant Todd Penley (Sergeant Penley) also saw a “greenish-bluish” van with a large silver stripe, and as he attempted to stop that vehicle, it “crash[ed] into a light pole” in the back of a Wendy’s parking lot. Sergeant Penley testified that after the van crashed, a “black male with a plaidish-type shirt” jumped

out of [the van] and scale[d] the wall that’s approximately 10 foot tall right there, so instead of me pursuing him and trying to get up the wall, I circled back around and pulled over into the Shoney’s parking lot on the other side of the wall and attempted to locate where he’s at.

Sergeant Penley called a K-9 officer. While waiting for the K-9 unit to arrive, Sergeant Penley, Officer Lee, and other police officers secured the area. Officer Lee recovered a hat and a cell phone in the immediate vicinity of the van. After Defendant was apprehended, no weapons or contraband were found on his person, and a search of the path Defendant had taken when fleeing the van did not reveal any

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weapons or contraband. Officer Love testified that a search of the driver's side seat of the van revealed a "blunt wrapper" and a wallet that contained eight hundred dollars. Officer Love testified that a "blunt wrapper" is "often associated with—with smoking marijuana. It's something in which you can wrap either tobacco or, in some cases, marijuana and then smoke it."

After Defendant was apprehended, Officer Lee discovered a bag containing cocaine, and another officer found a bag containing marijuana, near trash receptacles in the Wendy's parking lot. Officer Lee had no idea how long the bags had been there, and though the Wendy's was closed at the time of the crash, the parking lot was open and had been accessible by the public before the area was secured.

The trial court denied Defendant's motion to dismiss the charges against him. A jury convicted Defendant on all charges. Defendant appeals.

II. Standard of Review

The standard of review on a motion to dismiss is *de novo*. *Neier v. State*, 151 N.C. App. 228, 565 S.E.2d 229 (2002). Under the *de novo* standard, the Court "considers the matter anew and freely substitutes its own judgment for that of the" trial court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation omitted).

When considering the denial of a "defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion." *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002) (citations omitted).

If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed. This is true even though the suspicion so aroused by the evidence is strong.

Powell, 299 N.C. at 98, 261 S.E.2d at 117 (citations omitted). "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom[.]" *Id.* at 99, 261 S.E.2d at 117.

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III. Analysis

Defendant first argues that the trial court improperly denied his motion to dismiss all charges because the State did not present sufficient evidence of each element of the offenses charged and of Defendant's being the perpetrator. We agree.

A. Felony Speeding to Elude Arrest

[1] Defendant was convicted of felony speeding to elude arrest. In reviewing Defendant's motion to dismiss the charge of felony speeding to elude arrest stemming from Officer Lee's pursuit of a "bluish" van, we must examine not only whether there was substantial evidence of the crime, but whether Defendant was sufficiently identified as the perpetrator. *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. Officer Lee testified on direct concerning the van:

Q. [D]id you have an opportunity to observe the color of the vehicle?

A. Yes, I did. It was—I observed the vehicle to be a bluish van.

Q. Okay. Did you also have an opportunity to observe what type of van it may have been?

A. I don't know what type, but it was a mini-van from what I saw of it.

Officer Lee further testified that after he lost sight of the van:

I gave a description [to police dispatch] from what I had of the vehicle, a bluish van. The only thing I got of the tag was that the first letter was a W, and somehow when I got to the top of the hill I lost sight of it. It could have went on Stonewall or Finley [phonetic] 1 Avenue towards 321. It could have went Stonewall to Patterson. Finley headed back to [indecipherable].

Sergeant Penley testified that the van Defendant was driving was "greenish-bluish" and had a silver stripe on the side of it. On direct, Officer Lee was shown a photograph of the van that crashed at the Wendy's, and was asked:

Q. And when you observed the van in this photograph, did you recognize it?

A. Yes, I did.

Q. What did you recognize it to be?

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A. I recognized it's bluish—well, except for the silver. Like I said, at that time, I only got a split second look at the vehicle. I didn't notice that. I remembered the tag, the first letter was a W, and the vehicle was bluish.

Q. Did you recognize that to be the van that you had seen earlier and pursued earlier in the evening?

MR. CLONTZ: Objection.

THE COURT: Overruled.

Q. You may—

A. Yes, I do.

Officer Lee was subsequently cross-examined, and testified to the following:

A. Well, Sergeant Penley advised me did the vehicle have any silver. As far as I [had] seen, based on the short period I had contact with that vehicle, all I saw was blue and the first letter on the vehicle, which was a W. He asked me was there silver. I told him I wasn't sure. It might have had. All I saw was blue 'cause the majority of the vehicle was blue. From the half of the bottom up it was all blue.

Q. Now Officer Lee you don't claim to have seen a driver at any time during this period; is that correct?

A. That's correct. I never [caught] up to see the driver this whole time.

Q. You never got close enough, did you?

A. Never got close.

...

Q. Now, are you sure that the van that you later found at Wendy's wasn't a green van?

A. To my knowledge, it was bluish.

Q. You sure it didn't have a great big silver stripe at the bottom?

A. Like I said earlier, I only had a split second to see the vehicle. The only thing I got out of it was a bluish color and the first letter of the tag, which was a W.

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. . . .

Q. So, *it could have well been a van that either went towards Wal-Mart or a van that went elsewhere that never got seen.*

A. *It could possibly be. Like I said, I did lose sight of the vehicle once I got on top of Stonewall and Patterson.* [Emphasis added].

We disagree with the dissent that Officer Lee's testimony on direct, when taken as a whole along with his testimony on cross-examination, was sufficient evidence identifying the van that crashed in the Wendy's parking lot as being the van that fled from Officer Lee. Officer Lee's testimony on direct and cross did not constitute an issue of credibility to be decided by the jury. This testimony involved the very same witness clarifying and expounding on his earlier testimony and can only be interpreted as an admission by Officer Lee at trial that the van he observed in the Wendy's parking lot could have been a different van than the one that he had lost sight of some ten to fifteen minutes earlier.

The State cites no case in which our appellate courts have upheld the denial of a motion to dismiss on facts similar to those in this case, and we can find none. In *State v. Steelman*, 62 N.C. App. 311, 302 S.E.2d 637 (1983), this Court upheld the trial court's denial of the defendant's motion to dismiss a charge of fleeing to elude arrest when an officer had lost sight of the defendant for a period of time. In *Steelman*, however, the officer first identified a shirtless man driving the vehicle with a woman passenger. *Id.* at 12, 302 S.E.2d at 637-38. The vehicle sped away from the officer. *Id.* The officer lost the vehicle because it turned onto a logging road. *Id.* When the defendant subsequently crashed the vehicle, another officer witnessed a shirtless man fleeing from the driver's side of the vehicle, and a woman fleeing from the passenger side. *Id.* In its decision, this Court relied on the "uncontroverted fact that [both officers] described the driver as male and the passenger as female." *Steelman*, 62 N.C. App. at 313, 302 S.E.2d at 638. In addition, the defendant in *Steelman* did not contest that the vehicle that crashed was also the vehicle that fled from the first officer. The defendant argued that the woman, or some unknown third party, could have been driving the vehicle when it fled from the first officer, and that the defendant could have switched places during the period when the vehicle was out of sight of both officers. *Id.* at 313, 302 S.E.2d at 638.

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Steelman is distinguishable, because in the present case there was no identification of the driver of the van that fled from Officer Lee, whereas in *Steelman* the officer observed the shirtless man driving the vehicle as the shirtless man ignored the officer's lights and siren and fled from him. In an unpublished opinion, *State v. Peguse*, 173 N.C. App. 642, 619 S.E.2d 594, 2005 N.C. App. LEXIS 2086 (2005), this Court held:

There was no direct evidence introduced that defendant Hickmon was operating the vehicle at the time it was being pursued by Trooper Franze, and the trooper did not identify defendant Hickmon as the driver. As noted by defendant, [witness] Gaddy only testified that defendant Hickmon was the driver when the five men left the trailer, but she did not testify to any statements from the conversation held the next day that he had been driving when the police were pursuing them. Given the gap of several hours and an apparent robbery between the time she saw defendants leave and when they allegedly fled from law enforcement, it cannot be said that there was substantial evidence defendant Hickmon was operating the vehicle at the time this offense occurred. Accordingly, we reverse the trial court's ruling with respect to this conviction.

Id. at 25-26. In the present case, not only did Officer Lee fail to see the driver of the "bluish" van that sped away from him, Officer Lee was unable to definitively identify the "greenish-bluish" van with a large silver stripe that crashed as being the same van he had been pursuing earlier that night.

The facts of the present case fall between those of *Peguse* and *Steelman*. We do not suggest a bright-line rule that the officer from whom a suspect flees must always make visual contact with the suspect. Clearly, for example, if a vehicle is continuously tracked by one or more officers from the point of fleeing to the point of apprehension, and only one individual is in the vehicle, sufficient evidence would exist that the suspect apprehended was the same person who initially fled. We hold only that, on the facts before us, there was sufficient time between when Officer Lee lost track of the van he was pursuing and when Sergeant Penley observed a van crash in the Wendy's parking lot, that the complete absence of any identification of the driver of the van that fled Officer Lee is determinative of this issue.

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Some evidence must exist of a driver's identity. In the present case, there was no direct evidence of the identity of the driver of the van Officer Lee was pursuing. No officer, or other witness, saw the driver of the "bluish" van before or during the pursuit. In addition, a different "bluish" van was stopped that night at a Wal-Mart. Given that there is no evidence as to the driver's identity before or during the pursuit, no evidence concerning what might have occurred in the period of time between when Officer Lee lost sight of the van he was pursuing and when Sergeant Penley observed Defendant's van crash in the Wendy's parking lot, nor substantial evidence that the "greenish-bluish" van with a silver stripe that Defendant was driving was the same van that fled Officer Lee, we reverse the trial court's ruling on Defendant's motion to dismiss the charge of fleeing to elude arrest. On these facts, there was not substantial evidence presented at trial that Defendant was driving the van that fled from Officer Lee. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002).

We note that Officer Lee's testimony that the van he was pursuing could have been the van stopped at the Wal-Mart, or some other van not stopped at all that night, simply adds to the insufficiency of proof that Defendant was driving the van that fled from Officer Lee. The primary distinction between the facts in the cases cited by the State and the dissent, and the facts in the present case, is that Officer Lee *never saw the driver* of the van as it fled from him. Assuming *arguendo* that the van fleeing from Officer Lee was the same van that crashed in the Wendy's parking lot some minutes later, the State presented no evidence identifying the person driving the van that fled from Officer Lee, and further presented no evidence concerning that van's activities during the time its whereabouts were unknown.

B. Felony Possession of Cocaine and Marijuana

[2] In addition to felony speeding to elude arrest, Defendant was convicted of possession of cocaine and marijuana. "To obtain a conviction for possession of a controlled substance, the State bears the burden of proving two elements beyond a reasonable doubt: (1) defendant possessed the substance; and (2) the substance was a controlled substance." *State v. Harris*, 361 N.C. 400, 403, 646 S.E.2d 526, 528 (2007). Possession may either be actual or constructive. *State v. Alston*, 131 N.C. App 514, 519, 508 S.E.2d 315, 318 (1998).

"Under the theory of constructive possession, a person may be charged with possession of an item such as narcotics when he has both 'the power and intent to control its disposition or use,' even

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though he does not have actual possession.” *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (quoting *State v. Harvey*, 287 N.C. 1, 12, 187 S.E.2d 706, 714 (1972)). If a defendant does not have exclusive control over the premises, other incriminating circumstances must be present before a court can find constructive possession of a controlled substance. *State v. Crudup*, 157 N.C. App. 657, 662, 580 S.E.2d 21, 26 (2003). “Where a controlled substance is found on premises under the defendant’s control, this fact alone may be sufficient to overcome a motion to dismiss and to take the case to the jury.” *State v. Neal*, 109 N.C. App. 684, 686, 428 S.E.2d 287, 289 (1993). “If a defendant does not maintain control of the premises, however, other incriminating circumstances must be established for constructive possession to be inferred.” *Id.*

Constructive possession of drugs “depends on the totality of the circumstances in each case, and no single factor controls, but ordinarily the question will be for the jury.” *State v. McBride*, 173 N.C. App. 101, 106, 618 S.E.2d 754, 758 (2005) (citation omitted).

In his brief, Defendant cites *State v. Acolatse*, 158 N.C. App. 485, 581 S.E.2d 807 (2003). In *Acolatse*, there was evidence presented that (1) the defendant had been driving with a revoked license, (2) placed the defendant near a convicted drug dealer’s automobile then under surveillance, (3) the defendant was apprehended near cocaine recovered from the roof of a detached garage, (4) \$830.00 was found on the defendant’s person, “in denominations consistent with the sale of controlled substances,” (5) officers recovered three different cell phones, (6) there was a strong odor of cocaine in the defendant’s vehicle, and (7) the defendant was observed making a throwing motion. *Id.* at 486-490, 581 S.E.2d at 808-11. The trial court denied the defendant’s motion to suppress. *Id.* This Court reversed and held that the evidence presented was insufficient to allow an inference of constructive possession of cocaine. *Id.*

In *Acolatse*, when police officers approached the defendant, the defendant fled and ran around a nearby house. That house also had bushes around it, as well as a shed and detached garage. *Id.* at 486, 581 S.E.2d at 809. The defendant did not own or reside in any of the structures. *Id.* at 487, 581 S.E.2d at 809. When the defendant ran, police officers pursued the defendant and went in opposite directions in an attempt to trap the defendant. *Id.* At one point during the chase, police officers lost sight of the defendant for a short period of time, but when the officers regained sight of the defendant, he was stand-

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ing near some bushes. *Id.* One officer saw the defendant make a throwing motion toward the bushes. *Id.*

After the defendant's arrest, a search of the area uncovered narcotics on the roof of the detached garage, which was in a different direction than the bushes where the defendant was seen standing. Nothing was found in the bushes where the defendant made a throwing motion. *Id.* There were no fingerprints on the bags containing the narcotics. *Id.* The police officers also searched the defendant's car. *Id.* The search did not reveal any drugs, but the officers did recover three cell phones and detected a strong odor of cocaine inside the vehicle. The defendant had \$830.00 in cash on his person. *Id.*

This Court held that it was compelled to reverse the defendant's conviction for constructive possession, relying on our Supreme Court's ruling in *State v. Chavis*, 270 N.C. 306, 154 S.E.2d 340 (1967). *Chavis* held that a strong suspicion of constructive possession alone was not sufficient to survive the defendant's motion to dismiss. *Chavis*, 270 N.C. at 311, 154 S.E.2d at 344. In *Chavis*, officers observed the defendant continuously except for two to three seconds when they were blinded by the lights of an oncoming automobile. The defendant was wearing a hat when the officers first observed him. When the officers finally stopped the defendant, he was no longer wearing a hat. An officer located the hat along the path the defendant had been walking, and recovered narcotics from inside the headband of the hat. Our Supreme Court reasoned:

There is no evidence that either officer observed defendant make any disposition of the hat he had been wearing or of any article or articles he may have had in his possession. Officer Truitt testified: "I did not see the defendant place his hat in any particular place. I just saw him minus his hat."

The identity of the person who had possession of the marijuana prior to the discovery thereof by Officer Boone is not disclosed. Did defendant put the marijuana in the hat found by the officers? Was it put there by defendant's unidentified companion? Was it put there before or after defendant and his companion left the area where the hat was found, walked back towards Hillsboro Street and were accosted by the officers? There was no evidence the marijuana was in a hat while defendant was wearing it. Nor was there evidence the marijuana was put in the hat found by the officers at defendant's direction.

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Chavis, 270 N.C. at 310-11, 154 S.E.2d at 344.

In the present case: (1) Defendant was not at his residence or in a place where he exercised any control; (2) though Sergeant Penley observed Defendant exit the vehicle and scramble over the wall fleeing the Wendy's parking lot, he did not see Defendant take any actions consistent with disposing of the marijuana and cocaine in two separate locations in the Wendy's parking lot; (3) there was no physical evidence linking Defendant to the drugs recovered; and (4) there were no drugs found on or in Defendant's vehicle. In the present case, the only suspicious circumstances were the large amount of cash recovered, the drugs found in a public parking lot near Defendant's van, the presence of a wrapper in the van that could be used to smoke tobacco or marijuana, and the fact that Defendant fled from police after the crash.

Chavis dictates that this evidence only raises a suspicion of possession. "If the evidence is sufficient merely to raise a suspicion or conjecture as to any element of the offense, even if the suspicion is strong, the motion to dismiss should be allowed."

Acolatse, 158 N.C. App. at 490, 581 S.E.2d at 811 (citations omitted). We find the evidence in this case less compelling than that in *Acolatse* and *Chavis*. We must therefore reverse the trial court's denial of Defendant's motion to dismiss the charges of felony possession.

Because of our holdings above, we do not address Defendant's additional arguments.

Reversed.

Judge McCULLOUGH concurs.

Judge STEELMAN concurs in part and dissents in part with a separate opinion.

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

I concur in the result of the majority opinion as to the charge of possession of cocaine, but must respectfully dissent as to the charges of felony fleeing to elude arrest and possession of marijuana.

I. Supplemental Facts

The events relevant to these charges took place on the morning of 1 February 2009. It was a cold night. Officer Lee did not see the driver of the "bluish" mini-van during the initial chase through Lenoir.

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The initial chase lasted roughly 10 minutes. Officer Lee lost sight of the mini-van when he had to slow his vehicle to avoid a car that narrowly missed colliding with the mini-van. Officer Lee advised communications that he lost sight of the bluish mini-van; that the first letter of the tag was “W;” and that the vehicle might have gone to North Main Street or to U.S. Highway 321. Officer Lee headed for North Main Street, knowing that Officer Love was on U.S. Highway 321. Sergeant Penley was also on U.S. Highway 321, and spotted the mini-van at the intersection with Pennton Avenue. Sergeant Penley activated his blue lights, and turned around to follow the mini-van. The mini-van was headed south on U.S. Highway 321, and made an abrupt left turn across three to four lanes of travel into the Wendy’s parking lot, where it crashed into a light pole.

Defendant immediately bolted from the mini-van. He was subsequently found hiding in the bushes at Shoney’s. He was apprehended as he ran toward Bank of America by Sergeant Penley, Officer Curley, and Sergeant Branham of the Caldwell County Sheriff’s Department. Officer Lee arrived at the parking lot “no more than 10 or 15 minutes” after he lost sight of the mini-van. Prior to the apprehension of defendant, Sergeant Penley secured the Wendy’s parking lot. There were no other vehicles or persons in the parking lot while the arrest and search of the area took place. The passenger window of the mini-van was rolled down. A bag of marijuana was found five to ten feet from the passenger side of the mini-van near the “corral” for the Wendy’s dumpster. A “blunt wrapper” associated with smoking marijuana was found inside the mini-van. Officer Love found about \$800 in or beside the wallet containing defendant’s identification card. A bag containing rocks of crack cocaine was found less than a car length away from the mini-van.

At the conclusion of the State’s evidence, the trial court dismissed the charges of possession with intent to sell and deliver both cocaine and marijuana. These charges were submitted to the jury as possession of cocaine and possession of marijuana.

II. Felony Fleeing to Elude Arrest

I disagree with the majority that there was insufficient evidence to submit the charge of fleeing to elude arrest to the jury.

“In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence.” *State v.*

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Robinson, 355 N.C. 320, 336, 561 S.E.2d 245, 256 (2002). “The trial court must also resolve any contradictions in the evidence in the State’s favor.” *Id.*

On direct examination, Officer Lee testified regarding the mini-van which crashed in the parking lot.

Q: Did you recognize that to be the van that you had seen earlier and pursued earlier in the evening?

MR. CLONTZ (Defense Counsel): Objection.

THE COURT: Overruled.

Q: You may—

A: Yes, I do.

I note that the overruling of this objection is not argued on appeal. Any argument concerning this ruling has thus been abandoned. N.C. R. App. P. 28(b)(6). This testimony constitutes direct evidence that the mini-van pursued by Officer Lee was the same mini-van that crashed in the parking lot. The tag of the mini-van that crashed began with a “W.” This is circumstantial evidence that this was the same mini-van that Officer Lee pursued.

In *State v. Steelman*, 62 N.C. App. 311, 302 S.E.2d 637 (1983), the officer lost sight of a vehicle when it turned onto a logging road. A highway patrolman spotted the vehicle on a road which was near where the logging road ended, and observed the vehicle crash in a garden. “[S]ome five to ten minutes” after he lost sight of the vehicle, the officer arrived at the scene. *Steelman*, 62 N.C. App. 312, 302 S.E.2d at 638. The defendant argued that the driver could have switched positions with the passenger, or that “some unknown third person” could have been driving. *Steelman*, 62 N.C. App. at 313, 302 S.E.2d at 638.

“For circumstantial evidence to be sufficient to overcome a motion to dismiss, it need not, however, point unerringly toward the defendant’s guilt so as to exclude all other reasonable hypotheses.” *Steelman*, 62 N.C. App. at 313, 302 S.E.2d at 638. “The evidence is sufficient to go to the jury if it gives rise to a reasonable inference of defendant’s guilt.” *Steelman*, 62 N.C. App. at 313, 302 S.E.2d at 638-39 (internal quotation marks omitted). Acknowledging that “there are numerous possibilities as to what might have happened on the logging road that night[,]” the Court rejected the defendant’s argument. *Id.*

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The majority distinguishes *Steelman* because Officer Lee was unable to identify the driver of the mini-van that fled from him. The majority argues that there was no direct evidence of the identity of the driver of the mini-van that fled from Officer Lee. However, direct evidence is not required to survive a motion to dismiss; circumstantial evidence is sufficient “if it gives rise to a reasonable inference of defendant’s guilt.” *Steelman*, 62 N.C. App. at 313, 302 S.E.2d at 638-39.

In the instant case, both direct and circumstantial evidence give rise to a reasonable inference that defendant drove the mini-van that fled from Officer Lee. The mini-van was found in an area toward which it was observed fleeing by Officer Lee. When he lost sight of the mini-van, Officer Lee advised communications that the mini-van may have gone to U.S. Highway 321 or to North Main Street. Sergeant Penley “spotted a vehicle matching a similar description on [U.S.] 321[.]” Then, as Sergeant Penley approached, he saw the wreck. He observed a “black male with a plaidish-type shirt on” jump out of the mini-van and scale the wall between the parking lots of Shoney’s and Wendy’s. Sergeant Penley found a hat beside the mini-van that he had observed defendant wearing on the previous night. There was no evidence of an additional person being present in the mini-van. Officer Lee arrived at the parking lot “no more than 10 or 15 minutes” after he lost sight of the mini-van that fled from him.

As discussed above, Officer Lee’s testimony that he recognized the mini-van that crashed in the parking lot as the mini-van that fled from him is direct evidence that it was the same mini-van. This was strengthened by the first letter of the mini-van’s tag being a “W.” Further, only 10-15 minutes elapsed from when Officer Lee last saw the mini-van until he arrived at the Wendy’s parking lot. Since Officer Lee drove down North Main Street rather than proceeding directly to U.S. Highway 321, only a short period of time elapsed from when Officer Lee lost the mini-van until it was sighted by Sergeant Penley. This gives rise to a reasonable inference that the same person was operating the mini-van on both occasions.

The majority relies upon evidence that conflicts with Officer Lee’s testimony. Weighing conflicting testimony is a task for the jury, not the trial court. “When considering a motion to dismiss for insufficiency of evidence, the court is concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury.” *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987). “Contradictions and discrepancies do not warrant

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dismissal of the case—they are for the jury to resolve.” *State v. Montgomery*, 341 N.C. 553, 561, 461 S.E.2d 732, 736 (1995).

The majority also cites an unpublished opinion, *State v. Peguse*, 173 N.C. App. 642, 619 S.E.2d 594, 2005 N.C. App. LEXIS 2086 (2005). In *Peguse*, the Court held that there was insufficient evidence of the driver’s identity as the perpetrator where there was a gap of several hours and an apparent robbery between when a witness saw the defendants and when they fled from law enforcement. *Peguse* is neither binding nor persuasive authority. There is a major difference between a time lapse of several hours in *Peguse* and several minutes in the instant case.

Applying the correct standard of review, I would hold that the evidence gave rise to a reasonable inference that defendant was the operator of the mini-van that fled from Officer Lee, and was sufficient to warrant the submission of the charge of felony fleeing to elude arrest to the jury.

III. Possession of Cocaine

The State offered testimony concerning the bag of cocaine found in the parking lot. Officer Lee testified that the bag was found “less than a car length away,” “at an angle where the vehicle had curved and hit the pole.” There was no other evidence offered as to where in relationship to the mini-van, or to the defendant’s flight route, the cocaine was found. I agree with the majority that this evidence was insufficient to submit the charge of possession of cocaine to the jury.

IV. Possession of Marijuana

I disagree with the majority that there was insufficient evidence to submit the charge of possession of marijuana to the jury. The evidence presented to the jury as to the possession of marijuana was different, and more detailed than the possession of cocaine. The marijuana was not found on the person of defendant, and the State had to prove its case based upon constructive possession, showing incriminating circumstances. See *State v. Brown*, 310 N.C. 563, 568-69, 313 S.E.2d 585, 588-89 (1984).

Our Supreme Court has noted that constructive possession cases “have tended to turn on the specific facts presented.” *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009). The Courts have considered a variety of factors to determine whether sufficient incriminating circumstances exist to support a constructive possession. In *State*

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v. Neal, 109 N.C. App. 684, 428 S.E.2d 287 (1993), the Court held evidence of constructive possession to be sufficient where the defendant was observed fleeing from the area where cocaine was found. In *Neal*, the Court held evidence sufficient for constructive possession where another defendant stood in the room where the cocaine was later found and “[m]oments later” was found in another room with approximately \$860. *Neal*, 109 N.C. App. at 688, 428 S.E.2d at 290.

In the instant case, the most detailed evidence concerning the marijuana came from Officer Taft Love. Officer Love testified that the marijuana was found on the passenger side of the mini-van near a corral where the Wendy’s dumpster was located. While Officer Lee testified that the bag containing the marijuana was 3 to 4 feet from the mini-van, Officer Love testified that it was “a car length, give or take a few feet.” Officer Love was examined extensively about the condition of the clear, plastic bag, which he testified had not been run over, was not dirty, was not torn, and was not worn in any way. This testimony raises an inference that the bag had been in the parking lot only for a short period of time.

Next, Officer Love testified that the passenger side window was down, which he found to be unusual given that it was “very cold” that night. He then testified that the marijuana was “on the passenger’s side window side on the ground,” and that “it would have been somewhere between five or ten feel [sic] away from where the van was shortly before it struck the pole.” Officer Love found a “blunt wrapper” in the mini-van, under defendant’s wallet. He testified over objection that this was “often associated with—with smoking marijuana.” This objection was not argued on appeal. Officer Love also found about \$800 in or beside the wallet containing defendant’s identification card.

I would hold that this evidence provided a reasonable inference that defendant panicked when Sergeant Penley activated his blue lights on U.S. Highway 321; and that defendant executed an abrupt left turn across three to four lanes of travel into the Wendy’s parking lot. As defendant executed this maneuver, he was rolling down the window, and throwing the marijuana out the passenger-side window. As a result of attempting to do all of these things at once, he crashed the mini-van into the pole. The defendant’s flight, the location of the marijuana, the condition of the bag, the blunt wrapper in the mini-van, and the money in the mini-van are sufficient “incriminating circumstances” to warrant the submission of the possession of marijuana charge to the jury.

TEMPLETON PROPS., L.P. v. TOWN OF BOONE

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TEMPLETON PROPERTIES, L.P., PETITIONER v. TOWN OF BOONE, RESPONDENT

No. COA11-1025

(Filed 6 March 2012)

1. Appeal and Error—law of the case—dicta

An appeal was not barred by the law of the case where respondent argued that a prior appeal had decided as a matter of law that the record contained substantial evidence to support a board of adjustment zoning decision. The statement in the prior decision was, in context, merely *dicta*.

2. Zoning—remand for reviewable findings—new hearing

The trial court failed in its *de novo* review of the record in a zoning case where there had been a remand for reviewable findings of fact and the trial court conducted a new hearing and gathered more evidence. Moreover, the Board did not conduct a full hearing as only opponents of the special use application were allowed to be heard.

Appeal by petitioner from order entered 25 February 2011 by Judge Marvin P. Pope, Jr. in Superior Court, Watauga County. Heard in the Court of Appeals 12 January 2012.

Brough Law Firm, by Michael B. Brough, and Di Santi Watson Capua & Wilson, by Anthony S. di Santi, for petitioner-appellant.

Parker, Poe, Adams & Bernstein L.L.P., by Benjamin Sullivan, for respondent-appellee.

STROUD, Judge.

Templeton Properties, L.P. (“petitioner”) appeals from a trial court’s order affirming a decision of the Town of Boone Board of Adjustment (referred herein as “respondent” or “the Board”) denying petitioner’s application for a special-use permit. For the following reasons, we remand for reviewable findings of fact.

I. Background

Petitioner is the owner of a 2.9 acre parcel of land at 315 State Farm Road in the Town of Boone, North Carolina located in a “R-1 Single Family Residential” zoning district. On 2 March 2007, petitioner submitted an application to the Town for a special-use permit

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to develop on this property a medical clinic in excess of 10,000 square feet,¹ which was listed as a permissible use in zone “R-1” if a special-use permit was obtained, according to the Town’s Unified Development Ordinance (“UDO”).² The Board conducted public hearings on petitioner’s application on 5 April and 1 May 2007 and the Board heard evidence from the petitioner regarding the proposed medical clinic, and from nearby residents, who spoke in opposition to granting petitioner’s permit. At the conclusion of the public hearing on 1 May 2007, the Board voted unanimously that petitioner’s application was complete and that the application complied with all applicable requirements of the UDO. A motion was made and seconded to grant petitioner’s special-use permit with restrictions including reduced parking, restriction of hours of operation, and restrictions as to what types of medical facilities could be operated at that location. However, the motion failed by a vote of 3 to 5. One of the opposing board members stated that the proposed development was not in harmony with the neighborhood and was incompatible with the Town’s Comprehensive Plan; a second opposing board member stated that “the congestion would be a serious safety concern as well at certain times of the day[;]” and a third opposing board member agreed that after listening to the concerns of the residents, he felt there was an issue regarding safety due to traffic congestion and also felt that the project would compromise the quality of the residential neighborhood. On 4 May 2007, respondent sent petitioner a letter informing him that his application for the special-use permit had been denied and “Members of the Board stated that the project [(1)] will not be in harmony with the area, [(2)] will not be in general conformity with the comprehensive plan, and [(3)] will materially endanger the public health or safety. The last concern was specifically related to traffic issues.” On 8 May 2007, petitioner, through counsel, sent a letter to respondent contending that the result of the Board’s 1 May 2007 vote was not to deny his special-use permit, and because they never adopted or voted on a motion to deny the permit pursuant to UDO §§ 74 and 69, their actions only amounted to a denial of “the conditions that the applicant proposed were not imposed by the Board of Adjustment.” On 14 May 2007, respondent sent a letter to petitioner that the Board had scheduled a “Continuation Meeting” on 21 May 2007 to address petitioner’s contention. However, on 18 May

1. The application listed “James West” as “the applicant/contact[.]”

2. Subsequent to petitioner’s application, the town amended the UDO to remove medical clinics in excess of 10,000 square feet from the list of permissible uses in an R-1 zoning district.

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2007, petitioner filed a petition for writ of certiorari with the Superior Court, Watauga County, which was granted on 19 May 2007.³ On 21 May 2007, the Board conducted its “Continuation Meeting” and voted to deny petitioner’s application for a special-use permit. In subsequent discussion, two Board members stated that the motion should be denied because the proposed development would not (1) be in harmony with the area in which it is to be located, and (2) would not be in general conformity with the Comprehensive Plan. On 7 July 2008, the superior court entered an order, with supporting findings of fact and conclusions of law, reversing the Board’s denial of petitioner’s application for a special-use permit and remanded the case to the Board for issuance of petitioner’s special-use permit.

Respondent appealed to this Court from the superior court’s order. This Court in *Templeton Props. LP v. Town of Boone*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2009 N.C. App. LEXIS 1240 (N.C. Ct. App. July 21, 2009) (unpublished), held that the superior court erred by reviewing factual issues *de novo* as

[t]here was substantial evidence before the Board of Adjustment supporting and opposing the special use permit to build the proposed medical clinic. However, neither the transcripts of proceedings before the Board of Adjustment nor any of its letters to Petitioner indicate the facts the Board of Adjustment ultimately found. Indeed, transcripts from the 1 May 2007 hearing and the 21 May 2007 Continuation Meeting show that a majority of the Board of Adjustment Members intended to deny the special use permit, but the facts underlying those Board members’ decisions are nowhere evident.

The Superior Court was not free to find facts in place of the Board of Adjustment; its function was to determine whether the Board of Adjustment’s findings were supported by competent evidence in the record before it. Since there were no factual findings in the record for the Superior Court to review, that court should have remanded to the Board of Adjustment for reviewable findings of fact.

Id. at *12-13 (citation omitted). This Court remanded “to the Superior Court with instructions to remand to the Board of Adjustment for reviewable findings of fact.” *Id.* at *14. This Court further noted that it was not addressing the parties’ remaining arguments on appeal and

3. Petitioner’s petition for writ of certiorari and the superior court’s order granting that petition are not in the record.

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“[i]f there are further proceedings after remand to the Board of Adjustment, the Superior Court should review the entire record of proceedings before the Board of Adjustment, including its actions in the Continuation Meeting.” *Id.*

On remand, the Board met on 2 September 2010 to make findings of fact, as directed by this Court. The Board agreed to permit petitioner’s counsel to present arguments and to permit residents to voice their opinions regarding petitioner’s application for a special-use permit. Following testimony from residents, the Board made findings of fact, then voted (6-2) to adopt those findings of fact in support of the denial of the petitioner’s application for a special-use permit. On 29 September 2010, the Board issued a written decision including findings of fact and conclusions of law. On 27 October 2010, petitioner appealed to the superior court by petition for writ of certiorari, which was granted on the same day. A hearing was conducted on 21 February 2011⁴ and by written order, the trial court affirmed the Board’s decision. Petitioner filed notice of appeal to this Court on 25 March 2011.

II. Standard of Review

We have stated that

[a] particular standard of review applies at each of the three levels of this proceeding—the Board, the superior court, and this Court. *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 12-14, 565 S.E.2d 9, 16-18 (2002). First, the Board is the finder of fact in its consideration of the application for a special use permit. *Id.*, 356 N.C. at 12, 565 S.E.2d at 17. The Board is required, as the finder of fact, to

follow a two-step decision-making process in granting or denying an application for a special use permit. If an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. If a *prima facie* case is established, a denial of the permit then should be based upon findings *contra* which are supported by competent, material, and substantial evidence appearing in the record.

4. A transcript of this hearing is not in the record on appeal.

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. . . .

Any decision of the town board has to be based on competent, material, and substantial evidence that is introduced at a public hearing.

Id., 356 N.C. at 12, 565 S.E.2d at 16-17. A Board's "findings of fact and decisions based thereon are final, subject to the right of the courts to review the record for errors in law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority." *Id.*, 356 N.C. at 12, 565 S.E.2d at 17 (citation and quotations omitted).

Davidson County Broad., Inc. v. Rowan County Bd. of Comm'rs, 186 N.C. App. 81, 86, 649 S.E.2d 904, 909 (2007), *disc. review denied*, 362 N.C. 470, 666 S.E.2d 119 (2008). A superior court's review of a decision by the board of adjustment is limited to:

(1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious.

Wright v. Town of Matthews, 177 N.C. App. 1, 8, 627 S.E.2d 650, 656 (2006) (citation and quotation marks omitted). Additionally,

[t]he standard of review to be applied by the superior court depends upon the type of error assigned. [*Mann Media, Inc.*, 356 N.C. at 13, 565 S.E.2d at 17]. "If the error assigned is that a board's decision is not supported by the evidence or is arbitrary or capricious, the superior court must apply the whole record test." *Id.* *De novo* review is appropriate "if a petitioner contends the board's decision was based on an error of law," *Id.* (citations and quotations omitted). . . .

When using *de novo* review,

the superior court considers the matter anew and freely substitutes its own judgment for the [board's] judgment. When utilizing the whole record test, however, the reviewing court must examine all competent evidence (the "whole record") in

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order to determine whether the [board's] decision is supported by "substantial evidence." The "whole record" test does not allow the reviewing court to replace the board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.

Mann Media, Inc., 356 N.C. at 13-14, 565 S.E.2d at 17-18 (internal citations and quotations omitted). Also, the superior court "must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Id.*, 356 N.C. at 13, 565 S.E.2d at 17 (citations and quotations omitted).

Davidson County Broad., Inc., 186 N.C. App. at 87, 649 S.E.2d at 909-10. "When this Court reviews a superior court's order which reviewed a zoning board's decision, we examine the order to: (1) determine whether the superior court exercised the appropriate scope of review and, if appropriate, (2) decide whether the court did so properly." *Cook v. Union County Zoning Bd. of Adjustment*, 185 N.C. App. 582, 587, 649 S.E.2d 458, 464 (2007) (citation, brackets, and quotation marks omitted). On appeal petitioner argues that the superior court erred in affirming the Board's decision because (1) the denial of the application cannot be supported as a matter of law "on the basis that the proposed medical clinic would not be in harmony with the area in which it is proposed to be located[;]" (2) the denial of the application cannot be supported as a matter of law "on the basis that the proposed medical clinic would not be in general conformity with the town's comprehensive plan[;]" and (3) the "conclusion that the clinic would materially endanger public safety is not supported by substantial competent evidence." Respondent raises two arguments pursuant to N.C.R. App. P. 28(c)⁵ arguing that (1) petitioner's appeal is barred by the law of the case and (2) petitioner's argument regarding whether his proposed development would have been in conformity with the Town's Comprehensive Plan has been waived or abandoned.⁶ As the issue regarding the law of the case is dispositive, we address it first.

5. Even though respondent did not appeal this issue, N.C.R. App. P. 28(c) permits an appellee "[w]ithout taking an appeal" to "present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." *See also* N.C.R. App. P. 10(c).

6. In this argument, respondent contends that petitioner's appeal is "moot" because he failed to preserve any argument regarding the proposed medical clinic's

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III. Law of the case

[1] Respondent raises one concern, as noted above, regarding the law of the case and the record before us presents a second question regarding this same issue.

A. Substantial evidence

First respondent argues that petitioner’s appeal is barred by the “law of the case” because this Court decided as a matter of law that the record contained “substantial evidence” to support the Board’s decision to deny petitioner’s application. Respondent argues that on the previous appeal this Court made the following ruling:

There was substantial evidence before the Board of Adjustment supporting and opposing the special use permit to build the proposed medical clinic.

Templeton Props. LP v. Town of Boone, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2009 N.C. App. LEXIS 1240, at *12-13. Respondent argues that since this was the law of the case and petitioner “did not seek discretionary review” at the Supreme Court, it is established as a matter of law that there was “substantial evidence” to support the Board’s decision. Petitioner responds that this is not the holding of the case and the Court was merely making an observation. We agree.

Our Supreme Court has stated that “[a] decision of this Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal.” *Lea Co. v. North Carolina Bd. of Transp.*, 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989) (quoting *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974)); see *Collins v. Simms*, 257 N.C. 1, 3, 125 S.E.2d 298, 300 (1962). As noted above, the board of adjustment is the sole finder of fact in a proceeding concerning an application for a special use permit. See *Davidson County Broad., Inc.*, 186 N.C. App. at 86, 649 S.E.2d at 909. Contrary to respondent’s argument, this portion of the opinion was not “the law of the case[.]” See *Lea Co.*, 323 N.C. at 699, 374 S.E.2d at 868. In context, it is merely *obiter dicta* explaining the facts surrounding the superior court’s error as it

conformity with the Comprehensive Plan. “[A] case should be considered moot when ‘a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.’” *Hospice & Palliative Care Charlotte Region v. N.C. HHS*, 185 N.C. App. 109, 111-12, 648 S.E.2d 284, 286 (2007) (citation and quotation marks omitted). However, as a determination as to whether this issue was abandoned or waived would have an effect on the case before us, respondent’s argument is not about “mootness” but rather an issue of abandonment or waiver.

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notes that there was evidence in the record for and against granting the permit but the board of adjustment failed to make findings of fact either way. *See Templeton Props. LP*, 2009 N.C. App. LEXIS 1240, at *12-13; *Romulus v. Romulus*, ___ N.C. App. ___, ___, 715 S.E.2d 308, 321 (2011) (explaining that “[i]n every case what is actually decided is the law applicable to the particular facts; all other legal conclusions therein are but *obiter dicta*.” (citation omitted)). In fact, this Court’s holding was that “[t]he Superior Court was not free to find facts in place of the Board of Adjustment; its function was to determine whether the Board of Adjustment’s findings were supported by competent evidence in the record before it[,]” and the matter was remanded back to the superior court with instructions to remand back to the Board of Adjustment to make “reviewable findings of fact.” *Templeton Props. LP*, 2009 N.C. App. LEXIS 1240, at *13-14. This Court noted that there was substantial evidence both *supporting* and opposing issuance of the special use permit; the role of the Board as trier of fact is to find the facts from that evidence, based upon “competent, material, and substantial evidence that is introduced at a public hearing.” *See Davidson County Broad., Inc.*, 186 N.C. App. at 86, 649 S.E.2d at 909. The prior opinion simply notes that there was sufficient evidence in the record to support a decision either to deny or allow the petition, but did not dictate any particular findings, as it is the role of the Board to make findings of fact. Therefore, respondent’s argument is overruled.

We further note that the superior court concluded in its 25 February 2011 order that

5. The Court of Appeals has already held that there was substantial evidence in the Record to support the Board’s decision. That holding is the law of the case and cannot be challenged by [petitioner].

This conclusion amounted to an error of law, as it is based on *dicta* from this Court’s previous opinion. *See Wright*, 177 N.C. App. at 8, 627 S.E.2d at 656. Accordingly, this conclusion of law in the superior court’s order is reversed.

B. Reviewable findings of fact

[2] The record before us raises another issue regarding “the law of the case.” It appears that the superior court failed in its *de novo* review, as it did not address an “error of law[,]” “ensure that procedures specified by law in both statute and ordinance [were] followed[,]” or “ensure that appropriate due process rights of the petitioner [were] protected,

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including the right to offer evidence, cross-examine witnesses, and inspect documents[.]” *see id.*, as the record shows that the Board conducted a new hearing and gathered additional evidence on 2 September 2010, contrary to “the law of the case” from our prior opinion.

Our Supreme Court has stated that

[a] county may create a planning agency to perform the zoning duties of a board of adjustment, N.C.G.S. § 153A-344(a) (2001); N.C.G.S. § 153A-345(a) (2001), including issuing special use permits to “permit special exceptions to the zoning regulations in classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified in the ordinance,” N.C.G.S. § 153A-345(c).

A special use permit is “one which is expressly permitted in a given zone upon proof that certain facts and conditions detailed in the ordinance exist.” *Application of Ellis*, 277 N.C. 419, 425, 178 S.E.2d 77, 80 (1970). “ ‘It does not entail making an exception to the ordinance but rather permitting certain uses which the ordinance authorizes under stated conditions.’ ” *Woodhouse v. Board of Comm’rs of Nags Head*, 299 N.C. 211, 218, 261 S.E.2d 882, 887 (1980) (quoting with approval *Syosset Holding Corp. v. Schlimm*, 15 Misc. 2d 10, 11, 159 N.Y.S.2d 88, 89 (N.Y. Sup. Ct. 1956), *modified on other grounds*, 4 A.D.2d 766, 164 N.Y.S.2d 890 (1957)). “It is granted or denied after compliance with the procedures prescribed in the ordinance.” *Humble Oil & Ref. Co. v. Board of Aldermen of Chapel Hill*, 284 N.C. 458, 467, 202 S.E.2d 129, 135 (1974).

Mann Media, Inc., 356 N.C. at 10, 565 S.E.2d at 15-16. Several sections of the Town of Boone’s UDO were relevant to the Board in making its decision regarding petitioner’s application for a special-use permit. Section 69 of the UDO governs decisions regarding “Special Use Permits[.]”

[a] An application for a special use permit shall be submitted to the Board of Adjustment by filing a copy of the application with the administrator in Development Services Department.

[b] Subject to Subsection [c], the Board of Adjustment, shall issue the requested permit unless it concludes, based upon the information submitted at the hearing, that:

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[1] The requested permit is not within this jurisdiction according to the Table of Permissible Uses, or

[2] The application is incomplete, or

[3] If completed as proposed in the application, the development will not comply with one or more requirements of this ordinance (not including those the applicant is not required to comply with under the circumstances specified in Article VIII, Nonconforming Situations), or

[c] Even if the permit issuing board finds that the application complies with all other provisions of this ordinance, it may still deny the permit if it concludes, based upon the information submitted at the hearing, that if completed as proposed, the development, more probably than not:

[1] Will materially endanger the public health or safety, or

[2] Will substantially injure the value of adjoining or abutting property, or

[3] Will not be in harmony with the area in which it is to be located, or

[4] Will not be in general conformity with the comprehensive plan, thoroughfare plan, or other plan officially adopted by the council.⁷

Section 118 of the UDO, titled “Hearing Required on Appeals and Applications” states that

[a] Before making a decision on . . . an application for a . . . special-use permit, . . . the Board of Adjustment shall hold a public hearing on the . . . application.

[b] Subject to Subsection [c], the hearing shall be open to the public and all persons interested in the outcome of the appeal or the application shall be given an opportunity to present evidence and arguments and ask questions of persons who testify.

Section 120(c) of the UDO states that

7. UDO § 74 states the procedures for voting to approve or deny a special-use permit application and UDO § 75 grants the Board the authority to include additional requirements or conditions as part of approving a special-use permit application.

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[c] All findings and conclusions necessary to the issuance or denial of the requested permit or appeal (crucial findings) shall be based upon reliable evidence. . . .

Section 123 of the UDO, in pertinent part, states that

[a] Any decision made by the Board of Adjustment regarding an appeal or variance or issuance or revocation of a special use permit shall be reduced to writing and served upon the applicant or appellant and all other persons who make a written request for a copy.

. . . .

[c] In addition to a statement of the board's ultimate disposition of the case and any other information deemed appropriate, the written decision shall state the board's findings and conclusions, as well as supporting reasons or facts, whenever this ordinance requires the same as a prerequisite to taking action.

A summary of the progression of this case highlights the superior court's error. First, the Board conducted a full hearing pursuant to UDO § 118 on 5 April and 1 May 2007. The Board heard evidence from petitioner, including testimony from the applicant James West regarding the proposed medical clinic's compliance with the UDO; diagrams and maps describing the proposed medical clinic's light fixtures, dumpster plan, building specifications, parking lot specifications, grading, and tree removal; diagrams of the surrounding neighboring residential properties; pictures showing views of the proposed building from different angles; pictures showing views of the proposed medical clinic site as viewed from different neighboring residential properties; a letter from an appraiser stating that the proposed medical clinic would not have a negative impact upon residents' surrounding properties; and a listing of properties located on a section of State Farm Road near the proposed medical clinic showing several business uses.

Pursuant to UDO § 118(b), the Board permitted eight residents to present evidence and make arguments. Most of these residents voiced opposition or concerns regarding granting petitioner's application. These comments included the following specific concerns: the proposed medical clinic is not consistent with the town's Comprehensive Plan; the development is not in harmony with the area and will affect the character of the neighborhood because the

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surrounding properties are all residential homes; the lighting from the parking lot will create light pollution to the surrounding residential properties; the proposed medical facility will increase traffic volume; there is a blind curve on State Farm Road at the entrance to the proposed medical clinic; the proposed medical clinic will lower property values; the type of medical clinic was not specified and could include anything from a dentist office to a methadone clinic; and the medical facility could produce biomedical waste. Two of the residents presented evidence in the form of pictures of the area surrounding the proposed medical clinic and a traffic-count of State Farm Road on 30 April 2007 conducted by residents during three specific periods of time.

Petitioner was permitted to make final arguments and counsel for the Board made clarifying comments regarding the evidence. The hearing concluded with the Board voting in agreement that petitioner's application was complete and complied with the UDO pursuant to § 69(b)(2) and (3) but denied petitioner's application based on three concerns pursuant to UDO § 69(c). Pursuant to UDO § 123(a), the Board sent petitioner a letter on 4 May 2007, informing him that the application for the special-use permit had been denied based on UDO § 69(c). However, contrary to UDO §§ 120(c) and 123(c), the Board failed to make findings of fact to support its decision. Petitioner subsequently filed for and was granted a writ of certiorari by the superior court, which made findings of fact in its order and reversed the Board's decision. Accordingly, on appeal, this Court stated that it was error for the trial court to make findings and remanded "to the Superior Court with instructions to remand to the Board of Adjustment for reviewable findings of fact." *Templeton Props. LP*, 2009 N.C. App. LEXIS 1240 at *13-14.

On remand from this Court and the superior court, the Board held a hearing on 2 September 2010 to address this Court's ruling. The Board permitted petitioner to make arguments as to why the permit should be granted. Even though the Chairman of the Board stated that it was not his intent to reopen and hear the case "from scratch[,]” and counsel for the Board advised the Board several times that they were not to consider any new evidence at this hearing, counsel for the Board also advised the Board that since they heard arguments from petitioner, they could hear "arguments" from residents. Consequently, the Board permitted seven of the eight residents who spoke at the 5 April and 1 May 2007 hearings, including the Mayor of Boone, again to voice opposition and present evidence, including tes-

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timony that the proposed medical clinic would not be in harmony with the neighborhood; removal of the trees would remove a wind buffer; construction of the proposed medical clinic could cause erosion because there is a “fault line” at the property; the neighborhood is one of the few in Boone that does not have any commercial or business uses; and the proposed medical clinic would cause a loss of property values. Additionally, five of those residents emphasized safety concerns regarding the proposed medical clinic, stating that there is a dangerous intersection at the proposed medical clinic where VFW Drive enters State Farm Road; there are “blind curves” at the entrance to the proposed medical clinic; State Farm Road has a high volume of traffic; and VFW Drive is not wide enough to support traffic for the proposed medical clinic. After discussion, the Board adopted counsel’s proposed findings of fact, with “modifications” to include the following specific findings regarding safety and traffic concerns:

34. There is a blind curve in the area near the proposed development.

35. State Farm Road is narrow in the area and needs to be widened to 18 feet.

36. The curve of State Farm Road and the volume of traffic borne by State Farm Road presents existing hazardous conditions.

37. The further addition of traffic to that particular section of State Farm Road would be highly dangerous.

Counsel for petitioner objected at the hearing to the Board’s decision to hear from residents, stating that “what you are limited to here, it seems to me, are legal arguments as to what finding you can or can’t make or what findings you should or shouldn’t make.” Petitioner, in its 27 October 2010 petition for writ of certiorari, raised an issue regarding the procedure the Board implemented at the hearing on remand:

18. At the September 2, 2010 meeting, after acknowledging that the Board’s actions on remand had to be based solely on the evidence presented at the April 5 and May 1, 2007 hearings, the Board nevertheless proceeded (over the Petitioner’s objections) to listen to the unsworn testimony of seven opponents of the application, including the mayor of the Town of Boone.

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In its order, the superior court makes no mention of this argument or the 2 September 2010 hearing but merely states that

[o]n remand, the Board in due time adopted a September 29, 2010 written order with Findings of Fact based on evidence from the 2007 quasi-judicial hearing.

As noted above, this Court's only instruction to the superior court was for it to remand to the Board "with instructions to remand to the Board of Adjustment for *reviewable findings of fact*." *Id.* at *14 (emphasis added). The Board stated that they were only hearing "arguments" from the residents. At the beginning of the 2 September 2010 meeting, the chairman of the Board stated that "[a]ll testimony before this board must be sworn testimony." UDO § 120(b) states that "[a]ll persons who intend to present evidence to the permit-issuance board, rather than arguments only, shall be sworn." See *Plummer v. Plummer*, 198 N.C. App. 538, 548, 680 S.E.2d 746, 753 (2009) (noting that "the arguments of counsel are not evidence" (citation and quotation marks omitted)). We note that none of these residents were sworn before they made their statements. However, not swearing the residents in and then calling their testimony "argument" did not make their comments legal argument. A careful examination of the residents' testimony shows that their statements regarding how the medical clinic would devalue their property; the lack of businesses in the neighborhood; the construction would cause erosion; and the traffic issues are not legal arguments but a presentation of the same type of factual testimony the residents were allowed to present at the original 5 April and 1 May 2007 hearings. This Court made no instruction to the Board to gather additional evidence. The *reviewable findings of fact* were to be based on the evidence presented at the 5 April and 1 May 2007 hearings and to support the Board's decision to deny petitioner's application.⁸ As noted above, "[a] decision of this Court on a prior appeal constitutes the law of the case, both in sub-

8. At the 2 September 2010 hearing, there was some confusion as to whether the Board's decision to deny petitioner's application was based on three grounds in UDO § 69(c) mentioned by Board members at the conclusion of the 1 May 2007 meeting or on the two UDO § 69(c) grounds mentioned by Board members at the end of the 21 May 2010 "Continuation" hearing. Although discussions at the conclusion of these meetings about why individual Board members decided to deny petitioner's application were based on reasons listed in UDO § 69(c), these conversations did not amount to conclusions of law. What is clear from the record is that the Board did not approve petitioner's application and denial was based on UDO § 69(c). Therefore, the Board was free on remand on 2 September 2010 to make conclusions based on any of the grounds listed in UDO § 69(c), as long as they are supported by the findings of fact and the law.

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sequent proceedings in the trial court and on a subsequent appeal.” *Lea Co.*, 323 N.C. at 699, 374 S.E.2d at 868. But contrary to “the law of the case[.]” *see id.*, the Board conducted a new hearing and gathered more evidence from residents on 2 September 2010 before making its findings of fact. Therefore, the superior court failed in its *de novo* review of the record, as it did not address this “error of law[.]” *See Wright*, 177 N.C. App. at 8, 627 S.E.2d at 656.

We further note that contrary to UDO § 118, the Board did not conduct a full hearing, as only residents in opposition, including the mayor, were allowed to present evidence in opposition to petitioner’s special-use permit application. As noted above, part of the superior court’s review is to ensure “that procedures specified by law in both statute and ordinance [were] followed[.]” and “that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents[.]” *See id.* N.C. Gen. Stat. § 153A-340(c1) (2009) states that when a board of adjustment makes decisions regarding special-use permits the board “shall follow quasi-judicial procedures.” Even though a board of adjustment is not bound by formal rules of evidence or civil procedure, when it “conducts a quasi-judicial hearing to determine facts prerequisite to issuance of a permit, [its procedures] can dispense with no essential element of a fair trial.” *Cook*, 185 N.C. App. at 594, 649 S.E.2d at 467-68 (citations and quotation marks omitted). Essential elements of a fair trial include:

- (1) The party whose rights are being determined must be given the opportunity to *offer evidence*, cross-examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal;
- (2) absent stipulations or waiver such a board may not base findings as to the existence or nonexistence of crucial facts upon unsworn statements; and
- (3) crucial findings of fact which are “unsupported by competent, material and substantial evidence in view of the entire record as submitted” cannot stand.

Humble Oil & Refining Co., 284 N.C. at 470, 202 S.E.2d at 137 (citation omitted and emphasis added). Although petitioner’s counsel was permitted to make arguments at the 2 September 2010 hearing on remand, he did not get a second chance to present evidence, unlike the residents who testified opposing the special-use permit. Also it appears that the residents’ testimony did have some influence on the Board in making its decision, as five of the seven residents got to

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reemphasize their complaints regarding how the traffic situation around the proposed medical clinic would pose a safety danger to the public and the transcript from the hearing shows that the Board modified the proposed findings to include the specific concerns raised by these residents. Therefore, we cannot say that petitioner received a “fair trial” at this hearing. *See id.* Accordingly, the superior court erred in its *de novo* review as it did not address these violations of procedure and petitioner’s due process rights. *See Wright*, 177 N.C. App. at 8, 627 S.E.2d at 656. Due to this error, we cannot proceed with addressing the parties’ substantive arguments until the Board makes its reviewable findings of fact. Therefore, as the superior court did not properly address in its *de novo* review these errors, we reverse the superior court’s order and remand to the superior court for remand to the board of adjustment with instruction again to make reviewable findings of fact in accordance with this opinion. Specifically, the board of adjustment must make its findings of fact based only upon the testimony and evidence presented at the hearings held on 5 April and 1 May 2007. The Board may on remand consider legal arguments regarding the application of the law to the factual evidence presented at the hearing in 2007 but may not receive additional factual testimony or evidence, sworn or unsworn.

REVERSED AND REMANDED.

Judges STEPHENS and BEASLEY concur.

ROY F. WILLIAMS, PLAINTIFF v. KENNY CHARLES E. HABUL, GROUP THREE HOLDINGS, LLC, SUNENERGY 1, LLC, SUNENERGY SOLAR ROOFING, LLC, SUNENERGY1-ASHEVILLE AND MONSTER SOLAR DEVELOPERS, LLC, DEFENDANTS

No. COA11-1126

(Filed 6 March 2012)

1. Appeal and Error—interlocutory orders and appeals—dismissal in accordance with settlement

An appeal from an order to dismiss litigation in accordance with a settlement agreement was from an interlocutory order but was heard on appeal where it determined the action and prevented a judgment from which appeal might be taken.

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2. Compromise and Settlement—third-party beneficiary—action for damages

The trial court did not err by denying a motion to enforce a settlement agreement where plaintiff sought specific performance of a promise to employ a third party. Plaintiff's argument revealed a request for damages in favor of the third-party intended beneficiary (Mr. Groninger) rather than a request for specific performance, and Mr. Groninger was the real party in interest who must bring that action.

3. Compromise and Settlement—employment of third party—reimbursement for amounts paid

The trial court correctly denied plaintiff reimbursement of amounts paid to a third-party beneficiary of a settlement agreement. The language of the agreement clearly and unambiguously contemplated employment of the third party rather than an intent to pay regardless of whether he worked. Moreover, any claim for damages concerning defendants' breach of promise to pay the third party (Mr. Groninger) must be brought by Mr. Groninger.

4. Compromise and Settlement—receipt of payment—promise to employ third party—*independent covenants*

The trial court did not err by ordering plaintiff to dismiss litigation with prejudice even though plaintiff contended that defendants had committed a prior breach of the settlement agreement by not employing a third party. Plaintiff's promise to dismiss the litigation was expressly linked to his receipt of payment from defendants; defendants' promise to employ the third party and plaintiff's promise to dismiss the litigation were *independent covenants*.

5. Appeal and Error—preservation of issues—argument not raised below—*not heard on appeal*

An argument concerning breach of a settlement agreement that was not raised before the trial court was not properly before the appellate court.

Appeal by Plaintiff from order entered 15 June 2011 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 January 2012.

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Erwin, Bishop, Capitano & Moss, P.A., by J. Daniel Bishop and Amy N. Bokor, for Plaintiff-appellant.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, Douglas M. Jarrell, and Heyward H. Bouknight, III, for Defendant-appellees.

HUNTER, JR., Robert N., Judge.

Roy F. Williams (“Plaintiff”) appeals from the trial court’s order denying Plaintiff’s motion to enforce a settlement agreement he entered into with Kenny Charles E. Habul, SunEnergy 1, LLC, SunEnergy Solar Roofing, LLC, SunEnergy1-Asheville, and Monster Solar Developers, LLC (collectively “Defendants”), granting Defendants’ motion to enforce the agreement, and ordering Plaintiff to dismiss with prejudice his claims against Defendants that served as the basis for execution of the agreement. After careful review, we affirm.

I. Factual & Procedural Background

In early 2010, Plaintiff and Defendant Habul formed SunEnergy 1, LLC (“SunEnergy”) to engage in the business of selling solar energy systems. Plaintiff and Mr. Habul subsequently formed SunEnergy Solar Roofing, LLC, (“SunEnergy Solar Roofing”) Monster Solar, LLC, (“Monster Solar”) and SunEnergy1-Asheville, LCC (“SunEnergy-Asheville”) “for purposes related to the business of SunEnergy 1.” Plaintiff and Mr. Habul jointly managed and each held a 50 percent ownership interest in each of the entities.

On 19 January 2011, Plaintiff filed a complaint in Mecklenburg County Superior Court against Mr. Habul and the aforementioned entities alleging, *inter alia*, that Mr. Habul made unauthorized and large distributions to himself from SunEnergy and SunEnergy Solar Roofing.¹ Plaintiff’s complaint sought injunctive relief, damages, and attorney’s fees for embezzlement, constructive fraud, corporate waste, fraudulent transfer, and for denying Plaintiff access to corporate records. On 21 January 2011, the matter (the “Business Court Litigation”) was assigned to North Carolina Business Court Judge

1. Plaintiff’s complaint also named Group Three Holdings, LLC (“Group Three Holdings”) as a co-defendant. Mr. Habul is the sole owner and manager of Group Three Holdings, and Group Three Holdings’ business is unrelated to the businesses of the other named Defendants. Plaintiff’s complaint alleged, *inter alia*, that Mr. Habul withdrew money from SunEnergy and fraudulently transferred the money to Group Three Holdings.

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Calvin E. Murphy. Plaintiff subsequently filed an amended complaint, further alleging usurpation of corporate opportunity and securities fraud as additional claims for relief.²

On 16 February 2011, Plaintiff and Mr. Habul entered into an agreement (the “Settlement Agreement”) whereby Mr. Habul agreed to purchase Plaintiff’s membership interests in SunEnergy, Monster Solar, and SunEnergy Solar Roofing (collectively, the “Subject Entities”) for the total price of \$1,018,797 (the “Payment”).³ The Settlement Agreement set forth a payment schedule whereby Mr. Habul agreed to pay Plaintiff \$500,000 by 18 February 2011 and the remaining \$518,797 on or before 4 April 2011. In exchange, Paragraph 5 of the Settlement Agreement provides that Plaintiff “shall dismiss [the Business Court Litigation] with prejudice” within five business days of receiving the Payment. Plaintiff further agreed, pursuant to Paragraph 9 of the Settlement Agreement, to release and discharge Defendants “from any and all causes of action, suits, claims, demands, liabilities, and obligations whatsoever in law or in equity (including derivative claims on behalf of any entity) arising at any time prior to and through the [date on which Plaintiff receives the Payment].”

Plaintiff bargained for an additional provision in the Settlement Agreement concerning Stepan Groninger, an electrician Plaintiff recruited from Florida to work for SunEnergy. As the Settlement Agreement left Plaintiff with “no further interest of any kind in the Subject Entities,” Plaintiff insisted on including a provision in the Settlement Agreement to compensate Mr. Groninger. Paragraph 8 of the Settlement Agreement provides as follows:

8. Stepan Groninger. SunEnergy 1 shall continue to engage Stepan Groninger (“Groninger”) until July 31, 2010⁴ and shall pay him compensation of \$5,000 per month unless terminated for “Cause,” which shall mean (i) the failure of Groninger to carry out and perform the directions of his supervisor; (ii) the

2. Plaintiff joined Cornelius One, LLC and Greenbay Electronics, LLC as additional defendants in his amended complaint.

3. Mr. Habul, with Plaintiff’s consent, signed the Settlement Agreement on behalf of the Subject Entities and SunEnergy—Asheville.

4. The Settlement Agreement recites 31 July 2010, not 30 July 2011, as the date through which SunEnergy was obligated to employ Mr. Groninger. The trial court, citing *State v. Beddard*, 35 N.C. App. 212, 214-15, 241 S.E.2d 83, 85 (1978), found this was a typographical error and construed the date as 31 July 2011. We agree with the trial court’s construction of this provision.

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commission of an act constituting dishonesty against SunEnergy 1; or (iii) the commission of an act involving moral turpitude that causes harm to the customer relations, operations or business prospects of SunEnergy 1 or its affiliates.

The parties also agreed as part of the Settlement Agreement to file a joint motion requesting the trial court to stay the Business Court Litigation and to approve the Settlement Agreement. Accordingly, upon joint motion of the parties, Judge Murphy entered an order on 18 February 2011 staying the Business Court Litigation and approving the Settlement Agreement.

Mr. Habul tendered \$500,000 of the Payment to Plaintiff on 18 February 2011 and the remaining \$518,797 to Plaintiff on 4 March 2011. Plaintiff concedes he received the Payment in full, approximately one month ahead of the payment schedule described in the Settlement Agreement. Plaintiff did not, however, dismiss the Business Court Litigation within five business days of receipt (by 11 March 2011) as required by Paragraph 5 of the Settlement Agreement. Instead, on 18 March 2011, Plaintiff filed a motion requesting the trial court to enforce the Settlement Agreement. In his motion, Plaintiff alleged that “[a]lthough the major financial terms of the Settlement Agreement have been performed ahead of schedule, Defendants have breached their obligation under paragraph 8 to employ or contract Stepan Groninger . . . at the rate of \$5000 per month, through July 2011.” Plaintiff stated that “[b]ut for this breach, Plaintiff is ready, willing and able to file the notice of dismissal with prejudice of [the Business Court Litigation] called for by paragraph 5 of the Settlement Agreement.”

Plaintiff submitted Mr. Groninger’s sworn affidavit in support of his motion to enforce the Settlement Agreement. Mr. Groninger states in his affidavit that he was “ready, willing, and able to furnish services to SunEnergy,” yet he had received no communication from SunEnergy as of late February 2011. Mr. Groninger states that he “visited the jobsite that [he] was due to be working on and discovered that work had already commenced.” He further states that SunEnergy manager Mike Whitson told him his services would not be needed until June and “they did not want to keep [him] from other opportunities.” Mr. Groninger also describes a telephone conversation he had with Mr. Whitson, during which Mr. Whitson offered (on behalf of SunEnergy) to pay him for February if he agreed to release SunEnergy from March forward. Mr. Groninger admits that he responded, “fine, whatever;” however, Mr. Groninger states that he

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told Mr. Whitson to expect his decision in writing, but he never followed through with any form of written release.

On 4 April 2011, Defendants filed a cross-motion to enforce the Settlement Agreement. Defendants offered an affidavit from Mr. Whitson in support of their motion. Mr. Whitson states in his affidavit that Mr. Groninger sent him an email on 21 February 2011 stating: “ ‘If you guys no longer want my help, just let me know so I can pursue other opportunities, I understand.’ ” Mr. Groninger’s email also stated “that he had to leave North Carolina in two weeks (thus by March 7) to finish ongoing jobs he had in Florida.” Mr. Whitson, describing a telephone conversation with Mr. Groninger on 24 February 2011, states as follows in his affidavit:

Mr. Groninger stated twice in this conversation that he understood the settlement agreement between [Plaintiff] and Mr. Habul called for him to be paid for 6 months but that he did not want to force SunEnergy to employ him if the company did not need him. I emphasized that we could not engage him on a project part time with a full time salary while he completed his other business in Florida. I requested that he send me an email confirming that he was pursuing other options as of March 1 and he responded ‘Yes, I can do that.’ We agreed on February 24, 2011 that SunEnergy was no longer obligated to pay him after February. Mr. Groninger, however, did not send the email as he had promised.

Mr. Whitson also described an incident on 8 March 2011 when Mr. Groninger arrived at SunEnergy’s offices to pick up solar panels on Plaintiff’s behalf.⁵ According to Mr. Whitman, he attempted to speak to Mr. Groninger, but Mr. Groninger retorted, “ ‘No! I’ve been told not to talk to you. I am now working for [Plaintiff].’ ”

Plaintiff reimbursed Mr. Groninger at a rate of \$5,000 per month for the months of February, March, and April 2011.⁶ SunEnergy reimbursed Plaintiff for the February 2011 payment but refused to reimburse Plaintiff for any subsequent payments.

In an order entered 15 June 2011, the trial court denied Plaintiff’s motion to enforce the Settlement Agreement, granted Defendants’

5. Paragraph 2 of the Settlement Agreement permitted Plaintiff, on 24 hours’ notice, to pick up his (one-half) share of the solar panels held in stock by SunEnergy.

6. Plaintiff notes, and this Court acknowledges, that these are payments made by Plaintiff to Mr. Groninger as of the filing of Plaintiff’s affidavit on 3 May 2011.

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motion to enforce the Settlement Agreement, and ordered Plaintiff to “file a Notice of Dismissal with Prejudice, as set forth in the Settlement Agreement, within five (5) business days of entry of this Order.” With respect to Plaintiff’s motion, the trial court found that Mr. “Groninger was not terminated for cause,” and that he did not “positively and unambiguously waive[] his contractual right to employment through July 31, 2011.” The trial court did not expressly state in its order that Defendants breached the Settlement Agreement by failing to employ Mr. Groninger; the court did find, however, that Mr. Groninger, as an intended beneficiary of the agreement, “may be able to enforce any contractual right he may have to be engaged in work with SunEnergy 1 through July 31, 2011.” The trial court implicitly concluded that Plaintiff did not have a contractual right to enforce Mr. Groninger’s contractual rights, if any, as the court denied Plaintiff’s motion to enforce the Settlement Agreement. The trial court also denied Plaintiff’s request to be reimbursed for payments he made to Mr. Groninger, stating:

According to the plain and clear language of the agreed upon terms, SunEnergy 1 is only liable to compensate Groninger for services he furnished in work SunEnergy 1 provided him. The private intent of Plaintiff to compensate Groninger regardless of whether or not he was engaged in work is irrelevant. If the parties had contemplated paying Groninger a set sum regardless of whether he performed work for SunEnergy 1, they could have plainly and unambiguously provided for that in their agreement.

With respect to Defendant’s motion to enforce the Settlement Agreement, the trial court found that “[t]he plain language of Paragraph 5 unambiguously require[d] Plaintiff to file a Notice of Dismissal with Prejudice within five business days after receiving full payment.” Accordingly, because Plaintiff had received the Payment, the trial court ordered Plaintiff to dismiss the Business Court Litigation in accordance with the Settlement Agreement. Plaintiff refused to dismiss the Business Court Litigation, and, on 24 June 2011, Plaintiff filed his notice of appeal with this Court. The trial court has stayed its order requiring Plaintiff to dismiss the Business Court Litigation pending the outcome of this appeal.

II. Jurisdiction

[1] We first note that Plaintiff’s appeal is interlocutory, as the Business Court Litigation remains pending before the trial court. *See*

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Flitt v. Flitt, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) (“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 rights of all the parties involved in the controversy.”). Generally, an interlocutory order is not immediately appealable. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2011). The trial court’s order from which Plaintiff appeals, however, required Plaintiff to dismiss the Business Court Litigation, and, “[i]n effect determine[d] the action and prevent[ed] a judgment from which appeal might be taken.” N.C. Gen. Stat. § 7A-27(d)(2) (2011); *see Dodd v. Steele*, 114 N.C. App. 632, 636, 442 S.E.2d 363, 366 (1994) (“Under North Carolina law, it is clear that a voluntary dismissal terminates a case and precludes the possibility of an appeal.”). Moreover, the trial court’s order had the effect of discontinuing Plaintiff’s action against Defendants. *See* N.C. Gen. Stat. § 7A-27(d)(3) (2011) (an interlocutory order that “[d]iscontinues the action” is immediately appealable). Accordingly, this Court exercises jurisdiction over Plaintiff’s appeal pursuant to sections 7A-27(d)(2) and/or 7A-27(d)(3) of our General Statutes.

III. Analysis**A. Standard of Review**

This Court has determined that “a settlement agreement may be enforced by filing a new action or by filing a motion in the cause, even if ‘the parties and their settlement agreement [are] still before the trial court.’” *Currituck Assocs. v. Hollowell*, 166 N.C. App. 17, 24, 601 S.E.2d 256, 261 (2004) (citation omitted) (alteration in original). “‘A motion to enforce a settlement agreement is treated as a motion for summary judgment’” for purposes of appellate review. *Hardin v. KCS Int’l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (citation omitted); *see also McKinnon v. CV Industries, Inc.*, ___ N.C. App. ___, ___, 713 S.E.2d 495, 500 (2011) (“Courts may enter summary judgment in contract disputes because they have the power to interpret the terms of contracts.”).

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011). The moving party bears “the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law.” *Hardin*, 199

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N.C. App. at 695, 682 S.E.2d at 733. On appeal, this Court must review the entire record, viewing the evidence in the light most favorable to the non-moving party. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

B. Plaintiff's Motion to Enforce the Settlement Agreement*1. Specific Performance*

[2] Plaintiff contends the trial court erred in denying his motion to enforce the Settlement Agreement, as he was entitled to specific performance of Defendants' promise to employ Mr. Groninger under Paragraph 8. We disagree.

The trial court concluded Mr. Groninger was an intended beneficiary of the Settlement Agreement. Defendant does not challenge this finding, and, therefore, we treat Mr. Groninger as an intended beneficiary for purposes of this appeal. *See* N.C. R. App. P. 28(a) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). The question presented is whether Plaintiff had the right to specifically enforce Defendants' promise to employ Mr. Groninger, the intended third party beneficiary under Paragraph 8 of the Settlement Agreement.

A settlement agreement is a contract governed by the rules of contract interpretation and enforcement. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000) (citing *Casualty Co. v. Teer Co.*, 250 N.C. 547, 550, 109 S.E.2d 171, 173 (1959)). We recognize at the outset that the Restatement (Second) of Contracts serves as persuasive, not binding, authority upon this Court and, "[e]xcept as specifically adopted in this jurisdiction, the Restatement should not be viewed as determinative of North Carolina law." *Hedrick v. Rains*, 344 N.C. 729, 729, 477 S.E.2d 171, 172 (1996). Our Courts, however, have looked to the Restatement for guidance in cases involving third party beneficiary contracts. *See, e.g., Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 651, 407 S.E.2d 178, 181 (1991) (determining whether third party had contractual right of action). Under the Restatement approach, "A promise in a contract creates a duty in the promisor to the promisee to perform the promise even though he also has a similar duty to an intended beneficiary." Restatement (Second) of Contracts § 305(1) (1981). "The promisee of a promise for the benefit of a beneficiary has the same right to performance as any other promisee" Restatement (Second) of Contracts § 305(1) cmt. a. (1981). In the event of a breach of a promise intended to benefit a third party beneficiary to the con-

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tract, “[t]he promisee cannot recover damages suffered by the beneficiary, but the promisee is a proper party to sue for specific performance if that remedy is otherwise appropriate.” Restatement (Second) of Contracts § 307 cmt. b. (1981).

Here, Paragraph 8 of the Settlement Agreement represents Defendants’ promise to employ Mr. Groninger through 31 July 2011 at a compensation rate of \$5,000 per month. As we have already established, Mr. Groninger was the intended beneficiary of this promise. Under the Restatement view, Defendants’ promise under Paragraph 8 created a duty in Defendants as promisor to both Plaintiff as promisee and to Mr. Groninger as an intended third party beneficiary. In addition, Plaintiff, as promisee, is entitled to specific performance of Defendants’ promise to employ Mr. Groninger “*if that remedy is otherwise appropriate.*” *Id.* (emphasis added).

“The remedy of specific performance is an equitable remedy of ancient origin. Its sole function is to compel a party to do precisely what he ought to have done without being coerced by the court.” *McLean v. Keith*, 236 N.C. 59, 71, 72 S.E.2d 44, 53 (1952). Generally, “specific performance of a contract is decreed only when it is equitable to do so.” *Hutchins v. Honeycutt*, 286 N.C. 314, 318, 219 S.E.2d 254, 257 (1974). “The remedy of specific performance will be granted or withheld by the court according to the equities of the situation as disclosed by a just consideration of all the circumstances of the particular case” *Byrd v. Freeman*, 252 N.C. 724, 730, 114 S.E.2d 715, 720 (1960) (citation omitted).

“For a court to award specific performance, there must be a breach of a valid contract.” *McKinnon*, ___ N.C. App. at ___, 713 S.E.2d at 500. “Breach may [] occur by repudiation,” where one party makes a positive statement “to the other party indicating that he will not or cannot substantially perform his contractual duties.” *Millis Const. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 510, 358 S.E.2d 566, 569 (1987).

Plaintiff has paid Mr. Groninger \$5,000 per month for the months of February, March, and April 2011. Plaintiff argues that Defendants repudiated their promise to employ Mr. Groninger and seeks “specific performance” of the remaining payments to Mr. Groninger for the months of May, June, and July 2011. Without reaching the issue of breach, we conclude that (1) specific performance would not be an appropriate remedy based upon the facts before this Court, and (2) even if specific performance were an appropriate remedy, we con-

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strue the substance of Plaintiff's argument as a request for damages, not specific performance.

The equities in the instant case do not favor Plaintiff and undermine Plaintiff's request for the equitable remedy of specific performance. Plaintiff has received payment in excess of one million dollars from Defendants but has failed to reciprocate by dismissing the Business Court Litigation as promised. In addition, this Court recognizes the Restatement's policy against specific enforcement of personal services contracts. *See* Restatement (Second) of Contracts § 367(1) (1981) ("A promise to render personal services will not be specifically enforced."). This Court, therefore, would decline to award specific enforcement of Defendants' promise to employ Mr. Groninger if such a determination were necessary to our holding.

Plaintiff's argument, however, reveals a request for damages in favor of Mr. Groninger, not specific performance. Plaintiff fails to recognize that specific performance of Defendants' promise to employ Mr. Groninger would require not only Defendants to pay Mr. Groninger, but it would also require Mr. Groninger to work for Defendant SunEnergy. *See* Restatement (Second) of Contracts § 357 cmt. a. (1981) ("An order of specific performance is intended to produce as nearly as is practicable the same effect that the performance due under a contract would have produced."). Plaintiff does not seek this result. Plaintiff seeks an order requiring Defendants to pay \$15,000 to Mr. Groninger absent the agreed upon *quid pro quo*, i.e., without requiring Mr. Groninger to provide his electrician services to SunEnergy. Plaintiff's request, in substance, asks this Court to award damages to Mr. Groninger for Defendants' alleged breach. This we cannot do. As discussed *supra*, Plaintiff cannot recover damages on behalf of Mr. Groninger, the intended beneficiary. *See* Restatement (Second) of Contracts § 307 cmt. b. (1981) ("The promisee cannot recover damages suffered by the beneficiary . . ."). We conclude that Mr. Groninger, not Plaintiff, is the real party in interest with respect to Defendants' promise under Paragraph 8. *See Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 19, 234 S.E.2d 206, 209 (1977) ("The real party in interest is the party who by substantive law has the legal right to enforce the claim in question."). Therefore, it is Mr. Groninger, not Plaintiff, who must bring an action, if any,⁷ to seek damages for Defendants' alleged breach. N.C. Gen. Stat. § 1A-1, Rule 17(a) (2011) ("Every claim shall be prosecuted in the name of the real

7. See Part III(B)(2) *infra* (discussing Mr. Groninger's potential claim and mitigation of damages).

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party in interest[.]”). Accordingly, we hold the trial court correctly denied Plaintiff’s motion to enforce the Settlement Agreement.

2. Reimbursement

[3] Plaintiff next contends he is “entitled to reimbursement of the \$5,000 payments that he made to Groninger in March and April 2011.” We disagree.

Questions relating to the construction and effect of a settlement agreement are resolved by employing the same rules that govern the interpretation of contracts generally. *See Penn Dixie Lines, Inc. v. Grannick*, 238 N.C. 552, 556, 78 S.E.2d 410, 414 (1953). “The court is to interpret a contract according to the intent of the parties to the contract, unless such intent is contrary to law.” *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631, 518 S.E.2d 205, 209 (1999) (citing *Duke Power v. Blue Ridge Elec. Membership Corp.*, 253 N.C. 596, 117 S.E.2d 812 (1961)). “ ‘If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract’ ”. *Id.* (quoting *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996)). “When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court, and the court cannot look beyond the terms of the contract to determine the intentions of the parties.” *Asheville Mall, Inc. v. F.W. Woolworth Co.*, 76 N.C. App. 130, 132, 331 S.E.2d 772, 773-74 (1985) (internal citation omitted).

Paragraph 8 provides that “SunEnergy 1 shall continue to engage” Mr. Groninger through 31 July 2011 and “shall pay him compensation of \$5,000 per month” for the six months (February, March, April, May, June, and July 2011) of employment. This language clearly and unambiguously contemplates *compensation for employment*; it does not contemplate or evidence the parties’ intent to pay Mr. Groninger \$5,000 per month regardless of whether he worked for SunEnergy. We agree with the trial court that “[t]he private intent of Plaintiff to compensate Groninger regardless of whether or not he was engaged in work is irrelevant.”

Plaintiff relies upon the Restatement (Second) of Contracts § 310(2) (1981) in support of his position. Section 310(2) of the Restatement provides that “[t]o the extent that the *claim* of an intended beneficiary is satisfied from assets of the promisee, the promisee has a right of reimbursement from the promisor, which may be enforced directly.” Restatement (Second) of Contracts § 310(2) (1981) (emphasis added). The Reporter’s Note to section 310

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clarifies that, unlike the Restatement (First) of Contracts, this section applies to all intended beneficiaries. *See* Restatement (Second) of Contracts § 310 Reporter's Note (1981) (section not limited to creditor beneficiaries⁸).

Even if this Court were to adopt the Restatement's position on this issue, which we do not, it is impossible to determine from the evidence of record whether Mr. Groninger has a "claim" against Defendants. To conclude that Mr. Groninger has a claim against Defendants for any sum certain would ignore the question of whether and to what extent Mr. Groninger mitigated his damages incurred by Defendants' alleged breach. For example, the record indicates that Mr. Groninger was engaged in a project in Florida during the time in question. The issue of Mr. Groninger's damages and mitigation of his damages, however, is not before this Court. As discussed in part III(B)(1) *supra*, any claim for damages concerning Defendants' alleged breach of its promise to employ Mr. Groninger must be brought by Mr. Groninger. Accordingly, we hold that the trial court correctly denied Plaintiff's request for reimbursement.

C. Defendants' Motion to Enforce the Settlement Agreement

[4] Plaintiff further contends the trial court erred in granting Defendants' motion to enforce the Settlement Agreement and by ordering Plaintiff to dismiss the Business Court Litigation with prejudice. Specifically, Plaintiff contends he was not obligated to dismiss because Defendants committed a prior breach of the Settlement Agreement by failing to employ Mr. Groninger.⁹ Plaintiff's argument is unavailing.

"The general rule governing bilateral contracts requires that if either party to the contract commits a material breach of the contract, the other party should be excused from the obligation to perform further." *Coleman v. Shirlen*, 53 N.C. App. 573, 577-78, 281 S.E.2d 431, 434 (1981). However, "[f]ailure to perform an independent promise does not excuse nonperformance on the part of the

8. *See* Restatement (Second) of Contracts § 302 cmt. b. (1981) (distinguishing creditor beneficiaries from donee beneficiaries).

9. Plaintiff raised this argument in an action brought against Defendant Habul and Defendant Cornelius One, LLC in federal court. The United States District Court for the Western District of North Carolina, Judge Max O. Cogburn, Jr., presiding, dismissed Plaintiff's action with prejudice, ruling that the principles of *res judicata* and abstention barred Plaintiff's action, as Plaintiff's lawsuit raised issues that overlapped with the issues presented in Plaintiff's appeal before this Court. *Williams v. Habul*, No. 3:11CV374-MOC-DSC, 2011 WL 6032715, at *2-3 (W.D.N.C. Dec. 5, 2011).

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other party.” *Id.* at 578, 281 S.E.2d at 434. In determining whether a promise is independent or dependent, our Supreme Court has stated the following:

“Whether covenants are dependent or independent, and whether they are concurrent on the one hand or precedent and subsequent on the other, depends entirely upon the intention of the parties shown by the entire contract as construed in the light of the circumstances of the case, the nature of the contract, the relation of the parties thereto, and other evidence which is admissible to aid the court in determining the intention of the parties.”

Harris & Harris Const. Co. v. Crain & Denbo, Inc., 256 N.C. 110, 117, 123 S.E.2d 590, 595 (1962) (quoting *Wade v. Lutterloh*, 196 N.C. 116, 120, 144 S.E. 694, 696 (1928)).

Our examination of the Settlement Agreement reveals that Defendants’ promise to employ Mr. Groninger was a promise independent from Plaintiff’s promise to dismiss the Business Court Litigation. The plain language set forth in Paragraph 5 and Paragraph 8 and juxtaposition of these two provisions supports this conclusion. Paragraph 5 provides as follows:

5. Dismissal of Civil Action with Prejudice. Within 5 business days after [Plaintiff] receives the full Payment, [Plaintiff] shall dismiss [the Business Court Litigation] with prejudice by filing a Notice of Dismissal With Prejudice in the form attached hereto as Exhibit B.

Paragraph 5 expressly links Plaintiff’s dismissal of the Business Court Litigation to his receipt of the Payment by stating that Plaintiff “shall dismiss” his action against Defendants within five business days of receiving the Payment in full. Plaintiff’s promise to dismiss was therefore dependent upon Defendants’ promise to tender the Payment. Defendants’ failure to perform as promised under Paragraph 5 would have discharged Plaintiff’s corresponding promise and duties under *Paragraph 5*. Paragraph 8, on the other hand, represents Defendants’ promise to employ Mr. Groninger and does not reference Plaintiff’s obligations under Paragraph 5. The parties opted not to include language expressly linking Plaintiff’s dismissal to Defendants’ employment of Mr. Groninger. There is simply no nexus between the promises recited in Paragraph 5 and those recited in Paragraph 8 to permit construction of the promises in these separate provisions as

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mutually dependent. Moreover, we decline to read Defendants' promise to employ Mr. Groninger as a "constructive" condition on Plaintiff's dismissal. See *Harllee v. Harllee*, 151 N.C. App. 40, 47, 565 S.E.2d 678, 682 (2002) ("Absent clear and plain language, provisions of a contract will ordinarily not be construed as conditions precedent."). While Plaintiff is correct in asserting that "[t]he dismissal was in exchange for all of the settlement consideration," the distinction between independent and dependent promises and the effect of a breach thereof remains.

Bearing this distinction in mind, we conclude that a breach of Defendant's promise under Paragraph 8 would not have suspended or discharged Plaintiff's duty to perform under Paragraph 5. Plaintiff received the second and final installment of the Payment on 4 March 2011; thus, the only promise upon which Plaintiff's duty to dismiss depended was fulfilled, and, in accordance with the plain and unambiguous language in Paragraph 5, Plaintiff was obligated to dismiss the Business Court Litigation within five business days (by 11 March 2011). We need not reach the issue of breach, as Defendants' promise to employ Mr. Groninger and Plaintiff's promise to dismiss the Business Court Litigation were independent covenants. Whether or not Defendants breached Paragraph 8 was immaterial to Plaintiff's obligation to dismiss under Paragraph 5.¹⁰ As discussed in part III(B)(1) *supra*, Mr. Groninger may bring a suit for Defendants' alleged breach of Paragraph 8 if he so chooses. Accordingly, we hold that the trial court did not err in ordering Plaintiff to dismiss the Business Court Litigation with prejudice.

[5] Finally, we decline to consider Plaintiff's contention that the legal effect of Defendants' alleged breach was to remit him to his original claims. Plaintiff did not raise this argument before the trial court, and, therefore, it is not properly before this Court on appeal. See *Higgins v. Simmons*, 324 N.C. 100, 103, 376 S.E.2d 449, 452 (1989)

10. This Court acknowledges Plaintiff's argument that Defendants failed to preserve certain issues—including whether Defendants breached the Settlement Agreement and whether Plaintiff's receipt of the Payment served as the *quid pro quo* for Plaintiff's dismissal of the Business Court Litigation—for appellate review. Plaintiff fails to recognize that the Rules of Appellate Procedure do *not* require Defendants to list these issues as proposed issues on appeal in the appellate record. See N.C. R. App. P. 10(c) ("An appellee's list of proposed issues on appeal shall not preclude an appellee from presenting arguments on other issues in its brief."). Defendants properly preserved these issues as alternative bases in law for supporting the trial court's order by presenting them in their appellee brief. See *id.*

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("[A] contention not made in the court below may not be raised for the first time on appeal.").

For the foregoing reasons, the trial court's order is
Affirmed.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA v. DAVID HENRY ROGERS

No. COA11-482

(Filed 6 March 2012)

1. Constitutional Law—right to counsel—removal of attorney of choice—potential conflict of interest

The presumption in favor of defendant's counsel of choice was properly overcome in a prosecution for attempted first-degree murder and assault and the trial court did not abuse its discretion by removing defendant's retained counsel based on the possibility that the attorney might be called to testify. The attempted murder arose from defendant's affair with the victim's wife, and his retained counsel was also his best friend and had talked with the victim's wife. There was evidence of a serious potential for conflict in the attorney's relationships with both parties and his awareness of personal and sensitive information. The fact that the conflict never materialized was not dispositive.

2. Constitutional Law—right to counsel—removal of counsel—potential conflict of interest—findings

The trial court did not apply an incorrect standard to its decision on the State's motion to remove defendant's counsel under Rule 3.7 of the North Carolina Revised Rules of Professional Conduct. Defendant argued that the trial court should have made findings that it was likely that the attorney would be a necessary witness but cited no legal authority for its position, and there was no evidence of substantial hardship. There was competent evidence in the record to support the trial court's conclusions.

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3. Attorneys—removal—conflict of interest—pretrial and trial

The trial court did not err in an attempted first-degree murder and assault prosecution by determining that defendant's retained attorney must be removed to avoid any conflict of interest for pretrial as well as trial proceedings.

4. Criminal Law—defenses—automatism—instruction

There was no plain error in a prosecution for attempted murder and assault where the court instructed the jury that defendant had the burden of proving the defense of automatism.

5. Constitutional Law—double jeopardy—attempted murder—assault—same facts

There was no double jeopardy violation where judgment was entered for both attempted murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury based upon the same evidence. Each offense contained at least one element not included in the other.

Appeal by defendant from judgment entered 8 October 2010 by Judge William R. Pittman in Orange County Superior Court. Heard in the Court of Appeals 26 October 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for defendant-appellant.

BRYANT, Judge.

Where the record contains evidence of a serious potential conflict of interest, the trial court did not violate defendant's Sixth Amendment right to counsel by removing defendant's counsel. Where defendant relies on the affirmative defense of automatism, the trial court did not commit plain error by instructing the jury that defendant had the burden of persuasion to prove the defense of automatism. Where each offense of which defendant was convicted required proof of at least one element the other did not, there was no violation of the prohibition against double jeopardy.

On 9 July 2008, William Ralston ("Ralston"), retired firefighter and Coast Guard reservist, was taking care of personal matters in Orange County. On his way to an oil change, he passed his home on

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Wheeler's Church Road and saw an unfamiliar vehicle parked in his driveway with an unknown man standing beside it. Ralston subsequently identified that man as defendant.

Ralston entered his driveway and asked defendant if he needed any help. After confirming Ralston's identity, defendant said that he had some papers Ralston needed to sign relating to Ralston's recent retirement from the Coast Guard. Ralston walked toward defendant to comply with his request, at which time defendant produced a revolver and shot Ralston in the abdomen. Badly injured, Ralston ran to hide in some nearby brush and woods, where he called 911 and his wife's office seeking assistance. An ambulance responded, and Ralston was transported first to Person Memorial Hospital, then by helicopter to Duke University Medical Center, where he underwent surgery and was hospitalized for nearly one week. Ralston's neighbor, Bryan Murray, was home at the time of the shooting and testified at trial that he heard two gunshots and Ralston's screams at the time of the shooting.

Ralston did not know defendant. However, defendant knew Ralston by virtue of defendant's ongoing relationship with Ralston's wife, Chardell Ralston ("Chardell"). Defendant had been having an affair with Chardell for approximately two years prior to the shooting. On a few occasions during the course of their relationship, Chardell discussed with defendant the possibility of leaving her husband. Chardell also communicated with defendant's best friend and attorney, Wayne Eads ("Eads"), about her relationship with defendant and the consequences of a divorce.

When questioned by police on 11 July 2008, defendant denied any involvement in the shooting. He admitted knowing Chardell platonically, but denied that they had any sexual relationship. To Chardell, defendant also denied involvement in the shooting during a conversation they had on 10 July 2008. Approximately four months after the shooting, defendant told Chardell that he had no memory about the events of which he was accused.

Defendant was indicted by an Orange County grand jury on one count of attempted first-degree murder and one count of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant hired his friend Eads to represent him.

On 22 September 2009, a pretrial hearing was held on the State's motion *in limine* to remove Eads as defendant's counsel. The motion was based on potential conflicts of interest that could arise if Eads

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was called to testify in defendant's trial. The trial court granted the State's motion and appointed the Public Defender of Judicial District Fifteen-B to represent defendant. Defendant subsequently declined to be represented by the Public Defender, choosing instead to represent himself *pro se*.

Defendant entered a pretrial notice of appeal regarding the court's ruling on Eads' disqualification. On 13 January 2010, this Court entered an order granting the State's motion to dismiss defendant's pretrial appeal as did the Supreme Court of North Carolina six months later.

Defendant's case came on for trial at the 4 October 2010 criminal session of Orange County Superior Court. On 8 October 2010, the jury returned verdicts finding defendant guilty of one count of attempted first-degree murder and one count of assault with a deadly weapon with intent to kill inflicting serious bodily injury. On 8 October 2010, the trial court consolidated the charges and sentenced defendant to imprisonment for 132 to 168 months. Defendant appeals.

On appeal, defendant raises the following questions: (I) whether the trial court committed structural error by removing defendant's retained counsel; (II) whether the trial court committed plain error by instructing the jury that defendant had the burden of persuasion to prove the defense of automatism; and (III) whether the trial court violated the prohibition against double jeopardy.

I

[1] Defendant first argues that the trial court erred by removing Eads as defendant's retained counsel based on the possibility that Eads may have been called to testify as a witness in defendant's trial. Specifically, defendant contends that Eads' disqualification was erroneous because the trial court applied an incorrect legal standard and also because the trial court made no findings of fact to show that Eads was a likely and necessary witness for defendant's trial. We disagree.

On a motion for disqualification, the findings of the trial court are binding on appeal if supported by any competent evidence, and the court's ruling may be disturbed only where there is a manifest abuse of discretion, or if the ruling is based on an error of law. *State v. Taylor*, 155 N.C. App. 251, 255, 574 S.E.2d 58, 62 (2002) (citation omitted).

An accused's right to counsel in a criminal prosecution is guaranteed by both the North Carolina Constitution and the Sixth

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Amendment to the United States Constitution. *Id.* at 254, 574 S.E.2d at 62 (citation omitted). An essential element of this right is the right to retain counsel of the accused's choice. *Id.* (citation omitted). However, this right is not absolute. *Id.* (citation omitted).

[C]ourts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. *Therefore, where it is shown that an actual conflict or the potential for conflict exists, the presumption in favor of an accused's counsel of choice will be overcome. . . .* [I]t is incumbent upon a court faced with either an actual or potential conflict of interest, regarding attorney representation, to conduct an appropriate inquiry and, if need be, grant the motion for disqualification. *The trial court must be given substantial latitude in granting or denying a motion for attorney disqualification.*

State v. Shores, 102 N.C. App. 473, 475, 402 S.E.2d 162, 163 (1991) (citing *Wheat v. United States*, 486 U.S. 153, 159-60 (1988)) (emphasis added).

The United States Supreme Court has discussed the parameters of the Sixth Amendment right to counsel of choice in a number of cases. In *United States v. Gonzalez-Lopez*, 548 U.S. 140, 142-43, 165 L. Ed. 2d 409, 410 (2006), the trial court denied *pro hac vice* admission of the defendant's retained counsel based on the counsel's previous violation of a rule of professional conduct while handling an unrelated matter. When the case reached the Supreme Court, the Government conceded that the district court's disqualification of defendant's retained counsel was erroneous but argued that it was harmless error. *Id.* at 144, 165 L. Ed. 2d at 417. The Supreme Court concluded that a denial of the right to counsel of choice is not subject to review for harmlessness but rather qualifies as "structural error" affecting the framework within which the trial proceeds. *Id.* at 148-49, 165 L. Ed. 2d at 419. In holding that the district court's error violated the defendant's constitutional right to counsel of choice, the Supreme Court took care to note that none of the traditional limitations on the right to choose one's counsel was relevant, such as "a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that effectively exclude a defendant's first choice of counsel." *Id.* at 151-52, 165 L. Ed. 2d at 421-22. The Court then stated that its opinion should not cast doubt or place qualification upon previous holdings

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limiting the right to counsel of choice and recognizing the authority of trial courts to establish criteria for admitting lawyers to argue before them. *Id.*

In *Wheat v. United States*, 486 U.S. 153, 156, 100 L. E. 2d 140, 147 (1988), the petitioner moved to substitute as his counsel the counsel for several other codefendants in the same case, asserting his Sixth Amendment right to counsel of choice and his willingness to waive the right to conflict-free counsel in support of his motion. The district court denied the motion based on the substantial likelihood that the defendants would be called to testify at each others' trials, which would create a serious and untenable conflict of interest for the counsel. *Id.* at 156-57, 100 L. E. 2d at 147. In upholding the district court's ruling, the Supreme Court emphasized the latitude that must be accorded a trial court in making such a determination:

[A] district court must pass on the issue of whether or not to allow a waiver of a conflict of interest by a criminal defendant not within the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict[.] . . . *For these reasons we think the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.*

Id. at 162-63, 100 L. E. 2d at 151 (emphasis added).

In *State v. Taylor*, 155 N.C. App. 251, 253, 574 S.E.2d 58, 60 (2002), this Court addressed the issue of whether disqualification of counsel was proper where counsel sought to represent a defendant accused of shooting his live-in girlfriend after having previously represented the victim in divorce proceedings. After the shooting, defendant's counsel also prepared a document giving the victim's power of attorney to the defendant and had it sent to her to be executed. *Id.* at 256-57, 574 S.E.2d at 63. In determining that disqualification was proper, this Court noted that the failure of several potential conflicts to materialize in defendant's trial was not dispositive, referencing the Supreme Court's considerations in *Wheat*. *Id.* at 261-62, 574 S.E.2d at 65-66. Since a trial court must make a determination on a defendant's

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right to be represented by retained counsel at a very early stage in the proceedings, it must be given wide discretion in refusing waivers of conflicts of interest, even when no actual conflict may be shown prior to trial but a potential conflict exists. *Id.* While this Court did express concern over the State's nearly two-year delay in bringing the motion for disqualification, it found no prejudice since the substitute attorney was given five months to prepare for trial. *Id.* at 265, 574 S.E.2d at 67-68.

A

On appeal, defendant cites the United States Supreme Court's holding in *Gonzalez-Lopez* and this Court's holding in *Shores* to support his contention that disqualification of Eads was erroneous. However, there are substantial differences between the circumstances presented in the instant case and those presented in the aforementioned cases such that the outcomes should not be the same.

In *United States v. Gonzalez-Lopez*, the government conceded that disqualification of the defendant's counsel was erroneous in the first instance, and therefore the Supreme Court analyzed that case within the framework of structural error. 548 U.S. at 144, 165 L. Ed. 2d at 417. Here, the State has made no such concession nor is there an indication that we should review for structural error. Further, in *Gonzalez-Lopez*, the Court took care to note that none of the traditional limitations on the right to choose one's counsel was relevant, thus implying that a different result would have been reached if such limitations were present. *Id.* at 151-52, 165 L. Ed. 2d at 421-22. Here, one such limitation, a potential conflict of interest for defendant's retained counsel, was present from the outset.

Defendant also contends that the facts of this case merit the same outcome as in *State v. Shores*. In *State v. Shores*, we held that the "defendant's Sixth Amendment right . . . is too important to be denied on the basis of a mere, though substantial, possibility that [defense co-counsel] Chandler might be called as a witness [for the State]." 102 N.C. App. at 475-76, 402 S.E.2d at 164 (citation and internal quotations omitted). The Court, subsequently, concluded that defense counsel Chandler should not have been disqualified from representing defendant during pre-trial proceedings. *Id.* at 474, 402 S.E.2d at 163. In reaching their conclusion, the Court stated that:

[W]e have considered the fact that if [defense co-counsel] Chandler were disqualified this early in the proceedings and a

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pre-trial hearing determines that either [State's witness] Amanda Durham can not testify on behalf of the State or that the attorney-client privilege prohibits Chandler from testifying, defendant will have lost his constitutional right for no good reason.

Id. at 476, 402 S.E.2d at 164.

However, the facts in *Shores* are different from the facts in the case at bar. Most notably in *Shores*, according to the expected testimony of the State's witness, the defendant and defense counsel Chandler *may* have spoken previously about the crime for which defendant was being tried thereby resulting in a conflict of interest if Chandler was called as a witness for the State. *Id.* at 474, 402 S.E.2d at 162-63 (emphasis added). Conversely, in the case *sub judice*, it is uncontested that Eads and defendant had an attorney-client relationship. However, no such attorney-client relationship existed between Eads and Chardell. Therefore, because Eads had personal knowledge of the relationship between Chardell and defendant, a potential, or even actual, conflict of interest regarding attorney representation was far more probable in this case than in *Shores* if Eads was called to testify as a State's witness. Therefore, *Shores* does not control the result in this case.

Instead, we find the instant case substantially similar to *Taylor*, wherein this Court affirmed disqualification of the defendant's counsel based on, *inter alia*, the possibility that counsel would be called to testify as a witness at defendant's trial. 155 N.C. App. at 260-61, 574 S.E.2d at 65. Here, as in *Taylor*, the State based its concerns on the preexisting relationships between the attorney and the parties and witnesses to the proceeding, and the State described with specificity the matters about which the attorney could possibly testify. Moreover, in both cases, the State was delayed in bringing its motion for disqualification, and the conflicts failed to materialize at trial.

In light of the relevant precedent, the trial court was justified in its action with respect to attorney Eads. The record indicates that there was evidence of a serious potential for conflict based on Eads' longstanding relationship with the defendant as well as his correspondence with Chardell prior to the shooting. By virtue of his relationships with both parties, Eads was aware of personal and sensitive information, including the nature of their affair, which was a major factor leading to the shooting. Had Eads remained as defendant's counsel, he might have been called to testify, at which time he might

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have been asked to disclose confidential information regarding the relationship between defendant and Chardell, which information may have divulged defendant's motive for shooting Ralston, which in turn could compromise his duty of loyalty to his client.

As in *Taylor*, the fact that the conflict never materialized is not dispositive, nor is the fact that the State waited over one year after defendant's arrest and indictment to bring its motion for disqualification, since defendant still had nearly a year to prepare for trial after Eads was removed as counsel.

Based on the serious potential for conflict, the presumption in favor of defendant's counsel of choice was properly overcome, and the trial court did not abuse its discretion in disqualifying Eads as defendant's counsel.

B

[2] Defendant also alleges that the trial court applied an incorrect legal standard in disqualifying Eads. Defendant correctly states that the ethical rule at issue in the present case is Rule 3.7 of the North Carolina Revised Rules of Professional Conduct, which states, in pertinent part:

- (a) A lawyer shall not act as advocate in a trial in which the lawyer is likely to be a necessary witness unless:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.

N.C. Rules of Prof'l Conduct Rule 3.7(a) (2011). In a recent ethics opinion, the North Carolina State Bar opined that testimony is "necessary" within the meaning of the rule when it is relevant, material, and unobtainable by other means. 2011 Formal Ethics Opinion 1.

Pursuant to the language of Rule 3.7, defendant argues that the trial court should have made explicit and detailed findings that it was "likely" that Eads would be a "necessary" witness in defendant's trial and considered the various exceptions to the Rule before disqualify-

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ing him as defendant's retained counsel. However, defendant cites no legal authority to support his position.¹

In its motion *in limine*, the State specifically set forth several factual issues upon which attorney Eads could testify, including his conversations with Chardell prior to the shooting, defendant's love for Chardell, Chardell's marital issues which led to defendant shooting Ralston, and defendant's demeanor around the time of the offense. With respect to at least some of these issues, Eads would have been uniquely aware of the circumstances such that his testimony would have been unobtainable by other means, considering his private correspondence with Chardell and his long-standing relationship with defendant, which would enable him to form unique opinions as to certain aspects of their characters and their relationship with one another.

In response to the State's motion, the trial court stated:

[It] does have a significant concern about the potential that your attorney could be called as a witness in this case. This is not a comment on the validity or the truthfulness of the kinds of statements or facts that the State puts forth in the motion. But the mere fact that he may be called to testify to say things that you think would support these statements not being true or saying things that might support the facts alleged in the motion in limine, either way, he could not function as both a witness and an attorney. And so that conflict of interest may also present ethical issues for Mr. Eads, your attorney, that would be difficult if not impossible to navigate in a trial.

I have—the Court has considered the possibility that there may be conflicts that you could waive and has considered alternatives to relieving your attorney of his representation of you. But in the interest of fairness and efficiency and to avoid any conflict of interest or potential ethical issues in the trial or further proceedings of these matters, I will relieve Mr. Eads as the attorney of record in your case.

1. In *Robinson & Lawing v. Sams*, 161 N.C. App. 338, 587 S.E.2d 923 (2003), this Court held that the trial court's order disqualifying the defendant's attorney should not be vacated for want of findings of fact absent a request for such findings from either party. *Id.* at 341, 587 S.E.2d at 925-26. Further, orders granting disqualification have been upheld even absent explicit findings that an attorney was "likely" to be a "necessary" witness. *Taylor*, 155 N.C. App. at 264, 574 S.E.2d at 64 ("[A]lthough [counsel] was not actually called as a witness to testify . . . the *possibility* certainly existed." (emphasis added)).

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We note that neither party requested, nor did the trial court produce, findings of fact supporting its ruling on the motion *in limine*. However, we further note that there is competent evidence in the record to support the trial court's conclusion that Eads was likely to be a necessary witness at defendant's trial and that none of the exceptions to Rule 3.7 apply.

Arguably, the only applicable exception to Rule 3.7 is subdivision (c), involving substantial hardship. However, there is no evidence that defendant suffered such hardship because: defendant was appointed new counsel, which he subsequently declined; Eads was disqualified over a year before the trial was to take place; and, the issues being adjudicated were not so complicated as to require someone with a unique accumulation of knowledge to handle them.

Accordingly, the trial court did not apply an incorrect legal standard in rendering its decision on the State's motion. Defendant's argument is overruled.

C

[3] Defendant's final contention is that the trial court erred by removing Eads as defendant's counsel for pretrial as well as trial proceedings. We disagree.

"The right of a defendant to have an attorney of his own choosing must be balanced against the court's interest of conducting a fair and unbiased legal proceeding." *See Taylor*, 155 N.C. App. at 255, 574 S.E.2d at 62. Further, the trial court has tremendous latitude in determining whether or not a lawyer must be removed based on an actual or potential conflict. *See Wheat*, 486 U.S. at 162-63, 100 L. E. 2d at 151 ("[T]he district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.").

As a result, we find that the trial court did not err in determining that attorney Eads must be removed as defense counsel "in the interest of fairness and efficiency and to avoid any conflict of interest or potential ethical issues in the trial or further proceedings of these matters." This argument is overruled.

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II

[4] Defendant next argues that the trial court committed plain error by instructing the jury that defendant had the burden of persuasion to prove the defense of automatism. We disagree.

Since defendant did not object or request an alternate jury instruction at trial, the standard of review for this claim is plain error. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

In North Carolina, automatism or unconsciousness is a complete defense to a criminal charge because it precludes both a specific mental state and a voluntary act. *State v. Jones*, 137 N.C. App. 221, 230, 527 S.E.2d 700, 706 (2000). Automatism is an affirmative defense, and the burden is on the defendant to prove its existence to the jury. *Id.* In *State v. Jones*, this Court overruled the defendant's argument that the jury instruction on automatism constituted plain error because it shifted the burden of proving voluntariness away from the State and instead made the defendant disprove that he acted voluntarily. *Id.*

Defendant contends that since the State must prove every element of an offense beyond a reasonable doubt, and since automatism is a defense that raises a reasonable doubt about the element of a voluntary act, the State should have the burden of proof with respect to the defense. However, defendant's argument is nearly identical to the argument expressly overruled by this Court in *Jones*. Accordingly, we hold that the trial court did not commit plain error in rendering its jury instruction regarding the defense of automatism.

III

[5] Defendant's final argument is that the trial court violated the prohibition against double jeopardy. We disagree.

This Court reviews a trial court's denial of a double jeopardy motion to arrest judgment on an offense *de novo*. *State v. Newman*, 186 N.C. App. 382, 386-87, 651 S.E.2d 584, 587 (2007).

In *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004), the North Carolina Supreme Court held that because the offenses of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury each contain at least one element not included in the other, the defendants were not subjected to double jeopardy when both charges were submitted to the jury, even though the two offenses arose out of the same factual basis.

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Additional cases have resulted in similar outcomes. *See, e.g., State v. Garris*, 191 N.C. App. 276, 287, 663 S.E.2d 340, 349 (2008); *State v. Peoples*, 141 N.C. App. 115, 119-20, 539 S.E.2d 25, 29 (2000).

Defendant alleges that by entering judgments against defendant for both attempted murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury, the trial court violated the prohibition against double jeopardy because both offenses were based on identical evidence. However, the aforementioned case law makes clear that conviction for two separate offenses arising out of one incident is not a violation of the prohibition against double jeopardy when each offense requires proof of at least one element that the other does not. *Peoples*, 141 N.C. App. at 119, 539 S.E.2d at 29.

Thus, the trial court did not violate the prohibition against double jeopardy by entering judgments against defendant on two offenses arising out of the same incident, and defendant's argument is overruled.

No error.

Judges ELMORE and STEPHENS concur.

HEST TECHNOLOGIES, INC. AND INTERNATIONAL INTERNET TECHNOLOGIES, LLC, PLAINTIFFS v. STATE OF NORTH CAROLINA, EX REL. BEVERLY PERDUE, GOVERNOR, IN HER OFFICIAL CAPACITY; NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY; SECRETARY OF CRIME CONTROL AND PUBLIC SAFETY REUBEN YOUNG, IN HIS OFFICIAL CAPACITY; ALCOHOL LAW ENFORCEMENT DIVISION; DIRECTOR OF ALCOHOL ENFORCEMENT DIVISION JOHN LEDFORD, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA11-459

(Filed 6 March 2012)

1. Constitutional Law—Free Speech—video games and entertaining displays

That portion of N.C.G.S. § 14-306.4 which forbade the revelation of a sweepstakes prize by an entertainment display directly regulated protected speech under the First Amendment. Banning the dissemination of sweepstakes results through entertaining displays could not be characterized as merely a regulation of conduct.

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2. Constitutional Law—Free Speech—sweepstakes results—entertaining displays—ban overbroad

The portion of N.C.G.S. § 14-306.4 which criminalized the dissemination of a sweepstakes result through use of an entertaining display was unconstitutionally overbroad and void. The definition of entertaining displays encompassed all forms of videogames. The trial court's order was not sufficient to cure the constitutional defect in that it invalidated only a single example of an entertaining display rather than the entire statute.

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

Appeal by plaintiffs and defendants from order entered 30 November 2010 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 25 October 2011.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes, Richard S. Gottlieb, and Richard D. Dietz; Grace, Tisdale & Clifton, P.A., by Michael A. Grace and Christopher R. Clifton, for plaintiff International Intent Technologies, LLC.

Smith Moore Leatherwood LLP, by Richard A. Coughlin and Elizabeth B. Scherer, for plaintiff Hest Technologies, Inc.

Attorney General Roy Cooper, by Assistant Solicitor General John F. Maddrey and Special Deputy Attorney General Hal F. Askins, for defendants.

CALABRIA, Judge.

Both parties appeal the trial court's order which invalidated N.C. Gen. Stat. § 14-306.4(a)(3)(i) as unconstitutionally overbroad and upheld the constitutionality of the remainder of that statute. We affirm in part and reverse in part.

I. Background

Plaintiff Hest Technologies, Inc. ("Hest") is a Texas corporation authorized to transact business in North Carolina. Plaintiff International Internet Technologies, LLC ("IIT") is an Oklahoma corporation also authorized to transact business in North Carolina. Hest and IIT (collectively "plaintiffs") sell long-distance telephone time and high-speed internet service in internet cafes, business centers, convenience stores, and other retail establishments in North Carolina.

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In addition, each plaintiff has developed their own proprietary sweepstakes management software. Plaintiffs use this software to conduct promotional sweepstakes as a means of marketing their products at the point of sale. When plaintiffs' customers make a qualifying purchase of plaintiffs' products, they receive one or more sweepstakes entries. Alternatively, individuals may enter plaintiffs' sweepstakes without purchasing any of plaintiffs' products by completing entry forms that are available at each retail location. Free entries are not treated any differently than entries accompanying a purchase.

The result of each sweepstakes entry has been pre-determined by the sweepstakes software prior to disbursement. A player who has received a sweepstakes entry can only reveal this predetermined result by connecting to a computer terminal on which the sweepstakes software has been loaded. Once connected, the player has the option of either (1) choosing an "instant reveal," whereby the results of the sweepstakes entry are immediately displayed on a computer screen; or (2) having the results revealed through a video game played on the computer terminal. The method by which the result is revealed does not affect the outcome of the sweepstakes. Moreover, customers retain the value of the purchased prepaid phone or internet time, regardless of the outcome of the sweepstakes.

On 4 March 2008, plaintiffs initiated a declaratory judgment action against defendants in Guilford County Superior Court. Plaintiffs sought a declaration that its promotional sweepstakes did not violate any North Carolina gaming or gambling laws which were in effect at that time. Plaintiffs also sought injunctive relief to prevent defendants from attempting to enforce those laws against plaintiffs' sweepstakes systems. On 16 April 2008, the trial court temporarily enjoined defendants from any enforcement actions against plaintiffs. After the injunction was entered, plaintiffs continued to conduct their promotional sweepstakes.

On 20 July 2010, the North Carolina General Assembly enacted House Bill 80. This legislation amended the North Carolina General Statutes to include a provision which prohibited conducting or promoting any sweepstakes which utilized an "entertaining display." 2010 N.C. Sess. Laws 103 (codified as amended at N.C. Gen. Stat. § 14-306.4 (2011)). Plaintiffs' sweepstakes systems fell squarely within the ambit of the new N.C. Gen. Stat. § 14-306.4.

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In response to the enactment of House Bill 80, plaintiffs amended their original complaint to include an allegation that N.C. Gen. Stat. § 14-306.4 was, *inter alia*, an unconstitutional regulation of plaintiffs' protected First Amendment speech. On 11 October 2010, defendants filed a motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Defendants' motion argued that N.C. Gen. Stat. § 14-306.4 was "constitutional in all respects" and that plaintiffs' sweepstakes operations were in violation of that law. On 5 November 2010, plaintiffs filed a motion for summary judgment on their First Amendment claims.

On 18 November 2010, the trial court conducted a hearing on the parties' respective motions. On 30 November 2010, the trial court entered an "Order and Final Judgment" which held that N.C. Gen. Stat. § 14-306.4(a)(3)(i) was unconstitutionally overbroad under the United States and North Carolina constitutions. In addition, the trial court upheld the constitutionality of the remainder of the statute and dissolved the preliminary injunction preventing enforcement of the gambling laws against owners and operators of plaintiffs' sweepstakes systems. Plaintiffs and defendants each appeal.

II. Constitutionality of N.C. Gen. Stat. § 14-306.4

Both parties contend that the trial court erred in assessing the constitutionality of N.C. Gen. Stat. § 14-306.4. Defendants argue that the trial court erred by concluding that N.C. Gen. Stat. § 14-306.4(a)(3)(i) was unconstitutionally overbroad. Plaintiffs, in turn, argue that the trial court erred by failing to conclude that the entire statute was unconstitutional. We agree with plaintiffs and conclude that the entirety of N.C. Gen. Stat. § 14-306.4 is an unconstitutionally overbroad regulation of free speech.

A. Regulation of Speech

[1] Defendants first argue that N.C. Gen. Stat. § 14-306.4 does not implicate the First Amendment because it does not actually regulate any speech, protected or otherwise. Instead, defendants contend, and the dissent agrees, that the statute only regulates plaintiffs' conduct.¹

N.C. Gen. Stat. § 14-306.4 states, in relevant part:

1. In determining that N.C. Gen. Stat. § 14-306.4 regulates only conduct, the dissent relies solely on a pair of orders by a single United States District Court judge, interpreting an ordinance in Seminole County, Florida. These orders are not binding upon this Court and we find them unpersuasive.

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Notwithstanding any other provision of this Part, it shall be unlawful for any person to operate, or place into operation, an electronic machine or device to do either of the following:

- (1) Conduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize.
- (2) Promote a sweepstakes that is conducted through the use of an entertaining display, including the entry process or the reveal of a prize.

N.C. Gen. Stat. § 14-306.4(b) (2011). Defendants are correct that this statute attempts to regulate some conduct. Specifically, the statute attempts to regulate the use of an electronic machine or device in conjunction with a sweepstakes. However, the broad manner in which the statute attempts to regulate this conduct is problematic.

While it is true that plaintiffs are free to allow anyone to play their video games so long as the video games are not used to conduct or promote sweepstakes, it is equally true that plaintiffs remain free to conduct or promote sweepstakes so long as they do not involve the use of plaintiffs' video games. N.C. Gen. Stat. § 14-306.4 does not forbid the conducting or promotion of sweepstakes provided that the result of the sweepstakes entry is conveyed through any method other than an entertaining display. For example, if the sweepstakes conducted by plaintiffs were exactly the same in all respects, except that the results were conveyed by means of a scratch off ticket, a motion picture, a cartoon, or a simple verbal acknowledgment, the sweepstakes would be permitted by North Carolina law. Ultimately, North Carolina law permits players to learn the results of their sweepstakes entries by using the exact same computer terminals which display plaintiffs' video games, so long as the result is conveyed by words displayed on the monitor, rather than by an entertaining display. Thus, it is the specific method of disseminating sweepstakes results through an entertaining display that is criminalized by N.C. Gen. Stat. § 14-306.4.

The United States Supreme Court has stated that "the creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667, 180 L. Ed. 2d 544, 558 (2011). Moreover, that Court has also recently made clear that video games are entitled to full First Amendment protections:

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Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection.

Brown v. Entm’t Merchs. Ass’n, 131 S. Ct. 2729, 2733, 180 L. Ed. 2d 708, 714 (2011).

In light of these holdings, banning the dissemination of sweepstakes *results* through entertaining displays cannot be characterized as merely a regulation of conduct. Instead, that portion of N.C. Gen. Stat. § 14-306.4 which forbids “the reveal of a prize” by means of an entertaining display directly regulates protected speech under the First Amendment. This necessitates reviewing the statute under established First Amendment doctrine.

B. Overbreadth

[2] “A statute is overbroad if it sweeps within its ambit not solely activity that is subject to government control, but also includes within its prohibition the practice of a protected constitutional right.” *State v. Arnold*, 147 N.C. App. 670, 675, 557 S.E.2d 119, 122 (2001) (internal quotations and citation omitted). In the instant case, N.C. Gen. Stat. § 14-306.4 prohibits plaintiffs from revealing sweepstakes results by means of an entertaining display, which the statute defines as “visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play” N.C. Gen. Stat. § 14-306.4 (a)(3) (2011). The statute also provides a list of examples of entertaining displays, which it notes are “by way of illustration and not exclusion.” *Id.* These examples are:

- a. A video poker game or any other kind of video playing card game.
- b. A video bingo game.
- c. A video craps game.
- d. A video keno game.
- e. A video lotto game.
- f. Eight liner.

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- g. Pot-of-gold.
- h. A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player.
- i. Any other video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes.

Id. However, the examples listed in N.C. Gen. Stat. § 14-306.4 (a)(3) do not limit the definition of entertaining display, and thus, the statute ultimately bans all “visual information . . . that takes the form of actual . . . or simulated game play.” This definition necessarily encompasses all forms of video games, from the simplest simulation to a much more complex game requiring substantial amounts of interactive gameplay by the player, and thus, operates as a categorical ban on all video games for the purposes of communicating a sweepstakes result.² As a result, regardless of the types of games the General Assembly intended to regulate, the statute is constitutionally overbroad, as its plain language “sweeps within its ambit . . . the practice of a protected constitutional right.” *Arnold*, 147 N.C. App. at 675, 557 S.E.2d at 122.

Accordingly, we hold that the portion of N.C. Gen. Stat. § 14-306.4 which criminalizes the dissemination of a sweepstakes result through the use of an entertaining display must be declared void, as it is unconstitutionally overbroad. However, the trial court’s order, which only invalidated N.C. Gen. Stat. § 14-306.4 (a)(3)(i), was not sufficient to cure this constitutional defect. As previously noted, the examples in N.C. Gen. Stat. § 14-306.4 (a)(3)(a)-(h), which the trial court upheld, do not place any limitations on the definition of an entertaining display, and it is this definition, when applied to the dissemination of a sweepstakes result, which is unconstitutionally overbroad. Consequently, the trial court erred by only invalidating the single example of an entertaining display contained in subsection (i). Instead, the entire statute must be invalidated.

2. It is unnecessary to determine where plaintiffs’ specific games would fall within this spectrum. For purposes of an overbreadth challenge, “the challenger has the right to argue the unconstitutionality of the law as to the rights of others, not just as the ordinance is applied to him.” *State v. Mello*, 200 N.C. App. 561, 564, 684 S.E.2d 477, 480 (2009).

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III. Conclusion

N.C. Gen. Stat. § 14-306.4 regulates constitutionally protected speech. Specifically, the portion of the statute which forbids revealing a sweepstakes result by means of an entertaining display acts as a regulation of plaintiffs' right to communicate the results of otherwise lawful sweepstakes by means of a specific category of protected speech. While this Court has recognized, and we agree, that "[i]t is the legislature's prerogative to establish the conditions under which bingo, lotteries, or other games of chance are to be permitted," *Animal Protection Society v. State of North Carolina*, 95 N.C. App. 258, 269-70, 382 S.E.2d 801, 808 (1989), the portion of the statute at issue in the instant case regulates solely how a sweepstakes result is communicated, rather than the underlying circumstances under which the sweepstakes are permitted. The General Assembly cannot, under the guise of regulating sweepstakes, categorically forbid sweepstakes operators from conveying the results of otherwise legal sweepstakes in a constitutionally protected manner. N.C. Gen. Stat. § 14-306.4 is unconstitutionally overbroad in these circumstances and must be declared void. Consequently, the portion of the trial court's order which declared N.C. Gen. Stat. § 14.306.4(a)(3)(i) unconstitutional is affirmed; the remainder of the order is reversed.

Affirmed in part and reversed in part.

Judge McGEE concurs.

Judge HUNTER, Robert C. dissents by separate opinion.

HUNTER, Robert C., Judge, dissenting.

The majority concludes that N.C. Gen. Stat. § 14-306.4 (2011) regulates protected speech and is unconstitutionally overbroad. Because I conclude the statute regulates conduct rather than speech, I respectfully dissent.

Plaintiffs argue that N.C. Gen. Stat. § 14-306.4 violates the First Amendment of the United States Constitution because (1) it is a content-based restriction on protected expression that fails strict scrutiny; and (2) it is overbroad, in that it criminalizes a substantial number of video games that are unrelated to gambling. I disagree. I would reverse the trial court's order to the extent that it held N.C. Gen. Stat. § 14-306.4(a)(3)(i) is unconstitutional. I would affirm the order to the extent the trial court concluded that, in all other respects, 2010 N.C. Sess. Laws 103 is constitutional. I would also hold

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the trial court did not err in dissolving the preliminary injunction prohibiting enforcement of N.C. Gen. Stat. § 14-306.4.

The statute states in pertinent part:

(b) Notwithstanding any other provision of this Part, it shall be unlawful for any person to operate, or place into operation, an electronic machine or device to do either of the following:

(1) *Conduct* a sweepstakes through the use of an *entertaining display*, including the entry process or the reveal of a prize.

(2) *Promote* a sweepstakes that is conducted through the use of an *entertaining display*, including the entry process or the reveal of a prize.

N.C. Gen. Stat. § 14-306.4(b) (2011) (emphasis added). Subsection (a) of the statute defines “entertaining display”:

‘Entertaining display’ means visual information, *capable of being seen by a sweepstakes entrant*, that takes the form of actual game play, or simulated game play, such as, by way of illustration and not exclusion:

- a. A video poker game or any other kind of video playing card game.
- b. A video bingo game.
- c. A video craps game.
- d. A video keno game.
- e. A video lotto game.
- f. Eight liner.
- g. Pot-of-gold.
- h. A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player.
- i. Any other video game not dependent on skill or dexterity that is played *while revealing a prize as the result of an entry into a sweepstakes*.

N.C. Gen. Stat. § 14-306.4(a)(3) (emphasis added). “Sweepstakes” is also defined by the statute as “any game, advertising scheme or plan, or other promotion, which, *with or without payment of any consid-*

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eration, a person may enter to win or become eligible to receive any prize, *the determination of which is based upon chance.*” N.C. Gen. Stat. § 14-306.4(a)(5) (emphasis added).

A. Regulation of Speech

As the majority notes, the United States Supreme Court recently released *Brown v. Entm’t Merchs. Ass’n*, ___ U.S. ___, ___, 131 S. Ct. 2729, 2733, 180 L. Ed. 2d 708, 714 (2011), in which the Court held that video games are protected speech under the First Amendment:

Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection.

I, however, do not believe *Brown* applies to plaintiffs’ appeal. Rather, I conclude that N.C. Gen. Stat. § 14-306.4 regulates conduct not speech.

An ordinance similar to N.C. Gen. Stat. § 14-306.4 was recently challenged as an unconstitutional restraint on free speech in the United States District Court of the Middle District of Florida. *Allied Veterans of the World, Inc.: Affiliate 67 v. Seminole County, Fla.*, 783 F. Supp. 2d 1197 (M.D. Fla. 2011) (hereinafter “*Allied Veterans I*”). There, the plaintiffs challenged an ordinance enacted in Seminole County, Florida that prohibited the use and possession of “ ‘simulated gambling devices,’ ” defined as devices which provide “ ‘a computer simulation of any game, and which may deliver or entitle the person or persons playing or operating the device to a payoff.’ ” *Id.* at 1201 (quoting Seminole County Ordinance 2011–1).

The plaintiffs in *Allied Veterans I* sold internet access for use by their customers on the plaintiffs’ desktop computers. *Id.* at 1200. The plaintiffs also provided their customers the opportunity to participate in a sweepstakes. *Id.* The customer had the option to play a video simulation of a casino game to learn whether the customer had won the sweepstakes prize. *Id.*

The plaintiffs challenged the Seminole County ordinance as violating the federal constitution arguing, *inter alia*, it was a content-based restriction on speech that fails strict scrutiny, and it was

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unconstitutionally vague. *Id.* at 1202, 1206. The district court rejected the plaintiffs' First Amendment challenge holding that the ordinance regulated the plaintiffs' conduct rather than their speech. *Id.* at 1202. The district court further held that because the plaintiffs' conduct was clearly proscribed by the ordinance, they could not challenge the ordinance as being void for vagueness. *Id.* at 1207.

After the Supreme Court's decision in *Brown, supra*, the plaintiffs in *Allied Veterans I* filed an interlocutory appeal. *Allied Veterans of the World, Inc.: Affiliate 67 v. Seminole County, Fla.*, ___ F. Supp. 2d ___, 2011 WL 3958437 (M.D. Fla. Sept. 8, 2011) (No. 6:11-CV-155-ORL-28DAB) (hereinafter "*Allied Veterans II*"). In *Allied Veterans II*, the plaintiffs argued that in light of the Supreme Court's holding in *Brown* the Seminole County ordinance was an impermissible restriction on free speech. *Id.* at ___, 2011 WL 3958437 at 1. The district court again rejected the plaintiffs' argument and held that *Brown* was inapplicable because the ordinance at issue regulated conduct, not speech. *Id.* The plaintiffs were free to provide their video games to their customers so long as the games were not associated with the sweepstakes payoff. *Id.* at ___, 2011 WL 3958437 at 2. I find this reasoning persuasive and applicable in this case.

Here, N.C. Gen. Stat. § 14-306.4 does not prohibit plaintiffs from allowing a customer to play plaintiffs' video games. Rather, the statute prohibits plaintiffs from *conducting* or *promoting* their sweepstakes through the use of a video game. Plaintiffs are free to allow anyone to play their video games so long as the video games are not used to conduct or promote a sweepstakes. Because the statute merely regulates conduct and not speech, it is not subject to strict scrutiny, as plaintiffs contend. Rather, the law is subject to a rational basis review, whereby the law need only be rationally related to the State's police powers. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181, 594 S.E.2d 1, 15 (2004).

Here, one of the Legislature's stated purposes in enacting N.C. Gen. Stat. § 14-306.4 was to protect the morals of the inhabitants of our State from the "vice and dissipation" that is brought about by the "repeated play" of sweepstakes due to the use of "simulated game play," similar to video poker, "even when [such game play is] allegedly used as a marketing technique." 2010 N.C. Sess. Law 103. The protection of the morals of our State's inhabitants is a legitimate government purpose. *See State v. Warren*, 252 N.C. 690, 694, 114 S.E.2d 660, 664 (1960) ("The State possesses the police power in its capacity as a

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sovereign, and in the exercise thereof the Legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety and general welfare of society.”) I conclude the State’s prohibition of the use of “entertaining displays” that use actual or simulated game play for the promotion and conducting of sweepstakes is rationally related to this legitimate governmental purpose.

B. Overbreadth

Plaintiffs also argue that N.C. Gen. Stat. § 14-306.4 bans *all* video games from being used in promotional sweepstakes, including videos games unrelated to gambling, and is thereby unconstitutionally overbroad. I disagree.

Plaintiffs place much emphasis on the fact that consideration is not required to play their sweepstakes; free entries are available upon request. This fact, they argue, takes sweepstakes out of the realm of gambling and establishes that their sweepstakes are a legal activity. However, as this Court stated in *Animal Prot. Soc. of Durham, Inc. v. State*, “[i]t is the [L]egislature’s prerogative to establish the conditions under which bingo, lotteries, or *other games of chance* are to be permitted.” 95 N.C. App. 258, 269, 382 S.E.2d 801, 808 (1989) (concluding the plaintiffs’ free bingo game was properly regulated by the State under our gambling statutes as the Legislature defined “bingo,” in N.C. Gen. Stat. § 309.6 (1986), as a “game of chance,” and did not require payment of consideration to play the game). Thus, the fact that individuals can participate in plaintiffs’ sweepstakes and watch their video games without payment of consideration does not establish that the State is without power to regulate how sweepstakes are conducted.

“The overbreadth doctrine holds that a law is void on its face if it sweeps within its ambit not solely activity that is subject to governmental control, but also includes within its prohibition the practice of a protected constitutional right.’” *Treants Enters., Inc. v. Onslow County*, 94 N.C. App. 453, 458, 380 S.E.2d 602, 604 (1989) (quoting *Clark v. City of Los Angeles*, 650 F.2d 1033, 1039 (9th Cir. 1981), *cert. denied*, 456 U.S. 927, 72 L. Ed. 2d 443 (1982)). Plaintiffs argue that N.C. Gen. Stat. § 14-306.4 is overbroad because the law’s definition of “entertaining display” encompasses *all* video games, “from classic arcade games like Pac-Man to modern, story-driven video games”—and video games are protected speech. However, I conclude N.C. Gen. Stat. § 14-306.4 does not ban video games nor prohibit plaintiffs from allowing a customer to play their video games. Rather,

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the statute prohibits plaintiffs, or any person, from *conducting* or *promoting* a sweepstakes through the use of a video game. Plaintiffs are free to allow anyone to play their video games so long as the video games are not used to conduct or promote sweepstakes. The statute does not “include[] within its prohibition the practice of a protected constitutional right,” *Treants Enters.*, 94 N.C. App. at 458, 380 S.E.2d at 604 (citation and quotation marks omitted), and thus is not overbroad.

I conclude N.C. Gen. Stat. § 14-306.4 is not a content-based restraint on protected expression and is not unconstitutionally overbroad. Accordingly, I would reverse the trial court’s order to the extent that it held N.C. Gen. Stat. § 14-306.4(a)(3)(i) is unconstitutional; I would affirm the order to the extent the trial court concluded that, in all other respects, 2010 N.C. Sess. Laws 103 is constitutional; and I would hold the trial court did not err in dissolving the preliminary injunction prohibiting enforcement of N.C. Gen. Stat. § 14-306.4.

IN THE MATTER OF THE FORECLOSURE OF A LIEN BY FIVE OAKS RECREATIONAL ASSOCIATION, INC., A NORTH CAROLINA CORPORATION AGAINST, MARTIN J. HORN OWNER

No. COA11-1053

(Filed 6 March 2012)

1. Associations—Planned Community Act—effective date

The North Carolina Planned Community Act, which governs the operation of North Carolina homeowners associations, generally applies only to associations created on or after 1 January 1999, with some provisions applying regardless of when the association was created. Those provisions include foreclosure for delinquent assessments, the subject of this action. Moreover, the superior court order following a review *de novo* of the clerk of court’s order authorizing foreclosure was a final judgment, so that the Court of Appeals had jurisdiction over the appeal.

2. Accord and Satisfaction—check marked full payment—no evidence of disputed debt

The trial court did not err by granting summary judgment for petitioner in a foreclosure action where respondent raised the defense of accord and satisfaction based upon a check allegedly

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marked “full payment.” A notation of “full payment” did not constitute an accord and satisfaction when there was no evidence of a dispute over the debt.

Appeal by Respondent from order entered 2 June 2011 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 25 January 2012.

Hatch, Little, & Bunn, LLP, by Tina Frazier Pace and Justin R. Apple, for Petitioner-appellee.

The Law Offices of Martin J. Horn, PLLC, by Martin J. Horn, for Respondent-appellant.

HUNTER, JR., Robert N., Judge.

Martin J. Horn (“Respondent”) appeals from the trial court’s amended order granting summary judgment in favor of Five Oaks Recreational Association, Inc. (“Petitioner”) and authorizing Petitioner to proceed with foreclosure of Respondent’s property. After careful review, we affirm.

I. Factual & Procedural Background

Petitioner is a North Carolina non-profit corporation located in Durham. Petitioner maintains recreational facilities for the use and benefit of its members, which generally consist of property owners in the Five Oaks Community. Respondent owns property located at 4302 Pin Oak Drive in Durham—within the Five Oaks Community—and is a member of Petitioner. As a member, Respondent and his property are subject to the terms of Petitioner’s Declaration of Covenants, Conditions, and Restrictions (“the Declaration”) as recorded in Book 432, Page 306, of the Durham County Register of Deeds.

Pursuant to the Declaration, Respondent has agreed to pay dues, or “assessments,” to Petitioner to cover the costs of maintaining and operating Petitioner’s recreational facilities. Article X Section 3 of the Declaration provides that the “assessments, together with interest, costs, and reasonable attorney’s fees for the collection thereof shall be a charge and lien upon the lot of the respective Owners thereof, and the same shall be a continuing lien upon the lot against which each such assessment is made.” The Declaration further provides that if an assessment is not paid within thirty days of its due date, Petitioner has the power to “foreclose the lien against the lot, and interest, costs, and reasonable attorney’s fees of any such action for collection thereof shall be added to the amount of such assessment.”

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Petitioner's records indicate that Respondent fell behind on his assessment payments in April 2009 and that he has maintained a past due balance ever since. On 13 August 2010, Petitioner notified Respondent by letter that Respondent owed \$458.00 in unpaid assessments. Petitioner cautioned Respondent that it would exercise its power under the Declaration to file a claim of lien against Respondent's property—and possibly institute foreclosure proceedings—if Respondent failed to arrange for payment of his past due balance within fifteen days.

Petitioner received no response from Respondent and retained counsel to assist in Petitioner's debt collection efforts. By letter dated 21 September 2010, Petitioner's counsel informed Respondent of his statutory obligation to pay Petitioner's attorney's fees incurred through collection of Respondent's debt in addition to the debt itself. Petitioner indicated that Respondent's debt, including attorney's fees, totaled \$533.00, and, moreover, that any payments made by Respondent would be applied "in the following order: (1) to any fines accrued upon [Respondent's] assessment account; (2) attorneys fees incurred in the collection of those fines or in the collection of [Respondent's] past due assessments; (3) costs, including administrative costs; (4) late fees; and (5) past due assessments." The letter directed Respondent to tender all payments through Petitioner's counsel.

As of 11 October 2010, Petitioner had not received a response from Respondent. Petitioner sent Respondent a copy of the claim of lien that it was in the process of filing against Respondent's property pursuant to its authority under the Declaration. Petitioner indicated the claim of lien was for \$611.00 in past due assessments and \$225.00 in attorney's fees for a total amount of \$836.00. Petitioner filed the claim of lien against Respondent's property in Durham County District Court on 15 October 2010.

On 5 November 2010, Petitioner's counsel received a check from Respondent for \$611.00. The check, as reflected in the record, bears a handwritten message on the "MEMO" line in the lower left-hand corner of the instrument. Although it is difficult to decipher the handwriting, Respondent asserts in his affidavit that the message reads "full payment." However, Brittany Van Zille, the office assistant who processed the check, states in her affidavit that the check "was not accompanied by any note or correspondence indicating it was for payment in full." Ms. Van Zille further states that she knows not to process checks designated "payment in full," and, even if she had

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noticed the message, she “would not have been able to tell that the writing therein indicated that it was for ‘full payment.’”

Bank records indicate that Petitioner’s counsel indorsed and processed Respondent’s check on 9 November 2010. That same day, Petitioner commenced foreclosure proceedings by filing a petition and notice of foreclosure hearing in Durham County Superior Court.¹ The petition described Respondent’s debt as comprised of \$611.00 in past due assessments, \$625.00 in attorney’s fees, and \$180.00 in court costs.

On 12 April 2011, a foreclosure hearing based upon foreclosure of the claim of lien was held before the Honorable Archie L. Smith, III, Clerk of Superior Court of Durham County. Respondent—representing himself *pro se*—asserted that the notation on the check and subsequent processing of the check by Petitioner’s counsel constituted accord and satisfaction, thereby satisfying his debt and precluding foreclosure. The clerk of court disagreed, concluding as a matter of law “[t]hat the tendered check did not constitute accord and satisfaction as it was illegible and insufficient to notify [Petitioner] that it was tendered as payment in full.” The clerk of court authorized Petitioner to proceed with foreclosure and ordered Respondent to pay Petitioner’s attorney’s fees and court costs totaling \$1,680.00. On 27 April 2011, Respondent appealed the clerk of court’s order to Durham County Superior Court pursuant to N.C. Gen. Stat. § 45-21.16(d1) (2011).

On 10 May 2011, Petitioner filed a motion for summary judgment with the trial court. In support of its motion, Petitioner offered the affidavits of Ms. Van Zille and Petitioner’s counsel, an affidavit of debt, a certified claim of lien, and a certified copy of the Declaration. Respondent countered by filing his own motion for summary judgment on 18 May 2011, offering his sworn affidavit in support of the motion.

In a summary judgment order entered 24 May 2011, the trial court found, *inter alia*, that the notation on the check was “illegible,” that there was no evidence of a dispute over the amount of the debt, and that the amount demanded by Petitioner for the debt owed was for a “sum certain.” The trial court concluded there had not been accord and satisfaction as a matter of law because: (1) “the notation on the check was illegible and was therefore insufficient to notify

1. It is unclear from the record whether Petitioner’s counsel submitted the petition and notice of foreclosure hearing to the trial court prior to its receipt of Respondent’s check.

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[Petitioner] that it was tendered as payment in full,” (2) “the debt was neither disputed nor unliquidated,” and (3) “there was no ‘meeting of the minds’ and no agreement between [Respondent] and [Petitioner] to pay and accept less than the amount claimed.” The trial court’s order authorized Petitioner to proceed with foreclosure of Respondent’s property, and, in addition, ordered Respondent to pay Petitioner’s attorney’s fees and court costs totaling \$5,739.50. The trial court entered an amended order of summary judgment on 2 June 2011. The amended order omits the trial court’s factual findings but is otherwise identical to the original summary judgment order. Respondent timely filed his notice of appeal from the 2 June 2011 order with this Court on 21 June 2011.

II. Analysis

[1] Chapter 47F of our General Statutes, entitled the “North Carolina Planned Community Act,” (“the Act”) governs the operation of North Carolina homeowners associations such as Petitioner. *See* N.C. Gen. Stat. § 47F-1-102(a) (2011). We note the Act generally applies only to homeowners associations created on or after 1 January 1999, *see id.*, and, according to the Declaration, Petitioner was created on or about 9 December 1975. However, some of the Act’s provisions—and the only provisions relevant to the matter *sub judice*—apply regardless of the association’s date of inception. *See* N.C. Gen. Stat. § 47F-1-102(c) (2011). Thus, the provisions of the Act cited herein control.

With respect to collection of delinquent assessments, the Act provides that “[a]ny assessment levied against a lot remaining unpaid for a period of 30 days or longer shall constitute a lien on that lot when a claim of lien is filed of record in the office of the clerk of superior court of the county in which the lot is located.” N.C. Gen. Stat. § 47F-3-116(a) (2011). Moreover, the Act vests the association holding the claim of lien with authority to “foreclose the claim of lien in like manner as a mortgage on real estate under power of sale under Article 2A of Chapter 45 of the General Statutes.” *Id.*

N.C. Gen. Stat. § 45-21.16(d) delineates the procedure for a foreclosure hearing held before the clerk of court. *See* N.C. Gen. Stat. § 45-21.16(d) (2011). At the hearing, the party seeking foreclosure must establish four statutorily required elements: (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 afforded to all entitled parties. *See id.*; *In re Adams*, ___ N.C. App. ___, ___, 693

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S.E.2d 705, 709 (2010). Due to the extra-judicial nature of these proceedings, which are “meant to ‘function as a more expeditious and less expensive alternative to a foreclosure by action,’ ‘foreclosure under [N.C. Gen. Stat. § 45-21.16(d)] 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) (2011). On appeal, the superior court reviews *de novo* the same four issues described *supra*. *See id.* The superior court’s order authorizing Petitioner to proceed with foreclosure was a final judgment, and, therefore, this Court exercises jurisdiction over Respondent’s appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

A. Standard of Review

[2] 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) (2011). The moving party can establish it is entitled to judgment “by proving that an essential element of the opposing party’s claim is nonexistent, or by showing that the opposing party either cannot produce evidence to support an essential element of his or her claim or cannot surmount an affirmative defense which would bar the claim.” *Sanyo Elec., Inc. v. Albright Distrib. Co.*, 76 N.C. App. 115, 117, 331 S.E.2d 738, 739 (1985). On appeal, this Court must review the entire record, viewing the evidence in the light most favorable to the non-moving party. *Collingwood v. G.E. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

In the instant case, the parties agree there are no issues of material fact and this matter is ripe for summary judgment. Respondent primarily contends the trial court erred by granting summary judgment in favor of Petitioner because the check tendered by Respondent and deposited by Petitioner constituted accord and satisfaction as a matter of law. Respondent raises the defense of accord and satisfaction in an attempt to negate the existence of a valid debt, thereby precluding Petitioner’s foreclosure of its claim of lien against Respondent’s property. For the following reasons, we disagree.

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B. Accord and Satisfaction

“Although the existence of accord and satisfaction is generally a question of fact, ‘where the only reasonable inference is existence or non-existence, accord and satisfaction is a question of law and may be adjudicated by summary judgment when the essential facts are made clear of record.’” *Zanone v. RJR Nabisco, Inc.*, 120 N.C. App. 768, 771, 463 S.E.2d 584, 587 (1995) (citation omitted). Our Supreme Court has described the common law doctrine of accord and satisfaction as follows:

An accord and satisfaction is compounded of the two elements enumerated in the term. “An ‘accord’ is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considers himself, entitled to; and a ‘satisfaction’ is the execution, or performance, of such an agreement.”

Dobias v. White, 239 N.C. 409, 413, 80 S.E.2d 23, 27 (1954) (citation omitted). “Agreements are reached by an offer by one party and an acceptance by the other. This is true even though the legal effect of the acceptance may not be understood.” *Prentzas v. Prentzas*, 260 N.C. 101, 104, 131 S.E.2d 678, 681 (1963).

Respondent asserts “the tendering of a check marked full payment is akin to an offer, it is an accord. When the check is accepted, cashed or negotiated, then the offer is accepted by law, the accord becomes an accord and satisfaction—and the matter is closed and resolved.” Respondent misconstrues the doctrine of accord and satisfaction and its applicability to the facts before this Court.

“When there is some indication on a check that it is tendered in full payment of a *disputed* claim, the cashing of the check is held to be an accord and satisfaction as a matter of law.” *Sanyo*, 76 N.C. App. at 117, 331 S.E.2d at 740 (emphasis added). However, where there is “no evidence or allegation of communication between plaintiff and defendant concerning a dispute over the account,” nor “evidence or allegation of negotiation or agreement between plaintiff and defendant concerning payment or acceptance of less than the full amount of the account,” the defendant’s notation on a check stating that the check is to be in “full payment” of the debt owed does not constitute an accord and satisfaction. *Fruit & Produce Packaging Co. v. Stepp*,

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15 N.C. App. 64, 68, 189 S.E.2d 536, 538 (1972). “The fact that a remittance by check purporting to be “in full” is accepted and used does not result in an accord and satisfaction if the claim involved is liquidated and undisputed” *Id.* (citation omitted).

Viewing the evidence in the light most favorable to Respondent, it does not establish the existence of a dispute concerning Respondent’s debt. Respondent’s debt, as detailed in Petitioner’s letters, was based upon past due assessments owed by Respondent and the attorney’s fees incurred by Petitioner in attempting to collect this debt from Respondent. Respondent did not reply to Petitioner’s letters and gave no indication that he disputed the amount of Petitioner’s claim. Without preface, Respondent “delivered a check” to Petitioner’s counsel purportedly marked “full payment.” The check was not accompanied by a letter or other documentation expressing Respondent’s dissatisfaction with the amount of the debt or explaining the meaning of the notation on the check. *See Sanyo*, 76 N.C. App. at 117-18, 331 S.E.2d at 740 (holding there was accord and satisfaction as a matter of law where debtor tendered full payment check with accompanying letter describing check as delivered “in full, final and complete settlement of all amounts owed,” and “[i]n the event you are not agreeable to this check constituting full, final and complete settlement of our account with you, please return this check forthwith”). There was no evidence of a discussion at any time between Respondent and Petitioner that Respondent’s check was intended to cover Petitioner’s claim in full. *See Snow v. East*, 96 N.C. App. 59, 62-63, 384 S.E.2d 689, 691 (1989) (holding no accord and satisfaction because there was no discussion between the parties that a check tendered as payment in full was intended to cover the entire debt owed). Absent some other evidence demonstrating negotiation or a dispute over the amount of the asserted debt, Respondent’s notation on the check’s “MEMO” line was not sufficient to constitute a dispute for purposes of accord and satisfaction. Thus, Petitioner was “‘justified in treating the transaction as merely the act of an honest debtor remitting less than is due under a mistake as to the nature of the contract.’” *Fruit & Produce Packaging Co.*, 15 N.C. App. at 68, 189 S.E.2d at 538 (citation omitted).

Furthermore, Respondent’s reliance on *Barber v. White*, 46 N.C. App. 110, 264 S.E.2d 385 (1980) is misplaced. In *Barber*, the plaintiff entered into an agreement to paint the defendants house at an estimated cost of \$2,700.00. *Id.* at 111, 264 S.E.2d at 385. The plaintiff completed the work and presented the defendants with “a bill for

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\$2,359.19, *which defendants contested as too high.*” *Id.* (emphasis added). The defendants tendered a check to the plaintiff marked “painting in full” for \$1,813.19. *Id.* The plaintiff cashed the check and then demanded the balanced owed by the defendants. *Id.* This Court held that the “Plaintiff’s cashing of the check marked ‘painting in full’ established an accord and satisfaction as a matter of law.” *Id.* at 113, 264 S.E.2d at 386.

Unlike the defendants in *Barber*, Respondent did not attempt to negotiate or contest the amount of his debt. He simply dropped off an envelope with an enclosed check for an amount less than the amount due. *Barber* stands for the principle that cashing a check settles a *disputed* debt, and, as Respondent has failed to offer any evidence of a dispute, we find that case inapplicable to the case at bar.

We note the common law doctrine of accord and satisfaction has been codified in section 25-3-311 of our General Statutes as part of North Carolina’s adoption of the Uniform Commercial Code. *See* N.C. Gen. Stat. § 25-3-311 (2011). However, section 25-3-311 applies only where the amount of the claim is “unliquidated or subject to a bona fide dispute.” *See id.* This Court has interpreted this requirement to mean that “the ‘person against whom a claim is asserted’ must prove, *inter alia*, that ‘the amount of the claim was unliquidated or subject to a bona fide dispute’ *prior* to submission of the instrument representing full and final payment. *Hunter-McDonald, Inc. v. Edison Foard, Inc.*, 157 N.C. App. 560, 563, 579 S.E.2d 490, 492 (2003) (emphasis added); *see also Futrelle v. Duke Univ.*, 127 N.C. App. 244, 249-50, 488 S.E.2d 635, 639 (1997) (“The requirement, that a dispute exist, is satisfied in that, *prior to payment* . . . the parties disputed what remedy, if any, plaintiff was entitled to receive.” (emphasis added)). “It is not enough for defendant to demonstrate the parties presently disagree as to the amount due, but rather defendant must prove ‘the amount of the claim was unliquidated or subject to a bona fide dispute[.]’” *Hunter-McDonald, Inc.*, 157 N.C. App. at 563, 579 S.E.2d at 492 (citation omitted) (alteration in original).

As discussed *supra*, Respondent failed to introduce evidence demonstrating the existence of a dispute at any time prior to tendering the check to Petitioner. This fact alone renders N.C. Gen. Stat. § 25-3-311 inapplicable to Respondent’s accord and satisfaction defense; our common law analysis, *supra*, is dispositive. Respondent’s remaining contentions on this issue are without merit. We hold that Respondent failed to establish accord and satisfaction as a mat-

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ter of law, and the trial court did not err in granting summary judgment in favor of Petitioner.

For the foregoing reasons, the trial court's order is

Affirmed.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA v. TERRELL DAVEZ CORNELIUS

No. COA11-94

(Filed 6 March 2012)

1. Confessions and Incriminating Statements—statements in hospital—medication—defendant alert and oriented

The trial court did not err in denying defendant's motion to suppress his statements made in a hospital while medicated where the trial court made extensive findings that defendant was alert and oriented based on the testimony of the officer, the hospital records, and the recorded statements, and those statements supported the conclusion that defendant's statements were voluntary.

2. Estoppel—offensive collateral estoppel—felony murder—underlying felony—established at first trial

The defendant in a second felony murder trial was not entitled to retry the issue of whether defendant had committed the underlying felony of first-degree burglary where the jury in the first trial heard the evidence, deliberated, and without error returned a verdict of guilty of first-degree burglary. The offensive use of collateral estoppel against a defendant was established by *State v. Dial*, 122 N.C. App. 298, and defendant did not cite a case suggesting that *Dial* was overruled.

Appeal by defendant from judgment entered 11 February 2010 by Judge Catherine C. Eagles in Forsyth County Superior Court. Heard in the Court of Appeals 29 September 2011.

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Attorney General Roy Cooper, by Special Deputy Attorney General William P. Hart, Sr. and Special Deputy Attorney General Melissa L. Trippe, for the State.

Michael E. Casterline for defendant-appellant.

GEER, Judge.

Defendant Terrell Davez Cornelius appeals from his conviction of felony murder. In defendant's first trial on the charges of felony murder and first degree burglary, a jury found him guilty of first degree burglary but could not reach a verdict on the felony murder charge. The trial court declared a mistrial on the felony murder charge, and defendant was retried on that charge only.

In this appeal, defendant primarily argues that the trial court in the second trial erred in applying offensive collateral estoppel to bar him from relitigating, for purposes of the felony murder charge, whether he committed the felony of first degree burglary. Although defendant argues that offensive collateral estoppel should not apply in criminal cases, this Court held otherwise in *State v. Dial*, 122 N.C. App. 298, 470 S.E.2d 84 (1996). Because we also find defendant's remaining arguments unpersuasive, we hold that defendant received a trial free of prejudicial error.

Facts

The State's evidence tended to show the following facts. Rodney Fraley, Danny Cordray, and defendant went to Leon Conrad's house to rob him late on the evening of 8 November 2007 or early in the morning of 9 November 2007. All three men were armed with semi-automatic weapons. Fraley had suggested the robbery after spending the day with Conrad and seeing \$50,000.00 in cash, which he expected to be in Conrad's truck. When the men found the truck locked, defendant kicked in the main front door. As Cordray and defendant entered the residence, both of them shot at Conrad, and Conrad shot back.

Conrad ultimately died of gunshot wounds to his chest. Defendant, who was shot in the hands and abdomen, was admitted to Wake Forest University Baptist Medical Center on 9 November 2007 between 1:40 and 1:50 a.m. Defendant underwent exploratory surgery to make sure there were no injuries inside his abdomen. In addition, an orthopedic surgeon addressed the injuries to his hands. Defendant was then moved to a non-ICU, standard bed in the hospital.

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At 11:05 a.m. that morning, Detective Michael Poe of the Winston-Salem Police Department visited defendant in the hospital. Defendant's mother and sister were in the room with him. In a recorded statement, defendant told Detective Poe that he had been the victim of a robbery. However, after Detective Poe later learned the name of another individual involved in the shooting, Detective Poe went back to speak with defendant again that afternoon around 3:40 p.m. During this conversation, which was also recorded, defendant admitted that his previous statement had not been truthful and that he was shot while attempting to rob Conrad. Defendant also admitted to kicking in the door at Conrad's home and to firing a gun.

Detective Poe visited defendant in the hospital a third time three days later on 12 November 2007. The purpose of this interview, also recorded, was to clarify some issues. This time, defendant admitted that he, Fraley, and Cordray had wanted to steal \$50,000.00 from Conrad.

Defendant was indicted for first degree murder on 7 July 2008. Defendant was later indicted for first degree burglary with two aggravating factors on 10 November 2008. Defendant subsequently filed a motion to suppress the statements made in the hospital as involuntary. The trial court denied the motion in an order filed 26 February 2009. Consequently, the jury was allowed to hear at trial the recordings of defendant's three statements.

A jury found defendant guilty of first degree burglary on 11 March 2009. It was, however, unable to reach a unanimous verdict with respect to the felony murder indictment, and the trial court, therefore, declared a mistrial on the murder charge. The judge also granted a prayer for judgment continued as to the first degree burglary sentence pending a second trial on the first degree murder charge. At the second trial, defendant was found guilty of felony murder and was sentenced to life in prison without parole. Defendant timely appealed to this Court.

I

[1] Defendant first contends that the trial court erred in denying his motion to suppress the three statements made while he was in the hospital. Defendant argues that the medication he received in the hospital rendered these statements involuntary and, therefore, inadmissible.

“[T]he standard of review in evaluating a trial court's ruling on a motion to suppress is as follows: . . . Its findings of fact are conclusive on appeal if supported by competent evidence, even if the evi-

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dence is conflicting. Conclusions of law that are correct in light of the findings are also binding on appeal.” *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000) (internal citations and quotation marks omitted).

In this case, with respect to the voluntariness of defendant’s statements, the trial court made the following findings of fact. Defendant was alert, oriented, and able to interact with others throughout his hospital stay and at the time of each of the three interviews. Defendant was able to describe events in great detail, including names, locations, and statements made by others. Defendant also had the mental acuity to concoct a story explaining his gunshot wound but removing him from the home invasion and homicide. The court further noted that defendant’s family remained in the hospital room for two of the three interviews and did not request that those interviews be terminated. Finally, after determining that the evidence failed to show that defendant’s will was overborne or his capacity for self-determination critically impaired, the trial court concluded that defendant’s statements were voluntary.

Our review of the record indicates that these findings are supported by defendant’s hospital records and Detective Poe’s testimony. The State presented evidence that at the time of the first statement, the side effects of Dilaudid, which he had been administered, would have worn off. While defendant was still able to self-administer morphine, there was evidence he was taking no medication at all by the time of his final statement. In addition, nurses visited defendant every four hours, and defendant’s medical records indicated that he was consistently at maximum alertness and orientation. There were no notes in defendant’s medical records suggesting that he was confused or disoriented to any degree or that he was going in and out of consciousness.

Detective Poe testified that, even in the first interview, defendant was able to understand questions, responded in a coherent manner, and did not lapse into unconsciousness. He also testified that during the second interview, defendant was “[v]ery detailed and coherent” and did not fall asleep. Regarding defendant’s third interview, Detective Poe testified that defendant “elaborated on things” and “was able to . . . tell us what he wanted to tell us on his own.” Defendant did not appear to be on any type of drug, was coherent, and “made sense.” In addition to Detective Poe’s testimony, the trial court also had the opportunity to hear all three recorded interviews.

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The court could, therefore, assess on its own the coherency of defendant's statements, as well as the credibility of Detective Poe's testimony.

Defendant does not specifically contest the sufficiency of this evidence to support the trial court's findings. Instead, in support of his contention that "his capacity for self-determination and self-direction [were] overborne by the narcotics he was administered for pain," he points to his mother's testimony that he seemed lethargic and confused and his own testimony that he does not remember making the statements. It is, however, well established that a trial court's "findings of fact are conclusive on appeal if supported by competent evidence, *even if the evidence is conflicting.*" *Id.*, 532 S.E.2d at 501 (emphasis added) (quoting *State v. Peterson*, 347 N.C. 253, 255, 491 S.E.2d 223, 224 (1997)). "[A] trial court's resolution of a conflict in the evidence will not be disturbed on appeal . . ." *Id.*, 532 S.E.2d at 502 (quoting *State v. Steen*, 352 N.C. 227, 237, 536 S.E.2d 1, 7 (2000)).

Since the trial court's findings are supported by competent evidence, we next address whether those findings support the trial court's conclusion that the statements were voluntary. In *State v. McCoy*, 303 N.C. 1, 19-20, 277 S.E.2d 515, 529 (1981), the defendant similarly contended that his statement made while under the influence of pain killers in the emergency room was involuntary. Our Supreme Court noted:

[T]he trial court conducted a lengthy *voir dire* hearing concerning defendant's mental and physical condition at the time he made this statement. The state's evidence tended to show that defendant was alert, responsive and coherent. His attending physician gave permission for defendant to be interviewed. Defendant "did not appear to be sleepy or confused nor did he hesitate to answer questions at any time." The trial court made extensive findings of fact in accord with this evidence. Defendant did not except to any of these findings.

Id. The Court then held that "[f]rom these findings the trial court correctly concluded that the statement 'was made freely, voluntarily, understanding [sic] and knowingly . . .'" *Id.* at 20, 277 S.E.2d at 529. The Court concluded, therefore, that the trial court properly admitted the defendant's incriminating statements.

In this case, the trial court made comparable findings based on similar evidence. Under *McCoy*, therefore, the trial court's findings in this case support its conclusion that defendant's three statements

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were voluntary and admissible. *See also State v. McKoy*, 323 N.C. 1, 17, 372 S.E.2d 12, 20 (1988) (holding that trial court did not err in admitting statements made two hours after defendant's blood alcohol level was 0.26 when trial court found that, during questioning, the defendant was coherent and that his answers " 'were extremely reasonable, responsive and appropriate' "), *vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369, 110 S. Ct. 1227 (1990). Any intoxication remaining from defendant's medication "was relevant to [defendant's] credibility, which was a question for the jury." *Id.* at 23, 372 S.E.2d at 24.

Defendant, however, points to *State v. Williford*, 275 N.C. 575, 576-77, 169 S.E.2d 851, 853 (1969), in which the defendant had been shot in the ankle when leaving a robbery. An officer spoke with the defendant in the emergency room at the hospital, and the defendant confessed. *Id.* at 577, 169 S.E.2d at 853. The defendant then attempted to have the confession suppressed as being involuntary. *Id.* The Supreme Court did not, however, exclude the confession, but rather ordered a new trial because the trial court had failed to make sufficient findings of fact regarding "the immediate circumstances and conditions" of the statements to support its conclusion that the confession was voluntary. *Id.* at 582, 169 S.E.2d at 856.

Indeed, the Supreme Court, in *Williford*, held that "the admissibility of a confession is not, *ipso facto*, rendered involuntary because defendant was suffering from physical injuries and resulting pain at the time he made the confession. These are circumstances to be taken into consideration by the jury in weighing the evidence." *Id.* at 579-80, 169 S.E.2d at 855. Because the trial court in this case made the necessary findings, *Williford* establishes that the circumstances regarding defendant's injury and pain medication were for the jury to weigh.

Defendant also cites *Logner v. State of North Carolina*, 260 F. Supp. 970 (M.D.N.C. 1966), a decision granting a defendant's petition for writ of habeas corpus. The court concluded that the defendant's statements, which were made after having consumed large amounts of alcohol and amphetamines, were involuntary. *Id.* at 974. The court noted that multiple police officers testified that the defendant was obviously drunk during questioning. *Id.* at 973, 975. In addition, initially, when the defendant was arrested for driving under the influence, the "investigating officer noted he was too drunk to make a statement." *Id.* at 975. The court vacated the defendant's conviction based on its conclusion that the defendant, while obviously severely

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intoxicated, specifically "was interrogated for the purpose of eliciting a confession." *Id.*

The trial court's findings in this case—and the evidence supporting those findings—do not indicate a comparable level of intoxication and, therefore, we do not believe *Logner* supports a reversal of the trial court's decision in this case. Based on the testimony of Detective Poe, the hospital records, and the recorded statements, the trial court made extensive findings that defendant was alert and oriented. Those findings in turn support the trial court's conclusion that defendant's statements were voluntary. We, therefore, hold the trial court did not err in denying defendant's motion to suppress.

II

[2] Defendant next contends that his right to a trial by jury was violated when the trial court allowed offensive collateral estoppel to be used to establish the underlying felony for defendant's felony murder conviction. At defendant's second trial, the jury was instructed, with respect to the charge of felony murder, that "because it has previously been determined beyond a reasonable doubt in a prior criminal proceeding that Mr. Cornelius committed first degree burglary on November 9th, 2007, . . . you should consider that this element [of felony murder (that defendant committed the felony of first degree burglary)] has been proven to you beyond a reasonable doubt."

While defendant cites cases from other jurisdictions holding that offensive collateral estoppel is inappropriate in criminal cases, it appears that this Court's decision in *State v. Dial*, 122 N.C. App. 298, 470 S.E.2d 84 (1996), is controlling. In *Dial*, the defendant, who was indicted for first degree murder, contended that the State could not prove the murder occurred in North Carolina and, therefore, North Carolina's courts did not have jurisdiction. *Id.* at 302, 470 S.E.2d at 87. In the defendant's first trial, the trial court submitted the issue of jurisdiction to the jury. *Id.* Although the jury returned a special verdict finding that North Carolina had jurisdiction, it was unable to reach agreement on the defendant's guilt. *Id.*

At the defendant's second trial, the trial court concluded that the special verdict had resolved the issue of jurisdiction and denied defendant's motion to set aside that verdict and dismiss the case for lack of jurisdiction. *Id.* On appeal, the defendant "argue[d] that the special verdict was not binding at his second trial so that the State should have been required to prove, beyond a reasonable doubt, the

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existence of jurisdiction to the same jury deciding his guilt or innocence at his second trial.” *Id.* at 305, 470 S.E.2d at 88.

In rejecting this argument, this Court noted:

The question before us, then, is whether the trial court’s acceptance of the jury’s special verdict finding that North Carolina has jurisdiction at defendant’s first trial, prior to declaring a mistrial by reason of the jury’s inability to agree upon the issue of guilt or innocence, precludes defendant from relitigating jurisdiction at his second trial. The question is apparently one of first impression. We believe, however, that it is resolved by application of the settled principles of *res judicata* and collateral estoppel.

Id., 470 S.E.2d at 89. The Court explained:

The doctrines of *res judicata* and collateral estoppel apply to criminal, as well as, civil proceedings, and their application against a criminal defendant does not violate the defendant’s rights to confront the State’s witnesses or to a jury determination of all facts.

In the present case, all the requirements for precluding relitigation of the jurisdiction issue have been met: (1) the parties are the same; (2) the issue as to jurisdiction is the same; (3) the issue was raised and actually litigated in the prior action; (4) jurisdiction was material and relevant to the disposition of the prior action; and (5) the determination as to jurisdiction was necessary and essential to the resulting judgment.

Id. at 306, 470 S.E.2d at 89 (internal citations omitted). The Court, therefore, held “that the [trial] court’s acceptance of that special verdict of the jury at his first trial finding that North Carolina has jurisdiction precludes defendant from relitigating the issue of jurisdiction at his second trial.” *Id.*

Defendant acknowledges that *Dial* “ostensibly affirmed the offensive use of collateral estopped against a defendant,” but argues that it is “easily distinguished” because the jury, in that case, “only resolved one very limited question: the location of the crime.” To the contrary, that purportedly “limited” question was critical to any conviction—it resolved whether North Carolina had jurisdiction to prosecute the defendant at all. *See In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003) (holding that question of jurisdiction

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is “the most critical aspect of the court’s authority to act” (quoting *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987)). Since the defendant in *Dial* could not be convicted of murder without the State’s proving beyond a reasonable doubt the element—jurisdiction—decided in the first trial, we find *Dial* equally applicable when, as here, the prior verdict accepted by the trial court established an element of the crime of felony murder.

Defendant further argues that, regardless of *Dial*, the United States Supreme Court has intimated (without holding) that collateral estoppel in a criminal case is inappropriate, pointing to a footnote in the plurality opinion of *United States v. Dixon*, 509 U.S. 688, 710 n.15, 125 L. Ed. 2d 556, 577 n.15, 113 S. Ct. 2849, 2863 n.15 (1993). In that footnote, the plurality addressed a concern by the dissenting opinion that the plurality’s overruling of the “same conduct” Double Jeopardy test established by *Grady v. Corbin*, 495 U.S. 508, 109 L. Ed. 2d 548, 110 S. Ct. 2084 (1990), would result in prosecutors bringing separate prosecutions to perfect their case. *Dixon*, 509 U.S. at 710 n.15, 125 L. Ed. 2d at 577 n.15, 113 S. Ct. at 2863 n.15. In dismissing that concern, the plurality opinion noted that prosecutors would “have little to gain and much to lose from such a strategy. Under *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), an acquittal in the first prosecution might well bar litigation of certain facts essential to the second one—though a conviction in the first prosecution would not excuse the Government from proving the same facts the second time.” *Id.*

This plurality opinion was decided, however, in 1993—three years before *Dial* was decided in 1996. Because defendant has not cited a case suggesting that *Dial* was overruled, and *Dixon* does not squarely conflict with *Dial*, we are bound by *Dial*. See *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

Moreover, the holding in *Dial* is consistent with *State v. O’Neal*, 67 N.C. App. 65, 312 S.E.2d 493, *aff’d as modified on other grounds*, 311 N.C. 747, 321 S.E.2d 154 (1984). In *O’Neal*, the jury in the first trial reached agreement on six special verdict issues but could not agree on the seventh issue. *Id.* at 66, 312 S.E.2d at 494. The defendant requested a mistrial on the seventh issue alone, but the trial court declared a mistrial on all issues. *Id.* at 67, 312 S.E.2d at 494. On appeal, this Court concluded that because “the jury has heard the evidence, deliberated, and without error returned a verdict as to the other six issues, no new trial is required on these issues” and

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“[n]either the State *nor defendant* is entitled to one.” *Id.* at 71, 312 S.E.2d at 497 (emphasis added).

Here, a jury “heard the evidence, deliberated, and without error returned a verdict,” *id.*, of guilty of first degree burglary. The defendant was not, therefore, entitled to retry in the second felony murder trial the issue whether defendant had committed the felony of first degree burglary. Indeed, defendant does not dispute that if we conclude that offensive collateral estoppel can apply in a criminal case, then the trial court properly instructed the jury. Accordingly, we find no error in defendant’s trial.

No error.

Judges STROUD and THIGPEN concur.

STATE OF NORTH CAROLINA v. JOHN BRAVER FRIEND

No. COA11-572

(Filed 6 March 2012)

1. Constitutional Law—separation of powers—prosecutor’s voluntary dismissal and refile of charge—control of calendar

The separation of powers provision of the North Carolina Constitution was not violated by the State dismissing an impaired driving charge when its motion for a continuance was denied. Although defendant contended that the district attorney is an executive branch officer, the prosecutor is by precedent a judicial or quasi-judicial officer. Even if the district attorney is an executive officer, the trial court retained ultimate control over its calendar after the State filed a new charge.

2. Constitutional Law—due process—voluntary dismissal of charge after continuance denied—refiling—no violation

Defendant was not denied due process when the State refiled an impaired driving charge which it had earlier dismissed after its motion for a continuance had been denied. The voluntary dismissal was pursuant to N.C.G.S. § 15A-931, the refile was within the statute of limitations, defendant did not argue bad faith or

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show how he was prejudiced, and defendant did not demonstrate how the charge shocked the conscience or interfered with defendant's fundamental rights.

3. Constitutional Law—right to speedy trial—charge dismissed and refiled—appealed from district to superior court

Defendant's right to a speedy trial on an impaired driving charge was not violated where the date of the offense and initial charge was 7 March 2009, that charge was voluntarily dismissed by the State and the charge was refiled in district court on 13 April, defendant never filed a speedy trial motion in district court, and his only speedy trial request was in superior court on 4 February 2010. The time from his appeal from district to superior court until his trial in superior court was less than one year. Moreover, the reasons for the delay were attributable to defendant as much as to the State, defendant's delayed assertion of the right to a speedy trial weighed against him, and defendant did not show actual impairment of his defense.

4. Pleadings—summons—date of offense—sufficient

Defendant had adequate notice of a charge of impaired driving even though defendant argued that the criminal summons was defective in that it did not state the exact hour and minute of the offense. The date of the offense was a sufficient allegation of time in the usual form.

Appeal by defendant from judgment entered 17 February 2010 by Judge Clifton W. Everett, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 26 October 2011.

Attorney General Roy Cooper by Assistant Attorney General, Jess D. Mekeel, for the State.

Reece & Reece, by Michael J. Reece for defendant-appellant.

STEELMAN, Judge.

The State's dismissal and re-filing of the impaired driving charge did not violate the separation of powers. This same conduct did not violate defendant's rights to due process or a speedy trial. The criminal summons was not fatally defective.

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[219 N.C. App. 338 (2012)]

I. Factual and Procedural Background

On 7 March 2006, defendant was charged with driving while impaired in Pitt County. The case was scheduled for hearing in District Court 11 times. Several continuances were based on the unavailability of the State witnesses. On 18 July 2007, the arresting officer was not present in court. When the District Court denied the State's motion for a continuance, the State voluntarily dismissed the charge. On 27 July 2007, the State filed a new driving while impaired charge arising out of the 7 March 2006 incident. Defendant filed a motion to dismiss, which was granted by District Court Judge Charles M. Vincent on 24 October 2007. On 26 October 2007, the State appealed this ruling to Superior Court. On 28 February 2008, Judge Thomas D. Haigwood remanded this matter to the District Court for entry of a written order containing findings of fact and conclusions of law.

On 4 April 2008, in compliance with Judge Haigwood's order, Judge Vincent entered a written order which again dismissed the charge against defendant. On 9 May 2008, Judge W. Russell Duke, Jr. entered an order in Superior Court, reversing Judge Vincent's order and remanding the case to the District Court for trial. Defendant's petition for writ of *certiorari* to review this order was denied by this Court on 1 August 2008. On 13 April 2009, defendant was convicted of driving while impaired in District Court. Defendant appealed to Superior Court. On 15 February 2010, Judge Clifton W. Everett denied defendant's motion to dismiss, which was filed 4 February 2010. Judge Everett ruled that defendant's right to a speedy trial was not violated because "this is a misdemeanor charge and carries a statute of limitations" which has now expired.

On 17 February 2010, a jury found defendant guilty of driving while impaired. Judge Everett found defendant to be a Level Two offender, and imposed a suspended sentence of twelve months, with 24 months of supervised probation, 30 days in jail, a fine of \$500, and substance abuse treatment.

Defendant appeals.

II. Whether State's Dismissal Violated the Separation of Powers Provision of the North Carolina Constitution

[1] In his first argument, defendant contends that the State's dismissal of his original charge on 18 July 2007, following the District Court's denial of the State's motion for a continuance, violated the

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separation of powers provision of the North Carolina Constitution. Defendant further contends that Judge Duke erred in not dismissing the charge filed on 27 July 2007. We disagree.

Defendant argues that the district attorney is an executive branch official who was obligated to proceed with the trial when the District Court denied the State's continuance motion on 18 July 2007. Defendant further contends that to allow the State to voluntarily dismiss the charge allowed the executive branch to subvert the courts' ultimate authority to manage its trial calendar.

We first note that defendant's assertion that the district attorney is an executive branch officer is highly questionable. The Supreme Court addressed this question in the seminal case of *Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858 (1994):

First of all, the district attorney cannot be easily categorized as belonging to any one branch of government. We note that the office of the district attorney is created in Article IV of the Constitution, the Judicial article, rather than in Article III, the Executive article. Furthermore, in the past, this Court has characterized district attorneys as "independent constitutional officers." *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 870 (1991). We have also recognized that solicitors, as district attorneys were formerly known, are officers of the court and, in varied factual situations and in relation to diverse legal problems, may be considered a judicial or quasi-judicial officer.

Id. at 375, 451 S.E.2d at 870. Thus, defendant's separation of powers argument must fail since the district attorney is a judicial or quasi-judicial officer.

Even assuming that the district attorney is an executive officer, no violation of the separation of powers exists in this case. Our Supreme Court held that N.C. Gen. Stat. § 15A-931, which allows the district attorney to dismiss charges, is facially constitutional. *Id.* at 375-77, 451 S.E.2d at 869-71. Separation of powers does not demand that the branches of government "must be kept wholly and entirely separate and distinct[.]" *State v. Furrage*, 250 N.C. 616, 626, 109 S.E.2d 563, 570 (1959) (quoting 2 Joseph Story, Commentaries on the Constitution of the United States § 524 (1833)).

The State complied with N.C. Gen. Stat. § 15A-931 when the State voluntarily dismissed the original charge after the District Court denied its motion for a continuance. After the State filed a new

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charge, the Superior Court reversed the dismissal of that charge and remanded the case for trial. The trial court retained ultimate control over its calendar. Neither the dismissal nor the filing of the new charge threatened to violate the separation of powers. Therefore, even assuming two branches of government are at work in the setting of the trial calendar, defendant's separation of powers claim fails.

This argument is without merit.

III. Whether the State's Filing of a New Charge Against Defendant Violated Defendant's Rights to Due Process and a Speedy Trial

In his second and third arguments, defendant contends that the trial court erred in denying his motion to dismiss, since the charge violated his due process and speedy trial rights. We disagree.

A. Due Process

[2] Defendant argues that "the conduct of the State in re-filing the charge that had previously been dismissed both shocks the conscience and interferes with the rights and liberties of the citizenry. A criminal defendant has no power to control his prosecution." Defendant further argues that the imbalance of power between defendant and the State can be remedied only "by the inherent authority of the trial court[.]"

The North Carolina Constitution provides that "[n]o person shall be taken, imprisoned, or dis seized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. The Law of the Land Clause was "copied in substance from Magna Charta by the framers of the [North Carolina] Constitution of 1776" and is synonymous with "due process of law, a phrase appearing in the Federal Constitution and the organic law of many states." *State v. Ballance*, 229 N.C. 764, 768-69, 51 S.E.2d 731, 734 (1949) (internal quotation marks omitted). *See also Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004).

"Substantive due process protection prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (citations and internal quotation marks omitted). The right to a speedy trial is guaranteed by the North Carolina Constitution. "[E]very person for an injury done him in his lands, goods, person, or reputation shall

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have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.” N.C. Const. art. I, § 18. The right to a speedy trial is also guaranteed by the 6th and 14th Amendments to the United States Constitution.

In the instant case, the State filed the new charge on 27 July 2007, after voluntarily dismissing the original charge pursuant to N.C. Gen. Stat. § 15A-931. The North Carolina Supreme Court held that N.C. Gen. Stat § 15A-931 did not violate due process. *Simeon*, 339 N.C. at 376-77, 451 S.E.2d at 870-71. Moreover, subsection (b) of N.C. Gen. Stat. § 15A-931 provides that dismissal of a charge does not toll the statute of limitations. N.C. Gen. Stat. § 15A-931(b) (2011). The statute of limitations for misdemeanors is two years from the commission of the offense. N.C. Gen. Stat. § 15-1 (2011). In the instant case, the statute of limitations would have expired on 7 March 2008.

Defendant fails to demonstrate how the new charge shocked the conscience or interfered with defendant’s fundamental rights. Defendant does not argue that the State’s action was taken in bad faith, nor does he indicate how he was prejudiced by the new charge. This argument is without merit.

B. Speedy Trial

[3] Defendant contends that the “length of delay in defendant’s case ran from 7 March 2007, the offense date,” until his conviction in Superior Court on 17 February 2010. Defendant was convicted in District Court and appealed to Superior Court on 13 April 2009. On 4 February 2010, defendant asserted his right to a speedy trial.

In determining whether a defendant’s right to a speedy trial has been infringed, our Courts consider the four factors enumerated in *Barker v. Wingo*, 407 U.S. 514, 530-32, 33 L. Ed. 2d 101, 116-18 (1972): (1) the length of the delay, (2) the reason for the delay, (3) defendant’s assertion of his right to a speedy trial, and (4) prejudice to defendant. *State v. Washington*, 192 N.C. App. 277, 282, 665 S.E.2d 799, 803 (2008).

We must first determine the relevant period of delay. “A defendant’s right to a speedy trial attaches upon being formally accused of criminal activity, by arrest or indictment.” *State v. Hammonds*, 141 N.C. App. 152, 159, 541 S.E.2d 166, 172 (2000). The period relevant to speedy trial analysis ends upon trial. *See id.* at 160, 541 S.E.2d at 173. If the length of delay approaches one year, we examine the remaining three factors in *Barker*. *See State v. Webster*, 337 N.C. 674, 678-79, 447 S.E.2d 349, 351 (1994).

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In the instant case, the date of the offense and the initial charge was 7 March 2006. Defendant was tried upon the re-filed charge in District Court on 13 April 2009. However, defendant never filed a motion for a speedy trial in District Court. His only speedy trial request was filed in Superior Court on 4 February 2010. Under these circumstances, where defendant already had a trial in District Court, the time for computing the delay runs from his appeal from District Court to Superior Court (13 April 2009) until his trial in Superior Court (15 February 2010). The period of delay was thus less than one year, and the remainder of the *Barker* analysis is inapplicable. We hold defendant's claim of denial of the right to a speedy trial to be without merit.

Even assuming *arguendo* that the delay exceeded one year, defendant's speedy trial claim is without merit. Under the second *Barker* factor, the reason for the delay, defendant argues that the failure of State witnesses to appear in court and the State's filing of a new charge were responsible for the delay. Defendant bears the burden of "presenting *prima facie* evidence that the delay was caused by the neglect or willfulness" of the State. *Washington*, 192 N.C. App. at 283, 665 S.E.2d at 804.

In reviewing the reasons for delay, it appears that of the 11 continuances of the original charge, six were for defendant, three were for the State, and two were by consent. After the charges were re-filed on 27 July 2007, the case bounced back and forth between District Court and Superior Court as Judge Vincent's ruling dismissing the case was appealed. On 13 January 2009, the District Court Judge recused himself, and the case was finally tried in District Court on 13 April 2009. Once in Superior Court, defendant's case was tried in less than one year.

We hold that the reasons for delay were attributable as much to defendant as to the State. In addition, the delay due to the State's appeal of Judge Vincent's order and the recusal of a District Court judge are neutral factors, weighing neither in favor nor against defendant's speedy trial motion. *See Hammonds*, 141 N.C. App. at 161, 541 S.E.2d at 174. These delays were not caused by the negligence or willfulness of the State. We hold that this factor cannot be weighed in favor of defendant's claim.

As to the third *Barker* factor, the record is unequivocal that defendant did not assert his right to a speedy trial until 4 February 2010. "Defendant's failure to assert his right to a speedy trial, or his

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failure to assert his right sooner in the process, does not foreclose his speedy trial claim, but does weigh against his contention[.]” *State v. Grooms*, 353 N.C. 50, 63, 540 S.E.2d 713, 722 (2000). In *Grooms*, the defendant’s assertion came nearly three years after indictment, and the Court held that the delay in his demand weighed against his claim. *Id.* In this portion of our analysis, we presume that the delay is computed from the filing of the initial charge, 7 March 2006. Thus, defendant’s demand for a speedy trial came almost four years later, on 4 February 2010, and almost a year after his conviction in District Court. This delay in the assertion of his right to a speedy trial weighs against defendant’s claim.

Finally, as to the fourth *Barker* factor, defendant argues that he suffered prejudice in the impairment of his defense. “The right to a speedy trial is designed: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.” *Webster*, 337 N.C. at 680-81, 447 S.E.2d at 352. In the instant case, defendant fails to articulate any specific evidence or witness of which he has been deprived because of the delay.

Defendant further argues he suffered “anxiety and concern” during the delay. He attributes this anxiety to the fact that the prosecutor was “free to re-file at any time within the two year statute of limitations for misdemeanors[.]” The State filed a new charge 9 days after the original charge was dismissed, well within the two year statute of limitations for misdemeanors. *See* N.C. Gen. Stat. § 15-1 (2011). In *Webster*, the Court held that anxiety does not “loom as large as actual impairment of the defendant’s ability to defend against the criminal charges themselves.” *Webster*, 337 N.C. at 681, 447 S.E.2d at 352. Defendant did not assert his right to a speedy trial until almost two years after the statute of limitations had expired. As defendant’s anxiety was limited by the statute of limitations and defendant failed to show actual impairment of his defense, the fourth factor weighs against defendant’s claim.

The four *Barker* factors must be balanced. “No single factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial.” *State v. McBride*, 187 N.C. App. 496, 498, 653 S.E.2d 218, 220 (2007). *See also Barker*, 407 U.S. at 529-30, 33 L. Ed. 2d at 116-17. Although the presumed length of the delay required further analysis under *Barker*, the reason for delay does not weigh in defendant’s favor. Defendant’s tardy assertion

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of his right and lack of impairment to his defense weigh against his claim. We hold that even if the period of delay is computed from the date of the original charge, defendant's right to a speedy trial was not violated.

This argument is without merit.

IV. Whether the Criminal Summons was Fatally Defective

[4] In his final argument, defendant contends that the criminal summons, issued on 27 July 2007, was defective in that it failed to state the time of offense in terms of the exact hour and minute. We disagree.

“An indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense.” *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984).

“The legislature has, within constitutionally mandated parameters, the power to prescribe the manner in which a criminal charge can be stated in a pleading to relieve the State of the common law requirement that every element of the offense be charged.” *Id.* N.C. Gen. Stat. § 20-138.1(c) states that a pleading is “sufficient if it states *the time and place* of the alleged offense *in the usual form* [.]” N.C. Gen. Stat. § 20-138.1(c) (2011) (emphasis added).¹ Defendant fails to cite any authority that “in the usual form” demands that the hour and minute of the offense be alleged in the charging instrument.

In *Coker*, the Court refused to quash an indictment that charged the defendant with “operating” a vehicle, instead of “driving,” as prescribed in the pleading subsection of N.C. Gen. Stat. § 20-138.1. “In any event ‘operate’ as used in defendant’s citation is not so great a refinement on the statutory short-form pleading as to render the charge unintelligible or to prevent the court from proceeding to judgment.” *Coker*, 312 N.C. at 436, 323 S.E.2d at 347. The Court also rejected an argument that the indictment was “constitutionally infirm” because it lacked a statement of the theory of impairment. *Id.* at 436-41, 323 S.E.2d at 347-50. The Court pointed out that a defendant who feels he may be surprised may request a bill of particulars. *Id.* at 437, 323 S.E.2d at 348.

1. We note that although parts of N.C. Gen. Stat. § 20-138.1 were amended in 2006, subsection (c) was unchanged.

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In the instant case, the summons identified the charge as “operate a motor vehicle on a street or highway while subject to an impairing substance” and the date of the alleged offense as 7 March 2006. We hold that the date of the offense is a sufficient allegation of time in the usual form.

Defendant does not show prejudice resulting from the lack of the hour and minute of the offense on the summons. Defendant does not argue that he was surprised, or that he sought to rely on an alibi defense. Defendant does not assert that the summons exposed him to a subsequent prosecution for the same offense. When the State filed a charge on 27 July 2007, the summons stated the same offense, same offense date, same complainant, same location, same defendant, and same driver’s license number as the previous citation. The record does not indicate that defendant faced another charge of driving while impaired on 7 March 2006. Defendant did not request a bill of particulars. *See State v. Eason*, 242 N.C. 59, 62, 86 S.E.2d 774, 777 (1955).

This argument is without merit.

V. Conclusion

Under the holding of our Supreme Court in *Simeon*, there was no violation of separation of powers. Defendant failed to demonstrate that the dismissal of the driving while impaired charge and subsequent re-filing violated his due process rights. The length of the delay did not trigger consideration of the remaining *Barker* factors. Defendant’s right to a speedy trial was not violated. Defendant had adequate notice of the charge, and has failed to show prejudice; therefore, the criminal summons was not fatally defective.

NO ERROR.

Judges GEER and BEASLEY concur.

INLAND HARBOR HOMEOWNERS ASS'N, INC. v. ST. JOSEPHS MARINA, LLC

[219 N.C. App. 348 (2012)]

INLAND HARBOR HOMEOWNERS ASSOCIATION, INC., PLAINTIFF v. ST. JOSEPHS MARINA, LLC, RENAISSANCE HOLDINGS, LLC, ST. JOSEPHS PARTNERS, LLC, DEWITT REAL ESTATE SERVICES, INC., DENNIS BARBOUR, RANDY GAINEY, THOMAS A. SAIEED, JR., TODD A. SAIEED, ROBERT D. JONES, AND THE NORTH CAROLINA COASTAL RESOURCES COMMISSION, DEFENDANTS

No. COA11-715

(Filed 6 March 2012)

1. Waters and Adjoining Lands—bulkhead ownership—not a fixture

The trial court properly granted summary judgment for defendants in an action concerning ownership of a bulkhead where plaintiff argued that the bulkhead was a fixture and that plaintiff owned the property to which the fixture was attached. Plaintiff's argument did not justify reliance on an unpublished opinion; moreover, that opinion involved a bulkhead that supported an indoor swimming pool at a residence while this case involved a bulkhead used as a divider for real property that was partially submerged. Finally, plaintiff's assertion required that the deed and the intentions of the contracting parties be ignored.

2. Real Property—condominium plat—bulkhead—boundary rather than common area

The trial court properly granted summary judgment to plaintiff in an action concerning the ownership of a bulkhead where plaintiff contended that a recorded condominium declaration and condominium plat showed that it owned the bulkhead as a part of the condominium common areas. The bulkhead line and the common area were clearly defined on the condominium plat, with the bulkhead used as a boundary line that was not meant to be included in the common area.

3. Waters and Adjoining Lands—bulkhead ownership—amendment to condominium declaration—not a boundary agreement

The trial court did not err by granting summary judgment for defendants in a dispute over ownership of a bulkhead between a marina and a condominium homeowners association where plaintiff contended that an amendment to the condominium declaration created a boundary agreement. The amendment was clearly intended to define common areas among condominium owners and did not create a binding boundary agreement.

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4. Waters and Adjoining Lands— riparian rights—ownership of bulkhead—not established

The plaintiff in a dispute over ownership of a bulkhead did not have riparian rights where it did not prove ownership of the bulkhead.

5. Deeds— reformation denied—evidence of mutual mistake—not sufficient

The trial court did not err by denying plaintiff's motion for judicial reformation of a deed in a dispute over ownership of a bulkhead between a condominium homeowners association and a marina. Although plaintiff's evidence of its mistaken belief about the amount of property involved in a prior exchange of parcels was convincing, plaintiff failed to establish clear, cogent, and convincing evidence of defendants' mistaken belief at the time of the exchange of parcels.

Appeal by Plaintiff from order entered 12 October 2010 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 9 November 2011.

Clark, Newton & Evans, P.A., by Don T. Evans, Jr. and Seth P. Buskirk, for Plaintiff-Appellant.

Marshall, Williams & Gorham, LLP, by John. L. Coble and Williams Mullen, by Gilbert C. Laite, III and Kelly Colquette Hanley, for Defendants-Appellees.

BEASLEY, Judge.

Inland Harbor Homeowners Association, Inc. (Plaintiff) commenced this civil action on 2 December 2009. Plaintiff filed an amended complaint on 27 January 2010 alleging several causes of action against Renaissance Holdings, LLC, Dewitt Real Estate Services, LLC, St. Josephs Partners, LLC, St. Josephs Marina, LLC, Randy Gainey, Dennis Barbour, Robert D. Jones, Thomas A. Saieed, Jr., and Todd A. Saieed (Defendants). Plaintiff sought, *inter alia*, (1) a declaratory judgment to determine ownership of the bulkhead which is the boundary between Plaintiff and Defendant St. Josephs Marina's property; (2) nuisance and trespass damages against St. Josephs Marina; and (3) judicial reformation of a deed. On 27 August 2010, Plaintiff filed its motion for partial summary judgment seeking declaration of ownership of the bulkhead and judicial reformation of

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the deed. On 23 September 2010, Defendants filed their motion for partial summary judgment for the same causes of action, and for the nuisance and trespass claims. On 12 October 2010, the trial court entered the order of summary judgment which denied Plaintiff's motion for summary judgment and granted Defendants' motion. On 11 February 2011, Plaintiff voluntarily dismissed its final cause of action and filed notice of appeal on 7 March 2011.

Plaintiff and Defendants St. Josephs Marina and St. Josephs Partners, LLC own adjacent land in Carolina Beach, N.C. on the western side of the Myrtle Grove Sound. A portion of the subject property lies below the average high water mark and is completely submerged by water.

BWT Enterprises Inc. (BWT) was the record owner of the subject property and is the common predecessor in title to both Plaintiff and St. Josephs. In 1983, BWT owned a 5.8 acre tract of land (parent tract) adjacent to the Myrtle Grove Sound. Part of the parent tract was divided into two separate tracts. Tract 1 consisted of 1.44 acres which contained submerged land and Tract 2 consisted of 2.7 acres of dry land. Between 1984 and 1985, BWT built a bulkhead across the parent tract that divided Tract 1 and Tract 2. In 1984, BWT recorded a condominium plat (Condo Plat) which identified the "Bulkhead Line", common areas, and future development. Shortly after BWT recorded the Condo Plat, BWT also formed Plaintiff, Inland Harbor Homeowners Association Inc. BWT also recorded a "Declaration of Inland Harbor Condominiums Phase I" (Declaration). The Declaration designated part of Tract 1 to condominium ownership and future development.

In 1985, BWT formed the Inland Harbor Yacht Club Limited Partnership (Yacht Club) and BWT conveyed the parent tract to the Yacht Club, subject to the Declaration. At that point, the Yacht Club owned the original parent tract, except for one condominium unit that was sold when BWT owned the parent tract. Later that year, the Yacht Club conveyed the parent tract, less the condominium units that were sold, to Sundance Resorts, Ltd. (Sundance). Sundance executed a deed of trust to Branch Banking and Trust (BB&T) and in 1986 BB&T foreclosed and accepted a trustee's deed. After BB&T foreclosed, it obtained a Declaration of Title to Submerged Landscape for the submerged portions to the parent tract.

In 1989, BB&T conveyed the parent tract to FMS Development and Hyung Park (FMS and Park) and obtained a deed of trust. While

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FMS and Park held title, they amended the Declaration by executing “Amendment to Declaration of Unit Ownership and Covenants, Conditions and Restriction of Inland Harbor” (Amendment). In 1992, FMS and Park deeded the parent tract back to BB&T in lieu of foreclosure. In 1992, BB&T subdivided the parent tract and conveyed it in portions. BB&T conveyed the common areas located in Tract 1 to Plaintiff and conveyed the remaining parent tract to Mona Faye Black *et al.* (Blacks). The Blacks then conveyed a .28 acre parcel on Tract 1 to Plaintiff. In 2004, the Blacks conveyed all of their interest to St. Josephs Partners LLC (Partners).

In 2004, Plaintiff and Partners entered into an exchange agreement where Plaintiff agreed to exchange its .28 acres in exchange for .21 acres of Partners land. Partners also agreed to construct a pool with amenities, and perform other property maintenance. Subsequently, Partners began commercial development of the property. Partners rebuilt the bulkhead and constructed docks and marina facilities on the property. Partners applied for and was granted an easement over the submerged land with the boundaries running along the bulkhead. Plaintiff believes that it owns the bulkhead and the State improperly gave Partners an easement.

“Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 353 (2009) (internal quotation marks and citations omitted). “We review a trial court’s order granting or denying summary judgment *de novo*.” *Id.* at 337, 678 S.E.2d at 354.

Plaintiff argues that the trial court erred by determining that Plaintiff did not own the bulkhead. We disagree.

“In construing a deed description it is the function of the court to determine the true intent of the parties as embodied in the entire instrument.” *Board of Transportation v. Pelletier*, 38 N.C. App. 533, 536-37, 248 S.E.2d 413, 415 (1978). “The intention of the parties as apparent in a deed should generally control in determining the property conveyed thereby. But, if the intent is not apparent from the deed resort may be had to the general rules of construction.” *Id.* at 537, 248 S.E.2d at 415. “However, there are instances in which consideration should be given to the instruments made contemporaneously therewith, the circumstances attending the execution of the deed, and to

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the situation of the parties at the time.” *Smith v. Smith*, 249 N.C. 669, 675, 107 S.E.2d 530, 675 (1959). “[W]here lots are sold by reference to a recorded plat, the effect of reference to the plat is to incorporate it in the deed as a part of the description of the land conveyed.” *Kelly v. King*, 225 N.C. 709, 716, 36 S.E.2d 220, 224 (1945). In the case of boundary disputes,

course and distance govern unless there be in the deed some more certain description by which one or both may be controlled. The terminus of a line must be either the distance called for in the deed, or some permanent monument which will endure for years, the erection of which was contemporaneous with the execution of the deed.

Brown v. Hodges, 232 N.C. 537, 541, S.E.2d 603, 606-07 (1950).

[1] Plaintiff presents several arguments in support of its ownership of the bulkhead. First, Plaintiff argues that the bulkhead is properly categorized as a “fixture” and since it owns the property that the “fixture” is attached to, it also owns the bulkhead. Plaintiff’s argument hinges on our decision in *Burek v. Mancusco*, 189 N.C. App. 209, 657 S.E.2d 446 (2008) (unpublished). Before we address this argument on its merits, we first deal with Plaintiff’s reliance on an unpublished opinion. “Citation to unpublished authority is expressly disfavored by our appellate rules but permitted if a party, in pertinent part, ‘believes . . . there is no published opinion that would serve as well’ as the unpublished opinion.” *State ex rel. Moore Cty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005) (quoting N.C. R. App. 30(e)(3)). In this case, Plaintiff’s argument does not justify reliance on an unpublished opinion, and we remind Plaintiff that “citation to unpublished opinions is intended solely in those instances where the persuasive value of a case is manifestly superior to any published opinion.” *Id.*

In *Burek*, an unpublished opinion, this Court dealt with a bulkhead that supported an indoor swimming pool at a residence and the present case deals with a bulkhead used as a divider of real property that is partially submerged. Moreover, the Court in *Burek* limited the scope of classifying the bulkhead as a fixture. See *Burek*, 189 N.C. App. at 209, 657 S.E.2d at 446 (“Clearly, a bulkhead, under this definition, is a fixture due to its annexation to the land.”). Finally, accepting Plaintiff’s assertion would require us to ignore the deed and intentions of the contracting parties. Accordingly, we reject Plaintiff’s contention that the bulkhead is properly classified as a fixture.

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[2] Second, Plaintiff argues that it owns the bulkhead because the Declaration and Condo Plat show that the Bulkhead is a part of the condominium common areas. Plaintiff contends that a reading of the Declaration and the Condo Plat show BWT's intent to keep the bulkhead with Tract 1. Plaintiff relies on the following language in the Declaration that describes Tract 1.

The above description for purposes of the Declaration to which it is attached as an Exhibit, *is to be deemed to include the structure of the bulkhead along which some of the boundary lines recited above lie*, and being all of the property shown and described (including future development) in Unit Ownership Book 6, Page 195, New Hanover County Registry. (emphasis added).

The Declaration description, standing alone, shows an intention to include the bulkhead in Tract 1, but a reading of the Condo Plat shows a contrary intent.

In this case, absent a definite description in the deed, the "Bulkhead Line" and "Common Area" are clearly defined on the Condo Plat. The bulkhead is used as a boundary line, and not meant to be included in the designated common area as Plaintiff suggests. Because a reading of the Declaration and the plat create ambiguity as to the intent of BWT, Plaintiff's argument, without more, does not support BWT's intent to include the bulkhead in the common area where the plat shows a clear intention to separate the bulkhead and the common area. Further, Plaintiff argues the Declaration's references to a yacht club and boat dock further prove that the bulkhead is part of the condominium property. This argument is not persuasive. When the Declaration was executed, BWT owned the entire parent tract. Moreover, BWT's clear intent to construct a yacht club cannot give rise to an inference that BWT intended the bulkhead to be included wholly on Tract 1 on our reading of the Declaration and Condo Plat, where the plat shows a clear intent to divide the property using the bulkhead as the dividing line. Based on our reading of the Declaration and the Condo Plat, we hold that Plaintiff's evidence does not show BWT's intention to convey the bulkhead with Tract 1 excluding the bulkhead from the boundary rule in *Brown* and transferring ownership to Plaintiff through its acquisition of the common area.

[3] Alternatively, Plaintiff argues that the Amendment is a boundary agreement which is binding upon St. Josephs Marina. Plaintiff contends that the Amendment, recorded while FMS and Park owned the

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parent tract, supports the predecessors' intent to create a boundary agreement. The Amendment defined the common areas and facilities and included the bulkhead as part of the facilities. Plaintiff relies on *Smith v. Digh*, 9 N.C. App. 678, 117 S.E.2d 321 (1970) to support this assertion. Unlike *Smith*, here, the language of the amendment does not show a clear intention to define boundaries of the disputed area. A reading of the Amendment clearly shows that FMS was attempting to define common areas among condo owners, and did not intend to create a boundary agreement. The Amendment states,

“Common Areas and Facilities” (hereinafter, “Common Property”) means the portion of the condominium property owned in common by all of the Unit Owners . . . include the following . . . Bulkhead, deadmen and all supporting components of the bulkhead.

Moreover, the Amendment also states that this above mentioned section was an amendment to section 3B of the original declaration. Section 3 in the original declaration section is titled “Definitions.” Section 3B is clearly intended to define the common area and we refuse to interpret this language as creating a binding boundary agreement where the intentions of the predecessor are clear and unambiguous. Accordingly, Plaintiff's argument is overruled.

[4] Next, Plaintiff argues that the trial court erred by concluding that it had no riparian rights. We disagree.

Plaintiff's argument is premised on ownership of the bulkhead. “A riparian proprietor is an owner of land in actual contact with the water; proximity without contact is insufficient. An indispensable requisite of the riparian doctrine is actual contact of land with water.” *Young v. Asheville*, 241 N.C. 618, 622, 86 S.E.2d 408, 411 (1955). Because we have concluded that Plaintiff did not prove ownership of the bulkhead, we further hold that Plaintiff has no riparian rights.

[5] Finally, Plaintiff argues that the trial court erred by denying Plaintiff's motion for summary judgment on Plaintiff's claim for judicial reformation. We disagree.

“Where a deed fails to express the true intention of the parties, and that failure is due to the mutual mistake of the parties, or to the mistake of one party induced by fraud of the other, or to the mistake of the draftsman, the deed may be reformed to express the parties' true intent.” *Durham v. Creech*, 32 N.C. App. 55, 58-59, 231 S.E.2d 163, 166 (1977). When a party asserts mutual mistake as the basis for judi-

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cial reformation, “[t]he evidence presented to prove mutual mistake must be clear, cogent and convincing, and the question of reformation on that basis is a matter to be determined by the fact finder.” *Smith v. First Choice Servs.*, 158 N.C. App. 244, 250, 580 S.E.2d 743, 748 (2003). “[B]ecause mutual mistake is one that is common to *all the parties to a written instrument*, the party raising the defense must state with particularity the circumstances constituting mistake as to all of the parties to the written instrument.” *Van Keuren v. Little*, 165 N.C. App. 244, 247, 598 S.E.2d 168, 170 (2004) (internal quotation marks and citation omitted).

In preparation for litigation about the ownership of the bulkhead, Plaintiff discovered that it mistakenly conveyed property to Partners in the 2004 exchange of parcels. In support of its claim of mutual mistake, Plaintiff failed to offer clear, cogent, and convincing evidence of Partners’ mistake. Plaintiff’s affidavit from its attorney proves that it was aware at the time of the exchange that the vesting deed and the surveyor’s description gave different descriptions, but both descriptions purported to convey Plaintiff’s .28 acres. Plaintiff relied on the description in the vesting deed and unfortunately, Plaintiff gave more than the .28 acres that it contemplated at the time of the exchange. Although convincing evidence of Plaintiff’s mistaken belief, Plaintiff’s evidence fails to establish clear, cogent, and convincing evidence of Partners’ mistaken belief at the time of the exchange. Accordingly, Plaintiff’s final argument is overruled.

Affirmed.

Judge STEELMAN concurs.

Judge GEER concurs in result only.

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STATE OF NORTH CAROLINA v. ELLEREK DERMOT VAUGHTERS

No. COA11-1042

(Filed 6 March 2012)

1. Sentencing—aggravating factors—deadly weapon—not element of kidnapping offense

The trial court in a first-degree kidnapping prosecution did not err by finding as an aggravating factor under the Fair Sentencing Act that defendant was armed with a deadly weapon at the time of the crime. Although defendant argued that this was an element necessary of kidnapping, defendant confined, restrained, and removed the victim without his consent, committed the kidnapping for the purpose of committing robbery and facilitating flight afterwards, and the victim was seriously injured and was not released in a safe place. All of the elements of first-degree kidnapping were present without defendant's use of a firearm.

2. Sentencing—Fair Sentencing Act—balancing aggravating and mitigating factors—no abuse of discretion

The trial court did not err by concluding that aggravating factors outweighed the mitigating factors when sentencing defendant for first-degree kidnapping under the Fair Sentencing Act. The trial court found nineteen mitigating factors and one aggravating factor, but the aggravating factor was that defendant was armed with a deadly weapon at the time of the crime. The discretionary decision was not a matter of mathematics.

Appeal by Defendant from judgment entered 27 October 1992 by Judge Craig A. Thompson in Durham County Superior Court. Heard in the Court of Appeals 14 December 2011.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for Defendant.

HUNTER, JR., Robert N., Judge.

I. Factual & Procedural Background

On 5 August 1991, the Durham County Grand Jury indicted Ellerek Dermot Vaughters ("Defendant") for first degree murder.

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Subsequently on 19 August 1991, the Grand Jury indicted Defendant for first degree kidnapping and robbery with a dangerous weapon. Defendant initially pled not guilty, and testimonial evidence against Defendant was presented at trial beginning on 22 October 1992. On 23 October 1992, Defendant changed his plea to guilty on all charges including first degree murder under the theory of felony murder based on robbery with a dangerous weapon. Based on this plea, Defendant was adjudicated guilty of first degree murder and first degree kidnapping. The trial court arrested the charge of robbery with a dangerous weapon, as it merged with the first degree murder as an element of the offense. Defendant was sentenced to life in prison for the murder and an aggravated consecutive sentence of 25 years for the kidnapping.

Defendant had been interviewed by Durham police detective Darrell Dowdy on 3 July 1991. The transcript and tape recording of this interrogation were introduced at trial prior to Defendant's guilty plea. Defendant's admissions in that interview tended to show the following.

On 1 July 1991, Defendant and Greg Fray were at a convenience store in Raleigh and had been drinking heavily. In the parking lot, they came across Walter Eugene Burnett, who had pulled up in his van. They told Mr. Burnett to get in the back of the van, and Mr. Fray began driving the van with Mr. Burnett and Defendant in the back. Although Defendant had a gun with him, he had it in his pocket and did not pull it on Mr. Burnett at the time he ordered him into the van.

While driving the van, Mr. Fray repeatedly told Defendant to kill Mr. Burnett, and Mr. Burnett begged them not to kill him. After Mr. Burnett moved, Defendant struck him in the back with his hand. After stopping for beer a few times, Mr. Fray pulled the van over, and everyone got out of the van. After Mr. Fray knocked Mr. Burnett to the ground, Defendant held Mr. Burnett at gun point and told him to take his clothes off. Defendant asserts that Mr. Burnett reached up to grab the gun and the gun discharged, killing Mr. Burnett.

On 15 September 2006, Defendant filed a motion for appropriate relief in Durham County Superior Court seeking a belated appeal of his greater than presumptive range sentence for his kidnapping conviction. On 22 September 2006, Judge Orlando Hudson dismissed Defendant's motion. On 6 October 2006, Defendant filed a petition for writ of certiorari to this Court, which was granted on 25 October 2006, remanding the case to the Superior Court for an evidentiary hearing whether Defendant was advised by counsel of his right to appeal.

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On 23 March 2009, an evidentiary hearing was held before Judge Hudson. On 3 April 2009, Judge Hudson issued an order concluding that Defendant “was not apprised of his appellate rights as they relate to his aggravated sentence for first degree kidnapping” and that his motion for appropriate relief as it related to the aggravated first degree kidnapping sentence should be allowed. On 28 March 2011, Defendant filed a petition for writ of certiorari to this Court, which was granted on 21 April 2011 allowing his appeal as to the aggravated sentence for first degree kidnapping.

II. Standard of Review

Defendant assigns error to the trial court’s sentence, which we review for “‘whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.’” *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (citation omitted). We review the trial court’s weighing of aggravating factors and mitigating factors for abuse of discretion. *State v. Summerlin*, 98 N.C. App. 167, 177, 390 S.E.2d 358, 363 (1990). In reviewing sentencing, “[a] judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.” *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962).

III. Analysis

[1] Defendant argues that the trial court erred in finding as an aggravating factor that Defendant “was armed with a deadly weapon at the time of the crime,” as this is an element necessary to prove the kidnapping offense. We disagree.

Under the Fair Sentencing Act, which was applicable at the time Defendant was sentenced, the trial court can impose a sentence greater than the presumptive term if it considers the aggravating and mitigating factors for Defendant’s convictions and makes written findings of fact delineating those factors and explaining that the aggravating factors outweigh the mitigating factors. *State v. Green*, 101 N.C. App. 317, 322, 399 S.E.2d 376, 379 (1991). In the present case, the trial court found as an aggravating sentencing factor under N.C. Gen. Stat. § 15A-1340.4(a)(1)i. (1988) that Defendant “was armed with or used a deadly weapon at the time of the crime.” Section 15A-1340.4(a)(1) of the Fair Sentencing Act provided that “[e]vidence

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necessary to prove an element of the offense may not be used to prove any factor in aggravation.” N.C. Gen. Stat. § 15A-1340.4(a)(1) (1988). Defendant argues that evidence he used a firearm was necessary to prove elements of kidnapping and thus the trial court erred in finding the use of a firearm as an aggravating factor.

The elements of first degree kidnapping are “(1) confining, restraining, or removing from one place to another; (2) any person sixteen years or older; (3) without such person’s consent; (4) if such act was for the purposes of facilitating the commission of a felony.” *State v. Oxendine*, 150 N.C. App. 670, 675, 564 S.E.2d 561, 565 (2002). Kidnapping is first degree if the victim either was not released by the defendant in a safe place or was seriously injured or sexually assaulted. *Id.*

In the present case, Defendant confined, restrained, and removed Mr. Burnett, an adult over the age of 16, without his consent, by telling Mr. Burnett to get in the back of the van and driving away with him in the van. Defendant committed the kidnapping for the purpose of committing robbery and facilitating the flight of Defendant following the robbery of the van. Mr. Burnett was not released in a safe place and was seriously injured, making the offense first degree. All of the elements of first degree kidnapping are present in this case, and Defendant’s use of a firearm is not necessary in proving the elements as listed above.

In support of his argument, Defendant cites *State v. Brice*, where our Court found that “[r]elying on the use of a firearm to prove the necessary element of restraint [in a kidnapping case] precludes employing the use of a firearm again to enhance the sentence.” 126 N.C. App. 788, 795, 486 S.E.2d 719, 722-23 (1997). To the extent that Brice is inconsistent with *State v. Ruff*, 349 N.C. 213, 505 S.E.2d 579 (1998), discussed *infra*, we follow our Supreme Court’s holding in *Ruff*. See *State v. Coria*, 131 N.C. App. 449, 456, 508 S.E.2d 1, 5 (1998) (“While decisions of one panel of this Court are binding upon subsequent panels unless overturned by a higher court . . . we also have a responsibility to follow the decisions of our Supreme Court.” (internal citations omitted)).

Our Supreme Court has allowed the enhancement of a sentence based on the use or display of a firearm in a second degree kidnapping case. See *Ruff*, 349 N.C. at 216, 505 S.E.2d at 581. In *Ruff*, the defendant kidnapped the victim at gunpoint and raped her. *Id.* at 215, 505 S.E.2d at 580. The defendant’s sentence was enhanced pursuant

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to N.C. Gen. Stat. § 15A-1340.16A (1997), which allowed for enhancement where the defendant “used, displayed, or threatened to use or display a firearm at the time of the felony.” *Id.* “This provision does not apply, however, where ‘[t]he evidence of the use, display, or threatened use or display of a firearm is needed to prove an element of the underlying . . . felony.’” *Id.* at 216, 505 S.E.2d at 580 (quoting N.C. Gen. Stat. § 15A-1340.16A(b)(2)) (alterations in original).

In upholding the enhancement, the Court stated that “[b]ecause the use or display of a firearm is not an essential element of second-degree kidnapping, the trial court was not precluded from relying on evidence of defendant’s use of the firearm and enhancing defendant’s term of imprisonment pursuant to the firearm enhancement section.” *Id.* at 216-17, 505 S.E.2d at 581.

In *State v. Boyd*, our Court followed *Ruff* in finding the firearm enhancement applicable where the defendant pointed a firearm at one of the victims of second degree kidnapping. 148 N.C. App. 304, 307, 559 S.E.2d 1, 3 (2002). We see no reason to distinguish the first degree kidnapping conviction in this case from the second degree kidnapping convictions in *Ruff* and *Boyd*. Thus, using a firearm is not an essential element of first degree kidnapping and the trial court was correct to find the use of a firearm as an aggravating factor.

Defendant points out in his reply brief that *Ruff* was decided under the Structured Sentencing Act, which applies to cases where the date of offense is after 1 October 1994. N.C. Gen. Stat. § 15A-1340.10 (2011). Since the date of the offense in this case is 1 July 1991, Defendant is correct that the Fair Sentencing Act, not the Structured Sentencing Act, applies to the present case. However, this Court has repeatedly applied the logic of cases decided under the Fair Sentencing Act to cases arising under the Structured Sentencing Act. *See e.g., State v. Byrd*, 164 N.C. App. 522, 527, 596 S.E.2d 860, 863 (2004) (“We note that many of the cases analyzing trial courts’ decisions . . . were decided under the Fair Sentencing Act. Even though this case was heard under Structured Sentencing . . . the logic of the cases under the earlier act as to aggravating and mitigating factors remains valid.”); *State v. Radford*, 156 N.C. App. 161, 164 n.1, 576 S.E.2d 134, 137 n.1 (2003) (“Although *Brown*, and other cases cited in this opinion, were decided under the predecessor to the Structured Sentencing Act, our analysis is not affected.”).

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This Court recognized in an unpublished case that the provision in question from the Fair Sentencing Act is “almost identical” to the one used in *Ruff* from the Structured Sentencing Act, stating:

the Fair Sentencing Act . . . contained a provision almost identical to the provision of the Structured Sentencing Act at issue in the present case. Compare N.C. Gen.Stat. § 15A-1340.4(a)(1) (Cum.Supp.1981) (providing that “[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the same item of evidence may not be used to prove more than one factor in aggravation”), with N.C.G.S. § 15A1340.16(d) (providing that “[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation.”).

State v. Talley, No. COA07-89, 2007 WL 4105724, (N.C. App. November 20, 2007). In addition, Defendant’s initial brief to this Court cited *State v. Smith*, 125 N.C. App. 562, 567, 481 S.E.2d 425, 427-28 (1997), a case decided under the Structured Sentencing Act. Defendant refers to the provision from the Structured Sentencing Act as being “a later identical statute” to the one in the Fair Sentencing Act. As the provisions are essentially identical, we apply our Supreme Court’s logic in *Ruff* in concluding the trial court properly applied the use of a firearm as an aggravating factor.

[2] Defendant also argues that the trial court’s conclusion that the aggravating factor outweighed the mitigating factors was an abuse of discretion. We disagree.

The trial court found one statutory aggravating factor and 19 mitigating factors, 5 statutory and 14 nonstatutory. The trial court weighed the factors and found that the aggravating factor outweighed the mitigating factors.

“The balance struck by a trial court when weighing mitigating and aggravating factors will not be disturbed if there is support in the record for the trial court’s determination.” *State v. Canty*, 321 N.C. 520, 527, 364 S.E.2d 410, 415 (1988); see also *State v. Baucom*, 66 N.C.App. 298, 302, 311 S.E.2d 73, 75 (1984). “[A] discretionary decision of a trial court will be reversed only if it is ‘manifestly unsupported by reason.’” *Canty*, 321 N.C. at 527, 364 S.E.2d at 415 (citation omitted). This discretionary decision is not a matter of mathematics, and “the fact that there are more mitigating factors than

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aggravating factors is not determinative.” *Id.* In fact, “only one factor in aggravation is necessary to support a sentence greater than the presumptive term.” *Baucom*, 66 N.C. App. at 302, 311 S.E.2d at 75.

We find no abuse of discretion in the trial court’s decision that the aggravating factor outweighed the mitigating factors. Defendant points to *State v. Parker*, which proposes that “[i]n some cases, a single, *relatively minor* aggravating circumstance simply will not reasonably outweigh a number of *highly significant* mitigating factors.” 315 N.C. 249, 260, 337 S.E.2d 497, 503-04 (1985) (emphasis added). However, we cannot agree that the aggravating factor in the present case that Defendant was armed with a deadly weapon at the time of the crime was “relatively minor” or that the mitigating factors were “highly significant.” We see no reason to disturb the trial court’s discretion.

IV. Conclusion

For the foregoing reasons, the trial court’s determinations on sentencing are

Affirmed.

Judges HUNTER, Robert C. and GEER concur.

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No. COA11-301

(Filed 6 March 2012)

Gambling—sweepstakes—entertaining display—prohibition unconstitutional

An order dismissing a complaint that sought an injunction that its promotional sweepstakes did not violate any North Carolina gaming or gambling law was reversed where N.C.G.S. § 14-306.4, under which plaintiffs’ sweepstakes squarely fell, was held to be unconstitutional by *Hest Technologies, Inc. v. State*, No. COA11-459 (Filed 6 March 2012).

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Judge HUNTER, Robert C. dissents.

Appeal by plaintiffs from order entered 29 November 2010 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 25 October 2011.

Daughtry, Woodard, Lawrence & Starling, by Kelly K. Daughtry, for plaintiff-appellants.

Attorney General Roy Cooper, by Assistant Solicitor General John F. Maddrey and Special Deputy Attorney General Hal F. Askins, for defendant-appellees.

CALABRIA, Judge.

Sandhill Amusements, Inc., Carolina Industrial Supplies, J & F Amusements, Inc., J & J Vending, Inc., Matthews Vending Co., Patton Brothers, Inc., Trent Brothers Music Co., Inc., S & S Music Co., Inc., Old North State Amusements, Inc., and Uwharrie Fuels LLC (collectively “plaintiffs”) appeal the trial court’s order which granted defendants’ motion to dismiss plaintiffs’ complaint for failure to state a claim upon which relief could be granted and dissolved plaintiffs’ preliminary injunction. We reverse.

Plaintiffs sell long distance telephone time in retail establishments throughout North Carolina. Plaintiffs’ product is marketed through the use of a promotional sweepstakes system.

When plaintiffs’ customers make a qualifying purchase of plaintiffs’ products, they receive one or more sweepstakes entries. Alternatively, individuals may enter plaintiffs’ sweepstakes without purchasing any of plaintiffs’ products by completing an entry form available at each retail location. Free entries are not treated any differently than entries accompanying a purchase.

After distributing the sweepstakes entry, the owner or employee of the retail establishment activates a “sweepstakes terminal” on which the sweepstakes player can play a video game. The video game reveals whether the consumer has won the sweepstakes prize.

On 18 March 2009, plaintiffs initiated a declaratory judgment action against defendants in Wake County Superior Court. Plaintiffs sought a declaration that its promotional sweepstakes did not violate any North Carolina gaming or gambling laws which were in effect at that time. Plaintiffs also sought injunctive relief to prevent defendants from attempting to enforce those laws against plaintiffs’ sweep-

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stakes systems. On 2 July 2009, plaintiffs obtained a preliminary injunction prohibiting defendants from taking any enforcement action against plaintiffs for the possession, use, or operation of the sweepstakes system. After the injunction was entered, plaintiffs continued to conduct their promotional sweepstakes.

On 20 July 2010, the North Carolina General Assembly enacted House Bill 80. This legislation amended the North Carolina General Statutes to include a provision which prohibited conducting or promoting any sweepstakes which utilized an “entertaining display.” 2010 N.C. Sess. Laws 103 (codified as amended at N.C. Gen. Stat. § 14-306.4 (2011)). Plaintiffs’ sweepstakes systems fell squarely within the ambit of the new N.C. Gen. Stat. § 14-306.4.

In response to the enactment of House Bill 80, plaintiffs amended their original complaint to include an allegation that N.C. Gen. Stat. § 14-306.4 was unconstitutional and, in the alternative, that plaintiffs were being selectively prosecuted. On 19 November 2010, defendants filed a motion to dismiss plaintiffs’ complaint for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Defendants argued that N.C. Gen. Stat. § 14-306.4 was “constitutional in all respects” and that plaintiffs’ sweepstakes operations were in violation of that law.

On 29 November 2010, the trial court conducted a hearing on defendants’ motion. At the conclusion of the hearing, the trial court determined that N.C. Gen. Stat. § 14-306.4 was constitutional, dismissed plaintiffs’ complaint in its entirety, and dissolved plaintiffs’ preliminary injunction. The trial court entered a written order memorializing its decision that same day. Plaintiffs appeal.

In a decision filed today in *Hest Technologies, Inc. v. State*, No. COA11-459, ___ N.C. App. ___, ___ S.E.2d ___ (2012), this Court held that “the portion of N.C. Gen. Stat. § 14-306.4 which criminalizes the dissemination of a sweepstakes result through the use of an entertaining display must be declared void, as it is unconstitutionally overbroad.” Since N.C. Gen. Stat. § 14-306.4 has been declared void as unconstitutionally overbroad, the trial court’s order in the instant case must be reversed.

Reversed.

Judge McGEE concurs.

Judge HUNTER, Robert C. dissents by separate opinion.

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[219 N.C. App. 362 (2012)]

HUNTER, Robert C., Judge, dissenting.

In reversing the trial court's order the majority relies on *Hest Technologies, Inc. v. State*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, (March 6, 2012) (No. COA 11-459), where this Court held that N.C. Gen. Stat. § 14-306.4 (2011) is void for being unconstitutionally overbroad. In a dissenting opinion in *Hest Technologies*, I concluded N.C. Gen. Stat. § 14-306.4 regulated conduct rather than speech and the statute was not unconstitutionally overbroad. *Id.* at ___, ___ S.E.2d at ___ (Hunter, J., dissenting).

Plaintiffs appeal from the trial court's order granting the State's motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief could be granted and dissolving plaintiffs' preliminary injunction against the enforcement of N.C. Gen. Stat. § 14-306.4. Plaintiffs argue section 14-306.4 is an unconstitutional restriction on their freedom of speech, is unconstitutionally vague, and is a violation of their rights to due process and equal protection under our federal and state constitutions. I disagree.

Consistent with my opinion in *Hest Technologies*, I must dissent from the majority's holding in the instant case and conclude that N.C. Gen. Stat. § 14-306.4 is not a restriction on speech. I further conclude that plaintiffs cannot challenge section 14-306.4 for vagueness; plaintiffs have failed to establish a violation of their rights to equal protection under the law; and plaintiffs have failed to establish a claim of selective prosecution. Accordingly, I would affirm the trial court's order.

A. Regulation of Speech

Plaintiffs argue that N.C. Gen. Stat. § 14-306.4 is an impermissible restriction of their freedom of speech as guaranteed by the First and Fourteenth Amendments of the United States Constitution and article I, section 14 of the North Carolina Constitution. Specifically, plaintiffs contend that the statute's prohibition of the use of an "entertaining display" in conducting or promoting a sweepstakes is an impermissible content-based restriction on speech, proscribing the manner in which they communicate to a sweepstakes entrant whether the entrant has won a prize.

In *Hest Technologies*, ___ N.C. App. at ___, ___ S.E.2d at ___ (Hunter, J., dissenting), I addressed a similar constitutional challenge to the statute. My reasoning in that case applies to this appeal and leads me to the same conclusion, that N.C. Gen. Stat. § 14-306.4 is a

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restriction on conduct, not speech. *Id.*; see also *Allied Veterans of the World, Inc.: Affiliate 67 v. Seminole County, Fla.*, 783 F. Supp. 2d 1197 (M.D. Fla. 2011) (rejecting a First Amendment challenge to a similar law prohibiting the use of “simulated gambling devices” in sweepstakes concluding the law regulated conduct not speech); *Affiliate 67 v. Seminole County, Fla.*, ___ F. Supp. 2d ___, 2011 WL 3958437 (M.D. Fla. Sept. 8, 2011) (No. 6:11-CV-155-ORL-28DAB) (concluding, on subsequent appeal, that *Brown v. Entm’t Merchs. Ass’n*, ___ U.S. ___, ___, 131 S. Ct. 2729, 2733, 180 L. Ed. 2d 708, 714 (2011) did not apply to law prohibiting the use of “simulated gambling devices” in sweepstakes because the law regulated conduct, rather than speech or expressive conduct). Thus, I would overrule plaintiffs’ argument that N.C. Gen. Stat. § 14-306.4 is a content-based restriction on protected expression.

B. Vagueness

Next, plaintiffs contend N.C. Gen. Stat. § 14-306.4 is unconstitutionally vague. Specifically, plaintiffs take issue with the statute’s definition of “entertaining display” and its lack of definitions for “visual information” and “game play.” Plaintiffs also argue it is impossible to ascertain the type of machine the statute prohibits. I disagree.

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 228 (1972). However, “[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness.” *Parker v. Levy*, 417 U.S. 733, 756, 41 L. Ed. 2d 439, 458 (1974). As evidenced by plaintiffs’ argument that section 14-306.4 applies to them—albeit as a restriction of their speech rather than their conduct—they cannot challenge the statute for vagueness. This is so even under the heightened scrutiny applied to laws implicating First Amendment protections of speech. *Holder v. Humanitarian Law Project*, ___ U.S. ___, ___, 130 S. Ct. 2705, 2719, 177 L. Ed. 2d 355, 375 (2010). Nor can plaintiffs challenge the statute for vagueness as applied to the conduct of others. *Id.* Thus, I would hold plaintiffs’ void for vagueness challenge is overruled.

C. Equal Protection

Plaintiffs also argue that N.C. Gen. Stat. § 14-306.4 violates their rights to equal protection under our federal and state constitutions. Specifically, plaintiffs contend that the statute arbitrarily distinguishes between classes of business using sweepstakes as a promotional tool. I disagree.

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As discussed above, I have concluded the statute regulates plaintiffs' conduct not their speech. Thus, the statute does not implicate a fundamental right and is subject to a rational basis review. *See Hodel v. Indiana*, 452 U.S. 314, 331, 69 L. Ed. 2d 40, 55 (1981) ("Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose."); *Liebes v. Guilford Co. Dept. of Pub. Health*, ___ N.C. App. ___, ___, 713 S.E.2d 546, 553, *disc. review denied*, ___ N.C. ___, 718 S.E.2d 396 (2011).

Here, one of the Legislature's stated purposes in enacting N.C. Gen. Stat. § 14-306.4 was to protect the morals of the inhabitants of our State from the "vice and dissipation" that is brought about by the "repeated play" of sweepstakes due to the use of "simulated game play," similar to video poker, "even when [such game play is] allegedly used as a marketing technique." 2010 N.C. Sess. Law 103. The protection of the morals of our State's inhabitants is a legitimate government purpose. *See State v. Warren*, 252 N.C. 690, 694, 114 S.E.2d 660, 664 (1960) ("The State possesses the police power in its capacity as a sovereign, and in the exercise thereof the Legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety and general welfare of society.") I conclude the State's prohibition of the use of "entertaining displays" that use actual or simulated game play for the promotion and conducting of sweepstakes is rationally related to this legitimate governmental purpose.

That the statute does not prohibit all forms of sweepstakes is not a basis for plaintiffs' constitutional challenge. "[T]here is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the Legislature must be held rigidly to the choice of regulating all or none." *Silver v. Silver*, 280 U.S. 117, 123, 74 L. Ed. 221, 226 (1929) (rejecting an equal protection challenge to a law permitting recovery for injuries by gratuitous passengers injured in automobiles, but not permitting recovery by gratuitous passengers injured in other classes of motor vehicles). "It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs." *Id.* Thus, our Legislature's decision to protect the morals of our State's inhabitants by prohibiting sweepstakes that utilize "entertaining displays" while allowing other forms of sweepstakes is not a valid basis for plaintiffs' equal protection challenge.

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Lastly, plaintiffs' equal protection challenge alleges N.C. Gen. Stat. § 14-306.4 unreasonably restricts their right to earn a livelihood. "The right to work and earn a livelihood is a property right that may not be denied except under the police power of the State in the public interest for reasons of health, safety, morals or public welfare." *Warren*, 252 N.C. at 693, 114 S.E.2d at 663.

In *Warren*, the North Carolina Supreme Court further stated that for the Legislature to utilize the State's police power to enact laws for the regulation of an occupation " '(1) the purpose of the statute must be within the scope of the police power, (2) the act must be reasonably designed to accomplish this purpose, and (3) the act must not be arbitrary, discriminatory, oppressive or otherwise unreasonable.' " 252 N.C. at 694, 114 S.E.2d at 664 (quoting *In re Russo*, 107 Ohio App. 238, 150 N.E.2d 327, 331 (1958)). Here, our Legislature stated that the statute was enacted to protect the morals of the State's inhabitants. 2010 N.C. Sess. Law 103. The purpose of the law is therefore within the scope of the State's police powers. *Warren*, 252 N.C. at 694, 114 S.E.2d at 664. As explained above, I have also concluded the statute is reasonably related to this purpose and is not arbitrary. Thus, I would hold plaintiffs' argument that N.C. Gen. Stat. § 14-306.4 impermissibly restricts their right to earn a livelihood is overruled.

D. Selective Prosecution

Plaintiffs alternatively allege they are being selectively prosecuted under N.C. Gen. Stat. § 14-306.4. I disagree.

The two-part test to establish a claim of discriminatory selective prosecution requires:

- (1) the defendant must make a *prima facie* showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not; (2) upon satisfying (1) above, he must demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

Majebe v. N.C. Bd. of Med. Examiners, 106 N.C. App. 253, 260-61, 416 S.E.2d 404, 408 (1992) (quoting *State v. Howard*, 78 N.C. App. 262, 266-67, 337 S.E.2d 598, 601-02 (1985), *disc. review denied*, 316 N.C. 198, 341 S.E.2d 581 (1986)).

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Plaintiffs contend they are similarly situated to others who have not been prosecuted for operating video games that require the deposit of tokens to activate a machine that dispenses prizes based on chance. Plaintiffs further allege their prosecution was intentionally discriminatory, motivated by a discriminatory purpose—the desire to impede plaintiffs’ rights to free speech—and has a discriminatory effect.

Taking plaintiffs’ allegations as true in light of defendants’ motion to dismiss, *Scheerer v. Fisher*, 202 N.C. App. 99, 102, 688 S.E.2d 472, 474, *disc. review denied*, 364 N.C. 435, 702 S.E.2d 305 (2010), I conclude plaintiffs have failed to allege how they have been singled out for prosecution. The amendments to N.C. Gen. Stat. § 14-306.4 prohibiting the use of “entertaining displays” for conducting or promoting sweepstakes did not become effective until 1 December 2010. 2010 N.C. Sess. Law 103. Yet, plaintiffs moved to amend their complaint seeking declaratory judgment and injunctive relief in September 2010 and the trial court granted defendants’ motion to dismiss on 29 November 2010. Thus, plaintiffs’ claim of selective prosecution was made and dismissed prior to the effective date of the statutory amendments enacted by the Legislature in 2010 N.C. Sess. Law 103. Plaintiffs have cited no other authority under which their alleged prosecution occurred. As such, I conclude plaintiffs’ have failed to state a claim for selective prosecution.

For the foregoing reasons, I conclude the trial court did not err in granting defendants’ motion to dismiss plaintiffs’ complaint. Accordingly, I would affirm the trial court’s order.

IN RE FORECLOSURE OF CARTER

[219 N.C. App. 370 (2012)]

IN THE MATTER OF THE FORECLOSURE OF A DEED OF A NORTH CAROLINA DEED OF TRUST DATED AND RECORDED NOVEMBER 9, 2007 IN BOOK 5249 AT PAGE 2843, IN THE OFFICE OF THE REGISTER OF DEEDS, NEW HANOVER COUNTY, NORTH CAROLINA, By JAMES OLIVER CARTER, SUBSTITUTE TRUSTEE

No. COA11-990

(Filed 6 March 2012)

Mortgages and Deeds of Trust—foreclosure—right to arbitrate—improperly raised—appeal dismissed

An appeal to the Court of Appeals in a foreclosure action was dismissed where respondents' argument concerned their right to arbitration, rather than the six findings required by N.C.G.S. § 45-21.16 for the clerk of superior court to enter an order allowing a foreclosure sale to proceed. The right to arbitration was not pertinent to those findings and the trial court properly refused to rule on respondents' arbitration motion; respondents should have raised the issue in a motion to enjoin pursuant to N.C.G.S. § 45-21.34.

Appeal by respondents from order entered 8 June 2011 by Judge Russell J. Lanier, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 10 January 2012.

Driscoll Sheedy, P.A., by James W. Sheedy and Susan E. Driscoll, for petitioner-appellee.

Shanklin & Nichols, LLP, by Kenneth A. Shanklin and Cynthia W. Baldwin, for respondents-appellants.

HUNTER, Robert C., Judge.

Kirk E. Pugh and Barbara A. Pugh ("respondents") appeal from the trial court's order authorizing James Oliver Carter, the substitute trustee for Capital One Bank ("petitioner"), to proceed with foreclosure under a power of sale. Respondents argue that the trial court committed reversible error by denying their demand for arbitration and failing to issue written findings of fact regarding its denial of their motion to stay the foreclosure action and compel arbitration. After careful review, we dismiss respondents' appeal.

Background

On 9 November 2007, respondents signed a deed of trust ("DOT"), promissory note ("note"), and assignment of rents in favor of peti-

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tioner with regards to property respondents owned in New Hanover County. All three documents contained arbitration provisions. Specifically, the provisions stated that “all disputes, claims and controversies between [the parties] . . . shall be arbitrated pursuant to the Rules of the American Arbitration Association in affect at the time the claim is filed[.]” The arbitration agreements did not limit any party from seeking equitable relief or invoking a power of sale.

On 20 September 2010, petitioner sent respondents a demand for full payment of the note. After respondents failed to pay off the note, petitioner sent an additional delinquency notice to respondents on 26 January 2011 and claimed that the outstanding amount due included \$1,759,948.98 in principal, \$66,614.53 in interest, and \$1,353.52 in attorneys’ fees.

On 16 February 2011, the substitute trustee filed a Notice of Hearing for Foreclosure on the property pursuant to N.C. Gen. Stat. § 45-21.16 (2009). A hearing was held on 8 March 2011 before the Clerk of Superior Court. Respondents filed an Election of the Rights of Arbitration and Motion to Dismiss and/or Stay Foreclosure Pending Conclusion of Arbitration (“Arbitration Motion”) on the day of the hearing and presented it to the clerk.

The clerk issued an order allowing the foreclosure sale to proceed based on, *inter alia*, the following findings: (1) there was a valid debt of which petitioner was the holder; (2) respondents defaulted on the debt; (3) the DOT authorized a power of sale; (4) all parties were given proper notice of the hearing; (5) the loan was not a home loan defined under N.C. Gen. Stat. § 45-101(1b); and (6) the foreclosure was not barred by respondents’ period of military service. The clerk’s order did not address respondents’ Arbitration Motion.

On 15 March 2011, respondents appealed the clerk’s order to superior court. The trial court held a hearing on 4 May 2011. At the hearing, respondents argued that the trial court was required to look at the arbitration provisions and determine whether the provisions entitled respondents to arbitration. Respondents argued that they were entitled to arbitrate and, therefore, the trial court must issue a stay of the foreclosure pending the conclusion of arbitration.

Petitioner and the substitute trustee presented the following at the hearing before the trial court: (1) an affidavit evidencing a valid debt in favor of petitioner; (2) evidence that the property was used for commercial purposes; (3) proof that all parties received notice of

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the foreclosure hearing before the clerk; (4) evidence of default; (5) a copy of the DOT containing an express power of sale provision; and (6) evidence that respondents were not members of the military. Petitioner argued that respondents were improperly trying to assert an equitable defense on appeal when that defense should be asserted in a motion to enjoin. Respondents argued that the right to arbitration is not an equitable defense but an election of a contract right.

The trial court ordered the foreclosure to proceed and set the sale of the property for 7 July 2011. The trial court acknowledged that respondents likely had the right to arbitration but noted, "I just think they've got the wrong horse hooked to their cart." The trial court did not enter a ruling on respondents' Arbitration Motion.

On 13 June 2011, the substitute trustee filed a Notice of Sale. Respondents filed their Notice of Appeal to this Court on 1 June 2011. On 5 July 2011, the clerk stayed the foreclosure pending the outcome of the appeal.

Discussion

We first address respondents' argument that the trial court erred by refusing to stay the foreclosure proceeding and compel arbitration. Pursuant to N.C. Gen. Stat. § 45-21.16(d), at the foreclosure hearing authorized under the power of sale, the clerk must establish the existence of:

- (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), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), . . . and (vi) that the sale is not barred by G.S. 45-21.12A.

In regards to subsection (vi), N.C. Gen. Stat. § 45-21.12A (2009) prohibits a mortgagee or trustee exercising a power of sale during or within 90 days after a mortgagor's period of military service. If the party seeking foreclosure establishes all six necessary findings, the clerk is authorized to enter an order allowing the trustee or mortgagee to proceed with the foreclosure sale. N.C. Gen. Stat. § 45-21.16(d).

If a party wishes to challenge the clerk's findings pursuant to N.C. Gen. Stat. § 45-21.16(d), the party must appeal to the judge of the district or superior court having jurisdiction within 10 days. N.C. Gen. Stat. § 45-21.16(d)(1). The trial court's review of the clerk's findings is

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de novo, id., and the trial court is limited on appeal to determining whether the six criteria of N.C. Gen. Stat. § 45-21.16(d) have been satisfied, *In re Foreclosure of Godwin*, 121 N.C. App. 703, 704, 468 S.E.2d 811, 812 (1996). The trial court is prohibited from reviewing any issue or argument that was not raised before the clerk in connection with the clerk's N.C. Gen. Stat. § 45-21.16(d) analysis. See *In re David A. Simpson, P.C.*, ___ N.C. App. ___, ___, 711 S.E.2d 165, 170 (2011) (holding that the trial court did not err in refusing to consider debtor's claim of rescission as an equitable defense to the foreclosure action where that defense was not raised before the clerk); *Mosler v. Druid Hills Land Co.*, 199 N.C. App. 293, 297, 681 S.E.2d 456, 459 (2009) (holding that the trial court did not err in its refusal to consider the borrower's defense of merger on appeal since the defense was outside the subject matter jurisdiction of the trial court); *In re Watts*, 38 N.C. App. 90, 95, 247 S.E.2d 427, 430 (1978) (holding that the trial court exceeded its authorized scope of review by invoking equitable jurisdiction).

Here, respondents incorrectly assert that the trial court denied their Arbitration Motion. That is not the case. Neither the clerk nor the trial court judge ruled on the Arbitration Motion. Since the substitute trustee initiated foreclosure proceedings against respondents under a power of sale, both the clerk's and the trial court's scope of review was limited to issues related to the six findings specified in N.C. Gen. Stat. § 45-21.16. Respondents' argument concerning their right to arbitration was not pertinent to the six required findings. Consequently, the trial court properly refused to rule on respondents' Arbitration Motion.

We note that respondents should have raised their right to arbitrate in a motion to enjoin pursuant to N.C. Gen. Stat. § 45-21.34 (2009), which grants the trial court statutory authority and jurisdiction to issue a stay and enforce the arbitration agreement contained in the DOT. Pursuant to N.C. Gen. Stat. § 45-21.34, "prior to the time that the rights of the parties to the sale or resale becom[e] fixed[.]" a party may apply to enjoin the foreclosure sale "upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient[.]" (Emphasis added). "The hearing [before the clerk] was not intended to settle all matters in controversy between the mortgagor and mortgagee[.]" *Watts*, 38 N.C. App. at 94, 247 S.E.2d at 424. Therefore, for all other "matters," a party may seek relief

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under N.C. Gen. Stat. § 45-21.34 where the court's jurisdiction is much broader. In the case *sub judice*, respondents' Arbitration Motion constituted a "matter" that could be properly raised in a motion to enjoin pursuant to N.C. Gen. Stat. § 45-21.34. Thus, respondents chose the wrong statutory vehicle to assert their Arbitration Motion.

Next, respondents argue that the trial court erred in failing to issue findings of fact regarding its denial of respondents' Arbitration Motion. Respondents' argument is without merit because, as we noted previously, the trial court did not deny respondents' Arbitration Motion. Furthermore, had the trial court actually issued findings regarding respondents' Arbitration Motion, it would have exceeded its jurisdiction by addressing an issue not related to the six findings set forth in N.C. Gen. Stat. § 45-21.16(d).

Based on the foregoing, it is clear that respondents are appealing from an order that does not address respondents' Arbitration Motion. The trial court did not err in refusing to address the motion. We are, therefore, obliged to dismiss respondents' appeal.

Dismissed.

Judges THIGPEN and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. MARK ANTHONY COLLINS

No. COA11-529

(Filed 6 March 2012)

Motor Vehicles—license checkpoint—evasion—stopped elsewhere—validity of checkpoint irrelevant

An order in an impaired driving prosecution granting defendant's motion to suppress evidence obtained after defendant was stopped was remanded where defendant turned into a driveway short of a license checkpoint and the trial court granted the motion based on the checkpoint having been conducted without written authorization. Defendant was not stopped at the checkpoint and *White v. Tippett*, 187 N.C. App. 285, was controlling. The case was remanded for a determination of whether defendant was unconstitutionally stopped at the residence.

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[219 N.C. App. 374 (2012)]

Appeal by the State from order entered 23 November 2010 by Judge D. Jack Hooks, Jr. in Columbus County Superior Court. Heard in the Court of Appeals 26 October 2011.

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

The McGougan Law Firm, by Will M. Callihan, Jr., for defendant-appellee.

GEER, Judge.

The State appeals from an order granting defendant's motion to suppress on the grounds that a checkpoint, which defendant attempted to evade, was unlawful under N.C. Gen. Stat. § 20-16.3A (2011). Under *White v. Tippett*, 187 N.C. App. 285, 652 S.E.2d 728 (2007), however, because defendant did not actually stop at the checkpoint, its invalidity was immaterial to whether an officer had sufficient reasonable suspicion when stopping defendant once defendant drove into a residential driveway to avoid the checkpoint. We, therefore, vacate the order granting the motion to suppress and remand for further findings of fact and conclusions of law on the constitutionality of the stop of defendant.

Facts

The evidence presented by the State at the motion to suppress hearing tended to show the following. On 3 September 2008, Troopers Jeff Hammonds and Scott Floyd of the N.C. State Highway Patrol set up a checkpoint to check for individuals driving with revoked driver's licenses. They had verbal permission from their supervisor as to the pattern of checking and the location.

At approximately 3:15 p.m., defendant was driving west toward the checkpoint. About a hundred yards before the checkpoint, defendant turned left into a residential driveway. Trooper Hammonds left the checkpoint and parked behind defendant in the driveway, with lights still flashing. Trooper Hammonds followed defendant because Trooper Hammonds knew the people who lived at the residence, and defendant did not live there.

Defendant was knocking on the door when Trooper Hammonds rolled his window down and asked defendant what he was doing. Defendant said that he had heard somebody in the area was hiring, and he was trying to see if the residents of the house had a job for him. Defendant was on the porch during this conversation, standing

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a distance of about 50 feet from Trooper Hammonds, but then came off the porch and walked toward the trooper.

When defendant got close to Trooper Hammonds, the trooper smelled a moderate odor of alcohol and noticed that defendant had red, glassy eyes. Trooper Hammonds asked defendant if he had a driver's license, and defendant answered affirmatively. When defendant could not produce his driver's license, he gave the trooper his son's driver's license, a credit card, a social security card, and a military ID. Defendant told Trooper Hammonds that he must have left his driver's license at home.

At that point, Trooper Hammonds asked defendant if he had been drinking and where he had been drinking. Defendant answered that he had been drinking earlier that day. Trooper Hammonds then asked defendant to come back to the highway patrol vehicle so that Trooper Hammonds could give him a road side test. The record does not clearly indicate what happened after that request although defendant was, that same day, arrested and charged with driving while impaired ("DWI") and driving with a revoked license.

Defendant was initially tried in district court where he moved to suppress all evidence obtained when defendant was stopped without reasonable articulable suspicion. Defendant further contended that the checkpoint was unconstitutional and violated policy and procedures of the N.C. State Highway Patrol. The district court denied his motion to suppress and found defendant guilty of DWI and driving with a revoked license.

On appeal to superior court, defendant renewed his motion to suppress. At the hearing on the motion, Trooper Hammonds was the only witness to testify. Defendant presented no evidence. Following the hearing, the trial court entered an order finding, as pertinent to this appeal, that Troopers Hammonds and Floyd obtained only oral permission to set up a driver's license checking station even though the Highway Patrol had a written policy adopted pursuant to N.C. Gen. Stat. § 20-16.3A that mandated written approval prior to establishing a checkpoint. Based on those findings, the trial court concluded that the checking station "was in violation of the Highway Patrol's written guidelines in that it was conducted without written authorization" and that a violation of N.C. Gen. Stat. § 20-16.3A was grounds for a motion to suppress.

The trial court then concluded that all evidence obtained as a result of the invalid checking station must be excluded. It found that

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“Trooper Hammond’s attention was drawn to the defendant as a result of Defendant turning left prior to reaching the unauthorized checking station. This led to the Trooper’s belief and suspicion that Defendant turned left to avoid the unauthorized checking station.” It then concluded that the “actions taken to avoid an unlawful checking station could not lawfully constitute reasonable suspicion to stop defendant or probable cause for any arrest.”

Based on these conclusions, the trial court granted defendant’s motion to suppress. On or about 6 December 2010, the State filed a certification pursuant to N.C. Gen. Stat. § 15A-979(c) (2009) that “the appeal is not taken for the purpose of delay and that the evidence is essential to the case.” The State timely appealed to this Court.

Discussion

Our review of a trial court’s order on a motion to suppress “is strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Findings of fact not challenged on appeal are binding on this Court. *State v. Brown*, 199 N.C. App. 253, 256, 681 S.E.2d 460, 463 (2009). On the other hand, the 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).

In this case, the State contends that the trial court erred in granting the motion to suppress because the validity or invalidity of the driver’s license checkpoint was immaterial since defendant was not stopped at the checkpoint, but rather was stopped at a residential location before he ever got to the checkpoint. The State contends that this Court’s decision in *White v. Tippett*, 187 N.C. App. 285, 652 S.E.2d 728 (2007), is controlling.

In *White*, the petitioner challenged the suspension of her driving privileges by the North Carolina Department of Motor Vehicles due to her willful refusal to submit to an intoxilizer test. *Id.* at 286, 652 S.E.2d at 729. The petitioner had stopped at a checkpoint, but, before an officer could speak with her, drove off. *Id.* at 287, 652 S.E.2d at 729. An officer followed her and, when she exited her vehicle, found her to have a smell of alcohol and red, glassy eyes. *Id.* The petitioner

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was arrested when she registered a 0.10 on two Alcosenser tests and willfully refused to take an intoxilizer test. *Id.*

The petitioner made two arguments to the superior court: “First, that the checkpoint was unconstitutional, and second, that the officer lacked reasonable grounds to believe she had committed the offense for which she was arrested.” *Id.* at 288, 652 S.E.2d at 729. The Court rejected the petitioner’s first argument, holding that “the constitutionality of certain types of checkpoints . . . applies only where the petitioner or defendant has in fact been stopped at a checkpoint. Here, petitioner was not stopped at the checkpoint” *Id.*, 652 S.E.2d at 730.

The Court observed that “[w]hile the validity of the checkpoint is not at issue here, petitioner’s avoidance of the checkpoint is relevant to her next argument” that the officer lacked reasonable grounds to believe she had committed the offense for which she was arrested. *Id.* The Court concluded as to this second issue:

[A]n officer pursued a person who had evaded—intentionally or by accident—a checkpoint and come to a stop in a residential driveway. The officer then approached the stopped car and spoke to the occupants. At that point, from a combination of the driver’s evasion of a checkpoint, the odor of alcohol surrounding the driver, and a brief conversation with the driver, the officer had reasonable grounds to believe that the driver had committed an implied-consent offense.

Id. at 289, 652 S.E.2d at 730.

We agree with the State that *White* is controlling. This Court squarely held that the validity of a checkpoint is not relevant in deciding whether an officer had reasonable grounds to stop a driver when the driver was not actually stopped at the allegedly invalid checkpoint. Since defendant, in this case, evaded the checkpoint, the trial court’s determination that the invalidity of the checkpoint required exclusion of evidence obtained from the later stop cannot be reconciled with *White*. We must vacate the trial court’s order.¹

Although the trial court erred in its legal conclusion that the invalidity of the checkpoint ended the inquiry for purposes of the motion

1. As case law supports the proposition that defendant was not stopped at the checkpoint and, therefore, that the lawfulness or unlawfulness of the checkpoint is not an issue, we decline to address the State’s contention that the violation of a state agency’s internal guidelines was not a basis for granting a motion to suppress.

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to suppress, the question remains whether Trooper Hammonds had a reasonable articulable suspicion to stop defendant at the residence. *See id.* (after concluding that the validity of the checkpoint was immaterial, holding that court still needed to address whether trooper had reasonable grounds to believe an implied consent offense had occurred).

While the State contends that defendant's encounter with Trooper Hammonds was consensual, and defendant contends that Trooper Hammonds had no reasonable articulable suspicion before the investigatory stop occurred and, therefore, defendant was illegally seized, these arguments were not resolved by the trial court in its order. Although the trial court made findings of fact regarding what occurred after defendant turned into the residential driveway, those findings were made under the erroneous assumption that the invalidity of the checking station was dispositive of the motion to dismiss. It is well established that "[f]acts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light." *Helms v. Rea*, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973) (quoting *McGill v. Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939)).

Consequently, we decline to address in the first instance whether Trooper Hammonds stopped defendant or had the necessary reasonable suspicion to stop defendant. Rather, we remand to the trial court for a determination whether defendant was unconstitutionally stopped at the residence. Depending on the facts that the trial court finds on remand, the court could determine that no unconstitutional stop occurred. *See State v. Foreman*, 351 N.C. 627, 632-33, 527 S.E.2d 921, 924 (2000); *State v. Bowman*, 193 N.C. App. 104, 107-08, 666 S.E.2d 831, 834 (2008). We, therefore, vacate the order and remand for further proceedings.

Reversed and remanded.

Judges STEELMAN and BEASLEY concur.

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[219 N.C. App. 380 (2012)]

TIMOTHY ROSE, EMPLOYEE, PLAINTIFF v. N.C. DEPARTMENT OF CORRECTION,
EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT SERVICES, SERVICING
AGENT), DEFENDANT

No. COA11-780

(Filed 6 March 2012)

1. Workers' Compensation—back injury—pain developing gradually

The Industrial Commission did not err in a workers' compensation case by affirming the award of the Deputy Commissioner for temporary total disability compensation for a back injury where the pain from the injury developed gradually over a period of time. It was undisputed that plaintiff fell and suffered an injury while at work, and the injury and the pain did not have to be simultaneous.

2. Workers' Compensation—back injury—fall as contributing factor

The record in a workers' compensation case contained sufficient evidence to support a finding that plaintiff's fall was a contributing or a causative factor to his injury. Plaintiff's medical expert concluded to a reasonable degree of medical certainty that plaintiff's fall was the cause of his lower back injury.

Appeal by defendant from opinion and award entered 25 February 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 December 2011.

Law Offices of James Scott Farrin, by Barry C. Jennings and Douglas Berger, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Karissa J. Davan, for defendant-appellant.

HUNTER, Robert C., Judge.

The North Carolina Department of Correction (the "DOC") appeals from the 25 February 2011 opinion and award of the Full Commission of the North Carolina Industrial Commission. In that opinion and award, the Full Commission affirmed an award by the Deputy Commissioner of temporary total disability compensation to Timothy Rose ("plaintiff"). The DOC alleges that plaintiff failed to establish a causal connection between a compensable injury and the

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back pain for which he seeks compensation. Consequently, the DOC alleges the Full Commission erred in affirming the Award and Opinion of the Deputy Commissioner because: (1) the Full Commission's findings of fact are not supported by competent evidence, and (2) the Full Commission's conclusions of law are contrary to North Carolina caselaw. After careful review, we affirm the opinion and award of the Industrial Commission.

Background

Plaintiff began working for the DOC in 2007 and was employed as a correctional officer at the time he sustained an injury at work on 3 February 2008. On that date, plaintiff fell forward while walking up the stairs and struck his right knee on one of the stairs. That same day, plaintiff filed an Employee Initial Report of Injury reporting an injury to his right knee. The night of his fall, plaintiff was treated for pain in his right knee. Plaintiff later testified that upon striking his knee he felt an immediate sensation of pain "that went from [his] butt cheek down—all the way down to [his] foot."

Plaintiff received treatment at the local hospital over the next month and began seeking treatment from Dr. George Miller, a board certified orthopedic surgeon, in March 2008. On 27 March 2008, plaintiff reported pain in his right foot, left leg, and back pain. An MRI scan showed plaintiff had a disc protrusion that was pressing on the right L5 nerve in his spine. Dr. Miller referred plaintiff to Dr. Kurt Voos ("Dr. Voos"), also a board certified orthopedic surgeon.

Dr. Voos performed back surgery on plaintiff on 5 June 2008. However, plaintiff continued to have lower back and leg pain and has required continued narcotic medication. Dr. Voos determined plaintiff had reached maximum medical improvement with 10% permanent partial disability for his back.

On 29 April 2008, plaintiff's employer denied compensation for plaintiff's lower back condition. Plaintiff's workers' compensation claim was heard on 9 March 2009. Deputy Commissioner Ledford filed an opinion and award on 29 July 2010 concluding plaintiff was entitled to benefits for injuries to his lower back and his right knee. The DOC appealed to the Full Commission, which, on 25 February 2011, affirmed the Deputy Commissioner's decision finding, *inter alia*, that: plaintiff's 3 February 2008 accident

was a significant contributing or causative factor in plaintiff's development of a disc bulge at L4-L5. . . . The Full Commission

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finds by the greater weight of the medical evidence, that plaintiff's back pain did not develop immediately at the time of the fall and that fact does not negate the casual connection to the accident.

Plaintiff was awarded temporary total disability of \$355.52 per week from 27 March 2008 until further order of the Industrial Commission as well as medical expenses resulting from the injuries. The DOC appeals from the decision of the Full Commission.

Our 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. This [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (internal citation omitted) (quoting *Anderson v. Lincoln Const. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

Discussion

[1] The thrust of the DOC's first argument is that a back injury is not a compensable injury if the *symptoms* of the injury developed gradually over a period of time. We disagree.

In support of its argument, the DOC relies on *Chambers v. Transit Mgmt.*, 360 N.C. 609, 618, 636 S.E.2d 553, 558 (2006). In *Chambers*, the North Carolina Supreme Court concluded the evidence in that case was insufficient to establish the plaintiff suffered a "specific traumatic incident" as required by N.C. Gen. Stat. § 97-2(6). Section 97-2(6) defines an "injury" under the Workers' Compensation Act, in pertinent part:

With respect to back injuries, however, where injury to the back arises out of and in the course of the employment and *is the direct result of a specific traumatic incident* of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

N.C. Gen. Stat. § 97-2(6) (2009) (emphasis added). The *Chambers* Court noted prior caselaw established that a "specific traumatic incident" under section 97-2(6) "means the 'injury must not have developed gradually but must have occurred at a cognizable time.'"

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Chambers, 360 N.C. at 618, 636 S.E.2d at 558 (emphasis added) (quoting *Bradley v. E.B. Sportswear, Inc.*, 77 N.C. App. 450, 452, 335 S.E.2d 52, 53 (1985)).

In light of *Chambers*, the DOC argues plaintiff's back condition is not compensable because plaintiff's evidence establishes he did not report back pain until approximately six weeks after his fall. The DOC's argument, however, incorrectly applies our Supreme Court's reasoning in *Chambers*.

The distinguishing factor of *Chambers* is that the plaintiff was seeking compensation for an injury that was the result of "no particular inciting event." *Id.* at 617, 636 S.E.2d at 558. The plaintiff "presented no evidence linking [his] pain to the occurrence of an injury." *Id.* at 618, 636 S.E.2d at 559. Thus, the Chambers Court concluded the plaintiff failed to establish the injury was "the direct result of a specific traumatic incident" and 'causally related to such incident.' *Id.* at 619, 636 S.E.2d at 559 (quoting N.C. Gen. Stat. § 97-2(6) (2005)).

The DOC appears to base its reliance on *Chambers* on the fact that the plaintiff in that case described a "gradual onset" of pain. *Id.* at 617, 636 S.E.2d at 558. The *Chambers* Court recognized, however, that a compensable "injury must not have developed gradually." *Id.* at 618, 636 S.E.2d at 558 (citation omitted and emphasis added). The Court did not conclude that the gradual onset of pain would be determinative of the compensability of a claim, noting that pain "as a general rule, [is] the result of a 'specific traumatic incident.'" *Chambers*, 360 N.C. at 619, 636 S.E.2d at 559 (quoting *Roach v. Lupoli Constr. Co.*, 88 N.C. App. 271, 273, 362 S.E.2d 823, 824 (1987)). Rather, the *Chambers* Court concluded that the gradual onset of the plaintiff's pain "without more, does not establish evidence of a specific traumatic incident." *Id.* (emphasis added).

Here, it is undisputed that plaintiff fell and suffered an injury to his knee while at work. *Chambers*, therefore, does not, as a matter of law, require the conclusion that plaintiff failed to establish a "specific traumatic incident" as the DOC contends. As this Court stated in *Roach*:

Just because [the plaintiff] felt pain for the first time hours after the time he alleges he injured himself, does not mean that the "specific traumatic incident" could not have occurred when he says it did. Logic dictates that injury and pain do not

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have to occur simultaneously for [the plaintiff] to establish that he sustained a compensable injury

88 N.C. App. at 273, 362 S.E.2d at 825. The DOC's argument is overruled.

[2] The remaining issue raised by the DOC is whether the record contains competent evidence to support the Full Commission's finding that plaintiff's 3 February 2008 fall was a "contributing or causative factor" in plaintiff's back injury. We conclude it does.

It is the plaintiff that bears the burden of establishing a causal connection between his injury and an accident arising out of and suffered in the course of employment. *Gray v. RDU Airport Auth.*, ___ N.C. App. ___, ___, 692 S.E.2d 170, 174 (2010). The DOC argues plaintiff has failed to meet his burden because the testimony of his medical expert as to the cause of plaintiff's injury was no more than a guess or mere speculation.

In cases of "complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003). The evidence upon which a medical expert bases his or her opinion as to causation "must be such as to take the case out of the realm of conjecture and remote possibility." *Id.* (citation and quotation marks omitted). The entirety of the evidence must establish a "reasonable degree of medical certainty" as to causation. *Id.* at 234, 581 S.E.2d at 754.

Here, plaintiff's medical expert, Dr. Voos, testified in his deposition as follows:

[Counsel]: Well, more likely than not *to a reasonable degree of medical certainty*, can you relate all of the problems that [plaintiff] had based on all the different scenarios that we've talked about today back to the February 3 incident?

[Dr. Voos]: I won't speak to the knee. I don't know if he ever had anything done with the knee pain per say but *I would say for his back yes.* (Emphasis added.)

Thus, the record establishes that plaintiff's medical expert concluded to a "reasonable degree of medial certainty" that plaintiff's fall on 3 February 2008 was the cause of his lower back pain. The DOC's argument is overruled.

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In summary, the record contains competent evidence to support the Full Commission's findings of fact and justifies its conclusions of law. The opinion and award of the Industrial Commission is affirmed.

Affirmed.

Judges GEER and HUNTER, Jr., concur.

STATE OF NORTH CAROLINA v. CURTIS LEON FIELDS

No. COA11-613

(Filed 6 March 2012)

Search and Seizure—traffic stop—weaving in lane—reasonable suspicion

The trial court properly denied defendant's motion to suppress the results of a traffic stop in a driving while impaired prosecution where defendant was weaving in his lane, the weaving was characterized by the officer as "bouncing," and oncoming drivers were taking evasive maneuvers.

Appeal by defendant from order entered 17 November 2010 by Judge William R. Pittman and judgment entered 23 February 2011 by Judge W. Allen Cobb, Jr. in Sampson County Superior Court. Heard in the Court of Appeals 9 November 2011.

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

Mary McCullers Reece for defendant-appellant.

GEER, Judge.

Defendant Curtis Leon Fields appeals from his convictions for habitual driving while impaired ("DWI") and driving while license revoked. On appeal, defendant contends that the trial court erred in denying his motion to suppress when, defendant argues, the police officer lacked a reasonable articulable suspicion to stop him. We hold that the order denying the motion to suppress was amply supported by the trial court's uncontested findings that defendant's weaving in his own lane was sufficiently frequent and erratic to prompt evasive

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maneuvers from other drivers. The trial court, therefore, did not err in denying the motion to suppress.

Facts

At the hearing on defendant's motion to suppress and at trial, the State's evidence tended to show the following facts. On 8 May 2010, Deputy Sheriff Joshua Akers of the Sampson County Sheriff's Department observed a white Chevrolet Metro automobile with dim taillights while he was going to lock up the post office in Garland, North Carolina. He called Deputy Sheriff Austin Kelly Coleman and alerted him regarding the automobile.

Deputy Coleman followed the car for three quarters of a mile to a mile and observed that the driver, subsequently identified as defendant, was driving erratically. Defendant was weaving within his lane of travel constantly and drove on the center line at least once. There was a high level of traffic that evening, and Deputy Coleman stopped defendant when he observed oncoming drivers pulling over to the side of the road in reaction to defendant's driving.

It was approximately 10:30 p.m. when Deputy Coleman pulled over defendant. When Deputy Coleman approached defendant's car, he smelled a strong odor of alcohol coming from the vehicle and from defendant's person.

Deputy Coleman called Deputy Akers for backup. Deputy Akers, who believed defendant appeared intoxicated, obtained defendant's consent to search his vehicle. In the car, Deputy Akers found an open container of malt liquor as well as other alcohol. Deputy Akers then asked defendant and his passengers to get out of the car.

Although defendant performed fairly on three field sobriety tests, Deputy Coleman formed the opinion that defendant had consumed enough alcohol so as to impair his physical and mental faculties. Deputy Coleman charged defendant with DWI and driving with his license revoked and transported defendant to the Sampson County Sheriff's Office. An intoxilyzer test was performed at 12:44 a.m., and defendant registered .13 grams of alcohol per 210 liters of breath.

Defendant was indicted for driving with his license revoked and habitual DWI on 12 July 2010. The trial court denied defendant's motion to suppress evidence obtained as a result of the traffic stop in an order entered on or about 17 November 2010. The jury convicted defendant of DWI and driving with his license revoked, and defendant

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stipulated to three prior DWI convictions for purposes of the habitual DWI indictment. The trial court sentenced defendant to a presumptive-range term of 24 to 29 months imprisonment. Defendant timely appealed to this Court.

Discussion

Defendant contends that Deputy Coleman lacked reasonable suspicion to justify his traffic stop of defendant and that the trial court, therefore, should have granted his motion to suppress. He further asserts that in the absence of the evidence obtained as a result of the stop, insufficient evidence existed to support his conviction, and the trial court should have granted defendant's motion to dismiss.

"The scope of review of the denial of a motion to suppress is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Bone*, 354 N.C. 1, 7, 550 S.E.2d 482, 486 (2001) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). The trial court's conclusions of law are fully reviewable on appeal. *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Under the Fourth Amendment, a police officer is permitted to "conduct a brief investigatory stop of a vehicle and detain its occupants without a warrant[.]" *State v. McArn*, 159 N.C. App. 209, 212, 582 S.E.2d 371, 374 (2003). However, "in order to conduct a warrantless, investigatory stop, an officer must have reasonable and articulable suspicion of criminal activity." *Hughes*, 353 N.C. at 206–07, 539 S.E.2d at 630. "The reasonable suspicion must arise from the officer's knowledge prior to the time of the stop." *Id.* at 208, 539 S.E.2d at 631.

Reasonable suspicion requires "a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.'" *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10, 109 S. Ct. 1581, 1585 (1989)). "[T]he overarching inquiry when assessing reasonable suspicion is always based on the *totality* of the circumstances." *State v. Maready*, 362 N.C. 614, 619, 669 S.E.2d 564, 567 (2008).

In its order, the trial court made the following findings pertinent to whether Deputy Coleman had reasonable suspicion to stop defendant:

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4. Deputy Coleman thereafter encountered a white Chevrolet Metro operating on Garland Highway with dim tail lights.

5. While following [defendant's] vehicle for three fourths of a mile to one mile, Deputy Coleman noticed the vehicle weaving erratically within its travel lane, weaving from the "fog line" to the center line several times.

6. Deputy Coleman described the movements of the vehicle as "like a ball bouncing in a small room."

7. Deputy Coleman observed that traffic was heavy in the opposite direction of the followed vehicle due to traffic going to a popular local lake.

8. Deputy Coleman became concerned that the driver's ability to control the vehicle was impaired.

9. Deputy Coleman became concerned for the safety of the oncoming traffic traveling in the direction opposite that of the followed vehicle after observing oncoming traffic taking evasive action by moving to the far right.

Since defendant does not challenge these findings of fact on appeal, they are " 'presumed to be correct.' " *State v. Pickard*, 178 N.C. App. 330, 334, 631 S.E.2d 203, 206 (2006) (quoting *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998)). Based on these findings of fact, the trial court concluded that "[t]he weaving within the lane, its character as 'bouncing', the dim lights, the evasive movements of the oncoming traffic when viewed through the eyes of a reasonable cautious officer, guided by his training and experience, taken in total provide at least a minimal level of objective justification for stopping the vehicle." The court, therefore, determined that Deputy Coleman had a reasonable, articulable suspicion to conduct an investigative stop of defendant's vehicle.

Defendant contends that the trial court's findings are insufficient to support the trial court's conclusion. He argues that, at most, the court's findings establish that Deputy Coleman observed defendant weaving within his own lane of travel, which was insufficient to support the traffic stop.

This Court has previously held that a "defendant's weaving within his lane, standing alone, is insufficient to support a reasonable suspicion that defendant was driving under the influence of alcohol." *State*

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v. Fields, 195 N.C. App. 740, 746, 673 S.E.2d 765, 769 (2009). In this case, however, the trial court did not find only that defendant was weaving in his lane, but rather that defendant's driving was " 'like a ball bouncing in a small room.' " The driving was so erratic that the officer observed other drivers—in heavy traffic—taking evasive maneuvers to avoid defendant's car.

Defendant's conduct in this case was distinguishable from that of the defendants in *Fields* and *State v. Peele*, 196 N.C. App. 668, 675 S.E.2d 682 (2009), the cases upon which defendant relies. In *Fields*, this Court concluded that there was insufficient evidence to support a traffic stop when the officer attempted to justify his stop based only on the fact that he saw the defendant weave within his lane three times over one and a half miles. 195 N.C. App. at 746, 673 S.E.2d at 769. In *Peele*, this Court found that an unreliable anonymous tip coupled with the defendant's weaving a single time did not create a reasonable suspicion to justify the stop. 196 N.C. App. at 671, 675 S.E.2d at 685. Thus, neither *Fields* nor *Peele* involved the level of erratic driving and potential danger to other drivers that was involved in this case.

We hold the trial court properly concluded that Officer Coleman had the "minimal level of objective justification" that our courts have required to constitute reasonable suspicion. *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70. Therefore, the stop was proper, and the trial court properly denied defendant's motion to suppress.

No error.

Judges STEELMAN and BEASLEY concur.

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[219 N.C. App. 390 (2012)]

STATE OF NORTH CAROLINA v. SAMUEL JAMES COOPER

No. COA11-809

(Filed 6 March 2012)

1. Confessions and Incriminating Statements—defendant’s statement—not coerced

Defendant’s confession to five murders was not coerced where he contended that police threatened to imprison his father unless he confessed, but the trial court’s findings sufficiently supported the conclusion that defendant’s confession was not coerced. The findings included that defendant was not told that his father would benefit from defendant’s statements and that defendant specifically acknowledged that no promises or threats were made.

2. Constitutional Law—right to remain silent—invocation

There was ample evidence in the record to support the trial court’s finding that defendant did not invoke his right to remain silent when he refused to talk to police about the murders other than to deny his involvement. Defendant’s continued assertions of innocence cannot be considered unambiguous invocations of his right to remain silent.

3. Constitutional Law—right to counsel—invocation

Defendant’s right to counsel was not violated where defendant invoked his rights, the police arrested his father, defendant re-initiated a conversation with police, and detectives took his statements. Although defendant contended that the police engaged in conduct that was the functional equivalent of re-initiating interrogation by “parading” his father in front of him, the trial court found that defendant was never promised that his father would benefit from any statement that he made and that finding had adequate support in the record.

4. Homicide—first-degree murder—requested instruction on deliberation denied—felony murder conviction

There was error in a first-degree murder prosecution in not giving defendant’s requested instruction on deliberation where defendant was convicted on the basis of premeditation and deliberation and felony murder.

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[219 N.C. App. 390 (2012)]

Appeal by Defendant from judgments entered 16 April and 20 April 2010 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 15 December 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Steven M. Arbogast, for the State.

Mark Montgomery for Defendant.

BEASLEY, Judge.

Samuel James Cooper (Defendant) appeals from judgments based on his convictions for robbery with a dangerous weapon and five counts of first degree murder. For the following reasons, we find no error.

On 21 November 2007, Defendant robbed the Garner Plaza branch of Bank of America while possessing and threatening the use of a firearm. After Defendant was apprehended, his weapon was seized; the State Bureau of Investigation later linked that weapon to five unsolved murders. Defendant initially denied involvement in the murders, but eventually confessed that he had committed all five. Between 10 December and 11 December 2007, Defendant was indicted for robbery with a dangerous weapon and five counts of first degree murder.

By motion dated 22 October 2009, Defendant moved to suppress “all statements made by the defendant which were obtained by the police in violation of defendant’s statutory and constitutional rights.” This motion was denied on 17 December 2009 by the Honorable Henry W. Hight, Jr. Defendant was found guilty of all charges by a Wake County jury on 6 April 2010. By judgments dated 16 April and 20 April 2010, Defendant was sentenced to 117 to 150 months imprisonment for the charge of robbery with a dangerous weapon and to life imprisonment without parole for all five counts of first degree murder. Defendant gave notice of appeal in open court.

I.

Defendant argues that the trial court erred in denying his motion to suppress his statements confessing to the murders because they were obtained in violation of his Fifth Amendment rights, and were the result of threats by the police. We disagree.

[1] First, we address Defendant’s argument that his confession was not voluntary because it was obtained through threats by police. It is

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well-established that “findings of fact made by a trial judge following a *voir dire* on the voluntariness of a confession are conclusive . . . if they are supported by competent evidence. Conclusions of law that are correct in light of the findings of fact are also binding on appeal.” *State v. Gainey*, 355 N.C. 73, 84, 558 S.E.2d 463, 471 (2002) (citations omitted). When determining whether a confession is voluntary, we look at the totality of the circumstances. *State v. Corley*, 310 N.C. 40, 47, 311 S.E.2d 540, 545 (1984). “The proper determination is whether the confession at issue was the product of improperly induced hope or fear. [Our Supreme] Court has held that an improper inducement must promise relief from the criminal charge to which the confession relates, and not merely provide the defendant with a collateral advantage.” *Gainey*, 355 N.C. at 84, 558 S.E.2d at 471 (citations and internal quotation marks omitted).

Defendant argues that his statements were coerced, because police threatened to imprison his father unless he confessed. The trial court concluded that “[n]o promises, offers of reward, or inducements for Defendant to make a statement were made.” The trial court further stated that “[n]o threat or suggested violence or show of violence to persuade defendant to make a statement were made. The arrest of the Defendant’s father was not wrongful pressure applied by law enforcement.”

In support of these conclusions, the trial court found that “at no point was the Defendant ever promised or told that his father would benefit by any statement from the Defendant.” The testimony of Detective Passley that he never told Defendant’s mother that if Defendant confessed, his father would be released supports this finding, as does the testimony of Defendant’s sister that nobody told her that if Defendant confessed, her father would be released. Additionally, the trial court found that “Defendant specifically acknowledged that ‘I understand and know what I am doing. No promises or threats have been made and no pressure or coercion of any kind has been used against me by any officer.’ ” These findings of fact are more than sufficient to support the trial court’s conclusion that Defendant’s confession was not coerced. Accordingly, this argument is overruled.

[2] We next address Defendant’s contention that his Fifth Amendment right to remain silent was violated. The law is clear that “[a]lthough custodial interrogation must cease when a suspect unequivocally invokes his right to silence, an ambiguous invocation

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does not require police to cease interrogation immediately.” *State v. Forte*, 360 N.C. 427, 438, 629 S.E.2d 137, 145 (2006) (citation omitted).

The trial court found that “Defendant did not invoke his right to counsel or his right to remain silent.” Defendant argues that he refused to talk to police about the murders, other than to deny his involvement; thus he invoked his right to remain silent. Defendant’s continued assertions of his innocence cannot be considered unambiguous invocations of his right to remain silent. *See Berghuis v. Thompkins*, ___ U.S. ___, ___, 176 L. Ed. 2d 1078, 1110-11 (2010) (extending the rule that a suspect invoking the right to counsel must do so “unambiguously” to invocation of the right to remain silent). We find ample evidence in the record to support the trial court’s finding that Defendant did not invoke his right to remain silent.

[3] Finally, we consider whether Defendant’s confession was improperly obtained after he invoked his right to counsel. Much like the right to remain silent, the invocation of the right to counsel must be unambiguous. *State v. Hyatt*, 355 N.C. 642, 655, 566 S.E.2d 61, 70 (2002). The trial court concluded that “defendant fully understood . . . his constitutional right to counsel[,]” and that he “freely, knowingly, intelligently, and voluntarily waived each of those rights and thereupon made the statement. . . .”

It is uncontroverted that after the arrest of his father, Defendant reached out to police for the purpose of resuming interrogation. However, Defendant contends that by arresting his father and “parading” him in front of Defendant, the police first engaged in conduct that was the functional equivalent of re-initiating interrogation after Defendant invoked his right to counsel. Although it appears that Defendant did invoke his right to counsel prior to making the statements at issue, because Defendant was the one who re-initiated the conversation with police, his right to counsel was not violated when detectives took his later statements. *See State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000).

The trial court found that Defendant was never promised that his father would benefit from any statement he made. This finding has adequate record support. Consequently, we decline to hold that the lawful arrest of Defendant’s father constituted the re-initiation of the interrogation of Defendant. Defendant initiated further conversation with police after invoking his right to counsel, and then waived his rights and confessed to the five murders. This statement was given willingly and knowingly, and as such Defendant’s motion to suppress was properly denied.

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[219 N.C. App. 390 (2012)]

II.

[4] Defendant also argues that the trial court erred in its instruction of the jury as to the meaning of “deliberation.” Defendant asked for a special instruction on the meaning of “deliberation” at trial, requesting to have the jury instructed that deliberation means not only that Defendant acted “in a cool state of mind,” as the pattern jury instruction states, but also that Defendant “weighed the consequences of his actions.” The trial court declined to modify the pattern jury instruction. Our Supreme Court has instructed that “the trial court’s omission of elements of a crime in its recitation of jury instructions is reviewed under the harmless error test.” *State v. Bunch*, 363 N.C. 841, 845, 689 S.E.2d 866, 869 (2010). Even assuming, *arguendo*, that Defendant’s contention that the trial court’s refusal to alter the jury instruction on deliberation amounted to an omission of an element of the charged crimes, we find that the error was harmless.

A trial court’s 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)). For each count of first degree murder Defendant was found guilty on the basis of malice, premeditation and deliberation and on the basis of the first degree felony murder rule. Thus, even if the trial court’s jury instruction was in error and that error did change the jury’s verdict as to the finding of deliberation, the error would still be harmless beyond a reasonable doubt because the jury’s verdict was based on two separate, independent grounds.

No Error.

Judges ERVIN and THIGPEN, JR. concur.

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[219 N.C. App. 395 (2012)]

STATE OF NORTH CAROLINA v. DENAE JITON BLOCKER

No. COA11-940

(Filed 6 March 2012)

Sentencing—motion to suppress prior conviction—not a collateral attack

The trial court abused its discretion by summarily denying defendant's motion to suppress a prior conviction for sentencing purposes as a collateral attack. Although defendant could not seek to overturn her prior conviction, N.C.G.S. § 15A-980 granted her the right to move to suppress the conviction's use in this case.

Appeal by Defendant from judgment dated 18 May 2011 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 9 February 2012.

Attorney General Roy Cooper, by Assistant Attorney General Christine A. Goebel, for the State.

Beaver, Holt, Sternlicht & Courie, P.A., by H. Gerald Beaver, for Defendant.

STEPHENS, Judge.

On 12 October 2009, Defendant Denae Jiton Blocker was indicted on 11 charges related to a hotel robbery. Blocker pled guilty to the consolidated charges pursuant to *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970), in Cumberland County Superior Court, the Honorable Gregory A. Weeks presiding. Following entry of her plea, but prior to sentencing, Blocker filed, pursuant to N.C. Gen. Stat. § 15A-980, a "Motion to Suppress Prior Conviction for Sentencing Purposes," seeking suppression of a 2007 conviction that Blocker alleged was obtained in violation of her right to counsel.¹ The trial court briefly heard arguments of counsel before denying Blocker's motion. Following presentation of evidence at the sentencing hearing, the trial court sentenced Blocker to 61 to 83 months imprisonment. Blocker appeals.

1. Section 15A-980 provides that "[a] defendant has the right to suppress the use of a prior conviction that was obtained in violation of his right to counsel if its use by the State [will] . . . [r]esult in a lengthened sentence of imprisonment." N.C. Gen. Stat. § 15A-980(a) (2011).

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The sole issue on appeal is whether the trial court erred in denying Blocker's motion to suppress the use of her 2007 conviction in sentencing her on the 2009 charges. Blocker argues that she was entitled to an evidentiary hearing on her motion and that the trial court's summary denial of her motion was erroneous. We agree.

In denying Blocker's motion, the trial court agreed with the State's contention that Blocker's motion, which alleged that she was indigent and did not knowingly and voluntarily waive counsel when she pled guilty to the 2007 conviction, was an impermissible *Boykin*-style "collateral attack"² on Blocker's 2007 conviction and that the motion "was a matter that . . . should have been raised by way of [a motion for appropriate relief] at the District Court level" where Blocker was previously convicted. However, as noted in a prior unpublished opinion by this Court, while a *Boykin* challenge cannot be used to collaterally attack a prior conviction, a defendant may contest, pursuant to section 15A-980, a trial court's use of that prior conviction at a sentencing hearing. *State v. Fulp*, No. COA97-1305 (N.C. App. Dec. 15, 1998). In that case, the defendant moved to suppress a prior conviction on the grounds that the defendant did not knowingly and voluntarily waive his right to counsel, and the trial court summarily denied the motion, concluding that it constituted an improper collateral attack on the prior conviction pursuant to *Boykin*. *Id.*, slip op. at 2. On appeal in *Fulp*, we held that the trial court erred in summarily denying the motion because the defendant did not seek to overturn, or collaterally attack, his prior conviction pursuant to *Boykin*, but rather sought to suppress the use of that conviction for sentencing. *Id.*, slip op. at 3. We, therefore, remanded the case to the trial court for a proper determination of the defendant's motion. *Id.* While we recognize that this prior unpublished decision is not binding, *United Servs. Auto. Ass'n v. Simpson*, 126 N.C. App. 393, 396, 485 S.E.2d 337, 339, *disc. review denied*, 347 N.C. 141, 492 S.E.2d 37 (1997), we find the reasoning persuasive. We further note that, on appeal after remand, both this Court and our

2. Pursuant to the United States Supreme Court's decision in *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969)—in which the Supreme Court overturned a defendant's convictions on the ground that the record did not show that the defendant was aware of the consequences of his plea—our courts have held that when a defendant, whether represented by counsel or not, enters a plea of guilty or no contest, the record must affirmatively show that the defendant did so voluntarily and understandingly. *E.g.*, *State v. Ford*, 281 N.C. 62, 65, 187 S.E.2d 741, 743 (1972). In *State v. Stafford*, 114 N.C. App. 101, 440 S.E.2d 410 (1994), this Court held that a challenge to a prior conviction pursuant to *Boykin* could not be made collaterally, but must be brought in the case in which the original conviction was obtained.

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Supreme Court addressed the propriety of the trial court's ruling on the defendant's motion following an evidentiary hearing, specifically the propriety of the trial court's findings regarding the voluntary and knowing nature of the defendant's waiver of representation at his prior conviction. *See State v. Fulp*, 355 N.C. 171, 558 S.E.2d 156, (2002); *State v. Fulp*, 144 N.C. App. 428, 548 S.E.2d 785 (2001). The implication from those rulings, which *are* binding on this Court, is that a motion to suppress a prior conviction that challenges the voluntary nature of a waiver of counsel for that prior conviction may properly be made before the sentencing judge for a subsequent conviction.

In this case, Blocker's motion and supporting affidavit raised factual issues regarding her alleged indigence and waiver of counsel, but the trial court summarily denied the motion on grounds that it constituted an impermissible collateral attack. That ruling by the trial court was erroneous. Although Blocker could not seek to overturn her prior conviction pursuant to *Boykin*, section 15A-980 grants Blocker the right to move to suppress that conviction's use in this case. The trial court's decision to summarily deny that motion to suppress as a collateral attack was an abuse of discretion. *See State v. Harvey*, 78 N.C. App. 235, 237, 336 S.E.2d 857, 859 (1985) (stating that the trial court's decision to summarily deny a motion to suppress that fails to set forth adequate legal grounds is vested in the sound discretion of the trial court). Accordingly, we vacate the action of the trial court and remand the case for proper determination of Blocker's motion.

VACATED and REMANDED.

Judges STROUD and BEASLEY concur.

FILIPOWSKI v. OLIVER

[219 N.C. App. 398 (2012)]

VERONICA FILIPOWSKI, PLAINTIFF v. MELISSA OLIVER (LIEU), DEFENDANT

No. COA11-996

(Filed 6 March 2012)

Appeal and Error—interlocutory orders and appeals—avoidance of trial—not a substantial right

The appeal of the denial of a motion to dismiss was from an interlocutory order and was dismissed where defendant did not demonstrate why the order affected a substantial right which would be lost if not reviewed prior to final judgment. Avoidance of trial was not a substantial right justifying immediate appellate review.

Appeal by defendant from order entered 13 May 2011 by Judge Anderson D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 7 February 2012.

Wilson Helms & Cartledge, LLP, by G. Gray Wilson and Lorin J. Lapidus, and Woodruff Law Firm, PA, by Carolyn Woodruff, for plaintiff-appellee.

Morrow Porter Vermitsky & Fowler, PLLC, by John C. Vermitsky and John F. Morrow, for defendant-appellant.

PER CURIAM.

Plaintiff, Veronica Filipowski, filed this action alleging claims for alienation of affections and criminal conversation against defendant Melissa Oliver (Lieu). Defendant moved to dismiss the claims, pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6), contending the torts of alienation of affections and criminal conversation infringe upon her rights under the First and Fourteenth Amendments to the Federal Constitution and the corresponding provisions of the North Carolina Constitution. The superior court denied defendant's motion to dismiss and defendant immediately appealed to this Court. Plaintiff's motion to dismiss the appeal, filed after the record was docketed but before briefing and argument, was denied. Having now had the opportunity to consider the parties' briefs and oral arguments, and pursuant to the authority granted us in *North Carolina National Bank v. Virginia Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 632 (1983), we conclude that plaintiff's earlier motion

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to dismiss the appeal was improvidently denied and we, *ex mero motu*, dismiss this appeal.

The order from which defendant appeals is clearly interlocutory. “Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, N.C.G.S. § 1-277(a) authorizes appeal to be taken from any order or determination of a district or superior court that affects a substantial right. N.C. Gen. Stat. § 1-277(a) (2011). In evaluating whether appeal may be taken prior to final judgment, “[e]ssentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment.” *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736. To demonstrate that an order affects a substantial right, “[t]he [appellant] must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right.” *Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516, *disc. review denied*, 363 N.C. 653, 686 S.E.2d 515 (2009).

In this appeal, defendant is essentially asking this Court to decide the merits of the case disguised as an interlocutory appeal of an order affecting her substantial rights. Defendant has failed, however, to demonstrate why the order at issue affects a substantial right which will be lost if the order is not reviewed prior to a final judgment in the case. She argues only that the denial of her motion subjects her to the possibility of a lengthy and expensive trial. Our courts have held many times that avoidance of the time and expense of a trial is not a substantial right justifying immediate appellate review of an interlocutory order. *E.g.*, *Lee v. Baxter*, 147 N.C. App. 517, 520, 556 S.E.2d 36, 37-38 (2001).

Appeal dismissed.

Panel consisting of:

Chief Judge MARTIN, Judges HUNTER (ROBERT C.) and STEPHENS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 MARCH 2012)

BARBARINO v. CAPPUCINE, INC. No. 11-283	Cabarrus (10CVS1417)	Affirmed in Part and Reversed in Part
CANTILLANA v. FIVE OAKS HOMEOWNERS ASS'N No. 11-1048	Durham (11CVS2153)	Affirmed
CAPITAL ONE BANK v. ORBAN No. 11-904	Catawba (10CV2664)	Affirmed
CLARK v. PEPSI BOTTLING VENTURES No. 11-974	Ind. Comm. (W33098)	Affirmed
DAVIS v. MCCOMMONS No. 11-666	Union (05CVD2338)	Affirmed
FAIRWAY FOREST TOWNHOUSES v. FAIRFIELD SAPPHIRE VALLEY No. 11-942	Jackson (10CVS657)	Affirmed
GENTRY v. GENTRY No. 11-307	Madison (09CVD111)	Affirmed
HANES v. DARAR No. 11-627	Durham (09CVD4205)	As to Issue I: affirmed; Issue II: affirmed in part reversed and remanded in part; Issue III: affirmed; Issue IV: affirmed in part, reversed and remanded in part; Issue V: Reversed and remanded.
INSPECTION STATION v. N.C. DIV. OF MOTOR VEHICLES No. 11-688	Wake (09CVS24476)	Affirmed
JERNIGAN v. MCLAMB No. 11-1100	Sampson (03CVS686)	Affirmed
KIGHTS MEDICAL CORP. v. PICKETT No. 11-954	Wake (08CVS12075)	Affirmed
PROFESSIONAL SOLUTIONS v. RICHARD YEAGER & ASSOCS. No. 11-578	Mecklenburg (10CVS18264)	Reversed and Remanded

SMITH v. WAKE CNTY. GOV'T No. 11-1154	Ind. Comm. (W60926)	Affirmed
STATE v. ALLEN No. 11-670	Edgecombe (07CRS54622) (07CRS54637)	No Error
STATE v. BARRETT No. 11-932	Durham (10CRS57276)	No Error
STATE v. BLACKLEY No. 11-1133	Durham (10CRS7217)	No Error
STATE v. DANIELS No. 11-1032	Mecklenburg (09CRS210578)	No Error
STATE v. DAVIS No. 11-845	Guilford (08CRS99018-19)	No Error
STATE v. DRUMMER No. 11-1172	Johnston (04CRS58759)	Affirmed
STATE v. ERRICHELLO No. 11-857	Guilford (10CRS24465-66) (10CRS78042)	No Error
STATE v. FENNELL No. 11-1148	Pender (08CRS3155) (08CRS52362)	No prejudicial error; remanded for resentencing
STATE v. IMHOFF No. 11-871	Swain (10CRS50078)	No Error
STATE v. LAWRENCE No. 11-1083	Mecklenburg (08CRS251646)	Affirmed in part; remanded in part
STATE v. MARIN No. 11-481	Onslow (09CRS54523)	No Error
STATE v. MCFADGEN No. 11-978	Mecklenburg (09CRS204733) (09CRS204734) (09CRS204735)	No Error
STATE v. MOORE No. 11-487	Durham (07CRS53318)	No Error
STATE v. PARKS No. 11-1104	Guilford (08CRS51728)	No Error
STATE v. PITTMAN No. 11-1143	Nash (10CRS3568) (10CRS50263) (10CRS50264)	No Error and No Prejudicial Error

TAYLOR v. HOWARD TRANSP., INC. No. 11-812	Ind. Comm. (931701)	Dismissed
TAYLOR v. TAYLOR No. 11-258	Duplin (07CVD1170)	Affirmed in part, Vacated in part and Remanded
WRIGHT v. OAKLEY No. 11-426	Rowan (08CVS4035)	Affirmed

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[219 N.C. App. 403 (2012)]

IRENE PAIT, EMPLOYEE, PLAINTIFF v. SOUTHEASTERN GENERAL HOSPITAL,
EMPLOYER, NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION,
STATUTORY INSURER, DEFENDANTS

No. COA11-1286

(Filed 20 March 2012)

**1. Workers' Compensation—total and permanent disability—
temporary disability not supported**

The Industrial Commission erred in a workers' compensation case by denying defendants' request to have plaintiff determined to be both totally and permanently disabled. The Commission's findings of fact and conclusion of law as to the temporary nature of plaintiff's disability were not supported by any competent evidence in the record.

2. Workers' Compensation—hearing—total and permanent disability—standing—ripeness—motive irrelevant—joinder of beneficiaries unnecessary

The Industrial Commission did not err in a workers' compensation case by permitting a hearing on whether plaintiff was totally and permanently disabled. Defendants had standing to request a hearing on this issue as an employer or insurance carrier is permitted to request a hearing as to a plaintiff's benefits under the Workers' Compensation Act; the parties' dispute as to the extent of plaintiff's disability and defendants' liability was ripe for the Commission's hearing; defendants admitted motive to implicate the statute of limitations provision under N.C.G.S. § 97-38 was irrelevant to a determination by the Commission regarding plaintiff's disability; and joinder of all putative beneficiaries of plaintiff's potential death benefits claim was not necessary.

3. Workers' compensation—not awarded to defendants—no abuse of discretion

The Full Commission did not abuse its discretion in a workers' compensation case by failing to award attorney fees to defendants where the circumstances of the case, *i.e.*, that defendants, rather than plaintiff, were seeking a permanent and total disability determination, were unique.

Appeal by defendants from opinion and award entered 12 July 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 February 2012.

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[219 N.C. App. 403 (2012)]

R. James Lore for plaintiff appellee.

*Young Moore and Henderson P.A., by Angela Farag Craddock,
for defendant appellants.*

McCULLOUGH, Judge.

Southeastern General Hospital (“Southeastern”) and North Carolina Insurance Guaranty Association (“NCIGA,” collectively, “defendants”) appeal from an opinion and award of the Full Commission finding the evidence insufficient to prove that Irene Pait (“plaintiff”) is totally and permanently disabled and declining to award defendants attorney’s fees under N.C. Gen. Stat. § 97-88.1 (2011). We affirm in part, reverse in part, and remand for additional findings of fact consistent with this opinion.

I. Background

Plaintiff suffers from a compensable occupational lung disease resulting from her exposure to formalin in the course and scope of her employment by Southeastern on 9 March 1994. Plaintiff has been unable to return to any employment since the date of her injury, and she has been receiving weekly compensation for her compensable condition pursuant to a Form 21 Agreement approved by the Commission on 9 May 1994. Plaintiff has treated with Dr. Somnath Naik (“Dr. Naik”), a pulmonary specialist, since the date of her injury.

In September 2004, NCIGA assumed responsibility for paying plaintiff’s benefits from Southeastern’s original insurance carrier. After receiving and reviewing plaintiff’s file, NCIGA determined that plaintiff’s disability appeared to be total and permanent. Accordingly, in August 2006, NCIGA proffered to plaintiff a Form 26 Agreement stipulating to her entitlement to total and permanent disability compensation. Plaintiff refused the Form 26 Agreement.

On 30 October 2006, defendants filed a Form 33 Request that Claim be Assigned for Hearing, requesting the Commission to convene a hearing for the purpose of determining the extent of plaintiff’s disability. The matter was initially set for hearing on 20 February 2008.

On 31 January 2008, plaintiff filed a motion to dismiss defendants’ hearing request. On 5 February 2008, Deputy Commissioner Robert J. Harris (“Deputy Commissioner Harris”) entered an order denying plaintiff’s motion to dismiss. On 14 February 2008, plaintiff appealed Deputy Commissioner Harris’ order to the Full Commission. On 14 March 2008, the Full Commission denied plaintiff’s appeal as inter-

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locutory. On 20 March 2008, plaintiff filed a motion requesting that the Full Commission reconsider its 14 March 2008 order, but the Commission denied plaintiff's motion on 16 May 2008. Plaintiff appealed the Commission's 16 May 2008 order to this Court, and we likewise dismissed plaintiff's appeal as interlocutory. *Pait v. Southeastern Reg'l Hosp.*, No. COA08-955 (N.C. Ct. App. Apr. 21, 2009) (unpublished opinion).

Following plaintiff's unsuccessful appeal to this Court, the case was ordered to be returned to the docket for hearing. On 17 February 2010, plaintiff filed a motion to reconsider the order setting the case on the docket, which was denied by Commission Chair Pamela Young ("Chair Young") on 23 April 2010. Plaintiff then filed a motion to reconsider Deputy Commissioner Harris' 5 February 2008 order and to suspend the hearing on 30 June 2010. Plaintiff's motion was again denied by order on 19 July 2010.

A hearing in the matter was held before Deputy Commissioner John DeLuca ("Deputy Commissioner DeLuca") on 28 July 2010. At the hearing, plaintiff's medical records and the deposition testimony of Dr. Naik, plaintiff's treating physician, were received into evidence. In addition, defendants admitted their primary motive in seeking the present hearing was to obtain a final determination of disability to trigger the running of the statute of limitations period on possible death benefits claims under N.C. Gen. Stat. § 97-38 (2011). On 29 November 2010, Deputy Commissioner DeLuca filed an opinion and award, concluding that defendants were entitled to request a hearing to determine the extent of plaintiff's disability, that plaintiff is totally and permanently disabled based on the medical evidence presented, and that both parties' requests for attorney's fees under N.C. Gen. Stat. § 97-88.1 should be denied. Both parties appealed Deputy Commissioner DeLuca's opinion and award to the Full Commission.

On 12 July 2011, the Full Commission entered its opinion and award reversing the Deputy Commissioner's opinion and award by denying defendants' request to have plaintiff determined to be both totally and permanently disabled. The Full Commission also denied both parties' requests for attorney's fees under N.C. Gen. Stat. § 97-88.1. Defendants timely appealed from the Commission's opinion and award to this Court on 3 August 2011.

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

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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). The Commission’s findings of fact are conclusive on appeal if supported by any competent evidence. *Barbour v. Regis Corp.*, 167 N.C. App. 449, 454, 606 S.E.2d 119, 124 (2004). “The ‘Commission is the sole judge of the credibility of the witnesses and the [evidentiary] weight to be given their testimony[;]’ however, ‘findings of fact by the Commission may be set aside on appeal when there is a complete lack of competent evidence to support them.’” *Fonville v. General Motors Corp.*, 200 N.C. App. 267, 269-70, 683 S.E.2d 445, 447 (2009) (alterations in original) (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000)). 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. Defendants’ Challenge to the Commission’s Findings of Fact

[1] On appeal, defendants argue the Commission erred in its Findings of Fact numbers 8 and 9:

8. With respect to whether plaintiff is permanently and totally disabled, Dr. Somnath Naik, a pulmonary medicine physician, who has been treating plaintiff since 1992, agreed that he could not say to a reasonable degree of medical certainty that plaintiff’s condition is going to be permanent into the future because of the possibility that new drugs may come on the market to treat her condition. He acknowledged that he was aware that there are “certain drugs in the pipeline, including genetic drugs,” that may become available to improve plaintiff’s condition. He opined, however, that currently plaintiff is totally disabled as a result of her compensable condition.

9. The Full Commission finds, based upon the greater weight of the evidence, that plaintiff’s current incapacity to earn wages is total; however, the evidence is insufficient to prove that plaintiff is permanently and totally disabled.

Defendants argue these two findings of fact are not supported by competent evidence in the record, and therefore do not support the Commission’s conclusion to deny defendants’ request to determine that plaintiff is permanently and totally disabled. We agree.

In reviewing all the evidence in the record, we find no competent evidence to support the Commission’s findings of fact. As the Commission’s findings state, there is one instance in the deposition testimony

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where Dr. Naik “agreed that he could not say to a reasonable degree of medical certainty that plaintiff’s condition is going to be permanent into the future because of the possibility that new drugs may come on the market to treat her condition.” Specifically, on cross-examination at the close of Dr. Naik’s deposition, the following exchange occurred:

Q. [I]s it true that you are aware that other drugs are currently being developed by drug manufacturers and scientists to treat the condition that [plaintiff] needs?

A. There are some—they are working on genes and all that in genetic hospital treatment and modulation. But it’s all under research, and nothing is definite at this time whether it’s going to be helpful or not.

Q. Would it be fair to say that if one of these drugs comes to fruition and comes on the market, it could be a drug that dramatically improves her condition?

. . . .

A. I don’t know. I don’t know until I see the drug. We don’t know what is going to come, what is going to be off label. . . .

[A]nything which could prevent further inflammation or regress inflammation she already had would be helpful.

. . . .

Q. Would it be fair to say that if a genetic based drug comes on the market, that you cannot exclude the fact that it would dramatically improve her condition?

. . . .

A. I—as I said, I do not know what is going to come and how effective it will be. We can always keep that from the back when that happens.

Q. Would you concede that that is the intent of the drug manufacturers is to develop a genetic-based drug which would be pointed towards improving conditions of patients such as [plaintiff]?

A. That is the intent of any new drug, or any drug.

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Q. So in the sense when you say that her condition is permanent, would you not have to concede that that statement has to be qualified by the potential for a drug to come on the market during her lifetime which dramatically improves her condition?

. . . .

A. The condition is permanent in the sense she has not improved as we expect in terms of medical expectations. So when her condition has not improved, we call the condition as permanent. It's a term. It can change as new medical breakthrough occurs. And what is permanent today may not be permanent tomorrow.

Q. So when you say "permanent," you're looking back in time over the years that you've seen her, but you cannot say to a reasonable degree of medical certainty that it's going to be permanent into the future because the possibility of new drugs may come on the market; is that fair?

A. Yeah, I agree with that.

As the foregoing exchange reveals, Dr. Naik's testimony as to the "possibility" of future drugs which are currently being developed in laboratories and their potential to improve plaintiff's condition is based entirely on speculation. Dr. Naik even states during the exchange that he would have to "see" any drug that may come onto the market and that "nothing is definite at this time whether it's going to be helpful or not." Although he acknowledged the potential exists, Dr. Naik expressly stated that he doesn't know what type of drug will come out, how effective the drug will be, or if the drug could help improve plaintiff's condition.

Findings regarding the nature of an occupational disease, such as plaintiff's lung condition, "must ordinarily be based upon expert medical testimony." *Nix v. Collins & Aikman Co.*, 151 N.C. App. 438, 443, 566 S.E.2d 176, 179 (2002) (quoting *Norris v. Drexel Heritage Furnishings, Inc.*, 139 N.C. App. 620, 623, 534 S.E.2d 259, 262 (2000)). Further, it is well-settled that:

In cases involving complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury. However, when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not suf-

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ficiently reliable to qualify as competent evidence on issues of medical causation. [T]he evidence must be such as to take the case out of the realm of conjecture and remote possibility[.]

Holley v. ACTS, Inc., 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003) (emphasis added) (alterations in original) (internal quotation marks and citations omitted); see also *Rogers v. Lowe's Home Improvement*, 169 N.C. App. 759, 765, 612 S.E.2d 143 (2005) (“Expert opinion based merely upon speculation and conjecture does not constitute competent evidence of causation in cases involving complex medical issues beyond the ken of laypersons.” (internal quotation marks and citation omitted)).

Here, the testimony, and the Commission’s resulting findings of fact, reveal that any perceived “temporary” nature of plaintiff’s disability is based entirely on speculation that plaintiff’s lung condition could possibly improve in the future as a result of new drugs that may come onto the market. Such speculative expert testimony cannot support a finding that plaintiff’s disability as a result of her occupational lung disease is temporary.

Furthermore, “the Commission must concern itself with the claimant’s level of disability as it exists prior to and at the time of hearing.” *Carothers v. Ti-Caro*, 83 N.C. App. 301, 306, 350 S.E.2d 95, 98 (1986). “Nothing in the statute contemplates or authorizes an anticipatory finding by the Commission.” *Id.* Again, the Commission’s findings of fact, in addition to the testimony relied upon by the Commission, concerns only the possibility of future circumstances and does not address the circumstances of plaintiff’s condition and available medical treatment as they presently exist. In fact, the foregoing testimony expressly states plaintiff’s condition is permanent given that she has not improved medically “looking back in time over the years that [Dr. Naik has] seen her.” Accordingly, the Commission’s Finding of Fact number 8, based entirely on speculative and anticipatory testimony, is not supported by any competent evidence and therefore is erroneous as a matter of law.

Rather, the evidence in the record in its entirety supports a finding that plaintiff’s condition is permanent. On 20 October 1994, Dr. Naik opined that plaintiff was “permanently disabled.” Dr. Naik again opined on 12 July 1995 that plaintiff was “permanently disabled.” On 8 December 1995, Dr. Naik informed Southeastern’s prior insurance carrier of his opinion that plaintiff is not “a candidate for any kind of employment either now or in the future[.]” On 9 December 1996, Dr.

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Naik again informed Southeastern's prior insurance carrier that in his opinion, "[plaintiff] is permanently and totally disabled," and that he "do[es] not expect her to go back to work in the future." Finally, on 30 January 1997, a second physician, Dr. Allen Hayes, indicated his concurrence with Dr. Naik's assessment and opined that plaintiff would not return to "full-time gainful employment."

In addition, Dr. Naik testified in his deposition, prior to the foregoing exchange, that plaintiff remains unemployable as a result of her formalin exposure, that she cannot leave her house, and that she has remained unemployable since 1995, consistent with his opinions noted in plaintiff's medical records. Dr. Naik further testified unequivocally that plaintiff is "permanently disabled to work." Dr. Naik testified that on 8 December 2005, he found plaintiff's condition was not going to improve so that she could return to work in the future, and that by the end of 2000 he believed plaintiff "was not going to get any better than she was then. She's going to have some kind of problems all the time." Finally, in response to questioning, Dr. Naik agreed that "to a reasonable degree of medical certainty" his opinion is that plaintiff is "permanently and totally disabled from any type of employment." Accordingly, the Commission's Finding of Fact number 9 that the evidence is insufficient to establish that plaintiff is permanently and totally disabled is completely unsupported by the record. Aside from the speculative and anticipatory testimony cited by the Commission, there is absolutely no competent evidence in the record to support a determination that plaintiff's condition continues to be temporary in nature. Those findings of fact, therefore, cannot stand. Furthermore, because the Commission's conclusion of law that "the evidence does not prove that plaintiff is permanently and totally disabled as a result of her compensable injury" is not supported by any findings of fact nor any competent evidence in the record, it is in error as a matter of law.

IV. Issues Raised by Plaintiff

[2] We next address plaintiff's argument that alternative legal grounds require the Commission, and this Court, to reach the same effective result of denying defendants' request to have plaintiff determined totally and permanently disabled. Plaintiff essentially contends the Commission erred in permitting a hearing on this matter, raising three reasons why the Commission should not have conducted this hearing. First, plaintiff argues that defendants lack standing to request a hearing on this issue, contending that it is her right to choose the appropriate remedy for her disability under the Workers'

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Compensation Act, and therefore, defendants cannot force her to accept compensation for total and permanent disability. Second, plaintiff argues this issue is not a valid dispute under the Workers' Compensation Act because the parties reached an agreement as to plaintiff's benefits following her injury and all of plaintiff's compensation payments are current. Finally, plaintiff points to defendants' admitted motive in requesting the present hearing and argues that given this motive, the hearing requested by defendants requires the joinder of all putative beneficiaries of a potential death benefits claim in the event plaintiff dies as a result of her compensable injury. Plaintiff argues that, because joinder of these "necessary parties" is impossible while plaintiff is still alive, the Commission cannot properly convene the hearing requested by defendants. We address each of plaintiff's arguments in turn.

A. Standing of Defendants to Request Hearing

Under N.C. Gen. Stat. § 97-83 (2011), "upon the arising of a dispute under [the Workers' Compensation Act], either party may make application to the Commission for a hearing in regard to the matters at issue, and for a ruling thereon." *Id.* (emphasis added). In *Polk v. Nationwide Recyclers, Inc.*, 192 N.C. App. 211, 664 S.E.2d 619 (2008), this Court considered the same argument raised by plaintiff in the present case, "that defendant cannot force her to elect a remedy for her disability." *Id.* at 216, 664 S.E.2d at 623. In *Polk*, we held this reasoning was flawed because pursuant to N.C. Gen. Stat. § 97-83, as set forth above, an employer or insurance carrier is "permitted to request a hearing as to [a] plaintiff's benefits under the Act in the first place." *Id.*

Moreover, in *Effingham v. Kroger Co.*, 149 N.C. App. 105, 561 S.E.2d 287 (2002), this Court expressly held that once an injured employee reaches maximum medical improvement, "either party can seek a determination of permanent loss of wage-earning capacity." *Id.* at 114, 561 S.E.2d at 294 (emphasis added). Here, the dispute between the parties concerns only the proper classification of the extent of plaintiff's disability and the benefits owed to her therefor, and the record reveals some evidence that plaintiff's condition had reached maximum medical improvement prior to defendants' requesting the present hearing. Because the present dispute is a generalized dispute as to an injured worker's benefits, and given the evidence in the record, our decisions in *Polk* and *Effingham* control. Thus, we conclude defendants here had proper standing to request the present hearing under N.C. Gen. Stat. § 97-83.

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B. Ripeness and Case or Controversy

In the present case, defendants filed their hearing request to seek a determination by the Commission as to the extent of plaintiff's disability and their liability therefor. As implied in the previous discussion, a dispute regarding an injured worker's benefits is a valid case or controversy to be determined by the Commission. *See Polk*, 192 N.C. App. at 216, 664 S.E.2d at 623. The fact that defendants are current in their compensation payments to plaintiff has no bearing on the issue of plaintiff's continued disability and the extent of that disability. To the contrary, as we have already stated, once an injured employee reaches maximum medical improvement, "either party can seek a determination of permanent loss of wage-earning capacity." *Effingham*, 149 N.C. App. at 114, 561 S.E.2d at 294. As we noted above, there is competent evidence in the record indicating that plaintiff's condition had reached maximum medical improvement prior to defendants' requesting this hearing. Accordingly, the parties' dispute as to the extent of plaintiff's disability and defendants' liability therefor was ripe for the Commission's hearing.

Further, plaintiff's argument that a death benefits claim is not ripe because plaintiff is still alive is inapposite, as defendants did not seek, nor did the Commission purport to hear, any issues relating to plaintiff's beneficiaries' putative rights under N.C. Gen. Stat. § 97-38.

C. Joinder of Necessary Parties

We first note that the hearing conducted by the Commission in the present case concerns only plaintiff's condition as a result of her compensable injury. Defendants' motives for seeking the hearing are irrelevant to a determination by the Commission regarding plaintiff's disability for purposes of awarding benefits under the Workers' Compensation Act. Rather, a party's motives in requesting a hearing is more properly considered in making a determination as to whether the party requesting the hearing lacked reasonable grounds for purposes of awarding attorney's fees under N.C. Gen. Stat. § 97-88.1. *See, e.g., Meares v. Dana Corp.*, 193 N.C. App. 86, 94-95, 666 S.E.2d 819, 825-26 (2008). Nonetheless, plaintiff argues that, because defendants admitted their motive to implicate the statute of limitations provision under N.C. Gen. Stat. § 97-38, all putative beneficiaries of a death benefits claim under that statute are necessary parties that must be joined in order for the Commission to properly conduct the hearing in this matter.

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Death benefits under section 97-38 are a statutory right given to beneficiaries of an injured worker whose death results from a compensable injury or occupational disease. The statute imposes express time limitations on the accrual of death benefits claims. Specifically, under section 97-38, an employer must pay death benefits to an injured worker's beneficiaries, as defined under that section, only "[i]f death results proximately from [the] compensable injury or occupational disease and within six years thereafter, or within two years of the final determination of disability, whichever is later[.]" *Id.* When the parties are seeking a determination of an injured worker's disability status, the death benefits statute is not in issue, even in cases where a defendant's motive is to implicate that statute in the future. Rather, the purpose of a hearing regarding a determination of an injured worker's disability and the extent of that disability is to determine the rights of the plaintiff to receive compensation for his or her injury and the liabilities of the employer and its insurance carrier to pay the compensation owed for the injury. *See Chaisson v. Simpson*, 195 N.C. App. 463, 484, 673 S.E.2d 149, 164 (2009) ("'[T]he policy behind North Carolina's Workers' Compensation Act . . . [is] to provide a swift and certain remedy to an injured worker and to ensure a limited and determinate liability for employers.'" (alterations and omission in original) (quoting *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 16-17, 510 S.E.2d 388, 393 (1999))).

Plaintiff cites *Wray v. Woolen Mills*, 205 N.C. 782, 172 S.E. 487 (1934), in support of her contention that an injured worker's beneficiaries cannot be bound by the type of hearing requested by defendants in the present case. However, a review of the facts in *Wray* and the holding applicable to those facts reveals a contrary result. In *Wray*, a worker was injured in the course and scope of his employment on 28 November 1930. *Id.* at 782, 172 S.E. at 488. Under the Workers' Compensation Act in effect at that time, a claim for worker's compensation benefits must have been filed within one year of the accident. *Id.* at 783, 172 S.E. at 488. However, the injured worker filed his claim on 12 April 1932, failing to file within the time limits prescribed by the statute. *Id.* Thereafter, the injured worker died on 24 August 1932, and the injured worker's dependent mother filed a death benefits claim under the Workers' Compensation Act immediately thereafter. *Id.* Evidence produced at the hearing on the death benefits claim showed the injured worker's death was the proximate result of his injury at work. *Id.* at 782, 784, 172 S.E. at 488-89. Accordingly, the Commission awarded death benefits to the dependent mother under the Act. *Id.* at 783, 172 S.E. at 488.

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On appeal in *Wray*, the defendant employer argued the claim for death benefits was in effect an amendment to the original claim for worker's compensation benefits filed by the injured employee, and therefore, the claim should be barred under the statutory time limitations for filing worker's compensation claims. *Id.* However, our Supreme Court upheld the Commission, holding the death benefits claim was a distinct claim of the beneficiaries and was timely filed under the Act. *Id.* at 783-84, 172 S.E. at 488. Specifically, our Supreme Court stated:

[D]uring [the injured worker's] lifetime his dependents were not parties in interest to the proceeding he brought for the enforcement of his claim. Their right to compensation did not arise until his death and their cause of action was not affected by anything he did, not even to the extent of a reduction of their compensation by payments sought by him, because no such payments were made. The basis of their claim was an original right which was enforceable only after his death.

Id. Accordingly, *Wray* holds that a death benefits claim under the Workers' Compensation Act is a distinct claim to those beneficiaries upon the death of the injured worker. Notably, because the death benefits claim does not arise until the injured employee's death, as plaintiff is aware, the rights of the beneficiaries under the Act are not implicated until the injured employee's death. *See Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 93-94, 367 S.E.2d 335, 337 (1988). Moreover, the language in *Wray* specifically states that beneficiaries are "not parties in interest" to an injured worker's claim for benefits, which is the subject of the hearing requested by defendants in the present case. *Wray*, 205 N.C. at 783, 172 S.E. at 488.

In *Wall v. Sneed*, 13 N.C. App. 719, 187 S.E.2d 454 (1972), cited by plaintiff, this Court quoted our Supreme Court in defining a necessary party to a pending action: "A sound criterion for deciding whether particular persons must be joined in litigation between others appears in this definition: Necessary parties are those persons who have *rights* which must be ascertained and settled before the rights of the parties to the suit can be determined." *Id.* at 724, 187 S.E.2d at 457 (emphasis added) (quoting *Assurance Society v. Basnight*, 234 N.C. 347, 352, 67 S.E.2d 390, 395 (1951)). Furthermore:

[A] person must be joined as a party to an action if that person is "united in interest" with another party to the action. A person is "united in interest" with another party when that per-

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son's presence is necessary in order for the court to determine the claim before it without prejudicing the rights of a party before it or the *rights of others* not before the court.

Ludwig v. Hart, 40 N.C. App. 188, 190, 252 S.E.2d 270, 272 (1979) (emphasis added). Under these definitions, the putative beneficiaries of a death benefits claim are not "necessary parties" to a determination by the Commission as to the status of an injured worker's disability. These beneficiaries have no rights under the Act until the injured employee's death, and they are certainly not united in interest with the injured employee regarding the employee's lifetime worker's compensation benefits, as held by our Supreme Court in *Wray*. See *Booker v. Duke Medical Center*, 297 N.C. 458, 466-67, 256 S.E.2d 189, 195 (1979) (beneficiaries' right to compensation under Workers' Compensation Act is separate and distinct from rights of the injured employee and does not arise until injured employee's death).

The language implicated by the death benefits statute simply serves as a statute of limitations for those claims. *Kelly v. Duke Univ.*, 190 N.C. App. 733, 737, 661 S.E.2d 745, 747-48 (2008). When a dispute arises as to an injured worker's disability, the Commission may properly consider and determine the permanency of the injured worker's disability, without regard to any possible claim of death benefits by the putative beneficiaries. Were we to hold otherwise, the Commission would be required to ascertain and join as parties the putative beneficiaries of an injured worker any time the Commission considers a determination of total and permanent disability. As plaintiff concedes, all of an injured worker's putative beneficiaries under the Act are not ascertainable until the injured worker's death. Thus, the Commission could never make a final determination of disability in worker's compensation cases. Plaintiff's proposed interpretation of our laws, therefore, would lead to absurd results, contrary to the manifest purpose of our Legislature and the reason and purpose of the statutory language at issue. *Chaisson*, 195 N.C. App. at 479, 673 S.E.2d at 161.

Our Supreme Court has expressed the "overriding policy" of section 97-38 is to "provid[e] death benefits, at a fixed rate for a fixed period, to the individual dependents of an employee who has met with an *untimely and unexpected demise*." *Deese v. Lawn and Tree Expert Co.*, 306 N.C. 275, 281, 293 S.E.2d 140, 145 (1982) (emphasis added). Indeed, our Supreme Court noted that "it was never contemplated that the Workers' Compensation Act would . . . be the equivalent of general accident, health or *life insurance*. Instead, this

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legislation was enacted to afford certain and reasonable relief against *peculiar hardship*.” *Id.* at 281-82, 293 S.E.2d at 145 (emphasis added) (citations omitted). Plaintiff’s argument that any final determination of an injured worker’s disability by the Commission requires joinder of all putative beneficiaries of a death benefits claim is without merit.

V. Attorney’s Fees

[3] Finally, defendants argue the Commission abused its discretion in failing to award attorney’s fees under N.C. Gen. Stat. § 97-88.1. Defendants argue plaintiff showed no reasonable grounds for continuing to dispute defendants’ request for a hearing on the extent of her disability and for continuing to dispute the permanent nature of her disability.

N.C. Gen. Stat. § 97-88.1 provides the Commission with discretionary authority to assess costs and attorney’s 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.”). “Review of the Commission’s award or denial of attorney’s fees is limited and will not be overturned absent an abuse of discretion.” *Stevenson v. Noel Williams Masonry, Inc.*, 148 N.C. App. 90, 94, 557 S.E.2d 554, 557 (2001); *see also Sprinkle v. Lilly Indus., Inc.*, 193 N.C. App. 694, 702, 668 S.E.2d 378, 383 (2008) (“[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.” (alterations in original) (quoting *Lynch v. M.B. Kahn Constr. Co.*, 41 N.C. App. 127, 131, 254 S.E.2d 236, 238 (1979))). “An abuse of discretion arises when a decision is ‘manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.’” *Stevenson*, 148 N.C. App. at 94, 557 S.E.2d at 557 (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

Although the record evidence plainly indicates plaintiff’s condition is permanent and total, given the unique circumstances of this case, *i.e.*, that defendants, rather than plaintiff, are seeking a permanent and total disability determination, we hold the Commission did not abuse its discretion in refusing to award attorney’s fees to either party under these facts. *See Meares*, 193 N.C. App. at 95, 666 S.E.2d at 826 (“[I]t is somewhat unusual for the *defendants* in a workers’

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compensation case to request that an employee be declared permanently and totally disabled—normally the defendants oppose such a determination.”).

VI. Conclusion

We hold the Commission’s findings of fact and conclusion of law as to the temporary nature of plaintiff’s disability is not supported by any competent evidence in the record, and plaintiff’s alternative legal grounds for upholding the Commission’s award are without merit. We must, therefore, reverse that portion of the Commission’s opinion and award denying defendants’ request to have plaintiff determined to be both totally and permanently disabled. We remand the case to the Commission for entry of additional findings of fact as to plaintiff’s alleged permanent disability consistent with this opinion.

Because we discern no abuse of discretion in the Commission’s denial of attorney’s fees to both parties, we affirm that portion of the Commission’s opinion and award denying both parties’ requests for attorney’s fees under N.C. Gen. Stat. § 97-88.1.

Affirmed in part; reversed in part; and remanded.

Judges HUNTER (Robert C.) and THIGPEN concur.

STATE OF NORTH CAROLINA v. ELADIO AGUILAR-OCAMPO

No. COA11-1160

(Filed 20 March 2012)

1. Discovery—violation—failure to disclose evidence in timely manner—circumstances considered—no prejudice

The trial court did not commit prejudicial error in a traffick- ing in cocaine by possession and conspiracy to sell cocaine case by admitting into evidence the transcript of the recording of the drug transaction and the testimony of the interpreter who pre- pared that transcript. Although the State violated the rules of dis- covery by failing to disclose to the defense in a timely manner the contents of the transcript, the identity of the expert who pre- pared it, and the State’s intent to offer the interpreter’s expert opinion testimony, the trial court did not abuse its discretion by

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choosing not to strike the challenged evidence as the court considered the circumstances surrounding the alleged discovery violation both before and after admitting the challenged evidence. Further, even assuming *arguendo* that the trial court erred in allowing the transcript and the testimony into evidence, defendant failed to show he was prejudiced by the error.

2. Drugs—trafficking by possession of cocaine—conspiracy to sell cocaine—jury instructions—adequately contained substance of defendant’s requested instruction

The trial court did not err by denying defendant’s request for a special instruction to the jury on the word “knowingly,” as it appears in the elements of the offenses for trafficking by possession and conspiracy to sell cocaine. The instructions given by the trial court, when read as a whole, adequately contained the substance of defendant’s requested instruction for an explanation that defendant must have intentionally and voluntarily participated in the crimes.

Appeal by defendant from judgment entered 4 August 2010 by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 21 February 2012.

Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett-Baker, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant appellant.

McCULLOUGH, Judge.

On 4 August 2010, Eladio Aguilar-Ocampo (“defendant”) was convicted of trafficking cocaine by possession and conspiracy to sell cocaine. On appeal, defendant contends the trial court erred in admitting certain evidence in violation of the discovery rules and in denying his request for a special jury instruction on the knowledge element of both offenses. We hold defendant received a fair trial free from prejudicial error.

I. Factual and Procedural Background

In September 2009, officers with the Raleigh Police Department’s career criminal unit arrested James Joseph McMillan (“McMillan”) for drug offenses involving selling cocaine to suspected local gang members. Federal investigators took custody of McMillan, and McMillan

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agreed to cooperate with Raleigh police in investigating a local drug organization to help with his federal sentence.

McMillan told police his primary source for cocaine was Luis Nunez Garcia (“Luis”). McMillan also mentioned Luis’s brother, Manuel Nunez Garcia (“Manuel”). The police focused their investigation on Luis. Using McMillan as a confidential informant, police officers arranged to make a controlled purchase of cocaine from Luis, with the ultimate objective of learning more about Luis and his operation and identifying more targets up the supply chain before arresting Luis. McMillan’s primary contact in the Raleigh Police Department was Officer Keith Heckman (“Officer Heckman”).

On 10 December 2009, McMillan made arrangements by phone to purchase one ounce of cocaine from Luis. Officer Heckman and Detective Jason Hoyle (“Detective Hoyle”) then outfitted McMillan with hidden audio-video equipment and gave him \$1,000 in marked bills. Thereafter, Luis called McMillan and told McMillan to meet him at a specific CVS Pharmacy for the exchange. Officer Heckman and Detective Hoyle followed McMillan to the CVS Pharmacy and took up surveillance positions, along with other officers.

Once McMillan arrived at the CVS Pharmacy, he called Luis. Luis told McMillan he was at the hospital with his son, but his brother Manuel and another individual would be at the CVS Pharmacy in a burgundy van. McMillan identified the van in the parking lot and got into the backseat. Manuel was in the front passenger seat of the van, and defendant was in the driver’s seat. Officers confirmed two individuals were inside the van besides McMillan.

Inside the van, a conversation occurred regarding the present cocaine purchase. During the conversation, McMillan was also questioned about a debt he owed Luis for a prior drug transaction. Luis was also contacted and consulted by telephone during the conversation. The conversation was partly in Spanish between defendant, Manuel, and Luis, and partly in English when communications were made to McMillan. During the transaction, Manuel sold 37.05 grams of cocaine, a trafficking amount, to McMillan. The entire transaction was captured on McMillan’s hidden audio-video equipment.

After completing the purchase, McMillan left the CVS Pharmacy and met Officer Heckman at another location, at which Officer Heckman retrieved the drugs and the audio-video equipment from McMillan. Police made no arrests that day in order to continue their ongoing investigation into the drug operation.

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On 7 January 2010, Luis and Manuel were arrested on murder charges in Chatham County, North Carolina. Thereafter, on 13 January 2010, defendant was arrested on drug charges related to the 10 December 2009 drug transaction. On 8 March 2010, defendant was indicted for trafficking cocaine by transportation, trafficking cocaine by possession, and conspiracy to sell cocaine. Defendant was tried by jury beginning 3 August 2010.

Prior to trial, defense counsel filed a motion for discovery, specifically soliciting information regarding any expert witnesses the State intended to call at trial, as well as any reports or other written material produced by such experts. In response, the State produced a translated transcript of the audio-video recording of the transaction. However, at a hearing held just prior to trial, the State revealed the transcript had not been translated by a translator certified by the Administrative Office of the Courts (“AOC”). Immediately following the hearing, the State contacted Fred Albritton (“Albritton”), an AOC-certified Spanish interpreter, to prepare a second transcript of the audio-video recording by making any necessary edits to the original transcript. Albritton completed the second transcript around 1:00 p.m. on Friday, 30 July 2010, and a copy of the transcript was received by defendant later that afternoon. In the revised transcript, Albritton identified three voices present inside the van and labeled them CI, for “confidential informant;” H1, for “Hispanic 1;” and H2, for “Hispanic 2.” Albritton also identified a fourth voice on the audio recording as an individual communicating by telephone.

Defense counsel moved the trial court to suppress the revised transcript and preclude Albritton from testifying, arguing the State had failed to timely provide information as to the identity and qualifications of the translator in violation of the rules of discovery. The State argued it was not presenting Albritton as an expert, and the trial court held a *voir dire* hearing before denying defendant’s motion, overruling his objection, and allowing both Albritton to testify and the transcript into evidence.

During trial, the audio-video recording was played for the jury twice. The second time, the jury was provided a copy of Albritton’s transcript of the audio portion to read along while they observed and listened to the video. Albritton testified that he believed the speaker designated as H1 in the transcript was “the person sitting to the left in the video, which seems to be where the driver’s seat is located in the vehicle.” Albritton testified he based his identification on the “tonal quality of the voice and accent,” as well as contextual clues

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from the video portion of the recording. Albritton further testified he did not think his translation was 100 percent accurate and that parts of the recording were indiscernible, given the poor quality of the recording. Following Albritton's testimony, defendant again moved to strike the evidence and also moved the trial court for a mistrial, raising the discovery violation issue regarding Albritton's alleged expert opinion evidence. The trial court denied defendant's motions.

Officer Heckman, Detective Hoyle, and McMillan also testified at trial as to the events surrounding the investigation and the transaction at issue, and defendant testified in his own defense. At the conclusion of the trial, the jury returned verdicts of guilty of both trafficking cocaine by possession and conspiracy to sell cocaine and not guilty of trafficking by transportation.

At sentencing, the trial court consolidated the two charges, found one mitigating factor, and imposed a term of 35 to 42 months' imprisonment and a \$50,000 fine. Defendant timely appealed from the trial court's judgment to this Court.

II. Admission of Evidence

[1] Defendant first contends the trial court erred by admitting into evidence the transcript of the recording of the drug transaction and the testimony of Albritton, the interpreter who prepared that transcript. Defendant argues the State violated the rules of discovery by failing to disclose to the defense in a timely manner the contents of the transcript, the identity of the expert who prepared it, and the State's intent to offer Albritton's expert opinion testimony concerning both the identity of the individuals speaking on the audio-video recording and the meaning of the conversation taking place. Defendant argues the State's discovery violation required exclusion of the challenged evidence and that he was prejudiced by the trial court's erroneous admission of the evidence at trial.

"Discovery in a criminal case is governed by Chapter 15A, Article 48 of the North Carolina General Statutes." *State v. Ellis*, ___ N.C. App. ___, ___, 696 S.E.2d 536, 539 (2010). Specifically, upon a defense motion, the court must order:

The prosecuting attorney to give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall

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also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court.

N.C. Gen. Stat. § 15A-903(a)(2) (2011). “[O]nce a party, or the State has provided discovery there is a continuing duty to provide discovery and disclosure.” *State v. Blankenship*, 178 N.C. App. 351, 354, 631 S.E.2d 208, 210 (2006); *see also* N.C. Gen. Stat. § 15A-907 (2011).

“[T]he purpose 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). N.C. Gen. Stat. § 15A-910 (2011) empowers the trial court to apply sanctions for noncompliance with the discovery rules, including granting a continuance or recess, prohibiting the introduction of non-disclosed evidence, or declaring a mistrial. *Id.* § 15A-910(a)(2), (3), (3a). “Although the court has the authority to impose such discovery violation sanctions, it is not required to do so.” *State v. Hodge*, 118 N.C. App. 655, 657, 456 S.E.2d 855, 856 (1995). “Because the trial court is not required to impose any sanctions for abuse of discovery orders, what sanctions to impose, if any, is within the trial court’s discretion[,]” and will not be reversed absent a showing of abuse of that discretion. *State v. Weeks*, 322 N.C. 152, 171, 367 S.E.2d 895, 906 (1988).

During the trial in the present case, when the State proceeded to introduce the transcript prepared by Albritton and to call Albritton as a witness, the trial court held a *voir dire* hearing to determine the admissibility of the challenged evidence. During the *voir dire* hearing, the State conceded that were Albritton testifying as an expert, then the State had violated the discovery rules by not providing the requisite information in a timely manner. However, the State insisted at trial that Albritton would not be testifying as an expert. The trial court agreed and admitted the transcript and Albritton’s testimony. On appeal, the State concedes Albritton did in fact testify as an expert regarding his opinion of the translated conversation, as reflected in his transcript, thereby conceding the trial court abused its discretion in determining the witness was not testifying as an expert. *See Blankenship*, 178 N.C. App. at 354-55, 631 S.E.2d at 211 (“The determination of whether a witness’ testimony constitutes expert testimony is one within the trial court’s discretion, and will not be reversed on appeal absent an abuse of discretion.”). Accordingly,

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because the challenged evidence consisted entirely of an expert's opinion, the trial court erred in failing to recognize the State's failure to properly comply with the discovery requirements pursuant to N.C. Gen. Stat. § 15A-903(a)(2). *State v. Moncree*, 188 N.C. App. 221, 227, 655 S.E.2d 464, 468 (2008).

Nonetheless, the record reveals, and defendant admits in his reply brief, that "defense counsel was provided enough information to be able to anticipate that the [S]tate would offer expert testimony translating the Spanish portions of the conversation in the vehicle." Indeed, defendant was well aware of the State's initial attempt to have the audio interpreted and transcribed in light of the fact that part of the audio was in Spanish and that defendant was charged with the present offenses based on his involvement in the transaction. *See Moncree*, 188 N.C. App. at 226-27, 655 S.E.2d at 468 (defendant should not have been unfairly surprised by officer's testimony regarding substance found in defendant's shoe where defendant was charged with one count of possession of a controlled substance on the premises of a local confinement facility). Furthermore, the record reveals defense counsel was informed during the pretrial hearing that there was a problem with the original transcript, that the State would not use the original transcript, that the State would contact an AOC-certified interpreter to transcribe the conversation, and that the State would call the interpreter to testify.

Although defendant argues he could not reasonably anticipate what the precise translation would be or that Albritton would offer an opinion that the speaker denoted as H1 in the transcript was the driver of the vehicle, his arguments are inapposite, as both speakers in the transcript are implicated in the transaction, regardless of which Hispanic voice was attributed to the driver of the vehicle, or defendant. We also note that defendant had "a full opportunity at trial to cross-examine" Albritton concerning his opinion as to the identity of the speakers in the recording and the meaning of the conversation taking place on that recording, as well as the accuracy of the transcript he prepared and the difficulties he faced in preparing the translation. *See Ellis*, ___ N.C. App. at ___, 696 S.E.2d at 540-41. The record demonstrates the trial court considered these circumstances surrounding the alleged discovery violation both before and after admitting the challenged evidence and decided not to impose any of the requested discovery violation sanctions. Thus, we discern no abuse of discretion in the trial court's failing to strike the challenged evidence in the present case.

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Further, assuming *arguendo* that the trial court erred in allowing the transcript and Albritton's expert testimony into evidence, defendant cannot show he was prejudiced by the error. "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2011). "The burden of showing such prejudice under this subsection is upon the defendant." *Id.*

Here, defendant argues the transcript was the State's strongest evidence that defendant was acting in concert with Manuel during the drug transaction. Defendant argues the quality of the audio-video recording and the camera angle make it impossible to determine defendant's involvement in the transaction and therefore the video lends little value to the State's case without Albritton's interpretation of the events and conversation depicted. Defendant also argues without the transcript, the State's case relied almost entirely on McMillan's testimony, a witness of doubtful credibility and a prior criminal record. Defendant further argues McMillan's testimony is ambiguous as to defendant's role in the transaction and does not disprove defendant's testimony that he was unaware of the drug transaction until McMillan entered his vehicle.

Despite defendant's arguments to the contrary, the State had abundant other admissible evidence of defendant's participation in the drug transaction such that there is no reasonable possibility that, had Albritton's testimony and the transcript he prepared not been admitted into evidence, a different result would have been reached at trial. At trial, defendant admitted he was the driver of the van in question, that he was present and did not leave the vehicle during the drug transaction, and that he did not object in any way during the transaction. McMillan identified defendant in court as the driver of the van and testified that defendant was talking on the phone with Luis during the transaction, asked McMillan for the money to pay off a prior debt McMillan owed Luis, did not appear nervous, and remained in the van during the entire exchange. Although defendant attacks the credibility of McMillan as a witness on appeal, McMillan's testimony nonetheless constituted evidence against defendant for the jury to properly consider. *State v. Lewis*, 172 N.C. App. 97, 107, 616 S.E.2d 1, 7 (2005) ("[I]t is the province of the jury to weigh the credibility of the witnesses.").

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Moreover, the audio-video recording shows the driver of the van asked McMillan for the money to pay off McMillan's prior debt to Luis and that the driver of the van was speaking on the phone with the individual identified by McMillan as Luis, as the video clearly depicts an exchange of the cell phone between McMillan and the driver of the vehicle. The jury watched this video once during trial, without assistance from the transcript. In addition, the jury asked the trial court, during its deliberations, to view the video again, which was granted. Given this evidence adduced at trial, we fail to see how the trial court's alleged error in admitting the challenged evidence prejudiced defendant.

Despite our present holding, we reiterate the importance of the State's compliance with statutory discovery requirements. "District attorneys are elected public officials, and therefore North Carolina citizens trust the people who serve as district attorneys. Failure of district attorneys to follow statutory discovery requirements erodes the public's trust not only in district attorneys, but in any public official." *Moncree*, 188 N.C. App. at 228, 655 S.E.2d at 468.

III. Jury Instruction

[2] Defendant's remaining argument on appeal is that the trial court erred in denying his request for a special instruction to the jury on the word "knowingly," as it appears in the elements of the offenses for trafficking by possession and conspiracy to sell cocaine. Defendant contends his requested instruction was a correct statement of the law arising on the evidence presented at trial and that defendant's knowledge was an issue in the case, thereby requiring the trial court to give the requested special instruction. This Court reviews *de novo* a trial court's decisions regarding jury instructions. *State v. Cruz*, 203 N.C. App. 230, 235, 691 S.E.2d 47, 50 (citing *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009)), *aff'd*, 364 N.C. 417, 700 S.E.2d 222 (2010).

We first summarily address the State's contention that defendant did not preserve this issue for appellate review. During trial, when given an opportunity to object to the trial court's jury instructions, defense counsel responded he had no corrections to the trial court's instructions as given "beyond what we have asked for and lost." Thus, although defendant did not specifically "object" to the instructions, he alerted the trial court to the ruling he desired with respect to the requested instruction, thereby preserving the issue for appellate review. *Cf. State v. Joplin*, 318 N.C. 126, 131-32, 347 S.E.2d 421, 424 (1986) (holding defendant failed to preserve for appellate review the

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issue of whether the trial court committed reversible error in failing to include her requested jury instruction by failing to object to the jury instructions when given the opportunity to do so by the trial court).

“A trial judge is required . . . to instruct the jury on the law arising on the evidence. This includes instruction on the elements of the crime. Knowledge is a substantive feature of the crime[s] charged here. Failure to instruct upon all substantive or material features of the crime charged is error.” *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). “[I]f a party requests an instruction which is a correct statement of the law and is supported by the evidence, the court must give the instruction *at least in substance*.” *State v. Warren*, 327 N.C. 364, 371, 395 S.E.2d 116, 121 (1990) (emphasis added). “North Carolina statutes and case law do not require a trial court to use the exact words a defendant requests to charge the jury.” *State v. Sanders*, 171 N.C. App. 46, 53, 613 S.E.2d 708, 713 (citing *State v. Vause*, 328 N.C. 231, 239, 400 S.E.2d 57, 63 (1991)), *aff’d*, 360 N.C. 170, 622 S.E.2d 492 (2005).

In the present case, defendant requested the trial court give the following instruction on the element that defendant must have “knowingly” participated in the crimes:

You have been instructed that in order to sustain its burden of proof, the government must prove that the defendant acted knowingly. A person acts knowingly if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. Whether the defendant acted knowingly may be proven by the defendant’s conduct and by all of the facts and circumstances surrounding the case.

Defendant points out that he testified at trial that he had no prior knowledge that Luis or Manuel were involved in selling drugs or that Manuel intended to conduct a drug transaction when defendant drove him to the CVS pharmacy. Defendant maintained he was unaware of Manuel’s intentions until McMillan entered the vehicle. Thus, defendant argues the evidence presented places his knowledge of the offenses in issue, and the trial court was therefore required to give his requested instruction.

In the present case, the trial court gave the following instructions to the jury:

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Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proven by circumstances from which it may be inferred.

You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would draw from those circumstances.

....

A person has constructive possession of the substance if the person does not have it on his person but is *aware of its presence*, and has either alone or together with others both *the power and intent to control its disposition or use*.

A person's awareness of the presence of the substance and the person's power and intent to control its disposition or use may be shown by direct evidence or may be inferred from the circumstances.

(Emphasis added.) Further, when instructing the jury on the specific offenses charged, the trial court gave the following instructions:

The Defendant has been charged with trafficking in cocaine by possession, which is the unlawful possession of more than 28 grams of cocaine.

For you to find the Defendant guilty of this offense the State must prove two things beyond a reasonable doubt:

First, that the Defendant *knowingly* possessed cocaine.

A person possess[es] cocaine if he is aware of its presence and has either by himself or together with others both the power and intent to control its disposition or use of that substance.

....

The Defendant has also been charged with feloniously conspiring to sell cocaine. For you to find the Defendant guilty of this offense the State must prove three things beyond a reasonable doubt:

First, that the Defendant and Luis Nunez Garcia and Manuel Nunez Garcia entered into an agreement.

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Second, that the agreement was to sell cocaine. Selling cocaine is *knowingly* selling cocaine to another.

(Emphasis added.) We hold the instructions given by the trial court, when read as a whole, adequately contained the substance of defendant's requested instruction—an explanation that defendant must have intentionally and voluntarily participated in the crimes.

Our Supreme Court has previously provided the meaning of the word “knowingly.” In *State v. Stephenson*, 218 N.C. 258, 10 S.E.2d 819 (1940), our Supreme Court explained “[t]he word ‘knowingly’ . . . means that defendant knew what he was about to do, and, with such knowledge, proceeded to do the act charged.” *Id.* at 264, 10 S.E.2d at 823. Subsequently, in *Underwood v. Board of Alcoholic Control*, 278 N.C. 623, 181 S.E.2d 1 (1971), our Supreme Court noted:

Knowledge means “an impression of the mind, the state of being aware; and this may be acquired in numerous ways and from many sources. It is usually obtained from a variety of facts and circumstances. Generally speaking, when it is said that a person has knowledge of a given condition, it is meant that his relation to it, his association with it, his control over it, and his direction of it are such as to give him actual information concerning it.”

Id. at 632, 181 S.E.2d at 7 (quoting *State v. Hightower*, 187 N.C. 300, 308-09, 121 S.E. 616, 621 (1924)). Here, the trial court instructed the jury that in order to possess or sell cocaine, the defendant must have been aware of its presence and have had the power and intent to control its distribution or use. Therefore, the substance of the trial court's instructions, read in their entirety, effectively instructs the jury that defendant must have had knowledge of the substance and the crime being committed, and he must have intentionally and voluntarily participated in the crime. Accordingly, we find no error in the trial court's jury instructions.

However, we must note that had the trial court simply given the instruction requested by defendant at trial, defendant would have no basis to raise the trial court's decision not to do so on appeal. The better practice under circumstances such as those presented here is for the trial court to give the jury instruction requested by defendant when the requested instruction is correct on the law and properly based on the evidence adduced at trial.

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IV. Conclusion

We hold the trial court erred in determining that Albritton did not give expert testimony and in failing to recognize the State's resulting discovery violation. However, we discern no abuse of discretion in the trial court's denial of defendant's request to strike the challenged evidence, and defendant has failed to meet his burden of showing he was prejudiced by the alleged error.

In addition, although the trial court denied defendant's request for a special jury instruction on the knowledge element of both offenses, we hold the trial court's jury instructions included the substance of defendant's requested instruction, and therefore, the trial court's denial of defendant's request was not erroneous. Accordingly, we hold defendant received a fair trial, free from prejudicial error.

No prejudicial error.

Judges McGEE and GEER concur.

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No. COA11-1153

(Filed 20 March 2012)

1. Partnerships—by estoppel—sufficient representations to third party—belief and reliance upon representations—motion to dismiss erroneous

The trial court erred in granting defendant Jackson's motion to dismiss regarding plaintiff's claim for partnership by estoppel. Plaintiff alleged sufficient facts to meet the requirement of representing to a third party that defendants were involved in a partnership and that plaintiff believed defendants' representations and relied to its detriment on the representations. Plaintiff's choice to contract with defendant Stonewall individually and not with both defendants in their alleged capacity as a partnership did not defeat plaintiff's claim and there was sufficient evidence to meet the requirement of alleging an extension of credit to the partnership.

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2. Joint Venture—elements sufficiently alleged—motion to dismiss erroneous

The trial court erred in dismissing plaintiff's claim for joint venture because it adequately pled the elements of a joint venture. Plaintiff alleged a joining of funds, labor, and property in a common purpose where each defendant had a right to direct the other.

3. Partnerships—de facto partnership—elements sufficiently alleged—motion to dismiss erroneous

The trial court erred in dismissing plaintiff's claim for *de facto* partnership where plaintiff's allegations were sufficient to survive defendant's motion to dismiss, including sufficient allegations to meet any requirement of profit sharing.

4. Corporations—piercing the corporate veil—wrongdoing—insufficient allegations

The trial court did not err in dismissing plaintiff's claim for piercing the corporate veil where plaintiff failed to sufficiently allege a wrongdoing to meet the second prong of the instrumentality test for piercing the corporate veil.

Appeal by plaintiff from order entered 8 June 2011 by Judge James L. Gale in Forsyth County Superior Court. Heard in the Court of Appeals 7 February 2012.

Carruthers & Roth, P.A., by Rachel S. Decker and J. Patrick Haywood, for plaintiff appellant.

Wyrick Robbins Yates & Ponton, LLP, by Tobias S. Hampson, Lee M. Whitman; and McKenna Long & Aldridge, LLP, by Gregory S. Brow, for Jackson Paper Manufacturing Co., defendant appellee.

McCULLOUGH, Judge.

Best Cartage, Inc. ("plaintiff") appeals from the trial court's dismissal of plaintiff's claims for partnership by estoppel, joint venture, *de facto* partnership, and piercing the corporate veil against Stonewall Packaging, LLC, ("defendant Stonewall") and Jackson Paper Manufacturing Company ("defendant Jackson") (collectively "defendants"), by granting defendant Jackson's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief may be granted. Based upon the following, we affirm in part and reverse in part.

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I. Background

Defendant Jackson is in the business of manufacturing medium paper out of recycled materials, which is then used in the construction of cardboard. Defendant Stonewall, a Delaware limited liability company, with its principal place of business in Sylva, Jackson County, North Carolina, manufactured corrugated sheets of cardboard by incorporating the medium paper made by defendant Jackson. Plaintiff alleges that defendants sought to vertically integrate the manufacturing and construction of cardboard boxes. Plaintiff, on the other hand, is a tractor-trailer trucking company, who ultimately entered an Exclusive Transportation Agreement (the “Agreement”) with defendant Stonewall on 5 November 2009.

According to the Agreement, plaintiff would ship cardboard sheets manufactured by defendant Stonewall. In reliance on the Agreement, plaintiff purchased thirty-seven tractor-trailers to use in satisfying the Agreement. Defendant Jackson negotiated the terms of the Agreement with plaintiff, and one of its officers actually signed the Agreement on behalf of defendant Stonewall. Plaintiff alleges that it entered the Agreement based on the strength and reputation of defendant Jackson and under the assumption that defendant Jackson had a partnership relationship with defendant Stonewall. Plaintiff bases its assumption on the alleged facts that defendant Jackson sought tax incentives from the State of North Carolina for the “creation” of defendant Stonewall; North Carolina Governor Beverly Perdue referred to defendants as a “joint venture”; defendant Stonewall utilized the services of defendant Jackson and its employees without reimbursing defendant Jackson; defendant Jackson purchased the real property on which defendant Stonewall was located; defendant Jackson hired the employees that renovated the building in which defendant Stonewall operated; defendant Jackson’s employees selected and purchased the equipment used in defendant Stonewall’s operations; and defendants shared common officers and directors. Plaintiff performed under the Agreement until defendant Stonewall notified plaintiff that it would no longer be able to continue. At the request of defendant Stonewall’s secured lender, Atlantic Capital Bank, defendant Stonewall was placed into receivership.

Plaintiff decided to initiate this lawsuit in Forsyth County as a breach of contract claim rather than submit its claims for unpaid invoices into the receivership. Based on defendant Stonewall’s breach of the Agreement, plaintiff seeks direct damages of \$500,678.48 in unpaid invoices and consequential damages of \$1,315,336.51,

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which is the outstanding balance on plaintiff's loan for the tractor-trailers. On 25 October 2010, defendant Stonewall and the receiver filed an answer to plaintiff's complaint. That same day, the trial court allowed plaintiff to amend its complaint by adding claims against defendant Jackson. Plaintiff raised claims of partnership by estoppel, joint venture, *de facto* partnership, and piercing the corporate veil.

Defendant Jackson moved to designate the matter as a complex business case to be heard by the North Carolina Business Court and subsequently filed a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. In granting defendant Jackson's motion to dismiss, the trial court found that plaintiff had contracted solely with defendant Stonewall despite having knowledge of the alleged partnership between defendants, which precludes a finding that the Agreement was entered into for business purposes of the alleged partnership as necessary to bind an alleged partnership to a contract entered into by one partner. Furthermore, the trial court found that plaintiff did not extend credit to the alleged partnership, but exclusively to defendant Stonewall, which bars a claim for partnership by estoppel. The trial court also found in its order that plaintiff failed to allege a fiduciary relationship and joint-profit sharing, necessary for the claims of joint venture and *de facto* partnership. Finally, it found that plaintiff failed to allege a wrongdoing or injustice sufficient to meet the test for piercing the corporate veil. Plaintiff appeals from the trial court's order.

II. Analysis

At issue in this case is whether the trial court erred in granting defendant Jackson's motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(6) (2011), dismissing plaintiff's claims for partnership by estoppel, joint venture, *de facto* partnership, and piercing the corporate veil. For the following reasons, we affirm in part and reverse in part.

A. Standard of Review

"An appellate court conducts a de novo review when considering a trial court's dismissal of a [claim] under North Carolina Rule of Civil Procedure 12(b)(6)." *State Employees Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010). "[T]he standard of review is whether as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Laster v. Francis*, 199 N.C. App. 572, 575, 681 S.E.2d 858, 861 (2009) (citation omitted). Dismissal pursuant to Rule 12(b)(6) is warranted "when

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

When reviewing a motion to dismiss under Rule 12(b)(6), "[t]he trial court must treat the allegations in the complaint as true, but the court is not required to accept as true any conclusions of law or unwarranted deductions of fact." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001) (citation omitted). Furthermore, the trial court "should construe the complaint liberally and only grant the motion if it appears certain that plaintiffs could prove no set of facts which would entitle them to relief under some legal theory." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010).

B. Partnership by Estoppel

[1] Plaintiff first argues the trial court erred in granting defendant Jackson's motion to dismiss regarding plaintiff's claim for partnership by estoppel. The trial court found that plaintiff entered the Agreement exclusively with defendant Stonewall while possessing knowledge of the alleged partnership. The trial court also found that plaintiff failed to extend credit to the alleged partnership, precluding a finding that the pleadings were sufficient to support a claim for partnership by estoppel. We disagree.

Our state codifies partnership by estoppel in N.C. Gen. Stat. § 59-46 (2011), which defines one as:

(a) When a person, by words spoken or written, by conduct, or by contract, represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner, he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

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- (1) When a partnership liability results, he is liable as though he were an actual member of the partnership.

Our Court has further expounded on the statute in *Wiggs v. Peedin*, 194 N.C. App. 481, 669 S.E.2d 844 (2008), where we held

“[t]he essentials of equitable estoppel or estoppel *in pais* are a representation, either by words or conduct, made to another, who reasonably believing the representation to be true, relies upon it, with the result that he changes his position to his detriment. It is essential that the party estopped shall have made a representation by words or acts and that someone shall have acted on the faith of this representation in such a way that he cannot without damage withdraw from the transaction.

Id. at 488, 669 S.E.2d at 849 (quoting *Volkman v. DP Associates*, 48 N.C. App. 155, 158, 268 S.E.2d 265, 267 (1980)).

Plaintiff alleges that defendants combined labor, skills, and property to advance their alleged business partnership. Furthermore, plaintiff claims defendant Jackson displayed its conduct outwardly towards the general public in a sufficient manner for anyone to believe that it was partnered with defendant Stonewall. Specifically, a press release from the Office of Governor Perdue mentions that defendant Jackson sought tax incentives for defendant Stonewall, and the Governor even referred to the two as a “joint venture.” Moreover, plaintiff argues defendant Jackson negotiated and executed the Agreement on behalf of defendant Stonewall, while also dominating the decision making in the partnership by having certain employees work for both defendant Stonewall and itself. Defendant Jackson also bought real estate, equipment, and general supplies for defendant Stonewall with no expectation of reimbursement, and even renovated the building in which defendant Stonewall was located. These facts are clearly sufficient to meet the requirement of representing to a third party that defendants were involved in a partnership.

Plaintiff also makes adequate allegations that it believed defendants’ representations and relied to its detriment on the representations. Plaintiff believed that it was contracting with both defendants based on defendant Jackson’s officer signing the Agreement on behalf of defendant Stonewall and plaintiff also alleges that it entered the Agreement based on the strength and reputation of defendant Jackson. Based on defendant Jackson’s reputation and its officer having signed the Agreement, plaintiff entered a separate agreement for

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the purchase of thirty-seven tractor-trailers to aid in satisfying the Agreement. Plaintiff adequately alleges that it believed defendant Jackson would implicitly be a party to the Agreement and that it changed its position by purchasing the tractor-trailers in reliance on defendant Jackson's representations.

Alternatively, defendant Jackson contends the trial court correctly granted the motion to dismiss because plaintiff entered the Agreement with just defendant Stonewall, knowing of the alleged partnership between the defendants. Defendant Jackson argues plaintiff should be held accountable for its choice to contract with defendant Stonewall individually and not with both defendants in their alleged capacity as a partnership. However, plaintiff correctly cites to the case of *Hines v. Arnold*, 103 N.C. App. 31, 36-37, 404 S.E.2d 179, 183 (1991), for the contention that a partner can bind a partnership by executing a contract even where the third party knew of the partnership. Consequently, even if plaintiff was aware of a partnership between defendants, this would not necessarily defeat plaintiff's claim.

Defendant Jackson also makes the argument against partnership by estoppel that plaintiff failed to extend credit to the "actual or apparent partnership" as required by the statute. *See* N.C. Gen. Stat. § 59-46. More specifically, defendant Jackson claims plaintiff merely extended credit to defendant Stonewall and not to the alleged partnership. However, based on the facts as discussed above, plaintiff alleged that it was under the impression that it was contracting with a partnership between defendants and that defendants were attempting to become vertically integrated in the production of cardboard sheets. Thus, plaintiff extended credit to defendants by providing services without requiring up-front payments, which resulted in unpaid invoices of over \$500,000.00. We believe this is sufficient to meet the requirement of alleging an extension of credit to the partnership. As a result, plaintiff has sufficiently alleged the elements of a partnership by estoppel to survive a motion to dismiss pursuant to Rule 12(b)(6).

C. Joint Venture

[2] Plaintiff next contends the trial court erred in dismissing its claim for joint venture because it adequately pled the elements of a joint venture. We agree.

"A joint venture is an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure [sic] for joint profit, for which pur-

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pose they combine their efforts, property, money, skill, and knowledge, but without creating a partnership in the legal or technical sense of the term.”

Pike v. Trust Co., 274 N.C. 1, 8, 161 S.E.2d 453, 460 (1968) (quoting *In re Simpson*, 222 F. Supp. 904 (M.D.N.C. 1963)). Moreover,

“Facts showing the joining of funds, property, or labor, in a common purpose to attain a result for the benefit of the parties in which each has a right in some measure to direct the conduct of the other through a necessary fiduciary relation, will justify a finding that a joint adventure [sic] exists.”

...

“To constitute a joint adventure, [sic] the parties must combine their property, money, efforts, skill, or knowledge in some common undertaking. The contributions of the respective parties need not be equal or of the same character, but there must be some contribution by each coadventurer [sic] of something promotive of the enterprise.”

Id. To prove a joint venture one must generally show two essential elements which are “(1) an agreement to engage in a single business venture with the joint sharing of profits, (2) with each party to the joint venture having a right in some measure to direct the conduct of the other ‘*through a necessary fiduciary relationship.*’” *Southeastern Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 327, 572 S.E.2d 200, 204-05 (2002) (citation omitted). “The second element requires that the parties to the agreement stand in the relation of principal, as well as agent, as to one another.” *Id.*

Plaintiff argues it adequately pled the requirements as described above because it alleged a joining of funds, labor, and property in a common purpose where each defendant had a right to direct the other. Plaintiff alleged that both defendants shared certain directors and officers, which exerted control over both defendants, and furthermore, defendant Jackson purchased property and renovated it on behalf of defendant Stonewall. Plaintiff contends that these allegations are sufficient to show the sharing of expenses, employees, and physical space to survive a Rule 12(b)(6) motion. Defendant Jackson again argues that plaintiff must allege that it contracted with a purported partnership or joint venture, and not defendant Stonewall individually. However, as noted above, we believe this argument and the trial court’s reasoning fail because plaintiff has

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alleged that it believed it was contracting with defendant Stonewall on behalf of its partnership or joint venture with defendant Jackson. See *Hines*, 103 N.C. App. at 36-37, 404 S.E.2d at 183.

Defendant Jackson further argues plaintiff failed to allege that defendants agreed to engage in a business venture involving a joint sharing of profits, with a fiduciary relationship, and an equal right of control over one another. Viewing the allegations in the light most favorable to plaintiff, we believe plaintiff has satisfactorily alleged these facts. First, plaintiff alleges defendants entered into a business venture with the joint sharing of profits by arguing that defendants jointly sought tax incentives from the State of North Carolina; they desired to vertically integrate their businesses to streamline the making of cardboard sheets; and they shared employees without reimbursing the other for the cost of the services provided. Secondly, plaintiff alleges a fiduciary relationship in that the parties looked to vertically integrate, which would involve each defendant having an interest in the other's business. A fiduciary relationship exists where "one person is under a duty to act for the benefit of another on matters within the scope of the relationship." Black's Law Dictionary 1315 (8th ed. 2004). Moreover, defendant Jackson's employees and officers worked for and on behalf of defendant Stonewall on numerous occasions and even signed the Agreement on behalf of defendant Stonewall in a sufficient manner to be considered a fiduciary relationship. Finally, plaintiff alleged that defendants had equal control over one another in that they shared officers and directors, as well as other employees. In doing so, there must be some control exerted by the same people by both defendants sufficient to meet the requirement. While it appears from the allegations that defendant Jackson did exert more control over defendant Stonewall, mainly due to its more established position, the pleadings are sufficient in showing defendant Stonewall had the ability to exert control over defendant Jackson. Thus, we believe the pleadings are sufficient to move forward on the theory of joint venture.

D. De Facto Partnership

[3] Plaintiff's third argument is that the trial court erred in dismissing its claim for *de facto* partnership. Plaintiff again contends that it pled enough to survive the motion to dismiss. We agree.

"A partnership is an association of two or more persons to carry on as co-owners a business for profit." N.C. Gen. Stat. § 59-36(a) (2011). A more detailed description is that it is "a combination of two

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or more persons of their property, effects, labor, or skill in a common business or venture, under an agreement to share the profits or losses in equal or specified proportions, and constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business.” *Zickgraf Hardwood Co. v. Seay*, 60 N.C. App. 128, 133, 298 S.E.2d 208, 211 (1982). A *de facto* partnership may be found by examination of a parties’ conduct, which shows a voluntary association of partners. *Potter v. Homestead Preservation Assn.*, 330 N.C. 569, 576, 412 S.E.2d 1, 5 (1992). However, “co-ownership and sharing of any actual profits are indispensable requisites for a partnership.” *Wilder v. Hobson*, 101 N.C. App. 199, 202, 398 S.E.2d 625, 627 (1990).

To bolster its contention, plaintiff cites to *Potter* where our Supreme Court held that the trial court erred in not submitting to the jury the issue of whether or not the plaintiff had shown a *de facto* partnership. *Potter*, 330 N.C. 569, 412 S.E.2d 1. In *Potter*, the parties did not enter an express, written partnership agreement, but they worked together to develop and sell real estate. *Id.* Each party contributed a separate skill or service to the partnership. *Id.* Plaintiff also relies on *Trujillo v. N.C. Grange Mut. Ins. Co.*, 149 N.C. App. 811, 561 S.E.2d 590 (2002), where our Court held that where three brothers worked together to run a farm and each one provided something different to the enterprise, the allegations were sufficient to support a partnership. In the case at hand, as mentioned above, plaintiff alleges defendant Jackson’s active involvement and contributions to the success of defendant Stonewall’s business, which were in defendant Jackson’s interest in vertically integrating the two businesses. Furthermore, plaintiff alleged a sharing of expenses, sharing of tax incentives, and a donating of employees’ time for which no accounting was made.

Otherwise, defendant Jackson makes the same argument as presented under joint venture, that plaintiff failed to allege a profit-sharing situation between defendants. However, as noted above, we believe plaintiff’s allegations are sufficient to meet any requirement of profit sharing in that they shared employees with no accounting and jointly sought tax incentives to share in the vertical integration of their businesses. Consequently, we reverse the trial court’s dismissal of plaintiff’s claim for *de facto* partnership.

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E. Piercing the Corporate Veil

[4] At issue in plaintiff's final argument is whether the trial court erred in dismissing plaintiff's claim for piercing the corporate veil. Plaintiff alleges that defendant Jackson created and used defendant Stonewall merely as a shell to insulate itself from any potential claims brought by outside creditors. We do not believe plaintiff made sufficient allegations to maintain this claim.

In North Carolina, when reviewing a claim for piercing the corporate veil, our courts apply the instrumentality rule, which states:

[A] corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In such instances, the separate identities of parent and subsidiary of affiliated corporations may be disregarded.

Glenn v. Wagner, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985) (internal quotation marks and citation omitted). Furthermore, to attack a separate entity under the instrumentality rule one must prove:

“(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice 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; and

“(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and

“(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.”

Id. at 455, 329 S.E.2d at 330 (citation omitted). In examining the above requirements, some factors to consider are inadequate capitalization, non-compliance with corporate formalities, complete domination and control of the corporation so no independent identity exists, and excessive fragmentation. *Id.* at 455, 329 S.E.2d at 330-31. It is duly noted that piercing the corporate veil is a “drastic remedy” and “should be invoked only in an extreme case where necessary to serve the ends of justice.” *Dorton v. Dorton*, 77 N.C. App. 667, 672, 336 S.E.2d 415, 419 (1985).

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Plaintiff claims that it met the pleading requirements for piercing the corporate veil. The trial court, on the other hand, found that plaintiff failed to allege any wrongdoing on behalf of defendants to meet the second element of the instrumentality rule. Plaintiff contends defendant Jackson's actions constituted misconduct in that defendant Stonewall did not purchase the medium sheet from defendant Jackson until it was actually used in the process of making corrugated cardboard sheets, which was different than with any of defendant Stonewall's other suppliers. This relationship and agreement consisted of defendant Jackson providing the materials to defendant Stonewall on consignment, and thus allowed defendant Jackson to retrieve the materials and circumvent the claims of creditors once defendant Stonewall failed. Unfortunately, we cannot see how this agreement between defendants, on its face, amounted to a wrongdoing. Defendants were within their rights to supply materials based on consignment and defendant Jackson had the right to retrieve its rightfully owned materials once defendant Stonewall faltered.

Plaintiff also contends that defendant Stonewall's breach of the Agreement, in itself, can amount to a wrongdoing to meet the second element of the test. Plaintiff cites to *East Mkt. St. Square, Inc. v. Tycorp Pizza IV, Inc.*, 175 N.C. App. 628, 625 S.E.2d 191 (2006), where an individual defendant created a corporation for the sole purpose of entering the contract at issue and at the same time unjustly insulating the defendant from liability under the contract. *Tycorp Pizza* appears to differ from the case at hand in that there the breach of contract related to the creation of the shell corporation and unjustly insulated the controlling entity from any liability. *Id.* Here, alternatively, it does not appear, and plaintiff has not alleged, that defendant Jackson created defendant Stonewall for the sole purpose of entering the Agreement; and it does not appear that the creation of defendant Stonewall somehow unjustly insulates defendant Jackson from any liability. Consequently, we must hold that plaintiff failed to sufficiently allege a wrongdoing to meet the second prong of the instrumentality test for piercing the corporate veil, and as a result, the trial court did not err in dismissing plaintiff's claim for piercing the corporate veil pursuant to defendant Jackson's Rule 12(b)(6) motion. Furthermore, we see no need to address the other elements of the test as this particular requirement is dispositive.

III. Conclusion

We believe it was error for the trial court to dismiss plaintiff's claims for partnership by estoppel, joint venture, and *de facto* part-

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nership because plaintiff's pleadings were sufficient in alleging the elements for each claim to survive a Rule 12(b)(6) motion. Thus, we must reverse these issues and allow plaintiff to continue on these claims. However, the trial court correctly dismissed plaintiff's claim for piercing the corporate veil because plaintiff failed to adequately plead any wrongdoing on behalf of defendant Jackson in allegedly creating defendant Stonewall for its own use. Consequently, we affirm the trial court's dismissal of plaintiff's piercing the corporate veil claim.

Affirmed in part; reversed in part.

Judges STROUD and THIGPEN concur.

BRANCH BANKING & TRUST COMPANY AND BB&T COLLATERAL SERVICE CORPORATION, AS TRUSTEE, PLAINTIFFS v. D. KEITH TEAGUE AND WIFE, PENNY TEAGUE; DANNY GLOVER, JR. AND WIFE, MEREDITH GLOVER; NINA B. GIBBS AND HUSBAND, ROBERT E. GIBBS, JR., INDIVIDUALLY AND AS CO-TRUSTEES OF GIBBS FAMILY REVOCABLE TRUST U/D APRIL 2, 2009, AND GIBBS FAMILY REVOCABLE TRUST, DEFENDANTS

No. COA11-787

(Filed 20 March 2012)

1. Mortgages and Deeds of Trust—reformation—bona fide purchasers for value—without notice

The trial court did not err in a case involving a deed of trust by granting summary judgment in favor of the Teague defendants on the issue of whether plaintiffs were entitled to reformation of the deed of trust. The Teague and Glover defendants were *bona fide* purchasers for value who took the property in question without notice of the alleged defect in the deed, and reformation will not be granted if prejudice would result to the rights of a *bona fide* purchaser for value without notice.

2. Mortgages and Deeds of Trust—reformation—prejudice—material issue of fact

The trial court erred in a case involving a deed of trust by granting summary judgment to the Teague defendants on the issue of whether plaintiffs were entitled to reformation of the deed of trust. Whether defendants would have been prejudiced by reformation of the deed was a genuine issue of material fact.

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3. Liens—equitable lien—no breach of oral agreement—no action inconsistent with fiduciary or contractual obligation

The trial court did not err in a case involving a deed of trust by not imposing an equitable lien on a tract of land at issue. Plaintiffs did not assert that the Teague defendants had breached an oral agreement with plaintiffs or that the Teagues had acted inconsistently with some sort of a fiduciary or contractual obligation that they owed to plaintiffs.

Appeal by Plaintiffs from judgment entered 11 April 2011 by Judge Cy A. Grant, Sr. in Pasquotank County Superior Court. Heard in the Court of Appeals 17 November 2011.

Poyner Spruill LLP, by David Dreifus and Chad W. Essick, for Plaintiffs-Appellants.

Trimpi & Nash, LLP, by John G. Trimpi, for Defendants-Appellees.

BEASLEY, Judge.

Plaintiffs Branch Banking & Trust Company and BB&T Collateral Service Corporation appeal from an order granting summary judgment in favor of Defendants D. Keith Teague and wife, Penny Teague; Danny Glover, Jr. and wife, Meredith Glover; and Teague & Glover, P.A. (the Teague Defendants),¹ and dismissing Plaintiffs' claims for reformation of a deed of trust from Defendants Robert E. Gibbs, Jr., and Nina B. Gibbs to BB&T; the imposition of an equitable lien on property that Plaintiffs seek to have made subject to the deed of trust; and the foreclosure of the reformed deed of trust. For the following reasons, we affirm in part and reverse and remand in part.

In 1984, Ms. Gibbs began working for Teague & Glover as a bookkeeper. After learning that Ms. Gibbs had embezzled substantial sums from the law firm over a period of years, Teague & Glover terminated Ms. Gibbs' employment. Ms. Gibbs was criminally prosecuted and imprisoned as a result of her activities. In addition, Teague & Glover

1. Plaintiffs' complaint also named Nina B. Gibbs; her husband, Robert E. Gibbs, Jr. (both individually and in their capacity as Co-Trustees of the Gibbs Family Revocable Trust); and the Gibbs Family Revocable Trust (the Gibbs Defendants) as parties defendant. After the entry of summary judgment in favor of the Teague Defendants, Plaintiffs voluntarily dismissed their claims against the Gibbs Defendants, who have not participated in this appeal.

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filed a civil suit against the Gibbs². In March 2010, Teague & Glover obtained a judgment against the Gibbs requiring the payment in damages in excess of \$800,000. Subsequently, Defendants made an arrangement with the Gibbs under which they agreed to transfer all of their real and personal property to Teague & Glover in exchange for a reduction in the total amount of the judgment.

The property that underlies the present dispute consists of approximately 1.3 acres and is divided into two tracts: Tract A, an undeveloped tract containing about .6 acres, and Tract B, which contains the remainder of the property and includes the Gibbs' primary residence. The Gibbs obtained loans from BB&T in 1999 and 2005, each of which was secured by a deed of trust applicable to the entire 1.3 acre parcel. On 3 March 2009, the Gibbs obtained a new loan from BB&T in the amount of approximately \$94,000, with this total representing the outstanding principal obligation associated with the earlier loans. The 3 March 2009 loan was secured by a deed of trust applicable solely to Tract A. At the time that the Gibbs deeded the property to the Teagues and the Glovers, the recipients took the property subject to the deed of trust applicable to Tract A without assuming responsibility for the underlying debt secured by that instrument.

After obtaining title to the property, the Teague Defendants commissioned a survey which disclosed, among other things, that Tract A was the only part of the overall parcel subject to the deed of trust. In August 2010, the Teagues and the Glovers sold the property at an auction sale at which they informed prospective bidders that the property was subject to a lien secured by a deed of trust applicable to a portion of the property.

On 17 August 2010, Plaintiffs filed a complaint in which they sought reformation of the 2009 deed of trust from the Gibbs to BB&T so as to include Tract B as additional collateral associated with the loan that BB&T had made to the Gibbs, the imposition of an equitable lien on the entire parcel, and the foreclosure of the reformed deed of trust. On 19 August 2010, Plaintiffs filed a notice of *lis pendens* applicable to the entire tract pursuant to N.C. Gen. Stat. § 1-116. On 8 November 2010, the Teague Defendants filed an answer in which they denied having had any knowledge that there was a "dispute" concerning the scope of the deed of trust or that a "mistake" had been

2. Although Plaintiffs and the Teague Defendants refer to Mr. and Ms. Gibbs as "the Gibbs," the proper plural form of the name Gibbs is "Gibbses." For continuity, we also refer to the Gibbses as "the Gibbs."

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made in the deed of trust. On 15 February 2011, the Teague Defendants filed a summary judgment motion. On 18 March 2011, Plaintiffs filed a cross motion for summary judgment. The parties' motions were heard by the trial court on 28 March 2011. On 11 April 2011, the trial court entered an order granting summary judgment in favor of the Teague Defendants. From this order, Plaintiffs now appeal.

I.

[1] Plaintiffs argue that the trial court erred by granting summary judgment in favor of the Teague Defendants on the issue of whether Plaintiffs were entitled to reformation of the deed. In addition, Plaintiffs argue that the reformed deed of trust should relate back to the date of original execution, thereby giving it priority over the deed from the Gibbs to the Teagues and Glovers. We disagree.

According to N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011), 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.” “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 non-moving 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 (2000).

When the court reforms an instrument in connection with the imposition of an equitable or parol trust, “[t]he 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.” *Arnette v. Morgan*, 88 N.C. App. 485, 462, 363 S.E.2d 678, 680 (1988). The undisputed evidence before the trial court reflects that, after the execution and recordation of the deed of trust, the Gibbs deeded the parcel to the Teagues and Glovers in exchange for a \$200,000 reduction in the amount of the judgment that Teague & Glover had obtained against the Gibbs. Plaintiffs do not appear to dispute that this \$200,000 reduction in the amount of Teague & Glovers' judgment against the Gibbs constituted the provision of valuable con-

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sideration in return for the underlying transfer, since a grantor who cancels or reduces a grantee's preexisting debt in exchange for a deed is a *bona fide* purchaser for value. *See Sansom v. Warren*, 215 N.C. 432, 436, 2 S.E.2d 459, 461 (1939).

In addition, the parties appear to agree that the undisputed record evidence establishes that, at the time the Gibbs executed the deed to the Teagues and the Glovers in exchange for a reduction in the amount owed under the judgments, the Teague Defendants had no notice that Plaintiffs or the Gibbs Defendants claimed that there was an error in the deed of trust that the Gibbs had given to BB&T for the purpose of securing the 2009 loan that BB&T had extended to the Gibbs. In fact, Plaintiffs concede that the deed from the Gibbs to the Teagues and the Glovers was executed and recorded on 19 May 2010 and that, “[o]nly after [their] survey was completed in June 2010 did the Law Firm and the Teagues and Glovers learn that the property description in the 2009 Deed of Trust did not describe the entire Property but only described [Tract A].” As a result, we conclude that the Teagues and the Glovers were *bona fide* purchasers for value who took the property in question without notice of the alleged defect in the deed of trust applicable to the property. For that reason, we need not decide whether the deed of trust rested upon a mutual mistake of fact or whether an equitable lien or parol trust should have been imposed because, even if the omission of Tract B from the property utilized to secure the loan from BB&T to the Gibbs resulted from a mutual mistake of the parties or should have otherwise led to the imposition of a parol trust or an equitable lien, any reformed deed of trust would not have priority over the deed from the Gibbs to the Teagues and the Glovers.

Although Plaintiffs acknowledge that reformation of a deed of trust based upon a mutual mistake or the imposition of an equitable lien or parol trust will not be allowed to prejudice the rights of a *bona fide* purchaser for value, they argue that the Teague Defendants are not entitled to that status. Plaintiffs' contention rests on the assertion that “each case must be evaluated on its specific facts in order to determine whether any third party actually relied on the public record, and whether reformation would *prejudice* an innocent purchaser for value.” The position espoused by Plaintiffs essentially assumes that, in addition to demonstrating that the Teagues and the Glovers obtained a deed to the property for valuable consideration and without notice of the alleged error in the deed of trust, the Teague Defendants must also adduce evidence that, in reaching the

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decision to accept a deed to the property in exchange for reducing the amount of the judgment that Teague & Glover had obtained against the Gibbs, they “actually relied” on the allegedly erroneous provisions of the deed of trust. In support of this argument, Plaintiffs rely upon “the general principles of reformation,” which they contend render “the recording statutes . . . inapplicable,” and argue that their position is supported by this Court’s decision in *Noel Williams Masonry v. Vision Contractors of Charlotte*, 103 N.C. App. 597, 406 S.E.2d 605 (1991). We disagree.

In *Williams Masonry*, a contractor obtained a construction loan from a lending institution for use in developing a piece of property. The loan in question was secured by a deed of trust that failed to include a legal description specifically identifying the property utilized to secure the loan. Subsequently, the contractor entered into contracts with several subcontractors under which the subcontractors agreed to supply labor and materials for use in connection with construction activities on the property. After the contractor failed to pay the subcontractors, the subcontractors filed claims of lien against the property. Subsequently, the lending institution discovered the error in the deed of trust and recorded a corrected deed of trust. The trial court allowed reformation of the deed of trust and held that the reformed deed of trust related back to the date upon which the original deed of trust had been recorded, effectively giving the lending institution priority over the subcontractors’ lien claims. On appeal, this Court affirmed the trial court’s ruling, holding, in reliance upon the logic set out in *Arnette*, 88 N.C. App. at 460-62, 363 S.E.2d at 679-81, that the lender was entitled to the imposition of a parol trust on the property used to secure the loan and that the subcontractors should not be accorded the status of *bona fide* purchasers for value without notice given the absence of any evidence tending to show that they had either relied on the terms of the deed of trust in contracting with the contractor or had properly searched the public record for notice of defects in the deed of trust.

Plaintiffs’ challenge to the trial court’s order in reliance on *Williams Masonry* is tantamount to a contention that they were entitled to have a parol trust or equitable lien imposed upon Tract B. However, *Williams Masonry* and our recent decision in *S.T. Wooten Corp. v. Front Street Construction, LLC*, ___ N.C. App. ___, ___, 719 S.E.2d 249, 252 (2011) (upholding reformation of a deed under *Williams Masonry* despite an intervening claim of lien because the lien creditor “did not begin work or furnish new materials in reliance

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upon the error in the original deed” or “know of the mistake in the deed”), are readily distinguishable from the facts present here. In *Williams Masonry*, the subcontractors did not hold a deed or deed of trust applicable to the property. As a result, the specific issue before the Court in *Williams Masonry* was whether the subcontractors “should be given the status of *bona fide* purchasers for value.” *Williams Masonry*, 103 N.C. App at 603, 408 S.E.2d at 608. In declining to afford the subcontractors that status, we noted that, “[a]lthough each subcontractor contributed labor and materials to the property, there is no evidence that the consideration was given on the faith of the ownership of the property . . . free and clear of any deed of trust.” *Id.* In other words, the subcontractors provided labor and materials pursuant to a contract with the contractor under which they would be paid for their work; as might be expected, the contract between the contractor and the subcontractors had no legal relationship to the terms of the deed of trust securing the loan on the property that had been obtained by the contractor. Though the deed of trust was not part of the contract under which the subcontractors provided labor and materials at the development, the subcontractors had not checked the public record to determine whether there was any notice that the deed of trust was defective. Thus, we concluded that there was no legal basis for treating the subcontractors as *bona fide* purchasers for value without notice entitled to protection from reformation based upon the imposition of a parol trust or equitable lien.

After carefully reviewing the record and the briefs and the applicable decisions of this Court and the Supreme Court, we conclude that *Williams Masonry* is focused solely upon situations involving a party who, although not a *bona fide* purchaser for value, wishes to be treated as if it were one for purposes of resisting reformation based upon the imposition of a parol trust or an equitable lien. *Williams Masonry* did not hold that an actual *bona fide* purchaser for value without notice, such as the Teagues and the Glovers, must, in addition to providing consideration, establish specific reliance on the allegedly defective portions of a deed or deed of trust in making a particular business decision or satisfy any other additional requirements. Instead, *Williams Masonry* held that parties who are not actual *bona fide* purchasers for value will not be treated as having that status in a situation involving reformation arising from the imposition of a parol trust in the event that there is no connection between their contract with the grantor of a deed of trust and the terms of that instrument.

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In this case, however, the Teagues and the Glovers are indisputably *bona fide* purchasers for value. The undisputed record evidence establishes that the Teagues and the Glovers hold a deed to the entire tract of property and that their interest in the property is explicitly subject to the lien created by the deed of trust. For that reason, the Teagues and the Glovers are not lienholders claiming to be entitled to the same treatment as a *bona fide* purchaser for value—they actually are *bona fide* purchasers for value.³ As a result, even if Plaintiffs were otherwise entitled to the imposition of a parol trust or equitable lien applicable to Tract B, this fact would not overcome the rights of the Teagues and the Glovers as bona fide purchasers for value without notice. Thus, we conclude that the logic underlying *Williams Masonry* is not controlling in this case, so that any failure on the part of the Teague Defendants to establish that they “relied” on the alleged error in the deed of trust in deciding to take a deed in exchange for a reduction in the judgment amount is beside the point.⁴

II.

[2] Secondly, Plaintiffs argue that the trial court erred in granting summary judgment to the Teague Defendants where they had not established they would be prejudiced by reformation of the deed. We agree.

In essence, Plaintiffs argue that, since the Teague Defendants “had to have expected” that the loan would be repaid in connection with the foreclosure process and since the Teague Defendants did not rely on the terms of the deed of trust during their negotiations with the Gibbs, the Teague Defendants would receive “exactly what they bargained for” in the event that “the 2009 Deed of Trust is reformed.”

It is axiomatic that when this Court reviews a trial court’s grant of summary judgment, the “[e]vidence presented by the parties is viewed in the light most favorable to the non-movant.” *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citing *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). Here, the

3. In light of that fact, we need not give separate consideration to the issue of whether Teague & Glover had *bona fide* purchaser for value status, given that the interest held by the Teagues and the Glovers is sufficient to preclude reformation of the deed of trust.

4. In light of our decision with respect to this issue, we need not address the other arguments advanced by the parties in reliance on the logic utilized in *Williams Masonry*.

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uncontroverted evidence shows that the value of Plaintiff's lien was subtracted from the fair market value of the property when the amount to credit the judgment was determined. When that fact is viewed in the light most favorable to Plaintiffs, whether Defendants would be prejudiced by reformation of the deed is a genuine issue of material fact. As such, summary judgment on this particular issue was not proper, and the case should be remanded to the lower court for consideration of potential prejudice to Defendants.

III.

[3] Finally, Plaintiffs claim that they are entitled to have an equitable lien imposed upon the entire parcel. Plaintiffs have not, however, asserted that the Teague Defendants have breached an oral agreement with Plaintiffs or that the Teague Defendants have acted inconsistently with some sort of a fiduciary or contractual obligation that they owed to Plaintiffs. In essence, Plaintiffs' ultimate complaint is nothing more or less than a disagreement with the priority rules established by the relevant statutory provisions as construed by the Supreme Court and this Court. "Issues of public policy should [, however,] be addressed to the legislature." *Allen v. Allen*, 76 N.C. App. 504, 507, 333 S.E.2d 530, 533 (1985) (citing *Skinner v. Whitley*, 281 N.C. 476, 484, 189 S.E.2d 230, 235 (1972)). As a result, Plaintiffs are not entitled to have Tract B subjected to an equitable lien in their favor.

Thus, for the reasons set forth above, we conclude that the trial court's order should be, and hereby is, affirmed in part and reversed and remanded in part.

Affirmed in Part; Reversed and Remanded in Part.

Judge THIGPEN concurs.

Judge ERVIN concurs in part and dissents in part in separate opinion.

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

Although I concur in the Court's determinations that the Teagues and the Glovers were *bona fide* purchasers for value; that Plaintiffs were not entitled to reformation of the deed of trust; and that the holding in *Williams Masonry* is not controlling in the present case, I am unable to agree with the Court's conclusion that there is a genuine issue of material fact regarding whether Defendants would be preju-

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diced by reformation of the deed of trust. As a result, I concur in the Court's opinion in part and dissent in part.

“ ‘A genuine issue of material fact arises when ‘the facts alleged . . . are of such nature as to affect the result of the action.’ ” *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 179, 182, 711 S.E.2d 114, 116 (2011) (quoting *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971)) (citation and quotation marks omitted); see also *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E.2d 190, 193 (1980) (stating that “[a]n issue is material if, as alleged, facts would constitute a legal defense, or would affect the result of the action or if its resolution would prevent the party against whom it is resolved from prevailing in the action”). The ultimate issue about which the Court and I disagree is the extent, if any, to which the existence of a factual dispute about the manner in which the size of the credit that the Gibbs' received against the Teague & Glover judgment would constitute a genuine issue of material fact.

According to *Black's Law Dictionary*, “prejudice” is defined as “[d]amage or detriment to one's legal rights or claims.” *Black's Law Dictionary* 1218 (8th ed. 2004). In light of that definition, I believe that any “prejudice” determination requires a “before and after” comparison involving the nature and extent of a party's legal rights “with or without” the relevant event. As I understand the present record, there is no dispute that (1) Defendants were deeded a tract of property of which only Tract A, which contains less than half the total amount of property previously owned by the Gibbs and which does not include the residence that had been constructed on the property, was encumbered by Plaintiff's deed of trust; (2) if the Gibbs fail to meet their obligation under the deed of trust, the bank is only entitled to foreclose upon Tract A, rather than the entire tract of property previously owned by the Gibbs; (3) if the deed of trust were reformed in accordance with Plaintiff's request, the entire tract of property, including both Tract A and the remainder of the overall tract, would then be encumbered by Plaintiff's deed of trust; and (4) if the Gibbs defaulted on their obligation to Plaintiff after reformation, Plaintiff would be able to foreclose on the entire tract of property rather than just on Tract A. As a result, reformation would result in a change from a situation in which the larger and more desirable portion of the property in question was unencumbered to one in which the entire property is encumbered. In my view, such an outcome clearly constitutes “damage or detriment” to the Teagues' and Glovers' “legal

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rights” sufficient to compel a finding of “prejudice” regardless of the other factors upon which the Court relies.

As the Court correctly observes, “Plaintiffs argue that, since the Teague Defendants ‘had to have expected’ that the loan would be repaid in connection with the foreclosure process and since the Teague Defendants did not rely on the terms of the deed of trust during their negotiations with the Gibbsses, the Teague Defendants would receive ‘exactly what they bargained for’ in the event that ‘the 2009 Deed of Trust is reformed.’ ” This argument, which the Court obviously accepts, does not rest upon a comparison between the nature and extent of Defendants’ legal rights with or without reformation of the deed of trust. Instead, the Court appears to compare the economic effect of reformation with Defendants’ subjective expectations regarding the economic value of the bargain they made with the Gibbs. Put another way, the Court, consistently with Plaintiff’s argument, assumes that, if the amount of the debt owed by the Gibbs to BB&T was utilized in calculating the amount of credit which the Gibbs were entitled to receive against the Teague & Glover judgment in return for deeding the entire parcel to the Teagues and the Glovers, then the Teague Defendants would be unable to show the necessary prejudice.

The approach adopted by the Court is inconsistent with the manner in which I believe that the prejudice inquiry should be conducted. As I understand the appropriate prejudice inquiry, which should rest upon a “before and after” comparison of the type outlined above, the various factors, both objective and subjective, upon which Defendants relied in deciding how much to credit the Gibbs for the deed to the property are legally irrelevant to the issue of whether Defendants would be prejudiced by reformation of the deed of trust encumbering the property. As a result, the evidence upon which the Court relies in reversing the trial court’s decision with respect to the prejudice issue does not relate to a “material” issue of fact, because resolution of this issue would not affect the outcome of the case. Thus, since the Court reaches a contrary conclusion, I respectfully dissent from the Court’s decision to remand this case to the trial court for consideration of this issue, while concurring with the remainder of its opinion.

BENJAMIN EDWARDS AND LYNN OWENS, OWNERS OF “LIVE”; GEORGE BEAMAN, OWNER OF “CLUB 519”, “5TH STREET DISTILLERY” AND “MAC BILLIARDS”, PETITIONERS V. PITT COUNTY HEALTH DIRECTOR, JOHN H. MORROW, RESPONDENT

No. COA11-754

(Filed 20 March 2012)

Constitutional Law—equal protection—smoking ban—private club exception—rational reason—no violation

The trial court erroneously concluded that the challenged portions of the North Carolina smoking ban irrationally distinguished petitioners’ establishments from country clubs and unconstitutionally subjected the establishments to restrictions while exempting country clubs. The legislature’s exemption of country clubs is limited to private, non-profit country clubs and does not exclude public or for-profit country clubs. As the legislature could have had a plausible, rational reason for allowing smoking in private, non-profit country clubs, but disallowing smoking in private, for-profit non-country clubs, the smoking ban’s private club exception did not irrationally classify the establishments, and respondent’s enforcement of the North Carolina smoking ban against petitioners did not violate petitioners’ constitutional right to equal protection.

Appeal by Respondent from order entered 17 November 2010 by Judge G. Galen Braddy in Pitt County District Court. Heard in the Court of Appeals 12 January 2012.

Owens, Nelson, Owens & Dupree, PLLC, by Jonathan Vann Bridgers, for Petitioners.

Ferguson Stein Chambers Gresham & Sumter, PA, by Adam Stein, for Respondent.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for Amici American Heart Association, American Lung Association, American Cancer Society and American Cancer Society Action Network, Americans for Nonsmokers’ Rights, Tobacco Control Legal Consortium, and Campaign for Tobacco-Free Kids.

Attorney General Roy Cooper, by Assistant Solicitor General John F. Maddrey, for Amicus State of North Carolina.

STEPHENS, Judge.

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[219 N.C. App. 452 (2012)]

In early 2010, the director of the Pitt County Health Department, Respondent John H. Morrow, sent notices of violation to Petitioners George Beaman, Benjamin Edwards, and Lynn Owens (“Petitioners”), the owners of Club 519, 5th Street Distillery, Mac Billiards, and Live (the “establishments”), citing the establishments’ violation of North Carolina’s smoking ban, N.C. Gen. Stat. § 130A-491, *et seq.*, and advising the owners that they would be subject to “an ongoing administrative penalty of \$200 per day” if the violations continued beyond their third notice of violation. Petitioners appealed the citations and administrative penalties to the Pitt County Board of Health (the “Board of Health”), which upheld the penalties after hearing each appeal. Thereafter, Petitioners petitioned Pitt County District Court for judicial review of the decision of the Board of Health, contending, *inter alia*, that the Board of Health’s enforcement of the North Carolina smoking ban—specifically enforcement of sections 130A-492(11) and 130A-496(b)(3), which Petitioners allege exempt all country clubs from the ban, but do not exempt the “similarly situated” establishments—violates Petitioners’ constitutional rights to equal protection of the laws. Following a hearing in Pitt County District Court, the Honorable G. Galen Braddy presiding, the trial court entered an order in which it concluded that sections 130A-492(11) and 130A-496(b)(3), as applied to the Petitioners, “are in violation of the Equal Protection Clauses of both the United States and the North Carolina Constitutions and are therefore unconstitutional and unenforceable against Petitioners only.” From this order, Respondent appeals, arguing that the trial court erroneously concluded that the challenged portions of the North Carolina smoking ban irrationally distinguish the establishments from country clubs and unconstitutionally subject the former to restrictions while exempting the latter. For the following reasons, we agree with Respondent.

While generally prohibiting smoking “in all enclosed areas of restaurants and bars,” section 130A-496 of the smoking ban provides that “[s]moking may be permitted in . . . [a] private club.” N.C. Gen. Stat. § 130A-496 (2011). Section 130A-492(11) defines a “private club” as follows:

A country club or an organization that [(1)] maintains selective members, [(2)] is operated by the membership, [(3)] does not provide food or lodging for pay to anyone who is not a member or a member’s guest, and [(4)] is either [(a)] incorporated as a nonprofit corporation in accordance with Chapter 55A of

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the General Statutes or [(b)] is exempt from federal income tax under the Internal Revenue Code as defined in [section] 105-130.2(1). For the purposes of this Article, private club includes country club.

N.C. Gen. Stat. § 130A-492(11) (2011). Petitioners contend, and we agree, that the above statutory definition, read as a whole and interpreted to avoid superfluity,¹ creates two distinct types of private clubs that are exempt from the smoking ban: (1) country clubs, and (2) non-country club organizations meeting the four listed qualifications. The second sentence of the statutory definition, which specifically states that “private club includes country club,” belies the argument advanced by Respondent that the four listed qualifications must be met by a country club before that country club can be considered a private club exempted from the smoking ban. Rather, the second sentence’s unequivocal inclusion of country clubs in the private club exemption dictates the conclusion that, while a non-country club organization seeking exemption as a private club must meet the four listed qualifications, a country club need only be a country club in order to be exempted as a private club.

The question raised by Petitioners before the trial court, and the issue before this Court on appeal, is whether exempting country clubs from the smoking ban, but not the establishments, is unconstitutional.² Petitioners contend that this distinction is irrational, and thus, unconstitutional. *See Heritage Vill. Church & Missionary Fellowship, Inc. v. State*, 40 N.C. App. 429, 447-48, 253 S.E.2d 473, 484 (1979) (holding that statutory exemptions that make “an arbitrary and irrational distinction unrelated to the purposes of the statute” are “violative of the Equal Protection Clauses of the United States Constitution and of the North Carolina Constitution”), *aff’d*, 299 N.C. 399, 263 S.E.2d 726 (1980). They support this contention by highlighting the fact that, because section 130A-492(11) exempts all country clubs, for-profit country clubs are exempt while for-profit non-country club organizations are not. To address Petitioners’ constitu-

1. *See State v. Coffey*, 336 N.C. 412, 417-18, 444 S.E.2d 431, 434 (1994) (citations omitted) (stating that (1) our courts construe each word of a statute to have meaning because it is always presumed that the legislature acted with care and deliberation, and (2) a statute should not be interpreted in a manner which would render any of its words superfluous).

2. We note that because no fundamental right or suspect classifications are at issue, Petitioners’ argument is subject to rational basis review. *See Liebes v. Guilford Cnty. Dep’t of Pub. Health*, ___ N.C. App. ___, ___, 713 S.E.2d 546, 549, *disc. review denied*, ___ N.C. ___, 718 S.E.2d 396 (2011).

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tional claim, we must first determine whether a for-profit country club is, in fact, exempt from the smoking ban. Or, “When is a country club not a country club?”

Where statutory language is clear and unambiguous, our Courts do not “engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.” *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993). “The plain meaning of words may be construed by reference to standard, nonlegal dictionaries.” *State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 511 (2004) (internal quotation marks omitted). In this case, however, dictionaries offer no clear, unambiguous definition of the term “country club.” See Webster’s Third New International Dictionary 521 (2002) (defining “country club” as “an upper-class suburban or outlying club or clubhouse for social life, golf, and other recreation”); The Random House Dictionary of the English Language 463 (2d ed. 1987) (“[A] club, usually in a suburban district, with a clubhouse and grounds, offering various social activities and generally having facilities for tennis, golf, swimming, etc.”); The American Heritage Dictionary 463 (4th ed. 2000) (“A suburban club for social and sports activities, usually featuring a golf course”). Indeed, the dictionary entries seem to agree only that country clubs *usually* are suburban and feature social and recreational activities; any other characteristics are not universally applicable. We further note that (1) our General Statutes contain no definition of the term, and (2) the statutory codes of other jurisdictions, like the dictionary entries, are not in agreement as to what precisely constitutes a country club. See, e.g., Fla. Stat. § 501.013(5) (2011) (for exemption from certain consumer protection requirements, a country club (1) must “ha[ve] as its primary function the provision of a social life and recreational amenities to its members, and for which a program of physical exercise is merely incidental to membership”; and (2) is defined as “a facility that offers its members a variety of services that may include, but need not be limited to, social activities; dining, banquet, catering, and lounge facilities; swimming; yachting; golf; tennis; card games such as bridge and canasta; and special programs for members’ children”); Md. Code Ann., Alcoholic Beverages § 6-301(6)(iii) (2011) (for purpose of issuance of alcohol licenses, a “golf and country club” must have “200 or more bona fide members paying dues of not less than \$75 per annum per member” and must “maintain[] . . . two or more tennis courts, a swimming pool at least 30 feet by 80 feet in size, and a regular or championship golf course of nine holes or more”). We con-

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clude, therefore, that the undefined term “country club,” as used in the statute, is ambiguous and unclear. As such, we must interpret that ambiguous statutory language “to give effect to the legislative intent” and avoid “[a] construction of [the] statute which operates to defeat or impair the object of the statute.” *N.C. Baptist Hosps., Inc. v. Mitchell*, 323 N.C. 528, 532, 374 S.E.2d 844, 846 (1988) (citation omitted).

As specified in section 130A-491, titled “Legislative findings and intent”:

It is the intent of the General Assembly to protect the health of individuals in public places . . . from the risks related to secondhand smoke.

N.C. Gen. Stat. § 130A-491(b) (2011). The fact that the legislature’s stated intent is to protect individuals in *public* places from the dangers of secondhand smoke, along with the fact that the language allowing smoking in country clubs is situated in the subsection defining “*private* club,” is a clear indication that an interpretation of “country club” that “give[s] effect to the legislative intent” of the statutes would be one that only exempts private country clubs from the smoking ban. Conversely, an interpretation that allows smoking in public country clubs would, without question, “defeat or impair the object of the statute.” Thus, we conclude that the legislature’s exemption of country clubs from the smoking ban applies only to private country clubs and does not exclude public country clubs. The question, then, becomes, “When is a country club a private country club?”

As noted in this Court’s recent decision in *Liebes*, courts have looked at various factors to determine when a club is private rather than public. ___ N.C. App. at ___, 713 S.E.2d at 555 (citing the “multi-factor framework set forth in *United States v. Lansdowne Swim Club*, 713 F. Supp. 785 (E.D. Pa. 1989)” and various cases applying that analysis). Our legislature, too, considers several elements as determinative of private status and, indeed, has yet to settle on a single set of factors to make that determination, applicable in all instances. *See* N.C. Gen. Stat. § 18B-1000(5) (2011) (defining a “private club” as “[a]n establishment that is organized and operated solely for a social, recreational, patriotic, or fraternal purpose and that is not open to the general public, but is open only to the members of the organization and their bona fide guests”). *But see* N.C. Gen. Stat. § 130A-247(2) (2011) (“‘Private club’ means an organization that maintains selective members, is operated by the membership, does not provide food or lodging for pay to anyone who is not a member or

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a member's guest, and is either incorporated as a nonprofit corporation in accordance with Chapter 55A of the General Statutes or is exempt from federal income tax under the Internal Revenue Code as defined in [section] 105-130.2(1)."). The foregoing authority, establishing that there is no bright-line rule for distinguishing private clubs from non-private clubs, indicates that there is, likewise, no clear answer to the question of when a country club is a private country club. Our task, then, in interpreting the legislature's ambiguous exemption of private country clubs from the smoking ban, is to answer that question in a way that best effectuates the legislature's intent and does not operate to impair the object of the statute. See *Willoughby v. Bd. of Trs. of Teachers' & State Emps. Ret. Sys.*, 121 N.C. App. 444, 449, 466 S.E.2d 285, 289 (1996) (construing statute "so as to best effectuate the stated [] goal" of the statute); *H.B.S. Contractors, Inc. v. Cumberland Cnty. Bd. of Educ.*, 122 N.C. App. 49, 55, 468 S.E.2d 517, 522 (1996) (pursuing the "paramount objective in statutory interpretation" of "giv[ing] effect to the legislative intent" by choosing the interpretation that "best effectuates the legislative intent"). To that end, and for the following reasons, we conclude that the legislature's exemption of private country clubs applies only to nonprofit country clubs and does not, as Petitioners suggest, exempt for-profit country clubs.

Initially, we note that the vast weight of authority uses nonprofit status as a factor weighing in favor of—or as a requisite for—a determination that a club is truly private. See, e.g., *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1277 (7th Cir. 1993) (holding that a club's nonprofit status supports the conclusion that the club is private); *Lansdowne Swim Club*, 713 F. Supp. at 804 (holding that a club's nonprofit status "support[s] its claim that it is a private club"); N.C. Gen. Stat. § 130A-247(2) (private club must be nonprofit).

Beyond regularly serving as a requisite for private status in legal analysis, nonprofit status, in and of itself, presumptively ensures that a country club is truly, rather than nominally, a private club. From an economics standpoint, it is considered a given that the primary aim of a for-profit entity is profit maximization. See, e.g., James F. McDonough III, Comment, *The Myth of the Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy*, 56 Emory L.J. 189, 208 (2006) (noting that "the overriding motive of a for-profit firm is to maximize profits" (citing R.H. Coase, *The Nature of the Firm*, 4 *Economica* 386, 390-92 (1937))); Srikanth Srinivasan, Note, *College Financial Aid and Antitrust: Applying the*

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Sherman Act to Collaberative Nonprofit Activity, 46 Stan. L. Rev. 919, 932 (1994) (“Microeconomic theory assumes that commercial firms pursue one objective—profit-maximization.” (citing Robert S. Pindyck & Daniel L. Rubinfeld, *Microeconomics* 4 (2d ed. 1992))). In pursuit of that goal, a for-profit country club’s owners will make decisions for the club—such as the requirements for membership, the size of membership, whether to allow a new member, and whether to allow smoking—based primarily, if not singularly, on which option maximizes the country club’s profit. Cf. Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 Fla. L. Rev. 419, 446-47 (1998) (“In the for-profit setting, the shareholders’ primary concern is to maximize their profits and, because the board and management are accountable to the shareholders, a major objective is to satisfy the shareholders’ goal. This pressure will theoretically cause decision-makers of for-profit entities to attempt to maximize profits . . .”). The necessary results of such profit-driven decision-making will be minimal membership requirements (a non-exclusionary membership fee), expanded membership (open to anyone willing to pay the fee), and, ultimately, a near-publicly accessible country club (at least for anyone who can afford the fee). Contrasted with a nonprofit private country club—whose ownership and membership decisions are not based on profit maximization,³ but rather on furtherance of the private social and recreational purposes for which the club was established—the for-profit club is far less likely to exhibit those characteristics associated with truly private organizations, *i.e.*, more selective membership and operation by members for membership rather than by owner for profit. Accordingly, an interpretation of “country club” that allows smoking in only those truly private, nonprofit country clubs and that bans smoking in quasi-public, for-profit country clubs best effectuates the legislature’s intent to protect the health of individuals in public places.

Further, as evidenced by the legislature’s creation of a private club exception in the first place, it is clear that the legislature, while attempting to protect individuals in public places, also sought to limit the impact of the smoking ban on the rights of association of members of organizations that are truly private. Cf. *Coastal Ready-Mix*

3. See Barak D. Richman, *Antitrust and NonProfit Hospital Mergers: A Return to Basics*, 156 U. Pa. L. Rev. 121, 130 n34 (2007) (cautioning against presuming that profit maximization “drives nonprofit behavior”); Srinivasan, 46 Stan. L. Rev. at 932 (noting that “nonprofits do not presumptively pursue profit-maximization over non-commercial goals”).

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Concrete Co. v. Bd. of Comm'rs of Town of Nags Head, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (holding that legislative intent may be shown by “the language of the statute or ordinance” and “what the act seeks to accomplish”). In our view, interpreting the country club exemption to apply only to nonprofit private country clubs effectuates this intent by allowing smoking in clubs that are established and operated in the furtherance of a private, social or recreational purpose, while protecting from the risks of secondhand smoke citizens patronizing those organizations that are nominally private, but allow nearly unrestricted public access.

It is also notable that the legislative history of the statute reveals that the legislature’s initial definition of “private club” in the proposed bill was nearly identical to the definition of private club in section 18B-1000(5), the main difference being an additional nonprofit requirement not found in section 18B-1000(5). *See* Act of May 19, 2009, ch. 27, 2009 N.C. Sess. Laws 39 (private club exception first introduced in the fourth edition of House Bill 2); *see also* N.C. Gen. Stat. § 18B-1000(5). We find it significant that, presented with two differing statutory definitions of “private club”—one definition with a nonprofit requirement, one without, *compare* N.C. Gen. Stat. § 18B-1000(5), *with* N.C. Gen. Stat. § 130A-247(2)—and cognizant of those differing definitions, *Williams v. Alexander Cnty. Bd. of Educ.*, 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1998) (“In ascertaining the intent of the legislature, the presumption is that it acted with full knowledge of prior and existing laws.”), the legislature chose to model the statutory definition in the smoking ban after the private club definition that did not contain a nonprofit requirement, yet added to that definition a requirement that the club must be nonprofit. Clearly, then, the drafters of the smoking ban’s private club exception intended that all clubs qualifying under that exception would be nonprofit clubs. Accordingly, we conclude that an interpretation that accomplishes just that result best effectuates the legislature’s intent, as shown by the wording and legislative history of the statute.

Because we conclude that only private, nonprofit country clubs are exempt under the private club exemption, to address Petitioners’ constitutional claim we need not determine the constitutionality of exempting for-profit country clubs and not for-profit non-country club organizations. Rather, we need only determine the constitutionality of the smoking ban’s exemption of private, nonprofit country clubs, but not the establishments.

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Assuming that the establishments, which are private and for-profit, are similarly situated with private, nonprofit country clubs with respect to the smoking ban's statutory scheme, the question is whether the legislature could have had a plausible, rational reason for allowing smoking in private, nonprofit country clubs, but disallowing smoking in private, for-profit noncountry clubs. *Rhyme v. K-Mart Corp.*, 358 N.C. 160, 180-81, 594 S.E.2d 1, 15 (2004) (holding that rational basis review is satisfied "so long as there is a plausible policy reason for the classification . . . and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational") (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11, 120 L. Ed. 2d 1, 13 (1992)). And the answer, as it was in *Liebes*, is "yes." ___ N.C. App. at ___, 713 S.E.2d at 553-55. In *Liebes*, this Court noted several plausible reasons why our legislature would exempt nonprofit non-country club organizations, but not for-profit non-country club organizations, such as the potential impairment of the legislative intent accompanying a broader definition of "private club" and more objective enforcement resulting from the ready discernibility of nonprofit status. *Id.* Those same reasons justify the legislature's exemption of only nonprofit country clubs and not for-profit non-country club organizations such as the establishments. Accordingly, we conclude that the smoking ban's private club exception does not irrationally classify the establishments, and that the Board of Health's enforcement of the North Carolina smoking ban against Petitioners does not violate Petitioners' constitutional right to equal protection. Therefore, we hold that the trial court erred in declaring the challenged section of the North Carolina smoking ban unconstitutional. The decision of the trial court is

REVERSED.

Judge STROUD concurs.

Judge BEASLEY concurs in separate opinion.

BEASLEY, Judge, concurring in separate opinion.

I agree with the majority's reliance on *Liebes v. Guilford Cnty. Dep't of Pub. Health*, ___ N.C. App. ___ 713 S.E.2d 546 (2011) to resolve this issue, but I believe that the majority's interpretation of the country club exemption unduly narrows the force and effect of the statute.

"Where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g. "or"), the

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application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them.” *Spruill v. Lake Phelps Vol. Fire Dep’t, Inc.*, 351 N.C. 318, 323, 523 S.E.2d 672, 676 (2000) (internal quotation marks and citations omitted). Moreover, “we follow the maxims of statutory construction that words of a statute are not to be deemed *useless or redundant*[.]” *Town of Pine Knoll Shores v. Evans*, 331 N.C. 361, 366, 416 S.E.2d 4, 7 (1992).

N.C. Gen. Stat. § 130A-492(11) (2011) states,

A country club or an organization that maintains selective members, is operated by the membership, does not provide food or lodging for pay to anyone who is not a member or a member’s guest, and is either incorporated as a nonprofit corporation in accordance with Chapter 55A of the General Statutes or is exempt from federal income tax under the Internal Revenue Code as defined in G.S. 105-130.2(1). For the purposes of this Article, private club includes country club. (emphasis added).

The majority opines that the “country club” exemption only applies to “nonprofit country clubs and does not . . . exempt for-profit country clubs.” Under the majority’s interpretation, the “country club” and “an organization” are nearly identical. I do not believe that the legislature intended to limit the “country club” exception to non-profit country clubs, especially where juxtaposed to the term “country club”, the legislature made another exception for non-profit organizations. Here, the legislature could not have intended to use this disjunctive if both categories had the same characteristics. The majority’s approach to applying the “country club” exception creates a redundancy and unnecessarily limits the reach of the statute.

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APPLEWOOD PROPERTIES, LLC AND APPECREEK EXECUTIVE GOLF CLUB, LLC,
PLAINTIFFS v. NEW SOUTH PROPERTIES, LLC, APPLE CREEK VILLAGE, LLC AND
HUNTER CONSTRUCTION GROUP, INC., AND URBAN DESIGN PARTNERS,
DEFENDANTS

No. COA11-353-2

(Filed 20 March 2012)

**Environmental Law— Sedimentation Pollution Control Act—
land-disturbing activity—deposition into body of water—
summary judgment proper**

The trial court did not err in denying plaintiffs' motion for summary judgment in a construction case involving alleged violations of the Sedimentation Pollution Control Act (SPCA). The SPCA did not apply because a "land-disturbing activity" requires an element of deposition into a body of water, which was not present in this case.

Appeal by Plaintiffs from order entered 16 April 2010 by Judge Jesse B. Caldwell, III in Gaston County Superior Court. This matter was originally heard in the Court of Appeals on 17 November 2011, and an unpublished opinion was filed by this Court on 20 December 2011 dismissing the appeal. Plaintiffs filed a petition for rehearing on 23 January 2012. An order granting the petition was entered on 9 February 2012. The following opinion supersedes and replaces the opinion filed 20 December 2011.

Womble Carlyle Sandridge & Rice, PLLC, by Raboteau T. Wilder, Jr. and Amanda G. Ray, for Plaintiffs-Appellants.

Dean & Gibson, PLLC, by Michael G. Gibson and Sarah M. Bowman, for Hunter Construction Group, Inc., Defendant-Appellee.

BEASLEY, Judge.

Applewood Properties, LLC and Apple Creek Executive Golf, LLC (Plaintiffs) filed this action on 4 December 2006 asserting claims of negligence, nuisance, trespass, violations of the Sedimentation Pollution Control Act (SPCA), negligence *per se*, and intentional misconduct and gross negligence against Defendants New South Properties of the Carolinas, LLC (New South), Apple Creek Village, LLC (Village), and Hunter Construction Group, Inc. (Hunter).

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Plaintiffs added an additional Defendant, Urban Design Partners (Urban Design), on 7 April 2009. Hunter and Village subsequently moved for partial summary judgment and New South moved for summary judgment. On 16 April 2010, the trial court granted the motions for summary judgment as to the SPCA claims, and denied the motions with respect to all other claims. The trial court filed the order on 19 April 2010 and Hunter's counsel served the order upon the other parties on the same date. The trial court tried all of the remaining claims beginning on 19 April 2010. The jury returned a verdict in favor of Plaintiffs, finding Plaintiffs were damaged by the negligence of New South/Apple Creek, Hunter, and Urban Design, and were entitled to recover damages in the amount of \$675,000. The trial court subsequently filed a judgment on 10 June 2010 awarding Plaintiffs damages in the amount of \$675,000.

Plaintiffs filed and served a notice of appeal on 23 September 2010 seeking review of the 19 April 2010 order allowing Defendants' motions for summary judgment as to the SPCA claim. On 1 July 2011, this Court allowed Plaintiffs' motion to withdraw their appeal against all Defendants except Hunter. For the following reasons, we affirm the trial court's order.¹

"Summary judgment is properly granted when the forecast of evidence reveals no genuine issue as to any material fact, and when the moving party is entitled to a judgment as a matter of law." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citation and internal quotation marks omitted). "It has been said that a genuine issue is one which can be maintained by substantial evidence. Where the pleadings or proof of either party disclose that no cause of action or defense exists, a summary judgment may be granted[.]" *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534-35, 180 S.E.2d 823, 830 (1971).

Plaintiffs argue that the SPCA applies to the current situation, despite the fact that no sediment was deposited into a body of water. We disagree.

The preamble to the SPCA explains the purpose of the act:

The sedimentation of streams, lakes and other waters of this State constitutes a major pollution problem. *Sedimentation occurs from the erosion or depositing of soil and other mate-*

1. Because the claims decided by the 10 June 2010 judgment are not before this Court, we address only the propriety of this appeal regarding the 19 April 2010 order.

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rials into the waters, principally from construction sites and road maintenance. . . . It is the purpose of this Article to provide for the creation, administration, and enforcement of a program and for the adoption of minimal mandatory standards which will permit development of this State to continue with the least detrimental effects *from pollution by sedimentation*.

N.C. Gen. Stat. § 113A-51 (2011)(emphasis added). This Court has interpreted the preamble to the SPCA to mean that “the stated legislative intent behind the enactment of the SPCA . . . is to protect against the sedimentation of our waterways.” *McHugh v. N.C. Dept. of E.H.N.R.*, 126 N.C. App. 469, 476, 485 S.E.2d 861, 866 (1997).

Plaintiffs point to N.C. Gen. Stat. § 113A-64.1 (2011) of the Act which provides that a person engaged in a “[l]and-disturbing activity” who “failed to retain sediment generated by the activity” may be required “to restore the waters and land affected by the failure so as to minimize the detrimental effects of the resulting pollution by sedimentation.” Plaintiffs then reference N.C. Gen. Stat. § 113A-52(6) (2011) of the Act, which defines “land-disturbing activity” as “any use of the land by any person in residential, industrial, educational, institutional or commercial development . . . that results in a change in the natural cover or topography and that may cause or contribute to sedimentation.” Plaintiffs claim these provisions show that a person may violate the SPCA by using or affecting land, with no requirement that there be a deposition of sediment into a body of water. Thus, Plaintiffs’ SPCA claim against Defendant Hunter is based on the “land-disturbing activity” engaged in by Defendants that disturbed more than one acre of land on the parcel in question. However, Plaintiffs’ fail to recognize the second requirement of a land-disturbing activity—that it may cause or contribute to *sedimentation*. Because the preamble to the SPCA provides that sedimentation results from the erosion or depositing of materials into water, it is clear that even a “land-disturbing activity” requires an element of deposition into a body of water.

Plaintiffs cite to this Court’s opinion in *Williams v. Allen*, 182 N.C. App. 121, 126, 641 S.E.2d 391, 394 (2007), where we observed that the SPCA authorizes the Sedimentation Control Commission to adopt rules for the control of erosion and sedimentation resulting from land-disturbing activities, and that this rule-making authority is not limited to circumstances where sedimentation actually reaches a

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waterway. This observation is clearly *dicta*, and consequently not binding authority. See *Hayes v. Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 682 (1956). The holding of the case is that the trial court erred by ruling that the SPCA only applies to areas of more than one acre as a matter of law. *Williams*, 182 N.C. App. at 127, 641 S.E.2d at 394. Moreover, the observation does not shed any light on the case *sub judice* because this case is not about what the Sedimentation Control Commission could theoretically regulate. Instead, this case centers on the question of when the SPCA is applicable.

Plaintiffs also point to several other cases that purportedly stand for the proposition that the SPCA applies to activities that affect only land and do not involve the infiltration of sediment into water. These cases are easily distinguishable from the instant case because they involved the deposition of sediment into water. See *Banks v. Dunn*, 177 N.C. App. 252, 630 S.E.2d 1 (2006)(stating that uncontroverted evidence established that the red clay mud dumped by defendant washed down the hillside and into the stream at the bottom of the hill); *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 553 S.E.2d 431 (2001)(recognizing that there was sufficient evidence for the jury to find defendant liable for trespass when defendant's land-disturbing activities caused sediment to enter a lake on plaintiff's property).

Accordingly, we find that the SPCA does not apply to this situation and we affirm the trial court's grant of partial summary judgment to Defendants on Plaintiffs' SPCA claim.

Affirmed.

Judge ERVIN dissents with separate opinion.

Judge Thigpen, Jr. concurs.

ERVIN, Judge, dissenting.

After a careful review of the record in light of the applicable law, I am compelled to conclude, contrary to the result reached by my colleagues, that the Sedimentation Pollution Control Act of 1973 ("SPCA"), N.C. Gen. Stat. § 113A-50 *et. seq.* (2011), does, in fact apply to situations like the one at issue here. Simply put, I believe that the damage liability provisions of the SPCA are not limited to situations in which sediment is deposited into a body of water. As a result, I respectfully dissent from the Court's decision to affirm the trial

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court's summary judgment order on the basis that Defendant's activities did not result in the deposition of sediment into a river, lake, stream, or pond.¹

As I understand the record, Defendants were involved in the development of a large tract of land that was located adjacent to Plaintiffs' golf course. In order to develop the tract, Defendants obtained an approved erosion and sedimentation control plan from the Gaston County Natural Resources Department as required by the Gaston County Erosion and Sedimentation Control Program. In accordance with this approved plan, Defendants constructed silt collection basins on the tract. On 28 March 2006, the Gaston County Natural Resources Department inspected the site and found that all "reasonable measures" had not been taken to control erosion and sedimentation and that "a revision with an added berm with stone wrier to the draw in the center of the property to reduce the concentrated flow to the basin" was required. Another onsite inspection found that, as of 5 May 2006, the site was being properly maintained in compliance with the plan. However, the applicable inspection report did note that Defendants needed to "[m]ake sure all basins are cleaned and maintained, per our conversation."

On 27 June 2006, one of the silt collection basins at the site ruptured, causing a large volume of mud, water, sediment, and other debris to spill onto and damage Plaintiffs' golf course. On 29 June 2006, the Gaston County Natural Resources Department issued an inspection report which noted that severe sedimentation damage, in the form of "offsite sediment [disposal] onto [the] neighboring golf course" had occurred since the last inspection; determined that the development site did not comply "with SESCO/SPCA & Rules;" and cited Defendants for (1) failing to take sufficient measures to retain sediment on the site as required by N.C. Gen. Stat. § 113A-57(3) and (2) failing to take reasonable measures to protect all public and private property from damage as required by 15A NCAC 04B.0105. As a result, the Gaston County Natural Resources Department served Defendants with a notice of non-compliance requiring Defendants to "[r]estore adequate sediment control measures, to retain sediment on site" and to "[m]ake sure all areas are cleaned and restored per approved plan."

1. Although Plaintiffs contend in their reply brief that a body of water was, in fact, adversely affected by Defendants' activities, I do not believe that we need to address the extent, if any, to which Plaintiffs established that Defendants' alleged non-compliance with the SPCA affected a stream or wetland given my belief that impact upon a body of water is not a necessary component of Plaintiffs' SPCA claim.

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Although some repair work was undertaken following the rupture, storms continued to fill the basin, which overflowed onto Plaintiffs' golf course on a number of additional occasions during the ensuing months. The Gaston County Natural Resources Department found the existence of a violation stemming from the fact that no revised plan to correct the previous violations had been submitted on 13 July 2006. On 23 August 2006, another inspection report indicated that Defendants were not "in compliance with SESCO/SPCA & Rules" given that Defendant had failed (1) to submit a revised plan; (2) to provide adequate groundcover; (3) to take all reasonable measures to protect public and private property from damage; and (4) to maintain erosion control measures. Although the report stated that the "[s]ite appear[ed] to be stable since [the] basin [] blew out . . . [,]" the Gaston County Natural Resources Department noted that the "[o]utlet pipe in [the] basin [] is not installed per plan" and that, given "the volume of water coming onto the neighboring golf course, an adjustment in the pipe needs to be made." The Gaston County Natural Resources Department continued to issue violation notices relating to the site at which the rupture occurred through March 2009.

In seeking an award of damages based on the SPCA, Plaintiffs alleged that the golf course was damaged by "silt, mud, debris, and water" as the result of the basin rupture and overflow and that Defendants had (1) "engaged in land-disturbing activity that disturbed more than one acre of land on the parcel without installing erosion and sedimentation control devices and practices that were sufficient to retain the sediment generated by the land-disturbing activity within the boundaries of the parcel" and (2) "began land-disturbing activity that disturbed more than one acre on the parcel without filing or complying with erosion and sedimentation control plans with the governing agency." As a result of the fact that Plaintiffs' ability to establish the existence of facts necessary to support these allegations appears to be undisputed, the ultimate issue raised by the trial court's decision to grant summary judgment in favor of Defendant Hunter with respect to Plaintiffs' SPCA claim is whether such a showing suffices to establish damage liability under the SPCA.

According to N.C. Gen. Stat. § 113A-66(a):

Any person injured by a violation of this Article or any ordinance, rule, or order duly adopted by the Secretary or a local government, or by the initiation or continuation of a land-

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disturbing activity for which an erosion and sedimentation control plan is required other than in accordance with the terms, conditions, and provisions of an approved plan, may bring a civil action against the person alleged to be in violation (including the State and any local government). The action may seek any of the following:

- (1) Injunctive relief.
- (2) An order enforcing the law, rule, ordinance, order, or erosion and sedimentation control plan violated.
- (3) Damages caused by the violation.

Thus, according to the literal language of N.C. Gen. Stat. § 113A-66(a), any person who sustains an injury stemming from (1) a violation of any of the SPCA's provisions; (2) a violation of any rule or ordinance adopted by the Secretary of the Department of Natural Resources or a local governmental body authorized by the SPCA; or (3) any land-disturbing activity for which an erosion and sedimentation control plan is required which is not conducted in accordance with the terms, conditions, and provisions of an approved plan has a right to seek an award of damages from the responsible party.

According to N.C. Gen. Stat. § 113A-52(6), a land-disturbing activity includes "any use of the land by any person in residential, industrial, educational, institutional or commercial development, highway and road construction and maintenance that results in a change in the natural cover or topography and that may cause or contribute to sedimentation." As a result, any use of land which could cause sedimentation is subject to the SPCA, with the extent to which sedimentation actually occurs essentially irrelevant to the determination of whether a particular activity is "land-disturbing." In the event that any "land-disturbing activity" that will disturb more than one acre is undertaken, "the person conducting [the activity] shall install erosion and sedimentation control devices and practices that are sufficient to retain the sediment generated by the land-disturbing activity within the boundaries of the tract during construction upon and development of the tract[.]" N.C. Gen. Stat. § 113A-57(3). In addition, any land-disturbing activity must "be conducted in accordance with the approved erosion and sedimentation control plan." N.C. Gen. Stat. § 113A-57(5). "A local government may submit . . . an erosion and sedimentation control program for its jurisdiction" for approval, with "local governments [being] authorized to adopt ordinances and regulations necessary to establish and enforce erosion and sedimentation

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control programs” so long as they “meet [or] exceed the minimum requirements of [the SPCA] and the rules adopted pursuant to [the SPCA].” N.C. Gen. Stat. § 113A-60(a). As a result, given that the SPCA requires that any person who undertakes a land-disturbing activity “install erosion and sedimentation control devices and practices that are sufficient to retain the sediment generated by the land-disturbing activity within the boundaries of the tract . . .” and to conduct activities “in accordance with an approved erosion and sedimentation control plan,” N.C. Gen. Stat. § 113A-57(3), (5), the literal language of N.C. Gen. Stat. § 113A-66(a) clearly permits an injured party to seek an award of damages in the event that such a party sustains loss or damage stemming from another’s failure to install sedimentation control devices and practices sufficient to retain sediment on a disturbed tract or to follow an approved erosion and sedimentation control plan.

According to Plaintiffs’ complaint, the golf course was damaged by “silt, mud, debris, and water” as the result of the rupture and overflow of the basin. As we have already noted, Plaintiff alleged that Defendants had (1) “engaged in land-disturbing activity that disturbed more than one acre of land on the parcel without installing erosion and sedimentation control devices and practices that were sufficient to retain the sediment generated by the land-disturbing activity within the boundaries of the parcel” and (2) “began land-disturbing activity that disturbed more than one acre on the parcel without filing or complying with erosion and sedimentation control plans with the governing agency.” At the time of the hearing that led to the trial court’s decision to enter summary judgment in favor of Defendants with respect to the issue of their liability to Plaintiffs under the SPCA, Plaintiffs’ forecast sufficient evidence, when viewed in the light most favorable to them, to support a determination that the damage to Plaintiffs’ golf course resulted from Defendants’ failure to (1) take sufficient measures to retain sediment on site; (2) take all reasonable measures to protect all public and private property from damage stemming from Defendants’ land-disturbing activities; and (3) follow an approved erosion and sedimentation control plan. Thus, I believe that Plaintiff has stated a claim for and forecast sufficient evidence to establish a viable claim for relief pursuant to the SPCA. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534-35, 180 S.E.2d 823, 830 (1971).

In reaching a contrary determination, the Court concludes that Plaintiffs do not have a viable damage claim against Defendants pursuant to N.C. Gen. Stat. § 113A-66(a) because the deposition of sedi-

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ment into a body of water is an indispensable element of such a claim. The Court appears to reach this conclusion because (1) N.C. Gen. Stat. § 113A-51, which delineates the policy considerations that motivated the enactment of the SPCA, states that sedimentation consists of “the erosion or depositing of soil and other materials into the waters;” (2) we have interpreted N.C. Gen. Stat. § 113A-51 to mean that “the stated legislative intent behind the enactment of the SPCA . . . is to protect against the sedimentation of our waterways;” *McHugh v. N.C. Dept of E.H.N.R.*, 126 N.C. App. 469, 476, 485 S.E.2d 861, 866 (1997); (3) the definition of “land-disturbing activity” contained in N.C. Gen. Stat. § 113A-52(6) incorporates such a “deposition into a body of water” requirement given that it references N.C. Gen. Stat. § 113A-51; and (4) the decisions of this Court upon which Plaintiffs rely are distinguishable from the present case because they all involved the deposition of sediment into water. I do not find the Court’s analysis persuasive.

I simply do not read N.C. Gen. Stat. § 113A-51, the definition of “land-disturbing activity” set out in N.C. Gen. Stat. § 113A-52(6), or the language of our prior opinions addressing SPCA-related issues in the same manner that my colleagues do. As has been previously demonstrated, N.C. Gen. Stat. § 113A-66(a) authorizes a damage recovery stemming from any injury resulting from a violation of the SPCA; a violation of an ordinance, rule, or order duly adopted by a local government; or the initiation or continuation of a land-disturbing activity in the absence of compliance with an appropriate erosion and sedimentation control plan. Although N.C. Gen. Stat. § 113A-51 does state that “[c]ontrol of erosion and sedimentation is deemed vital to the public interest and necessary to the public health and welfare” and that “the purpose of [the SPCA is] to provide for the creation, administration, and enforcement of a program and for the adoption of minimal mandatory standards which will permit development of this State to continue with the least detrimental effects from pollution by sedimentation,” the relevant statutory language simply does not indicate that the provisions of the SPCA only apply to situations involving “erosion or depositing of soil and other materials into the waters.” Instead, it is clear to me that the relevant statutory provisions, taken as a whole, are directed at activities that both result in and create a risk of erosion and sedimentation. I believe that the validity of this assertion is confirmed by the fact that a “land-disturbing activity” subject to the provisions of the SPCA is one which “*may* cause or contribute to sedimentation,” N.C. Gen. Stat. § 113A-52(6)

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(emphasis added), rather than one which actually does result in sedimentation. For that reason, the reference to “sedimentation” in N.C. Gen. Stat. § 113A-52(6) cannot be understood to incorporate a “deposition into a body of water” requirement. Finally, the fact that the relevant decisions of this Court have, to date, involved actual sedimentation rather than the risk of such a result provides no indication that the damage claim made available by N.C. Gen. Stat. § 113A-66(a) is not available to a party, such as Plaintiffs, who sustained injury as the result of non-compliance with the requirements of the SPCA.

Thus, for the reasons set forth above, I believe that Plaintiff has forecast sufficient evidence, if believed, to establish a right to recover damages pursuant to N.C. Gen. Stat. § 113A-66(a) in the event that Defendant Hunter is a covered entity. As a result, I respectfully dissent from the Court’s decision to the contrary and would proceed to an examination of the remaining coverage issue that is also debated in the parties’ briefs.

DAVID E. SHOAF AND JACQUELINE S. COOPER, PLAINTIFFS v. JEFFERY S. SHOAF AND
BRYAN C. THOMPSON, AS REPRESENTATIVE OF THE ESTATE OF IRENE GARWOOD SHOAF,
DEFENDANTS

No. COA11-863

(Filed 20 March 2012)

1. Wills—caveat proceeding—separate civil action—prior pending action doctrine inapplicable

The trial court did not err in an action involving a will dispute by denying defendant’s motion to dismiss plaintiffs’ claims for conversion, breach of fiduciary duty, and constructive fraud on the basis of the prior pending action doctrine. Although the caveat proceeding initiated by plaintiffs and plaintiffs’ separate civil claim involved the same parties, the two proceedings did not present the same legal issues or demand the same relief and the existence of the caveat proceeding did not preclude the maintenance of plaintiffs’ separate civil action.

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2. Jurisdiction—subject matter—wills—conversion—breach of fiduciary duty—constructive fraud—not impermissible collateral attack

The trial court did not lack jurisdiction over the subject matter of plaintiffs' civil action alleging conversion, breach of fiduciary duty, and constructive fraud. The action did not constitute an "impermissible collateral attack" on the validity of the deceased's will as the complaint did not seek a determination of the validity of the contested will or require the trial court to make such a determination in the course of deciding other issues.

3. Wills—caveat proceeding—separate civil action—denial of stay—no possibility of legally inconsistent verdicts

The trial court did not err in a case involving a will dispute by failing to stay plaintiffs' civil action alleging conversion, breach of fiduciary duty, and constructive fraud until plaintiffs' caveat proceeding had been resolved. The denial of defendant's stay motion did not expose defendant to the possibility of legally inconsistent verdicts.

Appeal by defendant from order entered 25 March 2011 by Judge Lindsay R. Davis, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 15 December 2011.

Craige Brawley Liipfert & Walker LLP, by William W. Walker, for Plaintiffs-appellees.

Wilson Helms & Cartledge, LLP, by G. Gray Wilson, and Stuart H. Russell, for Defendants-appellants.

ERVIN, Judge.

Defendant Jeffery S. Shoaf¹ appeals from an order denying his motion to dismiss or to stay an action brought against him by Plaintiffs David E. Shoaf and Jacqueline S. Cooper. On appeal, Defendant argues that the trial court erred by denying his motion to dismiss this case based on the prior pending action doctrine given that, in Defendant's view, the same parties, issues, and requested

1. Although Bryan Thompson was named as a party defendant in his capacity as representative of Irene Shoaf's estate, Mr. Thompson is a "nominal defendant against whom no judgment is demanded and no relief asked." *Barnhardt v. Smith*, 86 N.C. 473, 478 (1882). As a result of the fact that Mr. Thompson did not note an appeal from the trial court's order, the word "Defendant" as used in this opinion refers exclusively to Jeffery S. Shoaf.

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relief are involved in both this case and a caveat proceeding instituted by Plaintiffs; on the basis that the trial court lacked jurisdiction over the subject matter at issue in this case given that Plaintiffs' complaint amounts to an impermissible collateral attack on the validity of a disputed will; and by denying his motion to stay this case until the validity of the disputed will has been resolved in the pending caveat proceeding. After careful consideration of Defendant's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. BackgroundA. Substantive Facts

Irene Shoaf was born on 23 March 1921 and died on 5 October 2009. Plaintiffs are Ms. Shoaf's adult children, while Defendant is her grandson. After Ms. Shoaf's husband died in 1976, she lived alone in Winston-Salem. In 1998, Defendant began living with Ms. Shoaf and assisting her with carrying out various daily activities, including buying her groceries and household supplies, taking her to the doctor, and managing her bank accounts and other financial matters.

In December 2000 and January 2001, Ms. Shoaf conveyed some or all of her residence to Defendant and moved into a condominium, leaving Defendant in sole possession of her former residence. Between 2002 and 2009, Defendant engaged in a variety of transactions involving certain of Ms. Shoaf's assets. In September 2002, Defendant utilized Ms. Shoaf's home to secure a \$50,000.00 line of credit. On 23 February 2005, Ms. Shoaf executed a power of attorney naming Defendant as her attorney in fact, and executed a deed transferring a 2.378 acre tract of real property to Defendant. According to this power of attorney, which remained in effect throughout the remainder of her life, Defendant had the authority to act for Ms. Shoaf.

After engaging in these transactions, Defendant married Crystal Shoaf. In April 2005, Defendant and Crystal Shoaf encumbered Ms. Shoaf's home with a deed of trust that secured a \$214,900.00 loan. Subsequently, Ms. Shoaf's health declined and her mental condition deteriorated. In October, 2006, Defendant took Ms. Shoaf to an attorney's office, where she executed a will in which she left half of her estate to Defendant.

B. Procedural History

After Ms. Shoaf's death, the Forsyth County Clerk admitted to probate a document dated 18 October 2006 and entitled the "Last Will

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and Testament of Irene Garwood Shoaf” (“the contested will”), in which Ms. Shoaf left her property to Plaintiffs and Defendant. As of the time of Ms. Shoaf’s death, her estate had no assets. On 9 November 2010, Plaintiffs filed a caveat in which they alleged that the contested will lacked validity because Ms. Shoaf did not have “sufficient mental capacity to make and execute a will at the time the document was signed” and because “execution of the document was procured by undue influence.” On 19 November 2010, Plaintiffs filed a separate civil action against Defendant in which they sought compensatory and punitive damages for conversion, breach of fiduciary duty, and constructive fraud and asked to have certain instruments that Ms. Shoaf executed in favor of Defendant set aside or to have a constructive trust in favor of Ms. Shoaf’s estate imposed on the property transferred pursuant to those instruments based upon allegations of fraud, Defendant’s failure to pay the purchase price, and Ms. Shoaf’s lack of mental capacity to enter into these transactions. On 26 January 2011, Defendant filed a motion to dismiss or stay Plaintiffs’ separate civil action in which he argued that the trial court lacked jurisdiction over the subject matter implicated by Plaintiffs’ claims; that Plaintiffs’ claims were barred by the prior pending action doctrine; that Plaintiffs had failed to state claims for which relief could be granted; that Plaintiffs’ claims were barred by the applicable statute of limitations; and that Plaintiffs lacked standing to seek to have assets transferred from Defendant to Ms. Shoaf’s estate. On 25 March 2011, the trial court entered an order denying Defendant’s motions to dismiss Plaintiffs’ separate civil action for an alleged lack of subject matter jurisdiction, the existence of a prior pending action, failure to plead the claims asserted in the complaint with sufficient specificity, and failure to state a claim for which relief could be granted and to stay the separate civil proceeding pending completion of the caveat proceeding. Defendant noted an appeal to this Court from the trial court’s order.

II. Legal Analysis

A. Standard of Review

In his brief, Defendant contends that the trial court erred by denying his motion to dismiss Plaintiffs’ claims on the basis of the prior pending action doctrine; by denying his motion to dismiss for lack of subject matter jurisdiction; and by failing, in the alternative, to order that Plaintiffs’ separate civil action be stayed until resolution of the issues that have been raised in the caveat proceeding. As a result of the fact that Defendant’s dismissal motions raise issues of

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law, the trial court's refusal to dismiss Plaintiffs' complaint is subject to *do novo* review. *Transp. Servs. of N.C., Inc. v. Wake Cnty. Bd. of Educ.*, 198 N.C. App. 590, 593, 680 S.E.2d 223, 225 (2009) (stating that "[t]his Court reviews *de novo* a trial court's ruling on a motion to dismiss"). However, we review a trial court order denying a request for a stay using an abuse of discretion standard. *Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard*, 112 N.C. App. 353, 356, 435 S.E.2d 571, 573 (1993) (utilizing an abuse of discretion standard to review a trial court's decision to grant a stay pursuant to N.C. Gen. Stat. § 1-75.12).²

B. Prior Pending Action

[1] According to Defendant, the caveat proceeding is a prior pending action. Defendant argues that, since the caveat and Plaintiffs' separate civil action involve the same parties and the same legal issues, the caveat bars the maintenance of Plaintiffs' separate civil action. We do not find this argument persuasive.

"Under the law of this state, where a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action." *Eways v. Governor's Island*, 326 N.C. 552, 558, 391 S.E.2d 182, 185 (1990) (citing *McDowell v. Blythe Brothers Co.*, 236 N.C. 396, 398, 72 S.E.2d 860, 862 (1952)) (other citation omitted). "The 'prior pending action' doctrine involves 'essentially the same questions as the outmoded plea of abatement,' and is, obviously enough, intended to prevent the maintenance of a 'subsequent action [that] is wholly unnecessary[.]'" *Jessee v. Jessee*, ___ N.C. App. ___, ___, 713 S.E.2d 28, 37 (2011) (quoting *Nationwide Mut. Ins. Co. v. Douglas*, 148 N.C. App. 195, 197, 557 S.E.2d 592, 593 (2001), and *State ex rel. Onslow County v. Mercer*, 128 N.C. App. 371, 375, 496 S.E.2d 585, 587 (1998)). "The ordinary test for determining whether or not

2. Although the order from which Defendant has noted an appeal is clearly interlocutory, this Court has held that the denial of a dismissal motion predicated on the prior pending action doctrine is immediately appealable. *Stevens v. Henry*, 121 N.C. App. 150, 154, 464 S.E.2d 704, 707 (1995) (stating that "[a] denial of a motion to dismiss on the ground that there is a prior pending action is immediately appealable") (citing *Atkins v. Nash*, 61 N.C. App. 488, 489, 300 S.E.2d 880, 881 (1983)). In view of the fact that we clearly have jurisdiction over Defendant's prior pending action claim and the fact that all three of Plaintiffs' claims are interrelated, we elect to address Defendant's remaining claims on the merits as well. *Newcomb v. County of Carteret*, ___ N.C. App. ___, ___, 701 S.E.2d 325, 338-39 (2010), *disc. review denied*, 365 N.C. 212, 710 S.E.2d 26 (2011), without expressing any opinion concerning the validity of Defendant's contention that the challenged orders affect a substantial right.

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the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded?" *Jessee*, ___ N.C. App. at ___, 713 S.E.2d at 37 (quoting *Cameron v. Cameron*, 235 N.C. 82, 85, 68 S.E.2d 796, 798 (1952), and citing *Clark v. Craven Regional Medical Authority*, 326 N.C. 15, 20, 387 S.E.2d 168, 171 (1990)). Although the caveat and Plaintiffs' separate civil claim involve the same parties, the two proceedings do not present the same legal issues or demand the same relief.

The caveat proceeding initiated by Plaintiffs seeks a judgment that the 18 October 2006 will lacks validity on the grounds that Ms. Shoaf lacked the mental capacity to make a will at the time of its execution and that the execution of the contested will was procured by undue influence on the part of Defendant. "A person has testamentary capacity within the meaning of the law if he has a clear understanding of the nature and extent of his act, of the kind and value of the property devised, of the persons who are the natural objects of his bounty, and of the manner in which he desires to dispose of property to be distributed[.]" *In re Staub's Will*, 172 N.C. 138, 141, 90 S.E. 119, 121 (1916) (citation omitted). The "competency of a testator to make a will is to be determined as of the date of its execution. Evidence of capacity at other times is important only in so far as it tends to show mental condition at the time of such execution." *In re Will of Hall*, 252 N.C. 70, 77, 113 S.E.2d 1, 6, (1960) (citing *In re Will of Hargrove*, 206 N.C. 307, 309, 173 S.E. 577 (1934), and *In re Will of Stocks*, 175 N.C. 224, 225, 95 S.E. 360, 361 (1918)). Similarly, "undue influence" is "something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another." *In re Will of Jones*, 362 N.C. 569, 574, 669 S.E.2d 572, 577 (2008) (quoting *In re Will of Turnage*, 208 N.C. 130, 131, 179 S.E. 332, 333 (1935)). As a result, the issues raised by the caveat are whether Ms. Shoaf had the requisite mental capacity to execute a will on 18 October 2006 and whether the execution of the contested will was procured by undue influence on the part of Defendant. Although a verdict in favor of Plaintiffs in the caveat proceeding would result in the disposition of Ms. Shoaf's estate on some basis other than that set forth in the contested will, such a verdict would not determine what assets should properly be considered to belong to Ms. Shoaf's estate.

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In their separate civil action, on the other hand, Plaintiffs allege that Defendant improperly obtained possession of some of Ms. Shoaf's assets during her lifetime; converted in excess of \$100,000 in funds and various items of personal property to his own use; engaged in constructive fraud by effectuating various transactions involving Ms. Shoaf for his own benefit; and took advantage of Ms. Shoaf's declining mental and physical faculties to obtain property to which he was not entitled. "The simple definition of conversion is 'an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.'" *Mace v. Pyatt*, 203 N.C. App. 245, 256, 691 S.E.2d 81, 90 (2010) (quoting *Myers v. Catoe Construction Co.*, 80 N.C. App. 692, 695, 343 S.E.2d 281, 283 (1986)), *disc. review denied*, 364 N.C. 614, 705 S.E.2d 354 (2010). "The elements of a constructive fraud claim are proof of circumstances (1) which created the relation of trust and confidence [the 'fiduciary' relationship], and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Bogovich v. Embassy Club of Sedgefield*, ___ N.C. App. ___, ___, 712 S.E.2d 257, 262 (2011) (quoting *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 28, 560 S.E.2d 817, 823, *disc. review denied*, 356 N.C. 164, 568 S.E.2d 196 (2002) (internal citation omitted)). In the event that they were to prevail in the separate civil action, Plaintiffs might be entitled to the entry of a judgment invalidating the transfer of certain items of property from Ms. Shoaf to Defendant, requiring the conveyance of certain assets from Defendant to Ms. Shoaf's estate, and awarding compensatory and punitive damages. Aside from the fact that the claims asserted in Plaintiffs' separate civil action have different elements and require proof of different facts from those at issue in the caveat proceeding, Plaintiffs' separate civil action does not involve a challenge to the validity of the contested will or require either a determination of Ms. Shoaf's capacity to execute a will as of 18 October 2006 or the extent to which Defendant procured the contested will by undue influence. As a result, after carefully reviewing the record, we conclude that the two proceedings do not involve the same legal issues or request the same relief, that the existence of the caveat proceeding does not preclude the maintenance of Plaintiffs' separate civil action, and that the trial court did not err by denying Defendant's motion to dismiss on the basis of the prior pending action doctrine.

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In urging us to reach a contrary result, Defendant argues that the separate civil action and the caveat “both concern four central issues,” which Defendant characterizes as (1) the validity of the 18 October 2006 will; (2) whether Defendant owed a fiduciary duty to Ms. Shoaf; (3) whether the contested will was procured by Defendant’s undue influence; and (4) the extent to which Ms. Shoaf was competent to execute a will on 18 October 2006. However, a proper resolution of the issues before the trial court in the caveat proceeding does not require consideration of the extent to which Defendant owed a fiduciary duty to Ms. Shoaf. Similarly, a proper resolution of the issues raised by the separate civil action does not require a determination of the validity of the contested will, whether Ms. Shoaf was mentally competent to execute a will on 18 October 2006, or whether the execution of the contested will was procured by undue influence. Although both proceedings do, at a very general level, arise from interactions between Defendant and Ms. Shoaf, the caveat proceeding focuses exclusively on Ms. Shoaf’s mental state on 18 October 2006 and the extent of Defendant’s influence over the execution of the contested will while the separate civil action is focused exclusively on whether Defendant unlawfully or improperly obtained ownership of Ms. Shoaf’s assets during her lifetime. As a result, we conclude, contrary to Defendant’s contention, that the two proceedings are not focused on the same “four central issues.”

In addition, Defendant cites *Baars v. Campbell Univ., Inc.*, 148 N.C. App. 408, 558 S.E.2d 871, *disc. review denied*, 355 N.C. 490, 563 S.E.2d 563 (2002), for the proposition that the caveat constitutes a prior pending action. In *Baars*, the plaintiffs filed a caveat seeking to have the decedent’s will invalidated on undue influence grounds and a separate civil action in which they alleged that the defendants had breached a fiduciary duty owed to the decedent and requested that a constructive trust be imposed on all assets that the defendants had acquired, directly or indirectly, from the decedent either during her life or after her death. On appeal, this Court upheld the trial court’s decision to dismiss the plaintiffs’ separate civil action on the grounds that the claims asserted in that proceeding were barred by the applicable statute of limitations, stating that, “after determining that plaintiffs’ lawsuit is governed by the three-year statute of limitations, we conclude that plaintiffs were not timely with any of their filings.” *Baars*, 148 N.C. App. at 417, 558 S.E.2d at 876. In addition, we noted³

3. The comments made in *Baars* concerning the prior pending action issue are, arguably, *dicta*, given that we had already upheld the dismissal of the plaintiffs’ separate civil action on statute of limitations grounds.

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that both the caveat and the separate civil action challenged the validity of the underlying will and stated that, “to the extent” that the civil action involved a challenge to the decedent’s will or an assertion that the defendants had improperly obtained property as a result of the admission of the disputed will to probate, the exclusive remedy available to the plaintiff was a caveat proceeding. As a result, we conclude that *Baars* is not controlling in this case because Plaintiffs’ complaint, unlike the complaint at issue in *Baars*, does not challenge the validity of Ms. Shoaf’s will or seek to recover property obtained pursuant to that instrument.

Thus, as the trial court appears to have recognized, the caveat challenges the validity of the contested will while the separate civil action asserts claims arising from Defendant’s involvement in transactions that occurred during Ms. Shoaf’s lifetime for the purpose of seeking to have certain property returned to Ms. Shoaf’s estate. Simply put, the two cases involve different issues and different requests for relief. For that reason, we conclude that the trial court did not err by denying Defendant’s motion to dismiss Plaintiffs’ separate civil action on the basis of the prior pending action doctrine.

C. Subject Matter Jurisdiction

[2] Secondly, Defendant argues that the trial court lacked jurisdiction over the subject matter of Plaintiffs’ separate civil action because it constituted an “impermissible collateral attack” on the validity of Ms. Shoaf’s will. *Johnson v. Stevenson*, 269 N.C. 200, 204, 152 S.E.2d 214, 217 (1967) (stating that “[t]he right of direct attack by caveat gave [the plaintiff] a full and complete remedy at law” depriving her of the right to seek equitable relief) (citing *Insurance Co. v. Guilford County*, 225 N.C. 293, 300, 34 S.E.2d 430, 434 (1945)). In support of this contention, Defendant argues that both the caveat proceeding and the separate civil action involve issues pertaining to Ms. Shoaf’s capacity to engage in certain transactions and to execute various documents at different times between 2005 and Ms. Shoaf’s death in 2009. More specifically, Defendant notes that Plaintiffs allege in their separate civil action that:

In October 2006, defendant took Irene to a local lawyer . . . and defendant caused Irene to execute a will that left half of her property to defendant. Defendant knew that, by October 2006, Irene’s doctors had diagnosed Irene as suffering from dementia and memory loss and that Irene lacked the mental capacity to make and execute a will. This episode was

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part of a continuing pattern whereby defendant breached his fiduciary duty to Irene and took advantage of her declining mental health, all to his benefit.

The inclusion of this allegation to the effect that, as part of a continuing pattern of attempting to obtain Ms. Shoaf's assets, Defendant had Ms. Shoaf execute a will that benefitted him personally, despite knowing that she was in no condition to do so, represents nothing more than an assertion of alleged fact and does not constitute an attempt to obtain the entry of a judgment invalidating the contested will. On the contrary, the complaint that Plaintiffs filed in the separate civil action does not seek a determination of the validity of the contested will or require the trial court to make such a determination in the course of deciding other issues. As a result, given that the "collateral attack" argument is the only basis upon which Defendant has challenged the trial court's jurisdiction over the subject matter implicated in Plaintiffs' separate civil action, we hold that the trial court did not err by denying Defendant's request that Plaintiff's complaint be dismissed for lack of subject matter jurisdiction.

D. Stay

[3] Finally, Defendant argues that the trial court erred by failing to stay Plaintiffs' civil action until the caveat proceeding had been resolved. According to Defendant, "the Caveat and Civil Action will be tried on the same issues and staying the Civil Action will avoid inconsistent verdicts on those issues." More particularly, Defendant contends that, in the absence of the requested stay, the jury in the caveat proceeding might find that the contested will was valid and the jury in the separate civil action might find that Ms. Shoaf lacked the mental capacity to properly execute certain other disputed instruments at various times between 2005 and 2009. However, since the validity of the contested will is not at issue in the separate civil action, the jury empanelled to decide that proceeding would not need to determine whether Ms. Shoaf had the capacity to execute that instrument. Moreover, "the competency or incompetency of a testator to engage in or understand any complicated matter or transaction in business is not a proper test of his mental capacity to execute a will." *In re Will of Maynard*, 64 N.C. App. 211, 226, 307 S.E.2d 416, 427 (1983) (citation omitted), *disc. review denied*, 310 N.C. 477, 312 S.E.2d 885 (1984). As a result, since the trial court's decision to deny Defendant's stay motion did not expose Defendant to the possibility of legally inconsistent verdicts, its decision to that effect did not constitute an abuse of discretion.

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III. Conclusion

Thus, for the reasons discussed above, we conclude that the trial court did not err by denying Defendant's motion to dismiss Plaintiffs' civil action on the basis of the prior pending action doctrine or for lack of subject matter jurisdiction or by denying Defendant's motion to stay the separate civil action pending resolution of the caveat proceeding. As a result, the trial court's order should be and hereby is affirmed.

AFFIRMED.

Judges BEASLEY and THIGPEN concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF v. SYBIL H. BARRETT, ATTORNEY,
DEFENDANT

No. COA11-1274

(Filed 20 March 2012)

**Attorneys—Disciplinary Hearing Commission—due process—
allegations materially different from complaint—insufficient
evidence to support disbarment**

The Disciplinary Hearing Commission denied defendant due process by conducting a hearing on the basis of allegations of fraud which materially differed from those alleged in the complaint. Defendant did not waive her due process rights and consent to consideration of additional issues by failing to object to admission of evidence concerning those issues. There was insufficient evidence to support disbarment or the imposition of other sanctions and the order of discipline disbaring defendant was reversed.

Appeal by Defendant from orders filed 23 February 2011 and 29 April 2011 by the Disciplinary Hearing Commission. Heard in the Court of Appeals 7 February 2012.

*Deputy Counsel David R. Johnson and Counsel Katherine Jean
for Plaintiff.*

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Law Office of Laura H. Budd, PLLC, by Laura H. Budd, for Defendant.

STEPHENS, Judge.

Procedural History and Factual Background

This case arises from a grievance filed with Plaintiff, the North Carolina State Bar (“the State Bar”), concerning Defendant Sybil H. Barrett’s participation as an attorney in a residential real estate closing in July 2007. On 30 October 2008, the State Bar received a grievance from the seller involved in the closing. The grievance alleged that Defendant had misrepresented the source of the buyer’s down payment on a HUD-1 settlement statement at closing in order to prevent the lender from learning that the seller had loaned the buyer part of the down payment funds. The buyer and seller had entered into an agreement concerning repayment of the loan. However, the buyer had apparently not made payments expected by the seller, who expressed concerns about his ability to collect on the loan. In correspondence sent to Defendant before filing the grievance, the seller had claimed that this misrepresentation had made the buyer appear to be a better credit risk in the eyes of the lender, permitting the buyer to finance purchase of the residence to the seller’s detriment.

The State Bar sent Defendant a notice of grievance, and Defendant responded by letter dated 6 March 2009, asserting that she had received approval of the HUD-1 statement from the lender, Chase Bank, and had not made any misrepresentations in connection with the closing. Defendant further asserted that the buyer and the seller had agreed to a five-year, no interest \$7,400 loan of the down payment funds with a balloon payoff, but that the buyer had later (post-closing) told the seller he was planning to refinance the home in order to pay off the loan at an earlier date. Defendant suggested that the refinance had not occurred, angering the seller, who had filed the grievance out of a desire “to punish everyone associated with the [closing].”

On 13 April 2010, the State Bar filed a complaint with the Disciplinary Hearing Commission (“the DHC”) alleging Defendant had knowingly misrepresented the seller’s \$7,400 loan to the buyer as a down payment on the HUD-1 statement. After Defendant refused to respond to the State Bar’s October 2010 discovery requests, The State Bar moved to compel her response on 4 January 2011. On 13 January 2011, the DHC entered an order allowing the motion to compel. On

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the same date, Defendant sent an email response to the chair of the DHC hearing committee stating:

I reviewed your bogus Order to Compel. I will not be producing anything. In fact, I will not be in communication with any of you people ever again.

I will not be at the February hearing.

I am moving on with my life. You have no power over me. You are mistaken to think that you do. You are fully aware that Mrs. [Leonor] Hodge [the attorney handling the matter for the State Bar] is lying. Apparently, this is the status quo.

Defendant did not comply with the order and the State Bar moved for sanctions against her. In her objection to the motion for sanctions, Defendant asserted that the State Bar's "continued requests for documents . . . are duplicitous and harassing in nature." The DHC denied the State Bar's motion for sanctions by order entered 23 February 2011.

At a hearing before a three-member DHC panel on 3 February 2011, the State Bar presented evidence that, in the July 2007 closing, Defendant represented the buyer and his lender. Paul Johnson, the lender's closing officer handling the loan, first sent Defendant instructions calling for a down payment of \$22,700 and prohibiting secondary financing without the lender's written approval. However, the buyer had received two loans toward the down payment: \$14,800 dollars from National Home and \$9,400¹ from the seller. On 17 July 2007, the day of the closing, Defendant prepared a draft HUD-1 statement for the closing showing "Down Payment [of] \$7,400" as a credit to the buyer, debited \$7,400 from the proceeds due to the seller, showed "Commission earned [of] \$14,800" from National Home as a contribution from the buyer, and showed a deduction from the proceeds due to the seller of \$14,800 as a seller fee to National Home. Defendant testified that Johnson had instructed her via phone call and fax to record the amounts in this manner. Defendant transmitted

1. Originally, the seller had agreed to a \$7,400 loan to the buyer, but at closing, the buyer was still \$2,000 short of the funds needed for his down payment. During the closing, the seller agreed to loan the buyer an additional \$2,000, for a total loan amount of \$9,400, and instructed Defendant to draft a promissory note. However, Defendant continued to list the amount as \$7,400 on the HUD-1 statement she prepared. At the DHC hearing, Defendant acknowledged this error, which she asserts was unintentional and merely clerical. The error in the amount of this loan was not part of any allegations by the State Bar against Defendant.

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the draft to Johnson, who stamped it “APPROVED” and initialed it “PJ” with the date “7-17” before returning it to Defendant.²

Defendant, the buyer and his agent, and the seller’s agent were present in Defendant’s office for the closing, while the seller participated by teleconference, email, and fax. Defendant testified that the HUD statement signed by herself, the buyer, and the seller was the PJ HUD statement, which showed entries regarding the \$7,400 and \$14,800 amounts as approved by the closing agent. The final PJ HUD statement was three pages instead of the standard two pages because the seller participated by fax. Thus, the first two pages were identical except that the buyer had signed the first and the seller had signed the second, receiving and returning it via fax. Defendant testified that, after the closing was concluded, she sent the signed PJ HUD statement along with other closing documents to the lender via FedEx. At the hearing, Defendant produced a fax from Johnson, dated two days after the closing, requesting that Defendant correct some wording on the title commitment, one of the documents Defendant had sent to the lender in the package of closing documents. Defendant also produced a copy of the PJ HUD statement from her files at the hearing.

The State Bar offered testimony from an employee of the lender³ that the lender’s file contained a substantially different HUD statement (“the MG HUD statement”) than that produced by Defendant. The MG HUD statement was only two pages long, showed the initials “MG” instead of “PJ,” and had the buyer’s and seller’s signatures together on the first page. The seller’s signature was forged. In addition, the MG HUD statement lacked the \$7,400 and \$14,800 entries contained on the PJ HUD statement and instead showed a \$22,700 down payment by the buyer. The lender’s representative testified that the PJ HUD statement was not part of the lender’s file. Defendant testified that she had never seen the MG HUD statement prior to the hearing, had not prepared it, and knew nothing about the seller’s forged signature.

At the close of the hearing, the DHC panel made oral findings that Defendant had committed fraud and criminal violations, and ordered Defendant’s disbarment. In its written order filed 23 February 2011,

2. This HUD statement will be referred to as “the PJ HUD statement.”

3. The lender’s representative at the hearing had not participated in the closing and had no knowledge about it beyond having reviewed the records that he produced from the lender’s file. Johnson was not a witness at the hearing.

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the DHC made detailed findings of fact and conclusions of law, again ordering disbarment. Specifically, conclusion of law 2 states that Defendant violated the Rules of Professional Conduct:

a. By falsely representing on the HUD-1 Settlement Statement that she provided to the buyer and seller . . . that the proceeds of the National Home loan were a “Commission Earned” and the seller’s loan was a “Down Payment” and by providing the lender with a HUD-1 Settlement Statement that failed to disclose these loans, Defendant committed a criminal act that reflects adversely on her honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b), and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c); and

b. By concealing from the lender the fact that the buyer obtained subordinate financing for his purchase of [the real property], defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c).

On 29 March 2011, Defendant moved the DHC to reconsider; the DHC denied the motion. Defendant appeals from the 23 February 2011 order and from the denial of her motion to reconsider.

Discussion

Defendant makes four arguments: that the DHC denied her due process by conducting the hearing on the basis of allegations of fraud materially different from those alleged in the complaint; that the evidence did not support the finding of fact that Defendant was the source of the MG HUD statement; that the evidence did not support the finding of fact and conclusion of law that Defendant knowingly misrepresented the source of the buyer’s down payment; and that the DHC imposed a disproportionate and unwarranted discipline on Defendant. For the reasons discussed herein, we reverse the DHC’s order.

Due Process Claim

Defendant first argues that the DHC denied her due process by conducting the hearing on the basis of allegations of fraud which materially differ from those alleged in the complaint. We agree.

Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution. Accordingly, prior to the imposi-

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tion of sanctions, a party has a due process right to notice both (1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions.

In re Small, 201 N.C. App. 390, 395, 689 S.E.2d 482, 485-86 (2009) (quotation marks and citations omitted), *disc. review denied*, 364 N.C. 240, 698 S.E.2d 654 (2010). An attorney facing disbarment is entitled to “procedural due process, which includes fair notice of the charge” made against her. *In re Ruffalo*, 390 U.S. 544, 550, 20 L. Ed. 2d 117, 122 (1968). The rules of the State Bar provide that “[p]leadings and proceedings before a hearing panel [of the DHC] will conform as nearly as practicable with requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts except as otherwise provided herein.” 27 N.C.A.C. Ch. 1, Sub. B .0114(n). The North Carolina Rules of Civil Procedure, in turn, require a complaint to include a “short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]” N.C.R. Civ. P., Rule 8(a)(1) (2011). Further, the State Bar’s own rules state that “[c]omplaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint.” 27 N.C.A.C. Ch. 1, Sub. B .0114(c).

Here, the complaint contains only one allegation of misconduct: that “Defendant purposefully represented on the HUD-1 Settlement Statement [of the relevant closing] that the proceeds of the seller’s loan to the buyer were a down payment made by the buyer [knowing this] was a false representation.” As noted *supra*, the PJ HUD statement listed the seller’s loan to the buyer as “Down Payment [of] \$7,400[.]” The complaint further alleges this action to be in violation of Rule 8.4 of the Rules of Professional Conduct, subsections (b) (“commi[ssion] of a criminal act”) and (c) (“engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation”). Thus, the complaint alleged a single false representation by Defendant in violation of the Rules: the entry of the \$7,400 loan as a “Down Payment” on the PJ HUD statement.

However, at the hearing, the State Bar presented evidence of different alleged acts of fraud and additional alleged misrepresentations, to wit, that Defendant had produced and submitted to the lender the MG HUD statement, which contained different financial information and included a forged signature purporting to be the

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seller's. Because these allegations were not contained in the complaint, Defendant was not prepared to refute or defend against them. Indeed, nothing in the record suggests that Defendant was aware that the MG HUD statement existed. When the State Bar sought to introduce the MG HUD statement at the hearing, Defendant objected, stating that she had never seen it before and had not prepared it. At the close of the hearing, Defendant noted that the complaint only alleged misrepresentations about the source of the down payment listed on the PJ HUD statement and, as a result, "my understanding is that was the only issue that required me to formulate a defense for today."

The State Bar first contends that, because Defendant was properly served with a copy of the subpoena to the lender requesting its account records from the loan closing at issue, she also received sufficient notice of any additional allegation which might arise from review of those documents. Thus, the State Bar asserts that Defendant cannot argue a lack of due process because she did not ask to examine the documents produced by the lender before the hearing. However, as the State Bar concedes, it never informed Defendant that the documents had been obtained, in violation of Rule 45(d1) of the North Carolina Rules of Civil Procedure. It can be reasonably inferred that the State Bar's violation of Rule 45(d1) would have indicated to Defendant that no documents had been received from the lender. We decline to hold that a party waives her due process rights by failing to request documents which the opposing party has implied do not exist and will not be part of the case against her.

Moreover, per the complaint, Defendant believed she need only prepare a defense to the allegation that the \$7,400 entry on the PJ HUD statement was a false representation. She brought to the hearing the materials she apparently believed would constitute a defense against that allegation: her testimony that Johnson instructed her to list the \$7,400 loan as a down payment on the HUD statement, a copy of the PJ HUD statement showing that the lender's agent had approved it, and the fax from Johnson sent two days after closing which suggested the lender had received the closing documents. We see no way that Defendant could have anticipated the addition of the allegations against her regarding the MG HUD statement, much less prepare a defense against them.

We likewise reject the State Bar's assertion that Defendant's due process rights were protected because "evidence of [Defendant's] additional falsification of documents was cumulative and did not contradict the misconduct identified in the complaint that [she] had

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knowingly falsified information on the HUD-1 settlement statement” and because the DHC concluded that Defendant had violated the same two Rules of Professional Conduct cited in the complaint. As the State Bar notes, the hearing and subsequent order dealt with “additional falsification of documents[.]” These additional alleged falsifications were far more than simply cumulative. Rather, they were different both in kind and in fact. The complaint advanced the theory that Defendant made false representations about the \$7,400 loan on the PJ HUD statement. The theory advanced by the State Bar at the hearing was that Defendant created an entirely different HUD statement (the MG HUD statement) which did not list a \$7,400 down payment, but rather listed a down payment of \$22,700, and further contained a forgery of the seller’s signature. The allegations in the complaint did not “allege [these] charges with sufficient precision to clearly apprise” Defendant of the conduct which she would have to defend at the hearing. 27 N.C.A.C. Ch. 1, Sub. B .0114(c). As such, the State Bar violated its own rules as well as Defendant’s due process rights.

The State Bar also contends that Defendant waived her due process rights and consented to consideration of the additional issues by failing to object to admission of the MG HUD statement or testimony about it. However, waiver of the right to due process must be made voluntarily, knowingly, and intelligently. *Estate of Barber v. Guilford Cty. Sheriff’s Dept.*, 161 N.C. App. 658, 664, 589 S.E.2d 433, 437 (2003). As noted *supra*, Defendant stated during the hearing that “my understanding is that [the misrepresentation alleged in the complaint] was the only issue that required me to formulate a defense for today.” This statement indicates Defendant believed she was facing only the allegation in the complaint and was not prepared to defend any others; it does not suggest that she was voluntarily, knowingly, and intelligently waiving her right to due process.

Thus, the DHC erred in making findings of fact and conclusions of law about any alleged wrongdoing by Defendant beyond the listing of the \$7,400 loan from the seller to the buyer as a down payment on the PJ HUD statement. Accordingly, we vacate the following portions of the DHC order on due process grounds: findings of fact 11-13, 17-19, and the parts of findings of fact 21-23 and conclusion of law 2(a) which refer to the \$14,800 “Commission Earned” from National Home or the MG HUD statement received by the lender.⁴ We also

4. The DHC order does not identify the HUD-1 statements by their initials. However, all references to the HUD-1 statement “contained in the lender’s file” or “pro-

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vacate the entirety of conclusion of law 2(b), which states that Defendant concealed the buyer's subordinate financing from the lender. To the extent this portion of conclusion of law 2 refers to information contained in the MG HUD statement, it violates Defendant's due process rights. To the extent it refers to information contained in the PJ HUD statement, it is not supported by competent evidence, as explained *infra*.

Sufficiency of the Evidence

We must also vacate findings of fact 24 and 27 in their entirety, and the remaining portions of findings of fact 22-23 and conclusion of law 2(a) as not supported by competent evidence.

These findings and conclusions relate to Defendant's alleged misrepresentations about the source of the \$7,400 "down payment" listed on the PJ HUD statement, a matter alleged in the complaint and thus properly before the DHC at the hearing. The State Bar's complaint did not specify to whom this false representation was supposedly made. However, it could not have been the buyer or the seller since both were fully aware that the \$7,400 "down payment" was actually a loan from the seller to the buyer.⁵ Nor could the \$7,400 "down payment" have been a false representation to the lender, since the State Bar's theory was that Defendant never sent the signed PJ HUD statement to the lender, instead creating and submitting the fraudulent MG HUD statement in its place. The uncontradicted testimony of the lender's representative was that the lender's file contained only the MG HUD statement. The lender can hardly have been misled or deceived by information contained in a document which it never received. Likewise, to the extent conclusion of law 2(b) refers to information contained in the PJ HUD statement, it is not supported by competent evidence and is vacated.

Having vacated the findings of fact noted above and the entirety of conclusion of law 2, there is no support for the DHC's "Additional Findings of Fact Regarding Discipline" 2 or "Conclusions of Law Regarding Discipline" 1, 2(a), 3-4, and 6. The only remaining additional finding of fact and conclusion of law regarding discipline state that Defendant refused to comply with a 13 January 2011 order ("the

vided to the lender" must be interpreted as references to the MG HUD statement since the lender's file produced at the hearing contained *only* the MG HUD statement.

5. Indeed, the buyer and seller had Defendant draw up a promissory note for the loan as part of the closing transaction.

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discovery order”) from the DHC compelling her response to discovery requests by the State Bar which interfered with the State Bar’s ability to regulate attorneys to the detriment of the legal profession.

However, Defendant’s failure to comply with the discovery order was also the subject of an order (“the sanctions order”) filed by the same DHC panel on the same date as the order of discipline (23 February 2011). In the sanctions order, the DHC found that Defendant had failed to comply with the discovery order, but denied the State Bar’s motion for sanctions against Defendant because her noncompliance “did not unduly prejudice the State Bar’s case[.]” In other words, the DHC panel had already determined that Defendant’s failure to comply with the discovery order was not sanctionable. Thus, that misconduct, standing alone, cannot serve as the basis for Defendant’s disbarment or imposition of any other sanction. Accordingly, the order of discipline disbaring Defendant is

REVERSED.

Chief Judge MARTIN and Judge HUNTER, ROBERT C., concur.

STATE OF NORTH CAROLINA v. KINARD JULIUS OAKES

No. COA11-418

(Filed 20 March 2012)

1. Evidence— prior crimes or bad acts—incarceration—prejudice not demonstrated—no plain error

The trial court did not commit plain error in an assault with a deadly weapon inflicting serious injury case by admitting testimony that defendant had been incarcerated in the past and was associated with people involved with drugs. Even assuming, without deciding, that the admission of the testimony was erroneous, defendant failed to demonstrate that the error caused the jury to reach its verdict.

2. Sentencing— plea transcripts—habitual felon phase—prejudice not demonstrated—no plain error

The trial court did not commit plain error during the habitual felon phase of defendant’s trial by admitting evidence of the plea transcripts for defendant’s prior felony convictions. Since the

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only issue in a habitual felon proceeding is whether the defendant has been convicted of or pled guilty to three felony offenses, there was essentially no likelihood that the jury would have reached any other verdict had the plea transcripts been excluded.

3. Sentencing— assault with deadly weapon inflicting serious injury—presumptive range—seriousness of offense considered—criminal record considered—no error

Defendant's argument that he was denied a fair sentencing hearing in an assault with a deadly weapon inflicting serious injury case because the trial court improperly considered the seriousness of the assault offense and gave too much weight to his criminal record was without merit. Defendant cited no authority, and the Court of Appeals found none, suggesting that a trial court may not take into account the seriousness of a crime and the defendant's criminal record in deciding where within a presumptive range a defendant's sentence should fall.

Appeal by defendant from judgment entered 28 September 2010 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 10 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General Linda Kimbell, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

GEER, Judge.

Defendant appeals from his convictions of assault with a deadly weapon inflicting serious injury ("AWDWISI") and of attaining habitual felon status. Defendant primarily contends on appeal that the trial court committed plain error in admitting evidence that defendant had previously been in jail and that he associated with "drug boys." As defendant has not demonstrated that the jury probably would have reached a different verdict in the absence of that evidence, he has not established plain error.

Facts

The State's evidence tended to show the following facts. Johnny Barnes was a resident of Eastgate Apartments, as was defendant. Barnes knew defendant by his nickname, which sounded something like "Dalp." On 5 October 2009, Barnes sold his coat to his friend

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Charlie to get money to do his laundry. After finishing his laundry, Barnes went to look for Charlie because he had received only part of the money for the coat. Barnes found Charlie at defendant's apartment and was talking to him when defendant came to the door in what Barnes described as a rage.

Defendant told Barnes that he should not "be knocking on my door looking for nobody about no damn money." Barnes indicated to defendant that he did not want any trouble and then began walking back towards his apartment with Charlie. Barnes heard defendant "cussing," and defendant continued "in a rage." A moment later, someone told Barnes to turn around. As he turned, defendant stabbed him in the shoulder with a knife. Barnes collapsed about 30 feet from defendant's apartment and called an ambulance. He was taken to the hospital where he stayed for a week and a half.

Officer Kyle Wilson of the Winston-Salem Police Department was called out to investigate the incident. When Officer Wilson arrived on the scene, he found Barnes holding his side and bleeding from his chest. Although Barnes could only identify the person who stabbed him as "Dap," he identified defendant's apartment building as being where his assailant lived. Another officer who arrived later found blood in front of that building.

After speaking with Barnes, Officer Wilson went into defendant's apartment where he saw a steak knife by the kitchen sink that was wet. Officer Wilson subsequently spoke with Barnes at the hospital where he described his assailant as a black male with a heavy beard and mustache who had recently been in jail. Having canvassed the neighborhood and spoken with Barnes' friend Charlie, Officer Wilson obtained a warrant and arrested defendant.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI") and for being a habitual felon. The jury convicted him, however, of AWDWISI and of being a habitual felon. The trial court sentenced defendant to a presumptive-range term of 95 to 123 months imprisonment. Defendant timely appealed to this Court.

I

[1] Defendant first argues that the trial court committed plain error in admitting testimony (1) that defendant had been incarcerated in the past and (2) that he associated with people involved with drugs. The testimony regarding defendant's prior incarceration came from

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both Barnes and Officer Wilson. During the cross-examination of Barnes, defendant's counsel elicited the following testimony:

Q. Is that what you told the police officer?

A. Told him what? I didn't know his real name. I went by the name as they called him.

Q. Dop?

A. Dalp [phonetic] or something. He'll tell you.

Q. So it's Dalp?

A. That's Kinard. But they called him something else down there. Because I was living down there, and he came like from just getting out of prison. I didn't know his full name.

Defendant made no objection or motion to strike with respect to this testimony.

Subsequently, during direct examination, Officer Wilson testified that Barnes "advised that he believed that the suspect had recently been in jail." At that point, defendant objected, but the trial court overruled the objection. Defendant concedes that his objection to Officer Wilson's answer was not sufficient to preserve the objection to the admission of the evidence that defendant had previously been in jail given his failure to object during Barnes' testimony. *See State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) ("[T]he defend-ant waived his right to raise on appeal his objection to the evidence. Where 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.").

Consequently, defendant argues that the admission of the testimony about his incarceration constituted plain error. It is well established that "[t]he plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant.'" *State v. Duke*, 360 N.C. 110, 138-39, 623 S.E.2d 11, 29-30 (2005) (internal citation omitted) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)).

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In this case, even assuming without deciding, that the admission of the above testimony was error, defendant has failed to demonstrate that the admission of this evidence caused the jury to reach its verdict. “The elements of AWDWISI are: (1) an assault, (2) with a deadly weapon, (3) inflicting serious injury, (4) not resulting in death.” *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000). The State presented ample evidence of each element and that defendant was the perpetrator.

Defendant asserts that the evidence against defendant was “weak” because the State did not corroborate Barnes’ testimony with the testimony of Charlie and did not present the knife defendant allegedly used. Based on our review of the record, we find it highly unlikely that the jury would have rejected Barnes’ testimony that defendant stabbed him.

Immediately after being stabbed and while awaiting transport to the hospital, Barnes identified defendant as his assailant by nickname and pointed to defendant’s apartment building as where his assailant lived. Officer Wilson found blood on the front step of that building and a wet steak knife next to defendant’s kitchen sink, suggesting it had just been washed. Barnes then specifically identified defendant at trial as the perpetrator. In the face of this evidence, defendant presents no explanation on appeal why a jury would find Barnes’ identification of defendant less credible in the absence of the testimony about defendant’s prior incarceration.

Defendant also appears to argue that because the State did not present testimony from a health care provider regarding Barnes’ injury, the evidence of the seriousness of that injury was sufficiently weak that evidence of defendant’s prior incarceration must have tipped the scales towards conviction. Given that Barnes was stabbed, both Officer Wilson and Barnes testified that Barnes was bleeding profusely, Barnes was hospitalized for more than a week, and Barnes required a breathing tube, we do not believe that defendant has shown that in the absence of the challenged testimony, the jury would have concluded that the injury was not serious. Defendant has, therefore, failed to show plain error regarding the admission of Barnes’ statement that defendant had previously been in prison.

Second, defendant argues Barnes’ testimony suggesting that defendant consorted with people involved with drugs constituted plain error. During Barnes’ cross-examination, the following exchange took place:

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Q. [Charlie] wasn't at his uncle . . . in Apartment B?

A. Not at the time. That's where he lives. That's where he was living at . . . one time. But at the house where I went to, that's where all the drug boys hung out at because—

[DEFENSE COUNSEL]: Objection, Judge. No question's before the witness.

A. That's what they did.

THE COURT: Overruled

Q. You're saying you did drugs over there?

A. No. I'm saying that's where they did their drugs at.

We do not believe, given the State's evidence, that this testimony was any more likely to tip the scales for conviction than the testimony regarding defendant's prior incarceration. Consequently, defendant has also failed to establish that the admission of this testimony amounted to plain error.

II

[2] Defendant next contends that the trial court committed plain error during the habitual felon phase of his trial in admitting evidence not only of the judgment and charging documents for defendant's prior felony convictions, but also the plea transcripts for those convictions. Defendant points out that those plea transcripts showed (1) that defendant had been given lenient sentences under prior plea agreements, (2) that he was ordered to undergo mental health counseling, and (3) that he had been intoxicated in the past—information irrelevant to whether he was convicted of the offenses set out in the habitual felon indictment.

Defendant contends that admission of his plea transcripts violated N.C. Gen. Stat. § 15A-1025 (2011), which provides that “[t]he fact that the defendant or his counsel and the prosecutor engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.” Because defendant did not object to the admission of the plea transcripts, he is limited to plain error review.

We agree with defendant that, at a minimum, this Court's opinion in *State v. Ross*, 207 N.C. App. 379, 700 S.E.2d 412 (2010), *disc. review*

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denied, 365 N.C. 346, 717 S.E.2d 377 (2011), establishes that it was error to admit plea transcripts that had not been redacted to remove information not relevant to the habitual felon proceeding, such as defendant's prior drug use, mental health counseling, and lenient sentencing.¹ Nevertheless, this Court in *Ross* concluded that even though the defendant had preserved the issue for review, he did not show sufficient prejudice to warrant a new habitual felon hearing. *Id.* at 400, 700 S.E.2d at 426.

The Court pointed out that the defendant did not dispute that he had been previously convicted of the three felonies required for the jury to find he had attained habitual felon status. *Id.* 700 S.E.2d at 425-26. As a result, the Court held that “[g]iven the overwhelming and uncontradicted evidence of the three felony convictions, there [was] essentially no likelihood” that the jury would have reached a different result. *Id.* 700 S.E.2d at 426. *See also State v. Stitt*, 147 N.C. App. 77, 84-85, 553 S.E.2d 703, 708-09 (2001) (holding defendant had failed to prove prejudice as to admission of transcripts of plea to prove habitual felon status, particularly given their admission only during the habitual sentencing phase of defendant's trial where the only issue was whether he had been convicted of the underlying felonies).

In this case, although defendant did argue below that the exhibits were not self-authenticating, he did not dispute the fact that he had been convicted of the necessary predicate felonies. In addition, the State presented evidence of those convictions in the form of the information, warrant, transcript of plea, and judgment for each of the three felonies. Since the only issue in a habitual felon proceeding is whether the defendant has been convicted of or pled guilty to three felony offenses, *Ross*, 207 N.C. App. at 399, 700 S.E.2d at 425, we believe, just as this Court did in *Ross*, that there is essentially no likelihood that the jury would have reached any other verdict had the plea transcripts been excluded.

III

[3] Finally, defendant contends that he was denied a “fair sentencing hearing because the trial court improperly considered the seriousness of the assault offense and gave too much weight to his criminal record before sentencing him.” During the sentencing hearing, the parties argued regarding the sufficiency of the State's evidence of

1. *Ross* does not specifically address whether the plea transcripts should have been excluded under N.C. Gen. Stat. § 15A-1025, and we do not address that issue here.

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defendant's prior convictions. Defendant was willing to stipulate only to two convictions of possession of drug paraphernalia and contended that he was a prior record level two.

The trial court then determined that seven misdemeanor convictions should be included in calculating defendant's prior record level. After hearing further argument by counsel, the trial court announced:

THE COURT: I'll try to take into account all the things argued by counsel, by the state, the seriousness of the current offense, his voluminous criminal history and record of a lot of misdemeanors. I'll also try to take into account what you said, the nature of the prior felonies that got him to this status of habitual felon, and the passage of time since his previous felony, and the things about Disability.

And the Court considering all these things, Madam Clerk, again will find that he was convicted by the Jury of the Class E assault with a deadly weapon inflicting serious injury. The Court will enhance it to a Class C pursuant to the habitual felon status, prior record level 3; the Court having found seven prior record level points due to seven prior A-1 or 1 misdemeanors.

The trial court then sentenced defendant to a presumptive-range term of 95 to 123 months imprisonment.

Although a sentence within the statutory limits will be presumed regular and valid, such a presumption is not conclusive. *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). "If the record discloses that the [trial] court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of [the] defendant's rights." *Id.* In *Boone*, our Supreme Court ordered a new sentencing hearing when the trial court improperly considered in sentencing the defendant's decision to reject a plea offer because the defendant "had the right to plead not guilty, and he should not and cannot be punished for exercising that right." *Id.* at 712-13, 239 S.E.2d at 465.

Here, defendant cites no authority—and we know of none—suggesting that a trial court may not take into account the seriousness of a crime and the defendant's criminal record in deciding where within a presumptive range a defendant's sentence should fall. The cases cited by defendant—*State v. Higson*, 310 N.C. 418, 312 S.E.2d 437

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(1984); *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983); *State v. Chatman*, 308 N.C. 169, 301 S.E.2d 71 (1983); and *State v. Benfield*, 67 N.C. App. 490, 313 S.E.2d 198 (1984)—all address the finding of an aggravating factor to increase the sentence beyond the presumptive range. They do not address what is at issue in this case: whether a trial court may consider the seriousness of the crime and the defendant’s record in deciding where, within the presumptive range, a defendant’s sentence should fall.

The imposition of the minimum sentence under the sentencing guidelines is within the discretion of the trial court. N.C. Gen. Stat. § 15A-1340.17(c)(2) (2011) (emphasis added) provides that for the presumptive range, when “the sentence of imprisonment is neither aggravated or mitigated,” then “any minimum term of imprisonment in that range is permitted” See also *State v. Parker*, 143 N.C. App. 680, 685-86, 550 S.E.2d 174, 177 (2001) (“The Structured Sentencing Act clearly provides for judicial discretion in allowing the trial court to choose a minimum sentence within a specified range.”). If a trial court is free to choose “any” minimum term, we fail to see why a trial court should not be able to take into account the seriousness of the particular offense when exercising its discretion to decide which minimum term within the presumptive range for that class of offense and prior record level to impose.

No error.

Chief Judge MARTIN and Judge STROUD concur.

STATE OF NORTH CAROLINA v. DARIEN FISHER

No. COA11-980

(Filed 20 March 2012)

Search and Seizure—vehicle search—detention after warning ticket—reasonable suspicion

The trial court erred in a possession of marijuana case by granting defendant’s motion to suppress the search of the vehicle he was driving. Based on the totality of the circumstances, including defendant’s nervousness, the smell of air freshener in the car, inconsistency with regard to travel plans, and driving a car not registered to defendant, the police officer had reasonable suspi-

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cion to detain defendant while awaiting a canine unit's arrival after issuing a warning ticket for a seat belt violation.

Appeal by the State from order entered 3 February 2011 by Judge Arnold O. Jones, II in Wayne County Superior Court. Heard in the Court of Appeals 10 January 2012.

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

Parish & Cooke, by James R. Parish, for defendant-appellee.

HUNTER, Robert C., Judge.

The State appeals from the trial court's 3 February 2011 order granting defendant Darien Fisher's motion to suppress the search of his vehicle. After careful review, we reverse and remand.

Background

On 9 February 2010, Sergeant Mike Cox, a drug investigator with the Wayne County Police Department, was driving an unmarked police car on Highway 70 West when he observed defendant driving without wearing his seatbelt. According to Sergeant Cox, defendant was driving in a "pack of traffic" traveling approximately 70 miles per hour. Defendant "was very diligent in his driving, looking straight ahead, [and] had both hands on the wheel[.]" Sergeant Cox stated that, when combined with other circumstances, a person driving in the "flow of traffic" is suspicious.

Sergeant Cox followed defendant for about three miles, during which time he noticed that the tag number on the vehicle did not match the tag numbers that are typically issued by the Goldsboro Department of Motor Vehicles. He then ran the tag number, which established that the car was registered to an elderly woman from Bayboro, North Carolina. Sergeant Cox stated:

90 percent of my drug seizures come from third party vehicles, meaning that the person driving the vehicle is not the registered owner of the vehicle; they tend to use vehicles that are registered to third parties, so it is not linking them to the vehicle, No. 1, and No. 2, it wouldn't show that they're maintaining the vehicle, and No. 3, . . . it would be . . . harder to seize the vehicle and forfeit it under the state law for maintaining the vehicle.

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Sergeant Cox also noticed that there was a hand print on the trunk of the vehicle, which was otherwise dirty, indicating that something had recently been placed in the trunk. He stated that this fact was another indicator that defendant was a drug courier. Sergeant Cox executed the traffic stop for the seatbelt violation.

Upon approaching the car, Sergeant Cox noticed a strong odor of air freshener, which he stated was often a sign that someone was involved in transporting drugs. Defendant claimed that he was traveling to Bayboro after a shopping trip to a mall in Smithfield, North Carolina. Sergeant Cox became suspicious because defendant had purportedly traveled over two hours to go shopping, yet there were no bags in the car that he could observe. Defendant claimed that he went to the mall to shop for clothes, but nothing fit him.

Sergeant Cox also found it suspicious that defendant never asked him why he had been stopped. He stated that usually someone had something to hide if he was not concerned with why he had been stopped. Additionally, Sergeant Cox noticed that defendant had a fast food bag in his car, which he stated is not suspicious in and of itself, but combined with other circumstances it is an indicator that the person is in a hurry and does not want to leave their car unattended.

At that time, defendant had been stopped for approximately five to six minutes. Sergeant Cox called for a canine unit due to his belief that defendant was transporting drugs. Sergeant Cox approached defendant and told him that he would be given a warning ticket for driving without a seatbelt and that he believed defendant was transporting contraband. Defendant refused to consent to a search of his vehicle and denied that he had any pending drug charges. Sergeant Cox chose to detain defendant until the canine unit arrived. While waiting for the unit, Sergeant Cox called the Pamlico County Sheriff's Department and spoke with a narcotics officer who told Sergeant Cox that defendant was a known marijuana and cocaine distributor with pending drug charges. According to Sergeant Cox, defendant was very nervous throughout the encounter, even after being told that he was only going to receive a warning.

It took approximately 20 to 25 minutes for the canine unit to arrive. Emmy, the drug detection dog, signaled to the officers that there were drugs in defendant's car. The officers searched the car and discovered two pounds of marijuana in the trunk. Defendant was charged with one count of possession with intent to sell and deliver a controlled substance, and one count of keeping and maintaining

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a motor vehicle for the use of controlled substances. Defendant moved to suppress the search of his vehicle. On 3 February 2011, the trial court granted defendant's motion. The State timely appealed to this Court.

Discussion

Here, the parties do not dispute the trial court's determination that the stop of defendant's vehicle was justified due to the seatbelt infraction. The State and defendant agree that the sole issue on appeal is whether Sergeant Cox had reasonable suspicion to detain defendant while awaiting the canine unit's arrival.

It is well established that

the scope of appellate review of an order such as this is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.

State v. Cooke, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). The State in the present case has not challenged any of the trial court's findings of fact, and, therefore, they are binding on appeal. *Id.* "The trial court's conclusions of law, however, are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

The Fourth Amendment to the federal constitution provides, in pertinent part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" U.S. Const. amend. IV. "[T]he Fourth Amendment does not give rise to a legitimate expectation of privacy in possessing contraband or illegal drugs, and as such, a well-trained dog that alerts solely to the presence of contraband during a walk around a car at a routine traffic stop 'does not rise to the level of a constitutionally cognizable infringement.'" *State v. Branch*, 177 N.C. App. 104, 107, 627 S.E.2d 506, 508 (quoting *Illinois v. Caballes*, 543 U.S. 405, 409, 160 L. Ed. 2d 842, 847 (2005)), *cert. and disc. review denied*, 360 N.C. 537, 634 S.E.2d 220 (2006). "However, in order to further detain a suspect from the time the warning ticket is issued until the time the canine unit arrives, there must be 'reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot.'" *State v. Euceda-Valle*, 182 N.C. App. 268, 274, 641 S.E.2d 858, 863 (quoting *State v. McClendon*, 350 N.C. 630, 636, 517

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S.E.2d 128, 132 (1999)), *disc. review denied*, 361 N.C. 698, 652 S.E.2d 923 (2007). “The specific and articulable facts, and the rational inferences drawn from them, are to be ‘viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.’” *State v. Hernandez*, 170 N.C. App. 299, 308, 612 S.E.2d 420, 426 (2005) (quoting *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994)). “In determining whether the further detention was reasonable, the court must consider the totality of the circumstances.” *Id.* Reasonable suspicion only requires “a minimal level of objective justification, something more than an ‘unparticularized suspicion or hunch.’” *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)). We emphasize that because the “reasonable suspicion standard is a commonsensical proposition, [c]ourts are not remiss in crediting the practical experience of officers who observe on a daily basis what transpires on the street.” *United States v. Foreman*, 369 F.3d 776, 782 (4th Cir. 2004) (quoting *United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993)).

The trial court in this case issued oral findings of fact detailing Sergeant Cox’s observations as set forth in his testimony. The trial court concluded:

In this case I do not find that there is articulable reason for the search. I find that the stop, in itself, was justified, but that there are not enough factors after the stop to continue with the detention of this defendant absent a search warrant. He did not give his consent. I find that his Fourth Amendment rights were violated.

Consequently, the only issue that is to be decided by this Court is whether the trial court erred in concluding that Sergeant Cox lacked reasonable suspicion to detain defendant beyond the scope of a routine traffic stop, thereby violating defendant’s Fourth Amendment rights.

The State argues on appeal that the following factors established that Sergeant Cox had a reasonable suspicion that defendant was transporting contraband: (1) there was an overwhelming odor of air freshener coming from the car; (2) defendant’s claim that he made a five hour round trip to go shopping but had not purchased anything; (3) defendant’s nervousness; (4) defendant had pending drug related charges and was known as a distributor of marijuana and cocaine in another county; (5) defendant was driving in a pack of cars; (6) defend-

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ant was driving a car registered to someone else; (7) defendant never asked why he had been stopped; (8) defendant was “eating on the go”; and (9) there was a handprint on the trunk indicating that something had recently been placed in the trunk.

As a preliminary matter, we recognize that Officer Cox did not know that defendant had pending drug charges in another county until after the canine unit was called; however, when reviewing the totality of the circumstances, we are still permitted to take this factor into account. *See Euceda-Valle*, 182 N.C. App. at 274, 641 S.E.2d at 863 (“[I]n order to further detain a suspect *from the time the warning ticket is issued until the time the canine unit arrives*, there must be reasonable suspicion[.]” (emphasis added) (citation and quotation marks omitted)). Granted, reasonable suspicion must exist at the moment the officer decides to detain the defendant beyond the issuing of the citation, *State v. Bell*, 156 N.C. App. 350, 354, 576 S.E.2d 695, 698 (2003) (“To determine reasonable articulable suspicion, courts view the facts through the eyes of a reasonable, cautious officer, . . . *at the time he determined to detain defendant.*” (emphasis added) (citation and quotation marks omitted)); however, that does not mean that all other factors that arise during the detention should not be considered in the court’s analysis. The extended detention of defendant is ongoing from the time of the traffic citation until the canine unit arrives and additional factors that present themselves during that time are relevant to why the detention continued until the canine unit arrived. Here, Officer Cox decided to call the canine unit before he knew of defendant’s pending drug charges, but once he acquired that information shortly after calling for the canine unit, it became a factor in his decision to continue the detention until the canine unit arrived.

While none of the factors listed by the State standing alone would give rise to a reasonable suspicion viewed through the eyes of Sergeant Cox, we must examine whether these factors, taken in combination, were sufficient to establish reasonable suspicion. This Court has acknowledged that “[f]acts giving rise to a reasonable suspicion include nervousness, sweating, failing to make eye contact, conflicting statements, and strong odor of air freshener.” *Hernandez*, 170 N.C. App. at 308, 612 S.E.2d at 426. In *Euceda-Valle*, 182 N.C. App. at 274, 641 S.E.2d at 863, this Court held that “the trial court’s findings of fact support its legal conclusion that law enforcement had a reasonable suspicion necessary to conduct the exterior canine sniff of the vehicle.” The Court reasoned that the following findings of fact

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supported the trial court's conclusion: "Defendant was extremely nervous and refused to make eye contact with the officer. In addition, there was smell of air freshener coming from the vehicle, and the vehicle was not registered to the occupants. And there was disagreement between defendant and the passenger about the trip to Virginia." *Id.* at 274-75, 641 S.E.2d at 863. In *McClendon*, 350 N.C. at 637, 517 S.E.2d at 133, this Court held that inconsistent statements by defendant concerning who owned the vehicle, coupled with his extremely nervous behavior, were sufficient to establish reasonable suspicion. In *State v. Briggs*, 140 N.C. App. 484, 493-94, 536 S.E.2d 858, 863-64 (2000), this Court held that reasonable suspicion existed where the officer knew that the defendant was on probation, the defendant's eyes were red and glassy, and the officer smelled burnt cigars in the vehicle, which he knew were typically used to cover the odor of contraband. Similar, albeit not identical, factors exist in the present case as those seen in *Euceda-Valle*, *McClendon*, and *Briggs*.

We recognize that several of the factors listed by the State in this case can easily be construed as innocent behavior, but "[i]t must be rare indeed that an officer observes behavior consistent *only* with guilt and incapable of innocent interpretation." *United States v. Price*, 599 F.2d 494, 502 (2nd Cir. 1979); see *United States v. Sokolow*, 490 U.S. 1, 9, 104 L. Ed. 2d 1, 11 (1989) ("Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion."). Even assuming, *arguendo*, that such "innocent" behavior as defendant's driving in the flow of traffic, the hand print on the trunk, and the fast food bag, were not proper factors to consider, multiple other factors existed that have been specifically identified by our caselaw as appropriate factors to consider in a reasonable suspicion analysis. As stated *supra*, these factors include nervousness, the smell of air freshener, inconsistency with regard to travel plans, *Hernandez*, 170 N.C. App. at 308, 612 S.E.2d at 426, and driving a car not registered to the defendant, *Euceda-Valle*, 182 N.C. App. 274-75, 641 S.E.2d at 863. These factors were present in this case and were sufficient to establish the reasonable suspicion necessary for Officer Cox to detain defendant beyond the time necessary to issue the warning citation. Moreover, defendant's pending drug charges is a factor to be considered in the continued detention of defendant while awaiting the canine unit. See *State v. Branch*, 162 N.C. App. 707, 712-13, 591 S.E.2d 923, 926 (2004) ("[I]t is proper for an officer's prior knowledge of a defendant, combined with present

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observations and not taken alone, to constitute a reasonable suspicion justifying further investigation.”), *rev'd on other grounds*, 546 U.S. 931, 163 L. Ed. 2d 314 (2005).

Based on the totality of the circumstances, we hold that the trial court erred in concluding that reasonable suspicion did not exist and that defendant's Fourth Amendment rights were violated. Consequently, we reverse and remand this case for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

Judges THIGPEN and McCULLOUGH concur.

TD BANK, N.A., PLAINTIFF v. SALVATORE MIRABELLA, DEFENDANT

No. COA11-1178

(Filed 20 March 2012)

**Negotiable Instruments—promissory note—holder of the note—
judicial notice of merger—summary judgment erroneous**

The trial court erred in a case involving a dispute over the payment of a promissory note by allowing plaintiff's motion for summary judgment. Plaintiff failed to show that it was the owner and holder of the promissory note upon which it had sued, plaintiff's alleged merger with the named lender on the note was not appropriate for judicial notice where no evidence of the merger was forecast before the trial court at the summary judgment stage, and plaintiff failed to properly present evidence of a merger to the Court of Appeals.

Appeal by defendant from summary judgment entered 25 July 2011 by Judge F. Lane Williamson in Superior Court, Buncombe County. Heard in the Court of Appeals 9 February 2012.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Esther E. Manheimer, for plaintiff-appellee.

Ferikes & Bleyntat, PLLC, by Edward L. Bleyntat, Jr., for defendant-appellant.

STROUD, Judge.

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Defendant appeals an order granting summary judgment in favor of plaintiff. For the following reasons, we reverse and remand for further proceedings consistent with this opinion.

I. Background

On 8 December 2010, plaintiff filed a complaint against defendant alleging “[t]hat the Defendant has failed, refused, and neglected to pay the amount due on” a promissory note (“Note”) of which “Plaintiff is the owner and holder[.]” Plaintiff specifically noted that it “has elected to bring suit on the Note without waiving its right to proceed later, if applicable, to foreclosure the Deed of Trust[.]” Plaintiff requested \$204,333.91, the amount owed on the Note, plus interest and attorney’s fees. On 2 March 2011, defendant answered the complaint and denied that plaintiff is the owner and holder of the Note. On 24 June 2011, plaintiff moved for summary judgment. On 25 July 2011, the trial court entered an order granting summary judgment in favor of plaintiff. Defendant appeals.

II. Summary Judgment

The Note in our record is between defendant as borrower and *Carolina First Bank* as lender. The Note provides that “‘You’ and ‘Your’ refer to the Lender.” The Note further provides that the borrower “promise[s] to pay you or your order, at your address, or at such other location as you may designate, the principal sum of \$224,910.00 (Principal) plus interest from February 23, 2008 on the unpaid Principal balance until this Note matures or this obligation is accelerated.” Thus, defendant promised to pay Carolina First Bank or Carolina First Bank’s order.

Defendant contends that “the trial court erred in allowing plaintiff’s motion for summary judgment[.]” (original in all caps), because “TD Bank failed to show that it was the owner and holder of the promissory note upon which it has sued.”

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. 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.

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Mitchell, Brewer, Richardson v. Brewer, ___ N.C. App. ___, ___, 705 S.E.2d 757, 764–65 (citations and quotation marks omitted), *disc. review denied*, 365 N.C. 188, 707 S.E.2d 243 (2011).

In *Liles v. Myers*, “[t]he plaintiff brought [an] action seeking to recover \$3,200 which she alleged was owed her by the defendant on a promissory note.” 38 N.C. App. 525, 525, 248 S.E.2d 385, 386 (1978). Thereafter, “[t]he plaintiff moved for summary judgment.” *Id.* at 526, 248 S.E.2d at 386. “The trial court . . . granted summary judgment in favor of the plaintiff. The defendant appealed.” *Id.* at 526, 248 S.E.2d at 387. This Court stated,

Prior to being entitled to a judgment against the defendant, the plaintiff was required to establish that she was holder of the note at the time of this suit. This element might have been established by a showing that the plaintiff was in possession of the instrument and that it was issued or endorsed to her, to her order, to bearer or in blank. It is essential that this element be established in order to protect the maker from any possibility of multiple judgments against him on the same note through no fault of his own. . . .

. . . .

As evidence that a plaintiff is holder of a note is an essential element of a cause of action upon such note, the defendant was entitled to demand strict proof of this element. By his answer denying the allegations of the complaint, the defendant demanded such strict proof. The incorporation by reference into the complaint of a copy of the note was not in itself sufficient evidence to establish for purposes of summary judgment that the plaintiff was the holder of the note. As the record on appeal fails to reveal that the note itself or any other competent evidence was introduced to show that the plaintiff was the holder of the note, she has failed to prove each essential element of her claim sufficiently to establish her entitlement to summary judgment.

Id. at 526-28, 248 S.E.2d at 387-88 (citations omitted); see *Hotel Corp. v. Taylor*, 301 N.C. 200, 203, 271 S.E.2d 54, 57 (1980) (“G.S. 25-3-301 provides that the holder of a negotiable instrument may enforce payment in his own name. To bring suit on the instrument in his own name, the plaintiff must first establish that he is in fact a holder. The holder of an instrument is defined in G.S. 25-1-201(20) to be one who

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is in possession of an instrument drawn, issued, or indorsed to him or to his order or to bearer or in blank. Where, as in this case, a negotiable instrument is made payable to order, one becomes a holder of the instrument when it is properly indorsed and delivered to him. Mere possession of a note payable to order does not suffice to prove ownership or holder status.” (citations and quotation marks omitted).

Plaintiff argues that it now stands in the place of Carolina First Bank on the Note due to a merger between it and Carolina First Bank. However, neither the complaint nor any other documents in the record which were presented to the trial court reveal any evidence of a merger or explain why plaintiff is TD Bank instead of Carolina First Bank.¹ In *Hotel Corp.*, our Supreme Court stated,

Plaintiff in this case alleged in its complaint that it became the owner and holder of the note sued upon by merger with indorsee Econo-Travel Corporation. G.S. 55-110(b) provides that in the event of a merger between corporations, the surviving corporation succeeds by operation of law to all of the rights, privileges, immunities, franchises and other property of the constituent corporations, without the necessity of a deed, bill of sale, or other form of assignment. Therefore, 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.

However, plaintiff introduced no evidence to support its allegation of the existence of a merger, choosing instead to rest on its pleadings, which merely contended that a merger had taken place. Since defendant-appellants had met their burden under Rule 56 as movants for summary judgment, it was incumbent upon plaintiff to come forth with evidence to controvert defendant’s case, or otherwise suffer entry of summary judgment against it. It would have been a simple matter for plaintiff to present evidence of a merger in a form permitted under Rule 56(c), if a merger had in fact occurred. By resting on its pleadings, plaintiff failed to establish a genuine issue as to whether it was the owner and holder of the note, therefore

1. We do not have a transcript, and thus we do not know what plaintiff argued before the trial court. However, we must rely upon the record before us, which indicates that no evidence of the merger was presented before the trial court. See N.C.R. App. P. 9(a).

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defendant-appellants were entitled to entry of summary judgment in their favor as a matter of law, and the trial court was correct in so ordering.

301 N.C. at 204-05, 271 S.E.2d at 58.

Plaintiff contends that this “Court can and should take judicial notice of the merger in this appeal, regardless of the record below” and directs this Court’s attention to various documents regarding the alleged merger, including documents which appear to have been filed with the Secretary of State of South Carolina. These documents were only provided in the appendix of plaintiff’s brief. N.C. Gen. Stat. § 8C-1, Rule 201 provides:

(a) *Scope of rule.*—This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of facts.*—A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) *When discretionary.*—A court may take judicial notice, whether requested or not.

(d) *When mandatory.*—A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be heard.*—In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of taking notice.*—Judicial notice may be taken at any stage of the proceeding.

N.C. Gen. Stat. § 8C-1, Rule 201 (2007).

Plaintiff argues that this Court should take judicial notice of the merger under either the first or second prong of subsection (b). Plaintiff first contends that the merger is “generally known within the territorial jurisdiction of the trial court[.]” *Id.* We first note that judicial notice of facts “generally known within the territorial jurisdiction” of the court are normally “subjects and facts of common and

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general knowledge.” *Dowdy v. R. R. and Burns*, 237 N.C. 519, 526, 75 S.E.2d 639, 644 (1953). Some examples of the sorts of facts which have been judicially noticed in North Carolina are that “[i]t is common knowledge that light bulbs burn out unexpectedly and frequently[,]” *Reese v. Piedmont, Inc.*, 240 N.C. 391, 397, 82 S.E.2d 365, 369 (1954) and that “gasoline either alone or mixed with kerosene constitutes a flammable commodity and a highly explosive agent.” *Stegall v. Oil Co.*, 260 N.C. 459, 462, 133 S.E.2d 138, 141 (1963). Although we recognize that it may be appropriate for an appellate court to take judicial notice of a bank merger in some situations, we do not believe that the alleged merger of TD Bank and First Carolina Bank falls within the realm of “common and general knowledge.” *Dowdy*, 237 N.C. at 526, 75 S.E.2d at 644. Although plaintiff’s brief compares the notoriety of its merger to that of Wachovia and Wells Fargo, which at least one federal court has judicially noticed, it appears that these banks are not quite so well-known as Wells Fargo and Wachovia as this panel has never heard of TD Bank or First Carolina Bank, much less of their merger, and thus we cannot say that this purported South Carolina merger is “generally known within the territorial jurisdiction of the trial court[.]” N.C. Gen. Stat. § 8C-1, Rule 201.

Plaintiff next contends that the merger should be judicially noticed because it is a fact “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *Id.* Although in certain situations copies of documents certified by the Secretary of State, even a state other than North Carolina, may be “sources whose accuracy cannot reasonably be questioned[.]” we do not deem plaintiff’s merger documents to be so here. *Id.* Due to the manner in which plaintiff presented us with its merger documents, we conclude that defendant has reasonably questioned these documents in its reply brief. *See* N.C. Gen. Stat. § 8C-1, Rule 201. Defendant argues,

[W]e have a claim of an out of state merger of financial institutions, the type of transaction that can be so complex and filled with regulatory and legal compliance directives from the FDIC, state banking authorities, and private arrangements involving transfers of title, exceptions to what is transferred, recourse between parties to the merger, and other qualifications, both in public documents and in confidential business documents, as to strain the lawyerly imagination. While plaintiff’s brief on appeal has attached a photocopy of merger documents allegedly filed with the South Carolina Secretary of

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State, a photocopy of an Agreement and Plan of Merger and a photocopy of a Conditional Approval from the Comptroller of Currency, none of these photocopies, which were not produced to the trial court, are certified or authenticated per North Carolina law. Nor does plaintiff make the Court aware of whatever other documents might exist, which might not be part of a public record but which may nonetheless cast light on whether plaintiff is the owner and holder of the note that is a subject of this case, or of any other assets of Carolina First Bank.

As such, we conclude there is a reasonable question as to whether plaintiff did merge with Carolina First Bank.

Plaintiff also argues that judicial notice is mandatory, as it has been “requested by a party[,]” and plaintiff has “supplied . . . the necessary information.” We do not consider plaintiff’s provision of the alleged merger documents as an appendix to its brief as supplying the necessary information under Rule 201. *See id.* Plaintiff had many options for properly filing its merger documents and yet failed to do so. Plaintiff could have filed an affidavit regarding the alleged merger with the trial court, presented the merger documents as exhibits before the trial court or included the documents in the record on appeal, as a supplement to the record or through a separate motion. Instead, plaintiff provided its only evidence of its alleged merger with First Carolina Bank, a merger which is not even mentioned in the complaint, through the appendix of its brief. Rule 9 of our Rules of Appellate Procedure provides that “[i]n appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9.” N.C.R. App. P. 9. In addition, because plaintiff failed to present the merger documents before the trial court, defendant has not had the opportunity to respond fully to the documents included in the appendix to plaintiff’s brief and to the extent defendant has responded it has questioned the authenticity of plaintiff’s documents. We will therefore not take judicial notice of the alleged merger or its effect upon the transaction in this case.

While in certain situations, taking judicial notice of a bank merger may be appropriate, we do not deem it so in this case, where at the summary judgment stage no evidence of the merger was forecast before the trial court, plaintiff failed to properly present evi-

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dence of a merger with this Court, and defendant has specifically contested the authenticity of the merger documents provided in the appendix to plaintiff's brief. However, we do believe that the information presented by plaintiff raises a genuine issue of material fact. We therefore reverse the trial court's order granting summary judgment and remand for further proceedings. *See Mitchell* at ____, 705 S.E.2d at 764.

III. Conclusion

For the foregoing reasons, we reverse and remand for further proceedings consistent with this opinion. As we are reversing and remanding this case, we need not address defendant's other arguments on appeal.

REVERSED and REMANDED.

Judge STEPHENS concurs.

Judge BEASLEY concurs in the result only.

STATE OF NORTH CAROLINA v. AARON PITTMAN

No. COA11-1114

(Filed 20 March 2012)

1. Pretrial Proceedings—joinder of cases—offenses closely related and connected—no deprivation of fair trial

The trial court did not abuse its discretion in an insurance fraud, obtaining property by false pretenses, and exploitation of an elder adult case by granting the State's motion to join defendant's case with his wife's (Dew) case where the offenses committed by both parties were closely related and connected. Further, the trial court's decision to grant the motion for joinder did not deprive defendant of a fair trial where Dew made statements tending to place blame on defendant. The State offered extensive evidentiary support for the jury's finding of guilt and Dew's statements bore limited relevance to the principal issue before the jury.

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2. Appeal and Error—preservation of issues—admission of evidence—wife’s statements—joint trial—no objection—no redaction—no plain error argued

Defendant’s argument that evidence of statements made by his wife to investigating officers in an insurance fraud, obtaining property by false pretenses, and exploitation of an elder adult case should have been deemed inadmissible at their joint trial was dismissed. Defendant did not properly preserve this issue for appellate review given his failure to object to the introduction of the challenged statements, to seek redaction of the statements, or to argue that the admission of the challenged evidence constituted plain error.

Appeal by defendant from judgments entered 3 March 2011 by Judge R. Allen Baddour, Jr. in Granville County Superior Court. Heard in the Court of Appeals 8 February 2012.

Attorney General Roy Cooper, by Assistant Attorney General M. Lynne Weaver, for the State.

Mercedes O. Chut for defendant.

ELMORE, Judge.

Aaron Pittman (defendant) appeals from judgments entered upon jury convictions for 1) insurance fraud, 2) obtaining property by false pretenses, and 3) exploitation of an elder adult. After careful consideration, we find no error.

In late 2003 defendant was employed as an insurance salesman. Around this time, he went to the home of Effie Satterwhite, a woman in her eighties who was limited in her abilities to read and write. Defendant spoke to Satterwhite about purchasing insurance, and Satterwhite decided to buy a \$10,000.00 burial insurance policy from defendant. Defendant helped Satterwhite complete the forms. The policy listed Satterwhite’s half-sister, Sally, as the beneficiary.

Defendant continued to have a relationship with Satterwhite after he sold the policy to her. After some time, defendant introduced Satterwhite to his wife, Mildred Dew. Satterwhite then developed a relationship with defendant and Dew, and the couple occasionally cleaned Satterwhite’s house. During one of his visits, defendant took copies of Satterwhite’s driver’s license and some of her financial records.

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In October 2004, defendant sold Satterwhite two additional insurance policies, 1) another \$10,000.00 life insurance policy and 2) a \$50,000.00 annuity. Again, defendant helped Satterwhite complete the necessary paperwork. These policies also listed Sally as the beneficiary. However, sometime later Dew was made the beneficiary on all three of Satterwhite's policies. Both Satterwhite's and Dew's signatures appeared on the change forms, and Dew was listed as Satterwhite's niece. After that, Dew began taking money out of the cash values of the life insurance policies and withdrawing money from the annuity. By March 2008, the annuity was "totally cashed out" and had "no value" remaining.

On 5 January 2010, Satterwhite went to her local bank to withdraw money. She was informed by the teller that she did not have enough money in her account to complete her withdrawal. Satterwhite was alarmed by this discovery, and she then spoke with the teller manager. The manager informed Satterwhite that defendant was a joint owner on her account, and that defendant had opened a checking account and linked it to her account. At that time, the local police department was contacted, and Detective Ricky Cates was assigned to the case.

Detective Cates discovered that defendant had changed the address listed on Satterwhite's account so that the monthly statements were being sent directly to him. Detective Cates also discovered that defendant had linked his account to Satterwhite's under the guise that he was her son. A review of Satterwhite's bank records also revealed that defendant had made a series of large cash withdrawals from her account.

Defendant and Dew were then arrested on 21 January 2010. At the time of his arrest, defendant was in possession of Satterwhite's driver's license and the title to her car. Defendant and Dew were each charged with 1) two counts of insurance fraud, 2) one count of obtaining property by false pretenses, and 3) one count of exploitation of an elder adult. Prior to trial, the State filed a motion to allow for joinder of defendant and Dew for trial. On 21 February 2010, defendant filed an objection to the State's motion for joinder, but the trial court granted the motion nonetheless.

On 28 February 2011 the case came on for trial by jury. At trial, the State offered into evidence prior statements made by Dew. These statements, in sum, established 1) that "her husband, Aaron Pittman told her to sign the form[s]," and 2) that "she thought it was wrong,

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but she trusted her husband.” Defendant testified at trial in his own defense. On 3 March 2011, the jury found defendant guilty of 1) insurance fraud, 2) obtaining property by false pretenses, and 3) exploitation of an elder adult. The trial court then sentenced defendant to 1) 96 to 125 months imprisonment for insurance fraud and obtaining property by false pretenses and to 2) 21 to 26 months imprisonment for exploitation of an elder adult. These sentences were ordered to be served consecutively. Defendant now appeals.

[1] Defendant first argues that the trial court violated North Carolina law by granting the State’s motion for joinder. Defendant further argues that the trial court’s decision to grant the motion for joinder deprived him of a fair trial. We disagree.

“Joinder decisions are in the sound discretion of the trial court.” *State v. Fultz*, 92 N.C. App. 80, 82, 373 S.E.2d 445, 447 (1988). According to our General Statutes, charges against two or more defendants may be joined for trial if the charges 1) are part of a common scheme or plan, 2) are part of the same act or transaction, or 3) are closely connected in time, place, and occasion. *See* N.C. Gen. Stat. § 15A-926(b)(2) (2011). In fact, “public policy strongly compels consolidation as the rule rather than the exception when each defendant is sought to be held accountable for the same crime or crimes.” *State v. Paige*, 316 N.C. 630, 643, 343 S.E.2d 848, 857 (1986) (citation and quotations omitted). Thus, “the test we apply on review is whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant.” *Fultz*, 92 N.C. App. at 83, 373 S.E.2d at 447 (quotations and citations omitted).

Here, defendant and Dew were charged with the same crimes, and these crimes arose out of the same common scheme. Defendant sold the policies to Satterwhite, and Dew signed the paperwork necessary to add herself as the beneficiary on the policies. Thus, the offenses committed by defendant and Dew were closely related and connected. As such, the decision of the trial court to join defendant and Dew for trial did not violate state law.

Defendant also argues that the decision of the trial court deprived him of a fair trial, because the State was permitted to offer statements of Dew that placed all of the blame for her charges on defendant. We disagree.

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Our Supreme Court has held that

[e]ven though the defendants in a joint trial may offer antagonistic or conflicting defenses, that fact alone does not necessarily warrant severance. The test is whether the conflict in defendants respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial.

State v. Lowery, 318 N.C. 54, 59, 347 S.E.2d 729, 734 (1986) (quotations and citations omitted).

Here, the record clearly establishes that defendant did not dispute the fundamental accuracy of the State's showing that: 1) he sold Satterwhite multiple insurance policies and an annuity; 2) he later changed the beneficiaries associated with those policies to Dew and converted Satterwhite's bank accounts from individual accounts solely owned by Satterwhite to joint accounts owned by both defendant and Satterwhite; and 3) he obtained money from the insurance policies, the annuities, and the joint accounts and used that money for personal purposes. Thus, the essential difference between the evidence presented by the State and the evidence presented on behalf of defendant was that the State's evidence tended to show that Satterwhite never authorized or approved of defendant's actions while the evidence presented on defendant's behalf tended to show that he had been acting on Satterwhite's behalf, in Satterwhite's best interests, or with Satterwhite's consent. Therefore, the central issue that the jury was required to resolve was not whether the relevant financial transactions occurred but whether Satterwhite had authorized or approved of those transactions.

When viewed in this context, Dew's statements likely had little bearing on the jury's evaluation of the credibility of defendant's claim to have acted in Satterwhite's best interests or with her consent. Thus, we are not persuaded that Dew's statements played a significant role in the jury's determination of the issue of defendant's guilt given that Dew's statements shed little or no light on the intent with which defendant acted. As a result, we conclude that the trial court's joinder decision did not impermissibly prejudice defendant, because 1) the State offered extensive evidentiary support for the jury's finding of guilt and 2) Dew's statements bore limited relevance to the principal issue before the jury. Thus, we are unable to agree that Dew's statements denied him of a fair trial.

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[2] Defendant next argues that evidence of the statements made by Dew to investigating officers should have been deemed inadmissible at their joint trial. We decline to reach this issue on the grounds that defendant did not properly preserve this issue for appellate review given his failure to object to the introduction of the challenged statements, to seek redaction of the statements, or to argue that the admission of the challenged evidence constituted plain error.

“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion.” N.C.R. App. P. 10(a)(1). As a result, where defendant “either did not object to admission of the evidence, or failed to state any grounds for his objection [, he] . . . failed to preserve these [issues] . . . for review other than for plain error.” *State v. Locklear*, 363 N.C. 438, 451, 681 S.E.2d 293, 304 (2009) (citing *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634, *cert. denied*, ___ U.S. ___, 130 S. Ct. 510, 175 L. Ed. 2d 362 (2009)).

Here, the challenged statements were admitted into evidence during the testimony of Mr. Tesh, who interviewed Dew during the course of his investigation. Near the beginning of his testimony, Mr. Tesh asked to read aloud from a statement he had taken from Dew. At that point, defendant’s trial counsel interposed a general objection, which the trial court overruled. Subsequently, Mr. Tesh testified in considerable detail about a series of documents that he had shown to Dew and the comments that Dew made during the course of their discussion. Among other things, Mr. Tesh told the jury that Dew had denied any knowledge of at least seven of these documents, that she denied having signed several documents that bore her name, that she signed other documents in compliance with instructions that she had received from Defendant, and that, while she thought that signing an authorization allowing the withdrawal of money from a particular account was wrong, she signed the relevant document anyway because she trusted her husband. Defendant never objected to any portion of the challenged testimony or asked to have any of the statements upon which his argument is predicated redacted during Mr. Tesh’s trial testimony. Moreover, defendant did not object when Dew’s trial counsel elicited testimony from Mr. Tesh to the same effect as the testimony that had been elicited from Dew on direct examination or when Mr. Tesh testified that he believed Dew was

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being truthful with him. As a result, given the absence of any contemporaneous objection to the admission of the challenged testimony, defendant has failed to preserve this issue for appellate review. Moreover, “since defendant does not argue plain error on appeal, defendant has not preserved for appellate review any issue as to the admission of [Dew’s] statement[s].” *State v. Ross*, ___ N.C. App. ___, ___ S.E.2d ___, ___ (2011). As a result, we conclude that defendant did not properly preserve his challenge to the admission of Dew’s testimony, and we decline to reach the merits of this issue.

No Error.

Judges BRYANT and ERVIN concur.

LINDA CAROL ROBINSON, AND JOHN CHARLES ROBINSON, PLAINTIFFS v. JEFFREY MARTIN SMITH, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITIES, WORTH HILL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE SHERIFF OF DURHAM COUNTY, NORTH CAROLINA, DURHAM COUNTY, NORTH CAROLINA, THE DURHAM COUNTY NORTH CAROLINA SHERIFF’S OFFICE AND UNKNOWN SURETY COMPANY, DEFENDANTS

No. COA11-934

(Filed 20 March 2012)

1. Pleadings—amended complaint—served prior to responsive pleading—Rules 20 and 21 inapplicable

The trial court did not err in a negligence action by considering plaintiffs’ amended complaint. Plaintiffs’ amended complaint was served on defendants before defendants had served a responsive pleading and neither N.C.G.S. § 1A-1, Rule 20 nor 21 were applicable.

2. Immunity—governmental—negligence—pleadings stage—insurance purchased

The trial court did not err in a negligence case by denying defendant’s motion to dismiss on the basis of governmental immunity. The trial court explicitly declined to consider materials beyond the pleadings at that stage, and plaintiffs’ specifically alleged, *inter alia*, that defendant Durham County had purchased insurance and thus had waived its immunity.

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Appeal by Defendants from order entered 27 April 2011 by Judge Michael R. Morgan in Durham County Superior Court. Heard in the Court of Appeals 15 December 2011.

Ekstrand & Ekstrand LLP, by Robert C. Ekstrand and Stephanie A. Sparks, for Plaintiffs-Appellees.

Office of the Durham County Attorney, by Assistant County Attorney Bryan E. Wardell, for Defendants-Appellants.

BEASLEY, Judge.

Jeffrey Martin Smith, individually and in his official capacity; Worth Hill, individually and in his official capacity as the Sheriff of Durham County, North Carolina; Durham County, North Carolina; The Durham County North Carolina Sheriff's Office; and Unknown Surety Company (collectively, Defendants) appeal from a 27 April 2011 order denying their motion to dismiss the above-captioned matter. For the following reasons, we affirm the trial court's order.

Linda Carol Robinson and her husband, John Charles Robinson (Plaintiffs) filed a complaint on 26 July 2010 against Jeffrey Smith in his official capacity and his employer, Durham County, alleging Smith negligently ran into Plaintiffs' car and injured Mrs. Robinson while acting in the course of his employment. On 23 August 2010, both Smith and Durham County filed motions to dismiss. On 1 December 2010, Plaintiffs filed their first amended complaint, which named all the present Defendants. On 7 January 2011, Defendants filed a motion to dismiss Plaintiffs' first amended complaint. On 27 April 2011, the trial court entered an order recognizing Plaintiffs' first amended complaint as the operative complaint in this proceeding and denying Defendants' motion to dismiss. On 9 May 2011, Defendants gave notice of appeal to this court.

At the outset, we note that this appeal is interlocutory, and would normally not be properly before us. "However, an interlocutory order may be heard in appellate courts if it affects a substantial right[.]" and "[t]his Court has held that denial of dispositive motions such as motions to dismiss . . . that are grounded on governmental immunity affect a substantial right and are immediately appealable." *Mabrey v. Smith*, 144 N.C. App. 119, 121, 548 S.E.2d 183, 185 (2001) (internal citations omitted). Thus, this interlocutory appeal is properly before this Court.

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I.

Defendants argue that the trial court erred in considering Plaintiffs' amended complaint. We disagree.

[1] Pursuant to N.C. Gen. Stat. § 1A-1, Rule 15(a) (2011), “[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served[.]” Here, Defendants do not argue that Plaintiffs' amended complaint was served on them after they had served a responsive pleading. Instead, they argue that because Plaintiffs' amendment added an additional party, it was not governed by Rule 15 but by Rules 20-21 of Civil Procedure, which Defendants contend require notice to existing litigants and leave of court when an amendment adds a party. Defendants' argument is without merit.

As the trial court stated, Rules 20 and 21 have no bearing on the instant case. Rule 20 governs permissive joinder and Rule 21 pertains to misjoinder and nonjoinder of parties. *See* N.C. Gen. Stat. § 1A-1, Rules 20 and 21 (2011). Neither rule is applicable here. Defendants further point to this Court's decision in *Coffey v. Coffey*, 94 N.C. App. 717, 381 S.E.2d 467 (1989) in support of their argument. However, *Coffey* is not applicable here either, as the defendant in that case had filed an answer and plaintiff was only permitted to amend her pleadings by leave of court or by written consent of the defendant under Rule 15(a). *Id.* at 722, 381 S.E.2d at 471. The rationale in *Coffey* is only applicable to cases where a responsive pleading has been filed prior to the proposed amendment; because no such pleading was filed here, this case is easily distinguishable. Accordingly, the trial court did not err in considering Plaintiffs' amended complaint to be the operative complaint in this action.

II.

[2] Defendants also argue that the trial court erred in denying their motion to dismiss Plaintiffs' claim on the basis of governmental immunity.¹ We disagree.

“A motion to dismiss should be granted when it appears that plaintiff is not entitled to *any* relief under any facts which could be presented in support of his claim.” *Harwood v. Johnson*, 326 N.C. 231, 239, 388 S.E.2d 439, 444 (1990). North Carolina courts have held that the defense of sovereign immunity can be both a matter of subject matter jurisdiction under Rule 12(b)(1) and a matter of personal

1. Although the trial court did not expressly deny Defendants' governmental immunity claim, it effectively did so by denying the motion which included that claim.

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jurisdiction under 12(b)(2).² See *Battle Ridge Cos. v. N.C. Dep't of Transp.*, 161 N.C. App. 156, 157, 587 S.E.2d 426, 427 (2003). When reviewing a motion to dismiss, “a trial court may consider and weigh matters outside the pleadings. However, if the trial court confines its evaluation to the pleadings, the court must accept as true the plaintiff’s allegations and construe them in the light most favorable to the plaintiff.” *Department of Transp. v. Blue*, 147 N.C. App. 596, 603, 556 S.E.2d 609, 617 (2001).

“Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity. Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity.” *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (internal citations omitted). It is axiomatic that “[a]bsent consent or waiver, the immunity provided by the doctrine is absolute and unqualified.” *Messick v. Catawba County*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 494 (1993).

Pursuant to N.C. Gen. Stat. § 153A-435(a) (2011),

A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property . . . caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment.

Further, if a county waives its immunity under § 153A-435(a), any person “sustaining damages as a result of an act or omission of the county or any of its officers, agents, or employees, occurring in the exercise of a governmental function, may sue the county for recovery of damages.” N.C. Gen. Stat. § 153A-435(b) (2011).

In the instant case, the trial court explicitly stated that it declined to consider materials beyond the pleadings at that stage. Thus, our review must also be based solely on the pleadings. In Plaintiffs’ first amended complaint, they specifically allege, *inter alia*, that Defendant Durham County has purchased insurance pursuant to N.C. Gen. Stat. § 153A-435 and thus had waived its immunity. Defendants point to the proffered affidavit of the County’s Risk Manager, filed with their motion to dismiss, that contends that the County has not

2. Defendants assert the defense under both 12(b)(1) and 12(b)(2) in their motion to dismiss.

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purchased insurance which would provide coverage for the claims included in this action. However, because the trial court declined to consider Defendants' affidavits so must we, and based only on the pleadings, Plaintiffs have alleged sufficient facts to survive a Rule 12 dismissal on the basis of governmental immunity. Thus, the trial court's order must be affirmed.

Affirmed.

Judges ERVIN and THIGPEN, JR. concur.

STATE OF NORTH CAROLINA v. JAQUAN RASEAN WEATHERS

No. COA11-1132

(Filed 20 March 2012)

Constitutional Law—confrontation clause—doctrine of wrongdoing—forfeiture of right to confrontation

The trial court did not abuse its discretion in a first-degree murder and kidnapping case by denying defendant's motion for a mistrial where a witness was excused from testifying further after suffering an extreme emotional reaction on the witness stand and defendant had no opportunity to cross-examine the witness. The doctrine of wrongdoing was applicable in light of the overwhelming evidence regarding defendant's efforts to intimidate the witness to keep him from testifying and their effect on the witness.

Appeal by Defendant from judgments entered 11 March 2011 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 January 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell, for the State.

Paul F. Herzog for Defendant.

STEPHENS, Judge.

Defendant Jaquan Rasean Weathers appeals from judgments entered upon his convictions for the first-degree murder of Leroy Hodge, Jr. (known as "Rico") and three related counts of kidnapping. The evidence at trial pertinent to the issues on appeal tended to show

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the following: The victim's house was commonly the site of illegal drug sales and use, particularly crack cocaine. On the night of the murder, Johnny Wilson had been selling crack from the victim's home before leaving to visit a friend. When Wilson returned, he entered the apartment and saw Defendant waving a gun around. Defendant was upset and angry because he believed someone had taken his drugs. As Wilson stood in the kitchen, he heard a gunshot from the bedroom. When Wilson entered the bedroom, he saw Rico lying on the floor and Defendant standing with his back to the wall.

Wilson was one of the State's chief witnesses at trial. During his direct examination on 28 February 2011, Wilson was shaking while testifying about Defendant's involvement in the murder. When he returned to the stand on 2 March, he "began to testify, but within a few minutes became distraught and indicated he did not wish to make any other statements." Wilson was shaking more noticeably than he had been on 28 February, and laid his head down on top of the witness stand and began to cry. Wilson became even more upset when a young man dressed in street clothes entered the courtroom. When asked if he had been threatened, Wilson responded, "I don't even want to answer that question."

In light of Wilson's extreme emotional state, the trial court excused Wilson from testifying further. At the prosecution's request, the court called a hearing on the issue of whether the doctrine of forfeiture applied to the circumstances and whether Wilson's testimony would remain on the record. Defendant argued that the appropriate remedy was to declare a mistrial because he had been denied the right to confront Wilson. By order entered 11 March 2011, the court directed that Wilson's testimony remain on the record. In the order, the trial court found that Defendant had "committed wrongful acts that were undertaken with the intention of preventing potential witnesses from testifying and has in fact caused a potential witness, Johnny Wilson, to refuse to testify."

Discussion

Defendant's sole argument on appeal is that the trial court erred in denying his motion for a mistrial.¹ Defendant contends that his actions toward Wilson were not designed to prevent Wilson from

1. Defendant also argues that the court erred in denying his motion to strike Wilson's testimony, but our review of the record reveals no motion to strike by Defendant. Because a party must present a "timely request, objection, or motion" to the trial court and obtain a ruling thereon in order to preserve an issue for appeal, we do not address this portion of Defendant's argument. *See* N.C.R. App. P. 10(a)(1).

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testifying and, in any event, were not egregious enough to trigger forfeiture of his constitutional right to confront witnesses against him. We disagree.

In considering whether the trial court erred in refusing to grant a mistrial, this Court employs an abuse of discretion standard.

The decision to grant or deny a mistrial lies within the sound discretion of the trial court and is entitled to great deference since the trial court is in a far better position than an appellate court to determine the effect of any misconduct on the jury. Absent an abuse of discretion, therefore, the trial court's ruling will not be disturbed on appeal. An abuse of discretion occurs when a ruling is manifestly unsupported by reason, which is to say it is so arbitrary that it could not have been the result of a reasoned decision.

State v. Taylor, 362 N.C. 514, 538, 669 S.E.2d 239, 260 (2008) (citations and quotation marks omitted).

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]” U.S. Const. amend. VI. However, certain wrongful actions by an accused can result in forfeiture of his Confrontation Clause rights. *See Giles v. California*, 554 U.S. 353, 359, 171 L. Ed. 2d 488, 495 (2008). Under the doctrine of forfeiture by wrongdoing, “one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.” *Davis v. Washington*, 547 U.S. 813, 833, 165 L. Ed. 2d 224, 244 (2006). “The rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds[.]” *Crawford v. Washington*, 541 U.S. 36, 62, 158 L. Ed. 2d 177, 199 (2004). Thus,

when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal trial system.

Davis, 547 U.S. at 833, 165 L. Ed. 2d at 244.

As codified in Federal Rule of Evidence 804(b)(6), forfeiture occurs when the defendant has “ ‘engaged or acquiesced in wrongdo-

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ing that was intended to, and did, procure the unavailability of the declarant as a witness.’” *Giles*, 554 U.S. at 367, 171 L. Ed. 2d at 500 (quoting Fed. Rule Evid. 804(b)(6)). The intent requirement “means that the [doctrine] applies only if the defendant has in mind the particular purpose of making the witness unavailable.” *Id.*

The North Carolina Rules of Evidence have no similar provision, and the doctrine of forfeiture has not been addressed directly in our State’s case law.² Here, the trial court followed the approach adopted by Utah state courts in *Utah v. Poole* which, as in federal case law, focused on the defendant’s intent to prevent the witness from testifying. 232 P.3d 519, 522 (Utah 2010).³ The trial court made several findings regarding the overwhelming evidence of Defendant’s wrongful acts and his intent. First, Wilson disclosed that, as they were being transported to the courthouse for trial, Defendant threatened to kill Wilson and his family. A detention officer also testified that she heard Defendant threaten Wilson. Second, in a taped interview with homicide detectives and assistant district attorneys, Wilson repeatedly expressed his concern that his life and the lives of his family members were in jeopardy.

Finally, Defendant made several phone calls that evidenced his intent to intimidate Wilson. In one call to his grandmother, Defendant repeatedly referred to Wilson as “nigger” and stated he would “straighten this nigger out[,]” a reference to intimidating Wilson to keep him quiet. Also during the phone calls, Defendant joked about the “slick moves” that he used to prevent Wilson from testifying. In other calls, Defendant instructed several acquaintances (including “Greasy,” “Mad Dog,” and others) to come to court to intimidate Wilson while he was testifying. One of the parties Defendant spoke to said he would be in court on the morning of 2 March 2011. On that date, Wilson, who had already been hesitant and fearful on the stand, became even more emotional and “broke down” when he saw a young man dressed in street clothes indicative of gang attire enter the courtroom.

Defendant argues that, because Wilson did not know about these phone calls, “[t]heir relevance is marginal at best” in determining the

2. Our Supreme Court has only briefly mentioned the doctrine in dicta. See *State v. Lewis*, 361 N.C. 541, 648 S.E.2d 824 (2007).

3. The Utah court used a preponderance of the evidence standard, *id.* at 525, while the trial court here applied the higher standard of clear, cogent, and convincing evidence. Because employing a higher standard of proof benefits Defendant, he does not assert any abuse of the court’s discretion on this point and we see none.

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reason Wilson chose to discontinue his testimony. We disagree. The calls were highly relevant in determining whether to apply the doctrine of forfeiture by wrongdoing in that they showed Defendant (1) wanted to intimidate Wilson and prevent him from testifying; (2) formed a plan to intimidate Wilson by having Defendant's acquaintances appear in the court room while Wilson was on the stand; and (3) believed his "slick moves" would be effective in intimidating Wilson.

Much of Defendant's argument on appeal centers on the correctness of the court's finding of fact concerning the presence of a spectator at trial described as "a young Afro-American male dressed in urban attire (low hanging baggie pants and hoodie) indicative of gang attire." There was no dispute at trial that such a spectator entered the courtroom on 2 March. The trial judge recalled that the young man had entered while Wilson was still on the stand, while defense counsel believed Wilson had already been taken out of the courtroom. The judge's memory of the timing was competent evidence and supports this finding of fact. Further, the remaining findings, including Defendant's threat to harm Wilson and his family and his bragging about doing so, along with Wilson's obvious fear, were more than sufficient to establish Defendant's efforts and intent to intimidate Wilson.

We likewise reject Defendant's contention that application of the doctrine was improper because Wilson never testified that he chose to remain silent out of fear of Defendant. It would be nonsensical to require that a witness *testify against a defendant* in order to establish that the defendant has intimidated the witness into *not* testifying. Put simply, if a witness is afraid to testify against a defendant in regard to the crime charged, we believe that witness will surely be afraid to finger the defendant for having threatened the witness, itself a criminal offense. *See* N.C. Gen. Stat. § 14-226 (2011). Defendant cites no authority for the proposition that a trial court cannot make reasonable inferences about the cause of a witness's refusal to testify based upon the facts and circumstances before it.

As Defendant notes, this Court has interpreted United States Supreme Court case law as demonstrating a "reluctance to uphold forfeiture of a criminal defendant's U.S. Constitutional rights, except in egregious circumstances." *State v. Wray*, ___N.C. App. ___, ___, 698 S.E.2d 137, 140-41 (2010). The evidence here could hardly be more egregious. We see no error in the trial court's determination that Defendant forfeited his right to confront Wilson.

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In light of the overwhelming evidence regarding Defendant's acts, the intention behind them, and their effect on Wilson, as well as the court's thoughtful, well-reasoned analysis thereof, the trial court did not abuse its discretion in refusing to grant a mistrial.

NO ERROR.

Judges STROUD and BEASLEY concur.

HUGH D. HINDMAN, JEFFREY A. BUTTS, AND PAUL H. GATES, PLAINTIFFS
v. APPALACHIAN STATE UNIVERSITY, AND THE BOARD OF TRUSTEES OF
APPALACHIAN STATE UNIVERSITY, BOARD OF GOVERNORS OF THE
UNIVERSITY OF NORTH CAROLINA, DEFENDANTS

No. COA11-1229

(Filed 20 March 2012)

Appeal and Error—mootness—breach of contract—no claim seeking to redress an active harm

Plaintiffs' appeal in an action arising from an alleged breach of contract was dismissed as moot where plaintiffs made no claim seeking to redress an active harm. Even if the trial court were to have entered a judgment declaring that the defendants had breached the employment contracts of plaintiffs, such judgment could not have had any practical effect, in light of the fact that the breach was in the past, was not alleged to be likely to recur, was the only redress plaintiffs sought, and plaintiffs were barred from bringing further action on this same claim or issue.

Appeal by plaintiffs from order entered 15 June 2011 by Judge Bradley B. Letts in Superior Court, Watauga County. Heard in the Court of Appeals 23 February 2012.

Tin Fulton Walker & Owen, PLLC, by John W. Gresham, for plaintiffs-appellants.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Norma S. Harrell, for defendants-appellees.

STROUD, Judge.

Plaintiffs appeal a trial court order allowing summary judgment in favor of defendants. As this case is moot, we affirm.

I. Background

On or about 10 February 2011, defendant filed a complaint alleging:

7. The Plaintiffs[, all tenured Professors at Appalachian State University,] and other university faculty members who were similarly situated fulfilled all of the duties set out in their contracts for the 2008-2009 academic year.

8. The Defendants failed to pay the salary set out in Plaintiffs' contracts as well as the salaries of other university faculty members who entered into identical contracts, reducing the agreed upon salary by 0.5%.

9. The Defendants have asserted that the failure to pay the agreed upon salaries was the result of an Executive Order by the Governor that required the pay of Plaintiffs to be reduced by 0.5%.

10. The Executive Order purported to provide Plaintiffs and the other similarly situated university faculty members with ten (10) hours of "flexible time off" in lieu of the [sic] their salary.

11. Neither the Plaintiffs nor the similarly situated faculty members received any such flexible time off in lieu of their reduced salary.

12. At the time that the Defendants failed to pay the salaries set out in the contracts of Plaintiffs and the similarly situated faculty members, the Plaintiffs and the other similarly situated faculty members had already fully performed all of the services they were obligated to perform under the terms of their contracts.

Plaintiffs brought a cause of action for breach of contract and requested "a declaratory judgment to establish that the Defendants have breached the employment contracts of the Plaintiffs and other faculty members who are similarly situated[.]" Plaintiffs did not seek any damages or any form of relief or redress for the alleged breach of contract. On 20 March 2011, defendants filed an answer, defenses, and a motion to dismiss; defendants raised defenses of sovereign immunity as well as mootness in their motion to dismiss. As to mootness, defendants alleged that "[p]laintiffs' claim should be dismissed pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and (6) on the grounds that it is moot and that plaintiffs have made no claim seeking to

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redress an active harm.” On 11 May 2011, defendants filed another motion to dismiss, which restated the defenses raised in the answer, and a motion for summary judgment. On or about 20 May 2011, plaintiffs filed a motion for summary judgment. On 15 June 2011, the trial court entered a brief order denying defendants’ motion to dismiss and plaintiffs’ motion for summary judgment and allowing defendants’ motion for summary judgment; the order does not state the basis for any of its rulings. Plaintiffs appeal.

II. Mootness

Defendants filed a motion to dismiss plaintiffs’ suit pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and (6) because it was moot; the trial court denied this motion to dismiss. Defendants did not appeal from the denial of their motions to dismiss.¹ Plaintiffs’ appeal only raises issues as to the trial court’s allowance of defendants’ motion for summary judgment. Despite the absence of appeal as to the trial court’s denial of the motion to dismiss both as to sovereign immunity and mootness, both parties have argued these issues before this Court. It is essentially impossible to discern the trial court’s rationale for its denial of defendants’ motions to dismiss and allowance of defendants’ motion for summary judgment, as there could be several possible reasons for this ruling; however, even if the trial court’s rationale for its order was wrong, “[i]f the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered.” *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989). Here, although the trial court failed to state any reason for its ruling, we will first consider whether the order should be affirmed because plaintiffs’ claims are moot.

Summary judgment can be granted based upon an affirmative defense raised by the defendant “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,” *Save Our Schools of Bladen Cty. v. Bladen Cty. Bd. of Educ.*, 140 N.C. App. 233, 237, 535 S.E.2d 906, 910 (2000) (citation and quo-

1. Although defendants filed two motions to dismiss, one in their answer filed on 28 March 2011 and one in a separate motion filed on 11 May 2011, the trial court’s order does not differentiate between the two motions. However, as the motions raise the same defenses, it appears that the trial court’s order denied both.

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tation marks omitted). There is no dispute about the facts as to the relief sought by plaintiffs.

Although plaintiffs argue that a mere declaration of a past wrong is a sufficient basis for a declaratory judgment action, it is still true that

actions filed under the Declaratory Judgment Act, N.C. Gen. Stat. §§ 1–253 through—267 (2005), are subject to traditional mootness analysis. A case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Typically, courts will not entertain such cases because it is not the responsibility of courts to decide abstract propositions of law.

Citizens Addressing Reassignment and Educ., Inc. v. Wake Cty. Bd. of Educ., 182 N.C. App. 241, 246, 641 S.E.2d 824, 827 (2007) (citations, quotation marks, and brackets omitted), *disc. review denied*, 362 N.C. 234, 659 S.E.2d 438 (2008). Here, even if the trial court were to enter a judgment declaring “that the Defendants have breached the employment contracts of the Plaintiffs” it could not “have any practical effect[;]” *id.*, in light of the fact that this breach was in the past, is not alleged to be likely to recur, is the only redress plaintiffs seek, and plaintiffs are barred from bringing further action on this same claim or issue. *See generally Whitacre P’ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (“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. . . . Under the companion doctrine of collateral estoppel, also known as estoppel by judgment or issue preclusion, the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.” (quotation marks omitted)). Accordingly, dismissal of plaintiffs’ case was appropriate. *See generally Finance, Inc. v. Thompson*, 247 N.C. 143, 150, 100 S.E.2d 381, 386 (1957) (“It appearing that the value of the Chevrolet is less than the total of (1) the costs of this action, including the expenses of sale, (2) Robinson’s first lien for \$30.00, and (3) plaintiff’s second lien for \$796.38, we need not determine the academic question whether, upon the facts established by the verdict, Robinson has a lien as against Thompson for the balance (the amount in excess of \$30.00) due on the repair bill.”); *Bechtel v. Cent. Bank & Trust Co.*, 164 S.E. 338, 338 (N.C. 1932)

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("As the sale which the plaintiff seeks to enjoin has already taken place, there is nothing now to restrain, and the action was properly dismissed. It is not worth while to moot an academic question. Appeal dismissed." (citation omitted)); *Citizens Addressing Reassignment and Educ., Inc.*, 182 N.C. App. at 246, 641 S.E.2d at 827-28 ("The disputed school is already operating, and plaintiffs do not seek closure of the facility. Therefore, a legal determination declaring the building unlawful would have no practical effect on the controversy. This issue presents only an abstract proposition of law for determination and is, therefore, also moot.").

III. Conclusion

Because plaintiffs have presented only an academic question and this Court's ruling upon plaintiffs' complaint would have no practical effect, this case is moot, and we therefore affirm the order allowing summary judgment in defendants' favor. As we are affirming the trial court's order on the grounds of mootness, we need not address plaintiffs' remaining arguments on appeal.

AFFIRMED.

Judges ELMORE and STEELMAN concur.

NEW HANOVER COUNTY CHILD SUPPORT ENFORCEMENT ON BEHALF OF ANGEL
E. BEATTY, PLAINTIFF v. TOMMY D. GREENFIELD, DEFENDANT

No. COA11-1086

Process and Service—Qualified process server—affidavit of service not fatally vague

The trial court did not err in a paternity and child support case by denying defendant's motion to dismiss for insufficient service of process. Service of process was made by a person that was qualified to make service under Rule of Civil Procedure 4. Further, the affidavit of service was not fatally vague as to the method of service because competent evidence supported a factual finding that the process server personally delivered a copy of the summons and complaint to defendant.

Appeal by defendant from order entered 21 April 2011 by Judge John J. Carroll, III in New Hanover County District Court. Heard in the Court of Appeals 25 January 2012.

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Johnson, Lambeth & Brown, by Maynard M. Brown, Carter T. Lambeth & Christopher C. Loutit, for plaintiff-appellee.

Highsmith Law Firm, P.A., by Mose L. Highsmith and James Zisa, Attorneys by James Zisa, for defendant-appellant.

STEELMAN, Judge.

Service of process was made by a person that was qualified to make service under Rule of Civil Procedure 4. The affidavit of service was not fatally vague as to the method of service because competent evidence supported a factual finding that the process server personally delivered a copy of the summons and complaint to the defendant. The trial court did not err in denying the defendant's motion to dismiss for insufficiency of service of process.

I. Background and Procedural History

This appeal concerns an action to establish paternity and to obtain child support for a minor child, T.G., born 6 December 1996. On 8 March 2002, the New Hanover County Child Support Enforcement Agency ("plaintiff"), on behalf of the child's mother, Angel E. Beatty, filed a complaint seeking establishment of paternity and child support. The complaint alleged that Tommy D. Greenfield ("defendant") was the father. Plaintiff then attempted service on defendant no fewer than six times at six different addresses in Atlanta, Georgia; Milwaukee, Wisconsin; New York, NY; and Stamford, Connecticut over a period of about four years.

Finally, on 25 October 2005 in Richmond, Virginia, Eddie W. Null, Sr. served defendant with a summons, notice of hearing, complaint, and subpoena, according to an affidavit Null executed that day. After a hearing on 15 March 2006, the trial court determined defendant was T.G.'s father and ordered defendant to pay \$696 per month in child support as well as retroactive support of \$4176. Several orders to show cause were issued when defendant failed to make any payments. On 31 March 2011, defendant filed a motion to dismiss on the grounds of lack of personal jurisdiction (Rule of Civil Procedure 12(b)(2)) and insufficiency of service of process (Rule of Civil Procedure 12(b)(5)). The trial court denied defendant's motion.

Defendant appeals.

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II. Service of Process

In his only argument, defendant contends that service of process was defective. We disagree.

A. Standard of Review

We review *de novo* questions of law implicated by the denial of a motion to dismiss for insufficiency of service of process. *Cf. A.H. Beck Found. Co. v. Jones Bros.*, 166 N.C. App. 672, 678, 603 S.E.2d 819, 823 (2004) (reviewing the denial of a motion to dismiss for lack of personal jurisdiction). The trial court's factual determinations are binding on this court if supported by competent evidence. *Cf. id.* However, a trial court is not required to make findings of fact in an order denying a motion to dismiss for insufficiency of process. *See* N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2011). When the trial court does not make findings of fact and no party has requested them, "it will be presumed that the judge, upon proper evidence, found facts sufficient to support his judgment." *Rossetto USA, Inc. v. Greensky Fin., LLC*, 191 N.C. App. 196, 199–200, 662 S.E.2d 909, 912 (2008) (internal quotation marks omitted). In such a case, we determine whether there is competent evidence in the record to support these presumed findings of fact. *Id.* at 200, 662 S.E.2d at 912.

B. Analysis

Defendant contends service was invalid because Null did not meet the qualifications for serving process under Rule of Civil Procedure 4. In North Carolina, N.C. Gen. Stat. § 1A-1, Rule 4(a) (2011) establishes who may make service of process for a North Carolina action. Rule 4 states that when service is made outside of North Carolina, the process server must be (1) "anyone who is not a party and is not less than 21 years of age" or (2) "anyone duly authorized to serve summons by the law of the place where service is to be made." N.C. Gen. Stat. § 1A-1, Rule 4(a).

N.C. Gen. Stat. § 1-75.10(a)(1) (2011) provides the method of establishing whether these rules were satisfied. When a defendant is personally served out of state, proof of service may be established by an affidavit executed by the process server. N.C. Gen. Stat. § 1-75.10(a)(1)(b). That affidavit must show, among other things, the process server's "qualifications to make service under Rule 4(a) or Rule 4(j) of the Rules of Civil Procedure." *Id.* These qualifications

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may also be established in accordance with the proof of service rules of the state where service is made. *Id.*

N.C. Gen. Stat. § 1-75.10(a)(1) provides that if an affidavit demonstrates that service has been made in compliance with Rule 4(a), the plaintiff has provided proof of service. Rule 4(a) states that a person is qualified to make service if they are qualified in the state in which service is made. Therefore, if the affidavit establishes that the process server was authorized to make service in the state in which service was made, the plaintiff has provided valid proof of service with respect to the process server's qualifications. Accordingly, N.C. Gen. Stat. § 1-75.10(a)(1) and Rule 4(a) will be satisfied concerning process server qualifications.

Null's affidavit states that he was over the age of eighteen and not a party to or otherwise interested in the action at the time of service. Under Rule 4(a), Null must qualify under Virginia law because the affidavit does not state he was twenty-one or older. In Virginia, "[a]ny person of age 18 years or older and who is not a party or otherwise interested in the subject matter in controversy" is authorized to serve process. Va. Code Ann. § 8.01-293(A)(2) (2007). Null's affidavit affirmatively demonstrates that he was qualified to effect service under Rule 4(a) as required by N.C. Gen. Stat. § 1-75.10(a)(1).

Defendant contends service was defective under *Harrel v. Preston*, 421 S.E.2d 676 (Va. Ct. App. 1992). That decision governs proof of service under Virginia law. The rules governing proof of service are distinct from the qualifications of a process server. When service is made under the law of another state, North Carolina's proof of service statute still controls. Under that statute, there is no need to establish proof of service in accordance with the law of the state where service was made if proof of service is shown to be in accordance with North Carolina law. *See* N.C. Gen. Stat. § 1-75.10(a)(1). In this case, proof of service was established pursuant to North Carolina law. Therefore, Virginia's proof of service law does not apply.

Defendant also argues that the affidavit of service is defective because it is too ambiguous as to the manner of service. N.C. Gen. Stat. § 1A-1, Rule 4(j) (2011) establishes the manner of service necessary to exercise personal jurisdiction. One acceptable method is "[b]y delivering a copy of the summons and of the complaint to the natural person or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." *Id.* § 1A-1, Rule 4(j)(1)(a). Null's affidavit states:

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On the 25th day of October, 2005, at 5:25 PM, at the address of 703 N 35th Street, RICHMOND, Richmond City County, VA; this affiant served the above described documents upon TOMMY D GREENFIELD, by then and there personally delivering 1 true and correct copy(ies) thereof, by then presenting to and leaving the same with TOMMY D GREENFIELD, black male, 40's, black hair, 5-11/190, person of suitable age and discretion who stated the above address to be the residence and usual place of abode of themselves and the subject(s) and/or subjects legal representative listed above. (Bold typeface omitted.)

This affidavit states that defendant was personally served and gives a physical description of defendant. He does not challenge this physical description on appeal. However, the affidavit also makes reference to a "person of suitable age and discretion." It was for the trial court to resolve any ambiguity in the return of service. Because none of the parties requested that the trial court make findings of fact, we presume the trial court made sufficient findings of fact to support the court's ruling that service was valid. *Rossetto USA*, 191 N.C. App. at 199–200, 662 S.E.2d at 912. One factual finding that the trial court would have to make in order to support its ruling was that Null personally delivered a copy of the summons and complaint directly to defendant and neglected to delete the extraneous text. There is competent evidence to support this finding—namely, the language in Null's affidavit stating he served defendant personally and providing a physical description of defendant.

Defendant's argument that service of process was invalid is without merit.

III. Conclusion

Defendant has failed to establish that the order appealed from is void because service of process was improper. The order is

AFFIRMED.

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

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[219 N.C. App. 536 (2012)]

MARVIN MCDONALD, CORNELIUS FORD, ANTHONY KOONCE, PERRY JONES, AARON PETTY, ANNIE POLK, PLAINTIFFS v. NORTH CAROLINA DEPARTMENT OF CORRECTION, A NORTH CAROLINA STATE AGENCY; NORTH CAROLINA DEPARTMENT OF CORRECTION MANAGEMENT INFORMATION SYSTEMS, A DIVISION OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION; ALVIN W. KELLER, SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTION; BOB BRINSON, CHIEF INFORMATION OFFICER, NORTH CAROLINA DEPARTMENT OF CORRECTION MANAGEMENT INFORMATION SYSTEMS, DEFENDANTS

No. COA11-1280

(Filed 20 March 2012)

Sentencing—structured sentencing—definition of month—calendar month

The trial court did not err by declaring that N.C.G.S. § 12-3 (12), which defines “imprisonment for one month” as “imprisonment for thirty days[,]” was inapplicable to sentences imposed under structured sentencing. N.C.G.S. § 12-3(3), which construes the word “month” to mean a calendar month, controlled.

Appeal by Plaintiffs from order entered 9 May 2011 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 9 February 2012.

N.C. Prisoner Legal Services, Inc., by Laura Grimaldi, for Plaintiff-Appellants.

Attorney General Roy Cooper, by Assistant Attorney General Joseph Finarelli, for Defendant-Appellees.

BEASLEY, Judge.

Marvin McDonald, Cornelius Ford, Anthony Koonce, Perry Jones, Aaron Petty, and Annie Polk (Plaintiffs) appeal the trial court’s order granting N.C. Department of Correction, N.C. Department of Correction—Management Information Systems, Alvin W. Keller, and Bob Brinson (Defendants) motion for judgment on the pleadings. For the following reasons, we affirm.

Plaintiffs are inmates in the N.C. Department of Correction (DOC).¹ On 10 December 2010, Plaintiffs filed a complaint seeking declaratory and injunctive relief against Defendants. After Defendants

1. Anthony Koonce and Annie Polk have been released from custody and Plaintiffs concede that their claims are moot.

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filed an answer, both parties filed motions for judgment on the pleadings. The case was heard on 4 April 2011 and the trial court granted Defendants' motion for judgment on the pleadings by order filed 9 May 2011. On 26 May 2011, Plaintiffs filed a timely notice of appeal.

First, Plaintiffs argue that the trial court erred by declaring that N.C. Gen. Stat. § 12-3 (12) was inapplicable to sentences imposed under structured sentencing. We disagree.

"This Court reviews a trial court's grant of a motion for judgment on the pleadings *de novo*." *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764 (2008) (citation omitted). "Judgment on the pleadings pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (internal quotation marks and citations and omitted).

Plaintiffs assert that N.C. Gen. Stat. § 12-3(12) applies to the Structured Sentencing Act (the Act) where the Act fails to expressly define the term "month." N.C. Gen. Stat. § 12-3(12) (2011) states,

"Imprisonment for One Month," How Construed.—The words "imprisonment for one month," wherever used in any of the statutes, shall be construed to mean "imprisonment for thirty days."

Plaintiffs contend that N.C. Gen. Stat. § 12-3(12) limits the DOC's ability to convert sentences of a year or more. Currently, the DOC calculates every 12 month sentence into a calendar year which consists of 365 days. Under Plaintiffs' proposed interpretation of the statute, DOC is not permitted to convert months over a year into 365 days, but is limited to construing months into 30 day periods. Plaintiffs assert that sentences over 12 months, under this interpretation of the statute, should consist of 360 days (12 months x 30 days), not 365 days.

We must first note that

[t]he functions of the court in regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination be one of guilt, then to pronounce the punishment or penalty prescribed by law. The execution of the sentence belongs to a different department of the government. The manner of executing the sentence and the mitigation of punishment are determined by the legislative department,

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and what the Legislature has determined in that regard must be put in force and effect by administrative officers.

Jernigan v. State, 279 N.C. 556, 563-64, 184 S.E.2d 259, 265 (1971) (internal quotation marks and citation omitted). Additionally, “the responsibility for determining the limits of statutory grants of authority to an administrative agency is a judicial function for the courts to perform.” *In re Community Association*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980).

Defendants argue, and we agree, that N.C. Gen. Stat. § 12-3(3) controls and N.C. Gen. Stat. § 12-3 (12) is inapplicable. N.C. Gen. Stat. § 12-3(3) (2011) states,

The word “month” shall be construed to mean a calendar month, unless otherwise expressed; and the word “year,” a calendar year, unless otherwise expressed. . . . When a statute refers to a period of one or more months and the last month does not have a date corresponding to the initial date, the period shall expire on the last day of the last month.

“In North Carolina, when the word ‘month’ is used in our General Statutes it is to be construed to mean a calendar month, unless otherwise expressed.” *Kennedy v. Insurance Co.*, 4 N.C. App. 77, 80, 165 S.E.2d 676, 677 (1969) (citing N.C. Gen. Stat. § 12-3(3)). In *Kennedy*, this Court held that

the term ‘thirty days’ and the term ‘one month’ are not synonymous, although where the particular calendar month is composed of exactly thirty days the number of days involved happen to be the same. The word ‘month’ has a clear and well-defined meaning, and refers to a particular time. Unless an intention to the contrary is expressed, it signifies a calendar month, regardless of the number of days it contains.

Id. at 80-81, 165 S.E.2d at 677.

Plaintiffs acknowledge the plain meaning of N.C. Gen. Stat. § 12-3(3), but argue that § 12-3(12) is also controlling in defining months. Plaintiffs argue that the two statutes should be “harmonized”. We recognize the rule of statutory interpretation that states “[w]here there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized[.]” *McIntyre v. McIntyre*, 341 N.C. 629, 631,

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461 S.E.2d 745, 747 (1995). We find the rule inapplicable in this case because we determine that N.C. Gen. Stat. § 12-3 (12) does not deal with the same subject matter as N.C. Gen. Stat. § 12-3(3).

“Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.” *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). It is clear from the plain language of N.C. Gen. Stat. § 12-3 (12) that the statute defines the term “imprisonment for one month” and does not define the term “month”. Under N.C. Gen. Stat. § 12-3 (12) “imprisonment for one month” is used as a term of art. “A complimentary rule of construction provides that when technical terms or terms of art are used in a statute, they are presumed to be used with their technical meaning in mind, likewise absent legislative intent to the contrary.” *Dare County Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371-72 (1997). The statute expressly states that “[t]he words ‘imprisonment for one month,’ wherever used in any of the statutes, shall be construed to mean ‘imprisonment for thirty days.’” A plain reading of the statute shows that “imprisonment for one month” is a term of art and delineates that the thirty day rule is only to be used where the term of art is expressly used in the statutes. We decline to extend this narrow and specific definition outlined in N.C. Gen. Stat. § 12-3 (12) to a broader interpretation that was not intended by the Legislature. Accordingly, we affirm the trial court’s order and Plaintiffs’ argument is overruled.

Because Plaintiffs’ second issue on appeal is based on the first issue, Plaintiffs’ second issue on appeal is also overruled.

Affirmed.

Judges HUNTER, Robert C. and STEPHENS concur.

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[219 N.C. App. 540 (2012)]

VASELENIUCK ENGINE DEVELOPMENT, LLC., PLAINTIFF v. SABERTOOTH
MOTORCYCLES, LLC., DEFENDANTSABERTOOTH MOTORCYCLES, LLC. v. VASELENIUCK ENGINE DEVELOPMENT,
LLC., AND DAVID VASELENIUCK, INDIVIDUALLY DEFENDANTS

No. COA11-870

(Filed 20 March 2012)

1. Liens—mechanics’ liens—violation—summary judgment improper

The trial court improperly granted summary judgment in a case involving motorcycle engines on defendant’s claim that plaintiff violated the enforcement by lien statute, N.C.G.S. § 44A-4. Although the evidence before the trial court was sufficient to raise an inference that plaintiff failed to substantially comply with N.C.G.S. § 44A-4, that was a factual issue which could have been determined only by the jury.

2. Conversion—trespass to chattels—valid possessory lien—genuine issue of material fact

The trial court erred in a case involving motorcycle engines by granting defendant’s motion for partial summary judgment on claims of conversion and trespass to chattels. There was a genuine issue of material fact regarding whether plaintiff had a valid possessory lien over all the engines in its possession.

Appeal by Plaintiff from orders entered 8 November 2010 by Judge F. Lane Williamson and 4 April 2011 by Judge Richard D. Boner in Lincoln County Superior Court. Heard in the Court of Appeals 26 January 2012.

Knox, Brotherton, Knox & Godfrey, by Allen C. Brotherton, for Plaintiff-Appellant.

Law Offices of J. Neal Rodgers, for Defendant-Third Party Plaintiff Appellee.

BEASLEY, Judge.

Vaseleniuck Engine Development, LLC (Plaintiff) appeals from an 8 November 2010 order and a 4 April 2011 order, both of which grant partial summary judgment to Sabertooth Motorcycles, LLC (Defend-

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ant). For the following reasons, we reverse both orders and remand this case for proceedings not inconsistent with this opinion.

On or about 14 September 2006, the parties entered into a contract for services, delivery, and setup of fifty engines for use in custom motorcycles. Defendant paid Plaintiff \$87,914 at the time the engines were ordered and another \$87,914 when the engines were delivered to Plaintiff's facility. Defendant also paid an additional \$55,800.50 for parts upon delivery of the engines. In total, Defendant has paid Plaintiff \$231,658.50. However, Defendant still owes Plaintiff a sum of \$38,000. Defendant received 15 engines that Plaintiff completed work on, but the rest of the engines remained in Plaintiff's possession.

Plaintiff asserted a possessory lien on the remaining property by service of notice to Defendant under N.C. Gen. Stat. § 44A-1. Defendant responded, and requested a judicial hearing. In spite of this request, Plaintiff sold three of the engines at auction. On 13 January 2010, Plaintiff filed a complaint asserting Defendant was liable for breach of contract and unfair and deceptive trade practices, and claiming that it had the right to retain possession of the remaining 35 engines and other property under a valid claim of lien. On 23 April 2010, Defendant filed an answer and counterclaim asserting breach of contract, violation of lien statute N.C. Gen. Stat. § 44A-4, claim and delivery, conversion/trespass to chattels, and unfair and deceptive trade practices. Defendants also included an allegation of the personal liability of David Vaseleniuck for violation of N.C. Gen. Stat. § 57C-3-30 and an assertion of the right to attorney fees pursuant to N.C. Gen. Stat. § 75-16.1. On 23 August 2010, Defendant filed a motion for partial summary judgment as to its claim against Plaintiff for violation of N.C. Gen. Stat. § 44A-4 *et seq.* This motion was granted by order filed 8 November 2010 (2010 order).

On 23 February 2011, Defendant filed another motion for partial summary judgment, this time as to the claims of (i) conversion/trespass to chattels, (ii) claim and delivery, (iii) unfair and deceptive trade practice, and (iv) violation of N.C. Gen. Stat. § 57C-3-30. This motion was granted with regard to the conversion/trespass to chattels claim and denied for all other claims by order dated 4 April 2011 (2011 order). From these orders, Plaintiff now appeals.¹

1. Plaintiff's brief was served on Defendant on 13 September 2011. Defendant did not file a brief until 20 February 2012, well past the 30 day period allowed in N.C. R. App. P. 13(a)(1) and even after the date that this case was heard. Thus, we did not consider Defendant's brief while deciding this case.

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[219 N.C. App. 540 (2012)]

I.

First, we note that Plaintiff's brief raises several issues regarding its compliance with our rules of appellate procedure and the interlocutory nature of the 8 November 2010 and 4 April 2011 orders. These issues were resolved in this Court's denial of Defendant's motion to dismiss. As this Court has held that Plaintiff's appeal from these two orders is properly before us, we turn to address Plaintiff's substantive arguments.

II.

[1] Plaintiff contends that the trial court improperly entered the 2010 order granting summary judgment on Defendant's claim that Plaintiff violated N.C. Gen. Stat. § 44A-4. Specifically, the 2010 order adjudged Plaintiff liable under N.C. Gen. Stat. § 44A-4(g) (2011) which provides that if a lienor "fails to comply substantially with any of the provisions of this section, the lienor shall be liable to the person having legal title to the property[.]" Although the evidence before the trial court was sufficient to raise an inference that Plaintiff failed to substantially comply with N.C. Gen. Stat. § 44A-4 (2011), "[t]his is a factual issue which can be determined only by the jury" and thus "the court erred in failing to submit this issue to the jury." *Drummond v. Cordell*, 73 N.C. App. 438, 441, 326 S.E.2d 292, 293 (1985). Accordingly, we reverse the 2010 order.

III.

[2] Plaintiff next contends that the trial court erred in entering the 2011 order granting Defendant's motion for partial summary judgment on the claims of conversion and trespass to chattels. We agree.

N.C. Gen. Stat. § 44A-2(a) (2011) mandates that "[a]ny person who . . . alters, repairs, stores, services, treats, or improves personal property other than a motor vehicle or an aircraft in the ordinary course of his business pursuant to a[] . . . contract with an owner or legal possessor of the personal property has a lien upon the property." Because it is uncontroverted that Plaintiff has altered the condition of all the engines in its possession, and has not been paid in full for this work, Plaintiff is entitled to a possessory lien on each engine.

"A successful action for trespass to chattel requires the party bringing the action to demonstrate . . . that there was an *unauthorized, unlawful* interference or dispossession of the property[.]" *Fordham v. Eason*, 351 N.C. 151, 155, 521 S.E.2d 701, 704 (1999) (citations omitted and emphasis added). "The tort of conversion is well

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defined as an *unauthorized* assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the . . . exclusion of an owner's rights." *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956) (internal quotation marks and citation omitted) (emphasis added). To grant Defendant summary judgment on the claims of trespass to chattels or conversion, the trial court had to have found that Plaintiff's possession of the engines was unauthorized. Because we hold that Plaintiff has shown a genuine issue of material fact exists regarding whether it has a valid possessory lien over the all the engines in its possession, the trial court's order granting partial summary judgment to Defendant must be reversed.

Reversed and Remanded.

Judges STEPHENS and STROUD concur.



IN THE MATTER OF P.K.M.

No. COA11-1094

(Filed 20 March 2012)

Appeal and Error—juvenile delinquency—no basis for appeal

The State had no right to appeal the trial court's motion to suppress the juvenile defendant's statement in a delinquency case. The State lacked a statutory basis for appeal because the trial court's order did not terminate the prosecution.

Appeal by the State from order entered 18 July 2011 by Judge Kristina L. Earwood in Macon County District Court. Heard in the Court of Appeals 23 February 2012.

Attorney General Roy Cooper, by Assistant Attorney General LaToya B. Powell, for the State.

The Law Office of Rich Cassady, by Rich Cassady, Esquire, for juvenile-appellee.

STEELMAN, Judge.

Where the trial court's order granting the juvenile's motion to suppress did not terminate the prosecution, the State has no right of appeal.

IN RE P.K.M.

[219 N.C. App. 543 (2012)]

I. Factual and Procedural Background

This case arises out of a delinquency petition filed against P.K.M., age twelve. The petition alleged that P.K.M. and several other juveniles broke into and vandalized a vacant building. The investigating detective received information indicating that P.K.M. was involved in the break-in. P.K.M. was called to the principal's office and then escorted to the school resource officer's office, where he met with the resource officer and the investigating detective. P.K.M. made incriminating statements during this meeting.

P.K.M. filed a motion to suppress the statements made to the resource officer and detective. The trial court granted P.K.M.'s motion to suppress based upon the United States Supreme Court's decision in *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 180 L. Ed. 2d. 310 (2011). The State appealed and certified "pursuant to N.C.G.S. § 15A-979(c) . . . that the appeal [was] not taken for the purpose of delay and that the evidence suppressed [was] essential to the prosecution of the case."

II. The State's Right to Appeal

P.K.M. contends the State's appeal must be dismissed because the State lacks a statutory basis for appeal. We agree.

A. Standard of Review

Whether the State has a statutory right of appeal to this Court is a question of law that we review *de novo*. See *State v. Lay*, 56 N.C. App. 796, 798, 290 S.E.2d 405, 406 (1982) (reviewing this question as one of law and according no deference to the trial court proceedings).

B. Analysis

A "proper party" may appeal any "final order" made by the trial court under the North Carolina Juvenile Code. N.C. Gen. Stat. § 7B-2602 (2011). The State is a proper party. *Id.* § 7B-2604(a). However, the State is limited to appealing two types of orders in delinquency proceedings. *Id.* § 7B-2604(b). It may appeal orders ruling that a state statute is unconstitutional. *Id.* § 7B-2604(b)(1). It may also appeal "[a]ny order which terminates the prosecution of a petition by upholding the defense of double jeopardy, by holding that a cause of action is not stated under a statute, or by granting a motion to suppress." *Id.* § 7B-2604(b)(2). Thus, the State may only appeal the order granting P.K.M.'s motion to suppress if that order terminated the prosecution.

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Although the State does not explicitly concede the issue, the State does not argue in its brief that the trial court's order terminated the prosecution. The trial court's order granting the motion to suppress did not state that the prosecution was terminated. The court did not dismiss the case. The State did not dismiss the case or inform the trial court that it could not proceed with the case for lack of evidence.

Granting a motion to suppress does not, standing alone, dispose of a juvenile delinquency case. *Cf. In re K.D.L.*, ___ N.C. App. ___, ___, 700 S.E.2d 766, 773 (2010) (reversing the denial of a motion to suppress and remanding for further proceedings because of the possibility that the State could have elected to proceed without the confession). Assuming *arguendo* that dismissal of the case for insufficient evidence is not required in order to satisfy the "terminates the prosecution" standard created by N.C. Gen. Stat. § 7B-2604(b)(2), our review of the record suggests the State could present alternate evidence of P.K.M.'s alleged involvement in the break-in. A teacher at P.K.M.'s school overheard several students discussing the break-in. This information led the police to develop P.K.M. as a suspect. The State does not argue on appeal that it could not have proceeded without P.K.M.'s statements, and we decline to make this assumption.

The State's certification referencing N.C. Gen. Stat. § 15A-979(c) has no bearing on this appeal. That statute governs the State's appeal of a motion to suppress in a criminal case. It does not apply to cases under the Juvenile Code.

"In North Carolina, there is no inherent right to appeal. Rather, avenues of appeal are created by statute." *Northfield Dev. Co. v. City of Burlington*, 165 N.C. App. 885, 887, 599 S.E.2d 921, 924 (2004) (citing *Cox v. Kinston*, 217 N.C. 391, 396, 8 S.E.2d 252, 257 (1940)). The State has no statutory right of appeal in this case, and it has not petitioned for certiorari review. Therefore, the State's appeal is

DISMISSED.

Judges ELMORE and STROUD concur.

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[219 N.C. App. 546 (2012)]

SHERRY S. ALBERT, ADMINISTRATRIX OF THE ESTATE OF DORIS HILL KING;
SHERRY S. ALBERT, ADMINISTRATRIX OF THE ESTATE OF FRANK LARUE
KING, PLAINTIFFS v. J. KIMZIE COWART, WACHOVIA CORPORATION, REGIONS
BANK, AM SOUTH INVESTMENT SERVICES, INC., AND NEW YORK LIFE
INSURANCE AND ANNUITY CORPORATION, DEFENDANTS

No. COA11-1136

(Filed 3 April 2012)

1. Fiduciary Relationship—money transferred to joint account—transfer not a gift

The trial court did not err in denying plaintiff's motions for directed verdict and motion for judgment notwithstanding the verdict as to her claim against defendant Cowart for breach of fiduciary duty. The evidence, when viewed in the light most favorable to Cowart, showed that Cowart was acting in furtherance of plaintiff's deceased Doris King's wishes when he transferred half of the King's money to a joint account with right of survivorship. The transfer was not a gift to Cowart in violation of N.C.G.S. § 32A-14.1.

2. Unjust Enrichment—money transferred to joint account—transfer not a gift—no breach of fiduciary duty

The trial court did not err in denying plaintiff's motions for a directed verdict and judgment notwithstanding the verdict as to her claim against defendant Cowart for unjust enrichment. Cowart was unjustly enriched by a gift to himself and a breach of his fiduciary duty as the evidence, when viewed in the light most favorable to Cowart, showed that he did not make a gift to himself or breach his fiduciary duty.

Appeal by plaintiffs from judgment entered 18 January 2011 and Order entered 21 January 2011 by Judge Mark E. Powell in Superior Court, Henderson County. Heard in the Court of Appeals 23 February 2012.

Prince, Youngblood & Massagee, PLLC, by Boyd B. Massagee, Jr., for plaintiff-appellants.

Dameron, Burgin, Parker & Jackson, P.A., by Phillip T. Jackson, for defendant-appellee J. Kimzie Cowart.

STROUD, Judge.

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[219 N.C. App. 546 (2012)]

Sherry S. Albert, acting in her capacity as *administratrix* of the estates of Doris Hill King and Frank LaRue King (referred to herein as “plaintiff”) appeals from the denial of her motions for a directed verdict at trial, the jury verdict in favor of defendant Cowart, and the order denying her motion for judgment notwithstanding the verdict. For the following reasons, we affirm.

I. Background

On 28 September 2006, plaintiff filed a complaint against J. Kimzie Cowart (“defendant Cowart”) and Wachovia Corporation alleging that Cowart had wrongly transferred funds belonging to Doris Hill King into a joint account at Wachovia Bank and raising claims for breach of fiduciary duty, unjust enrichment, fraud, and conversion. On 5 September 2007, plaintiff filed an amended complaint which included the same alleged claims against defendant Cowart; added New York Life Insurance and Annuity Corporation, Regions Bank, and AMSouth Investment Services, Inc. as defendants; alleged that defendant Cowart had withdrawn the \$450,000.00 from the disputed Wachovia account, deposited it into a account at AmSouth Bank¹, and then purchased a \$400,000.00 annuity through New York Life Insurance and Annuity Corporation; and requested the “imposition of constructive trusts” on the disputed accounts.² Defendant Cowart filed an answer to plaintiff’s amended complaint denying plaintiff’s claims.³ Plaintiff filed a motion for summary judgment against defendant Cowart “to determine that [the disputed] Account was not a survivorship account.” Defendant Cowart also moved for summary judgment regarding the status of the disputed account and for the remaining claims against him. In an order entered 31 July 2008, the trial court granted in part defendant Cowart’s motion and dismissed plaintiff’s claims for constructive fraud and conversion. However, the trial court denied defendant Cowart’s motion as to the survivorship account, the breach of fiduciary duty

1. On 15 February 2008, the trial court entered a consent order requiring defendant Regions Bank to freeze the disputed account until it issued a final judgment regarding the distribution of those assets and dismissing claims against defendant AmSouth without prejudice, as it had merged with defendant Regions Bank.

2. Plaintiff’s complaint alleged claims for breach of fiduciary duty against defendant Wachovia and plaintiff’s amended complaint alleged additional claims against defendant Wachovia, including negligence, and breach of debtor/creditor relationship. Defendant Wachovia Bank is not a party to this appeal.

3. Defendant Cowart also raised a cross-claim against defendant Wachovia Bank, which is not at issue in this appeal.

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claim, and the unjust enrichment claim; and granted plaintiff's motion and held that the disputed account was not a survivorship account. The trial court certified the judgment for immediate appeal pursuant to Rule 54. Defendant Cowart appealed from this order.

This Court in *Albert v. Cowart*, 200 N.C. App. 57, 65, 682 S.E.2d 773, 779, *disc. review denied and dismissed as moot*, 363 N.C. 744, 687 S.E.2d 688 (2009) reversed in part the trial court's order. This Court explained that

[u]nder North Carolina General Statutes, section 53-146.1, “[a]ny two or more persons may establish a deposit account or accounts by written contract. The deposit account and any balance thereof shall be held for them as joint tenants, with or without right of survivorship, as the contract shall provide” N.C. Gen. Stat. § 53-146.1(a) (2007). “Parties who wish to create a right of survivorship applicable to joint bank accounts must comply with the requirements of G.S. § 41-2.1(a)[.]” *In re Estate of Heffner*, 99 N.C. App. 327, 328, 392 S.E.2d 770, 771 (1990). Under General Statutes, section 41-2.1, a right of survivorship in banking deposits may be created by written agreement:

(a) A deposit account may be established with a banking institution in the names of two or more persons, payable to either or the survivor or survivors . . . when both or all parties have signed a written agreement, either on the signature card or by separate instrument, expressly providing for the right of survivorship.

N.C. Gen. Stat. § 41-2.1(a) (2007).

Id. at 63, 682 S.E.2d at 778. This Court noted that both Doris King and defendant Cowart had previously signed “Wachovia Customer Access Agreement[s]” which were “designed to eliminate most subsequent signature cards and authorizations when opening future accounts” and specifically, those agreements elected “to create the Right of Survivorship for any joint account.” *Id.* at 64, 682 S.E.2d at 778-79. This Court further noted that on 7 September 2005, both Doris King and defendant Cowart signed a statement to open a joint account in their names and “on the authority of the aforementioned statement and authorizations on file, Wachovia created Account 588 in the names of Doris H. King and Kimzie Cowart.” *Id.* at 65, 682 S.E.2d at 779. In reversing in part the trial court's order and holding “that Account 588 incorporated a right of survivorship[,]” this Court noted

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the clear intent of both Doris King and Cowart's individual CAA forms specifically authorizing, pursuant to N.C. Gen. Stat. § 53-146.1, the incorporation of a right of survivorship to any joint account opened, as well as the subsequent agreement between Doris King and Cowart to enter into a joint checking account.

Id. This Court did not rule on any of the trial court's other determinations in the summary judgment order. *Id.* at 65-66, 682 S.E.2d at 779-80. The remaining claims were tried at the 9 November 2010 Civil Session of Superior Court, Henderson County.

Evidence presented at trial tended to show that Doris and Frank King were residents of Henderson County, North Carolina. In April of 2005, Doris King was diagnosed with lymphoma and her husband Frank King was suffering from Alzheimer's disease. Plaintiff Sherry Albert, Frank King's daughter and Doris's stepdaughter, testified that she traveled from Florida to visit the Kings two or three times a year and classified their relationship as a "very healthy relationship." She did not discuss money with the Kings, and Doris did not tell Sherry that she had cancer. Plaintiff Sherry testified that Doris's will left her estate to her husband Frank King but if Frank predeceased Doris, Doris's estate would go to Sherry. Frank King's will also stated that Sherry would get his entire estate if Doris predeceased Frank.

In September of 2005, Doris became ill and was admitted to the hospital. Doris's treating physician Dr. Phillip Sellers became concerned for Doris and Frank King as

[Doris] had not made any arrangements for care of her husband, Frank, who was increasingly demented, and it was obvious that Doris was going to die and that, I felt that some arrangements needed to be made to be sure that he was cared for after she died. And I pushed her to try to get in touch with somebody, she was very reluctant to do anything or to face in a realistic kind of way what her situation was. And so I pushed her and that's when she gave me Kimzie [Cowart's] name.

Dr. Seller's stated that Doris indicated that defendant Cowart was "a person she trusted[.]" Defendant Cowart is the biological nephew of Frank King and at the time lived in Florida.

Defendant Cowart testified that he was close to Frank and Doris King, as they were his last living aunt and uncle, and in 2005, he had visited the Kings about once a month. During 2005, he observed a

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decline in Doris's health and thought that she had cancer. He also noticed that Frank's health had also declined, and he thought Frank had Alzheimer's disease. In September of 2005, defendant Cowart traveled from Florida to Henderson County and discovered that Doris King had been admitted to the hospital. He received a note from Dr. Sellers indicating that he wanted to talk to him. Once defendant Cowart called Dr. Sellers, he was told that the Kings were ill and needed some help. Defendant Cowart met with Doris in the hospital and she requested that he draw up a power of attorney and a living will. Defendant Cowart had an attorney draw up the documents and he returned to the hospital. He found a notary and two witnesses and Doris King signed the documents, including the power of attorney which authorized defendant Cowart to, *inter alia*, "[t]o transact [Doris's] banking business" including endorsing checks, drawing checks, and making deposits. Doris told defendant Cowart that she wanted to move to a nursing facility and she requested that he fill out the necessary paperwork. After defendant Cowart followed her directions, Doris was admitted into the nursing home the next day. Defendant Cowart again met with Doris. From that meeting, he went to Wachovia Bank and attempted to open a joint account with Doris to pay for Frank and Doris's medical bills. Defendant Cowart was told by a bank employee that the power of attorney did not allow him to open a joint account with Doris. The bank gave defendant Cowart a form for Doris and defendant Cowart to sign to open the account. Defendant Cowart returned to the hospital and explained the situation to Doris and Doris signed the document. This document dated "09/07/2005" stated the following: "Please open a checking account in the name of Doris H. King and Kimzie Cowart in the amount of \$100,000. Please send signature for me to sign." Defendant Cowart testified that he did not know who had filled in the blank with the figure \$100,000. Defendant Cowart returned with this documentation, and Wachovia Bank opened a joint account with Doris and defendant Cowart ("Account 588") and \$100,110.44 was deposited in that account. Defendant Cowart had another meeting with Doris. As a result of this meeting, defendant called plaintiff Sherry Albert and told her she needed to come and take care of Frank King. Defendant then went to Wachovia Bank again and transferred half of the King's money from the King's joint accounts into Account 588. Defendant Cowart explained that he left half of the King's money in the King's joint accounts because he wanted money in those accounts to provide for care for Frank King. Since defendant Cowart had been in North Carolina for a week, he had to return to Florida the next day to

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work. While driving home to Florida, defendant Cowart heard that Doris had died. Doris King died on 11 September 2005. Defendant Cowart said that he had made arrangements for Doris's funeral prior to Doris's death but was unable to come back and attend the funeral because of work. He testified that he paid for Doris's funeral expenses in the amount of \$5,519.80. Defendant Cowart testified that Doris told defendant Cowart that she did not want plaintiff Sherry to know that she was in bad health. He also testified that he did not "take any action on behalf of Doris King without her knowledge and consent[,]" and he transferred the money into Account 588 while acting as Doris King's attorney-in-fact.

Candice Dublin, the branch manager at the Wachovia Bank in Henderson County, testified that on 7 September 2005 defendant Cowart came into the bank and told her that Doris King had been in the hospital, she had terminal cancer, she was going to move to a nursing facility, and that he came in to help Doris pay her bills and funeral arrangements. Defendant Cowart showed Ms. Dublin a power of attorney signed by Doris King, notarized, and dated 7 September 2005; he requested to open a joint account with Doris King. Ms. Dublin informed defendant Cowart that she could not open up the joint account with the power of attorney and she drew up a written statement for both Doris and defendant Cowart to sign acknowledging their request to open up the joint account. Defendant Cowart returned to the bank with the written statement signed by both Doris King and defendant Cowart and Ms. Dublin opened up the joint account ("Account 588"). Defendant Cowart acting as Doris's attorney in fact had Ms. Dublin withdraw from Frank and Doris King's certificate of deposit ("CD") account \$100,110.41 and deposited those funds into Account 588. On 9 September 2005, defendant Cowart acting as Doris's attorney in fact had Ms. Dublin withdraw from the Kings' CD accounts and deposit in Account 588, \$54,950.45, \$197,486.42, and \$99,050.69. Another \$9,000 was moved by check endorsed by defendant Cowart from the King's joint account and deposited into Account 588, for a total of \$460,597.97. A check dated 15 September 2005 was written for \$5,519.80 from Account 588 and on September 16 another check was written for \$450,000.00 payable to "AM South." Ms. Dublin further stated that in 2003, Doris King had signed a signature card acknowledging that any future joint accounts opened by her would be right of survivorship accounts; instructions affecting any of Doris's joint accounts could be given by any joint owner of the account; and these instructions could be given orally or in writing. Ms. Dublin testified that because defendant Cowart had a

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valid power of attorney she could not refuse to make his banking transactions. Ms. Dublin further testified that she had known Doris King since 1996 and Doris had told her that her step-daughter plaintiff Sherry never came to visit her father Frank King. Also, Doris asked Ms. Dublin to be the executor to her estate because she “felt that [plaintiff Sherry] would take the money for herself, put Mr. King in a nursing home, and never go see him.”

Patricia Harvey testified that she knew Doris King and Doris had told her that plaintiff Sherry was a “gold digger[,]” and she never came to see them, and she never called “unless she wanted something” and Doris was hurt by this. Ms. Harvey said that Doris did not want plaintiff Sherry Albert to get anything from her and Doris told Ms. Harvey that she “would give it to a dog before she would give it to Sherry.”

Elizabeth Ellington, another friend of Doris King, also testified that plaintiff Sherry was never around that much when Doris needed her. However, defendant Cowart would assist the Kings if they needed something or needed someone to drive them around. Ms. Ellington overheard Doris telling defendant Cowart that she wanted to move her money so that Sherry would not inherit her share of the Kings’ money.

At the close of all evidence, plaintiff moved for a directed verdict as to the claims of breach of fiduciary duty and unjust enrichment against defendant Cowart. Plaintiff’s motions were denied. On 17 November 2010, the jury returned a verdict in favor of defendant Cowart on the issues of breach of fiduciary duty and unjust enrichment. The trial court subsequently issued a judgment in favor of defendant Cowart. Plaintiff subsequently moved for a judgment notwithstanding the verdict (“JNOV”) and for a new trial, which, by order entered 21 January 2011, was denied. Plaintiff filed timely notice of appeal from the denial of her motion for a directed verdict, the jury verdict, and the order denying her motion for judgment notwithstanding the verdict.

II. Standard of Review

The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical. We must determine whether, upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in

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favor of the non-movant, the evidence is sufficient to be submitted to the jury.

A motion for either a directed verdict or JNOV should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim. A scintilla of evidence is defined as very slight evidence.

Springs v. City of Charlotte, ___ N.C. App. ___, ___, 704 S.E.2d 319, 322-23 (2011) (citations and quotation marks omitted). "This Court has also held that a motion for judgment notwithstanding the verdict is cautiously and sparingly granted." *Hodgson Constr., Inc. v. Howard*, 187 N.C. App. 408, 411, 654 S.E.2d 7, 10 (2007) (citation and quotation marks omitted).

III. Breach of Fiduciary Duty

[1] Plaintiff first contends that the trial court erred in denying her motions for a directed verdict and motion for judgment notwithstanding the verdict ("JNOV") as to her claim against defendant Cowart for breach of fiduciary duty. Plaintiff argues that the transfer of \$460,598.00 from the Kings' joint accounts into Account 588 by defendant Cowart was for his own benefit and amounted to a gift to himself, as he opened Account 588 as a right of survivorship account with the intention that the money go to him after Doris King died and Doris received no benefit, outside of the payment of her funeral expenses, from the transfer of the money to Account 588. Plaintiff further argues that defendant Cowart's transfer of money from the Kings' joint accounts to Account 588 amounted to a breach of his fiduciary duty as Doris King's attorney in fact as he acted for his own benefit over that of his principal, Doris King. Plaintiff also argues that the evidence shows that defendant Cowart did not follow Doris King's desire as the principal because she requested that defendant Cowart take care of her husband Frank after her death but instead defendant Cowart transferred the money to an annuity for his own benefit. Plaintiff concludes that defendant Cowart's gift while acting as an attorney-in-fact of his principal's money to himself [was] an act beyond his authority and a breach of his fiduciary duty" and as a direct and proximate cause of this breach plaintiff suffered damages in excess of \$450,000.00 "and [is] entitled to judgment against Cowart for Cowart's breach of fiduciary duty notwithstanding the verdict."⁴

4. Plaintiff, citing portions of defendant Cowart's *voir dire* testimony, also argues that defendant Cowart's testimony that Doris did not want plaintiff Sherry to have any of her money "lacks credibility[.]" However, as this testimony was made as an offer of proof outside of the presence of the jury, we need not address these arguments.

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Defendant Cowart counters that plaintiff failed to meet her burden for the JNOV motion to show that he made a gift to himself in breach of his fiduciary duty as Doris King's attorney in fact. Defendant argues that Doris King signed the power of attorney; Account 588 was created as a joint account with the right of survivorship by Doris King and him signing the written authorization form; pursuant to Doris King's wishes and the power of attorney, defendant Cowart transferred funds to Account 588; under North Carolina law these transfers were not a gift; and following Doris King's death, defendant "became the owner of that account—not by a gift to himself—but by operation of law." (emphasis omitted). Defendant concludes that because the evidence shows that he did not make a gift to himself, plaintiffs failed to meet their burden to show that he breached his fiduciary duty, and the denial of their motions for directed verdict and JNOV should be affirmed.

"For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citations omitted). A fiduciary relationship has been defined as

one in which "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. . . . , [and] 'it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and *resulting domination and influence on the other.*' "

Id. at 651, 548 S.E.2d at 707-08 (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (emphasis in original)). The relationship created by a power of attorney between the principal and the attorney-in-fact is fiduciary in nature, *see* N.C. Gen. Stat. § 32A-8 (2009), and this

fiduciary relationship implies that the principal has placed trust or confidence in the agent, and the agent or employee is bound to the exercise of the utmost good faith, loyalty, and honesty toward his principal or employer. Thus, an attorney-in-fact is presumed to act in the best interests of the principal.

Estate of Graham v. Morrison, 168 N.C. App. 63, 74, 607 S.E.2d 295, 303 (2005) (citations and quotation omitted). "[F]iduciaries must act in good faith. They can never paramount their personal interest over

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the interest of those for whom they have assumed to act.” *Miller v. McLean*, 252 N.C. 171, 174, 113 S.E.2d 359, 362 (1960) (citations omitted).

N.C. Gen. Stat. § 32A-14.1 (2009), in pertinent part, addresses gifts made by the attorney-in-fact:

(a) Except as provided in subsection (b) of this section, if any power of attorney authorizes an attorney-in-fact to do, execute, or perform any act that the principal might or could do or evidences the principal’s intent to give the attorney-in-fact full power to handle the principal’s affairs or deal with the principal’s property, the attorney-in-fact shall have the power and authority to make *gifts* in any amount of any of the principal’s property to any individual or to any organization described in sections 170(c) and 2522(a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal’s personal history of making or joining in the making of lifetime gifts. As used in this subsection, “Internal Revenue Code” means the “Code” as defined in G.S. 105-228.90.

(b) Except as provided in subsection (c) of this section, or unless gifts are expressly authorized by the power of attorney, a power described in subsection (a) of this section may not be exercised by the attorney-in-fact in favor of the attorney-in-fact or the estate, creditors, or the creditors of the estate of the attorney-in-fact.

(Emphasis added.) As plaintiff is arguing that defendant Cowart breached his fiduciary duty by making a gift to himself in violation of N.C. Gen. Stat. § 32A-14.1(b), we note that

[t]o make a gift *inter vivos* there must be an intention to give coupled with a delivery of, and loss of dominion over, the property given, on the part of the donor. Donor must divest himself of all right and title to, and control of, the gift. Such gift cannot be made to take place in the future. The transaction must show a completely executed transfer to the donee of the present right to the property and the possession.

Smith v. Smith, 255 N.C. 152, 155, 120 S.E.2d 575, 578 (1961) (citations omitted). This Court has further stated that “a deposit by one party into an account in the names of both, standing alone, does not constitute a gift to the other.” *Hutchins v. Dowell*, 138 N.C. App. 673,

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678, 531 S.E.2d 900, 903 (2000) (citing *Smith*, 255 N.C. at 155, 120 S.E.2d at 578).

At trial, defendant argued that he did not breach his fiduciary duty as he and Doris jointly agreed to open Account 588, Doris directed him to make the transfers to Account 588, and the funds in Account 588 became his only by operation of law after Doris's death. We note that there was "more than a scintilla of evidence supporting" defendant Cowart's defense. See *Springs*, ___ N.C. App. at ___, 704 S.E.2d at 322-23. The durable power of attorney signed by Doris King on 7 September 2005 gave defendant Cowart as her attorney in fact the power and authority to

3. Transact all my banking business at such bank or banks as I may hereafter designate; to endorse all checks, notes, drafts and bills of exchange for collection and deposit; and to deposit the same in any such bank; to draw checks on my account in any bank or banks and to deliver the same; and to sign, execute and deliver all promissory notes[.]

Plaintiff makes no challenge to the creation of the power of attorney. As noted in our prior opinion and by Candace Dublin in her testimony, Account 588 was opened as a joint account with a right of survivorship pursuant to the Customer Access Agreements and the documentation signed by both Doris King and defendant Cowart. See *Albert*, 200 N.C. App. at 64-65, 682 S.E.2d at 778-79.

The evidence when viewed in the light most favorable to defendant Cowart shows that defendant Cowart was acting in furtherance of Doris King's wishes when he transferred half of the King's money to Account 588. Multiple witnesses testified that Doris King did not have a good relationship with plaintiff Sherry Albert and did not want her to get any of her share of the Kings' money. However, plaintiff Sherry testified that according to the Kings' wills she would inherit all of their assets if they predeceased her. Plaintiff Sherry Albert admitted that she did not know that Doris had cancer and Doris told defendant Cowart not to tell Sherry that she was ill. Also testimony was presented that Doris trusted defendant Cowart. Defendant Cowart testified that he did not "take any action on behalf of Doris King without her knowledge and consent[.]" and transferred the money while acting as Doris's attorney-in-fact. Accordingly, the evidence, when viewed in the light most favorable to defendant Cowart, tended to show that Doris directed defendant Cowart to move her share of the Kings' assets into Account 588 because she did not want plaintiff

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Sherry to get her share of the money. Defendant Cowart did not move any of the money out of Account 588 until after Doris King's death, when by operation of law by right of survivorship the funds in Account 588 became the property of defendant Cowart. *See* N.C. Gen. Stat. § 53-146.1 (2009) (stating that “[f]unds in a joint account established with right of survivorship shall belong to the surviving joint tenant or tenants upon the death of a joint tenant[.]”). Defendant Cowart’s deposit of funds into Account 588 pursuant to the power of attorney did not amount to a gift to himself because those deposits were made when Doris was alive and a joint tenant of account 588. *See Hutchins*, 138 N.C. App. at 678, 531 S.E.2d at 903. As a joint tenant, Doris King still retained control of the funds pursuant to the terms of the joint account, *see Smith*, 255 N.C. at 155, 120 S.E.2d at 578, and therefore, the transfer was not a gift to defendant Cowart in violation of N.C. Gen. Stat. § 32A-14.1.

Accordingly, the trial court properly denied plaintiff’s motions for a directed verdict and JNOV as to the claim of breach of fiduciary duty.

IV. Unjust Enrichment

[2] Plaintiff next contends that the trial court erred in denying her motions for a directed verdict and JNOV as to her claim against defendant Cowart for unjust enrichment. Plaintiff argues that “[t]he evidence showed that Cowart was unjustly enriched by the funds he withdrew from Account-588 and used to open accounts solely in his favor[;]” it is undisputed that Doris made no gift of any of the funds at issue to Cowart; and “Cowart gifted the money to himself which he is not entitled to do” and “it is inequitable for Cowart to retain the \$450,000.00 acquired by him through a breach of his fiduciary duty or other inequitably [sic].” Defendant Cowart counters that the trial court correctly denied plaintiff’s motion for directed verdict and JNOV as to her claim for unjust enrichment. We have stated that

[u]njust enrichment is a legal term characterizing the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself [or herself] at the expense of another. . . [.]

Adams v. Moore, 96 N.C. App. 359, 362, 385 S.E.2d 799, 801 (1989), *disc. review denied*, 326 N.C. 46, 389 S.E.2d 83 (1990). Plaintiff’s

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argument is that defendant Cowart was unjustly enriched by a gift to himself and a breach of his fiduciary duty. As discussed above, the evidence when viewed in the light most favorable to defendant Cowart shows that he did not make a gift to himself or breach his fiduciary duty, as Doris and defendant Cowart jointly opened Account 588, the deposits into Account 588 were directed by Doris, and the funds in Account 588 became his property by operation of law after Doris's death. Therefore, we overrule plaintiff's argument as to unjust enrichment. Accordingly, we affirm the trial court's denial of plaintiff's motions for directed verdict and JNOV.⁵

AFFIRM.

Judges ELMORE and STEELMAN concur.

MEHERRIN TRIBE OF NORTH CAROLINA A/K/A MEHERRIN INDIAN TRIBE,
PETITIONER AND PLAINTIFF V. NORTH CAROLINA STATE COMMISSION OF INDIAN
AFFAIRS, RESPONDENT AND DEFENDANT

No. COA11-885

(Filed 3 April 2012)

**Native Americans—North Carolina State Commission of
Indian Affairs—jurisdiction to hear intra-tribal disputes**

The trial court erred in reversing respondent North Carolina State Commission of Indian Affairs' (Commission) decision to decline to decide which of two individuals representing competing factions of petitioner tribe represented the tribe on the Commission. The Commission had no jurisdiction to decide the issue as N.C.G.S. §§ 143B-405 and 143B-406 gave the Commission no authority to resolve such intra-tribal disputes.

Appeal by respondent from order entered 9 June 2010 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 11 January 2012.

5. As the ruling denying plaintiff motion for a directed verdict and the order denying plaintiff's motion for JNOV were affirmed, we need not address defendant Cowart's argument for an alternative basis in law to support the judgment pursuant to N.C.R. App. P. 28(c).

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*Barry Nakell for petitioner-appellee.**Attorney General Roy Cooper, by Special Deputy Attorney General Donald R. Teeter, Sr., for respondent-appellant.*

ERVIN, Judge.

Respondent North Carolina State Commission of Indian Affairs appeals from an order entered by the trial court reversing the Commission's decision to overturn an order entered by Senior Administrative Law Judge Fred G. Morrison granting summary judgment in favor of Petitioner Meherrin Tribe of North Carolina. The ultimate issue in dispute between the parties is the extent, if any, to which the Commission erred by declining to seat a representative favored by the leadership of the Tribe as the Meherrin representative on the Commission.¹ After careful consideration of the Commission's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be reversed and that this matter should be remanded to the trial court for further remand to the Commission for the entry of an order dismissing the Tribe's petition.

I. Background

A. Substantive Facts

"The Meherrin Indian Tribe [] is composed of the descend[ants] of indigenous peoples who formerly resided at the mouth of the Meherrin River Valley and 'who are of the same linguistic stock as the Cherokee, Tuscarora, and other tribes of the Iroquois Confederacy of New York and Canada' N.C. Gen. Stat. § 71A-7.1 (2007). These descend[ants] 'now resid[e] in small communities in Hertford, Bertie, Gates, and Northampton Counties' *Id.* The [Meherrin have] not been recognized by the federal government and although N.C. Gen. Stat. § 71A-7.1 states that 'in 1726 [the Tribe] w[as] granted reservational lands[,] any such right to these lands now appears extinguished. The [Meherrin are] governed by the 1996 Meherrin Tribe Constitution and By-Laws, as amended." *Meherrin Indian Tribe v.*

1. As will be explained in more detail later in this opinion, two factions are competing for control of the tribal government. In order to avoid confusion, references to "the Tribe" should be understood to be to the faction that removed the former tribal chief and wishes to have Chassidy Hall seated as a member of the Commission and references to "the Meherrin" should be understood to be to all individuals eligible to claim membership in the Meherrin Tribe regardless of their position concerning the underlying tribal dispute.

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Lewis, 197 N.C. App. 380, 381, 677 S.E.2d 203, 205 (2009), *disc. rev. denied*, 363 N.C. 806, 690 S.E.2d 705 (2010) (*Meherrin I*).

“On 10 November 2007, the [Meherrin] held a duly noticed and regularly scheduled meeting of its General Body.” *Meherrin I*, 197 N.C. App at 381, 677 S.E.2d at 205. At this meeting, those in attendance voted to remove Thomas Lewis as Chief and scheduled the next tribal meeting for 12 January 2008 at the Meherrin Indian Church. Prior to the January meeting, Chief Lewis announced on the tribal website that the meeting had been moved to the Elks Shrine Building. As a result, two meetings were conducted on 12 January 2008. While the group supporting Chief Lewis met at the Elks building, the group supporting the removal of Chief Lewis met at the Church, where they voted to replace Douglas Patterson with Ms. Hall as the Meherrin representative to the Commission. Based on these events, the Tribe, which represents the anti-Chief Lewis faction, contends that Chief Lewis was properly removed from his position on 10 November 2007; that Ms. Hall replaced Mr. Patterson as the Tribe’s representative to the Commission on 12 January 2008; and that the Commission was obliged to seat Ms. Hall as the Meherrin representative. The pro-Chief Lewis faction contends, on the other hand, that Chief Lewis was not properly removed as Chief on 10 November 2007; that Mr. Patterson was not properly replaced by Ms. Hall as the Meherrin representative on the Commission on 12 January 2008; and that Mr. Patterson should be seated as the Meherrin representative to the Commission.

On 13 March 2008, the Tribe, as representative of the anti-Chief Lewis faction, filed a civil action against former Chief Lewis, Mr. Patterson, and others associated with the pro-Chief Lewis faction seeking the entry of a declaratory judgment identifying the individuals who constitute the lawful leadership of the Meherrin. Among other things, the Tribe asked for a declaration that “Thomas Lewis has been removed as Chief” and that the actions taken at the 10 November 2007 meeting and 12 January 2008 meeting of the anti-Chief Lewis faction be deemed valid.

“On 8 May 2008, [the *Meherrin I*] defendants filed a pre-answer motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), and (6). Defendants’ motion to dismiss claimed ‘the underlying facts raised in the Complaint arise from acts of self-governance over the people and property of the Meherrin Tribe of North Carolina[;] this action should be dismissed for lack of subject matter jurisdic-

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tion, lack of personal jurisdiction and for Plaintiffs' failure to state a claim upon which relief may be granted.' Defendants further alleged that 'Plaintiffs' action should be dismissed for lack of subject matter jurisdiction based on Plaintiffs' lack of standing to bring suit.'” *Meherrin I* at 382-83, 677 S.E.2d at 206. The trial court denied the defendants' motion to dismiss, and the defendants appealed to this Court. We upheld the trial court's decision, stating that:

The Meherrin Tribe has no reservation. The Tribe has not been recognized by the federal government. The constitution of the Tribe has no functioning judiciary for resolution of intra-tribal disputes to which this dispute could be referred prior to litigation. The sole source of legal authority of the Tribe flows from N.C. Gen. Stat. § 71A-7.1[.]² . . . While indigenous tribes may enjoy sovereign immunity over some disputes, the predicate facts which would present a sovereign immunity defense are not present here.

Meherrin I at 385-86, 677 S.E.2d at 208 (citing *Jackson Co. v. Swayney*, 319 N.C. 52, 352 S.E.2d 413, *cert. denied*, 484 U.S. 826, 108 S. Ct. 93, 98 L. Ed. 2d 54 (1987)). As a result, we held in *Meherrin I* that this intra-tribal power struggle was properly resolved in superior court given the absence of tribal institutions which had the authority to make the necessary decision and that the case should be remanded to the Hertford County Superior Court for resolution of the underlying leadership dispute.

B. Procedural History

On 13 May 2008, Chief Lewis wrote the Commission for the purpose of asserting that Mr. Patterson was the duly elected Meherrin representative to that body. On 16 September 2008, the Tribe filed a petition for a contested case hearing pursuant to N.C. Gen. Stat. § 150B-2 alleging that the Commission had improperly refused to seat Ms. Hall as the Meherrin representative. The petition made no reference to the controversy over the validity of the vote by which Ms. Hall was allegedly elected to the Commission or the fact that litigation to resolve the underlying leadership dispute had been initiated and was ongoing. On 17 October 2008, the Tribe filed an amended petition in which it repeated its earlier allegations regarding Ms. Hall's status as the elected Meherrin representative to the Commission and asserted that the Commission had improperly acted in support of the other

2. N.C. Gen. Stat. § 71A-7.1 does not grant any executive or judicial power to the Tribe.

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faction. On 8 October 2008, the Commission moved to dismiss the Tribe's petition on the grounds that there "existed an internal dispute within the [Meherrin] as to the actual and proper leadership of the tribe which resulted in the commencement of litigation" and that "said litigation is still pending." In addition, Respondent asserted that it had "received two names to fill the Meherrin seat" and had, for that reason, decided to allow the seat to remain vacant until the internal tribal controversy had been resolved.

On 27 March 2009, the Tribe sought partial summary judgment with respect to its claim that Ms. Hall had been properly elected as the Meherrin representative to the Commission. In support of this motion, the Tribe submitted a copy of the tribal constitution and bylaws and an affidavit executed by Chief Wayne Brown, the chief elected by the anti-Chief Lewis faction, delineating the events which led to his election. On 30 March 2009, the Tribe filed a revised motion for summary judgment supported by the materials that had been previously submitted and numerous e-mails between the Tribe's counsel and others involved in the dispute concerning various substantive and procedural issues relating to the validity of actions taken by the competing factions on 10 November 2007 and 12 January 2008. On 17 April 2009, the Tribe filed a second affidavit executed by Chief Brown addressing the validity of one of the competing meetings held on 12 January 2008. On 9 March 2009, the Commission submitted a brief in opposition to the Tribe's partial summary judgment motion in which it argued that, pursuant to certain provisions of the Meherrin constitution and bylaws, Chief Lewis was never properly removed and that the meeting held by the pro-Chief Lewis faction on 12 January 2008, rather than the competing meeting held by the anti-Chief Lewis faction on that same date, was the official tribal meeting. On 9 April 2009, the affidavit of the Commission's Executive Director, Greg Richardson, detailing the history of the communications that the two factions had had with the Commission and the Commission's decision to declare the seat vacant pending resolution of the internal tribal conflict was filed. On 4 June 2009, Chief Lewis executed an affidavit setting out his basis for believing that he remained the lawful Chief. On 15 June 2009, Judge Morrison entered an order granting summary judgment in favor of the Tribe³ in which he stated that:

3. The record also indicates that Judge Morrison denied Mr. Patterson's motion to intervene or to dismiss, continue, or stay the present proceeding "pending a final adjudication in the Superior Court of Hertford County in [*Meherrin I*]."

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As there is no genuine issue as to any material fact, [the Tribe] is entitled to judgment as a matter of law. [The Tribe]’s Motion for Summary Judgment is Granted. There has been no vacancy from [the Tribe]’s perspective as it voted for Ms. Hall to replace Mr. Patterson as its representative prior to the expiration of his term, and so notified the Commission. [The Commission] shall accept and recognize Chassidy Hall as the Meherrin representative on the North Carolina Commission of Indian Affairs for a term of three years.

On 17 November 2009, the Tribe filed a petition for judicial review in which it argued that, because the Commission had not yet filed a final agency decision, Judge Morrison’s decision had become final by operation of law. On 17 December 2009, the Commission filed a response asserting that it had not been properly notified of Judge Morrison’s decision or provided with a copy of the record developed before the Office of Administrative Hearings. On 22 December 2009, the Tribe filed motions for summary judgment and judgment on the pleadings; however, the trial court denied those motions on 10 February 2010. On 29 January 2010, the trial court ruled that the record developed before the Office of Administrative Hearings had not been properly delivered to the Commission, that the Commission was required to render its final decision by 4 February 2010, and that the Commission must issue a written decision by no later than 12 February 2010. After conducting a hearing on 2 February 2010, the Commission determined that the record disclosed the existence of genuine issues of material fact, all of which pertained to the tribal leadership dispute and the validity of various actions that had been taken by the competing factions, and remanded this case to Judge Morrison for further proceedings.

On 1 March 2010, the Tribe filed a petition for judicial review. In its petition, the Tribe alleged that the 2 February 2010 hearing had not been held in a timely manner, an assertion that implicitly challenged the trial court’s earlier decision to allow the Commission to make a decision on or before 4 February 2010, and that “the hearing was held in violation of state law and due process,” an assertion that rested on a variety of challenges to the manner in which the hearing before the Commission had been conducted. The assertions in the Tribe’s petition focused on aspects of the procedure employed at the 2 February 2010 hearing that the Tribe considered unfair, improper, or as tending to favor the other faction of the tribe, and on assertions tending to support the Tribe’s position that Ms. Hall, rather than Mr. Patterson,

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was the properly elected Meherrin representative on the Commission. However, the Tribe conceded that “[t]he issue before the Administrative Law Judge and before the Commission was only whether Chassidy Hall or Douglas Patterson had been designated or selected by the Meherrin Indian Tribe, a/k/a Meherrin Tribe of North Carolina, as its representative on the Commission.” On 26 March 2010, the Commission filed an answer to the Tribe’s petition in which it requested the trial court to affirm its decision to reverse Judge Morrison’s order.

On 29 and 30 March 2010, the trial court conducted a hearing concerning the issues raised by the Tribe’s petition for judicial review. On 8 June 2010, the trial court entered orders denying several motions filed by the Tribe for the purpose of seeking reconsideration of earlier rulings and denying the Tribe’s motion for summary judgment. On 9 June 2010, the trial court entered an order in which it stated, in pertinent part, that:

2. In his Decision Granting Summary Judgment for [the Tribe], . . . the Administrative Law Judge determined that there were no genuine issues as to any material fact and that [the Tribe] was entitled to judgment as a matter of law[.]

3. While [the Commission], in its Decision and Order . . . , identified eight issues of material fact . . . , those issues are not of such material fact as to constitute grounds for remand of the case to an Administrative Law Judge[.] . . .

4. There is no genuine issue as to material fact in this administrative contested case proceeding.

5. The Administrative Law Judge . . . properly found that there is no genuine issue as to any material fact.

6. The Administrative Law Judge properly found that the [Tribe] is entitled to judgment as a matter of law.

7. The Administrative Law Judge properly granted the [Tribe’s] Motion for Summary Judgment[.] . . .

8. . . . [The Court] adopts the Administrative Law Judge’s decision allowing summary judgment for the [Tribe] . . . , thereupon reversing the [Commission]’s decision.

The Commission noted an appeal to this Court from the trial court’s order.

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[219 N.C. App. 558 (2012)]

II. Legal AnalysisA. Standard of Review

As of the date upon which the trial court entered its order,⁴ N.C. Gen. Stat. § 150B-36 provided, in pertinent part, that:

(d) An Administrative Law Judge may grant . . . summary judgment, pursuant to a motion made in accordance with G.S. 1A-1, Rule 56[.] . . . For any decision by the Administrative Law Judge granting . . . summary judgment that disposes of all issues in the contested case, the Agency⁵ shall make a final decision. . . . The party aggrieved by the Agency's decision shall be entitled to immediate judicial review of the decision under Article 4 of this Chapter.

Similarly, at the time that the trial court's order was entered,⁶ N.C. Gen. Stat. § 150B-51 provided that:

(d) In reviewing a final Agency decision allowing judgment on the pleadings or summary judgment, or in reviewing an Agency decision that does not adopt an Administrative Law Judge's decision allowing judgment on the pleadings or summary judgment pursuant to G.S. 150B-36(d), the court may enter an order allowed by G.S. 1A-1, Rule 12(c) or Rule 56. . . .

According to well-established North Carolina law, a trial court's decision to grant summary judgment raises a question of law, which we review *de novo*. *Krueger v. N.C. Criminal Justice Educ. & Training Standards Comm'n*, 198 N.C. App. 569, 577, 680 S.E.2d 216, 221 (2009) (stating that, “[s]ince the decision at issue is a summary judgment decision and an appellate court reviews a grant of summary judgment *de novo*, this Court can—and, according to [*N.C. Dep't of Env't & Natural Res. v.*] *Carroll*, [358 N.C. 649, 664, 599 S.E.2d 888, 898 (2004),] should—go ahead and review the final agency decision under the correct Rule 56 standard.”). As a result, the ultimate issue that the Commission's appeal presents for our consideration is the extent, if any, to which Judge Morrison appropriately entered summary judgment in favor of the Tribe.

4. N.C. Gen. Stat. § 150B-36 was repealed, effective 1 January 2012.

5. The parties appear to agree that the Commission is an “agency” as defined in N.C. Gen. Stat. § 150B-2(1a), which defines an “agency” as “an agency or officer in the executive branch of the government of this State,” including “the Council of State, the Governor's office, a board, a commission, a department, a council, and any other unit of government in the executive branch.”

6. N.C. Gen. Stat. § 150B-51 was amended, effective 1 January 2012.

MEHERRIN TRIBE OF N.C. v. N.C. STATE COMM'N OF INDIAN AFFAIRS

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B. Jurisdiction over Internal Tribal Disputes

As we have already indicated, the fundamental issue around which the present case revolves is the extent, if any, to which the Commission acted appropriately by failing to determine that Ms. Hall should be seated as the Meherrin representative on the Commission. “Administrative boards have only such authority as is properly conferred upon them by the Legislature.” *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. 168, 173, 118 S.E.2d 792, 796 (1961). “As a creature of the Legislature, an agency of the State ‘can only exercise (1) the powers granted in express terms, (2) those necessarily implied in or fairly incident to the powers expressly granted, and (3) those essential to the declared [purposes] of the [agency].’” *Carl v. State*, 192 N.C. App. 544, 553, 665 S.E.2d 787, 795 (2008) (quoting *Madry v. Scotland Neck*, 214 N.C. 461, 462, 199 S.E. 618, 619 (1938), *disc. review and cert. denied*, 363 N.C. 123, 672 S.E.2d 684 (2009)). As a result, the initial question we must address in order to decide the issues raised by the Commission’s appeal is the extent, if any, to which the Commission has the authority to resolve disputes over its own membership arising from intra-tribal controversies.

The Commission was established by N.C. Gen. Stat. § 143B-404 and is “administered under the direction and supervision of the Department of Administration[.]” N.C. Gen. Stat. § 143B-407, which governs the composition of the Commission and the manner in which its members are selected, provides, in pertinent part, that:

(a) The State Commission of Indian Affairs shall consist of . . . [appointed members and] representatives of the Indian community. These Indian members shall be selected by tribal or community consent from the Indian groups that are recognized by the State of North Carolina[.] . . . [T]he Meherrin [has] one [representative]. . . .

(b) . . . Members representing Indian tribes and groups shall be elected by the tribe or group concerned and shall serve for three-year terms[.] . . . Vacancies occurring on the Commission shall be filled by the tribal council or governing body concerned. . . . In the event that a vacancy occurs among the membership representing Indian tribes and groups and the vacancy temporarily cannot be filled by the tribe or group for any reason, the Commission membership may designate a tribal or group member to serve on the Commission on an interim basis until the tribe or group is able to select a permanent member to fill the vacancy. . . .

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According to N.C. Gen. Stat. § 143B-405, “[t]he purposes of the Commission shall be as follows:

- (1) To deal fairly and effectively with Indian affairs.
- (2) To bring . . . resources into focus for the implementation or continuation of meaningful programs for Indian citizens[.]
- (3) To provide aid and protection for Indians as needs are demonstrated[.]
- (4) To hold land in trust for the benefit of State-recognized Indian tribes.[.]
- (5) To assist Indian communities in social and economic development.
- (6) To promote recognition of and the right of Indians to pursue cultural and religious traditions considered by them to be sacred and meaningful to Native Americans.

In order to achieve these ends, N.C. Gen. Stat. § 143B-406 authorizes the Commission:

- (1) To study . . . assemble and disseminate information on any aspect of Indian affairs.
- (2) To investigate relief needs of Indians of North Carolina and to provide technical assistance in the preparation of plans for the alleviation of such needs.
- (3) To confer with appropriate officials . . . to encourage and implement coordination of applicable resources to meet the needs of Indians in North Carolina.
- (4) To cooperate with and secure the assistance of the local, State and federal governments . . . in formulating any such programs, and to coordinate such programs with any [federal] programs[.] . . .
- (5) To act as trustee for any interest in real property that may be transferred to the Commission for the benefit of State-recognized Indian tribes[.] . . .
- (6) To review all proposed or pending State legislation and amendments to existing State legislation affecting Indians in North Carolina.

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- (7) To conduct public hearings on matters relating to Indian affairs and to subpoena any information or documents deemed necessary by the Commission.
- (8) To study the existing status of recognition of all Indian groups, tribes and communities . . . [in] North Carolina.
- (9) To establish appropriate procedures to provide for legal recognition by the State of presently unrecognized groups.
- (10) To provide for official State recognition by the Commission of such groups.
- (11) To initiate procedures for their recognition by the federal government.

A careful examination of the relevant statutory provisions clearly demonstrates that the General Assembly intended for the Commission to primarily serve an advocacy and resource provision function and that the General Assembly did not appear to contemplate that the Commission would function as an administrative or judicial body vested with substantial decision-making authority, including the authority to resolve intra-tribal disputes.

As we have already noted, the ultimate issue raised by the Tribe's initial petition was the extent to which the Commission should resolve the dispute between the competing Meherrin factions concerning the identity of the Meherrin representative on the Commission by determining that Ms. Hall had been properly selected to fill that position. The validity of the Tribe's position hinges upon the lawfulness of the decision to remove Chief Lewis on 7 November 2008 and the decision of the anti-Chief Lewis faction to elect Ms. Hall to replace Mr. Patterson as the Meherrin representative to the Commission on 12 January 2009. Thus, in order to grant the relief requested by Petitioner, the Commission would be required to resolve the underlying intra-tribal dispute, a decision well outside the scope of its explicit or implicit statutory authority. As a result of the fact that we have identified no statutory provision that would authorize the Commission to adjudicate intra-tribal controversies such as the one that underlies the present dispute,⁷ we hold that the Commission

7. Although N.C. Gen. Stat. § 143B-407(b) does authorize the Commission, in the event that "a vacancy occurs among the membership representing Indian tribes and groups" that "temporarily cannot be filled by the tribe or group for any reason," "to designate a tribal or group member to serve on the Commission on an interim basis until the tribe or group is able to select a permanent member to fill the vacancy," we do not believe that this provision authorizes the Commission to determine whether

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had no authority to decide which of the two competing Meherrin representatives should be seated on the Commission and that the Tribe's petitions ultimately seek relief which the Commission is not empowered to provide. For that reason, we further conclude that the trial court erred by reversing the Commission's decision to refrain from seating Ms. Hall as the Meherrin representative and that Judge Morrison had no authority to grant summary judgment in favor of the Tribe in connection with its request that the Commission seat Ms. Hall as the Meherrin representative.⁸

III. Conclusion

Thus, for the reasons discussed above, we conclude that the Commission's challenge to the trial court's order, which erroneously assumed that the Commission had the authority to resolve the issue of whether Ms. Hall or Mr. Patterson should serve as the Commission's representative to the Commission, is well-founded. As a result, the trial court's order is reversed and this case is remanded to the trial court for further remand to the Commission with instructions that the petition be dismissed for lack of jurisdiction.

REVERSED AND REMANDED.

Judges BRYANT and ELMORE concur.

Ms. Hall or Mr. Patterson should represent the Meherrin on the Commission given that the underlying problem is a dispute between two competing tribal factions over which group is entitled to control the Meherrin and which of two competing candidates for Commission membership should be deemed legitimate rather than a temporary vacancy that the Meherrin are unable, for some reason unrelated to an intra-tribal dispute, to fill.

8. In light of our determination that the Commission lacks the authority to resolve the underlying intra-tribal dispute and to identify the lawfully-elected Meherrin representative to the Commission, we further conclude that the General Court of Justice provides the appropriate forum within which these questions should be resolved, with the available options including, but not necessarily being limited to, amending the pleadings in the Hertford County Superior Court action discussed earlier in this opinion to include resolution of the Commission membership controversy or, depending upon facts and circumstances of which we lack complete information, initiating a separate action devoted to the resolution of that issue.

DIAZ v. SMITH

[219 N.C. App. 570 (2012)]

RICARDO DIAZ, EMPLOYEE, PLAINTIFF v. JERRY MARK SMITH, D/B/A SMITH'S HOME REPAIR, EMPLOYER TRAVELERS INDEMNITY COMPANY, CARRIER, DEFENDANTS

No. COA10-694-2

(Filed 3 April 2012)

1. Workers' Compensation— party aggrieved—determination of insurance coverage—standing

Petitioner employee in a workers' compensation case was a party aggrieved, even though he was awarded all the benefits that he claimed, and had standing to challenge the Industrial Commission's determination that defendant employer's workers' compensation insurance policy was properly cancelled. An employee is "aggrieved" by a workers' compensation tribunal's determination regarding workers' compensation insurance coverage.

2. Workers' Compensation—cancellation of insurance policy—premium finance agreement—proper procedure for cancellation

The Industrial Commission did not erroneously apply N.C.G.S. § 58-35-85, which provides the procedures for cancelling an insurance policy financed by a premium finance agreement, in determining that plaintiff employee's workers' compensation insurance policy was effectively cancelled. The third-party financing company was authorized by the power of attorney clause of the financing agreement to cancel plaintiff's policy with Travelers and the financing company properly did so via the "Notice of Cancellation" sent on 15 January 2007.

Appeal by plaintiff from opinion and award entered 19 March 2010 by the North Carolina Industrial Commission. Originally heard in the Court of Appeals 10 January 2011. Petition for Rehearing granted 6 May 2011.

The Olive Law Firm, PA, by Juan A. Sanchez, for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Kelli A. Burns, M. Duane Jones, and Shelley W. Coleman, for defendant-appellee Travelers Indemnity Company.

HUNTER, Robert C., Judge.

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Plaintiff Ricardo Diaz (“plaintiff”) appeals from the Industrial Commission’s opinion and award in which it awarded plaintiff workers’ compensation benefits, but concluded that defendant-employer Jerry Mark Smith’s (“Smith”) workers’ compensation insurance policy had been effectively cancelled by defendant-carrier Travelers Indemnity Company (“Travelers”). This case was originally decided 5 April 2011. *See Diaz v. Smith*, ___ N.C. App. ___, 709 S.E.2d 424 (2011). We held that the Commission applied the notice requirements of the incorrect statute in determining whether Smith’s insurance policy was properly cancelled. Consequently, we reversed and remanded the Commission’s opinion and award. On 6 May 2011, Travelers’ Petition for Rehearing was granted. After careful review upon rehearing, we affirm the Commission’s opinion and award.¹

Facts

Smith began Smith’s Home Repair in the summer of 2006. After submitting an application with the North Carolina Rate Bureau, Smith obtained a workers’ compensation insurance policy with Travelers as an assigned risk policy. Because Smith could not afford to pay his premium in full, he financed the premium through a third party known as Monthly Payment Plan, Inc. (“MPP”). MPP’s financing agreement included a power of attorney provision authorizing MPP to cancel Smith’s policy if he failed to make timely payments. Smith signed neither the Travelers’ policy nor the MPP financing agreement; both were signed in Smith’s name by his insurance agent, David Cantwell. An acknowledgment page, not normally contained in “regular policies,” was included at the end of Smith’s policy with Travelers, notifying him that, pursuant to the power of attorney clause in the financing agreement, MPP could cancel his policy for non-payment.

In November 2006, MPP cancelled Smith’s policy for non-payment of premiums. The policy was reinstated, however, after MPP received Smith’s monthly premium payment. After Smith failed to make his premium payment for January 2007, MPP sent Smith a letter dated 2 January 2007, titled “Ten Day Notice,” advising Smith that “unless payment is made within ten days from the date of th[e] letter,” his workers’ compensation policy would be “cancelled through the use of [the] power of attorney that [he] signed.” MPP sent copies of this letter by regular mail to Smith’s correct address in Asheville,

1. Due to an oversight at the Court, this opinion was delayed. We apologize for this delay.

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North Carolina, as well as to Cantwell's office. Both Smith and Cantwell received their respective copy of the letter.

After MPP did not receive payment from Smith, MPP sent a "Notice of Cancellation" letter, dated 15 January 2007, notifying Smith of MPP's intent to cancel his policy through the power of attorney provision in the finance agreement. Copies of this notice were sent to Smith's address and Cantwell's; both received the notice. A copy of the notice of intent also was sent to Travelers, notifying the insurer of MPP's intent to cancel Smith's policy through its power of attorney.

By certified mail, Traveler's sent a letter headed "Notice of Cancellation—Nonpayment of Premium Financed Policy," explaining that MPP had "exercised its right to cancel th[e] policy as provided in its agreement with [Smith], due to [Smith]'s delinquent payment status." Although the notice of cancellation stated that it was "issue[d]" on 1 February 2007, it back-dated the cancellation to be effective 25 January 2007. Travelers' notice of cancellation was sent to Smith at the last known address in its file, which was not Smith's then-current address. Smith did not receive the notice; the certified letter was returned undelivered to Travelers on 12 February 2007.

After conducting an audit on 5 March 2007, Travelers returned \$317.00 in unearned premiums to MPP. MPP issued Smith a refund check of \$225.00. Smith cashed the check without contacting anyone but his insurance agent for an explanation of the refund.

Plaintiff began working for Smith around 17 April 2007 as a framer and roofer, working approximately 40 hours a week at \$10.00 an hour. On 20 July 2007, plaintiff fell off the roof on which he was working and injured his left arm. Plaintiff was seen in Mission Hospital's emergency room, where x-rays showed that he had fractured his left humerus and dislocated his left elbow. His elbow was splinted and reduced. On 1 August 2007, plaintiff underwent "open reduction, internal fixation of the humerus, and exploration of the radial nerve."

Plaintiff was released by his doctor to return to sedentary work, without any use of his left arm, on 17 September 2007. On that day, plaintiff filed his claim for workers' compensation benefits. Defendants denied plaintiff's claim "for lack of coverage" on 28 September 2007. Plaintiff did not return to work until 3 January 2008, when he started working for another employer at the same or greater average weekly wage. Plaintiff's doctor assigned a 20% permanent

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partial impairment rating to his left arm, with lifting restrictions of no more than 40 pounds with his left arm.

After conducting an evidentiary hearing on plaintiff's claim on 29 May 2008, the deputy commissioner entered an opinion and award on 23 December 2008, in which he concluded that plaintiff had sustained a compensable injury on 20 July 2007, and, as a result, was entitled to disability as well as ongoing medical benefits. The deputy commissioner also determined that Travelers had failed to comply with the notice requirements of N.C. Gen. Stat. § 58-36-105 (2009) in attempting to cancel Smith's workers' compensation policy. Thus, the deputy commissioner concluded, Travelers' cancellation was ineffective and the policy was "in full effect" on 20 July 2007.

Defendants appealed to the Full Commission, which issued an amended opinion and award on 19 March 2010, in which the Commission upheld the deputy commissioner's conclusion that plaintiff was entitled to disability and medical benefits as a result his compensable injury. The Commission ruled, however, that N.C. Gen. Stat. § 58-36-105 did not govern the cancellation of Smith's policy and that "Defendant Smith's policy was effectively and properly cancelled pursuant to the power of attorney held by MPP and in accordance with § 58-35-85." Based on this determination, the Commission held that Smith, not Travelers, was liable for plaintiff's benefits. Plaintiff timely appealed to this Court.

I

[1] Before reaching plaintiff's argument for reversal of the Commission's opinion and award, we address Travelers' contention that plaintiff, as he was awarded all workers' compensation benefits that he claimed, is not a "party aggrieved" by the Commission's decision. The Workers' Compensation Act provides that an appeal from an opinion and award of the Industrial Commission is subject to the "same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." N.C. Gen. Stat. § 97-86 (2009); *Ratchford v. C.C. Mangum, Inc.*, 150 N.C. App. 197, 199, 564 S.E.2d 245, 247 (2002). Under N.C. Gen. Stat. § 1-271 (2009), "[a]ny party aggrieved' is entitled to appeal in a civil action." *Moody v. Sears Roebuck & Co.*, 191 N.C. App. 256, 262-63, 664 S.E.2d 569, 574 (2008). A "party aggrieved" is one whose legal rights have been denied or directly and injuriously affected by the action of the trial tribunal. *Selective Ins. Co. v. Mid Carolina Insulation Co.*, 126 N.C. App. 217, 219, 484 S.E.2d 443, 445 (1997). If the party seeking

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appeal is not an aggrieved party, the party lacks standing to challenge the lower tribunal's action and any attempted appeal must be dismissed. *Culton v. Culton*, 327 N.C. 624, 626, 398 S.E.2d 323, 325 (1990), *superseded by statute on other grounds as recognized in In re J.A.A.*, 175 N.C. App. 66, 72-73, 623 S.E.2d 45, 49 (2005).

Generally, when an employee has been awarded the benefits to which he or she claimed entitlement under the Workers' Compensation Act, the employee is not aggrieved and lacks standing to appeal the Industrial Commission's decision. *See Henke v. First Colony Builders, Inc.*, 126 N.C. App. 703, 705, 486 S.E.2d 431, 432 (concluding claimant, who had been "granted workers' compensation benefits, as well as attorney's fees" was not aggrieved by Commission's denial of request for interest to be included in payment to her attorney as "[p]laintiff suffer[ed] no direct legal injury in the denial of interest payments to her attorney"), *appeal dismissed, disc. review denied, and cert. denied*, 347 N.C. 266, 493 S.E.2d 455 (1997). Plaintiff acknowledges that the Commission's decision awards him all the benefits he requested, but contends that he is a "party aggrieved" in that "[t]he decision by the Full Commission adversely affects [his] ability to collect his monetary benefits and all but negates his ability to receive further treatment."

Although the parties fail to point to any North Carolina authority—and we have found none—directly on point, other appellate courts that have addressed this issue have held that an employee is "aggrieved" by a workers' compensation tribunal's determination regarding workers' compensation insurance coverage. *See, e.g., Shope v. Workmen's Comp. Appeals Bd.*, 21 Cal. App. 3d 774, 777, 98 Cal. Rptr. 768, 770 (1971) ("Petitioner was affected by the decision of the Board determining that he had no recovery against Carrier and that he would have to look for recompense to an employer who was no longer in business and whose financial ability to pay the award was problematical. We, therefore, hold that petitioner has standing to have this court review the Board's determination as to the insurance coverage."); *Associated Theaters v. Industrial Acc. Commission*, 57 Cal. App. 105, 107, 206 P. 665, 666 (1922) (holding that employee was a "party aggrieved" entitled to seek review of industrial accident commission's determination that employee's injury was outside the scope of employer's insurance coverage and thus could recover only from employer); *In re Hughes*, 273 P.2d 450, 454 (Okla. 1954) (holding that where benefits for injuries to employee was awarded against employer by an order of the state's industrial commission relieving

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insurer from liability and there was a possibility that employer would not be able to satisfy award due to lack of assets, employee was a “party aggrieved” with standing to challenge order). Although not controlling, *see Morton Bldgs., Inc. v. Tolson*, 172 N.C. App. 119, 127, 615 S.E.2d 906, 912 (2005) (“[W]hile decisions from other jurisdictions may be instructive, they are not binding on the courts of this State.”), we find these authorities persuasive and conclude that plaintiff is a “party aggrieved” by the Commission’s determination that Smith’s workers’ compensation insurance was properly cancelled.

This conclusion is, moreover, consistent with the long-standing principle that courts “must construe the Work[ers]’ Compensation Act liberally so as to effectuate its human purpose of providing compensation for injured employees.” *Roper v. J.P. Stevens & Co.*, 65 N.C. App. 69, 73, 308 S.E.2d 485, 488 (1983), *disc. review denied*, 310 N.C. 309, 312 S.E.2d 652 (1984); *see also Hughes*, 273 P.2d at 454 (“We think that, under the proper interpretation of our Workmen’s Compensation Law, which we are bound to liberally construe in favor of the employee, when the protection of industrial insurance contemplated in the Act is denied such employee by a final order of the State Industrial Commission he certainly is an ‘aggrieved’ party . . .”).

II

[2] Turning to plaintiff’s contention on appeal, he argues that the Commission erroneously applied N.C. Gen. Stat. § 58-35-85 (2009), which provides the procedures for cancelling an insurance policy financed by a premium finance agreement, in determining whether Smith’s workers’ compensation insurance policy was effectively cancelled. Plaintiff contends that the procedures set out in N.C. Gen. Stat. § 58-36-105 (2009) for cancelling workers’ compensation insurance policies governed the cancellation of Smith’s insurance policy. Because, plaintiff argues, Travelers failed to follow N.C. Gen. Stat. § 58-36-105’s requirements in cancelling Smith’s policy, the cancellation was ineffective and Smith’s workers’ compensation policy was in effect on the date of his compensable injury.

Issues involving statutory interpretation are questions of law, reviewed *de novo* on appeal. *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009); *see Oxendine v. TWL, Inc.*, 184 N.C. App. 162, 164, 645 S.E.2d 864, 865 (2007) (reviewing *de novo* determination of which of two competing statutes controlled in workers’ compensation case).

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N.C. Gen. Stat. § 58-36-105, titled “Certain workers’ compensation insurance policy cancellations prohibited,” provides in pertinent part:

(a) No policy of workers’ compensation insurance or employers’ liability insurance written in connection with a policy of workers’ compensation insurance shall be cancelled by the insurer before the expiration of the term or anniversary date stated in the policy and without the prior written consent of the insured, except for any one of the following reasons:

(1) Nonpayment of premium in accordance with the policy terms.

. . . .

(b) Any cancellation permitted by subsection (a) of this section is not effective unless written notice of cancellation has been given by registered or certified mail, return receipt requested, to the insured not less than 15 days before the proposed effective date of cancellation. . . . Whenever notice of intention to cancel is required to be given by registered or certified mail, no cancellation by the insurer shall be effective unless and until such method is employed and completed. . . .

N.C. Gen. Stat. § 58-36-105(a)-(b). N.C. Gen. Stat. § 58 35 85 sets out the procedure for cancellation of an insurance policy by an insurance premium finance company:

When an insurance premium finance agreement contains a power of attorney or other authority enabling the insurance premium finance company to cancel any insurance contract or contracts listed in the agreement, the insurance contract or contracts shall not be cancelled unless the cancellation is effectuated in accordance with the following provisions:

(1) Not less than 10 days’ written notice is sent by personal delivery, first class mail, electronic mail, or facsimile transmission to the last known address of the insured or insureds shown on the insurance premium finance agreement of the intent of the insurance premium finance company to cancel his or their insurance contract or contracts unless the defaulted installment payment is received. Notification thereof shall also be provided to the insurance agent.

(2) After expiration of the 10-day period, the insurance premium finance company shall send the insurer a request for

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cancellation and shall send notice of the requested cancellation to the insured by personal delivery, first-class mail, electronic mail, electronic transmission, or facsimile transmission at his last known address as shown on the records of the insurance premium finance company and to the agent. . . .

(3) Upon receipt of a copy of the request for cancellation notice by the insurer, the insurance contract shall be cancelled with the same force and effect as if the request for cancellation had been submitted by the insured, without requiring the return of the insurance contract or contracts.

(4) All statutory, regulatory, and contractual restrictions providing that the insured may not cancel the insurance contract unless the insurer first satisfies the restrictions by giving a prescribed notice to a governmental agency, the insurance carrier, an individual, or a person designated to receive the notice for said governmental agency, insurance carrier, or individual shall apply where cancellation is effected under the provisions of this section.

N.C. Gen. Stat. § 58-35-85(1)-(4).

We previously held in this case that N.C. Gen. Stat. § 58-36-105 and N.C. Gen. Stat. § 58-35-85 overlap with regard to cancellation of a workers' compensation insurance policy, but that N.C. Gen. Stat. § 58-36-105 is the more specific statute and is, therefore, controlling. *Diaz*, ___ N.C. App. at ___, 709 S.E.2d at 429. Upon re-examination, we hold that only N.C. Gen. Stat. § 58-35-85 applies in situations, such as in the case *sub judice*, where a premium finance company with power of attorney initiates cancellation of a workers' compensation insurance policy.

The clear language of N.C. Gen. Stat. § 58-36-105 states that without written consent from the insured, a policy of workers' compensation insurance "shall not be cancelled by the insurer before the expiration of the term or anniversary dates stated in the policy[,]" subject to 10 enumerated exceptions. N.C. Gen. Stat. § 58-36-105(a)(1)-(10). This statute clearly applies to situations where the insurer seeks to cancel the insured's policy prior to expiration of the policy. It follows that this statute does not apply where the insured requests cancellation of the policy. Rather, N.C. Gen. Stat. § 58-35-85 applies where a premium finance company with power of attorney, such as MPP, steps into the shoes of the insured and requests cancellation of an insurance policy

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due to a breach of the financing agreement. *Unisun Ins. Co. v. Goodman*, 117 N.C. App. 454, 455-56, 451 S.E.2d 4, 5 (1994) (“The procedure for cancellation of an insurance policy where the premium is financed by a premium financing company, and, where the insured defaults on the finance agreement, is governed by N.C. Gen. Stat. § 58-35-85[.]”), *disc. review denied*, 339 N.C. 742, 454 S.E.2d 662 (1995). While N.C. Gen. Stat. § 58-35-85 refers to “insurance contracts” generally and does not specifically refer to workers’ compensation insurance policies, this Court has held that N.C. Gen. Stat. § 58-35-85’s predecessor, N.C. Gen. Stat. § 58-60, applied to workers’ compensation policies. *Graves v. ABC Roofing Co.*, 55 N.C. App. 252, 253-55, 284 S.E.2d 718, 719 (1981).

Here, it does not appear that Travelers had any reason to attempt to cancel Smith’s workers’ compensation insurance policy, and did not attempt to do so. The premiums for the Travelers policy had been paid by MPP on Smith’s behalf. MPP, however, was not receiving payment from Smith in violation of the financing agreement, and, therefore, had the ability through the power of attorney clause in the financing agreement to cancel Smith’s policy with Travelers. MPP was bound to follow the provisions of N.C. Gen. Stat. § 58-35-85 regarding notice and return of unearned premiums, which it did. *Pearson v. Nationwide Mutual Ins. Co.*, 325 N.C. 246, 254, 382 S.E.2d 745, 748 (1989) (“In order to cancel a policy the carrier must comply with the procedural requirements of the statute . . .”).

Still, plaintiff contends that MPP is not the insured, and, therefore, it could not cancel the policy. Plaintiff claims that if MPP could not step into the shoes of the insured and cancel the policy, then Travelers was effectively canceling the policy without consent of the insured and in violation of N.C. Gen. Stat. § 58-36-105. Plaintiff points to the fact that N.C. Gen. Stat. § 58-36-105 refers to “the insured” in section (a), but then refers to “the insured or the insured’s representative” in subsections (a)(2), (a)(5), and (a)(6). Plaintiff argues that the insured and the insured’s representative are not one in the same. In the subsections mentioned by plaintiff, the legislature was setting forth the circumstances by which the insurer could cancel the insured’s policy without consent of the insured. It is clear that the legislature wished to set out that wrongdoing by an insured or an insured’s representative, whomever that might be, could potentially justify cancellation of the contract. In certain situations, the insured and the insured’s representative may not be one in the same for purposes of N.C. Gen. Stat. § 58-36-105(a)(2), (a)(5), (a)(6); however, we

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do not interpret this language to mean that a premium finance company cannot step into the shoes of the insured and cancel the policy under the power of attorney provision. While Smith and MPP are not the same entity, “[a] power of attorney creates an agency relationship between one who gives the power, the principal, and one who exercises authority under the power of attorney, the agent.” *Whitford v. Gaskill*, 119 N.C. App. 790, 793, 460 S.E.2d 346, 348 (1995), *rev’d on other grounds*, 345 N.C. 475, 480 S.E.2d 690 (1997); *see Branch Banking and Trust Co. v. Creasy*, 301 N.C. 44, 56, 269 S.E.2d 117, 124 (1980) (“An agent is one who acts for or in the place of another by authority from him.”). MPP was Smith’s agent and was acting in the place of Smith by authority from him.²

Moreover, N.C. Gen. Stat. § 58-35-85(3) (emphasis added), which we hold is controlling, states: “Upon receipt of a copy of the request for cancellation notice by the insurer, the insurance contract *shall be cancelled with the same force and effect as if the request for cancellation had been submitted by the insured*, without requiring the return of the insurance contract or contracts.” This Court has interpreted this provision and recognized that a premium finance company has the authority under the power of attorney provision of the financing agreement to cancel an insurance policy on behalf of the insured. *See Cahoon v. Canal Ins. Co.*, 140 N.C. App. 577, 579-83, 537 S.E.2d 538, 540-42 (2000) (holding that premium finance company followed the provisions of N.C. Gen. Stat. § 58-35-85 and effectively cancelled the insured’s policy); *Unisun Inc. Co.*, 117 N.C. App. at 457, 451 S.E.2d at 6 (“[C]ancellation requested by a finance company occurs in the same manner as if the insured requested the cancellation.”). While *Cahoon* and *Unisun* were decided prior to the enactment of N.C. Gen. Stat. § 58-36-105, they are nevertheless controlling with regards to N.C. Gen. Stat. § 58-35-85, which is the applicable statute in this case. Based on this statute and the relevant caselaw, we hold that MPP was permitted to invoke the power of attorney provision in the financing agreement and cancel Smith’s policy with Travelers. Effectively, Smith, the insured, was initiating cancellation of the policy through his agent. Because Travelers was not cancelling the policy on its own initiative, N.C. Gen. Stat. § 58-36-105 simply does not apply.

2. Plaintiff argues that Smith’s agent endorsed the power of attorney on Smith’s behalf without authorization. Plaintiff did not argue before the Industrial Commission that the power of attorney was forged and therefore invalid. We decline to address this argument on appeal. N.C. R. App. P. 10(a)(1).

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Plaintiff also contends that even if MPP was permitted to request cancellation, N.C. Gen. Stat. § 58-35-85(4) “contemplates the additional restrictions contained in N.C. Gen. Stat. § 58-36-105(b).” Plaintiff argues that “the legislature wanted the insured employer to receive a Notice of Cancellation that stated the reason for cancellation even when the insured himself had consented to such a cancellation.” This interpretation would create an untoward result. Reading the statutes together, it is apparent that the legislature did not intend to require the insurer to notify the insured of the reason for cancellation pursuant to N.C. Gen. Stat. § 58-36-105(b) where the insured, either personally or through his agent, has provided a written notice of cancellation pursuant to N.C. Gen. Stat. § 58-35-85. We note that N.C. Gen. Stat. § 58-35-85(2) states that the premium finance company must provide notice to the insured that a request for cancellation has been made. This provision guarantees that the insured is made aware that his agent has requested cancellation. Smith received the Notice of Cancellation sent to Travelers on 15 January 2007.

Conclusion

Based on the foregoing, we hold that MPP was authorized by the power of attorney clause of the financing agreement to cancel Smith’s policy with Travelers and that MPP properly did so via the “Notice of Cancellation” sent on 15 January 2007. Consequently, because Travelers had received prior written consent of the insured and was not unilaterally attempting to cancel Smith’s policy, N.C. Gen. Stat. § 58-36-105 is inapplicable in this case. We hold that the Industrial Commission properly concluded that “Defendant Smith’s policy was effectively and properly cancelled pursuant to the power of attorney held by MPP and in accordance with § 58-35-85.” We affirm the opinion and award of the Full Commission.

Affirmed.

Chief Judge MARTIN and Judge THIGPEN concur.

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ROBERT S. CLEMENTS, PLAINTIFF v. DONNA G. CLEMENTS, BY AND THROUGH LAWRENCE S. CRAIGE AND LAVAUGHN NESMITH, DIRECTOR OF THE NEW HANOVER COUNTY DEPARTMENT OF SOCIAL SERVICES, DEFENDANT

No. COA11-1323

(Filed 3 April 2012)

1. Appeal and Error—interlocutory orders and appeals—denial of motion to dismiss—affected substantial right

The Court of Appeals addressed the merits of defendant's appeal from the trial court's order denying defendant's motion to dismiss for lack of subject matter jurisdiction. The order affected a substantial right as there was a real chance that the parties could be subject to inconsistent verdicts should defendant decide to make a claim for child support before the Clerk of Superior Court and the Clerk enters an order that differs from that of the district court.

2. Jurisdiction—subject matter jurisdiction—child support— incompetent ward—district court's original jurisdiction

The trial court did not err in a child support case by denying defendant's motion to dismiss for lack of subject matter jurisdiction. The Clerk of Superior Court did not have exclusive jurisdiction over the issue of child support, even where it involved the estate of an incompetent ward, and the district court's original jurisdiction outweighed the concurrent jurisdiction of the two forums.

Appeal by defendant from order entered 8 June 2011 by Judge Jeffrey E. Noecker in New Hanover County District Court. Heard in the Court of Appeals 21 February 2012.

Pennington & Smith, PLLC, by Ralph S. Pennington and Kristy J. Jackson, for plaintiff appellee.

Shipman & Wright, LLP, by Gary K. Shipman and C. Cory Reiss, for defendant appellant.

McCULLOUGH, Judge.

Robert S. Clements ("plaintiff") has filed a motion to dismiss with our Court arguing that the order from which Donna G. Clements ("defendant") is appealing is interlocutory and does not affect a substantial right. Specifically, plaintiff contends the issue of child sup-

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port should be addressed by the Clerk of Superior Court of New Hanover County, North Carolina, (the “Clerk”) and not the district court. We disagree and thus will address defendant’s argument on appeal. Defendant appeals from the trial court’s denial of her motion pursuant to N.C.R. Civ. P. 12(b)(1) (2011) for lack of subject matter jurisdiction. We believe the trial court correctly denied defendant’s motion and thus affirm its decision.

I. Background

The parties were married on 15 February 1997 and subsequently separated on 4 July 2004. They had one child born during the marriage on 5 January 1998, of which plaintiff has had sole custody since separation. Plaintiff filed a complaint for absolute divorce on 13 March 2007 and defendant filed her answer with counterclaims on 20 April 2007. Defendant raised counterclaims of equitable distribution, child custody, and child support. Plaintiff filed a reply and motion in the cause, seeking equitable distribution, child support, child custody, and sequestration of the marital home. On 1 June 2007, due to defendant’s repeated arrests and questionable mental health, defendant’s counsel moved for a continuance in the case and requested that a Guardian Ad Litem be appointed to investigate defendant’s competency. The trial court appointed a Guardian Ad Litem, allowing it time to investigate defendant’s competency, and at the same time entered a judgment of absolute divorce on 9 November 2007.

On 27 February 2008, the Clerk adjudicated defendant incompetent and appointed guardians of defendant’s person and estate. On 4 November 2009, the trial court, with consent of defendant’s guardians, appointed a Guardian Ad Litem to represent defendant’s interests in the current action with respect to child custody, visitation, and other personal matters. The trial court set a 24 May 2010 hearing to deal with all issues, including child custody and support. On 4 February 2010, plaintiff filed a motion for summary judgment as to the equitable distribution claim, which the trial court granted on 10 June 2010, leaving only the issues of child support and custody to be addressed. Child custody was resolved by consent order on 24 August 2010, and the trial court scheduled the remaining issue of child support to be heard on 9 June 2011.

On 3 May 2011, defendant replaced her former counsel with her current counsel. Subsequently, on 25 May 2011, defendant moved to dismiss plaintiff’s claim for child support on grounds that the district court lacked subject matter jurisdiction over the issue. The trial court

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heard the motion and on 8 June 2011 entered an order denying the motion and finding that it had subject matter jurisdiction.

Defendant filed her notice of appeal on 13 June 2011 with a subsequent motion to stay the trial court's order on 15 June 2011. The next day plaintiff filed a motion to calendar the issue of support and determine if defendant's appeal was interlocutory or had a substantial right affected. The trial court granted plaintiff's motion to calendar and set the child support issue to be heard the week of 23 January 2012. On 2 August 2011, the trial court also denied defendant's motion to stay, finding that its previous order was interlocutory and did not affect a substantial right. As a result, defendant filed a motion for temporary stay pursuant to N.C.R. App. P. 8(a) and 37 (2012) with our Court, which we granted pending plaintiff's response. Plaintiff then filed his response and included a motion to dismiss. Our Court ultimately denied defendant's motion for temporary stay on 24 August 2011 and at the same time denied plaintiff's motion to dismiss as moot. Plaintiff filed another motion to dismiss with our Court on 2 December 2011, arguing that defendant's appeal is interlocutory. Defendant filed a response and our Court entered a 14 December 2011 order referring plaintiff's motion to our panel for review.

II. Analysis

A. Motion to Dismiss

[1] Defendant raises a single issue on appeal, but we must first address plaintiff's motion to dismiss as referred to our panel. Plaintiff filed his motion with our Court arguing that defendant's appeal is interlocutory and does not affect a substantial right. We disagree.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "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). To obtain appellate review of an interlocutory order, the appellant must state "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C.R. App. P. 28(b)(4) (2012). Furthermore, appellate review of an interlocutory order is only available

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

Currin & Currin Constr., Inc. v. Lingerfelt, 158 N.C. App. 711, 713, 582 S.E.2d 321, 323 (2003) (quoting *Myers v. Mutton*, 155 N.C. App. 213, 215, 574 S.E.2d 73, 75 (2002)).

“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 order to determine whether a particular interlocutory order is appealable pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27 (d)(1), we utilize a two-part test, with the first inquiry being whether a substantial right is affected by the challenged order and the second being whether this substantial right might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal.” *Hamilton v. Mortgage Info. Servs.*, ___ N.C. App. ___, ___, 711 S.E.2d 185, 189 (2011). “‘A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.’” *Trivette v. Yount*, ___ N.C. App. ___, ___, 720 S.E.2d 732, 735, (2011) (quoting *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000)).

Plaintiff contends that a denial of a motion to dismiss for lack of subject matter jurisdiction is interlocutory and does not affect a substantial right. See *Country Club of Johnston County, Inc. v. U.S. Fidelity and Guar. Co.*, 135 N.C. App. 159, 519 S.E.2d 540 (1999). More specifically, plaintiff argues that the issue of child support has not been adjudicated, meaning the appeal is interlocutory. Consequently, the issue turns to whether or not the denial of a motion for lack of subject matter jurisdiction affects a substantial right. In claiming that the denial of the motion does not affect a substantial right, plaintiff contends that cases involving subject matter jurisdiction all revolve around which court has the jurisdiction to hear a case and should we accept defendant’s argument, every case involving subject matter jurisdiction would affect a substantial right. Plaintiff acknowledges that defendant has the right to avoid two trials with the potential of inconsistent verdicts, but he contends the potential is lacking in the instant case. See *Liggett Group v. Sunas*, 113 N.C. App. 19, 24, 437 S.E.2d 674, 677 (1993). At most, plaintiff argues that defendant may be subjected to a retrial before the Clerk if our Court were to

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reverse the district court's order in an appeal following the district court's final judgment. *See McIntyre v. McIntyre*, 175 N.C. App. 558, 563, 623 S.E.2d 828, 832 (2006). Otherwise, plaintiff claims we should dismiss defendant's appeal because it has caused excessive delay and costs in an already lengthy case. *See Waters v. Personnel, Inc.*, 294 N.C. 200, 207-08, 240 S.E.2d 338, 343 (1978).

Alternatively, defendant's argument is that should plaintiff's motion be allowed and the district court addresses the issue of child support with the same factual support, there is a real possibility of conflicting results since the Clerk also has the ability to hear the issue and submit its own order. A party has a substantial right to avoid two trials on the same facts in different forums where the results would conflict. *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 639, 652 S.E.2d 231, 237 (2007). Where a party is appealing an interlocutory order to avoid two trials, the party must "show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 736, 460 S.E.2d 332, 335 (1995). In the case at hand, plaintiff contends that the Clerk is the proper forum to hear an issue regarding expenditures to be made from the estate of an incompetent ward, *see* N.C. Gen. Stat. § 35A-1251(21) (2011), while defendant argues the district court is the proper forum to address issues of child support. *See* N.C. Gen. Stat. § 7A-244 (2011). Clearly, the sole issue left to resolve is that of child support and should there be separate cases before the district court and the Clerk, they would cover the same factual issues. Furthermore, there is a real chance that the parties could be subject to inconsistent verdicts should defendant decide to make a claim for child support before the Clerk and the Clerk enters an order that differs from that of the district court. As a result, we believe it would be more practical for our Court to address the issue of subject matter jurisdiction at this time, rather than leave the possibility for entry of inconsistent verdicts. Thus, "[t]he trial court's order in the instant case affects a substantial right and this Court exercises jurisdiction over [d]efendant's appeal pursuant to North Carolina General Statutes §§ 1-277(a) and 7A-27(d)(1)." *Trivette*, ___ N.C. at ___, 720 S.E.2d at 735. Plaintiff's motion to dismiss defendant's appeal as interlocutory is denied.

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B. Subject Matter Jurisdiction

[2] Defendant's main contention on appeal is that the trial court erred in denying her motion to dismiss for lack of subject matter jurisdiction pursuant to N.C.R. Civ. P. 12(b)(1). Specifically, defendant contends that issuance of child support from an incompetent ward is an issue for the Clerk and not the district court, even where the district court retains original jurisdiction. We disagree.

"An appellate court's review of an order of the trial court denying or allowing a Rule 12(b)(1) motion is *de novo*, except to the extent the trial court resolves issues of fact and those findings are binding on the appellate court if supported by competent evidence in the record." *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998). "Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). Furthermore, subject matter jurisdiction cannot be conferred by consent or waiver and a court cannot create it where it does not already exist. *Burgess v. Burgess*, ____ N.C. App. ____, ____, 698 S.E.2d 666, 668-69 (2010).

Generally speaking, the "superior court is the only proper division to hear matters regarding the administration of incompetents' estates." *Cline v. Teich*, 92 N.C. App. 257, 263, 374 S.E.2d 462, 466 (1988); *see* N.C. Gen. Stat. § 35A-1102 (2011). Alternatively, as defendant notes, the district court is the proper forum for all issues relating to child support. N.C. Gen. Stat. § 7A-244. In the case at hand, the parties initiated their claims in the district court seeking resolution of equitable distribution, child custody, and child support, which in turn established original jurisdiction in the district court. The district court addressed the issues regarding equitable distribution and child custody, with only the matter of child support remaining. During the pendency of the case before the district court, defendant was adjudicated incompetent by the Clerk and the Clerk obtained original jurisdiction over issues relating to the "administration of incompetents' estates." *Cline*, 92 N.C. App. at 263, 374 S.E.2d at 466. The question then turns to whether the Clerk has exclusive, original, and continuing jurisdiction rather than just concurrent jurisdiction with the district court.

Defendant cites to N.C. Gen. Stat. § 7A-240 (2011), for her argument that the superior and district courts have concurrent original

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jurisdiction over many civil matters, but not issues regarding the estates of incompetent wards. However, a closer reading of the statute shows that it does not conclusively exclude issues regarding the estate of an incompetent ward, but merely excludes “proceedings in probate and the administration of decedents’ estates.” *Id.* Defendant goes on to note that Chapter 35A of the General Statutes, regarding incompetency and guardianship matters, “establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child.” N.C. Gen. Stat. § 35A-1102 (2011). Moreover, in situations involving the incompetency of a ward, the Clerk generally appoints guardians to manage the ward’s estate and the Clerk “shall retain jurisdiction following appointment of a guardian in order to assure compliance with the [C]lerk’s orders and those of the superior court.” N.C. Gen. Stat. § 35A-1203(b) (2011). Defendant contends the exclusivity language in N.C. Gen. Stat. § 35A-1102, establishes exclusive jurisdiction in the Clerk over all matters regarding the estate of an incompetent ward and likewise “[i]f a trial court has exclusive jurisdiction, the court has the power to adjudicate an action or class of actions to the exclusion of all other courts[.]” *Burgess*, ___ N.C. App. at ___, 698 S.E.2d at 669 (internal quotation marks and citation omitted). However, from further review of Chapter 35A the exclusivity language does not continue throughout, and we do not see how a child support matter could be considered under the exclusive jurisdiction of the Clerk just because one party involved has been adjudicated incompetent.

Defendant relies on the *Cline* case, along with *McKoy*, to bolster her argument that the district court is not the proper forum to seek any form of support from the estate of an incompetent ward. Nonetheless, we believe that both cases can be distinguished from the instant case. In *Cline*, the former spouse of an incompetent sought support from the incompetent’s estate and brought action for such support in the district court. *See Cline*, 92 N.C. App. 257, 374 S.E.2d 462. While spousal support may be sought from the estate of an incompetent spouse, our Court held that the district court was not the proper forum for such a case due to the fact that the spouse initiated the claim for spousal support in the district court *after* her spouse had been found to be incompetent. *Id.* At that point, the superior court had original jurisdiction over the estate of the incompetent and retained continuing jurisdiction over the issue of spousal support. Alternatively, in the case at bar, defendant initiated the case for child support in the district court *prior* to being adjudicated incom-

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petent, so we cannot see how *Cline* is comparable to this case. Similarly, in *McKoy* the parents of a child each sought custody of the child in district court after the child had been adjudicated incompetent by the clerk of superior court. *See McKoy*, 202 N.C. App. 509, 689 S.E.2d 590. As in *Cline*, our Court held that the clerk had original and exclusive jurisdiction to address the custody dispute where the child had already been adjudicated incompetent. *Id.* Again, *McKoy* can be distinguished in that the clerk had obtained original jurisdiction by adjudicating the child incompetent *prior* to the initiation of the custody dispute, while in the case at hand the Clerk adjudicated defendant incompetent *after* the parties commenced their child support dispute in district court. We do not find either of these cases controlling.

On the other hand, plaintiff contends that the district court and the Clerk have concurrent jurisdiction over the issue of child support, but that the district court has original jurisdiction to address the issue. Our General Statutes do not contain language giving the Clerk exclusive jurisdiction over child support claims. Original jurisdiction is “[a] court’s power to hear and decide a matter before any other court can review the matter.” *In re H.L.A.D.*, 184 N.C. App. 381, 386-87, 646 S.E.2d 425, 430 (2007) (quoting *Black’s Law Dictionary* 869 (8th ed. 2004)). “It is the general rule that where there are courts of concurrent jurisdiction, the court which first acquires jurisdiction retains it,” *In re Greer*, 26 N.C. App. 106, 112, 215 S.E.2d 404, 408 (1975), *superseded on other grounds by statute as recognized in Taylor v. Robinson*, 131 N.C. App. 337, 508 S.E.2d 289 (1998), and the one that first exercises jurisdiction generally prohibits the exercise by another. *Hudson Int’l, Inc. v. Hudson*, 145 N.C. App. 631, 635-36, 550 S.E.2d 571, 573-74 (2001). Here the district court first obtained jurisdiction over the child support issue and the Clerk subsequently adjudicated defendant incompetent.

Defendant also contends the rights of incompetent wards are strongly protected in that a dependent of an incompetent must request support from the incompetent’s estate and the guardian of the estate must determine whether and what amount to approve. However, a minor child is in an equally as protected status as that of an incompetent ward. *See Latta v. Trustees of the General Assembly of the Presbyterian Church*, 213 N.C. 462, 469, 196 S.E. 862, 866 (1938). Furthermore, the district court has a similar duty as that of the Clerk to consider the financial situation of the incompetent party.

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The purpose of the [child support] guidelines and criteria shall be to ensure that payments ordered for the support of a minor child are in such amount as to meet the reasonable needs of the child for health, education, and maintenance, *having due regard to the estates, earnings, conditions*, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c1) (2011) (emphasis added).

By the same token, the Clerk would also be required to consider the child support guidelines should it be the forum to address the issue of child support owed by the estate of an incompetent ward. *Id.* Both parties cite to the case of *Griffin v. Griffin*, 118 N.C. App. 400, 456 S.E.2d 329 (1995), where our Court held that the district and superior courts had concurrent jurisdiction to address custody issues, but where the superior court has a superseding adoption petition, “the jurisdiction of the district court to review the post termination of parental rights’ placement is suspended[.]” *Id.* at 403, 456 S.E.2d at 332. However, here there are no competing orders pending in both courts and the Clerk is not the only forum that can make decisions affecting the estate of an incompetent ward. Consequently, the Clerk does not have exclusive jurisdiction over the issue of child support, even where it involves the estate of an incompetent ward, and the district court’s original jurisdiction outweighs the concurrent jurisdiction of the two forums. Thus, we must affirm the trial court’s denial of defendant’s motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

III. Conclusion

Based on the foregoing reasons, we deny plaintiff’s motion to dismiss defendant’s appeal in arguing that it is interlocutory and does not affect a substantial right and furthermore affirm the trial court’s denial of defendant’s motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. We hold that the district court and the Clerk have concurrent jurisdiction over the issue of child support, but that the Clerk does not have exclusive jurisdiction and as a result the district court’s original jurisdiction makes it the proper forum to address the issue.

Affirmed.

Judges McGEE and GEER concur.

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[219 N.C. App. 590 (2012)]

STATE OF NORTH CAROLINA v. CHARLES FITZGERALD HARRIS

No. COA11-1031

(Filed 3 April 2012)

Sexual Offenders—unlawfully on premises of place intended primarily the use, care, or supervision of minors—indictment fatally defective—no subject matter jurisdiction

The trial court lacked subject matter jurisdiction over a case in which defendant was charged with having been a sex offender unlawfully on the premises of a place intended primarily for the use, care, or supervision of minors. The indictment failed to allege that defendant had been convicted of an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a victim who was under 16 years of age at the time of the offense as required by N.C.G.S. § 14-208.18(a).

Appeal by defendant from judgment entered 17 May 2011 by Judge H. William Constangy in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 February 2012.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

Thomas, Ferguson & Mullins LLP, by James H. Monroe, for defendant-appellant.

ERVIN, Judge.

Defendant Charles Fitzgerald Harris appeals from a judgment sentencing him to 88 to 115 months imprisonment based upon his convictions for having been a sex offender unlawfully on the premises of a place intended primarily for the use, care, or supervision of minors in violation of N.C. Gen. Stat. § 14-208.18 and having attained the status of an habitual felon. On appeal, Defendant contends that the trial court lacked subject matter jurisdiction over this case because the indictment lodged against him failed to allege all the essential elements of the offense defined in N.C. Gen. Stat. § 14-208.18. After careful consideration of Defendant's challenge 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 vacated.

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[219 N.C. App. 590 (2012)]

I. Factual BackgroundA. Substantive Facts

On the morning of 14 January 2010, Officers Darryl Norton and Brett Hock of the Charlotte-Mecklenburg Police Department responded to a suspicious vehicle call at an elementary school located in Charlotte. According to the caller, a black male was asleep in a vehicle parked in the school parking lot.

After their arrival at the school, the officers observed a vehicle matching that described by the caller in the location which the caller had specified. Upon approaching the vehicle, the officers found Defendant asleep in the driver's seat. At that point, Officer Norton knocked on the vehicle's window, woke Defendant, and asked for identification, which Defendant provided.

While Officer Hock ran a records check on Defendant, Officer Norton talked to him. Defendant told Officer Norton that he was at the school for the purpose of picking up his girlfriend, who worked there. After the records check revealed that Defendant was a registered sex offender, Defendant was handcuffed and placed in the back of a patrol car while the officers attempted to obtain more information about the parameters associated with Defendant's sex offender registration status.

After making appropriate inquiries, Officer Norton learned that Defendant was required to have obtained written permission from the principal or the principal's agent before coming onto school grounds. Although Officer Norton was able to verify that Defendant's girlfriend worked at the school, the school's principal stated that he did not know Defendant and that Defendant did not have permission to be on school grounds. As a result, the officers placed Defendant under arrest.

B. Procedural History

On 6 July 2010 and 23 August 2010, the Mecklenburg County grand jury returned bills of indictment charging Defendant with being a sex offender unlawfully on premises primarily intended for the use, care, or supervision of minors in violation of N.C. Gen. Stat. § 14-208.18 and having attained the status of an habitual felon. The charges against Defendant came on for trial before the trial court and a jury at the 16 May 2011 criminal session of Mecklenburg County Superior Court. At trial, the State and Defendant stipulated that Defendant was required to register as a sex offender as the result of

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prior convictions for attempted second degree rape and sexual battery. On 17 May 2011, the jury returned a verdict convicting Defendant of having violated N.C. Gen. Stat. § 14-208.18. After the return of the jury's verdict, Defendant pled guilty to having attained habitual felon status. Based upon the jury's verdict and Defendant's guilty plea, the trial court entered a judgment sentencing Defendant to 88 to 115 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

In his sole challenge to the trial court's judgment, Defendant contends that the trial court lacked subject matter jurisdiction over this case because the indictment purporting to charge him with violating N.C. Gen. Stat. § 14-208.18 failed to allege all the essential elements of the offense defined in that statutory provision. More specifically, Defendant contends that the indictment failed to (1) "clearly and lucidly set forth that [Defendant] was on the premises of the school[;]" (2) "allege [that Defendant] was 'knowingly' on the premises of the school[;]" or (3) "allege [that Defendant] had been convicted of an offense under Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a minor child." We conclude that at least a portion of Defendant's argument has merit.

According to N.C. Gen. Stat. § 15A-924(a)(5) an indictment must contain:

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

"As a '[p]rerequisite to its validity, an indictment must allege every essential element of the criminal offense it purports to charge,'" *State v. Billinger*, ___ N.C. App. ___, ___, 714 S.E.2d 201, 206 (2011) (quoting *State v. Courtney*, 248 N.C. 447, 451, 103 S.E.2d 861, 864 (1958)), although it "need only allege the ultimate facts constituting each element of the criminal offense." *State v. Rambert*, 341 N.C. 173, 176 459 S.E.2d 510, 512 (1995) (citation omitted). "Our courts have recognized that[,] while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form." *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006). "The general rule in this

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State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words.” *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953).

“North Carolina law has long provided that ‘[t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity.’” *State v. Neville*, 108 N.C. App. 330, 332, 423 S.E.2d 496, 497 (1992) (quoting *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966)). “[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of [subject matter] jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court.” *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000). This Court “review[s] the sufficiency of an indictment *de novo*.” *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409, *appeal dismissed and disc. review denied*, 363 N.C. 586, 683 S.E.2d 215 (2009). “An arrest of judgment is proper when the indictment ‘wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty.’” *State v. Kelso*, 187 N.C. App. 718, 722, 654 S.E.2d 28, 31 (2007) (quoting *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943)), *disc. review denied*, 362 N.C. 367, 663 S.E.2d 432 (2008). “The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment.’” *State v. Marshall*, 188 N.C. App. 744, 752, 656 S.E.2d 709, 715 (quoting *State v. Fowler*, 266 N.C. 528, 531, 146 S.E.2d 418, 420 (1966)), *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008).

The indictment by means of which the grand jury attempted to charge Defendant with violating N.C. Gen. Stat. § 14-208.18 alleged, in pertinent part, that:

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 14th day of January, 2010, in Mecklenburg County, Charles Fitzgerald Harris *did unlawfully, willfully and feloniously on the premises of Winget Park Elementary School*, located at . . . Charlotte, North Carolina. *A place intended primarily for the use, care, or supervision of minors and defendant is a registered sex offender.*

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(emphasis added). According to N.C. Gen. Stat. § 14-208.18:

(a) It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:

- (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children’s museums, child care centers, nurseries, and playgrounds.

...

(c) Subsection (a) of this section is applicable only to persons required to register under this Article who have committed any of the following offenses:

- (1) Any offense in Article 7A of this Chapter.
- (2) Any offense where the victim of the offense was under the age of 16 years at the time of the offense.

As a result, the essential elements of the offense defined in N.C. Gen. Stat. § 14-208.18(a) are that the defendant was (1) knowingly on the premises of any place intended primarily for the use, care, or supervision of minors and (2) at a time when he or she was required by North Carolina law to register as a sex offender based upon a conviction for committing an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a victim who was under the age of 16 at the time of the offense. N.C. Gen. Stat. § 14-208.18.

A. Omission of “Go” or “Went”

First, Defendant contends that the indictment failed to “clearly and lucidly” allege that Defendant went onto the premises of the school. Defendant’s argument hinges on the fact that the language contained in the indictment to the effect that Defendant “did unlawfully, willfully and feloniously on the premises of Winget Park Elementary School” omitted any affirmative assertion that Defendant actually went on the school’s premises. We do not find this argument persuasive.

Although “ ‘an indictment may be couched in ungrammatical language, this will not, of itself, render the indictment insufficient, provided the intention and meaning of the pleader is clearly apparent,’ ” since “ ‘[i]t is the general rule that an indictment is not vitiated by

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mistakes which are merely clerical, where they do not destroy the sense of the indictment, and the meaning is apparent.’” *State v. Hawkins*, 155 N.C. 466, 470, 71 S.E. 326, 327 (1911) (quoting Howard C. Joyce, *Treatise on the Law Governing Indictments* §§ 201 & 202, at 215-19 (1st ed. 1908)) (holding that an indictment alleging that the defendant “unlawfully, willfully and feloniously break and enter” with the intent to commit larceny was not fatally defective based upon the omission of the word “did”). A cursory analysis of the language in which the challenged indictment is couched clearly indicates that Defendant was being charged with having been “on the premises” of the school. The absence of words such as “go” or “went,” while less than optimal, does not render the indictment unclear. As a result, given that the challenged language, taken in context, sufficiently apprised Defendant that he was alleged to have entered the grounds of a school, *see State v. Thrift*, 78 N.C. App. 199, 201-02, 336 S.E.2d 861, 862 (1985) (holding that the fact that a statutory term was misspelled in an indictment did not render that charging instrument fatally defective), *appeal dismissed and disc. review denied*, 316 N.C. 557, 344 S.E.2d 15 (1986), this component of Defendant’s challenge to the indictment lacks merit.

B. Omission of “Knowingly”

Secondly, Defendant argues that the fact that the indictment failed to allege that he “knowingly” entered the school grounds rendered the indictment fatally defective. We do not find this contention persuasive either.

“Our Supreme Court has held that [t]he term *willfully* implies that the act is done knowingly” *State v. Memminger*, 186 N.C. App. 681, 652 S.E.2d 71, 2007 N.C. App. LEXIS 2234, *6 (2007) (unpublished) (quoting *State v. Falkner*, 182 N.C. 793, 798, 108 S.E. 756, 758 (1921)) (holding that the absence of the term “knowingly” from an indictment which stated that the defendant “ ‘did . . . willfully . . . possess [cocaine] with intent to sell or deliver . . . ’ ” did not render the indictment invalid given that the allegations in the indictment sufficiently tracked the applicable statutory language and given that the allegation that the defendant acted “willfully” implied that knowing conduct had occurred).¹ As we have already noted, the indictment returned against Defendant alleged that he was “unlawfully, willfully

1. Although we recognize that our decision in *Memminger* has no precedential effect, *United Services Automobile Ass’n v. Simpson*, 126 N.C. App. 393, 396, 485 S.E.2d 337, 339, *disc. review denied*, 347 N.C. 141, 492 S.E.2d 37 (1997), we find its reasoning persuasive.

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and feloniously on the premises” of the school. Although the indictment did not explicitly track the relevant statutory language by alleging that Defendant was “knowingly” on the school’s premises, the fact that the indictment stated that Defendant acted “willfully,” sufficed to allege the requisite “knowing” conduct. *Falkner*, 182 N.C. at 798, 108 S.E. at 758. As a result, we conclude that this aspect of Defendant’s challenge to the indictment attempting to charge him with violating N.C. Gen. Stat. § 14-208.18 lacks merit.

C. Omission of Allegations Concerning Prior Convictions

Finally, Defendant contends that the indictment failed to allege that he had been convicted of an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a victim who was under 16 years of age at the time of the offense as required by N.C. Gen. Stat. § 14-208.18(a). This aspect of Defendant’s argument has merit.

N.C. Gen. Stat. § 14-208.7 provides that “[a] person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides.” A “reportable conviction” is defined as:

- a. A final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting. A final conviction for aiding and abetting is a reportable conviction only if the court sentencing the individual finds that the registration of that individual under this Article furthers the purposes of this Article as stated in [N.C. Gen. Stat. §] 14-208.5.
- b. A final conviction in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section, or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state.
- c. A final conviction in a federal jurisdiction (including a court martial) of an offense, which is substantially similar to an offense against a minor or a sexually violent offense as defined by this section.
- d. A final conviction for a violation of [N.C. Gen. Stat. §§] 14-202(d), (e), (f), (g), or (h), or a second or subsequent

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conviction for a violation of [N.C. Gen. Stat. §§] 14-202(a), (a1), or (c), only if the court sentencing the individual issues an order pursuant to [N.C. Gen. Stat. §] 14-202(1) requiring the individual to register.

N.C. Gen. Stat. § 14-208.6(4). The offenses punishable by virtue of Article 7A of Chapter 14 of the North Carolina General Statutes include first degree rape, rape of a child, second degree rape, first degree sexual offense, sexual offense with a child, second degree sexual offense, sexual battery, intercourse and sexual offenses with certain victims, and statutory rape. N.C. Gen. Stat. §§ 14-27.1-10. As a result, a number of convictions that result in the imposition of a registration requirement pursuant to N.C. Gen. Stat. 14-208.7, including certain forms of secret peeping, N.C. Gen. Stat. §§ 14-202(d)-(h), and sexually violent offenses, N.C. Gen. Stat. § 14-208.6(5) (defining sexually violent offenses so as to include offenses set forth in Article 7A of Chapter 14 of the North Carolina General Statutes and certain other offenses, such as incest and taking indecent liberties with a student), do not constitute offenses which are listed in Article 7A of Chapter 14 of the North Carolina General Statutes or involve a victim under the age of 16. For that reason, the simple fact that an individual required to register as a sex offender enters the premises of any place intended primarily for the use, care, or supervision of minors does not inevitably mean that a violation of N.C. Gen. Stat. § 14-208.18 has occurred.

The indictment in which the grand jury attempted to charge Defendant with violating N.C. Gen. Stat. § 14-208.18 simply alleged that Defendant was a “registered sex offender.” In view of the fact that certain individuals are required to register as sex offenders despite the fact that they did not commit an offense that is listed in Article 7A of Chapter 14 or involved a victim under the age of 16, an allegation that Defendant was a “registered sex offender” does not suffice to allege all of the elements of the criminal offense enumerated in N.C. Gen. Stat. § 14-208.18. *Greer*, 238 N.C. at 328, 77 S.E.2d at 920. Thus, we are compelled to conclude that the indictment returned against Defendant fails to “‘allege every essential element of the criminal offense it purports to charge,’” *Billinger*, ___ N.C. App. at ___, 714 S.E.2d at 206 (quoting *Courtney*, 248 N.C. at 451, 103 S.E.2d at 864), thereby depriving the trial court of jurisdiction to enter judgment against Defendant for his alleged violation of N.C. Gen. Stat. § 14-208.18(a). In view of the fact that we are required to “vacate [D]efendant’s underlying felony conviction, we [must] also vacate

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[D]efendant’s judgment sentencing [D]efendant as a[n] habitual felon.” *State v. Fox*, ___ N.C. App. ___, ___, 721 S.E.2d 673, 678 (2011) (citing N.C. Gen. Stat. § 14-7.5).

In seeking to persuade us to reach a contrary result, the State contends that the “specific offense committed would be mere surplusage” and that the allegation that Defendant’s conduct was “unlawful” gave him ample notice that his status as a registered sex offender precluded him from entering the premises of the school in question. However, according to well-established North Carolina law, only those allegations which are “beyond *the essential elements of the crime sought to be charged* are irrelevant and may be treated as surplusage.” *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972) (emphasis added). An allegation that the underlying offense requiring sex offender registration was an offense listed in Article 7A of Chapter 14 of the North Carolina General Statutes or involved a victim under the age of 16 is an essential element for purposes of the offense set out in N.C. Gen. Stat. § 14-208.18(a) and cannot, for that reason, be treated as mere surplusage. In addition, we do not believe an allegation that Defendant’s conduct was “unlawful” satisfies the requirement that the indictment allege every essential element of an offense under N.C. Gen. Stat. § 14-208.18(a). *Billinger*, ___ N.C. App. at ___, 714 S.E.2d at 206. Alleging that Defendant was a “registered sex offender” and that his conduct was “unlawful” does not, standing alone, provide any notice of the nature of Defendant’s allegedly unlawful conduct or the reason that his alleged conduct was unlawful. As a result, we conclude that neither of the State’s justifications for upholding the challenged “prior offense” allegation have merit.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the indictment returned against Defendant for the purpose of charging him with violating N.C. Gen. Stat. § 14-208.18 was insufficient to confer subject matter jurisdiction upon the trial court. As a result, the trial court’s judgment should be, and hereby is, arrested and Defendant’s convictions are vacated without prejudice to the State’s right to attempt to prosecute Defendant based upon a valid indictment.

VACATED.

JUDGES BRYANT AND ELMORE concur.

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STATE OF NORTH CAROLINA v. BRIAN W. RHODES, JR.

No. COA11-1355

(Filed 3 April 2012)

Criminal Law—new trial—newly discovered evidence—due diligence—different result probable

The trial court did not abuse its discretion in a possession of drugs and drug paraphernalia case by awarding defendant a new trial based upon newly discovered evidence. The confession by defendant's father that the drugs and drug paraphernalia discovered by police were his constituted newly discovered evidence, defendant used due diligence and proper means to attempt to procure the testimony at trial, and the evidence was sufficient to support the trial court's conclusion that the newly discovered evidence would probably result in a different outcome at a new trial.

Appeal by State from order entered 29 July 2011 by Judge Richard Stone in Rockingham County Superior Court. Heard in the Court of Appeals 7 March 2012.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for Defendant-appellee.

HUNTER, JR., Robert N., Judge.

The State appeals from the trial court's order setting aside Defendant's convictions and awarding Defendant a new trial based upon newly discovered evidence. After careful review, we affirm.

I. Factual & Procedural Background

On 5 March 2010, a Rockingham County jury convicted Brian Wendell Rhodes, Jr. ("Defendant") on charges of possession with intent to manufacture, sell, or deliver cocaine and possessing drug paraphernalia. The State's evidence at trial, as summarized in this Court's prior unpublished decision, *State v. Rhodes*, No. COA10-784 (N.C. App. January 4, 2011), *appeal dismissed, disc. rev. denied*, 365 N.C. 196, 709 S.E.2d 921 (2011), tended to show the following:

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On 6 February 2008, Lieutenant David Frizzell of the Reidsville Police Department (“Lieutenant Frizzell”) went to 1001 Fawn Circle in Reidsville, North Carolina, to execute a search warrant. The subjects of the search warrant were the defendant and his father, Brian Rhodes, Sr. (“Rhodes”). Officers knocked on the door and announced their presence and then used a battering ram to open the locked door. Defendant, who Lieutenant Frizzell described as argumentative, was ordered to the floor and restrained with handcuffs. Officers then began searching the residence for narcotics.

Sergeant Jimmy Hutchens of the Reidsville Police Department (“Sergeant Hutchens”) assisted with the execution of the search warrant. Sergeant Hutchens testified that during the search, while defendant was restrained, he noticed that defendant was having difficulty breathing. Defendant asked Sergeant Hutchens for his medication, and Sergeant Hutchens asked defendant where he kept the medication. Defendant told Sergeant Hutchens that “it was in his bedroom, which was to the left at the top of the stairs.” Sergeant Hutchens relayed the information to Lieutenant Frizzell, who retrieved defendant’s medication from on top of a dresser in the bedroom and threw it downstairs to Sergeant Hutchens. Sergeant Hutchens then gave the medication to defendant.

After retrieving defendant’s medication, Coumadin, Lieutenant Frizzell searched the room in which he found defendant’s medication. Officer Woody Hutchens (“Officer Hutchens”) of the Reidsville Police Department assisted him with the search. Officer Hutchens located “a shoebox in the top of the closet with a white, powdery substance in it, as well as a green vegetable, leafy substance.” Officer Hutchens also found a black bag inside the shoebox that had a large bag of white powder, a strainer, scales, and cash. Officer Hutchens next searched the dresser from where Lieutenant Frizzell had retrieved defendant’s medication. Officer Hutchens found defendant’s identification on the dresser. Defendant’s identification had been issued three months earlier, and it listed defendant’s address as 1001 Fawn Circle in Reidsville, North Carolina. Finally, inside the dresser, Officer Hutchens found “a black box with a small bag that appeared to be crack rocks in it.”

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Id. at *1.

Defendant's evidence at trial tended to show that Defendant was not living with his parents and sister at their residence in Reidsville on the evening of 6 February 2008, when the police searched and discovered drugs and drug paraphernalia at that residence. Defendant's mother ("Mrs. Rhodes") testified that Defendant had lived in Greensboro since 2006, that Defendant was visiting on the night in question, and that Defendant had been in the house for "[p]robably about five or ten minutes" when the police arrived to execute the search warrant. Mrs. Rhodes further testified that the cocaine and marijuana recovered by the police during their search of the residence did not belong to her or Defendant. Defendant's father ("Mr. Rhodes") also took the stand and testified that the drugs recovered by the police did not belong to Mrs. Rhodes or Defendant. Mr. Rhodes admitted that he had been convicted of various drug-related offenses over the course of the past ten years and, when asked whether the drugs found by the police were his, Mr. Rhodes replied: "I plead the Fifth."

The jury convicted Defendant on all charges, and the trial court sentenced Defendant to six to eight months' imprisonment. Judge Stone suspended Defendant's sentence and placed Defendant on supervised probation for a period of thirty months. Defendant appealed his convictions to this Court, and we found no error in Defendant's trial. *Id.* The North Carolina Supreme Court subsequently denied Defendant's petition for discretionary review. *See State v. Rhodes*, 365 N.C. 196, 196, 709 S.E.2d 921, 921-22 (2011).

On 28 May 2010, Defendant filed a motion for appropriate relief in Rockingham County Superior Court and moved for a new trial based upon newly discovered evidence. In his motion, Defendant alleged that following his convictions on the drug charges, Mr. Rhodes confessed to a probation officer that the drugs and drug paraphernalia that had served as the basis for Defendant's convictions actually belonged to him.

Defendant's motion for appropriate relief came before Judge Stone at a hearing held on 25 July 2011. Defendant testified that when he went to report at the probation office following his convictions on the drug charges, Mr. Rhodes accompanied him and informed one of the probation officers at the office that the drugs in question were his. Virginia Bullins, the probation officer to whom Mr. Rhodes allegedly confessed, also testified at the hearing and corroborated Defendant's testimony.

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By order entered 29 July 2011, the trial court concluded that Mr. Rhodes' confession to Officer Bullins "is newly discovered evidence, clearly pointing to the guilt of another." The trial court set aside Defendant's convictions and awarded Defendant a new trial. The State filed its notice of appeal with this Court on 1 August 2011.

II. Jurisdiction

This appeal is properly before us, as the State appeals from the superior court's order granting a new trial based upon newly discovered evidence as a matter of right. *See* N.C. Gen. Stat. § 15A-1445(a)(2) (2011); *see also State v. Monroe*, 330 N.C. 433, 436, 410 S.E.2d 913, 915 (1991) (holding that N.C. Gen. Stat. § 15A-1445(a)(2) "grants the State an absolute right to appellate review of a superior court order granting defendant a new trial on the ground of newly discovered evidence").

III. Analysis

The State contends the trial court erred when it granted Defendant's motion for appropriate relief and awarded Defendant a new trial based upon newly discovered evidence. For the reasons that follow, we disagree with the State's contentions, and we hold the trial court did not abuse its discretion in awarding Defendant a new trial based on the new evidence.

A. Standard of Review

To prevail on a motion for appropriate relief based on newly discovered evidence, a criminal defendant must establish the following:

- (1) [A] witness or witnesses will give newly discovered evidence;
- (2) the newly discovered evidence is probably true;
- (3) the evidence is material, competent and relevant;
- (4) due diligence was used and proper means were employed to procure the testimony at trial;
- (5) the newly discovered evidence is not merely cumulative or corroborative;
- (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and
- (7) the evidence is of such a nature that a different result will probably be reached at a new trial.

State v. Beaver, 291 N.C. 137, 143, 229 S.E.2d 179, 183 (1976). The defendant has "the burden at the hearing on his motion for appropriate relief 'of establishing the facts essential to his claim by a preponderance of the evidence.'" *State v. Hardison*, 143 N.C. App. 114,

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120, 545 S.E.2d 233, 237 (2001) (citation omitted); N.C. Gen. Stat. § 15A-1420(c)(5) (2011).

“The decision of whether to grant a new trial in a criminal case on the ground of newly discovered evidence is within the trial court’s discretion and is not subject to review absent a showing of an abuse of discretion. Findings of fact made by the trial court are binding on appeal if they are supported by the evidence.”

State v. Stukes, 153 N.C. App. 770, 773, 571 S.E.2d 241, 244 (2002) (quoting *State v. Wiggins*, 334 N.C. 18, 38, 431 S.E.2d 755, 767 (1993)). The question of whether there is sufficient evidence to support a factual finding entered by the trial court is a question of law, and thus fully reviewable on appeal. See *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998). Accordingly, we undertake a *de novo* review of the questions of law presented by the State’s appeal in the instant case, while affording great deference to the trial court’s conclusions on these questions as required under our abuse of discretion standard.

Before applying our standard of review in the case *sub judice*, however, we note that in its order the trial court labeled two determinations as both findings of fact and conclusions of law. The trial court found as fact, *inter alia*, the following:

The confession to the probation officer is newly discovered evidence[.]

....

The newly discovered evidence is probably true.

These “findings of fact,” which are also labeled by the trial court as “conclusions of law,” reflect two of the seven requirements that must be established by a criminal defendant in moving for appropriate relief based upon newly discovered evidence. See *Beaver*, 291 N.C. at 143, 229 S.E.2d at 183. In its order, the trial court’s conclusions of law mirror these seven requirements. A determination that the defendant has met his burden in satisfying one of these requirements involves the application of legal principles and judicial reasoning and is more properly classified as a conclusion of law. See *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997). We therefore reclassify these mislabeled “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

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appellate court can reclassify an item before applying the appropriate standard of review.”).

B. The State’s Appeal

The State first contends Defendant failed to produce newly discovered evidence because the information revealed by Mr. Rhodes’ confession could have been elicited through due diligence at trial. We disagree.

Defendant was required to establish before the trial court that a “witness or witnesses will give newly discovered evidence,” and, further, that “due diligence was used and proper means were employed to procure the testimony at trial.” *Beaver*, 291 N.C. at 143, 229 S.E.2d at 183. “Newly discovered evidence is evidence which was in existence but not known to a party at the time of trial.” *State v. Nickerson*, 320 N.C. 603, 609, 359 S.E.2d 760, 763 (1987).

In the instant case, Defendant offered Officer Bullins’ testimony regarding Mr. Rhodes’ confession as newly discovered evidence. Mr. Rhodes did not admit to exclusive ownership of the drugs in question until after Defendant’s trial. As an out of court statement against interest, the defense would have been able to examine Mr. Rhodes during its case regarding this issue. *See* N.C. Gen. Stat. § 8C-1, Rule 804(b)(3) (2011). Without this admission the evidence of ownership of the drugs was ambiguous as to whether Defendant, Mr. Rhodes, or both Defendant and Mr. Rhodes owned or possessed the drugs. Officer Bullins’ testimony regarding Mr. Rhodes’ confession is therefore newly discovered evidence.

Moreover, the defense exercised due diligence in attempting to procure this information at trial by calling Mr. Rhodes as witness and specifically asking him whether the drugs in question were his. Mr. Rhodes elected to exercise his constitutional right against self-incrimination, prompting the trial court to excuse Mr. Rhodes as a witness and thus ensuring that defense counsel would have no further opportunity to elicit testimony from Mr. Rhodes.

The defense also called Mrs. Rhodes as a witness, and the following exchange took place between defense counsel and Mrs. Rhodes on redirect examination:

[Defense counsel]: The cocaine. Was the cocaine and marijuana, was it yours?

[Mrs. Rhodes]: No.

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[Defense counsel]: Okay. Was it Mr. Rhodes?

[Mrs. Rhodes]: I'm not going to answer that. That's my husband.

[Defense counsel]: No, I'm saying your son.

[Mrs. Rhodes]: Oh, no.

While it is true defense counsel did not press Mrs. Rhodes on the question of whether the drugs in question belonged to Mr. Rhodes, it is clear from the preceding exchange that Mrs. Rhodes was unwilling to implicate her husband and that any attempt to elicit this information would have been futile. We also note that defense counsel did not ask Defendant during his trial testimony whether the drugs belonged to Mr. Rhodes. However, Defendant may not have known who possessed the drugs, and, moreover, we cannot say that defense counsel's failure to cast aspersions upon Mr. Rhodes to the maximum extent possible equates to a lack of due diligence. We hold the trial court did not err in concluding that Defendant established the due diligence requirement.

The State next takes issue with the trial court's conclusion that Mr. Rhodes' confession was "probably true." *See Beaver*, 291 N.C. at 143, 229 S.E.2d at 183. The State insists that the trial court was presented with insufficient evidence to make this determination. We disagree. As the State concedes, "it is for the trial court to assess the credibility of a witness." *State v. Williamson*, ___ N.C. App. ___, ___, 698 S.E.2d 727, 731 (2010), *vacated on other grounds*, 365 N.C. 326, ___ S.E.2d ___ (2011). Judge Stone presided over Defendant's trial and was intimately familiar with the circumstances of the case. In addition, Judge Stone took judicial notice of Mr. Rhodes' "history of violating drug laws in the past," which was information previously revealed during defense counsel's direct examination of Mr. Rhodes at trial. Accordingly, we hold the trial court did not err in concluding that the newly discovered evidence is probably true.

The State further contends that Mr. Rhodes' confession would not exculpate Defendant in a new trial. *See Beaver*, 291 N.C. at 143, 229 S.E.2d at 183 (requiring the new evidence be "of such a nature that a different result will probably be reached at a new trial"). We disagree.

The jury in the instant case could have concluded based on the circumstances that Defendant, Mr. Rhodes, or Defendant and Mr. Rhodes owned or possessed the drugs in question. However, while a jury may draw adverse inferences against parties to *civil actions* when

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they assert their Fifth Amendment right against self-incrimination, see *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1975), the Fifth Amendment does not permit the jury to draw such inferences in a criminal case. See *Namet v. United States*, 373 U.S. 179, 185-86 (1963). Thus, the jury here was not permitted to infer from Mr. Rhodes' exercise of his Fifth Amendment rights that he owned or possessed the drugs in question. See *State v. Pickens*, 346 N.C. 628, 639, 488 S.E.2d 162, 168 (1997). The jury was presented with no evidence other than the circumstances under which the drugs were recovered to determine who owned or possessed them. With this new evidence—Mr. Rhodes' confession—a new jury would now have an affirmative statement that Mr. Rhodes alone possessed the drugs. We hold this evidence is sufficient to support the trial court's conclusion that the newly discovered evidence would probably result in a different outcome at a new trial.

IV. Conclusion

We have carefully reviewed Defendant's remaining arguments, and we conclude they are without merit. Therefore, as we have determined the trial court did not err in concluding that Defendant met his burden with respect to each of the seven requirements for a new trial on grounds of newly discovered evidence, we hold that the trial court did not abuse its discretion in granting Defendant's motion for appropriate relief and awarding Defendant a new trial.

For the foregoing reasons, we affirm the order of the trial court.

Affirmed.

Judge BEASLEY concurs.

Judge BRYANT concurs in the result only.

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[219 N.C. App. 607 (2012)]

TODD HURLEY, EMPLOYEE, PLAINTIFF v. WAL-MART STORES, INC., EMPLOYER,
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, CARRIER, (CLAIMS
MANAGEMENT, INC., THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA11-1107

(Filed 3 April 2012)

Workers' Compensation—attorney fees—appeal from deputy commissioner—issue not addressed

An opinion and award of the Industrial Commission awarding past and future healthcare expenses for plaintiff's compensable knee injury and attorney fees was reversed and remanded to the Industrial Commission as it failed to address the issue presented by the defendants' appeal from the order of the deputy commissioner, the award of attorney's fees under N.C.G.S. § 97-90.

Appeal by plaintiff and defendants from Opinion and Award entered 4 May 2011 and order entered 7 July 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 January 2012.

Wallace and Graham, P.A., by Whitney V. Wallace, for plaintiff appellant/appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones, for defendant appellant/appellee.

STROUD, Judge.

Todd Hurley ("plaintiff") appeals and Wal-Mart Stores, Inc., Insurance Company of the State of Pennsylvania, and Claims Management, Inc. (referred to collectively as "defendants") cross-appeal from an opinion and award of the full commission awarding past and future healthcare expenses for plaintiff's compensable knee injury and attorney's fees and the order denying their motion for reconsideration. For the following reasons, we reverse the 4 May 2011 opinion and award of the full commission, as it failed to address the issues presented by the defendants' appeal from the order of the deputy commissioner, and we remand to the full commission for further proceedings.

I. Background

The uncontested findings in the full commission's opinion and award establish that on 30 October 2008, plaintiff was working as a

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co-manager at defendant Wal-Mart's store in Greensboro, North Carolina, when he was escorting an alleged shoplifter to the store's loss-prevention area. As plaintiff was walking beside the woman holding her by the right arm, she "jerked aggressively to the left[.]" Plaintiff felt sharp pain in his left knee, and his "left knee buckled inward, and he went down to the floor." Immediately after, plaintiff also "felt slight pain in his right knee" which "got progressively worse after that." On 30 October 2008, plaintiff filed an Industrial Commission Form 19 "Employer's Report of Employee's Injury" listing injuries to both knees. Defendants accepted plaintiff's left knee injury and provided all medical and indemnity benefits related to that compensable injury. However, defendants denied plaintiff's injury to his right knee claiming that this condition or injury did not arise out of and was not in the course or scope of his employment. On 2 September 2009, plaintiff filed a Form 33 requesting that his worker's compensation claim be assigned for a hearing. Plaintiff's claim was heard before a deputy commissioner, who issued an opinion and award on 30 September 2010, finding that plaintiff had suffered a compensable injury by accident to his right knee and awarding plaintiff payment for all medical treatment he has received for his compensable right knee condition since 30 October 2008 and further medical treatment of his compensable injury. The deputy commissioner also concluded that defendants had defended the claims on reasonable grounds and plaintiff was not entitled to attorney's fees under N.C. Gen. Stat. § 97-88.1, but plaintiff's counsel was "entitled to recover attorney's fees pursuant to a petition under N.C. Gen. Stat. § 97-90(c). *Palmer v. Jackson*, 157 N.C. App. 625 (2003)." The deputy commissioner's "award" section stated

4. Within 15 days of her receipt of this Opinion and Award, Plaintiff's counsel should submit to the undersigned a petition for an attorney's fee and proposed Order pursuant to the provisions of N.C. Gen. Stat. § 97-90(c). Among the other documentation required pursuant to said provisions, Plaintiff's counsel should provide an itemization of the time spent by her and her staff on this claim. Thereafter, the undersigned will file an Order setting Plaintiff's attorney's fee.

Defendants were also ordered to pay costs including an expert witness fee. Plaintiff's counsel submitted an affidavit showing that the firm had spent "approximately 44 hours" on his case, which amounted to a total of \$6,350.00 in attorney's fees. By order entered 12 October 2010, the deputy commissioner awarded plaintiff's counsel \$5,500.00 in attorney's fees to be paid by defendants.

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On 14 October 2010, defendants filed notice of appeal to the full commission. The Form 44 filed by defendants identified two issues for appeal to the full commission:

1. Conclusion of Law No. 8 is contrary to law, is not supported by the findings of fact, and is contrary to the competent and credible evidence of record. Without exclusion, the findings of fact and competent and credible evidence of record do not support a conclusion that Plaintiff is entitled to any attorneys' fees to be paid by Defendants.
2. Award No. 4, as well as the Order dated October 12, 2010 awarding Plaintiff's attorney's fees are each contrary to law, not supported by the findings of fact, and contrary to the competent and credible evidence of record.

The full commission in its opinion and award affirmed, with some modifications, the deputy commissioner's opinion and award. Specifically, the full commission affirmed the deputy's conclusion that plaintiff's right knee condition was a compensable injury and the award of payment for past and future medical treatment of that condition. As to attorney's fees, the full commission concluded:

9. Defendants have not defended this claim without reasonable grounds, and Plaintiff is thus not entitled to attorney's fees under N.C. GEN. STAT. § 97-88.1.
10. Plaintiff's counsel is entitled to recover attorney's fees pursuant to N.C. GEN. STAT. § 97-88.

In its award, the full commission stated:

4. Within 15 days of receipt of this Opinion and Award, Plaintiff's counsel should submit to the Full Commission an affidavit of time spent defending this appeal before the Full Commission pursuant to the provisions of N.C. GEN. STAT. § 97.88. Thereafter, the undersigned will file an Order setting Plaintiff's attorney's fee.

The full commission made no mention of the deputy's award of attorney's fees pursuant to N.C. Gen. Stat. § 97-90(c). On 13 May 2011, defendants filed a motion to reconsider the full commission's 4 May 2011 opinion and award, arguing "[t]he only award that Defendants appealed, the award of attorney's fees [pursuant to N.C. Gen. Stat. § 97-90(c)] at the Deputy Commissioner level, was not affirmed in the Full Commission Opinion and Award" and "no grounds exist in this

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case for an award of attorney's fees for the appeal under § 97-88." In plaintiff's response to defendants' motion, plaintiff argued that the award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88 was proper and supported by the record. On 7 June 2011, plaintiff appealed to this Court from the full commission's 4 May 2011 opinion and award. On 8 June 2011, defendants also filed notice of appeal. On 7 July 2011, the full commission denied defendants' motion to reconsider, stating "that adequate grounds do not exist to reconsider or amend the May 4, 2011 Opinion and Award[.]" On 13 May 2011, plaintiff's counsel filed an affidavit indicating that 16 hours had been spent on plaintiff's appeal to the full commission and, by order dated 7 July 2011, the full commission awarded plaintiff's counsel \$3,000.00 in attorney's fees, pursuant to N.C. Gen. Stat. § 97-88. On 11 July 2011, defendants appealed to this Court from the denial of their motion to reconsider and from the order awarding attorney's fees pursuant to N.C. Gen. Stat. § 97-88. On appeal, plaintiff contends that the full commission erred in failing to address the issue of the deputy commissioner's award of attorney's fees pursuant to N.C. Gen. Stat. § 97-90(c). On cross-appeal, defendants contend that the full commission erred in awarding attorney's fees pursuant to N.C. Gen. Stat. § 97-88.

II. Defendants' appeal

We begin with defendants' appeal, as it addresses the first award of attorney's fees, for the plaintiff's representation at the deputy commissioner hearing level. Defendants contend that as a matter of law attorney's fees pursuant to N.C. Gen. Stat. § 97-88 were in error because (1) "[d]efendants did not appeal any of the [deputy commissioner's] awards relating to compensability or benefits from the Deputy Commissioner's Opinion and Award" as defendants had accepted the deputy commissioner's decision and had begun payment of medical compensation for treatment of plaintiff's right knee; (2) the only issue they appealed was the award of attorney's fees pursuant to N.C. Gen. Stat. § 97-90(c); and (3) they were successful in their appeal of that one issue as the full commission reversed the deputy commissioner's award of attorney's fees pursuant to N.C. Gen. Stat. § 97-90(c). Plaintiff counters that the full commission acted well within its authority in awarding attorney's fees pursuant to N.C. Gen. Stat. § 97-88.

As defendants contend that the full commission made an error of law, we apply a *de novo* review. See *Salomon v. Oaks of Carolina*, ___ N.C. App. ___, ___, 718 S.E.2d 204, 206 (2011). Before we can address

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any of the substantive arguments regarding awards of attorney's fees raised by either party, we first note that the full commission addressed issues other than the award of attorney's fees, although this was the *only* issue raised by defendants' Form 44 Application for Review. The full commission did not have authority to address these additional issues under the Workers' Compensation Rules of the North Carolina Industrial Commission. Rule 701 provides, in pertinent part, as follows:

(2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for the appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds, as provided in paragraph (3). Appellant's completed Form 44 and brief must be filed and served within 25 days of appellant's receipt of the transcript or receipt of notice that there will be no transcript, unless the Industrial Commission, in its discretion, waives the use of the Form 44. The time for filing a notice of appeal from the decision of a Deputy Commissioner under these rules shall be tolled until a timely motion to amend the decision has been ruled upon by the Deputy Commissioner.

(3) Particular grounds for appeal not set forth in the application for review *shall be deemed abandoned, and argument thereon shall not be heard before the Full Commission.*

Workers' Comp. R. of N.C. Indus. Comm'n 701 (emphasis added).

Instead of addressing the one issue which was clearly presented—the deputy commissioner's award of attorney's fees—the full commission's opinion and award stated the issues raised by the appeal as follows:

1. Whether Plaintiff's right knee condition is compensable in this claim?
2. If so, to what compensation is Plaintiff entitled?
3. Whether Plaintiff should be compelled to execute an Industrial Commission Form 26A, *Employer's Admission of*

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Employee's Right to Permanent Partial Disability, for his compensable left knee injury?

(Emphasis in original.) The full commission also stated that it “reviewed the prior Opinion and Award based upon the record of the proceedings before the Deputy Commissioner and the briefs and arguments of the parties. The appealing party has not shown good grounds to reconsider the evidence, receive further evidence, or rehear the parties or their representatives.” The above statement of the issues raised by the appeal is baffling, as defendants clearly did not appeal any issue of compensability of plaintiff’s injury. The full commission addressed only issues that were not appealed and ignored the one issue which was appealed, which was the deputy commissioner’s award of attorney’s fees under N.C. Gen. Stat. § 97-90.

The full commission does not have the authority to waive or violate its own rules. *See Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 744, 619 S.E.2d 907, 910 (2005) (“[T]he portion of Rule 701 requiring appellant to state with particularity the grounds for appeal may not be waived by the Full Commission. Without notice of the grounds for appeal, an appellee has no notice of what will be addressed by the Full Commission. The Full Commission violated its own rules by failing to require that plaintiff state with particularity the grounds for appeal and thereafter issuing an Opinion and Award based solely on the record. For the foregoing reasons, we reverse the Full Commission and vacate its Opinion and Award.”)

We further note that N.C. Gen. Stat. § 97-85 (2009), in pertinent part, states that

[i]f application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]

Here, defendants appealed to the full commission but, as noted above, the only issues raised in their Form 44 were related to the deputy commissioner’s award of attorney’s fees pursuant to N.C. Gen. Stat. § 97-90; defendants did not challenge any of the deputy commissioner’s findings or conclusions regarding plaintiff’s compensable injury to his right knee or the award of payment for treatment for that condition and, therefore, those determinations of the Deputy

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Commissioner were not at issue and were *not* before the full commission for review. We have stated that “[w]hen the matter is ‘appealed’ to the full Commission pursuant to G.S. 97-85, it is the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties.” *Vieregge v. N.C. State University*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992) (citation omitted) (emphasis added). Defendants having filed a Form 44 are “entitled to have the full Commission respond to the questions directly raised by [their] appeal.” *Id.* at 639, 414 S.E.2d at 774. Despite the lack of any issue “in controversy” on appeal to the full commission, and presumably any argument, regarding the compensability of plaintiff’s injury, the full commission proceeded to address the facts and issues of compensability at length, to the exclusion of the only issue specifically raised by defendants’ appeal of the deputy commissioner’s award.

Understandably, defendants made a motion to reconsider before the full commission regarding its omission of a determination regarding attorney’s fees pursuant to N.C. Gen. Stat. § 97-90(c). Inexplicably, this motion was denied. We hold that this denial was in error. The proper procedure for addressing the issue of attorney’s fees pursuant to Section 97-90(c) would have been for the full commission to make its findings and conclusions, and then either party who desired review could appeal that decision to the superior court.

We note that under N.C. Gen. Stat. § 97-90(c), the issue of attorney’s fees arising from an opinion and award of the full commission would be appealable to the superior court, and thus would be subject to dismissal if appealed directly to this Court instead of the superior court. In *Creel v. Town of Dover*, 126 N.C. App. 547, 486 S.E.2d 478 (1997), the plaintiff appealed to this Court arguing that the full commission failed to address the issue of attorney’s fees pursuant to N.C. Gen. Stat. § 97-90(c). *Id.* at 551, 486 S.E.2d at 480. However, the deputy commissioner’s opinion and award had failed to address the issue of attorney’s fees, and plaintiff had not raised the deputy commissioner’s failure to address attorney’s fees in “his appeal to the Commission, which likewise failed to address the issue in its Opinion and Award.” *Id.* The plaintiff appealed to this Court instead of to the superior court, arguing that “he had no right to appeal the decision of the Commission to the superior court because the former’s Opinion and Award omitted any reference to counsel fees.” *Id.* at 552, 486 S.E.2d at 480. We rejected this argument, noting that

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[h]ad he or his attorney brought the matter to the superior court in the manner set out in G.S. § 97-90, the Commission would thereby have been compelled to explain its failure to award counsel fees. Perhaps, as plaintiff claims, the Commission neglected to do so because of mere oversight. Whatever the explanation for the Commission's omission, however, neither plaintiff nor his attorney complied with G.S. § 97-90. Plaintiff's appeal of the Commission's decision (or lack thereof) as to counsel fees is therefore dismissed.

Id. In contrast, here, plaintiff did address the issue of the award of attorney's fees pursuant to N.C. Gen. Stat. § 97-90(c) before the deputy commissioner; the deputy commissioner awarded attorney's fees; defendants appealed the attorney's fees specifically in their Form 44 and requested that this issue be addressed in their motion for reconsideration. Despite the efforts of both parties to have the full commission rule upon the issue, the full commission failed to make any findings or conclusions regarding the attorney's fees ordered by the deputy commissioner pursuant to N.C. Gen. Stat. § 97-90(c). Thus, instead of dismissing the appeals of both parties, both of whom complied with the workers' compensation rules in their attempts to have the full commission address the issue of attorney's fees, we must instead reverse the opinion and award and remand for consideration of the issue actually raised on defendant's appeal to the full commission, the award of attorney's fees under N.C. Gen. Stat. § 97-90. For this reason, we are unable to address the legal arguments of either party as to the awards of attorney's fees under either N.C. Gen. Stat. §§ 97-90 or 97-88, as neither the full commission nor the superior court has addressed these issues as required by statute.

REVERSED AND REMANDED.

Judges STEPHENS and BEASLEY concur.

CRUMLEY & ASSOCS., P.C. v. CHARLES PEED & ASSOCS., P.A.

[219 N.C. App. 615 (2012)]

CRUMLEY & ASSOCIATES, P.C., PLAINTIFF v. CHARLES PEED & ASSOCIATES, P.A.,
JAMES W. SNYDER, JR., AND CHARLES O. PEED, JR., DEFENDANTS

No. COA11-1077

(Filed 3 April 2012)

1. Attorney Fees—quantum meruit claim—based on reasonable value of plaintiff’s services—clean hands doctrine inapplicable

The trial court did not err in an action involving the parties’ respective claims of entitlement to certain attorney fees when it permitted plaintiff to recover in *quantum meruit*. Plaintiff’s *quantum meruit* claim and the trial court’s award were based upon the reasonable value of plaintiff’s services while it handled each of the cases and the clean hands doctrine did not bar plaintiff’s equitable recovery.

2. Attorney Fees—reimbursement for advanced costs—obligation remained with clients

The trial court erred in an action involving the parties’ respective claims of entitlement to certain attorney fees when it awarded plaintiff reimbursement for costs advanced by it on behalf of those clients who chose to follow defendant Snyder when he departed from plaintiff’s employment. The obligation for reimbursement of those costs remained with the clients and plaintiff had no right of recovery of those costs against defendant Peed & Associates.

3. Attorney Fees—constructive fraud—no fiduciary relationship

The trial court erred in an action involving the parties’ respective claims of entitlement to certain attorney fees by granting summary judgment against defendant Peed, holding him liable to plaintiff for constructive fraud. There was no discrepancy in bargaining power between the two parties, competing at arms-length as lawyers in a legal dispute, concerning the matter at issue, and thus, no fiduciary relationship arose with respect thereto.

Appeal by plaintiff and defendant from judgment entered 30 September 2010 by Judge John O. Craig, III in Forsyth County Superior Court. Heard in the Court of Appeals 6 March 2012.

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Tuggle Duggins & Meschan P.A., by Michael S. Fox, Jeffrey S. Southerland, and Alan B. Felts, for plaintiff-appellant.

Bennett & Guthrie, P.L.L.C., by Richard V. Bennett, Joshua H. Bennett, and Roberta King Latham, for defendant-appellant Charles Peed & Associates, P.A.

Charles O. Peed, Jr., pro se, for defendant-appellant.

MARTIN, Chief Judge.

Plaintiff, Crumley & Associates, P.C., (“Crumley”) brought this action alleging various claims for relief against defendant Charles Peed & Associates, P.A., (“Peed & Associates”) and the individual defendants, Charles Peed, Jr. (“Peed”) and James W. Snyder, Jr. (“Snyder”). The genesis of the dispute involves the parties’ respective claims of entitlement to certain attorneys fees awarded to Snyder in contingent fee cases which originated while he was an employee of Crumley, but which were collected by Peed & Associates after Snyder left Crumley’s employ and became employed by Peed & Associates. Crumley sought to recover damages against Peed & Associates on various theories, including breach of contract, constructive trust, *quantum meruit*, and against the individual defendant, Charles Peed, for constructive fraud.

Briefly summarized, the voluminous record filed in this Court reflects that prior to 29 January 2007, Snyder was employed by Crumley as an associate attorney. While employed by Crumley, Snyder was required to sign an employment contract which contained, *inter alia*, provisions stating that if Snyder left Crumley’s employ:

Upon a client choosing to have Mr. Snyder represent them in the future, Mr. Snyder shall, within 30 days, pay to the firm any funds the firm has advanced to the client.

....

Mr. Snyder agrees to pay to the firm 70% of the fees he may receive from his continued representation of the client in the matter for which the firm was representing the client at the time of his departure.

On 29 January 2007, Crumley terminated Snyder’s employment. Snyder thereafter secured employment with Peed & Associates. Crumley sent a letter to each of Snyder’s clients informing them, as is required by the North Carolina State Bar, that they had a choice

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whether to continue to be represented by Crumley, follow Snyder to Peed & Associates, or obtain other representation. Between twenty-eight and thirty-three clients decided to continue their attorney-client relationship with Snyder. These clients were primarily workers' compensation claimants in North Carolina and Virginia whose cases were being handled by Snyder on a contingent fee basis. In the months that followed, cases that had followed Snyder to Peed & Associates began to settle, and Snyder was awarded fees based on the contingent fee agreements. On 4 May 2007, attorneys for Crumley wrote Peed and Peed & Associates notifying them that Crumley claimed entitlement to a portion of the fees awarded to Snyder in those cases based on the fee provision in Snyder's compensation agreement with Crumley. Alternatively, plaintiff sought to have the fees held in trust and specifically requested that

all fees in all such cases must be held until the final resolution of the dispute over the fees in the subject cases. Assuming that the fee provisions in Snyder's Compensation Agreement with [Crumley] are invalid and unenforceable, we will still have to address fee allocation and will have to do so on a case-by-case, quantum meruit basis.

(Emphasis in original.) Despite receiving the letter, Peed deposited the disputed fees into the operating account for Peed & Associates, where the money was later used to pay the firm's general operating expenses, including Snyder's salary.

Snyder sought an opinion from the North Carolina State Bar regarding the enforceability of the pertinent sections of his compensation agreement with Crumley. In 2008, the Ethics Committee of the State Bar issued a Proposed Ethics Opinion, later adopted by the State Bar Council as 2008 FEO 8, which addressed the ethical implications of fee-splitting provisions identical to those found in Snyder's compensation agreement with Crumley. The opinion concluded the 70/30% fee-split and provision requiring repayment of advanced costs within thirty days did not comply with the provisions of Rule 5.6 of the Rules of Professional Conduct.

Defendants moved for summary judgment. Crumley thereafter submitted to a voluntary dismissal of a number of its claims, including those for declaratory judgment and breach of contract, but pursued its claims against Snyder, against Peed & Associates for a portion of the fees based in *quantum meruit*, and against Peed for constructive fraud. After a hearing, the trial court granted summary

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judgment dismissing Crumley's claims against Snyder, denied the motions of Peed & Associates and Peed, and entered summary judgment in favor of Crumley with respect to the liability of Peed & Associates for a portion of the fees in *quantum meruit* and Peed individually for constructive fraud.

The parties thereafter stipulated to the amount of fees received by Peed & Associates in each of the cases, the periods of time each of the respective firms handled each case, and the professional time expended by each firm in connection with each case. The trial court heard evidence without a jury on the question of damages and entered judgment awarding Crumley \$147,946.53 in *quantum meruit* as its reasonable share of the attorneys fees collected by Peed & Associates, together with \$7,577.12 for costs and expenses which Crumley advanced in connection with the cases. The trial court also awarded Crumley \$1.00 in nominal damages against Peed, individually, for constructive fraud. Crumley, Peed, and Peed & Associates appeal.

Initially, we are constrained to observe that both Crumley and Peed, in their briefs and at oral argument, freely trade suggestions and outright allegations that the other has engaged in unprofessional and even unethical conduct, perhaps hoping thereby to persuade the Court toward deciding for the party engaging in the least egregious conduct. Those questions are better left to the State Bar and the parties' peers, and we reject their attempts, in exchanging affronts, to obfuscate the purely legal issues their dispute has presented, first to the trial court, and now to this Court.

The trial court granted summary judgment in favor of Crumley on the issues of liability, and those determinations are the primary issues presented for our review. "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] Defendant Peed & Associates asserts the trial court erred when it permitted Crumley to recover in *quantum meruit*, arguing that because the fee-splitting provisions of Crumley's compensation agreement with Snyder violated the Rules of Professional Conduct, they were unenforceable and, essentially, that Crumley's attempts to

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enforce the agreement amounted to “unclean hands.” We reject this argument.

“*Quantum meruit* is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment.” *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998). An action in *quantum meruit* cannot stand if there is an enforceable contract. *Id.* at 42, 497 S.E.2d at 415.

The “clean hands” doctrine prevents recovery in equity where the party seeking relief comes to court with unclean hands. *Ray v. Norris*, 78 N.C. App. 379, 384, 337 S.E.2d 137, 141 (1985), *disc. review denied*, 316 N.C. 378, 342 S.E.2d 897 (1986). “The maxim applies to the conduct of a party with regard to the specific matter before the court as to 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).

We believe the law is settled in North Carolina that counsel, who has provided legal services pursuant to a contingency fee contract and is terminated prior to a resolution of the case and the occurrence of the contingency upon which the fee is based, has a claim in *quantum meruit* to recover the reasonable value of those services from the former client, or, where the entire contingent fee is received by the former client’s subsequent counsel, from the subsequent counsel. See *Pritchett & Burch, PLLC v. Boyd*, 169 N.C. App. 118, 124-25, 609 S.E.2d 439, 443, *disc. review denied*, 359 N.C. 635, 616 S.E.2d 543 (2005); *Guess v. Parrott*, 160 N.C. App. 325, 331, 585 S.E.2d 464, 468 (2003).

In the instant case, neither Crumley’s *quantum meruit* claim nor the trial court’s award were based upon the unenforceable fee-splitting agreement; rather, they were based upon the reasonable value of Crumley’s services while it handled each of the cases. Thus, the fact that the fee-splitting agreement was determined to be in violation of the Rules of Professional Conduct and unenforceable is of no consequence to Crumley’s right of recovery in *quantum meruit*. Crumley had enforceable contingency fee agreements with its former clients, who chose to follow Snyder to Peed & Associates, and Crumley is entitled to recover the reasonable value of its services rendered pursuant to those contingency fee agreements.

Moreover, “[t]he doctrine of clean hands is only available to a party who was injured by the alleged wrongful conduct.” *Ray*, 78 N.C. App. at 385, 337 S.E.2d at 142. Here, the fee-splitting agreement

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between Crumley and Snyder is not the specific matter before the court; Peed & Associates can claim no injury by any wrongful conduct by Crumley relating thereto. Therefore, the clean hands doctrine does not bar Crumley's equitable recovery in *quantum meruit* from Peed & Associates of the reasonable value of fees to which it was entitled under its contingency fee contracts with its former clients.

II.

[2] Peed & Associates also contends the trial court erred when it awarded Crumley \$7,577.12 as reimbursement for costs advanced by it on behalf of those clients who chose to follow Snyder when he departed from Crumley. We conclude there is merit to Peed & Associates' argument in this regard.

Costs advanced for a client are the client's financial responsibility; a departing lawyer may not be made liable to a prior firm for this debt. 2008 N.C. Eth. Op. 8. The prior firm may pursue any legal claim it has against the client and, pursuant to an employment agreement, may require the departing lawyer to protect the firm's interest when receiving reimbursement for costs advanced from any settlement or judgment received by the client. *Id.* Here, there is no evidence that Peed & Associates sought or received reimbursement for the \$7,577.12 in costs which Crumley advanced prior to Snyder's departure. The obligation for reimbursement of those costs, therefore, remained with the clients and Crumley has no right of recovery of those costs against Peed & Associates. Accordingly, we must reverse the trial court's award of \$7,577.12 for advanced costs to Crumley.

III.

[3] Defendant Peed, in his individual capacity, contends the trial court erred in granting summary judgment holding him liable to Crumley for constructive fraud. We agree.

To establish constructive fraud, a plaintiff must show that defendant (1) owes plaintiff a fiduciary duty; (2) breached this fiduciary duty; and (3) sought to benefit himself in the transaction. *Sullivan v. Mebane Packaging Grp.*, 158 N.C. App. 19, 32, 581 S.E.2d 452, 462, *disc. review denied*, 357 N.C. 511, 588 S.E.2d 473 (2003). "A confidential or fiduciary relation can exist under a variety of circumstances and is not limited to those persons who also stand in some recognized legal relationship to each other . . ." *Stilwell v. Walden*, 70 N.C. App. 543, 546, 320 S.E.2d 329, 331 (1984). "[I]t extends to any possible case in which a fiduciary relation exists in fact, and in which

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there is confidence reposed on one side, and resulting domination and influence on the other.” *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (internal quotation marks and citation omitted). “Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the ‘special circumstance’ of a fiduciary relationship has arisen.” *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 348 (4th Cir. 1998). Determining whether a fiduciary relationship exists requires looking at the particular facts and circumstances of a given case. *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 665, 391 S.E.2d 831, 832 (1990). North Carolina courts generally find that parties who interact at arms-length do not have a fiduciary relationship with each other, even if they are mutually interdependent businesses. *Id.* at 666, 391 S.E.2d at 833.

Rule of Professional Conduct 1.15-2(g) provides that “if [a] lawyer’s entitlement [to fees] is disputed, the disputed amounts shall remain in the trust account or fiduciary account until the dispute is resolved.” N.C. Revised R. Prof’l Conduct Rule 1.15-2. Crumley asserts that a trustee-beneficiary fiduciary relationship arose when Peed received attorneys fees in the disputed cases and, knowing that Crumley claimed entitlement to a portion of the fees, failed to hold the funds in trust as required under Rule of Professional Conduct 1.15-2(g). However, Crumley has cited no authority, and we can find none, which supports its contention that a violation of a rule of professional conduct would give rise to any type of trust relationship between attorneys under such circumstances. Indeed, Peed correctly calls to our attention the general rule that a violation of a rule of professional conduct, “in an of itself,” does not give rise to civil liability in North Carolina. *McGee v. Eubanks*, 77 N.C. App. 369, 374, 335 S.E.2d 178, 181-82 (1985), *disc. review denied*, 315 N.C. 589, 341 S.E.2d 27 (1986); *see also* N.C. Revised R. Prof’l Conduct Rule 0.2[7].

Crumley also contends a fiduciary relationship arose in this case based on the particular facts and circumstances present here, evidencing as a matter of law that it reposed a confidence in Peed to protect its interest in the disputed fees and that Peed possessed all of the power and exercised domination and control with respect to the matter. However, the cases in which North Carolina courts have found fiduciary relationships to exist based on one party’s domination or influence typically involve a discrepancy in bargaining power. *See, e.g., Tin Originals, Inc.*, 98 N.C. App. at 666, 391 S.E.2d at 833. Here, no discrepancy in bargaining power has been shown between the two

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parties, competing at arms-length as lawyers in a legal dispute, concerning the matter at issue, and thus, no fiduciary relationship has arisen with respect thereto. There being no fiduciary duty owed to Crumley by Peed, Crumley's claim for constructive fraud must fail. Our decision renders moot Crumley's appeal from the award of only nominal damages. We have considered the remaining legal arguments advanced by the parties and conclude they are wholly without merit, and we reject them without discussion.

In summary, we hold the trial court correctly entered summary judgment concluding Crumley is entitled to recover from Peed & Associates, in *quantum meruit*, the reasonable value of the legal services rendered pursuant to its contingency fee contracts with its former clients before terminating the attorney-client relationship with Crumley. There being no issue raised as to the amount of the fees to which Crumley is entitled, we affirm the judgment establishing the amount thereof as \$147,946.12. We hold the trial court erred by awarding judgment in favor of Crumley and against Peed & Associates for costs and expenses advanced by Crumley, but not recovered by Peed & Associates, and we therefore reverse the trial court's award in the amount of \$7,577.12 for those costs and expenses. Finally, we hold the trial court erred in granting summary judgment finding Peed liable to Crumley for constructive fraud and we reverse the judgment awarding Crumley \$1.00 in nominal damages.

Affirmed in part, reversed in part.

Judges HUNTER and STEPHENS concur.

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HERITAGE OPERATING, L.P. PLAINTIFF v. N.C. PROPANE EXCHANGE, LLC,
KENDALL T. RHINE, KENDALL L. RHINE, JANICE G. RHINE, ANTHONY L.
RHINE, CHRISTY LAMBETH, AND CRAIG LAMBETH, DEFENDANTS

No. COA11-1212

(Filed 3 April 2012)

Appeal and Error—interlocutory orders and appeals—denial of summary judgment—substantial right not affected

Defendant's appeal from the trial court's order denying defendant's motion for summary judgment in a case involving a non-compete agreement was dismissed as interlocutory. The appeal did not affect a substantial right as there was no possibility of a verdict in the instant case being inconsistent with any previous judicial determinations.

Appeal by defendants from order entered 6 June 2011 by Judge Richard D. Boner in Davidson County Superior Court. Heard in the Court of Appeals 22 February 2012.

Young Moore and Henderson P.A., by Christopher A. Page and Michael S. Rainey, and GlassWilkin, PC, by R. Charles Wilkin, pro hac vice, for the plaintiff.

Pinto Coates Kyre & Brown, PLLC, by Brady A. Yntema and Jon Ward, and Jackson Kelly, PLLC, by Chad J. Sullivan, for defendants N.C. Propane Exchange, LLC, Kendall T. Rhine, Kendall L. Rhine, Janice G. Rhine, and Anthony L. Rhine.

THIGPEN, Judge.

N.C. Propane Exchange, LLC, (“N.C. Propane”), Kendall T. Rhine, Kendall L. Rhine, Janice G. Rhine, and Anthony L. Rhine (collectively, “Defendants”) appeal from the denial of their motion for summary judgment on the basis that prior verdicts in Texas and Kentucky constitute *res judicata* and collateral estoppel. We must determine whether the trial court properly denied Defendants’ motion for summary judgment. Because the present case does not involve the same factual issues and there is no possibility of inconsistent verdicts, we conclude this appeal does not affect a substantial right and dismiss this appeal as interlocutory.

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I. Factual and Procedural History

Plaintiff Heritage Operating, L.P. (“Heritage”) owns and operates a business in Thomasville and Mooresville, North Carolina, known as Metro Lift Propane, Inc. (“Metro Lift Propane”). Kendall L. Rhine is a former officer, director, and shareholder of Metro Lift Propane and, his sons, Kendall T. Rhine and Anthony L. Rhine, are former district managers for Metro Lift Propane.

Heritage acquired the assets of Metro Lift Propane in late 2003. As part of that acquisition, Heritage entered into Non-Competition Agreements with Kendall L. Rhine, Kendall T. Rhine, and Anthony L. Rhine on 1 January 2004. Heritage paid Kendall L. Rhine \$500,000.00 in exchange for his agreement to be restricted from engaging in certain activities within a seventy-five (75) mile radius of each of nine Metro Lift locations (“Restricted Areas”) for a period of ten (10) years. The Restricted Areas included Charlotte, Mooresville, and Greensboro, North Carolina. Pursuant to the Non-Competition Agreement, Kendall L. Rhine agreed that he would not:

- (a) Engage in the business of the propane cylinder exchange business within a 75-mile radius of (i) any of the operations of the locations listed on Annex I (the “Restricted Area”).
- (b) Solicit, service, or sell propane cylinder exchange services to any present or future propane cylinder exchange related customer or account in the Restricted Area.
- (c) Directly or indirectly solicit or hire any of the employees of [Metro Lift Propane or Metro Lift Energy, LLC] who become employees of Heritage or its affiliates . . . to become employees of any entity in which the Restricted Party is a holder of any ownership interest or to which the Restricted Party renders any service. . . .
- (d) Furnish, divulge, or make accessible to anyone any confidential or proprietary information or trade secrets (“Confidential Information”) concerning the Metro Lift Business including, but not limited to customer identification, customer lists, business records and supply cost and pricing data. . . .
- (e) Provide to, arrange for, guarantee funds, or arrange for product supply or consumer tank or cylinder purchases to any person who engages in the Restricted Area.

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(f) Be a member of a partnership or a stockholder, investor, officer, director, employee, agent, associate, or consultant, of any person, partnership, or corporation which does any of the acts described in the foregoing subparagraphs (a), (b), (c), (d), (e) or (f)

Heritage paid Kendall T. Rhine and Anthony L. Rhine \$65,734.50 each to restrict them from engaging in similar activities within a 75 mile radius of the Metro Lift business for a period of five years.

Defendant N.C. Propane Exchange, LLC, (“N.C. Propane”) was organized on 17 October 2008, and its Articles of Organization were filed with the North Carolina Secretary of State on 3 November 2008. Kendall T. Rhine organized N.C. Propane and was one of its initial members/managers, as were Kendall T. Rhine’s mother, Janice Rhine, Anthony L. Rhine, and Defendant Craig Lambeth. Craig Lambeth formerly worked for Heritage and had served as a District Manager for its Thomasville, North Carolina, location for a period leading up to 2 February 2009. Craig Lambeth’s wife, Christy Lambeth, was the registered agent of N.C. Propane.

Heritage initiated this action on 3 February 2009, asserting causes of action for breach of contract for the Non-Competition Agreements, trade secret violations, intentional interference with contract, unfair or deceptive trade practices, and civil conspiracy, and seeking damages and injunctive relief. Also in February 2009, Heritage¹ filed actions against some of the same defendants in Texas, Kentucky, and Missouri alleging similar claims, including breach of contract of the Non-Competition Agreements as a result of the formation and operation of different propane cylinder exchange companies.

In October 2010, the Texas action went to trial, and the jury rendered a verdict finding the defendants liable on certain claims, but concluding that Heritage did not suffer any damages. On 14 December 2010, the Texas court entered a verdict in favor of the defendants and reduced the period of limitation in Kendall L. Rhine’s Non-Competition Agreement to five years.

In March 2011, the Kentucky action went to trial. Kendall L. Rhine made a motion for summary judgment based on *res judicata* and col-

1. We note that the plaintiff in the Texas action was Heritage Operating, L.P., d/b/a Metro Lift Propane of Dallas, and the plaintiff in the Kentucky action was Heritage Operating, L.P., d/b/a Metro Lift Propane of Louisville. However, for ease of discussion, we refer to the plaintiff as “Heritage” in all of the three actions.

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lateral estoppel, which the Kentucky court denied. The Kentucky court directed a verdict in favor of Heritage at the close of its evidence on its claim of breach of contract of Kendall L. Rhine, and the jury subsequently rendered a verdict on various other issues. Additionally, the Kentucky court awarded \$941,290.00 in damages to Heritage for its claim of breach of Kendall L. Rhine's Non-Competition Agreement.

Both the Texas and Kentucky actions are currently on appeal. The Missouri action has not yet gone to trial.

Following the Texas and Kentucky trials, all of the defendants in the present action moved for summary judgment on the basis that the prior verdicts in Texas and Kentucky constitute *res judicata* and collateral estoppel. On 6 May 2011, the trial court entered an order denying the motion for summary judgment. Defendants now appeal the denial of that motion.

II. Whether the Appeal Affects a Substantial Right

On appeal, Heritage contends Defendants' appeal from the trial court's order denying their motion for summary judgment is interlocutory and should be dismissed. We agree.

"The denial of summary judgment is not a final judgment, but rather is interlocutory in nature. We do not review interlocutory orders as a matter of course." *McCallum v. North Carolina Co-op. Extension Service of N.C. State University*, 142 N.C. App. 48, 50, 542 S.E.2d 227, 230 (citation omitted), *disc. review denied*, 353 N.C. 452, 458 S.E.2d 527 (2001). "As a general rule, a moving party may not appeal the denial of a motion for summary judgment because ordinarily such an order does not affect a 'substantial right.'" *Bockweg v. Anderson*, 333 N.C. 486, 490, 428 S.E.2d 157, 160 (1993) (citation omitted). In deciding what constitutes a substantial right,

it is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. Examples of when a substantial right is affected include cases where there is a possibility of a second trial on the same issues, and where there is a possibility of inconsistent verdicts.

Patterson v. DAC Corp. of North Carolina, 66 N.C. App. 110, 112-13, 310 S.E.2d 783, 785 (1984) (citations omitted).

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“[T]he denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable.” *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161; *see also Williams v. City of Jacksonville Police Dept.*, 165 N.C. App. 587, 589-90, 599 S.E.2d 422, 426 (2004) (stating that “[t]he denial of summary judgment based on collateral estoppel, like *res judicata*, may expose a successful defendant to repetitious and unnecessary lawsuits. Accordingly, the denial of a motion for summary judgment based on the defense of collateral estoppel may affect a substantial right[.]”) (quotation and quotation marks omitted). This rule is directed at “preventing the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff.” *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161. Thus, the “denial of a motion for summary judgment based upon the defense of *res judicata* may involve a substantial right so as to permit immediate appeal only where a possibility of inconsistent verdicts exists if the case proceeds to trial.” *Country Club of Johnston County, Inc. v. U.S. Fidelity and Guar. Co.*, 135 N.C. App. 159, 167, 519 S.E.2d 540, 546 (1999) (quotation and quotation marks omitted), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207 (2000); *see also Community Bank v. Whitley*, 116 N.C. App. 731, 733, 449 S.E.2d 226, 227 (“A substantial right is likely to be affected where a possibility of inconsistent verdicts exists if the case proceeds to trial, but the facts of this case would not lead to such an outcome.”), *disc. review denied*, 338 N.C. 667, 453 S.E.2d 175 (1994).²

To demonstrate that a second trial will affect a substantial right, Defendants must show “not only that one claim has been finally determined and others remain which have not yet been determined,

2. We acknowledge the existence of an apparent conflict in this Court as to whether the denial of a motion for summary judgment based on *res judicata* affects a substantial right and is immediately appealable. *Compare Country Club*, 135 N.C. App. at 167, 519 S.E.2d at 546 (holding that the “denial of a motion for summary judgment based upon the defense of *res judicata* may involve a substantial right so as to permit immediate appeal *only where a possibility of inconsistent verdicts exists if the case proceeds to trial*”) (emphasis added) (quotation and quotation marks omitted) *with Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 83, 609 S.E.2d 259, 261 (2005) (stating that “[t]he denial of a motion for summary judgment on the basis of *res judicata* affects a substantial right and thus, entitles a party to an immediate appeal”) (citation omitted). However, our Supreme Court has addressed this issue in *Bockweg*, and, like the panel in *Country Club*, “we do not read *Bockweg* as mandating in every instance immediate appeal of the denial of a summary judgment motion based upon the defense of *res judicata*. The opinion pointedly states reliance upon *res judicata* ‘may affect a substantial right.’” *Country Club*, 135 N.C. App. at 166, 519 S.E.2d at 545 (emphasis in original) (quoting *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161).

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but that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists[.]” *Country Club*, 135 N.C. App. at 163-64, 519 S.E.2d at 544 (emphasis in original) (quotations and quotation marks omitted).

In this case, Defendants contend this appeal implicates a substantial right because of “[c]oncerns over multiple trials and inconsistent verdicts regarding the Rhine Appellants’ alleged breach of the same Non-Compete Contracts[.]” Heritage argues the current action has different factual issues and there is no possibility of inconsistent verdicts because “Heritage’s claims in this lawsuit are limited to injuries sustained in North Carolina, relating to the formation, financing, and operations of N.C. Propane[.]” We agree with Heritage.

In each of the three relevant lawsuits—the Texas action, the Kentucky action, and the current action—Heritage asserted claims, *inter alia*, against Kendall L. Rhine, Kendall T. Rhine, and Anthony L. Rhine for breach of the Non-Competition Agreements. However, the factual issues underlying each action are different. In each of the three lawsuits, Heritage challenges the actions of Kendall L. Rhine, Kendall T. Rhine, Anthony L. Rhine, and others in forming, financing, and operating a different propane cylinder exchange company in a different Restricted Area.

Each action involves the formation, financing, and operation of a different company that does business solely in the state the action was brought in. The factual issues underlying the Texas action involve the formation, financing, and operations of DFW Propane Exchange, LLC, (“DFW Propane”) a Texas entity with its principal place of business in Texas that operates a propane cylinder exchange business in Texas. The factual issues underlying the Kentucky action involve the formation, financing, and operations of Kentuckiana Propane Exchange, LLC, (“Kentuckiana Propane”) a Kentucky limited liability company with its principal place of business in Kentucky that operates a propane cylinder exchange business in Kentucky. Likewise, the factual issues underlying the present action involve the formation, financing, and operations of N.C. Propane, a North Carolina limited liability company with a registered agent and principal office in North Carolina. Each of the three above named companies is listed as a defendant only in the action filed in the state in which the company is located and does business.

Moreover, the facts regarding the formation of each propane cylinder exchange company vary. For example, Heritage alleges the

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Texas location was purchased by the Rhine Brothers, LLC, a defendant in only the Texas action, and then purchased by DFW Propane from the Rhine Brothers. In comparison, Heritage alleges that N.C. Propane was formed as a new company, with Kendall T. Rhine signing the Articles of Organization on 17 October 2008. Heritage also alleges that construction of the new facility for N.C. Propane has begun in Thomasville, North Carolina. Whether the Non-Competition Agreements were breached by the formation of each company depends on the factual circumstances in each case. Similarly, whether the Non-Competition Agreements were breached by the financing and/or operation of each company depends on the specific factual circumstances in each case.

Additionally, although Heritage contends the Rhine family follows a similar pattern of obtaining confidential information from a former manager of a Heritage plant and using that information to establish and operate a new business near a Heritage business in a Restricted Area, the actions involve different former Heritage employees. The present action involves a former Heritage manager and his wife who acted only in North Carolina. In its complaint, Heritage alleges Kendall L. Rhine, Janice Rhine, Kendall T. Rhine, and Anthony L. Rhine solicited Craig Lambeth, a former district manager at Heritage's Thomasville, North Carolina, location, to assist with setting up N.C. Propane in Thomasville. Heritage alleges Craig Lambeth divulged confidential information about its business, is using its confidential information to solicit Heritage's customers, and is soliciting current employees of Heritage's Thomasville location. Heritage also alleges that Craig Lambeth's wife, Christy Lambeth, was listed as the registered agent for N.C. Propane. Neither Craig nor Christy Lambeth are parties to either the Kentucky or Texas actions.³

We acknowledge that all three cases involve allegations of a similar pattern of conduct by the Rhine family and an alleged breach of the same Non-Competition Agreements. However, we conclude the factual issues in the present lawsuit concerning the actions of

3. We note that in the Texas and Kentucky actions, Heritage alleges that James Marcus Withers, a defendant in both the Kentucky and Texas actions and a former district manager at Heritage's Louisville, Kentucky, plant, used confidential information gained during his employment at Heritage to assist Kendall L. Rhine, Kendall T. Rhine, Anthony L. Rhine, and other defendants unique to the other actions to solicit Heritage's customers and employees. Additionally, Heritage alleges in the Kentucky action that Angie McClish, a former Heritage employee and a defendant in only the Kentucky action, used confidential information obtained during her employment with Heritage to assist Kentuckiana Propane.

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Kendall L. Rhine, Janice Rhine, Kendall T. Rhine, and Anthony L. Rhine in *North Carolina*, the formation, financing, and operations of N.C. Propane, and the actions of Craig Lambeth and Christy Lambeth are different from the factual issues determined in the Kentucky and Texas actions. Thus, the factual issues central to the instant case were not determined in either of the two previous lawsuits, and the same factual issues would not be present if the instant case continues to trial. Although the verdicts may be different, there is no possibility of a verdict in the instant case being inconsistent with any previous judicial determinations. Accordingly, we conclude this appeal does not affect a substantial right and dismiss it as interlocutory. *See Country Club*, 135 N.C. App. at 167, 519 S.E.2d at 546 (dismissing the appeal because “the current case presents no possibility of inconsistent verdicts”); *Community Bank*, 116 N.C. App. at 733, 449 S.E.2d at 227 (dismissing the appeal from the denial of a motion for summary judgment as interlocutory because “the facts of this case would not lead to” the possibility of inconsistent verdicts).

DISMISSED.

Judges CALABRIA and ERVIN concur.

ELIZABETH DIXON, PLAINTIFF V. RANDALL GIST AND LAURA GIST, DEFENDANTS

No. COA11-1370

(Filed 3 April 2012)

1. Statutes of Limitation and Repose—fraud—claims filed after expiration of three-year statute of limitations

The trial court did not err by granting defendants’ motion for judgment on the pleadings and dismissing plaintiff’s claims arising from the allegedly fraud-induced conveyance of real property. The pleadings showed that these claims were filed after the expiration of the three-year statute of limitations.

2. Fraud—constructive fraud—breach of fiduciary duty—civil conspiracy—conversion—sufficiently pled—asserted within statute of limitations

The trial court erred by granting defendants’ motion for judgment on the pleadings and dismissing plaintiff’s claims for con-

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structive fraud based on breach of a fiduciary duty, civil conspiracy, and conversion arising from defendants' allegedly fraudulent withdrawal of money from plaintiff's bank account. The claims were sufficiently pled and asserted within the applicable statute of limitations.

Appeal by Plaintiff from orders entered 6 and 13 June 2011 by Judge Theodore S. Royster, Jr. in Davidson County Superior Court. Heard in the Court of Appeals 6 March 2012.

Peebles Law Firm, PC, by Todd M. Peebles, for Plaintiff.

Wyatt Early Harris Wheeler LLP, by William E. Wheeler, for Defendants.

STEPHENS, Judge.

After voluntarily dismissing a nearly identical prior action commenced on 20 September 2010, Plaintiff Elizabeth Dixon commenced the present action by filing a complaint in Davidson County Superior Court on 20 April 2011 against Defendants Randall and Laura Gist. In her complaint, Dixon alleged that she was "befriended" by the Gists, "tricked into believing a special relationship of trust and confidence had been established with [the Gists]," "induced" by the Gists to "convert[her] bank account into a joint account with rights of survivorship" with the Gists, and, ultimately, "defrauded" by the Gists "out of sixteen [] acres of land and property" and many thousands of dollars in cash. Based on Dixon's allegedly fraud-induced conveyance of real property to the Gists and on the Gists' allegedly fraudulent withdrawal of money from Dixon's bank account, Dixon asserted claims against the Gists for constructive fraud, civil conspiracy, undue influence, conversion, and "declaratory judgment voiding conveyances." On 24 May 2011, the Gists filed their answer to Dixon's complaint, along with a motion for judgment on the pleadings. The trial court, Judge Theodore S. Royster, Jr. presiding, granted the Gists' motion in a 6 June 2011 order, concluding that the Gists were entitled to judgment dismissing Dixon's claims. From the order dismissing her claims, as well as a subsequent order awarding attorneys' fees to the Gists, Dixon appeals, arguing that the trial court's conclusions that her claims were subject to dismissal were erroneous. With respect to Dixon's claims arising from the allegedly fraud-induced conveyance of real property, we disagree with Dixon and conclude that the trial court properly dismissed those claims. However, we agree with

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Dixon that the trial court erroneously dismissed her constructive fraud and related claims arising from the allegedly fraudulent withdrawal of money from her bank account.

A motion for judgment on the pleadings pursuant to North Carolina Rule of Civil Procedure 12(c) should only be granted when “the movant clearly establishes that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law.” *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 558 (1984). When ruling on a motion for judgment on the pleadings, “[a]ll well pleaded factual allegations in the nonmoving party’s pleadings are taken as true,” and “[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party.” *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). Further, the trial court is to consider “only the pleadings and any attached exhibits, which become part of the pleadings.” *Minor*, 70 N.C. App. at 78, 318 S.E.2d at 867. On appeal, we review a trial court’s ruling on a motion for judgment on the pleadings *de novo*. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005).

[1] In this case, Dixon’s claims arising from the allegedly fraud-induced conveyance of real property—asserted in her initial complaint filed 20 September 2010, and reasserted in her 20 April 2011 complaint filed after voluntary dismissal of the initial complaint—were properly dismissed because the pleadings show that these claims were filed after the expiration of the three-year statute of limitations. *See N.C. State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 80, 240 S.E.2d 345, 349 (1978) (holding that judgment on the pleadings is proper if it appears from the pleadings “that the plaintiff’s right to recover is barred by the lapse of time”); *see also* N.C. Gen. Stat. § 1-52(9) (2011) (three-year statute of limitations for claims of fraud). In her complaint, Dixon alleges that in June 2007 the Gists persuaded Dixon to accompany them to an attorney’s office for a meeting about selling property to the Gists, at which meeting Dixon was told she had to sign a document “in order to speak with the attorney,” “was handed a document that was substantially blank,” and was told to sign; the document was the deed to property owned by Dixon, according to her complaint. Dixon alleges that she “remained personally unaware” of the conveyance until June 2010, despite the fact that the Gists had built a home on the conveyed property in 2007.

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Assuming the truth of Dixon's allegation that she was actually unaware of the conveyance until June 2010, we nevertheless conclude that the claims are barred by the statute of limitations because the allegations presented by the Gists in their answer (supported by attached exhibit evidence) show that, in the exercise of due diligence, Dixon should have discovered the alleged fraud by July 2007. See *Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 403-04, 653 S.E.2d 181, 185 (2007) (cause of action for fraud accrues when claimant should have discovered the fraud in the exercise of due diligence), *disc. review denied*, 362 N.C. 361, 663 S.E.2d 316 (2008). The exhibits attached to the Gists' answer show that Dixon was present at the 16 July 2007 meeting of the Lexington, North Carolina planning board, at which meeting (1) the planning board discussed rezoning the property in question, (2) it was explained to the planning board that the property was owned by the Gists, and (3) it was stated that Dixon "previously owned the [property] recently purchased by [the Gists]." In our view, and assuming *arguendo* that Dixon was actually unaware of the conveyance, Dixon should have discovered that she had conveyed the property to the Gists, and thus, have discovered the alleged fraud, at least by the time of the 16 July 2007 planning board meeting, where Dixon was present for a discussion of the conveyance and the Gists' ownership of the property. Because Dixon's initial complaint was filed in September 2010, more than three years after her cause of action accrued in July 2007, we conclude that Dixon's claims arising from the conveyance of property to the Gists were filed after the applicable statute of limitations expired and, thus, were properly dismissed.

[2] However, regarding those claims arising from the allegedly fraudulent withdrawal of money from Dixon's bank account, we conclude that Dixon has sufficiently pled within the statute of limitations claims for (1) constructive fraud based on breach of a fiduciary duty, (2) civil conspiracy, and (3) conversion.¹

1. We note that the statute of limitations for the constructive fraud claim regarding the withdrawal of money from Dixon's account is subject to a ten-year statute of limitations. *Adams v. Moore*, 96 N.C. App. 359, 362, 385 S.E.2d 799, 801 (1989) (noting that "the ten-year statute of limitations under [N.C. Gen. Stat. §] 1-56 applies to *constructive* fraud claims based upon a breach of fiduciary duty" (emphasis in original)), *disc. review denied*, 326 N.C. 46, 389 S.E.2d 83 (1990); see also N.C. Gen. Stat. § 1-56 (2011). This ten-year statute of limitations does not apply to the claims arising from the allegedly fraud-induced conveyance of property because those claims are for actual fraud based on specific misrepresentations rather than constructive fraud based on the abuse of a confidential relationship. *Forbis v. Neal*, 361 N.C. 519, 528-29, 649 S.E.2d 382, 388 (2007) (noting that constructive fraud differs from actual fraud in that it is based on a confidential relationship rather than a specific misrepresentation).

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As for this first claim, a fiduciary relationship can be found to exist “anytime one person reposes a special confidence in another, in which event the one trusted is bound to act in good faith and with due regard to the interests of the other,” *Adams*, 96 N.C. App. at 362, 385 S.E.2d at 801, and a claim for constructive fraud based upon a breach of such a relationship is sufficiently pled “by alleging facts and circumstances (1) which created the relation of trust and confidence, and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.” *Terry*, 302 N.C. at 85, 273 S.E.2d at 679 (brackets in original) (internal quotation marks omitted) (quoting *Rhodes*, 232 N.C. at 548-49, 61 S.E.2d at 725).

In this case, Dixon has alleged that a fiduciary relationship existed between her and the Gists by virtue of the Gists “becoming joint account holders on [Dixon’s] primary banking account with the purported purpose of helping [Dixon] with her daily necessities and monthly obligations.” Dixon supports this allegation with assertions that (1) the Gists told Dixon that “it would be in her best interest to add them as signatories on her [] bank checking account so that they could make purchases for her with her debit card and/or write checks from her bank account”; (2) the Gists were, in fact, added to Dixon’s account; and (3) the Gists helped take care of Dixon’s “daily needs” between June 2007 and June 2010. Assuming their truth, as must be done when considering a motion for judgment on the pleadings, *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499 (noting that factual alle-

Although Dixon labels those claims as claims arising from constructive fraud, the crux of the claims is that the Gists misrepresented the purpose of the meeting with the attorney and the nature of the “substantially blank” document that Dixon was required to sign. *See Terry v. Terry*, 302 N.C. 77, 84, 273 S.E.2d 674, 678 (1981) (limiting analysis of claim to constructive fraud where “[t]he gist of the complaint” was constructive fraud rather than actual fraud); *see also Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979) (holding that in determining the sufficiency of a claim, the focus is on the “wrong complained of” not the “incorrect choice of legal theory”). Unlike Dixon’s fraudulent withdrawal claims, which, as discussed *infra*, allege facts and circumstances showing a fiduciary relationship established between the parties by the Gists’ “becoming joint account holders on [Dixon’s] primary banking account,” Dixon’s fraud-induced conveyance claims do not allege, beyond vague averments of trust and confidence, the existence of some other fiduciary relationship between Dixon and the Gists and the abuse of that relationship by the Gists in procuring the conveyance. *Cf. Terry*, 302 N.C. at 83, 273 S.E.2d at 677 (in stating a cause of action for breach of a fiduciary relationship, “it is not sufficient for [a] plaintiff to allege merely that [the] defendant had won his trust and confidence and occupied a position of dominant influence over him” (quoting *Rhodes v. Jones*, 232 N.C. 547, 548-49, 61 S.E.2d 725, 725 (1950))). As the fraud-induced conveyance claims only sufficiently allege actual fraud, the three-year statute of limitations of section 1-52(9) applies to those claims.

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gations in the nonmoving party's pleadings are taken as true), these facts alleged by Dixon, along with any permissible favorable inferences, are sufficient at least to raise an issue of fact as to whether a fiduciary relationship existed between the parties with respect to the joint bank account. *Cf. Moore v. Bryson*, 11 N.C. App. 260, 265, 181 S.E.2d 113, 116 (1971) (holding that there is at least a triable issue regarding the existence of a fiduciary relationship where an "individual" "undertook to manage and generally control [property] for the benefit of [the property's co-owners], causing them to repose special faith, confidence and trust in him to represent their best interest with respect to the property"; also holding that "while a fiduciary relationship ordinarily does not arise . . . from the simple fact of [the parties'] cotenancy, such a relationship may be created by their conduct, as where one cotenant assumes to act for the benefit of his cotenants" (internal quotation marks omitted)); *cf. also HAJMM Co. v. House of Raeford Farms, Inc.*, 94 N.C. App. 1, 11, 379 S.E.2d 868, 874 (1989) (noting that "[t]he existence of a fiduciary relationship is not contingent upon a technical or legal relationship"), *aff'd in part and modified and reversed on other grounds*, 328 N.C. 578, 403 S.E.2d 483 (1991). Further, assuming the truth of Dixon's allegations that, in 2009, the Gists began transferring "the funds from [Dixon's] bank account into other accounts in the sole name of the [Gists], ultimately transferring roughly ninety percent [] of [Dixon's] funds out of her account and into accounts of [the Gists] over which [Dixon] had no control," we must conclude that Dixon has sufficiently pled facts on her claim that the Gists committed constructive fraud by breaching their fiduciary duty to Dixon. *See Forbis*, 361 N.C. at 529-30, 649 S.E.2d at 388-89 (holding that where the defendant-fiduciary "allegedly divested [the plaintiff-beneficiaries] of almost all their assets" and, therefore, obtained a "benefit through the alleged abuse of the confidential or fiduciary relationship," the plaintiff-beneficiaries are entitled to "a presumption that constructive fraud occurred"). As Dixon's complaint sufficiently asserted a claim for constructive fraud based upon a breach of fiduciary duty within the applicable statute of limitations, dismissal of that claim, as well as dismissal of the related claim of civil conspiracy to commit constructive fraud, was improper.

We likewise conclude that, based on the above-discussed allegations, Dixon's conversion claim, along with its related civil conspiracy claim, arising from the Gists' alleged unlawful transfers of money from Dixon's bank account beginning in 2009 was (1) sufficiently pled, and (2) asserted within the applicable statute of limitations. *See Stratton v. Royal Bank of Can.*, ___ N.C. App. ___, ___, 712 S.E.2d

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221, 227 (2011) (“A conversion is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the . . . exclusion of an owner’s rights. Conversion claims are subject to a three-year limitation period under [section 1-52(4)].” (internal citations and quotation marks omitted)); *see also* N.C. Gen. Stat. § 1-52(4). This is so despite the Gists’ allegation that Dixon confirmed that the Gists had none of Dixon’s property or money in June 2010—which allegation contradicts various allegations in Dixon’s complaint and is, thus, assumed to be untrue. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499 (“All well pleaded factual allegations in the nonmoving party’s pleadings are taken as true and all contravening assertions in the movant’s pleadings are taken as false.”).

Based on the foregoing, we reverse the trial court’s dismissal of Dixon’s claims for constructive fraud, civil conspiracy, and conversion related to the Gists’ alleged improper withdrawal of money from Dixon’s account. However, we hold that the trial court did not err in dismissing those claims arising from Dixon’s allegedly fraud-induced conveyance of real property to the Gists, *i.e.*, the related claims for fraud, civil conspiracy, undue influence, and declaratory judgment. Further, because we are reversing a portion of the trial court’s order dismissing Dixon’s complaint, we vacate the court’s order awarding attorneys’ fees based on the trial court’s conclusion that all of Dixon’s claims were frivolous, but instruct the court that it may reconsider the award of attorneys’ fees in light of our holding and any future determinations by the trial court regarding the merits of Dixon’s surviving claims.

AFFIRMED in part; REVERSED in part; VACATED in part.

Chief Judge MARTIN and Judge HUNTER, ROBERT C. concur.

ESTATE OF BROWNE v. THOMPSON

[219 N.C. App. 637 (2012)]

ESTATE OF ROBERT E. BROWNE, III; SHELBY V.T. CLARK; JEANNE F. CLARK; JOHN H. LOUGHRIDGE, JR.; ELFORD HAMILTON MORGAN; JANE SMITH MORGAN; AND NORWOOD ROBINSON, PLAINTIFFS v. G. KENNEDY THOMPSON; THOMAS J. WURTZ; DONALD K. TRUSLOW; ROBERT K. STEEL; WACHOVIA CORPORATION; WELLS FARGO & COMPANY (AS SUCCESSOR-IN-INTEREST TO WACHOVIA CORPORATION); AND KPMG, LLP, DEFENDANTS

No. COA 11-852

(Filed 3 April 2012)

Corporations—individual stockholders—claims not within scope of Barger exceptions

The trial court did not err by granting defendants' motion to dismiss in a case brought by individual stockholders of Wachovia Corporation alleging that the individual defendants participated in a fraudulent scheme to deceive plaintiffs and the public as to Wachovia's financial stability. Shareholders generally cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock and plaintiffs' claims did not fall within the scope of either of the exceptions enumerated in *Barger*, 346 N.C. 650.

Appeal by plaintiffs from order and opinion entered 3 March 2011 by Judge John R. Jolly, Jr. in the North Carolina Business Court. Heard in the Court of Appeals 29 November 2011.

Robinson & Lawing, LLP, by Norwood Robinson, for plaintiff-appellants Estate of Robert E. Browne, III., Shelby V.T. Clark, Jeanne F. Clark, Elford Hamilton Morgan, Jane Smith Morgan, and Norwood Robinson.

John H. Loughridge, Jr., pro se, plaintiff-appellant.

Robinson, Bradshaw & Hinson, P.A., by Robert W. Fuller, Louis A. Bledsoe, III, and Adam K. Doerr, for defendant-appellees G. Kennedy Thompson, Thomas J. Wurtz, Donald K. Truslow, Robert K. Steel, Wachovia Corporation, and Wells Fargo & Company (as successor-in-interest to Wachovia Corporation).

McGuire Woods LLP, by Douglas W. Ey, Jr. and Mark W. Kinghorn for defendant-appellee KPMG LLP.

STEELMAN, Judge.

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Plaintiffs' claims do not fall within the scope of either of the *Barger* exceptions. North Carolina does not recognize "holder" claims. The trial court correctly dismissed plaintiffs' complaint.

I. Factual and Procedural History

On 1 October 2009, seven stockholders (plaintiffs) of Wachovia Corporation filed this action. Defendants include Wachovia Corporation (Wachovia), Wells Fargo & Company (Wells Fargo), KPMG LLP (KPMG),¹ and past directors of Wachovia. Plaintiffs allege that the individual defendants participated in a fraudulent scheme to deceive plaintiffs and the public as to Wachovia's financial stability.

Plaintiffs contend that Wachovia's 2006 acquisition of Golden West Financial Corporation, a bank and mortgage lender with a large portfolio of adjustable-rate mortgages, caused Wachovia to suffer unprecedented losses. Plaintiffs contend that the individual defendants concealed information regarding underwriting standards, collateral quality, and necessary reserves for loans. Plaintiffs further contend that defendants issued false public SEC filings, press releases, and earnings calls regarding Wachovia's financial strength and stability through September 2008. Plaintiffs assert that they relied on these representations in deciding to retain Wachovia stock in 2005 through 2008.

In late September 2008, the price of Wachovia's stock fell below \$1 per share. Later that year, Wells Fargo consummated a merger with Wachovia and acquired all outstanding shares of Wachovia stock. Wachovia shareholders, including plaintiffs, received 0.1991 shares of Wells Fargo common stock in exchange for each share of Wachovia common stock that they owned.

The complaint alleges "Count I Negligence, Misrepresentation and Breach of Duty of a Corporate Director and/or Officer (Against the Wachovia Corporate Defendants and the Individual Defendants)" and "Count II Negligent Misrepresentation (Against the Auditor Defendant, KPMG)[.]"

Defendants filed motions to dismiss under N.C.R. Civ. P. 12(b)(6). On 3 March 2011, the trial court entered an Order and Opinion, dismissing plaintiffs' complaint.

Plaintiffs appeal.

1. KPMG was the auditor for Wachovia from 2006 through 2008.

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II. Analysis

Plaintiffs argue that the trial court erred in granting defendants' motions to dismiss. We disagree.

A. Standard of Review

We review *de novo* the trial court's order granting defendants' motions to dismiss. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

When considering a motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure, [t]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.

Id., 157 N.C. App. at 400, 580 S.E.2d at 4 (alteration in original) (internal quotation marks omitted).

B. Claims Against the Individual Defendants and Wachovia Defendants

"The well-established general rule is that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997). The two exceptions to this rule are "(1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder, and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders." *Id.*

As to the first *Barger* exception, plaintiffs have alleged no facts indicating that defendants owed plaintiffs a special duty. Plaintiffs do not allege that defendants induced them to become shareholders. *See Howell v. Fisher*, 49 N.C. App. 488, 497, 272 S.E.2d 19, 25 (1980). Plaintiffs do not allege a duty arising from a particular contract between plaintiffs and defendants. *See Barger*, 346 N.C. at 659-60, 488 S.E.2d at 220. We hold that the trial court properly held that plaintiffs' complaint did not allege sufficient facts to meet the special duty exception of *Barger*.

As to the second *Barger* exception, plaintiff is required to allege injury that is "separate and distinct from the injury sustained by the

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other shareholders or the corporation itself.” *Id.*, 346 N.C. at 659, 488 S.E.2d at 219. Plaintiffs contend that misrepresentations concerning the financial condition of Wachovia caused them to retain their stock and suffer grievous financial injury when the value of their shares plummeted. As in *Barger*, the diminution of the value of their stock is precisely the same injury suffered by the corporation itself. *Id.*, 346 N.C. at 659, 488 S.E.2d at 220. Plaintiffs have failed to allege an injury that is separate and distinct from the injury suffered by other shareholders or the corporation. The trial court properly held that plaintiffs’ complaint did not allege sufficient facts to meet the separate injury exception of *Barger*.

Plaintiffs argue that we should follow the rationale of the Delaware case of *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), and reject the *Barger* test. *Barger* is a decision of our Supreme Court, and we are not free to blithely disregard its holding. *See e.g., Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985).

Plaintiffs further contend that North Carolina courts have previously cited *Tooley* with approval. In *Cabaniss v. Deutsche Bank Secs., Inc.*, 170 N.C. App. 180, 611 S.E.2d 878 (2005), this court cited *Tooley* in a case where Delaware law controlled. *Cabaniss*, 170 N.C. App. at 182, 611 S.E.2d at 880. North Carolina law controls the instant case. The remaining cases cited by plaintiffs are decisions of the North Carolina Business Court. The Business Court is a special Superior Court, the decisions of which have no precedential value in North Carolina.

Further, in *Maurer v. SlickEdit, Inc.*, 2006 NCBC 1 (N.C.Super. Feb. 6, 2006), the trial court’s mention of *Tooley* was merely in passing, or *obiter dictum*. The trial court commented in a footnote that it “leaves consideration of the merits of the *Tooley* approach for another day.” *Maurer*, 2006 NCBC 1 n.5. In *Marcoux v. Prim*, 2004 NCBC 5 (N.C.Super. April 14, 2004), the trial court applied Delaware law. Again, North Carolina law controls the instant case.

C. Holder Claims

Next, plaintiffs argue that North Carolina law recognizes a cause of action for holders. In support of this argument, plaintiffs cite *Gilbert v. Bagley*, 492 F. Supp. 714 (M.D.N.C. 1980), *superseded by statute* N.C. Gen. Stat. § 55-8-30, *as recognized* in *Rivers v. Wachovia Corp.*, 665 F.3d 610 (4th Cir. 2011). However, the trial court correctly observed that *Gilbert* relies on the premises that officers and direc-

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tors owe a fiduciary duty to shareholders and that such duty is directly actionable by individual shareholders.

In 1989, the General Assembly amended the statutes governing corporations, eliminating the provision that the directors' duty runs to both the shareholders and the corporation.

The drafters recognized that directors have a duty to act for the benefit of all shareholders of the corporation, but they intended to avoid stating a duty owed directly by the directors to the shareholders that might be construed to give shareholders a direct right of action on claims that should be asserted derivatively.

Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 14.01[2] (7th ed.) (citing Official Commentary, N.C. Gen. Stat. § 55-8-30 (1989)). Plaintiffs have failed to cite, and our research has not revealed, a single North Carolina case recognizing holder claims. The trial court properly held that plaintiffs' complaint failed to state a claim.

D. Claims Against KPMG

To state a claim for negligent misrepresentation, a party must allege that it justifiably relied to its detriment on information prepared without reasonable care by one who owed the relying party a duty of care. *Brinkman v. Barrett Kays & Assocs., P.A.*, 155 N.C. App. 738, 742, 575 S.E.2d 40, 43-44 (2003). The element of justifiable reliance requires that the party rely upon information in a transaction. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 209-10, 367 S.E.2d 609, 614 (1988) (quoting Restatement (Second) of Torts § 552 (1977)).

Plaintiffs owned their Wachovia shares and did not sell them. Plaintiffs assert a holder claim. After reiterating that North Carolina does not recognize holder claims, the trial court analyzed plaintiffs' allegations under the standard articulated in jurisdictions that recognize holder claims and found plaintiffs' allegations to lack specificity. As discussed in the previous section, plaintiffs have failed to cite, and our research has not revealed, any binding authority in North Carolina that recognizes holder claims. We decline to analyze the specificity of plaintiffs' allegations under a standard discussed in *Small v. Fritz Cos.*, 65 P.3d 1255 (Cal. 2003), which neither interprets North Carolina

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law nor is binding on this Court. The trial court properly held that plaintiffs' complaint failed to state a claim against KPMG.

AFFIRMED.

Chief Judge MARTIN and Judge McGEE concur.

STATE OF NORTH CAROLINA v. TONYA BRIGETT JUSTICE

No. COA11-1232

(Filed 3 April 2012)

**Larceny—from a merchant by removal of anti-theft device—
indictment fatally flawed—merchandise description too
general—attempted larceny alleged—no subject matter
jurisdiction**

The trial court lacked subject matter jurisdiction in a larceny from a merchant by removal of anti-theft device case because the indictment was fatally flawed. The description “merchandise” was too general to identify the property allegedly taken by defendant and the indictment alleged only an *attempted* rather than a *completed* larceny. Judgment was arrested, which served to vacate the verdict, and the habitual felon judgment was reversed and remanded for dismissal of the habitual felon indictment.

Appeal by Defendant from judgment dated 16 May 2011 by Judge James U. Downs in Henderson County Superior Court. Heard in the Court of Appeals 20 February 2012.

Attorney General Roy Cooper, by Deputy Director Caroline Farmer, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for Defendant.

STEPHENS, Judge.

Defendant Tonya Justice appeals from judgment entered upon her conviction of larceny from a merchant by removal of anti-theft device. For the reasons which follow, we arrest judgment in part, and reverse and remand in part.

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At trial, the evidence tended to show the following: In December 2009, Defendant and a male friend went to a Belk department store. Defendant took several garments into a fitting room. She then handed some items out of the fitting room to her friend, who put the clothes back on hangers. The store's loss prevention manager, who recognized Defendant from a prior shoplifting incident, observed that the sensors were removed from several shirts that had been returned to hangers. The store's assistant manager called the police. As Defendant left the fitting room and walked toward the exit, the loss prevention manager stopped her and asked her to remove the merchandise she had under her clothes. Defendant admitted that she had removed the sensors from the clothing because she had a drug problem.

Defendant was indicted for larceny from a merchant by removal of anti-theft device and for having attained the status of habitual felon. A jury found Defendant guilty of the larceny offense and Defendant pled guilty to the habitual felon charge. Defendant appeals.

Discussion

Defendant argues that the trial court (1) lacked subject matter jurisdiction because the indictment for the larceny charge was fatally flawed, (2) erred by allowing the State to amend the larceny indictment because the amendment involved a substantial alteration to the charge, and (3) erred by entering judgment on a fatally defective verdict for the larceny charge. Because we agree that the indictment was fatally flawed, we arrest the judgment entered upon Defendant's conviction of larceny from a merchant.

This Court reviews the sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations omitted). If an indictment is fatally defective, then the superior court lacks subject matter jurisdiction over the case. *See State v. Bell*, 121 N.C. App. 700, 702, 468 S.E.2d 484, 486 (1996). An indictment is fatally defective when it fails to charge an essential element of the offense. *State v. Bartley*, 156 N.C. App. 490, 499, 577 S.E.2d 319, 324 (2003) (citation omitted).

Defendant was indicted under N.C. Gen. Stat. § 14-72.11 which makes larceny from a merchant a felony when the offense occurs under certain specific circumstances, including "[b]y removing,

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destroying, or deactivating a component of an antishoplifting or inventory control device to prevent the activation of any antishoplifting or inventory control device.” N.C. Gen. Stat. § 14-72.11(2) (2011). “The essential elements of larceny are that [the] defendant (1) took the property of another; (2) carried it away; (3) without the owner’s consent; and (4) with the intent to permanently deprive the owner of the property.” *State v. Coats*, 74 N.C. App. 110, 112, 327 S.E.2d 298, 300 (1985) (citation omitted). Thus, an indictment under section 14-72.11(2) must allege the four elements of larceny and also removal of an antishoplifting or inventory control device.

In addition, our case law on larceny indictments makes clear that the property alleged to have been taken must be identified “with certainty sufficient to enable the jury to say that the article proved to be stolen is the same, and to enable the court to see that it is the subject of larceny and also to protect the defendant . . . in the event of future prosecution for the offense. . . .” *State v. Ingram*, 271 N.C. 538, 542, 157 S.E.2d 119, 122 (1967) (quotation marks and citation omitted). In *Ingram*, the Supreme Court held that an indictment’s description of the property taken as “merchandise, chattels, money, valuable securities and other personal property” was too general and therefore insufficient. *Id.* at 543, 157 S.E.2d at 123; compare *State v. Monk*, 36 N.C. App. 337, 340, 244 S.E.2d 186, 188-89 (1978) (holding that “assorted items of clothing, having a value of \$504.99 the property of Payne’s, Inc.” was a sufficiently particular description of the property taken to support a larceny charge).

Here, the indictment states:

The jurors for the State upon their oath present that on or about the date of offense shown and in Henderson County the defendant named above unlawfully, willfully and feloniously did remove a component of an anti-theft or inventory control device to prevent the activation of the anti-theft or inventory control device. This act was committed in an effort to steal *merchandise* from Belks [sic] of Hendersonville, NC.

(Emphasis added). As in *Ingram*, the description “merchandise” is too general to identify the property allegedly taken by Defendant. As such, the indictment is fatally defective, and deprives the superior court of subject matter jurisdiction over the case. *Bell*, 121 N.C. App at 702, 468 S.E.2d at 486.

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While the insufficient description of the property allegedly taken, standing alone, dooms the indictment here, we note that the indictment is also fatally flawed in that it alleges only an *attempted* rather than a *completed* larceny. See *State v. Chandler*, 342 N.C. 742, 753, 467 S.E.2d 636, 642 (1996) (“The offense of attempted larceny is complete where there is a general intent to steal and an act in furtherance thereof[.]”). The indictment here alleges that Defendant “did remove a component of an anti-theft or inventory control device . . . in an effort to steal” property.

We reject the State’s contentions that the indictment’s mention of Defendant’s removal of an antishoplifting device or the use of the phrase “effort to steal” allege a completed larceny. As to the former, as stated *supra*, an indictment under section 14-72.11(2) must allege the removal of an antishoplifting or inventory control device *in addition to* the four elements of larceny. Thus, the removal of an antishoplifting device is a separate and distinct element from the taking and carrying away of the property in question. As to the State’s second contention, the word “steal” is defined as, *inter alia*, “[t]o take (personal property) illegally with the intent to keep it unlawfully[.]” while “attempt” is defined as “[t]he act or an instance of making an *effort to accomplish something[.]*” Black’s Law Dictionary 1453, 137 (8th ed. 2004). Thus, the phrase “an effort to steal” plainly alleges only an attempted larceny and is insufficient to charge Defendant with an offense under section 14-72.11(2).

Conclusion

“Judgment must be arrested when the indictment fails to charge a criminal offense or fails to charge an essential element of the offense.” *State v. McGaha*, 306 N.C. 699, 702, 295 S.E.2d 449, 451 (1982) (citation omitted). “When judgment is arrested because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment, the verdict itself is vacated and the [S]tate must seek a new indictment if it elects to proceed again against the defendant.” *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990) (citation omitted). The indictment against Defendant for larceny from a merchant is fatally flawed, and accordingly, we arrest the judgment, which serves to vacate the verdict entered against Defendant. As a result, we do not address Defendant’s remaining arguments.

Further, we must reverse the judgment entered upon Defendant’s guilty plea to the habitual felon charge against her. “[B]eing an habit-

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ual felon is not a crime and cannot support, standing alone, a criminal sentence. Rather, being an habitual felon is a status justifying an increased punishment for the principal felony.” *State v. Priddy*, 115 N.C. App. 547, 549, 445 S.E.2d 610, 612, *disc. review denied*, 337 N.C. 805, 449 S.E.2d 751 (1994) (citation omitted). Therefore, where “there [i]s no pending felony prosecution to which the habitual felon proceeding could attach as an ancillary proceeding,” judgment entered upon Defendant’s habitual felon conviction must be “reversed and the case remanded to th[e trial] court for entry of an order that the [habitual felon] indictment be dismissed.” *State v. Allen*, 292 N.C. 431, 436, 233 S.E.2d 585, 589 (1977). Accordingly, we reverse the habitual felon judgment, and remand for dismissal of the habitual felon indictment.

JUDGMENT ARRESTED IN PART; REVERSED AND REMANDED IN PART.

Chief Judge MARTIN and Judge HUNTER, ROBERT C., concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 MARCH 2012)

BRIGGS v. UNIV. OF N.C. No. 11-804	Ind. Comm. (890917)	Affirmed
DIANE K. TROUM, INC. v. AMINI INNOVATION CORP. No. 11-1045	Guilford (10CVS667)	Affirmed
ELITE FLOORING & DESIGN, INC. v. BEAUCATCHER CONDO. No. 11-1233	Buncombe (09CVS425)	Dismissed
FAIRFIELD HARBOUR PROP. OWNERS ASS'N, INC. v. DREZ No. 11-205-2	Craven (10CVS1349)	Affirmed in Part, Reversed in Part
IN RE D.J.N. No. 11-1235	Harnett (10JT126)	Affirmed
IN RE D.M. No. 11-1295	Beaufort (11JA30)	Affirmed in part; Reversed and Remanded in part
IN RE J.C. No. 11-800	Mecklenburg (10JB522)	Affirmed
IN RE J.D.L. No. 11-1171	Haywood (03JT38) (07JT245) (09JT60)	Affirmed
IN RE J.G.L. No. 11-1091	Union (09JT165)	Affirmed
IN RE RICHARDSON No. 11-1124	Granville (11SPC1201)	Affirmed
JAMES S. FARRIN, P.C. v. PERRY, PERRY & PERRY, P.A. No. 11-683	Durham (09CVS5519)	Dismissed
JERKINS v. WARREN No. 11-1073	Pitt (10CVD893)	Reversed and Remanded
MANUEL v. GEMBALA No. 11-1236	Bladen (11CVS41)	Affirmed in part, dismissed in part
MCK ENTERS., LLC v. LEVI No. 11-1070	McDowell (09CVS464)	Dismissed in part; vacated and remanded in part.

PARLIER v. BURKE CNTY. EMS No. 11-797	Ind. Comm. (W37359)	Affirmed
STATE FARM MUT. AUTO. INS. v. HILL No. 11-1125	Cabarrus (10CVD3564)	Affirmed
STATE v. ANDERSON No. 11-1061	Forsyth (07CRS56401)	No Error
STATE v. AUDREY No. 11-1155	Mecklenburg (09CRS27574) (09CRS5006)	Affirmed
STATE v. BARTS No. 11-937	Alamance (83CRS16485-88) (83CRS16943)	Affirmed
STATE v. BURDETTE No. 11-1210	Cabarrus (09CRS54226)	No Error
STATE v. CHANDLER No. 11-1328	Durham (10CR60986)	Reversed
STATE v. CONNER No. 11-1152	Rockingham (10CRS50899)	No Error
STATE v. CRUZ No. 11-893	Henderson (10CRS436-439) (10CRS50704) (10CRS50708-710)	New Trial
STATE v. DOCKERY No. 11-961	McDowell (08CRS52752-53) (10CRS389)	No error in part; vacated and remanded in part
STATE v. EATON No. 11-956	Forsyth (08CRS56454) (10CRS23848)	New Trial
STATE v. FISHER No. 11-938	Mecklenburg (10CRS207054)	No Error
STATE v. JACKSON No. 11-959 ;	Martin (09CRS51358)	No Error in Part; Reversed in Part
STATE v. JACOBS No. 11-679	Wake (09CRS202)	Affirmed
STATE v. KEEFE No. 11-1204	Durham (10CRS52148)	No Error
STATE v. PENNINGTON No. 11-790	Wilkes (10CRS50889)	No Error

STATE v. RUCKER No. 11-740	Cabarrus (08CRS53935) (08CRS53941)	No Error
STATE v. UNDERWOOD No. 11-891	Johnston (08CRS56768) (08CRS8066)	New trial in part; No error in part
VERREY v. HELMKAMP No. 11-966	Currituck (10CVS617)	Affirmed in Part; Reversed in Part
WACHS TECHNICAL SERVS., LTD v. PRAXAIR DISTRIBUTION, INC. No. 11-633	Mecklenburg (09CVS27622)	Affirmed
WINSLOW v. FORTNEY No. 11-853	Union (09CVD4848)	Affirmed
WOOD v. TEACHERS & STATE. EMPS. RETIREMENT SYS. No. 11-784	Wake (09CVS2350)	Affirmed
WOODARD v. SUN BAY CONDO. OWNERS ASS'N, INC. No. 11-492	Wilson (10CVS1734)	Dismissed

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 APRIL 2012)

BATTS v. BATTS No. 11-875	Edgecombe (11CVD79)	Affirmed
CAMACHO v. FLOWERS No. 11-949	Cumberland (09CVS11663)	Affirmed in part; Reversed and Remanded in part.
CROP PROD. SERVS., INC. v. MCDONALD No. 11-567	Franklin (10CVS197)	Affirmed
EHP LAND CO., INC. v. BOSHER No. 11-1220	Perquimans (07CVS59)	Affirmed
HALTIWANGER v. PHOENIX SKI CORP. No. 11-1075	Haywood (10CVS773)	Affirmed
HAYES v. TIME WARNER CABLE, INC. No. 11-1120	Durham (08CVS1889)	Affirmed
HUNT v. PUBLIC SCH. OF ROBESON CNTY. No. 11-1110	Ind. Comm. (W18411)	Affirmed
IN RE I.B.I. No. 11-1184	Haywood (08JT90)	Affirmed
IN RE K.N.M. No. 11-1138	Lincoln (09JT84)	Affirmed
IN RE K.R.B. No. 11-1377	Caldwell (10J82)	Vacated and Remanded
IN RE R.F. No. 11-1262	Iredell (09JT170)	Affirmed
IN RE S.C. No. 11-1096	Mecklenburg (09J631-632)	Affirmed in Part, Reversed and Remanded in Part
IN RE T.M. No. 11-1265	Iredell (09JT213-215)	Affirmed
IN RE V.C.R. No. 11-1108	Wake (10JB780)	Remanded
IN RE WILL OF ABBRUZZESE No. 11-1293	New Hanover (09E918)	Appeal Dismissed

LAUREL HILL APARTMENTS v. HALL No. 11-1169	Cleveland (10CVD2214)	Reversed
MACMILLAN v. MACMILLAN No. 11-1158	Forsyth (85CVD351)	Reversed
MILLS v. FUNKHOUSER No. 11-440	Guilford (10CVD11307)	Reversed
QUINN v. QUINN No. 11-964	Duplin (89CVD62)	Affirmed
SMITH v. BANK OF STANLY No. 11-1314	Stanly (09CVS1201)	Affirmed
STATE v. BECTON No. 11-1147	Wake (06CRS33390)	Affirmed
STATE v. BROOKS No. 11-1149	Durham (08CRS53995) (09CRS6493)	No Error
STATE v. CORBETT No. 11-1129	Mecklenburg (08CRS229778) (08CRS229779)	No Error
STATE v. FARMER No. 11-1310	Onslow (09CRS54493) (09CRS54569) (09CRS54595) (09CRS54597) (09CRS54628)	Affirmed
STATE v. GILCHRIST No. 11-1272	Guilford (08CRS100277)	No error at trial; judgment arrested as to the conviction for attempted robbery with a dangerous weapon
STATE v. HENDERSON No. 11-730	Wake (07CRS20528-31)	Remanded for resentencing
STATE v. HENDERSON No. 11-1028	Wake (09CRS203467-68) (09CRS203605)	No Error
STATE v. JOHNSON No. 11-1014	Wake (08CRS45460) (08CRS45463) (08CRS58677) (08CRS58678)	No Error
STATE v. KIM No. 11-963	Mecklenburg (09CRS228023)	No Error

STATE v. MAKOWSKIE No. 11-1056	Guilford (10CRS24743) (10CRS78634-35)	No Error
STATE v. MARTINEZ No. 11-752	Robeson (06CRS53910)	No Error
STATE v. MOORE No. 11-945	Harnett (10CRS1671) (10CRS51810-11)	No Error
STATE v. ROYSTER No. 11-1389	Durham (10CRS58673)	No Error
STATE v. SCOTT No. 11-1182	Alamance (10CRS51326) (10CRS8251)	No Error
STATE v. WALKER No. 11-1093	Cleveland (10CRS1955) (10CRS53705)	No Error
STATE v. YATES No. 11-1215	Wake (08CRS87315-18) (08CRS87399-402) (08CRS87920-23) (08CRS87940-43) (10CRS11659) (10CRS11660)	No Error

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ACCOMPLICES AND ACCESSORIES

Accessory after the fact to first-degree murder—motion to dismiss—sufficiency of evidence—knowledge that gun in vehicle used in murder—The trial court did not err by denying defendant's motion to dismiss the charge of accessory after the fact to first-degree murder based on alleged insufficiency of the evidence that defendant knew the gun found in his vehicle had been used in a murder. The totality of the evidence gave rise to a reasonable inference that defendant knew precisely what had taken place. **State v. Schiro, 105.**

ACCORD AND SATISFACTION

Check marked full payment—no evidence of disputed debt—The trial court did not err by granting summary judgment for petitioner in a foreclosure action where respondent raised the defense of accord and satisfaction based upon a check allegedly marked "full payment." A notation of "full payment" did not constitute an accord and satisfaction when there was no evidence of a dispute over the debt. **In re Foreclosure of Five Oaks Recreational Ass'n, Inc., 320.**

APPEAL AND ERROR

Appealability—interests of justice—online ticket broker—The Court of Appeals granted *certiorari* in the interests of justice in an appeal from a summary judgment for plaintiffs in an action challenging an online marketplace for tickets as violating ticket resale statutes and being an unfair trade practice. **Hill v. Stubhub, Inc., 227.**

Interlocutory orders and appeals—avoidance of trial—not a substantial right—The appeal of the denial of a motion to dismiss was from an interlocutory order and was dismissed where defendant did not demonstrate why the order affected a substantial right which would be lost if not reviewed prior to final judgment. Avoidance of trial was not a substantial right justifying immediate appellate review. **Filipowski v. Oliver, 398.**

Interlocutory orders and appeals—denial of motion to dismiss—affected substantial right—The Court of Appeals addressed the merits of defendant's appeal from the trial court's order denying defendant's motion to dismiss for lack of subject matter jurisdiction. The order affected a substantial right as there was a real chance that the parties could be subject to inconsistent verdicts should defendant decide to make a claim for child support before the Clerk of Superior Court and the Clerk enters an order that differs from that of the district court. **Clements v. Clements, 581.**

Interlocutory orders and appeals—denial of summary judgment—substantial right not affected—Defendant's appeal from the trial court's order denying defendant's motion for summary judgment in a case involving a non-compete agreement was dismissed as interlocutory. The appeal did not affect a substantial right as there was no possibility of a verdict in the instant case being inconsistent with any previous judicial determinations. **Heritage Operating, L.P. v. N.C. Propane Exchange, LLC, 623.**

Interlocutory orders and appeals—dismissal in accordance with settlement—An appeal from an order to dismiss litigation in accordance with a settlement agreement was from an interlocutory order but was heard on appeal where it determined the action and prevented a judgment from which appeal might be taken. **Williams v. Habul, 281.**

APPEAL AND ERROR—Continued

Interlocutory orders and appeals—substantial right—compelling discovery—Plaintiff's appeal from an interlocutory discovery order requiring her to produce information and documents, which she claimed were protected by various privileges, affected a substantial right and was immediately appealable. **Young v. Kimberly-Clark Corp.**, 172.

Issue not reached—prior holding in same case precluded—Although appellants contended that Orange County's own representatives conceded that their parking proposals did not meet the parking requirements under the Zoning Ordinance, this issue was not reached based on the prior holding that Orange County produced competent, material, and substantial evidence supporting the issuance of a zoning compliance permit. **Orange Cnty. v. Town of Hillsborough**, 127.

Issues not addressed—prior holding in another case precluded—In light of the Court of Appeals' holding in case number COA11-375, it was not necessary to reach the issues presented on appeal in case number COA11-386. **Orange Cnty. v. Town of Hillsborough**, 127.

Juvenile delinquency—no basis for appeal—The State had no right to appeal the trial court's motion to suppress the juvenile defendant's statement in a delinquency case. The State lacked a statutory basis for appeal because the trial court's order did not terminate the prosecution. **In re P.K.M.**, 543.

Law of the case—dicta—An appeal was not barred by the law of the case where respondent argued that a prior appeal had decided as a matter of law that the record contained substantial evidence to support a board of adjustment zoning decision. The statement in the prior decision was, in context, merely *dicta*. **Templeton Props., L.P. v. Town of Boone**, 266.

Mootness—breach of contract—no claim seeking to redress an active harm—Plaintiffs' appeal in an action arising from an alleged breach of contract was dismissed as moot where plaintiffs made no claim seeking to redress an active harm. Even if the trial court were to have entered a judgment declaring that the defendants had breached the employment contracts of plaintiffs, such judgment could not have had any practical effect, in light of the fact that the breach was in the past, was not alleged to be likely to recur, was the only redress plaintiffs sought, and plaintiffs were barred from bringing further action on this same claim or issue. **Hindman v. Appalachian State Univ.**, 527.

Preservation of issues—admission of evidence—wife's statements—joint trial—no objection—no redaction—no plain error argued—Defendant's argument that evidence of statements made by his wife to investigating officers in an insurance fraud, obtaining property by false pretenses, and exploitation of an elder adult case should have been deemed inadmissible at their joint trial was dismissed. Defendant did not properly preserve this issue for appellate review given his failure to object to the introduction of the challenged statements, to seek redaction of the statements, or to argue that the admission of the challenged evidence constituted plain error. **State v. Pittman**, 512.

Preservation of issues—argument not raised below—not heard on appeal—An argument concerning breach of a settlement agreement that was not raised before the trial court was not properly before the appellate court. **Williams v. Habul**, 281.

Preservation of issues—failure to timely object—Although defendant Taylor contended the trial court erred by granting summary judgment in favor of plaintiffs

APPEAL AND ERROR—Continued

even though the motion was allegedly untimely, defendant waived this issue by failing to appear and object at the time the trial court considered the motion. **Nguyen v. Taylor, 1.**

ASSOCIATIONS

Planned Community Act—effective date—The North Carolina Planned Community Act, which governs the operation of North Carolina homeowners associations, generally applies only to associations created on or after 1 January 1999, with some provisions applying regardless of when the association was created. Those provisions include foreclosure for delinquent assessments, the subject of this action. Moreover, the superior court order following a review *de novo* of the clerk of court's order authorizing foreclosure was a final judgment, so that the Court of Appeals had jurisdiction over the appeal. **In re Foreclosure of Five Oaks Recreational Ass'n, Inc., 320.**

ATTORNEY FEES

Constructive fraud—no fiduciary relationship—The trial court erred in an action involving the parties' respective claims of entitlement to certain attorney fees by granting summary judgment against defendant Peed, holding him liable to plaintiff for constructive fraud. There was no discrepancy in bargaining power between the two parties, competing at arms-length as lawyers in a legal dispute, concerning the matter at issue, and thus, no fiduciary relationship arose with respect thereto. **Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A., 615.**

Quantum meruit claim—based on reasonable value of plaintiff's services—clean hands doctrine inapplicable—The trial court did not err in an action involving the parties' respective claims of entitlement to certain attorney fees when it permitted plaintiff to recover in *quantum meruit*. Plaintiff's *quantum meruit* claim and the trial court's award were based upon the reasonable value of plaintiff's services while it handled each of the cases and the clean hands doctrine did not bar plaintiff's equitable recovery. **Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A., 615.**

Reimbursement for advanced costs—obligation remained with clients—The trial court erred in an action involving the parties' respective claims of entitlement to certain attorney fees when it awarded plaintiff reimbursement for costs advanced by it on behalf of those clients who chose to follow defendant Snyder when he departed from plaintiff's employment. The obligation for reimbursement of those costs remained with the clients and plaintiff had no right of recovery of those costs against defendant Peed & Associates. **Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A., 615.**

Unfair trade practices—sufficient findings of fact—The trial court's judgment included sufficient findings of fact to support its conclusion of law that defendant Taylor was liable for unfair and deceptive practices, which permitted the trial court to award attorney fees under N.C.G.S. § 75-1.1. **Nguyen v. Taylor, 1.**

ATTORNEYS

Disciplinary Hearing Commission—due process—allegations materially different from complaint—insufficient evidence to support disbarment—The

ATTORNEYS—Continued

Disciplinary Hearing Commission denied defendant due process by conducting a hearing on the basis of allegations of fraud which materially differed from those alleged in the complaint. Defendant did not waive her due process rights and consent to consideration of additional issues by failing to object to admission of evidence concerning those issues. There was insufficient evidence to support disbarment or the imposition of other sanctions and the order of discipline disbaring defendant was reversed. **N.C. State Bar v. Barrett, 481.**

Removal—conflict of interest—pretrial and trial—The trial court did not err in an attempted first-degree murder and assault prosecution by determining that defendant's retained attorney must be removed to avoid any conflict of interest for pretrial as well as trial proceedings. **State v. Rogers, 296.**

BROKERS

Online tickets—exemption from liability—exceptions—In order for a website to lose the benefit of the exemption from liability granted by 47 U.S.C. § 230 (which provided an exemption for information provided by another content provider), the website must effectively control the content posted by third parties or take other actions which essentially ensure the creation of unlawful material. **Hill v. StubHub, Inc., 227.**

Online ticket sales—exemption from liability—unlawful activity—The trial court erred by using an erroneous “entire website” approach and granting summary judgment for plaintiffs in an action against an online ticket broker where defendants claimed the immunity created by 47 U.S.C. § 230. Focusing upon the specific content at issue in this case, the undisputed evidence established that defendant simply functioned as a broker, effectively putting a buyer and seller into contact with each other to facilitate a sale at a price established by the seller. The fact that defendant may have been on notice that its website could be used to make unlawful sales and that certain of defendant's practices may have provided incentives for the overpricing of certain tickets did not support a decision stripping defendant of its immunity under the federal statute. **Hill v. StubHub, Inc., 227.**

Online ticket sales—fees—defendant neither a seller nor an agent—dependent services—The trial court erred by determining that the fees charged by an online ticket broker violated N.C.G.S. § 14-33 where the undisputed evidence established that defendant was neither a ticket seller nor the ticket seller's agent. Defendant provided an independent brokerage function so that its fees related to its own services rather than the services provided by the seller. **Hill v. StubHub, Inc., 227.**

COMPROMISE AND SETTLEMENT

Employment of third party—reimbursement for amounts paid—The trial court correctly denied plaintiff reimbursement of amounts paid to a third-party beneficiary of a settlement agreement. The language of the agreement clearly and unambiguously contemplated employment of the third party rather than an intent to pay regardless of whether he worked. Moreover, any claim for damages concerning defendants' breach of promise to pay the third party (Mr. Groninger) must be brought by Mr. Groninger. **Williams v. Habul, 281.**

Receipt of payment—promise to employ third party—dependent co-venants—The trial court did not err by ordering plaintiff to dismiss litigation with

COMPROMISE AND SETTLEMENT—Continued

prejudice even though plaintiff contended that defendants had committed a prior breach of the settlement agreement by not employing a third party. Plaintiff's promise to dismiss the litigation was expressly linked to his receipt of payment from defendants; defendants' promise to employ the third party and plaintiff's promise to dismiss the litigation were independent covenants. **Williams v. Habul, 281.**

Third-party beneficiary—action for damages—The trial court did not err by denying a motion to enforce a settlement agreement where plaintiff sought specific performance of a promise to employ a third party. Plaintiff's argument revealed a request for damages in favor of the third-party intended beneficiary (Mr. Groninger) rather than a request for specific performance, and Mr. Groninger was the real party in interest who must bring that action. **Williams v. Habul, 281.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Defendant's statement—not coerced—Defendant's confession to five murders was not coerced where he contended that police threatened to imprison his father unless he confessed, but the trial court's findings sufficiently supported the conclusion that defendant's confession was not coerced. The findings included that defendant was not told that his father would benefit from defendant's statements and that defendant specifically acknowledged that no promises or threats were made. **State v. Cooper, 390.**

Motion to suppress pre-Miranda statements—admission of guilt—Although the trial court erred in an attempted felonious breaking or entering, possession of implements of housebreaking, and resisting a public officer case by failing to grant defendant's motion to suppress his pre-*Miranda* statements that he was breaking into Auto America and that he ran from an officer because he did not want to be caught, defendant was not prejudiced because defendant admitted his guilt after having been given his *Miranda* rights. **State v. Hemphill, 50.**

Statements in hospital—medication—defendant alert and oriented—The trial court did not err in denying defendant's motion to suppress his statements made in a hospital while medicated where the trial court made extensive findings that defendant was alert and oriented based on the testimony of the officer, the hospital records, and the recorded statements, and those statements supported the conclusion that defendant's statements were voluntary. **State v. Cornelius, 329.**

CONSTITUTIONAL LAW

Confrontation clause—doctrine of wrongdoing—forfeiture of right to confrontation—The trial court did not abuse its discretion in a first-degree murder and kidnapping case by denying defendant's motion for a mistrial where a witness was excused from testifying further after suffering an extreme emotional reaction on the witness stand and defendant had no opportunity to cross-examine the witness. The doctrine of wrongdoing was applicable in light of the overwhelming evidence regarding defendant's efforts to intimidate the witness to keep him from testifying and their effect on the witness. **State v. Weathers, 522.**

Discriminatory tax—rational basis—The trial court did not err by granting summary judgment in favor of the City and denying the same for appellants even though appellants contended there was no rational basis for a discriminatory tax. The other businesses being taxed lesser amounts for privilege license purposes were different classes of business. **IMT, Inc. v. City of Lumberton, 36.**

CONSTITUTIONAL LAW—Continued

Double jeopardy—attempted murder—assault—same facts—There was no double jeopardy violation where judgment was entered for both attempted murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury based upon the same evidence. Each offense contained at least one element not included in the other. **State v. Rogers, 296.**

Due process—voluntary dismissal of charge after continuance denied—refiling—no violation—Defendant was not denied due process when the State refiled an impaired driving charge which it had earlier dismissed after its motion for a continuance had been denied. The voluntary dismissal was pursuant to N.C.G.S. § 15A-931, the refiled charge was within the statute of limitations, defendant did not argue bad faith or show how he was prejudiced, and defendant did not demonstrate how the charge shocked the conscience or interfered with defendant's fundamental rights. **State v. Friend, 338.**

Effective assistance of counsel—failure to object—Defendant did not receive ineffective assistance of counsel in an attempted felonious breaking or entering and possession of implements of housebreaking case based on his attorney's failure to object to the admission of the tools and defendant's statements at trial. The screwdriver and wrench were properly seized pursuant to a constitutional stop and frisk, and defendant was not prejudiced by the admission of his pre-*Miranda* statements. **State v. Hemphill, 50.**

Equal protection—smoking ban—private club exception—rational reason—no violation—The trial court erroneously concluded that the challenged portions of the North Carolina smoking ban irrationally distinguished petitioners' establishments from country clubs and unconstitutionally subjected the establishments to restrictions while exempting country clubs. The legislature's exemption of country clubs is limited to private, non-profit country clubs and does not exclude public or for-profit country clubs. As the legislature could have had a plausible, rational reason for allowing smoking in private, non-profit country clubs, but disallowing smoking in private, for-profit non-country clubs, the smoking ban's private club exception did not irrationally classify the establishments, and respondent's enforcement of the North Carolina smoking ban against petitioners did not violate petitioners' constitutional right to equal protection. **Edwards v. Pitt Cnty. Health Dir., 452.**

Free Speech—sweepstakes results—entertaining displays—ban overbroad—The portion of N.C.G.S. § 14-306.4 which criminalized the dissemination of a sweepstakes result through use of an entertaining display was unconstitutionally overbroad and void. The definition of entertaining displays encompassed all forms of videogames. The trial court's order was not sufficient to cure the constitutional defect in that it invalidated only a single example of an entertaining display rather than the entire statute. **Hest Techs., Inc. v. State ex rel. Perdue, 308.**

Free Speech—video games and entertaining displays—That portion of N.C.G.S. § 14-306.4 which forbade the revelation of a sweepstakes prize by an entertainment display directly regulated protected speech under the First Amendment. Banning the dissemination of sweepstakes results through entertaining displays could not be characterized as merely a regulation of conduct. **Hest Techs., Inc. v. State ex rel. Perdue, 308.**

Right to confront witnesses—private conversations with attorneys—attorney-client privilege—The trial court did not violate defendant's constitutional right to confront the witnesses against him in a first-degree murder case by refusing

CONSTITUTIONAL LAW—Continued

to permit defense counsel to cross-examine two coparticipants regarding conversations they had with their attorneys. The coparticipants' private conversations with their attorneys were protected by the attorney-client privilege. Further, defendant was permitted to inform the jury that the coparticipants were testifying under an agreement with the State and were provided a charge concession. **State v. Lowery, 151.**

Right to counsel—invocation—Defendant's right to counsel was not violated where defendant invoked his rights, the police arrested his father, defendant re-initiated a conversation with police, and detectives took his statements. Although defendant contended that the police engaged in conduct that was the functional equivalent of re-initiating interrogation by "parading" his father in front of him, the trial court found that defendant was never promised that his father would benefit from any statement that he made and that finding had adequate support in the record. **State v. Cooper, 390.**

Right to counsel—removal of attorney of choice—potential conflict of interest—The presumption in favor of defendant's counsel of choice was properly overcome in a prosecution for attempted first-degree murder and assault and the trial court did not abuse its discretion by removing defendant's retained counsel based on the possibility that the attorney might be called to testify. The attempted murder arose from defendant's affair with the victim's wife, and his retained counsel was also his best friend and had talked with the victim's wife. There was evidence of a serious potential for conflict in the attorney's relationships with both parties and his awareness of personal and sensitive information. The fact that the conflict never materialized was not dispositive. **State v. Rogers, 296.**

Right to counsel—removal of counsel—potential conflict of interest—findings—The trial court did not apply an incorrect standard to its decision on the State's motion to remove defendant's counsel under Rule 3.7 of the North Carolina Revised Rules of Professional Conduct. Defendant argued that the trial court should have made findings that it was likely that the attorney would be a necessary witness but cited no legal authority for its position, and there was no evidence of substantial hardship. There was competent evidence in the record to support the trial court's conclusions. **State v. Rogers, 296.**

Right to jury trial—waiver—failure to appear—The trial court did not err by conducting a bench trial to determine plaintiffs' damages even though defendant Taylor specifically demanded a jury trial in his answer. Since defendant did not appear at trial, he waived his right to a jury trial. **Nguyen v. Taylor, 1.**

Right to remain silent—invocation—There was ample evidence in the record to support the trial court's finding that defendant did not invoke his right to remain silent when he refused to talk to police about the murders other than to deny his involvement. Defendant's continued assertions of innocence cannot be considered unambiguous invocations of his right to remain silent. **State v. Cooper, 390.**

Right to speedy trial—charge dismissed and refiled—appealed from district to superior court—Defendant's right to a speedy trial on an impaired driving charge was not violated where the date of the offense and initial charge was 7 March 2009, that charge was voluntarily dismissed by the State and the charge was refiled in district court on 13 April, defendant never filed a speedy trial motion in district court, and his only speedy trial request was in superior court on 4 February 2010.

CONSTITUTIONAL LAW—Continued

The time from his appeal from district to superior court until his trial in superior court was less than one year. Moreover, the reasons for the delay were attributable to defendant as much as to the State, defendant's delayed assertion of the right to a speedy trial weighed against him, and defendant did not show actual impairment of his defense. **State v. Friend, 338.**

Right to unanimous verdict—jury instruction—failure to distinguish between two murder theories—The trial court did not err in an accessory after the fact to first-degree murder case by instructing the jury that it was immaterial that the verdict sheet did not distinguish between the two murder theories of the underlying felony even though defendant contended that it allowed the jury to return a non-unanimous verdict. The indictment stated the “felony of murder” and not the “felony murder rule.” Further, it would not have affected the jury unanimously finding defendant guilty of knowingly and willingly assisting the shooter in attempting to escape detection and/or arrest by hiding the firearm. **State v. Schiro, 105.**

Separation of powers—prosecutor's voluntary dismissal and refile of charge—control of calendar—The separation of powers provision of the North Carolina Constitution was not violated by the State dismissing an impaired driving charge when its motion for a continuance was denied. Although defendant contended that the district attorney is an executive branch officer, the prosecutor is by precedent a judicial or quasi-judicial officer. Even if the district attorney is an executive officer, the trial court retained ultimate control over its calendar after the State filed a new charge. **State v. Friend, 338.**

CONVERSION

Trespass to chattels—valid possessory lien—genuine issue of material fact—The trial court erred in a case involving motorcycle engines by granting defendant's motion for partial summary judgment on claims of conversion and trespass to chattels. There was a genuine issue of material fact regarding whether plaintiff had a valid possessory lien over all the engines in its possession. **Vaseleniuck Engine Dev., LLC v Sabertooth Motorcycles, LLC, 540.**

CORPORATIONS

Individual stockholders – claims not within scope of Barger exceptions—The trial court did not err by granting defendants' motion to dismiss in a case brought by individual stockholders of Wachovia Corporation alleging that the individual defendants participated in a fraudulent scheme to deceive plaintiffs and the public as to Wachovia's financial stability. Shareholders generally cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock and plaintiffs' claims did not fall within the scope of either of the exceptions enumerated in *Barger*, 346 N.C. 650. **Estate of Browne v. Thompson, 637.**

Piercing the corporate veil—wrongdoing—insufficient allegations—The trial court did not err in dismissing plaintiff's claim for piercing the corporate veil where plaintiff failed to sufficiently allege a wrongdoing to meet the second prong of the instrumentality test for piercing the corporate veil. **Best Cartage, Inc. v. Stonewall Packaging, LLC, 429.**

CRIMINAL LAW

Defenses—automatism—instruction—There was no plain error in a prosecution for attempted murder and assault where the court instructed the jury that defendant had the burden of proving the defense of automatism. **State v. Rogers, 296.**

Guilty plea—attorneys not required to advise client of immigration consequences—The trial court did not err in an assault with a deadly weapon inflicting serious injury case by concluding that the United States Supreme Court's decision in *Padilla v. Kentucky*, was inapplicable to defendant's case since it was a new rule of constitutional law that was not retroactively applicable on collateral review. Prior to *Padilla*, neither our state courts nor federal courts required counsel to advise a client of the immigration consequences of a guilty plea. *Padilla* did not establish a watershed rule of criminal procedure and did not fall within either of the *Teague* exceptions. **State v. Alshaif, 162.**

New trial—newly discovered evidence—due diligence—different result probable—The trial court did not abuse its discretion in a possession of drugs and drug paraphernalia case by awarding defendant a new trial based upon newly discovered evidence. The confession by defendant's father that the drugs and drug paraphernalia discovered by police were his constituted newly discovered evidence, defendant used due diligence and proper means to attempt to procure the testimony at trial, and the evidence was sufficient to support the trial court's conclusion that the newly discovered evidence would probably result in a different outcome at a new trial. **State v. Rhodes, 599.**

DAMAGES AND REMEDIES

Compensatory damages—amount—The trial court did not abuse its discretion in a defamation *per se*, appropriation, and unfair and deceptive practices case by awarding one million dollars in compensatory damages to each plaintiff police officer. Defendant Taylor's action of creating a heavily edited version of a video recording making it appear as though defendant was wrongfully arrested caused plaintiffs significant harm in their personal lives and in their careers as police officers, this harm will continue throughout the remainder of plaintiffs' careers, and defendant profited from the harm he caused plaintiffs in an amount exceeding ten million dollars. **Nguyen v. Taylor, 1.**

Punitive damages—aggravating factors—standard of proof—The trial court did not abuse its discretion in a defamation *per se*, appropriation, and unfair and deceptive practices case by awarding each plaintiff two million dollars in punitive damages from defendant Taylor. However, while the trial court's judgment concluded, based upon defendant's admission, that he acted with actual malice and personal ill will toward plaintiffs, it failed to state whether this finding of an aggravating factor was by clear and convincing evidence as required by N.C.G.S. § 1D-15(b). The judgment was remanded to the trial court to consider whether the evidence of that aggravating factor met the required standard of proof, and so that the judgment could be amended to reflect its determination on this issue. **Nguyen v. Taylor, 1.**

Punitive damages—improper use of co-defendants' admissions—The trial court erred by its punitive damages award. The trial court improperly used the admissions of defendant's co-defendants regarding profits and ability to pay to determine the amount of punitive damages to award against defendant. Defendant's failure to participate in the instant case did not relieve plaintiffs of their burden to prove their damages. Defendant was granted a new trial on the issue of punitive damages. **Nguyen v. Taylor, 1.**

DEEDS

Amended restrictive covenants—resubdividing property—The trial court did not err by ruling that the provision for changes, division or combination of lots in the 2007 amended covenants was valid and reasonable. Neither plaintiffs' brief nor their complaint made it clear what remedy plaintiffs sought with regard to individual lot owners who resubdivided their property under the original covenants and whose resubdivision was now valid under the amended covenants. **Taddei v. Vill. Creek Prop. Owners Ass'n, Inc., 199.**

Property owners—amendment of restrictive covenants—The trial court did not err by concluding the amendments made to the property owners' restrictive covenants were lawfully based on paragraph 3 of the covenants. The covenants were properly amended, prior to the expiration of the first 20-year term, according to the language of Paragraph 3. **Taddei v. Vill. Creek Prop. Owners Ass'n, Inc., 199.**

Reformation denied—evidence of mutual mistake—not sufficient—The trial court did not err by denying plaintiff's motion for judicial reformation of a deed in a dispute over ownership of a bulkhead between a condominium homeowners association and a marina. Although plaintiff's evidence of its mistaken belief about the amount of property involved in a prior exchange of parcels was convincing, plaintiff failed to establish clear, cogent, and convincing evidence of defendants' mistaken belief at the time of the exchange of parcels. **Inland Harbor Homeowners Ass'n, Inc. v. St. Josephs Marina, Inc., 348.**

DISCOVERY

Medical records—emotional distress claim—waiver—The superior court did not abuse its discretion in a wrongful termination case by ordering the production of plaintiff's medical records that allegedly involved purely physical conditions unrelated to her mental or emotional condition. Plaintiff's arguments were speculative and hypothetical. Further, the statutory privileges accorded communications between a patient and various medical providers is impliedly waived if the patient brings a claim for emotional distress since this type of claim places her medical condition at issue. **Young v. Kimberly-Clark Corp., 172.**

Names of persons contacted by counsel—work-product doctrine inapplicable—identification—The trial court did not err in a wrongful termination case by requiring plaintiff to disclose the names of persons contacted by her counsel even though plaintiff contended it violated the work-product doctrine and her right against disclosure of trial witnesses until prior to trial. Contrary to plaintiff's assertion, the order only required plaintiff to comply with her already existing discovery obligations and merely required identification of the persons contacted. **Young v. Kimberly-Clark Corp., 172.**

Tax returns—mitigation defense—loss of past and future earnings—certification—The trial court did not err in a wrongful termination case by ordering plaintiff to disclose her tax returns even though plaintiff contended the information contained in them was available from other sources. Information from the tax returns was relevant to the subject matter as it related to both the mitigation defense of the party seeking discovery and plaintiff's claim for loss of past and future earnings. Further, plaintiff's own certification as to her income was available only on the income tax returns themselves. **Young v. Kimberly-Clark Corp., 172.**

Violation—failure to disclose evidence in timely manner—circumstances considered—no prejudice—The trial court did not commit prejudicial error in a

DISCOVERY—Continued

trafficking in cocaine by possession and conspiracy to sell cocaine case by admitting into evidence the transcript of the recording of the drug transaction and the testimony of the interpreter who prepared that transcript. Although the State violated the rules of discovery by failing to disclose to the defense in a timely manner the contents of the transcript, the identity of the expert who prepared it, and the State's intent to offer the interpreter's expert opinion testimony, the trial court did not abuse its discretion by choosing not to strike the challenged evidence as the court considered the circumstances surrounding the alleged discovery violation both before and after admitting the challenged evidence. Further, even assuming *arguendo* that the trial court erred in allowing the transcript and the testimony into evidence, defendant failed to show he was prejudiced by the error. **State v. Aguilar-Ocampo, 417.**

DRUGS

Cocaine trafficking—motion to dismiss—knowing possession or transportation—driving vehicle—The trial court did not err by denying defendant's motion to dismiss the cocaine trafficking charges based on alleged insufficient evidence to show that defendant knowingly possessed or transported cocaine. The evidence that defendant was driving the vehicle which contained cocaine was alone enough to show that defendant's possession was knowing. **State v. Lopez, 139.**

Felony possession—constructive possession—evidence not sufficient—The trial court erred by denying defendant's motion to dismiss charges of felony possession of cocaine and marijuana where the drugs were found near trash receptacles in a parking lot after defendant fled from an automobile crash. Defendant was not in a place where he exercised any control, he was not seen taking any actions consistent with disposing of the drugs, there was no physical evidence linking him to the drugs recovered, and there were no drugs found in his van, although a large amount of cash and a wrapper that could be used to smoke tobacco or marijuana were recovered from the van. **State v. Lindsey, 249.**

Trafficking by possession of cocaine—conspiracy to sell cocaine—jury instructions—adequately contained substance of defendant's requested instruction—The trial court did not err by denying defendant's request for a special instruction to the jury on the word "knowingly," as it appears in the elements of the offenses for trafficking by possession and conspiracy to sell cocaine. The instructions given by the trial court, when read as a whole, adequately contained the substance of defendant's requested instruction for an explanation that defendant must have intentionally and voluntarily participated in the crimes. **State v. Aguilar-Ocampo, 417.**

EMOTIONAL DISTRESS

Negligent infliction of emotional distress—intentional infliction of emotional distress—The trial court did not err by dismissing plaintiff's claims of negligent and intentional infliction of emotional distress. Plaintiff's statement that he began to experience serious on and off the job stress that severely affected his relationship with his wife and family members was insufficient to support these claims. **Pierce v. Atl. Grp., Inc., 19.**

EMPLOYER AND EMPLOYEE

Wrongful discharge—failure to show violation of law or public policy—The trial court did not err by dismissing plaintiff's wrongful discharge claim. Plaintiff's allegations failed to show that defendants ever violated their Occupational Safety and Health Administration obligations, including 13 N.C. Admin. Code 07F .0901, *et seq.*, and plaintiff's assertions that defendants' termination of his employment violated law or public policy based on provisions of the administrative code that were yet to become effective did not remedy this deficiency in plaintiff's pleadings. **Pierce v. Atl. Grp., Inc., 19.**

Wrongful discharge—Retaliatory Employment Discrimination Act—initiation of inquiry—The trial court did not err by dismissing plaintiff's complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) for violation of the Retaliatory Employment Discrimination Act. Plaintiff called defendant Duke's ethics hotline to report the retaliatory treatment he had been receiving and not to report a concern regarding occupational health and safety in the context of his employment with defendant Atlantic. These allegations were insufficient to constitute the initiation of an inquiry pursuant to N.C.G.S. § 95-241(a). **Pierce v. Atl. Grp., Inc., 19.**

ENVIRONMENTAL LAW

Sedimentation Pollution Control Act—land-disturbing activity—deposition into body of water—summary judgment proper—The trial court did not err in denying plaintiffs' motion for summary judgment in a construction case involving alleged violations of the Sedimentation Pollution Control Act (SPCA). The SPCA did not apply because a "land-disturbing activity" requires an element of deposition into a body of water, which was not present in this case. **Applewood Props., LLC v. New S. Props., LLC, 462.**

ESTOPPEL

Acceptance of benefits—county not subject to same extent as individual or private corporation—The trial court did not err by concluding that Orange County was not estopped from challenging the validity of the zoning ordinance, thereby avoiding the parking condition of site plan approval, based on its acceptance of the benefits of the conditional site plan approval by commencing construction of the addition to the Justice Center. A county is not subject to an estoppel to the same extent as an individual or a private corporation. Enforcing the doctrine of estoppel on Orange County would impair Orange County's mandated government function under N.C.G.S. § 7A-302 of providing courtrooms, office space for juvenile court counselors and support staff, and related judicial facilities for each county where a district court has been established. **Orange Cnty. v. Town of Hillsborough, 127.**

Offensive collateral estoppel—felony murder—underlying felony—established at first trial—The defendant in a second felony murder trial was not entitled to retry the issue of whether defendant had committed the underlying felony of first-degree burglary where the jury in the first trial heard the evidence, deliberated, and without error returned a verdict of guilty of first-degree burglary. The offensive use of collateral estoppel against a defendant was established by *State v. Dial*, 122 N.C. App. 298, and defendant did not cite a case suggesting that *Dial* was overruled. **State v. Cornelius, 329.**

EVIDENCE

Curtailing cross-examination—precluding doctor’s testimony—The trial court did not err in a first-degree murder case by curtailing defendant’s cross-examination of witnesses about privileged attorney-client conversations and precluding a doctor’s testimony since defendant saw the doctor in preparation of his defense. **State v. Lowery, 151.**

Doctor testimony not admitted—medical diagnosis or treatment exception inapplicable—The trial court did not err in a first-degree murder case by denying defendant’s motion to admit the testimony of a doctor stating that defendant confessed to the killing only because one of the interviewing officers told him that he would receive the death penalty if he did not confess. Defendant saw the doctor for the purpose of preparing a defense, and the statement defendant sought to admit was not shown to be pertinent to medical diagnosis or treatment. **State v. Lowery, 151.**

Prior crimes or bad acts—incarceration—prejudice not demonstrated—no plain error—The trial court did not commit plain error in an assault with a deadly weapon inflicting serious injury case by admitting testimony that defendant had been incarcerated in the past and was associated with people involved with drugs. Even assuming, without deciding, that the admission of the testimony was erroneous, defendant failed to demonstrate that the error caused the jury to reach its verdict. **State v. Oakes, 490.**

Prior crimes or bad acts—other thefts and break-ins—corroboration—motive—opportunity—intent—knowledge—The trial court did not err in an accessory after the fact to first-degree murder case by admitting evidence of other thefts and break-ins, including alleged crimes committed after the time of the charged offense. The evidence was admissible to corroborate the testimony of several other witnesses and was relevant to show defendant’s motive, opportunity, intent, and knowledge because the shooter in the first-degree murder case had incriminating evidence against defendant in having been involved in a break-in. **State v. Schiro, 105.**

Testimony—substantially similar evidence already presented—The trial court did not err in a first-degree murder case by overruling defendant’s objection to his girlfriend’s testimony that she did not press defendant for information on what happened on the pertinent night because she did not want to anger him or get beaten. There was substantially similar evidence presented at trial that was unchallenged on appeal. Further, there was no probability that the jury would have reached a different outcome in light of the other evidence presented at trial. **State v. Gettys, 93.**

FIDUCIARY RELATIONSHIP

Breach of fiduciary duty—Property owner association president—differing opinions—personal interest in outcome—The trial court did not err by granting summary judgment in favor of defendant property owner association president on the issue of breach of fiduciary duty. The evidence presented by plaintiffs did not indicate that defendant breached his fiduciary duty and merely showed that he had a differing opinion from plaintiffs on a number of issues regarding the covenants and Village Creek. Defendant’s personal interest in the outcome of the amendment vote did not make this a “voidable” transaction as described in N.C.G.S. § 55A-8-31(a). **Taddei v. Vill. Creek Prop. Owners Ass’n, Inc., 199.**

Money transferred to joint account—transfer not a gift—The trial court did not err in denying plaintiff’s motions for directed verdict and motion for judgment notwithstanding the verdict as to her claim against defendant Cowart for breach of

FIDUCIARY RELATIONSHIP—Continued

fiduciary duty. The evidence, when viewed in the light most favorable to Cowart, showed that Cowart was acting in furtherance of plaintiff's deceased Doris King's wishes when he transferred half of the King's money to a joint account with right of survivorship. The transfer was not a gift to Cowart in violation of N.C.G.S. § 32A-14.1. **Albert v. Cowart, 546.**

FRAUD

Constructive fraud—breach of fiduciary duty—civil conspiracy—conversion—sufficiently pled—asserted within statute of limitations—The trial court erred by granting defendants' motion for judgment on the pleadings and dismissing plaintiff's claims for constructive fraud based on breach of a fiduciary duty, civil conspiracy, and conversion arising from defendants' allegedly fraudulent withdrawal of money from plaintiff's bank account. The claims were sufficiently pled and asserted within the applicable statute of limitations. **Dixon v. Gist, 630.**

GAMBLING

Cyber-gambling—Internet Tax Freedom Act—The trial court did not err by granting summary judgment in favor of the City and denying the same for appellants even though appellants contended the local municipal ordinance was preempted by the Internet Tax Freedom Act since it applied to businesses engaged in promotional activity using the internet. The ordinance never mentioned internet-based sweepstakes or made a distinction regarding electronic commerce, but instead imposed the tax for cyber-gambling establishments that used a computer or gaming terminal in provision of games of chance. **IMT, Inc. v. City of Lumberton, 36.**

Games—no payment requirement—The trial court did not err by granting summary judgment in favor of the City and denying the same for appellants even though appellants contended their games did not require payment as the local municipal ordinance required. The ordinance applied to appellants because they accepted payment in exchange for customers' use of computers that conducted games of chance. **IMT, Inc. v. City of Lumberton, 36.**

Privilege license tax—games of chance—sweepstakes—The trial court did not err by granting summary judgment in favor of the City and denying the same for appellants even though appellants contended they did not operate "games of chance" as required under the pertinent local municipal ordinance instituting a privilege license tax applicable to for-profit businesses where persons utilized electronic machines to conduct games of chance. The ordinance imposed a privilege tax on electronic machines that conducted "games of chance" including sweepstakes. **IMT, Inc. v. City of Lumberton, 36.**

Sweepstakes—entertaining display—prohibition unconstitutional—An order dismissing a complaint that sought an injunction that its promotional sweepstakes did not violate any North Carolina gaming or gambling law was reversed where N.C.G.S. § 14-306.4, under which plaintiffs' sweepstakes squarely fell, was held to be unconstitutional by *Hest Technologies, Inc. v. State*, No. COA11-459 (Filed 6 March 2012). **Sandhill Amusements, Inc. v. State ex rel. Perdue, 362.**

HOMICIDE

First-degree murder—failure to instruct on lesser-included offense of voluntary manslaughter—The trial court did not err in a first-degree murder case by

HOMICIDE—Continued

refusing to instruct the jury on the lesser-included offense of voluntary manslaughter. Defendant was not prejudiced because the jury had the option of convicting him of second-degree murder. **State v. Gettys, 93.**

First-degree murder—felony murder rule—robbery with dangerous weapon—The trial court did not err by refusing to dismiss the first-degree murder charge under the felony murder rule. The evidence viewed in the light most favorable to the State revealed that there was substantial evidence of each element of robbery with a dangerous weapon and that defendant was the perpetrator. **State v. Gettys, 93.**

First-degree murder—requested instruction on deliberation denied—felony murder conviction—There was error in a first-degree murder prosecution in not giving defendant's requested instruction on deliberation where defendant was convicted on the basis of premeditation and deliberation and felony murder. **State v. Cooper, 390.**

IMMUNITY

Governmental—negligence—pleadings stage—insurance purchased—The trial court did not err in a negligence case by denying defendant's motion to dismiss on the basis of governmental immunity. The trial court explicitly declined to consider materials beyond the pleadings at that stage, and plaintiffs' specifically alleged, *inter alia*, that defendant Durham County had purchased insurance and thus had waived its immunity. **Robinson v. Smith, 518.**

INDICTMENT AND INFORMATION

Misdemeanor resisting an officer—general description of actions sufficient—The trial court did not err by failing to dismiss the charge of misdemeanor resisting an officer even though defendant contended the indictment for this charge was fatally defective. An indictment for resisting arrest must only include a general description of defendant's actions, and the indictment's general language was sufficient to put defendant on notice that the events surrounding his arrest would be brought out at trial. **State v. Hemphill, 50.**

INJUNCTIONS

Enjoining from transferring, removing, or disposing assets—statutory exemptions—The trial court did not err in a breach of contract, negligent misrepresentation, and unfair or deceptive practices case by enjoining defendant individual from transferring, removing, or disposing assets. The prohibition was within the authority conferred by N.C.G.S. § 1-358. Further, the order did not prohibit defendant from filing an amended motion or subsequent motion to claim statutory exemptions. **Songwooyarn Trading Co., Ltd. v. Sox Eleven, Inc., 213.**

JOINT VENTURE

Elements sufficiently alleged—motion to dismiss erroneous—The trial court erred in dismissing plaintiff's claim for joint venture because it adequately pled the elements of a joint venture. Plaintiff alleged a joining of funds, labor, and property in a common purpose where each defendant had a right to direct the other. **Best Cartage, Inc. v. Stonewall Packaging, LLC, 429.**

JUDGMENTS

Motion to set aside entry of default—agreement for extension of time—failure to file answer—The trial court did not abuse its discretion by refusing to set aside entry of default against defendant Bungalo. Although defendant, due to an agreement with plaintiffs' counsel, was granted an extension of time, an answer was never filed. Further, plaintiffs then waited an additional three weeks to file a motion for entry of default. **Nguyen v. Taylor, 1.**

JURISDICTION

Subject matter jurisdiction—child support—incompetent ward—district court's original jurisdiction—The trial court did not err in a child support case by denying defendant's motion to dismiss for lack of subject matter jurisdiction. The Clerk of Superior Court did not have exclusive jurisdiction over the issue of child support, even where it involved the estate of an incompetent ward, and the district court's original jurisdiction outweighed the concurrent jurisdiction of the two forums. **Clements v. Clements, 581.**

Subject matter—wills—conversion—breach of fiduciary duty—constructive fraud—not impermissible collateral attack—The trial court did not lack jurisdiction over the subject matter of plaintiffs' civil action alleging conversion, breach of fiduciary duty, and constructive fraud. The action did not constitute an "impermissible collateral attack" on the validity of the deceased's will as the complaint did not seek a determination of the validity of the contested will or require the trial court to make such a determination in the course of deciding other issues. **Shoaf v. Shoaf, 471.**

Supplemental hearing—principal matter on appeal—The trial court had jurisdiction in a breach of contract, negligent misrepresentation, and unfair or deceptive practices case to conduct a supplemental hearing and issue an order when the principal matter was on appeal. The supplemental hearing did not concern the subject matter of the suit and was intended to aid in the security of plaintiff's rights while the appeal was pending. **Songwooyarn Trading Co., Ltd. v. Sox Eleven, Inc., 213.**

JURY

Divided jury—Allen instruction—pattern jury instructions—The trial court did not err or commit plain error in a first-degree murder case by giving an *Allen* charge to the divided jury. The pattern jury instructions fairly apprised the jurors of their duty to reach a consensus after open-minded debate and examination without sacrificing their individually held convictions merely for the sake of returning a verdict. **State v. Gettys, 93.**

Refusal to remove jury foreperson—failure to renew challenge during trial—The trial court did not err in a first-degree murder case by refusing to remove the jury foreperson from the jury. Defense counsel failed to renew his challenge as required by N.C.G.S. § 15A-1214(h)(2) since he did not attempt to renew the challenge until after the jury returned its verdict. Removal for cause must be requested during the trial. **State v. Lowery, 151.**

LARCENY

From a merchant by removal of anti-theft device—indictment fatally flawed—merchandise description too general—attempted larceny alleged—no subject matter jurisdiction—The trial court lacked subject matter jurisdiction

LARCENY—Continued

in a larceny from a merchant by removal of anti-theft device case because the indictment was fatally flawed. The description “merchandise” was too general to identify the property allegedly taken by defendant and the indictment alleged only an *attempted* rather than a *completed* larceny. Judgment was arrested, which served to vacate the verdict, and the habitual felon judgment was reversed and remanded for dismissal of the habitual felon indictment. **State v. Justice, 642.**

LIBEL AND SLANDER

Libel per se—failure to allege email or report susceptible of two meanings—libel per quod—The trial court did not err by dismissing plaintiff’s defamation claim. Plaintiff’s complaint, alleging that defendant falsely contended that plaintiff falsified his time card or reported plaintiff to the Nuclear Regulatory Commission did not set forth a cause of action for libel *per se*. Further, plaintiff’s complaint was insufficient to state a claim because the complaint did not allege that the email or report were susceptible of two meanings. Finally, plaintiff’s allegation that the alleged defamation damaged plaintiff’s economic circumstances did not fairly inform defendants of the scope of plaintiff’s libel *per quod* claim. **Pierce v. Atl. Grp., Inc., 19.**

LIENS

Equitable lien—no breach of oral agreement—no action inconsistent with fiduciary or contractual obligation—The trial court did not err in a case involving a deed of trust by not imposing an equitable lien on a tract of land at issue. Plaintiffs did not assert that the Teague defendants had breached an oral agreement with plaintiffs or that the Teagues had acted inconsistently with some sort of a fiduciary or contractual obligation that they owed to plaintiffs. **Branch Banking & Trust Co. v. Teague, 441.**

Mechanics’ liens—violation—summary judgment improper—The trial court improperly granted summary judgment in a case involving motorcycle engines on defendant’s claim that plaintiff violated the enforcement by lien statute, N.C.G.S. § 44A-4. Although the evidence before the trial court was sufficient to raise an inference that plaintiff failed to substantially comply with N.C.G.S. § 44A-4, that was a factual issue which could have been determined only by the jury. **Vaseleniuck Engine Dev., LLC v Sabertooth Motorcycles, LLC, 540.**

MORTGAGES AND DEEDS OF TRUST

Foreclosure—right to arbitrate—improperly raised—appeal dismissed—An appeal to the Court of Appeals in a foreclosure action was dismissed where respondents’ argument concerned their right to arbitration, rather than the six findings required by N.C.G.S. § 45-21.16 for the clerk of superior court to enter an order allowing a foreclosure sale to proceed. The right to arbitration was not pertinent to those findings and the trial court properly refused to rule on respondents’ arbitration motion; respondents should have raised the issue in a motion to enjoin pursuant to N.C.G.S. § 45-21.34. **In re Foreclosure of Carter, 370.**

Reformation—bona fide purchasers for value—without notice—The trial court did not err in a case involving a deed of trust by granting summary judgment in favor of the Teague defendants on the issue of whether plaintiffs were entitled to reformation of the deed of trust. The Teague and Glover defendants were *bona fide* purchasers for value who took the property in question without notice of the alleged

MORTGAGES AND DEEDS OF TRUST—Continued

defect in the deed, and reformation will not be granted if prejudice would result to the rights of a *bona fide* purchaser for value without notice. **Branch Banking & Trust Co. v. Teague, 441.**

Reformation—prejudice—material issue of fact—The trial court erred in a case involving a deed of trust by granting summary judgment to the Teague defendants on the issue of whether plaintiffs were entitled to reformation of the deed of trust. Whether defendants would have been prejudiced by reformation of the deed was a genuine issue of material fact. **Branch Banking & Trust Co. v. Teague, 441.**

MOTOR VEHICLES

License checkpoint—evasion—stopped elsewhere—validity of checkpoint irrelevant—An order in an impaired driving prosecution granting defendant's motion to suppress evidence obtained after defendant was stopped was remanded where defendant turned into a driveway short of a license checkpoint and the trial court granted the motion based on the checkpoint having been conducted without written authorization. Defendant was not stopped at the checkpoint and *White v. Tippett*, 187 N.C. App. 285, was controlling. The case was remanded for a determination of whether defendant was unconstitutionally stopped at the residence. **State v. Collins, 374.**

Speeding to elude arrest—identification of defendant—not sufficient—Defendant's motion to dismiss the charge of felony speeding to elude arrest should have been granted where the pursuing officer never saw the driver as the vehicle fled from him. Some evidence must exist of a driver's identity; here, there was sufficient time between the officer losing track of the van he was pursuing and another officer seeing a van crash that the absence of identification of the fleeing driver was determinative. Even if the van that fled the original officer was the same van that crashed some minutes later, the State presented no evidence identifying the person driving that van and no evidence of that van's activities during the intervening time. **State v. Lindsey, 249.**

NATIVE AMERICANS

North Carolina State Commission of Indian Affairs—jurisdiction to hear intra-tribal disputes—The trial court erred in reversing respondent North Carolina State Commission of Indian Affairs' (Commission) decision to decline to decide which of two individuals representing competing factions of petitioner tribe represented the tribe on the Commission. The Commission had no jurisdiction to decide the issue as N.C.G.S. §§ 143B-405 and 143B-406 gave the Commission no authority to resolve such intra-tribal disputes. **Meherrin Tribe of N.C. v. N.C. State Comm'n of Indian Affairs, 558.**

NEGOTIABLE INSTRUMENTS

Promissory note—holder of the note—judicial notice of merger—summary judgment erroneous—The trial court erred in a case involving a dispute over the payment of a promissory note by allowing plaintiff's motion for summary judgment. Plaintiff failed to show that it was the owner and holder of the promissory note upon which it had sued, plaintiff's alleged merger with the named lender on the note was not appropriate for judicial notice where no evidence of the merger was forecast before the trial court at the summary judgment stage, and plaintiff failed to properly present evidence of a merger to the Court of Appeals. **TD Bank, N.A. v. Mirabella, 505.**

NUISANCE

Unrepaired dwelling—town ordinance—The trial court did not err by granting partial summary judgment in favor of plaintiff based upon Town Ordinance § 16-31(6)(b). Defendant would have promptly performed the necessary repairs to its dwelling if plaintiff had not refused to issue the required permits. The case was remanded for further proceedings on the issue of whether the dwelling was a nuisance under the town ordinance, and if so, to determine appropriate relief. **Town of Nags Head v. Cherry, Inc., 66.**

PARTNERSHIPS

By estoppel—sufficient representations to third party—belief and reliance upon representations—motion to dismiss erroneous—The trial court erred in granting defendant Jackson's motion to dismiss regarding plaintiff's claim for partnership by estoppel. Plaintiff alleged sufficient facts to meet the requirement of representing to a third party that defendants were involved in a partnership and that plaintiff believed defendants' representations and relied to its detriment on the representations. Plaintiff's choice to contract with defendant Stonewall individually and not with both defendants in their alleged capacity as a partnership did not defeat plaintiff's claim and there was sufficient evidence to meet the requirement of alleging an extension of credit to the partnership. **Best Cartage, Inc. v. Stonewall Packaging, LLC, 429.**

De facto partnership—elements sufficiently alleged—motion to dismiss erroneous—The trial court erred in dismissing plaintiff's claim for *de facto* partnership where plaintiff's allegations were sufficient to survive defendant's motion to dismiss, including sufficient allegations to meet any requirement of profit sharing. **Best Cartage, Inc. v. Stonewall Packaging, LLC, 429.**

PLEADINGS

Amended complaint—served prior to responsive pleading—Rules 20 and 21 inapplicable—The trial court did not err in a negligence action by considering plaintiffs' amended complaint. Plaintiffs' amended complaint was served on defendants before defendants had served a responsive pleading and neither N.C.G.S. § 1A-1, Rule 20 nor 21 were applicable. **Robinson v. Smith, 518.**

Failure to answer or object—requests deemed admitted—The trial court did not err by granting summary judgment against defendant Taylor because he failed to answer or otherwise object to any of the requests. Consequently, each of plaintiffs' requests were deemed admitted, and defendant's admissions sufficiently established each element of defamation *per se*, appropriation, and unfair and deceptive practices. **Nguyen v. Taylor, 1.**

Sanctions—Rule 11—failure to sign complaint—prompt remedial measures—two dismissal rule—The trial court erred in a case regarding administration of a family trust by dismissing plaintiff's complaint with prejudice for failure to sign and verify the complaint under N.C.G.S. § 1A-1, Rule 11. Plaintiff's prompt remedial measures of filing an amended signed complaint, once plaintiff discovered the mistake, conferred subject matter jurisdiction on the trial court to enable it to deal with the substantive issues raised in the pleadings. The two dismissal rule did not apply because both dismissals were involuntary. **Estate of Livesay v. Livesay, 183.**

PLEADINGS—Continued

Summons—date of offense—sufficient—Defendant had adequate notice of a charge of impaired driving even though defendant argued that the criminal summons was defective in that it did not state the exact hour and minute of the offense. The date of the offense was a sufficient allegation of time in the usual form. **State v. Friend, 338.**

PRETRIAL PROCEEDINGS

Joinder of cases—offenses closely related and connected—no deprivation of fair trial—The trial court did not abuse its discretion in an insurance fraud, obtaining property by false pretenses, and exploitation of an elder adult case by granting the State's motion to join defendant's case with his wife's (Dew) case where the offenses committed by both parties were closely related and connected. Further, the trial court's decision to grant the motion for joinder did not deprive defendant of a fair trial where Dew made statements tending to place blame on defendant. The State offered extensive evidentiary support for the jury's finding of guilt and Dew's statements bore limited relevance to the principal issue before the jury. **State v. Pittman, 512.**

PROCESS AND SERVICE

Qualified process server—affidavit of service not fatally vague—The trial court did not err in a paternity and child support case by denying defendant's motion to dismiss for insufficient service of process. Service of process was made by a person that was qualified to make service under Rule of Civil Procedure 4. Further, the affidavit of service was not fatally vague as to the method of service because competent evidence supported a factual finding that the process server personally delivered a copy of the summons and complaint to defendant. **New Hanover Cty. Child Support Enft ex rel. Beatty v. Greenfield, 531.**

REAL PROPERTY

Condominium plat—bulkhead—boundary rather than common area—The trial court properly granted summary judgment to plaintiff in an action concerning the ownership of a bulkhead where plaintiff contended that a recorded condominium declaration and condominium plat showed that it owned the bulkhead as a part of the condominium common areas. The bulkhead line and the common area were clearly defined on the condominium plat, with the bulkhead used as a boundary line that was not meant to be included in the common area. **Inland Harbor Homeowners Ass'n, Inc. v. St. Josephs Marina, Inc., 348.**

SEARCH AND SEIZURE

Motion to suppress—gun—vehicle search—consent—contraband in car panels—The trial court did not err in an accessory after the fact to first-degree murder case by denying defendant's motion to suppress the evidence seized from his vehicle, including a gun. A reasonable person would not have considered defendant's statements that the officers were "tearing up" his car to be an unequivocal revocation of his consent. Further, it was reasonable for a detective to believe contraband could have been hidden behind the car panels after having found marijuana and a stolen license plate in the front section of the vehicle. **State v. Schiro, 105.**

SEARCH AND SEIZURE—Continued

Motion to suppress—traffic stop—reasonable suspicion—voluntary consent—The trial court did not err in a trafficking in cocaine by possession and transportation case by denying defendant's motion to suppress the evidence. An officer had reasonable suspicion to search defendant's vehicle based solely upon what he observed during a traffic stop after defendant was lawfully stopped for speeding. Defendant voluntarily gave his consent to a search of the entire vehicle, which included under the hood and in the air filter compartment of the vehicle. **State v. Lopez, 139.**

Motion to suppress evidence and statements—reasonable articulable suspicion—flight—investigatory stop—pat-down for dangerous items—The trial court did not err in an attempted felonious breaking or entering, possession of implements of housebreaking, and resisting a public officer case by denying defendant's motions to suppress evidence collected and defendant's statements. Defendant's flight, combined with the totality of circumstances, was sufficient to support a reasonable articulable suspicion and an investigatory stop. Once the officer felt a screwdriver and wrench during the pat-down of defendant, he was justified in removing these items as they constituted both a potential danger to the officer and were further suggestive of criminal activity being afoot. **State v. Hemphill, 50.**

Traffic stop—weaving in lane—reasonable suspicion—The trial court properly denied defendant's motion to suppress the results of a traffic stop in a driving while impaired prosecution where defendant was weaving in his lane, the weaving was characterized by the officer as "bouncing," and oncoming drivers were taking evasive maneuvers. **State v. Fields, 385.**

Vehicle search—detention after warning ticket—reasonable suspicion—The trial court erred in a possession of marijuana case by granting defendant's motion to suppress the search of the vehicle he was driving. Based on the totality of the circumstances, including defendant's nervousness, the smell of air freshener in the car, inconsistency with regard to travel plans, and driving a car not registered to defendant, the police officer had reasonable suspicion to detain defendant while awaiting a canine unit's arrival after issuing a warning ticket for a seat belt violation. **State v. Fisher, 498.**

SENTENCING

Aggravating factors—deadly weapon—not element of kidnapping offense—The trial court in a first-degree kidnapping prosecution did not err by finding as an aggravating factor under the Fair Sentencing Act that defendant was armed with a deadly weapon at the time of the crime. Although defendant argued that this was an element necessary for kidnapping, defendant confined, restrained, and removed the victim without his consent, committed the kidnapping for the purpose of committing robbery and facilitating flight afterwards, and the victim was seriously injured and was not released in a safe place. All of the elements of first-degree kidnapping were present without defendant's use of a firearm. **State v. Vaughters, 356.**

Assault with deadly weapon inflicting serious injury—presumptive range—seriousness of offense considered—criminal record considered—no error—Defendant's argument that he was denied a fair sentencing hearing in an assault with a deadly weapon inflicting serious injury case because the trial court improperly considered the seriousness of the assault offense and gave too much weight to his

SENTENCING—Continued

criminal record was without merit. Defendant cited no authority, and the Court of Appeals found none, suggesting that a trial court may not take into account the seriousness of a crime and the defendant's criminal record in deciding where within a presumptive range a defendant's sentence should fall. **State v. Oakes, 490.**

Fair Sentencing Act—balancing aggravating and mitigating factors—no abuse of discretion—The trial court did not err by concluding that aggravating factors outweighed the mitigating factors when sentencing defendant for first-degree kidnapping under the Fair Sentencing Act. The trial court found nineteen mitigating factors and one aggravating factor, but the aggravating factor was that defendant was armed with a deadly weapon at the time of the crime. The discretionary decision was not a matter of mathematics. **State v. Vaughters, 356.**

Life imprisonment without parole—not cruel and unusual punishment—Although defendant contended that the trial court erred in a first-degree murder case by sentencing defendant to life imprisonment without the possibility of parole since it allegedly violated the 8th Amendment's prohibition against cruel and unusual punishment, the Court of Appeals has previously rejected defendant's argument. **State v. Lowery, 151.**

Motion to suppress prior conviction—not a collateral attack—The trial court abused its discretion by summarily denying defendant's motion to suppress a prior conviction for sentencing purposes as a collateral attack. Although defendant could not seek to overturn her prior conviction, N.C.G.S. § 15A-980 granted her the right to move to suppress the conviction's use in this case. **State v. Blocker, 395.**

Plea transcripts—habitual felon phase—prejudice not demonstrated—no plain error—The trial court did not commit plain error during the habitual felon phase of defendant's trial by admitting evidence of the plea transcripts for defendant's prior felony convictions. Since the only issue in a habitual felon proceeding is whether the defendant has been convicted of or pled guilty to three felony offenses, there was essentially no likelihood that the jury would have reached any other verdict had the plea transcripts been excluded. **State v. Oakes, 490.**

Structured sentencing—definition of month—calendar month—The trial court did not err by declaring that N.C.G.S. § 12-3 (12), which defines "imprisonment for one month" as "imprisonment for thirty days[.]" was inapplicable to sentences imposed under structured sentencing. N.C.G.S. § 12-3(3), which construes the word "month" to mean a calendar month, controlled. **McDonald v. N.C. Dept. of Corr., 536.**

SEXUAL OFFENDERS

Unlawfully on premises of place intended primarily for use, care, or supervision of minors—indictment fatally defective—no subject matter jurisdiction—The trial court lacked subject matter jurisdiction over a case in which defendant was charged with having been a sex offender unlawfully on the premises of a place intended primarily for the use, care, or supervision of minors. The indictment failed to allege that defendant had been convicted of an offense enumerated in Article 7A of Chapter 14 of the North Carolina General Statutes or an offense involving a victim who was under 16 years of age at the time of the offense as required by N.C.G.S. § 14-208.18(a). **State v. Harris, 590.**

STATE

Public trust rights—standing—The trial court erred by denying defendant's motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1). Regardless of plaintiff's attempt to argue that nuisance is the basis of its claims, the potential destruction of defendant's dwelling based upon the claim that it was located within a public trust area was actually an attempt to enforce the State's public trust rights. Only the State acting through the Attorney General has standing to bring an action to enforce the State's public trust rights in accord with N.C.G.S. § 113-131. **Town of Nags Head v. Cherry, Inc.**, 66.

STATUTES OF LIMITATION AND REPOSE

Fraud—claims filed after expiration of three-year statute of limitations—The trial court did not err by granting defendants' motion for judgment on the pleadings and dismissing plaintiff's claims arising from the allegedly fraud-induced conveyance of real property. The pleadings showed that these claims were filed after the expiration of the three-year statute of limitations. **Dixon v. Gist**, 630.

TAXATION

Privilege license tax—constitutionality—The trial court did not err by granting summary judgment in favor of the City and denying the same for appellants even though appellants contended the local municipal ordinance was unconstitutional because it imposed an unjust and inequitable taxation scheme. Appellants provided no evidence that the City's privilege license tax would completely deprive appellants of all profit associated with their businesses. Further, factual elements were missing to prove the City's privilege license tax was prohibitive. **IMT, Inc. v. City of Lumberton**, 36.

Privilege license tax—cyber-gambling—consttutionality—The trial court did not err by granting summary judgment in favor of the City and denying the same for appellants even though appellants contended the local municipal ordinance instituting a privilege license tax was unconstitutional. The City properly taxed businesses for the privilege of carrying out cyber-gambling through the use of computer terminals as authorized by N.C.G.S. § 160A-211. **IMT, Inc. v. City of Lumberton**, 36.

Property assessments—carry forward provision—wrongful tax valuations—The Property Tax Commission did not err by failing to find and conclude that the 2010 tax assessments were correctly carried forward from 2009 as required by N.C.G.S. § 105-286. Nothing in the statute or our case law suggested that the carry forward provision was intended to immunize wrongful tax valuations from appeal or to convert them from wrongful to correct. **In re Appeal of Ocean Isle Palms, LLC**, 81.

Property assessments—negotiated reduction on prior assessment—not a waiver of current appeal—The Property Tax Commission did not err by granting summary judgment in favor of Ocean Isle on its 2010 appeal from tax assessments based on Ocean Isle negotiating reductions in its 2008 tax assessments and choice not to appeal from those assessments. The adjustments were better characterized as unilateral actions by the County based on the information provided by Ocean Isle rather than a negotiation between the parties. **In re Appeal of Ocean Isle Palms, LLC**, 81.

TAXATION—Continued

Property assessments—Schedule of Values—summary judgment improper—The Property Tax Commission erred by granting summary judgment in favor of Ocean Isle on its 2010 appeal from tax assessments because there were genuine issues of material fact as to whether the County's 2007 Schedule of Values was misapplied for the condition factor to undeveloped lots that had been sold. A county's schedules, rules, and standards for tax revaluations must be applied in a uniform and equitable manner that determines the true value of property. **In re Appeal of Ocean Isle Palms, LLC, 81.**

Rule of uniformity—cyber-gambling establishments—The trial court did not err by granting summary judgment in favor of the City and denying the same for appellants even though appellants contended the local municipal ordinance violated the rule of uniformity by taxing similarly situated taxpayers differently. The tax was applied to every single cyber-gambling establishment that utilized computer or gaming terminations to carry on its business. Further, the state endorsed lotteries reasonably constituted a separate classification from appellants' unendorsed legal businesses, and the City's privilege license tax did not need to be imposed upon them. **IMT, Inc. v. City of Lumberton, 36.**

Use tax liability—offset by erroneously collected sales tax—The North Carolina Revenue Law under N.C.G.S. § 105-164.41 authorized petitioner to offset its use tax liability with sales taxes erroneously paid by its customers. **Technocom Bus. Sys. Inc. v. N.C. Dep't of Revenue, 207.**

TERMINATION OF PARENTAL RIGHTS

Failure to provide support—no decree or custody agreement requiring payment—The trial court erred by concluding that grounds existed to terminate respondent father's parental rights to his minor children because he failed to provide support for them. There was no decree or custody agreement which required respondent to pay for the care, support, and education of the juveniles. **In re D.T.L., 219.**

Willful abandonment—six-month statutory period—institution of civil custody action—The trial court erred by concluding that grounds existed to terminate respondent father's parental rights to his minor children because he willfully abandoned them. During the relevant six-month statutory period, respondent was released from incarceration and petitioner mother obtained a domestic violence protection order prohibiting respondent from contacting either petitioner or the juveniles. Further, respondent's institution of a civil custody action undermined the finding that he willfully abandoned his children. **In re D.T.L., 219.**

TORT CLAIMS ACT

Veterinary malpractice—wrongful death—replacement value damages for deceased companion animal—lost investment valuation method not recognized—The Industrial Commission did not err in a Tort Claims Act case by awarding plaintiffs damages based on the replacement value, rather than intrinsic value, of their deceased companion animal killed as a result of defendant's veterinary malpractice. Plaintiffs' emotional bond with their pet was something that is not recognized as compensable under North Carolina law, nor is the lost investment valuation method. **Shera v. N.C. State Univ. Veterinary Teaching Hosp., 117.**

UNJUST ENRICHMENT

Money transferred to joint account—transfer not a gift—no breach of fiduciary duty—The trial court did not err in denying plaintiff's motions for a directed verdict and judgment notwithstanding the verdict as to her claim against defendant Cowart for unjust enrichment. Cowart was unjustly enriched by a gift to himself and a breach of his fiduciary duty as the evidence, when viewed in the light most favorable to Cowart, showed that he did not make a gift to himself or breach his fiduciary duty. **Albert v. Cowart, 546.**

WATERS AND ADJOINING LANDS

Bulkhead ownership—amendment to condominium declaration—not a boundary agreement—The trial court did not err by granting summary judgment for defendants in a dispute over ownership of a bulkhead between a marina and a condominium homeowners association where plaintiff contended that an amendment to the condominium declaration created a boundary agreement. The amendment was clearly intended to define common areas among condominium owners and did not create a binding boundary agreement. **Inland Harbor Homeowners Ass'n, Inc. v. St. Josephs Marina, Inc., 348.**

Bulkhead ownership—not a fixture—The trial court properly granted summary judgment for defendants in an action concerning ownership of a bulkhead where plaintiff argued that the bulkhead was a fixture and that plaintiff owned the property to which the fixture was attached. Plaintiff's argument did not justify reliance on an unpublished opinion; moreover, that opinion involved a bulkhead that supported an indoor swimming pool at a residence while this case involved a bulkhead used as a divider for real property that was partially submerged. Finally, plaintiff's assertion required that the deed and the intentions of the contracting parties be ignored. **Inland Harbor Homeowners Ass'n, Inc. v. St. Josephs Marina, Inc., 348.**

Riparian rights—ownership of bulkhead—not established—The plaintiff in a dispute over ownership of a bulkhead did not have riparian rights where it did not prove ownership of the bulkhead. **Inland Harbor Homeowners Ass'n, Inc. v. St. Josephs Marina, Inc., 348.**

WILLS

Caveat proceeding—separate civil action—denial of stay—no possibility of legally inconsistent verdicts—The trial court did not err in a case involving a will dispute by failing to stay plaintiffs' civil action alleging conversion, breach of fiduciary duty, and constructive fraud until plaintiffs' caveat proceeding had been resolved. The denial of defendant's stay motion did not expose defendant to the possibility of legally inconsistent verdicts. **Shoaf v. Shoaf, 472.**

Caveat proceeding—separate civil action—prior pending action doctrine inapplicable—The trial court did not err in an action involving a will dispute by denying defendant's motion to dismiss plaintiffs' claims for conversion, breach of fiduciary duty, and constructive fraud on the basis of the prior pending action doctrine. Although the caveat proceeding initiated by plaintiffs and plaintiffs' separate civil claim involved the same parties, the two proceedings did not present the same legal issues or demand the same relief and the existence of the caveat proceeding did not preclude the maintenance of plaintiffs' separate civil action. **Shoaf v. Shoaf, 471.**

WORKERS' COMPENSATION

Attorney fees—appeal from deputy commissioner—issue not addressed—An opinion and award of the Industrial Commission awarding past and future healthcare expenses for plaintiff's compensable knee injury and attorney fees was reversed and remanded to the Industrial Commission as it failed to address the issue presented by the defendants' appeal from the order of the deputy commissioner, the award of attorney fees under N.C.G.S. § 97-90. **Hurley v. Wal-Mart Stores, Inc.** 607.

Back injury—fall as contributing factor—The record in a workers' compensation case contained sufficient evidence to support a finding that plaintiff's fall was a contributing or a causative factor to his injury. Plaintiff's medical expert concluded to a reasonable degree of medical certainty that plaintiff's fall was the cause of his lower back injury. **Rose v. N.C. Dep't of Correction**, 380.

Back injury—pain developing gradually—The Industrial Commission did not err in a workers' compensation case by affirming the award of the Deputy Commissioner for temporary total disability compensation for a back injury where the pain from the injury developed gradually over a period of time. It was undisputed that plaintiff fell and suffered an injury while at work, and the injury and the pain did not have to be simultaneous. **Rose v. N.C. Dep't of Correction**, 380.

Cancellation of insurance policy—premium finance agreement—proper procedure for cancellation—The Industrial Commission did not erroneously apply N.C.G.S. § 58-35-85, which provides the procedures for cancelling an insurance policy financed by a premium finance agreement, in determining that plaintiff employee's workers' compensation insurance policy was effectively cancelled. The third-party financing company was authorized by the power of attorney clause of the financing agreement to cancel plaintiff's policy with Travelers and the financing company properly did so via the "Notice of Cancellation" sent on 15 January 2007. **Diaz v. Smith**, 570.

Disability—doctor testimony—credibility—The Industrial Commission did not err in a workers' compensation case by finding that plaintiff was disabled based upon the opinion of a doctor. Contradictions in the testimony go to its weight, and the Commission is the sole judge of the credibility of witnesses. **Rawls v. Yellow Roadway Corp.**, 191.

Disability—sufficiency of findings of fact—The Industrial Commission did not err in a workers' compensation case by finding that plaintiff worker was disabled from 22 June 2007 through 20 June 2010 based on findings of fact 55 and 57. **Rawls v. Yellow Roadway Corp.**, 191.

Failure to apportion disability—no scientific basis—The Industrial Commission did not err in a workers' compensation case by failing to apportion plaintiff's disability. Finding of fact 56 revealed that there was really no scientific basis to apportion plaintiff's disability. **Rawls v. Yellow Roadway Corp.**, 191.

Hearing—total and permanent disability—standing—ripeness—motive irrelevant—joinder of beneficiaries unnecessary—The Industrial Commission did not err in a workers' compensation case by permitting a hearing on whether plaintiff was totally and permanently disabled. Defendants had standing to request a hearing on this issue as an employer or insurance carrier is permitted to request a hearing as to a plaintiff's benefits under the Workers' Compensation Act; the parties' dispute as to the extent of plaintiff's disability and defendants' liability was ripe for the Commission's hearing; defendants admitted motive to implicate the statute of

WORKERS' COMPENSATION—Continued

limitations provision under N.C.G.S. § 97-38 was irrelevant to a determination by the Commission regarding plaintiff's disability; and joinder of all putative beneficiaries of plaintiff's potential death benefits claim was not necessary. **Pait v. Se. General Hosp., 403.**

Injuries—sufficiency of finding of fact—The Industrial Commission did not err in a workers' compensation case by finding that plaintiff's accident on 24 February 2005 resulted in left temporal lobe intracerebral hemorrhage, right temporal lobe contusion, subarachnoid hemorrhage, and post-traumatic brain injury concussion syndrome based on finding of fact 36. **Rawls v. Yellow Roadway Corp., 191.**

Not awarded to defendants—no abuse of discretion—The Full Commission did not abuse its discretion in a workers' compensation case by failing to award attorney fees to defendants where the circumstances of the case, *i.e.*, that defendants, rather than plaintiff, were seeking a permanent and total disability determination, were unique. **Pait v. Se. General Hosp., 403.**

Party aggrieved—determination of insurance coverage—standing—Petitioner employee in a workers' compensation case was a party aggrieved, even though he was awarded all the benefits that he claimed, and had standing to challenge the Industrial Commission's determination that defendant employer's workers' compensation insurance policy was properly cancelled. An employee is "aggrieved" by a workers' compensation tribunal's determination regarding workers' compensation insurance coverage. **Diaz v. Smith, 570.**

Total and permanent disability—temporary disability not supported—The Industrial Commission erred in a workers' compensation case by denying defendants' request to have plaintiff determined to be both totally and permanently disabled. The Commission's findings of fact and conclusion of law as to the temporary nature of plaintiff's disability were not supported by any competent evidence in the record. **Pait v. Se. General Hosp., 403.**

ZONING

Denial of zoning compliance permit—arbitrary and capricious—The trial court did not err by concluding that the Hillsborough Board of Adjustment's final order denying issuance of a zoning compliance permit was arbitrary and capricious based on appellants' decision to deny approval of alternative parking for the Justice Center because it did not "adequately address the parking needs of the Justice Facility." The trial court properly remanded to appellants for approval of the 2006 site plan and ordered that a zoning compliance permit be issued to Orange County. **Orange Cnty. v. Town of Hillsborough, 127.**

Remand for reviewable findings—new hearing—The trial court failed in its *de novo* review of the record in a zoning case where there had been a remand for reviewable findings of fact and the trial court conducted a new hearing and gathered more evidence. Moreover, the Board did not conduct a full hearing as only opponents of the special use application were allowed to be heard. **Templeton Props., L.P. v. Town of Boone, 266.**