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CASES

Argued and Determined in the

COURT OF APPEALS

OF

North Carolina

AT

Raleigh

STATE OF NORTH CAROLINA v. TRAVARAS VASHAUN JACKSON

No. COA11-876

(Filed 17 April 2012)

Criminal Law—motion for appropriate relief—evidentiary hearing required—summary denial erroneous

The trial court erred by summarily denying defendant's motion for appropriate relief and an accompanying discovery motion in a drug case. Defendant's motion for appropriate relief raised issues of fact with sufficient particularity to merit an evidentiary hearing and the trial court erred by failing to conduct a hearing so that defendant would have an opportunity to produce evidence to substantiate his allegations.

Appeal by writ of *certiorari* review of the order denying Defendant's motion for appropriate relief entered 15 November 2010 by Judge Arnold O. Jones, II, in Wayne County Superior Court. Heard in the Court of Appeals 15 December 2011.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

North Carolina Prisoner Legal Services, by D. Tucker Charns, for Defendant-appellant.

ERVIN, Judge.

Defendant Travaras Vashaun Jackson appeals from an order denying his motion for appropriate relief and related discovery motion. On appeal, Defendant argues that the trial court erred by summarily denying his motion for appropriate relief and an accompanying discovery motion. 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 and that this case should be remanded to the Wayne County Superior Court for further proceedings not inconsistent with this opinion.

I. Background

A. Substantive Facts

On 23 October 2006, Sergeants Dan Peters of the Wayne County Drug Squad and Seth Harris of the Goldsboro Police Department gave an unidentified informant $25.00 for use in making a controlled drug purchase at an apartment located in Goldsboro. The informant claimed to have gone to the apartment, returned with a bag of white powder, and told the officers that an unidentified black male in the apartment had stated that the powder was cocaine. At that point, Sergeant Harris prepared and executed an affidavit, with which he obtained the issuance of a warrant authorizing a search of the apartment. In the affidavit, Sergeant Harris stated that:

> The applicant states that he has a confidential source which[] is also known to Sgt. D. Peters of the Goldsboro Police Department, that has proven reliable in the past to the applicant by providing information in the past that has led to the seizure of a controlled substance in Wayne County. On October 23, 2006 the source told the applicant that the source was inside the above mentioned residence [within] the past 48 hours and had seen a quantity of off white powder substance that was represented to be cocaine by a black male and in the possession of the black male while inside the residence listed above. The source has in the past provided information to the applicant that has led to the seizure of controlled substances, therefore the applicant knows that the source knows cocaine when the source sees it.

Later that day, Sergeant Harris, Sergeant Peters, and other law enforcement officers executed the search warrant. The officers knocked on the apartment door and, after failing to receive a response, used a battering ram to force an entry into the apartment. When the officers entered, Defendant, who was immediately inside

the door, ran towards a bathroom. Sergeant Peters pursued Defendant and retrieved a plastic bag from the toilet bowl before Defendant had a chance to dispose of it. The plastic bag held three other bags that appeared to contain controlled substances. The officers handcuffed Defendant, searched the apartment and Defendant, and seized various items, including Defendant's identification cards, which were discovered in the bedroom; an apartment key, which was removed from Defendant's pocket; and an electric bill identifying Heather Seagraves, who arrived toward the end of the search, as the individual in whose name utility service was provided to the apartment.

After executing the search warrant, Sergeant Harris arrested Defendant and took him to the Goldsboro Police Department. After Sergeant Harris informed Defendant of his *Miranda* rights, Defendant agreed to answer questions without invoking his right to the assistance of counsel. In a written statement that Sergeant Harris prepared and Defendant signed, Defendant stated that:

> The bag of drugs I was trying to hide today were mine and nobody else's. There was crack, [cocaine] powder and ecstasy in that bag. It had to be 5 or 6 grams of crack, 3 or 4 grams of powder, and 10 or 15 pills. I've been selling drugs out of that apartment since about June of this year. I make an average of about 300 [] or 400 dollars a day. My girl knows I sell drugs, but she doesn't get involved with it. She's not even there during the daytime. She doesn't know what I do when she's not there.

Chemical testing performed by the State Bureau of Investigation indicated that the plastic bag retrieved from the toilet held 3.3 grams of 3,4 methylenedioxymethamphetamine, more commonly known as MDMA or ecstasy; 3.6 grams of cocaine hydrochloride powder; and 6.3 grams of cocaine base.

B. Procedural History

On 6 August 2007, a Wayne County grand jury returned bills of indictment charging Defendant with possession of cocaine with the intent to sell and deliver, possession of MDMA with the intent to sell and deliver, possession of marijuana with the intent to sell and deliver, maintaining a dwelling for the purpose of using controlled substances, and having attained the status of an habitual felon. On 14 March 2008, Defendant filed a motion seeking the suppression of the evidence seized during the search of the apartment. Defendant argued, among other things, that the affidavit submitted in support of

the application for the issuance of the search warrant contained statements that "were in violation of the principle set forth in *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)," and also filed a motion seeking the disclosure of the identity of the alleged informant.

The charges against Defendant came on for trial before Judge Jerry Braswell and a jury at the 17 March 2008 criminal session of Wayne County Superior Court. After denying Defendant's suppression motion on the grounds that no affidavit had been attached to the motion and that Defendant had failed to show standing to challenge the search of the apartment, Judge Braswell allowed Defendant to examine Sergeant Harris concerning the extent to which there was any additional discoverable evidence that had not been provided to Defendant as of that date. In response to Defendant's questions, Sergeant Harris testified that: (1) he had never worked with the informant before the date upon which he sought the issuance of the search warrant; (2) when the informant returned with the white powder, the officers did not remove it from the bag, smell it, field test it, or otherwise attempt to identify the substance; and (3) although Sergeant Harris "understood" that the informant was a former drug user, he did not know if the informant had a criminal record or was knowledgeable about the drug trade. After hearing this testimony and engaging in a further colloquy with counsel, the trial court denied Defendant's request for a continuance and a dismissal of the pending charges, both of which were predicated on Defendant's need to interview the alleged informant and alleged discovery violations.

At the conclusion of the evidence, Judge Braswell dismissed the charge of possession of marijuana with the intent to sell and deliver. The jury returned verdicts convicting Defendant of possession of cocaine with the intent to sell and deliver and possession of MDMA with the intent to sell or deliver. However, the jury was unable to reach a unanimous verdict with respect to the issue of Defendant's guilt of maintaining a dwelling for the use of controlled substances, leading the trial court to declare a mistrial with respect to that charge. After the required separate hearing, the jury found that Defendant had attained habitual felon status. Based upon the jury's verdicts, Judge Braswell entered judgments sentencing Defendant to two consecutive terms of 85 to 111 months imprisonment. Although Defendant noted an appeal to this Court from Judge Braswell's judgments, this Court filed an opinion on 5 May 2009 finding no error in

the proceedings leading to the entry of Judge Braswell's judgments. *State v. Jackson*, 196 N.C. App. 790, 675 S.E.2d 720 (2009) (unpublished).

On 8 June 2010, Defendant filed a motion for appropriate relief in which he alleged that:

> [Defendant]'s motion to suppress was denied because trial counsel failed to file a statutorily required affidavit with the motion. Therefore, trial counsel was ineffective. In the alternative, to the extent appellate counsel was required to allege ineffective assistance of counsel on direct appeal, appellate counsel was also ineffective.

In addition, Defendant moved "pursuant to N.C. Gen. Stat. § 15A-1415(f) for discovery of the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed, or the prosecution of, the Defendant." After a hearing held on 3 November 2010, the trial court entered an order summarily denying Defendant's motions for appropriate relief and discovery on 15 November 2010. In its order, the trial court stated that:

1. The Affidavit supporting the search warrant at issue did not contain "false statements" under the theory argued by the Defendant;

2. Even in the absence of a supporting Affidavit, the trial judge nevertheless fairly considered the arguments requested within this Motion and rejected them;

3. The Defendant has failed to adequately show that trial counsel's actions in failing to file an Affidavit prejudiced his defense;

4. A determination that this Motion for Appropriate Relief is without merit can be determined on the face of the record and, therefore, the Defendant's Motion for additional discovery is moot.

On 14 January 2011, this Court granted Defendant's request for *certiorari* review of the trial court's order.

II. Legal Analysis

A. Standards of Review

1. Motion for Appropriate Relief

a. Entitlement to Evidentiary Hearing

N.C. Gen. Stat. § 15A-1420(c) provides, in pertinent part, that, when a defendant files a motion for appropriate relief:

> (1) Any party is entitled to a hearing on questions of law or fact arising from the motion . . . unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact.
>
> . . .
>
> . . .
>
> (3) The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law. . . .
>
> (4) If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact. . . .

As a result, N.C. Gen. Stat. "§ 15A-1420(c)(1) requires that 'the court must [initially] determine . . . whether an evidentiary hearing is required to resolve questions of fact.' If the trial court 'cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact.' N.C.G.S. § 15A-1420(c)(4). Under subsection (c)(4), read in *pari materia* with subsections (c)(1), (c)(2), and (c)(3), an evidentiary hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor, or the motion presents only questions of law[.]" *State v. McHone*, 348 N.C. 254, 258, 499 S.E.2d 761, 763 (1998). Thus, the ultimate question that must be addressed in determining whether a motion for appropriate relief should be summarily denied is whether the information contained in the record and presented in the defendant's motion for appropriate relief would suffice, if believed, to support an award of relief.

b. Procedural Default

According to N.C. Gen. Stat. § 15A-1419(a)(3), a motion for appropriate relief must be denied in the event that, in "a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C. Gen. Stat. § 15A-1419 " 'is not a general rule that any claim not brought on direct appeal is forfeited on state collateral review. Instead, the rule requires North Carolina courts to determine whether the particular claim at issue could have been brought on direct review.' " *State v. Thompson*, 359 N.C. 77, 122, 604 S.E.2d 850, 881 (2004) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 525 (2001), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002)) (internal citation omitted), *cert. denied*, 546 U.S. 830, 126 S. Ct. 48, 163 L. Ed. 2d 80 (2005). For that reason, "ineffective assistance of counsel claims 'brought on direct review will be decided on the merits [only] when the cold record reveals that no further investigation is required, *i.e.*, claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.' " *Thompson*, 359 N.C. at 122-23, 604 S.E.2d at 881 (quoting *Fair*, 354 N.C. at 166, 557 S.E.2d at 524. As the Supreme Court has clearly noted:

> "It is not the intention of this Court to deprive criminal defendants of their right to have [ineffective assistance of counsel] claims fully considered. Indeed, because of the nature of [ineffective assistance of counsel] claims, defendants likely will not be in a position to adequately develop many [ineffective assistance of counsel] claims on direct appeal. Nonetheless, to avoid procedural default under N.C. [Gen. Stat.] § 15A-1419(a)(3), defendants should necessarily raise those [ineffective assistance of counsel] claims on direct appeal that are apparent from the record."

Thompson, at 123, 604 S.E.2d at 881 (quoting *Fair*, at 167, 557 S.E.2d at 525).

c. Review of Order Deciding a Motion for Appropriate Relief

"We review a trial court's ruling on a motion for appropriate relief 'to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' 'When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by com-

petent evidence and may be disturbed only upon a showing of manifest abuse of discretion.' " *State v. Taylor*, ___ N.C. App ___, ___, 713 S.E.2d 82, 86, *disc. review denied*, ___ N.C. ___, 717 S.E.2d 558 (2011) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982), and *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (internal citations omitted)). " 'As a general rule[,] . . . any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law.' " *Wiseman Mortuary, Inc. v. Burrell*, 185 N.C. App. 693, 697, 649 S.E.2d 439, 442 (2007) (quoting *In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999)). Thus, the four justifications provided for the summary denial of Defendant's motion for appropriate relief by the trial court were, in actuality, conclusions of law. "We will review conclusions of law *de novo* regardless of the label applied by the trial court." *Zimmerman v. Appalachian State Univ.*, 149 N.C. App. 121, 131, 560 S.E.2d 374, 380 (2002) (citing *Carpenter v. Brooks*, 139 N.C. App. 745, 752, 534 S.E.2d 641, 646, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000)). If "the issues raised by Defendant's challenge to [the trial court's] decision to deny his motion for appropriate relief are primarily legal rather than factual in nature, we will essentially use a *de novo* standard of review in evaluating Defendant's challenges to [the court's] order." *Taylor*, ___ N.C. App at ___, 713 S.E.2d at 86.

2. Ineffective Assistance of Counsel

"To make a successful ineffective assistance of counsel claim, a defendant must show that (1) defense counsel's 'performance was deficient,' and (2) 'the deficient performance prejudiced the defense.' Counsel's performance is deficient when it falls 'below an objective standard of reasonableness.' Deficient performance prejudices a defendant when there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *State v. Waring*, 364 N.C. 443, 502, 701 S.E.2d 615, 652 (2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064-65, 2068, 80 L. Ed. 2d 674, 693-94, 698 (1984) (other citation omitted), *cert. denied*, ___ U.S. ___, 132 S. Ct. 132, 181 L. Ed. 2d 53 (2011).

B. Substantive Legal Analysis

1. Default

As an initial matter, we must address the State's claim that "Defendant is procedurally barred from claiming ineffective assis-

tance of trial counsel." In seeking to persuade us of the validity of this contention, the State essentially argues that Defendant was in a position to raise his challenge to the effectiveness of the assistance that he received from his trial counsel on direct appeal. We do not find this argument persuasive.

As we have already noted, ineffective assistance of counsel claims must be asserted on direct appeal "if the record is adequately developed to resolve the claim without ancillary proceedings." In his motion for appropriate relief, Defendant alleged that his trial counsel provided him with deficient representation by failing to attach to the suppression motion an affidavit which set out the basis for his claim to have standing to contest the search of the apartment and establishing a valid basis for suppressing the challenged evidence as required by N.C. Gen. Stat. § 15A-977(a). According to the State, no ancillary proceedings needed to be held in order to establish that Defendant's trial counsel failed to file the required affidavit, thus demonstrating that Defendant should have raised his ineffectiveness claim on direct appeal. The State's analysis is, however, incomplete.

A successful ineffectiveness claim requires proof both that the representation that the defendant received was deficient and that the deficient representation prejudiced the defendant. Although establishing that Defendant's trial counsel failed to file an affidavit along with the suppression motion might, without more, demonstrate that Defendant received deficient representation from his trial counsel, such a showing does not adequately address the prejudice issue. In order to establish the necessary prejudice, Defendant was required to show that, had the required affidavit been filed, he would have been able to establish that he had standing to challenge the search of the apartment and that the available facts would have supported suppression of the challenged evidence. The record before this Court at the time of Defendant's direct appeal did not contain sufficient information to permit the Court to address both prongs of the required prejudice analysis.

"A defendant has standing to contest a search if he or she has a reasonable expectation of privacy in the property to be searched." *State v. McKinney*, 361 N.C. 53, 56, 637 S.E.2d 868, 871 (2006) (citing *State v. Mlo*, 335 N.C. 353, 378, 440 S.E.2d 98, 110-11, *cert denied*, 512 U.S. 1224, 114 S. Ct. 2716, 129 L. Ed. 2d 841 (1994)). "A person who . . . actually lives in the area searched has standing." *State v. Swift*, 105 N.C. App. 550, 556, 414 S.E.2d 65, 69 (1992) (citing *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S. Ct. 1684, 1690, 109 L. Ed. 2d 85,

95 (1990)). The fact that the defendant is not married to the other occupant of a particular residence does not deprive him of standing to challenge a search of the place where he lives. *See State v. Austin*, 320 N.C. 276, 289, 357 S.E.2d 641, 649 (defendant had standing to challenge the search of a house where "joint rent receipts had in the past been issued to defendant and . . . defendant had resided there for five or six years, keeping all of his clothes there, eating and sleeping there, working in the yard, planting a garden, and receiving his mail there"), *cert. denied*, 484 U.S. 916, 108 S. Ct. 267, 98 L. Ed. 2d 224 (1987), and *Kentucky v. King*, ___ U.S.___ , ___ n1, 131 S. Ct. 1849, 1854 n1, 179 L. Ed. 2d 865, 873 n1 (2011) (noting that, while "[r]espondent's girlfriend leased the apartment," "respondent stayed there part of the time, and his child lived there" and that, "[b]ased on these facts, [the State had] conceded in state court that respondent has Fourth Amendment standing to challenge the search"). *See also*, *e.g.*, *United States v. Wright*, 525 F. Supp. 2d 328, 335 (W.D.N.Y. 2007) (stating that "defense testimony from [the defendant's] fiancée . . . established that he lived and slept in that apartment at the time of the search," providing "sufficient proof to give defendant standing to contest this search."), and *United States v. Schust*er, 717 F.2d 537, 541 n1 (11 Cir. 1983) (stating that "[t]he apartment actually belonged to [defendant's] girlfriend, but there is no dispute as to [defendant's] standing to contest the search since he resided there."), *cert denied*, 465 U.S. 1010, 104 S. Ct. 1008, 79 L. Ed. 2d 239 (1984).

At the hearing held concerning Defendant's suppression motion prior to trial, the State argued that Defendant lacked standing to challenge the search of the apartment in which he had been arrested. In the course of discussing the issue of standing, Judge Braswell and Defendant's trial counsel engaged in the following colloquy:

> THE COURT: Well, in looking at your memorandum in support of your motion to suppress, I'm just wondering how it is that Mr. Jackson has standing to quash a search warrant [] on an apartment that he hasn't alleged was his.
>
> [DEFENSE COUNSEL]: You know, that's a good question, your Honor.
>
> THE COURT: I'm looking for a good answer. . . . because at this point the burden of proof is on the Defendant.

Aside from the fact that Defendant failed to articulate any basis for a determination that he had standing to challenge the search of the apartment prior to the denial of his suppression motion, the record

developed at trial did not suffice to show that Defendant had the required standing. More particularly, the State introduced evidence that, at the time that the search warrant was executed, Defendant had a key to the apartment in his pocket. In addition, two identification cards bearing Defendant's name were found in the bedroom. An electric bill found in the apartment was addressed to Ms. Seagraves. Although Defendant told Sergeant Harris that he had been "selling drugs out of that apartment" for several months, the record did not contain any evidence tending to show that Defendant lived in the apartment. For that reason, Defendant moved for dismissal of the maintaining a dwelling for the purpose of using controlled substances charge on the grounds that there was insufficient evidence that he "maintained" the dwelling in question. Thus, we conclude that the evidence contained in the trial record did not provide Defendant's appellate counsel with sufficient information to permit Defendant to show standing and that this deficiency in the record precluded Defendant from successfully asserting his ineffective assistance of trial counsel claim on direct appeal. As a result, we conclude that Defendant was not procedurally barred from challenging his trial counsel's failure to attach an affidavit to the suppression motion in a motion for appropriate relief filed after the conclusion of the direct appeal process.

2. Summary Denial of Motion for Appropriate Relief

Next, we must determine whether the trial court erred by summarily denying Defendant's motion for appropriate relief. In order to make that determination, we must ascertain whether Defendant made an adequate showing in his motion and supporting documentation that he was entitled to prevail on his ineffective assistance of trial counsel claim. In order to make the required showing, Defendant was required to demonstrate the ability to show both that he received deficient representation from his trial counsel and that he was prejudiced by this deficient representation. As a result of the fact that the State has not contended that the failure of Defendant's trial counsel to attach an affidavit to his suppression motion did not constitute an adequate showing of deficient representation, the ultimate issue that we must address in order to determine whether the trial court correctly denied Defendant's motion for appropriate relief without a hearing is whether Defendant forecast adequate evidence of prejudice.

a. Standing

The first of the prejudice-related showings that Defendant was required to make in order to avoid summary denial of his motion for appropriate relief was that he had standing to challenge the search of the apartment. We believe that the evidentiary showing made in Defendant's motion for appropriate relief adequately demonstrated that Defendant had the ability to show that he had standing to contest the challenged search.

A careful review of the affidavit submitted in support of Defendant's motion for appropriate relief tends to show that Defendant lived in the apartment with Ms. Seagraves and their daughter. Ms. Seagraves stated in her affidavit that:

> 2) On October 23, 2006, Travaras Jackson and I were living together in our apartment at 108 S. Berkeley Blvd. Apt A3 ("the apartment") in Goldsboro, North Carolina. . . .
>
> 3) Travaras and I have two daughters together. Our first daughter, Destiny Jackson, was born May 19, 2005.
>
> . . . .
>
> 5) I recall signing the lease for the apartment and setting up utilities for the apartment in my name only around the beginning of 2006.
>
> 6) A few weeks after Destiny and I had settled in at the apartment, Travaras moved in with me on a permanent basis because I really needed his help caring for, and raising Destiny.
>
> 7) From the time he moved into the apartment to the time he was arrested in this case, Travaras only lived with me and only slept at the apartment. We never bothered to put Travaras's name on the lease or on any of our utility bills because this would have been an unnecessary hassle. Travaras helped me pay the rent and bills; he had a key to the apartment; and he kept all of his personal belongings at the apartment.
>
> 8) Travaras and I always considered the apartment to be a home we shared together with our daughter as a family.

After reviewing Ms. Seagraves' affidavit, we conclude that Defendant forecast ample evidence tending to show that he lived in the apartment and, thus, had standing to challenge the search of the apartment. As a result, the trial court could not have summarily denied

Defendant's motion for appropriate relief based on a failure to make an adequate preliminary showing of standing.

b. Validity of Search Warrant

Secondly, we must determine whether Defendant forecast sufficient evidence to support a finding that the search of the apartment violated his right to be free from unreasonable searches and seizures as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 20 of the North Carolina Constitution. In attempting to make the required showing, Defendant argues that the affidavit executed by Officer Harris contained false statements made in bad faith and that, in the event that the affidavit was redacted in such a manner as to remove these false statements, the affidavit did not suffice to support the required determination of probable cause. After carefully reviewing the record, we believe that Defendant made a sufficient showing of prejudice to preclude summary denial of his motion for appropriate relief and that the trial court erred by reaching a contrary conclusion.

i. General Legal Principles Relating to Search Warrants

"The requirement that a search warrant be based on probable cause is grounded in both constitutional and statutory authority. U.S. Const. amend. IV; N.C.G.S. § 15A-244 (1988). Probable cause for a search is present where facts are stated which establish reasonable grounds to believe a search of the premises will reveal the items sought and that the items will aid in the apprehension or conviction of the offender." *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997) (citing *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984)).

> An "affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." The applicable test is "whether, given all the circumstances set forth in the affidavit before [the magistrate], including "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed."

State v. Riggs, 328 N.C. 213, 218, 400 S.E.2d 429, 432 (1991) (quoting *Arrington*, 311 N.C. at 636, 638, 319 S.E.2d at 257-58 (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)). "In applying the [relevant legal standard, the] Court also found the principles underlying *Aguilar* [*v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964)] and *Spinelli* [*v. United States*, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969)], mainly that evidence is needed to show indicia of reliability, to be important components in determining the totality of the circumstances." *State v. Hughes*, 353 N.C. 200, 204, 539 S.E.2d 625, 628 (2000).

"When probable cause is based on an informant's tip[,] a totality of the circumstances test is used to weigh the reliability or unreliability of the informant. Several factors are used to assess reliability including: '(1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be and was independently corroborated by the police.' " *State v. Green*, 194 N.C. App. 623, 627, 670 S.E.2d 635, 638 (quoting *State v. Collins*, 160 N.C. App. 310, 315, 585 S.E.2d 481, 485 (2003), *aff'd* 358 N.C. 135, 591 S.E.2d 518 (2004)), *aff'd* 363 N.C. 620, 683 S.E.2d 208 (2009). The reliability of an informant who supplied information utilized to support the issuance of a search warrant has often been "established by showing that the informant had been used previously and had given reliable information, that the information given was against the informant's penal interest, that the informant demonstrated personal knowledge by giving clear and precise details in the tip, or that the informant was a member of a reliable group such as the clergy." *Hughes*, 353 N.C. at 203, 539 S.E.2d at 628. Thus:

> Courts have looked to a number of factors in determining whether the magistrate had a substantial basis for finding probable cause. One factor is whether the magistrate made reasonable inferences based on his experience, " 'particularly when coupled with common or specialized experience.' " This Court has also found a substantial basis when an investigating officer's supporting affidavit contained factual allegations that he conducted surveillance of "defendant's house, [and] he saw many people visiting the house for a short time and witnessed several hand-to-hand transactions between defendant and visitors to his house." Additionally, the procedure followed for a controlled purchase by a CI and alleged in sufficient detail has been deemed to provide a substantial basis to support an officer's affidavit.

State v. Taylor, 191 N.C. App. 587, 590, 664 S.E.2d 421, 423 (2008) (quoting *Riggs*, 328 N.C. at 221, 400 S.E.2d at 434, and *State v. Stokley*, 184 N.C. App. 336, 341, 646 S.E.2d 640, 644 (2007), *disc. rev. denied*, 362 N.C. 243, 660 S.E.2d 542 (2008), and citing *State v. Johnson*, 143 N.C. App. 307, 311, 547 S.E.2d 445, 448 (2001)).

"It is elementary that the Fourth Amendment's requirement of a factual showing sufficient to constitute 'probable cause' anticipates a truthful showing of facts." *Fernandez*, 346 N.C. at 13, 484 S.E.2d at 358 (citing *Franks v. Delaware*, 438 U.S. 154, 164-65, 98 S. Ct. 2674, 2681, 57 L. Ed. 2d 667, 677-78 (1978)). "*Franks* held that where a search warrant is issued on the basis of an affidavit containing false facts which are necessary to a finding of probable cause, the warrant is rendered void, and evidence obtained thereby is inadmissible if the defendant proves, by a preponderance of the evidence, that the facts were asserted either with knowledge of their falsity or with a reckless disregard for their truth." *Fernandez*, 346 N.C. at 13, 484 S.E.2d at 358) (citing *Franks*, 438 U.S. at 155-56, 98 S. Ct. at 2676, 57 L. Ed. 2d at 672 (other citation omitted). We will now utilize these principles to determine whether Defendant made a sufficient showing of prejudice in his motion for appropriate relief.

ii. Sufficiency of Defendant's Showing

(a). False Statements

In his motion for appropriate relief, Defendant alleged that the affidavit supporting the issuance of a search warrant contained false statements made in bad faith or in reckless disregard for the truth and that, in the event that such statements were to be redacted, the remaining statements in the affidavit did not suffice to support a finding of probable cause. After carefully reviewing the record, we conclude that the showing made by Defendant's motion for appropriate relief with respect to these issues was sufficient to preclude summary denial of Defendant's motion.

As we have already noted, Officer Harris asserted in the affidavit submitted in support of his application for the issuance of a search warrant that:

> The applicant states that he has a confidential source which[] is also known to Sgt. D. Peters of the Goldsboro Police Department, that has proven reliable in the past to the applicant by providing information in the past that has led to the seizure of a controlled substance in Wayne County. On October 23, 2006 the source told

> the applicant that the source was inside the above mentioned residence [within] the past 48 hours and had seen a quantity of off white powder substance that was represented to be cocaine by a black male and in the possession of the black male while inside the residence listed above. The source has in the past provided information to the applicant that has led to the seizure of controlled substances, therefore the applicant knows that the source knows cocaine when the source sees it.

However, as we have also noted, Officer Harris testified under questioning by Defendant's trial counsel that (1) the only time he worked with the informant was the day he sought a search warrant; (2) after the informant returned with white powder, the officers did not examine the powder, remove it from the bag, smell it, field test it, or make any other attempt to identity the powder; and (3) Officer Harris had no information about the informant's personal history or previous interactions with the criminal justice system. An accurate depiction of Officer Harris' limited interactions with the informant would have tended to undermine his assertions that the informant "has proven reliable in the past to the applicant by providing information in the past that has led to the seizure of a controlled substance;" that the informant "has in the past provided information to the applicant that has led to the seizure of controlled substances;" and that Officer Harris "knows that the source knows cocaine when the source sees it."

Although the trial court concluded as a matter of law that the affidavit executed by Officer Harris "did not contain 'false statements' under the theory argued by the Defendant," we are unable to concur in this determination after conducting the *de novo* examination required by the applicable standard of review. A claim that an informant "has proven reliable in the past to the applicant by providing information in the past that has led to the seizure of a controlled substance" clearly suggests that, on at least one occasion prior to the incident underlying the case before the court, the informant had provided truthful information. However, Officer Harris' testimony clearly showed that he had not had any sort of prior relationship with the informant and knew little or nothing about him. Admittedly, "courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner." *Riggs*, 328 N.C. at 222, 400 S.E.2d at 434-35 (quoting *Gates*, 462 U.S. at 236, 76 L. Ed. 2d at 547, 103 S. Ct. 2331 (alterations in original)). However, we believe that acceptance of the State's contention that Officer Harris' statements concerning the informant's reliability were accurate because

the single interaction between Officer Harris and the informant had occurred before Officer Harris applied for the issuance of a warrant to search the apartment requires us to put an interpretation upon the language used by Officer Harris which it will not reasonably bear. Thus, Defendant's motion for appropriate relief amply tended to show that the affidavit submitted in support of the application for a warrant to search the apartment contained false statements.

(b). Bad Faith

In addition, we believe that the record contains adequate evidence to support further inquiry into the "bad faith" issue. Although we recognize that, for purposes of evaluating the validity of a *Franks* claim, "[t]ruthful . . . 'does not mean . . . that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily,' " *Fernandez* at 13, 484 S.E.2d at 358 (quoting *Franks*, 438 U.S. at 165, 57 L. Ed. 2d at 678, 98 S. Ct. at 2681), the challenged facts all involved matters of which Officer Harris had personal knowledge. For example, Officer Harris knew that he had never worked with the informant before and did not, for that reason, have any basis for evaluating the informant's veracity apart from the single occasion upon which the request to search the apartment rested. The statement in the affidavits concerning the informant's prior actions did not involve facts that, although asserted in good faith, later turned out to be erroneous. Instead, the statements in question could be understood to involve assertions that Officer Harris knew to be inaccurate or knew would be understood in a manner that conflicted with the actual facts, thereby permitting an inference that Officer Harris did not act in good faith at the time that he executed the affidavit used to support the issuance of the search warrant. Thus, Defendant's motion for appropriate relief provided ample basis for a finding that a *Franks* violation occurred.

(c). Sufficiency of a Redacted Affidavit

As we have already noted, the final step in the analysis required under *Franks* and its progeny is to examine the affidavit submitted in support of the search warrant after the impermissible statements have been redacted for the purpose of determining whether that affidavit, considered without the information deemed to be inaccurate, would have supported a finding that probable cause to search the apartment existed. After deleting the apparently inaccurate informa-

tion contained in the relevant affidavit, we believe that a valid affidavit would have read something like the following:

> The applicant states that he has a confidential source which is also known to Sgt. D. Peters of the Goldsboro Police Department. On October 23, 2006 the source told the applicant that the source was inside the above mentioned residence within the past 48 hours and had seen a quantity of off white powder substance that was represented to be cocaine by a black male and in the possession of the black male while inside the residence listed above.

As should be apparent, such a redacted affidavit would include no information tending to support a finding that the informant was reliable.

In its brief, the State argues that a properly redacted affidavit would suffice to permit a finding of probable cause. In support of this contention, the State cites our decision in *State v. Smothers*, 108 N.C. App. 315, 318-19, 423 S.E.2d 824, 826 (1992). However, in *Smothers:*

> the information supplied by the informant established that he had been in defendant's residence during the previous seventy-two hours and that he had personally observed a box containing "a bunch" of small bags of white powder and . . . had personally observed defendant and others using cocaine by heating it and then snorting it through a straw[.] . . . The informant stated that he had personal knowledge of the appearance of cocaine and marijuana because a relative previously used these drugs.
>
> In addition . . . the affiant, Lieutenant Anderson, personally spoke with a second individual who . . . verified that the informant entered defendant's residence . . . [and that the] informant stated to him that he had seen cocaine and marijuana in the residence and had been offered cocaine by defendant. . . . Lieutenant Anderson verified that defendant resides at the home in question by checking the address listed with the North Carolina Department of Motor Vehicles on defendant's driver's license. Further, the affidavit recites that the officer has received information in the past from other citizens living near defendant's residence concerning an unusual amount of traffic going to and from defendant's residence at all hours of the day and night.

As a result, the affidavit at issue in *Smothers* contains a wealth of information and corroborative detail that does not appear in the affi-

davit before the Court in this case. In addition, the State relies on *Riggs*, 328 N.C. at 218, 221, 400 S.E.2d at 432, 434, in support of its contention that a properly redacted affidavit would adequately support the issuance of the challenged search warrant. In *Riggs*, however:

> Deputy Floyd's affidavit tended to show that the informant used by Deputy Stevens on 26 February 1987 had made two prior controlled purchases of drugs and also previously had given accurate information which resulted in the arrest of a "narcotics violator." Such evidence established that informant's reliability. . . . Evidence before the magistrate [also] tended to show that two different individuals had been able to secure drugs by sending an observed third party on the defendants' premises and that one of the transactions had occurred within the previous 48 hours. Therefore, it was reasonable for the magistrate to conclude that there was a fair probability or substantial chance that contraband was present in the defendants' residence.

As was the case in *Smothers*, the affidavit at issue in *Riggs* contained factual information upon which the magistrate could make a determination above and beyond the bare assertion that an informant claimed to have entered a particular apartment and observed the presence of controlled substances. Thus, the authority upon which the State relies does not suffice to justify a holding that a properly redacted affidavit would have supported a decision to authorize a search of the apartment.

After carefully reviewing the record, we conclude that, in the event that the assertions contained in the original affidavit to the effect that the informant "has proven reliable in the past to the applicant by providing information in the past that has led to the seizure of a controlled substance in Wayne County;" "has in the past provided information to the applicant that has led to the seizure of controlled substances;" and that "the applicant knows that the source knows cocaine when the source sees it" are removed, the remaining material does not suffice to support a finding of probable cause. In essence, the affidavit executed by Officer Harris simply indicates that an informant had entered the premises at some relatively recent point in time and observed controlled substances. However, the affidavit contains no support for a determination that the information provided by the informant was reliable or had been corroborated, such as evidence of the prior provision of accurate information by the informant, the observation of the informant's visit to the premises by investigating

officers, the results of prior surveillance of the apartment, or anything tending to inspire confidence in the informant's credibility. In the event that we were to accept the redacted affidavit as sufficient, we would effectively be holding that an adequate showing of probable cause had been made when an unknown individual claims, without any supporting evidence whatsoever, that another person had engaged in illegal activity. This we are unwilling to do. As a result, we conclude that Defendant made a sufficient showing that a properly redacted affidavit would not support the issuance of a warrant authorizing a search of the apartment to preclude summary denial of his motion for appropriate relief.

c. Other Issues

In deciding that Defendant's motions for appropriate relief and discovery should be summarily denied, the trial court, in addition to stating that "[t]he Affidavit supporting the search warrant at issue did not contain 'false statements' under the theory argued by the Defendant" and that "Defendant has failed to adequately show that trial counsel's actions in failing to file an [a]ffidavit prejudiced his defense," concluded that, "[e]ven in the absence of a supporting [a]ffidavit, the trial judge nevertheless fairly considered the arguments requested within this Motion and rejected them." In essence, we understand this determination to amount to a suggestion that, although the trial court dismissed Defendant's suppression motion, Defendant nonetheless had the benefit of an adequate consideration of the validity of his challenge to the warrant upon which the search of the apartment was predicated. We do not believe that this conclusion has merit.

After the trial court summarily denied his suppression motion, Defendant argued that the belated disclosure of the fact that a controlled buy had occurred constituted a violation of the statutory provisions governing the discovery process and stated that he wished to call the informant as a witness. At that point, the prosecutor informed Defendant and the trial court that the informant had "died about [three] days after this incident." In light of Defendant's claim that he might be entitled to further discovery, the trial court allowed Defendant to "have the officer under oath to answer the question as to . . . other information that you deem discoverable that's not been made available to the Defendant." After Defendant elicited testimony casting doubt upon the accuracy of certain statements contained in the application for the issuance of a search warrant, the State objected that Defendant was conducting "a fishing expedition," lead-

ing the trial court to sustain the State's objection and direct Defendant to "get to the point." After Officer Harris provided additional testimony, including evidence that he had never worked with the informant before the day on which he obtained the search warrant and that he believed that the white powder was cocaine based solely on the fact that it "was represented to him by the black male inside of the apartment to be cocaine," the trial court sustained the State's objection to Defendant's questions concerning the officer's failure to "confirm or dispel" the informant's statement that he had bought cocaine. Although Defendant alluded to the possibility that the affidavit contained false statements by pointing out that there were contradictions between information contained in the affidavit and Officer Harris' testimony, the trial court stated that this was simply defense counsel's "opinion or interpretation of it" and that the trial court did not "read" the affidavit as containing a "misstatement of fact" and reminded Defendant's trial counsel that the only issue that he was entitled to "explor[e] was as to whether or not he had any other information to be made available to you."

This colloquy, which occurred after the trial court had summarily denied Defendant's motion, does not constitute an adequate substitute for the procedural and substantive rights that Defendant lost as the result of his trial counsel's failure to attach an affidavit to Defendant's suppression motion. Although Defendant was permitted to examine Officer Harris for the purpose of determining if he was entitled to additional discovery, the trial court precluded him from fully exploring the issue of the extent to which statements contained in Officer Harris' affidavit were false. In addition, the trial court did not make any factual findings or conclusions of law of the type that will ultimately be necessary in order to determine the validity of Defendant's request that the evidence seized as a result of the search of his apartment be suppressed. As a result, we have no hesitation in concluding that Defendant did not, in fact, have the benefit of a full airing of the issues which underlie his ineffective assistance of counsel claim at the time of trial. Thus, we are unable to agree with the trial court's determination that Defendant did, in fact, have a full and fair opportunity to litigate the issues surrounding the suppression motion and that Defendant's motion for appropriate relief should be denied for that reason.

C. Remedy

A careful analysis of the record demonstrates that, for the reasons set forth above, the trial court erred by summarily denying

Defendant's motions for appropriate relief and discovery. Although certain of the facts underlying Defendant's motion for appropriate relief appear undisputed, such as the fact that Defendant's trial counsel failed to attach an affidavit to the suppression motion that he filed on behalf of Defendant, the State has not yet had a chance to be heard and to adduce evidence concerning certain issues that may be in dispute, such as the extent to which Defendant had standing to contest the search of the apartment and the extent to which Officer Harris acted in bad faith in drafting the affidavit submitted in support of his request for the issuance of a warrant authorizing a search of the apartment. N.C. Gen. Stat. § 15A-1420(c)(1) clearly provides that "[a]ny party is entitled to a hearing on questions of law or fact arising from [a] motion [for appropriate relief.]" *See, e.g.*, *State v. Melvin*, 320 N.C. 508, 510, 358 S.E.2d 528, 528 (1987) (ordering that a case be "remanded to the Superior Court . . . [where] the court shall conduct a hearing . . . [at which] the [S]tate and defendant, duly represented, shall be present[, and b]oth the state and defendant shall be given opportunity to offer evidence relevant to the issue [presented in the case]"). As a result, given that neither party has had an opportunity to fully develop a record for use in evaluating the validity of Defendant's ineffective assistance of trial counsel claim, this case should be remanded to the Wayne County Superior Court for further proceedings not inconsistent with this opinion, including consideration of Defendant's discovery motion.[1]

III. Conclusion

Thus, for the reasons set forth above, we conclude that the "defendant's motion for appropriate relief raised issues of fact with sufficient particularity to merit an evidentiary hearing" and that the trial court erred by "fail[ing] to conduct a hearing so that defendant would have an opportunity to produce evidence to substantiate his allegations." *State v. Hardison*, 126 N.C. App. 52, 57, 58, 483 S.E.2d 459, 462 (1997). As a result, the trial court's order is reversed and this case is remanded to the Wayne County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges BEASLEY and THIGPEN concur.

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1. Given that Defendant's ineffective assistance of trial counsel claim was not ripe for consideration on direct appeal, we necessarily conclude that the trial court did not err by rejecting Defendant's appellate ineffectiveness claim.

STATE OF NORTH CAROLINA v. STACEY ALLEN GLENN

No. COA11-897

(Filed 17 April 2012)

1. Evidence—unavailable witness—prior crimes or bad acts—testimonial statements—no opportunity for cross-examination—prejudicial

The trial court committed reversible error in a first-degree kidnapping, assault with a deadly weapon inflicting serious injury, and indecent exposure case by overruling defendant's objections to the admission of a statement from an unavailable witness concerning a prior act by defendant. The statement was testimonial and defendant had not had the opportunity to cross-examine the witness. Furthermore, the State failed to prove that the introduction of the statement was harmless beyond a reasonable doubt.

2. Evidence—prior crimes or bad acts—inadmissible under 404(b)

The trial court erred in a first-degree kidnapping, assault with a deadly weapon inflicting serious injury, and indecent exposure case by admitting evidence from two witnesses about prior sexual encounters with defendant where the evidence was inadmissible under Rule 404(b).

Appeal by defendant from judgments entered 13 December 2010 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 10 January 2012.

Attorney General Roy Cooper, by David L. Elliot, Director, Victims and Citizens Services and Brian C. Tarr, Assistant Attorney General, for the State.

Duncan B. McCormick, for defendant-appellant.

CALABRIA, Judge.

Stacey Allen Glenn ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of first-degree kidnapping, assault with a deadly weapon inflicting serious injury ("AWDWISI") and indecent exposure. We grant a new trial.

I. Background

On 21 May 2009, Kara Moore ("Moore") and a friend went to several bars in downtown Wilmington. Around 1:00 a.m. Moore's friend went home. Instead of leaving with her friend, Moore met two men at a bar, accompanied them to their apartment in downtown Wilmington and stayed with them for approximately one hour. While at the men's apartment, Moore smoked crack cocaine and consumed a beer.

Around 3:00 or 3:30 a.m., Moore left the men's apartment. While seeking a taxi cab to return to her home in Leland, a four-door vehicle pulled up and the driver asked her if she needed a ride. Moore mistakenly believed the vehicle was a cab, and sat in the front passenger seat. When Moore discovered the vehicle was not a cab and the male driver was not only naked from the waist down but also "had an erection," she immediately tried to exit the vehicle. When the driver realized Moore's intent to depart, he called her a bitch and grabbed her shirt. Moore resisted and managed to jump out of the moving vehicle. Since she was unable to safely exit as he drove away, she was "drug by [the] vehicle" and her shirt was torn from her body.

Law enforcement and Emergency Medical Services were contacted and Moore was transported to the hospital. As a result of exiting a moving vehicle, Moore sustained road rash, back and neck injuries and a permanent scar. While at the hospital, Moore viewed eight photographs and selected two men in an attempt to identify her potential attacker. Defendant's photograph was one of the two men Moore selected.

Defendant was subsequently arrested and charged with first-degree kidnapping, AWDWISI and indecent exposure. Beginning 6 December 2010, defendant was tried by a jury in New Hanover Superior Court. The jury returned guilty verdicts for all charges. For first-degree kidnapping, the trial court sentenced defendant to a minimum of 96 months and a maximum of 125 months and consolidated judgment for AWDWISI and indecent exposure to a minimum of 26 months and a maximum of 41 months. Defendant was to serve both sentences in the North Carolina Department of Correction. Defendant appeals.

II. Constitutional Right to Confront Witnesses

[1] Defendant alleges the trial court violated his constitutional right to confront witnesses against him by overruling objections to testimony of a prior act by an unavailable witness. We agree.

A. Standard of Review

When the Court reviews an alleged violation of a defendant's constitutional rights, the appropriate standard of review is *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007). "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless...it was harmless beyond a reasonable doubt." *State v. Lewis*, 361 N.C. 541, 549, 648 S.E.2d 824, 830 (2007). When the State fails to prove the error was harmless beyond a reasonable doubt, "the violation is deemed prejudicial and a new trial is required." *State v. Rashidi*, 172 N.C. App. 628, 638, 617 S.E.2d 68, 75 (2005).

B. Testimonial or Nontestimonial Statements

The Confrontation Clause of the Sixth Amendment prohibits admission of "testimonial" statements of a witness who did not appear at trial unless: (1) the party is unavailable to testify and (2) the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 158 L. Ed. 2d 177, 203 (2004). Although *Crawford* did not define "testimonial," it did find that at a minimum, statements are testimonial if they were made as part of prior testimony in a hearing or former trial or those made during police interrogations. *Id.; see also State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (2004).

Whether statements made to law enforcement were "testimonial" was subsequently clarified by the United States Supreme Court in the companion cases of *Davis v. Washington* and *Hammon v. Indiana. Davis v. Washington*, 165 L. Ed. 2d 224, 234 (2006). In those cases, the Court found "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 237. In contrast, statements are "testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.*

The challenged testimony in *Davis* was held to be nontestimonial because "the circumstances of [the unavailable witness]'s interrogation objectively indicate[d] its primary purpose was to enable police assistance to meet an ongoing emergency." *Id.* at 240. In reaching this conclusion, the Court relied upon the following factors: (1) the unavailable witness spoke "about events as *they were actually hap-*

pening, rather than describing past events"; (2) the unavailable witness, facing an ongoing emergency, called "for help against a bona fide physical threat"; (3) the "elicited statements were necessary to be able to *resolve* the present emergency"; and (4) the informal interrogation where the unavailable witness's "frantic answers were provided over the phone, in an environment that was not tranquil, or even . . . safe." *Id.* (internal quotations omitted).

In *Michigan v. Bryant*, a recent United States Supreme Court case, the Court further examined how to determine the "primary purpose" of an interrogation and stated that "[t]o determine whether the 'primary purpose' of an interrogation is 'to enable police assistance to meet an ongoing emergency,' " courts should "objectively evaluate the circumstances in which the encounter occurr[ed] and the statements and actions of the parties." 179 L. Ed. 2d 93, 108 (2011) (internal citation omitted). The Court listed several factors for courts to consider when determining the primary purpose of an interrogation: (1) "the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred"; (2) objective determination of whether an ongoing emergency existed; (3) whether a threat remained to first responders and the public; (4) medical condition of declarant; (5) whether a nontestimonial encounter evolved into a testimonial one; and (6) the informality of the statement and circumstances surrounding the statement. *Id.* at 109-119.

C. Misty Hooper's Statement to Law Enforcement

In the instant case, the State introduced evidence regarding the 1999 interrogation of Misty Hooper ("Hooper"), who accused defendant of raping her at knifepoint in Aurora, Colorado however, defendant was only convicted of menacing. At the time of trial, Hooper was deceased and it was therefore undisputed that she was unavailable to testify and that defendant did not have an opportunity to cross-examine her.

The court conducted a pretrial hearing to determine whether Hooper's statements were admissible. Both Brian Baker ("Officer Baker"), a patrol officer with Aurora Police Department ("APD"), and Gregory McGahey ("McGahey"), a former detective with APD, were questioned to determine the primary purpose of Hooper's interrogation. Officer Baker testified that in September 1999 law enforcement in Aurora received a 911 call at 1:58 a.m. concerning a possible sexual assault. Officer Baker responded to the call at a Waffle House

restaurant. When he arrived, he encountered Hooper who was crying and visibly upset. Hooper told Officer Baker that she was waiting at a bus stop when a car approached and the driver asked her for directions. When Hooper leaned close to the car to give directions, the driver grabbed her shirt collar and instructed her to enter the vehicle. The victim claimed she entered the vehicle because he had a knife. He then drove to a parking lot where he raped and then released her. Hooper got dressed and walked to the Waffle House where law enforcement was called.

The trial court found that Hooper's statement to Officer Baker was given to enable police assistance to meet an ongoing emergency and therefore was admissible. Defendant again objected to the testimony when it was presented at trial, contending Hooper's statement was testimonial. The trial court overruled defendant's objection and allowed the officer to testify about Hooper's statement.

Defendant contends that the trial court's ruling was erroneous because there was no ongoing emergency at the time that Officer Baker interrogated Hooper. The State argues that the trial court's ruling was correct because Hooper's statement was analogous to statements which were held to be nontestimonial in *Bryant*. To support its argument, the State cites the evidence that Officer Baker arrived shortly after the 911 call, that he did not take notes during the interview, and that Officer Baker put out a "be on the lookout" ("BOLO") for the license plate numbers Hooper provided him.

In *Bryant*, law enforcement responded to a report that a man had been shot. *Bryant*, 179 L. Ed. 2d at 102. When they arrived, officers found the victim mortally wounded, lying next to his car. *Id.* The officers asked the victim "what had happened, who had shot him, and where the shooting had occurred." *Id.* (citation omitted). The victim told the officers he was shot through the defendant's back door and that after the shooting he got in his vehicle and drove to the convenience store parking lot. *Id.* The officers spoke to the victim for five to ten minutes, but the conversation ended when the paramedics arrived. *Id.* The victim died at the hospital. *Id.*

The Court in *Bryant* concluded that the victim's statements were not testimonial. *Id.* at 119. In so determining, the Court noted that it appeared there was an ongoing emergency since the location of the shooter was unknown, the motive for the shooting was unknown, and the officers also did not know if the shooter would arrive on the scene. *Id.* In addition, the victim was in considerable pain and asked

the officers when "emergency medical services would arrive." *Id.* at 118. Therefore, the primary purpose of his statement to the officers was seemingly to seek medical assistance, not "to establish or prove past events potentially relevant to later criminal prosecution." *Id.* The Court also thought the informality of the questioning was important, in that it occurred in an open, exposed area and the officers' questions were posed in a disorderly fashion. *Id.* at 112. Lastly, the officers' questions of who, what and where, were "the exact type of questions necessary to allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Id.* at 118. (citations and internal quotations omitted).

Prior to *Bryant*, the North Carolina Supreme Court determined statements made by a victim of a crime to law enforcement were testimonial. *Lewis*, 361 N.C. at 549, 648 S.E.2d at 830. In *State v. Lewis*, a woman was robbed in her home and law enforcement was called several hours later. *Id.* at 543, 648 S.E.2d at 826. In response to a series of questions, the victim gave the responding officer a statement which included the events that occurred and a description of the assailant. *Id.* The victim died prior to the defendant's trial and the State relied, in part, on the testimony of the investigating officers. *Id.* at 542-43, 648 S.E.2d at 826. The trial court allowed the victim's statement into evidence. *Id.* at 543, 648 S.E.2d at 826. On appeal, this Court found that the statements were testimonial and were not harmless beyond a reasonable doubt and granted defendant a new trial. *State v. Lewis*, 166 N.C. App. 596, 604, 603 S.E.2d 559, 564 (2004). The State appealed. The North Carolina Supreme Court found the first statement was nontestimonial. However, the second statement, the description of the defendant, was found to be testimonial but the admission was harmless beyond a reasonable doubt, thus reversing the judgment of the Court of Appeals. *State v. Lewis*, 360 N.C. 1, 22, 619 S.E.2d 830, 844 (2005). On petition for writ of certiorari, the United States Supreme Court vacated the judgment and remanded the case to the North Carolina Supreme Court for further consideration in light of *Davis v. Washington*. *Lewis v. North Carolina*, 165 L. Ed. 2d 985, 985-86 (2006). On remand, the North Carolina Supreme Court determined that the statements were testimonial and based its determination on the factors discussed in *Davis* including, (1) the victim faced "no immediate threat to her person"; (2) the officer was seeking to determine "what happened" rather than "what is happening"; (3) the interrogation bore the requisite degree of formality because the officer questioned the victim outside defendant's presence and as part of his investigation; (4) "the victim's statement deliberately recounted, in

response to police questioning, how potentially criminal past events began and progressed"; and (5) "the interrogation occurred some time after the events described were over." *Lewis*, 361 N.C. at 547, 648 S.E.2d at 829 (citation omitted). The Court also determined that while defendant's location was unknown at the time of the interrogation, *Davis* clearly indicated that this fact alone did not "in and of itself create an ongoing emergency." *Id.* at 549, 648 S.E.2d at 829 (citation omitted).

The instant case is more closely aligned with *Lewis* and distinguishable from *Bryant*. To determine the primary purpose of a statement responding to an interrogation by law enforcement, we first examine the circumstances surrounding the questioning. *Bryant*, 179 L. Ed. 2d at 115. In *Bryant*, the officers responded to a call that a man had been shot and found the victim "bleeding on the gas station parking lot, they did not know who [the victim] was, whether the shooting had occurred at the gas station or at a different location, who the assailant was, or whether the assailant posed a continuing threat . . . ." *Id.* at 115 (internal quotations and citations omitted).

In the instant case, Officer Baker responded to a 911 call of a sexual assault and approached Hooper in a parking lot, where there was no ongoing assault. In addition, Hooper had no signs of trauma and no suspect was present. Officer Baker testified that he understood that a sexual assault had occurred near a Waffle House in Aurora. Thus, Officer Baker knew an assault had already occurred, but when he first arrived at the restaurant, he was unaware of Hooper's safety, his safety, the safety of the general public or the location of the subject. However, there is no evidence that upon his arrival, he searched the area for the perpetrator or secured the scene.

Moreover, after Officer Baker began questioning Hooper, he knew the emergency situation was over. Once an officer determines there is no longer an ongoing emergency, statements by a witness can transition from nontestimonial to testimonial statements. *See Bryant*, 179 L. Ed. 2d at 111 ("A conversation which begins as an interrogation to determine the need for emergency assistance can evolve into testimonial statements." (internal quotations and citations omitted)). This may occur when statements made to officers initially appear to be an emergency are "no longer an emergency," or if the perpetrator "flees with little prospect of posing a threat to the public." *Id.* at 112.

When Officer Baker spoke to Hooper, he asked her if she wanted medical attention, but she refused. He also asked her what happened.

Thus, Officer Baker assessed the situation, determined there was no immediate threat and then gathered the information. Furthermore, Hooper told Officer Baker that defendant voluntarily released her from his car and then Hooper walked to the Waffle House. Officer Baker was aware that the situation that instigated the 911 call had ended. Therefore, even if Officer Baker believed there was an ongoing emergency when he arrived at the Waffle House, Hooper's statement transitioned from a nontestimonial statement into a testimonial statement after Officer Baker determined that no ongoing emergency existed.

Next, we examine whether there were any ongoing threats to the victim, to law enforcement or to the public. In *Bryant*, the victim was shot and then drove his car to the parking lot. *Id.* at 102. The Court recognized the fact that the victim drove away indicated that the victim "perceived an ongoing threat." *Id.* at 116. The Court reasoned that the defendant could potentially arrive at the gas station in pursuit of the victim. *Id.* at 119. In addition, the Court was concerned because the victim sustained a gunshot wound and they were unaware of the degree of "physical separation that was sufficient to end the emergency . . . ." *Id.* at 117 (noting that "[i]f an out-of-sight sniper pauses between shots, no one would say that the emergency ceases during the pause.").

In the instant case, defendant voluntarily released Hooper from his car and drove away. There was no indication that defendant would return to the area to harm Hooper again. Unlike the assailant in *Bryant*, who was armed with a gun, defendant in the instant case only displayed a knife to threaten Hooper. There was no evidence that Hooper sustained any injuries from the knife. Furthermore, even if defendant were to use the knife, he would have to be closer in physical proximity to harm her or others with a knife unlike that of a gun. Officer Baker was aware that defendant released Hooper from the car and drove away. There was no evidence that defendant was ever in the Waffle House parking lot or close enough to harm Officer Baker with his knife.

In determining whether there was a potential threat to the public at large, the *Bryant* Court looked at the defendant's motive for shooting the victim. *Id.* at 116-17. Since the officers in *Bryant* did not know the motive for the shooting, the Court recognized that the emergency was broad, encompassing a potential threat to the public, thus risking the safety of other individuals. *Id.* at 116. In Hooper's case, the evidence suggested defendant's motive was sexual and did not rise to the level of endangering the public at large. Hooper specifically told

Officer Baker that defendant stated he "just want[ed] sex." Officer Baker noted in his police report that defendant's only apparent motive was "sexual." This sexual motive, unlike the unknown motive of the shooter in *Bryant*, did not suggest an immediate threat to the public at large.

The *Bryant* Court also indicated the circumstances of the encounter provided context for understanding the victim's statements to officers. *Id.* at 119. In *Bryant*, several officers in an exposed area all asked the victim the same questions. *Id.* The Court noted that the victim "was obviously in considerable pain and had difficulty breathing and talking." *Id.* at 118. Therefore, the Court could not say the "primary purpose" of the victim's statement was "to establish or prove past events potentially relevant to later criminal prosecution." *Id.* (citation omitted). The *Bryant* Court noted " 'Statements for Purposes of Medical Diagnosis or Treatment' under Federal Rule of Evidence 803(4) as an example of statements that are 'by their nature, made for a purpose other than use in a prosecution.' " *Bullcoming v. New Mexico*, 180 L. Ed. 2d. 610, 629 (2011) (citing *Bryant*, 179 L. Ed. 2d at 109-10, n.9) (Sotomayer, J., concurring in part).

In the instant case, Officer Baker was the only officer questioning Hooper, therefore the circumstances of the questioning were more like an interview, and unlike the circumstances in *Bryant* where several officers asked questions. Officer Baker asked Hooper what happened and she narrated the events of the evening. Since Hooper had no obvious injuries, and initially refused medical attention, the primary purpose of her statement could not have been to obtain medical attention. Furthermore, Hooper seemed to have no difficulty in recalling the events, and gave Officer Baker a detailed description of the events, implying that her primary purpose was to provide information necessary for defendant's prosecution. In fact, Hooper told Officer Baker she wanted to prosecute the suspect. The *Bryant* Court also looked at the victim's responses to the officer's questions. *Bryant*, 179 L. Ed. 2d at 119. In *Bryant*, the victim's responses indicated there was an ongoing emergency. *Id.* Hooper's responses, however, showed that defendant voluntarily released her and drove away. There was no evidence presented that the primary purpose of her statement was for any other reason than to apprehend defendant. Consequently, the holding in *Bryant* is not dispositive in the instant case.

In examining the factors identified by our Supreme Court in *Lewis*, Hooper's statement to Officer Baker was clearly testimonial. Here, there was no impending danger, because the driver released Hooper and Hooper was waiting at a restaurant in a presumably safe environment. In addition, Officer Baker questioned her with the requisite degree of formality because the questioning was part of an investigation, outside the defendant's presence. Officer Baker wanted to determine "what happened" rather than "what is happening." *See Lewis*, 361 N.C. at 547, 648 S.E.2d at 829. Furthermore, Hooper's statement deliberately recounted how potentially criminal events from the past had progressed and the interrogation occurred after the described events ended. Finally, Hooper gave the officer a physical description of the driver, how he was dressed, his approximate age, and the type of vehicle he was driving. For a criminal case, this information would be "potentially relevant to later criminal prosecution." *Davis*, 165 L. Ed. 2d at 237.

D. Prejudice

Since we find that Hooper's statement was testimonial, and thus that the trial court erred in admitting the statements, we must now determine whether the error was harmless beyond a reasonable doubt. *See Lewis*, 361 N.C. at 549, 648 S.E.2d at 830. When overwhelming evidence of guilt is presented against defendant, the constitutional error may be harmless beyond a reasonable doubt. *State v. Garnett*, ___ N.C. App. ___, ___, 706 S.E.2d 280, 285 (2011), *review denied*, 365 N.C. 200, 710 S.E.2d 31, 32 (2011) (citation omitted).

In the instant case, defendant was indicted for first-degree kidnapping of Moore and the State alleged that the purpose of the kidnapping was the commission of a felony, serious injury and terrorizing the victim. During closing arguments, the State used Hooper's statement to prove its theory, that defendant intended to rape and terrorize Moore. The prosecutor told the jury, "we know what he intends to do to women. Misty Hooper . . . is a textbook example of how he terrorizes women . . . and how he rapes them. And [Moore] was next." Later on, he again used Hooper's experience as a basis to convict defendant,

> Hooper . . . was a textbook example of what he does to women, and how he does it, and why. He finds women by themselves, late at night, when there's no one else around, he gets them into his car, and once he gets them there he uses terror and violence to rape them.

The jury ultimately determined that defendant kidnapped Moore for the purpose of terrorizing her.

The drivers in both the Hooper case and the instant case, picked up women in the early morning hours on public streets. Officer Baker testified that Hooper reported that defendant raped her after she got into his vehicle. In the instant case, when Moore entered the vehicle, the driver was not wearing pants and displayed an erection. The State implied that defendant was the driver of the vehicle and that he intended to terrorize and rape Moore just as he had done ten years earlier with Hooper.

However, in the other incidents the State introduced, none of the women were harmed. In fact, in each of those prior incidents defendant never kidnapped or attempted to kidnap the women. Hooper's statement was the only testimony introduced that indicated defendant would physically harm a woman. The State's introduction of evidence that defendant terrorized and raped another woman surely influenced the jury and was not harmless beyond a reasonable doubt.

Additionally, since the evidence presented to the jury was only a portion of the Hooper investigation it misrepresented the nature of Hooper and defendant's encounter. While Hooper initially claimed that defendant raped her, defendant only pled guilty to menacing. Furthermore, evidence was presented during the pretrial hearing that Hooper participated in prostitution. When McGahey questioned defendant, he claimed that he "was out looking for prostitutes" and that Hooper willingly had sex with him. Defendant claimed that he only picked up his knife when Hooper refused to get out of the car unless she received more money because "the sex took longer than anticipated." McGahey interviewed Hooper's sister and boyfriend. Hooper's sister stated that she was more of an "escort." However, Hooper's boyfriend validated defendant's story regarding Hooper's prostitution. Based on this information, McGahey testified that it was his "opinion that [Hooper] was engaged in prostitution." This information, coupled with defendant's ex-wife's testimony that defendant solicited prostitutes, makes it less likely that defendant raped Hooper. Since the State presented the jury only Hooper's initial statement to Officer Baker, that she was raped, without including the fruits of the investigation, the State provided a skewed view of the encounter. While we agree that this portion of McGahey's testimony should not have been entered into evidence, neither should Officer Baker's. The admission of Hooper's statement prejudiced defendant.

Furthermore, the State's evidence of defendant's guilt was not overwhelming. During trial, Moore positively identified defendant as her potential attacker, yet at the photo lineup she identified two men. Substantial evidence was presented that Moore had a long history of drug and alcohol abuse and that she had consumed seven alcoholic beverages and smoked crack cocaine on the night of the incident. In addition, Moore was only in the car approximately ten to thirty seconds before jumping out, therefore, this short period of time was not long enough to observe the driver. Evidence regarding the car was also ambiguous. Moore described the vehicle as a blue four-door vehicle. Even though security footage showed that the car had four doors, the color, model and license plate number were unclear on the DVD. Finally, neither Moore's missing shirt, nor any other evidence was found in defendant's car to prove that the car, she believed was a taxi on the night of her injuries, was defendant's vehicle.

The State has failed to prove that the introduction of Hooper's statement was harmless beyond a reasonable doubt and therefore, we grant defendant a new trial.

III. Evidence of Prior Acts

[2] Since defendant raises an additional issue on appeal which may reoccur at a new trial, we choose to address the merits of the issue here. *See State v. Hyleman*, 324 N.C. 506, 511, 379 S.E.2d 830, 833 (1989). Defendant alleges the trial court erred in admitting evidence of prior acts committed when the evidence was not relevant, where any probative value was substantially outweighed by the danger of unfair prejudice and where the evidence was inadmissible under Rule 404(b). We agree.

Whether evidence was properly admitted under Rule 404(b) involves a three-step test. First, is the evidence relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried? *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Second, is that purpose relevant to an issue material to the pending case? *State v. Anderson*, 350 N.C. 152, 174, 513 S.E.2d 296, 310 (1999). Third, does the probative value of the evidence substantially outweigh the danger of unfair prejudice pursuant to Rule 403? *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907, *appeal dismissed and disc. review denied*, 360 N.C. 653, 637 S.E.2d 192 (2006). This Court reviews questions of relevancy *de novo*, but accords deference to the trial court's ruling. *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (2011) ("A trial court's rul-

ings on relevancy are technically not discretionary, though we accord them great deference on appeal."). The third step of the Rule 404(b) test—the Rule 403 balancing test—is reviewed for abuse of discretion. *Summers*, 177 N.C. App. at 697, 629 S.E.2d at 907.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C–1, Rule 404(b) (2011). However, the court may admit the evidence "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C–1, Rule 404(b) (2011). "Rule 404(b) evidence is admissible to prove identity when the defendant is not definitely identified as the perpetrator of the alleged crime." *State v. Gray*, ___ N.C. App. ___, ___, 709 S.E.2d 477, 488 (2011).

The rule of inclusion of evidence "is constrained by the requirements of similarity and temporal proximity. *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). "Evidence of a prior bad act generally is admissible under Rule 404(b) if it constitutes 'substantial evidence tending to support a reasonable finding by the jury that the defendant committed the similar act.' " *Id.* at 155, 567 S.E.2d at 123. (citation omitted). However, "the similarities between the two situations" do not need to "rise to the level of the unique and bizarre. Rather, the similarities simply must tend to support a reasonable inference that the same person committed both the earlier and later acts." *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991) (citation omitted). "[T]he more striking the similarities between the facts of the crime charged and the facts of the prior bad act, the longer evidence of the prior bad act remains relevant and potentially admissible for certain purposes." *Gray*, ___ N.C. App. at ___ S.E.2d at 488.

In the instant case, the trial court allowed the State to introduce evidence from two witnesses about sexual encounters with defendant. Each instance had some similarity to defendant's alleged assault on Moore. One of these was Officer Baker's testimony concerning Hooper. Since we determined that evidence should have been excluded under *Crawford*, it will not be repeated here.

The trial court also allowed the testimony of Chelsie Clark ("Clark"), a woman assaulted in Longmont, Colorado in 2000. The trial court allowed Clark's testimony to show identity, *modus operandi*, intent, plan, scheme, system, or design. Clark testified that

a man approached her while she was enjoying her early morning walk, pulled down his pants and grabbed at her as she ran away to a neighbor's house. Clark was able to identify defendant in both a photo lineup and in court.

For admission under 404(b), the State must show that the incidents were sufficiently similar. *See Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123. In both the instant case and the Clark case, an assailant exposed himself to the women and grabbed them but the circumstances were very different. In the Clark case, defendant was on foot, he was partially clothed and then removed his penis to expose it. Subsequently, he grabbed at Clark in a sexual manner by grabbing at her breasts and buttocks. While he followed her up the driveway towards her neighbor's house, he did not attempt to restrain her.[1] Clark testified that he "grabbed at" her. She stated that she hit him and pushed him away.

In contrast, Moore's assailant was in a vehicle when he approached her. Moore voluntarily got into the vehicle and discovered that the assailant was not wearing pants. The man called her a bitch and grabbed her hair and shirt as she attempted to exit the vehicle. In the instant case, there was no evidence the assailant attempted to touch Moore in a sexual manner. Furthermore, the incident with Clark occurred nine years prior to the incident with Moore. Given the differences in the two instances, as well as the remoteness in time of the incident with Moore, we find the admission of the evidence was error. *See Gray*, ___ N.C. App. at ___, 709 S.E.2d at 488. The only purpose for the introduction of the evidence was to show that defendant "has the propensity for the type of conduct for which he [was] tried." *See Coffey*, 326 N.C. at 278, 389 S.E.2d at 54.

Since we have determined that the evidence should not have been admitted under Rule 404(b), there is no reason to analyze whether the issue was relevant, or whether the probative value of the evidence outweighed the prejudicial effect. Furthermore, since we granted a new trial on the issue of testimonial evidence, there is no reason to determine whether this evidence was prejudicial.

IV. Closing Arguments

Defendant alleges the trial court erred in failing to intervene *ex mero motu* when the prosecutor suggested during closing arguments

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1. We note that the trial court did make findings when admitting evidence under Rule 404(b) and found that Clark was restrained. However, based on the testimony, we find that the evidence did not support the judge's finding.

that if defendant was found not guilty he would prey on the jurors' female family members. However, since we have determined a new trial is warranted on other grounds, and it is unlikely this error will reoccur, it is unnecessary to decide whether the trial court erred by not intervening *ex mero motu*. *See State v. Saunders*, 35 N.C. App. 359, 363, 241 S.E.2d 351, 353 (1978).

V. Conclusion

The trial court violated defendant's constitutional right to confront witnesses against him by allowing Officer Baker's testimony concerning Hooper's statement, because her statement was testimonial. In addition, we find that admission of Clark's testimony was error as the incident was not sufficiently similar to the instant case.

New trial.

Chief Judge MARTIN and Judge McGEE concur.

STATE OF NORTH CAROLINA v. ROBIN LIVICE FOYE

No. COA11-1281

(Filed 17 April 2012)

1. Motor Vehicles—driving while impaired—driving while license revoked—sufficient evidence—driver of vehicle

The trial court did not err in a driving while impaired and driving while license revoked case by denying defendant's motion to dismiss for insufficient evidence. The State presented sufficient evidence of all elements of both charges, including that defendant was the driver of the vehicle.

2. Motor Vehicles—driving while impaired—driving while license revoked—jury instructions—reasonable doubt—burden of proof not lowered—no plain error

The trial court did not commit plain error in a driving while impaired and driving while license revoked case by giving an erroneous instruction to the jury on reasonable doubt which improperly lowered the State's burden of proof. Additional language added by the judge, when viewed together with the correct pattern jury instruction, did not lower the burden to less than reasonable doubt or otherwise prejudice defendant. Furthermore,

the trial court's additional language did not amount to a structural error which infected defendant's entire trial process.

3. **Judges—duty of impartiality—jury instruction—reasonable doubt—not erroneous—no violation**

The trial court did not violate its duty of impartiality in a driving while impaired and driving while license revoked case by giving an erroneous jury instruction which lowered the State's burden of proof. The trial court's additional language in the jury instruction on reasonable doubt was not erroneous.

4. **Motor Vehicles—driving while impaired—driving while license revoked—jury instructions—reasonable doubt—no coercion**

The trial court did not coerce the jury into returning guilty verdicts in a driving while impaired and driving while license revoked case by defining reasonable doubt in a way that facilitated findings of guilt on both charges. The trial court's additional language to the jury instruction on reasonable doubt was not erroneous.

Appeal by defendant from judgment entered 11 and 12 May 2011 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 6 March 2012.

Attorney General Roy Cooper, by Assistant Attorney General Tamara S. Zmuda, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for defendant appellant.

McCULLOUGH, Judge.

Robin Livice Foye ("defendant") appeals from his convictions of driving while intoxicated ("DWI") and driving while license revoked ("DWLR"). Defendant contends the State failed to prove that he was actually driving his car, an essential element of both crimes. Furthermore, he argues the trial court erred in its instruction to the jury on the standard of reasonable doubt. For the following reasons, we disagree and find no error on behalf of the trial court.

I. Background

On 24 October 2009, at around 5:00 a.m., Officer William Grosclose, who at the time had been a traffic officer with the Kinston Department of Public Safety for almost two years, was parked at

Grainger Stadium in Kinston, North Carolina, approaching the end of his shift when he heard a loud boom. He was unsure of the cause of the noise and could not locate its origin. A few minutes later he received a call from dispatch alerting him to a wreck on Liberty Hall Road, about one to one-and-one-half miles away.

Officer Grosclose arrived at the scene of the accident to find a damaged 1989 Buick sedan in a ditch on the side of the road. Liberty Hall Road is a two-lane residential road and the vehicle was located near a curve and an intersection. Officer Grosclose noticed blood between the driver's seat and passenger seat, on the steering wheel, and on the back of the passenger seat. No one was in the car and there were not any keys in the ignition. The driver's side door was jammed closed, but the passenger door was wide open. Officer Grosclose looked up the registration for the vehicle, determined that it belonged to defendant, and obtained his address. He requested that other officers check defendant's residence, but they reported that no one was home. As the other officers tracked back from defendant's home to the scene of the accident, they located defendant on East Bright Street at approximately 5:30 a.m.

Officer Grosclose joined the other officers on East Bright Street and found defendant leaning against a patrol car. Defendant had an injury to the left side of his cheek, consistent with the impact of a steering wheel or seatbelt, and blood on his hands. Defendant's breath emanated a strong odor of alcohol. Additionally, according to Officer Grosclose, defendant appeared unsteady on his feet, slurred his speech, and refused to cooperate with the officers' investigation. Officer Grosclose proceeded to question defendant about the accident, to which he responded with a variety of stories. Defendant initially told Officer Grosclose that he had been at the Ponderosa Club when a fight broke out and his car had been stolen. He then changed his story to his friends having driven the car while he was a passenger. However, officers were unable to obtain any evidence that other people had been at the scene of the accident and the nearby hospitals did not have any reports of patients with injuries matching those possibly caused by the accident. Defendant finally admitted that he had driven the car because he had been jumped at the Ponderosa Club and he thought his life had been threatened. Officer Grosclose testified at trial that defendant's statements "didn't make sense" and "wouldn't piece together." Furthermore, they had "[n]o logical order."

Officer Grosclose attempted to have defendant perform field sobriety tests, but he refused. Officer Grosclose testified that in his

opinion defendant consumed a sufficient amount of alcohol such that his mental and physical faculties were impaired. As a result, he arrested defendant for DWI and DWLR. Following his arrest, defendant also refused a breathalyzer test. Officer Grosclose obtained a search warrant to test defendant's blood. At approximately 7:20 a.m., a paramedic withdrew defendant's blood. Melanie Thornton, a forensic chemist at the North Carolina State Bureau of Investigation Crime Lab, testified that she analyzed defendant's blood and determined that it had a blood alcohol concentration of .18, over twice the legal limit in North Carolina. Defendant was eventually cited for DWI, DWLR, and misdemeanor hit and run.

On 4 October 2010, in Lenoir County District Court before Judge Lonnie Carraway, defendant was found guilty of DWI and DWLR, but acquitted of misdemeanor hit and run. Judge Carraway sentenced defendant as a Level 1 offender to consecutive sentences of twelve months for DWI and forty-five days for DWLR. Defendant appealed to the superior court. On 7 February 2011, Judge Paul L. Jones conducted a trial of defendant's case in Lenoir County Superior Court. The next day Judge Jones dismissed defendant's hit-and-run charge and ordered a mistrial for the DWI and DWLR charges due to a hung jury.

On 9 May 2011, defendant had his retrial before Judge Jones. At the end of all evidence defendant's counsel made a motion to dismiss asserting that there was "nothing to link defendant to driving the car" and that there was "no evidence that anyone observed him driving the car." Judge Jones responded, "Well, there was testimony by the officer that defendant] said he was driving." Consequently, the trial court denied defendant's motion to dismiss. On 12 May 2011, the jury returned guilty verdicts against defendant on the charges of DWI and DWLR. The trial court entered a consolidated sentence of twelve months for both charges. Defendant gave oral notice of appeal.

II. Analysis

A. Motion to Dismiss

[1] Defendant's first issue on appeal is that the trial court erred in denying his motion to dismiss because the State failed to establish the *corpus delicti* of his DWI and DWLR charges. We disagree.

Our Court reviews the denial of a motion to dismiss *de novo*. *State v. Adams*, ___ N.C. App. ___, ___, 721 S.E.2d 391, 394 (2012). Under *de novo* review we consider the matter anew and freely substitute our own judgment for that of the lower court. *Sutton v. Dep't*

of Labor, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999). To survive a motion to dismiss the State must provide substantial evidence of each essential element of the offense. *State v. Davis*, 74 N.C. App. 208, 212, 328 S.E.2d 11, 14 (1985). Our review of the sufficiency of the evidence "is the same whether the evidence is circumstantial or direct, or both." *State v. Garcia*, 358 N.C. 382, 413, 597 S.E.2d 724, 746 (2004) (internal quotation marks and citation omitted). The evidence is to be viewed in the light most favorable to the State with the State receiving any reasonable inferences therefrom. *Id.* at 412-13, 597 S.E.2d at 746. Furthermore, when the evidence only raises a suspicion of guilt, a motion to dismiss must be granted. *State v. Daniels*, 300 N.C. 105, 114, 265 S.E.2d 217, 222 (1980), *superseded by statute on other grounds in State v. Wortham*, 318 N.C. 669, 351 S.E.2d 294 (1987). However, "[i]f there is more than a scintilla of competent evidence to support allegations in the warrant or indictment, it is the court's duty to submit the case to the jury." *State v. Everhardt*, 96 N.C. App. 1, 11, 384 S.E.2d 562, 568 (1989) (internal quotation marks and citation omitted), *aff'd*, 326 N.C. 777, 392 S.E.2d 391 (1990).

Defendant argues the State failed to present substantial independent evidence that he drove his car on the morning of 24 October 2009. In making his argument, defendant contends the State may not solely rely on a naked, extrajudicial confession to support a criminal conviction. *See State v. Cope*, 240 N.C. 244, 247, 81 S.E.2d 773, 776 (1954). However, defendant argues the State must provide other corroborating evidence and in the case at hand the other evidence offered by the State does not substantiate defendant's single comment that he drove his car after being jumped at the Ponderosa Club. *Id.*

Under the *corpus delicti* rule, a conviction cannot be based solely on a defendant's confession. *State v. Smith*, 362 N.C. 583, 592, 669 S.E.2d 299, 305 (2008). Rather, "other corroborating evidence is needed to convict for a criminal offense." *Id.* Moreover, in noncapital cases, a defendant's conviction will be upheld by the defendant's confession where the confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that the defendant had the opportunity to commit the crime. *See State v. Trexler*, 316 N.C. 528, 533, 342 S.E.2d 878, 881 (1986) (DWI conviction upheld where sufficient independent evidence existed to show that defendant appeared impaired, was actually impaired, and otherwise the wreck was unexplained).

Defendant argues that his lone confession in the middle of his sequence of rambling excuses was not sufficient to meet the State's burden of proving that defendant actually drove his car.

> A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
>
> (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90 89, or its metabolites in his blood or urine.

N.C. Gen. Stat. § 20-138.1(a) (2011). Additionally, any person is guilty of the crime of DWLR "whose drivers license has been revoked who drives any motor vehicle upon the highways of the State while the license is revoked[.]" N.C. Gen. Stat. § 20-28(a) (2011). Defendant contends the State did not present sufficient evidence to corroborate his alleged confession and prove that it was trustworthy. In arguing so, defendant notes that his confession contradicted his previous statements; there were no eyewitnesses to him having driven the car or getting out of the driver's seat; he was not found with the keys to the vehicle in his possession, which can be a factor in determining if he drove, *see State v. Sawyer*, 230 N.C. 713, 715, 55 S.E.2d 464, 466 (1949); and his injuries did not establish that he was driving the car because the blood on the back of the passenger seat could have been from him sitting in the backseat. Defendant contends these discrepancies are merely suspicion and are not sufficient to meet the level of substantial evidence. *State v. Hamilton*, 145 N.C. App. 152, 158, 549 S.E.2d 233, 237 (2001).

Alternatively, the State argues that it presented sufficient independent evidence tending to establish the *corpus delicti* of the crime charged. The State notes that

> "[i]ndependent evidence of the *corpus delicti* . . . does not equate with independent evidence as to each essential element of the offense charged. Applying the more traditional definition of *cor-*

> *pus delicti*, the requirement of corroborative evidence would be met if that evidence tended to establish the essential harm, and it would not be fatal to the State's case if some elements of the crime were proved solely by defendant's confession."

State v. Highsmith, 173 N.C. App. 600, 604, 619 S.E.2d 586, 590 (2005) (quoting *State v. Parker*, 315 N.C. 222, 229 S.E.2d 487, 491 (1985)). The State contends it presented substantial evidence regarding the trustworthiness of defendant's statement and his opportunity to commit the crime. In particular, the State noted that the vehicle was registered to defendant; defendant was found walking on a road near the scene; defendant had injuries consistent with someone that had been in a wreck; and defendant concedes he was impaired based on the blood test. In regard to the injuries, defendant had a cut on his cheek consistent with blood on the steering wheel; there was blood between the driver's and passenger seat, as well as on the back of the passenger seat, consistent with defendant having to crawl out the passenger door due to the driver's side door being stuck closed. While this is merely a scenario that could have happened, it is sufficient, in consideration with the other evidence,

> for a reasonable jury to infer that defendant was under the influence of an impairing substance when he drove the vehicle.
>
> There are numerous possible other scenarios, ... But,
>
> > to hold that the trial court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of facts. . . . Proof of guilt beyond a reasonable doubt is required before the jury can convict. . . . What the evidence proves or fails to prove is a question of fact for the jury.

State v. Mack, 81 N.C. App. 578, 583, 345 S.E.2d 223, 226 (1986) (internal quotation marks and citations omitted). Consequently, viewing the evidence in the light most favorable to the State, the State presented sufficient evidence to survive the motion to dismiss; and as a result, the trial court did not err in denying defendant's motion to dismiss at the close of all evidence.

B. Jury Instruction on Reasonable Doubt

[2] Defendant's next argument is that the trial court committed plain error by giving an erroneous instruction to the jury on reasonable doubt, which improperly lowered the State's burden of proof. We disagree.

Our Court generally reviews jury instructions *de novo*. *State v. Jenkins*, 202 N.C. App. 291, 296, 688 S.E.2d 101, 105 *disc. review denied*, 364 N.C. 245, 698 S.E.2d 665 (2010). However, jury instructions which are not objected to are reviewed for plain error. *State v. Mohamud*, 199 N.C. App. 610, 612, 681 S.E.2d 541, 543 (2009). Plain error exists where the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (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).

In the case at bar, the trial court initially gave pattern jury instruction, N.C.P.I., Crim. 101.10 (2011), regarding the State's burden of proof and reasonable doubt. Twenty-six minutes later the jury indicated that it was deadlocked and was set to reenter the courtroom when it decided to rediscuss. Nine minutes later the jury returned to the courtroom and the foreperson asked "to be reminded of the definition of the burden of proof beyond a reasonable doubt and we wanted to also look at some of the photographic evidence that was submitted." The trial court asked if either side had an objection to a reinstruction, which they did not, and the trial court proceeded to again give the pattern jury instruction, adding "[r]emember, nothing can be proved 100 percent basically, but beyond a reasonable doubt. So you have to decide for yourself what is reasonable, what makes sense." The jury returned to deliberations and six minutes later found defendant guilty on both charges.

In adding its own words to the pattern jury instruction, defendant contends the trial court diluted the State's burden of proof. Defendant notes that the right to proof beyond a reasonable doubt is a well-established principle in our legal system. *In re Winship*, 397 U.S. 358, 363-64, 25 L. Ed. 2d 368, 375 (1970). The additional language allegedly undermined the principle by defining doubt in a way that allowed the jury to convict defendant without being fully satisfied or entirely convinced of his guilt. Furthermore, defendant argues the trial court failed to inform defense counsel of the proposed additional language, which was in violation of N.C. Gen. Stat. § 15A-1234(c) (2011), and any "failure to comply with the statutory mandate is reversible error." *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001).

On the other hand, the State contends the instructions to the jury, as a whole, were conceptually correct. " '[A]s a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.' " *State v. Hooks*, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001) (quoting *Holland v. United States*, 348 U.S. 121, 140, 99 L. Ed. 150, 167 (1954)). Moreover,

> " '[t]he charge of the court must be read as a whole . . . , in the same connected way that the judge is supposed to have intended it and the jury to have considered it. . . .' It will be construed contextually, and isolated portions will not be held prejudicial when the charge as [a] whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no grounds for reversal."

Id. at 634, 548 S.E.2d at 505 (quoting *State v. Rich*, 351 N.C. 386, 393-94, 527 S.E.2d 299, 303 (2000)).

> If, when so construed, it is sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed, any exception to it will not be sustained even though the instruction could have been more aptly worded.

State v. Maniego, 163 N.C. App. 676, 685, 594 S.E.2d 242, 248 (2004) (internal quotation marks and citation omitted). The State notes the first two paragraphs of the instruction given to the jury were from the pattern jury instruction on reasonable doubt and the additional statement of "nothing can be proved 100 percent basically, but beyond a reasonable doubt, so you have to decide for yourself what is reasonable, what makes sense[,]" is more or less a correct statement of the law. Furthermore, defendant conveniently neglects to discuss the trial court's final sentences in which it stated, "Any questions about the definition of reasonable doubt? The State has the burden and the defendant has no burden. That's why he doesn't have to testify." Evidently, the trial court attempted to rephrase the definition of reasonable doubt in a manner in which the jury could understand, but at the same time maintain that the entire burden was on the State and not defendant.

Our Supreme Court has addressed this issue on a few occasions where the trial court, in explaining reasonable doubt, used the descriptions " '"not satisfied beyond any doubt, or all doubt; or a vain or fanciful doubt, but rather what the term implies, a reasonable

doubt, one based on common sense and reason, generated by insufficiency and proof[,]" ' " *State v. Flippin*, 280 N.C. 682, 687, 186 S.E.2d 917, 921 (1972) (quoting *State v. Brackett*, 218 N.C. 369, 372, 11 S.E.2d 146, 148 (1940)), and "[t]his does not mean satisfied beyond all doubt. Neither does it mean satisfied beyond some shadow of a doubt or a vain, imaginary, or fanciful doubt." *State v. Miller*, 344 N.C. 658, 671, 477 S.E.2d 915, 923 (1996). Even more, one trial court described reasonable doubt as meaning "just that, a reasonable doubt. It is not a mere possible, fanciful or academic doubt, nor is it proof beyond a shadow of a doubt nor proof beyond all doubts, for there are few things in human existence that are beyond all doubts." *State v. Adams*, 335 N.C. 401, 420, 439 S.E.2d 760, 770 (1994). To be upheld, the instruction must not have "indicate[d] that the burden of proof is less than 'beyond a reasonable doubt.' " *Miller*, 344 N.C. at 671-72, 477 S.E.2d at 923. Based on the cases cited and the trial court's final statements, we cannot see how the additional language that "nothing can be proved 100 percent basically," when viewed together with the correct pattern jury instruction, lowered the burden to less than reasonable doubt or otherwise prejudiced defendant.

Defendant further argues the trial court's instruction to the jury amounted to structural error.

> Structural error is a rare form of constitutional error resulting from "structural defects in the constitution of the trial mechanism" which are so serious that " 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.' " "Such errors 'infect the entire trial process,' and '*necessarily* render a trial fundamentally unfair[.]' "
>
> . . . In fact, the United States Supreme Court emphasizes a strong presumption *against* structural error[.]

State v. Garcia, 358 N.C. 382, 409-10, 597 S.E.2d 724, 744 (2004) (citations omitted). However, as discussed above, we do not believe the trial court's additional language amounted to a structural error which infected defendant's entire trial process. Consequently, the trial court's jury instruction, when viewed as a whole, does not amount to structural or plain error.

C. Duty of Impartiality Owed to the Jury

[3] Defendant's third argument is similar to his second argument in that it relates to the trial court's added language to the jury instruc-

tion, but defendant is now arguing that the trial court violated its duty of impartiality by lowering the State's burden of proof while the jury was deadlocked. As noted above, we do not believe the trial court's additional language was a violation, and consequently we disagree with defendant's current argument.

Defendant failed to raise its issue regarding the trial court's impartiality in the lower court; nonetheless, a question of whether the trial court violated its duty of impartiality is preserved as a matter of law notwithstanding defendant's failure to raise the issue. *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989). In determining whether the trial court violated its duty of impartiality we apply a "totality of the circumstances" test. *State v. Davis*, 353 N.C. 1, 41, 539 S.E.2d 243, 269 (2000). "Whether the judge's language amounts to an expression of opinion is determined by its probable meaning to the jury, not by the judge's motive." *State v. McEachern*, 283 N.C 57, 59-60, 194 S.E.2d 787, 789 (1973). Additionally, the timing of the remarks must be considered. *See State v. Jenkins*, 115 N.C. App. 520, 525, 445 S.E.2d 622, 625 (1994).

At issue is whether the trial court abandoned its neutrality in regard to the question of defendant's guilt. Defendant contends the trial court improperly conveyed its opinion of the case to the jury through its additional language in the instruction, which effectively told the jury that convicting defendant would be proper even if the State had not proven guilt beyond a reasonable doubt. It is well settled that "[j]urors respect the judge and are easily influenced by suggestions, whether intentional or otherwise, emanating from the bench." *State v. Holden*, 280 N.C. 426, 429, 185 S.E.2d 889, 892 (1972). "The slightest intimation from the trial judge as to the weight or credibility to be given evidentiary matters will always have great weight with the jury, . . ." *State v. Grogan*, 40 N.C. App. 371, 374, 253 S.E.2d 20, 22 (1979). N.C. Gen. Stat. §§ 15A-1222-32 (2011), bar the trial court from expressing any opinion in front of the jury regarding a question of fact. Thus, defendant claims the trial court's instruction indicates that guilty verdicts would be proper, in the case at hand, because the State could not be expected to fully establish or entirely convince the jury that defendant was guilty.

However, the State argues the trial court properly instructed the jury on the standard of reasonable doubt and therefore did not violate its duty to remain impartial. "A remark by the court is not grounds for a new trial if, when considered in the light of the circumstances under

which it was made, it could not have prejudiced defendant's case. The burden rests on the defendant to show that the trial court's remarks were prejudicial." *State v. Anderson*, 350 N.C. 152, 179, 513 S.E.2d 296, 312 (1999) (internal quotation marks and citations omitted). Sometime prior to the trial court's questionable instruction it had informed the jury that

> [t]he law requires the presiding judge to be impartial and express no opinions as to the facts. You are not to draw any inference from any ruling that I have made. You must not let any inflection in my voice or expression on my face, or any question I've asked a witness or anything else that I have done during this trial influence your findings. It is your duty to find the facts of the case from the evidence as presented.

Furthermore, the colloquy between the trial court and defense counsel indicates that the jury may not have been deadlocked at the time of the trial court's additional language.

> The Court: In the matter of State versus Robin Foye, there's some indication that the jury is deadlocked.
>
> Mr. Corrigan: I thought the issue was that they messed up the verdict sheet?
>
> The Court: Well, that's the earlier version.
>
> Mr. Corrigan: We didn't hear the second version.
>
> The Court: Bring them back in.
>
> Bailiff: Now they're rediscussing it again.
>
> Mr. Corrigan: I guess they are not hopelessly deadlocked, huh, Judge?
>
> The Court: Deadlocked, but maybe not hopeless. What did they do with the verdict sheet they messed up?

The jury then discussed the case for nine minutes and returned, asking for the reinstruction on reasonable doubt and to view all the photographic evidence. Neither defense counsel, nor the trial court, appears to have known what the jury was thinking and consequently we cannot tell either. The State presented substantial evidence of the crimes and the trial court attempted to insulate itself from any views of impartiality by instructing the jury to not draw any inferences from its comments. Thus, the trial court did not err in giving its additional

instruction on reasonable doubt because it did not violate its duty of impartiality.

D. Coercion of the Jury

[4] Defendant's final argument again revolves around the trial court's added language to the pattern jury instruction on reasonable doubt. This time defendant contends the trial court coerced the jury into returning guilty verdicts by defining reasonable doubt in a way that facilitated findings of guilt on both charges. We again disagree.

As stated above, defendant failed to object to the trial court's instruction to the jury; and as a result, we review defendant's argument for plain error. *State v. Hunt*, 192 N.C. App. 268, 270, 664 S.E.2d 662, 663 (2008). In reviewing the trial court's instruction, we must look at the totality of the circumstances. *State v. Dexter*, 151 N.C. App. 430, 433, 566 S.E.2d 493, 496 (2002). Moreover, we must look for any indications of a deadlock, *State v. Adams*, 85 N.C. App. 200, 210, 354 S.E.2d 338, 344 (1987), and determine whether the particular instruction altered the burden of proof. *State v. Dial*, 38 N.C. App. 529, 533, 248 S.E.2d 366, 368 (1978).

Defendant argues the trial court's instruction on reasonable doubt improperly influenced the jury's deliberations and caused the jury to return guilty verdicts where it is likely that it would not have. It is well established that a trial court may not coerce a jury into returning a particular verdict. *Jenkins v. United States*, 380 U.S. 445, 446, 13 L. Ed. 2d 957, 958 (1965). There is no indication that the jury was definitely deadlocked or that the trial court's instruction improperly coerced the jury into returning guilty verdicts.

At the same time the jury asked for a reinstruction on reasonable doubt, it asked for all photographic evidence, which included photographs of the bloodstains within the vehicle, as well as pictures of defendant's various injuries. The photographs could have easily influenced the jury to return guilty verdicts. Furthermore, as previously discussed, the trial court's instruction did not unduly influence the jury to amount to plain error. The trial court even qualified its additional comments by finishing the instruction with the statements, "Any questions about the definition of reasonable doubt? The State has the burden and the defendant has no burden. That's why he doesn't have to testify." Clearly, the trial court left for the jury to decide what was reasonable and the evidence does not prove it likely that the jury would have returned any other verdicts than those of guilty.

Consequently, the trial court did not coerce the jury into returning guilty verdicts and its additional instruction on reasonable doubt did not amount to plain error.

III. Conclusion

Based on the foregoing, we find no error on behalf of the trial court. The trial court did not err in denying defendant's motion to dismiss as the evidence at trial was sufficient to submit the issue to the jury. Furthermore, the trial court's additional instruction regarding reasonable doubt did not lower the State's burden of proof, violate the trial court's duty of impartiality, or unduly coerce the jury into returning verdicts of guilty.

No error.

Judges McGEE and GEER concur.

STATE OF NORTH CAROLINA v. DAVID ROLAND CONLEY

No. COA11-1251

(Filed 17 April 2012)

1. Evidence—other wrongs—relevant—admitted for proper purpose—not unduly prejudicial

The trial court did not err in an uttering a forged instrument and attempting to obtain property by false pretenses case by admitting evidence concerning a second forged check. The evidence was relevant because it made defendant's explanations for possessing the check at issue less probable, was offered for the proper purpose of proving defendant's intent in committing the offenses for which he was charged, and was not unfairly prejudicial under Rule 403 of the Rules of Evidence. Defendant's argument that the evidence was not admissible to impeach him lacked merit because the trial court did not admit the evidence for that purpose.

2. Forgery—uttering forged instrument—jury instruction—sufficiently clear—no reasonable possibility of different result

The trial court did not err or commit plain error in an uttering a forged instrument and attempting to obtain property by

false pretenses case by failing to clarify in its instructions to the jury that the charged offenses related only to defendant's conduct regarding the check at issue, and not a second forged check admitted into evidence. The jury was apprised of this fact based on the trial court's statements and the evidence presented at trial. Furthermore, even if the jury instructions were erroneous for lack of clarity, there was no reasonable possibility that, had the error not been committed, a different result would have been reached at trial.

3. Judges—answer to jury question—not an impermissible opinion—repetition of fact

The trial court did not commit plain error in an uttering a forged instrument and attempting to obtain property by false pretenses case by misstating and impermissibly expressing an opinion on the evidence. The trial court's response to the jury's question was not an opinion on the evidence but was merely the repetition of a fact that a witness had already testified to.

4. Forgery—uttering forged instrument—obtaining property by false pretenses—sufficient evidence—denial of motion to dismiss proper

The trial court did not err in an uttering a forged instrument and attempting to obtain property by false pretenses case by denying defendant's motion to dismiss the charges against him at the close of all the evidence. There was substantial evidence of all the elements of each crime and that defendant was the perpetrator.

Appeal by Defendant from judgment and commitment entered 25 May 2011 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 7 March 2012.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

David Roland Conley ("Defendant") appeals from the jury's verdicts convicting him of uttering a forged instrument and attempting to obtain property by false pretenses. For the following reasons, we hold no error.

I. Factual & Procedural Background

The State's evidence at trial tended to show the following. On 4 March 2010, Defendant entered the SunTrust Bank ("SunTrust") located at 970 South Cannon Boulevard in Kannapolis. Defendant presented a check (hereinafter referred to as "the check" or "the Suntrust check") to a teller, Stephanie Craft. The check bore check number 52629, named Allied Concrete Forming & Associates, Inc. ("Allied") as the account holder, and was made payable to Defendant in the amount of $674.20. Ms. Craft ran the check through the bank's computer system for verification purposes and noticed that an alert had been placed on Allied's account. The alert indicated that the number of the check, 52629, was out of sequence with the numbers of those checks currently drawn on Allied's account. Ms. Craft immediately contacted Allied by telephone and spoke with Lissette Rodriguez, an assistant controller and human resources manager. Ms. Craft requested verification of the check's validity. Ms. Rodriguez informed Ms. Craft that the check was invalid and had not been issued by Allied.

Ms. Rodriguez contacted Kannapolis Police Department, and Sergeant Jason Hinson ("Sergeant Hinson"), the investigating officer, arrived shortly thereafter. Defendant explained to Sergeant Hinson that he had acquired the SunTrust check in exchange for performing some "odds and ends work" for Allied. Defendant equivocated, however, when Sergeant Hinson informed him that the check was fraudulent. Sergeant Hinson placed Defendant under arrest and transported Defendant to the police station for questioning.

At the police station, Defendant explained to Sergeant Hinson that he had met a man—whom he was unable to identify to the police—in Charlotte who asked him if he was interested in making some fast cash. Defendant agreed, and the man drove Defendant to a local McDonald's where the man asked Defendant for his identification card. The man left the McDonald's with Defendant's identification card and returned thirty minutes later with the SunTrust check. The man instructed Defendant to go to SunTrust and cash the check, stating that the two of them would split the proceeds once the transaction had been completed.[1]

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1. Defendant also executed a voluntary written statement at the police station reciting this account of the SunTrust transaction and, more specifically, how the SunTrust check had come into his possession.

On 29 March 2010, Defendant was indicted on charges of forgery of an endorsement, uttering a forged instrument, and attempt to obtain property by false pretenses. The matter came on for trial at the 24 May 2011 Criminal Session of Cabarrus County Superior Court. At trial, Ms. Rodriguez testified that only she and Allied's controller, Nancy Simpson, were authorized to issue checks on Allied's behalf. Accordingly to Ms. Rodriquez, the signature on the SunTrust check resembled Ms. Simpson's signature, but the font was "all off" and "really different." Rodriguez further testified that the genuine Allied check numbered "52629" had not been issued to anyone, and that that particular check remained located in her office at the time Defendant presented the SunTrust check. Rodriguez also stated that Defendant had no affiliation with Allied and, to her knowledge, that Allied had never issued a check to Defendant.

During its examination of Ms. Rodriguez, the State elicited testimony regarding a second forged check (hereinafter referred to as "the Wachovia check"), which was also made payable to Defendant and drawn on Allied's account. The prosecutor asked Ms. Rodriguez whether she was aware of any other counterfeited or forged checks issued or made payable to Defendant besides the SunTrust check, to which Ms. Rodriguez responded: "Yes. As a matter of fact, the same day of that incident, we got a copy of another check, check number 52,630, and it's actually payable to [Defendant]." Ms. Rodriguez testified that the Wachovia check was also paid to the order of Defendant in the amount of $674.20—the same amount as the SunTrust check—and was deposited at Wachovia Bank.

The defense did not present evidence at trial, and Defendant's motion to dismiss at the close of the evidence was denied. The jury subsequently convicted Defendant on the uttering a forged instrument and attempting to obtain property by false pretenses charges, but acquitted Defendant on the forgery charge. The trial court determined that Defendant had a prior record level of VI and sentenced Defendant as a habitual felon to a consolidated presumptive term of 117 to 150 months. Defendant entered notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011), as Defendant appeals from a final judgment of the superior court as a matter of right.

III. Analysis

Defendant raises the following assignments of error on appeal: (1) the trial court erred in admitting evidence of the Wachovia check; (2) the trial court erred by failing to clearly instruct the jury that the charges against Defendant related only to the SunTrust check; (3) the trial court erred when it misstated and expressed an opinion on the evidence; and (4) the trial court erred when it denied Defendant's motion to dismiss for insufficiency of the evidence. We address these contentions in turn.

A. The Wachovia Check

[1] Defendant contends the trial court erred in admitting evidence concerning the Wachovia check because (1) the evidence was irrelevant, unfairly prejudicial, and inadmissible character evidence, and therefore inadmissible under Rule 404(b); and (2) the evidence was not admissible for impeachment purposes because Defendant did not testify as a witness at trial. Defendant asserts the trial court's error in admitting this evidence entitles him to a new trial. We disagree.

"To receive a new trial based upon a violation of the Rules of Evidence, a defendant must show that the trial court erred and that there is a 'reasonable possibility' that without the error 'a different result would have been reached at the trial.' " *State v. Ray*, 364 N.C. 272, 278, 697 S.E.2d 319, 322 (2010) (quoting N.C. Gen. Stat. § 15A-1443(a) (2009)).

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2011). Relevant evidence is generally admissible, but nonetheless may be excluded under other Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 402 (2011). For instance, even if relevant,

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2011). Our Supreme Court has described Rule 404(b) as " 'a clear 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. Locklear*, 363 N.C. 438, 447, 681 S.E.2d 293, 301-02 (2009) (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)). In reviewing the admissibility of evidence under Rule 404(b), "we must assure that the evidence meets the two constraints of 'similarity and temporal proximity.' " *State v. Khouri*, ___ N.C. App. ___ , ___ , 716 S.E.2d 1, 8 (2011) (citation omitted). Further, even if the evidence is relevant and admissible for a proper purpose under Rule 404(b), the evidence may still be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2011). Thus, in determining whether the trial court properly admitted evidence of the Wachovia check, we must proceed along the following line of inquiry: Was the evidence relevant and offered for a proper purpose under Rule 404(b), and, if so, was the evidence not unfairly prejudicial under Rule 403? For the following reasons, we hold the evidence was properly admitted.

Ms. Rodriguez' testimony regarding the Wachovia check is relevant because it makes less probable Defendant's explanations for possessing the check, a fact "of consequence" under Rule 401. *See* N.C. Gen. Stat. § 8C-1, Rule 401 (2011). Defendant initially informed the police that he acquired the check after performing "odd and ends" work. Defendant later stated that he cashed the check for an unidentified individual in exchange for a portion of the proceeds from the check. Evidence of a second fraudulent check (the Wachovia check) drawn on Allied's account and made payable to Defendant undermines Defendant's alternative explanations for possessing the check and was therefore relevant.

Moreover, evidence of the Wachovia check was admissible for the proper purpose of proving Defendant's intent in committing the offenses for which he was charged. *See* N.C. Gen. Stat. § 8C-1, Rule 404(b) (2011) (proving intent is a proper purpose for introduction of prior "bad acts" evidence). The State was required to prove beyond a reasonable doubt Defendant's intent to defraud with respect to both the uttering a forged instrument charge, *see* N.C. Gen. Stat. § 14-120 (2011) and the attempting to obtain property by false pretenses charge, *see* N.C. Gen. Stat. § 14-100 (2011). Defendant insisted he did not know the SunTrust check was forged and therefore had no intent to commit the crimes for which he was arrested and later charged.

Ms. Rodriguez' testimony concerning a second forged check virtually identical to the SunTrust check—made payable to Defendant in the same amount and also drawn on Allied's account—as previously stated, undermines Defendant's explanations for possessing the check and tends to prove that Defendant possessed the intent to defraud when he entered SunTrust and presented the forged instrument. Evidence of the Wachovia check was therefore admissible under Rule 404(b) for the proper purpose of proving Defendant's intent to defraud, an essential element of the offenses for which he was charged.

Furthermore, we conclude that the evidence withstands scrutiny under Rule 403's balancing test. While we recognize that the evidence of the Wachovia check caused some confusion during the jury's deliberations, discussed further *infra*, we cannot say that the probative value of this evidence in proving Defendant's intent was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2011). Accordingly, we hold this evidence admissible under Rule 404(b).

Defendant also argues evidence of the Wachovia Check was not admissible to impeach him because he did not testify as a witness at trial. This argument is irrelevant, as our review of the trial transcript indicates the trial court did not admit the evidence for this purpose.[2] Impeaching a witness involves introducing evidence to cast aspersions upon that witness's credibility *as a witness*. Defendant did not testify as a witness at trial. The trial transcript reveals the trial court admitted the Wachovia check as proof Defendant intended to defraud SunTrust when he presented the SunTrust check. The Wachovia check "impeached" *Defendant's explanations for possessing the check*, i.e., Defendant's *evidence*, not his credibility as a witness at trial. As previously discussed, the evidence at issue was admissible for this purpose under Rule 404(b) to prove Defendant's intent to defraud. Whether the evidence was admissible to impeach Defendant's credibility as a witness has no bearing on Defendant's appeal, as the trial court did not admit the evidence for that purpose.

Therefore, because we discern no error in the trial court's admission of the evidence in question, we need not determine whether exclusion of the evidence would have yielded a different result at trial. *See Ray*, 364 N.C. at 278, 697 S.E.2d at 322. Defendant's assignment of error is overruled.

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2. The State also concedes the evidence was not admitted for purposes of impeaching a witness.

B. Unanimous Jury Verdict

[2] Defendant next contends the trial court erred by failing to clarify in its instructions to the jury that the charged offenses related only to Defendant's conduct regarding the SunTrust check. Defendant argues the court's failure to specify his actions regarding the SunTrust check as the only basis for the charges deprived him of his constitutional right to a unanimous jury verdict, as the jurors may have relied upon evidence concerning the Wachovia check in convicting him. We disagree.

From the outset, we note that Defendant failed to object at trial to the challenged jury instructions. We have articulated our standard of review on this issue where the defendant fails to lodge a timely objection to an allegedly erroneous jury instruction as follows:

> In general, a constitutional issue may not be raised for the first time on appeal. However, the North Carolina Supreme Court has recognized an exception for assignments of error which allege that a defendant's constitutional right to a unanimous jury verdict has been violated.
>
> When a criminal defendant is denied a right arising under the North Carolina Constitution, he is entitled to a new trial only "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."

State v. Haddock, 191 N.C. App. 474, 478-79, 664 S.E.2d 339, 343-44 (2008) (citations omitted).

Our examination of the record reveals that the alleged error could not have affected the outcome of the trial. While it is true the trial court did not articulate Defendant's actions relating to the SunTrust transaction as the sole basis for the charged offenses, this was unnecessary, as the jury was apprised of this fact based on Judge Spainhour's statements and the evidence presented at trial. In Judge Spainhour's opening remarks at trial, he informed the prospective jurors that the "[t]he intended victim in th[is] case was *SunTrust Bank*." (Emphasis added). Moreover, the vast majority of the evidence presented before the jury focused upon Defendant's conduct relating to the SunTrust check. The State called five witnesses, all of which testified regarding the SunTrust check. Only one witness, Ms. Rodriquez, offered testimony regarding the Wachovia check. Furthermore, the trial court clarified this issue in response to a question posed by the jury during deliberations, and we must presume the

court's instructions resolved the issue as the jury thereafter proceeded to deliberate and to return its verdicts without further inquiry. *See State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208 (1993) (presuming the jury " 'attend[s] closely . . . strive[s] to understand, . . . and follow[s] the instructions given them' " (quoting *Francis v. Franklin*, 471 U.S. 307, 324 n. 9 (1985))). Accordingly, we hold the trial court did not err in issuing its instructions to the jury.

Finally, we note that even if the jury instructions were erroneous for lack of clarity, we find no "reasonable possibility that, had the error in question not been committed, a different result would have been reached at [] trial." *State v. Galloway*, 304 N.C. 485, 496, 284 S.E.2d 509, 516 (1981) ; *see also State v. Applewhite*, 127 N.C. App. 677, 681, 493 S.E.2d 297, 299 (1997) ("Our state's Supreme Court has stressed that an improper [jury] instruction will rarely justify reversing a criminal conviction when no objection was made in the trial court."). Defendant's assignment of error is overruled.

C. Trial Court's Response to Jury's Inquiry Concerning the Wachovia Check

[3] Defendant further contends the trial court erred by misstating and impermissibly expressing an opinion on the evidence. We disagree.

During its deliberations, the jury submitted the following question regarding the Wachovia Check:

> The jury would like to know if the information about the check that was deposited at Wachovia was admissible (confusion about objection—sustained or overruled?) and if so, what date was that check deposited?

The trial court instructed the jury in response:

> All right. A couple of things. First of all, that check, if you believe it was—if you find that there was such a check—it was not admitted into evidence, that is, the check itself was not; it was admitted into evidence that a check was deposited at Wachovia. The date of that prior check was—all we can tell you is the evidence, and we discussed this in court with the attorneys, it was prior to the alleged event at SunTrust.

Defendant did not object to these instructions at trial. Where trial counsel fails to object to the trial court's instructions in response to a question from the jury seeking clarification, we review for plain

error. *State v. Duke*, 360 N.C. 110, 133, 623 S.E.2d 11, 26 (2005). We find plain error

> only in exceptional cases where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done. Thus, the appellate court must study the whole record to determine if the error had such an impact on the guilt determination, therefore constituting plain error.

State v. Streater, 197 N.C. App. 632, 639, 678 S.E.2d 367, 372, *disc. rev. denied*, 363 N.C. 661, 687 S.E.2d 293 (2009) (quotation marks and citation omitted). To prevail under the plain error standard, Defendant must show: (1) a different result probably would have been reached but for the error or (2) the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial. *Id.* We need not reach the question of plain error, however, as we hold the trial court did not err in providing this instruction.

N.C. Gen. Stat. § 15A-1222 provides that a "judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2011). Defendant contends the trial court violated this provision when it responded to the jury's question, *supra*, by stating that the Wachovia check was deposited "prior to the alleged event at SunTrust." Defendant asserts this was error because the State did not offer any evidence demonstrating that the Wachovia check was deposited before the incident at SunTrust. We disagree.

Ms. Rodriguez testified that she became aware of the transaction involving the Wachovia check on the same day that Ms. Craft called her to inquire about the authenticity of the SunTrust check as presented by Defendant as he stood before her. Obviously, Defendant could not have deposited the Wachovia check *after* he attempted to cash the SunTrust check, as he was arrested while still on the SunTrust premises shortly after Ms. Rodriguez spoke with Ms. Craft. The only possible inference to be drawn from Ms. Rodriguez' testimony is that the Wachovia check was deposited prior to the incident at SunTrust. Judge Spainhour was therefore not offering his opinion on the evidence; he was merely repeating a fact that Ms. Rodriguez had already testified to in responding to the jury's question. We hold the trial court's response to the jury's question was not error, and Defendant's assignment of error is overruled.

D. Defendant's Motion to Dismiss

[4] Finally, Defendant contends the trial court erred in denying his motion to dismiss the charges against him at the close of all the evidence. Defendant asserts the evidence was insufficient to convict him on the charges of uttering a forged instrument and attempting to obtain property by false pretenses. We disagree.

"When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In determining whether substantial evidence of each element exists, this Court must view the evidence presented before the trial court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Conflicting testimony, contradictions, and discrepancies are factual determinations to be resolved by the jury and do not require dismissal. *State v. Prush*, 185 N.C. App. 472, 478, 648 S.E.2d 556, 560 (2007). However, whether substantial evidence exists with respect to each element of the charged offense is a question of law. *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956). Accordingly, we review the trial court's denial of Defendant's motion to dismiss *de novo*. *See State v. Patino*, ___ N.C. App. ___ , ___ , 699 S.E.2d 678, 682 (2010).

" 'The essential elements of the crime of uttering a forged check are (1) the offer of a forged check to another, (2) with knowledge that the check is false, and (3) with the intent to defraud or injure another.' " *State v. Brown*, ___ N.C. App. ___ , ___ , 720 S.E.2d 414, 415 (2011) *writ denied, disc. rev. denied*, ___ N.C. ___ , 721 S.E.2d 227 (2012); N.C. Gen. Stat. § 14-120 (2011). "The elements of obtaining property by false pretenses are '(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.' " *State v. Ledwell*, 171 N.C. App. 314, 317, 614 S.E.2d 562, 565 (2005) (quoting *State v. Childers*, 80 N.C. App. 236, 242, 341 S.E.2d 760, 764 (1986)). Attempting to obtain and obtaining property by false pretenses are both covered by N.C. Gen. Stat. § 14–100 and contain the same elements. N.C. Gen. Stat. § 14–100 (2011). Defendant does not

contest each element as to the charged offenses; rather, Defendant argues only that the State was required to prove the SunTrust check was "falsely made" to carry its burden on each offense, but was unable to establish this because the State offered no evidence to prove that the check had been signed by an unauthorized individual. Defendant's argument is unavailing.

Viewing the evidence in the light most favorable to the State, as we are required to do, we conclude the State introduced substantial evidence tending to prove the SunTrust check was falsely made and not signed by an authorized individual. Ms. Rodriguez testified that she had in her possession the genuine Allied check bearing check number 52629 at the time Defendant presented the SunTrust check bearing the same number. Ms. Rodriguez further testified the SunTrust check bore a font that was "way off" and "really different" from the font used by Allied in printing its checks. Ms. Rodriguez identified the Allied company name on the SunTrust check but stated "it's not our check." The jury could reasonably conclude from this testimony that the SunTrust check was "falsely made."

Defendant cites Ms. Rodriguez' testimony that the signature on the SunTrust check appeared "pretty close" to Ms. Simpson's signature in support of his assertion that the State failed to demonstrate the check was signed by an unauthorized individual. Defendant's argument is not persuasive. Ms. Rodriguez testified that only she and Ms. Simpson were authorized to sign checks issued by Allied, and it is evident from Ms. Rodriguez' testimony that she did not sign the SunTrust check herself. Moreover, the jury could have reasonably inferred from the aforementioned portions of Ms. Rodriguez' testimony indicating the fraudulent nature of the SunTrust check that the signature on the check did not belong to Ms. Simpson. This presented the jury with substantial evidence from which it could conclude that the signature on the SunTrust check was not executed by an authorized individual. Accordingly, we hold that the State presented sufficient evidence of the charged offenses to withstand Defendant's motion to dismiss. Defendant's assignment of error is overruled.

IV. Conclusion

For the foregoing reasons, we hold no error in the trial court's ruling.

No error.

Judge Bryant concurs.

Judge Beasley concurs in a separate opinion.

BEASLEY, Judge concurs with separate opinion.

While I concur in the majority opinion, because Defendant's argument regarding admissibility of check number 52630 which was deposited at Wachovia Bank is not irrelevant as the majority suggests, I write separately.

The majority rightly asserts that the trial court admitted this check number 52630 for impeachment purposes. Defendant argues that the trial court erred by admitting the check for impeachment purposes, pursuant to N.C. Gen. Stat. § 8C-1, Rule 608 (2011). The State however, on appeal argues that the "evidence of the Wachovia check is admissible because it is used to impeach **evidence**, not a witness, and because it is both relevant and serves a permissible purpose." (emphasis added). I would therefore hold that the trial court erred by admitting check number 52630 for impeachment purposes, but the error was not prejudicial error.

N.C. Gen. Stat. § 8C-1, Rule 608(a) (2011) states:

> (a) Opinion and reputation evidence of character.—The credibility of a witness may be attached or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

When Defendant objected to the admissibility of the Wachovia check, the trial court overruled the objection after a bench conference. During jury deliberations, the jury inquired, "if the information about the check that was deposited at Wachovia was admissible, 'was' is underlined. Parentheses, '(confusion about objection,' dash, 'sustained or overruled and if so, what date was that check deposited?' " After the trial court, the assistant district attorney, and the defense attorney recollected the court's ruling, the trial court recalled that it overruled Defendant's objection to the admission of the Wachovia check. The trial court noted "[a]nd I concluded it was in the nature of an impeachment question because—or an impeachment of evidence

because it was inconsistent with or diametrically different from the statements, . . . the defendant made to the officer during the investigation." Since Defendant did not testify, he correctly argues that the trial court erred by admitting check number 52630 for impeachment purposes as only witnesses can be impeached.

Defendant on appeal also argues that check number 52630 was not admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009) because it could not be offered to attack his credibility. While established that because Defendant did not testify and therefore his credibility could not be attacked, the trial court could have admitted check number 52630 under Rule 404(b) to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." Rule 404(b). Furthermore, because there was substantial evidence, in addition to the Wachovia check, as outlined in the majority opinion, to demonstrate that Defendant presented a check to Suntrust Bank from an account held by Allied Concrete Forming & Associates, Inc. for which he did not have authorization, the trial court's error was not prejudicial to Defendant.

STATE OF NORTH CAROLINA v. ROBERT MITCHELL FOUST

No. COA11-1067

(Filed 17 April 2012)

1. Evidence—prior crimes or bad acts—relevant—probative value not outweighed by prejudice

The trial court did not commit plain error in a first-degree rape case by introducing evidence of defendant's prior altercation with the victim's friend and a name-calling incident. The altercation and the name-calling incident were relevant to demonstrate the victim's state of mind and the probative value of the evidence was not outweighed by any prejudice to defendant.

2. Appeal and Error—preservation of issues—constitutional issue not raised at trial—no offer of proof

Defendant failed to properly preserve for appellate review his argument that the trial court erred in a first-degree rape case by sustaining the State's objection to defendant's cross-examination of a police detective. Defendant's failure to raise the constitu-

tional claim with the trial court and his failure to present evidence of what the detective's testimony would have been constituted a failure to preserve these issues for review.

3. Criminal Law—prosecutor's closing argument—statement not inflammatory

The trial court did not err in a first-degree rape case by failing to intervene *ex mero motu* in the State's closing argument. The State's comparison of defendant to a hunter or beast in the field was not a characterization of defendant himself, and the analogy was limited to non-inflammatory statements.

4. Criminal Law—prosecutor's closing argument—no reference to defendant's failure to testify

The trial court did not abuse its discretion or err by failing to intervene *ex mero motu* in a first-degree rape case by allowing several statements during the State's closing arguments. The challenged statements did not improperly refer to defendant's failure to testify.

Appeal by Defendant from judgment entered 19 August 2010 by Judge James E. Hardin, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 8 February 2012.

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

Cheshire, Parker, Schneider, & Bryan, P.L.L.C., by Maitri "Mike" Klinkosum, for Defendant.

HUNTER, JR., Robert N., Judge.

I. Factual & Procedural Background

On 15 February 2010, Robert Mitchell Foust ("Defendant") was indicted for first degree rape. Defendant pled not guilty, and the case came on for trial before Judge James E. Hardin, Jr. on 16 August 2010. The State's evidence at trial tended to show the following.

In late September 2008, Donna Toomes' fiancé passed away from liver cancer. Not long after that, in September or October 2008, Defendant, who worked at a garage diagonal to Ms. Toomes' home, came to her house to ask about her son. After that, Defendant began visiting often, even daily, and bringing Ms. Toomes beer, cigarettes, candy bars, etc. Ms. Toomes believed Defendant was just being friendly.

In early December 2008, Ms. Toomes was in her home visiting with George, a friend, and her mother, Dorothy Draver. Defendant came to the house, and an altercation with George broke out. On cross-examination, Defendant's counsel questioned Ms. Toomes about the altercation. These questions elicited responses that George told Ms. Toomes that Defendant hit him with a baseball bat and that there were broken items in the house after the altercation.

On 9 December 2008, Defendant had been drinking and again showed up at Ms. Toomes' house. While Ms. Toomes had a male visitor, Defendant said to Ms. Toomes, "I guess you're just a whore." He also told her, "I get it. You're just a slut." Ms. Toomes wrote about this incident in her day planner, stating, "I had to make Robert leave. He's disrespectful as hell. Perverted."

On 19 December 2008, Defendant went to Ms. Toomes' house and offered to take her to the grocery store. Defendant asked Ms. Toomes to go to the grocery store with him, and she agreed to go, as there were four other people at her home and she felt safe. They left for Harris Teeter, with Defendant driving a truck owned by Tommy Campbell, who owned the shop where Defendant worked.

After she entered the truck, Ms. Toomes noticed they were driving in the opposite direction from the Harris Teeter. Defendant turned onto a road, turned off the truck, and got out. Defendant then returned to the truck, turned the truck around, and stopped the truck again. Ms. Toomes told Defendant she was scared and uncomfortable. She had a straight razor in her back pocket that she pulled out and clicked twice.

Defendant then punched Ms. Toomes twice, once with his elbow and once with his fist. During the attack, Ms. Toomes' glasses were broken, and she began bleeding. Ms. Toomes asked Defendant why he hit her, and he responded that he had needs and that she was going to be the one to meet them. Defendant came over to the passenger side of the truck and pulled Ms. Toomes out by her legs, leaving her lying with her buttocks on the edge of the seat. Defendant pulled her jeans down to her knees, pushed her panties to the side, and forced her to have intercourse with him.

Ms. Toomes testified that she did not consent, repeatedly asking him why he was raping her and telling him that he did not have to do it. She stared at the ceiling of the truck during the attack. At one point, Ms. Toomes grabbed a shirt that was on the back of the truck seat to cover her face to stop the bleeding. When Defendant finished,

Ms. Toomes pulled herself back into the truck and convinced Defendant to drive her home. At her house, she tried to get out of the truck with the shirt in her hand. Defendant snatched the shirt from her and said, “What are you doing, trying to collect evidence against me?” Ms. Toomes told Defendant she would not tell anyone what had happened. She arrived home at 1:30 a.m. and told her roommate and a few other people present what happened, but did not call the police because she did not want Defendant to get violent with her or her kids.

The next day, Ms. Toomes told her mother about the rape, and her mother took pictures of her injuries. These photos were introduced at trial. Ms. Toomes put her clothes from that night, including her jeans, which had a broken zipper, into a plastic bag. She wrote in her planner a few hours after she got home that Defendant had raped and beaten her.

Martha Traugott, a special agent with the North Carolina State Bureau of Investigation (“SBI”), testified regarding her analysis of Ms. Toomes’ clothes. Ms. Toomes’ panties tested positive for semen, saliva, and blood. Her jeans tested positive for semen. Sharon Hinton, a forensic biologist with the SBI, testified that the sperm on the panties matched Defendant.

Ms. Draver testified that she was at Ms. Toomes’ house the day of Defendant’s altercation with George, and that Defendant was upset that he had to leave while George got to stay. Ms. Draver also testified regarding Ms. Toomes’ statements to her the morning after the rape. She also testified that following the rape she had a conversation with Defendant where she said, “You have totally disrespected my home, one with a baseball incident on George, and two, when you raped my daughter. . . . You are never coming back on my property. . . . If you do, I will personally take you to the police station, and we’ll get this matter done with.” In response, Defendant said, “I’m sorry I disrespected your home.”

Detective Larry Kernodle with the Alamance County Sherriff’s Department testified that on 11 May 2009, he was investigating an unrelated matter and visited Ms. Toomes at her home to ask about Defendant. Ms. Toomes told him about the altercation with George and the incident on 9 December 2008 before describing the rape to him. During the course of the interview, Detective Kernodle collected Ms. Toomes’ day planner, the photos of her following the assault, and the bag containing her clothes. Ms. Toomes rode with Detective Kernodle to the site of the assault, which Detective Kernodle recognized, as

Defendant had previously lived in a vehicle at the end of that dead end road. During cross-examination, the following exchange occurred:

> Q ([Defense Counsel]:) This, this incident happened in the, in the City of Burlington. Is that right?
>
> A Correct.
>
> Q All right. And, but Burlington PD hasn't taken part in the investigation at all, have they?
>
> A No, sir.
>
> Q So, is it safe to say you've taken a personal interest in the case?
>
> [Prosecution]: Well, objection, Your Honor.
>
> COURT: Sustained.

At the close of the State's evidence, Defendant made a motion to dismiss which was denied. Defendant made an offer of proof of two letters from potential witnesses but presented no evidence to the jury. Defendant renewed his motion to dismiss at the close of all the evidence, and the motion was denied.

During closing arguments, the State began its argument by saying

> What happened in the fall of 2008 is no different than a hunter in the field, a beast in the field sitting [sic] a prey, stalking the prey, learning the prey, and at some point in time, eventually taking what he wants, and that's what happened here.

Defendant did not object to these statements. Also during the course of closing arguments, the State made the following statements:

> Make no mistake, this was not two teenagers going out parking behind some area trying to make out. This was violent. This was forcible. This was brutal.
>
> Uncontradicted, mind you, uncontradicted evidence of what he did to her. There's been no explanation. There's nothing saying, well, that could have been at a different time.
>
> [Defense Counsel]: Well, objection, Your Honor.
>
> Court: Over-ruled.
>
> [Prosecutor]: There is no evidence whatsoever about these pictures not being taken the very next day. Un—unchallenged.

> . . . .
>
> But that's what happened to her. And again there's no other explanation for this. There's no challenge to this. There's no counter-argument, if you will, to how this happened. None. It is what it is.
>
> . . . .
>
> Ain't no other way that it got down there, and there certainly is no evidence whatsoever that there was any consensual sex. There's absolutely no evidence whatsoever of consensual oral sex. There's absolutely not one shred of evidence of any type of foreplay.
>
> . . . .
>
> And there's been not one shred of contrary expert testimony of any type to say there's a problem, 'cause there's not a problem.

Except for the objection to the first statement noted above, Defendant did not object to the remaining statements.

The jury found Defendant guilty of first degree rape. Defendant was sentenced to a minimum of 480 months and a maximum of 585 months imprisonment.

II. Jurisdiction

Defendant appeals from a final judgment in superior court where he was convicted of a non-capital offense. Therefore, we have jurisdiction over his appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

III. Analysis

Defendant first argues that the trial court committed plain error in introducing evidence of Defendant's altercation with George and of the 9 December name-calling incident. We disagree.

Because Defendant did not object at trial to any of the testimony regarding the two incidents, we review for plain error. *See* N.C. R. App. P. 10(a)(4) (allowing plain error to be specifically contended in criminal cases where an issue was not preserved at trial). Plain error is applied " 'cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." ' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations omitted). Plain

error occurs " 'where it can be fairly said "the . . . mistake had a probable impact on the jury's finding that the defendant was guilty." ' " *Id.* (citations omitted).

Rule 404(b) of our Rules of Evidence states, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2011). The evidence is admissible, however, for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* This list is not exclusive, however, and "evidence of other offenses *is admissible* so long as it is *relevant to any fact or issue* other than the character of the accused." *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987).

The determination of whether evidence was properly admitted under Rule 404(b) involves a three-step test. First, is the evidence relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried? Second, is that purpose relevant to an issue material to the pending case? Third, is the probative value of the evidence substantially outweighed by the danger of unfair prejudice pursuant to Rule 403?

There 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). This rule, however, is "constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002). "It is not necessary that the similarities between the two situations rise to the level of the unique and bizarre." *State v. Aldridge*, 139 N.C. App. 706, 714, 534 S.E.2d 629, 635 (2000). "Rather, the similarities simply must tend to support a reasonable inference that the same person committed both the earlier and later acts." *Id.*

[1] Defendant in the present case argues there are no similarities between the prior acts introduced and the crime charged. However, the common factor is that Ms. Toomes, the victim, was present and/or aware of each of the incidents. "In sex [offense] cases, the victim's state of mind can be relevant." *State v. Thompson*, 139 N.C. App. 299, 305, 533 S.E.2d 834, 839 (2000). "When it is relevant, any evidence tending to show the victim is afraid of [the defendant], or evidence

explaining why the victim never reported the sexual incidents to anyone, is admissible." *Id.*

The victim in the present case, Ms. Toomes, testified that she told Defendant she would not report him and that when she got out of the truck, Defendant said, "I've killed before, and I'm not afraid to do it again." Ms. Toomes said she did not call the police because she has two children and she did not want Defendant to come back and get violent with her while she was alone. She testified that she is alone a lot and was scared. Defendant, during closing arguments, questioned Ms. Toomes' failure to call the police and indicated that she would not have been afraid of Defendant. Through this, Defendant made Ms. Toomes' state of mind relevant. The previous altercation with George and the 9 December name-calling incident, both of which Ms. Toomes was aware of, demonstrate Defendant's aggression and support Ms. Toomes' account of her state of mind that she did not report the rape because she was afraid of Defendant. *See id.* ("The evidence of physical abuse . . . tended to explain [the victim's] fear of defendant and why she never reported all the incidents of sexual abuse."). In addition, Ms. Toomes' knowledge of these prior incidents shows that she was overcome by fears for her safety and that the rape was not consensual. *See State v. Young*, 317 N.C. 396, 413, 346 S.E.2d 626, 636 (1986) ("[E]vidence of a victim's awareness of prior crimes allegedly committed by the defendant may be admitted to show that the victim's will had been overcome by her fears for her safety where the offense in question requires proof of lack of consent or that the offense was committed against the will of the victim."). Because the altercation with George and the 9 December name-calling incident were relevant to demonstrate Ms. Toomes' state of mind, the trial court did not commit plain error under Rule 404(b) in admitting the evidence. Additionally, we find that the probative value of this evidence in demonstrating Ms. Toomes' state of mind is not outweighed by any prejudice to Defendant.

[2] Defendant also alleges the trial court erred in sustaining the State's objection to Defendant's cross-examination of Detective Kernodle. Defendant questioned Detective Kernodle as follows:

> Q ([Defense Counsel]:) This, this incident happened in the, in the City of Burlington. Is that right?
>
> A Correct.
>
> Q All right. And, but Burlington PD hasn't taken part in the

investigation at all, have they?

A No, sir.

Q So, is it safe to say you've taken a personal interest in the case?

[Prosecution]: Well, objection, Your Honor.

COURT: Sustained.

Defendant argues that this deprived Defendant of his rights to confrontation and cross-examination. We find that Defendant has not preserved this issue properly for appeal.

" '[A]lthough cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court.' " *State v. Larrimore*, 340 N.C. 119, 150, 456 S.E.2d 789, 805 (1995) (citation omitted). In order to establish error in the exclusion of evidence, there must be a showing of what the excluded testimony would have been. *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985) ("It is well-established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify."). There must be a specific offer of proof unless the significance of the evidence is obvious from the record. *Id.* The substance of the witness's testimony is needed to determine whether there was prejudicial error in its exclusion. *Id.* In the cases cited by Defendant, there were offers of the evidence excluded. *See State v. Wilson*, 269 N.C. 297, 298, 152 S.E.2d 223, 224 (1967) (witness answered questions in absence of jury); *State v. Armstrong*, 232 N.C. 727, 728, 62 S.E.2d 50, 51 (1950) (providing the statements witnesses would have made if allowed); *State v. Clark*, 128 N.C. App. 722, 725, 496 S.E.2d 604, 606 (1998) (witness proffered testimony on *voir dire*); *State v. Helms*, 322 N.C. 315, 318, 367 S.E.2d 644, 646 (1988) (trial court conducted lengthy *voir dire*).

In the present case, Defendant did not request testimony outside of the presence of the jury and did not offer any evidence of what Detective Kernodle would have said in response to the question if allowed to testify. There is no mention in the record or in Defendant's brief of how Detective Kernodle would have testified. Absent some showing of what the content of the testimony excluded would be, there is no record for this and we therefore cannot examine the exclusion for error. *See Simpson*, 314 N.C. at 370, 334 S.E.2d at 60.

Defendant puts forward on appeal a constitutional argument that the trial court violated Defendant's right to confrontation. However, "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). Defendant's failure to raise constitutional claims with the trial court and his failure to present evidence of what Detective Kernodle's testimony would have been constitute a failure to preserve these issues for our review. *See State v. Reid*, 204 N.C. App. 122, 127, 693 S.E.2d 227, 232 (2010) ("We first note that defendant did not assert any constitutional claims in the trial court and failed to make a specific offer of proof when the trial court sustained the State's objections. Therefore, defendant has failed to preserve this issue for our review.").

[3] Defendant objected to several portions of the State's closing arguments. The State began its closing argument by saying

> What happened in the fall of 2008 is no different than a hunter in the field, a beast in the field sitting [sic] a prey, stalking the prey, learning the prey, and at some point in time, eventually taking what he wants, and that's what happened here.

Defendant did not object to this statement, so we must examine the argument to see if it was " 'so grossly improper that the trial court erred in failing to intervene *ex mero motu*.' " *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (2003) (citation omitted). Defendant argues that the statement constituted "name-calling" and was improper. We disagree.

First, the State did not engage in "name-calling." In cases prohibiting name-calling, the prosecutor directly refers to the defendant by a derogatory name. *See, e.g., State v. Jones*, 355 N.C. 117, 133-34, 558 S.E.2d 97, 107-08 (2002) (finding improper remarks where the prosecutor called the defendant " 'this quitter, this loser, this worthless piece of' " and referred to the defendant as " 'lower than the dirt on a snake's belly' "); *State v. Twitty*, ___ N.C. App. ___, ___, 710 S.E.2d 421, 426 (2011) (finding the term "parasite" unnecessary and unprofessional, but not grossly improper). In the present case, the State employed an analogy comparing Defendant to a hunter or beast, but did not call Defendant a name.

Regardless of whether the prosecutor's argument may be characterized as name-calling, it is true that our courts "will not allow . . . arguments designed to inflame the jury, either directly or indirectly,

by making inappropriate comparisons or analogies." *Walters*, 357 N.C. at 105, 588 S.E.2d at 366. For instance, it has been held that referring to Hitler in order to inflame and impassion the jury is improper. *Id.* (concluding use of Hitler as the basis for an example was improper); *State v. Frink*, 158 N.C. App. 581, 594, 582 S.E.2d 617, 624 (2003) (finding comparison of the defendant to a leading member of the Nazi party improper, although the requisite prejudice was not demonstrated). Similarly, our Supreme Court has found that references to the Oklahoma City bombing and the Columbine school shootings "urged jurors to compare defendant's acts with the infamous acts of others" and "attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice." *Jones*, 355 N.C. at 132, 558 S.E.2d at 107.

The analogy in the present case has none of the historical implications of the objectionable arguments in *Walters*, *Frink*, and *Jones*. It lacks the capacity of those arguments to inflame and impassion the jury. Instead, it is an analogy used to explain the State's theory of the crime.

The statement " 'he who hunts with the pack is responsible for the kill' " has been accepted by our courts as an illustration of the theory of acting in concert. *State v. Bell*, 359 N.C. 1, 20, 603 S.E.2d 93, 107 (2004) (quoting *State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970)). In *Bell*, our Supreme Court found no error where the prosecutor built upon this premise, describing how animals hunt their prey. *Id.* However, in *State v. Roache*, 358 N.C. 243, 297-98, 595 S.E.2d 381, 416 (2004), the Court found as improper statements that went beyond this to say the defendant was " 'high on the taste of blood and power over [his] victims.' " Still, the Court held that given the overwhelming evidence of the defendant's guilt, the trial court did not err in failing to intervene *ex mero motu*. *Id.* at 298, 595 S.E.2d at 416.

The remarks in the present case are much more like those in *Bell* than *Roache*. The State compared Defendant to a hunter or beast of the field, describing how animals hunt their prey to illustrate its theory of the rape. Unlike *Roache*, there was no characterization of Defendant himself, and the analogy was limited to non-inflammatory statements. The trial court did not err in failing to intervene *ex mero motu*.

[4] Defendant also argues that the trial court erred in allowing several statements during the State's closing arguments as follows:

> Make no mistake, this was not two teenagers going out parking behind some area trying to make out. This was violent. This was forcible. This was brutal.
>
> Uncontradicted, mind you, uncontradicted evidence of what he did to her. There's been no explanation. There's nothing saying, well, that could have been at a different time.
>
> [Defense Counsel]: Well, objection, Your Honor.
>
> Court: Over-ruled.
>
> [Prosecutor]: There is no evidence whatsoever about these pictures not being taken the very next day. Un—unchallenged.
>
> . . . .
>
> But that's what happened to her. And again there's no other explanation for this. There's no challenge to this. There's no counter-argument, if you will, to how this happened. None. It is what it is.
>
> . . . .
>
> Ain't no other way that it got down there, and there certainly is no evidence whatsoever that there was any consensual sex. There's absolutely no evidence whatsoever of consensual oral sex. There's absolutely not one shred of evidence of any type of foreplay.
>
> . . . .
>
> And there's been not one shred of contrary expert testimony of any type to say there's a problem, 'cause there's not a problem.

Except for the objection to the first statement noted above, Defendant did not object to the remaining statements. Therefore, we examine the first statement for abuse of discretion and the remaining statements for whether the trial court erred in not intervening *ex mero motu*. *Walters*, 357 N.C. at 101, 588 S.E.2d at 364. Defendant argues that these statements improperly refer to his failure to testify. We disagree.

"It is . . . well settled that when a defendant exercises his right to silence, it 'shall not create any presumption against him,' and any comment by counsel on a defendant's failure to testify is improper and is violative of his Fifth Amendment right." *State v. Ward*, 354 N.C.

231, 250-51, 555 S.E.2d 251, 264 (2001) (citations omitted). A prosecutor may not comment on a defendant's failure to testify during closing arguments. *State v. Williams*, 341 N.C. 1, 13, 459 S.E.2d 208, 216 (1995). However, a prosecutor can bring out the defendant's " 'failure to produce exculpatory evidence or to contradict evidence presented by the State.' " *Id.* (citation omitted).

Our Supreme Court has found that statements by the district attorney that the evidence is "uncontradicted" are not improper. *State v. Stephens*, 347 N.C. 352, 361, 493 S.E.2d 435, 441 (1997) ("[A] prosecutor's argument that the State's evidence was uncontradicted does not constitute an improper reference to the defendant's failure to testify."). In *State v. Smith*, 290 N.C. 148, 165-66, 226 S.E.2d 10, 21 (1976), the district attorney repeatedly argued that the evidence was uncontradicted. Our Supreme Court found that "[c]ontradictions in the State's evidence, if such existed, could have been shown by the testimony of others or by cross-examination. . . . Thus, the prosecution was privileged to argue that the State's evidence was uncontradicted and such argument may not be held improper as a comment upon defendant's failure to testify." *State v. Smith*, 290 N.C. 148, 168, 226 S.E.2d 10, 22 (1976).

In the present case, the objectionable statements included (1) that it was "uncontradicted" that the event was not consensual and was forcible and brutal and "[t]here's been no explanation" for the event; (2) that there is no evidence that the photographs were not taken the day after the rape and they were "unchallenged;" (3) that there was no other explanation or counter-argument for the broken zipper; (4) that there was no evidence of consensual sex, consensual oral sex, or foreplay; and (5) that there was no contrary expert testimony pointing out a problem with the DNA evidence. None of these statements refer to Defendant's failure to testify at trial. The evidence referred to above could have been contradicted by other witness testimony or through cross-examination of the State's witnesses. As the State did not refer to Defendant's failure to testify, the trial court did not abuse its discretion or err in failing to intervene *ex mero motu* during the State's closing arguments.

IV. Conclusion

For the foregoing reasons, we find

No error.

Judges STEELMAN and GEER concur.

REV O, INC., PLAINTIFF-APPELLANT v. MARILYN WOO, DEFENDANT-APPELLEE

No. COA11-1051

(Filed 17 April 2012)

1. Unjust Enrichment—unfair trade practices—LLC Act—allegations unsupported—recovery unsupported

The trial court did not erroneously grant summary judgment in favor of defendant on plaintiff's unjust enrichment and unfair or deceptive trade practice claims as plaintiff failed to established that defendant's alleged violations of the Chapter 57C of the North Carolina General Statutes (LLC Act) occurred or that any violations of the LLC Act would support a damage recovery in favor of plaintiff.

2. Unjust Enrichment—no genuine issue of material fact—summary judgment proper

The trial court did not err in granting summary judgment in favor of defendant on plaintiff's unjust enrichment claim as there was no genuine issue of material fact remaining as to whether defendant was unjustly enriched to the detriment of plaintiff by her acts as manager of Downtown Properties.

3. Unfair Trade Practices—argument unsupported—summary judgment proper

The trial court did not err in granting summary judgment in favor of defendant on plaintiff's unfair or deceptive trade practice claim as plaintiff failed to offer any support for her argument that defendant's conduct as manager of Downtown Properties constituted unfair or deceptive trade practices.

4. Unjust Enrichment—unfair trade practices—public policy violations—not supported

Plaintiff's argument in an unjust enrichment and unfair or deceptive trade practice case that defendant's approval of the sale of Downtown Properties' assets was against public policy lacked merit. Plaintiff failed to cite any authority or advance any argument explaining why the alleged public policy implications of defendant's actions as manager of Downtown Properties would support reversal of the trial court's order.

Appeal by plaintiff from judgment entered 18 May 2011 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 25 January 2012.

The Edmisten & Webb Law Firm, by William Woodward Webb and James Ryan Hawes, for Plaintiff-appellant.

Boxley, Bolton, Garber & Haywood, L.L.P., by Kenneth C. Haywood, for Defendant-appellee.

ERVIN, Judge.

Plaintiff Rev O, Inc., appeals from an order granting summary judgment in favor of Defendant Marilyn Woo. On appeal, Plaintiff argues that the trial court erroneously granted summary judgment in favor of Defendant on the grounds that the record disclosed the existence of genuine issues of material fact concerning the extent to which Defendant allegedly violated Chapter 57C of the North Carolina General Statutes ("the LLC Act"), was unjustly enriched and engaged in unfair or deceptive trade practices, and acted inconsistently with North Carolina public policy. After careful consideration of Plaintiff'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. Factual Background

A. Substantive Facts

On 1 February 2007, Plaintiff leased a tract of commercial property in Raleigh from Downtown Properties, LLC. At that time, Downtown Properties was a limited liability company that had a single member, the Paul W. Woo Revocable Trust. Although Defendant, who was the widow of Paul Woo, managed Downtown Properties, she did not own it and was not a member of the LLC. The lease between Plaintiff and Downtown Properties provided that Plaintiff was "solely responsible for obtaining any liquor license for the sale of alcoholic beverages at the Premises, and [that] this lease IS expressly conditioned on the issuance or revocation of such permit."

Between 1 February 2007, the effective date of the lease, and 1 May 2007, Plaintiff paid Downtown Properties the required $40,000 security deposit and $120,000 in rent. However, since Plaintiff was unable to obtain a permit authorizing the sale of alcoholic beverages, the parties terminated the lease on 4 May 2007. On 18 September

2007, Downtown Properties sold its real estate, including this property, to a third party. After selling the property, Downtown Properties had no assets. As a result, Downtown Properties filed Articles of Dissolution in 2009. Although Plaintiff filed suit against Downtown Properties on 12 August 2008 for the purpose of seeking reimbursement of the monies that it had paid under the lease and although Plaintiff obtained a default judgment against Downtown Properties on 2 October 2008, Plaintiff was unable to collect the amount of that judgment because Downtown Properties had no assets.

B. Procedural History

On 24 April 2009, Plaintiff filed a complaint against Defendant alleging claims sounding in unjust enrichment and unfair or deceptive trade practices and seeking to pierce Downtown Properties' corporate veil for the purpose of obtaining an individual recovery from Defendant relating to actions that she had taken as the manager of Downtown Properties. Plaintiff's claim against Defendant rested upon the contention that Defendant had wrongfully assented to or participated in the sale and distribution of Downtown Properties' assets and that her participation in these events rendered her individually liable to Plaintiff.

On 24 June 2009, Defendant filed an answer denying the material allegations of Plaintiff's complaint and raising various affirmative defenses. In her answer, Defendant noted that the lease between Plaintiff and Downtown Properties, which Plaintiff attached to its complaint as an exhibit, stated that Defendant was the manager of Downtown Properties and asserted that, in "her capacity as manager[,] she d[id] not have liability for the obligations" of Downtown Properties. In addition, Defendant moved to dismiss Plaintiff's complaint for various reasons.

On 7 January 2011, Defendant filed a motion for summary judgment. In support of her summary judgment motion, Defendant filed an affidavit which stated, in pertinent part, that:

> 1. The Articles of Organization of Downtown Properties, LLC . . . were filed on April 26, 2000. . . . Beginning in 2005 the sole member of Downtown Properties was the Paul W. Woo Revocable Trust dated June 5, 2002.
>
> . . . .
>
> 3. . . . I became a Manager of Downtown Properties in 2005. I ceased owning any interest as a Member in Downtown

> Properties in 2005 which is 2 years before the lease transaction with Rev 0, Inc.
>
> 4. Downtown Properties, LLC, and Rev 0, Inc., entered into a document entitled "Lease" with an effective date of February 1, 2007. . . .
>
> 5. Subsequent to entering into the Lease between the parties, upon the request of Rev 0, Inc., the Lease Agreement was terminated by both parties effective May 4, 2007. . . .
>
> 6. Subsequent to entering into a lease termination, Downtown Properties sold the Cabarrus Street property and all remaining land holdings on September 19, 2007. . . .
>
> 7. Since the transfer in September of 2007, Downtown Properties has not acquired or conveyed any other assets of monetary value.
>
> 8. After the conveyance of the assets in 2007, Downtown Properties consisted of no other assets of monetary value and, therefore, in 2009, it filed Articles of Dissolution.
>
> 9. From 2007 forward, no assets of Downtown Properties have been distributed from Downtown Properties . . . to Marilyn E. Woo.
>
> 10. I have not been enriched or received anything of monetary value from Downtown Properties from 2007 to the date of this Affidavit.
>
> 11. As the manager of Downtown Properties, LLC, I could not completely control or dominate the company since it was solely owned by the Paul W. Woo Revocable Trust under Trust Agreement dated June 5, 2002. The Member could at any time remove me as Manager of the company.
>
> 12. As Manager of Downtown Properties, I implemented the policies and directions provided by the Member.

On 18 May 2011, the trial court granted Defendant's motion. Plaintiff noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Standard of Review

According to N.C. Gen. Stat. § 1A-1, Rule 56(c), summary judgment is properly granted "if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." "A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations omitted). "The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citing *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002)). "[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 400 (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 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. Mortgage 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") (internal citation omitted).

B. Elements of Plaintiff's Claims

1. Unjust Enrichment

In its complaint, Plaintiff asserted a claim against Defendant for unjust enrichment. Unjust enrichment has been defined as "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.' " *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 179, 684 S.E.2d 41, 54 (2009) (quoting *Ivey v. Williams*, 74 N.C. App. 532, 534, 328

S.E.2d 837, 838-39 (1985)) (internal citation omitted). "A claim of this type is . . . described as a claim in quasi contract or a contract implied in law. . . . If there is a contract between the parties[,] the contract governs the claim and the law will not imply a contract." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988) (citing *Concrete Co. v. Lumber Co.*, 256 N.C. 709, 713-14, 124 S.E. 2d 905, 908 (1962), and *Johnson v. Sanders*, 260 N.C. 291, 295, 132 S.E. 2d 582, 586 (1963) (other citations omitted).

2. Unfair or Deceptive Trade Practices

In addition, Plaintiff asserted a claim against Defendant for unfair and deceptive trade practices. "The elements of a claim for unfair or deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1 . . . 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) (citing *Furr v. Fonville Morisey Realty, Inc.*, 130 N.C. App. 541, 551, 503 S.E.2d 401, 408 (1998), *disc. review improvidently allowed*, 351 N.C. 41, 519 S.E.2d 314 (1999)). "Although it is a question of fact whether the defendant performed the alleged acts, it is a question of law whether those facts constitute an unfair or deceptive . . . practice." *RD&J Props*, 165 N.C. App. at 748, 600 S.E.2d at 500-01 (citing *First Atl. Mgmt., Corp. v. Dunlea Realty, Co.*, 131 N.C. App. 242, 252-53, 507 S.E.2d 56, 63 (1998)).

3. Piercing the Corporate Veil

Finally, Plaintiff sought to pierce Downtown Properties' corporate veil in order obtain the entry of a judgment against Defendant individually. "[The Supreme Court of North Carolina] has enumerated three elements which support an attack on separate corporate entity under the instrumentality rule:

> "(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."

Glenn v. Wagner, 313 N.C. 450, 454-55, 329 S.E.2d 326, 330 (1985) (quoting *Acceptance Corp. v. Spencer*, 268 N.C. 1, 9, 149 S.E.2d 570, 576 (1966)). "We have previously considered the following factors in determining the level of control a corporate or individual defendant exercises over a corporation:

1. Inadequate capitalization[.]
2. Non-compliance with corporate formalities.
3. Complete domination and control of the corporation so that it has no independent identity.
4. Excessive fragmentation of a single enterprise into separate corporations.

East Mkt. St. Square, Inc. v. Tycorp Pizza IV, Inc., 175 N.C. App. 628, 636, 625 S.E.2d 191, 198 (citing *Glenn*, 313 N.C. at 455, 329 S.E.2d at 330-31 (internal citations omitted), *disc. review denied*, 361 N.C. 166, 639 S.E.2d 649 (2006). However, it "is not the presence or absence of any particular factor that is determinative. Rather, it is a combination of factors which . . . suggest that the corporate entity attacked had 'no separate mind, will or existence of its own' and was therefore the 'mere instrumentality or tool' of the dominant corporation." *Glenn*, 313 N.C. at 458, 329 S.E.2d at 332 (internal citation omitted).

C. Analysis of Plaintiff's Arguments

1. Violation of LLC Act

[1] First, Plaintiff argues that the trial court erroneously granted summary judgment in favor of Defendant on the grounds that "several genuine issues of material fact must be resolved to determine whether [Defendant] violated the North Carolina Limited Liability Company Act in a way that would cause her to be personally liable under the Act." Although Plaintiff contends that Defendant violated the LLC Act and suggests that these violations support a finding of liability on unjust enrichment and unfair and deceptive trade practice grounds, we conclude that Plaintiff has not established that Defendant's alleged violations of the LLC Act occurred or that any violations of the LLC Act would support a damage recovery in favor of Plaintiff.

N.C. Gen. Stat. § 57C-4-06, which limits distributions to limited liability company members, provides that:

> (a) No distribution may be made if, after giving effect to the distribution:
>
> (1) The limited liability company would not be able to pay its debts as they become due in the usual course of business; or
>
> (2) The limited liability company's total assets would be less than the sum of its total liabilities[.] . . .

In addition, N.C. Gen. Stat. § 57C-4-07 provides, in pertinent part, that "[a] manager or director who votes for or assents to a distribution in violation of [N.C. Gen. Stat. §] 57C-4-06 . . . is personally liable to the limited liability company for the amount of the distribution that exceeds what could have been distributed without violating N.C. Gen. Stat. § 57C-4-06."

Plaintiff contends that there is a genuine issue of material fact concerning the extent to which Defendant approved the sale of Downtown Properties' assets in violation of N.C. Gen. Stat. § 57C-4-06 and that, if Defendant "is personally liable to Downtown Properties, the LLC would be able to pay some if not all of the judgment obtained by [Plaintiff]." Put another way, Plaintiff's theory appears to be that, if Defendant approved a distribution to Downtown Properties' members in violation of N.C. Gen. Stat. § 57C-4-06, Defendant would be liable to Downtown Properties pursuant to N.C. Gen. Stat. § 57C-4-07 and Plaintiff would be entitled to benefit from Defendant's liability to Downtown Properties. We do not find Plaintiff's reasoning persuasive.

According to N.C. Gen. Stat. § 57C-4-06, a manager's decision to approve the distribution of a limited liability company's assets to the members is improper only if, following the distribution, the LLC "would not be able to pay its debts as they become due in the usual course of business" or if the LLC's "total assets would be less than the sum of its total liabilities." All of the evidence contained in the present record tends to show that:

> 1. Plaintiff terminated its lease with Downtown Properties in May 2007;
>
> 2. Downtown Properties sold its real estate in September 2007;

3. Plaintiff filed suit against Downtown Properties almost a year later, in August 2008; and

4. Plaintiff did not obtain a default judgment against Downtown Properties until October 2008.

Plaintiff has not forecast any evidence tending to show that, at the time that the asset sale and related distribution occurred, Downtown Properties was unable to pay its debts or that Downtown Properties' liabilities exceeded the value of its assets. In addition, Plaintiff has not cited any authority establishing that the entry of a default judgment against Downtown Properties more than a year after the challenged sale and distribution somehow establishes the existence of a debt that had become due "in the usual course of business" as of the date of the transaction in question. On the contrary, Plaintiff has simply asserted that the obligation evidenced by the default judgment should be treated as having been incurred in the "regular course of Downtown Properties' business" because "the 'main purpose' of the LLC was leasing the Property." However, given that Plaintiff did not file suit for the purpose of asserting its reimbursement claim until almost a year after the lease had been terminated and all of Downtown Properties' assets had been sold and given the absence of any record evidence establishing that Plaintiff informed Defendant or Downtown Properties of the existence of its claim prior to the date of the challenged sale and distribution, we are unable to ascertain how the transaction at issue here was effectuated in violation of N.C. Gen. Stat. § 57C-4-06.

Secondly, Plaintiff has failed to articulate any basis on which, at the time of the distribution, Downtown Properties should have expected that Plaintiff might succeed in a claim for reimbursement for the deposit and rent payments that it made to Downtown Properties prior to the termination of the lease. The lease was "expressly conditioned on the issuance or revocation" of a license for the sale of alcoholic beverages. The lease does not, however, contain any language providing that, in the event that Plaintiff terminated the lease after failing to obtain authorization to sell alcoholic beverages, Plaintiff would be entitled to reimbursement of any monies paid while the lease was in effect. In addition, Plaintiff has not identified any statutory provision or common law principle giving it the right to seek reimbursement of the payments that it made to Downtown Properties prior to the termination of the lease. As a result, given the complete absence of any evidence tending to show that Plaintiff had

a right to obtain reimbursement of the monies paid to Downtown Properties under the lease at the time of the challenged sale and distribution, the record does not provide any basis for believing that the sale and distribution of Downtown Properties' assets violated N.C. Gen. Stat. § 57C-4-06.

Thirdly, even if the distribution of Downtown Properties' assets violated N.C. Gen. Stat. § 57C-4-06, any liability to which Defendant would be subject pursuant to N.C. Gen. Stat. § 57C-4-07 would lie in favor of Downtown Properties and not in favor of Plaintiff. In spite of its claim to be entitled to benefit from Defendant's alleged violation of N.C. Gen. Stat. § 57C-4-06, Plaintiff has not argued that it has the right to force Downtown Properties to sue Defendant, that Downtown Properties would be legally required to seek recovery from Defendant pursuant to N.C. Gen. Stat. § 57C-4-07, or that Plaintiff has the ability to enforce any rights that Downtown Properties might have against Defendant. Simply put, Plaintiff has failed to cite any authority or advance any argument in support of the proposition that Plaintiff would be entitled to benefit from the fact that Downtown Properties might have a claim against Defendant, and we know of none. Thus, even if Defendant did, in fact, violate N.C. Gen. Stat. § 57C-4-06 at the time that the distribution of Downtown Properties' assets occurred, there is no basis for believing that such a showing would in any way inure to Plaintiff's benefit.

Finally, Plaintiff has failed to explain how any liability that Defendant might have to Downtown Properties based upon the provisions of N.C. Gen. Stat. §§ 57C-4-06 and 57C-4-07 would have any bearing on the viability of the specific claims that Plaintiff seeks to assert against Defendant. Plaintiff has not identified any nexus between the possibility that Defendant might be liable to Downtown Properties pursuant to N.C. Gen. Stat. §§ 57C-4-06 and 57C-4-07 and the elements of the unjust enrichment and unfair and deceptive trade practice claims that Plaintiff seeks to assert against Defendant. "It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358, *disc. rev. denied*, 360 N.C. 63, 623 S.E.2d 582 (2005). As a result, we conclude that Plaintiff has failed to show that (1) the distribution of Downtown Properties' assets constituted a violation of N.C. Gen. Stat. § 57C-4-06; (2) that any legal rights stemming from any such violation would have accrued to Plaintiff rather than Downtown Properties; or (3) that any violation of the LLC Act which might have occurred provided any

support for Plaintiff's unjust enrichment and unfair and deceptive trade practice claims. As a result, despite Plaintiff's argument in reliance on the LLC Act, the trial court did not err by granting summary judgment in favor of Defendant.[1]

2. Unjust Enrichment

[2] Secondly, Plaintiff asserts that a "genuine issue of material fact remains as to whether [Defendant] was unjustly enriched to the detriment of [Plaintiff] by her acts as manager of Downtown Properties." Although Plaintiff concedes that Defendant forecast evidence tending to show that the assets of Downtown Properties were sold in September, 2007; that "no assets of Downtown Properties" had been distributed to Defendant after 2007; and that Defendant "ha[d] not been enriched or received anything of monetary value from Downtown Properties from 2007 to the date of this affidavit," Plaintiff argues that Defendant may have received something of value from the Paul W. Woo Revocable Trust and that, if so, "she may have been unjustly enriched." Plaintiff has failed, however, to articulate any connection between the possibility that Defendant might have received something from the Paul W. Woo Revocable Trust after 2007 and the elements of a claim for unjust enrichment. In addition, Plaintiff has not provided any evidentiary support for its claim that such a distribution may have occurred. As a result, we conclude that Plaintiff is not entitled to relief from the trial court's order based upon this argument.

3. Unfair or Deceptive Trade Practices

[3] Thirdly, Plaintiff argues that, in the event that Defendant received anything of value from the Paul W. Woo Revocable Trust, her conduct as manager of Downtown Properties "may constitute unfair or deceptive trade practices." Once again, Plaintiff has failed to identify any record support for this assertion, to cite any authority in support of its position to this effect, or to otherwise explain how Plaintiff had a viable claim against Defendant pursuant to N.C. Gen. Stat. § 75-1.1. As a result, Plaintiff is not entitled to obtain reversal of the trial court's order based on this logic.

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1. Plaintiff argues that, in addition to the other alleged violations of the LLC Act discussed in the text, Defendant failed to honor her obligation to act in "good faith" as set out in N.C. Gen. Stat. § 57C-3-22. However, given that the alleged basis for Defendant's lack of "good faith" claim is her participation in the challenged distribution of Downtown Properties' assets and given that the same logic that has persuaded us to reject Plaintiff's arguments in reliance upon N.C. Gen. Stat. §§ 57C-4-06 and 57C-4-07 support rejection of Plaintiff's argument in reliance upon N.C. Gen. Stat. § 57C-3-22 as well, we do not find Plaintiff's "good faith" claim persuasive.

4. Violation of Public Policy

[4] Finally, Plaintiff argues that, if Defendant approved the sale of Downtown Properties' assets, her actions were "against public policy." Once again, we conclude that Plaintiff's argument lacks merit.

According to Plaintiff, Defendant "assent[ed] to a distribution that create[d] a windfall for the member of the LLC at the expense of the creditors of the LLC." As we have already demonstrated, however, Plaintiff has not shown that it was, in fact, a "creditor" of Downtown Properties at the time of the challenged distribution or that Defendant or Downtown Properties should have foreseen at that time that Downtown Properties might be liable to Plaintiff. In addition, although Plaintiff claims that Downtown Properties had "refused to reimburse the good faith money that [Plaintiff] had paid," Plaintiff has not demonstrated that Downtown Properties had any obligation to make such a payment at the time of the disputed sale and distribution. Under that set of circumstances, we are unable to see what "public policy" was violated when the challenged distribution occurred, and Plaintiff has not cited any authority or advanced any argument explaining why the alleged public policy implications of Defendant's actions as manager of Downtown Properties would support reversal of the trial court's order. As a result, we conclude that Plaintiff's "public policy" argument lacks merit as well.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Plaintiff has failed to demonstrate that the trial court erred by granting summary judgment in favor of Defendant. As a result, the trial court's order should be, and hereby, is affirmed.

AFFIRMED.

Judges BRYANT and ELMORE concur.

SIMONE PRAVER, PLAINTIFF v. MICHAEL RAUS, DEFENDANT

No. COA11-413

(Filed 17 April 2012)

1. Divorce—separation agreement—not entered into under duress

The trial court did not err in a domestic case by concluding that defendant was not acting under duress when he signed the separation agreement at issue. The trial court's findings of fact were supported by evidence.

2. Divorce—breach of separation agreement—voluntary unemployment to suppress income

The trial court did not err in a domestic case by concluding that defendant was in breach of the separation agreement. Defendant's argument that the evidence showed he lacked the ability to perform under the agreement was without merit where defendant presented evidence of an inability to pay but the trial court found, based on other evidence, that defendant was voluntarily unemployed with the intent of depriving the plaintiff of support.

3. Divorce—separation agreement—argument abandoned—specific performance—inadequate remedy at law

The trial court did not err in ordering specific performance of a separation agreement on the ground that the order contained no findings of fact regarding whether plaintiff fully complied with her obligations under the agreement. Defendant abandoned any claim that plaintiff breached the agreement and the Court of Appeals declined to address the argument. The matter was remanded for findings and conclusions as to whether plaintiff's remedy at law was inadequate with regard to the arrearages owed by defendant under the separation agreement.

4. Attorney Fees—domestic case—separation agreement—inadequate findings of fact

The trial court failed to make sufficient findings of fact to justify its award of attorney fees in a domestic case regarding the breach of a separation agreement. The matter was remanded.

Appeal by defendant from order entered 2 December 2010 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 10 October 2011.

Leonard G. Kornberg for plaintiff-appellee.

Horack, Talley, Pharr & Lowndes, P.A., by Kary C. Watson, for defendant-appellant.

GEER, Judge.

Defendant Michael Raus appeals the trial court's order requiring specific performance of the separation agreement he entered into with plaintiff Simone Praver. Mr. Raus contends on appeal that the trial court's findings of fact are inadequate to support its order of specific performance in that the trial court made no finding that Ms. Praver's remedies at law were inadequate. Mr. Raus has failed to distinguish between the order's requirement that he pay arrearages due under the agreement and its requirement that he make future payments as they come due. Under controlling Supreme Court authority, the trial court was required to make a finding that Ms. Praver had no adequate remedy at law with respect to the arrearages but not as to the prospective payments. Because we find Mr. Raus' remaining arguments unpersuasive, we affirm in part and reverse and remand in part for further findings as to the adequacy of Ms. Praver's remedies at law with respect to arrearages.

<u>Facts</u>

Ms. Praver and Mr. Raus were married 14 December 1985 and had three children. They separated on 10 January 2004 and entered into a separation agreement on 5 March 2004. The agreement provided, *inter alia*, for Mr. Raus (1) to pay child support in the amount of $1,500.00 per month from March 2004 until certain specified terminating events or upon a showing of a substantial change in circumstances under North Carolina law, and (2) to pay alimony in the amount of $4,500.00 per month from 1 July 2004 to 30 June 2014, as well as 30% of Mr. Raus' gross income over $240,000.00, unless specified terminating events occurred.

On 22 August 2006, Ms. Praver filed a verified complaint alleging that Mr. Raus had, in violation of the separation agreement, failed (1) to pay alimony and child support with a total past-due amount of $130,470.00; (2) to pay the children's orthodontic expenses; (3) to maintain $500,000.00 in life insurance on himself for the benefit of the

children's college education; and (4) to maintain life insurance equal to the remainder of his alimony obligation for Ms. Praver's benefit. Ms. Praver sought an order requiring specific performance of the separation agreement.

Mr. Raus filed an answer and counterclaim on 18 January 2007, asserting several affirmative defenses to enforcement of the separation agreement. Included among the affirmative defenses were Mr. Raus' claims that the separation agreement was the result of duress and undue influence and that throughout the lifetime of the agreement Mr. Raus had a continuous inability to perform his obligations under the agreement. In addition, Mr. Raus asserted a counterclaim seeking rescission of the agreement on the grounds that the agreement was procedurally and substantively unconscionable.

The trial court entered an order on 2 December 2010 concluding in pertinent part:

> 2. The Defendant breached the parties' separation agreement by failing to pay the monthly amounts owed for alimony and child support, by the greater weight of evidence.
>
> 3. The Defendant's [sic] was not under duress at the time he entered into this agreement. In addition, this agreement was neither procedurally or substantively unconscionable.
>
> 4. The Defendant has the means and ability to perform the support terms of this agreement at the time the agreement was entered into and currently.
>
> 5. The Defendant is voluntarily suppressing his income with the intent to deprive the Plaintiff of support.
>
> 6. The Defendant has the means and ability to specifically perform the terms and conditions of this agreement.

Based upon its conclusions of law, the trial court ordered Mr. Raus to pay $500.00 per month towards his alimony arrearages of $311,840.00 and his child support arrearages of $96,000.00. It further ordered Mr. Raus to pay $1,500.00 in child support and $4,500.00 in alimony by the first of each month, to pay $10,000.00 in Ms. Praver's attorney's fees, and to inform Ms. Praver and her counsel when he became employed so that his obligations could be satisfied by withholding. Mr. Raus timely appealed to this Court.

I

[1] Mr. Raus first contends that the trial court's findings of fact do not support its conclusion that Mr. Raus was not acting under duress when he signed the separation agreement. *See Fletcher v. Fletcher*, 23 N.C. App. 207, 210, 208 S.E.2d 524, 527 (1974) ("Duress may take the form of unlawfully inducing one to make a contract or to perform some other act against his own free will. It may be manifested by threats or by the exhibition of force which apparently cannot be resisted.").

When a trial court sits without a jury, we review "the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). If the trial court's findings of fact are supported by substantial evidence, then those findings " 'are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.' " *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998) (quoting *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975)).

In support of its conclusion that Mr. Raus was not under duress at the time he entered into the separation agreement, the trial court made the following relevant findings of fact:

> 4. As a threshold matter, the Court heard testimony regarding the Defendant's affirmative defenses. The Defendant's arguments revolved mainly about the fact that the Plaintiff was represented and the Defendant were [sic] pro-se. The Defendant testified that he did not have the ability to contract because he was []depressed and took Effexor, Zoloft, Ambien and used a C-pap machine for sleep apnea. He also testified he was under duress, but "the Plaintiff did not put a gun to my head" in signing the Contract. The Court notes that it would be unusual for him not to be depressed at the end of a marriage and if she voided the agreement of every depressed litigant, then almost every agreement which cam[e] before the Court would have to be voided.
>
> 5. The Defendant failed to offer any evidence that any of the defenses were related to anything, which the Plaintiff had

> done to the Defendant. His issues were attributed to certain outside forces, which prevented him from knowing what he was doing when he signed the agreement.
>
> 6. However the Defendant testified that the $1,500 amount for child support was fair and 30% of his income for alimony was also reasonable. He readily admitted that he understood the terms of the agreement and knew what he was signing.
>
> . . . .
>
> 8. He also testified that he voluntarily got out of bed, put on his close [sic], got in his vehicle alone and drove to the bank to sign the separation agreement at a bank.

The trial court also found, in finding of fact 9, that Mr. Raus was a businessman who at various times had owned three businesses and had sufficient funds to live in a $1.5 million home and send his two children to private school. Additionally, the trial court found in finding of fact 10: "[Mr. Raus] freely and voluntarily knew what he was signing; he was not under any duress when he signed the agreement and the agreement was not unconscionable given [sic] procedurally or substantively when looking at the agreement in its totality."

Mr. Raus argues that to the extent findings of fact 4, 6, and 8 summarize defendant's testimony, they are not proper findings of fact because they are mere recitations of testimony, citing *Long v. Long*, 160 N.C. App. 664, 588 S.E.2d 1 (2003), and *Chloride, Inc. v. Honeycutt*, 71 N.C. App. 805, 323 S.E.2d 368 (1984). In those cases, the findings were inadequate because the trial court did not, with a mere recitation of testimony, resolve the conflicts in the evidence and actually find facts. *Id.* at 805, 323 S.E.2d at 368-69. That is not, however, the case here.

Findings of fact 4, 6, and 8 summarize admissions by Mr. Raus relating to the voluntary nature of his actions, including his admission that the separation agreement was fair, that he understood the agreement, that he voluntarily went to sign the agreement, and that he was not acting under duress when signing it. With respect to Mr. Raus' testimony about his depression and medications, the court did—after reciting that testimony—resolve the dispute it raised by determining that it was not entitled to much weight. In short, the court did not err in setting out those portions of Mr. Raus' testimony that defeated his affirmative defense of duress and in explaining why it found his evidence in support of duress inadequate.

Mr. Raus also challenges the sufficiency of the evidence to support finding of fact 9 and finding of fact 10, regarding his financial status at the time he entered into the separation agreement and the lack of duress and unconscionability. These findings are supported by Mr. Raus' own testimony as well as representations in the separation agreement that Mr. Raus has not specifically challenged. Although Mr. Raus points to testimony that supports his contentions and argues that his evidence is entitled to greater weight, we may not accept his invitation to substitute our own judgment for that of the trial court. Since the trial court's findings are supported by evidence, they are binding.

Mr. Raus makes no further argument regarding his affirmative defense of duress. We, therefore, hold that the trial court did not err in declining to set aside the separation agreement based on duress.

II

[2] Mr. Raus next contends that the trial court should not have concluded that he was in breach of the separation agreement. Mr. Raus argues that the evidence shows he lacked the ability to perform under the agreement.

The trial court determined, in finding of fact 13, that Mr. Raus owed Ms. Praver $96,000.00 in child support and $311,840.00 in alimony. With respect to Mr. Raus' ability to pay the amounts due under the agreement, the trial court found:

> 14. Soon after the parties [sic] into the separation agreement, the Defendant's family's business shut down for some inexplicable reason; this was the business in which the Defendant earned an income of at least $240,000 per year. As a result the Defendant indicated that he did not have the financial ability to comply with the ongoing support obligations of the agreement.
>
> 15. However, since the time that his business shut down, he has had at least 4 well paying jobs. In addition, he has lived rent free in a town-home owned by his brother. He has also continually had an American Express card in his name but paid by his mother, which [sic] he charges his living expenses.
>
> 16. Up through 2007, he sent of [sic] his children to private secondary school and purchased for them whatever they wanted and/or needed. He did this all at the same time that he paid less then [sic] 10% of his total support obligation to the Plaintiff.

> 17. The Defendant moved to Kentucky to live with his girlfriend and her three children several months ago. The Defendant had a job working for Jewish Hospital in Kentucky up through one month prior to trial. He was earning at least $60,000 a year at this job plus an unknown amount of potential bonus and/or commission. While working in Kentucky, he is living in his girlfriend's residence and her children's residence, rent-free. He pays a portion of the utilities, has a car payment of $437 per month and pays 20-30 per week in fuel costs. The Defendant still has the American express credit card to pay his expenses and which his mother pays for. He also pays his child's college expense and living expenses of $1,000-$1,500 per month which he has consistently done for over one year.

Mr. Raus argues that these findings of fact, as well as finding of fact 13, are not supported by the evidence. Based on our review of the record, we hold that each finding is supported by the terms of the separation agreement itself, Mr. Raus's answer, or his own testimony. The findings are, therefore, binding on appeal notwithstanding the existence of conflicting evidence.

Indeed, Mr. Raus does not actually contest that he failed to pay the amounts owed, but rather argues only that his performance was excused because of an inability to pay. In support of this position, he points to his actual income and argues that under *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 347 S.E.2d 19 (1986), the trial court should not have found him in breach of the agreement. In *Cavenaugh*, this Court reviewed a trial court's order requiring defendant to pay all arrearages due under a separation agreement and to make periodic payments in the future as provided under the agreement. *Id.* at 656-58, 347 S.E.2d at 22-24. Although in that particular case, the Court concluded that the trial court's order did not adequately address the defendant's evidence that, based on his actual income, he was unable to fulfill his obligations under the agreement, *id.* at 657-58, 347 S.E.2d at 23, the Court also noted that when the supporting spouse deliberately suppresses income or dissipates resources, then the trial court may rely upon the spouse's capacity to earn rather than his or her actual income. *Id.* at 657, 347 S.E.2d at 23 (citing *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982)).

This Court applied that principle in *Condellone v. Condellone*, 129 N.C. App. 675, 682, 501 S.E.2d 690, 695-96 (1998) (quoting *Cavenaugh*, 317 N.C. at 658, 347 S.E.2d at 23), explaining that "[i]n the

absence of a finding that the defendant is able to perform a separation agreement, the trial court may nonetheless order specific performance if it can find that the defendant 'has deliberately depressed his income or dissipated his resources.' " The Court further clarified that "[i]n finding that the defendant is able to perform a separation agreement, the trial court is not required to make a specific finding of the defendant's present ability to comply as that phrase is used in the context of civil contempt." *Id.* at 683, 501 S.E.2d at 696 (internal quotation marks omitted). The Court then held that despite there being no evidence of the defendant's current income, the trial court's finding of a pattern of conduct to depress his income was sufficient to support its order of specific performance as to future payments and arrearages owed under the separation agreement. *Id.* at 683-84, 501 S.E.2d at 696.

Here, while Mr. Raus presented evidence of an inability to pay, the trial court found, based on other evidence, "that the Defendant is voluntarily unemployed with the intent of depriving the Plaintiff of support." It was up to the trial court to decide the credibility of Mr. Raus' claim of an inability to pay. Since the court made the findings required by *Cavenaugh* based on the evidence presented, it was not required to make findings regarding Mr. Raus' present ability to comply with the separation agreement. The trial court, therefore, did not err in concluding that Mr. Raus had breached the separation agreement.

III

[3] Mr. Raus next challenges the trial court's order of specific performance on the grounds that the order contains (1) no findings of fact regarding whether Ms. Praver fully complied with her obligations under the separation agreement, and (2) no determination whether Ms. Praver's remedy at law was inadequate. Mr. Raus contends that in the absence of these findings, the court was prohibited from ordering specific performance of the separation agreement.

With respect to whether Ms. Praver was required to prove and the trial court to find, as a prerequisite to specific performance by Mr. Raus, that Ms. Praver had performed all of her obligations under the separation agreement, our Supreme Court in *Cavenaugh* observed in *dicta* that "[s]pecific performance is available to a party only if that party has alleged and proven that he has performed his obligations under the contract . . . ." *Cavenaugh*, 317 N.C. at 656-57, 347 S.E.2d at 22. Although no evidence was presented at trial that Ms. Praver had violated any term of the separation agreement, Mr. Raus asserts on

appeal that Ms. Praver had an affirmative burden to prove her compliance under the agreement to warrant an order for specific performance.

Mr. Raus complains that "[t]here are no allegations in Ms. Praver's Verified Complaint for Specific Performance addressing her performance under the Agreement." In the trial court, however, Mr. Raus never moved to dismiss Ms. Praver's claim for specific performance on that basis. Mr. Raus did allege in his answer, as his seventh affirmative defense, that "Plaintiff's claims should be barred on the basis that she has breached material terms and conditions provided therein." He did not, however, present any evidence or make any argument to the trial court seeking a ruling on this contention. Further, when the trial court specifically asked Mr. Raus, who was appearing *pro se*, about that defense, Mr. Raus denied knowing to what the answer referred. Mr. Raus effectively abandoned any claim that Ms. Praver breached the agreement.

Mr. Raus has, therefore, failed to preserve this issue for appeal. *See* N.C.R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."). Accordingly, we decline to address this issue.

Mr. Raus also asserts that the trial court erred in making no determination that Ms. Praver's remedy at law was inadequate before ordering specific performance of the separation agreement. The specific performance order required both that Mr. Raus pay the arrearages due under the agreement and that he make prospective payments as they came due. Our courts have treated an order of specific performance to pay arrearages differently from an order of specific performance of prospective payments.

Our Supreme Court held in *Moore v. Moore*, 297 N.C. 14, 252 S.E.2d 735 (1979), *overruled on other grounds by Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986), that because of the absence of an adequate remedy at law, specific performance was appropriate both as to arrearages and as to prospective payments. However, in *Cavenaugh*, 317 N.C. at 656-57, 347 S.E.2d at 22-23, the Supreme Court appeared to alter the rule as to arrearages and held that there had to be an evidentiary basis supporting a trial court's conclusion of law that no adequate remedy at law existed.

In *Moore*, our Supreme Court examined whether the trial court had properly denied the plaintiff an order of specific performance for enforcement of future payments and arrearages under a separation agreement that had not been incorporated into a judicial decree. 297 N.C. at 16, 252 S.E.2d at 737. The Court asked: "What remedy at law is available to the plaintiff who seeks to compel compliance with a provision for periodic alimony payments in a separation agreement that has not been made part of a divorce judgment?" *Id.* at 17, 252 S.E.2d at 738. The Court answered its question, observing that a plaintiff would have to wait until payments became due and the spouse did not pay them and then he or she would have to file suit, reduce the claim to judgment, and, if unpaid, proceed with execution on the judgment. *Id.* If the defendant persisted in not complying, the plaintiff would have to resort to the remedy repeatedly. Given the expense and delay in obtaining recovery of sums "providing for the plaintiff's basic subsistence," the Court held "that the remedy available at law involves unusual and extreme hardship." *Id.*

While this analysis seemed to address primarily the requirement that the defendant make prospective payments, the Court then held that the trial court had erred in excluding evidence regarding the defendant's income, assets, and liabilities. *Id.* at 18, 252 S.E.2d at 738. Based on the excluded evidence, the Court also held that no adequate remedy at law existed as to the arrearages: "That evidence shows a deliberate pattern of conduct by defendant to defeat plaintiff's rights under their separation agreement. Execution upon plaintiff's judgments for arrearages cannot be enforced upon the property of defendant's second wife. Defendant deliberately, each payday, places his income out of reach of plaintiff's remedies at law." *Id.*, 252 S.E.2d at 738-39. Consequently, the Court remanded "for entry of a decree ordering defendant to specifically perform his support obligations under the separation agreement, both as to the arrearages and future payments." *Id.* at 19, 252 S.E.2d at 739.

In *Cavenaugh*, our Supreme Court, as an initial matter, held that the trial court's order of specific performance of a separation agreement had to be remanded because of the trial court's failure to make "findings of fact on defendant's ability to pay the arrearages [due under the agreement] and to comply with the terms of the separation agreement in the future." 317 N.C. at 658, 347 S.E.2d at 23. The Court pointed out that if the trial court determined that the defendant lacked the ability to fulfill his obligations under the agreement, "specific performance of the entire agreement [could] not be ordered

absent evidence that defendant ha[d] deliberately depressed his income or dissipated his resources." *Id.* On the other hand, the Court explained, if the court found that "the state of defendant's finances warrant[ed] it, the trial judge [could] order specific performance of all or any part of the separation agreement unless plaintiff otherwise ha[d] an adequate remedy at law." *Id.*

The Court then examined the trial court's "conclusion that plaintiff did not have an adequate remedy at law to collect the arrearages owed by defendant," which was based on a finding of fact that "it would require 'a multiplicity of actions and legal processes . . .' to effect collection of the judgment through execution." *Id.* The Court determined that there was no evidence to support that finding, and, therefore, the finding could not "be used to support a conclusion of law that the plaintiff does not have an adequate remedy at law . . . ." *Id.* As a result, the trial court's "decree of specific performance for the arrearages" failed for that reason as well as the failure to address the defendant's ability to comply with the agreement. *Id.*, 347 S.E.2d at 23-24.

The leading North Carolina family law treatise has explained, citing *Moore*, that "[b]ecause separation agreements often involve periodic payments, . . . the law recognizes that legal relief is usually inadequate, and the moving party has little difficulty with this element, *especially for an order involving future payments*." See 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 14.35b(ii), at 14-99 (5th ed. 2002) (emphasis added). With respect to arrearages, however, the treatise summarizes the law as follows: "Under appropriate facts, . . . the court has the power to order specific performance of arrearages as well as of future payments. Certainly, evidence of a pattern of defaults, of unsatisfied judgments, and of conduct to keep assets from execution on a judgment support the conclusion that the plaintiff has an inadequate remedy at law for both arrearages and future payments. *If the order of specific performance involves only arrearages, there must be some evidence in the record to support the conclusion that collection would involve a multiplicity of suits*." *Id.* (emphasis added).

Therefore, under our Supreme Court's holding in *Cavenaugh*, this case must be returned to the trial court for findings of fact and conclusions of law regarding whether Ms. Praver's remedy at law was inadequate with regard to the arrearages owed by Mr. Raus under the separation agreement. *See Condellone*, 129 N.C. App. at 684, 501 S.E.2d at 696 (holding that trial court has authority to order specific

performance of arrearages in "proper case").[1] Under *Moore*, however, no findings of fact were necessary as to the adequacy of Ms. Praver's remedy at law for future payments. Any error in failing to include a conclusion of law can be remedied on remand. We, therefore, affirm the order of specific performance in part and reverse and remand it in part for further findings of fact and conclusions of law.

IV

[4] Defendant's final contention is that the trial court failed to find sufficient facts to justify its award of attorneys' fees. Ms. Praver concedes that the findings are inadequate. We, therefore, reverse the attorneys' fees award and remand for further findings of fact and conclusions of law as to Ms. Praver's request for attorneys' fees. *See Upchurch v. Upchurch*, 34 N.C. App. 658, 665, 239 S.E.2d 701, 705 (1977) ("In order to award attorney fees in alimony cases the trial court must make findings of fact showing that fees are allowable and that the amount awarded is reasonable.").

Affirmed in part; reversed and remanded in part.

Chief Judge MARTIN and Judge STROUD concur.

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1. We note that the separation agreement contained a provision stating that the parties agreed that "neither party has a plain, speedy or adequate legal remedy to compel compliance with the provisions of this Agreement" and "that an order for specific performance enforceable by contempt is an appropriate remedy for a breach of this Agreement by either party." Neither party has discussed the impact of this provision on the ability of the trial court to order specific performance and, therefore, we do not address it or express any opinion on its effect.

IN THE MATTER OF THE FORECLOSURE OF THE NINE DEEDS OF TRUST OF MARSHALL AND MADELINE CORNBLUM, GRANTORS, AS RECORDED IN BOOK 346, AT PAGE, 582, AS RECORDED IN BOOK 346, AT PAGE, 565, AS RECORDED IN BOOK 339, AT PAGE, 117, AS RECORDED IN BOOK 332, AT PAGE, 904, AS RECORDED IN BOOK 328, AT PAGE, 133, AS RECORDED IN BOOK 326, AT PAGE, 962, AS RECORDED IN BOOK 329, AT PAGE, 851, AS RECORDED IN BOOK 336, AT PAGE, 646, AND AS RECORDED IN BOOK 362, AT PAGE, 776, OF THE SWAIN COUNTY REGISTRY. WILLIAM RICHARD BOYD, JR. SUBSTITUTE TRUSTEE. AND IN THE MATTER OF THE FORECLOSURE OF THE THREE DEEDS OF TRUST OF LONGBRANCH PROPERTIES, LLC, GRANTORS, AS RECORDED IN BOOK 1667, AT PAGE, 47, AS RECORDED IN BOOK 1603, AT PAGE 11, AND AS RECORDED IN BOOK 1656, AT PAGE, 50, OF THE JACKSON COUNTY REGISTRY. WILLIAM RICHARD BOYD, JR. SUBSTITUTE TRUSTEE.

No. COA11-534

(Filed 17 April 2012)

1. Jurisdiction—subject matter—arbitration award

The superior court's judgment confirming an arbitration award in an action arising out of twelve consolidated foreclosure actions was reversed because there was no subject matter jurisdiction to compel or confirm arbitration. The clerk and trial court are limited to making the findings contained in N.C.G.S. § 45-21.16(d).

2. Arbitration and Mediation—arbitration award—foreclosure sales not void—argument moot

Although the superior court lacked subject matter jurisdiction to confirm an arbitration award in an action arising out of twelve consolidated foreclosure actions, the Court of Appeals did not disturb the foreclosure sales and resulting transfers of title to real property and appellants' argument that the foreclosure sales were void was dismissed as being moot.

Appeal by respondents from judgment entered 15 November 2010 by Judge James U. Downs in Swain County Superior Court. Heard in the Court of Appeals 13 December 2011.

Shanahan Law Group, PLLC, by Kieran J. Shanahan, Brandon S. Neuman, and John E. Branch III, for respondents-appellants.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Esther E. Manheimer & Mark A. Pinkston, for claimants-appellees.

STEELMAN, Judge.

The trial court erred in submitting to arbitration an action commenced pursuant to N.C. Gen. Stat. § 45-21.16. Appellants' argument that the foreclosure sales were void is dismissed as being moot.

I. Factual and Procedural Background

This appeal arises out of twelve consolidated foreclosure actions. The appellants in this case (collectively, "appellants") include Marshall E. Cornblum, Madeline H. Cornblum, and Longbranch Properties, LLC. Appellants executed thirteen promissory notes secured by deeds of trust on various pieces of real property purchased and developed with the loans.[1] When the mortgagors defaulted on their obligations, United Community Bank ("UCB"), the mortgagee, commenced twelve separate foreclosure actions under N.C. Gen. Stat. § 45-21.16 (2011). These actions were filed in December 2009 and January 2010 in Swain and Jackson Counties.

Appellants demanded arbitration of all claims pursuant to arbitration agreements contained in each deed of trust. When UCB refused to arbitrate, appellants filed motions to compel arbitration. The clerks of court of Swain and Jackson counties denied these motions and entered orders allowing the foreclosures to proceed. Appellants appealed to the superior court. All twelve appeals were consolidated.

The superior court conducted a hearing *de novo* and issued an order granting each motion to compel arbitration. The court ordered the parties to arbitrate their dispute in accordance with the arbitration provisions contained in the deeds of trust. Pursuant to the arbitration agreements, the court also ordered the parties to join all other claims arising out of their relationship. UCB filed a "statement of claims," which asserted claims for breach of contract in addition to the claims in foreclosure. While the arbitration proceedings were pending, UCB assigned the promissory notes, guaranties, and deeds of trust to Asset Holding Company 5, LLC ("AHC" and collectively, "appellees"). AHC was joined in the arbitration proceedings as a party-claimant, but UCB remained a party for the purposes of appellants' counterclaims.

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1. Not every promissory note was executed by every appellant and not every appellant executed a promissory note. But a precise description of these obligations is unnecessary for the purpose of this appeal.

The arbitrator ruled in favor of appellees on all claims. The arbitrator made five rulings that are relevant to this appeal: (1) AHC met its burden of proof under each of the six statutory requirements under the powers of sale; (2) the evidence was undisputed that appellants had defaulted on their obligations under the promissory notes and guaranties; (3) due to these defaults, AHC was entitled to an award in the amount of principal and interest due under each note or guarantee; (4) appellees were entitled to attorneys' fees; and (5) appellants' defenses, counterclaims, and class claims were without merit. The superior court subsequently granted appellees' motion to confirm the arbitration award and denied appellants' motion to vacate the award.

Appellants appeal.

II. Subject Matter Jurisdiction

In appellants' sole argument, they contend that the superior court lacked subject matter jurisdiction to confirm the arbitration award. We agree, but insofar as appellants ask us to void the foreclosure sales, their argument is moot.

A. Standard of Review

"In reviewing a question of subject matter jurisdiction, our standard of review is *de novo.*" *In re K.A.D.*, 187 N.C. App. 502, 503, 653 S.E.2d 427, 428 (2007).

B. Analysis

1. Subject Matter Jurisdiction

[1] In the proceedings below, appellants filed a motion to compel these matters to be submitted to arbitration. This request was granted by the superior court. Now they contend that the superior court did not have jurisdiction to confirm the arbitration award. Our courts generally do not allow parties to assert conflicting positions in the same or subsequent judicial proceedings. *See*, *e.g.*, *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 21, 591 S.E.2d 870, 883–84 (2004) (compiling decisions). As Chief Justice Stacy opined, a party may not "safely 'run with the hare and hunt with the hound.' " *Rand v. Gillette*, 199 N.C. 462, 463, 154 S.E. 746, 747 (1930). But this proposition does not apply to subject matter jurisdiction.

> "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." Subject matter "[j]urisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties." Specifically, subject matter jurisdiction cannot be conferred by waiver or consent of the parties.

Mosler ex rel. Simon v. Druid Hills Land Co., 199 N.C. App. 293, 295, 681 S.E.2d 456, 458 (2009) (citations omitted) (alterations in original). Therefore, even though appellants themselves created the alleged jurisdictional defect of which they now complain, they are not barred from arguing it was error on appeal.

N.C. Gen. Stat. § 7A-240 provides a grant of "original general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice" to the district and superior courts. N.C. Gen. Stat. § 7A-240. However, the General Assembly has enacted various caveats to this general jurisdiction. *See*, *e.g.*, *id.* § 7A-244 (providing that the district court is the proper division for various cases involving domestic relations). These jurisdictional caveats control because "[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." *Trs. of Rowan Technical Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985). Appellants argue that the narrow scope of the statutory foreclosure by power of sale hearing places a jurisdictional restriction on the clerk of court and the superior court on appeal. They maintain that the clerk and superior court do not have jurisdiction in a power of sale foreclosure proceeding to do *anything* other than making (or refusing to make) the findings required by the statute.

Foreclosure by power of sale is an expedited process governed by statute. In order to exercise the power of sale granted in a mortgage or deed of trust, the mortgagee or trustee must initiate a hearing before the clerk of court. *See* N.C. Gen. Stat. § 45-21.16. That hearing is very narrow in scope:

> If the clerk finds 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), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all mate-

> rial respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A, then the clerk shall authorize the mortgagee or trustee to proceed under the instrument . . . .

Id. § 45-21.16(d). The clerk's decision may be appealed to the superior court for a hearing *de novo. Id.* § 45-21.16(d1). Appeal to this Court from the superior court's ruling does not stay the court's order; the appellant must execute a bond in order to stay the foreclosure sale. *Id.* § 1-292; *see also In re Hackley*, ___ N.C. App. ___, ___, 713 S.E.2d 119, 125 (applying N.C. Gen. Stat. § 1-292 to a foreclosure action), *disc. review denied and review denied as moot*, ___ N.C. ___, 718 S.E.2d 377 (2011).

Pursuant to N.C. Gen. Stat. § 45-21.34, after the clerk (or superior court) has authorized a foreclosure sale pursuant to the hearing, anyone with a legal or equitable interest in the property may apply to the superior court for an injunction (or a temporary restraining order) to halt the sale. N.C. Gen. Stat. § 45-21.34. An interested party may assert any legal or equitable ground for halting the sale. *Id.* That party must apply for the injunction before the parties rights become "fixed" pursuant to N.C. Gen. Stat. § 45-21.29A. *Id.* § 45-21.34. In pertinent part, N.C. Gen. Stat. § 45-21.29A reads: "If an upset bid is not filed following a sale, resale, or prior upset bid within the period specified in [Article 2A of Chapter 45], the rights of the parties to the sale or resale become fixed."

This Court recently held in *In re Foreclosure of Pugh* that the clerk of court and the trial court correctly denied the respondents' motion to compel arbitration because the clerk and trial court are limited to making the findings contained in N.C. Gen. Stat. § 45-21.16(d). No. COA11-990, slip op. at 6–7 (N.C. Ct. App. March 6, 2012). The Court stated that the proper vehicle to bring an arbitration motion is a motion to enjoin a foreclosure sale under N.C. Gen. Stat. § 45-21.34. *Id.* at 8. "[H]ad the trial court actually issued findings regarding [the] respondents' [a]rbitration [m]otion, 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)." *Id.* (emphasis added). The Court also explained that an arbitration motion would be properly raised in a motion to enjoin pursuant to N.C. Gen. Stat. § 45-21.34 where "the court's *jurisdiction* is much broader." *Id.* (emphasis added). We note that several decisions by this Court that do not relate to arbitration have also treated the findings in N.C. Gen. Stat. § 45-21.16(d) as jurisdictional limitations. *See Mosler*, 199 N.C.

App. at 297, 681 S.E.2d at 459 (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).

In re Foreclosure of Pugh leaves us with the following rule: In a power of sale proceeding initiated pursuant to N.C. Gen. Stat. § 45-21.16, the clerk of court, and the superior court on appeal from the clerk's decision, lack subject matter jurisdiction to consider and rule on a party's motion to compel arbitration. We are bound by this rule. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). ("[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court."). Under *In re Foreclosure of Pugh*, submitting this case to arbitration and confirming the arbitration award fell outside of the superior court's subject matter jurisdiction. Notwithstanding appellants' effort to compel the arbitration proceedings, we reverse the superior court's judgment confirming the arbitration award because there was no subject matter jurisdiction to compel or confirm arbitration.

2. Mootness

[2] We recently ruled in *Hackley* that when the parties' rights became "fixed" pursuant to N.C. Gen. Stat. § 45-21.29A, the appellant's challenge to the foreclosure proceedings were moot. ___, N.C. App. at ___, 713 S.E.2d at 125; *see also Cnty. of Cumberland v. Barton*, *No.* COA11-631, slip op. at 7 (N.C. Ct. App. Dec. 6 2011) (unpublished) (dismissing appeal where the record revealed "that the foreclosure sale . . . ha[d] been completed, that the proceeds of the sale ha[d] been applied to eliminate [the d]efendants' tax and assessment liabilities, and that [the d]efendants' real property ha[d] been conveyed to the purchaser"). In that case, the debtor failed to stay the foreclosure proceeding. He did not execute the bond required by N.C. Gen. Stat. § 1-292. *Hackley*, ___ N.C. App. at ___, 713 S.E.2d at 125. The debtor argued that because he had filed for bankruptcy, there was an automatic stay of the foreclosure. *Id.* at 124. *See generally* 11 U.S.C. § 362(a) (2006) (providing for the automatic bankruptcy stay). But the Court refused to consider the substance of his bankruptcy argument because there was insufficient documentation in the record to establish he was entitled to the automatic stay. *Hackley*, ___ N.C. App. at ___, 713 S.E.2d at 123-24.

The Court took judicial notice of a recorded deed contained in an appendix to the debtor's brief. *Id.* at ___, 713 S.E.2d at 123. That deed established that the foreclosure sale had been completed. *Id.* at ___, 713 S.E.2d at 124. The Court held:

> Here, the subject real property was sold and the Trustee's Deed was recorded. There is no indication in the record that respondent paid a bond to stay the foreclosure sale; nor was there an upset bid during the 10 day period, or any indication in the record that respondent obtained a temporary restraining order or preliminary injunction prior to the end of the ten-day upset bid period. Therefore, respondent's and the secured creditor's rights in the subject real property are fixed and respondent's appeal is moot.

Id. at ___, 713 S.E.2d at 125 (citations omitted). Therefore, under *Hackley*, when the trustee's deed has been recorded after a foreclosure sale, and the sale was not stayed, the parties rights to the real property become fixed, and any attempt to disturb the foreclosure sale is moot. That rule is binding upon this panel. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

The facts are similar in this case. Appellants did not obtain a stay by posting the bond required by N.C. Gen. Stat. § 1-292. They did not challenge the foreclosure sale under N.C. Gen. Stat. § 45-21.34 by separate action while the sale was pending. Nor is there any indication that there was an upset bid during the ten-day period prescribed by statute. *See* N.C. Gen. Stat. § 45-21.27 ("[T]here may be successive upset bids each of which shall be followed by a period of 10 days for a further upset bid."). As did the Court in *Hackley*, we take judicial notice of the recorded trustee's deeds submitted by appellees in the appendix of their first memorandum of additional authority. *See Hackley*, ___ N.C. App. at ___, 713 S.E.2d at 123. As in *Hackley*, these deeds establish that the foreclosure sales have occurred and that the interests in real property have been transferred to purchasers. *See id.* at ___, 713 S.E.2d at 124.

The only distinction between this case and *Hackley* is that appellants' challenge is based on the superior court's lack of subject matter jurisdiction. N.C. Gen. Stat. § 45-21.34 provides that a trial court may enjoin a foreclosure sale on any "legal or equitable ground which the court may deem sufficient." N.C. Gen. Stat. § 45-21.34. A defect in subject matter jurisdiction on the part of the court authorizing a foreclosure sale would be such a ground. *Cf. In re Foreclosure of Pugh*,

slip op. at 7–8 (explaining that a motion to compel arbitration is properly brought in a motion to enjoin under N.C. Gen. Stat. § 45-21.34 because it is not pertinent to the findings specified by N.C. Gen. Stat. § 45-21.16). The party seeking the injunction must ensure that its application is heard, decided, and filed prior to the date upon which the rights of the parties become fixed. *Goad v. Chase Home Fin., LLC*, ___ N.C. App. ___, ___, 704 S.E.2d 1, 3 (2010). The General Assembly has provided a procedure for obtaining relief from a jurisdictionally-defective order authorizing a foreclosure sale. We hold that the rule in *Hackley* applies with equal force when the appealing party contends that the superior court lacked subject matter jurisdiction to authorize the foreclosure sale to proceed.

In this case, appellants did not apply for a temporary stay or injunction on the ground that the superior court lacked subject matter jurisdiction to authorize the sale. The foreclosure sale was consummated, and the parties' rights in real property are fixed. Under *Hackley*, appellants' arguments attacking the consummation of the foreclosure sale are moot. *See Hackley*, ___ N.C. App. at ___, 713 S.E.2d at 125. The foreclosure sale cannot be undone through this appeal. *See Austin v. Dare Cnty.*, 240 N.C. 662, 663, 83 S.E.2d 702, 703 (1954) ("The sale and conveyance having been consummated, whatever Judge Carr should have restrained the defendants, *pendente lite*, is now an academic question. It is quite obvious that a court cannot restrain the doing of that which has been already consummated."). Therefore, our conclusion that the superior court lacked subject matter jurisdiction does not disturb the foreclosure sales and resulting transfers of title to real property.

III. Conclusion

Appellants' argument that the foreclosure sales in this case must be set aside fails. Therefore, the resulting transfer of real property will not be disturbed as a result of our decision in this case. The trial court's 15 November 2010 judgment confirming arbitration is reversed. We appreciate that the outcome in this case is somewhat incongruous because we reverse the order authorizing the foreclosure sale but leave the resulting transfer in real property undisturbed. However, appellants' conflicting litigation postures, the statutory framework, as well as binding precedent compel this result.

REVERSED.

Judges McGEE and STROUD concur.

IN THE MATTER OF ZAHRA CLARE BAKER INVESTIGATION

No. COA11-313

(Filed 17 April 2012)

1. Appeal and Error—mootness—capable of repetition—evaded review

The State's appeal from the trial court's order to unseal search warrants was not moot even though the warrants had already been unsealed and released as the matter was capable of repetition yet evaded review.

2. Public Records—sealed search warrants—order unsealing records—complied with mandate

The trial court did not err in a case involving sealed search warrants by failing to give effect to the plain language in the original orders commanding that the records remain sealed and not released to the public until further order of the court. The trial court complied with the senior resident judge's mandate regarding the duration of orders sealing search warrants from public review.

3. Public Records—delivery of previously sealed records to Clerk—hearing not required—sufficient notice given—compliance with mandate

The trial court did not err in a case involving sealed search warrants by ordering the clerk of court to deliver documents previously sealed by orders of the superior court without any motion, hearing, or notice to the State. As the prosecution failed to make a timely motion to extend the orders sealing the warrants, the trial court was not required to engage in a test to balance the right to access the contents of the sealed search warrants against the governmental interests in protecting against premature release. Further, the State's contention that it was not on notice of the delivery of these previously sealed records was rejected and the trial court's compliance with the senior resident judge's administrative order was not an abandonment of the court's obligation.

4. Public Records—sealed search warrants—release—not impermissible exercise of jurisdiction

The trial court's order releasing previously sealed search warrants and corresponding documents did not impermissibly exercise appellate jurisdiction to resolve a conflict between the

administrative order and the prior orders issued sealing the search warrants. The order releasing the sealed warrants was not in conflict with the prior orders sealing the warrants.

5. Public Records—sealed search warrants—release in accordance with administrative order

The State's argument that the trial court erred in concluding that the administrative order at issue limited the discretion of the court in entering orders sealing warrants and related documents lacked merit. The search warrants and corresponding documents were unsealed in accordance with administrative procedures established by the senior resident superior court judge.

Appeal by the State from order entered 30 November 2010 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 16 November 2011.

District Attorney James C. Gaither, Jr., and Assistant District Attorney Eric R. Bellas for the State.

Stevens Martin Vaughn & Tadych, PLLC, by C. Amanda Martin, for defendant-appellee.

BRYANT, Judge.

Where the search warrants at issue were unsealed in accordance with procedures set forth in the administrative order of the resident superior court judge and where the State failed to make a timely motion to extend the period for which the documents were sealed, there was no error by the superior court in unsealing the search warrants and corresponding documents.

In the afternoon of 9 October 2010, Zahra Baker, born 16 November 1999, was reported missing. Earlier that morning, just before 5:30 a.m., an officer with the Hickory Police Department, at the request of the Hickory Fire Department, responded to a residence located at 21 21st Avenue Northwest. The fire department had responded to a call reporting a burning pile of debris. A fireman drew the police officer's attention to a note found on the front windshield of a 1996 Chevrolet Tahoe located at the residence. The note stated "Mr. Coffey, you like being in control now who is in control we have your daughter and your pot smoking red head son is next unless you do what is asked 1,000,000 unmarked will be in touch soon." Mark Coffey and his only daughter were at the residence and determined to

be unharmed. At 6:41 a.m., the officer and the Hickory Fire Department left the residence.

At 2:00 p.m. that afternoon, officers with the Hickory Police Department again responded to the residence after receiving a call from Adam Baker stating that the previous night someone left a note stating that his boss's daughter had been abducted. However, it was Baker's own daughter, Zahra, who was missing. Thereafter, an investigation ensued involving local, state, and federal law enforcement agencies.

On 29 September 2010, prior to the issuance of any warrant in the case of Zahra's disappearance, an administrative order on sealing warrants was filed by Judicial District 25B Senior Resident Superior Court Judge Timothy S. Kincaid. The order set out the procedures applicable "to a request to seal or redact an arrest or search warrant, a search warrant application, a search warrant affidavit, an inventory of seized items pursuant to a search warrant, or other similar court documents." The order was made effective for all sealing motions filed on or after 1 October 2010.

Between 11 and 29 October 2010, at least thirteen search warrants were issued in the investigation of the disappearance of Zahra Baker. The subject matter of the search warrants ranged between a search of persons, the residence at 21 21st Avenue Northwest, cell phone records, email accounts, and social networking site accounts. As each search warrant was issued, the State made a motion either in Catawba County Superior Court or Catawba County District Court for an order sealing the warrant and its return until further order of the Court. As to each motion, the court made the following finding:

> [I]t appearing to the Court that the release of information contained in said court order, application, and motion and its return will potentially undermine an ongoing investigation or jeopardize the right of the State to prosecute a defendant or defendants or jeopardize the right of a defendant or defendants to receive a fair trial . . . .

As to each motion, the court ordered "that this search warrant and its return be sealed and not released to the public until further order of the Court."

On 29 November 2010, a number of news media organizations—print and television – made a public records request for search warrants more than thirty days old. Shortly thereafter, the State filed a

motion and an amended motion to extend the orders sealing the warrants and their returns. On 30 November 2010, in response to the media's public records request, Catawba County Superior Court Judge Nathaniel Poovey ordered that search warrants sealed for more than thirty days at the time of the request be unsealed. The order specified that "Paragraph 10(c) of [Judge Kincaid's] Administrative Order [on sealing warrants] provides that any order directing that a warrant, warrant affidavit or other document be sealed or redacted shall expire in 30 days unless a different expiration date is specified in the order." Judge Poovey's order unsealing certain warrants found that the State filed a motion to extend the sealing of the orders after media organizations requested copies of search warrants that were more than 30 days old. The Superior Court ordered that "[the] clerk shall immediately deliver copies of materials related to the eleven warrants that were sealed more than 30 days prior to the State's November 29 motion to anyone making such a request . . . ." The State, by and through the District Attorney, appeals.

On appeal, the State raises the following four issues: Did the lower court err (I) in not giving effect to the plain language in the original sealing orders; (II) by ordering the delivery of documents previously sealed by order of the court without any hearing, motion, or notice to the State; (III) by exercising appellate jurisdiction; and (IV) by concluding that an administrative order of general applicability limited the discretion of the trial court.

[1] The State acknowledges that the documents affected by the superior court order have been unsealed and released but contends that the issue is not moot. The State contends that the matter falls within the exception to the mootness rule whereby an appellate court will hear a matter in dispute if such is capable of repetition yet evading review. The State cites *In re Search Warrants Issued in Connection with the Investigation into the Death of Nancy Cooper*, 200 N.C. App. 180, 683 S.E.2d 418 (2009).

> This exception is applicable if '(1) the challenged action is too short in duration to be fully litigated and (2) there is a reasonable expectation that the same party will be subjected to the same action again.' The search warrants and attendant documents were sealed for a thirty day period. '[T]his kind of secrecy order is usually too short in duration to be litigated fully.' There is also a reasonable expectation that the issue of a

> party being denied access to a search warrant and related documents due to a sealing order would be capable of repetition.

Id. at 185, 683 S.E.2d at 423 (quoting *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 63 (4th Cir. 1989)). We agree, the matter is capable of repetition yet evades review. Accordingly, the appeal is not barred on grounds that the matter is moot.

I

[2] In its first argument, the State contends the trial court erred by failing to give effect to the plain language in the original orders commanding that the records remain sealed "and not released to the public until further order of the Court." The State contends that Judge Poovey impermissibly modified the orders of four superior court judges[1] by issuing an order unsealing eleven warrants and their associated documents on the basis of an administrative order which directed that documents sealed by court order be unsealed after thirty days. We disagree.

> The General Assembly has authorized our Supreme Court to promulgate rules of practice and procedure for the superior and district courts. N.C. Gen. Stat. § 7A-34 (2005). Pursuant to this authority, our Supreme Court requires the Senior Resident Judge and Chief District Judge in each judicial district to "take appropriate actions [such as the promulgation of local rules] to insure prompt disposition of any pending motions or other matters necessary to move the cases toward a conclusion." N.C. Gen. R. Prac. Super. and Dist. Ct. 2(d) (2007); *see also* N.C. Gen. Stat. § 7A-146 (2005) (non-exclusive listing of the powers and duties of the Chief District Judge). " 'Wide discretion should be afforded in [the] application [of local rules] so long as a proper regard is given to their purpose.' " *Lomax v. Shaw*, 101 N.C. App. 560, 563, 400 S.E.2d 97, 98 (1991) (applying local superior court rules) (quoting *Forman & Zuckerman v. Schupak*, 38 N.C. App. 17, 21, 247 S.E.2d 266, 269 (1978)).

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1. The information contained in thirteen search warrants and their returns was ordered sealed by four superior court judges and one district court judge over a period of two-and-a-half weeks. However, because the State's motion to extend the orders sealing the records was filed on Monday, 29 November 2010, Judge Poovey concluded that the State's motion was timely filed with regard to warrants sealed by court orders entered 27 and 29 October 2010.

In re J.S., 182 N.C. App. 79, 84, 641 S.E.2d 395, 397-98 (2007) (original brackets).

> Access to public records in North Carolina is governed generally by our Public Records Act, codified as Chapter 132 of the North Carolina General Statutes. Chapter 132 provides for liberal access to public records. *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992). Absent "clear statutory exemption or exception, documents falling within the definition of 'public records' in the Public Records Law must be made available for public inspection." *Id.* at 486, 412 S.E.2d at 19.

Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999), quoted by *In re Search Warrants of Cooper*, 200 N.C. App. at 186, 683 S.E.2d at 424. Under North Carolina General Statutes, section 132-1.4(k), arrest and search warrants that have been returned by law enforcement agencies, indictments, criminal summons, and nontestimonial identification orders are public records. N.C. Gen. Stat. § 132-1.4(k) (2011).

Here, the administrative order issued by Judge Kincaid set forth uniform procedures applicable to "[any] request to seal or redact an arrest or search warrant, a search warrant application, a search warrant affidavit, an inventory of seized items pursuant to a search warrant, or other similar court documents" made on or after 1 October 2010. Specifically, the order established that "[a]ny order directing that a warrant affidavit or other document be sealed or redacted . . . [s]hall expire in thirty (30) days unless a different expiration date is specified in the order . . . ." The administrative order further provided that "[t]he State may move for an extension of an order sealing or redacting a court document, and the existing order shall remain in effect until the motion for extension is decided."

Judge Poovey's order unsealing certain search warrants set out the following:

> When possible, orders shall be read in such a way as to resolve or avoid conflict. Such a reading of the administrative order and the various orders entered in the matter of the investigation of the disappearance of Zahra Clare Baker yields the result that the sealing orders were to remain in place for a maximum of 30 days but that time could be shortened by an order of the court or lengthened by further order upon a motion made by the State.

Judge Poovey made the unchallenged finding that the State failed to make a motion for an extension of the orders sealing the search warrants and accompanying documents within the thirty-day period the warrants were sealed and did not file a motion to extend the period the warrants were sealed until after a request was made to unseal the documents. Therefore, in accordance with the administrative order establishing the procedure for sealing arrest or search warrants, Judge Poovey unsealed the applicable search warrants.

Given the wide discretion afforded the Senior Resident Superior Court Judge by our Supreme Court in the promulgation of local rules and because the State not only fails to show that Judge Poovey's order violated the administrative order of the Senior Resident Judge but rather illustrates Judge Poovey's compliance with the Senior Resident Judge's mandate regarding the duration of orders sealing search warrants from public review, the State's argument that Judge Poovey failed to give effect to the language in the orders commanding that the warrants remain sealed "and not released to the public until further order of the Court" is overruled. *See In re J.S.*, 182 N.C. App. at 84, 641 S.E.2d at 397-98.

II

[3] The State next argues that Judge Poovey erred by ordering the Clerk of Court to deliver documents previously sealed by orders of the Superior Court without any motion, hearing, or notice to the State. The State contends that by failing to make findings of fact with regard to grounds for unsealing the records requested, Judge Poovey failed to weigh the right of access to records against the compelling governmental interests sought to be protected by the prior orders and, thus, abandoned the obligation to protect against the premature release of the warrants and to protect the interests of the public, the State, and those potential defendants. We disagree.

The administrative order issued by Judge Kincaid in accordance with the authority conferred by our Supreme Court and effective at the time the search warrants in the investigation of Zahra's disappearance were issued and sealed, afforded an opportunity and corresponding procedure for the trial court to engage in the requested balancing test: the opportunity arose when the State made a motion to extend the orders sealing the warrants and their returns. *See* N.C.G.S. § 7A-34 ("The Supreme Court is hereby authorized to prescribe rules of practice and procedure for the superior and district courts supplementary to, and not inconsistent with, acts of the General Assembly.");

N.C. Gen. R. Prac. Super. and Dist. Ct. 1 (2012) ("[The general rules of practice for superior and district court] shall at all times be construed and enforced in such manner as to avoid technical delay and to permit just and prompt consideration and determination of all the business before them."); *In re J.S.*, 182 N.C. App. at 84, 641 S.E.2d at 398 ("Wide discretion should be afforded in [the] application [of local rules] so long as a proper regard is given to their purpose.").

Here, the prosecution failed to make a timely motion to extend the orders sealing the warrants and did not file a motion until after media organizations filed a public records request to view the warrants. Therefore, the administrative order did not require the trial court to engage in a test to balance the right to access the contents of the sealed search warrants against the governmental interests in protecting against premature release.

As for the State's assertion regarding the lack of notice, Judge Poovey's order unsealing the warrants made the unchallenged finding that copies of the Administrative Order were distributed to "the chief district judge, the district attorney, the clerk of superior court, the county attorney of Catawba County, the city attorneys for the municipalities in Catawba County, and to representatives of all municipal police departments." Further, the administrative order set out that "[a]ny order directing that a warrant or warrant affidavit or other document be sealed or redacted . . . [s]hall expire in thirty (30) days unless a different expiration date is specified in the order . . . ." We reject the State's contention that it was not on notice of the delivery of these previously sealed records. Furthermore, the media organizations made their public records request prior to but on the same day the State requested an extension of the orders sealing the records. The trial court ruled on the records request ordering the records unsealed the following day. Absent authority requiring a specific type of notice of release of documents, we find there was sufficient notice that the records could be released.

While we state no opinion on the authority of a superior court to *ex mero motu* weigh the right of access to sealed records against governmental interests, we do hold that Judge Poovey's unsealing of the warrants and corresponding documents in compliance with the administrative order of the senior resident superior court judge was not an abandonment of the court's obligation to protect the interests of the public, the State, and those potential defendants. The State

does not challenge Judge Kincaid's authority to issue the administrative order nor the validity of the administrative order. To hold that Judge Poovey's compliance with Judge Kincaid's administrative order was an abandonment of the court's obligation would render impotent the authority to be exercised by senior resident superior court judges in accordance with the directive of our Supreme Court to prescribe rules of practice and procedure for the superior and district courts to be "construed and enforced in such manner as to avoid technical delay and to permit just and prompt consideration and determination of all the business before them." N.C. Gen. R. Prac. Super. and Dist. Ct. 1.

We also note that Judge Poovey's order does acknowledge the long held judicial principles of openness, the presumptive right to access court records, and the need to narrowly tailor restrictions upon such a right. In so doing, it appears Judge Poovey considered the procedures set forth in the administrative order of Judge Kincaid, the notice of the administrative order provided to the District Attorney, the failure of the State to make a motion to extend the orders sealing the warrants, and the request by media organizations to review documents previously sealed by court orders for which the period of non-disclosure had expired. This does not constitute an abandonment of the court's obligation. Accordingly, this argument is overruled.

III

[4] Next, the State argues that Judge Poovey's order impermissibly exercised appellate jurisdiction to resolve a conflict between the administrative order and the prior orders issued sealing the search warrants. We disagree.

As we have reasoned, Judge Poovey's order releasing the sealed warrants and corresponding documents was not in conflict with the prior orders sealing the warrants and their returns "until further order of the Court"; therefore, we overrule this argument.

IV

[5] Lastly, the State argues that Judge Poovey erred in concluding that the administrative order limited the discretion of the court in entering orders sealing warrants and related documents.

We do not see that Judge Poovey concluded that the administrative order limited the discretion of the superior court, only that the

search warrants and corresponding documents were unsealed in accordance with administrative procedures established by the senior resident superior court judge and in the absence of a timely motion by the State to extend the period of time for which the records were sealed. Accordingly, this argument is overruled.

No error.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA v. ROBERT HUGH HEWSON

No. COA11-1208

(Filed 17 April 2012)

1. Criminal Law—post-conviction DNA testing—motion failed to meet criteria for testing

The trial court did not err in a first-degree murder, discharge of a weapon into occupied property, and misdemeanor violation of a domestic violence protective order case by denying defendant's motion for post-conviction, independent DNA testing. There was no reasonable probability that the disclosure of DNA evidence in support of defendant's contention would result in a different outcome in a jury's deliberation and defendant's motion failed to meet the criteria for a request for post-conviction DNA testing pursuant to N.C.G.S. § 15A-269(a)(1).

2. Appeal and Error—post-conviction DNA testing—motion failed to meet criteria for testing—remaining arguments not addressed

Where the trial court had sufficient bases to determine that post-conviction, independent DNA testing was not material to defendant's defense and, thus, had grounds to deny defendant's motion for post-conviction DNA testing pursuant to N.C.G.S. § 15A-269(a), the Court of Appeals did not address defendant's remaining arguments.

Appeal by defendant from order entered 15 July 2011 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 8 February 2012.

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

William D. Spence for defendant-appellant.

BRYANT, Judge.

Where the evidence supported the trial court's finding that post-conviction DNA testing would not be material to defendant's defense, we affirm the trial court's order denying defendant's motion for post-conviction, independent DNA testing.

On 8 November 2005, judgment and commitments were entered against defendant Robert Hewson in New Hanover County Superior Court for the offenses of first-degree murder, discharge of a weapon into occupied property, and misdemeanor violation of a domestic violence protective order. Defendant was sentenced to life imprisonment without parole for the offense of first-degree murder and, for the remaining offenses, a consecutive active sentence of twenty-five to thirty-nine months. This Court heard defendant's appeal from those convictions on 6 December 2006. In *State v. Hewson*, 182 N.C. App. 196, 642 S.E.2d 459 (2007), this Court found no error and, in the recitation of facts, noted that "[o]n the first-degree murder charge, the jury returned a guilty verdict based upon malice, premeditation, and deliberation, and based upon felony murder, with the underlying felony being discharging a weapon into occupied property." *Id.* at 200, 642 S.E.2d at 463.

On 16 September 2010, defendant, acting *pro se*, filed a "Motion for Employment of Funds: Seeking Post D.N.A. Measurements and Independent Analysis" in New Hanover County Superior Court. In recounting the procedural history, defendant noted that "[a]s routine homicide investigations are evaluated, several items of potential evidence were seized by the Wilmington Police Department for such person to test items for incriminating and exculpatory matter." As a basis for his motion for DNA analysis, defendant states that "[i]tems of D.N.A. testing have went [sic] untested for gunshot residue; and others have been tested, but an independent forensic testing would hold a reasonable probability of contradicting the prior test results of the S.B.I. laboratory."

On 13 October 2010, the Superior Court issued an order requiring that the New Hanover County Public Defender's Office be appointed to represent defendant on his motion.

On 15 November 2010, defendant filed an Amended Motion for Post-Conviction Independent Testing of DNA and Other Evidence. Defendant alleged the following:

> 3. It is alleged on information and belief that there was DNA evidence obtained during the investigation of this case. Said DNA was obtained from the clothing of the [defendant] and from the window sill [sic] and other areas of the crime scene, from the victim and from the [defendant]. Further, blood was noted on the Smith and Wesson 38 caliber revolver found at the crime scene.
>
> 4. Significant advances have been made in the science of DNA testing. . . .
>
> 5. Recent revelations regarding malfeasance, misfeasance and nonfeasance in the S.B.I. serology section has led to an investigation to review SBI crime lab practices . . . .
>
> . . .
>
> 7. The DNA evidence sought to be independently tested is material to the [defendant's] defense and is related to the investigation or prosecution that resulted in the verdict and judgment in this case.
>
> . . .
>
> THEREFORE, based on the foregoing, the [defendant] requests the following:
>
> 1. That the State be ordered to produce the dna [sic] material gathered in this case and have it re-tested by an independent laboratory.

On 12 April 2011, defendant filed a "Summary of Evidence for Motion for Post-Conviction Independent Testing of DNA and Other Evidence," wherein defendant stated the following:

> 1. At trial, DNA evidence was used to support the State's theory that the [defendant] was not inside the victim's house at the time, or immediately before, the victim died of gunshot wounds and to connect the [defendant] to the gun.
>
> . . .

> 3. The results of the DNA testing were used to link the [defendant] to the gun and to support the State's theory that the [defendant] was at all times outside the victim's house, never shooting from inside the house, and that the victim was the only person inside the house.
>
> 4. The [defendant] was convicted of first degree murder on the basis of malice, premeditation and deliberation, as well as under the felony murder rule. The predicate felony under the felony murder rule was discharging a firearm into occupied property.
>
> 5. Whether or not the [defendant] was in the house immediately before the victim's death is relevant under both first degree murder theories. The [defendant] could not be guilty of the predicate felony of shooting into occupied property if he was inside the property himself. Similarly, the [defendant's] presence outside the home was the basis for the State's theory that the [defendant] acted in a premeditated and deliberate way.

A hearing on defendant's motion was held on 11 May 2011. During the hearing, defendant signed an Affidavit Supporting the Motion for Post-Conviction Independent Testing of DNA and Other Evidence. In his motion, defendant makes the following averments:

> 1. That I was convicted of first degree murder based on felony murder and premeditation and deliberation;
>
> 2. That I am actually innocent of first degree murder because:
>
>   a. I did not premeditate and deliberate, and form a specific intent to kill Gail Tice [Hewson];
>
>   b. I ~~did not shoot~~ do not recall whether or not I shot into an occupied dwelling.
>
> 3. I am actually innocent of first degree murder and therefore entitled to relief under N.C.G.S.15A-269.

(Edits included in the original document).

On 15 July 2011, the trial court entered an order denying defendant's motion for post-conviction independent DNA testing. The court made the following findings of fact:

> 1. The affidavit presented to the Court is insufficient, specifically the part of the affidavit in which the Defendant says that, "I do not recall whether or not I shot into an occupied dwelling."
>
> 2. DNA testing is not material to the Defendant's defense inasmuch as he was convicted under both theories of first degree murder, premeditation and deliberation as well as felony murder.
>
> Therefore, the Court concludes that the Defendant has not met the requirements set out in N.C.G.S.15A-269.

Defendant gave notice of appeal following the trial court's oral rendering of its judgment at the conclusion of the hearing.

On appeal, defendant raises the following issues: Whether the trial court erred (I) in finding that the affidavit was insufficient under N.C. Gen. Stat. § 15A-269; (II) in finding that DNA testing was not material to defendant's defense; and (III) in concluding that defendant had not met the requirements for requesting post-conviction DNA testing pursuant to N.C.G.S. § 15A-269.

Grounds for Appeal

We note that pursuant to North Carolina General Statutes, section 15A-270.1, "[a] defendant may appeal an order denying the defendant's motion for DNA testing under this Article, including by an interlocutory appeal." N.C. Gen. Stat. § 15A-270.1 (2011); *see also State v. Norman*, 202 N.C. App. 329, 688 S.E.2d 512 (2010).

Issue

We first address argument II.

II

[1] Defendant argues that the trial court erred in finding as fact that DNA testing was not material to defendant's defense. Defendant was convicted of first-degree murder on the basis of both premeditation and deliberation and felony-murder predicated upon discharge of a weapon into occupied property. Defendant contends that the State's theory of the case, presented during his trial in 2005, indicated that the victim was always inside the home and defendant was always outside the home while discharging his handgun into the residence. Defendant notes that evidence collected during the police investiga-

tion of the murder showed that blood was found on defendant's pants, and that the blood was never tested for identification purposes. Defendant contends that if DNA evidence indicates the blood on defendant's pants belonged to the victim, defendant could argue that he was in close proximity to the victim; that he was not shooting at her from outside of the residence; and that he would have the basis for a heat-of-passion defense to first-degree murder based on premeditation and deliberation with a potential reduction in charge to second-degree murder. We disagree.

In making a request for post-conviction DNA testing pursuant to North Carolina General Statutes, section 15A-269,

> (a) [a] defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing . . . if the biological evidence meets all of the following conditions:
>
> (1) *Is material to the defendant's defense.*
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

N.C. Gen. Stat. § 15A-269(a) (2011) (emphasis added). "Favorable evidence is *material* if there is a 'reasonable probability' that its disclosure to the defense would result in a different outcome in the jury's deliberation." *State v. Canady*, 355 N.C. 242, 252, 559 S.E.2d 762, 767 (2002) (quoting *State v. Strickland*, 346 N.C. 443, 456, 488 S.E.2d 194, 202 (1997)) (emphasis added).

In his amended motion for post-conviction testing of DNA evidence, defendant acknowledged that during his criminal trial, evidence was presented that bullets remaining in the gun found outside the victim's residence matched bullets taken from the victim's body.

During the 11 May 2011 hearing on defendant's amended motion for post-conviction independent testing of DNA evidence, the State further described the evidence presented at trial: defendant threatened and assaulted the victim; in the days leading up to her death, the victim took out a 50B domestic violence protection order that was served on defendant; in the week leading up to the shooting, defendant was barred from purchasing a handgun from a local business due to the 50B protection order; the victim turned in weapons in her custody to a sheriff; the victim's 9-1-1 call, recorded the day of her shooting and played for the jury, included the victim's statements that her husband[, defendant,] was shooting at her; all shell casings were found outside the residence; the trajectory of the bullets suggested that the bullets were fired into the residence from outside; the gun used to shoot the victim had be reloaded to continue shooting; and, after placing defendant under arrest at the scene, law enforcement had to break in the door to enter the residence and aid the victim.

Also, in support of his motion for employment of funds seeking post-conviction DNA testing, defendant attached a search warrant that was issued in connection with the murder investigation of his wife. The affiant in support of the search warrant stated the following:

> On 9-29-04, the New Hanover County 911 Center received a phone call from a female calling from 1721 Fontenay Place. The female caller did not identify herself but stated that she had been shot and that her husband keeps shooting her. Officer A.C. Anderson was the first officer on the scene. Upon Officer Anderson's arrival, she observed the defendant, Mr. Robert Hewson, standing outside of the residence with his hands in the air. Mr. Hewson was handcuffed and detained, and according to Officer Anderson, the only statement that he made was that he had not been inside of the house. However, Officer Anderson observed blood stains on Mr. Hewson's pants. Officer K. Tully and M. Lewis entered the residence and located the victim, Mrs. Gail Hewson, lying on the floor of a lounge type room. Gail Hewson appeared to have been shot multiple times.
>
> According to Det. Benton, upon a preliminary inspection of the residence, broken glass was observed on the living room couch and there were bullet holes in the window directly behind the couch, indicating that the shooter was outside shooting into the residence. There was also a blood trail that

> led from the living room, down a hallway, and into the room where Gail Hewson was located by Officer Tully and Lewis. Four bullet holes were also observed in the windows of the room where Gail Hewson was located. Additionally, Det. Benton noted that spent shell casings were located outside of the residence, as well as in the room w[h]ere Gail Hewson was found, and black revolver [sic] was located outside on the front porch of the residence.

We find that the evidence submitted by defendant in support of his motion supports the jury's verdict of guilty on the charge of first-degree murder based on premeditation and deliberation and based on the felony-murder rule, and does not support a jury instruction on the heat-of-passion defense. Defendant's contention that he was in close proximity to the victim at some point, even if supported by DNA evidence, does not minimize the significance of or otherwise refute the substantial evidence that defendant fired a gun into occupied property and that the victim suffered fatal gunshot wounds as a result. Based on this record, there is no reasonable probability that the disclosure of DNA evidence in support of defendant's contention would result in a different outcome in a jury's deliberation. *See id.* Therefore, we affirm the trial court's determination that DNA testing was not material to defendant's defense and, consequently, the trial court's conclusion that defendant's motion failed to meet the criteria for a request for post-conviction DNA testing pursuant to N.C.G.S. §15A-269(a)(1).

[2] Further, because we hold that the trial court had sufficient basis to determine that post-conviction independent DNA testing was not material to defendant's defense and, thus, had grounds to deny defendant's motion for post-conviction DNA testing made pursuant to N.C.G.S. § 15A-269(a), we need not address defendant's remaining arguments.

Affirmed.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA v. LACY BARNHART

No. COA11-623

(Filed 17 April 2012)

Burglary and Unlawful Breaking or Entering—larceny—assault on a female—sufficient evidence—motion to dismiss properly denied

The trial court did not err by denying defendant's motion to dismiss charges of first-degree burglary, larceny after breaking and entering, and assault on a female because there was substantial evidence that defendant was the perpetrator of the crimes for which he was convicted.

Appeal by defendant from judgments entered 27 January 2011 by Judge Douglas B. Sasser in Hoke County Superior Court. Heard in the Court of Appeals 15 December 2011.

Roy Cooper, Attorney General, by Thomas M. Woodward, Special Deputy Attorney General, for the State.

Winifred H. Dillon, for the defendant.

THIGPEN, Judge.

Lacy Barnhart ("Defendant") appeals from judgments convicting him of first-degree burglary, larceny after breaking and entering, and assault on a female, challenging the sufficiency of the evidence to show that Defendant was the perpetrator of the offenses. We find no error in the trial court's denial of Defendant's motion to dismiss.

The evidence of record tends to show the following: At approximately 11:00 p.m. on 8 April 2010, Jeanne Morgan ("Morgan"), who lived alone, locked all of the doors to her home in Hoke County, North Carolina, and went to bed. At approximately 1:00 a.m. on 9 April 2010, Morgan was awakened by a male intruder lying on top of her and pinning her to the bed. Morgan began screaming, and the intruder told her to "[s]hut the [expletive deleted] up[.]" Morgan complied.

The intruder then dragged Morgan out of bed and demanded that Morgan show him where she kept her jewelry and money. The intruder would not allow Morgan to turn on the light, and he held Morgan tightly by wrapping his left arm around her neck. Morgan showed him where she kept her jewelry case and a fifty-dollar bill, which the intruder took. The intruder then told Morgan to return to

bed and remain there until after she heard the intruder leave. Morgan again complied, after which she called the police. Morgan later discovered that her cell phone and a small change purse from her pocketbook, which she kept in the living room, were also missing.

Morgan testified at trial that the intruder was wearing gloves, and because of his "deeper voice[,]" she believed the man was "an older person, not a young person[.]" Morgan also testified that although she never saw his face, she did see that the intruder was African-American. Morgan said she and the intruder were approximately the same height.

Officer James Fowler ("Officer Fowler") of the Raeford Police Department testified that on 9 April 2010 at approximately 1:00 a.m. he responded to a call concerning a breaking and entering. Shortly thereafter, he arrived at Morgan's home. Officer Fowler and other officers of the Raeford Police Department began canvassing the neighborhood, searching for the intruder and other evidence pertaining to the breaking and entering.

At approximately 3:00 a.m., Officer Fowler stopped by a twenty-four hour convenience store located near Morgan's home. Officer Fowler asked the store clerk to be on the lookout for anyone attempting to sell jewelry or "suspiciously walking around." Officer Fowler returned to the convenience store between 5:00 and 6:00 a.m. after receiving a call about a suspicious male sleeping in a laundromat next door. This man was not doing laundry, and was later identified as Defendant.

Guy Morris ("Morris"), who was working as the security guard at the convenience store and the laundromat on 9 April 2010, testified that he saw Defendant enter the laundromat at approximately 2:00 a.m. Defendant then went to sleep inside the laundromat, after which Morris awoke Defendant and asked him to leave. Defendant left the laundromat and entered the convenience store, where he made a purchase with a fifty-dollar bill. After the transaction, Defendant returned to the laundromat. Morris testified that he observed the laundromat continuously from midnight on 9 April 2010 until the police arrived later the same morning to speak with Defendant. Morris said no one other than Defendant had entered the laundromat during that time.

Detective Herbert Greene ("Detective Greene") testified that he questioned Defendant on 9 April 2010 about the fifty-dollar bill he had used to purchase items at the convenience store. Defendant said he

had won the fifty-dollar bill in a poker game at his cousin's house. However, Defendant would not give his cousin's name, address, or telephone number. Defendant told Sergeant Bryan Garwicki ("Sergeant Garwicki") he won the fifty-dollar bill at his brother's house.

Sergeant Garwicki searched the laundromat and recovered a change purse in an open box next to the dryers. A cell phone and several items of jewelry, which met the description given by Morgan of the stolen jewelry, were inside the change purse. At trial, Morgan identified the change purse and jewelry recovered by Sergeant Garwicki as her property, which had been stolen from her home on 9 April 2010. Sergeant Garwicki also recovered two pairs of rubber gloves in a trash can opposite the dryers.

Defendant was placed under arrest and indicted on charges of first-degree burglary, larceny after breaking and entering, possession of stolen goods, second-degree kidnapping, assault on a female, and injury to real property. After the trial in this case, the jury acquitted Defendant of the kidnapping charge and found him guilty of the remaining charges. The trial court arrested judgment on the possession of stolen goods and injury to real property convictions and entered judgments convicting Defendant of first-degree burglary, larceny after breaking and entering, and assault on a female. The trial court imposed the sentences of 115 to 147 months incarceration for the first-degree burglary conviction, 18 to 22 months incarceration for the larceny after breaking and entering conviction, and 150 days incarceration for the assault on a female conviction, to be served consecutively. From these judgments, Defendant appeals.

I: Motion to Dismiss

In Defendant's first and only argument on appeal, he contends the trial court erred by denying his motion to dismiss the charges of first-degree burglary, larceny after breaking and entering, and assault on a female, because there is not substantial evidence that Defendant was the perpetrator of the crimes for which he was convicted. We disagree.

When reviewing a challenge to the denial of a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines "whether the State presented substantial evidence in support of each element of the charged offense." *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005) (quotation

omitted). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (quotation omitted). "In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *Id.* (quotation omitted). Additionally, a "substantial evidence inquiry examines the sufficiency of the evidence presented but not its weight," which remains a matter for the jury. *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (quotation omitted). Thus, "[i]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Id.* (quotation omitted).

Here, Defendant challenges the sufficiency of the evidence that Defendant was the perpetrator of the crimes charged. Defendant specifically contends that because there was no physical evidence linking Defendant to the crimes in this case; because Morgan could not identify or specifically describe the intruder; and because Defendant did not make any inculpatory statements, there was no substantial evidence that Defendant committed the crimes. We find this argument unconvincing.

The State presented the following evidence: Morgan described Defendant as an African American male who was approximately her height—a description which, although nonspecific, is not inconsistent with Defendant's appearance. The crimes occurred at approximately 1:00 a.m. on 9 April 2010 at Morgan's home. The intruder took a fifty-dollar bill, a change purse, a cell phone, and jewelry. Morris observed Defendant going into the laundromat near Morgan's home at approximately 2:00 a.m. the same morning. The change purse, cell phone, and jewelry that were stolen from Morgan's home were found hidden in a box in the laundromat. Morris testified that he observed the laundromat continuously from midnight on 9 April 2010 until the time that the police arrived to question Defendant. Morris said Defendant was the only person who entered the laundromat during that period of time. Defendant admitted he used a fifty-dollar bill to purchase items at the convenience store that morning, and Defendant gave the police conflicting stories as to where he got the fifty-dollar bill.

Defendant argues this case is analogous to *State v. Malloy*, 309 N.C. 176, 305 S.E.2d 718 (1983), in which the Supreme Court held that there was insufficient evidence to support the defendant's conviction for possession of stolen firearms. In *Malloy*, the Court determined whether the defendant possessed certain stolen firearms located in the trunk of a car parked next to the location at which the defendant was working on another automobile. *Id.* at 177, 305 S.E.2d at 719. The Supreme Court held that the record did not contain sufficient evidence to establish that the defendant actually or constructively possessed the stolen firearms because the only evidence linking the defendant to the stolen firearms was his physical proximity to them. *Id.* at 179-80, 305 S.E.2d at 720-21.

We believe this case is distinguishable from *Malloy*. Here, Defendant's proximity to the stolen items found in the laundromat was not the only evidence incriminating Defendant. Defendant's appearance was consistent with the general description given by Morgan of the intruder. Additionally, Defendant gave the police conflicting stories regarding where he obtained the fifty-dollar bill, and he refused to give the police any contact information for the "brother" or "cousin" from whom Defendant said he had received the fifty-dollar bill. Detective Greene gave the following testimony, regarding Defendant's response to his questions about Defendant's "cousin":

> The reason why I asked for a phone number is because . . . "If I call your [cousin's] phone number, could he tell me . . . that you were at his house gambling that night?" And [Defendant] told me no. . . . I didn't understand what he meant by no . . . and I said, "Well, why do you mean no? You know, you told me you were at your cousin's house gambling." . . . I said, "Would your cousin tell me that?" And he said no.

Other facts also distinguish this case from *Malloy*. In *Malloy*, officers testified that the defendant was not the only person near the automobile containing the stolen firearms: "There were two other individuals in the parking lot." *Malloy*, 309 N.C. at 177, 305 S.E.2d at 719. Furthermore, the police first found the defendant in *Malloy* "[a] day or two" after the firearms were stolen, and the police did not discover the stolen firearms until another day had passed. *Id.* at 177-78, 305 S.E.2d at 719.

In this case, testimony reveals that Defendant was the only person seen entering the laundromat where the stolen items were discovered in the relevant hours on the early morning in question, and

Defendant was seen entering the laundromat approximately one hour after the items were stolen. While we recognize that Defendant did not have exclusive control of the laundromat where the stolen items were found, *see State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) ("Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession"), we believe there was substantial evidence of other incriminating circumstances sufficient to establish Defendant's constructive possession of the stolen items in this case, *see State v. Alston*, 193 N.C. App. 712, 716, 668 S.E.2d 383, 386 (2008), *aff'd per curiam*, 363 N.C. 367, 677 S.E.2d 455 (2009) ("Incriminating circumstances relevant to constructive possession [have included] . . . evidence that defendant . . . was the only person who could have placed the contraband in the position where it was found").

In light of the foregoing evidence, and viewing the evidence in the light most favorable to the State, we believe the State presented substantial evidence that Defendant was the perpetrator of the first-degree burglary, larceny after breaking and entering, and assault on a female at Morgan's house on 9 April 2011. Therefore, we conclude the trial court did not err in denying Defendant's motion to dismiss.

NO ERROR.

Judges ERVIN and BEASLEY concur.

STATE OF NORTH CAROLINA v. MONTREZ BENJAMIN WILLIAMS, DEFENDANT

No. COA11-1496

(Filed 17 April 2012)

1. Evidence—witness testimony—prior crimes or bad acts—opened the door

The trial court did not commit plain error in a first-degree murder case when it allowed the State to introduce evidence that defendant had been charged with and convicted of crimes involving armed robberies. Defendant's mother's testimony as to his peaceful nature opened the door to the State's cross examination as to his prior crimes. Further, the State did not seek to introduce

any portion of defendant's juvenile *record*, so no *in camera* hearing was needed under N.C.G.S. § 7B-3000(f) and the evidence fell squarely under Rule 404(a).

2. Evidence—witness testimony—co-defendant in prison for murder—no plain error

Defendant's argument in a first-degree murder case that the trial court committed plain error when it allowed the State to introduce evidence that defendant's "co-defendant" was already in prison for murder was overruled. Even assuming that the person characterized as a "co-defendant" was involved in the same events for which defendant was charged, and that the trial court erred in allowing evidence of this co-defendant's prior conviction for murder, in light of the remaining evidence, any alleged error by the trial court did not amount to plain error.

Appeal by defendant from judgments entered 15 June 2011 by Judge Hugh B. Lewis in Superior Court, Mecklenburg County. Heard in the Court of Appeals 22 March 2012.

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

Glenn Gerding, for defendant-appellant.

STROUD, Judge.

Defendant appeals his two convictions for first degree murder. For the following reasons, we find no error.

I. Background

The State's evidence tended to show that on 1 July 2008, defendant confessed to shooting two people in self-defense; an eyewitness told detectives that defendant had committed the shootings. No weapons were found on or around either of the victims and both were shot more than once. On or about 14 July 2008, defendant was indicted for two counts of murder. On 25 May 2011, defendant filed notice that he "intend[ed] to offer the defense of self-defense[.]" After a trial by jury, defendant was found guilty of two counts of first degree murder. Defendant was twice sentenced to life imprisonment without parole. Defendant appeals.

II. Standard of Review

Defendant argues only plain error before this Court.

> The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation, quotation marks, ellipses, and brackets omitted).

III. Other Crimes

[1] Defendant called his mother to testify as to his character, and she specifically described defendant as a "peacemaker" and stated that she had not seen any "kind of violent part in" defendant. On cross examination, the State questioned defendant's mother as to her knowledge that defendant had previously been "convicted of crimes" including armed robberies and that he had "pistol whipped" a person; defendant's mother acknowledged most of these actions by defendant but held to her testimony as to defendant's peaceful nature. Defendant first contends that "the trial court committed plain error when it allowed the State to introduce evidence . . . [defendant] had been charged with and convicted of crimes involving armed robberies even though . . . [defendant] never testified." (Original in all caps.)

N.C. Gen. Stat. § 8C-1, Rule 404 provides in pertinent part as follows:

> (a) Character evidence generally.—Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) Character of accused.—Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same[.]

N.C. Gen. Stat. § 8C-1, Rule 404(a)(1) (2007). N.C. Gen. Stat. § 8C-1, Rule 405(a) provides that "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." N.C. Gen. Stat. § 8C-1, Rule 405(a) (2007).

Defendant argues that his mother's testimony as to his peaceful nature did not "open the door" to the State's cross examination as to his prior crimes; we disagree. In *State v. Roseboro*, 351 N.C. 536, 528 S.E.2d 1, *cert. denied*, 531 U.S. 1019, 148 L.Ed. 2d 498 (2000), our Supreme Court determined that evidence of defendant's prior violent acts against his wife was admissible, as defendant had called witnesses to testify to his peaceful nature:

> A criminal defendant is entitled to introduce evidence of his good character, thereby placing his character at issue. The State in rebuttal can then introduce evidence of defendant's bad character. Such evidence offered by the defendant or the prosecution in rebuttal must be a pertinent trait of his character. . . . Defendant placed his character at issue by having members of his family testify about his reputation for nonviolence or peacefulness, a pertinent trait of his character. In accordance with Rule 405(a), the prosecutor then cross-examined these witnesses about whether they knew of or had heard any accusations that defendant had hit or been violent toward his wife.
>
> Defendant argues that the prosecutor failed to limit his inquiry only to specific instances of misconduct by defendant by asking very general questions about whether the witnesses knew about any violence in the marriage or allegations of violence. Given that defendant's character witnesses testified that defendant was not a violent person, the prosecution was entitled to probe their knowledge of defendant's violence in his marriage. Such an inquiry was directed at specific instances of defendant's misconduct in the context of his marriage, not just general charges of violent behavior. On this basis, defendant's argument that the prosecutor elicited irrelevant information concerning problems in defendant's marriage is without merit.

351 N.C. 536, 553, 528 S.E.2d 1, 12 (citations and quotation marks omitted). Just as in *Roseboro*, here defendant's mother also testified that defendant was not a violent person, placing "a pertinent trait of

his character" at issue. *Id.* The State's questions regarding defendant's prior crimes fall squarely under Rule 404(a)(1), as they were in rebuttal to the defendant's character evidence as to his peaceful nature.

Defendant further argues that even if his mother's testimony "opened the door" to the State's cross examination, his prior crimes were juvenile adjudications, and the use of evidence of a juvenile adjudication is limited by N.C. Gen. Stat. § 7B-3000(f), which provides:

> The juvenile's record of an adjudication of delinquency for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult may be used in a subsequent criminal proceeding against the juvenile either under G.S. 8C-1, Rule 404(b), or to prove an aggravating factor at sentencing under G.S. 15A-1340.4(a), 15A-1340.16(d), or 15A-2000(e). The record may be so used only by order of the court in the subsequent criminal proceeding, upon motion of the prosecutor, after an in camera hearing to determine whether the record in question is admissible.

N.C. Gen. Stat. § 7B-3000(f) (2007). Defendant argues that even if his prior adjudications were admissible, the trial court failed to hold an *in camera* hearing to determine the admissibility of his juvenile record.

Defendant's reliance upon N.C. Gen. Stat. § 7B-3000(f) is misplaced for two reasons. First, N.C. Gen. Stat. § 7B-3000(f) specifically addresses the use of juvenile court *records*. N.C. Gen. Stat. § 7B-3000(a) defines the juvenile "record" as this term is used by N.C. Gen. Stat. § 7B-3000(f):

> The clerk shall maintain a complete record of all juvenile cases filed in the clerk's office to be known as the juvenile record. The record shall include the summons and petition, any secure or nonsecure custody order, any electronic or mechanical recording of hearings, and any written motions, orders, or papers filed in the proceeding.

N.C. Gen. Stat. § 7B-3000(a) (2007).

The State did not seek to introduce any portion of defendant's juvenile *record*, so no *in camera* hearing was needed. *See* N.C. Gen. Stat. § 7B-3000(f). Juvenile records include far more information than the simple fact of an adjudication. *See* N.C. Gen. Stat. § 7B-3000(a). The State's questions on cross examination only inquired as to defendant's mother's knowledge of defendant's prior crimes. Secondly, N.C. Gen. Stat. § 7B-3000(f) mentions use of juvenile records under Rule

404(b), not Rule 404(a)(1), and this evidence falls squarely under Rule 404(a), not Rule 404(b).[1] Accordingly, this argument is overruled.

IV. Co-Defendant in Prison

[2] During defendant's trial, on direct examination by the State, Ms. Shay Hammond testified that on the day of the murders she had seen defendant with "Black." The State questioned Ms. Hammond about Black's current whereabouts and she testified that he was in prison for "[s]everal things" including murder. Defendant also contends "the trial court committed plain error when it allowed the State to introduce evidence . . . [defendant's] co-defendant was already in prison for murder." (Original in all caps.) We note that there is no evidence in the record before us that defendant had a co-defendant; our record indicates defendant was tried alone. It is also not clear from the testimony that the "murder" Black was imprisoned for was the same incident which led to defendant's charges. However, assuming that the person characterized as a "co-defendant" was involved in the same events for which defendant was charged, and that the trial court erred in allowing in evidence of this co-defendant's prior conviction for murder, in light of the evidence we have already noted, including defendant's confession, the fact that no weapons were found on or around either of the victims, and the evidence presented showing both of the victims were shot more than once, we cannot say any alleged error by the trial court amounted to plain error. *See id.*

V. Conclusion

For the foregoing reasons, we find no plain error.

NO ERROR.

Judges ELMORE and STEELMAN concur.

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1. We note that although Rule 404(b) is not applicable in this case, some juvenile records are admissible under Rule 404(b), including evidence of "an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult[.]" N.C. Gen. Stat. § 7B-3000(f).

IN THE MATTER OF A.M. (JUVENILE)

No. COA11-1380

(Filed 17 April 2012)

Juveniles—delinquency—failure to order publication of witness list—failure to remedy violation of mandate—prejudicial

The trial court erred in a juvenile case by failing to order petitioner to publish a list of the witnesses it intended to call at trial. The court erred in failing to allow petitioner's motion in *limine*, continue the case, or find another way to remedy the situation created by the petitioner's failure to comply with the plain mandate of N.C.G.S. § 7B-2300(b). Petitioner's failure to comply with a statutory mandate and the court's failure to remedy the situation was prejudicial.

Appeal by juvenile from orders entered 24 March 2011 by Judge Paul A. Hardison and 19 May 2011 by Judge Carol Jones Wilson in District Court, Onslow County. Heard in the Court of Appeals 22 March 2012.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Creecy Johnson, for the State

Geeta Kapur, for juvenile-appellant.

STROUD, Judge.

Juvenile appeals adjudication and disposition orders. For the following reasons, we order that juvenile receive a new hearing.

I. Background

On 29 October 2010, three petitions ("October petitions") were filed against juvenile for disorderly conduct at school, misdemeanor assault, and delinquency based upon juvenile allegedly "kick[ing] another student in the groin area of his body, causing this student to fall to the ground in pain." On 8 December 2010, a petition ("December petition") was filed against juvenile for delinquency based upon juvenile allegedly "wantonly and willfully set[ting] fire to and caus[ing] to be burned an uninhabited house[.]" (Original in all caps.) On 24 March 2011, the court heard both the October and December petitions. Petitioner dismissed its petitions as to disorderly conduct and assault inflicting serious injury and the juvenile

admitted the allegation of simple assault, leaving the delinquent act alleged in the December petition, "wantonly and willfully set[ting] fire to and caus[ing] to be burned an uninhabited house[,]" (original in all caps), as the only contested matter for consideration at the adjudicatory hearing. Also on 24 March 2011, the court adjudicated the juvenile delinquent based upon the juvenile's admission of simple assault and upon the December petition. On 19 May 2011, the court entered a "JUVENILE LEVEL 2 DISPOSITION ORDER (DELINQUENT)" requiring juvenile be placed on probation for 12 months, cooperate with a community commitment program, pay $500.00 in restitution, abide by a curfew set by a "COURT COUNSELOR AND/OR PARENT[,]" not associate with "ANYONE DEEMED INAPPROPRIATE BY COURT COUNSELOR AND/OR PARENT[,]" not be anywhere it is "UNLAWFUL FOR [a] JUVENILE TO BE[,]" cooperate with a wildness program, be on house arrest by "be[ing] with parents or grandparents at ALL times[,]" "be confined . . . [at] an approved detention facility" for fourteen days, perform community service, and "FOLLOW ALL OTHER COURT COUNSELORS RECOMMENDATIONS[.]" Juvenile appeals.

II. Witness List

Juvenile contends that "the trial court erred when it failed to order the petitioner to publish a list of the witnesses it intended to call at trial when the juvenile followed the statutory requirement of filing a written request for the list." (Original in all caps.) "[Juvenile] alleges a violation of a statutory mandate, and alleged statutory errors are questions of law. A question of law is reviewed *de novo*. Under the *de novo* standard, the Court considers the matter anew and freely substitutes its own judgment for that of the lower court." *State v. Reeves*, ___ N.C. App. ___, ___, 721 S.E.2d 317, 322 (2012) (citations, quotation marks, and brackets omitted).

N.C. Gen. Stat. § 7B-2300(b) provides that

> [u]pon motion of the juvenile, *the court shall order the petitioner to furnish the names of persons to be called as witnesses.* A copy of the record of witnesses under the age of 16 shall be provided by the petitioner to the juvenile upon the juvenile's motion if accessible to the petitioner.

N.C. Gen. Stat. § 7B-2300(b) (2009) (emphasis added).

On 21 March 2011, juvenile filed a "MOTION IN LIMINE FOR THE STATE TO DISCLOSE THE PRIOR CRIMINAL HISTORY AND

RECORDS OF ALL STATE'S WITNESSES AND A LIST OF WITNESSES IT INTENDS TO CALL AT TRIAL[.]" According to the transcript, the petitioner provided the names of some witnesses to juvenile prior to the hearing, but the court never addressed juvenile's motion in limine. On 24 March 2011, the day of juvenile's hearing, the petitioner for the first time disclosed a new witness; this witness was the only eyewitness to testify that she had seen juvenile set a fire. Juvenile's attorney moved to continue the hearing so she could "do some investigation[.]" Petitioner's counsel claimed that it only became aware of the witness "today" and had given juvenile's attorney an opportunity to speak with the witness earlier that day. The court denied the motion to continue. However, during the witness' testimony, she testified she had received a subpoena "back in December[.]"

While it appears from the transcript that more than one individual from the district attorney's office handled this case, it also appears clear from the witness's testimony that petitioner was aware of her as a witness long before the date of juvenile's hearing. Petitioner's brief essentially concedes this point. Furthermore, the witness was an important one as she was the only eyewitness to testify that she saw juvenile start a fire. N.C. Gen. Stat. § 7B-2300(b) mandates that when requested the petitioner shall disclose the names of witnesses to juvenile, and it is clear that this witness was certainly material to the case against juvenile. *Contrast In re Coleman*, 55 N.C. App. 673, 673-74, 286 S.E.2d 621, 622 (1982) (concluding that respond-ent should not receive a new hearing where State did not disclose a document but it was unclear "(1) whether the document contains information required by statute to be disclosed, and (2) whether the information would be favorable or material to respondent's case"). We thus agree with juvenile that the court erred in failing to allow her motion in limine, continue the case, or find another way to remedy a situation created by the petitioner's failure to comply with the plain mandate of N.C. Gen. Stat. § 7B-2300(b). *See* N.C. Gen. Stat. § 7b-2300(b). Accordingly, we conclude that the petitioner's failure to comply with a statutory mandate and the court's failure to remedy the situation was prejudicial as with more notice juvenile may have been able to impeach this material witness and thus may not have been adjudicated delinquent for setting a fire and would not have received the disposition as ordered by the court. *See generally State v. Godley*, 140 N.C. App. 15, 26, 535 S.E.2d 566, 574-75 (2000) ("To show prejudicial error, a defendant has the burden of showing that there was a rea-

sonable possibility that a different result would have been reached at trial if such error had not occurred." (citation and quotation marks omitted)), *disc. review denied*, 353 N.C. 387, 547 S.E.2d 25, *cert denied*, 532 U.S. 964, 149 L.Ed. 2d 384 (2001).

III. Conclusion

For the foregoing reasons, we conclude that juvenile must receive a new hearing. As juvenile is receiving a new hearing, we need not address her other issue on appeal.

NEW HEARING.

Judges ELMORE and STEELMAN concur.

STATE OF NORTH CAROLINA v. JAMES EMMETT LONG, JR.

No. COA11-962

(Filed 17 April 2012)

1. Appeal and Error—time for appeal elapsed—writ of certiorari granted

Defendant's petition for writ of certiorari in a probation violation case was granted where defendant and his appointed counsel both attested that defendant gave counsel adequate notice of his desire to appeal from the court's judgments but defense counsel admitted that he filed written notice of appeal only after the time for taking appeal from said judgments had elapsed.

2. Probation and Parole—judgment revoking probation—original judgments—impermissible collateral attack—appeal dismissed

Defendant's appeal from the trial court's judgments revoking his probation was dismissed as defendant's brief on appeal only asserted error with respect to the original judgments in which the trial court imposed and suspended seven consecutive sentences pursuant to defendant's guilty plea. This challenge was an impermissible collateral attack on the original judgments.

Appeal by defendant from judgments entered 7 March 2011 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 3 April 2012.

Roy Cooper, Attorney General, by Munje B. Foh and Laura E. Parker, Assistant Attorneys General, for the State.

MARTIN, Chief Judge.

On 2 July 2010, defendant James Emmett Long, Jr. pled guilty to one count each of felonious breaking or entering, larceny after breaking or entering, felonious larceny, attempted felonious breaking or entering, conspiracy to commit breaking or entering, possession of burglary tools, and breaking or entering into a motor vehicle. He was sentenced to three consecutive terms of nine to eleven months imprisonment, and four consecutive terms of six to eight months imprisonment, which terms were suspended. Defendant was placed on supervised probation for a period of thirty-six months.

As a condition of his probation, defendant agreed to successfully complete the Triangle Residential Options For Substance Abusers, Inc. ("TROSA") program, which is a two-year residential substance abuse recovery program in Durham, North Carolina. On 20 December 2010, defendant's probation officer filed seven probation violation reports indicating that defendant willfully failed to follow the rules of the TROSA program, that he was "unsatisfactorily discharged" from the program on 10 December 2010, that he left the program "without waiting for his probation officer to be notified," and that he "ha[d] absconded supervision" because "his whereabouts are unknown at this time." After a hearing on the matter during which defendant "admitted the willful violation of his probation in all cases," on 7 March 2011, the trial court revoked defendant's probation and activated the seven suspended sentences. Defense counsel sought to appeal from the judgments revoking defendant's probation by filing written notice of appeal on 31 March 2011, and by filing a petition for writ of certiorari on 22 August 2011.

A party entitled to appeal from an order or judgment rendered in a criminal action "may take appeal by (1) giving oral notice of appeal at trial, or (2) filing notice of appeal . . . within fourteen days after entry of the judgment." N.C.R. App. P. 4(a). "[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005). However, "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judg-

ments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C.R. App. P. 21(a)(1).

[1] In the present case, defendant did not give timely written or oral notice of appeal from the 2011 judgments revoking his probation and activating his suspended sentences. Although defendant and his appointed counsel both attest that defendant gave counsel adequate notice "of his desire to appeal" from the court's 2011 judgments, and the record includes copies of notes written by defendant to defense counsel indicating the same, defense counsel admits that he filed written notice of appeal only after the time for taking appeal from said judgments had elapsed. Therefore, we grant defendant's petition for writ of certiorari with respect to the judgments revoking his probation entered on 7 March 2011.

[2] Nevertheless, although defendant's petition for writ of certiorari sought review of the 2011 judgments revoking his probation, on appeal, defendant only asserts error with respect to the original judgments entered on 2 July 2010, in which the trial court imposed and suspended seven consecutive sentences pursuant to defendant's guilty plea. Specifically, defendant contends the trial court lacked jurisdiction to accept his plea and to suspend and later activate the sentences on the offenses of felonious breaking or entering and larceny after breaking or entering under File No. 10 CRS 052224, because defendant was not indicted on these offenses and did not effectively waive the State's responsibility to charge him by a bill of indictment.

When appealing from an order activating a suspended sentence, "inquiries are permissible only to determine [(1)] whether there is evidence to support a finding of a breach of the conditions of the suspension, or [(2)] whether the condition which has been broken is invalid because it is unreasonable or is imposed for an unreasonable length of time." *State v. Noles*, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971) (citing *State v. Caudle*, 276 N.C. 550, 553, 173 S.E.2d 778, 781 (1970)). " '[W]hile it is true that a defendant may challenge the jurisdiction of a trial court, such challenge may be made in the appellate division *only if and when* the case is properly pending before the appellate division.' " *State v. Jamerson*, 161 N.C. App. 527, 529, 588 S.E.2d 545, 547 (2003) (emphasis added) (quoting *State v. Absher*, 329 N.C. 264, 265 n.1, 404 S.E.2d 848, 849 n.1 (1991) (per curiam)). Thus, "[a] defendant on appeal from an order revoking probation may not challenge his adjudication of guilt," *State v. Cordon*, 21 N.C. App. 394,

397, 204 S.E.2d 715, 717, *cert. denied*, 285 N.C. 592, 206 S.E.2d 864 (1974), as "[q]uestioning the validity of the original judgment where sentence was suspended on appeal from an order activating the sentence is . . . an impermissible collateral attack." *Noles*, 12 N.C. App. at 678, 184 S.E.2d at 410.

In other words, in the present case, defendant could have appealed his 2 July 2010 judgments as a matter of right or by petition in accordance with the procedures set forth in our statutes and appellate rules. *See State v. Holmes*, 361 N.C. 410, 413, 646 S.E.2d 353, 355 (2007); *see, e.g.*, N.C. Gen. Stat. § 15A 1342(f) (2011); N.C. Gen. Stat. § 15A 1415(b)(2) (2011); N.C. Gen. Stat. § 15A 1444 (2011); N.C.R. App. P. 4(a); N.C.R. App. P. 21(a)(1). However, because defendant did not timely appeal by right or by petition from the 2 July 2010 judgments entered upon his guilty plea and only "now attempts to attack the[se] sentences imposed and suspended in [2010]" in an appeal from the 7 March 2011 judgments revoking his probation, "[w]e conclude, consistent with three decades of Court of Appeals precedent, that this challenge is an impermissible collateral attack on the original judgments." *See Holmes*, 361 N.C. at 413, 646 S.E.2d at 355. Accordingly, this appeal must be dismissed.

Petition for writ of certiorari allowed; Appeal dismissed.

Judges BRYANT and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. SHERI MCGAHA SMALLEY

No. COA11-918

(Filed 17 April 2012)

1. Embezzlement—sufficient evidence—agent of corporation

The trial court did not err in an embezzlement case by denying defendant's motion to dismiss the charge as the State's evidence showed that defendant was an agent of the company and not an independent contractor.

2. Embezzlement—sufficient evidence—constructive possession of corporation's money

The trial court did not err in an embezzlement case by denying defendant's motion to dismiss the charge as the State presented sufficient evidence to prove that defendant had constructive possession of the corporation's money.

Appeal by defendant from judgment entered 10 March 2011 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 8 March 2012.

Attorney General Roy Cooper by Assistant Attorney General David D. Lennon for the State.

Robert W. Ewing of Ewing Law Firm, P.C., for defendant.

ELMORE, Judge.

Sheri McGaha Smalley (defendant) appeals from a judgment entered upon a jury conviction of one count of embezzlement. We find no error.

In 1997, Chris Manus started Manus Contracting, Inc. (the company). In 2004, Manus hired defendant to handle the company's finances. Manus gave defendant a signature stamp so that she could sign checks for the company, and defendant was responsible for taking the money that came into the company and distributing it as needed. She worked primarily from her home.

In October 2005, Manus informed defendant that the company no longer needed her services. Manus then requested that defendant return the company's materials to him. However, defendant did not return any of the materials until August 2006, and the materials she returned were incomplete. As a result, Manus contacted Deputy Lori Pierce of the Union County Sheriff's Department. Deputy Pierce investigated the company's bank records, and discovered that defendant had written numerous checks to herself. Deputy Pierce estimated that defendant had paid herself approximately $18,540.00 more than her agreed upon salary.

In July 2007, defendant was arrested for embezzling the company's funds. On 8 March 2011, her case came on for trial by jury. At the conclusion of the State's evidence, defendant moved to dismiss the charges against her for insufficiency of the evidence. The trial

court denied her motion. Defendant did not present any evidence at trial, and at the conclusion of all evidence she renewed her motion. The trial court again denied the motion. Defendant was then convicted of one count of embezzlement. The trial court sentenced her to 6-8 months imprisonment, but suspended the sentence on condition that defendant serve a split sentence of 60 days imprisonment and be placed on 36 months supervised probation. Defendant now appeals.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

[1] Defendant first argues that the trial court erred in denying her motion to dismiss because the State failed to prove that defendant was an agent of the company. Specifically, defendant argues that she was an independent contractor and was therefore not a servant or agent under the embezzlement statute. We disagree.

According to our General Statutes, a person may be criminally liable for the embezzlement of property from a corporation if that person is an agent of the corporation. *See* N.C. Gen. Stat. § 14-90 (2011). "Two essential elements of an agency relationship are: (1) the authority of the agent to act on behalf of the principal, and (2) the principal's control over the agent." *State v. Weaver*, 359 N.C. 246, 258, 607 S.E.2d 599, 606 (2005) (citation omitted).

Here, the State's evidence showed the following: 1) defendant "had full access to [the company's] checking accounts"; 2) defendant "could write checks on her own"; 3) defendant "would delegate the funds" of the company. Thus, we conclude that the State presented sufficient evidence to show that defendant had the authority to act on

behalf of the corporation. The State also presented sufficient evidence to prove that the company had control over defendant's performance. At trial, Manus explained that defendant had several responsibilities he expected her to meet. Manus also testified that he spoke to defendant "[i]n person probably once a week. By telephone, I probably talked to her three, four times a week, sometimes a lot more than that. If she had a question, she would call me." We conclude that when this evidence is viewed in the light most favorable to the State, it is sufficient to prove that the company had the ability to control defendant's performance.

In sum, the State's evidence shows that defendant was an agent of the company and not an independent contractor. As a result, we conclude that the trial court did not err with regards to this issue.

[2] Defendant next argues that the trial court erred in denying her motion to dismiss because the State failed to prove that she received into her possession lawfully the personal property of the company. We disagree.

To be guilty of embezzlement, "[t]he person accused must have . . . *received into his possession lawfully* the personal property of another[.]" *Id.* at 255, 607 S.E.2d at 604 (2005) (citation omitted) (emphasis in original). This Court has held that "the possession required by [statute] to make out a *prima facie* case of embezzlement may be actual or constructive possession." *State v. Jackson*, 57 N.C. App. 71, 77, 291 S.E.2d 190, 194 (1982) (citation omitted). "Constructive possession of goods exists without actual personal dominion over them, but with an intent and capability to maintain control and dominion over them." *Id.* at 76, 291 S.E.2d at 194 (quotations and citations omitted).

In *Jackson*, we held that the defendant had constructive possession of the corporation's goods when, while acting as an agent of the corporation and during the course of his employment there, he took deliveries of meat for the corporation, signed the invoices, and arranged for the diversion of the meat to various places. *See Id.* at 77, 291 S.E.2d at 194.

Here, the State's evidence showed that defendant was given complete access to the corporation's accounts. She was also able to write checks on behalf of the corporation and to delegate where the corporation's money went. Thus, we conclude that the State presented sufficient evidence to prove that defendant had constructive posses-

sion of the corporation's money according to our holding in *Jackson*.

In sum, we conclude that defendant had lawful constructive possession of the company's funds, because she was able to maintain control and dominion of the funds. Thus, we conclude that the trial court did not err with regards to this issue.

No error.

Judges STEELMAN and STROUD concur.

JESSICA LEIGH FINCH, Plaintiff v. CAMPUS HABITAT, L.L.C., Defendant

No. COA11-1485

(Filed 17 April 2012)

1. Attorney fees—breach of contract—notification of intent to seek attorney fees

Plaintiff's argument that pursuant to N.C.G.S. § 6-21.2, defendant failed to properly notify her it was seeking attorney's fees in a breach of contract case was without merit. N.C.G.S. § 6-21.2(5) was inapplicable to this situation.

2. Attorney fees—breach of contract—statutorily allowed amount—award exceeded amount

The trial court erred in a breach of contract case by awarding defendant attorney fees of more than 15% of plaintiff's outstanding rent balance. The trial court awarded attorney fees pursuant to N.C.G.S. § 6-21.2 but awarded ten times the statutorily allowed amount.

Appeal by plaintiff from judgment entered 1 July 2011 by Judge William G. Stewart in District Court, Wilson County. Heard in the Court of Appeals 22 March 2012.

Khot & Associates, PLLC, by Bobby P. Khot, for plaintiff-appellant.

Narron & Holdford, P.A., by I. Joe Ivey, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals judgment requiring her to pay attorney's fees to defendant Campus Habitat, L.L.C. For the following reasons, we reverse and remand the award of attorney's fees.

I. Background

Plaintiff leased a room in a student apartment from defendant Campus Habitat, L.L.C., ("Campus") and this dispute began when plaintiff claimed that defendant Campus had breached the housing agreement ("agreement"), causing her to move out and stop paying rent. On or about 10 March 2010, plaintiff filed a complaint regarding breach of the agreement and requested a declaratory judgment, temporary restraining order, and preliminary injunction. On 12 May 2010, defendant Campus Habitat 2, L.L.C. ("Campus 2") filed a motion to dismiss and defendant Campus Habitat, L.L.C. ("Campus") filed an answer and counterclaimed for breach in the amount of $3,090.00. Defendant Campus also requested "attorney's fees as provided in the Agreement[.]" The agreement between plaintiff and defendant Campus provided that "[r]esident is liable for all damages caused by the Resident's violation of any term of this Agreement. This includes all attorney's fees and collection costs." On 15 April 2011, before the hearing began, plaintiff moved to dismiss defendant Campus 2 as a party; the trial court allowed the motion. On 1 July 2011, the trial court entered a judgment ordering defendant Campus recover $3,090.00 from plaintiff "by way of judgment" and $4,458.50 from plaintiff "as reimbursement for . . . attorney's fees[.]" Plaintiff appeals.

II. Attorney's Fees

The only issues plaintiff raises on appeal are regarding the award of attorney's fees.

> The case law in North Carolina is clear that to overturn the trial judge's determination on the issue of attorneys' fees, the defendant must show an abuse of discretion. However, where an appeal presents a question of statutory interpretation, full review is appropriate, and we review a trial court's conclusions of law *de novo*.

Bruning & Federle Mfg. Co. v. Mills, 185 N.C. App. 153, 155-56, 647 S.E.2d 672, 674 (citations, quotation marks, and brackets omitted), *cert denied*, 362 N.C. 86, 655 S.E.2d 837 (2007).

A. Notice

[1] Plaintiff first claims that pursuant to N.C. Gen. Stat. § 6-21.2 defendant Campus failed to properly notify her it was seeking attorney's fees. In its judgment, the trial court noted it was awarding attorney's fees pursuant to N.C. Gen. Stat. § 6-21.2 which provides:

> The holder of an unsecured note or other writing(s) evidencing an unsecured debt, and/or the holder of a note and chattel mortgage or other security agreement and/or the holder of a conditional sale contract or any other such security agreement which evidences both a monetary obligation and a security interest in or a lease of specific goods, or his attorney at law, shall, after maturity of the obligation by default or otherwise, *notify the maker, debtor, account debtor, endorser or party sought to be held on said obligation that the provisions relative to payment of attorneys' fees in addition to the "outstanding balance" shall be enforced* and that such maker, debtor, account debtor, endorser or party sought to be held on said obligation has five days from the mailing of such notice to pay the "outstanding balance" without the attorneys' fees. If such party shall pay the "outstanding balance" in full before the expiration of such time, then the obligation to pay the attorneys' fees shall be void, and no court shall enforce such provisions.

N.C. Gen. Stat. § 6-21.2(5) (2009) (emphasis added).

In *Wilson Bldg. Co. v. Thorneburg Hosiery Co.*, 85 N.C. App. 684, 355 S.E.2d 815, *disc. review denied*, 320 N.C. 798, 361 S.E.2d 75 (1987), this Court stated:

> The notice provision of G.S. 6-21.2(5) simply provides that the obligor will have five days notice to pay any outstanding balance on the debt before the claimant goes to the expense of employing counsel to collect the balance due. In our opinion, the notice provision has no application in this situation where the obligor has refused to pay Wilson's claim and demanded arbitration pursuant to the terms of the contract. Wilson was forced into the position of having to employ counsel not only to collect its own claim, but also to protect it against Thorneburg's claim because of Thorneburg's demand of arbitration. When Wilson filed its response to Thorneburg's demand for arbitration, and its own claim for the balance due

> on the contract, it clearly notified Thorneburg it was demanding attorneys' fees under the terms of the contract.

Id. at 688-89, 355 S.E.2d at 818.

Here, defendant Campus was in the same position as Wilson. *See id.* at 689, 355 S.E.2d at 818. Plaintiff filed a complaint and thus defendant Campus

> was forced into the position of having to employ counsel not only to collect its own claim, but also to protect it against [the plaintiff's] claim . . . . When [defendant Campus] filed its response to [the plaintiff's] demand . . . and its own claim for the balance due on the contract, it clearly notified [the plaintiff] it was demanding attorneys' fees under the terms of the contract.

Id. Accordingly, N.C. Gen. Stat. § 6-21.2(5) is inapplicable to this situation. *See id. Thus*, this argument is overruled.

B. Amount

[2] Plaintiff next contends the attorney's fees awarded were more than allowed by statute. N.C. Gen. Stat. § 6-21.2(2) provides;

> If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

N.C. Gen. Stat. § 6-21.2(2) (2009). Here, defendant Campus counterclaimed for $3,090.00, the amount owing on the agreement. The trial court found that "[t]he amount owed by the Plaintiff to the Defendant pursuant to the lease agreement for unpaid rent is $3,090.00" and ordered plaintiff pay defendant Campus this amount. The trial court further ordered plaintiff pay $4,458.50 in attorney's fees. Fifteen percent of $3,090.00 is $463.50; the trial court therefore awarded nearly ten times the amount allowed by statute, in violation of N.C. Gen. Stat. § 6-21.2(2). *See id.*

Defendant Campus contends that although the trial court awarded attorney's fees specifically pursuant to N.C. Gen. Stat. § 6-21.2, the trial court could have awarded attorney fees under N.C. Gen. Stat. § 1-263, and the trial court had discretion under N.C. Gen. Stat. § 1-263 to exceed 15% of $3,090.00. However, the trial court here

clearly stated it was awarding attorney's fees pursuant to N.C. Gen. Stat. § 6-21.2. The trial court made no mention in open court or in the judgment of N.C. Gen. Stat. § 1-263 and made no findings of fact or conclusions of law which would indicate that N.C. Gen. Stat. § 1-263 played any part in its determination. In addition, there is no indication in the transcript or communications between the trial court and counsel in the record that N.C. Gen. Stat. § 1-263 was argued or considered as a basis for the award of attorney's fees. Under these circumstances, we cannot assume that the trial court made a clerical error in its reference to N.C. Gen. Stat. § 6-21.2 instead of N.C. Gen. Stat. § 1-263. The award of attorney's fees of more than 15% of the "outstanding balance" is in violation of the stated statute. *Id.* Accordingly, we reverse the award and remand for entry of an award of attorney's fees which is in compliance with N.C. Gen. Stat. § 6-21.2.

III. Conclusion

For the foregoing reasons, we reverse and remand the trial court's award of attorney's fees.

REVERSED and REMANDED.

Judges ELMORE and STEELMAN concur.

STATE OF NORTH CAROLINA v. MARVIN MELLET RAMIREZ

No. COA11-1331

(Filed 17 April 2012)

Constitutional Law—right to counsel—revocation proceedings—waiver of counsel—failure to conduct sufficient inquiry

The trial court erred in a probation revocation proceeding by allowing defendant to proceed without counsel. Defendant had not waived counsel entirely but had waived only assigned counsel and the trial court did not conduct the inquiry as required by N.C.G.S. § 15A-1242 to ensure that defendant wanted to proceed *pro se*.

Appeal by defendant from judgments entered on or about 27 June 2011 by Judge Alma L. Hinton in Superior Court, Pitt County. Heard in the Court of Appeals 4 April 2012.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Gaines M. Weaver, for the State.

John R. Mills, for defendant-appellant.

Diener Law, by Cynthia E. Everson, for defendant-appellant.

STROUD, Judge.

Defendant appeals the revocation of his probation. For the following reasons, we reverse and remand for a new hearing.

I. Background

On or about 11 February 2011, defendant pled guilty to various offenses; defendant was placed on supervised probation. On 16 June 2011, defendant was informed that a hearing would be held regarding his violation of the conditions of probation. On 17 June 2011, defendant signed a "WAIVER OF COUNSEL" form ("waiver form") noting that he waived his "right to *assigned* counsel" but that he did *not* waive his "right to all assistance of counsel which includes my right to assigned counsel and my right to the assistance of counsel." (Emphasis added). Furthermore, on the waiver form defendant did *not* check the box indicating that he "desire[d] to appear in [his] own behalf[.]" In summary, the waiver form indicated that defendant had waived his right to assigned counsel but intended to hire his own counsel and did not desire to proceed *pro se*. On 27 June 2011, at defendant's probation revocation hearing, the following dialogue took place:

> MS. HORNER [State's attorney]: Marvin Ramirez.
>
> Mr. Ramirez is at 61 and 64 on the probation calendar. Mr. Ramirez previously waived counsel on June 17th, 2011. Mr. Ramirez, are you ready to proceed today?
>
> THE DEFENDANT: Yes, ma'am.
>
> MS. HORNER: And are you ready to proceed without a lawyer?
>
> THE DEFENDANT: When I went to my first appearance, I was going—when they asked me did I want to hire a lawyer or have an appointed attorney, I told them I would hire one because of the new charge I had.

MS. HORNER: Your Honor, in this particular case, he did waive on June 17th, 2011; however, because of the anticipated request today, I'm not sure of the Court's position as to reconsidering.

THE COURT: If he waived, we're ready to go.

. . . .

THE COURT: Mr. Ramirez, is there anything you would like to tell me about yourself or your case?

THE DEFENDANT: Your Honor, the reason I don't have no attorney is because I—

THE COURT: I'm not interested.

Defendant admitted to the probation violation and was subsequently sentenced to imprisonment by the trial court. Defendant appeals.

II. Defendant's Right to Counsel

Defendant contends that the trial court erred in allowing him to proceed without counsel as he had not waived counsel entirely but had waived only assigned counsel. We review this issue *de novo*. *State v. Watlington*, ___ N.C. App. ___, ___, 716 S.E.2d 671, 675 (2011).

The State directs this Court's attention to *State v. Warren*, 82 N.C. App. 84, 345 S.E.2d 437 (1986), arguing that in *Warren* the defendant was not entitled to a new probation revocation hearing where "[t]he defendant . . . signed . . . a waiver, the trial court certified that defendant had been advised per G.S. Sec. 1242, and there is no record to support defendant's contention that the waiver of counsel was not knowing, intelligent and voluntary." *Id.* at 89, 345 S.E.2d at 441. However, we find this case distinguishable because in *Warren* the defendant indicated that he planned to represent himself and was waiving his right to all counsel; *id.* at 87, 345 S.E.2d at 440, here, both on defendant's waiver form and before the trial court defendant consistently maintained that he intended to hire an attorney, and he did not intend to proceed *pro se*. Thus, we find this case to be more in line with *State v. McCrowre*, 312 N.C. 478, 322 S.E.2d 775 (1984).

In *McCrowre*, at his arraignment, the defendant signed a waiver of *assigned* counsel stating that he planned to hire counsel. *Id.* at 479, 322 S.E.2d at 776. When defendant's case was called for trial, 13 days later, defendant asked for a continuance stating that he was going to hire an attorney. *Id.* at 479-80, 322 S.E.2d at 776. The trial court con-

tinued the case. *Id.* at 480, 322 S.E.2d at 776. A week later, defendant again appeared before the trial court without an attorney. *Id.* The defendant twice requested the assistance of counsel which the trial court denied because the defendant had waived his right to appointed counsel. *Id.* Our Supreme Court stated,

> *The record clearly indicates that when defendant signed the waiver of his right to assigned counsel, he did so with the expectation of being able to privately retain counsel.* Before Judge Battle, the defendant stated that he wanted to discharge Mr. Britt, his assigned counsel, and employ his own lawyer. *There is no evidence that defendant ever intended to proceed to trial without the assistance of some counsel.*
>
> > *Statements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself.* At most, defendant's statements amounted to an expression of the desire that his court-appointed lawyers be replaced. *Given the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention.*
> >
> > The waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will.
>
> *The trial judge mistakenly believed that defendant had waived his right to all counsel* at arraignment.
>
> Had defendant clearly indicated that he wished to proceed pro se, the trial court was required to make inquiry to determine whether defendant:
>
> > (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
> >
> > (2) Understands and appreciates the consequences of this decision; and
> >
> > (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

> N.C. Gen. Stat. § 15A-1242 (1983). Such was not done in the present case and it was therefore error to permit defendant to go to trial without the assistance of counsel. For this reason, defendant is entitled to a new trial.

Id. at 480-81, 322 S.E.2d at 776-77 (emphasis added) (citations, ellipses, and brackets omitted); *see also State v. Proby*, 168 N.C. App. 724, 726, 608 S.E.2d 793, 794 (2005) ("Before a defendant in a probation revocation is allowed to represent himself, the court must comply with the requirements of N.C. Gen. Stat. § 15A-1242[.]")

Here, just as in *McCrowre*, defendant initially waived only his right to appointed counsel with the intent of hiring his own attorney. *See McCrowre*, 312 N.C. at 479, 322 S.E.2d at 776. The trial court also seems to have been under the mistaken belief that defendant had waived his right to *all* counsel as the State told the trial court that defendant had "waived counsel[,]" and when directed by the trial court to begin only if counsel had been waived, the State began discussing the merits of the hearing. *See id.* at 481, 322 S.E.2d at 777. As the trial court did not conduct the inquiry as required by N.C. Gen. Stat. § 15A-1242, to ensure that defendant wanted to proceed *pro se*, we must reverse and remand for a new hearing. *See id.*

III. Conclusion

For the foregoing reasons, we reverse and remand for a new hearing.

REVERSED and REMANDED.

Judges HUNTER, Robert C. and ERVIN concur.

ELIZABETH COOMER, Plaintiff-Petitioner v. LEE COUNTY BOARD OF EDUCATION, Defendant-Respondent

No. COA11-1105

(Filed 17 April 2012)

Appeal and Error—petition for judicial review Administrative Procedure Act—petition filed outside time limit

The superior court did not err in dismissing petitioner employee's petition for judicial review of her dismissal from employment with respondent school system. The superior court properly looked to Article 4 of the Administrative Procedure Act to determine the correct time limit for appealing from school boards to the courts. That time limit is thirty days, and petitioner filed her petition nine months after respondent issued its decision, well outside the thirty-day limit.

Appeal by plaintiff-petitioner from order entered 28 March 2011 by Judge Richard T. Brown in Lee County Superior Court. Heard in the Court of Appeals 25 January 2012.

The Leon Law Firm, P.C., by Mary-Ann Leon, for plaintiff-petitioner.

Tharrington Smith LLP, by Curtis H. Allen, III, for defendant-respondent.

ELMORE, Judge.

Elizabeth Coomer (petitioner) appeals from an order dismissing her petition for judicial review as untimely. After careful consideration, we affirm the order of the superior court.

Petitioner was employed as an instructional assistant/bus driver by the Lee County Schools. In November 2009, the Superintendent of the Lee County Schools dismissed petitioner from her employment after determining that she was medically unable to drive a school bus and thus could not fulfill all of the essential functions of her job. The Lee County Board of Education (respondent) ratified the superintendent's decision. Petitioner appealed to respondent, but respondent upheld the superintendent's decision, notifying petitioner of its decision by letter dated 13 January 2010.

On 1 October 2010, petitioner filed a complaint and petition for judicial review. In her complaint, petitioner alleged that respondent

had breached its contract with her. In her petition for judicial review, petitioner alleged that respondent had acted unlawfully and upon unlawful procedure, and thus she was entitled to judicial review of its decision.

Respondent moved to dismiss both the complaint and the petition for judicial review. The superior court granted respondent's motion to dismiss the petition for judicial review after finding it untimely and entered final judgment with respect to that claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). However, the superior court denied respondent's motion to dismiss the complaint, and respondent has not appealed that decision. Accordingly, we consider only whether the superior court properly dismissed the petition for judicial review.

Petitioner filed her petition for judicial review pursuant to N.C. Gen. Stat. § 115C-45(c), which states that "[a]n appeal shall lie to the local board of education from any final administrative decision" when the petitioner has "alleged violation of a specified federal law, State law, State Board of Education policy, State rule, or local board policy[.]" N.C. Gen. Stat. § 115C-45(c) (2011). Following an appeal of right to a local board of education, a petitioner may further appeal

> to the superior court of the State on the grounds that the local board's decision is in violation of constitutional provisions, is in excess of the statutory authority or jurisdiction of the board, is made upon unlawful procedure, is affected by other error of law, is unsupported by substantial evidence in view of the entire record as submitted, or is arbitrary or capricious.

N.C. Gen. Stat. § 115C-45(c) (2011).

Here, petitioner appealed to the superior court after the respondent local board of education affirmed the superintendent's decision to terminate her employment. In her appeal, petitioner alleged that respondent had acted unlawfully and upon unlawful procedure when it terminated her employment. Specifically, she alleged that respondent acted unlawfully by (1) violating N.C. Gen. Stat. Chapter 168A and the Americans with Disabilities Act (ADA) by discriminating against her on the basis of her disabling condition, (2) violating N.C. Gen. Stat. Chapter 168A and the ADA by failing to provide reasonable accommodations, and (3) misapplying Board Policy 7400.

The superior court dismissed the petition as untimely after first determining that petitions for judicial review brought under § 115C-45(c) are subject to the thirty-day time limit set out in

§ 150B-45(a). The superior court also found that petitioner had not shown good cause for the court to accept her untimely petition. Section 115C-45(c) does not contain a time limit, so the superior court looked to the time limit set out in Article 4 of the Administrative Procedure Act (APA). Under the APA, a person seeking judicial review of a final decision under Article 4 of the APA "must file a petition within 30 days after the person is served with a written copy of the decision." N.C. Gen. Stat. § 150B-45(a) (2011). Although local boards of education are generally excluded from the requirements of the APA, *see* N.C. Gen. Stat. §§ 115C-2, 150B-2(1a) (2011), our appellate courts have consistently applied the standards for judicial review set out in § 150A-51 to appeals from school boards to the courts, *e.g.*, *Overton v. Board of Education*, 304 N.C. 312, 316-17, 283 S.E.2d 495, 498 (1981). As the Supreme Court explained in *Overton*, because "no other statute provides guidance for judicial review of school board decisions and in the interest of uniformity in reviewing administrative board decisions," the courts "apply the standards of review set forth in G.S. 150A-51[.]" *Id.*

Similarly, here, no other statute provides guidance for the judicial review of school board decisions, so the superior court, following *Overton*, properly looked to Article 4 of the APA to determine the correct time limit for appealing from school boards to the courts.[1] That time limit is thirty days, and petitioner filed her petition nine months after respondent issued its decision, well outside the thirty-day limit. Accordingly, the superior court properly dismissed the petition as untimely.

Affirmed.

Judges BRYANT and ERVIN concur.

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1. This is consistent with recent amendments to Chapter 115C, which apply the APA's judicial review standards to certain student appeals under § 115C-45 and specifically state that such appeals must be brought within thirty days of the local school board's decision. N.C. Gen. Stat. § 115C-390.8(i) (2011).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 APRIL 2012)

BLACKBURN v. BUGG No. 11-1349	Warren (04CVD130)	Affirmed in part; vacated in part.
COLE v. CITY OF CHARLOTTE No. 11-1307	Mecklenburg (10CVS16251)	Affirmed
HARRINGTON v. BRENTS No. 11-1170	New Hanover (10CV2899)	Dismissed
IN RE A.F. No. 11-1358	Cumberland (10JA37)	Affirmed
IN RE C.M.W. No. 11-1325	Beaufort (10JA61-67)	Affirmed in part; remanded in part
IN RE J.L. No. 11-1225	Pender (09JA7)	Affirmed
IN RE J.M.D. No. 11-1222	Greene (07JA35)	Affirmed
IN RE J.N.M. No. 11-1224	Greene (10JA16-17)	Vacated and Remanded
IN RE K.R.B. No. 11-1167	Forsyth (09J174-175)	Affirmed
IN RE M.A. No. 11-1238	Forsyth (11J83-86)	Reversed and Remanded
IN RE Y.B.S. No. 11-1357	Yadkin (11J13)	Affirmed
MATZ v. PHILLIPS No. 11-615	Swain (09CVD248)	Dismissed
MURN v. MURN No. 11-882	Iredell (08CVD58)	Affirmed in part; Reversed and Remanded in part
MYATT v. CRANDALL No. 11-859	Wake (10CVS4980)	Dismissed
PORTFOLIO RECOVERY ASSOCS., LLC v. HAMMONDS No. 11-1260	Cumberland (08CVD10178)	Affirmed

SEC. CREDIT CORP. v. MID/EAST ACCEPTANCE CORP. No. 11-775-2	Johnston (10CVS3936)	Affirmed in part; reversed in part
STATE v. ALLEN No. 11-917	Person (10CRS50169-70)	No Error
STATE v. ARCINIEGA No. 11-1271	Wayne (08CRS55810)	No Error
STATE v. ARMS No. 11-764	Gaston (10CRS50620)	No Error
STATE v. ATWATER No. 11-1364	Alamance (10CRS55932)	Affirmed
STATE v. BONEY No. 11-1123	Cumberland (08CRS67024-26) (08CRS67028-29)	No Error
STATE v. CLARK No. 11-1412	Wake (09CRS208852)	No Error
STATE v. COX No. 11-1181	Brunswick (09CRS56557) (10CRS5257)	No Error
STATE v. DIXON No. 11-925	Guilford (09CRS24008-10)	Affirmed
STATE v. EICHACKER No. 11-865	Wake (08CRS36336) (09CRS201843-45) (09CRS27112)	Affirmed
STATE v. ELLIS No. 11-1084	Cleveland (10CRS56029) (10CRS56127) (10CRS56130) (10CRS56133)	No Error
STATE v. FINNELL No. 11-1041	Orange (10CRS51814)	No Error
STATE v. GILL No. 11-1206	Lee (09CR1807)	Dismissed
STATE v. HAWKINS No. 11-1441	Iredell (09CRS59806-07)	No Error

STATE v. HILL No. 11-1151	Cabarrus (09CRS54394) (10CRS2484)	No Error
STATE v. JOHNSON No. 11-1099	Alamance (05CRS51934)	No Error
STATE v. JONES No. 11-1189	Cabarrus (10CRS50873)	Vacated
STATE v. KLEIN No. 11-997	Johnston (06CRS11326-27) (06CRS11329) (06CRS61049) (06CRS61051) (06CRS61055) (07CRS402) (08CRS6626-27)	Affirmed
STATE v. LANEY No. 11-1173	Mecklenburg (08CRS260265) (10CRS22230)	Affirmed
STATE v. LAPLANTE No. 11-888	Buncombe (10CRS53057-58)	Reversed and Remanded
STATE v. LEWIS No. 11-861	Onslow (10CRS50066)	No Error
STATE v. LEWIS No. 11-1049	Wayne (09CRS56463) (10CRS3565)	No Error
STATE v. LEWTER No. 11-1242	Hertford (11CRS483) (11CRS486)	Reversed and Remanded
STATE v. MASON No. 11-1023	Cabarrus (08CRS11025) (09CRS11294-98)	Affirmed
STATE v. MCCLENNY No. 11-1283	Currituck (09CRS1234)	Affirmed
STATE v. MCNEIL No. 11-708	Wake (09CRS8317-18)	No Error
STATE v. MILLER No. 11-1177	Rowan (09CRS52604-06)	Dismissed

STATE v. MILLS No. 11-1076	Mecklenburg (10CRS238763-64) (10CRS238766-67) (10CRS238769-70) (10CRS238772-73) (10CRS61291)	No Error
STATE v. MITCHELL No. 11-890	Mecklenburg (08CRS234644) (08CRS234645)	No Error
STATE v. OLLIS No. 11-1131	Watauga (08CRS52764)	Dismissed
STATE v. PIZANO-TREJO No. 11-1085	Cumberland (09CRS57918-19)	Vacated in part; remanded in part affirmed in part
STATE v. RATLIFF No. 11-1384	Buncombe (10CRS60549-50) (11CRS100-101)	No Error
STATE v. ROBINSON No. 11-986	Catawba (05CRS1687-88)	No Error
STATE v. ROGERS No. 11-1298	Catawba (10CRS7721-22)	No Error
STATE v. ROSEBORO No. 11-1130	Cleveland (10CRS51698)	Remanded for resentencing
STATE v. ROYAL No. 11-1156	Durham (10CRS53575-77) (10CRS7855)	No error in part; vacated and remanded in part
STATE v. THOMAS No. 11-832	Mecklenburg (08CRS231651)	No Error
STATE v. TURNER No. 11-1205	Duplin (08CRS51563) (08CRS51567)	No Error
STATE v. WALDEN No. 11-1064	Wake (11CRS2754)	Affirmed
STATE v. WILLIAMS No. 11-1256	Mecklenburg (07CRS243120)	Affirmed

STATE v. YOST No. 11-1029	Rowan (07CRS56924)	Affirmed
VUNCANNON v. N.C. INST. OF CHRISTIAN DEVELOPMENT, INC. No. 11-1404	Randolph (10CVS424)	Affirmed

WASTE INDUSTRIES USA, INC. AND BLACK BEAR DISPOSAL, LLC, PLAINTIFFS v. STATE OF NORTH CAROLINA AND NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL AND NATURAL RESOURCES, DEFENDANTS AND NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, AND ROGERS-EUBANKS NEIGHBORHOOD ASSOCIATION, DEFENDANT-INTERVENORS AND NORTH CAROLINA COASTAL FEDERATION AND THE NORTH CAROLINA CHAPTER OF SIERRA CLUB, DEFENDANT-INTERVENORS

No. COA11-246

(Filed 1 May 2012)

1. Constitutional Law—Commerce Clause—insufficient evidence of discrimination—insufficient evidence that burden clearly outweighed purpose

The trial court did not err by concluding that N.C.G.S. § 130A-295.6, which places limitations on the size and location of solid waste landfills, did not violate the Commerce Clause by discriminating against out-of-state waste and granting summary judgment in favor of defendants. Plaintiffs failed to demonstrate that the legislation was discriminatory facially, in purpose, or in effect. Furthermore, plaintiffs failed to forecast evidence that the burden on interstate commerce clearly outweighed the State's legitimate purposes.

2. Constitutional Law—Contract Clause—insufficient evidence of unconstitutional impairment

The trial court did not err by concluding that N.C.G.S. § 130A-295.6, which places limitations on the size and location of solid waste landfills, did not violate the Contract Clause and granting summary judgment in favor of defendants. Plaintiffs failed to forecast any evidence that their contract with Camden County was unconstitutionally impaired.

3. Common Law—vested rights doctrine—landfill project—no permit issues—no vested right—no misuse of political process

The trial court did not err in granting defendants' motion for summary judgment in a case concerning a franchise agreement for a solid waste landfill. Plaintiffs did not have a common law vested right in the proposed landfill as no permit had been issued before the challenged legislation became applicable. Furthermore, there was no evidence that the legislature misused the political process in order to dictate the outcome of plaintiff's application for the proposed landfill.

Appeal by plaintiffs from order entered 13 September 2010 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 29 September 2011.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Lee M. Whitman, Tobias S. Hampson, and Sarah M. Johnson, for plaintiffs-appellants.

Attorney General Roy Cooper, by Assistant Solicitor General John F. Maddrey, and Senior Deputy Attorney General James C. Gulick, for defendants-appellees.

Southern Coalition for Social Justice, by Allison J. Riggs and Anita S. Earls, for North Carolina State Conference of Branches of the NAACP and Rogers-Eubanks Neighborhood Association, defendant-intervenors-appellees.

Southern Environmental Law Center, by Chandra T. Taylor and Susannah Knox, for North Carolina Coastal Federation and The North Carolina Chapter of Sierra Club, defendant-intervenors-appellees.

GEER, Judge.

Plaintiffs Waste Industries USA, Inc. and Black Bear Disposal, LLC appeal the trial court's grant of summary judgment in favor of defendants and defendant-intervenors. Plaintiffs primarily argue that N.C. Gen. Stat. § 130A-295.6 (2011), which placed limitations on the size and location of solid waste landfills, violates the Commerce Clause by discriminating against out-of-state waste.

It is undisputed that the legislation does not facially discriminate. In addition, the General Assembly, in the session law, set out in detail the purposes of the legislation, none of which in any way suggest an intent to discriminate against out-of-state waste. In the face of (1) these articulated objectives, (2) the State's long-time policy against expansion of landfills, (3) the State's failure, a year prior to enactment of the challenged legislation, to meet the State's statutorily-mandated goal for reduction of landfill use, and (4) the General Assembly's receipt, after that failure, of extensive information regarding the importance of size and location restrictions on landfills to public health, the environment, environmental justice, and financial security, plaintiffs presented only sparse evidence that the General Assembly actually had a hidden purpose of blocking out-of-state waste. Plaintiffs point to a single remark by one legislator, the presence of senators at a meeting where out-of-state waste was men-

tioned, and few comments by unnamed legislators in unknown contexts and by mid-level State employees, most of which comments did not specifically relate to the challenged restrictions.

We hold that plaintiffs have failed to forecast sufficient evidence to override the General Assembly's articulated objectives and that plaintiffs' evidence of discriminatory effect shows effects on solid waste generally and not out-of-state waste in particular. Because plaintiffs have also failed to show that any incidental effects on out-of-state waste outweigh the benefits to the State, the trial court properly granted summary judgment to defendants and defendant-intervenors on the Commerce Clause claim. Since we find plaintiffs' arguments as to the other claims also unpersuasive, we affirm.

Facts

In 2002, Waste Industries was approached by developers from Virginia who owned land in Camden County, North Carolina. The developers were interested in locating a municipal solid waste landfill on their property. In September 2002, Waste Industries and Camden County entered into negotiations over a franchise agreement for a solid waste landfill. In October 2002, Waste Industries formed Black Bear Disposal, LLC ("Black Bear"), a wholly-owned subsidiary of Waste Industries, to build and operate the landfill.

N.C. Gen. Stat. § 130A-294(b) (2001) required plaintiffs to obtain a franchise agreement from the County prior to applying for a permit to operate a solid waste facility in North Carolina. On 21 October 2002, the Camden County Commissioners passed an ordinance awarding a franchise to Black Bear. The franchise agreement (1) required Black Bear to accept only waste as "allowed by the permit issued" by the State, (2) incorporated by reference the State's solid waste management regulations, and (3) expressly allowed termination of the agreement upon failure of the State to issue a permit or upon changes in the statutes or regulations.

N.C. Gen. Stat. § 130A-294(a)(4)(a) required the North Carolina Department of Environmental and Natural Resources ("DENR") to "[d]evelop a permit system governing the establishment and operation of solid waste management facilities." A solid waste management facility permit has two parts: (1) a permit to construct the facility issued after "site and construction plans have been approved and it has been determined that the facility can be operated in accordance with the applicable rules set forth in this Subchapter"; and (2) a permit to operate the facility issued after demonstrated compliance with

the construction permit. N.C. Admin. Code tit. 15A, r. 13B.0201(b)(1), (2) (Sept. 2001).

In August 2004, Black Bear submitted a site study to DENR as required by N.C. Admin. Code tit. 15A, r. 13B.1618 (Sept. 2001), in order to obtain the necessary permit. Between August 2004 and April 2005, Black Bear made repeated additional submissions regarding the site study. DENR responded to the submissions by pointing out continued inadequacies and inconsistencies in the documentation of existing topography, surface water drainage patterns, high water table values, groundwater flow, drinking water wells, porosity values, facility acreage, landfill acreage, landfill height, and floodplain existence. According to DENR, issues still remained with the site study as of May 2005.

In addition, on 5 April 2005, DENR notified Waste Industries that Black Bear did not meet the financial assurance and responsibility requirements of N.C. Gen. Stat. § 130A-294(b2) (2005). On 3 February 2006, Waste Industries asked to be added as a co-applicant with Black Bear. DENR then requested additional information from Waste Industries and Black Bear on 16 March 2006 and on 25 May 2006.

On 27 July 2006, the General Assembly passed a one-year moratorium on new landfills:

> There is hereby established a moratorium on consideration of applications for a permit and on the issuance of permits for new landfills in the State. The purposes of this moratorium are to allow the State to study solid waste disposal issues in order to protect public health and the environment. The Department of Environment and Natural Resources shall not consider a permit application nor issue a permit for a new landfill for the disposal of construction or demolition waste, municipal solid waste, or industrial solid waste for a period beginning on 1 August 2006 and ending on 1 August 2007.

2006 N.C. Sess. Laws ch. 244, § 2 ("the Moratorium"). The Moratorium did not affect landfills that had permits issued prior to 1 August 2006. *Id.* In the Moratorium legislation, the General Assembly noted eight areas requiring more study in order to update North Carolina's solid waste laws. *Id.* at § 4(a).

On 16 April 2007, the Camden County Commissioners passed an ordinance that extended the required commencement date of landfill operation under plaintiffs' franchise agreement from 4 November

2007 to 4 November 2012. The record does not indicate that any activity took place on plaintiffs' application for a permit during the Moratorium.

At the end of the Moratorium, the General Assembly enacted legislation governing approval of solid-waste landfills, which included additional restrictions for landfills relating to buffers, height, capacity, and size. 2007 N.C. Sess. Laws ch. 550, § 9(a), as amended by 2007 N.C. Sess. Laws ch. 543, § 1(a). This legislation, codified in N.C. Gen. Stat. § 130A-295.6, provided in pertinent part:

> (d) The Department shall not issue a permit to construct any disposal unit of a sanitary landfill if, at the earlier of (i) the acquisition by the applicant or permit holder of the land or of an option to purchase the land on which the waste disposal unit will be located, (ii) the application by the applicant or permit holder for a franchise agreement, or (iii) at the time of the application for a permit, any portion of the proposed waste disposal unit would be located within:
>
> (1) Five miles of the outermost boundary of a National Wildlife Refuge.
>
> (2) One mile of the outermost boundary of a State gameland owned, leased, or managed by the Wildlife Resources Commission pursuant to G.S. 113-306.
>
> (3) Two miles of the outermost boundary of a component of the State Parks System.
>
> . . . .
>
> (i) The Department shall not issue a permit for a sanitary landfill that authorizes:
>
> (1) A capacity of more than 55 million cubic yards of waste.
>
> (2) A disposal area of more than 350 acres.
>
> (3) A maximum height, including the cap and cover vegetation, of more than 250 feet above the mean natural elevation of the disposal area.

These restrictions ("the challenged restrictions") applied to plaintiffs' pending permit application. *See* 2007 N.C. Sess. Laws ch. 550, § 9(b), as amended by 2007 N.C. Sess. Laws ch. 543, § 1(b).

On 11 September 2007, DENR informed plaintiffs that their application was still incomplete and that the changes in state law might have rendered the facility unsuitable. On 15 January 2008, plaintiffs nonetheless elected to pay the $50,000.00 permit fee and proceed with their application. DENR denied plaintiffs' application for a permit on 8 May 2008 because (1) plaintiffs had continued to fail to complete the site suitability application, and (2) the site did not comply with the requirements of N.C. Gen. Stat. § 130A-295.6(d) due to its proximity to a national wildlife refuge and a state park.

On 3 December 2007, plaintiffs brought suit against the State of North Carolina and DENR, alleging that 2007 N.C. Sess. Laws ch. 543 and ch. 550 violated the United States Constitution and the State Constitution on various grounds and deprived plaintiffs of their common law vested rights. Plaintiffs sought declaratory relief and a writ of mandamus.

On 31 December 2009, the North Carolina State Conference of Branches of the NAACP and the Rogers-Eubanks Neighborhood Association were allowed to intervene. The trial court also granted the motion to intervene of the North Carolina Coastal Federation and the North Carolina Chapter of the Sierra Club on 2 March 2010.

All parties moved for summary judgment. At the hearing on the motions on 24 August 2010, all parties agreed that there were no issues of material fact and that summary judgment was appropriate for the disposition of the case. On 13 September 2010, the trial court entered an order denying plaintiffs' motion for summary judgment and granting defendants and defendant-intervenors' motions for summary judgment. Plaintiffs timely appealed to this Court.

Discussion

Plaintiffs contend on appeal that the challenged restrictions violate the Commerce Clause and the Contract Clause of the United States Constitution, as well as their common law vested rights, and that the trial court, therefore, should have granted plaintiffs' motion for summary judgment. Alternatively, plaintiffs contend that genuine issues of material fact exist, and this case should be remanded for trial.

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). The party moving for summary

judgment has the burden of establishing the lack of any triable issue. *Collingwood v. Gen. Electric Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party meets its burden, then the non-moving party must "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Id.* This Court reviews the trial court's grant of summary judgment de novo. *Nationwide Mut. Fire Ins. Co. v. Mnatsakanov*, 191 N.C. App. 802, 805, 664 S.E.2d 13, 15 (2008).

I

[1] Plaintiffs first contend that the enacted legislation violates the federal Commerce Clause. Commerce Clause claims are subject to a two-tiered analysis. *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996). "The first tier, a virtually *per se* rule of invalidity, applies where a state law discriminates facially, in its practical effect, or in its purpose." *Id.* (internal quotation marks omitted). "The second tier applies if a statute regulates evenhandedly and only indirectly affects interstate commerce. In that case, the law is valid unless the burdens on commerce are clearly excessive in relation to the putative local benefits." *Id.* (internal quotation marks omitted). Plaintiffs essentially concede that the challenged legislation is not facially discriminatory, but argue that it discriminates against interstate commerce in purpose and in effect and that it, in any event, excessively burdens interstate commerce.

A. Discriminatory Purpose

Plaintiffs first argue that the purpose of the legislation was to block out-of-state waste from entering the State and, therefore, was to discriminate against interstate commerce. The United States Supreme Court, in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7, 66 L. Ed. 2d 659, 668 n.7, 101 S. Ct. 715, 723 n.7 (1981) (internal quotation marks omitted), held that in considering claims that a state statute is unconstitutional, we must "assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation."

Applying this standard to plaintiffs' Commerce Clause claim, we begin with a review of the General Assembly's articulated objectives. The legislature included in 2007 N.C. Sess. Laws ch. 550 a series of "Whereas" clauses setting out the objectives of the legislation. Those clauses start by discussing the public policy of the State of protecting the State's water quality, including protecting groundwater from contamination and protecting the water quality of rivers and coastal estu-

aries. 2007 N.C. Sess. Laws ch. 550. The clauses point to increased concerns over water quality resulting from recent flooding and drought, the reliance of half the population on groundwater for drinking water, increasing groundwater pollution, and recent documented depletion of large groundwater aquifers. *Id.* Next, the clauses note that the State has rare and endangered plants and animals and that the State's parks, natural areas, and wildlife refuges serve these plants and animals, as well as migrating birds. *Id.* The clauses then recognize that more study is needed on fragile ecosystems; that these ecosystems, along with changes in air and water quality, have impacts outside the state; and that the public should be able to continue to enjoy the natural attractions of the State. *Id.*

The General Assembly continued with the following "Whereas" clauses:

> Whereas, improperly sited, designed, or operated landfills have the potential to cause serious environmental damage, including groundwater contamination; and
>
> Whereas, it is essential that the State study the siting, design, and operational requirements for landfills for the disposal of solid waste in areas susceptible to flooding from natural disasters, areas with high water tables, and other environmentally sensitive areas in order to protect public health and the environment; and
>
> . . . .
>
> Whereas, it is the policy of the State to promote methods of solid waste management that are alternatives to disposal in landfills; . . . .

Id.

None of the purposes articulated by the General Assembly in the legislation suggest a purpose of discriminating against out-of-state waste entering the State. Under *Clover Leaf Creamery*, we must, therefore, determine whether the circumstances surrounding the legislation force us to conclude that those purposes were not the real objectives and that one of the real purposes was to discriminate against out-of-state waste. As the Fourth Circuit has observed, the " 'historical background of the decision' " is " 'probative of whether a decisionmaking body was motivated by a discriminatory intent.' " *See Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 336 (4th Cir.

2001) (quoting *Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 819 (4th Cir. 1995)).

In North Carolina, the use of landfills has been the least-preferred option for managing solid waste since the Solid Waste Management Act was enacted in 1989. N.C. Gen. Stat. § 130A-309.04 (1989). At that time, the legislature declared that it "is the policy of the State to promote methods of solid waste management that are alternatives to disposal in landfills . . . ." *Id.* The legislature stated that it "is the goal of this State to reduce the municipal solid waste stream, primarily through source reduction, reuse, recycling, and composting, on a per capita basis, on the following schedule: . . . [f]orty percent (40%) by 30 June 2001." N.C. Gen. Stat. § 130A-309.04(c) (1992).

Governor James Martin issued Executive Order 86 on 1 March 1989 extending the State's 40% deadline until 2006, explaining that "as the most desirable waste management strategy to be undertaken, North Carolina has stated its commitment to prevention, minimization, and recycling of wastes before they impact the State's environment and is committed to reduce its dependence on landfills as a means of solid waste disposal . . . ." N.C. Admin. Code tit. 9, r. 2B.0000 (Mar. 1989).

By 2006, however, North Carolina had not met the goal of a 40% per capita reduction in solid waste. In July of that year, the General Assembly passed the one-year Moratorium on new landfills to allow time for study. In the preamble to the Moratorium legislation, the General Assembly listed various concerns relating to water quality, environmentally sensitive areas, and public health. The eight areas identified as requiring more study in order to update the State's solid waste laws included financial responsibility requirements; siting, design, and operational requirements in areas susceptible to flooding from natural disasters, areas with high water tables, and other environmentally sensitive areas; and "[w]ays to reduce the amount of solid waste disposed of within North Carolina landfills, including statewide tipping fees, bans on the disposal of certain types of waste in landfills, more aggressive recycling requirements, and enhanced regulatory requirements for landfills and other solid waste management facilities." 2006 N.C. Sess. Laws ch. 244, § 4(a)(8). The General Assembly also established a Joint Select Committee on Environmental Justice to study environmental justice issues including "[t]he impacts that landfills located in proximity to minority and low-income communities have on these communities with regard to human health, the environment, and economic development." *Id.* at § 5(f)(2).

Plaintiffs argue, however, that comments made by legislators in the spring or early summer of 2006, prior to the passage of the Moratorium, suggest that the General Assembly's purpose in adopting the Moratorium was to prevent the importing of out-of-state waste. As support for this claim, plaintiffs cite the affidavit of Lonnie Craven Poole, III, CEO of Waste Industries. Mr. Poole's affidavit stated that certain legislators had reported to him that other unidentified legislators wanted to block the importing of out-of-state waste.

Defendants and defendant-intervenors moved in the trial court to strike these portions of Mr. Poole's affidavit as hearsay, but the record contains no ruling on the motion to strike. On appeal, plaintiffs argue that the statements in Mr. Poole's affidavit were in fact considered by the trial court and properly so. Defendants and defendant-intervenors, however, contend that because the statements were inadmissible, the trial court must not have considered them and urges this Court to disregard them as well.

Even assuming, without deciding, that the anonymous statements reported in Mr. Poole's affidavit are admissible and that the trial court considered them, the primary authority upon which plaintiffs rely for their admissibility demonstrates the statements' lack of relevance in discerning the purpose of the challenged legislation. In *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268, 50 L. Ed. 2d 450, 466, 97 S. Ct. 555, 565 (1977) (emphasis added), the authority cited by plaintiffs as supporting admission of these statements, the United States Supreme Court held: "The *legislative or administrative history* may be highly relevant, especially where there are *contemporary statements* by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege."

The Poole affidavit statements were made in wholly unknown contexts by unknown speakers more than a year before the challenged restrictions were passed. Those secondhand statements are not part of any legislative history or any other official reporting of legislators' positions and views. Moreover, they are not contemporary to the legislation challenged on appeal. The statements considered by the Supreme Court in *Village of Arlington Heights* were, in contrast, contained "in the official minutes" and were directly related to the challenged action. *Id.* at 270, 50 L. Ed. 2d at 467, 97 S. Ct. at 566. Plaintiffs cite no authority—and we know of none—suggesting that

the *Clover Leaf Creamery* circumstances warranting a court's overriding express statements of legislative purpose may include anonymous, secondhand statements made in unknown contexts and not contemporaneously with the challenged legislation.

Plaintiffs, however, also argue that the Moratorium itself is evidence that the legislation at issue in this case had the purpose of blocking out-of-state waste. In doing so, they rely on comments made by non-legislators, primarily mid-level employees in the Executive Branch. Plaintiffs point to (1) an inquiry in 2005—two years before the legislation at issue—from an aide to Senator Basnight to the head of the Division of Waste Management with unidentified "questions concerning out of state waste disposal"; (2) a 2005 telephone call from a policy advisor in the Governor's office to a member of DENR saying that she was interested in what could be done regarding the importing of waste; (3) the 2005 annual meeting of the ERC, an Executive Branch commission, at which one of the topics was the increasing volume of both in-state and out-of-state waste in landfills; (4) a photograph presented at the 2006 annual meeting of the ERC, among other materials, showing New York waste; (5) a draft of a never-given speech prepared for the Governor in connection with the signing of the Moratorium mentioning out-of-state waste, but with no evidence of the identity of the author, whether the Governor participated in the preparation of the draft, or even whether the Governor ever saw the draft; (6) portions of Executive Branch employees' depositions indicating their awareness that four proposed landfill projects that were pending at the time of the Moratorium intended to accept out-of-state waste; and (7) a 2007 email from the Section Chief of the Division of Waste Management to a professor at UNC School of Law in which he expressed his "opinion" that "the driving factor in the moratorium was the out-of-state waste issue."

Plaintiffs have cited no authority that remarks by such mid-level State employees—and not legislators who enacted the Moratorium or the Governor who signed it into law—are relevant to prove that the expressed purposes of the Moratorium were not the true purposes. Nor have plaintiffs cited any authority that such comments relating to prior legislation are sufficient to override the articulated objectives in the legislation challenged as unconstitutional.

As for evidence regarding the challenged legislation, plaintiffs point to a single statement from a legislator: a remark made by Senator Ellie Kinnaird that the parties appear to agree was made on

26 July 2007 at unidentified "senate hearings." The transcript of the hearing reports Senator Kinnaird as saying:

> I appreciate the work that's been done on this, and I think it's very important.
>
> And I hope that we pass this. *It's true we're a growing state, but we don't need to be bringing in garbage from Philadelphia and New York and New Jersey.* That has nothing to do with our growth.
>
> And I'd like to say that while people sort of acknowledge that recycling is out there, there's recycling and recycling.
>
> I have two counties. One does, and I have dyslexia with numbers, but I believe one does 64% recycling.
>
> The other has set a goal of 2%.
>
> We can aggressively recycle.

(Emphasis added.)

Apart from Senator Kinnaird's remark, plaintiffs point to a meeting hosted by Senator Basnight and attended by several senators at which members of the Division of Waste Management "went through the recommendations that had been presented" by DENR regarding landfill regulation, such as size limitations. The head of the Division acknowledged that out-of-state waste was mentioned by unidentified individuals, but he did not remember any particular discussions regarding what steps could be taken with respect to out-of-state waste. We cannot, based on this evidence, specifically attribute a discriminatory purpose to any of the senators present.

In any event, defendants contend that the courts are not permitted "to impute the motives or opinions" of individual legislators to the entire General Assembly, citing *United States v. O'Brien*, 391 U.S. 367, 383-84, 20 L. Ed. 2d 672, 684, 88 S. Ct. 1673, 1682-83 (1968) (emphasis added), in which the United States Supreme Court held:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. *It is entirely a different matter when we are asked to*

> *void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it*, and the stakes are sufficiently high for us to eschew guesswork.

Plaintiffs argue that defendants' citation of *O'Brien* is "wholly improper" as the decision has essentially been overruled, citing *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1528 (11th Cir. 1993), and *Hernandez v. Woodard*, 714 F. Supp. 963, 970 (N.D. Ill. 1989). Plaintiffs have, however, misread *Church of Scientology* and *Hernandez*. Those opinions questioned the viability of *O'Brien's* holding that the Court would not strike down an otherwise constitutional statute based on an alleged illicit motive -- a different issue from the reasoning above, which addressed how to prove Congressional purpose. *See Church of Scientology*, 2 F.3d at 1529; *Hernandez*, 714 F. Supp. at 970-71. In any event, subsequently, the United States Supreme Court reaffirmed the language questioned by the two lower federal courts. *See Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 652, 129 L. Ed. 2d 497, 524, 114 S. Ct. 2445, 2464 (1994).

Under *O'Brien* and *Clover Leaf Creamery*, the speech of a single legislator (Senator Kinnaird) in an unidentified hearing and the presence of senators at a meeting at which out-of-state waste was mentioned by someone is not sufficient to void as unconstitutional N.C. Gen. Stat. § 130A-295.6.[1] *Village of Arlington Heights* does not require a different conclusion given its focus on legislative history, sworn testimony, minutes of meetings, and reports. 429 U.S. at 268, 50 L. Ed. 2d at 465-66, 97 S. Ct. at 564-65. Nothing in *Village of Arlington Heights* suggests that such speech is sufficient to establish—or even raise an issue of fact—regarding the constitutionality of a statute when the legislature has specifically set out constitutional purposes in the legislation. *Compare Chambers Med. Techs. of S.C., Inc. v. Bryant*, 52 F.3d 1252, 1259 (4th Cir. 1995) (emphasizing before considering remarks by legislators in hearings: "The South Carolina legislature did not include a statement of the purpose for the fluctu-

1. Because of the United States Supreme Court's holding in *O'Brien*, we need not decide whether our Supreme Court's opinion in *D & W, Inc. v. City of Charlotte*, 268 N.C. 577, 581-82, 151 S.E.2d 241, 244, *supplemented by* 268 N.C. 720, 152 S.E.2d 199 (1966) (holding that affidavit from legislator was "incompetent" to prove "legislative purpose" of General Assembly in enacting legislation), is controlling authority with respect to a claim under the federal constitution for violation of the Commerce Clause.

ating treatment cap in the legislation enacting it to which this court may defer in determining the purpose of the cap, nor are there committee reports reflecting the purpose of the cap.").

Next, plaintiffs point to the fact that DENR's proposed legislation did not include any buffer or height restrictions, and plaintiffs speculate, therefore, that DENR must not have believed such restrictions were necessary. Plaintiffs then make the additional leap of logic and argue that if DENR did not desire the challenged restrictions, then the General Assembly's articulated purposes for the restrictions must not have been the real reasons.

Plaintiffs have, however, cited to no evidence that DENR personnel in fact believed that the restrictions were unnecessary—defendant-intervenors, on the other hand, point to evidence in the record that DENR omitted the details of restrictions because the staff believed they should be left up to regulatory rule-making. Nor do plaintiffs cite any authority suggesting that an Executive Branch Department's proposed legislation—which does not even mention out-of-state waste—is relevant to determining the General Assembly's purpose in enacting different provisions and language after considering input from a wide range of sources regarding regulation of landfills received during the study period allowed by the Moratorium.[2]

The buffer, height, capacity, and size restrictions appear to have originally come from one of the intervenors, the North Carolina Coastal Federation ("NCCF"). The original NCCF recommendations included (1) a buffer from surface waters of 300 feet, prohibiting construction in wetlands or prior converted wetlands; (2) limiting total capacity to 25 million cubic feet; (3) limiting the area to 150 acres; and (4) limiting height to 200 feet. Lobbyists from the waste industry specifically requested that the limits be increased to 50 million cubic yards and a maximum height of 250 feet.

Ultimately, the Legislature implemented a limit of 55 million cubic yards, 5 million cubic yards in excess of what the industry lob-

2. Comments were received from the business community as well as State and Federal agencies, environmental groups, and environmental justice organizations, including DENR, the U.S. Fish and Wildlife Service, the N.C. Wildlife Resources Commission, the N.C. Department of Commerce, defendant-intervenor North Carolina Coastal Federation, Professor Steve Wing of the Department of Epidemiology of the School of Health at UNC-CH, Dr. Jennifer Norton, Blue Ridge Environmental Defense League, the North Carolina Environmental Justice Network, Conservation Council of North Carolina, Center for Competitive Waste Industry, National Solid Waste Management Association, North Carolina Association of County Commissioners, and defendant-intervenor the Sierra Club.

byists had requested; an area limit of 350 acres, well above the limit requested by NCCF; and a maximum height of 250 feet, as requested by industry lobbyists. N.C. Gen. Stat. § 130A-295.6(i). DENR's draft legislation must be considered in the context of all of the input received by the General Assembly as it was studying solid waste disposal during the Moratorium, including recommendations made by plaintiffs' own industry's lobbyists. In that context, DENR's unexplained omission of specific restrictions is not evidence of the General Assembly's having an unvoiced unconstitutional intent.

Plaintiffs further argue that the challenged legislation cannot have environmental concerns as its actual purpose because the Legislature "has made no effort to address" existing landfills or prohibit expansion of existing landfills that currently violate the buffer and size restrictions. However, as our Supreme Court has noted,

> "[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. . . . 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."

Adams v. N.C. Dep't of Natural & Econ. Res., 295 N.C. 683, 693, 249 S.E.2d 402, 408 (1978) (quoting *Silver v. Silver*, 280 U.S. 117, 123, 74 L. Ed. 2d 221, 226, 50 S. Ct. 57, 59 (1929)).

We turn back to the specific question before us: Does plaintiffs' evidence raise an issue of fact regarding whether the legislation at issue—specifically, the height, capacity, size, and buffer restrictions—was enacted under circumstances forcing the conclusion that the adoption of the restrictions was for the purpose of blocking out-of-state waste? We have found no case suggesting that the limited evidence presented by plaintiffs is sufficient to raise a question about whether the articulated purposes of the legislation were its actual objectives.

Plaintiffs cite only *Gilmore*, 252 F.3d at 336. However, the dramatic difference in the evidence in *Gilmore* from that in this case demonstrates the inadequacy of plaintiffs' evidence. The Fourth Circuit, in *Gilmore*, upheld the trial court's grant of summary judgment to the waste industry plaintiffs on their Commerce Clause claim on the ground "that no reasonable juror could find that in enacting the statutory provisions at issue Virginia's General Assembly acted without a discriminatory purpose." *Id.*

The Fourth Circuit based its decision on evidence of (1) the General Assembly's having just learned before enacting the legislation, that Virginia was the nation's second largest importer of waste; (2) press releases by the Governor and the state senator who introduced the legislation indicating that the purpose of the legislation was to restrict the amount of out-of-state waste entering Virginia; (3) memoranda from the introducing senator to other legislators providing background information regarding the issue of out-of-state waste imports; and (4) transcripts of speeches on the floor of the General Assembly establishing the legislature's hostility towards out-of-state waste. *Id.* at 336-340.

The Fourth Circuit concluded:

> The evidence just outlined shows unmistakably the legislative and gubernatorial opposition to further increases in the volume of [municipal solid waste] generated outside Virginia crossing the borders of Virginia for ultimate placement in Virginia's seven regional landfills. No reasonable juror could find the statutory provisions at issue had a purpose other than to reduce the flow of [municipal solid waste] generated outside Virginia into Virginia for disposal. Indeed, the very purpose the Defendants proffer in this litigation for the enactment of the statutory provisions at issue—to alleviate or at least reduce health and safety threats to Virginia's citizens and environment created by the importation of [municipal solid waste] from states with less strict limitations upon the content of [municipal solid waste] fully supports our conclusion. This is because an inherent component of the Defendants' proffered purpose of Virginia's enactment of the statutory provisions at issue is discrimination against [municipal solid waste] generated outside Virginia.

Id. at 340. Thus, in addition to official statements by the senator who authored the legislation, the Governor who signed it into law, and the legislators who enacted it, the State of Virginia essentially admitted, in the litigation, that the purpose of the legislation was to discriminate against out-of-state waste.

The evidence in this case stands in stark contrast, including the State's history of concern about the disposal of waste in landfills regardless of the source, the legislation's articulated objectives, no discriminatory statements by the sponsoring legislators, no discriminatory statements by the Governor himself, only a single remark by

one senator in an unspecified hearing rather than speeches by numerous legislators during the floor debate, and stray remarks made one to two years before the enactment of the challenged legislation by unidentified legislators in unknown contexts and non-legislators. We cannot say that the content of plaintiffs' evidence "forces us to conclude that [the objectives articulated] could not have been a goal of the legislation," *Clover Leaf Creamery*, 449 U.S. at 463 n.7, 66 L. Ed. 2d at 668 n.7, 101 S. Ct. at 723 n.7 (internal quotation marks omitted), especially in light of other circumstances identified by defendants and defendant-intervenors, including the extensive material provided to the General Assembly regarding legitimate concerns sought to be remedied.

We find the analysis of the Fifth Circuit persuasive:

> [T]he stray protectionist remarks of certain legislators are insufficient to condemn this statute. Our independent review of the legislative record reveals that the Legislature heard extensive testimony from various witnesses on the legitimate . . . concerns sought to be remedied . . . . This evidence provided a more than adequate and legitimate basis for the Legislature's decision to adopt the proposed regulations and undercuts [plaintiff's] contention that the enactment of the overall statutory scheme was driven by a discriminatory purpose.

Allstate Ins. Co. v. Abbott, 495 F.3d 151, 161 (5th Cir. 2007). *See also Maine v. Taylor*, 477 U.S. 131, 148-50, 91 L. Ed. 2d 110, 127-28, 106 S. Ct. 2440, 2453 (1986) ("But there is little reason in this case to believe that the legitimate justifications the State has put forward for its statute are merely a sham or a *post hoc* rationalization. In suggesting to the contrary, the Court of Appeals relied heavily on a 3-sentence passage near the end of a 2,000-word statement submitted in 1981 . . . . We fully agree with the Magistrate that [these] three sentences do not convert the Maine statute into an economic protectionism measure." (internal citation and quotation marks omitted)). In this case, we hold that plaintiffs have failed to forecast sufficient evidence that they will be able to meet the test set out in *Clover Leaf Creamery* and establish that the General Assembly actually had a purpose of discriminating against out-of-state waste.

B. Discriminatory Effect

Next, plaintiffs contend that the challenged legislation violates the Commerce Clause by having the effect of discriminating against

out-of-state waste. Plaintiffs have identified three possible discriminatory effects.

First, plaintiffs point to the fact that four proposed landfills, which intended to accept out-of-state waste, were not built. Plaintiffs' "effect" argument presumes that the purpose of the legislation was to eliminate these four planned landfill projects *because* they intended to accept out-of-state waste. However, since we have concluded that plaintiffs failed to present evidence giving rise to an issue of fact regarding the purpose of the legislation, plaintiffs cannot rely upon that supposed "purpose" to establish a discriminatory effect.

Regardless, even assuming that the legislation had the purpose and effect of blocking the four landfills, such an "effect" is not one that shows discrimination against out-of-state waste. Because the record contains no evidence that the proposed landfills would have accepted *only* out-of-state waste, the fact that the landfills were not built affected both in-state and out-of-state waste. Unlike in *Philadelphia v. New Jersey*, 437 U.S. 617, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978) (holding unconstitutional statute prohibiting importing of out-of-state waste), the buffer, height, area, and capacity restrictions do not distinguish between in-state and out-of-state waste. Out-of-state waste can continue to come into the State because existing landfills can expand or new landfills can be built in compliance with the challenged restrictions.

The second discriminatory effect argued by plaintiffs is the fact that the restrictions make it impossible to construct large regional landfills that accept out-of-state waste in North Carolina. The legislation, however, neither prevents large regional landfills nor precludes the acceptance of out-of-state waste.

When the bill was enacted, North Carolina already had existing regional landfills. Further, only two of the four proposed landfills that plaintiffs argue were the intended target of the legislation exceeded the size limitation, with the other two projects being much smaller. Indeed, the record indicates that only about 1% of the landfills currently operating in the United States are larger than the maximum size limits set out in the challenged legislation. Finally, the height restrictions were what waste industry lobbyists had suggested, and the capacity was five million cubic yards bigger than the industry had requested.

Thus, the effect of the legislation was not to preclude regional landfills, but rather to prevent only extraordinarily large landfills

regardless of where the waste came from. Regional landfills exist and can continue to be built subject to the restrictions, and nothing prohibits them from taking in only out-of-state waste.

Plaintiffs' third discriminatory effect is the "near impossibility," as they contend, of construction of a landfill along North Carolina's coast, thereby hindering use of the most cost-effective means of transporting waste from out of state: barging. The United States Supreme Court has held, however, that "[w]e cannot . . . accept [the] underlying notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127, 57 L. Ed. 2d 91, 101, 98 S. Ct. 2207, 2215 (1978). As the Fourth Circuit has explained, "[t]he Clause does not purport to . . . protect the participants in intrastate or interstate markets, *nor the participants' chosen way of doing business*." *Brown v. Hovatter*, 561 F.3d 357, 364 (4th Cir. 2009) (emphasis added). The barging of waste—rather than transporting it by truck or rail—is the plaintiffs' chosen way of doing business and that particular way of doing business is not protected by the Commerce Clause.

The trial court, therefore, did not err in concluding that plaintiffs failed to present evidence of discriminatory effect sufficient to avoid summary judgment. Because of plaintiffs' failure to demonstrate that the legislation is discriminatory facially, in purpose, or in effect, strict scrutiny does not apply, and we need not address plaintiffs' arguments regarding whether demonstrable justifications exist for the restrictions and whether there are non-discriminatory alternatives.

C. <u>Rational Basis Review</u>

We next consider whether the legislation is unconstitutional based on its incidental effect on interstate commerce. As the United States Supreme Court has explained:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 178, 90 S. Ct. 844, 847 (1970).

The United States Supreme Court applied *Pike* in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346, 167 L. Ed. 2d 655, 669, 127 S. Ct. 1786, 1797 (2007). In *United Haulers*, a flow control ordinance required that "all solid waste generated within the Counties be delivered to the [Solid Waste Management] Authority's processing sites." *Id.* at 336, 167 L. Ed. 2d at 663, 127 S. Ct. at 1791. The fees charged by the Authority's processing sites were significantly more than the fees charged at alternative facilities, all of which were out of state. *Id.* at 336-37, 167 L. Ed. 2d at 663-64, 127 S. Ct. at 1791-92.

However, the requirement that solid waste be delivered to the Authority provided environmental benefits, health benefits, and revenue, *id.* at 334-35, 167 L. Ed. 2d at 662, 127 S. Ct. at 1790-91, because the Authority's higher fees allowed it to provide extensive recycling, composting, household hazardous waste disposal, and other services, in addition to standard landfill transportation and solid waste disposal. *Id.* at 336, 167 L. Ed. 2d at 663, 127 S. Ct. at 1791. The Supreme Court concluded that the public benefits outweighed any incidental burden on interstate commerce that existed. *Id.* at 346, 167 L. Ed. 2d at 670, 127 S. Ct. at 1797.

Notably, in *United Haulers*, the Court characterized the plaintiffs' argument that the laws did not pass the "more permissive *Pike* test" as an invitation "to rigorously scrutinize economic legislation passed under the auspices of the police power." *Id.* at 347, 167 L. Ed. 2d at 670, 127 S. Ct. at 1798. The Court observed that "[t]here was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause." *Id.* (internal citation omitted).

In this case, the challenged legislation similarly provides environmental, public health, environmental justice, and financial security benefits. Although plaintiffs protest that the State presented no scientific basis for any of these benefits, plaintiffs have cited no authority holding that a legislature must have a scientific basis for benefits that are the purpose of legislation. Instead, what is required is that the legislation "effectuate a legitimate local public interest," *Pike*, 397 U.S. at 142, 25 L. Ed. 2d at 178, 90 S. Ct. at 847, which the legislation at issue in this case does.

Still, defendants and defendant-intervenors have pointed to expert evidence supporting the buffer and size restrictions, including a letter from the U.S. Fish and Wildlife Service, a comprehensive study of the financial and physical failures of mega-landfills, and expert testimony regarding environmental justice issues, air and water quality impacts, and the effect on sensitive areas of non-native species attracted by landfills. The General Assembly had an ample basis for concluding that the legislation promoted the local purposes set out in the legislation itself.

Plaintiffs also argue that any benefits are cancelled out by the fact that existing landfills violating the restrictions may continue to operate or even expand, while, in addition, other offensive projects might be constructed in the buffer zones. "Grandfathering" by the legislature of some landfills does not make the legislation's requirements for new landfills "arbitrary or irrational." *Clover Leaf Creamery*, 449 U.S. at 468, 66 L. Ed. 2d at 671, 101 S. Ct. at 726. Further, as the Supreme Court emphasized, "a legislature need not strike at all evils at the same time or in the same way," but instead "a legislature may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *Id.* at 466, 66 L. Ed. 2d at 670, 101 S. Ct. at 725 (internal quotation marks omitted).

Finally, plaintiffs claim the burdens on interstate commerce are driving up the cost of disposal in North Carolina. Whatever additional cost results from the implementation of the statute will impact the cost of waste disposal for North Carolina's citizens. Just like the United States Supreme Court in *United Haulers*, we do not believe that it is our place to weigh in on the uniquely legislative public policy debate over whether the increased costs of waste disposal outweigh the benefits to the environment, public health, and environmental justice.

The United States Supreme Court, applying *Pike*, ended its *Clover Leaf Creamery* analysis by emphasizing: "Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause." *Id.* at 474, 66 L. Ed. 2d at 675, 101 S. Ct. at 729. Here, plaintiffs have not forecast evidence meeting that burden, and, therefore, the challenged legislation does not violate the Commerce Clause. The trial court properly granted summary judgment to defendants and defendant-intervenors on plaintiffs' Commerce Clause claim.

II

[2] Plaintiffs next contend that the enacted legislation violates the Contract Clause of the federal constitution by substantially impairing plaintiffs' franchise agreement with the County. Whether a change in state law is an impairment of contract in violation of the Contract Clause "has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186, 117 L. Ed. 2d 328, 337, 112 S. Ct. 1105, 1109 (1992).

There is no dispute in this case that a contract exists. As for the second element, the United States Supreme Court stressed in *Exxon Corp. v. Eagerton*, 462 U.S. 176, 190, 76 L. Ed. 2d 497, 509-10, 103 S. Ct. 2296, 2305 (1983) (internal citations and quotation marks omitted):

> Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people. This Court has long recognized that a statute does not violate the Contract Clause simply because it has the effect of restricting, or even barring altogether, the performance of duties created by contracts entered into prior to its enactment. If the law were otherwise, one would be able to obtain immunity from state regulation by making private contractual arrangements.
>
> The Contract Clause does not deprive the States of their broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result.

Here, the legislation at issue did not retroactively alter any rights of plaintiffs or Camden County under the franchise agreement or change either party's obligations. The franchise agreement did not grant plaintiffs a right to build or operate a landfill, but rather simply made it possible for plaintiffs to apply to the State for a permit allowing them to build and operate the landfill. *See* N.C. Gen. Stat. § 130A-294(b1)(2) ("A person who intends to apply for a new permit, the renewal of a permit, or a substantial amendment to a permit for a sanitary landfill shall obtain, *prior to applying for a permit*, a franchise for the operation of the sanitary landfill from each local government having jurisdiction over any part of the land on which the

sanitary landfill and its appurtenances are located or to be located." (emphasis added)).

The agreement did not guarantee plaintiffs would receive a permit or even be able to build their landfill. Indeed, the agreement anticipated that a permit might be denied or—as happened here—the law governing landfills might be changed. Either party could terminate the agreement if (1) "DENR fails or refuses to issue, grant or renew any permit," (2) "any change occurs in any applicable existing law, regulation, rule, ordinance or permit condition," or (3) "any new law, regulation, rule, ordinance or permit condition" adversely affected the project. Thus, the franchise agreement expressly contemplated what ultimately happened: the law changed.

Plaintiffs, however, argue that under *Faulkenbury v. Teachers' & State Emps.' Ret. Sys. of N.C.*, 345 N.C. 683, 483 S.E.2d 422 (1997), the legislation "cannot constitutionally be applied to prevent Plaintiffs' plans to build and operate the Proposed Landfill." In *Faulkenbury*, although the plaintiffs had vested retirement and disability benefits, state law changed reducing their disability retirement payments. *Id.* at 690, 483 S.E.2d at 426. The Supreme Court reasoned that "pursuant to the plaintiffs' contracts, they were promised that if they worked for five years, they would receive certain benefits if they became disabled. The plaintiffs fulfilled this condition. At that time, the plaintiffs' rights to benefits in case they were disabled became vested. The defendants could not then reduce the benefits." *Id.* at 692, 483 S.E.2d at 428.

No similar contract existed here. The very terms of the franchise agreement anticipated that change could occur and, in fact, that plaintiffs might never be able to build or operate their landfill. Plaintiffs had no rights under the franchise agreement that could be considered analogous to the vested rights in *Faulkenbury*. Because plaintiffs have not forecast any evidence that their contract with Camden County was unconstitutionally impaired, the trial court properly granted summary judgment to defendants and defendant-intervenors on the Contract Clause cause of action.

III

[3] Lastly, plaintiffs contend that the trial court erred in granting defendants' motion for summary judgment because they had a common law vested right and, therefore, were entitled to have the law applied to their landfill project as it existed before the change in the statutes. As set forth by this Court in *Browning-Ferris Indus. of S.*

Atl., Inc. v. Guilford Cnty. Bd. of Adjustment, 126 N.C. App. 168, 171-72, 484 S.E.2d 411, 414 (1997) (internal citations and quotation marks omitted):

> The common law vested rights doctrine is rooted in the due process of law and the law of the land clauses of the federal and state constitutions and has evolved as a constitutional limitation on the state's exercise of its police power[s]. A party's common law right to develop and/or construct vests when: (1) the party has made, prior to the amendment of a zoning ordinance, expenditures or incurred contractual obligations substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building; (2) the obligations and/or expenditures are incurred in good faith; (3) *the obligations and/or expenditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required, authorizing the use requested by the party*; and (4) the amended ordinance is a detriment to the party. The burden is on the landowner to prove each of the above four elements.

(Emphasis added.)

For landfill projects, state law required a permit. Because no permit was issued in this case, plaintiffs cannot meet the requirement for the vested rights analysis that their expenditures on the proposed landfill "were made *in reasonable reliance on and after* the issuance of a valid . . . permit." *Id.* at 171, 484 S.E.2d at 414 (emphasis added). As a result, plaintiffs had no common law vested rights in the proposed landfill.

Plaintiffs assert that *Mission Hosps., Inc. v. N.C. Dep't of Health & Human Servs.*, 205 N.C. App. 35, 696 S.E.2d 163 (2010), entitled them "to have the law as it existed prior to the change." In *Mission Hospital*, the appellant received letters from the State confirming certain equipment and leases did not require Certificates of Need (CON). *Id.* at 37-38, 696 S.E.2d at 167. After purchase agreements were issued for the equipment, *id.* at 38, 696 S.E.2d at 170, the CON law was amended. *Id.*, 696 S.E.2d at 168. The amended statutes required a CON for the equipment. *Id.*, 696 S.E.2d at 169-70. This Court held that since the valid, binding purchase agreements occurred *at a time when no CON was required*, appellant had a vested right in the equipment. *Id.* at 46, 696 S.E.2d at 171-72.

Here, of course, a permit was in fact required at the time plaintiffs entered into the franchise agreement. As a result, *Browning-Ferris* controls, and plaintiffs have failed to show any violation of their common law vested rights. *See Griffin v. Town of Unionville, N.C.*, 338 F. App'x 320, 324-25 (4th Cir. 2009) (unpublished) (holding that even though plaintiff had entered into franchise agreement with local government, it had no vested right to build industrial solid waste facility when State denied permit because "[w]here multiple permits or governmental approvals are required for a project, a landowner has no vested right to complete that project unless he makes his substantial expenditures in good faith reliance on and after receiving all requisite permits or other required approvals").

In an argument related to their vested rights claim, plaintiffs next contend that the Legislature "misuse[d] the political process in order to dictate the outcome of an application to use one's property in a particular way." Plaintiffs cite *Robins v. Town of Hillsborough*, 361 N.C. 193, 639 S.E.2d 421 (2007) for the proposition that this Court has found such activity unconstitutional.

In *Robins*, the plaintiff filed a development plan with the Town of Hillsborough's Board of Adjustment to build an asphalt plant. *Id.* at 194-95, 639 S.E.2d at 423. The Court explained: "Instead of following the proper procedures by which the Board of Adjustment would have rendered an up or down decision on plaintiff's application, defendant [Town], acting through its Board of Commissioners, passed the moratorium [on asphalt plants] and eventually amended the ordinance [banning all asphalt plants], effectively usurping the Board of Adjustment's responsibility in the matter." *Id.* at 199, 639 S.E.2d at 425.

The Court reasoned that "[i]n essentially dictating by legislative fiat the outcome of a matter which should be resolved through quasi-judicial proceedings, defendant did not follow its own ordinance pertaining to the disposition of site specific development plans, thus leaving the Town Board no defense to the charge that its actions were arbitrary and capricious." *Id.* The Court then held that "when the applicable rules and ordinances are not followed by a town board, the applicant is entitled to have his application reviewed under the ordinances and procedural rules in effect as of the time he filed his application." *Id.*

Any resemblance between *Robins* and this case is at best superficial. Plaintiffs do not contend that the General Assembly failed to follow the applicable rules when passing the challenged legislation.

Moreover, the relationship between the Hillsborough Board of Commissioners and the Board of Adjustment is not analogous to the relationship between the General Assembly and DENR in this case.

Plaintiffs' assertions that only an executive agency—DENR—had the ability to regulate solid waste disposal and that the General Assembly "effectively usurped NCDENR's responsibility" disregards the basic civics principle that the legislature enacts the laws, while the executive branch carries out those laws. *See State v. Harris*, 216 N.C. 746, 754, 6 S.E.2d 854, 860 (1940) ("In licensing those who desire to engage in professions or occupations such as may be proper subjects of such regulation, the Legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance. Where such a power is left to the unlimited discretion of a board, to be exercised without the guide of legislative standards, the statute is not only discriminatory but must be regarded as an attempted delegation of the legislative function offensive both to the State and the Federal Constitution." (internal citation omitted)).

It is well established that "[n]o one has the right for the General Assembly not to change a law." *State ex rel. Banking Comm'n v. Citicorp Sav. Indus. Bank of N.C.*, 74 N.C. App. 474, 477, 328 S.E.2d 895, 897 (1985). Additionally, "no person has a vested right in a continuance of the common or statute law. It follows that, generally speaking, a right created solely by the statute may be taken away by its repeal or by new legislation." *Pinkham v. Mercer*, 227 N.C. 72, 78, 40 S.E.2d 690, 694 (1946).

Plaintiffs have not cited any further evidence which would demonstrate that the actions of the Legislature were a misuse of the political process. Plaintiffs could not reasonably rely on the franchise agreement, as a permit was necessary before beginning the project, and the General Assembly followed the applicable procedures in adopting the Moratorium and then amending the solid waste disposal statutes. Therefore, the trial court properly granted summary judgment for defendants and defendant-intervenors on this claim as well.

Affirmed.

Judges STROUD and THIGPEN concur.

T-WOL ACQUISITION COMPANY, INC., TERENCE A. COLBERT, AND HAL H. HARRIS, PLAINTIFFS ECDG SOUTH, LLC; JOHN L. EDMONDS, ESQ. AND RUDOLPH CLARK, JR., CPA, DEFENDANTS

No. COA11-1244

(Filed 1 May 2012)

1. Estoppel—judicial estoppel—inconsistent positions in prior and present actions—no abuse of discretion

The trial court did not abuse its discretion in its application of the doctrine of judicial estoppel as to plaintiff Harris. Harris's failure to list on his bankruptcy petition his involvement and ownership interest in plaintiff T-WOL was inconsistent with the position that he took in this action. Thus, Harris was estopped from claiming any ownership interest in or position as an officer or director of T-WOL.

2. Fiduciary Relationship—breach of fiduciary duty—sole shareholder of corporation—no duty owed to directors or officers

The trial court did not err in dismissing plaintiff Colbert's claims of constructive fraud, civil conspiracy, usurpation of corporate opportunity, and unfair and deceptive trade practices, which were based on defendant Edmond's alleged breach of fiduciary duty due to the transfer of the disputed property. Edmonds, as the sole shareholder of plaintiff T-WOL, did not owe a fiduciary duty to the directors or officers of T-WOL and could dispose of the disputed property as he saw fit.

3. Fiduciary Relationship—breach of fiduciary duty—sole shareholder of corporation—no duty owed corporation

The trial court did not err by dismissing plaintiff T-WOL's claims of constructive fraud, civil conspiracy, usurpation of corporate opportunity, and unfair and deceptive trade practices, which were based on defendant Edmonds alleged breach of fiduciary duty. As defendant Edmonds was the sole shareholder of plaintiff of T-WOL, he did not owe a fiduciary duty to the corporation itself and could dispose of the disputed real property as he saw fit.

4. Fiduciary Relationship—breach of fiduciary duty—alleged accountant for corporation—no duty owed

The trial court properly dismissed plaintiffs' claims for breach of fiduciary duty, civil conspiracy, constructive fraud, and unfair and deceptive trade practices against defendant Clark. Clark, alleged to be the accountant for plaintiff T-WOL, did not owe any duty to T-WOL. Furthermore, plaintiffs' claims against defendant ECDG South, LLC were also properly dismissed as ECDG's only role in the lawsuit was that it was the company to which the disputed property was transferred, a transfer which was determined to be valid.

Appeal by plaintiffs from order and judgment entered 19 April 2011 by Judge Michael R. Morgan in Superior Court, Durham County. Heard in the Court of Appeals 8 March 2012.

Shirley & Adams, P.L.L.C., by Ryan J. Adams, for plaintiffs-appellants.

Michaux & Michaux, P.A., by Eric C. Michaux, for defendants-appellees.

STROUD, Judge.

"Oh what a tangled web we weave,

When first we practise to deceive!"

Sir Walter Scott, *Marmion*, Canto VI, Stanza 17.

Over a period of more than ten years, the parties to this case have woven this "tangled web" of claims and counterclaims. After carefully untangling the knots as best we can based upon the record before us and the applicable law, we affirm the trial's court's order granting summary judgment in favor of ECDG South, LLC, John L. Edmonds, and Rudolph Clark, Jr. ("defendants"), from which T-WOL Acquisition Company, Inc., Terence A. Colbert, and Hal H. Harris ("plaintiffs") have appealed.

I. Factual Background

The weaving of this web of deception started sometime in the early 1990's, when defendant Edmonds began trying to develop low income housing on three parcels of real property ("the disputed property") located in Durham, North Carolina. Because defendant Edmonds lived in New York, he needed someone present in North

Carolina to assist him with this process. He first enlisted Gilford A. Finch for this purpose and Fair City-Pines Corporation was created to hold the disputed property, but the attempts of Mr. Finch and defendant Edmonds to develop the disputed property were unsuccessful and devolved into litigation, in manner quite similar to this lawsuit. Plaintiff T-WOL was created as part of defendant Edmonds' second attempt to develop the disputed property and this second attempt is the genesis of this lawsuit.

Based upon the affidavits, depositions, and documents filed with the parties' summary judgment motions, along with the parties' pleadings, it appears that in 1999 defendant Edmonds approached plaintiff Harris and asked for his assistance in developing low-income housing in Durham. For this purpose they formed T-WOL Acquisition Company, Inc. ("T-WOL") on 19 September 2000. On 25 October 2000, plaintiff Harris and defendant Edmonds were named as directors; 500 shares of T-WOL stock were issued to plaintiff Harris and 350 shares were issued to defendant Edmonds; defendant Edmonds was elected as president and plaintiff Harris as vice president and secretary; and the corporation adopted bylaws. Also on 25 October 2000, defendant Edmonds assigned to T-WOL his rights to "amounts loaned to Gilford A. Finch and Fair City-Pines Corporation" and "real property promised in payment thereof by Fair City-Pines Corporation . . . and Gilford A. Finch[,]" which arose from defendant Edmonds' first attempt to develop the same real property in Durham and the ensuing lawsuit, as discussed above.

One day later, on 26 October 2000, plaintiff Harris signed stock certificates purporting to transfer his 500 shares to plaintiff Colbert.[1] Despite the fact that plaintiff Harris had just transferred his stock to plaintiff Colbert, on 21 December 2000, defendant Edmonds and plaintiff Harris signed a stock assignment agreement which affirmed that defendant Edmonds and plaintiff Harris were the only shareholders of T-WOL. Only twenty days later, on 9 January 2001, plaintiff Harris filed for Chapter 7 bankruptcy protection claiming over $42 million in debts and $11,398.00 in assets. Plaintiff Harris did not disclose any interest in T-WOL or any transfer of stock in T-WOL on his bankruptcy petition. On 20 March 2001, Fair City-Pines Corporation transferred the disputed property by general warranty deed to T-WOL pursuant to the assignment by defendant Edmonds. On 13 June 2001, plaintiff Harris received a discharge of debt from the bankruptcy court.

1. Corporate records for T-WOL from 2000 to 2005 show that plaintiff Colbert was elected as a director and later as president, but the parties dispute the validity of these corporate records and elections, as discussed below.

About two years later, on 1 June 2003, plaintiff Colbert signed stock certificates transferring the 500 shares of T-WOL stock back to plaintiff Harris. About three years after this transfer, on 5 May 2005, the North Carolina Department of the Secretary of State administratively dissolved T-WOL "for failure to file an annual report[.]"

About seven years after plaintiff Harris's discharge in bankruptcy and three years after the administrative dissolution of plaintiff T-WOL, on 11 January 2008, defendant Clark filed articles of organization for ECDG South as a North Carolina limited liability company. On 24 April 2008, defendant Edmonds executed a special warranty deed as president of T-WOL transferring the disputed property to ECDG South, LLC. On 15 August 2008, defendant Edmonds as a member/manager of ECDG South LLC executed a deed of trust on the disputed property to obtain a loan for ECDG South LLC from NewBridge Bank.

Over a year after the transfer of the disputed property to ECDG South, LLC, on 22 April 2009, without advising defendant Edmonds of their plans to reinstate T-WOL, plaintiffs Colbert and Harris filed an application for reinstatement for T-WOL with the Secretary of State. After they had "caused all the back year tax returns and annual reports to be filed" the dissolution was cancelled and T-WOL was reinstated "effective as of the 5th day of May, 2005."

On 25 August 2009, plaintiffs filed a verified complaint against defendants alleging that defendant John L. Edmonds had wrongfully transferred real property from plaintiff T-WOL Acquisition Company, Inc. to defendant ECDG South, LLC and raising claims for breach of fiduciary duty, constructive fraud, civil conspiracy, usurpation of corporate opportunity, conversion, unfair and deceptive trade practices, specific performance to transfer real property back to plaintiffs, a declaratory judgment that the deed transferring the contested real property be null and void, and for punitive damages. On the same date, plaintiffs filed a notice of *lis pendens* describing the nature of the complaint and the real property involved. On 26 October 2009, defendants filed their answer denying plaintiffs' allegations, raising a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), raising the affirmative defense of fraud, and requesting that plaintiffs' claims be dismissed with prejudice. About 16 months later, defendants obtained new counsel and on 23 February 2011, filed a motion to amend their answer to add counterclaims for judicial dissolution of T-WOL Acquisition Company, Inc., unjust enrichment, breach of fiduciary obligation, civil conspiracy, forgery, false pretenses, unfair and deceptive trade practices, and for punitive damages. Following a

hearing on defendants' motion on 7 March 2011, the trial court on 23 March 2011 entered an order allowing in part and denying in part defendants' motion, providing specifically as follows:

> 1. Defendants' Motion to Amend is allowed in part and denied in part.
>
> > a. To the extent the Amended Answer raises affirmative defense those defenses/amendments are allowed, including Breach of Fiduciary Obligation, Civil Conspiracy, Forgery, and False Pretenses.
> >
> > b. To the extent the Amended Answer attempts to seek affirmative relief through counterclaims/amendments [those] are denied, without prejudice.
>
> 2. Defendants can raise these denied amendments after the conclusion of the trial in this matter, either as equitable remedies, in a bifurcated trial, or in a new trial, at the discretion of the Trial Judge.
>
> 3. Defendants cannot pursue Discovery on their counterclaims until such time as those claims are raised.

On or about 1 April 2011, plaintiffs filed a motion for summary judgment, with supporting affidavits and documentation. Defendants filed affidavits with supporting documentation in response to plaintiffs' motion.

By order entered 19 April 2011, the trial court granted summary judgment in favor of defendants, ruling that

> as a result of the Court's application of judicial estoppel in its discretion on the issues of stock ownership and stock transfer, which estoppel arises from Plaintiff Harris's sworn statements in the aforementioned bankruptcy proceedings, *see Bioletti v. Biolette*, 693 S.E.2d 691 (N.C. App. 2010), and the Court being of the opinion, therefore, that summary judgment in favor of the Plaintiffs should be denied and Summary Judgment in favor of the Defendants should be granted[.]

The trial court entered summary judgment in favor of defendants, dissolved the *lis pendens*, and ordered that the corporate records for T-WOL be delivered to counsel for defendant Edmonds. Plaintiffs filed timely notice of appeal from the trial court's 19 April 2011 order.

II. Summary judgment

The standard of review from a motion for summary judgment is well established:

> Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' N.C. Gen. Stat. § 1A-1, Rule 56(c). 'A trial court's grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party.' *Sturgill v. Ashe Memorial Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer, ____ N.C. App. ____, ____, 705 S.E.2d 757, 764-65 (2011) (quoting *Liptrap v. Coyne*, 196 N.C. App. 739, 741, 675 S.E.2d 693, 694 (2009)), *disc. review denied*, 365 N.C. 188, 707 S.E.2d 243 (2011). Summary judgment is appropriate if "plaintiff[s] cannot surmount an affirmative defense which would bar the claim." *Gibson v. Mutual Life Ins. Co.*, 121 N.C. App. 284, 286, 465 S.E.2d 56, 58 (1996) (citation and quotation marks omitted).

Plaintiffs argue that the trial court erred in "granting summary judgment in favor of defendants[.]" Specifically, plaintiffs contend that (1) a material issue of fact existed as to plaintiffs' claims for breach of fiduciary duty, constructive fraud, civil conspiracy, usurpation of corporate opportunity, and unfair and deceptive trade practices; (2) declaratory judgment should have been entered in favor of plaintiffs; (3) the trial court erred in applying the doctrine of judicial estoppel; (4) the trial court erred in applying the law of resulting trust; and (5) the trial court erred in ordering T-WOL to surrender its records to defendants' counsel.

Defendants counter that the trial court's order should be affirmed as (1) plaintiff Harris is barred by judicial estoppel from claiming an ownership interest in T-WOL which makes defendant Edmonds the sole shareholder of T-WOL; (2) plaintiff Colbert is barred by the statute of limitations from claiming ownership of T-WOL stock; (3) the trial court correctly applied the doctrine of resulting trust as defendant Edmonds had "provided all the consideration for the acquisition and maintenance of [the disputed property;]" (4) plaintiff Colbert

"had no right to apply for reinstatement of the corporate status of T-WOL after its Administrative Dissolution in 2005[;]" (5) as the sole owner of T-WOL defendant Edmunds is entitled to the corporate records of T-WOL; (6) plaintiffs received defendants motion for summary judgment 13 days before the hearing, within the time permitted by Rule 56(c); and (7) claims against defendant Clark were properly dismissed because plaintiffs failed to show that they had any contract with defendant Clark. As the issue of judicial estoppel is dispositive, we address it first. Plaintiffs contend that the trial court erred in considering the doctrine of judicial estoppel and in the alternative, erred in its application of the doctrine.

A. Shareholder derivative suit

Before addressing judicial estoppel, we must note that although plaintiffs have not referred to it as such, this lawsuit is essentially a derivative lawsuit, as both individual plaintiffs seek to redress alleged wrongs to the corporation, plaintiff TWOL, and to have the disputed property returned to T-WOL. Although the complaint requests recovery of damages for all of the "plaintiffs" without distinguishing between the rights of the corporation as opposed to the individual plaintiffs, and prays "[t]hat the Defendants be ordered to transfer the property back to *Plaintiffs*, free of any and all encumbrances and liens, pursuant to the [Declaratory Judgment] Cause of Action," all of the claims arise from the actions of the defendants in regard to plaintiff T-WOL and the disputed property.[2] (emphasis added.) We also note that defendants have not argued that this is properly a derivative lawsuit, or that plaintiffs have failed to allege the requisites of a derivative lawsuit.

> As a general rule, shareholders have no right to bring actions "in their [individual] name[s] to enforce causes of action accruing to the corporation[,]" *Fulton v. Talbert*, 255 N.C. 183, 185, 120 S.E.2d 410, 412 (1961), but must assert such claims derivatively on behalf of the corporation. *Robinson* § 17–2(a) at 333. A correct characterization of the shareholder's action as derivative or individual may be crucial, as there are certain mandatory procedural and pleading requirements for a derivative

2. For example, the complaint alleges that defendants Edmonds and Clark deliberately failed "to file the appropriate tax returns and annual reports" for T-WOL and that this action "underscores how Defendants Edmonds and Clark had conspired, against Plaintiffs, over a long period of time, to steal *T-WOL's Property.*" There is no allegation that either individual plaintiff has ever had any ownership interest in the disputed property.

> action. F.H. O'Neal & R. Thompson, *O'Neal's Oppression of Minority Shareholders* § 7:07 (2d ed. 2000), p. 52. Some procedural restrictions proceed from concerns about prevention of a multiplicity of lawsuits and concern over "who should properly speak for the corporation." *Id.* Other restrictions arise from concerns that derivative actions will be misused by " 'self-selected advocate[s]' pursuing individual gain rather than the interests of the corporation or the shareholders as a group, bringing costly and potentially meritless 'strike suits.' " *Id.*
>
> Thus, for example, a shareholder who brings a derivative action in North Carolina must show that he or she "[f]airly and adequately represents the interests of the corporation in enforcing the right of the corporation[,]" N.C. Gen. Stat. § 55–7–41 (1999), and may not commence the action until written demand on the corporation's directors has been made and the statutory period has elapsed. N.C. Gen. Stat. § 55–7–42 (1999). Further, the corporation may then determine by a majority vote of "independent" directors that maintenance of the derivative action "is not in the best interest of the corporation." N.C. Gen. Stat. § 55–7–44(a)(b)(1) (1999). "Independent" directors may include persons who have been nominated or elected by persons who are defendants in the derivative action, persons who are themselves defendants in the derivative action, and persons who approve of the act being challenged. N.C. Gen. Stat. § 55–7–44(c)(1)(2)(3) (1999). "If the corporation commences an inquiry into the allegations set forth in the demand or complaint, the court may stay a derivative proceeding for a period of time the court deems appropriate." N.C. Gen. Stat. § 55–7–43 (1999). Finally, the derivative suit may not be settled without the approval of the court. N.C. Gen. Stat. § 55–7–45(a) (1999). It is of obvious importance to the parties that the recovery in a derivative action goes to the corporation, not to the plaintiff personally. *Outen v. Mical*, 118 N.C. App. 263, 266, 454 S.E.2d 883, 885 (1995).

Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 395-96, 537 S.E.2d 248, 253-54 (2000), *disc. review denied*, 353 N.C. 378, 547 S.E.2d 14 (2001). The primary purpose of this lawsuit is to restore the disputed property to plaintiff T-WOL; the only benefit to the individual plaintiffs is as shareholders in T-WOL. But since no party has addressed any issues as to the requirements for a derivative lawsuit under N.C. Gen. Stat. § 55-7-41 *et. seq.*, we shall not either, and

we express no opinion on these issues. But we do note that the first requirement of a derivative lawsuit, or any of the claims which plaintiffs have alleged, is to establish the identity of the shareholders of T-WOL, and these are the issues which the parties have argued at length. We will therefore examine the arguments actually raised, as these are dispositive.

B. Judicial estoppel

[1] Defendants claim that although Plaintiff Harris may nominally be a shareholder of T-WOL, he is judicially estopped from exercising any rights as a shareholder based upon his failure to identify his interest in T-WOL in his 9 January 2001 bankruptcy petition, in which he was required by law to identify this interest but he did not, and he obtained a discharge in bankruptcy. Thus, we must first consider whether plaintiff Harris, as a shareholder, is barred from participation in this action.

1. Consideration

Plaintiffs argue that defendants should not have been allowed to present the affirmative defense of judicial estoppel as they did not plea this affirmative defense in their amended answer as required by N.C. Gen. Stat. § 1A-1, Rule 8(c). Plaintiffs also argue that since the trial court's prior 23 March 2011 order, regarding defendants' motion to amend, denied defendants' motion to add counterclaims and allowed certain affirmative defenses, not including judicial estoppel, the trial court erred in allowing defendants to "present the affirmative claim of judicial estoppel" in violation of its prior order.

Defendants contend that contrary to plaintiffs' arguments the trial court's 23 March 2011 order regarding the amendment of defendants' answer stated that defendants could not raise counterclaims but allowed them to "present any affirmative defenses[;]" defendants served their affidavit which addressed judicial estoppel in response to plaintiffs' motion for summary judgment; and pursuant to the trial court's 23 March 2011 order regarding defendants' motion to amend and N.C. Gen. Stat. § 1A-1, Rule 56(e), the trial court properly considered the affirmative defense of judicial estoppel.

N.C. Gen. Stat. § 1A-1, Rule 8(c) (2009) states that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel . . . and any other matter constituting an avoidance or affirmative defense." Generally, estoppel is an affirmative defense which must be plead with certainty. *Duke University v. St. Paul Mercury Ins. Co.*,

95 N.C. App. 663, 673, 384 S.E.2d 36, 42 (1989). "Broadly speaking, judicial estoppel prevents a party from acting in a way that is inconsistent with its earlier position before the court." *Powell v. City of Newton*, 364 N.C. 562, 569, 703 S.E.2d 723, 728 (2010) (citing *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 28-29, 591 S.E.2d 870, 888-89 (2004)). We note that defendants did not directly mention or allege facts that would raise the affirmative defense of judicial estoppel in their initial answer. Nor did defendants' proposed amended answer include the affirmative defense of judicial estoppel, although it did allege others. Therefore, defendants did not raise judicial estoppel as an affirmative defense in their pleadings. Contrary to defendants' argument, the trial court's 23 March 2011 order granting in part and denying in part defendants' motion to amend their answer did not permit defendants to raise "any affirmative defenses" but stated that defendants could raise their affirmative claims as affirmative defenses; barred defendants from making new counterclaims in their amended answer; but permitted defendants to raise their counterclaims at the end of the trial "either as equitable remedies, in a bifurcated trial or in a new trial, at the discretion of the Trial Judge." None of defendants' affirmative claims or counterclaims were based upon judicial estoppel.

Yet the failure to plead judicial estoppel does not end our inquiry, as "although the failure to plead an affirmative defense ordinarily results in its waiver, the parties may still try the issue by express or implied consent." *Id.* at 673, 384 S.E.2d at 42 (citation omitted). N.C. Gen. Stat. § 1A-1, Rule 15(b) (2009) provides as follows:

> When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Our Supreme Court discussed the application of N.C. Gen. Stat. § 1A-1, Rule 15(b) as follows:

> [T]he implication of Rule 15(b) . . . is that a trial court may not base its decision upon an issue that was tried inadvertently. Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue.

Eudy v. Eudy, 288 N.C. 71, 77, 215 S.E.2d 782, 786-87 (1975) (citations omitted), *overruled on other grounds in Quick v. Quick*, 305 N.C. 446, 457-58, 290 S.E.2d 653, 661 (1982). Here, on or about 1 April 2011, plaintiffs filed a motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, with supporting documentation and affidavits, arguing that there was no genuine issue of material fact as the forecast of evidence showed that defendant Edmonds was not the sole shareholder of T-WOL when he transferred the contested real property, as plaintiff Harris and/or Colbert were also shareholders. Subsequently, defendants filed the "affidavit of John L. Edmonds, Esq. in response to plaintiff's [sic] motion for summary judgment" pursuant to Rule 56(e) and supporting documentation, which alleged that plaintiff Harris denied any ownership interest in T-WOL in his previous bankruptcy filings. The record shows that both parties argued extensively and specifically for and against the application of judicial estoppel at the 11 April 2011 hearing on plaintiffs' motion for summary judgment and plaintiffs made no objection to the consideration of judicial estoppel on the grounds that it was not included in defendants' pleadings. Therefore, by the "implied consent" of the parties, the trial court properly considered the doctrine of judicial estoppel. *See* N.C. Gen. Stat. § 1A-1, Rule 15(b).

2. Application

Plaintiffs argue next that the trial court erred in its application of the doctrine of judicial estoppel. Plaintiffs, citing *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 38, 591 S.E.2d 870, 894 (2004), argue that plaintiff Harris's position in this case is consistent with his position in the bankruptcy, as he did not own the T-WOL shares when he filed for bankruptcy and was not required to disclose the transfer of T-WOL shares, as it was done "in the ordinary course of business" to secure "a commitment [from plaintiff Colbert] to advance money in the future for T-Wol purposes[.]" Plaintiffs further argue that "there is no threat to judicial integrity" because plaintiff Harris had not "intent-

ionally misled the bankruptcy court" as he consulted with "multiple attorneys regarding his bankruptcy, including Edmonds[;]" and plaintiffs "will not gain an unfair advantage or cause an unfair detriment to Defendants by allowing [plaintiffs] to present evidence Edmonds was not the only share holder of T-Wol" because defendant Edmonds advised plaintiff Harris not to list "everything in his bankruptcy" and defendant Edmonds was listed as a creditor numerous times on defendant Harris's bankruptcy schedule.[3] Plaintiffs further argue that judicial estoppel should be applied to defendants as defendant Edmonds had stated in his affidavit that he was the sole shareholder of T-WOL but later acknowledged that he was not.

Defendants counter that the trial court did not abuse its discretion in applying judicial estoppel. Defendants argue that the undisputed facts establish that plaintiff Harris denied in his bankruptcy being an officer or director in the corporation, any ownership interest in T-WOL, or any transfer of T-WOL stock; in contrast plaintiffs' pleadings state that plaintiff Harris was the owner of T-WOL stock; despite the omission of T-WOL from his bankruptcy property listings, plaintiff Harris received the benefit of bankruptcy discharge; this omission was not inadvertent; and plaintiff Harris was properly judicially estopped from claiming an ownership interest in T-WOL.

We have recently summarized the doctrine of judicial estoppel as follows:

> Our Supreme Court first recognized the doctrine of judicial estoppel in *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 591 S.E.2d 870 (2004), and noted that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." *Id.* at 28, 591 S.E.2d at 888 (quotation omitted). The purpose of this doctrine is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment[.]" *Id.* (quotation omitted). "[J]udicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation." *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005). In *Whitacre P'ship*, our Supreme Court set forth three factors which may be considered in determining whether the doctrine is applicable:

3. Plaintiff Harris also concedes that defendant Edmonds was not his attorney in the bankruptcy matter and that he sought counsel from other attorneys before filing his bankruptcy petition.

> First, a party's subsequent position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled. Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.
>
> *Whitacre P'ship*, 358 N.C. at 29, 591 S.E.2d at 888-89 (internal citations and quotations omitted). The first factor is the only factor that must be present for judicial estoppel to apply. *Wiley v. United Parcel Serv., Inc.*, 164 N.C. App. 183, 188, 594 S.E.2d 809, 812 (2004). . . . "[J]udicial estoppel is to be applied in the sound discretion of our trial courts." *Whitacre P'ship*, 358 N.C. at 33, 591 S.E.2d at 891.

Estate of Means v. Scott Elec. Co., ____ N.C. App. ____, ____, 701 S.E.2d 294, 298-99 (2010). Our Supreme Court has further stated that judicial estoppel "seeks to protect the courts, not litigants, from individuals who would play 'fast and loose with the judicial system' " and is a "discretionary equitable doctrine . . . providing courts with a means to protect the integrity of judicial proceedings[.]" *Whitacre P'ship*, 358 N.C. at 26, 591 S.E.2d at 887.

In *Bioletti v. Bioletti*, 204 N.C. App. 270, 693 S.E.2d 691 (2010), this Court addressed the application of the doctrine of judicial estoppel to the plaintiff's claims in light of his inconsistent position in his prior bankruptcy proceeding. In *Bioletti*, the plaintiff filed a petition seeking relief under Chapter 7 of the Bankruptcy Code, alleging that he did not have any funds to pay his creditors. *Id.* at 270, 693 S.E.2d at 692. Thirteen days later, the defendant's brother William Bioletti died and, as a result of his death, the plaintiff was entitled to certain "monies and financial accounts[.]" *Id.* at 270-71, 693 S.E.2d at 692. However, the plaintiff executed a "hand written agreement" transferring away any interest he was entitled to receive to the defendant. *Id.* at 271, 693 S.E.2d at 692. A meeting of creditors was held and subsequently the bankruptcy court entered an order granting the plaintiff's request for bankruptcy discharge. *Id.* The plaintiff then amended his property schedule in the bankruptcy proceeding indicating that he had received $24,747.19 as a result of William Bioletti's death and the

bankruptcy court issued a final decree closing the plaintiff's bankruptcy case. *Id.* The plaintiff subsequently filed a complaint against defendant alleging that the defendant "had unlawfully converted to her own use monies which he was entitled to receive from insurance policies and retirement accounts owned by William Bioletti" and raising claims for fraud and conversion, for the imposition of a constructive trust, and for punitive damages. *Id.* The defendant filed a motion to dismiss and alternatively a motion for summary judgment arguing that the plaintiff's claims were barred by laches and judicial estoppel. *Id.* at 271, 693 S.E.2d at 693. The trial court granted the defendant's motion for summary judgment based on the application of the doctrine of judicial estoppel and the plaintiff appealed. *Id.* at 273, 693 S.E.2d at 694. This Court first determined that the plaintiff's position in the current case was inconsistent with the position that he took in the bankruptcy proceeding as the plaintiff was contending that he was entitled to recover in excess of $92,000 from defendant "which originated from insurance contracts, retirement accounts or similar instruments originally owned by William Bioletti[,]" but had only reported to the bankruptcy Court that he had received $24,747.19, in violation of the bankruptcy code provisions requiring him to disclose all of the monies from William Bioletti's estate. *Id.* at 276-78, 693 S.E.2d at 696-97 (footnote omitted). This Court next determined that the plaintiff had succeeded in persuading the bankruptcy court to accept that the value of his interest in William Bioletti's estate was only $24,797.14 as he never disclosed the full amount of the monies he was entitled to and received a discharge in bankruptcy. *Id.* at 278-79, 693 S.E.2d at 697. This Court, after noting that

> [a]lthough this Court has no bankruptcy jurisdiction and is reluctant, for that reason, to render an opinion concerning the effect that any understatement of Plaintiff's claim to monies resulting from William Bioletti's death may have had on the outcome of his bankruptcy proceeding,

also determined that the "Plaintiff would obtain an unfair advantage in the event that we were to overturn the trial court's decision to the effect that Plaintiff was judicially estopped from proceeding against Defendant in this case" as the defendant had paid all of the plaintiff's creditors in full in the bankruptcy and, if successful in his suit, he would also receive "an amount in excess of $ 92,000 from Defendant[.]" *Id.* at 279, 693 S.E.2d at 697. This Court concluded that the trial court did not abuse its discretion in applying the doctrine of judicial estoppel and affirmed the trial court's summary judgment order in favor of the defendant. *Id.* at 279-80, 693 S.E.2d at 697-98.

Accordingly, we must first consider whether the position that plaintiff Harris has taken in the case before us is inconsistent with the position that he took in the bankruptcy proceeding. It is undisputed that approximately two and a half months after the formation of T-WOL, on 9 January 2001, defendant Harris filed for Chapter 7 bankruptcy protection in the Southern District of New York, listing total liabilities of over $42 million and total assets of $11,398.00. Schedule B of the bankruptcy filings required defendant Harris to list "all personal property of the debtor of whatever kind" including "Stock and interests in incorporated and unincorporated businesses."[4] Plaintiff Harris listed his ownership of 100 shares of "The Winback Organization Ltd" but made no mention of any ownership of T-WOL stock. We note that while plaintiff Harris's bankruptcy was pending, Fair City-Pines Corporation on 20 March 2001 transferred by general warranty deed the disputed property to T-WOL pursuant to the assignment by defendant Edmonds.[5] About two weeks later, in his ongoing bankruptcy proceeding, plaintiff Harris filed his "Statement of Financial Affairs" on 3 April 2001. In this filing, plaintiff Harris was required to list, *inter alia*, "all other property, other than property transferred in the ordinary course of business or financial affairs of the debtor, transferred either absolutely or as security within one year immediately preceding the commencement of this case." Plaintiff Harris did not list shares of T-WOL that he allegedly transferred to plaintiff Colbert. The bankruptcy filing also required plaintiff Harris to list any income received "other than from employment, trade, profession, or operation of the debtor's business during the two years immediately preceding the commencement of this case." Again, plaintiff Harris did not list the $10,000 he claimed he had received from plaintiff Colbert in exchange for his 500 shares in T-WOL but only listed $500 in lottery winning in 1999. The bankruptcy filing also required plaintiff Harris to

> list the names and addresses of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation . . . within the two years immediately preced-

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4. 11 U.S.C. § 521(1) (2009) requires a debtor seeking bankruptcy protection to file a schedule of assets, liabilities, current income, current expenditures, and a statement of the debtor's financial affairs. We also note that property of a bankruptcy estate is defined broadly to include: "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (2009).

5. "The duty of disclosure in a bankruptcy proceeding is a continuing one[.]" *Browning Mfg. v. Mims* (*In re Coastal Plains, Inc.*), 179 F.3d 197, 208 (5th Cir. 1999) (citation omitted).

> ing the commencement of this case or in which the debtor owned 5 percent or more of the voting or equity securities within the two years immediately preceding the commencement of this case.

Again, plaintiff Harris made no mention of his previous or ongoing involvement in T-WOL. Plaintiff Harris received a discharge from the bankruptcy court in June of 2001.

In contrast to his bankruptcy filings, plaintiffs in their verified complaint alleged that plaintiff Harris was the sole director when T-WOL was incorporated, he was later named as one of the two directors, one of the two shareholders, and was vice president and secretary of T-WOL, and transferred his shares to plaintiff Colbert. Even though plaintiffs argue that plaintiff Harris did not list the transfer of shares to plaintiff Colbert because it was in the "ordinary course of business," the bankruptcy filing still required to disclose the names of any corporation "in which the debtor owned 5 percent or more of the voting or equity securities *within the two years* immediately preceding the commencement of this case." (emphasis added.) Looking to the evidence in the record, we note the corporate records for T-WOL show that on 25 October 2000 the following action was taken: (1) Ben Sirmons, the registering agent, assigned the corporation to defendant Edmonds and plaintiff Harris; (2) by "consent to organizational action[,]" bylaws were adopted, defendant Edmonds was elected as president, plaintiff Harris was elected as vice president and secretary, and 350 shares were issued to defendant Edmonds and 500 shares were issued to plaintiff Harris; and (3) by "consent to action without meeting," plaintiff Harris and defendant Edmonds elected themselves as directors of T-WOL. Also on 25 October 2000, defendant Edmonds, assigned to T-WOL his rights to "amounts loaned to Gilford A. Finch and Fair City-Pines Corporation" and "real property promised in payment thereof by Fair City-Pines Corporation . . . and Gilford A. Finch[.]" Upon examination of all of plaintiff Harris's machinations, it is obvious that he sought to "play 'fast and loose with the judicial system' " *see Whitacre P'ship*, 358 N.C. at 26, 591 S.E.2d at 887, and that he has repeatedly taken inconsistent positions based upon what might be most beneficial to him at the moment. We hold that, just as the plaintiff in *Bioletti*, plaintiff Harris's failure to list in his bankruptcy his involvement and ownership interest in T-WOL was inconsistent with the position that he is taking in this action.

We also hold that plaintiff Harris succeeded in persuading the bankruptcy court to accept that he had no involvement or ownership interest in T-WOL as he never disclosed any involvement in T-WOL to the bankruptcy court and ultimately received a discharge in bankruptcy. Like the Court in *Bioletti*, we will not speculate as to whether the bankruptcy court would have ruled differently in his bankruptcy proceeding if plaintiff Harris had disclosed his involvement in T-WOL, but if we were to rule in his favor, reversing summary judgment, and plaintiffs ultimately succeed in their claims at trial, plaintiff Harris would receive his interest as a shareholder in T-WOL, which would then have value as T-WOL would also own the disputed property, allowing him to derive an unfair advantage from his inconsistent positions. Therefore, we hold that the trial court did not abuse its discretion in its application of the doctrine of judicial estoppel as to plaintiff Harris and plaintiff Harris is estopped from claiming any ownership interest in or position as an officer or director of T-WOL. We also note that our application of the doctrine of judicial estoppel to plaintiff Harris creates an insurmountable obstacle to plaintiffs' remaining claims, as discussed below. *See Gibson*, 121 N.C. App. at 286, 465 S.E.2d at 58.

C. Plaintiff Colbert

[2] Plaintiffs also contend that the trial court "misapplied the doctrine of judicial estoppel by using it to bar not only Harris's claims, but also the claims asserted by T-WOL and Colbert." Defendants argue that the only shareholders of T-WOL were plaintiff Harris and defendant Edmonds; plaintiff Harris is judicially estopped from claiming to be a shareholder or that he transferred shares to plaintiff Colbert; and defendant Edmonds as the sole shareholder of T-WOL could "dissolve the corporation and dispose of its assets[.]" As discussed below, plaintiffs' claims are ultimately based on the existence of and breach of a fiduciary duty by the defendants to each particular plaintiff. To answer the parties' contentions, we must first look at the forecast of evidence to determine plaintiff Colbert's involvement or position in T-WOL, as he is alleged by plaintiffs to be the president, director, and a shareholder in T-WOL, to determine what duty, if any, defendants owed plaintiff Colbert.

1. Status as Shareholder

N.C. Gen. Stat. § 55-1-40(22) (2009) defines a "Shareholder" as

> the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent

of the rights granted by a nominee certificate on file with a corporation.

Plaintiffs have presented inconsistent allegations regarding plaintiff Colbert's status as shareholder. First, plaintiffs alleged in their verified complaint that plaintiff Colbert is a shareholder in T-WOL based upon plaintiff Harris's transfer of his 500 shares to plaintiff Colbert in 26 October 2000.[6] But in his deposition, plaintiff Colbert admitted that he was never a stockholder in T-WOL because defendant Edmonds did not sign the share certificates. In his deposition, he repeatedly claimed to have "an interest" in T-WOL because he had provided $10,000.00 to Harris for use in the development of the disputed property but ultimately admitted that this was a personal loan to Harris and he was not a shareholder in T-WOL. However, in their brief on appeal, plaintiffs argue that the shares were properly transferred to plaintiff Colbert because they were endorsed by plaintiff Harris and delivered to plaintiff Colbert. Yet at oral argument before this Court, plaintiffs took the position that even plaintiffs do not actually know whether plaintiff Harris or plaintiff Colbert is a shareholder, but assert that this is irrelevant as summary judgment should be reversed either way, as one of them must be. Defendants counter that plaintiff Colbert was never a shareholder in T-WOL because the shares were never properly transferred to plaintiff Colbert as they were never delivered or endorsed by defendant Edmonds, as president.

Despite their contradictory positions, plaintiffs allege in their verified complaint, and the corporate records of T-WOL show, that on 1 June 2003, plaintiff Colbert transferred the 500 shares of T-WOL stock back to plaintiff Harris. Thus, if the original transfer from plaintiff Harris was valid and plaintiff Colbert was a shareholder, he ceased to be a shareholder when he transferred the 500 shares back to plaintiff Harris. Accordingly, the evidence, even when viewed in the light most favorable to plaintiffs, tends to show that plaintiff Colbert is not and was not at the time of filing of this lawsuit a shareholder of T-WOL. Since we have already determined that plaintiff Harris is estopped from claiming to be a shareholder in T-WOL, and plaintiff Colbert is not a shareholder in T-WOL, defendant Edmonds is the sole shareholder of T-WOL.

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6. Actually, the complaint alleged that both plaintiffs Harris and Colbert were simultaneously shareholders of T-WOL when the lawsuit was filed, so that there were three shareholders total, a position which appears to be impossible under the facts alleged.

2. Director and Officer

Next, we turn to examine plaintiff Colbert's other positions in T-WOL. Even if he was not a shareholder, plaintiff Colbert claims to have authority to act for plaintiff T-WOL as president. Plaintiff Colbert testified that he was president from 2005 onward and plaintiff Harris testified that defendant Edmonds signed the consent to action forms electing plaintiff Colbert as president. According to T-WOL's corporate records, plaintiff Colbert was elected as a director at the latest on 24 October 2003 by "consent to action without meeting of the shareholders" and elected as president on 25 October 2005. As noted above, defendant Edmonds transferred the contested real property from T-WOL to ECDG South on 24 April 2008. Therefore, according to plaintiffs' arguments, plaintiff Colbert, not defendant Edmonds, was the president and director of T-WOL when the disputed property was transferred out of T-WOL.

Defendant Edmonds states in his affidavit that he has never met plaintiff Colbert, he was never notified of the consent without meeting votes, he never consented to the appointment of plaintiff Colbert as president and director, and those "documents are fraudulent and do not represent my will or consent." Also included in the record is an affidavit from Albert H. Lyter, III, an expert in forensics, in which he states that he examined the consent to action without meeting documents and opined that "they were not prepared in the year indicated on the document" and the signers "signed them all at once" concluding that the documents "were not prepared over the time period indicated on the documents (2000 to 2005) but were prepared simultaneously by each signer." Therefore, there is a genuine issue of fact as to whether plaintiff Colbert was president and a director of T-WOL when defendant Edmonds transferred the property from T-WOL to ECDG South. We must next determine whether this amounts to an issue of "material" fact. *See Mitchell*, ____ N.C. App. at ____, 705 S.E.2d at 764-65.

Plaintiff Colbert's claims for constructive fraud, civil conspiracy, usurpation of corporate opportunity, and unfair and deceptive trade practices are all based on plaintiffs' claims of an alleged breach of fiduciary duty by defendant Edmonds in transferring the disputed property from T-WOL to ECDG South LLC and defendant Clark's participation in this breach of duty. *See Governor's Club Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 249-50, 567 S.E.2d 781, 787-88 (2002) (noting that the claim of constructive fraud requires a

breach of a fiduciary duty and "allegations sufficient to allege constructive fraud are likewise sufficient to allege unfair and deceptive trade practices."), *affirmed per curium* by 357 N.C. 46, 577 S.E.2d 620 (2003); *Meiselman v. Meiselman*, 309 N.C. 279, 307, 307 S.E.2d 551, 567 (1983) (noting that a corporate director or officer can breach their fiduciary duty by usurpation of a corporate opportunity); *Muse v. Morrison*, 234 N.C. 195, 198, 66 S.E.2d 783, 785 (1951) (noting that for the claim of civil conspiracy there must be an underlying wrongful act resulting in injury).[7] Therefore, given plaintiffs' claims, it is their contention that defendant Edmonds, as the sole shareholder of T-WOL, owes plaintiff Colbert a fiduciary duty because he is president and a director of T-WOL. "A claim for breach of fiduciary duty requires the existence of a fiduciary duty." *Governor's Club Inc.*, 152 N.C. App. at 247, 567 S.E.2d at 786. A fiduciary relationship "exists in all cases where 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." *Stone v. McClam*, 42 N.C. App. 393, 401, 257 S.E.2d 78, 83, *disc. review denied*, 298 N.C. 572, 261 S.E.2d 128 (1979) (citation omitted). "As a general rule, shareholders do not owe a fiduciary duty to each other or to the corporation." *Freese v. Smith*, 110 N.C. App. 28, 37, 428 S.E.2d 841, 847 (1993) (citing Robinson, *North Carolina Corporation Law*, § 11.4 (1990))[8]. However, directors and officers of a corporation owe a fiduciary duty to the corporation and the shareholders. *See Meiselman v. Meiselman*, 58 N.C. App. 758, 774 295 S.E.2d 249, 259 (1982) (noting that "[d]irectors of a corporation are trustees of the property of the corporation for the benefit of the corporate creditors, as well as shareholders."), *modified and aff'd*, 309 N.C. 279, 307 S.E.2d 551 (1983); N.C. Gen. Stat. § 55-8-30 (2009) (listing the fiduciary duties of a corporate director); N.C. Gen. Stat. § 55-8-42 (2009) (listing the fiduciary duties of corporate officers). However, we find no North Carolina authority addressing the con-

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7. At the summary judgment hearing, plaintiffs' counsel abandoned their claim for conversion of the contested real property. *See Norman*, 140 N.C. App. at 414, 537 S.E.2d at 264 (stating that "In North Carolina, only goods and personal property are properly the subjects of a claim for conversion. A claim for conversion does not apply to real property." (citation omitted)), *disc. review denied*, 353 N.C. 378, 547 S.E.2d 13 (2001).

8. The exception to this rule is that controlling or majority shareholders owe a fiduciary duty to minority shareholders in a closely held corporation. *See Freese*, 110 N.C. App. at 37, 428 S.E.2d at 847. This exception is not at issue in this case because defendant Edmonds is the sole shareholder of T-WOL based on judicial estoppel and was the minority shareholder even without judicial estoppel.

straints imposed on the actions of an individual regarding a corporate asset who, like defendant Edmonds, is effectively the sole shareholder and a director of the corporation. It appears that the consensus in other jurisdictions is that a sole shareholder of a corporation is generally free to dispose of corporate assets as he sees fit, except where such actions harm or defraud the corporation's creditors, or otherwise violate public policy. *See Anderson v. Benson*, 394 N.W.2d 171, 175 (Minn. Ct. App. 1986); *accord L.R. Schmaus Co. v. Commissioner*, 406 F.2d 1044, 1045 (7th Cir. 1969); *Household Reinsurance Co., Ltd., v. Travelers Ins. Co.*, No. 91 C 1308, 1992 U.S. Dist. LEXIS 1006 (E.D. Ill. January 31, 1992); *See also Pittman v. American Metal Forming Corp.*, 336 Md. 517, 649 A.2d 356, 363-64 (Md. 1994) (holding that a sole shareholder of a corporation does not breach a fiduciary duty to the corporation when he charges lease prices above fair market value for the property and equipment he leased to his corporation). Even though it does not address this exact issue, we find our Supreme Court's reasoning in *Snyder v. Freeman* instructive in explaining the consequences of a sole shareholder's actions on the corporation:

> Under some circumstances, the action of all the shareholders of a close corporation bind the corporation even if the corporation is considered to be a legal entity separate from the shareholders. A corporation is ordinarily bound by acts of its shareholders and directors "only when they act as a body in regular session or under authority conferred at a duly constituted meeting." *Park Terrace, Inc. v. Phoenix Indemnity Co.*, 241 N.C. 473, 478, 85 S.E. 2d 677, 680 (1955), *on rehearing*, 243 N.C. 595, 91 S.E. 2d 584 (1956). Nevertheless,"'[t]he contracts of the sole shareholder, or all the shareholders, will bind the corporation in modern law, although not made by the authority of the board of directors, since they are the only persons beneficially interested, aside from corporate creditors. If they do not distinguish between corporate business and their individual affairs, or waive formalities established for their benefit, there is no reason why the courts should insist on such formalities. The contract of the owners of all shares will be regarded as binding on the corporation if so intended.' " *Philadelphia Life Insurance Co. v. Crosland-Cullen Co.*, 234 F. 2d 780, 783 (4th Cir. 1956), *quoting* Ballentine on Corporations § 126, p. 296.

300 N.C. 204, 210, 266 S.E.2d 593, 597-98 (1980) (footnote omitted). Plaintiffs raise no public policy concerns and there are no alleged corporate creditors. Therefore, even if there is an issue of fact as to whether plaintiff Colbert was a director or president of T-WOL, this is not an issue of material fact because defendant Edmonds as the sole shareholder of T-WOL did not owe a fiduciary duty to the directors or officers of T-WOL and could dispose of the disputed property as he saw fit. Accordingly, plaintiff Colbert's claims of constructive fraud, civil conspiracy, usurpation of corporate opportunity, and unfair and deceptive trade practices, which were based on defendant Edmond's alleged breach of fiduciary duty due to the transfer of the disputed property, were properly dismissed by the trial court.

D. Plaintiff T-WOL

[3] Since plaintiff Harris has been eliminated by judicial estoppel and plaintiff Colbert has been eliminated because T-WOL has only one shareholder, only claims of plaintiff T-WOL remain. N.C. Gen. Stat. § 55-3-02(1) (2009) states that a corporation has the power "To sue and be sued, complain and defend in its corporate name."[9] However, as defendant Edmonds is the sole shareholder and he did not owe a fiduciary duty to the directors or officers of T-WOL, he also did not owe a fiduciary duty to T-WOL, the corporation, *see Freese*, 110 N.C. App. at 37, 428 S.E.2d at 847, and, as noted above, could dispose of the disputed real property as he saw fit. Accordingly, plaintiff T-WOL's claims of constructive fraud, civil conspiracy, usurpation of corporate opportunity, and unfair and deceptive trade practices, which were based on defendant Edmonds alleged breach of fiduciary duty were properly dismissed by the trial court. Given this determination, we also affirm the trial court's declaration that the transfer of the disputed property from T-WOL to ECDG South, LLC was valid. Additionally, we affirm the transfer of the corporate records to defendant Edmonds as the sole shareholder of T-WOL.

E. Defendants Clark and ECDG South LLC

[4] Plaintiffs argue that defendant Clark as the accountant for T-WOL breached his fiduciary duty to T-WOL by intentionally failing to file tax returns and annual reports with the Secretary of State which resulted in T-WOL's administrative dissolution; defendants Clark and Edmonds subsequently forming ECDG South LLC; and defendant

9. Defendants have not raised any arguments regarding the standing of plaintiffs Harris or Colbert to bring this action on behalf of T-WOL and we express no opinion on this issue.

Edmonds transferring the disputed property from the dissolved T-WOL without any consideration to plaintiffs. Plaintiffs' additional claims for constructive fraud, civil conspiracy, and unfair and deceptive trade practices against defendant Clark are all based on this alleged breach of fiduciary duty. Defendants counter that the forecast of evidence shows that defendant Clark had no duty to T-WOL and the claims against him were properly dismissed.

Plaintiffs' claims against Clark are also based upon the same actions which they claim harmed plaintiff T-WOL, and we have already determined that defendant Edmonds, as sole shareholder, did not owe any duty to either T-WOL or its officers or directors. We are unable to discern how defendant Clark, alleged to be the accountant for T-WOL, could owe any duty to T-WOL above that owed by defendant Edmonds. For the same reasons as discussed above, the trial court properly dismissed plaintiffs' claims of breach of fiduciary duty, civil conspiracy, constructive fraud, and unfair and deceptive trade practice against defendant Clark.

Plaintiffs' claims against ECDG South, LLC were also properly dismissed as its only role in this lawsuit is that it is the company to which the disputed property was transferred, and as discussed above, that transfer was valid. As we have affirmed summary judgment in favor of defendants, we need not address the parties' remaining arguments.

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judges ELMORE and STEELMAN concur.

THE NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF- APPELLANT v. CULLY'S MOTORCROSS PARK, INC., AND LAURIE VOLPE DEFENDANTS-APPELLEES

No. COA11-651

(Filed 1 May 2012)

1. Malicious Prosecution—initiation of proceedings—competent evidence to support determination

The trial court did not err in a malicious prosecution counterclaim by concluding that plaintiff initiated proceedings against defendant. There was competent evidence in the record to support the trial court's determination that except for the efforts of plaintiff, it was unlikely that there would have been a criminal prosecution of defendant.

2. Malicious Prosecution—probable cause for prosecution—lacking

The trial court did not err in a counterclaim for malicious prosecution by finding probable cause lacking to criminally charge defendant with obtaining property by false pretenses. There was competent evidence in the record for the trial court to conclude that a reasonable person would not have believed defendant was hiding information that she had already provided to plaintiff.

3. Malicious Prosecution—immunity—actual malice not required—malice inferred from lack of probable cause

The trial court did not err in a malicious prosecution counterclaim by failing to find that plaintiff was immune from civil liability. N.C.G.S. § 58-79-40(c) does not require actual malice and malice may be inferred from probable cause.

4. Unfair Trade Practices—malicious prosecution claim—in or affecting commerce—judgment proper

The trial court did not err by entering judgment for defendant on her counterclaim for unfair and deceptive trade practices. Defendant's claim was premised on her malicious prosecution claim, which was entered without error. Also, plaintiff failed to object to the trial court's statement that he stipulated to the fact that insurance was in or affecting commerce. Further, the trial court was correct in concluding that plaintiff, by engaging in the unfair and deceptive act of malicious prosecution in order to gain leverage in the civil action, caused defendant to suffer damages.

5. Immunity—Noerr-Pennington doctrine—not applicable to the facts

The trial court did not err in a malicious prosecution case by concluding that the *Noerr-Pennington* doctrine, which immunizes conduct undertaken to influence or petition government bodies from antitrust liability, was inapplicable. The action underlying the N.C.G.S. § 75-1.1 claim was plaintiff's instigation of a malicious prosecution without probable cause, which was done for the improper purpose of gaining leverage in a lawsuit, and the doctrine did not apply to these facts.

6. Malicious Prosecution—unfair and deceptive trade practices—additional element—separate injuries

The trial court did not err by concluding that defendant suffered separate injuries resulting from a malicious prosecution and an unfair and deceptive trade practices claim. Plaintiff failed to address the trial court's conclusion that there was a separate, additional element involved in the N.C.G.S. § 75-1.1 claim.

7. Attorney Fees—unfair trade practices – properly awarded

The trial court did not err in awarding attorney fees in favor of defendant where she prevailed on her unfair and deceptive trade practices claim.

Appeal by Plaintiff from orders and judgment entered 7 February 2011 by Judge Wayland J. Sermons, Jr. in Superior Court, Wilson County. Heard in the Court of Appeals 8 November 2011.

Harris, Creech, Ward and Blackerby, P.A., by Jay C. Salsman, C. David Creech, and Luke A. Dalton, for Plaintiff-Appellant.

Hemmings & Stevens, PLLC, by Aaron C. Hemmings and M. Cory Howes, for Defendants-Appellees.

Young Moore and Henderson, P.A., by Glenn C. Raynor and Andrew P. Flynt, for North Carolina Association of Defense Attorneys, amicus curiae.

Schulz Stephenson Law, by Bradley N. Schulz; and Wait Law, P.L.L.C., by John L. Wait, for North Carolina Advocates for Justice, amicus curiae.

McGEE, Judge.

The North Carolina Farm Bureau Mutual Insurance Company (Plaintiff) filed a complaint on 24 February 2009 against Cully's Motorcross Park, Inc. (Cully's); Laurie Volpe (Ms. Volpe) (together, Defendants); and Louis Volpe (Mr. Volpe). Plaintiff sought declaratory judgment regarding Plaintiff's liability as insurer of real property owned by Defendants and Mr. Volpe. Defendants, along with Mr. Volpe, filed a motion for a change of venue and an answer and counterclaim on 23 March 2009. They asserted claims of breach of contract, unfair claims settlement practices, bad faith, and unfair and deceptive trade practices.[1] Defendants also sought punitive damages. They filed an amended answer and counterclaim on 22 June 2009, adding an additional claim for malicious prosecution.

Mr. Volpe died in the summer of 2010 and, prior to trial, Plaintiff dismissed Mr. Volpe as a party. Following a bench trial, the trial court entered judgment on 7 February 2011. The trial court ordered, *inter alia*, that Ms. Volpe recover the sum of $26,075.00 from Plaintiff for Ms. Volpe's malicious prosecution claim, treble damages in the amount of $30,000.00 for her Section 75-1.1 claim, and attorney's fees. Plaintiff appeals.

I. Factual Background

The following facts in this case are undisputed. Ms. Volpe was the president and sole shareholder of Cully's, a dirt bike and cart racing track originally based in Florida. Mr. Volpe was the secretary of Cully's. Cully's purchased an historic building (the Building) in Wilson from James Skinner (Mr. Skinner) for $31,500.00 on 19 December 2007. Cully's paid $25,000.00 in cash and executed a purchase money note and deed of trust in the amount of $6,500.00. Plaintiff issued an insurance policy to Cully's, insuring the Building with a policy limit of $60,000.00.

During the late evening of 5 September and early morning hours of 6 September 2008, the Building burned in a fire. A red gas can labeled "Race Fuel" was found, tilted on its side, in a room at the end of a "burn trail" that led from the fire. Cully's owned similar red gas cans. Randall Loftin (Mr. Loftin), an investigator for Plaintiff's Special Investigations Unit, was in charge of investigating Cully's insurance claim related to the Building.

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1. We note that the parties in this case, as well as the trial court, refer to "unfair and deceptive trade practices" claims. Because N.C. Gen. Stat. § 75-1.1 refers to "unfair or deceptive acts or practices in or affecting commerce[,]" and no longer contains the word "trade," we will refer to Defendants' claims as "Section 75-1.1 claims." *See* N.C. Gen. Stat. § 75-1.1 (2011); *see also Talbert v. Mauney*, 80 N.C. App. 477, 343 S.E.2d 5 (1896).

Both Mr. Volpe and Ms. Volpe provided a recorded statement to Plaintiff on 3 October 2008. In their statements, they each denied knowledge of the fire. Mr. Volpe told Plaintiff's agents that Cully's intended to sell the remnants of the Building to "a Hispanic male for salvage value." Ms. Volpe, on behalf of Cully's, executed a "Sworn Proof of Loss" statement for the damage to the Building. In her proof of loss statement, Ms. Volpe did not indicate that the Building was subject to a mortgage, but she did disclose that Cully's owed $6,500.00 on the Building. At trial, Ms. Volpe testified that "she did not consider a purchase money deed of trust due in one year that did not require monthly payments[] to be a mortgage."

Plaintiff requested that Mr. Volpe and Ms. Volpe submit to examinations under oath. Ms. Volpe complied on 5 January 2009, but Mr. Volpe refused to submit to an examination. Mr. Loftin became convinced that Mr. Volpe and Ms. Volpe were experiencing financial difficulties and had attempted to hide the deed of trust on the Building from Plaintiff. Plaintiff denied Cully's claim on 23 February 2009.

After Plaintiff filed its complaint, and Defendants and Mr. Volpe filed their answer, Mr. Loftin met with Sergeant J.C. Lucas (Sgt. Lucas) of the Wilson Police Department on 16 April 2009. Mr. Loftin provided Sgt. Lucas with documentation of the sale of the Building for salvage, as well as documentation of the deed of trust in the amount of $6,500.00. Mr. Loftin also informed Sgt. Lucas that Ms. Volpe had sold the Building to Jose Giron (Mr. Giron) without paying off the deed of trust. Sgt. Lucas thereafter met with Mr. Giron, who confirmed that he had purchased the Building.

Sgt. Lucas executed a warrant for the arrest of Ms. Volpe for obtaining property by false pretenses, on the ground that Ms. Volpe had allegedly sold the Building to Mr. Giron without paying the $6,500.00 secured by the deed of trust. Ms. Volpe retained an attorney and the charges against her were dismissed on 18 May 2009. Defendants and Mr. Volpe amended their answer and counterclaim on 22 June 2009, adding a claim for malicious prosecution.

The trial court conducted a bench trial during the week of 6 December 2010. Prior to entry of judgment, Plaintiff filed a motion to amend the pleadings and to make additional findings, or in the alternative, for a new trial. The trial court granted Plaintiff's motion to amend the pleadings in order to consider the issue of the *Noerr-Pennington* doctrine. In an order entered 7 February 2011, the trial court concluded that the *Noerr-Pennington* doctrine was inapplicable

as a defense. In its judgment, also entered 7 February 2011, the trial court ordered: (1) that Defendants recover nothing from Plaintiff as to Defendants' breach of contract claim; (2) that Defendants recover nothing from Plaintiff as to Defendants' Section 75-1.1 claim based on Plaintiff's refusal to pay the insurance claim; (3) that Ms. Volpe recover from Plaintiff $26,075.00 for malicious prosecution; and (4) that Ms. Volpe recover from Plaintiff treble damages of $30,000.00 for her Section 75-1.1 claim arising from the malicious prosecution claim. The trial court also awarded Ms. Volpe attorney's fees in the amount of $29,752.50 and costs in the amount of $2,400.28.

II. Issues on Appeal

Plaintiff raises the following issues on appeal: (1) whether the trial court erred by determining that Plaintiff initiated criminal proceedings against Ms. Volpe; (2) whether the trial court erred by finding probable cause lacking to charge Ms. Volpe with obtaining property by false pretenses; (3) whether Plaintiff was entitled to immunity under N.C. Gen. Stat. § 58-79-40; (4) whether the trial court erred by entering judgment in favor of Ms. Volpe as to her Section 75-1.1 claim; (5) whether the *Noerr-Pennington* doctrine immunized Plaintiff from a Section 75-1.1 claim; (6) whether the trial court erred in awarding Ms. Volpe damages for both her Section 75-1.1 claim and her malicious prosecution claim; and (7) whether the trial court erred in granting Ms. Volpe attorney's fees under N.C. Gen. Stat. § 75-16.1.

III. Standards of Review

When reviewing a bench trial, 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 the facts.' " *City of Wilmington v. Hill*, 189 N.C. App. 173, 175, 657 S.E.2d 670, 671-72 (2008) (citation and alteration omitted). "The trial court's conclusions of law are reviewed *de novo*." *Id.* at 176, 657 S.E.2d at 672. "Whether probable cause exists is a mixed question of law and fact, but where the facts are admitted or established, the existence of probable cause is a question of law for the court." *Best v. Duke University*, 337 N.C. 742, 750, 448 S.E.2d 506, 510 (1994).

IV. Malicious Prosecution

> "To prove a claim for malicious prosecution, a plaintiff must establish four elements: (1) the defendant initiated the earlier proceeding; (2) malice on the part of the defendant in doing so; (3) lack of probable cause for the initiation of the earlier pro-

> ceeding; and (4) termination of the earlier proceeding in favor of the plaintiff."

Kirschbaum v. McLaurin Parking Co., 188 N.C. App. 782, 789, 656 S.E.2d 683, 687-88 (2008) (citation omitted).

a. Initiation

[1] Plaintiff first argues that it did not initiate the criminal proceedings against Ms. Volpe. Plaintiff argues that "[b]y merely giving honest assistance and information to law-enforcement, [Plaintiff] did not initiate the criminal proceeding against [Ms.] Volpe." Plaintiff contends that the trial court's findings of fact did not support its conclusions of law. Plaintiff challenges the following findings of fact by the trial court:

> 44. That Plaintiff instituted or caused to be instituted a criminal proceeding[] without probable cause, said criminal proceeding being Wilson County criminal case number 09 CR 52084, charging [Ms.] Volpe with Obtaining Property with False Pretenses.
>
> 45. That Plaintiff instituted or caused to be instituted said criminal proceedings against [Ms.] Volpe with malice.
>
> . . . .
>
> 61. That Plaintiff did cause to be instituted a criminal proceeding against [Ms.] Volpe, when it had full knowledge of the debt owed [Mr.] Skinner upon the [Building], by being told of the same by [Ms.] Volpe in her recorded statement on October 3, 2008, and further with full knowledge that [Mr.] Loftin, the investigator for the Plaintiff, had been told that the property had been sold to someone else, as early as October 3rd, 2008,and further was present at the October 3, 2008 statements given to the Plaintiff concerning the debt and the fact that the structure had been sold to a Hispanic male for salvage value, but did not release or pursue this information to Detective Lucas or any other officer of the Wilson Police Department until April 2009, after a counter claim had been filed by [Ms.] Volpe and Cully's Motorcross Park Inc against Plaintiff.
>
> 62. That the acts of the Plaintiff in providing all such information, which does not amount to a crime, to Detective J.C. Lucas, an experienced officer but unfamiliar with fire investigations, were designed to achieve leverage in this action, and the [c]ourt specifically finds that it was highly unlikely that

> Detective Lucas would have ever known about all the circumstances concerning the debt to [Mr.] Skinner and the sale to [Mr.] Giron, and further never have pursued criminal charges based upon that evidence, without the instigation of Plaintiff through [Mr.] Loftin.

Plaintiff also cites the following findings of fact:

> 34. That on or about April 16, 2009, [Mr.] Loftin met with Detective J.C. Lucas of the Wilson Police Department, at the Wilson Farm Bureau office, at Loftin's request. Detective Lucas had been out on sick leave for a number of months and was just returning to the case. Detective Lucas was mainly a sex offense investigator and this was his second fire case. Loftin provided Lucas with the real estate documents showing the $6,500 debt and the deed to Giron.
>
> 35. That Loftin informed Lucas of the conveyance of the property to Mr. Giron and the failure of [Ms.] Volpe to pay off the $6500 owed Mr. James Skinner pursuant to the terms of the deed of trust.

Plaintiff argues that findings of fact 34 and 35 "amount to nothing more than merely providing honest assistance and information, which is insufficient to establish initiation."

Plaintiff's argument that it did not initiate the criminal proceedings against Ms. Volpe relies on *Harris v. Barham*, 35 N.C. App. 13, 239 S.E.2d 717 (1978) and *Shillington v. K-Mart Corp.*, 102 N.C. App. 187, 402 S.E.2d 155 (1991). In *Harris*, this Court held that the trial court had properly granted summary judgment in favor of the defendant on the following facts. A person using the plaintiff's name had opened a bank account and had written several checks which had been returned for insufficient funds. *Harris*, 35 N.C. App. at 14, 239 S.E.2d at 718. Raleigh police officers contacted the bank where the account had been opened, inquired about the account, and asked an officer of the bank, Mr. Mangum, to notify police officers if a person with the plaintiff's name came to the bank. *Id.* The plaintiff entered the bank to obtain traveler's checks, for which he paid cash. *Id.* at 15, 239 S.E.2d at 718. Mr. Mangum approached the plaintiff, asked his name, and requested that the plaintiff accompany him to a side room where he had the plaintiff write out his signature several times. *Id.* at 15, 239 S.E.2d at 718-19. Mr. Mangum informed the plaintiff of the account and the checks written thereon, and the plaintiff denied opening the account. *Id.* at 15, 239 S.E.2d at 718.

The plaintiff was detained by police officers after the bank notified them of the plaintiff's presence. *Id.* at 15, 239 S.E.2d at 719. This Court held there was insufficient evidence that the bank, or its agents, had initiated the proceedings against the plaintiff, citing the following facts:

> It is undisputed that neither [Mr.] Mangum nor any other employee of the Bank ever signed any warrant or otherwise directly instituted any criminal proceeding against the plaintiff, nor did they procure anyone else to do so. Neither [Mr.] Mangum nor any other employee appeared at the preliminary hearing or before the grand jury. Indeed, the entire extent of [Mr.] Mangum's or the Bank's participation in this matter was to notify the police, as [Mr.] Mangum had been requested by them to do, when a person named George Harris came into the Bank. This he did only after information given him by the police and his own investigation indicated that someone using that name had perpetrated a fraud. This falls short of being the participation in a criminal prosecution required to establish the first element of a valid claim for malicious prosecution.

Id. at 16, 239 S.E.2d at 719. This Court concluded that the bank had merely given honest assistance to the police officers and reiterated that " '[m]erely giving honest assistance and information to prosecuting authorities . . . does not render one liable as a co-prosecutor.' " *Id.* (citation omitted).

In *Shillington*, this Court held that there was insufficient evidence of initiation, when the arresting "[o]fficer . . . testified that he and his supervisor decided to arrest plaintiff based on the information they received from defendant, but defendant's agents neither directed that they do so nor did defendant's agents press charges themselves, nor did they appear at the magistrate's office at any time." *Shillington*, 102 N.C. App. at 196, 402 S.E.2d at 160. The Court noted that the "[o]fficer . . . testified that he also considered the fact that plaintiff had entered an area he had been warned to stay out of." *Id.* The plaintiff in *Shillington* had been wandering around near a K-Mart store that had recently suffered tornado damage. *Id.* at 191, 402 S.E.2d at 157. The plaintiff worked near the K-Mart store and there was uncertainty as to whether the plaintiff had actually crossed onto K-Mart property when he was arrested. *Id.*

In the present case, Plaintiff contends that Sgt. Lucas initiated the criminal proceedings on his own accord. In support of this argument, Plaintiff cites the Restatement Second of Torts:

> When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable [for malicious prosecution] even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.

Restatement (Second) of Torts § 653 cmt. g (1977). Plaintiff also argues that, when asked at trial whether Mr. Loftin or Plaintiff had initiated the criminal proceeding against Ms. Volpe, Sgt. Lucas gave the following answer: "No, no. . . . I have probable cause. I felt like I could win this case in court, and I wanted to go forward with it. That was my decision, my decision only." Plaintiff argues that "Sgt. Lucas's uncontroverted testimony establishes that the trial court erred in finding that [Mr.] Loftin's 'investigation' brought about the criminal charge."

In support of their counter-argument, Defendants cite *Williams v. Kuppenheimer Manufacturing Co.*, 105 N.C. App. 198, 412 S.E.2d 897 (1992). Citing *Williams*, Defendants argue that "where 'it is unlikely there would have been a criminal prosecution of [a] plaintiff' except for the efforts of a defendant, this Court has held a genuine issue of fact existed and the jury should consider the facts comprising the first element of malicious prosecution." In *Williams*, the plaintiff was a retail employee of the defendant company and had resigned after being confronted with a number of suspicious sales receipts. *Id.* at 198-99, 412 S.E.2d at 898-99. The plaintiff denied any wrongdoing, but an agent of the defendant company contacted the Charlotte Police Department and "turned over the evidence which [the agent] had compiled against plaintiff." *Id.* at 199, 412 S.E.2d at 899. This Court also noted the following facts:

> According to testimony of law enforcement officials, they relied on the evidence compiled by [the plaintiff's supervisor]. In the course of their investigation, law enforcement officials reviewed the materials provided by [the plaintiff's supervisor] and the only witnesses that Detective Job, the investigator for

> the Police Department, contacted were the three people she talked to by telephone whose names had been furnished by [the plaintiff's supervisor] as being persons who had alterations performed on garments purchased that had been voided.

Id. This Court held that there was sufficient evidence of initiation to submit the question to the jury, conducting the following analysis:

> Defendant brought all the documents used in the prosecution to the police. As discussed earlier, these documents included the eleven suspicious void sales, the three suspicious alteration tickets, and the names and addresses of witnesses to be contacted. From the record it appears the only additional investigation undertaken by the authorities was to contact the three individuals who had suspicious alterations performed. Law enforcement officials never interviewed other customers, store employees or plaintiff prior to the time of his arrest. Except for the efforts of defendant, it is unlikely there would have been a criminal prosecution of plaintiff. Under these circumstances, the trial court was correct in determining this was a factual matter for the jury.

Id. at 201, 412 S.E.2d at 900.

We find *Williams* more analogous to the facts before us. Mr. Loftin had all of the information he provided to Sgt. Lucas as early as 3 October 2008. On 16 April 2009, after Defendants' counterclaim was filed, Mr. Loftin called Sgt. Lucas and set up a meeting at which Mr. Loftin informed Sgt. Lucas of Ms. Volpe's actions. Sgt. Lucas thereafter interviewed Mr. Giron, and Ms. Volpe was then arrested. We find competent evidence in the record to support the trial court's determination that Plaintiff initiated the proceedings against Ms. Volpe on the grounds that: "Except for the efforts of [Plaintiff], it is unlikely there would have been a criminal prosecution of [Ms. Volpe]. Under these circumstances, the trial court was correct in determining this was a factual matter[.]" *Id.* at 201, 412 S.E.2d at 900. Thus, on the facts before us, we are not persuaded that the trial court erred in determining that Plaintiff initiated the proceedings against Ms. Volpe.

b. Probable Cause

[2] Plaintiff also argues that "the trial court erred by finding probable cause lacking to criminally charge [Ms.] Volpe with obtaining property by false pretenses." Plaintiff contends that "[t]he test for determining probable cause in a claim for malicious prosecution . . .

is whether a reasonable man of ordinary prudence and intelligence would have believed there was probable cause, not whether a crime was in fact committed."

At trial, Mr. Loftin was asked during direct examination what crime he suspected Ms. Volpe of committing. Mr. Loftin testified that he thought "she had committed insurance fraud in an attempt, material misrepresentation with an attempt to hide the fact that there was a $6,500 payment that was due on this house with a deed of trust involved." However, the trial court found that Plaintiff "had been told as early as [Ms.] Volpe's statement on September 8, 2008, that [Defendants] owed $6,500 on the property." We conclude that there was competent evidence in the record for the trial court to conclude that a reasonable person would not have believed Ms. Volpe was hiding information that she had already provided to Plaintiff. In light of the testimony at trial, and the findings of fact made by the trial court, we find no error in the trial court's finding that probable cause was lacking.

V. Immunity Pursuant to N.C. Gen. Stat. § 58-79-40

[3] Plaintiff argues that the trial court erred in failing to find, pursuant to N.C. Gen. Stat. § 58-79-40, that Plaintiff was immune from civil liability. N.C. Gen. Stat. § 58-79-40(c) (2011) provides in pertinent part:

> In the absence of fraud or malice, no insurance company (or insurance agency), or person who furnishes information on its behalf, shall be liable for damages in a civil action or subject to criminal prosecution for any oral or written statement made or any other action that is necessary to supply information required pursuant to this section.

Plaintiff contends that, in the absence of malice or fraud, it cannot be held liable for its own, or its agent's, conduct in providing information that the police requested.

Plaintiff asserts that: "All information provided by [Plaintiff] to the Wilson Police Department was supplied in accordance with [Plaintiff's] obligations under N.C. Gen. Stat. § 58-79-40." Plaintiff also argues that the "record is void of any allegation or evidence of fraud." Plaintiff next contends that, in order to overcome N.C.G.S. § 58-79-40 immunity, Defendants were required to show that Plaintiff acted with "actual malice[.]" Specifically, Plaintiff contends that "[a] holding that anything less than actual malice can overcome the immunity provided by § 58-79-40(c) would not only conflict with the common law

privilege, but would improperly frustrate the legislative intent behind enactment of the statute."

Plaintiff argues that "[t]he record is void of any evidence that [Plaintiff] acted with actual malice when it provided truthful information relevant to an incendiary fire, information it was statutorily obligated to provide[.]" Citing *Dobson v. Harris*, 352 N.C. 77, 86, 530 S.E.2d 829, 837 (2000), Plaintiff contends that "[a]ctual malice requires proof of ill-will or personal hostility, or a showing that the declarant published a statement with knowledge that it was false[.]"

However, we can find no cases interpreting N.C.G.S. § 58-79-40(c) that require "actual malice." The plain language of the statute is clear that immunity applies "in absence of fraud or malice[.]" N.C.G.S. § 58-79-40(c). In the present case, the trial court found that Mr. Lofton acted without probable cause. "Although a want of probable cause may not be inferred from malice, the rule is well settled that malice may be inferred from want of probable cause, *e.g.*, as where there was a reckless disregard of the rights of others in proceeding without probable cause." *Cook v. Lanier*, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966); *see also Dickerson v. Refining Co.*, 201 N.C. 90, 96, 159 S.E. 446, 450 (1931) ("Malice, in the sense in which it is used in actions for malicious prosecutions . . . is inferable from the absence of probable cause."). We therefore find Plaintiff's argument to be without merit.

VI. <u>Ms. Volpe's Section 75-1.1 Claim</u>

[4] Plaintiff next argues that the trial court erred by entering judgment for Ms. Volpe as to her counterclaim under Section 75-1.1 because the claim was premised on the malicious prosecution claim. As we have held that the trial court did not err with respect to Ms. Volpe's malicious prosecution claim, Plaintiff's argument is without merit. Plaintiff also asserts that the acts which the trial court determined were unfair or deceptive were not "in or affecting commerce." Plaintiff contends that Mr. Lofton did not engage in commerce by merely reporting Ms. Volpe's conduct to the police. Defendants contend that Plaintiff stipulated to the actions as being involved in commerce. Plaintiff counters this argument by contending that it stipulated only to the business of insurance affecting commerce, and not to the alleged malicious prosecution affecting commerce.

The trial court held a conference with the parties to establish the issues the trial court would resolve. During the conference, the trial court enumerated each element of each claim brought by the parties,

and determined whether the elements would be listed among the issues to be determined by the trial court. When the trial court reached the issue of the Section 75-1.1 claim, the following exchange occurred:

> [THE COURT:] 5. Did Farm Bureau participate in unfair and deceptive acts in the malicious prosecution of Laurie Volpe. We talked about that, and I think that that is allowable under the unfair trade practices. Now, what say[] you, Mr. Salsman [(Plaintiff's Counsel)]?
>
> MR. SALSMAN: Your Honor, our position would be that that's a claim that belongs to Laurie Volpe. There's been no evidence that Cully's, the corporation, had any involvement in the alleged malicious prosecution, certainly no evidence that Cully's was ever harmed in any way by any alleged malicious prosecution of Laurie Volpe by Farm Bureau.
>
> . . . .
>
> THE COURT: So in this particular request for special instructions or special issues, can you—how does the malicious prosecution of Laurie Volpe enter into the benefit of or claim by corporation?
>
> I can see how we would—I guess if we couch this in the terms of did Farm Bureau—as to the claim of Laurie Volpe for unfair trade practice, is the malicious prosecution of Laurie Volpe an unfair trade practice, but not as to the corporation.
>
> MR. HEMMINGS [(Defendant's Counsel)]: Well, it happened during the claim process that the corporation was making.
>
> . . . .
>
> MR. SALSMAN: In order to submit—one of the elements, and I'm jumping a little ahead on this first issue still is that damages were proximate in cause. There was absolutely no evidence put on that Cully's suffered any damages proximately caused by the alleged malicious prosecution of Laurie Volpe.
>
> She talked about how she personally suffered harm, but there's no evidence to show that Cully's suffered any harm as a result of the criminal prosecution of Laurie Volpe. So I just—I don't think there's any damages proximately caused to Cully's as a result of that alleged conduct.

THE COURT: Well, obviously we're just talking about now the special interrogatories as to the actions. The unreasonable refusal—without conducting a reasonable investigation could have nearly benefit Cully's thereby making number 3 appropriate. So if perhaps since we have a claim by corporation and a claim by Laurie Volpe for unfair deceptive trade practices, we will have to consider them separately. They're separately made in separately filed answers. I don't see why we wouldn't separate them out then if we have this issue of problems of—

MR. SALSMAN: Your Honor, we think that's important when we—if you were to find some unfair and deceptive trade practices and figure out what damages might be attributed to that. If it was because of the malicious prosecution, I think the damages are perhaps much more limited for that, so I think it's important to separate out.

THE COURT: I'm going to separate out the damages—I mean separate out the claims, so I'm going to do a claim for unfair deceptive for the corporation. I'm going to use number 1 without conducting a reasonable investigation.

And I don't have any other grounds—do you have any additional grounds that you would like for me to submit as a basis for question of fact on for the corporation other than without conducting a reasonable investigation understanding that the other three that you suggested I've already indicated I will not give?

MR. HEMMINGS: No.

THE COURT: Then I'm only going to give number 1.

Sticking with the corporation, second issue will be: Was it in commerce or did it affect commerce? Will the Plaintiff[] stipulate that insurance is commerce?

MR. SALSMAN: Yes, Your Honor, and we in fact admitted that in our answer.

THE COURT: I will not consider that.

Number 3, I will consider was any conduct the proximate cause of any injuries that may have been given for Cully's.

And then number 4, what amount, if any, has Cully's been injured.

Thus, the trial court determined that the element of whether a course of conduct was "in or affecting commerce" was stipulated by Plaintiff as to the Section 75-1.1 claim brought by Cully's. The trial court then addressed the Section 75-1.1 claim brought by Ms. Volpe:

> And then going back to the unfair and deceptive trade practices claim for Laurie Volpe, I'm going to give number 1 without conducting a reasonable investigation, and number 5, did they participate in unfair and deceptive acts.
>
> Second issue I'm going to not consider, having been stipulated.

The "second issue" with respect to Cully's was the determination of whether insurance was commerce. With respect to Ms. Volpe, the determination would have been whether Plaintiff's malicious prosecution was "in or affected commerce." However, the trial court clearly stated: "I'm not going to consider [that issue], having been stipulated." Immediately following the above-quoted material, the trial court moved on to the remaining issues. At no point did Plaintiff object to the trial court's statement that Plaintiff stipulated to the "second issue" as to Ms. Volpe; i.e. whether Plaintiff's actions giving rise to Ms. Volpe's Section 75-1.1 claim were in or affecting commerce. The trial court also a provided a final summary of the issues as follows:

> THE COURT: All right. Let me try to restate then the Defendant's contested issues then. All right.
>
> . . . .
>
> Number 2—I mean number 3. Excuse me. Before number 3, label this Unfair and Deceptive Trade Practices.
>
> Number 3. Did Farm Bureau refuse to pay the claim submitted by Cully's Motorcross Park, Inc. without conducting a reasonable investigation based upon all available information?
>
> Number 4. Was Farm Bureau's conduct—well, strike. Go back and eliminate Laurie Volpe from that question so it just reads—so it just reads Cully's Motorcross Park, Inc.
>
> Number 4 then would be, was Farm Bureau's conduct a proximate cause of Cully's Motorcross Park, Inc.'s injuries?
>
> Number 5 will read, what amount of damages, if any, were sustained by Cully's Motorcross Park, Inc.?

Next issue. Did Farm Bureau refuse to pay the claim submitted by Laurie Volpe without conducting a reasonable investigation based upon all available information?

Next issue. Did Farm Bureau participate in an unfair and deceptive act in the malicious prosecution of Laurie Volpe?

Number next. Was Farm Bureau's conduct a proximate cause of Laurie Volpe's injuries?

Number 6. What amount, if any, has Laurie Volpe been injured?

. . . .

Comments on those, Mr. Salsman?

MR. SALSMAN: No, sir.

THE COURT: Mr. Hemmings. Other than the objections that you made for failure to give punitive damages and failure to give your other contentions of unfair and deceptive trade practices which are preserved for appellate review.

MR. HEMMINGS: Just wanted to make sure four elements and you asked that we stipulate to the fourth one.

THE COURT: Yeah. I did not include the elements that we've already stipulated to and the facts that would have been established, four are in commerce. I think everybody stipulates the insurance already had. And the last one on malicious prosecution, the claim was clearly dismissed. That's not an issue of fact that I would submit to a jury. I would instruct them summarily on that.

. . . .

All right. Anything else from the Plaintiff in regards to the issues or the jury instructions or applicable law that I'm going to consider that we haven't talked about?

MR. SALSMAN: No, sir.

THE COURT: Thank you very much. Anything else for the Defendant other than to note your objections to the requested instructions or issues that I have indicated I will not give, anything other than those?

MR. HEMMINGS: No, sir.

Reviewing this colloquy, it is clear that, during the discussion establishing the issues to be decided by the trial court, Plaintiff was given the opportunity to address the Section 75-1.1 claim. When setting forth this issue, the trial court was clear that Ms. Volpe's Section 75-1.1 claim arose from the malicious prosecution. Regarding the second element of the claim, Plaintiff was asked: "Was it in commerce or did it affect commerce? Will the Plaintiff[] stipulate that insurance is commerce?" Plaintiff clearly stipulated to this second element, and the trial court concluded that it would not address the second element with respect to Cully's.

While we acknowledge that the specific language of the stipulation was "insurance is commerce[,]" it is clear from the colloquy quoted above that Plaintiff was aware the trial court was discussing the element of "affecting commerce" with respect to Ms. Volpe's Section 75-1.1 claim. Because Plaintiff failed to object to the trial court's statement that Plaintiff stipulated to the fact, Plaintiff allowed the trial court to determine all issues as discussed during the colloquy, and did not require the trial court to determine whether Ms. Volpe's Section 75-1.1 claim involved actions "in or affecting commerce."

This situation is analogous to those circumstances arising when a plaintiff fails to request specific jury instructions or fails to object to instructions provided. We therefore agree with Defendants that, on the facts arising from the transcript, Plaintiff stipulated to this element and is bound by that stipulation. *See Crowder v. Jenkins*, 11 N.C. App. 57, 62, 180 S.E.2d 482, 485 (1971) ("[A] stipulation admitting a material fact becomes a judicial admission in a case and eliminates the necessity of submitting an issue in regard thereto to the jury.").

Plaintiff further argues that, because the trial court found Ms. Volpe's counterclaims to be frivolous and malicious, she was not entitled to recover under Section 75-1.1. Plaintiff asserts that, because the trial court concluded that Plaintiff was not liable for breach of contract with respect to the fire policy on the Building, Ms. Volpe did not suffer any damage as a result of Plaintiff's unfair and deceptive act in seeking to gain leverage in the lawsuit. However, we note that the trial court found that Ms. Volpe had "sustained damages in the amount of $10,000.00 as a result of such unfair trade practices of Plaintiff." Plaintiff contends this finding of fact was unsupported by the evidence.

However, there is ample evidence in the transcript and the record concerning the legal fees and other costs that Ms. Volpe incurred from her arrest and malicious prosecution. Plaintiff's argument would require us to hold that, because the unfair and deceptive act was intended to "gain leverage in the civil action," the only damages the trial court should have considered would have been those that Ms. Volpe suffered as a result of Plaintiff's having gained such leverage. In other words, because Ms. Volpe did not prevail in her breach of contract counterclaim against Plaintiff, she suffered no damages for the purposes of the Section 75-1.1 claim. However, Plaintiff cites no authority in support of this argument. We hold that the trial court was correct in concluding that Plaintiff, by engaging in the unfair and deceptive act of malicious prosecution in order to gain leverage in the civil action, caused Ms. Volpe to suffer damages in the form of legal fees and other costs deriving from her prosecution.

VII. The *Noerr-Pennington* Doctrine

[5] Plaintiff next argues that the trial court erroneously found the *Noerr-Pennington* doctrine inapplicable to the present case. The *Noerr-Pennington* doctrine immunizes conduct undertaken to influence or petition government bodies from antitrust liability:

> In *Noerr and Pennington*, the Supreme Court held that attempts to influence the legislative process, even if prompted by an anticompetitive intent, are immune from antitrust liability. This doctrine rests on two grounds: the First Amendment's protection of the right to petition the government, and the recognition that a representative democracy, such as ours, depends upon the ability of the people to make known their views and wishes to the government.

Potters Medical Center v. City Hosp. Ass'n, 800 F.2d 568, 578 (6th Cir., 1986). Citing *Forro Precision, Inc. v. Intern. Business Machines*, 673 F.2d 1045 (9th Cir. 1982), Plaintiff argues that providing information to the police triggers the *Noerr-Pennington* doctrine.

In *Forro*, the plaintiff company (Forro) had its business searched by police officers who were "accompanied by and aided in the search by employees" of the defendant company (IBM). *Forro*, 673 F.2d at 1049. "Forro brought suit against IBM on the basis of its participation in the search[.]" *Id.* The claims were eventually limited to whether "IBM had intentionally interfered with prospective business advantage under California law and had monopolized and attempted to monopolize in violation of section 2 of the Sherman Act." *Id.* IBM

asserted "a counterclaim under California law that Forro had misappropriated its trade secrets." *Id.* The jury returned a verdict in favor of Forro as to its "intentional interference claim and awarded actual damages in the amount of $2,739,010." *Id.* The jury also "found in favor of IBM on the misappropriation claim and awarded actual damages in the sum of $260,777, but deadlocked on the antitrust claims and on both parties' claims for punitive damages." *Id.*

The police involvement in *Forro* arose from IBM's cooperation with police agents in an effort to "discourage trade secret thievery." *Id.* at 1051. The cooperation resulted in a widely publicized search of Forro's place of business which caused Forro to "incur[] out-of-pocket expenses in the amount of $79,000 as a result of the search, and allegedly suffer[] further losses in sales and profits as a result of the adverse publicity." *Id.* The police operation resulted in ten indictments, none of which was "sought against Forro or any of its employees or principals." *Id.*

On appeal, the Ninth Circuit Court of Appeals reviewed, *inter alia*, the Sherman Act antitrust claims. The Ninth Circuit conducted the following discussion of whether IBM's involvement with the police warranted the application of the *Noerr-Pennington* doctrine:

> We do not liken an approach to the police for aid in apprehending wrongdoers to political activity. However, we think that the public policies served by ensuring the free flow of information to the police, although somewhat different from those served by *Noerr-Pennington*, are equally strong. Encouraging citizen communication with police does not generally promote the free exchange of ideas, nor does it provide citizens with the opportunity to influence policy decisions. Nonetheless, it would be difficult indeed for law enforcement authorities to discharge their duties if citizens were in any way discouraged from providing information. We therefore hold that the *Noerr-Pennington* doctrine applies to citizen communications with police.

Id. at 1060 (citation omitted). We note, however, that the underlying cause of action to which the Ninth Circuit held *Noerr-Pennington* applicable was Forro's claim of an attempted "violation of the Sherman Act's proscription of monopolization [which] must establish three things: (1) possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal 'antitrust' injury." *Id.* at 1058 (citation omitted).

In the present case, the trial court's order making additional findings and conclusions of law in response to Plaintiff's *Noerr-Pennington* argument contains the following conclusion of law:

> Defendant's reliance upon Forro Precision, Inc. v. International Business Machines Inc., 673 F. 2d 1045, 1982(9th circuit) and Ottensmeyer vs. Chesapeake and Potomac Telephone Company of Maryland 756 F. 2d 986 (1985) is misplaced and the [c]ourt distinguishes each case from the factual situation present herein. Those cases dealt with claims of intentional interference with prospective business advantage, and antitrust claims in Forro, and Sherman Act issues regarding telephone service in the state of Maryland, both issues of wide spread commercial interest and protection of the public at large from monopolization and unfair business practices to the community as a whole. The Court distinguishes those cases from the facts herein, which deal with a single fire insurance policy claim affecting only the Plaintiff and Defendants.

The *Noerr-Pennington* doctrine has been recognized in North Carolina in *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 275, 620 S.E.2d 873, 881 (2005) ("We hold that *Noerr* applies in the state courts of North Carolina."). This Court has also held it is applicable to cases involving claims under N.C. Gen. Stat. § 75-1.1. *See Reichhold Chems., Inc. v. Goel*, 146 N.C. App. 137, 156, 555 S.E.2d 281, 293 (2001) ("We therefore hold that the reasoning of *Noerr* and *PRE* apply to N.C.G.S. § 75-1.1.").

"This Court has noted that Chapter 75 of the North Carolina General Statutes was modeled after that federal antitrust law, and that federal decisions may 'provide guidance in determining the scope and meaning of chapter 75.' " *Reichhold*, 146 N.C. App. at 156, 555 S.E.2d at 293 (citation omitted). In *Reichhold*, this Court discussed whether a plaintiff, bringing an objectively reasonable lawsuit, was protected from liability by the holdings in either *Noerr* or another Supreme Court case, *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 123 L. Ed. 2d 611 (1993) (*PRE*). In *Reichhold*, this Court stated that "[u]nder *PRE*, a plaintiff may not be held liable under federal antitrust law for bringing an objectively reasonable lawsuit, regardless of the plaintiff's subjective intent in bringing the suit." *Reichhold*, 146 N.C. App. at 157, 555 S.E.2d at 293. After concluding that the lawsuit in question was objectively reasonable, this Court held that the plaintiff's action in bringing

the objectively reasonable lawsuit was not "an unfair trade practice under N.C.G.S. § 75-1.1." *Id.*

We first note that *Forro* involved Forro's lawsuit concerning the "Sherman Act's proscription of monopolization[.]" *Forro*, 673 F.2d at 1058. *Reichhold* concerned whether the plaintiff's objectively reasonable lawsuit was shielded from unfair and deceptive practices liability by *Noerr* and *PRE*. *Reichhold*, 146 N.C. App. at 157, 555 S.E.2d at 293. In the present case the action underlying the Section 75-1.1 claim was Plaintiff's instigation of a malicious prosecution without probable cause, which the trial court found to be done for the improper purpose of gaining leverage in a lawsuit. We find the present case distinguishable from both *Reichhold* and *Forro* and hold that *Noerr-Pennington* does not apply on these facts. We therefore find the trial court's reasoning sound and find *Noerr-Pennington* inapplicable to the facts of the present case. *See*, *e.g.* *Reichhold*, 146 N.C. App. at 148, 555 S.E.2d at 288 ("Because we see no relation between the tort of tortious interference and the legislative intent behind federal antitrust law, we decline to attempt to conform the reasoning of *Noerr* to the present case.").

VIII. Damages

[6] Plaintiff argues that the trial court erred by concluding that Ms. Volpe suffered separate injuries resulting from the malicious prosecution and from the Section 75-1.1 claim because the conduct giving rise to those causes of action was the same. Plaintiff, citing *MRD Motorsports, Inc. v. Trail Motorsport, LLC*, 204 N.C. App. 572, 576, 694 S.E.2d 517, 520 (2010) (citation omitted), asserts that a claimant is " 'entitled to only one redress for a single wrong[.]' " However, in this case, the trial court found that "Plaintiff's actions in having [Ms.] Volpe arrested constitute a separate and distinctive injury to [Ms. Volpe] . . . in that it was done for such improper purpose [of gaining leverage in their civil action], and Plaintiff is liable . . . to [Ms.] Volpe for such unfair and deceptive trade practice." Plaintiff does not address the trial court's conclusion that there was a separate, additional element involved in the Section 75-1.1 claim. Because the trial court found an additional element, we are not persuaded by Plaintiff's argument.

IX. Attorney's Fees

[7] Plaintiff's final argument is that the trial court erred in awarding attorney's fees in favor of Ms. Volpe because she should not have pre-

vailed in her Section 75-1.1 claim. In light of our holding with respect to Ms. Volpe's Section 75-1.1 claim, this argument is without merit.

Affirmed.

Judges CALABRIA and STROUD concur.

BILLY G. PATTERSON, PEARNELL PATTERSON, AND KEITH PATTERSON, PLAINTIFFS v. THE CITY OF GASTONIA, DEFENDANT

No. COA11-520

(Filed 1 May 2012)

1. Constitutional Law—due process claim—not barred by governmental immunity—amended complaint—no prejudice

The trial court erred by dismissing plaintiffs' cause of action to the extent it asserted a claim for violation of due process under the North Carolina Constitution as the claims were not barred by governmental immunity. However, because the court subsequently allowed plaintiffs to amend their complaint to reassert their due process claims, plaintiffs were not prejudiced by the error.

2. Constitutional Law—due process claims—no service on plaintiff required—adequate state remedy existed

The trial court did not err by granting defendant's motion for summary judgment as to plaintiffs' due process claims. Defendant was not required to serve notices, complaints, and orders regarding the demolition of plaintiffs' mobile homes on plaintiff Keith Patterson as his interest in the mobile homes did not appear anywhere in the public record. Furthermore, plaintiffs' claim that they were denied due process under the North Carolina Constitution when defendant failed to give them notice of a City Council meeting and an opportunity to be heard before the passing of the ordinance of demolition was barred as an adequate remedy existed at state law to redress their alleged injury.

3. Appeal and Error—preservation of issues—sovereign immunity—bar to tort claims—failure to cite authority

The trial court did not err in a case involving the demolition of plaintiffs' mobile homes by concluding that plaintiffs' tort claims

for conversion, trespass to chattels, and trespass were barred by sovereign immunity. Plaintiffs failed to cite cases addressing sovereign immunity, instead relying on cases addressing constitutional claims or public official immunity, even though plaintiffs sued only the City of Gastonia and not any public officials.

4. Eminent Domain—inverse condemnation—no authority that actions constituted a taking

The trial court did not err in granting summary judgment as to plaintiffs' claim for inverse condemnation. Plaintiffs cited no authority, and the Court of Appeals found none, suggesting that defendant City's entry into a leasehold in accordance with its authority under the City's Minimum Housing Code and the enabling legislation constituted a taking within the meaning of inverse condemnation.

Appeal by plaintiffs from orders entered 16 January 2009, 23 November 2009, and 9 December 2010 by Judges David S. Cayer, Timothy L. Patti, and W. Robert Bell respectively in Gaston County Superior Court. Heard in the Court of Appeals 10 October 2011.

Gray Layton Kersh Solomon Furr & Smith, P.A., by Michael L. Carpenter and William E. Moore, Jr., for plaintiffs-appellants.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson and Lindsay E. Willis, for defendant-appellee.

GEER, Judge.

Plaintiffs Billy G. Patterson, his wife Pearnell Patterson, and their son Keith Patterson ("the Pattersons") appeal from the trial court's orders granting the City of Gastonia's motions to dismiss and for summary judgment. The Pattersons primarily contend on appeal that the City's actions relating to demolition of the Pattersons' mobile homes violated their due process rights under the North Carolina Constitution. As we find that the Pattersons had an adequate alternative remedy at law for redress of their claim, their direct state constitutional claim was barred, and the trial court properly granted summary judgment.

Facts

Mr. and Mrs. Patterson were the record owners of 21 mobile homes located at Patterson Circle in Gastonia, North Carolina. Their

son, Keith Patterson, also claims an ownership interest in the mobile homes. The Pattersons leased the property on which the homes were located.

The City opened code enforcement cases on those 21 mobile homes in January 2006. In its code enforcement action, the City relied upon the procedures adopted in the City's Minimum Housing Code pursuant to N.C. Gen. Stat. § 160A-443 (2011). Section 160A-443 authorizes municipalities to adopt "ordinances relating to dwellings within [a] city's territorial jurisdiction that are unfit for human habitation." The statute requires that the City designate a public officer to exercise the powers described. N.C. Gen. Stat. § 160A-443(1). The statute further provides in pertinent part that "whenever it appears to the public officer (on his own motion) that any dwelling is unfit for human habitation, the public officer shall, if his preliminary investigation discloses a basis for such charges, issue and cause to be served upon the owner of and parties in interest in such dwellings a complaint stating the charges in that respect and containing a notice that a hearing will be held before the public officer (or his designated agent) . . . ." N.C. Gen. Stat. § 160A-443(2). That notice must contain notice of the time and place of the hearing to be held before the public officer. *Id.*

Following the hearing, if "the public officer determines that the dwelling under consideration is unfit for human habitation, he shall state in writing his findings of fact in support of that determination and shall issue and cause to be served upon the owner thereof an order[.]" N.C. Gen. Stat. § 160A-443(3). That order may provide either for (1) demolition of the property or (2) repair of the property. N.C. Gen. Stat. § 160A-443(3)(a), (b). In order to decide if an order for repair should issue, the public officer must determine whether "the repair, alteration or improvement of the dwelling can be made at a reasonable cost in relation to the value of the dwelling"—the City is authorized to fix in advance "a certain percentage of [the property's] value as being reasonable[.]" N.C. Gen. Stat. § 160A-443(3)(a).

The City of Gastonia's Minimum Housing Code mirrors these provisions and sets the reasonable value for purposes of an order of demolition at 50% of the value of the dwelling. Gastonia, N.C., Code of Ordinances ch. 16, art. V, §§ 16-127(13), 16-132(a), (b) (1982). However, the City's Code also provides an additional opportunity for the owner to repair the dwelling apart from that set out in the enabling legislation. Under the Code, if the chief code enforcement officer determines that the building is "dilapidated," then he or she

must make written findings of fact and "shall issue" an order requiring the owner to "vacate, close and remove or demolish" the building within a specified time. *Id.* at § 16-132(b)(2). Within 10 days from the date of that "order determining that the building is dilapidated, the owner may notify the chief code enforcement officer in writing of his intent to make such repairs or alterations to said dwelling." *Id.* at § 16-132(b)(3). After receipt of such a notice, the chief code enforcement officer is required to issue "a supplemental order" directing the owner to bring the dwelling into a minimum standard of fitness. *Id.* The order must provide a reasonable time for the repairs to be completed, which may be no less than 30 days and no more than 90 days. *Id.*

N.C. Gen. Stat. § 160A-446(c) (2011) provides for an appeal to a housing appeals board from "any decision or order of the public officer . . . by any person aggrieved thereby" within 10 days of the rendering or service of the order. Consistent with the statute, the City of Gastonia's ordinance provides for an appeal to the Board of Adjustment from "any decision or order of the chief code enforcement officer." Gastonia, N.C., Code of Ordinances ch. 16, art. V, § 16-132(d). An appeal from an order requiring the aggrieved person to do any act suspends the effect of the chief code enforcement officer's order. *Id.*

N.C. Gen. Stat. § 160A-446(f) further provides that "[a]ny person aggrieved by an order issued by the public officer or a decision rendered by the board may petition the superior court for an injunction restraining the public officer from carrying out the order or decision and the court may, upon such petition, issue a temporary injunction restraining the public officer pending a final disposition of the cause." The City of Gastonia's code likewise allows "[a]ny person aggrieved by an order issued by the chief code enforcement officer or a decision rendered by the board . . . to petition the superior court for a temporary injunction, restraining the chief code enforcement officer pending a final disposition of the cause, as provided by G.S. 160A-446(f)." Gastonia, N.C., Code of Ordinances ch. 16, art. V, § 16-132(e).

In this case, following an investigation, the chief code enforcement officer issued an emergency notice of violations for the Pattersons' mobile homes and ordered the Pattersons to bring the mobile homes into compliance with the City Code within 48 hours of receipt of the notices. On 27 January 2006, the Pattersons received Reports and Requests for Corrective Action which advised them that the code violations with which they were charged had to be corrected

within 30 days. In January and February 2006, Mr. and Mrs. Patterson obtained building permits for the mobile homes listing themselves as the owners of the homes.

On 6 March 2006, the City served complaints and notices of hearing by the United States mail, return receipt requested, alleging that the Pattersons' dwellings were not in compliance with the City's building code and setting a hearing before the chief code enforcement officer for 29 March 2006. Billy Patterson attended the 29 March 2006 hearing before the chief code enforcement officer. Following the 29 March 2006 hearing, the chief code enforcement officer issued an order to demolish for each of the mobile homes owned by the Pattersons. Those orders, however, granted the Pattersons the option to elect, within 10 days from the date of the order to demolish, to bring the dwellings into compliance with the building code by submitting a written notice of intent to repair the property.

On 7 April 2006, Billy Patterson signed notices of intent to repair all 21 mobile homes. The chief code enforcement officer then issued supplemental orders to repair, giving the Pattersons until 7 May 2006 to complete the ordered repairs. Those supplemental orders were served on Mr. and Mrs. Patterson by the United States mail, return receipt requested. The return receipt was signed by plaintiff Keith Patterson. When none of the mobile homes were completely repaired by 6 June 2006, the City Council, via its consent agenda, issued orders to demolish all of the mobile homes that were not in compliance with the City's Minimum Housing Code.

On 26 July 2006, Dee Dee Gillis, chief code enforcement officer for the City of Gastonia, sent a letter to Mr. and Mrs. Patterson outlining what actions and documentation would be necessary for the Pattersons to prove that the mobile homes had been brought into compliance with the Housing Code. On 10 November 2006, the City of Gastonia tore down six of the 21 mobile homes at issue.[1] Following the City's demolition of those six mobile homes, the Pattersons sold one of the mobile homes. Dr. Anthony, the owner of the land on which the mobile homes sat, had the remaining mobile homes torn down because he did not want to have further difficulties with the City.

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1. We note that while the affidavit of the chief code enforcement officer for the City of Gastonia states that the only mobile homes demolished by the City were six mobile homes torn down in November 2006, plaintiffs assert in their brief on appeal that the City demolished certain of the mobile homes in June 2006 and others were demolished in August and September 2006. Plaintiffs' claim does not appear to be supported by the record, although the specific date of demolition is not germane to our consideration of the issues in the case.

On 26 June 2008, the Pattersons filed suit against the City of Gastonia alleging wrongful demolition on the basis of the City's having violated their common law and constitutional due process rights, inverse condemnation, trespass, and conversion/trespass to chattels. The City filed two motions to dismiss the complaint. The first motion contended that the complaint should be dismissed under North Carolina Rule of Civil Procedure 12(b)(1) and (2) based on sovereign immunity, while the second motion, based on Rule 12(b)(6), asserted that the Pattersons had failed to state a claim for relief.

On 16 January 2009, the trial court entered an order granting the first motion to dismiss after finding that the City had not waived its sovereign immunity. The court dismissed "the causes of action in the Complaint sounding in tort, entitled 'Wrongful Demolition', 'Conversion/ Trespass to Chattels' [sic], and 'Trespass', constituting the First, Third and Fourth Causes of Action, respectively." The court denied the motion to dismiss the second cause of action for "Inverse Condemnation."

On 16 October 2009, the City filed a motion for summary judgment on the Pattersons' inverse condemnation claim on the grounds that (1) plaintiffs' had not exhausted their administrative remedies, (2) plaintiffs could not prove facts constituting an inverse condemnation, and (3) the claim was barred by the statute of limitations. On 22 October 2009, the Pattersons filed a motion to amend their complaint to reallege their due process claims based on the intervening decision of *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 678 S.E.2d 351 (2009).

Both the City's motion for summary judgment and the Pattersons' motion to amend were heard on 26 October 2009. The trial court granted defendant's motion for summary judgment as to the inverse condemnation claim, but allowed the Pattersons' motion to amend their complaint to reassert their due process claims under the North Carolina Constitution.

On 10 December 2009, the Pattersons filed their amended complaint, alleging that the Pattersons had not been given any notice of the 6 June 2006 hearing at which the City determined that their property was to be demolished and were not, therefore, given an opportunity to present evidence that they "had not been given an adequate opportunity to repair the subject dwellings." The amended complaint further alleged that "[e]ven though Plaintiff Keith Patterson was a co-owner of

the subject property, he was never given notice by the Defendant or offered an opportunity to be heard prior to the demolition."

On 18 November 2010, the City filed a second motion for summary judgment asserting that there was no genuine issue of material fact as to the remaining due process claims. On 9 December 2010, the trial court entered an order granting the City's summary judgment motion. The trial court concluded that the Pattersons had an adequate remedy at law that barred their constitutional claim and that plaintiffs Billy G. Patterson and Pearnell Patterson were, in any event, afforded due process. As for Keith Patterson, the trial court concluded that he was not entitled to notice as he had no ownership interest in the property that had been recorded.

The Pattersons timely appealed to this Court from the trial court's orders granting the City's motions to dismiss pursuant to Rules 12(b)(1), (2), and (6) and from the orders granting the City's motions for summary judgment.

I

[1] The Pattersons first contend that the trial court erred in ruling in the 16 January 2009 order that their due process claims—labeled "Wrongful Demolition"—were barred by governmental immunity. The trial court dismissed this cause of action as "sounding in tort." The complaint, however, alleged that "[d]efendant demolished Plaintiffs' property without affording Plaintiffs adequate due process under the common law *and Constitution of the State of North Carolina*."(Emphasis added.)

In *Corum v. Univ. of N.C.*, 330 N.C. 761, 785-86, 413 S.E.2d 276, 291 (1992), our Supreme Court held that sovereign immunity does not bar state constitutional claims: "The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights." The trial court, therefore, erred in dismissing the first cause of action to the extent it asserted a claim for violation of due process under the North Carolina Constitution. However, because the court subsequently allowed the Pattersons to amend their complaint to reassert their due process claims, they were not prejudiced by the error.

II

[2] The Pattersons next contend that the trial court erred in granting the City's motion for summary judgment as to their due process claims. Plaintiff Keith Patterson argues individually that he was given

no notice at all of any of the proceedings relating to the demolition of the mobile homes. All of the Pattersons contend that they were denied notice and an opportunity to be heard prior to the City's passing, on 6 June 2006, an ordinance directing that the Pattersons' mobile homes be demolished. The Pattersons argue that the demolition under these circumstances constituted both a procedural due process and a substantive due process violation.

A. Failure to Serve Keith Patterson with Notice

Keith Patterson was not served with the notices, complaints, and orders sent to Billy G. and Pearnell Patterson. Plaintiffs argue that the failure to notify him violated the enabling statutes—N.C. Gen. Stat. § 160A-442 (2011) and N.C. Gen. Stat. § 160A-443(2)—and denied him due process. The City responds that because Keith Patterson was not a record owner of the mobile homes, they had no duty to serve him.

Section 160A–443 sets forth the provisions that a city must include in any ordinances adopted pursuant to its power to regulate minimum housing standards. Under N.C. Gen. Stat. § 160A-443(2), the initial complaint must be served on "the owner of and parties in interest" of the dwellings at issue. Subsequent provisions in N.C. Gen. Stat. § 160A-443 refer simply to "the owner." N.C. Gen. Stat. § 160A–442(4) (emphasis added) defines "owner": " 'Owner' means the holder of the title in fee simple and every mortgagee *of record*." On the other hand, " '[p]arties in interest' means all individuals, associations and corporations who have interests *of record* in a dwelling and any who are in possession thereof." N.C. Gen. Stat. § 160A–442(5) (emphasis added).

The Pattersons do not contend that Keith Patterson was a record owner of the property. Instead, the Pattersons assert that "[a]t no time did Plaintiffs ever inform the City that Keith Patterson was not a co-owner of the dwellings. . . . The City knew or should have known that Keith Patterson was a co-owner of the dwellings and would have been privy to that fact through numerous conversations with the lessor of the real property and seller of the dwellings."

The Pattersons argue that "of record" in N.C. Gen. Stat. § 160A-442(4) modifies only "mortgagee" and not "the holder of the title in fee simple." This construction of the definition of "owner" is not consistent with the definition of "parties in interest," which also is limited only to those who have an interest "of record." It is a " 'fundamental rule of statutory construction that statutes in pari materia, and all parts thereof, should be construed together and compared with each other.' " *Martin v. N.C. Dep't of Health & Human*

Servs., 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) (quoting *Redevelopment Comm'n of Greensboro v. Sec. Nat'l Bank of Greensboro*, 252 N.C. 595, 610, 114 S.E.2d 688, 698 (1960)). We see no reasonable basis for concluding that the General Assembly would limit "parties in interest" and "mortgagee[s]" to those "of record" but would not have the same limitation for holders of title in fee simple. Indeed, *Lawyer v. City of Elizabeth City N.C.*, 199 N.C. App. 304, 308, 681 S.E.2d 415, 418 (2009), relied upon by plaintiffs, appears to construe the statutes as referring to owners of record.

In *Lawyer*, this Court reversed a grant of summary judgment because "reasonable minds could differ as to whether the steps taken by defendants [to ascertain to whom notice should be sent] were sufficient." *Id.* at 309, 681 S.E.2d at 418. The plaintiffs in *Lawyer* had purchased the house and property at a sheriff's sale, but the sheriff's deed was not filed until after the house was demolished. *Id.* at 305, 681 S.E.2d at 416. The prior owners remained listed by the tax office as the "owners of the property" and, therefore, received the City's notices of condemnation. *Id.* The prior owners then sent a letter indicating that they no longer owned the property because it had been sold at auction. When the City inquired of the tax office and the register of deeds, it was assured that the prior owners were the owners of the property. *Id.*

In concluding that issues of fact existed, this Court noted that while "[n]o party presented evidence as to what the appropriate standard of care under the circumstances would be[,] [h]ad the City engaged an attorney to conduct a title search, including all 'out' conveyances, the attorney should have discovered the unrecorded sheriff's deed." *Id.* at 308, 681 S.E.2d at 418. The Court could not, however, determine whether the City had a duty to do so. *Id.* We read *Lawyer* as holding that there was a genuine issue of material fact as to whether the plaintiffs were, in fact, an owner of record under the circumstances of that case.

In support of their contention that the City was required to conduct an investigation to identify even those owners not of record, the Pattersons also cite *Farmers Bank of Sunbury v. City of Elizabeth City*, 54 N.C. App. 110, 282 S.E.2d 580 (1981). In *Farmers Bank*, the plaintiff bank had entered into a promissory note with the record owners of the property that was secured with a deed of trust on that property. *Id.* at 111, 282 S.E.2d at 581. That deed of trust was in fact recorded and included the name of the trustee although there was no reference to the bank. *Id.* at 115, 282 S.E.2d at 583. The deed of trust

did not, however, include the trustee's address. *Id.* This Court reversed entry of summary judgment in favor of the defendant City and enforcement officer because the defendants had not specifically identified what steps, if any, they had taken to ascertain the identity and whereabouts of the trustee or other interested parties apart from the record homeowners. *Id.* at 115-16, 282 S.E.2d at 584.

In short, in *Lawyer*, there was evidence that the plaintiffs' ownership could have been uncovered through a title search, giving rise to issues of fact regarding whether they were owners of record. In contrast, in *Farmers Bank*, the existence of the deed of trust was a matter of public record, but there was a question whether the defendants could have with reasonable diligence located the trustee and the bank based on the recorded deed of trust. Neither case suggests that a city has a duty to investigate interests not identifiable through a search of the public record.

Here, the Pattersons have presented no evidence that Keith Patterson's interest in the mobile homes appeared anywhere in the public record. Instead, they contend that the City should have gone beyond a public record search and conducted an investigation to uncover whether there might have been owners other than those appearing of record. Neither the statute nor the case law imposes this duty on a city. Under the circumstances of this case, the trial court properly granted summary judgment on Keith Patterson's individual due process claim.

B. <u>Failure to Give Notice as to June 2006 Ordinance</u>

We next turn to plaintiffs' argument that they were denied due process under the North Carolina Constitution when the City failed to give them notice of the June 2006 City Council meeting and an opportunity to be heard before the passing of the ordinance of demolition. In *Corum*, 330 N.C. at 782, 413 S.E.2d at 289, our Supreme Court held that "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." Therefore, in order for plaintiffs to proceed under the state constitution, they must establish that they lacked an adequate alternative state remedy.

An alternative remedy is adequate when "a plaintiff [has] at least the opportunity to enter the courthouse doors and present his claim." *Craig*, 363 N.C. at 340, 678 S.E.2d at 355. Phrased differently, "an adequate remedy must provide the possibility of relief under the circumstances." *Id.*

In *Copper v. Denlinger*, 363 N.C. 784, 789, 688 S.E.2d 426, 429 (2010), our Supreme Court held that "an adequate remedy exist[ed] at state law to redress the alleged" due process injury when a statute granted a student the right to appeal first to the School Board and then to superior court from disciplinary decisions. The Supreme Court affirmed an order granting a motion to dismiss the state constitutional due process claim when "the complaint contain[ed] no allegations suggesting that the student was somehow barred from the doors of either the courthouse or the Board. Nor [did] the complaint allege that he exhausted his administrative remedies, or even that it would have been futile to attempt to appeal his suspension to the Board." *Id.* The Court concluded: "Thus, under our holdings in both *Corum* and *Craig*, an adequate remedy exists at state law to redress the alleged injury, and this direct constitutional claim is barred." *Id.*

Copper controls our decision in this case. The Pattersons' amended complaint alleged that the City violated their due process rights by failing to give them notice of the 6 June 2006 City Council hearing and failing to give them an opportunity to present evidence that they "had not been given an adequate opportunity to repair the subject dwellings." The Pattersons, however, had available to them the right to appeal to the City's Board of Adjustment and the right to seek injunctive relief in superior court—both remedies that would have redressed any inadequacy in the time allowed to repair their mobile homes.

In response to the chief code enforcement officer's order that the mobile homes be demolished, the Pattersons chose, on 7 April 2006, to sign a notice of intent to repair as allowed by the City's Code. The chief code enforcement officer then issued a supplemental order requiring that the premises be repaired by 7 May 2006. The order specifically warned that a failure to complete the repairs by that date would render the supplemental order void, and the City would pursue further remedies including demolition of the premises.

Instead of signing an intent to repair, the Pattersons could have chosen to appeal the initial order of the chief code enforcement officer requiring demolition. Although they chose the alternative route of repair, upon receipt of the supplemental order with its 7 May 2006 deadline, the Pattersons could have appealed to the Gastonia Board of Adjustment on the grounds that they needed additional repair time. *See* N.C. Gen. Stat. § 160A-446(c) (providing for appeal to housing appeals board from "any decision or order of the public officer . . . by

any person aggrieved thereby"); *Gastonia*, N.C., Code of Ordinances ch. 16, art. V, § 16-132(d) (allowing appeal to Board of Adjustment from "any decision or order of the chief code enforcement officer" within 10 days of issuance or service of order). That appeal would also have had the effect of suspending the chief code enforcement officer's order. The Pattersons would have had the right to seek review of the Board's decision by way of a petition for writ of certiorari filed with the superior court. N.C. Gen. Stat. § 160A-446(e).

In addition, or alternatively, under N.C. Gen. Stat. § 160A-446(f), if the Pattersons believed that the time allowed for repair was inadequate, they could have "petition[ed] the superior court for an injunction restraining the public officer from carrying out the order or decision and the court [could], upon such petition, issue a temporary injunction restraining the public officer pending a final disposition of the cause." *See also* Gastonia, N.C., Code of Ordinances ch. 16, art. V, § 16-132(e) (providing that "[a]ny person aggrieved by an order issued by the chief code enforcement officer or a decision rendered by the board" may petition superior court for temporary injunction restraining chief code enforcement officer).

Thus, the Pattersons had administrative appeals and the right to seek relief in superior court to bar the demolition of their mobile homes—remedies that would have allowed them to present evidence that they had not been given enough time to repair their property, precisely the process they claim they were denied. Further, the Pattersons claim that given more time, they would have performed their acknowledged duty to bring their property into compliance with the City's Minimum Housing Code. The administrative remedies and petition for injunctive relief could have provided the necessary additional time. Plaintiffs provide no explanation why they did not pursue these remedies and make no argument that pursuit of the remedies would have been futile. Consequently, under *Copper*, an adequate remedy existed for the Pattersons at state law to redress their alleged injury, and their direct constitutional claims are, therefore, barred.

The Pattersons, however, point to *Wiggins v. City of Monroe*, 73 N.C. App. 44, 326 S.E.2d 39 (1985), in which this Court reversed summary judgment entered in favor of the City even though the plaintiffs had not attempted to avoid demolition of their house by pursuing their administrative remedies. *Wiggins* predates *Corum* and does not specifically address state constitutional claims.

Nevertheless, in *Wiggins*, the chief building inspector had—as authorized by the City—directed the plaintiffs that the City would allow them to avoid demolition if they began repairs on the house within 10 days and completed the repairs within 60 days. *Id.* at 46, 326 S.E.2d at 41. Although the plaintiffs began their repairs within the 10-day time period, the City demolished the house 13 days into the 60-day repair period. *Id.* This Court held that although the chief building inspector had the "legal right initially to pursue either remedy—repair or demolition—he could not abandon the chosen remedy—the reparations—in midstream." *Id.* at 48, 326 S.E.2d at 42. "Once the alternate remedy [of repair was] elected, it [could not] be arbitrarily withdrawn." *Id.*, 326 S.E.2d at 43.

Wiggins stands in stark contrast with this case. Here, the full 60-day period allowed for repair had elapsed without the Pattersons having completed the repairs. The supplemental order provided that if the Pattersons did not comply with the deadline, then their mobile homes would be demolished. The Chief Code Enforcement Officer's July letter did not change the deadline. As a result, unlike the City in *Wiggins*, the City of Gastonia did not withdraw the repair remedy in mid-stream. It simply enforced its deadline. While the Pattersons had remedies they could have pursued to obtain an extension of that deadline, they chose not to do so. *Wiggins* does not provide a basis for reversing summary judgment on the Pattersons' constitutional claims.

The Pattersons further argue that the administrative remedies were immaterial because the City Council was required to conduct an evidentiary hearing prior to passing the ordinance ordering demolition and that the failure to do so violated due process. The sole authority cited by the Pattersons is N.C. Gen. Stat. § 160A-443(5), which provides:

> That, if the owner fails to comply with an order to remove or demolish the dwelling, the public officer may cause such dwelling to be removed or demolished. The duties of the public officer set forth in this subdivision shall not be exercised until the governing body shall have by ordinance ordered the public officer to proceed to effectuate the purpose of this Article with respect to the particular property or properties which the public officer shall have found to be unfit for human habitation and which property or properties shall be described in the ordinance. *No such ordinance shall be adopted to require demolition of a dwelling until the owner has first*

> *been given a reasonable opportunity to bring it into conformity with the housing code.* This ordinance shall be recorded in the office of the register of deeds in the county wherein the property or properties are located and shall be indexed in the name of the property owner in the grantor index.

(Emphasis added.) Plaintiffs argue that the italicized language requires that the City Council "make a finding that a property owner has been given a reasonable opportunity to repair the dwelling before the ordinance to demolish can be issued."

Nothing in N.C. Gen. Stat. § 160A-443(5) requires that the City Council make any findings or conduct an evidentiary hearing. Plaintiffs' argument would require that we rewrite the statute to read: "No such ordinance shall be adopted to require demolition of a dwelling until [the governing body has made a finding that] the owner has first been given a reasonable opportunity to bring it into conformity with the housing code." It is well established, however, that "[w]e have no power to add to or subtract from the language of the statute." *Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525, 528 (1950). The statute requires that the property owner be given a reasonable opportunity to repair the property; it does not require that the City Council conduct an evidentiary hearing and make a finding that the owner received the reasonable opportunity.

As the statute states and this Court noted in *Newton v. City of Winston-Salem*, 92 N.C. App. 446, 451, 374 S.E.2d 488, 492 (1988), the factual determinations are made in a hearing before the public officer. In *Newton*, the Court found that the plaintiff had no opportunity to be heard on the determination that a dwelling should be demolished because the hearing for which the plaintiff received notice involved an order to repair and not an order to demolish. *Id.* The demolition order was based only on the building inspector's determination without benefit of a hearing, that the condition of the property had changed due to vandalism. *Id.*

Here, the Chief Code Enforcement Officer issued an order for demolition after a hearing at which Billy Patterson appeared. The officer made the finding that repair of the "dwelling [could not] be made at a reasonable cost in relation to the value of the dwelling" under N.C. Gen. Stat. § 160A-443(3)(b). Thus, in contrast to *Newton*, the Pattersons in this case were given an opportunity to be heard on the fundamental question regarding whether "the repairs *cannot* be

made at a reasonable cost in relation to the value of the dwelling." *Newton*, 92 N.C. App. at 451, 374 S.E.2d at 492.

If plaintiffs disagreed with that determination or, upon electing to attempt to repair the properties, believed they had not been given a long enough repair period, then plaintiffs had adequate alternative state remedies they could, but did not, pursue. The trial court, therefore, properly entered summary judgment in favor of the City on the Pattersons' state constitutional claims.[2]

III

[1] With respect to their tort claims for conversion, trespass to chattels, and trespass, the Pattersons contend that the trial court should not have found them barred by sovereign immunity. It is, however, "a fundamental rule that sovereign immunity renders this state, including counties and municipal corporations herein, immune from suit absent express consent to be sued or waiver of the right of sovereign immunity." *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 246 (2001).

A city may waive sovereign immunity by purchase of insurance:

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

N.C. Gen. Stat. § 160A-485(a) (2011). Sovereign immunity is not waived if the municipality's insurance excludes the claim from coverage. *See Doe v. Jenkins*, 144 N.C. App. 131, 135, 547 S.E.2d 124, 127 (2001) ("[B]ecause the insurance policy does not indemnify defendant against the negligent acts alleged in plaintiff's complaint, defendant has not waived its sovereign immunity . . . .").

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2. In their reply brief, plaintiffs also contend that the City was required to issue subsequent orders to demolish following the supplemental orders to repair, citing N.C. Gen. Stat. § 160A-443(5a). This contention was not the basis of the due process claims as alleged in the amended complaint and, therefore, is not properly before this Court.

The Pattersons do not address whether their claims are covered or excluded by the City's insurance coverage. Instead, the Pattersons seem to argue that, regardless of any absence of insurance, the City waived sovereign immunity by failing to follow the procedures in its Code. Although the Pattersons have not demonstrated that the City failed to follow proper procedures, the Pattersons, in any event, have not cited cases addressing sovereign immunity, but rather have relied on cases addressing constitutional claims or public official immunity even though the Pattersons sued only the City and not any public officials.[3] The Pattersons have not, therefore, identified any error in the trial court's decision that sovereign immunity barred their claims for conversion, trespass to chattels, and trespass to real property.

IV

[4] Finally, the Pattersons contend that the trial court improperly granted summary judgment as to their claim for inverse condemnation. The Pattersons have acknowledged in their brief, however, that they cannot bring an inverse condemnation claim for the loss of mobile homes because mobile homes are considered personal property. *See Hensley v. Ray's Motor Co. of Forest City, Inc.*, 158 N.C. App. 261, 264, 580 S.E.2d 721, 723 (2003) (observing that "[t]raditionally, the law treats a mobile home not as an improvement to real property but as a good, defined and controlled by the UCC as something 'movable at the time of identification to the contract for sale . . . .' " (quoting N.C. Gen. Stat. § 25-2-105(1) (2001))); *City of Durham v. Woo*, 129 N.C. App. 183, 191, 497 S.E.2d 457, 462 (1998) ("This definition clearly indicates that for purposes of condemnation, 'property' is limited to interests in real property, and does not include personal property.").

The Pattersons nonetheless argue that the City's unauthorized entry onto the property they leased supported a claim for inverse condemnation. In an inverse condemnation action, a plaintiff must show:

> (1) a taking (2) of private property (3) for a public use or purpose. Although an actual occupation of the land, dispossession of the landowner, or physical touching of the land is not nec-

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3. Sovereign immunity means that "a subordinate division of the state, or agency exercising statutory governmental functions like a city administrative school unit, may be sued only when and as authorized by statute." *Smith v. Hefner*, 235 N.C. 1, 6, 68 S.E.2d 783, 787 (1952). Whereas public official immunity provides that: "[A] public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto." *Id.* at 7, 68 S.E.2d at 787.

> essary, a taking of private property requires 'a substantial interference with elemental rights growing out of the ownership of the property.' A plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental.

Adams Outdoor Adver. of Charlotte v. N.C. Dep't of Transp., 112 N.C. App. 120, 122, 434 S.E.2d 666, 667 (1993) (internal citations omitted) (quoting *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E.2d 101, 109 (1982)).

The Pattersons cite no authority and we have found none suggesting that the City's entry onto a leasehold in accordance with its authority under the City's Minimum Housing Code and the enabling legislation constitutes a taking within the meaning of inverse condemnation. The trial court, therefore, properly granted summary judgment on plaintiffs' inverse condemnation claim.

Affirmed.

Chief Judge MARTIN and Judge STROUD concur.

JEFFREY SMITH ET. AL, PLAINTIFFS v. THE CITY OF FAYETTEVILLE, DEFENDANT

No. COA11-1263

(Filed 1 May 2012)

1. Appeal and Error—notice of appeal—sufficient for review

Plaintiffs gave sufficient notice of appeal in a privilege license tax case to vest the Court of Appeals with jurisdiction to consider both the grant of defendant's summary judgment motion and the denial of plaintiffs' summary judgment motion.

2. Taxation—privilege license tax—insufficient evidence tax was unreasonable—conflicting evidence

The trial court did not err in a case involving a privilege license tax by granting summary judgment in favor of defendant City and denying summary judgment for a majority of plaintiffs. Those plaintiffs failed to present sufficient evidence to rebut the presumption that the license tax was reasonable and not prohibitive. The trial court erred by granting summary judgment in favor

of the City as to the remaining plaintiffs as there was conflicting evidence on the issue of whether the City's privilege license tax on those plaintiffs' businesses was reasonable and not prohibitory.

Appeal by Plaintiffs from order entered 15 August 2011 by Judge Russell J. Lanier, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 22 February 2012.

The Law Offices of Lonnie M. Player, Jr., PLLC, by Lonnie M. Player, Jr., for Plaintiffs-appellants.

City Attorney for the City of Fayetteville Karen M. McDonald, Assistant City Attorney for the City of Fayetteville Brian K. Leonard, and Parker, Poe, Adams & Bernstein L.L.P., by Anthony Fox and Benjamin Sullivan, for Defendant-appellee.

HUNTER, JR., Robert N., Judge.

Jeffrey Smith, et al. ("Plaintiffs") appeal an order granting summary judgment to the City of Fayetteville (the "City") ("Defendant"). Plaintiffs argue (1) the trial court erred by granting summary judgment in favor of the City and denying Plaintiffs' summary judgment motion and (2) the ordinance at issue is unenforceable against Plaintiffs. We affirm the trial court's grant of the City's motion for summary judgment and denial of Plaintiffs' motion for summary judgment on the issues of whether the privilege license tax unlawfully classifies and exempts property for taxation, violates the rule of uniformity, and is preempted by federal law. With respect to Plaintiffs Tanya Marion, Thi Quoc Tran, Triumph Entertainment, LLC, Tim Moore, Douglas Guy, Danny Dye, Beverly K. Harris, Harris Management Services, Inc., JB&H Consulting, Inc., Charles Shannon Silver, and Randy Griffin, we affirm the trial court's grant of the City's motion for summary judgment and denial of Plaintiffs' motion for summary judgment on the issue of whether the privilege license tax is reasonable and not prohibitory. However, we reverse the trial court's order granting summary judgment for the City and against Plaintiffs Jeffrey Smith, Chris Marion, and Crafty Corner, LLC and remand for trial for only these Plaintiffs and only on the issue of whether the privilege license tax is reasonable and not prohibitory.

I. Facts & Procedural Background

Plaintiffs sell blocks of internet usage and telephone time at competitive rates to customers in the City. When a customer purchases time, the customer receives a sweepstakes entry. The entry has a pre-

determined prize that can be revealed using computers located on Plaintiffs' business premises. Some of these computers are connected to the internet while others are not.

The City is entitled to create and annually collect privilege license taxes pursuant to N.C. Gen. Stat. §§ 160A-211 and 105-109(e), respectively. For the fiscal year of 2009 to 2010, the City imposed a municipal privilege tax for miscellaneous businesses, including Plaintiffs' businesses, of $50.00. On 12 July 2010, the City enacted an ordinance instituting a privilege license tax on businesses conducting "electronic gaming operations" of $2,000 per business location and $2,500 per "computer terminal" conducting such gaming operations within each business location (the "Ordinance"). Under the Ordinance, "electronic gaming operations" include:

> [a]ny business enterprise, whether as a principal or accessory use, where persons utilize electronic machines, including, but not limited to, computers and gaming terminals (collectively, the "machines"), to conduct games of chance, including sweepstakes, and where cash, merchandise or other items of value are redeemed or otherwise distributed, whether or not the value of such distribution is determined by electronic games played or by predetermined odds.

The City avers it instituted a privilege license tax specific to electronic gaming operations because these businesses uniquely burden City resources, including law enforcement resources.

On 29 September 2010, Plaintiffs filed this action seeking a declaratory judgment enjoining the City from enforcing the privilege license tax against them. After filing the complaint, Plaintiffs obtained a preliminary injunction, relieving them from paying the 2010-2011 tax until after the resolution of this action. The City answered Plaintiffs' complaint and asserted counterclaims against each Plaintiff to recover the privilege license taxes for 2010-2011. On 8 July 2011, Plaintiffs filed a motion for summary judgment. On 15 July 2011, the City filed a cross-motion for summary judgment. On 25 July 2011, both motions were heard by Judge Russell J. Lanier, Jr. in Cumberland County Superior Court. Judge Lanier, Jr. entered an order 15 August 2011 denying Plaintiffs' motion for summary judgment and granting the City's motion for summary judgment. Plaintiffs entered timely notice of appeal 15 August 2011 of Judge Lanier, Jr.'s order granting Defendant's motion for summary judgment.

II. Jurisdiction & Standard of Review

[1] 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).

At the outset, we note that although cross motions for summary judgment were filed at the trial court level and the trial court issued a single order granting Defendant's motion for summary judgment *and* denying Plaintiffs' motion for summary judgment, Plaintiffs' notice of appeal appeals only "the Order granting summary judgment to Defendant in this matter." In all cases before this Court, the notice of appeal "shall designate the judgment or order from which appeal is taken." N.C. R. App. P. 3(d). Moreover, "[p]roper notice of appeal is a jurisdictional requirement that may not be waived." *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994). As such, "the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken." *Id.*; *see also Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 845 (2006). However,

> "[t]he [Federal] courts of appeals have in the main consistently given a liberal interpretation to the requirement of Rule 3(c) that the notice of appeal designate the judgment or part thereof appealed from. The rule is now well settled that a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake."

Smith v. Indep. Life Ins. Co., 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979) (citation omitted) (second alteration in original) (where this Court held that the plaintiff's notice of appeal, although specifying appeal from only one part of an order, showed sufficient intent to appeal the entire order). In the case at bar, the order from which Plaintiffs appealed both granted Defendant's motion for summary judgment and denied Plaintiffs' motion for summary judgment. However, the specific language of Plaintiffs' notice of appeal provided: "Plaintiffs . . . hereby give Notice of Appeal to the Court of Appeals of North Carolina from the Order *granting summary judgment to Defendant in this matter*, entered August 15, 2011, in the Superior Court of Cumberland County, North Carolina by the Honorable

Russell J. Lanier, Jr." (Emphasis added.) Although the notice appealed only the part of the order granting summary judgment to Defendant, Plaintiffs' intent could not have been to challenge only that portion of the order as Plaintiffs' brief clearly discusses arguments on the denial of Plaintiffs' summary judgment motion as well. Additionally, Defendant does not allege Plaintiffs' notice of appeal did not put it on notice that Plaintiffs were appealing the entire order entered by Judge Lanier, Jr. on 15 August 2011. Therefore, Plaintiffs gave sufficient notice of appeal to vest this Court with jurisdiction to consider both the grant of Defendant's summary judgment motion and the denial of Plaintiffs' summary judgment motion.

Our Supreme Court has stated the following standard of review for cases where the parties filed cross-motions for summary judgment:

> The instant case presents cross-motions for summary judgment. Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." The standard of review for summary judgment is *de novo*.

Forbis v. Neal, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007) (citations omitted) (alteration in original).

III. Analysis

[2] Plaintiffs contend the trial court erred in granting summary judgment for the City and denying summary judgment for Plaintiffs because the Ordinance in question is unenforceable under several distinct legal theories.

While Plaintiffs' appeal was pending, this Court addressed some of the same arguments presented by Plaintiffs' appeal in another decision. *See IMT v. City of Lumberton*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (No. COA11-813) (February 21, 2012). When this Court is presented with identical facts and issues, we are bound to reach the same conclusions as prior panels of this court. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Thus, for the reasons stated in *IMT*, we hold Plaintiffs' arguments that the Ordinance

unlawfully classifies and exempts property for taxation, violates the rule of uniformity, and is preempted by federal law are without merit.

We do, however, address Plaintiffs' argument that the Ordinance is unconstitutional because it imposes an unjust and inequitable taxation scheme as it is so high it amounts to a prohibition of their businesses. Although we addressed the unjust and inequitable taxation scheme issue under our Constitution in *IMT*, we are not bound by *IMT* on this issue in the instant case. In *IMT*, the business owners failed to present evidence sufficient to prove the privilege license tax was prohibitive of their businesses. ___ N.C. App. at ___, ___ S.E.2d at ___. Here, however, a few Plaintiffs submitted affidavits on the prohibitory effect the City's tax has had on their businesses and on similarly situated businesses, and, therefore, we conduct an analysis different from that of *IMT* as to whether the City's privilege license tax imposes an unjust and inequitable taxation scheme.

The North Carolina Constitution provides, "The power of taxation shall be exercised in a just and equitable manner." N.C. Const. Art. V, § 2(1). This provision was passed by the General Assembly in 1935 (Act of 1935, ch. 248, 1935 N.C. Sess. Laws 270) and adopted at the general election of 1936. *North Carolina Government*, *1585-1979*: *A Narrative and Statistical History* at 920-21 (Issued by Thad Eure, Secretary of State; John L. Cheney, Jr., ed.; Raleigh, NC 1981) (votes cast on November 3, 1936 ratified section 1 of chapter 248, 1935 N.C. Public Laws 270, by a vote of 242,899 to 152,516). The goal was to add a sense of "equality and fair play" to the General Assembly's power to tax:

> The pervading principle to be observed by the General Assembly in the exercise of these powers is equality and fair play. It is the will of the people of North Carolina, as expressed in the organic law, that justice shall prevail in tax matters, with "equal rights to all and special privileges to none". Of course, it is recognized that in devising a scheme of taxation, "some play must be allowed for the joints of the machine" and many practical inequalities may exist, still they are not to result from obvious discrimination. The goal must be kept in sight. The thesis of the Constitution is, that all similarly situated are entitled to the same treatment from the government they support.

Rockingham County v. Bd. of Trustees of Elon Coll., 219 N.C. 342, 344-45, 13 S.E.2d 618, 620 (1941). The provision "is a limitation upon the legislative power, separate and apart from the limitation con-

tained in the Law of the Land Clause in Article I, § 19, of the Constitution of North Carolina, and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States." *Foster v. N.C. Med. Care Comm'n*, 283 N.C. 110, 126, 195 S.E.2d 517, 528 (1973).

Plaintiffs cite to several cases in support of their position that the City's taxation scheme is not just and equitable because the tax is so high it amounts to a prohibition of their businesses. However, Plaintiff cites to only one relevant case that was decided *after* the addition of the "just and equitable" taxation provision to our Constitution and that interprets the provision. *See Nesbitt v. Gill*, 227 N.C. 174, 41 S.E.2d 646 (1947). Beyond *Nesbitt*, we can find no other appellate authority providing this Court with manageable standards as to whether a privilege license tax has been exercised in a "just and equitable manner."[1] Dean Henry Brandeis discerned the impact of this language in *Popular Government*, noting that opponents to the provision felt it would

> leave the people without any guarantees against the unwise use of the taxing power by the legislature, as the requirement that taxes be levied only "in a just and equitable manner" . . . affords less protection than the part of the Federal Constitution which prohibits the taking of property without due process of law—a prohibition which is extremely indefinite.

Henry Brandeis, Jr., *Taxation, Revenue, and Public Debt*, Vol. 1 Popular Government No. 4, The Proposed Constitution for North Carolina, June 1934, at 93. However, Dean Brandeis proffered no guide to interpretation of the provision. Moreover, our review of the House and Senate journals lends us no aid in the interpretation of the section; any legislative history research, based upon the usual sources, is unavailing.

However, Plaintiffs also cite to cases decided *before* the 1936 amendment that added the "just and equitable" tax provision. These cases determine not if the privilege license tax is "just and equitable" but if it is "unreasonable." *See, e.g.*, *State v. Danenberg*, 151 N.C. 718,

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1. We recognize there is an unpublished Business Court opinion that interprets the "just and equitable" taxation provision of our Constitution as it applies to a corporation, yet it is both factually distinguishable from the instant case and only provides persuasive authority for this Court on the issue at hand. *See Delhaize Am., Inc. v. Lay*, 06 CVS 08416, 2011 WL 1679628 (N.C. Super. Jan. 12, 2011). Thus, it is unhelpful in our analysis.

721, 66 S.E. 301, 303 (1909); *State v. Razook*, 179 N.C. 708, 710, 103 S.E. 67, 68 (1920); and *Clark v. Maxwell*, 197 N.C. 604, 607, 150 S.E. 190, 192 (1929). Defendant cites to a case decided after the 1936 amendment, but even this case determines whether a privilege license tax is "unreasonable" and not "just and equitable." *See E. B. Ficklen Tobacco Co. v. Maxwell*, 214 N.C. 367, 372, 199 S.E. 405, 409 (1938). Therefore, we hold that this common law prohibition on unreasonable taxation schemes is the same or substantially the same as our Constitutional provision requiring taxes to be exercised in a "just and equitable manner." Accordingly, we refer not only to *Nesbitt* but to the common law decided before the 1936 amendment to inform us in analyzing this issue.

The court must first determine whether the activity to be taxed is legal. *See Patterson v. S. Ry. Co.*, 214 N.C. 38, 47, 198 S.E. 364, 370 (1938) (holding that a business was not illegal and, as such, was not barred from recovery). If so, under the common law that pre-dates the "just and equitable" taxation provision of our constitution, the court must determine whether the city instituting the tax has the statutory authority to do so. *See Danenberg*, 151 N.C. at 720, 66 S.E. at 302 (where the first question in determining whether a privilege license tax on beer was discriminatory and prohibitive was whether Charlotte had the authority to enact the tax in the first place).

If the activity taxed is legal and the city imposing the tax had authority to do so, only then should the court determine if the amount of the tax is unreasonable and prohibitory. *Id.* at 721, 66 S.E. at 303; *Razook*, 179 N.C. at 710, 103 S.E. at 68. We note there is a presumption that privilege license taxes are reasonable and not prohibitory. *Razook*, 179 N.C. at 711, 103 S.E. at 69 ("'All presumptions and intendments are in favor of the validity of the [privilege license] tax[,] . . . [and] the mere amount of the tax does not prove its invalidity.'" (citation omitted)). The "'power of taxation is very largely a matter of legislative discretion' and . . . 'in respect to the method of apportionment as well as the amount, it only becomes a judicial question in cases of palpable and gross abuse.'" *E. B. Ficklen Tobacco Co.*, 214 N.C. at 372, 199 S.E. at 409 (citation omitted).

A plaintiff, however, can rebut the presumption that a privilege license tax is reasonable and not prohibitory. To do so, the plaintiff must show the tax is so high that it amounts to a prohibition of the plaintiff's particular business, effectively eliminating all similar businesses within the city. *Razook*, 179 N.C. at 710, 103 S.E. at 68; *see also Danenberg*, 151 N.C. at 721, 66 S.E. at 303 ("As municipal corpora-

tions have no inherent police powers and can exercise only those conferred by the State, it of necessity follows that, in the absence of express charter authority, they cannot directly by taxation prohibit or destroy a business legalized by the State.") and N.C. Const. art. I, § 1 (listing "fruits of their own labor" as an inalienable right endowed to all persons).

To show a privilege license tax is so high it amounts to a prohibition of the plaintiff's business, the plaintiff must show the tax, in relation to the plaintiff's gross revenues, prevents the plaintiff from operating a profitable entity. *See Danenberg*, 151 N.C. at 722, 66 S.E. at 303. This Court recognizes that "evidence regarding the effect on the [individual] 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." *IMT*, ___ N.C. App. at ___, ___ S.E.2d at ___ (citing *Danenberg*, 151 N.C. at 722, 66 S.E. at 303). However, our Supreme Court is clear that a privilege license tax should reasonably relate to the profits of the business. *Nesbitt*, 227 N.C. at 180, 41 S.E.2d at 650. Our Supreme Court has also held that a privilege license tax may be higher for businesses that are more profitable. *Clark*, 197 N.C. at 607, 150 S.E. at 192.

In addition to providing evidence of the prohibitive effect of the privilege license tax on the particular plaintiff's gross revenues, the plaintiff must also show it is more likely than not that the tax is also prohibitive of similarly situated businesses within the same city. To do this, the plaintiff may join these similarly situated businesses as parties in the case challenging the tax or submit affidavits from owners of similarly situated businesses in which the owners aver that the tax has prevented them from running a profitable business, presenting evidence of their gross revenues in relation to the tax as support. Evidence of the confiscating nature of the privilege license tax on the plaintiff's business as well as similarly situated businesses may also take into account the size of the city in which the license tax is imposed.

> The 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.

Danenberg, 151 N.C. at 722, 66 S.E. at 303.

Additional evidence the plaintiff may but is not required to present to show the license tax is unreasonable and prohibitory is comparison evidence of the amount of the tax with the amount of the privilege license tax the city has charged in the past on the plaintiff's business. The plaintiff may also put forth comparison evidence of the amount of the current privilege license tax imposed on the plaintiff by the city with the amount in privilege license taxes the city imposes on other businesses in the city. If the current amount of the privilege license tax is statistically significantly higher than the amount imposed on the plaintiff's business in the past or the amount charged on other businesses within the same city, this evidence helps rebut the presumption that the privilege license tax is reasonable and not prohibitory.

Once the plaintiff has presented sufficient evidence to rebut the presumption that the privilege license tax is reasonable and not prohibitory, the burden of production shifts to the city imposing the tax to show the challenged tax is nevertheless reasonable and not prohibitory. Two non-exclusive ways to accomplish this include showing: (1) the tax is reasonably related to the cost of increased police regulation of the taxed business or (2) the plaintiff's inability to profit is due to his negligence in running his business and not because the tax is prohibitive.

"[T]he 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" is an important consideration to determine if the challenged privilege license tax is reasonable. *Danenberg*, 151 N.C. at 722, 66 S.E. at 303. If the sale of a good or service "furnishes extraordinary opportunities for the violation of [state law]," it becomes the municipality's "undoubted duty to regulate and supervise it." *Id.* "One of the recognized methods of regulation is by license taxation which will reduce the area and extent of the business without annihilating it and thus bring it more easily within municipal control, as well as provide funds for the expense the municipality incurs." *Id.* at 723, 66 S.E. at 304 (One of the most effective ways of restraining and limiting the number of "near beer saloons" in a city was to impose a heavy license fee on them.). If more police regulation of a business is required due to the nature of the business, it follows that a privilege license tax on that particular business may be higher to help cover such regulation costs. *See id.* (where our Supreme Court held a privilege license tax on establish-

ments that sold “near beer” to be reasonable in part because of the added police supervision required of those establishments to maintain order).

To show the privilege license tax is not prohibitive and unreasonable, the city may also present evidence that the plaintiff’s inability to run a profitable business is due not to the license tax but to the plaintiff’s own negligence or incompetence or some other considerations. *See IMT*, ___ N.C. App. at ___, ___ S.E.2d at ___ (citing *Danenberg*, 151 N.C. at 722, 66 S.E. at 303). This may be accomplished by submitting evidence on the day-to-day operations of the plaintiff’s business or by showing how other similarly situated businesses are profitable, even after paying the privilege license tax.

Once conflicting evidence is received by the trial court on the issue of whether the privilege license tax is reasonable and not prohibitory, the issue becomes a material question of fact reserved for the fact-finder. It is therefore inappropriate for a trial court to decide such a matter on summary judgment as a matter of law.

In sum, our review of the body of law on this issue provides the following analysis to determine if a privilege license tax is reasonable and not prohibitory. The first step is to determine if the activity taxed is legal, and, if so, whether the city instituting the tax had the authority to do so. If so, the tax enjoys a presumption of reasonableness. To rebut this presumption, the plaintiff must present evidence of his business’s gross revenues, indicating that the tax is so high it prevented the plaintiff from conducting a profitable business. The plaintiff must also present evidence that the tax has prevented similarly situated businesses from being profitable. If the plaintiff successfully rebuts the presumption, the city instituting the tax may put forth evidence to show the tax is nevertheless reasonable and not prohibitory because either (1) the tax is reasonably related to the cost of increased police regulation of the taxed business or (2) the plaintiff’s inability to profit is due to his negligence in running his business and not because the tax is prohibitive. If the plaintiff successfully rebuts the presumption and the city presents evidence contradicting the plaintiff’s evidence, the issue of whether the privilege license tax is reasonable and not prohibitory becomes a material question of fact reserved for the fact-finder.

Here, although N.C. Gen. Stat. § 14-306.4 (2011) holds that sweepstakes using an “entertaining display” are prohibited, this ban was recently held by this Court to be unconstitutional. *See Hest*

Technologies, Inc. v. State ex rel. Perdue, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (COA11-459) (Mar. 6, 2012) ("[T]he 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."). Thus, as the law stands, Plaintiffs' businesses conduct legal activities.

Next, we hold the City had the authority to enact the Ordinance instituting the privilege license tax on Plaintiffs' businesses. *See* N.C. Gen. Stat. § 160A-211(a) (2011) ("Except as otherwise provided by law, a city shall have power to levy privilege license taxes on all trades, occupations, professions, businesses, and franchises carried on within the city."). As such, there is a presumption that the privilege license tax instituted on Plaintiffs' businesses by the City is reasonable and not prohibitive.

To rebut this presumption, each Plaintiff must have presented evidence of his business's gross revenues, indicating that the tax is so high it prevents him from conducting a profitable business. Plaintiffs must also present evidence that the tax has prevented similarly situated businesses from being profitable. However, Plaintiffs Tanya Marion, Thi Quoc Tran, Triumph Entertainment, LLC, Tim Moore, Douglas Guy, Danny Dye, Beverly K. Harris, Harris Management Services, Inc., JB&H Consulting, Inc., Charles Shannon Silver, and Randy Griffin did not present sufficient evidence to rebut the presumption that the license tax is reasonable and not prohibitive. These particular Plaintiffs presented no evidence besides non-specific, widespread assertions that the tax would prohibit their businesses. For example, the Plaintiffs' complaint states in a general manner, "In most cases, the revised privilege tax bills received by Plaintiffs from Defendant accounted for many multiples more than the total amount of gross revenue generated by Plaintiffs throughout the entire existence of their businesses." However, no specific evidence on how the tax affected these particular Plaintiffs' revenues was presented. As such, we affirm the trial court's order granting summary judgment to the City and denying summary judgment to Plaintiffs Tanya Marion, Thi Quoc Tran, Triumph Entertainment, LLC, Tim Moore, Douglas Guy, Danny Dye, Beverly K. Harris, Harris Management Services, Inc., JB&H Consulting, Inc., Charles Shannon Silver, and Randy Griffin. *See IMT*, ___ N.C. App. at ___, ___ S.E.2d at ___ (where this Court could not hold the privilege license tax was prohibitive when the appellants did not provide a "sufficient record of proof

to show governmental action was taken to deprive Appellants of a constitutional right").

On the other hand, Plaintiffs Jeffrey Smith, Chris Marion, and Crafty Corner, LLC presented what we consider a sufficient record of evidence to rebut the presumption that the license tax is reasonable and not prohibitory. These Plaintiffs submitted affidavits to the trial court in which they detailed evidence of their particular business's gross revenues and net profits and asserted that payment of the tax would require them to close their businesses. These Plaintiffs further indicated they were informed the newly instituted privilege license fee was due several days *before* they were even notified by the City of the increase in the tax. These Plaintiffs claim that if they had received notice of the increased tax before it took effect, they may have decided to close their businesses to avoid the tax. However, they were not given any such opportunity. Each Plaintiff also presented evidence that the City required a full year's tax payment (1 July 2010 to 30 June 2011) and would not pro-rate the tax even though businesses with electronic sweepstakes games would be banned effective 1 December 2010. Moreover, the fact that over fifteen owners of businesses in the City joined as Plaintiffs in this matter constitutes some evidence that the tax was prohibitive on similarly situated businesses within the City. Additionally, Plaintiffs presented evidence that the revised minimum privilege license tax on their businesses was at least $4,500 while the previously imposed license tax was only $50, making the new amount charged 9,000 percent higher than the previously charged tax. Guided by the analysis provided above, we hold that such evidence is sufficient to rebut the presumption that the City's privilege license tax on these particular Plaintiffs' businesses is reasonable and not prohibitory.

We further note the City put forth several affidavits that show the extent of police regulation required to regulate Plaintiffs' businesses. Defendant also presented evidence of the amount of the City's privilege license tax on Plaintiffs' businesses compared with the amounts other cities charge similar businesses in privilege license taxes, showing the City's tax on Plaintiffs' businesses is not an outlier when compared to other cities' taxes on internet sweepstakes businesses. With such conflicting evidence on the issue of whether the City's privilege license tax on Plaintiffs' businesses is reasonable and not prohibitory, we hold there is a genuine issue of material fact on this issue. Therefore, we hold the trial court erred in deciding this matter on summary judgment with respect to Plaintiffs Jeffrey Smith, Chris

Marion, and Crafty Corner, LLC. Accordingly, we reverse the trial court's order granting summary judgment to the City and denying summary judgment to Plaintiffs Jeffrey Smith, Chris Marion, and Crafty Corner, LLC.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's grant of the City's motion for summary judgment and denial of Plaintiffs' motion for summary judgment on the issues of whether the privilege license tax unlawfully classifies and exempts property for taxation, violates the rule of uniformity, and is preempted by federal law. With regard to Plaintiffs Tanya Marion, Thi Quoc Tran, Triumph Entertainment, LLC, Tim Moore, Douglas Guy, Danny Dye, Beverly K. Harris, Harris Management Services, Inc., JB&H Consulting, Inc., Charles Shannon Silver, and Randy Griffin, we also affirm the trial court's order granting summary judgment to the City and denying it to these Plaintiffs on the issue of whether the tax is just and equitable. However, with regard to Plaintiffs Jeffrey Smith, Chris Marion, and Crafty Corner, LLC, we reverse the trial court's grant of summary judgment in favor of the City and denial of summary judgment for these Plaintiffs on the issue of whether the City's tax is just and equitable of these Plaintiffs' businesses because there is a genuine issue of material fact on this issue. We remand this specific issue for trial but only for Plaintiffs Jeffrey Smith, Chris Marion, and Crafty Corner, LLC.

Affirmed in part; reversed and remanded in part.

Judges BRYANT and BEASLEY concur.

STATE OF NORTH CAROLINA v. TAVARIS LAMONT FOWLER

No. COA11-1414

(Filed 1 May 2012)

Search and Seizure—motion to suppress—strip search—probable cause—exigent circumstances—reasonable manner

The trial court did not err in a felony possession of cocaine case by denying defendant's motion to suppress evidence obtained after a "strip search" of defendant's person. The officers had probable cause to believe defendant was hiding the drugs on his person and exigent circumstances existed to justify the roadside strip search. Furthermore, the search was conducted in a reasonable manner.

Appeal by defendant from judgment entered 21 April 2011 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 March 2012.

Attorney General Roy Cooper, by Assistant Attorney General J. Joy Strickland, for the State.

Danielle Blass for defendant appellant.

McCULLOUGH, Judge.

On 21 April 2011, Tavaris Lamont Fowler ("defendant") pled guilty to felony possession of cocaine after the trial court denied his motion to suppress certain evidence found on his person at the time of his arrest. On appeal, defendant argues the trial court erred in denying his motion to suppress, contending the search of his person was conducted without probable cause and exigent circumstances, as required by this Court's opinion in *State v. Battle*, 202 N.C. App. 376, 688 S.E.2d 805, *disc. review denied*, 364 N.C. 327, 700 S.E.2d 926 (2010). We affirm.

I. Background

On the evening of 19 November 2009, Officer Brett Gant ("Officer Gant") of the Charlotte-Mecklenburg Police Department was working with a confidential informant to set up potential drug deals with multiple individuals, including defendant. Defendant subsequently contacted the informant by telephone and agreed to meet the informant for the exchange of a small amount of cocaine at a McDonald's restaurant on Beatties Ford Road in Charlotte, North Carolina. Officer Gant

and the informant drove in an unmarked vehicle to a parking lot across the street from the McDonald's restaurant, where the informant identified defendant's vehicle in the McDonald's parking lot approximately 100 feet away. When the informant did not show up to complete the deal, defendant left the McDonald's parking lot. Officer Gant proceeded to follow defendant headed inbound on Beatties Ford Road and relayed to fellow Officer Daniel Bignall ("Officer Bignall") that "[t]here was going to be a subject in a silver Kia with crack cocaine in the Beatties Ford Road corridor."

Officer Bignall was approximately four miles away from the McDonald's restaurant when he received the tip from Officer Gant. Officer Eric Mickley ("Officer Mickley") was riding with Officer Bignall at the time. Officer Bignall drove in the direction of Beatties Ford Road and observed a vehicle matching Officer Gant's description. Officer Gant approximated the vehicle was travelling at 45 miles per hour in a 35-mile-per-hour zone. Accordingly, Officer Bignall activated his patrol lights and stopped the vehicle, in which defendant was the driver.

Upon approaching defendant's vehicle, Officer Bignall informed defendant he was speeding "40, 45" miles per hour in a 35-mile-per-hour zone and asked defendant for his driver's license and registration. Defendant responded that he did not have a driver's license, but he produced a North Carolina identification card. Officer Bignall then asked defendant to step out of the vehicle, placed defendant in handcuffs, and stated to defendant that he was not under arrest. After checking defendant's information, Officer Bignall discovered defendant's driver's license had been permanently suspended. Defendant was placed under arrest for driving while license revoked. Officer Bignall asked defendant for permission to search the vehicle, to which defendant responded, "Go ahead." Officer Mickley conducted the search of defendant's vehicle and recovered a small amount of marijuana in an ashtray.

Believing defendant had drugs on his person, Officer Bignall proceeded to conduct a search of defendant's person. Officer Bignall asked defendant to remove his socks and shoes, and Officer Bignall proceeded to search defendant's pockets and waistband area. Officer Bignall then undid defendant's belt and looked down into defendant's pants while asking defendant to sway back and forth in an attempt to "loosen up anything that may have been hidden on his person." Officer Bignall stated he believed defendant was carrying drugs on his person because of the information relayed by Officer Gant and because there were signs of marijuana use in defendant's vehicle but

there was no plastic bag in the vehicle in which the marijuana would have been packaged.

Officer Bignall then told defendant he would need to conduct a second, more thorough search of defendant's person. Officer Bignall placed defendant in the backseat of his police vehicle and drove defendant to "the back side" of a school parking lot "behind or near a loading dock, so [they] were shielded by the loading dock, a fence, and [the] police vehicle." Officer Mickley secured defendant while Officer Bignall conducted the search. Officer Bignall dropped defendant's pants down and searched defendant's boxer briefs with his hand. Both Officer Bignall and Officer Mickley testified that defendant's underwear was not removed during the search. During the search, Officer Bignall discovered an object containing three grams of crack cocaine in the "kangaroo pouch" of defendant's boxer briefs, or the "fly area . . . where the two pieces of fabric overlap." The entirety of the vehicle stop was recorded by audio-video equipment on Officer Bignall's patrol vehicle.

On 8 March 2010, defendant was indicted for possession with intent to sell or deliver cocaine based on the events of 19 November 2009. Prior to trial, defendant filed a motion to suppress the evidence found on his person, arguing that no probable cause or exigent circumstances existed to warrant a public "strip search." On 19 April 2011, the trial court conducted a hearing on defendant's motion to suppress, during which Officers Gant, Bignall, and Mickley testified to the foregoing events. Defendant also testified in his own defense, stating the officers had removed not only his pants, but also his underwear, leaving his private parts exposed to view by other people. The trial court denied defendant's motion to suppress in open court on the following morning, 20 April 2011, and thereafter entered a written order denying the motion, concluding the searches of defendant's person were conducted incident to defendant's arrest and were reasonable.

The following day, on 21 April 2011, defendant decided to plead guilty to possession of cocaine while reserving his right to appeal the denial of his motion to suppress. The trial court accepted defendant's plea and sentenced defendant to seven to nine months' imprisonment. Defendant timely appealed from the trial court's judgment to this Court by written notice on 2 May 2011.

II. Standard of Review

The scope of appellate review of a trial court's order granting or denying 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 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).

> Indeed, an appellate court accords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred.

Id. at 134, 291 S.E.2d at 619-20.

If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal. *State v. Barnard*, 184 N.C. App. 25, 28, 645 S.E.2d 780, 783 (2007), *aff'd*, 362 N.C. 244, 658 S.E.2d 643 (2008). "While the trial court's factual findings are binding if sustained by the evidence, the court's conclusions based thereon are reviewable *de novo* on appeal." *State v. Parker*, 137 N.C. App. 590, 594, 530 S.E.2d 297, 300 (2000).

III. Discussion

On appeal, defendant argues the trial court erred in denying his motion to suppress the evidence obtained during the search of his person because the search the officers performed was an unreasonable and intrusive public "strip search" that violated his constitutional rights. We disagree.

"The Fourth Amendment of the United States Constitution and Article 1 § 20 of the North Carolina Constitution preclude only those intrusions into the privacy of the body which are unreasonable under the circumstances." *State v. Johnson*, 143 N.C. App. 307, 312, 547 S.E.2d 445, 449 (2001). In determining whether an officer's conduct was reasonable in executing a search of the defendant's person, the trial court must balance " 'the need for the particular search against the invasion of personal rights that the search entails.' " *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 559, 60 L. Ed. 2d 447, 481 (1979)). " 'Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and

the place in which it is conducted.' " *Id.* (quoting *Wolfish*, 441 U.S. at 559, 60 L. Ed. 2d at 481).

In *Battle*, 202 N.C. App. 376, 688 S.E.2d 805, this Court emphasized that " ' "deeply imbedded in our culture . . . is the belief that people have a reasonable expectation not to be unclothed involuntarily, to be observed unclothed or to have their 'private' parts observed or touched by others." ' " *Id.* at 384, 688 S.E.2d at 813 (alteration in original) (quoting *State v. Stone*, 362 N.C. 50, 55, 653 S.E.2d 414, 418 (2007) (quoting *Justice v. City of Peachtree*, 961 F.2d 188, 191 (11th Cir. 1992))). Accordingly, in *Battle*, we noted that "[a] valid search incident to arrest . . . will not normally permit a law enforcement officer to conduct a roadside strip search." *Id.* at 387-88, 688 S.E.2d at 815. Rather, "[i]n order for a roadside strip search to pass constitutional muster, there must be both probable cause and exigent circumstances that show some significant government or public interest would be endangered were the police to wait until they could conduct the search in a more discreet location—usually at a private location within a police facility." *Id.* at 388, 688 S.E.2d at 815.

A. Strip Searches

We first address the State's contention that the requirements enunciated in *Battle* do not apply to the present case because the searches conducted of defendant's person did not rise to the level of "strip searches." As to this issue, the trial court made the following pertinent findings of fact:

> 9. After the initial searches of defendant's person and vehicle did not produce the expected cocaine, Officer Bignall took the defendant back to the side of his patrol car, which was still parked on the side of Beatties Ford Road, to conduct a more thorough search of his person. Bignall placed the defend-ant between two open doors of the patrol car and unbuckled defendant's belt and loosened his trousers. He then pulled out the waistband of the pants and looked inside, telling the defendant to sway back and forth as he did so. This search was done on the roadside, as other vehicles were passing. . . . [T]he officers did not pull down defendant's pants or expose his private parts to any other person or to passing motorists. . . . This second search of defendant's person likewise produced no contraband.
>
> 10. At this point, Officer Bignall placed defendant in the back of his patrol car and did further investigation into his prior

criminal record. . . . After finding a number of prior convictions, Bignall advised the defendant that he would be taken to jail for driving while license revoked. At this point it was clear that defendant was under arrest. Bignall then told defendant that he was going to do a "really good search."

11. [Officer Bignall] then drove his patrol car to the rear of the school parking lot, away from the roadway and passing motorists on Beatties Ford Road, when he conducted a third search of the defendant's person.

12. At the back of the parking lot, Bignall removed defendant from the patrol car, still handcuffed, and conducted a more extensive search of the defendant. During this search, Officer Bignall again unbuckled defendant's belt, loosened his trousers, and this time pulled down his pants. He then patted down defendant's groin, buttocks and private areas. . . . [T]he officer did not pull down defendant's underwear or otherwise expose his bare buttocks or genitals. . . . This third search, the most intrusive of the searches of defendant's person, was done in the back of a school parking lot, away from the public road and out of the view of passing motorists.

From these findings of fact, we conclude the searches of defendant's person constituted strip searches. During both searches, defendant's private areas were observed by Officer Bignall. In addition, during the third search, in which the contraband was found on defendant's person, defendant's pants were removed, leaving defendant in his underwear, and Officer Bignall searched inside of defendant's underwear with his hand. Moreover, in Finding of Fact number 16, the trial court expressly indicated the third search was "something in the nature of a 'strip search.' " Given the heightened privacy interests in one's "intimate areas," *see Stone*, 362 N.C. at 55, 653 S.E.2d at 418, we hold the second and third searches of defendant's person can properly be considered "[s]earches akin to strip searches." *State v. Smith*, 118 N.C. App. 106, 117, 454 S.E.2d 680, 687 (1995) (Walker, J., dissenting), *reversed per curiam on grounds stated in dissenting opinion*, 342 N.C. 407, 464 S.E.2d 45 (1995). Thus, the requirements of probable cause and exigent circumstances must be established to justify the strip searches of defendant in the present case, as enunciated in *Battle*.

B. Probable Cause

Defendant's first argument on appeal is that no probable cause existed to warrant the roadside strip searches of his person. Probable cause is "a suspicion produced by such facts as indicate a fair probability that the person seized has engaged in or is engaged in criminal activity." *State v. Schiffer*, 132 N.C. App. 22, 26, 510 S.E.2d 165, 167 (1999). "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and . . . the belief of guilt must be particularized *with respect to the person to be searched* or seized[.]" *Battle*, 202 N.C. App. at 388, 688 S.E.2d at 815 (alterations in original) (internal quotation marks and citations omitted).

> When probable cause is based on an informant's tip a totality of the circumstances test is used to weigh the reliability or unreliability of the informant. Several factors are used to assess reliability including: "(1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be and was independently corroborated by the police."

State v. Green, 194 N.C. App. 623, 627, 670 S.E.2d 635, 638 (quoting *State v. Collins*, 160 N.C. App. 310, 315, 585 S.E.2d 481, 485 (2003)), *aff'd*, 363 N.C. 620, 683 S.E.2d 208 (2009).

Here, regarding probable cause to further search defendant's person, the trial court found as fact that "Officer Bignall persisted in conducting an extensive search of defendant's person due to the fact that he had received information from Officer Gant and his informant that defendant would be traveling on Beatties Ford Road in a silver Kia, carrying 3 grams of crack cocaine. His initial search[] of the vehicle and the defendant had not produced this cocaine."

Defendant argues the trial court's finding on probable cause is erroneous because the information provided by the confidential informant was vague, lacked sufficient specificity, and lacked sufficient reliability to provide legal justification for the extensive search of his person. Specifically, defendant contends there is no competent evidence to support the trial court's finding of fact that "[t]he informant . . . told [Officer] Gant that defendant would be arriving in a silver *Kia*[.]" (Emphasis added.) Defendant contends the evidence indicates only that the informant told the officer that defendant would be travelling in a "silver *vehicle*" to and from the McDonald's parking lot, which is broad enough to apply to many cars in the vicinity. (Emphasis added.) In addition, defendant contends the informant

did not provide any other identifying information or description of defendant, nor did the informant identify any quantity of drugs that defendant would be carrying or state that defendant would be carrying drugs on his person. Defendant further contends the informant's information was not sufficiently reliable to provide legal justification for a search of his person because the officers did not corroborate any of the informant's information.

At the hearing on defendant's motion to suppress, Officer Gant testified that the confidential informant involved in this case was not only known to him, but also to another detective at the police department who had used the informant on a prior occasion. Officer Gant testified that the informant was a paid informant registered with the police department's Vice and Narcotics Division and that information from the informant had led to the arrest of at least six other individuals during the week prior to the arrest of defendant. Officer Gant testified that the informant had contacted a specific telephone number to set up a drug deal, and that individual had returned the informant's call to set up the deal for a "small amount of cocaine" at the McDonald's restaurant on Beatties Ford Road. Officer Gant testified that the informant was in Officer Gant's vehicle when the informant both made and received the phone calls. Officer Gant testified that immediately after the phone calls, the informant travelled with Officer Gant to a parking lot approximately 100 feet away from the McDonald's restaurant, where the informant identified defendant's vehicle as the individual who "showed up based on the phone call." Officer Gant testified that he actually saw defendant in the vehicle identified by the informant. Officer Gant testified that when defendant left the McDonald's parking lot, Officer Gant actually followed defendant onto Beatties Ford Road while providing a description of defendant's vehicle to Officer Bignall. Although Officer Gant could not remember the exact description given of defendant's vehicle, Officer Bignall testified twice that he received information from Officer Gant that "[t]here was going to be a subject in a silver *Kia* with crack cocaine in the Beatties Ford Road corridor." (Emphasis added.) Officer Bignall further testified that "[i]t was less than a minute" between the time he received the call from Officer Gant and the time he observed defendant's vehicle and that defendant's vehicle was "the only silver vehicle on Beatties Ford Road at that time going inbound."

After stopping defendant's vehicle, defendant consented to a search of his vehicle, in which a small amount of marijuana was

found, but no cocaine. Accordingly, there is competent evidence in the record to show that the informant, who was known to the officers and who had provided reliable information in the past, provided sufficient reliable information, corroborated by Officer Gant, to establish probable cause to believe that defendant would be carrying a small amount of cocaine in his vehicle. When the consensual search of defendant's vehicle did not produce the cocaine, the officers had sufficient probable cause, under the totality of the circumstances, to believe that defendant was hiding the drugs on his person. Thus, defendant's arguments that the officers lacked probable cause to conduct a more extensive search of his person are without merit.

C. Exigent Circumstances

Regarding exigent circumstances warranting the roadside strip search of defendant, the trial court made the following finding of fact:

> [Officer Bignall] knew that the defendant had experience with the intake procedures at the Mecklenburg County Jail, including search policies. He also reasonably could anticipate that defendant, even though handcuffed, would do anything possible to dispose of any contraband on his person prior to undergoing extensive (including "strip") search procedures at the jail. These circumstances constituted exigent circumstances that justified the extensive and intrusive nature of the third search of the defendant.

Defendant argues the State presented no evidence to support the trial court's finding that exigent circumstances existed to justify the intrusive search of his person. Defendant points out that less intrusive means of searching his person were readily available to the officers.

However, although defendant argues no testimony was presented supporting a finding of exigent circumstances, the trial court's finding is nonetheless supported by the transcript of the audio-video recording produced from Officer Bignall's police vehicle, which was admitted into evidence at the suppression hearing. The transcript reveals multiple conversations between Officer Bignall and defendant regarding defendant's prior criminal record, which included felony drug offenses, prior to the strip search of defendant in the school parking lot. Further, the transcript reveals defendant's constant begging and pleading with Officer Bignall not to take defendant to jail. This is competent evidence supporting the trial court's finding of fact that Officer Bignall knew defendant had prior experience with intake

procedures at the jail and that he could reasonably expect that defendant would attempt to rid himself of any evidence in order to prevent his going to jail.

In addition, although defendant points out that testimony was presented that a police station was located just down the street from the location of the stop on Beatties Ford Road, there is no evidence in the record indicating that this particular police station was open and operating at the time of defendant's stop, which was approximately 11:00 p.m. at night, or that the officers would be able to conduct a more private search at that location. Moreover, this Court has previously noted that "'[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means.' " *Battle*, 202 N.C. App. at 393, 688 S.E.2d at 818 (quoting *Illinois v. Lafayette*, 462 U.S. 640, 647, 77 L. Ed. 2d 65, 72 (1983)). Thus, defendant's arguments that no exigent circumstances existed to justify the search of his person are likewise without merit.

D. Reasonableness of the Search

Having concluded the requirements set forth in *Battle* for conducting a roadside strip search—probable cause and exigent circumstances—were properly found by the trial court, we summarily address the reasonableness of the search of defendant's person conducted by the officers. Notably, the trial court found as fact that the third most intrusive search of defendant's person, during which the drugs were found in his boxer briefs, "took place at night, in a dark area, away from the traveled roadway, with no other people in the immediate vicinity other than defendant and the officers." Further, the trial court found as fact that "the officer did not pull down defendant's underwear or otherwise expose his bare buttocks or genitals" and that "[n]o females were present or within view of the defendant during this search." Defendant does not challenge these findings regarding the reasonableness of the searches of his person. These findings support the trial court's conclusion that, although the searches of defendant's person were intrusive, they were conducted in a discreet manner away from the view of others and limited in scope to finding a small amount of cocaine based on the corroborated tip of a known, reliable informant.

Although defendant relies heavily on the opinion and holding in *Battle* to support his argument that the search the officers performed in this case was an unreasonable and intrusive public strip search

that violated his constitutional rights, the trial court's findings of fact, supported by competent evidence, readily distinguish this case from the facts of *Battle*. First, in *Battle*, after stopping the vehicle in which the defendant was a passenger based on a confidential informant's tip, no drugs or drug paraphernalia were found on the scene prior to the officer's conducting a strip search of the defendant. *Id.* at 402, 688 S.E.2d at 823-24. Notably, the confidential informant in *Battle* provided no information "concerning who in the vehicle might have the drugs." *Id.* at 402, 688 S.E.2d at 823. In addition, although a female officer conducted the strip search of the defendant in *Battle*, a male officer stood close by holding a Taser gun ready for use on the defendant if she did not cooperate with the female officer's search. *Id.* at 379, 688 S.E.2d at 810. Further, the strip search of the defendant in *Battle* was conducted in broad daylight "on a street with both pedestrians and vehicles in the immediate vicinity." *Id.* at 401, 688 S.E.2d at 823. Specifically, "[t]here were vehicles driving by, people on their front porches, and a nursing home slightly to the front of the vehicle[.]" *Id.* at 393, 688 S.E.2d at 818 (internal quotation marks omitted). Moreover, "[t]he State presented no evidence of exigent circumstances" and the trial court entered no findings of fact or conclusions of law as to any exigent circumstances justifying such an intrusive search of the defendant. *Id.* at 396, 402, 688 S.E.2d at 820, 824. Thus, in *Battle*, we concluded the manner in which the search was conducted was inappropriate and the place in which the search was conducted was likely to increase the humiliation of the defendant; therefore, the roadside strip search of the defendant in *Battle* did not pass constitutional muster. *Id.* at 402-03, 688 S.E.2d at 824.

Here, however, the search of defendant was based on corroborated information that defendant himself would be carrying drugs, and a small amount of marijuana was found during the consensual search of defendant's vehicle. Moreover, the search of defendant here took place at night in a discreet location, away from any vehicle or pedestrian traffic, and no females were present during the search. Finally, the trial court specifically made findings of fact, supported by the transcript of the audio-video recording of the stop, concerning the exigent circumstances justifying the strip searches of defendant. Thus, given these circumstances, we hold the trial court properly concluded the searches of defendant's person were reasonable and did not violate his constitutional rights.

IV. Conclusion

We hold the second and third searches of defendant's person in the present case can properly be classified as searches akin to strip searches, and therefore, they must be justified by both probable cause and exigent circumstances.

Testimony by Officers Gant and Bignall support the trial court's finding of fact that the officers had probable cause to believe defendant was hiding drugs on his person, given the reliable and corroborated information provided by the confidential informant. The transcript of the audio-video recording from Officer Bignall's police vehicle supports the trial court's finding of fact regarding the exigent circumstances necessitating the strip search of defendant at the time of his arrest. Finally, although the strip searches of defendant's person were intrusive, they were conducted in a discreet manner and in a discreet location, away from the roadside, and were limited in scope to finding drugs on defendant's person.

Thus, we hold the competent evidence in the record supports the trial court's findings of fact, and the trial court's findings of fact support its conclusion of law that the strip searches of defendant's person conducted incident to his arrest in the present case were reasonable and did not violate his constitutional privacy interests.

Affirmed.

Judges McGEE and GEER concur.

PHILLIP SAMUEL BEESON, Plaintiff v. FRANK PALOMBO; SANDRA CATHERINE MCKENZIE, and THE CITY OF NEW BERN, Defendants

No. COA11-1324

(Filed 1 May 2012)

Police Officers—wrongful conduct—obtaining and executing search warrants—warrants properly sought—probable cause—defendants immune

The trial court erred in a case in which plaintiff alleged wrongful conduct by defendant police officers in obtaining and executing arrest warrants against plaintiff by denying defendants'

motion for summary judgment. Plaintiff only challenged the existence of probable cause for the seeking and issuance of the warrants, and as the warrants were properly sought and issued based upon probable cause, and as plaintiff failed to demonstrate any deliberate falsehood or reckless disregard by defendants in seeking the warrants, defendants were shielded by immunity.

Appeal by defendants from order entered 19 July 2011 by Judge John E. Nobles, Jr. in Superior Court, Craven County. Heard in the Court of Appeals 23 February 2012.

William F. Ward, III, P.A., by William F. Ward, III, for plaintiff-appellee.

Sumrell, Sugg, Carmichael, Hicks & Hart, PA, by Anakah D. Harrison and Scott C. Hart, for defendant-appellants.

STROUD, Judge.

Defendants appeal trial court order denying their motion for summary judgment. For the following reasons, we reverse and remand.

I. Background

On or about 18 March 2010, plaintiff filed a verified complaint against defendants, the City of New Bern and two of its employees on the New Bern Police Department in both their individual and official capacities, for false imprisonment, malicious prosecution, negligent infliction of emotional distress, and intentional infliction of emotional distress based upon defendants' alleged wrongful conduct in obtaining and executing arrest warrants against plaintiff for assault on a female. On 24 May 2010, defendants answered plaintiff's complaint denying most of the allegations and defending upon the grounds of sovereign/governmental immunity, public official immunity, the existence of probable cause for issuance of the arrest warrants, and plaintiff's own wrongful conduct.

On 6 May 2011, defendants filed a motion for summary judgment arguing that

> the existence of probable cause clearly justified all actions taken relative to Plaintiff during the course of his arrest, that any official capacity claims against the individual Defendants are duplicative, and that the individual Defendants are immune under the Doctrine of Public Official Immunity for any claims asserted against them in their individual capacities.

On 19 July 2011, the trial court denied defendants' motion for summary judgment. Defendants appeal.[1]

II. Public Official Immunity

[1] Defendants first contend that the trial court erred in denying their motion for summary judgment because they are "entitled to public official immunity." (Original in all caps.) A thorough description of public official immunity has been provided in *Epps v. Duke Univ.*:

> The public official immunity doctrine proscribes, among other things, suits to prevent a State officer or Commission from performing official duties or to control the exercise of judgment on the part of State officers or agencies. . . .
>
> > As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, . . . keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability.
>
> The exceptions to official immunity have expanded over the years, with bad faith and willful and deliberate conduct now operating as additional common law bases for liability.
>
> The official immunity doctrine is deceptively simple. Actual prosecution of a tort claim against a public official, though, reveals the complex nature of the doctrine. The tort must arise from some action taken while the tortfeasor-public official is acting under color of state authority. The complainor must decide whether to sue the public official in his official capacity, in his personal/individual capacity, or both. Assuming a plaintiff asserts a well-pleaded claim against the public officer in both official and individual capacities, the doctrine of governmental (or official) immunity interposes several barriers to liability.
>
> . . . .
>
> . . .[W]hile named defendants may be shielded from liability in their official capacities, they remain personally liable for

1. "As an initial matter, we note that the trial court's order denying defendant's motion for summary judgment is interlocutory, and thus, not generally subject to immediate appeal. Orders denying summary judgment based on public official immunity, however, affect a substantial right and are immediately appealable. Thus, defendant's appeal is properly before this Court." *Fraley v. Griffin*, ___ N.C. App. ___, ___, 720 S.E.2d 694, 696 (2011) (citations and quotation marks omitted).

> any actions which may have been corrupt, malicious or perpetrated outside and beyond the scope of official duties. Official immunity does not extend to the individuals acting in an official capacity who in disregard of law invade or threaten to invade the personal or property rights of a citizen even though they assume to act under the authority of the State.

122 N.C. App. 198, 203-04, 468 S.E.2d 846, 850-51 (citations, quotation marks, and brackets omitted), *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996).

Here, plaintiff has sued defendants Frank Palombo and Sandra McKenzie in both their official and individual capacities; plaintiffs also allege malicious motive and conduct on the part of defendants Palombo and McKenzie in both their official and individual capacities. Plaintiff's complaint is rife with language alleging the maliciousness of defendants Palombo and McKenzie, as plaintiff claims they acted purposely, intentionally, knowingly, maliciously, willfully, unlawfully, without just cause, and without probable cause. Yet a thorough reading of both plaintiff's complaint and brief makes it clear that plaintiff is actually only challenging defendant McKenzie's choice to seek and have arrest warrants issued. All of plaintiff's claims center on facts which plaintiff alleges demonstrate that the arrest warrants were obtained without probable cause. Thus here, we are asked to review not merely a summary judgment order, but rather, whether the summary judgment order was erroneously denied because probable cause existed for issuance of the arrest warrants. If probable cause existed for the issuance of the arrest warrants, then defendants would be shielded by public official immunity.

A. Standard of Review

Defendant's appeal the trial court's order denying summary judgment; the standard of review for an order denying summary judgment is well-established:

> We review a trial court order granting or denying a summary judgment motion on a *de novo* basis, with our examination of the trial court's order focused on determining whether there is a genuine issue of material fact and whether either party is entitled to judgment as a matter of law. As part of that process, we view the evidence in the light most favorable to the nonmoving party.

Cox v. Roach, ____ N.C. App. ____, ____, ____ S.E.2d ____, ____ (Feb. 7, 2012) (No. COA11-905) (Citation omitted).

We must therefore consider the forecast of evidence in the light most favorable to plaintiff. *See id.* But in this instance, the relevant issue is whether there was probable cause for issuance of the arrest warrants against plaintiff, and as to a review of probable cause for arrest warrants, our Court has stated, "an appellate court reviewing the decision of a magistrate to issue a warrant does not decide the question of probable cause *de novo*; rather, the question for the appellate court's consideration is whether the evidence viewed as a whole provided a sufficient basis for the magistrate's finding." *State v. Martin*, 315 N.C. 667, 676, 340 S.E.2d 326, 331 (1986).

B. Probable Cause Generally

> The Fourth Amendment requirement that no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the persons or things to be seized, applies to arrest warrants as well as to search warrants. The judicial officer issuing such warrant must be supplied with sufficient information to support an independent judgment that there is probable cause for issuing the arrest warrant. The same probable cause standards under the Fourth and Fourteenth Amendments apply to both federal and state warrants.

> The standard applied to determinations of probable cause is not a technical one. As the Court said recently in *State v. Zuniga*, 312 N.C. 251, 322 S.E.2d 140 (1984), Probable cause is a flexible, common-sense standard. It does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability is all that is required. At minimum, a supporting affidavit for an arrest warrant must show enough for a reasonable person to conclude that an offense has been committed and that the person to be arrested was the perpetrator.[2]

2. N.C. Gen. Stat. § 15A-304 does not require an affidavit for an arrest warrant as "oral testimony under oath or affirmation" will also suffice. N.C. Gen. Stat. § 15A-304(d) (2007). Though it appears from defendant McKenzie's deposition that she did not use an affidavit to procure the arrest warrants, it does not change the requirement that in order to challenge probable cause for an arrest warrant the challenger must allege "deliberate falsehood or . . . reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." *Cox*, ___ N.C. App. at ___, ___ S.E.2d at ___ (applying standard used to challenge probable cause for a warrant to a civil case where no affidavit is mentioned).

Martin, 315 N.C. at 675-76, 340 S.E.2d at 331 (citations and quotation marks omitted).

> Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances strong in themselves to warrant a cautious man in believing the accused to be guilty. The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.

Cox, ____ N.C. App. at ____, ____ S.E.2d at ____ (citation omitted). Probable cause for an arrest warrant is presumed valid unless plaintiff presents "allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." *Id.* at ____, ____ S.E.2d at ____ (citation omitted).

C. Evidence of Probable Cause

On or about 5 October 2010, defendant McKenzie, the police officer who sought arrest warrants for plaintiff, was deposed. The following dialogue took place:

> Q. Okay. When you went to the Magistrate's Office and you spoke with Mr. Hargett, what did you tell Mr. Hargett?
>
> A. The facts of the case.
>
> Q. What did you tell Mr. Hargett?
>
> A. Exactly what the girls had told me: that Mr. Beeson had touched their breast area by removing lint, a piece of lint, as in Mary Smith stating that the hair that was on her shirt—I believe it was Mary. Oh, that he had—that Mary had stated that she had covered her breast area with her arms and saying—telling him, "Mr. Beeson, no, I will get it." And Mary said she was—when her—she dropped her arms, Mr. Beeson reached towards her breast area, anyways, and removed the lint.[3]
>
> Q. Okay. Did you—what did you tell the magistrate about where this incident allegedly occurred?
>
> . . . .

3. A pseudonym will be used to protect the identity of the minor involved in this case.

> A. I explained to him that it happened at the school, during their class of—that they were in the World History—[classroom.]
>
> . . . .
>
> Q. Now, you said a few moments ago, that when you first went to Mr.—to the Magistrate's Office, Mr. Hargett's office, that you believed this to be a sexual assault, an indecent liberty's [sic] case?
>
> A. Correct.
>
> Q. Okay. What did you tell him about that, when you discussed the indecent liberty's [sic] issue?
>
> A. Based on the fact that there were—there—that Mr. Beeson had allegedly touched their breast area. And he reviewed the statute books, and read them, and explained to me that he did not believe it met the elements of that but he believed it met the elements of assault on a female.

On 6 May 2011, Cedric Hargett, the magistrate who issued the arrest warrants for plaintiff, stated in his second affidavit filed in this matter as follows:

> 4. In April of 2008, I issued warrants for the arrest of Philip Samuel Beeson on two counts of assault on a female after facts were presented to me by Captain Sandra McKenzie of the New Bern Police Department.
>
> 5. I considered the facts presented to me by Captain McKenzie relating to her investigation and determined that probable cause existed for the issuance of the warrants.
>
> 6. In November of 2008, I executed an affidavit with regard to the issuance of those warrants. At the time that Affidavit was executed, I felt that I did not know all of the details of the allegations.
>
> 7. After the opportunity to further reflect on this matter, I have reached the conclusion that, although I might not have known all the details relating to the investigation, probable cause clearly existed to believe that Mr. Beeson committed the crimes of assault on a female, with which he was charged. I am comfortable and confident that sufficient information was presented to me to make the determination of the existence of

> probable cause and, upon reflection, I feel that I acted correctly in determining that probable cause existed.
>
> 8. To the degree my November 2008 affidavit implies that there was any lack of probable cause at the time of the issuance of the warrants against Mr. Beeson, I hereby withdraw that affidavit.
>
> 9. I have not been pressured, coerced or forced to sign this affidavit in any way.

D. Probable Cause Rebutted

Plaintiff contends that there was not probable cause for the arrest warrants issued against him and directs this Court to evidence which he contends demonstrates the lack of probable cause in obtaining the arrest warrants. Plaintiff relies heavily upon the fact that Mr. Hargett, the magistrate who issued the arrest warrants, stated in his November 2008 affidavit ("first affidavit") that he would not have issued the warrants if he had more information regarding the plaintiff's alleged actions. Mr. Hargett's first affidavit states:

> 2. On or about April 28, 2008, Captain Sandra McKenzie came to my office and informed me of a situation involving Phillip Be[e]son. During that conversation, Captain McKenzie, omitted numerous material facts and circumstances which I would have considered in making an independent determination of whether probable cause for a crime existed.
>
> 3. I was not informed by Captain McKenzie that the alleged victims' complaints occurred in a classroom full of other students. Only a slight mention was made by Captain McKenzie about removing lint or hair from the alleged victims' clothes.
>
> 4. I was further not informed that an investigator for the New Bern Police Department had previously consulted with the District Attorney's Office concerning the facts and allegations in these cases and had been told that there was not enough evidence to proceed with criminal charges.
>
> 5. I was not informed that an investigator for the New Bern Police Department had previously consulted with the District Attorney's Office concerning the facts and allegations in these cases and had been told that there was not enough evidence to proceed with criminal charges.

6. The above facts and circumstances were material and relevant as to the issue of probable cause for a criminal charge.

7. The circumstances of Captain McKenzie, the commander of the Major Crimes Criminal Investigations Division, coming to my office to seek warrants was highly unusual and has, in fact, never previously occurred during my time while a magistrate. Her position of authority created perceived pressure upon me not generally otherwise felt in similar circumstances and implied a major case status.

8. The presentation given by Captain McKenzie gave me the unmistakable impression that Mr. Be[e]son's alleged conduct was of a sexual nature. In fact, due to Captain McKenzie's statements to me, we initially considered a felony charge of indecent liberties with a minor.

9. Had I been fully informed of the above facts, I would not have issued the warrants against Mr. Beeson.

Plaintiff alleges a lack of probable cause is shown by the following facts:

a. That the alleged conduct involved removing lint or hair from the alleged victims' clothing in the area of the breasts;

b. That the removal of the lint from the clothing of the alleged victims occurred in a classroom full of students during class;

c. That there was no "rubbing, cupping, or massaging of the breast area" during the alleged de-linting;

d. That the two alleged minor "victims" and their families had, repeatedly, expressed to the Police Department that they did not desire to file criminal complaints against the plaintiff, Beeson;

e. That the two alleged minor "victims" and their families did not believe the conduct of plaintiff to be criminal;

f. That the police department had previously consulted with the District Attorney's Office concerning the facts and allegations and had been informed that there was insufficient evidence to proceed with criminal charges.

Essentially, plaintiff argues that there is a genuine issue of material fact, which a jury must decide, as to whether probable cause existed to issue the arrest warrants, because the issuing magistrate himself later changed his mind on this issue, after learning of some facts of which he was not aware when he issued the warrant.

E. Probable Cause Analysis

Plaintiff urges us to view the issuance of the arrest warrants with hindsight, knowing that the criminal charges against him were ultimately dismissed. Although it is said that hindsight is 20/20, in reviewing the existence of probable cause, we cannot use hindsight, but instead we must determine "whether the evidence viewed as a whole provided a sufficient basis for the magistrate's finding" at the time the arrest warrant was issued, *Martin*, 315 N.C. at 676, 340 S.E.2d at 331, and whether the evidence presented to the magistrate was based upon "deliberate falsehood or . . . reckless disregard for the truth." *Cox*, ____ N.C. App. at ____, ____ S.E.2d at ____.

The law enforcement agent procuring a warrant need not disclose every fact known or believed about the alleged crime, if these facts are not material facts which would change the determination of probable cause. *See Martin*, 315 N.C. at 678, 340 S.E.2d at 332. In *Martin*, the "Defendant alleged that Detective Scott knowingly and intentionally or with reckless disregard for the truth presented the magistrate, through Officer Brown, false information in that he deliberately omitted material facts from the information he gave Officer Brown by not telling him he disbelieved [an eyewitness's] story." *Id.* (quotation marks omitted). Our Supreme Court rejected this argument, as Detective Scott's beliefs about the eyewitness's story were not material to the determination of probable cause. *See id.* We must therefore determine whether the information which defendant McKenzie gave Mr. Hargett was sufficient to support a determination of probable cause, and whether any of the information which defendant McKenzie failed to disclose to Mr. Hargett was material to this determination. *See id.* at 676-78, 340 S.E.2d at 331-32.

Defendant McKenzie informed Mr. Hargett that plaintiff, a teacher, had "touched [the] breast area" of two *minor* female students even after at least one of the students had covered herself with her arms and asked plaintiff not to touch her; this is certainly "enough for a reasonable person to conclude that an offense has been committed and that the person to be arrested was the perpetrator." *Martin*, 315 N.C. at 676, 340 S.E.2d at 331. Neither of Mr. Hargett's

affidavits, nor any of the depositions, contain evidence supporting "allegations of deliberate falsehood or of reckless disregard for the truth" on the part of defendant McKenzie. *See Cox*, ____ N.C. App. at ____, ____ S.E.2d at ____. Even if defendant McKenzie did not tell Mr. Hargett every fact involved, there is no indication of any misrepresentation or deception. At most, the first affidavit emphasizes that Mr. Hargett considered certain information to be pertinent which defendant McKenzie did not; it does not, however, indicate that defendant McKenzie purposely lied to or hid the truth from Mr. Hargett. *See id.* (noting that "[a]llegations of negligence or innocent mistake are insufficient" to rebut probable cause for a warrant (citation omitted)). Further evidence that defendant McKenzie was candid with Mr. Hargett can be seen in the fact that defendant McKenzie originally thought the arrest warrants would be issued for indecent liberties. Mr. Hargett did not think the elements fit that crime but instead fit the crime of assault on a female. In summary, Mr. Hargett's first affidavit in no way challenges the critical facts in this case: a male teacher touched the "breast area" of two minor female students.

The questions raised by plaintiff as to the allegedly omitted facts regarding whether the touching of the breasts was due to lint or hair removal, who observed it, and how much touching actually occurred do not change the determination of probable cause. *See Martin*, 315 N.C. at 676, 340 S.E.2d at 331. In fact, it appears that defendant McKenzie believed the touching occurred but did not necessarily believe plaintiff's claims that the touching was due to hair or lint removal, just as in *Martin* the officers believed only portions of a witness's story and reported only that portion to the magistrate. *Id.* at 678, 340 S.E.2d at 332. Furthermore, as defendant McKenzie noted in her deposition, it is not unusual for crime victims not to want to proceed with prosecution, particularly when the victim is a minor who may have to testify before the accused. The fact that the minors involved and their parents may not have wanted to pursue criminal charges and may not have considered the manner criminal is not material to the determination of the existence of probable cause. Lastly, it is a judicial official's function to determine whether probable cause exists and a law enforcement officer's function to explain the facts to the judicial official so that such a determination may be made. *See* N.C. Gen. Stat. § 15A-304. Clearly, Mr. Hargett, at the time defendant McKenzie was before him, believed there to be probable cause of assault on a female, as is evidenced by the arrest warrants he issued as well as both of his affidavits; the fact that someone from

the district attorney's office may have disagreed with Mr. Hargett has no bearing on our analysis.

Viewing the facts alleged "in the light most favorable to" plaintiff, *Cox*, ____ N.C. App. at ____, ____ S.E.2d at ____, and considering "the evidence . . . as a whole" we conclude that there was "a sufficient basis for the magistrate's finding" of probable cause, and thus the seeking and issuance of the arrest warrants. *Martin*, 315 N.C. at 676, 340 S.E.2d at 331. As substantively plaintiff only challenges the existence of probable cause for the seeking and issuance of the arrest warrants, and as the arrest warrants were properly sought and issued based upon probable cause, and as plaintiff has not demonstrated any "deliberate falsehood or . . . reckless disregard" by defendants in seeking the arrest warrants, defendants are shielded by immunity. *See Cox*, ____ N.C. App. at ____, ____ S.E.2d at ____, *Epps*, 122 N.C. App. at 203-04, 468 S.E.2d at 850-51. As such, we see no "genuine issue of material fact" and defendants are "entitled to judgment as a matter of law." *Cox*, ____ N.C. App. at ____, ____ S.E.2d at ____.

III. Conclusion

As defendants are shielded by immunity the trial court erred in failing to grant defendants' motion for summary judgment. Accordingly, we reverse the trial court's order denying summary judgment and remand for entry of an order granting summary judgment in favor of defendants. As we are reversing the trial court's denial for summary judgment and ordering the trial court to grant summary judgment in favor of defendants, we need not address defendants' other arguments on appeal.

REVERSED and REMANDED.

Judge ELMORE concurs.

Judge STEELMAN concurs in the result by separate opinion.

STEELMAN, Judge, concurring in the result.

I concur in the result of this case. The exceptions to official immunity have gradually expanded over the years. *Epps v. Duke Univ.*, 122 N.C. App. 198, 204, 468 S.E.2d 846, 851 (1996). This Court has explicitly recognized five: "A public officer . . . 'is shielded from liability unless he engaged in discretionary actions which were

allegedly: (1) corrupt; (2) malicious; (3) outside of and beyond the scope of his duties; (4) in bad faith; or (5) willful and deliberate.' " *Smith v. Jackson Cnty. Bd. of Educ.*, 168 N.C. App. 452, 468, 608 S.E.2d 399, 411 (2005) (quoting *Reid v. Roberts*, 112 N.C. App. 222, 224, 435 S.E.2d 116, 199 (1993)). I am not persuaded that the lack of probable cause to issue an arrest warrant, standing alone, is sufficient to negate immunity. *Cf. Schlossberg v. Goins*, 141 N.C. App. 436, 446, 540 S.E.2d 49, 56 (2000) (stating that a plaintiff cannot defeat public official immunity by alleging "reckless indifference"). I would affirm on this basis.

PATRICIA COLYER BIRTHA, AS ADMINISTRATRIX OF THE ESTATE OF SARAH LENON COLYER; DECEASED, JAMES WEST LINDSAY, AS ADMINISTRATOR OF THE ESTATE OF LOTTIE MAE LINDSAY AND WILLIAM LINDSAY, DECEASED, MONTEZZ NELSON, NEXT OF KIN OF REBECCA GRIER AND JAMES GRIER, DECEASED ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS V. STONEMOR, NORTH CAROLINA, LLC, STONEMOR, NORTH CAROLINA FUNERAL SERVICES, INC., STONEMOR, NORTH CAROLINA SUBSIDIARY, LLC, ALDERWOODS GROUP, INC., SERVICE CORPORATION INTERNATIONAL, A/K/A SCI, D/B/A YORK MEMORIAL CEMETERY, DEFENDANTS

No. COA11-79

(Filed 1 May 2012)

1. Jurisdiction—personal—insufficient minimum contacts—defendant properly dismissed

The trial court did not commit reversible error in a negligence, breach of contract, fraud, fraud upon the public, and unfair and deceptive trade practices case when it dismissed defendant SCI from the suit for lack of personal jurisdiction. Plaintiffs failed to allege facts that permitted the inference of jurisdiction under the long-arm statute.

2. Statutes of Limitation and Repose—continuing wrong doctrine—discovery rule—duty to support negligence claim not established

The trial court did not err by granting defendants' motion to dismiss claims of negligence, fraud, and breach of contract. As neither the continuing wrong doctrine nor the discovery rule were applicable to plaintiffs' claims, a majority of the claims were barred by the statute of limitations. Moreover, plaintiffs' argu-

ment that N.C.G.S. § 65-60 established the duty supporting both their common law negligence and negligence *per se* claims was rejected.

3. Contracts—breach of contract—filed outside statute of limitations—improper basis—insufficient allegations—third-party beneficiary claims

The trial court did not err when it dismissed plaintiffs' claims for breach of contract. The claims were filed outside the statute of limitations, violation of N.C.G.S. § 65-60 was not the proper basis for plaintiff's breach of contract claims, and the allegations failed to provide even general terms of the contract which were necessary to determine whether a breach occurred. Plaintiffs' claims for breach of contract based on a theory of third-party beneficiary were properly dismissed for the same reasons.

4. Fraud—upon the public—not recognized theory—properly dismissed

The trial court did not err by dismissing plaintiffs' claim of fraud upon the public for failure to state a claim. Fraud upon the public is not a recognized theory of recovery under North Carolina law.

5. Fraud—common law—failure to allege claim with particularity—properly dismissed

The trial court did not err by dismissing plaintiffs' claim for common law fraud because plaintiffs failed to properly allege the fraud claim with particularity.

6. Unfair Trade Practices—breach of contract not sufficient to establish claim—failure to allege aggravating circumstances

The trial court did not err in dismissing plaintiffs' claim for unfair and deceptive trade practices. A mere breach of contract, even if intentional, was not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1 and plaintiffs failed to allege substantial aggravating circumstances.

Appeal by Plaintiffs from order entered 29 July 2010 by Judge Timothy L. Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 August 2011.

Pamela A. Hunter, for Plaintiff-Appellants.

Moore and Van Allen, PLLC, by M. Cabell Clay, Anthony T. Lathrop and Alton L. Gwaltney, III, for Defendant-Appellee.

BEASLEY, Judge.

Patricia Colyer Birtha, James West Lindsay, and Montez Nelson (Plaintiffs) appeal an order of dismissal of their claims of negligence, breach of contract, fraud, fraud upon the public, and unfair and deceptive trade practices against Stonemor, North Carolina, LLC, Stonemor, North Carolina Funeral Services, Inc., Stonemor North Carolina Subsidiary, LLC, Alderwoods Group, Inc., and Service Corporation International aka SCI doing business as York Memorial Cemetery (Defendants). For the following reasons, we affirm.

Plaintiffs assert similar injuries stemming from Defendants' alleged failure to properly maintain grave sites. Plaintiff Birtha's mother was buried at York Cemetery in 1968 and in February 2007, after several inquiries, Birtha became aware that her mother's headstone was placed at the wrong burial plot. Plaintiff Lindsay's mother's and father's remains were interred at York Cemetery in August 1986. In February 2007, Lindsey discovered that Defendants removed his parents' headstones, and Defendants informed him that his parents' headstones and gravesites could not be located. Plaintiff Nelson's mother's remains were buried at York Cemetery in February 2003 and her father's remains were buried November of 2006. When Nelson's father's remains were buried, she was informed that Defendants could not locate her mother's grave site.

Plaintiffs commenced this action on 18 June 2007, in their capacities as estate administrators, against Defendants. Defendant SCI moved to dismiss the original complaint pursuant to N.C.R. Civ. P. 12(b)(2) (Rule 12(b)(2)) and Defendants Alderwoods Group, Inc. and SCI moved to dismiss pursuant to N.C.R. Civ. P. 12(b)(6) (Rule 12(b)(6)). At the 17 April 2009 hearing, Plaintiffs submitted an amended complaint. On 9 July 2010, the trial court granted Defendants' motion to dismiss pursuant to Rules 12(b)(2) and 12(b)(6) and dismissed all claims against all Defendants. Plaintiffs filed a motion for a new trial on 12 August 2010 and notice of appeal on 27 August 2010.

[1] In their first argument, Plaintiffs assert that the trial court committed reversible error when it dismissed SCI from the suit for lack of personal jurisdiction. We disagree.

Our Court has previously held that when reviewing the grant or denial of a Rule 12(b)(2) motion

> [t]he standard of review to be applied by a trial court . . . depends upon the procedural context confronting the court.
>
> . . . .
>
> If the defendant supplements his motion to dismiss with an affidavit or other supporting evidence, the allegations in the complaint can no longer be taken as true or controlling and plaintiff cannot rest on the allegations of the complaint. In order to determine whether there is evidence to support an exercise of personal jurisdiction, the court then considers (1) any allegations in the complaint that are not controverted by the defendant's affidavit and (2) all facts in the affidavit (which are uncontroverted because of the plaintiff's failure to offer evidence).
>
> . . . .
>
> When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court. Under Rule 52(a)(2) of the Rules of Civil Procedure, however, the trial court is not required to make specific findings of fact unless requested by a party. When the record contains no findings of fact, it is presumed that the court on proper evidence found facts to support its judgment.

Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 693-94, 611 S.E.2d 179, 182-83 (2005) (internal citations, internal quotation marks, ellipses, and brackets omitted).

In order to determine whether our courts may exercise personal jurisdiction over a non-resident defendant, we apply a two part test: "(1) Does a statutory basis for personal jurisdiction exist, and (2) If so, does the exercise of this jurisdiction violate constitutional due process?" *Golds v. Central Express, Inc.*, 142 N.C. App. 664, 665, 544 S.E.2d 23, 25 (2001). "The assertion of personal jurisdiction over a defendant comports with due process if defendant is found to have sufficient minimum contacts with the forum state to confer jurisdiction." *Id.* at 665-66, 544 S.E.2d at 25. The long-arm statute is "liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process." *Id.* at 666, 544 S.E.2d at 26

(internal quotation marks omitted). "The burden is on [the] plaintiff to establish itself within some ground for the exercise of personal jurisdiction over defendant." *Public Relations, Inc. v. Enterprises, Inc.*, 36 N.C. App. 673, 677, 245 S.E.2d 782, 784 (1978).

In the present case, Plaintiffs contend that N.C. Gen. Stat. § 1-75.4(1) confers jurisdiction because SCI acquired and retains all shares in Alderwoods, a co-defendant. Defendant SCI submitted an affidavit in support of its Rule 12(b)(2) motion. Plaintiffs did not present any affidavits, but instead relied on verified responses by Defendants. Defendants' responses merely re-state an issue that is uncontroverted; SCI acquired and retains all shares of Alderwoods. However, "when a subsidiary of a foreign corporation is carrying on business in a particular jurisdiction, the parent is not automatically subject to jurisdiction in the state". *Ash v Burnham Corp*, 80 N.C. App. 459, 462, 343 S.E.2d 2, 4 (1986) (internal quotation marks and citations omitted). Rather, the issue is whether or not SCI, by virtue of its position as sole shareholder in Alderwoods, falls within the purview of the long-arm statute.

In *Golds*, our Court found that the plaintiff did not meet its burden of presenting a *prima facie* statutory basis for personal jurisdiction where "the complaint [did] not state the section of this statute under which jurisdiction [was] obtained nor [did] it allege any facts as to activity being conducted in this State[.]" *Golds*, 142 N.C. App. at 667, 544 S.E.2d at 26. Similarly, Plaintiffs assert the section of the long-arm statute in their brief, but failed to state any grounds for personal jurisdiction in their complaint. Further, the complaint did not allege facts as to activity being conducted within the state by SCI.

> [W]e stressed that while application of the minimum contacts standard will vary with the quality and nature of defendant's activity, . . . it is essential in each case that there be some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws. Absent such purposeful activity by defendant in the forum State, there can be no contact with the forum State sufficient to justify personal jurisdiction over defendant.

Buying Group, Inc. v. Coleman, 296 N.C. 510, 515, 251 S.E.2d 610, 614 (1979) (internal quotation marks and citations omitted).

An affidavit provided by Janet Key of SCI supports the trial court's decision in that SCI had no employees, it has corporate headquarters in Houston, Texas, SCI had no business dealings in North Carolina, nor does it maintain accounts in North Carolina, SCI does not own real property in North Carolina, nor pay taxes to the State of North Carolina. Based on the foregoing, we hold that Plaintiffs failed to allege facts that permitted the inference of jurisdiction under the long-arm statute. Therefore, Plaintiffs' argument is overruled.

[2] Next, Plaintiffs contend that the trial court erred by granting Defendants' motion to dismiss the claims of negligence, fraud, and breach of contract. Plaintiffs assert that they filed their claims within the required statute of limitations, and that North Carolina recognizes the continuing wrong doctrine as a tolling mechanism for negligence claims. We disagree.

This Court reviews the grant of a motion to dismiss pursuant to Rule 12(b)(6) to determine

> whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. On appeal of a 12(b)(6) motion to dismiss, this Court conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Burgin v. Owen, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428–29 (2007) (internal quotation marks and citations omitted).

The trial court dismissed Plaintiffs' negligence claim on two grounds, that it (1) was barred by the statute of limitations and (2) failed to state a claim for relief. (R. 48)

To successfully allege a negligence claim, plaintiffs must show "(1) the defendant owed the plaintiff a duty of reasonable care, (2) the defendant breached that duty, (3) the defendant's breach was an actual and proximate cause of the plaintiff's injury, and (4) the

plaintiff suffered damages as the result of the defendant's breach." *Gibson v. Ussery*, 196 N.C. App. 140, 143, 675 S.E.2d 666, 668 (2009) (citation omitted). "A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim. Once the defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff." *Horton v. Carolina Medicorp*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (citation omitted). Pursuant to N.C. Gen. Stat § 1-52 (2011), the statute of limitations for negligence is three years. "A cause of action based on negligence accrues when the wrong giving rise to the right to bring suit is committed, even though the damages at that time be nominal and the injuries cannot be discovered until a later date." *Harrold v. Dowd*, 149 N.C. App. 777, 781, 561 S.E.2d 914, 918 (2002).

Plaintiffs assert that the continuing wrong doctrine applies to the negligence claims and thereby tolls the statute of limitations until the violative act ceases. Our Supreme Court has recognized the continuing wrong doctrine as "an exception to the general rule that a claim accrues when the right to maintain a suit arises." *Babb v. Graham*, 190 N.C. App. 463, 481, 660 S.E.2d 626, 637 (2008). "For the continuing wrong doctrine to apply, the plaintiff must show a continuing violation by the defendant that is occasioned by continual unlawful acts, not by continual ill effects from an original violation." *Marzec v. Nye*, 203 N.C. App. 88, 94, 690 S.E.2d 537, 542 (2010) (internal quotation marks and brackets omitted). "Courts view continuing violations as falling into two narrow categories. One category arises when there has been a long-standing policy of discrimination. . . . In the second continuing violation category, there is a continually recurring violation." *Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 368, 424 S.E.2d 420, 425 (1993). The first category is not applicable in this case because Plaintiffs do not allege discrimination. As for the second category, our courts have used this exception narrowly. We could find no case law, and Plaintiffs have presented no case law to suggest that the allegations here would amount to a continually recurring violation as opposed to the continual ill effects from an original violation.

We also reject Plaintiffs' assertion that the discovery rule tolls the statute of limitations in this case. "N.C.G.S. § 1-52(16) establishes what is commonly referred to as the discovery rule, which tolls the running of the statute of limitations for torts resulting in certain

latent injuries." *Misenheimer v. Burris*, 360 N.C. 620, 622, 637 S.E.2d 173, 175 (2006). The discovery rule provides,

> [u]nless otherwise provided by statute, *for personal injury or physical damage to claimant's property*, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

N.C. Gen. Stat § 1-52(16) (2011) (emphasis added). In this case, Plaintiffs do not allege bodily harm or physical damage to Plaintiffs' property; therefore, the discovery rule is not applicable. Accordingly, the trial court properly determined that the doctrine of continuing wrong was inapplicable and all but one of Plaintiffs' negligence claims was properly dismissed as barred by the statute of limitations. Because Plaintiffs' claims were barred by the statute of limitations, with the exception of James Grier's (Mr. Grier) claim which Defendants concede is not barred by the statute of limitations, we now address Grier's remaining negligence claim.

All Plaintiffs, including Mr. Grier, rely on N.C. Gen. Stat. § 65-60 to establish a duty of care owed by Defendants. The statute states,

> [a] record shall be kept of every burial in the cemetery of a cemetery company, showing the date of burial, name of the person buried, together with lot, plot, and space in which such burial was made therein . . . and shall be readily available at all reasonable times for examination by an authorized representative of the [North Carolina Cemetery] Commission.

N.C. Gen. Stat. § 65-60 (2011). Plaintiffs contend that Section 65-60 establishes both the duty supporting their common law negligence claims and also their negligence *per se* claims. In order to prevail on a claim of negligence *per se*, plaintiff must show,

> (1) a duty created by a statute or ordinance; (2) that the statute or ordinance was enacted to protect a class of persons which includes the plaintiff; (3) a breach of the statutory duty; (4) that the injury sustained was suffered by an interest which the statute protected; (5) that the injury was of the nature con-

> templated in the statute; and, (6) that the violation of the statute proximately caused the injury.

Rudd v. Electrolux Corp., 982 F. Supp. 355, 365 (1997) (citing *Baldwin v. GTE South, Inc.*, 335 N.C. 544, 439 S.E.2d 108 (1994)).

A plain reading of the Section 65-60 shows that the statute was designed to ensure that cemeteries keep proper records and to give the North Carolina Cemetery Commission authority to enforce the record keeping requirement. Plaintiffs argue that Section 65-60 is designed to protect them, but they fail to argue, and we fail to see, how Plaintiffs are included in the class that the statute was designed to protect. Moreover, Plaintiffs also fail to allege that Plaintiffs' injuries were suffered by an interest which the statute protected, and that the injuries were of the nature contemplated in the statute. Based on the foregoing, the trial court properly dismissed all of the negligence claims, including Mr. Grier's claim.

[3] Next, Plaintiffs argue that the trial court erred when it dismissed their claims for breach of contract. We disagree.

Plaintiffs argue that they properly alleged a breach of the burial contract entered into by decedents. Plaintiffs advance breach of contract arguments on two bases: (i) failing to inter decedents in the agreed upon sites and (ii) failing to maintain records.

Pursuant to N.C. Gen. Stat. § 1-52 (2011), the applicable statute of limitations for a breach of contract claim is three years. This action was not commenced until 2007. Plaintiffs' complaint fails to specifically allege the dates of the breach of each respective contract. The complaint does give the following dates of interment:

> 7. The deceased, Sarah Lenon Colyer, mother of Plaintiff, Patricia Colyer Birtha, was interred at Defendant cemetery on or about July 28, 1968.
>
> 8. The deceased, Lottie Mae Lindsay, mother of Plaintiff, James West Lindsay was interred at Defendant cemetery immediately after becoming deceased on or about August 16, 1968.9. The deceased, William Lindsay, father of Plaintiff, James West Lindsay, was interred at Defendant cemetery immediately after becoming deceased on or about August 20, 1986.
>
> 10. The deceased, Rebecca Grier, mother of Plaintiff, Montez Nelson, was interred at Defendant cemetery immediately after becoming deceased on or about February 19, 2003.

> 11. The deceased, James Grier, father of Plaintiff, Montez Nelson, was interred at Defendant cemetery immediately after becoming deceased on or about November 8, 2006.

Plaintiffs further allege that

> Defendants have failed to maintain proper burial records from at least on or about July 28, 1968, to the present time, thereby causing the Plaintiffs['] decedents and numerous decedents of all other persons similarly situated as the Plaintiffs['] decedents to be buried at the wrong burial sites and causing grave markers to be placed at the wrong burial sites. Additionally, *from at least July 28, 1968 to the present time, these Defendants have sold the same burial plot contracted for by one party to other parties* . . . thereby causing the same burial plot to be sold to multiple persons, *in violation of the laws of the State of North Carolina, as well as the terms of each parties respective contract.* (emphasis added).

Here, the complaint generally alleges that the breach of contract occurred on the dates of interment, respectively. These dates are well outside of the three year statute of limitations for breach of contract claims. Even if we assume that the date of interment for each decedent controls as the date of breach of contract, as Defendants acknowledge, the statute of limitations would have expired as to all claims, except Mr. Grier. Because the trial court found that the breach of contract claim was barred by the statute of limitations, and Plaintiffs' argument is unsupported by authority, we affirm the trial court's determination that the breach of contract claim, except as to Mr. Grier, is barred by the statute of limitations.

Additionally, the trial court also properly dismissed Plaintiffs' breach of contract claims for failure to state a claim. It is well-settled that a "violation of a statute designed to protect persons or property is a negligent act, and if such negligence proximately causes injury, the violator is liable. This is an appropriate allegation on the first cause of action based on negligence and not on the second based on breach of contract." *Murray v. Aircraft Corporation*, 259 N.C. 638, 642, 131 S.E.2d 367, 370 (1963) (internal citations omitted). Here, Plaintiffs allege that violation of N.C. Gen. Stat. § 65-60 is the basis for their breach of contract claims. Because a violation of the statute is not the proper basis for a breach of contract claim, all Plaintiffs' breach of contract claims for failure to maintain records, including Mr. Grier, were properly dismissed.

Finally, the breach of contract claims were properly dismissed because the allegations failed to provide even general terms of the contract which were necessary to determine whether a breach occurred. *See Claggett v. Wake Forest University*, 126 N.C. App. 602, 608, 486 S.E.2d 443, 446 (1997) ("To state a claim for breach of contract, the complaint must allege that a valid contract existed between the parties, that defendant breached the terms thereof, the facts constituting the breach, and that damages resulted from such breach.") Accordingly, we affirm the trial court's dismissal of Plaintiffs' breach of contract claims.

Plaintiffs also contend that the trial court erred in dismissing their claim for breach of contract based on third-party beneficiary. For the same reasons stated above, we overrule Plaintiffs' third party beneficiary claim.

[4] Next, Plaintiffs argue that the trial court erred by dismissing their claim of fraud upon the public for failure to state a claim. We disagree. As the trial court stated, fraud upon the public is not a recognized theory of recovery under North Carolina law. *See Gilmore v. Smathers*, 167 N.C. 440, 83 S.E. 823 (1914). Therefore, Plaintiffs' argument is meritless.

[5] Plaintiffs also argue that the trial court committed reversible error when it determined that Plaintiffs did not allege a valid claim for relief for common law fraud. We disagree.

Plaintiffs argue that they pled common law fraud with particularity in their complaint and that their claim for fraud was not time-barred by the statute of limitations because accrual of time starts at the time of discovery of the fraudulent conduct by the aggrieved party.

To allege a claim for fraud, a plaintiff must plead: "(1) [a] [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Isbey v. Cooper Companies, Inc.*, 103 N.C. App. 774, 776, 407 S.E.2d 254, 256 (1991). "In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." N.C. Gen. Stat. § 1A-1, Rule 9(b) (2011). Our Supreme Court has held that the particularity requirement is satisfied "by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations." *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981). Our Supreme Court has construed N.C. Gen. Stat. § 1-52(9) "to

set accrual at the time of discovery regardless of the length of time between the fraudulent act or mistake and plaintiff's discovery of it." *Feibus & Co. v. Godley Construction Co.* 301 N.C. 294, 304, 271 S.E.2d 385, 392 (1980). "Under this provision, 'discovery' means either actual discovery or when the fraud should have been discovered in the exercise of reasonable diligence." *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 547, 589 S.E.2d 391, 396 (2003) (citation omitted).

In the case *sub judice*, Plaintiffs made the following allegations in their amended complaint:

> 44. That the acts of the Defendants in providing incorrect [] burial maps to the plaintiffs . . . have been and continue to be intentional, willful and with malice aforethought to cause the Plaintiffs to rely to their detriment.
>
> 45. The Plaintiffs . . . have been damaged based upon these false representations because the Defendants have buried the decedents of Plaintiffs . . . in plots other than the burial sites which were purchased by the decedents of Plaintiffs[.]
>
> . . . .
>
> 49. That these Defendants made these false statements and misrepresentations with the intent to cause all persons who purchased the burial plots to enter into said contract . . . from the Defendants based upon the false statements and material misrepresentations.
>
> 50. That the persons who purchased said burial plots from Defendants and all other similarly situated person did in fact rely upon the false statements and material misrepresentations of the Defendants.

These allegations are very general and are not alleged with the required particularity where Plaintiffs failed to state (1) the time, place, or content of the misrepresentations; (2) the particular person making the misrepresentation; and (3) whether Plaintiffs relied on these misrepresentations. Plaintiffs failed to properly allege the fraud claim with particularity, and this assignment is overruled.

[6] Plaintiffs argue that the trial court erred in dismissing their claim for unfair and deceptive trade practices where Defendants (1) failed to place stakes at gravesites to establish proper boundaries, (2) failed to keep proper records to determine where decedents were buried, (3) lost headstones from graves, (4) could not establish where dece-

dents were buried, and (5) "have engaged in conduct . . . forbidden under [N.C. Gen. Stat. § 75-1.1]."

"To state a claim for unfair and/or deceptive trade practices, the plaintiffs must allege that (1) the defendants committed an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiffs or to the plaintiffs' business." *Walker v. Sloan*, 137 N.C. App. 387, 395 529 S.E.2d 236, 243 (2000) (citation omitted). [I]t is well recognized that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under [N.C. Gen. Stat.] § 75-1.1." *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 367-68, 533 S.E.2d 827, 832-33 (2000). "North Carolina courts are extremely hesitant to allow plaintiffs to attempt to manufacture a tort action and alleged UDTP out of facts that are properly alleged as breach of contract claim." *Jones v. Harrelson & Smith Contr'rs, LLC*, 194 N.C. App. 203, 229, 670 S.E.2d 242, 259 (2008) (citation omitted).

Here, Plaintiffs failed to establish the existence of contracts between the Plaintiffs and Defendants and, have thus failed to show a breach of contract. Even assuming arguendo that Defendants breached these contracts, "a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1." *Watson Elec. Constr. Co. v. Summit Cos.*, 160 N.C. App. 647, 657, 587 S.E.2d 87, 95 (2003) (internal quotation marks and citation omitted). "[P]laintiff[s] must show substantial aggravating circumstances attending the breach to recover under the Act." *Id.* As Plaintiffs do not allege substantial aggravating circumstances, the trial court properly dismissed Plaintiffs unfair and deceptive trade practices claim.

For the foregoing reasons, we affirm the trial court's dismissal of the claims of negligence breach of contract, fraud, fraud upon the public, and unfair and deceptive trade practices.

Affirmed.

Judges BRYANT and GEER concur.

OLA M. LEWIS, PLAINTIFF v. EDWARD LEE RAPP, DEFENDANT

No. COA11-1188

(Filed 1 May 2012)

1. Libel and Slander—libel per se—false statement—insufficient evidence of actual knowledge

The trial court did not err in a libel action by denying plaintiff's motion for partial summary judgment and granting defendant's motion for summary judgment with regard to a 9 April publication. Although it was undisputed that defendant made false statements about plaintiff in the publication, plaintiff failed to forecast any evidence that defendant acted with actual malice.

2. Libel and Slander—libel per se—defamatory accusation—not constitutionally protected opinion—actual malice

The trial court erred in a libel action by denying plaintiff's motion for partial summary judgment with regard to a 12 April publication. Defendant's accusation in the publication was subject to one interpretation; that the accusation was defamatory; and the accusation was not a constitutionally protected opinion. It was, therefore, defamation *per se* as a matter of law. Furthermore, plaintiff forecast sufficient evidence to show that defendant acted with knowledge, or at the least with reckless disregard, of the falsity of his publication.

Appeal by plaintiff from order entered 19 July 2011 by Judge William R. Pittman in Brunswick County Superior Court. Heard in the Court of Appeals 7 February 2012.

Marshall, Williams & Gorham, L.L.P., by Lonnie B. Williams, and Stratas & Weathers, L.L.P., by Nicholas A. Stratas, Jr., for plaintiff-appellant.

Stevens Martin Vaughn & Tadych, PLLC, by Hugh Stevens, for defendant-appellee.

HUNTER, Robert C., Judge.

Ola M. Lewis ("plaintiff") appeals from the trial court's 19 July 2011 order denying her partial motion for summary judgment and granting Edward Lee Rapp's ("defendant") motion for summary judgment. After careful review, we affirm in part, and reverse and remand in part.

Background

In April 2010, plaintiff was the serving Senior Resident Judge of Judicial District 13B in North Carolina and was engaged in a campaign to retain her seat in the November 2010 election. She was also a vocal supporter of William Rabon who was running for the North Carolina State Senate. Defendant, a citizen of North Carolina, was a known supporter of Rabon's opponent, Bettie Fennell. Defendant also volunteered to serve as Fennell's "Media Strategist" without receiving compensation.

On 9 April 2010, defendant posted a blog entry on Facebook titled "Dirty Politics by the good ol boys." The blog entry was also posted on Carolina Talk Network. In this post, defendant criticized Rabon and further stated: "When sitting judges campaign for a candidate, in clear violation of the seventh canon of the NC Code of Judicial conduct[,] [w]e are clearly into dirty politics" (hereinafter referred to as "the 9 April publication"). That same day, plaintiff's attorney emailed defendant and informed him that plaintiff was a candidate for office and that Canon 7B(2) of the Code of Judicial Conduct allows a candidate to endorse any other candidate seeking election to any office. Plaintiff's attorney also cited a memorandum issued by Chief Judge John Martin on 26 February 2010 in which he reiterated to members of the judiciary what conduct was permissible and what conduct was prohibited by the Code of Judicial Conduct during the 2010 election cycle. The memorandum specifically cited to Canon 7B(2) and stated that a judge was permitted to endorse any candidate seeking office so long as the judge is also a judicial candidate.

On 12 April 2010, defendant posted another blog entry on Facebook and Carolina Talk Network titled: "Apologies, Corrections, Explanations and Amplifications on my Blogs." Defendant stated in pertinent part:

> I have spent this past weekend in prayer, mediation [sic], and contemplation. . . . First, let me apologize for my comment about the sitting judge being in violation [of] The North Carolina Code of Judicial Conduct. I was wrong. This can be done only by proper disciplinary proceedings and I have neither right nor authority to make that judgment and will let the proper authorities make that determination, if and when, it is brought before them. I have read, top to bottom, The North Carolina Code of Judicial Conduct and have voiced my opinion based on the pertinent articles provided in *appendix 1* at the

> end of this blog. I also solicited the opinion of a friend of mine who happens to be an attorney. We both agreed that there is probable cause for such action. Read the appendix and make up your own mind. . . . It is my belief that for any Republican office holder to campaign openly for any candidate in a primary is wrong. Office holders cannot appear to be private citizens. The power and authority of their office precludes this.

(hereinafter referred to as "the 12 April publication") (Emphasis omitted). Defendant included portions of the Code of Judicial Conduct in the appendix to his blog entry; however, he did not include Canon 7B(2).

On 14 April 2010, plaintiff filed a complaint alleging that defendant's publications were libelous *per se* because the false accusations damaged plaintiff's reputation as a judge. Plaintiff sought monetary damages as well as a temporary restraining order, a preliminary injunction, and a permanent injunction.

After discovery was complete, defendant moved for summary judgment on 3 February 2011. On 9 June 2011, plaintiff moved for partial summary judgment, asking the trial court to enter judgment "as a matter of law as to Defendant's words constituting libel *per se*." On 19 July 2011, the trial court denied plaintiff's motion for partial summary judgment and granted defendant's motion for summary judgment. Plaintiff timely appealed to this Court.

Discussion

[1] Plaintiff argues on appeal that the trial court erred in denying her motion for partial summary judgment and granting defendant's motion for summary judgment. "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)). Consequently, we review *de novo* the trial court's determination that defendant did not commit libel *per se* in the 9 April and 12 April publications.

"In order to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002).

> In North Carolina, the term defamation applies to the two distinct torts of libel and slander. Libel *per se* is "a publication which, when considered alone without explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace."

Id. at 29, 568 S.E.2d at 898 (quoting *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)). "Whether a publication is libelous *per se* is a question of law for the court." *Id.* at 31, 568 S.E.2d at 899.

"[I]n order to be libelous *per se*, defamatory words '*must be susceptible of but one meaning* and of such nature that the court can presume as a matter of law that they 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.' " *Id.* at 30-31, 568 S.E.2d at 898-99 (quoting *Flake v. News Co.*, 212 N.C. 780, 786, 195 S.E. 55, 60 (1938)) (emphasis added). "When examining an allegedly defamatory statement, the court must view the words within their full context and interpret them 'as ordinary people would understand' them." *Id.* at 31, 568 S.E.2d at 899 (quoting *Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 319, 312 S.E.2d 405, 409, *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984)).

"In actions for defamation, the nature or status of the parties involved is a significant factor in determining the applicable legal standards." *Proffitt v. Greensboro News & Record*, 91 N.C. App. 218, 221, 371 S.E.2d 292, 293 (1988). "[T]he First Amendment sets limits on a public figure's ability to recover for defamation." *Wells v. Liddy*, 186 F.3d 505, 532 (4th Cir. 1999).

> Where the plaintiff is a public official and the allegedly defamatory statement concerns his official conduct, he must prove that the statement was made with actual malice—that is, *with knowledge that it was false or with reckless disregard of whether it was false or not.* The rule requiring public officials to prove actual malice is based on First Amendment principles and reflects the Court's consideration of our national commitment to robust and wide-open debate of public issues.

Varner v. Bryan, 113 N.C. App. 697, 703, 440 S.E.2d 295, 299 (1994) (emphasis added) (internal citation and quotation marks omitted). "When a defamation action brought by a 'public official' is at the summary judgment stage, the appropriate question for the trial judge is whether the evidence presented is sufficient to allow a jury to find that actual malice had been shown with convincing clarity." *Id.* at 704, 440 S.E.2d at 299.

It is important to acknowledge that "evidence of personal hostility does not constitute evidence of 'actual malice' " *Id.* at 704, 440 S.E.2d at 300. Additionally, "reckless [disregard] is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 20 L. Ed. 2d 262, 267 (1968).

A. 9 April Publication

We will first address the 9 April publication, which plaintiff contends was libelous *per se* and disseminated with actual malice. Defendant admits that this publication contained the false statement that plaintiff was in violation of the Code of Judicial Conduct, but defendant argues that plaintiff cannot forecast any evidence that defendant acted with actual malice, an essential element of her claim. We agree with defendant.

Defendant claims that he did not have actual knowledge at the time of the publication that plaintiff was a candidate for office and therefore permitted by the Code of Judicial Conduct to endorse another candidate running for office. Defendant claims that he believed the statement he made to be true when he made it. There is no evidence to show otherwise. Defendant was consistent in his deposition, stating that he did not know that plaintiff was a candidate for office when he wrote the 9 April publication. Plaintiff claims that defendant *should have known* that she was running for reelection because she was recognized, along with the other candidates, at the Brunswick County Republican Party executive committee meeting on 8 April 2010. Defendant was in attendance at that meeting. While plaintiff is correct in stating that the information was made public and perhaps defendant should have known that she was a candidate, plaintiff has failed to show actual knowledge. Consequently, we are left with only defendant's assertions in his depositions that he did not, in fact, have actual knowledge of plaintiff's candidacy.

Plaintiff has also failed to show that defendant acted with reckless disregard of the truth. Again, defendant consistently stated that he was unaware that plaintiff was running for office. Undoubtedly, defendant could have conducted some research before making his false assertions in the 9 April blog entry; nevertheless, it appears from all accounts that defendant believed that plaintiff was a sitting judge and not running for office. As such, defendant in this case may have acted negligently when publishing the blog entry, but there is no evidence that he acted maliciously. *See Varner*, 113 N.C. App. at 705, 440 S.E.2d at 300 (rejecting "plaintiff's contention that 'actual malice' may be shown by evidence that defendants failed to avail themselves of available means for ascertaining the falsity of the statements"). Despite plaintiff's claim that defendant should have known that she was a candidate for office, plaintiff is unable to show, by reference to any materials obtained during discovery, that defendant "in fact entertained serious doubts as to the truth of [the] publication." *St. Amant*, 390 U.S. at 731, 20 L. Ed. 2d at 267 (holding that evidence that the defendant did not verify the truth of his statements was insufficient to prove that the defendant acted with reckless disregard).

In sum, it is undisputed that defendant made false statements about plaintiff in the 9 April publication. However, plaintiff has failed to forecast any evidence that defendant acted with actual knowledge or reckless disregard with "convincing clarity." *Varner*, 113 N.C. App. at 704, 440 S.E.2d at 299. In other words, there is no issue of material fact with regard to actual malice.

B. 12 April Publication

[2] Next, we address the 12 April publication, which plaintiff contends was also libelous *per se*. Plaintiff claims that defendant was still accusing her of being in violation of the Code of Judicial Conduct, as he did in the 9 April publication. Defendant argues that he did not affirm the false statement that was present in the 9 April publication; rather, he informed his readers that he incorrectly stated that plaintiff was in violation of the Code of Judicial Conduct in his 9 April publication and he was merely asserting his *opinion* that "probable cause" existed for the "proper authorities" to take disciplinary action against plaintiff.

The pivotal question then is whether defendant's statement was a constitutionally protected opinion. "Whether a statement constitutes fact or opinion is a question of law for the trial court to decide. Like all questions of law, it is subject to *de novo* review on appeal."

Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1285 n.12 (4th Cir. 1987) (internal citations omitted). "Political speech regarding a public election lies at the core of matters of public concern protected by the First Amendment." *Wiggins v. Lowndes County*, 363 F.3d 387, 390 (5th Cir. 2004). "The United States Supreme Court has held that statements of opinion relating to matters of public concern which do not contain provable false connotations are constitutionally protected." *Gaunt v. Pittaway*, 135 N.C. App. 442, 448, 520 S.E.2d 603, 608 (1999) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 111 L. Ed. 2d 1 (1990)). In other words, "[r]hetorical hyperbole and expressions of opinion not asserting provable facts are protected speech." *Daniels v. Metro Magazine Holding Co., L.L.C.*, 179 N.C. App. 533, 539, 634 S.E.2d 586, 590 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 692, 654 S.E.2d 251 (2007). "In determining whether a statement can be reasonably interpreted as stating actual facts about an individual, courts look to the circumstances in which the statement is made." *Id.* "Specifically, we consider whether the language used is loose, figurative, or hyperbolic language, as well as the general tenor of the article." *Id.* at 540, 634 S.E.2d at 590 (citation and quotation marks omitted).

Even "where a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials," the public figure must still establish the existence of actual malice. *Milkovich*, 497 U.S. at 20, 111 L. Ed. 2d at 19. Therefore, we must determine whether defendant's statement was merely an opinion on a matter of public concern. If it was, then defendant is not liable for defamation and the inquiry ends. If, however, defendant disseminated a false, defamatory statement about plaintiff that was not an opinion, then we must still determine whether defendant acted with actual malice.

Before addressing whether defendant was asserting an opinion, we will first determine whether defendant's statement was susceptible to more than one interpretation and whether the statement was damaging to plaintiff. Upon review of the 12 April publication in context, there is only one logical interpretation—defendant was still attempting to convince the readers that plaintiff was in violation of the Code of Judicial Conduct when she supported Rabon's campaign. Defendant admitted in the 12 April publication that he was not in a position to make the ultimate determination that plaintiff had violated the Code of Judicial Conduct, and he apologized for reaching that ultimate determination in the 9 April publication. Nevertheless,

defendant continued to lodge the same accusation in the 12 April publication as he presented in the 9 April publication—that plaintiff was in violation of the Code of Judicial Conduct. This accusation undoubtedly tended to impeach plaintiff in her trade or profession since it accused her, a sitting judge, of violating the Code of Judicial Conduct that she had sworn to uphold. *Cohen v. McLawhorn*, ___ N.C. App. ___, ___, 704 S.E.2d 519, 527 (2010) ("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*.").

Next, we will determine whether the accusation was a constitutionally protected opinion. It is undisputed that defendant's statement in the 12 April publication constituted political speech regarding a public election. Plaintiff strictly contends that defendant's statement contained provable false connotations and did not, therefore, constitute an opinion. We hold that defendant's 12 April publication contained provable false connotations and was not defendant's subjective opinion.

Although defendant expressly stated that it was his opinion that plaintiff had violated the Code of Judicial Conduct, an individual "cannot preface an otherwise defamatory statement with 'in my opinion' and claim immunity from liability[.]" *Daniels*, 179 N.C. App. at 539, 634 S.E.2d at 590. Defendant claimed in the 12 April publication that he had read the Code of Judicial Conduct from "top to bottom" and it was his "opinion" that "probable cause" existed for the "proper authorities" to take "action." Defendant was aware at that point that plaintiff was a candidate for judicial office. Having read the Code of Judicial Conduct from "top to bottom," he was also aware that as a candidate for office, plaintiff was permitted to campaign on behalf of another candidate pursuant to Canon 7B(2). Defendant had been told by plaintiff's attorney that Chief Judge Martin had issued a memorandum in which he stated that a sitting judge seeking reelection was permitted to campaign for any other candidate. Whether plaintiff was, in fact, in violation of the Code of Judicial Conduct could be easily investigated and proven false. Defendant ignored the proof that plaintiff was not in violation of the Code of Judicial Conduct and chose to assert a provable *false* accusation against plaintiff.[1]

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1. We note that defendant did express an opinion when he stated: "It is my belief that for any Republican office holder to campaign openly for any candidate in a primary is wrong. Office holders cannot appear to be private citizens. The power and authority of their office precludes this." This statement, unlike the accusation that plaintiff was in violation of the Code of Judicial Conduct, cannot be proven true or

Moreover, defendant included portions of the Code of Judicial Conduct in the appendix to his blog entry so that his readers could "make up [their] own mind[s]"; however, he did not include Canon 7B(2), which exonerates plaintiff of any wrongdoing. Defendant did, however, include Canon 7B(1), which, if read in isolation, would indicate that a judge may not endorse a political candidate. The inclusion of Canon 7B(1), coupled with the exclusion of Canon 7B(2), can only be perceived as a deliberate attempt by defendant to substantiate the false accusation contained in the publication. "Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich*, 497 U.S. at 18-19, 111 L. Ed. 2d at 18; *see Moldea v. New York Times Co.*, 15 F.3d 1137, 1144 ("Just as a speaker is not immunized from liability simply by prefacing otherwise defamatory statements with the words 'In my opinion . . .,' defamatory assessments based on incorrect 'facts' stated by the speaker are also actionable."), *aff'd as modified*, 22 F.3d 310 (D.C. Cir. 1994).

Not only did defendant attempt to mislead the readers by failing to attach Canon 7B(2), he also stated that he had discussed the matter with his friend, an attorney, and they agreed that there was "probable cause" for disciplinary action to be taken by the proper authorities. Defendant was clearly trying to bolster the validity of his false accusation by asserting that someone with expertise in the field of law concurred with his assessment. *See Action Repair, Inc. v. American Broadcasting Cos., Inc.*, 776 F.2d 143, 147 (7th Cir. 1985) (acknowledging that a statement by a judge in support of an allegedly defamatory comment was more prejudicial "than similar speculation from multitudes of anonymous lay people" because the judge is perceived as an expert in legal matters).

In sum, defendant's 12 April publication was framed as an opinion; however, it presented the same false accusations that were contained in the 9 April publication. Defendant attempted to convince the readers of the publication that plaintiff was in violation of the Code of Judicial Conduct by claiming that he had read the Code of Judicial Conduct from "top to bottom"; supplying only the portion of the Code of Judicial Conduct that would support his accusation; and

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false. Defendant is entitled to his opinion that it is "wrong," or even unethical, for an office holder to campaign for a candidate. An opinion that a judge has acted unethically is quite different from an accusation that a judge has committed an act that could potentially lead to official disciplinary action.

claiming that an attorney agreed with his assessment. We hold that plaintiff's accusation in the 12 April publication was subject to one interpretation; that the accusation was defamatory; and that the accusation was not a constitutionally protected opinion. It was, therefore, defamation *per se* as a matter of law.

Still, plaintiff must show that defendant acted with actual malice. "[T]hat is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Varner*, 113 N.C. App. at 703, 440 S.E.2d at 299 (citation and quotation marks omitted). Plaintiff was unable to do so with regard to the 9 April publication. We hold that sufficient evidence was forecast by plaintiff to show that defendant acted with knowledge, or at the least with reckless disregard, of the falsity of his 12 April publication. Defendant claimed that he was unaware that plaintiff was running for reelection when he wrote the 9 April publication. He further claimed that since he thought she was a sitting judge who was not running for reelection, she was in violation of the Code of Judicial Conduct. In essence, defendant's only defense with regard to the 9 April publication was that he did not know that plaintiff was running for office. Defendant could no longer claim ignorance on 12 April after he had been informed that plaintiff was, in fact, running for reelection. At that time he knew that plaintiff was a candidate and that according to Canon 7B(2) she was permitted to support another candidate. Nevertheless, defendant sought to convince the readers of his blog that plaintiff was in violation of the Code of Judicial Conduct. The evidence tends to establish that he acted, at the very least, with reckless disregard, i.e., he entertained serious doubts as to the truth of his publication. We hold that "the evidence presented is sufficient to allow a jury to find that actual malice ha[s] been shown with convincing clarity." *Id.* We hold that a genuine issue of material fact existed for jury determination with regard to actual malice.

Conclusion

Based on the foregoing, we hold that the trial court did not err in granting defendant's motion for summary judgment and denying plaintiff's motion for partial summary judgment with regard to the 9 April publication. We hold that the trial court erred in denying plaintiff's motion for partial summary judgment and granting defendant's motion for summary judgment with regard to the 12 April publication. We reverse and remand for entry of partial summary judgment for plaintiff because the 12 April publication constituted libel *per se* as a

matter of law. The issue of actual malice and damages is left for jury determination.

Affirmed in part; reversed and remanded in part.

Judges THIGPEN and McCULLOUGH concur.

IN THE MATTER OF: G.B.R. AND S.D.R.

No. COA11-1354

(Filed 1 May 2012

1. Termination of Parental Rights— termination petition—motion to amend—improperly granted—no prejudice

The trial court erred in allowing DSS to amend motions to terminate respondent father's parental rights to conform to the evidence presented at the termination hearing as there is no right to amend a termination petition to conform to the evidence at a hearing under N.C.G.S. § 1A-1, Rule 15(b). However, respondent was not prejudiced by the amendment to the motions as the trial court did not rely upon the amendment in terminating his parental rights and DSS's motion to terminate parental rights gave respondent notice that DSS was seeking to terminate his parental rights based on neglect stemming from his incarceration.

2. Termination of Parental Rights—findings of fact not supporting conclusion of neglect as ground for termination—evidence of changed circumstances not considered

The trial court erred by terminating respondent father's parental rights based on neglect because the trial court's findings were not supported by clear, cogent, and convincing evidence of neglect at the time of the hearing and, in turn, those facts did not support the trial court's conclusion that respondent neglected his children within the meaning of N.C.G.S. § 7B–101(15). The trial court failed to consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect.

Appeal by respondent from orders entered 15 August 2011 by Judge Alexander Lyerly in District Court, Mitchell County. Heard in the Court of Appeals 9 April 2012.

Eggers, Eggers, Eggers & Eggers, PLLC, by Kimberly M. Eggers; and Harrison & Poore, PA, by Hal Harrison, for petitioner-appellee Mitchell County Department of Social Services.

Pamela Newell for guardian ad litem.

Michael E. Casterline for respondent-appellant father.

STROUD, Judge.

Respondent-father appeals from the trial court's orders terminating his parental rights to the minor children on the ground of neglect. For the following reasons, we reverse in part the orders of the trial court.

I. Facts and background

The Mitchell County Department of Social Services ("DSS") filed juvenile petitions on 12 August 2009 alleging the minor children George and Sam[1] to be neglected in that they did not receive proper care, supervision, or discipline, and they lived in an environment injurious to their welfare, and dependent in that they were in need of placement. At the time the petitions were filed, respondent-father was incarcerated; the children were living with their mother.[2] DSS was granted non-secure custody of the children, and the children were placed in foster care.

The children were adjudicated neglected based solely upon the mother's acts or omissions, by orders entered 20 November 2009; the order specifically noted that "there was no evidence as to any neglectful conduct relative to the respondent father" and he "had no part to play in any of the conduct leading to the filing of the Petition herein." By disposition orders entered on the same day, the trial court authorized continued custody with DSS and ordered the children's mother to complete a substance abuse treatment program as well as satisfy all requirements set forth in her case plan with DSS. The disposition orders made no mention of respondent-father. At a permanency planning review hearing held on 3 May 2010, the trial court

1. We will refer to the minor children G.B.R. and S.D.R. by the pseudonyms George and Sam to protect the children's identity and for ease of reading.

2. The minor children's mother is not a party to this appeal.

relieved DSS of all responsibility for reunification efforts "with either respondent parent" and authorized a permanent plan of adoption.

On 7 July 2010, DSS filed motions to terminate both parents' rights to the minor children, and alleged the ground of neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). On 26 October 2010, respondent-father filed a response denying the material allegations of the DSS motions and seeking to have the motions dismissed pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for failure to allege sufficient facts upon which relief may be granted.

By the time the termination hearing was held on 12 July 2011, respondent-father had been released early from prison and was employed. DSS presented evidence that in 2006 the children had been adjudicated neglected in Avery County as a result of respondent-father's actions and, after all of DSS's evidence had been presented, DSS moved under N.C. Gen. Stat. § 1A-1, Rule 15(b) to amend the motions to terminate to conform with the evidence by including the additional allegation that respondent-father "was the parent involved in the petitions in Avery County where an adjudication of neglect was made based upon his conduct." Over objection, the trial court allowed the motion to amend the termination motions. The trial court denied motions to dismiss made by respondent-father. The trial court made no ruling during the hearing but by written orders entered 15 August 2011, held that respondent-father neglected the minor children and that termination of respondent-father's parental rights was in the best interests of the minor children and thus ordered that his rights be terminated. Respondent-father appeals, arguing that (1) the trial court erred in allowing DSS to amend the motions to terminate his parental rights to conform to the evidence at the termination hearing; (2) the trial court erred in terminating his parental rights without making sufficient findings of fact to support a conclusion of neglect; and (3) the order of termination improperly lists conclusions of law as findings of fact and fails to state a statutory basis for termination.

II. Amendment to motions to terminate parental rights

[1] Respondent-father first contends the trial court erred in allowing DSS to amend the motions to terminate his parental rights to conform to the evidence presented at the termination hearing. "A motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citations omitted). But in this situation, respondent-father

contends that the amendment to conform to the pleadings under N.C. Gen. Stat. § 1A-1, Rule 15(b) is not allowed as a matter of law pursuant to *In re B.L.H.*, 190 N.C. App. 142, 660 S.E.2d 255, *aff'd per curiam*, 362 N.C. 674, 669 S.E.2d 320 (2008). For questions of law, we apply *de novo* review. *In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010). Specifically, respondent-father, citing *In re B.L.H.*, argues that the trial court erred in allowing the amendment because he was not properly put on notice that the adjudication of neglect from Avery County in 2006 would be added to the claims raised by the petition and used against him in the termination proceedings, as "[t]here were no facts concerning this prior case alleged in the petition[.]". Respondent-father concludes that because of the lack of notice he was "unable to effectively prepare a defense against those allegations" and the orders terminating his parental rights should be reversed.

In *In re B.L.H.*, 190 N.C. App. 142, 660 S.E.2d 255, we addressed the issue of an amendment to a petition to terminate the parental rights of the respondent-mother. In that case, on 30 January 2007 and 5 February 2007 DSS filed petitions to terminate the parental rights of the respondent-mother, alleging that (1) the minor children were neglected and there was a high risk of repetition of neglect, pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and that (2) the minor children had been in DSS custody for more than six continuous months and the respondent-mother had willfully failed to pay a portion of their care, pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). *Id.* at 144, 660 S.E.2d at 256. At the hearing on these petitions, a social worker testified regarding the custody and placement of the minor children from 2005 to 2006 and DSS moved to amend the termination petitions to conform to the evidence to include an additional ground not raised in the original petition, specifically under N.C. Gen. Stat. § 7B-1111(a)(2), that the minor children had been left in foster care for a period of 12 months preceding the filing of the petition. *Id.* Over the respondent-mother's objection that "she received no notice of the allegation and that such an amendment was a substantial change to the petitions requiring additional time to prepare a defense[,]" the trial court allowed the amendment and subsequently entered orders terminating the respondent-mother's parental rights based only on the amended allegations pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). *Id.* The respondent-mother appealed, arguing that the trial court erred in amending the petitions; DSS countered that the amendment was allowed pursuant to N.C. Gen. Stat. § 1A-1, Rule 15(b). *Id.* This Court, after noting that "[t]he Rules of Civil Procedure will . . . apply to fill procedural gaps where Chapter 7B requires, but does not identify, a

specific procedure to be used in termination cases" stated that Chapter 7B, Article 11 of our General Statutes, which addresses the termination of parental rights, "is entirely silent on the amendment of petitions or motions in termination proceedings[.]" *Id.* at 146, 660 S.E.2d at 257. This Court further stated that

> [t]he only right of amendment permitted in Chapter 7B proceedings is for the amendment of a petition in juvenile, abuse, neglect or dependency proceedings, and this right is limited to "when the amendment does not change the nature of the conditions upon which the petition is based." N.C. Gen. Stat. § 7B-800 (2007).

Id. This Court went on to hold that

> [a]ccordingly, we will not superimpose a right to amend a petition or motion for termination of parental rights to conform with the evidence presented at the adjudication hearing and the trial court erred by allowing the amendment. *See Peirce*, 53 N.C. App. at 380, 281 S.E.2d at 203(holding "the legislative intent was that G.S., Chap. 7A, Art. 24B, [now Article 11 of Chapter 7B] exclusively control the procedure to be followed in the termination of parental rights.").

Id. at 146-47, 660 S.E.2d at 257. Thus, *B.L.H.* seems to establish that Chapter 7B, Article 11 entirely eliminates the use of a motion to amend a petition or motion for termination of parental rights to conform to the evidence presented at the hearing under N.C. Gen. Stat. § 1A-1, Rule 15(b).

The *B.L.H.* Court then addressed whether there was sufficient notice to the respondent-mother in the *original* petition, and noted that

> [a] petition for termination of parental rights must allege "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights [listed in N.C.G.S. § 7B-1111] exist." N.C. Gen. Stat. § 7B-1104(6) (2007). "While there is no requirement that the factual allegations [in a petition for termination of parental rights] be exhaustive or extensive, they must put a party on notice as to what acts, omissions, or conditions are at issue." *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002). Where the factual allegations in a petition to terminate parental rights do not refer to a specific statutory ground for termination, the trial court may

> find any ground for termination under N.C.G.S. § 7B-1111 as long as the factual allegations in the petition give the respondent sufficient notice of the ground. *In re A.H.*, 183 N.C. App. 609, 644 S.E.2d 635 (2007); *In re Humphrey*, 156 N.C. App. 533, 577 S.E.2d 421 (2003). However, where a respondent lacks notice of a possible ground for termination, it is error for the trial court to conclude such a ground exists. *In re C.W. & J.W.*, 182 N.C. App. 214, 228-29, 641 S.E.2d 725, 735 (2007); *Hardesty*, 150 N.C. App. at 384, 563 S.E.2d at 82.

Id. at 147, 660 S.E.2d at 257-58. In reversing the trial court's orders, this Court further held that the petitions as originally filed by DSS, without the amendments, were not sufficient to give the respondent-mother notice that N.C. Gen. Stat. § 7B-1111(a)(2) was a possible ground for terminating her parental rights and that the trial court erred in finding grounds existed to terminate respondent-mother's parental rights to the minor children pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). *Id.* at 148, 660 S.E.2d at 258.

Thus, based on this Court's ruling in *B.L.H.* that there is no right to amend a termination petition to conform to the evidence at hearing under N.C. Gen. Stat. § 1A-1, Rule 15(b), *see id.* at 146-47, 660 S.E.2d at 257, we must hold that as a matter of law that the trial court erred in allowing DSS to amend the petitions to terminate the parental rights of respondent-father. But this does not end our analysis, as we still must determine if the original motions to terminate respondent-father's parental rights gave sufficient notice that DSS was seeking termination based on neglect, pursuant to N.C. Gen. Stat. § 7B-1111(a)(1).

The motions to terminate parental rights as filed by DSS on 7 July 2010 alleged the following regarding respondent-father:

> 4. Mitchell County Department of Social Services was awarded custody of the above-named juvenile pursuant to the aforementioned Orders. That the facts sufficient to warrant the termination of parental rights of the above-named respondent *parents* are as follows:
>
> a. That the respondent mother has neglected the juvenile and has continued to neglect the juvenile as defined by N.C.G.S. § 7B-101(a)(1) and there is a likelihood of future neglect if the juvenile is returned to the *parents*, to wit:

> . . . .
>
> (7) At all relevant times herein, respondent father has been incarcerated with the North Carolina Department of Corrections and has not been available as a resource to provide for the juvenile. Respondent father is serving a sentence for being a habitual felon. He currently has approximately 3 years remaining with that sentence.

(Emphasis added.) First we note that even though the mother is specifically referenced in the allegations of neglect, the motions also allege the respondent-father's incarceration and lack of availability to care for the children. The motions also allege that DSS is seeking termination of the "parents[']" parental rights and there was "a likelihood of future neglect if the juvenile is returned to the parent*s*[.]"(emphasis added). Certainly, the respondent-father's incarceration could be a factor in determining whether to terminate respondent-father's parental rights based on neglect. *See In re C.W.*, 182 N.C. App. 214, 220, 641 S.E.2d 725, 730 (2007) (noting in a termination of parental rights case, "[a] parent's incarceration may be relevant to whether his child is neglected; however, [i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." (citations and quotation marks omitted)). Thus, the motions gave respondent-father notice of the possibility of the termination of his parental rights for neglect under N.C. Gen. Stat. § 7B-1111(a)(1), although the factual circumstances alleged in the original motion were limited to his incarceration, which was expected to continue for three more years.

Even if we assume arguendo that it would also be necessary for the motion for termination to allege the specific factual circumstances of the 2006 adjudication of neglect based upon respondent-father's conduct, in this case it would not change the result, as the trial court did not rely upon any factual circumstances related to respondent-father except his incarceration. It appears that the trial court did not base its determination of neglect upon the 2006 adjudication in Avery County as the trial court made no mention of it at the conclusion of the hearing in open court and there is no finding of fact that references this specific allegation. Thus, the fact that the trial court erroneously allowed the amendment to the motions appears to have had no effect upon its ultimate determination of neglect. This case differs from *B.L.H.*, as in *B.L.H*, there was no notice to the respondent-mother of the possibility of termination based on N.C.

Gen. Stat. § 7B-1111(a)(2), which was the only ground that the trial court found in terminating her parent rights, because DSS's original petitions had only alleged grounds supporting termination of parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and N.C. Gen. Stat. § 7B-1111(a)(3). *See id.* Accordingly, DSS's motion to terminate parental rights gave respondent-father notice that DSS was seeking to terminate his parental rights based on neglect stemming from his incarceration, pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), but because the trial court did not rely upon the amendment, respondent-father was not prejudiced by the amendment to the motions.

III. Neglect

[2] Respondent-father next contends that the trial court erred in terminating his parental rights based on neglect because the findings of fact do not support the trial court's conclusions of law. We have stated that "[t]he standard for 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 Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984).

A child is neglected if he or she

> does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2009). In determining neglect, the court must consider "the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (emphasis in original). Although evidence of past neglect is admissible, "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* (citation omitted). This is especially true where the parent has not had custody of the child for quite some time. *Id.* at 714, 319 S.E.2d at 231.

As to respondent-father, the trial court in its orders found:

> (7) At all relevant times herein, Respondent Father has been incarcerated with the North Carolina Department of Corrections and has not been available as a resource to provide for the

> Juvenile[s]. Respondent Father is serving a sentence for being a habitual felon. At the time of the Hearing in this Matter, Respondent Father had been released early from the sentences imposed herein. Furthermore, Respondent Father has neglected [the] Juvenile[s] and has continued to neglect the Juvenile[s] as defined by N.C. G. S. § 7B-101(a)(1) and there is a likelihood of future neglect if the Juvenile[s] [are] returned to him.
>
> . . . .
>
> 8. Respondent[-father] has not been a part of the life of the juvenile[s] since 9 December 2006 when he was first arrested for the charges leading to his latest incarceration. This has resulted in him being in prison for over 4 years of the [juveniles' lives]. Previously, Respondent[-father] was in prison during the earlier years of the [juveniles' lives]. Because of the foregoing, the Court finds that there currently exists little or no bond between the juvenile[s] and respondent father[.]

The trial court concluded that the minor children were neglected and "[t]here remains a likelihood of future neglect if the [juveniles are] returned to either of the Respondent Parents" and that it was in the best interest of the juveniles that the parental rights of both parents be terminated.

The trial court's findings focus on respondent-father's past incarceration and mention that he had been released from prison. But there are no specific findings as to current conditions of neglect after respondent-father's release, any changes in circumstances following his release, or how his current conditions or behavior show a probability of repetition of neglect. *See Ballard*, 311 N.C. at 715, 319 S.E.2d at 232. In fact, our review of the transcript and evidence indicates that DSS presented no evidence as to the respondent-father's circumstances since his release from incarceration and no evidence which would indicate a likelihood of repetition of neglect by respondent-father. DSS's evidence at the hearing focused almost entirely on the mother and on the children's progress and bond with their foster family. As to respondent-father, DSS's evidence was that he had been incarcerated as a habitual felon and that he had attempted to stay in contact with the children by writing while in prison, although only the first letters, in October of 2009, were given to the children. DSS stopped delivering written correspondence from respondent-father to the children because someone, either a social worker or therapist,

determined that the letters were too upsetting to the children based upon their reaction to the letters, and not based on "anything [respondent-father] said" in the letters. Respondent-father's evidence tended to show that he sent approximately 10 to 20 letters or cards to the children while he was incarcerated. His evidence also tended to show that he had full-time employment since January 2011, as he had begun working on work release prior to his parole in May 2011; he had family medical insurance available through his employer; he had his own furnished apartment which was near both his workplace and schools for the children; he did not drink any alcoholic beverages and was not on any medication, prescribed or not; and he had no relationship with the mother because of the way she had treated the children during his incarceration. Respondent-father also presented evidence that while incarcerated, he completed an anger management course; a character education course; a human resource development program; and a "father accountability" class which lasted for about 16 weeks, meeting twice a week. He also testified regarding the 2006 adjudication of neglect, which occurred when he was arrested for driving while impaired with the children in the car, and the mother was not immediately available to care for the children; the children were returned to the parents 9 days later.

The factual situation presented here is quite similar to that at issue in *In re Shermer*, 156 N.C. App. 281, 576 S.E.2d 403 (2003) in which this Court reversed the trial court's termination of the previously-incarcerated father's parental rights based upon neglect. Actually, respondent-father herein appears to have made more progress than the father in *Shermer*, who was still attending classes and seeking employment at the time of the termination hearing. *Id.* at 283, 576 S.E.2d at 405. In *Shermer*, this Court stated that

> [h]ere, we see no clear, cogent, and convincing evidence and no finding that respondent has neglected his children or that any past neglect was likely to reoccur. The trial court took judicial notice of past orders in which it had found that both children were neglected. However, as respondent points out in his brief, conditions have changed since then. When the previous orders were entered, the children lived with Sherry Shermer, respondent's ex-wife, and respondent was in prison. The orders concerned one incident where Ms. Shermer allegedly fired a gun around the children and another where Ms. Shermer brought Buddy along on an attempt to help respondent escape from prison. Although these orders are rel-

> evant evidence in the termination proceeding, the trial court also was required to consider how conditions have changed since the time the orders were entered. *In re Tyson*, 76 N.C. App. 411, 416–17, 333 S.E.2d 554, 557–58 (1985).

Id. at 287, 576 S.E.2d at 407.

Just as in *Shermer*, the trial court here failed to "consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *See Ballard*, 311 N.C. at 715, 319 S.E.2d at 232. Thus, as in *Shermer*,

> we conclude that the trial court's findings are not supported by clear, cogent, and convincing evidence of neglect at the time of the hearing and, in turn, that those facts do not support the trial court's conclusion that respondent neglected [George and Sam] within the meaning of N.C. Gen. Stat. § 7B–101(15).

156 N.C. App. at 288, 576 S.E.2d at 408. We therefore reverse the portion of the trial court's order terminating respondent-father's parental rights. Because we reverse, we need not address respondent-father's remaining arguments.

REVERSED.

Judges HUNTER, Robert C. and ERVIN concur.

STATE OF NORTH CAROLINA v. DONALD ADAMS

No. COA11-930

(Filed 1 May 2012)

Evidence—prior crimes or bad acts—burning personal property—felony breaking and entering—properly admitted

The trial court did not err in a burning personal property and felony breaking and entering case by admitting N.C.G.S. § 8C-1, Rule 404(b) evidence of an out-of-state break-in at the victim's Atlanta apartment for which defendant was not investigated, charged, or convicted. The State offered substantial evidence tending to support a reasonable finding by the jury that defendant committed the out-of-state break-in. Furthermore, the evidence

was properly admitted to show proof of defendant's common plan or scheme, identity, and motive; the evidence was relevant to prove defendant's identity as the perpetrator of the Raleigh burglary as well as his motive and the existence of a common plan or scheme; and the trial court did not abuse its discretion in determining that the probative value of the evidence outweighed the prejudicial effect.

Appeal by defendant from judgment entered 3 March 2011 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 25 January 2012.

Attorney General Roy Cooper, by Assistant Attorney General Creecy J. Johnson, for the State.

Bushnaq Law Office, PLLC, by Faith S. Bushnaq, for defendant.

ELMORE, Judge.

Donald Adams (defendant) appeals from convictions for two counts of burning personal property and one count of felony breaking and entering. After careful review, we find no error.

Defendant was indicted on 15 June 2009 for one count of felony breaking and entering, one count of felony larceny, and two counts of burning personal property. Prior to trial, the trial court conducted an evidentiary hearing concerning the admission of evidence of two prior acts allegedly committed by defendant in June and November 2008, pursuant to Rule 404(b) of our Rules of Evidence. Ultimately, the trial court admitted evidence of these prior incidents over defendant's objection.

Defendant's trial commenced on 28 February 2011, and the evidence presented at trial tended to show the following: Defendant and Tiffani Corbin were married in May 2004 and divorced in July 2008. Defendant and Corbin resided together in Atlanta, Georgia, until May 2008.

In June 2008, defendant visited Corbin's residence to discuss halting their divorce. During this visit, Corbin reiterated to defendant her desire to get divorced, which resulted in defendant getting angry and throwing furniture and books as well as shoving a television. Defendant also broke a lamp and a table. Corbin contacted the police after the incident, but the matter was not investigated because defendant owned the property together with Corbin.

Corbin and defendant divorced the following month but maintained contact and briefly attempted to reconcile. However, Corbin discontinued her efforts when defendant refused to seek counseling for anger management. Corbin subsequently accepted a job transfer to Raleigh following a confrontation with defendant at Corbin's home in October 2008. Corbin informed defendant that she was moving to Raleigh but did not divulge her new address.

Corbin maintained her apartment in Atlanta while she traveled regularly to Raleigh for work. During one of her business trips to Raleigh in November 2008, Corbin learned from a neighbor that her apartment in Atlanta had been broken into and ransacked. Corbin returned to find that her couch had been shredded, a lamp was broken, the floor was covered in an oily substance, and her personal belongings had been strewn about. Corbin also discovered that her laptop and car title had been stolen. Atlanta police investigated the break-in but could not locate any fingerprints or DNA evidence tying defendant to the crime. Further, no eyewitnesses placed defendant at the scene. As a result, defendant was never charged, arrested, or convicted for this break-in.

On 20 January 2009, Corbin returned home from work to find that her apartment in Raleigh had been burglarized and ransacked. Similar to the break-in in November 2008, Corbin's clothes and other personal belongings had been strewn about and covered in liquid, her furniture had been cut, and her electronics destroyed. The floor was also covered in liquid, and her pictures had been slashed. A fire had been lit in Corbin's fireplace in which pictures of defendant and Corbin, books, shoes, picture frames, and photo albums had been burned.

After an investigation, the Raleigh police failed to recover defendant's DNA or forensic evidence from the scene and no eyewitnesses placed defendant at Corbin's apartment. However, testimony from a representative from Sprint Nextel regarding defendant's cell phone records revealed that defendant's cellphone was active in Raleigh and Durham during the afternoon of 20 January 2009 and in Atlanta later that evening.

After deliberating, the jury returned verdicts of guilty of two counts of burning personal property and one count of breaking and entering. The trial court sentenced defendant on 3 March 2011 to a consolidated term of eight to ten months for the burning personal property convictions and a consecutive term of eight to ten, months, suspended for the breaking and entering conviction, with 60 months of supervised probation. Defendant now appeals.

Defendant's sole contention on appeal is that the trial court erred in admitting 404(b) evidence of an out-of-state break-in at Corbin's Atlanta apartment for which defendant was not investigated, charged, or convicted. We disagree.

Rule of Evidence 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2011). "To be admissible under this rule, evidence of other acts must contain similarities that support the *reasonable inference that the same person* committed both the earlier and the later [acts]." *State v. English*, 95 N.C. App. 611, 614, 383 S.E.2d 436, 438 (1989) (quotations and citation omitted; alteration in original). "Such an inference clearly cannot be supported absent a demonstrable nexus between the defendant and the act sought to be introduced against him." *Id.*

In analyzing Rule 404(b), this Court has stated that it

> is a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject but to 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. Kennedy, 130 N.C. App. 399, 403, 503 S.E.2d 133, 135 (1998). However, "the admissibility of evidence of a prior crime must be closely scrutinized since this type of evidence may put before the jury crimes or bad acts allegedly committed by the defendant for which he has neither been indicted nor convicted." *State v. Jones*, 322 N.C. 585, 588, 369 S.E.2d 822, 824 (1988) (quotations and citation omitted).

In evaluating the admissibility of Rule 404(b) evidence, we start by determining whether there was substantial evidence presented by the State tending to support a reasonable finding by the jury that the defendant committed the other crimes, wrongs, or acts. *State v. Stager*, 329 N.C. 278, 303, 406 S.E.2d 876, 890 (1991) (citing *Huddleston v. United States*, 485 U.S. 681, 99 L. Ed. 2d 771 (1988)); *see also State v. Haskins*, 104 N.C. App. 675, 679-80, 411 S.E.2d 376,

380 (1991) ("In this regard, the trial court is required to make an initial determination pursuant to Rule 104(b) of whether there is sufficient evidence that the defendant in fact committed the extrinsic act."). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Williams*, 307 N.C. 452, 454, 298 S.E.2d 372, 374 (1983) (quotations and citations omitted). The prosecution can present either direct or circumstantial evidence so long as it "tends to support a *reasonable* inference that the same person committed both the earlier and later acts." *State v. Peterson*, 361 N.C. 587, 601, 652 S.E.2d 216, 226 (2007) (quotations and citation omitted). If the State does offer substantial evidence tending to support a reasonable finding by the jury that the defendant committed the other crimes, wrongs, or acts, then we must conduct a three-pronged analysis regarding the admissibility of the 404(b) evidence.

This three-pronged analysis requires that we first "determine whether the evidence was offered for a proper purpose under Rule 404(b), then determine whether the evidence is relevant under Rule 401, and finally determine whether the trial court abused its discretion in balancing the probative value of the evidence under Rule 403." *State v. Martin*, 191 N.C. App. 462, 467, 665 S.E.2d 471, 474 (2008). The standard of review applied to the first two prongs of our analysis is *de novo* as the crux of both prongs is relevancy; that is, whether the evidence is *relevant* to a permissible purpose under Rule 404(b) and whether that purpose is relevant to the proceeding under Rule 401. *See State v. Kirby*, ____ N.C. App. ____, ____, 697 S.E.2d 496, 503 (2010) ("Whether evidence is relevant is a question of law, thus we review the trial court's admission of the evidence *de novo*."); *see also Haskins*, 104 N.C. App. at 679, 411 S.E.2d at 380 ("Even if offered for a proper purpose under Rule 404(b), evidence of prior crimes, wrongs, or acts must be relevant, and such evidence is not relevant unless it reasonably tends to prove a material fact in issue other than the character of the accused.") (quotations and citations omitted)). Further, "[a] trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal." *See State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (2011), *cert. denied*, ____ U.S. ____, 181 L. Ed. 2d 529 (2011) (citations omitted). The standard of review applied to the third prong is abuse of discretion. *See State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) ("We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion.") (citation omitted).

In the instant case, Corbin testified that, in June 2008, defendant, during a conversation at her apartment in Raleigh, became angry and threw furniture and books as well as shoved a television. Defendant also broke a lamp and a table during this incident. A few months later, Corbin testified that during one of her business trips to Raleigh in November 2008, she learned from a neighbor that her apartment in Atlanta had been burglarized and ransacked. Corbin returned to find that her couch had been shredded, a lamp was broken, the floor was covered in an oily substance, and her personal belongings had been strewn about. Corbin also discovered that her laptop and car title had been stolen. Corbin noted that the car title was in her name and also defendant's. Atlanta police investigated the break-in but could not locate any fingerprints or DNA evidence tying defendant to the crime. Further, no eyewitnesses placed defendant at the scene.

Then, on 20 January 2009, Corbin testified that she returned home from work and found her apartment in Raleigh burglarized and ransacked. Corbin's clothes and other personal belongings had been strewn about and covered in liquid, her furniture had been cut, and her electronics destroyed. The floor was also covered in liquid, and her pictures had been slashed. A fire had been lit in Corbin's fireplace, in which pictures of defendant and Corbin, books, shoes, picture frames, and photo albums had been burned. After inspection, Corbin found that the only item stolen from her apartment was a set of jewelry given to her by defendant. As was the case with the November 2008 break-in, the police could not locate any forensic evidence or eyewitnesses tying defendant to the crime.

After the 404(b) evidentiary hearing, the trial court stated, in pertinent part:

> Speaking of the June, 2008 matters, what we have before the Court is a 404(b) allegation of an incident between the Defendant and the State's witness.
>
> [The] Court does make a determination that there is substantial evidence tending to support a reasonable inference by a jury that the Defendant committed a similar act, namely, damage or injury to personal property.

In reference to the November 2008 incident, the trial court then stated:

> [The] Court finds that the similarity of damage, namely that items were destroyed or disfigured, and also that there [were] household liquids used in each incident sufficient to show that

> there is a logical tendency that the same person committed the offenses. . . . We have items being destroyed in the case at issue, namely the house had been ransacked and there were items that were cut up, strewn about the apartment, almost every item was damaged in some way. And there were other items that were personal to the relationship that allegedly were missing.

Accordingly, the trial court admitted this 404(b) evidence based on the multitude of similarities between the January 2009 incident and the June and November 2008 incidents.

Defendant contends that the trial court erred by admitting this 404(b) evidence. Specifically, defendant contends that the 404(b) evidence is not substantial, especially considering the lack of eyewitness testimony and forensic evidence connecting defendant to the November 2008 and January 2009 incidents. Additionally, defendant asserts that this 404(b) evidence should have been excluded because defendant was neither investigated for nor charged in connection with the June and November 2008 incidents.

In his brief, defendant attempts to distinguish this case from two North Carolina cases, *State v. Peterson* and *State v. Campbell*, 133 N.C. App. 531, 515 S.E.2d 732 (1999), and argues that we should reach the same result as this Court did in *State v. English* regarding 404(b) evidence. However, defendant's argument is without merit as this Court in *English* concluded that the trial court erred in admitting the 404(b) evidence because the evidence established "no connection whatsoever between defendant and the cause of the earlier fire[.]" *English*, 95 N.C. App. at 614, 383 S.E.2d at 438.

Conversely, it is quite clear from the record that the evidence here establishes a significant connection between defendant and the three incidents, including that: Corbin was the intended victim; her furniture was displaced, shredded, or destroyed; liquid was poured over the floors and her personal items; toiletries were scattered about; the only items stolen from Corbin were personal items, including a laptop, car title, and a set of jewelry given to her by defendant; and the police could not locate eyewitnesses or forensic evidence placing defendant at the scene. We also note that the State presented substantial circumstantial evidence showing that defendant was in Raleigh during the afternoon of 20 January 2009 based on his cell phone records, which captured outbound calls using cellular towers in Raleigh and Durham. Later that evening, defendant's cell phone records indicated that he had returned to Atlanta.

Further, this case is actually quite similar to *Campbell* and *Peterson* in that defendant was not investigated or charged in connection with the June and November 2008 incidents nor was there forensic evidence or eyewitness testimony tying him to the November 2008 incident. In *Campbell*, this Court upheld the trial court's decision to admit evidence of the victim's suspicion that the defendant "was involved in recent burglaries at her home" based on the defendant's familiarity with the home and "the conduct and schedules of the victim and her mother." *Campbell*, 133 N.C. App. at 539-40, 515 S.E.2d at 738. In *Peterson*, the defendant, convicted of murder, argued that the trial court erred in admitting evidence about a friend who had died in a manner similar to the murder victim "because there was no evidence which tended to show that defendant was [directly or indirectly] responsible for the death of [his friend]." *Peterson*, 361 N.C. at 600, 652 S.E.2d at 226. However, our Supreme Court upheld the admission of this evidence because "[t]he similarities in the case *sub judice* are also striking" to the circumstances surrounding the death of the defendant's friend. *Id.* at 602, 652 S.E.2d at 227. A few of the similarities highlighted by the Court included the absence of eyewitnesses to either of the incidents, the fact that both individuals died in the same manner, and the fact that both victims had a close personal relationship with the defendant. *Id.* at 599-600, 652 S.E.2d at 225.

Therefore, and despite defendant's assertion that there is not a sufficient demonstrable nexus between the June and November 2008 incidents and the January 2009 incident, we agree with the trial court's ruling that the State did present substantial evidence tending to support a reasonable finding by the jury that the defendant committed the other crimes, wrongs, or acts in June and November 2008.

Based on our conclusion that the State did present substantial evidence tending to support a finding that defendant committed these other acts, we must now determine whether the evidence was offered for a proper 404(b) purpose. Here, the State offered the June and November 2008 acts as 404(b) evidence to show proof of defendant's common plan or scheme, his identity, and his motive for committing the acts. After our analysis, we conclude that the trial court properly admitted the State's evidence for these specific purposes, pursuant to Rule 404(b).

It is well settled that

> evidence of another crime is admissible to prove a common plan or scheme to commit the offense charged. But, the two

> acts must be sufficiently similar as to logically establish a common plan or scheme to commit the offense charged, not merely to show the defendant's character or propensity to commit a like crime.

State v. Willis, 136 N.C. App. 820, 822–23, 526 S.E.2d 191, 193 (2000) (citation omitted). "Rule 404(b) evidence is [also] admissible to prove identity when the defendant is not definitely identified as the perpetrator of the alleged crime." *State v. Gray*, ____ N.C. App. ____, ____, 709 S.E.2d 477, 488 (2011). However, "there must be shown some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes." *State v. Corum*, 176 N.C. App. 150, 156-57, 625 S.E.2d 889, 893 (2006) (quotations and citation omitted).

> The showing required to admit the evidence under the exception for motive is somewhat different. For motive, the prior act must pertain[] to the chain of events explaining the context, motive and set-up of the crime and form[] an integral and natural part of an account of the crime . . . necessary to complete the story of the crime for the jury.

Willis, 136 N.C. App. at 823, 526 S.E.2d at 193 (internal quotations and citation omitted; alteration in original).

We agree with the trial court that the evidence is sufficiently similar to establish proof of a common plan or scheme by defendant, his identity, and his motive. The evidence demonstrates that these three incidents are inextricably interlinked by their commonalities and were not the result of happenstance. As a result, we conclude that the trial court did not err in admitting the other acts into evidence for a proper 404(b) purpose.

Next we determine whether or not the 404(b) evidence presented by the State is relevant. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2011).

> Evidence is relevant if it has any logical tendency to prove a fact at issue in a case, . . . and in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. It is not required that evidence bear directly on the question in issue, and evidence is compe-

> tent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.

State v. Riddick, 316 N.C. 127, 137, 340 S.E.2d 422, 428 (1986) (quoting *State v. Arnold*, 284 N.C. 41, 47-48, 199 S.E.2d 423, 427 (1973)).

Here, the 404(b) evidence offered by the State is relevant to prove facts at issue, specifically defendant's identity as the perpetrator of the Raleigh burglary as well as his motive and the existence of a common plan or scheme. As a result, this evidence makes it more probable than not that defendant was the culprit. Thus, we conclude that the State's prior act evidence was properly admitted for its relevancy.

Last, even if the prior act evidence is admissible under Rule 404(b) and relevant to the proceeding under Rule 401, the third prong of our analysis requires that we determine whether the probative value of this evidence outweighs the danger of undue prejudice to the defendant, pursuant to Rule 403. *State v. Frazier*, 319 N.C. 388, 390, 354 S.E.2d 475, 477 (1987); *see also* N.C. Gen. Stat. § 8C-1, Rule 403 (2011). We review a trial court's determination to admit evidence under Rule 403 for an abuse of discretion. *See State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907 (2006). Accordingly, the trial court's "ruling may be reversed for an abuse of discretion only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *State v. Jones*, 89 N.C. App. 584, 594, 367 S.E.2d 139, 145 (1988) (quotations and citation omitted).

"The test of admissibility [under Rule 404(b)] examines whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of Rule 403." *State v. Aldridge*, 139 N.C. App. 706, 714, 534 S.E.2d 629, 635 (2000) (citations omitted). "Although it is not necessary that there be bizarre and unique signature elements common to the past crimes and the crimes the State presently seeks to prove, the similarities between the crimes must support the reasonable inference that the same person committed both the earlier and the later crimes." *Haskins*, 104 N.C. App. at 681, 411 S.E.2d at 381 (internal quotations and citation omitted). "In addition, the prior crime must not be so remote [in time] as to have lost its probative value." *Id.* (quotations and citation omitted; alteration in original). Regarding remoteness, this Court has stated that "the more striking the similarities between the facts of the crime charged and the facts of the prior bad act, the

longer evidence of the prior bad act remains relevant and potentially admissible for certain purposes." *Gray*, ____ N.C. App. at ____, 709 S.E.2d at 488; *see also Riddick*, 316 N.C. at 134, 340 S.E.2d at 427 ("Remoteness in time is less important when the other crime is admitted because its *modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried as to permit a reasonable inference that the same person committed both crimes. It is reasonable to think that a criminal who has adopted a particular *modus operandi* will continue to use it notwithstanding a long lapse of time between crimes. It is this latter theory which sustains the evidence's admission in this case.").

As stated herein *supra*, there are substantial similarities between the January 2009 incident and the June and November 2008 incidents thereby rendering the evidence more relevant than remote. Thus, we conclude that the probative value of this evidence as proof of defendant's common scheme or plan, his identity, and his motive is not outweighed by its prejudicial effect. Accordingly, we find no abuse of discretion by the trial court in admitting this testimony under Rule 403. *See State v. Boyd*, 321 N.C. 574, 578, 364 S.E.2d 118, 120 (1988) (finding "no abuse of discretion by the trial court in failing to exclude this testimony under the balancing test of Rule 403 since the alleged incident was sufficiently similar to the act charged and not too remote in time."). Therefore, we hold that the trial court did not err in admitting the State's 404(b) evidence.

No error.

Judges BRYANT and ERVIN concur.

STATE OF NORTH CAROLINA v. ANTONIO DSHAWN STOWES

No. COA11-831

(Filed 1 May 2012)

1. Evidence—motion to suppress—not timely—denial not erroneous

Defendant's motion to suppress evidence in a possession of a firearm by a felon, robbery with a dangerous weapon, and carrying a concealed weapon case was not timely and the trial court did not err in denying it.

2. Appeal and Error—preservation of issues—photographic lineup procedures—plain error review

Defendant in a possession of a firearm by a felon, robbery with a dangerous weapon, and carrying a concealed weapon case waived any argument as to potential error in a photographic lineup procedure, except as to plain error, by failing to object during the examination of a witness concerning the photographic lineup and failing to object to that witness's in-court identification of defendant.

3. Identification of Defendants—photographic lineup—procedure not impermissibly suggestive—no plain error

The trial court did not commit plain error in a possession of a firearm by a felon, robbery with a dangerous weapon, and carrying a concealed weapon case by overruling defendant's objection to the State's admission of two exhibits relating to a photographic lineup. The investigating officer's presence in the room with the witness during the photographic lineup did not create an impermissibly suggestive lineup procedure.

4. Identification of Defendants—photographic lineup—Eyewitness Identification Reform Act violation—motion to suppress untimely—exclusion of evidence not warranted

The trial court did not err in a possession of a firearm by a felon, robbery with a dangerous weapon, and carrying a concealed weapon case by denying defendant's motion to suppress two exhibits relating to a photographic lineup based on a violation of the Eyewitness Identification Reform Act (EIRA). Defendant failed to make a timely motion to suppress the identification procedures and defendant cited no case law in support

of his argument that the EIRA violation warranted exclusion of the evidence.

5. Identification of Defendants—in-court identification—not tainted by impermissibly suggestive photo lineup

The trial court did not commit plain error in a possession of a firearm by a felon, robbery with a dangerous weapon, and carrying a concealed weapon case by allowing a witness to make an in-court identification of defendant. The identification was not tainted by an impermissibly suggestive photo lineup conducted prior to the trial.

Appeal by Defendant from judgment entered 27 January 2011 by Judge Paul C. Ridgeway in Superior Court, Durham County. Heard in the Court of Appeals 29 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General Thomas O. Lawton III, for the State.

Guy J. Loranger for Defendant-Appellant.

McGEE, Judge.

Antonio Dshawn Stowes (Defendant) was convicted on 27 January 2011 of possession of a firearm by a felon, robbery with a dangerous weapon, and carrying a concealed weapon. Defendant was sentenced to a consolidated sentence of 76 months to 101 months in prison. Defendant appeals.

The evidence at trial tended to show that on the evening of 29 May 2010, Gurkawal Vilkhu (Mr. Vilkhu) was working at Fashion Avenue, a clothing store in Durham (the store). Mr. Vilkhu was the store manager. At around seven or eight o'clock that evening, a man wearing sunglasses came into the store and tried on shoes. Mr. Vilkhu asked the man why he was wearing sunglasses at night and the man replied: "[I]t's my eyes[.]" The man remained in the store for forty-five to fifty minutes, and then approached the counter and asked to try on jewelry. After trying on jewelry, the man told Mr. Vilkhu he could not afford the jewelry. The man then returned to the back of the store.

A few minutes later, the man came back to the counter and, after asking Mr. Vilkhu the price of two pairs of shoes, drew a silver gun from his pocket. The man showed the gun to Mr. Vilkhu and told Mr. Vilkhu to give him the money from the cash register. Mr. Vilkhu told the man he could not open the register. The man then left the store

and carried with him two pairs of shoes. The man had not paid for the shoes.

Mr. Vilkhu called the police, but the responding officers were unable to apprehend a suspect. Several days after the robbery, Officer Anna Christaldi (Officer Christaldi) of the Durham Police Department obtained surveillance recordings from the store. Based on images in the recordings and conversations with other police officers, Officer Christaldi began to focus on Defendant as a suspect. Officer Christaldi obtained a photograph of Defendant and created a photo lineup using Defendant's photograph, along with five other photographs obtained from the police database that were "similar" to Defendant's photograph.

Officer Christaldi prepared paperwork for the photo lineup and asked Officer Edwina Lloyd (Officer Lloyd), who was not involved in the investigation, to administer the lineup to Mr. Vilkhu. Officer Lloyd complied and presented the lineup to Mr. Vilkhu on 4 June 2010, a few days after the robbery. Officer Lloyd testified that, when she administered the photo lineup, she did not know which photograph was the one of the suspect. Officer Lloyd read instructions to Mr. Vilkhu verbatim from a preprinted instruction sheet. Mr. Vilkhu identified the photograph of Defendant with "75 percent" certainty as the suspect who had robbed the store. Officer Christaldi was present throughout the photo lineup, along with Officer Lloyd and Officer Lloyd's training officer, because Officer Christaldi could not find a second, independent investigator and "had to think outside the box[.]" Officer Christaldi was standing within Mr. Vilkhu's view and was not "that far" from Officer Lloyd. Officer Christaldi testified that she made no comments and "was just standing there" while the photo lineup was displayed.

During trial, Mr. Vilkhu testified extensively regarding the robbery and the photo lineup. In the courtroom, Mr. Vilkhu identified Defendant as the man he had identified during the photo lineup, and also as the man who had robbed the store. Officer Lloyd testified regarding the photo lineup, during which time the State moved to admit State's Exhibits 4 and 5 (Exhibits 4 and 5), which consisted of the photographs used during the photo lineup and associated paperwork. Defendant objected and the trial court stated that it would treat Defendant's objection as both an objection and a motion to suppress. The trial court then denied Defendant's motion to suppress and overruled Defendant's objection.

I. Issues on Appeal

Defendant raises the following issues on appeal: (1) whether the trial court erred in overruling Defendant's objection to admission of the State's pretrial identification evidence because the procedure was impermissibly suggestive; (2) whether the trial court erred in denying Defendant's motion to suppress the State's pretrial identification evidence because the State obtained the evidence in violation of the Eyewitness Identification Reform Act (EIRA); and (3) whether the trial court committed plain error in allowing Mr. Vilkhu to identify Defendant during the trial when Mr. Vilkhu's identification was "tainted by an impermissibly suggestive photo lineup that had been conducted prior to trial[.]"

II. Preservation of issues.

We first address the preservation of Defendant's issues for appeal. As to Defendant's third argument regarding Mr. Vilkhu's in-court identification, we note that Defendant concedes he did not preserve this argument by objection and therefore he is limited to plain error review. In Defendant's other arguments, he challenges the trial court's ruling denying his motion to suppress Exhibits 4 and 5. Defendant also argues that the trial court erred in overruling his objection to the admission of Exhibits 4 and 5.

A. Motion to Suppress

[1] A motion to suppress must be made prior to trial unless the evidence obtained falls within certain exceptions not relevant here. *See e.g.* N.C. Gen. Stat. § 15A-975 (2011). In the present case, Defendant objected at trial to the introduction of Exhibits 4 and 5 by the State and the trial court itself elected to treat Defendant's objection as a motion to suppress. The trial court then denied Defendant's motion to suppress and overruled Defendant's objection. We hold that Defendant's "motion to suppress" was not timely, and the trial court did not err in denying it. *See, e.g., State v. Paige*, 202 N.C. App. 516, 522, 689 S.E.2d 193, 197 (2010) (concluding "that the trial court did not err in denying defendant's motion to suppress on the grounds that it was not timely"); *see also State v. Jones*, 157 N.C. App. 110, 114, 577 S.E.2d 676, 679 (2003) ("[D]efendant's objection at trial to the admissibility of the evidence is without merit because the objection, treated as a motion to suppress, was not timely made."). This argument is overruled.

B. Preservation by Objection

[2] Defendant also contends that his objection to the admission of Exhibits 4 and 5 preserved the issue for appeal. The State counters that Defendant's failure to object to Mr. Vilkhu's in-court identification of Defendant at trial amounted to a waiver of Defendant's objection to the results of the pretrial identification procedure and therefore to Exhibits 4 and 5 as well. The following exchange occurred during the State's examination of Mr. Vilkhu without objection by Defendant:

> [Mr. Vilkhu:] They just show the five—four or five pictures. Which is right person they come in your store, show you a gun and they take a shoe. I say, yes.
>
> [THE STATE:] Would you recognize your signature if you saw it again, your handwriting? Would you recognize that if you saw it again, sir?
>
> [Mr. Vilkhu:] Yes.
>
> [THE STATE:] If I may approach, Your Honor?
>
> THE COURT: Yes.
>
> . . . .
>
> [THE STATE:] I'm going to hand what's been marked State's Exhibit 3. Can you just take a look at that piece of paper, sir? Do you see your signature on that page?
>
> [Mr. Vilkhu:] Yes, sir.
>
> [THE STATE:] Did you actually put your signature on that page, sir?
>
> [Mr. Vilkhu:] I know this is my signature.
>
> [THE STATE:] What was on that page of instructions? Were those read to you before you looked at some photographs, if you can remember?
>
> [Mr. Vilkhu:] I recognize. He just asked me which is right person, so he show me pictures. Then I write down right person. Then he tell me, witness for my name and signature, this is right person, which one is, third one picture.
>
> [THE STATE:] Those photographs that were shown to you, would you recognize those photographs if you saw them again?

[Mr. Vilkhu:] Yes, sir.

[THE STATE:] May I approach, Your Honor?

THE COURT: Yes, sir.

. . . .

[THE STATE:] I'm going to show you State's Exhibit 4. Do you recognize that exhibit, sir? All those photographs, can you take a look at those, please?

[Mr. Vilkhu:] Yes. That's number 4, no.

[THE STATE:] The whole package—I understand you don't recognize photo number 4—the whole package, I'm calling that State's Exhibit 4. Don't confuse that with the numbers on the photographs.

Those photographs—State's Exhibit 4 that's a bunch of photographs; is it not?

[Mr. Vilkhu:] Yes.

[THE STATE:] Have you seen those photographs before?

[Mr. Vilkhu:] Yes, they show me—

[THE STATE:] Are those the photographs that were shown to you?

[Mr. Vilkhu:] Yes.

[THE STATE:] Did you recognize—out of all those photographs, did you recognize any of the photos?

[Mr. Vilkhu:] I just one recognize which is same person.

[THE STATE:] Which photograph did you recognize—you said the same person. Are you referring to the person that was in the store with the gun and took the shoes?

[Mr. Vilkhu:] This person.

[THE STATE:] The person that you recognized, out of all those photographs—how many people did you recognize out of all those photographs that are a part of State's Exhibit 4?

[Mr. Vilkhu:] This is six copy of the photo, so I recognize number 3.

> [THE STATE:] Did you know any of the other people, besides 3?
>
> [Mr. Vilkhu:] No, I never see.
>
> [THE STATE:] Number 3, who was number 3? How did you see him beforehand? How did you know who that person was?
>
> [Mr. Vilkhu:] Actually, I remember who, face-to-face talking. He just no have glasses this time in the picture.
>
> [THE STATE:] In the photo number 3, is that the person with the gun who took the sneakers?
>
> [Mr. Vilkhu:] Yes, sir.
>
> [THE STATE:] Is that person here in court today?
>
> [Mr. Vilkhu:] Yes.
>
> [THE STATE:] Where is that person here in court today?
>
> [Mr. Vilkhu:] On the right side—
>
> [THE STATE:] I'd ask that the record reflect the witness has identified the defendant again, Your Honor.
>
> THE COURT: So noted.

Our Supreme Court addressed a similar circumstance in *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989). In *Hunt*, the defendant argued that his constitutional right to assistance of counsel was violated during a lineup. *Hunt*, 324 N.C. at 354, 378 S.E.2d at 760. Our Supreme Court held "[a]ssuming arguendo that defendant's constitutional right of assistance of counsel at the lineup was violated, defendant waived that error by failing to object when the witness later identified him before the jury as the man he had picked out of the lineup." *Id.* at 355, 378 S.E.2d at 761. The Supreme Court then reviewed *State v. Hammond*, 307 N.C. 662, 300 S.E.2d 361 (1983), noting:

> In [*Hammond*], the defendant similarly objected prior to an in-court identification, and a voir dire was held. After the voir dire, however, the defendant failed to object once the identification was actually made in the presence of the jury. This Court held that defendant's failure to object to the witness's identification during trial waived defendant's right to have the propriety of the in-court identification considered on appeal.

Hunt, 324 N.C. at 355, 378 S.E.2d at 761; *see also State v. Rankins*, 133 N.C. App. 607, 515 S.E.2d 748 (1999).

Because Defendant failed to object during the examination of Mr. Vilkhu concerning the photo lineup, and because Defendant did not object to Mr. Vilkhu's in-court identification of Defendant, we conclude Defendant has waived any argument as to potential error in the photo lineup procedure, except as to plain error. Defendant does argue plain error in the alternative to each of his arguments and we, therefore, review for plain error.

III. Standard of Review

When a defendant fails to preserve instructional or evidentiary errors at trial for appellate review, our Court may nonetheless review for plain error. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Our Supreme Court recently clarified the process for plain error review:

> We now reaffirm our holding in *Odom* and clarify how the plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error "had a probable impact on the jury's finding that the defendant was guilty." *See id.* (citations and quotation marks omitted); see also [*State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)] (stating "that absent the error the jury probably would have reached a different verdict" and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error). Moreover, because plain error is to be "applied cautiously and only in the exceptional case," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378[.]

State v. Lawrence, ____ N.C. ____, ____, ____ S.E.2d ____, ____ (Filed Apr. 13, 2012, No. 100PA11).

IV. Results of the Photo Lineup

A. Irreparable Misidentification

[3] On appeal, Defendant presents two theories under which he contends the trial court erred with respect to the results of the photo

lineup. Defendant first argues that the trial court committed plain error in overruling his objection to the State's admission of Exhibits 4 and 5 because the pre-trial identification procedure conducted by Officer Christaldi was impermissibly suggestive and created a substantial likelihood of misidentification.

Defendant contends that the trial court's findings of fact do not support its conclusion that Defendant's "due process rights had not been denied because neither the photo array nor the procedure used by the investigators had been 'impermissibly suggestive and conducive to irreparable mistaken identification.' " Defendant argues that the trial court's finding of fact that "the investigators violated the [EIRA] by using a non-independent administrator to conduct the lineup, and its failure to find any other facts that outweighed the biasing effect of this violation, established both the impermissibly suggestive nature of the lineup and the substantial risk of mistaken identity that it created." Thus, Defendant argues that Officer Christaldi's presence in the room was both an error which rendered the lineup impermissibly suggestive, and that it was also a violation of EIRA. We will address the EIRA violation below.

Our Courts apply "a two-step process for determining whether an identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification[.]" *State v. Marsh*, 187 N.C. App. 235, 239, 652 S.E.2d 744, 746 (2007), *overruled on other grounds by State v. Tanner*, 364 N.C. 229, 695 S.E.2d 97 (2010). " 'First, the Court must determine whether the identification procedures were impermissibly suggestive. Second, if the procedures were impermissibly suggestive, the Court must then determine whether the procedures created a substantial likelihood of irreparable misidentification.' " *Id.* (citation omitted).

Defendant contends that Officer Christaldi's presence in the room with Mr. Vilkhu created an impermissibly suggestive lineup procedure. The trial court found that Officer Christaldi, who was involved in the case, was present at the time of the photo lineup. Officer Christaldi was not an "independent administrator." However, the trial court found that Officer Christaldi refrained from making statements or gestures or otherwise communicating with Officer Lloyd or Mr. Vilkhu during the lineup. Defendant contends that "Officer Christaldi did not state whether she made any *unintentional* movements or body language that Mr. Vilkhu could have seen[.]" Defendant concedes that Officer Lloyd stated "that Officer Christaldi did not make any statements or do anything regarding her body lan-

guage when the photos were being shown." However, Defendant argues that Officer Lloyd's testimony was not competent evidence because Officer Lloyd testified that she could not see everything that Officer Christaldi did during the lineup because of where she was standing. Thus, Defendant's sole argument on this issue is that the photo lineup was impermissibly suggestive because one of the officers administering the procedure was involved in the investigation, and that officer may have made unintentional movements or body language which could have influenced Mr. Vilkhu.

Our Supreme Court has stated that the test for whether an identification procedure was impermissibly suggestive is "whether the totality of the circumstances reveals a pretrial procedure so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice." *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984). We must consider the following factors: " 'the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty shown by the witness, and the time between the offense and the identification.' " *State v. Johnson*, 161 N.C. App. 68, 73, 587 S.E.2d 445, 448 (2003) (citation omitted).

The record in the present case indicates that Mr. Vilkhu was seventy-five percent certain of his identification; Officer Christaldi's presence at the lineup appears to be the only irregularity in the procedure; Mr. Vilkhu did not describe any suggestive actions on the part of Officer Christaldi; and there was no testimony from the officers to indicate such. Further, the lineup was conducted within days of the robbery. With respect to Mr. Vilkhu's "opportunity to view the criminal at the time of the crime[,]" we note that the person who committed the robbery was in the store for forty-five or fifty minutes and spoke with Mr. Vilkhu a number of times. The only impediment to Mr. Vilkhu's view of the robber was a pair of sunglasses that the robber was wearing. Weighing the factors recounted in *Johnson*, and considering the facts in light of our case law discussing impermissible lineup procedures, we find no plain error in the trial court's determination that the lineup was not impermissibly suggestive. *See, e.g.*, *State v. Leggett*, 305 N.C. 213, 222, 287 S.E.2d 832, 838 (1982) (holding that a photo lineup procedure not impermissibly suggestive when the defendant's photo was the only photograph shown in both of two separate lineup arrays); *State v. Osborne*, 83 N.C. App. 498, 501, 350 S.E.2d 909, 911 (1986) (holding an identification procedure was not

impermissibly suggestive when, among other factors, "there [was] no evidence of any improper inducement of [the witness] to choose one subject over another"). Because we have determined that the lineup was not impermissibly suggestive, our analysis of this issue ends here.

B. EIRA Violation

[4] Defendant next argues that the trial court erred in denying his motion to suppress because of the EIRA violation. Defendant notes that the trial court provided a lesser remedy provided by EIRA, and contends that this prejudiced him. Defendant cites N.C. Gen. Stat. § 15A-974(a)(2) (2009) and argues that "evidence 'obtained as a result of a substantial violation of the provisions of [the N.C. Criminal Procedure Act, or Chapter 15A] must be suppressed.' " However, as the State points out in its brief, the statute provides: "*Upon timely motion*, evidence must be suppressed if: . . . it is obtained as a result of a substantial violation of [Chapter 15A]." N.C. Gen. Stat. § 15A-974(a)(2) (2011) (emphasis added). As noted above, Defendant did not make a timely motion to suppress the identification procedures.

Further, though the trial court did find that an EIRA violation occurred, we note that the trial court granted Defendant all of the remedies set forth in EIRA for resolving that error. N.C. Gen. Stat. § 15A-284.52(d) (2011) provides:

> All of the following shall be available as consequences of compliance or noncompliance with the requirements of this section:
>
> (1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification.
>
> (2) Failure to comply with any of the requirements of this section shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible.
>
> (3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.

The trial court's order denying Defendant's motion to suppress contains the following concluding paragraph:

> The specific failures to comply with the requirements of [EIRA] have been considered by the [trial c]ourt in adjudicating . . . Defendant's objection and this motion to suppress eyewitness identification.
>
> . . . .
>
> The [trial c]ourt further ORDERS, that with respect to the above-identified failure to comply with the specific requirements of the Eyewitness Identification Reform Act, such failure to comply shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible and, to the extent that such evidence of compliance or noncompliance with the requirements of the Act are presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.

Defendant cites no case law in support of his argument that the EIRA violation involved in this case should warrant exclusion of the evidence. We are not persuaded that the trial court committed plain error by granting Defendant all other available remedies under EIRA, rather than excluding the evidence.

VI. Mr. Vilkhu's In-Court Identification

[5] Defendant's final argument is that "the trial court committed plain error by allowing Mr. Vilkhu to make an in-court identification . . . where the identification was tainted by an impermissibly suggestive photo lineup . . . conducted prior to the trial." As we concluded above, the photo lineup was not impermissibly suggestive and Defendant's argument is without merit.

No error.

Judges STEELMAN and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. CEASAR ARMANDO LAUREAN

No. COA11-569

(Filed 1 May 2012)

1. Homicide—first-degree murder—failure to instruct on lesser-included offense—second-degree murder—no evidence to support instruction

The trial court did not err in a first-degree murder case by failing to submit the lesser-included-offense of second-degree murder to the jury. The facts in the case fully supported a jury verdict of first-degree murder and there was no evidence presented to support an instruction on second-degree murder.

2. Evidence—behavior of victim—not relevant to charges—properly excluded

The trial court did not err in a first-degree murder case by excluding evidence of the victim's behavior. The specific instances of conduct for which the victim received minor disciplinary infractions were not relevant to the issues presented to the jury.

Appeal by defendant from judgment entered 23 August 2010 by Judge W. Osmond Smith in Wayne County Superior Court. Heard in the Court of Appeals 16 November 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

BRYANT, Judge.

Where the trial court did not err in failing to submit to the jury the lesser included offense of second-degree murder and where it did not err by excluding specific instances of conduct as evidence of the victim's behavior while allowing evidence regarding the victim's reputation for truthfulness, we uphold the judgment of the trial court.

In January 2008, for offenses occurring in December 2007, defendant Corporal Ceasar Armando Laurean of the United States Marine Corps was indicted on charges of first-degree murder, robbery with a dangerous weapon, financial transaction card theft, attempted misdemeanor transaction card fraud, and obtaining property by false pre-

tenses. The State dismissed the charge of obtaining property by false pretenses prior to trial. This case came on for trial during the 10 August 2010 Criminal Session of Wayne County Superior Court.

At trial, evidence was presented that in February 2007, defendant was stationed at Camp Lejeune in Onslow County and assigned to the Separations Section, 2d Marine Logistics Group. There, defendant assumed the position of staff Non-Commissioned Officer in Charge (NCOIC). The duties of the NCOIC included supervising the marines in the unit, including Lance Corporal Maria Lauterbach. Following a series of disciplinary infractions by Lance Cpl. Lauterbach, the Officer in Charge (OIC), Chief Warrant Officer (CWO) Caroline Bier, instructed defendant to counsel Lauterbach.

In May 2007, Lance Cpl. Lauterbach accused defendant of a sexual assault that she alleged had occurred six weeks earlier. Defendant denied the allegation and an investigation ensued. Lauterbach was transferred to another section at Camp Lejeune, and a military protective order was issued commanding the separation of Lance Cpl. Lauterbach and defendant. Despite the order barring contact between the two, defendant and Lance Cpl. Lauterbach were seen together on multiple occasions, such as, in the giftware department of the Base Exchange and at a local dry cleaner. In June 2007, Lance Cpl. Lauterbach learned that she was pregnant. She claimed the pregnancy was the result of the sexual assault.

On Friday, 14 December 2007, Lance Cpl. Lauterbach worked at her unit from 7:30 a.m. until 3:30 p.m. At 4:30 p.m., her roommate found a note stating “Sorry, but I cannot take this Marine Corps life anymore, so I am going away. Sorry for the inconvenience. Maria.” The note was turned over to a warrant officer in Lauterbach’s section. Lauterbach’s mother filed a missing person’s report.

During the investigation into her disappearance, it was determined that on 14 December 2007, Lance Cpl. Lauterbach withdrew $700.00 from her bank account via an ATM machine and, at 5:00 p.m. that day, purchased a bus ticket for travel the next day from Jacksonville, North Carolina to El Paso, Texas. The ticket agent at the bus station was the last person to acknowledge seeing Lance Cpl. Lauterbach alive.

On 16 December 2007, defendant purchased supplies to build a fire pit in his back yard. Defendant’s neighbors later testified that around the holidays in December 2007, defendant had a bonfire in his backyard—an event that had not previously occurred. On 20

December, Lauterbach's cell phone was found near the entrance to Camp Lejeune. On 24 December, a man who attempted to obscure his face from the video camera at an ATM but resembled defendant, used Lauterbach's debit card to access her bank account in an attempt to withdraw funds.

On 8 January 2008, defendant was interviewed about the disappearance of Lance Cpl. Lauterbach by the Naval Criminal Investigative Service. Following the interview, defendant asked what would happen to the investigation involving Lauterbach's accusations of sexual assault against him if she did not come back. On 11 January 2008, defendant did not report for work.

On 11 and 12 January 2008, investigators searched defendant's home pursuant to a search warrant. Blood stains later determined to contain the DNA of Lance Cpl. Lauterbach were found on numerous items in the garage. Lauterbach's body and that of her fetus were found burned and buried in the fire pit in defendant's back yard. A search of defendant's computer revealed that on 8 January at 11:30 a.m., defendant performed a computer search of Puerto Vallarta, Mexico.

Defendant had fled in early January but was apprehended near San Juan de la Vina, a small town located in Michoacán, Mexico, on 10 April 2008. Defendant was extradited back to the United States to stand trial. Due to pretrial publicity, a change of venue was granted. The case moved from Onslow County to Wayne County, and defendant received a trial by jury in Wayne County Superior Court.

Defendant was convicted of first-degree murder, financial transaction card theft, and attempted financial transaction card fraud. Defendant was found not guilty of robbery with a dangerous weapon. Judgment on all offenses was consolidated, and defendant was sentenced to life imprisonment without parole. Defendant appeals.

On appeal, defendant raises the following questions: did the trial court err (I) by failing to submit the lesser-included-offense of second-degree murder to the jury; and (II) by excluding evidence of the victim's behavior.

I

[1] Defendant argues that the trial court erred by failing to instruct the jury on the lesser included offense of second-degree murder. Defendant acknowledges that the evidence presented was sufficient to support an instruction on first-degree murder, necessarily acknow-

ledging support for a finding of premeditation and deliberation. However, defendant points out that there was no evidence presented to illustrate the circumstances leading up to the infliction of the fatal injury. On this basis, defendant contends that the jury should have been allowed to consider whether defendant formed the intent to kill without premeditation and deliberation, and, thus, the trial court erred in denying his request for an instruction on second-degree murder. We disagree.

We review the trial court's denial of the request for an instruction on the lesser included offense de novo. *E.g. State v. Ligon*, 332 N.C. 224, 240-41, 420 S.E.2d 136, 145-46 (1992); *State v. Dyson*, 165 N.C. App. 648, 653-55, 599 S.E.2d 73, 77 (2004) (de novo review of whether a trial court's denial of defendant's request for a lesser included offense instruction was proper).

"It is an elementary rule of law that a trial judge is required to declare and explain the law arising on the evidence and to instruct according to the evidence." *State v. Strickland*, 307 N.C. 274, 284, 298 S.E.2d 645, 652 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). "[D]ue process requires an instruction on a lesser-included offense only 'if the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater.' " *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841 (1995) (citing *Beck v. Alabama*, 447 U.S. 625, 635, 65 L. Ed. 2d 392, 401 (1980) (holding that "if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the court] is constitutionally prohibited from withdrawing that option from the jury . . . ." *Beck*, 447 U.S. at 638, 65 L. Ed. 2d at 403)). However, "[t]he trial court should refrain from 'indiscriminately or automatically' instructing on lesser included offenses. Such restraint ensures that the jury's discretion is . . . channelled [sic] so that it may convict a defendant of only those crimes fairly supported by the evidence." *State v. Taylor*, 362 N.C. 514, 530, 669 S.E.2d 239, 256 (2008) (citations, quotations, and brackets omitted).

"Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (citation omitted). Moreover, " 'a defendant is not entitled to an instruction on a lesser included offense merely because the jury could

possibly believe some of the State's evidence but not all of it.' " *Taylor*, 362 N.C. at 533, 669 S.E.2d at 257 (quoting *State v. Annadale*, 329 N.C. 557, 568, 406 S.E.2d 837, 844 (1991)).

> First-degree murder is, *inter alia*, the unlawful killing of a human being committed with malice, premeditation, and deliberation. "The unlawful killing of a human being with malice but without premeditation and deliberation is murder in the second degree."

State v. Bedford, ____ N.C. App. ____, ____, 702 S.E.2d 522, 526-27 (2010) (quoting *State v. Geddie*, 345 N.C. 73, 94, 478 S.E.2d 146, 156 (1996)) (citing N.C. Gen. Stat. § 14-17 (2009)).

> The well-established rule for submission of second-degree murder as a lesser-included offense of first-degree murder is: "If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree . . . and there is no evidence to negate these elements other than [the] defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder."

State v. Locklear, 363 N.C. 438, 454-55, 681 S.E.2d 293, 306 (2009) (quoting *Strickland*, 307 N.C. at 293, 298 S.E.2d at 658).

Here, the evidence presented illustrates that Lance Cpl. Lauterbach made a formal accusation of rape on 11 May 2007. She also maintained that the assault resulted in her pregnancy. An Article 32 hearing to present the findings of an investigation to a military court and determine whether to proceed to a general court martial was scheduled to be held in December 2007 or January 2008.

It is clear from the evidence that defendant was very concerned about the sexual assault allegation, the pregnancy, and the investigation. Lance Cpl. Blake Costa testified that defendant admitted to a sexual encounter with Lance Cpl. Lauterbach—though he described it as consensual—and acknowledged that the situation was temporarily affecting his career. Costa testified that defendant asked him to help defendant make contact with Lauterbach. Defendant stated that he wanted Lauterbach to move to Mexico, the purpose for which was to discredit her as a deserter and help salvage his military career.

On 14 December 2007, Lance Cpl. Lauterbach withdrew $700.00 from her bank account and purchased a bus ticket to El Paso, Texas. Shortly thereafter, she disappeared. At some point in December 2007, a blue Hyundai, had been observed parked at defendant's house. On 7 January 2008, Lance Cpl. Lauterbach's blue Hyundai was found at the Jacksonville bus station. Law enforcement was unable to retrieve identifiable prints from the vehicle.

In early January, following an interview with naval investigators in the investigation of Lance Cpl. Lauterbach's disappearance, defendant inquired as to how Lauterbach's disappearance would affect the investigation into her allegations against him. Shortly thereafter, defendant fled. On 11 and 12 January 2008, investigators searched defendant's home. Blood stains were found in the garage, specifically, on a black storage container, a paint can, a pink plastic swim raft, tan pillow case, painting equipment, a pegboard on the garage wall, a white plastic bag, an infant swing, a box, the garage wall, the ceiling, and the garage floor. These blood stains contained Lance Cpl. Lauterbach's DNA. In the back yard, Lauterbach's body and that of her fetus were found in the charred earth of defendant's firepit. Defendant's neighbors testified that around the holidays in December 2007, defendant had a bonfire in his back yard—the first and only time that such an event had ever occurred there.

On appeal, defendant concedes that the evidence presented warranted an instruction on the charge of first-degree murder, necessarily acknowledging support for findings of premeditation and deliberation. However, defendant asserts that because the evidence failed to illustrate the circumstances immediately preceding Lance Cpl. Lauterbach's murder, the jury should have been allowed to consider that he formed the intent to kill absent premeditation and deliberation and, therefore, was entitled to an instruction on second-degree murder. Defendant asserts that an absence of evidence (the failure to illustrate the exact circumstances surrounding the murder) entitles him to a jury instruction on second-degree murder, while simultaneously acknowledging the sufficiency of the evidence to support an instruction on first-degree murder. Defendant's assertions must fail.

On the evidence presented, an instruction by the trial court on the charge of second-degree murder would be, defendant must concede, an instruction for which no evidence was presented in support thereof. An instruction on the charge of second-degree murder requires that the unlawful killing of a human being occur without pre-

meditation and deliberation. *See Bedford*, ____ N.C. App. at ____, 702 S.E.2d at 526-27 (citing N.C. Gen. Stat. § 14-17 (2009). Defendant fails to direct this Court's attention to any evidence that Lance Cpl. Lauterbach was killed without premeditation and deliberation. *See Locklear*, 363 N.C. 454-55, 681 S.E.2d at 306 (" 'If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree . . . and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.' " (quoting *Strickland*, 307 N.C. at 293, 298 S.E.2d at 658)). Defendant does not deny that he committed a homicide, he simply challenges what he refers to as a lack of evidence of premeditation and deliberation. However, the facts in this case fully support a jury verdict of first-degree murder. *See State v. Moses*, 350 N.C. 741, 775, 517 S.E.2d 853, 874 (1999) (Our Supreme Court "has stated 'the finding of premeditation and deliberation indicates a more cold-blooded and calculated crime.' " (quoting *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990)). Accordingly, we overrule defendant's argument.

II

[2] Next, defendant argues that the trial court erred by excluding evidence of specific instances of conduct by Lance Cpl. Lauterbach that led to defendant imposing military discipline on her immediately prior to her accusation of rape. Defendant argues that such evidence established that Lauterbach had a motive to falsely accuse defendant of rape and was admissible under Rule of Evidence 404(b). We disagree.

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2011). "A trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal." *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (2011) (citing *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991); *also State v. Lawrence*, 352 N.C. 1, 17-18, 530 S.E.2d 807, 817-18 (2000) (reviewing trial court's exclusion of expert witness testimony on behalf of defendant for error and finding none)).

" 'In a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible.' " *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006) (brackets omitted) (quoting *State v. Bruton*, 344 N.C. 381, 386, 474 S.E.2d 336, 340 (1996)). However, under Rule of Evidence 404(b),

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. R. Evid. 404(b) (2011).

> To be admissible under Rule 404(b), evidence of a prior crime or incident must be sufficiently similar to the incident at issue. *State v. Boyd*, 321 N.C. 574, 364 S.E.2d 118 (1988). Even if evidence is sufficiently similar to be admissible under Rule 404(b), it is nevertheless subject to the relevancy requirements and balancing test of Rule 403. *State v. Thibodeaux*, 352 N.C. 570, 532 S.E.2d 797 (2000) (citation omitted), *cert. denied*, 531 U.S. 1155, 148 L. Ed. 2d 976 (2001).

State v. Nance, 157 N.C. App. 434, 438, 579 S.E.2d 456, 459 (2003).

Here, defendant was indicted on charges of first-degree murder, robbery with a dangerous weapon, attempted misdemeanor financial transaction card fraud, obtaining property by false pretenses, and financial transaction card theft stemming from the murder of Lance Cpl. Lauterbach and the use of her debit card in an attempt to withdraw funds from her bank account.

At trial, defendant sought to question CWO Bier and the OIC of the legal division, CWO Joel Larsen, about Lance Cpl. Lauterbach's disciplinary infractions which led to CWO Bier's request that defendant counsel Lauterbach. Defendant argued that this information was relevant because it established Lauterbach's motive for making a false allegation of rape against him. In a hearing outside of the jury's presence, the trial court expressed concern that the jury could reasonably be left with the uncontested assertion that defendant raped Lauterbach. The trial court ruled that defendant would be allowed to question CWO Larsen regarding Lauterbach's reputation of truthfulness, including the allegation of rape but, because the character trait was not an essential element of a charge or defense, sustained the

State's objections as to specific instances of conduct leading to disciplinary infractions. The court further instructed CWO Bier, before her testimony, that while she was allowed to disclose the fact that Lauterbach received counseling, she was not to disclose the basis for such counseling.

We agree the question of whether Lance Cpl. Lauterbach's accusation of rape was grounded in fact or falsehood was not before the jury. Moreover, Lauterbach's specific instances of conduct unrelated to defendant shed no light upon the crimes for which defendant was charged. *See Grant*, 178 N.C. App. at 573, 632 S.E.2d at 265. Therefore, the specific instances of conduct for which Lance Cpl. Lauterbach received minor disciplinary infractions were not relevant to the issues presented to the jury and were properly excluded from evidence presented at trial.

Accordingly, defendant's argument is overruled.

No error.

Judges CALABRIA and STROUD concur.

IN THE MATTER OF AARON EVANS HAMILTON

No. COA11-1463

(Filed 1 May 2012)

1. Sexual Offenders—sex offender registration—petition for termination—not moot—no automatic termination

The trial court did not err in failing to dismiss petitioner's petition for termination of his sex offender registration for mootness and in automatically declaring that petitioner's registration requirement had ended. Petitioner failed to show mootness. Further, N.C.G.S. § 14-208.7 was amended to provide that registration of convicted sex offenders could continue beyond ten years, even when the registrant had not reoffended, and Section 14-208.12A provides that persons wishing to terminate their registration requirement must petition the superior court.

2. Sexual Offenders—sex offender registration—petition for termination—Jacob Wetterling Act—Adam Walsh Act—petitioner complied with requirements

The trial court erred as a matter of law in finding that petitioner's removal from the registry would not comply with the provisions of the federal Jacob Wetterling Act. The Jacob Wetterling Act had been repealed and replaced by the Adam Walsh Act (42 U.S.C. § 16915) and the uncontroverted evidence before the trial court was that petitioner had fully complied with all requirements of 42 U.S.C. § 16915 regarding termination of the registration period. Furthermore, the trial court failed to find the facts on all issues joined in the pleadings and the matter was remanded.

Appeal by Petitioner from order dated 29 August 2011 by Judge Gary M. Gavenus in Transylvania County Superior Court. Heard in the Court of Appeals 3 April 2012.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

Charles W. McKeller for Petitioner.

STEPHENS, Judge.

Procedural History and Factual Background

On 20 August 2001, Petitioner Aaron Evans Hamilton pled guilty to a charge of taking indecent liberties with a child. Petitioner was sentenced to a prison term of 19 to 23 months, suspended for three years with a term of intensive supervised probation and 30 days in jail. Registration ("the registration requirement") with the North Carolina Sex Offender Registry ("the registry") was one of the terms of Petitioner's probation. Petitioner initially registered on 27 August 2001. After successfully completing his probationary sentence on 19 August 2004, Petitioner was discharged.

Petitioner continued to register with the registry annually as required by law. He was never convicted of another sexual offense or of any other criminal offense. On 17 May 2011, Petitioner filed a petition for termination of sex offender registration pursuant to N.C. Gen. Stat. § 14-208.12A.

Following a hearing on 29 August 2011, the trial court made only a single finding of fact:

> The relief requested by [P]etitioner does not comply with the provisions of the federal Jacob Wetterling Act, 42 U.S.C. § 14071, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State.

This finding is one of eight pre-printed options for findings of fact following a hearing on a petition for termination of the registration requirement. Here, the trial court simply struck through the word "complies" and wrote in "does not comply" in its place. The court then concluded that Petitioner was not entitled to relief and denied his petition for termination of the registration requirement. The court announced its finding of fact, conclusion of law, and ruling in open court, and entered an order on the same date. From this order, Petitioner appeals.

Discussion

Petitioner makes two arguments: that the trial court erred in failing to dismiss the petition for mootness and in finding that the relief requested does not comply with the provisions of the Jacob Wetterling Act. As discussed below, we vacate and remand.

Standard of Review

> Resolution of issues involving statutory construction is ultimately a question of law for the courts. Where an appeal presents a question of statutory interpretation, full review is appropriate, and we review a trial court's conclusions of law *de novo*. . . .
>
> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. Moreover, when confronted with a clear and unambiguous statute, courts are without power to interpolate, or superimpose, provisions and limitations not contained therein.
>
> The best indicia of the legislature's intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish. Moreover, in discerning the intent of the General Assembly, statutes *in pari materia* should be con-

> strued together and harmonized whenever possible. *In pari materia* is defined as upon the same matter or subject.

In re Borden, ____ N.C. App. ____, ____, 718 S.E.2d 683, 685 (2011) (citations and quotation marks omitted).

"When the trial court sits as fact-finder without a jury: it must (1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising from the facts found; and (3) enter judgment accordingly." *Gainey v. Gainey*, 194 N.C. App. 186, 188, 669 S.E.2d 22, 23 (2008). In turn,

> [t]he standard of appellate review for a decision rendered in a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary.

Sessler v. Marsh, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001) (citations omitted), *disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001).

Mootness

[1] Defendant first argues that the trial court erred in failing to dismiss the petition for mootness. Specifically, Petitioner asserts that, "[d]ue to the lack of need for a petition for removal from the registry, the trial court should have dismissed the petition for mootness and declared that Mr. Hamilton's registration requirement had ended."We disagree.

The doctrine of mootness is well-established in our State:

> Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.
>
> Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action.

In re Peoples, 296 N.C. 109, 147-48, 250 S.E.2d 890, 912 (1978) (citations omitted).

Here, Petitioner filed a petition seeking removal from the registry on 17 May 2011, thus creating the question in controversy. On that date, Petitioner apparently believed that there was a real question in controversy for the trial court to decide, as did the State, which appeared at the hearing in the matter. No party argued mootness before the trial court. From the date the petition was filed until the present, we see no change in facts, law, or other circumstances, and Petitioner has not argued that any such changes have occurred. In sum, Petitioner has failed to show mootness, and a careful reading of his brief reveals that Petitioner is actually asserting a different argument, to wit, that his registration requirement should have automatically terminated ten years after the date of his initial registration because sections 14-208.7 (as amended) and 14-208.12A do not apply to him. After careful consideration, we reject this argument as well.

Our State first established the North Carolina Sex Offender Registry in 1995, and the registration scheme has been amended numerous times in the intervening years. At the time of Petitioner's conviction in 2001, N.C. Gen. Stat. § 14-208.7 provided, *inter alia*, that Petitioner was subject to the registration requirement for a period of ten years after which the registration requirement would automatically terminate, so long as Petitioner had not reoffended.

In 2006, two changes were made to the registration scheme relevant to Petitioner's appeal. First, section 14-208.7 was amended to provide that registration of convicted sex offenders could continue beyond ten years, even when the registrant had not reoffended. N.C. Gen. Stat. § 14-208.7(5a) (2007) (providing that the registration requirement "shall be maintained for a period of at least ten years following the date of initial county registration"). This change became effective 1 December 2006, but the implementing language did not specify whether it applied retroactively to those persons already on the sex offender registry as of the effective date.

Second, the automatic termination of the registration requirement language was deleted from section 14-208.7, and section 14-208.12A was added to the registration scheme. Section 14-208.12A provides that persons wishing to terminate their registration requirement must petition the superior court for relief.

> (a) Ten years from the date of initial county registration, a person required to register under this Part may petition the superior court to terminate the 30-year registration requirement[1] if the person has not been convicted of a subsequent offense requiring registration under this Article.
>
> . . .
>
> (a1) The court may grant the relief if:
>
> (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
>
> (2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and
>
> (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

N.C. Gen. Stat. § 14-208.12A (2012).[2] The implementing language of this statute states that it became effective 1 December 2006, and further specifies that it "is applicable to persons for whom the period of registration would terminate on or after [the effective] date." Petitioner's period of registration was not scheduled to terminate until 2011, and thus, section 14-208.12A plainly and explicitly applies to Petitioner. Further, while Petitioner contends the 2006 amendment to section 14-208.7, deleting the automatic termination language and adding language that the registration requirement last for "at least ten years" is ambiguous, we are not persuaded. The General Assembly did not explicitly state that this amendment was to apply retroactively to persons already on the registry. However, reading section 14-208.7 *in pari materia* with section 14-208.12A, we must construe the abolition of the automatic termination provision as applying to

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1. A 2008 amendment to N.C. Gen. Stat. § 14-208.7 increased the duration of the initial registration requirement from ten to thirty years. 2008 N.C. Sess. Law 117, Sec. 8. The General Assembly expressly provided that the 30-year registration requirement applied only to offenders first registering on or after the amendment's effective date, 1 December 2008. Thus, this amendment did not alter or affect Petitioner's registration requirement.

2. None of the minor amendments occurring since this statute's 2006 enactment are significant or pertinent to Petitioner's appeal.

persons for whom the period of registration would terminate on or after 1 December 2006. To do otherwise would render the implementing language of section 14-208.12A superfluous and frustrate the General Assembly's intent in enacting and amending the registration scheme. Accordingly, this argument is overruled.

The Trial Court's Finding of Fact

[2] Petitioner also argues that the trial court erred as a matter of law in finding that his removal from the registry would not comply with the provisions of the federal Jacob Wetterling Act. Specifically, Petitioner contends this finding of fact was erroneous because (1) the Jacob Wetterling Act was repealed and replaced by the Adam Walsh Act and (2) removing Petitioner's registration requirement *would* comply with the relevant provisions of the Adam Walsh Act. We agree.

As discussed above, a trial court may remove a petitioner from the registry if, *inter alia*, the removal "complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State[.]" N.C. Gen. Stat. § 14-208.12A(a1)(2). The Jacob Wetterling Act, 42 U.S.C. § 14071, was repealed upon the adoption of 42 U.S.C. § 16901 *et seq.*, the Adam Walsh Child Protection and Safety Act of 2006 ("the Adam Walsh Act"). The Adam Walsh Act now provides the "federal standards applicable to the termination of a registration requirement" and covers substantially the same subject matter as the Jacob Wetterling Act.

The Adam Walsh Act sets the duration of the registration requirement for sex offenders based upon what "tier" to which an offender belongs. *See* 42 U.S.C. § 16915 (2011) (titled "Duration of registration requirement"). The Act defines three tiers of sex offenders, based upon the facts of the offense committed:

> (2) Tier I sex offender. The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.
>
> (3) Tier II sex offender. The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—
>
> (A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of Title 18);

(ii) coercion and enticement (as described in section 2422(b) of Title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of Title 18);

(iv) abusive sexual contact (as described in section 2244 of Title 18);

(B) involves—

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender. The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

42 USCS § 16911 (2011). In turn, the Adam Walsh Act further provides:

(a) Full registration period. A sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless

the offender is allowed a reduction under subsection (b) of this section. The full registration period is—

(1) 15 years, if the offender is a tier I sex offender;

. . .

(b) Reduced period for clean record.

(1) Clean record. The full registration period shall be reduced as described in paragraph (3) for a sex offender who maintains a clean record for the period described in paragraph (2) by—

(A) not being convicted of any offense for which imprisonment for more than 1 year may be imposed;

(B) not being convicted of any sex offense;

(C) successfully completing any periods of supervised release, probation, and parole; and

(D) successfully completing of an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General.

(2) Period. In the case of—

(A) a tier I sex offender, the period during which the clean record shall be maintained is 10 years; and

. . .

(3) Reduction. In the case of—

(A) a tier I sex offender, the reduction is 5 years[.]

42 USCS § 16915 (2011).

Here, Petitioner contends that he was a tier I sex offender pursuant to section 16911, a matter not disputed by the State at the hearing or on appeal, and we agree. Thus, under the terms of section 16915, Petitioner's full registration period would be 15 years (subsection (a)), which could be reduced by five years (subsection (b)(3)(A)) if, after a period of ten years (subsection (b)(2)(A)), Petitioner had not committed another sex offense or other serious offense and had successfully completed any "periods of supervised release, probation, and parole" and "an appropriate sex offender treatment program" (subsection (b)(1)).

The record reveals that one of the special conditions set by the trial court following Petitioner's 2001 guilty plea was that he participate in a sexual abuse treatment program. By a Final Discharge dated 19 August 2004, Petitioner's probation/parole officer stated that Petitioner had "satisfactorily completed" his probation period as ordered. Further, at the 29 August 2011 hearing, Petitioner's counsel stated that Petitioner had not committed any new offenses, a matter again not disputed by the State. In sum, the uncontroverted evidence before the trial court was that Petitioner had fully complied with all requirements of 42 USCS § 16915 regarding termination of the registration period. Thus, the trial court's sole finding of fact is not supported by competent evidence and must be vacated. *See Sessler*, 144 N.C. App. at 628, 551 S.E.2d at 163.

Further, our review of the record suggests that the uncontroverted evidence at the hearing supported findings of fact 1-5 and 7 as preprinted on the "Petition and Order for Termination of Sex Offender Registration[.]" Petitioner asserted the matters contained in findings of fact 1-7 in his petition, and thus the trial court erred in failing to "find the facts on all issues joined in the pleadings[.]" *Gainey*, 194 N.C. App. at 188, 669 S.E.2d at 23. Accordingly, we remand for the trial court to review the competent evidence before it and make the appropriate findings of fact as dictated thereby.

However, as noted by the State, the ultimate decision of whether to terminate a sex offender's registration requirement still lies in the trial court's discretion. *See* N.C. Gen. Stat. § 14-208.12A(a1) (providing that a trial court "may" grant a petitioner relief if terms of the statute are met). Thus, after making findings of fact supported by competent evidence on each issue raised in the petition, the trial court is then free to employ its discretion in reaching its conclusion of law whether Petitioner is entitled to the relief he requests. "A trial court abuses its discretion if its determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision." *State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (citations and quotation marks omitted), *cert. denied*, 552 U.S. 1319, 170 L. Ed. 2d 760 (2008).

VACATED AND REMANDED.

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

RINK & ROBINSON, PLLC, Plaintiff v. CATAWBA VALLEY ENTERPRISES, LLC, DATA STORAGE TECHNOLOGY, INC., P. AARON BLIZZARD, AND BRIAN S. DYE, Defendant

No. COA11-955

(Filed 1 May 2012)

1. Pleadings—motion to amend—clerical error—theory of recovery not changed

The trial court did not err in a breach of contract case by granting plaintiff's motion to amend its pleadings. The trial court did not abuse its discretion by allowing a typographical error to be fixed and did not allow plaintiff to change its theory of recovery by granting the motion.

2. Statutes of Limitation and Repose—breach of contract—defendants induced delay—not bar to plaintiff's claim

The trial court did not err in a breach of contract case by denying defendants' motion for directed verdict and judgment notwithstanding the verdict. Defendants were precluded from relying on the statute of limitations as a bar to plaintiff's claim as defendants induced the delay by their own representations.

3. Attorney fees—breach of contract—insufficient findings of fact

The trial court erred in a breach of contract case by awarding attorney fees and costs to plaintiff without making any findings of fact to support the awards.

4. Pleadings—breach of contract—insufficient notice

The trial court did not err in a breach of contract case by disallowing recovery from defendants individually for personal tax returns. Plaintiff's complaint failed to sufficiently state a claim against either defendant in their individual capacities for personal tax returns. Plaintiff's remaining arguments on appeal regarding whether the trial court erred in excluding evidence of the personal tax returns were thus overruled.

5. Trials—doctrine of litigation by consent—evidence objected to

The doctrine of litigation by consent was not applicable in a breach of contract case and the issue of defendants' personal tax

returns was not tried by implied consent where defendants' attorney clearly objected to evidence of the personal tax returns.

6. Pleadings—motion to amend complaint to conform to evidence—evidence objected to—amendment not appropriate

The trial court did not abuse its discretion in a breach of contract case by denying plaintiff's motion to amend its complaint to conform to the invoices on personal tax returns. As defendants objected to the evidence of personal tax returns, an amendment to conform the pleading to this evidence was not appropriate.

Appeal by defendants from judgment entered 12 November 2010 by Judge Charles C. Lamm, Jr. in Catawba County Superior Court. Heard in the Court of Appeals 8 March 2012.

Bill Morgan, attorney for plaintiff.

W. Wallace Respess, Jr. of Respess & Jud, attorney for defendants Catawba Valley Enterprises, LLC, et al.

H. Kent Crowe of Crowe & Davis, PA, attorney for defendant Brian S. Dye.

ELMORE, Judge.

Catawba Valley Enterprises, LLC, Data Storage Technology, Inc., P. Aaron Blizzard, and Brian S. Dye (together defendants) appeal from a judgment in favor of Rink & Robinson, PLLC (plaintiff) for failure to pay for accounting services rendered. Plaintiff, also cross-appeals the trial court's decision to disallow recovery from defendants Blizzard and Dye individually for personal tax returns prepared on their behalf. After careful consideration, 1) we affirm the judgment in part but reverse and remand in part for further findings of fact and 2) we affirm the trial court's decision to disallow recovery from defendants Blizzard and Dye in their individual capacities.

Background

Plaintiff is an accounting firm that is owned and managed by Michael Rink. Defendants are two companies, Data Storage Technology, Inc. and Catawba Valley Enterprises, LLC, and their principal officers, Blizzard and Dye. Around 1998 or 1999, plaintiff began performing consulting work for defendants. Specifically, plaintiff assisted Blizzard and Dye in getting the companies up and running. Plaintiff advised Blizzard and Dye on how to make the companies

more profitable and how to prepare tax returns for the companies. Plaintiff also prepared personal tax returns for both Dye and Blizzard, but plaintiff did not prepare corporate tax returns for either company at that time.

However, starting in 2003, plaintiff agreed to begin preparing corporate tax returns for the companies. In April 2003 and April 2004, plaintiff sent engagement letters addressed to Dye for Data Storage Technology, Inc. and Blizzard for Catawba Valley Enterprises, LLC. An engagement letter is an instrument used by CPAs that defines in writing what services are to be provided to the client. The engagement letters sent by plaintiff to defendants established that: 1) bills for services are due when rendered; 2) a finance charge of 1.5% per month would be applied to all accounts over 30 days; 3) all unpaid amounts shall be personally guaranteed by the principals of each company; 4) in the event of a lawsuit, defendants agree to pay all attorneys fees; 5) no claim shall be asserted by either party more than 1 year after the date of services. The engagement letters were signed by Rink and either Blizzard or Dye.

Between 23 April 2003 and 21 August 2006, plaintiff sent defendants numerous invoices for services rendered. Defendants failed to pay these invoices in full. Plaintiff then filed suit against defendants on 17 May 2007 for breach of contract. Plaintiff sought to recover 1) $6,256.76 plus interest for services rendered on behalf of Data Storage Technology, Inc. and 2) $38,163.82 plus interest for services rendered on behalf of Catawba Valley Enterprises, LLC. On 4 October 2010, the case came on for trial by jury.

At trial, Rink testified that Dye told him that if he postponed filing suit then Dye would make sure Rink was paid. Rink also testified that he and Blizzard discussed the postponement of a lawsuit on a few occasions. Also at trial, Rink attempted to admit into evidence invoices for money owed for personal tax returns prepared for Blizzard and Dye individually. Defendants objected to this evidence, and the trial court sustained the objection. The trial court concluded that "there was no claim for relief made in the prayer for judgment [] against either of the individual defendants[,] except as may be shown by the evidence that they guaranteed the corporate liability for services."

At the close of plaintiff's evidence, defendants moved for a directed verdict based on the statute of limitations, arguing that plaintiff had failed to file suit within the 1-year period required by the

engagement letters. The trial court denied the motion based on "[e]quitable estoppel and the course of dealings[]" between the parties. Plaintiff then moved to amend the complaint to conform to the evidence presented. Plaintiff argued that its complaint contained a typographical error, because in the complaint plaintiff alleged that Catawba Valley Enterprises, LLC owed $6,256.76 and Data Storage Technology owed $38,163.82 but those numbers were reversed in the prayer for relief. The trial court allowed the amendment, concluding that "I'll allow the amendment as it relates to Catawba Valley Enterprises and Data Storage Technology and include in that correction of the typographical error where it's alleged that one corporation owes one amount, the other corporation owes the other amount, and in the prayer for relief those amounts are reversed[.]"

On 8 October 2010, the jury rendered a verdict in favor of plaintiff. Defendants then moved for judgment not withstanding the verdict (JNOV), but the trial court denied that motion. On 12 November 2010, the trial court entered a judgment against all defendants in the amount of $71,220.45 for services rendered for Data Storage Technology, Inc., and in the amount of $15,842.66 for services rendered for Catawba Valley Enterprises, LLC. These amounts included the invoice amounts submitted to the jury, plus interest, attorneys fees, and costs. Defendants now appeal. Plaintiff also cross-appeals the trial court's decision to disallow recovery from defend-ants Blizzard and Dye individually for personal tax returns.

Defendants' appeal

[1] Defendants present three arguments on appeal. Defendants first argue that the trial court erred in granting plaintiff's motion to amend its pleadings, changing the amount owed. Specifically, defendants argue that the amendment converted plaintiff's breach of contract claim to an open account claim. We disagree.

"A motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse." *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). Thus, the "ruling is not reviewable in the absence of a clear showing of abuse of discretion[.]" *Consolidated Vending Co. v. Turner*, 267 N.C. 576, 581, 148 S.E.2d 531, 534 (1966).

Here, the trial court made it clear that it was allowing the motion to correct a "typographical error where it's alleged that one corporation owes one amount, the other corporation owes the other amount, and in the prayer for relief those amounts are reversed[.]" Further-

more, the trial court indicated that plaintiff had "proceeded all along on an account theory[.]" Later in the proceedings, when plaintiff attempted to add a claim for unjust enrichment, the trial court stated "I'm not going to allow you to switch horses in mid-stream[.]"

Thus, we are unable to agree that the trial court allowed plaintiff to change its theory of recovery. As a result, we conclude that the trial court did not err with regards to this issue.

[2] Defendants next argue that the trial court erred in denying their motion for directed verdict and JNOV because plaintiff's claims were barred by the statute of limitations. We disagree.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)). "In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor." *Turner v. Duke University*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

Here, defendants contend that plaintiff's claim was barred by the statute of limitations because it was filed more than one year after the services were provided. At trial they argued that "[t]his lawsuit was filed on May 17 of 2007. All of the evidence is that there was no work done -- that the work of Rink and Robinson had been completed more than a year prior to the filing of this lawsuit." Defendants further argued that plaintiff "can't sue Data Storage or Catawba Valley or either of these individuals for services that were completed more than a year prior to the institution of the suit on May 17, 2007."

We agree that "[t]he lapse of time, when properly pleaded, is a technical legal defense. Nevertheless, equity will deny the right to assert that defense when delay has been induced by acts, representations, or conduct[]" of the defendant. *Nowell v. Great Atlantic & Pacific Tea Co.*, 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959). "The doctrine of equitable estoppel may be invoked to prevent a defendant from relying on a statute of limitations if the defendant . . . caused the

plaintiff to allow his claim to be barred by the statute of limitations." *Blizzard Bldg. Supply, Inc. v. Smith*, 77 N.C. App. 594, 595, 335 S.E.2d 762, 763 (1985) (citation omitted), *cert. denied*, 315 N.C. 389, 339 S.E.2d 410 (1986).

Here, plaintiff presented evidence that both Blizzard and Dye asked Rink to postpone filing suit in order to give defendants more time to pay the invoices. At trial, Rink testified that the "[l]ast conversation I had with Mr. Dye was—he had called me and he said that if I would hold off suing him that they—that he would see that I got paid, just give him some more time." Rink also testified that he had similar conversations with Blizzard, and that Blizzard "said he agreed to pay the amount of the bills and also if I would hold off and not sue that—that he would see that I was taken care of[.]"

When reviewing the trial court's denial of a motion for directed verdict and JNOV we must take this evidence as true and consider it in the light most favorable to plaintiff. In doing so, we conclude that defendants induced the delay by their own representations. As a result, the trial court was correct in concluding that defendants were precluded from relying on the statute of limitations as a bar to plaintiff's claim.

[3] Finally, defendants argue that the trial court erred in awarding attorney's fees and costs to plaintiff without making any findings of fact to support the awards. We agree.

"The allowance of attorney fees is in the discretion of the presiding judge, and may be reversed only for abuse of discretion." *Washington v. Horton*, 132 N.C. App. 347, 351, 513 S.E.2d 331, 334-35 (1999) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Stilwell v. Gust*, 148 N.C. App. 128, 130, 557 S.E.2d 627, 629 (2001) (citation omitted). However, "[i]n awarding fees, the trial court's discretion is not unrestrained." *Id.* (citation omitted). "The general rule in this state is [that] a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute." *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 603, 632 S.E.2d 563, 575 (2006) (quotations and citations omitted). According to our General Statutes, contractual agreements to pay attorneys fees are valid and enforceable. *See* N.C. Gen. Stat. § 6-21.2 (2011). But, "the trial court must make some findings of fact to support the award." *Porterfield v. Goldkuhle*, 137

N.C. App. 376, 378, 528 S.E.2d 71, 73 (2000) (quotations and citations omitted).

In *Calhoun*, we reviewed the trial court's award of attorneys fees under N.C. Gen. Stat. § 6-21.2. There, we concluded that the trial court "made no findings of fact whether the contract at issue is a printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money[.]" 178 N.C. App. at 604, 632 S.E.2d at 575 (quotations and citations omitted). As a result, we remanded the case "to the trial court for appropriate factual determinations." *Id.* at 605, 632 S.E.2d at 575.

Here, plaintiff also sought to recover attorneys fees under N.C. Gen. Stat. § 6-21.2. Upon review of the record, we conclude that the trial court failed to make the necessary findings of fact to support such award. As a result, we reverse the award for attorneys fees and costs and remand to the trial court for further findings of fact.

Plaintiff's appeal

[4] On cross-appeal plaintiff argues that the trial court erred in disallowing recovery from Blizzard and Dye individually for personal tax returns. Plaintiff first argues that its complaint was broad enough to give notice of those claims. We disagree.

"Under the notice theory of pleading a statement of claim is adequate if it gives sufficient notice of the claim asserted[.]" *Redevelopment Comm'n of Washington v. Grimes*, 277 N.C. 634, 645, 178 S.E.2d 345, 351-52 (1971) (quotations and citation omitted). Our Rules of Civil Procedure require the pleading to contain "[a] short and plain statement of the claim[.]" *Brewer v. Harris*, 279 N.C. 288, 292, 182 S.E.2d 345, 347 (1971) (citation omitted). However, "more than a general statement" is required. *Baumann v. Smith*, 41 N.C. App. 223, 229, 254 S.E.2d 627, 631 (1979). "A mere assertion of a grievance is insufficient to state a claim upon which relief can be granted. Some degree of factual particularity is required." *Alamance County v. N.C. Dep't of Human Resources*, 58 N.C. App. 748, 750, 294 S.E.2d 377, 378 (1982).

Here, plaintiff's pleading makes no mention of individual claims against Blizzard or Dye for personal tax returns. Likewise, the prayer for relief states no request for recovery from Blizzard or Dye in their individual capacities. Plaintiff argues that its "intentional references to the plural form of 'Defendants' in the Complaint" was sufficient to

give notice of individual claims against Blizzard and Dye. We are not persuaded by this argument, and we find this language to be nothing more than an assertion of general grievances. As a result, we conclude that plaintiff's complaint failed to sufficiently state a claim against either Blizzard or Dye in their individual capacities for personal tax returns.

Accordingly, we overrule plaintiff's remaining arguments on appeal regarding whether the trial court erred in excluding evidence of the personal tax returns. "Evidence which is not relevant is not admissible." *State v. Cagle*, 346 N.C. 497, 506, 488 S.E.2d 535, 541 (1997) (quotations and citation omitted).

[5] Plaintiff next argues that the issue of personal tax returns was tried by implied consent. We disagree.

"When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C. Gen. Stat. § 1A-1, Rule 15 (2011). However, "the rule of litigation by consent is applied when *no objection is made on the specific ground that the evidence offered is not within the issues raised by the pleadings.*" *Roberts v. William N. & Kate B. Reynolds Memorial Park*, 281 N.C. 48, 58, 187 S.E.2d 721, 726 (1972) (quotations omitted) (emphasis in original).

Here, defendants' attorney clearly objected to evidence of the personal tax returns and stated that "if you'll examine the complaint, there is no pleading, no cause of action, no separate count, there is nothing in this complaint to put us on notice that this gentleman is seeking money from individuals for payment of individual tax returns." Thus, we are unable to agree that the doctrine of litigation by consent is applicable to this issue.

[6] Plaintiff's final argument on appeal is that the trial court abused its discretion in denying plaintiff's motion to amend its complaint to conform to the invoices on personal tax returns. Again, we disagree.

An "amendment to conform to the evidence is appropriate only where sufficient evidence has been presented at trial ***without objection*** to raise an issue not originally pleaded and where the parties understood, or reasonably should have understood, that the introduction of such evidence was directed to an issue not embraced by the pleadings." *W & H Graphics, Inc. v. Hamby*, 48 N.C. App. 82, 86, 268 S.E.2d 567, 570 (1980) (citation omitted) (emphasis added). Here, as we previously noted, defendants objected to the evidence of per-

sonal tax returns. Thus, an amendment to conform the pleading to this evidence was not appropriate. As such, we conclude that the trial court did not err in denying plaintiff's motion to amend its pleading.

Conclusion

In sum, we affirm the judgment in part, but we reverse and remand in part for further findings of fact in support of the award for attorneys fees and costs. Furthermore, we affirm the decision of the trial court to disallow recovery from Blizzard and Dye in their individual capacities.

Affirmed in part, remanded in part.

Judges STEELMAN and STROUD concur.

JOHN LEE MYNHARDT, PLAINTIFF-APPELLANT v. ELON UNIVERSITY; LAMBDA CHI ALPHA, INC.; DELTA PI CHAPTER OF LAMBDA CHI ALPHA; AND CLINTON JOSEPH BLACKBURN; JOHN FERRELL CASSADY; CHARLES KENNETH CALDWELL, JR.; DAVID WILLIAMSON WELLS; LINWOOD BRADY LONG; BRIAN THOMAS McELROY; WILLIAM JOSEPH HARTNESS; AND ROBERT LAWRENCE OLSON, ALSO KNOWN AS ROBERT S. OLSON, JR., DEFENDANTS-APPELLANTS

No. COA11-668

(Filed 1 May 2012)

1. Negligence—duty of care—not owed to plaintiff—summary judgment proper

The trial court did not err in a negligence action by granting summary judgment in favor of defendants. Defendants assumed no duty to protect plaintiff from drinking-related injuries at an off-campus party and no special relationship resulting in the imposition of a duty existed between defendants and plaintiff when plaintiff voluntarily, and with an invitation, attended an off-campus party of which defendant Elon had no knowledge.

2. Negligence—agency relationship—argument unsupported

Plaintiff's argument in a negligence case that defendants were liable to him based upon agency relationships was unsupported and without merit.

3. Negligence—joint venture—argument unsupported

Plaintiff's argument in a negligence case that defendants were liable to him based upon a joint venture was unsupported and without merit.

Appeal by Plaintiff from amended orders entered 28 January 2011 by Judge Howard E. Manning, Jr. in Superior Court, Alamance County. Heard in the Court of Appeals 10 January 2012.

Butler Daniel & Associates, by A.L. Butler Daniel; Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr.; and The Law Office of Michael S. Petty, by Michael S. Petty, for Plaintiff-Appellant.

Cranfill Sumner & Hartzog LLP, by Dan M. Hartzog and Kari R. Johnson, for Defendant-Appellee Elon University.

Brown, Crump, Vanore & Tierney, L.L.P., by O. Craig Tierney, Jr., for Defendant-Appellee Lambda Chi Alpha, Inc.

McGEE, Judge.

Plaintiff was a twenty-one-year-old student at Elon University (Elon) in February 2007 when, tragically, he was involved in an incident that left him paralyzed. Plaintiff had been out with friends on the evening of 2 February 2007 and, around midnight, they ended up at a bar in Burlington. Plaintiff remained at the bar until it closed at 2:00 a.m. on the morning of 3 February 2007. Upon leaving the bar at 2:00 a.m., Plaintiff and three friends started walking to a party one of them had heard about. Before they reached the party, they noticed another party taking place at 211 North Lee Street (the Lee Street house). Plaintiff and his friends decided to check out the party at the Lee Street house, even though they knew nothing about that party, nor who was sponsoring the party. Sometime after entering the Lee Street house, Plaintiff and one of his friends, Mary Kate Kelly (Kelly), entered the bathroom together, locked the door, and started to "make out." Plaintiff and Kelly had been in the bathroom about ten minutes when they heard someone knocking on the bathroom door. Neither Plaintiff nor Kelly opened the bathroom door, and the knocking grew louder.

According to Plaintiff, when he and Kelly did exit the bathroom, John Cassady (Cassady) and Clinton Blackburn (Blackburn) immediately confronted Plaintiff. Cassady was a student at Elon, and vice-president of the Delta Pi Chapter (the Chapter) of the Lambda Chi

Alpha fraternity (Lambda Chi and, along with Elon, Defendants). The Chapter is the Elon chapter of Lambda Chi. Blackburn was not a student at Elon, and was not associated with Lambda Chi. Plaintiff testified that Cassady and Blackburn began yelling at him and pushing him. Cassady was a tenant at the Lee Street house and Blackburn was visiting Cassady at the Lee Street house. Blackburn put Plaintiff in a "grip hold" from behind and started forcing Plaintiff toward the kitchen door exit. According to Plaintiff, before they made it to the door, Blackburn "forcefully pushed" Plaintiff to the floor. After being pushed to the floor, Plaintiff could not move his limbs. Cassady and Blackburn then dragged Plaintiff by his legs out the door. As a result of this incident Plaintiff, tragically, suffered permanent paralysis. Defendants contest some of the facts as presented above, but there is no dispute that Plaintiff was injured as Blackburn and Cassady were forcing him out of the Lee Street house.

The Lee Street house was located off the Elon campus and was not owned by Elon, Lambda Chi, or the Chapter. However, it was rented by some members of the Chapter, and apparently had been rented by members of the Chapter for some time. Elon did own the main facility in which the Chapter was located, and that facility was located on the Elon campus. Elon exercises control over certain aspects of "Greek" life on campus, and Elon has promulgated rules and regulations affecting Greek organizations. These regulations include specific protocols that must be followed if a fraternity or sorority desires to serve alcohol at a party conducted on-campus. Defendants recognized, prior to 3 February 2007, that off-campus parties involving fraternities did occur. According to certain national standards, which had been adopted by both Elon and Lambda Chi, dangerous incidents, such as fights or alcohol poisoning, were more likely to occur at off-campus parties. Prior to the 3 February 2007 incident, both Elon and Lambda Chi were aware of violations involving the Chapter, including alcohol violations, hazing, and arrests for marijuana offenses, and some of these incidents occurred off-campus. Defendants expressed concern regarding violations by members of the Chapter, and certain steps were taken to try and remedy those concerns. Both Elon and Lambda Chi had the authority to sanction the Chapter for rules violations.

Plaintiff brought this action against Defendants, the Chapter, Cassady, Blackburn, and other individuals on 5 June 2008. Plaintiff thereafter filed several amended complaints. Both Elon and Lambda Chi moved for summary judgment on 27 May 2010. The Chapter also

moved for summary judgment. The trial court granted summary judgment in favor of Defendants by orders dated 30 December 2010. The trial court denied the Chapter's motion for summary judgment with respect to Plaintiff's negligence claim. The trial court amended those orders on 28 January 2011, certifying the orders granting summary judgment to Defendants for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Plaintiff appeals the orders granting summary judgment in favor of Defendants.

I. Analysis

Initially, we note that Plaintiff's appeal is interlocutory because Plaintiff's negligence claim against the Chapter remains. However, because the orders from which Plaintiff appeals constitute final judgments with respect to Plaintiff's claims against Defendants, and because the trial court properly certified the orders for immediate review pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, we review Plaintiff's appeal. N.C.R. Civ. P. § 1A-1, Rule 54; N.C. Gen. Stat. § 1-277 (2011); N.C. Gen. Stat. § 7A-27 (2011); *see also Hoots v. Pryor*, 106 N.C. App. 397, 400-01, 417 S.E.2d 269, 272 (1992).

II. Standard of Review

> A motion for summary judgment is properly granted when
>
> > the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.
>
> N.C.G.S. § 1A-1, Rule 56(c) (1999). A defendant moving for summary judgment bears the burden of showing either that (1) an essential element of the plaintiff's claim is nonexistent; (2) the plaintiff is unable to produce evidence which supports an essential element of its claim; or, (3) the plaintiff cannot overcome affirmative defenses raised in contravention of its claims. In ruling on such motion, the trial court must view all evidence in the light most favorable to the non-movant, accepting the latter's asserted facts as true, and drawing all reasonable inferences in its favor.
>
> . . . .
>
> The purpose of a summary judgment motion is to foreclose the need for a trial when . . . the trial court determines that

> only questions of law, not fact, are to be decided. Summary judgment may not be used, however, to resolve factual disputes which are material to the disposition of the action.

Cucina v. City of Jacksonville, 138 N.C. App. 99, 101-02, 530 S.E.2d 353, 354-55 (2000) (citations omitted).

III. Negligence

[1] In order to set out a *prima facie* claim of negligence against [defendant], plaintiff was required to present evidence tending to show that (1) [defendant] owed a duty to plaintiff; (2) [defendant] breached that duty; (3) such breach constituted an actual and proximate cause of plaintiff's injury; and, (4) plaintiff suffered damages in consequence of the breach.

Id. at 102, 530 S.E.2d at 355 (citation omitted).

The dispositive issue in the present case is whether Defendants owed Plaintiff a duty of care. "Whether a defendant owes a plaintiff a duty of care is a question of law." *Davidson v. Univ. of N.C. at Chapel Hill*, 142 N.C. App. 544, 552, 543 S.E.2d 920, 925 (2001) (citation omitted). Because we hold that Defendants did not owe Plaintiff a duty of care in this case, we affirm the decisions of the trial court.

First, Plaintiff argues that Defendants owed him a duty of care based upon a theory of voluntary undertaking.

> The voluntary undertaking theory has been consistently recognized in North Carolina, although it is not always designated as such. *See Pinnix*, 242 N.C. at 362, 87 S.E.2d at 897 (recognizing that a duty of care "may arise generally by operation of law under application of the basic rule of the common law which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care"); *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 666, 255 S.E.2d 580, 584, *disc. review denied*, 298 N.C. 295, 259 S.E.2d 911 (1979) (recognizing that "[t]he law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm and calls a violation of that duty negligence"). The undertaking theory has been described as follows:
>
> > Akin to the special relationship exceptions is the "undertaking" theory implicated when a defendant voluntarily "undertakes" to provide needed services to the plaintiff

> > when otherwise she would have no obligation. The agreement may arise from a binding contract between the parties or from a gratuitous promise, unenforceable in contract.
>
> Logan § 2.20, at 27. Furthermore, the voluntary undertaking doctrine has been applied in other jurisdictions under similar circumstances. *See Furek v. University of Delaware*, 594 A.2d 506 (Del.1991) (holding that, pursuant to Restatement (Second) of Torts § 323, a university may be liable for a student's injuries during fraternity hazing activities when the university knows of the dangers involved in such activities and undertakes to regulate the activities).

Davidson, 142 N.C. App. at 558-59, 543 S.E.2d at 929.

Plaintiff argues that

> Defendants knew of the specific dangers involved with open fraternity parties, and they undertook to regulate said activities. Defendants voluntarily undertook to provide services to, and to impose supervision, regulation, enforcement, and control over, [the Chapter] and students participating in Greek organizations or at "Greek" events for the protection of students such as [Plaintiff].

However, in *Hall v. Toreros, II, Inc.*, 176 N.C. App. 309, 316-17, 626 S.E.2d 861, 867 (2006), this Court rejected plaintiff's argument that the adoption of regulations for the purpose of protecting a class of people constitutes a voluntary undertaking that creates a duty to that class of people that would not otherwise exist. In a case involving a defendant restaurant, this Court stated that it did not want to

> discourage, indeed penalize, voluntary assumption or self-imposition of safety standards by commercial enterprises, thereby increasing the risk of danger to their customers and the public. Accordingly, we reject plaintiffs' assertion that adoption of the [safety standards] by [the defendant] as company policy, standing "alone[,] [wa]s sufficient for [a] finding of the legal duties submitted to the jury[.]"

Hall, 176 N.C. App. at 317, 626 S.E.2d at 867. Plaintiff relies on *Davidson* to support his position. We do not find *Davidson* controlling in the present case. In *Davidson*, the plaintiff was a junior varsity cheerleader at the University of North Carolina at Chapel Hill (UNC). *Davidson*, 142 N.C. App. at 546, 543 S.E.2d at 921. Prior to an UNC

women's basketball game, the junior varsity cheerleaders were warming up and practicing stunts in Carmichael Auditorium, a sports venue owned by UNC and located on the UNC campus, where the women's basketball game was to occur. *Id.* at 546, 543 S.E.2d at 922. While practicing a three-tier pyramid stunt, which UNC knew to be dangerous, the plaintiff cheerleader fell and sustained serious bodily injuries and permanent brain damage. *Id.* According to evidence presented at trial, though the plaintiff cheerleader and the other cheerleaders were representing UNC at official UNC functions, "UNC had not adopted guidelines regarding the experience required to join either cheerleading squad, the skill level required to perform particular stunts, or safety in general." *Id.* at 548, 543 S.E.2d at 923. "UNC 'never shared with [the cheerleaders] information regarding safety and technical cheerleading skills.' " *Id.* Although the UNC varsity cheerleaders attended summer camps "where they were exposed to [national] guidelines for cheerleading and safety[,]" the junior varsity cheerleaders were not sent to those camps, and the national guidelines had not been adopted by UNC. *Id.*

In *Davidson*, the issue presented was "whether a university ha[d] an affirmative duty of care toward a student athlete who [wa]s a member of a school-sponsored, intercollegiate team." *Davidson*, 142 N.C. App. at 553, 543 S.E.2d at 926. In *Davidson*, this Court made it clear that this was "an issue of first impression in North Carolina." *Id.*

UNC "acknowledged that it assumed certain responsibilities with regard to teaching the cheerleaders about safety." *Id.* at 559, 543 S.E.2d at 929. Evidence also showed that UNC employees were aware of the particular danger in the type of stunt in which the plaintiff cheerleader was injured. *Id.* at 548, 543 S.E.2d at 923. The Department of Student Life was responsible for cheerleading squads in the years just prior to the accident. *Id.* Frederic Schroeder (Schroeder), Director of Student Life, sent letters to the coach of the varsity cheerleading squad warning about the dangers of the three-tier pyramid, and also sent letters to the co-captains of the varsity squad urging them to adopt certain safety guidelines. *Id.* Schroeder received a letter from the Assistant Athletic Director at UNC asking him to " 'take charge of any future decisions with regard to the safety and well-being' of the cheerleading squads." *Id.* at 549, 543 S.E.2d at 924. These letters were sent several years prior to the accident. *Id.* This Court held that "the evidence is uncontroverted that [UNC] voluntarily undertook to advise and educate cheerleaders in regard to safety. Therefore, we hold that [UNC] owed plaintiff a duty of care[.]" *Id.* at 559, 543 S.E.2d at 930.

In the present case, we do not find that Defendants' actions are analogous to the actions of UNC and its employees in *Davidson*. We want to encourage universities and Greek organizations to adopt policies to curb underage drinking and drinking-related injuries or other incidents. Adopting such policies, however, does not make a university or Greek organization an insurer of every student, member, or guest who might participate in off-campus activities. *Davidson*, 142 N.C. App. at 556, 543 S.E.2d at 928. We hold that Defendants assumed no duty to protect Plaintiff from drinking-related injuries at an off-campus party.

Plaintiff also argues that a duty existed because there was a special relationship between Defendants and Plaintiff. Plaintiff again primarily relies on *Davidson*. In *Davidson*, this Court cited a treatise on the law of torts in support of the proposition that a duty may exist for a defendant in certain special relationships, where

> "plaintiff is typically in some respect particularly vulnerable and dependant upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare. In addition, such relations have often involved some existing or potential economic advantage to the defendant. Fairness in such cases thus may require the defendant to use his power to help the plaintiff, based upon the plaintiff's expectation of protection, which itself may be based upon the defendant's expectation of financial gain."

Davidson, 142 N.C. App. at 554, 543 S.E.2d at 926-27 (citation omitted). In *Davidson*, this relationship is clear. The plaintiff was a cheerleader, representing UNC at school events. The plaintiff and the other cheerleaders helped to promote UNC to potential students and donors. *Id*. at 555, 543 S.E.2d at 927.

In the present case, Plaintiff was attending an off-campus party, uninvited, and Plaintiff was not acting in any manner as a representative of Elon. Plaintiff had no relationship whatsoever with Lambda Chi, the Chapter, Cassady, or Blackburn. This Court was careful to limit its holding in *Davidson* to the facts of that case:

> We emphasize that our holding is based on the fact that plaintiff was injured while practicing as part of a school-sponsored, intercollegiate team. Our holding should not be interpreted as finding a special relationship to exist between a university, college, or other secondary educational institution, and every stu-

> dent attending the school, or even every member of a student group, club, intramural team, or organization. We agree with the conclusion reached by other jurisdictions addressing this issue that a university should not generally be an insurer of its students' safety, and that, therefore, the student-university relationship, standing alone, does not constitute a special relationship giving rise to a duty of care.

Davidson, 142 N.C. App. at 556, 543 S.E.2d at 928 (citations omitted). We hold that no special relationship resulting in the imposition of a duty existed between Defendants and Plaintiff when Plaintiff voluntarily, and uninvited, attended an off-campus party of which Elon had no knowledge. Suffice it to say that no special relationship existed on these facts between Lambda Chi and Plaintiff, either.

We have also examined Plaintiff's argument that he alleged sufficient affirmative acts by Defendants to survive summary judgment based upon ordinary principles of negligence. We find it unnecessary to include any analysis for this argument and hold that it fails as a matter of law. We hold that Defendants owed no duty to Plaintiff on these facts and, therefore, Plaintiff's claims for negligence fail as a matter of law.

IV. Agency

[2] Plaintiff next argues that Defendants are liable to him based upon agency relationships. We disagree.

Plaintiff cites to some general law regarding the principle of agency, followed by an unsupported statement that, in this case, Elon and Lambda Chi were principals to the Chapter, and thus liable by *respondeat superior* for the torts of the Chapter member Cassady. However, Plaintiff provides no specific support for his argument that the law of agency applied in this particular fact situation. After thorough research, we conclude this is because no such authority exists. We decline to make new law by recognizing an agency relationship between Plaintiff and any Defendants on the facts of this case. Plaintiff's argument is without merit.

V. Joint Venture

[3] Plaintiff's argument with regard to joint venture likewise fails. Plaintiff again does not support his argument with any law applicable to the facts before us, and we find no law to support Plaintiff's position. Plaintiff's argument is without merit.

VI. Conclusion

Defendants owed no duty to Plaintiff that would support Plaintiff's claims for negligence. Plaintiff's claims based upon agency and joint venture likewise fail as a matter of law. We affirm the trial court's grant of summary judgment in favor of Defendants.

Affirmed.

Judges CALABRIA and GEER concur.

IN THE MATTTER OF: APPEAL OF: DAVID H. MURDOCK RESEARCH INSTITUTE (DHMRI) FROM THE DECISION BY THE CABARRUS COUNTY BOARD OF EQUALIZATION AND REVIEW DENYING THE APPLICATION FOR PROPERTY TAX EXEMPTION FOR CERTAIN PROPERTY FOR TAX YEAR 2008.

No. COA11-1480

(Filed 1 May 2012)

Taxation—ad valorem—late application for exemption—taxpayer's exempt status—motion to dismiss properly denied—exemption properly granted

The North Carolina Property Tax Commission (PTC) properly denied Cabarrus County's motion to dismiss and reversed the Cabarrus County Board of Equalization and Review's denial of a taxpayer's late application for exemption from *ad valorem* taxes. The PTC appropriately reviewed the materials presented by both parties prior to the hearing and based its decisions on competent evidence. Furthermore, the County had prior knowledge of the taxpayer's exempt status before seeking an assessment against it.

Appeal by Cabarrus County from final decision entered 31 May 2011 by the Property Tax Commission. Heard in the Court of Appeals 3 April 2012.

Hartsell & Williams, P.A., by Christy E. Wilhelm and Fletcher L. Hartsell, Jr., for plaintiff appellee.

Cabarrus County Attorney Richard M. Koch, for Cabarrus County defendant appellant.

McCULLOUGH, Judge.

Cabarrus County ("County") appeals from the North Carolina Property Tax Commission's ("PTC") final decision denying the County's Motion to Dismiss ("Motion") and reversing the Cabarrus County Board of Equalization and Review's ("Board") denial of David H. Murdock Research Institute's ("DHMRI") late application for exemption from *ad valorem* taxes for the year 2008. Based on the following, we affirm the decision of the PTC.

I. Background

The North Carolina Research Campus ("NCRC") is an educational and scientific biotechnical campus located in Kannapolis, Cabarrus County, North Carolina. The NCRC was established to improve the health and nutrition of people by creating a partnership between both public and private North Carolina universities to study these subjects. The principal laboratory on the NCRC is the David H. Murdock Core Laboratory Building Condominium and DHMRI owns Unit 1 of the Core Laboratory, which is a unique area housing DHMRI's operations and equipment.

DHMRI is a private foundation organized under Internal Revenue Code § 509(a)(3), Type I, which supports university-related scientific research. Under North Carolina law, this classification allows DHMRI to be exempt from ad valorem taxes. Furthermore, DHMRI was incorporated with the North Carolina Secretary of State as a non-profit corporation on 30 March 2007. During a three-year span ending in 2005, the County and DHMRI worked together to establish Tax Increment Financing, which provided the County with knowledge of the tax status of DHMRI's various pieces of property.

The beginning of the *ad valorem* tax year for 2008 was 1 January 2008, which happened to be a reevaluation year. DHMRI's deadline for filing an application for exemption from *ad valorem* taxes was 31 January 2008. The County adopted its budget for fiscal year 2008-2009 on 16 June 2008. However, the County had assessed the Core Labor-atory on 8 April 2008 and DHMRI received a tax bill for $449,910.58 on 23 July 2008. The total assessment to Unit 1 of the Core Laboratory, which was still under construction, was $40,170,588.00. On 1 December 2008, DHMRI filed a late application with the County for exemption from *ad valorem* taxes for the year 2008 pursuant to N.C. Gen. Stat. § 105-278.1, based on it being "for nonprofit educational, scientific, literary, or charitable purposes" under N.C. Gen. Stat. § 105-278.7(a)(1) (2011).

The Board held a hearing on 10 December 2008 to review DHMRI's late application. At the hearing, DHMRI allegedly did not attempt to explain the lateness of its application, but merely contended that it was entitled to exemption based on it being a charitable organization. DHMRI, on the other hand, claims that it attempted to present evidence of its reason for lateness, but was interrupted by the County Assessor, who was Clerk to the Board. The County Assessor told the Board that any consideration of the late application could have serious budgetary implications and that he, personally, did not like late applications. Subsequently, on 17 December 2008, the Board notified DHMRI of its denial of DHMRI's late application. DHMRI then filed its notice of appeal to the PTC on 15 January 2009. On 1 July of that same year, DHMRI received a letter from the Internal Revenue Service stating that it had been granted tax exempt status under Internal Revenue Code § 501(c)(3), retroactive to 30 March 2007.

DHMRI filed its Form AV-14 Application for Hearing with the PTC on 29 November 2010. The County then filed its Motion on 1 February 2011, seeking to have DHMRI's appeal dismissed. DHMRI filed a response to the Motion to which it attached an affidavit of Gerald A. Newton, analyzing the Board's handling of late exemption applications for other taxpayers in the County over the previous four years. Mr. Newton had previously served on the Board and was in a position to interpret the Board's meeting minutes. The PTC held a hearing on 23 March 2011, to address the Motion. At the hearing, the County objected to Mr. Newton's affidavit based on DHMRI's failure to attach the minutes of the Board's meetings reviewed by Mr. Newton. However, it appears from the transcript of the hearing that the PTC summarily overruled the County's objection without comment. Ultimately, the PTC denied the Motion and stated that it was not referring the case back to the Board for rehearing. On 31 May 2011, Chairman Terry L. Wheeler issued a written final decision on behalf of the PTC, granting DHMRI the exemption. The County filed its notice of appeal to this Court on 30 June 2011.

II. Analysis

The County's sole argument on appeal is that the PTC exceeded its authority by deciding the case on the merits when the sole issue before it at the hearing was the Motion. More specifically, the County contends the hearing was a preliminary hearing and that the issue of whether or not the Board improperly denied DHMRI's late application should be addressed in a later evidentiary hearing. We disagree.

This Court may review a decision from the PTC as provided in N.C. Gen. Stat. § 105-345.2(b) (2011), which states:

> The court may affirm or reverse the decision of the [PTC], declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the [PTC's] findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the [PTC]; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

Moreover, we must " 'review all questions of law *de novo* and apply the whole record test where the evidence is conflicting to determine if the [PTC's] decision has any rational basis.' " *In re Appeal of Pavillon Int'l*, 166 N.C. App. 194, 197, 601 S.E.2d 307, 308 (2004) (quoting *In re Univ. for the Study of Human Goodness & Creative Grp. Work*, 159 N.C. App. 85, 88-89, 582 S.E.2d 645, 648 (2003)).

> Under a *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the [PTC]." *In re Appeal of the Greens of Pine Glen Ltd. Part.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). An appellate court may not replace the [PTC's] judgment with its own judgment when there are two reasonably conflicting views of the evidence. *In re Appeal of Perry-Griffin Foundation*, 108 N.C. App. 383, 393, 424 S.E.2d 212, 218 (1993). Instead, when there are two reasonably conflicting results which could be reached, this Court is required,
>
> > 'in determining the substantiality of evidence supporting the agency's decision, to take into account evidence contradictory to the evidence on which the agency decision relies. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

> > If the whole record supports the [PTC's] findings, the decision of the [PTC] must be upheld.'
>
> *Pavillon*, 166 N.C. App. at 197, 601 S.E.2d at 308 (quoting *In re Univ. for the Study of Human Goodness & Creative Grp. Work*, 159 N.C. App. at 89, 582 S.E.2d at 648).

In re Appeal of Totsland Preschool, Inc., 180 N.C. App. 160, 163, 636 S.E.2d 292, 295 (2006).

> The [PTC] constitutes the State Board of Equalization and Review for the valuation and taxation of property in the State. It shall hear appeals from the appraisal and assessment of the property of public service companies as provided in G.S. 105-333. The [PTC] may adopt rules needed to fulfill its duties.

N.C. Gen. Stat. § 105-288(b) (2011). Under N.C. Gen. Stat. § 105-282.1(a) (2011), "[e]very owner of property claiming exemption or exclusion from property taxes under the provisions of this Subchapter has the burden of establishing that the property is entitled to it[,]" and "must file an application for the exemption or exclusion annually during the listing period." In the case at hand, the listing period ends on 31 January of each calendar year. Owners of property eligible for exemption under N.C. Gen. Stat. § 105-278.7 must file an application in their initial year of eligibility. N.C. Gen. Stat. § 105-282.1(a)(2), (a)(2)(a). However,

> [u]pon a showing of good cause by the applicant for failure to make a timely application, an application for exemption or exclusion filed after the close of the listing period may be approved by the Department of Revenue, the board of equalization and review, the board of county commissioners, or the governing body of a municipality, as appropriate. An untimely application for exemption or exclusion approved under this subsection applies only to property taxes levied by the county or municipality in the calendar year in which the untimely application is filed.

N.C. Gen. Stat. § 105-282.1(a1) (2011).

The County contends the basis for the appeal to the PTC was not whether DHMRI was an exempt organization, but whether the Board abused its discretion in refusing to grant DHMRI's late exemption application. The PTC may hear appeals from the Board pursuant to N.C. Gen. Stat. § 105-290 (2011). In reviewing the Board's decision,

the PTC must adhere to N.C. Gen. Stat. § 105-290, as well as its own rules as codified in N.C. Admin. Code tit. 17, r. 11.0201 *et seq.* (April 2011). "The hearing before the [PTC] is a formal adversarial proceeding conducted under the rules of evidence as applied in the Trial Division of the General Courts of Justice. The North Carolina Rules of Civil Procedure do not apply to proceedings before the [PTC]." N.C. Admin. Code tit. 17, r. 11.0209. The County argues that all parties understood the hearing was a motion hearing and, moreover, the PTC did not require the parties to submit a pretrial order in advance, with copies of exhibits and a list of witnesses, pursuant to N.C. Admin. Code tit. 17, r. 11.0213 and –.0214. According to the County, the PTC clearly rules on motions to dismiss in the manner of a motion hearing, *In re Louisiana Pacific Corp.*, ____ N.C. App. ____, 703 S.E.2d 190 (2010), and consequently cannot preemptively decide the entire case.

Otherwise, the County contends the Motion should be considered as analogous to a Rule 12 motion to dismiss, although the North Carolina Rules of Civil Procedure do not apply. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), (c) (2011); N.C. Gen. Stat. § 105-290. In arguing so, the County notes that the purpose of a Rule 12 motion to dismiss is " 'to test the legal sufficiency of the pleading against which [the motion] is directed.' " *Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 647, 599 S.E.2d 410, 415 (2004) (citation omitted), *aff'd*, 360 N.C. 167, 622 S.E.2d 495 (2005). Ultimately, the County contends the PTC may accept as true DHMRI's assertions in its Form AV-14, with attachments, in considering the Motion, but it may not make findings of fact which are conclusive on appeal. *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979). As a result, the County claims the PTC overreached its boundaries in summarily deciding the entire case when the only matter before it was the preliminary Motion.

In response to the County's argument that the Motion should have been considered under N.C. Gen. Stat. § 1A-1, Rule 12, DHMRI claims the Motion should have been considered as if it were for summary judgment under N.C. Gen. Stat. § 1A-1, Rule 56 (2011). Although, the Rules of Civil Procedure do not apply, DHMRI contends the Motion more closely resembles one for summary judgment. N.C. Admin. Code tit. 17, r. 11.0209; N.C. Gen. Stat. § 1A-1, Rule 56. Where a trial court considers items outside the pleadings, such as affidavits or testimony, a Rule 12(b)(6) motion is converted to a motion for summary judgment. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). Moreover, N.C. Gen. Stat. § 1A-1, Rule 56(c) states,

"[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Thus, DHMRI argues there was no genuine issue of material fact and that it deserved judgment as a matter of law based on its late application being improperly denied. Although the North Carolina Rules of Civil Procedure do not apply to the PTC, we do believe the Motion more closely resembles a motion for summary judgment. *See* N.C. Admin. Code tit. 17, r. 11.0209; N.C. Gen. Stat. § 1A-1, Rule 56.

Additionally, DHMRI argues the PTC properly followed its administrative and statutory guidelines in ruling in its favor. DHMRI notes that the PTC may, but is not required to hold a prehearing conference to simplify the issues and otherwise expedite the appeal. N.C. Admin. Code tit. 17, r. 11.0208. Once the appeal was filed the County had twenty days to file an answer. N.C. Admin. Code tit. 17, r. 11.0212. Nevertheless, the County merely filed its Motion without filing a response. Moreover, each party must file copies of all documents to be reviewed at least ten days before the hearing, while also providing a copy to the opposing party. N.C. Admin. Code tit. 17, r. 11.0213. Here, DHMRI filed its response to the Motion more than ten days before the hearing and at the hearing the PTC considered the Motion, the request for hearing, and the affidavit filed by DHMRI. Based on all this information, the PTC denied the Motion and entered its final decision in DHMRI's favor.

DHMRI goes on to argue that the PTC properly denied the Motion and ruled in DHMRI's favor because the County failed to contest the facts as presented by DHMRI. In its final decision, the PTC made various findings of fact based on the evidence presented at the hearing by DHMRI. Specifically, Mr. Newton's affidavit showed that the Board had approved untimely applications in thirteen other meetings in 2008. Consequently, DHMRI contends the PTC's findings of fact were properly based on competent evidence. Furthermore, DHMRI notes that the County conceded that DHMRI was exempt from the *ad valorem* taxes. Specifically, in the Motion the County stated that it "does not dispute that [DHMRI] is a qualifying exempt organization and that its property would be exempt if a timely application for an exemption were filed." Based on this admission and the whole record, DHMRI contends the PTC's final decision was proper and that the hearing process before the Board had been unfair on its behalf.

In reviewing the whole record, we must determine whether or not the County was treated fairly throughout the hearing process. Based on the evidence before us, it appears that the County was treated properly in that the PTC appropriately reviewed the materials presented by both parties prior to the hearing and based on competent evidence denied the Motion while entering a final decision in favor of DHMRI. Clearly, the Board's decision to deny DHMRI's late application was arbitrary and capricious due to its only feasible reason for denying the application being that DHMRI had received such a large assessment, which the County had already included in its budget for the upcoming year. The County had prior knowledge of DHMRI's tax exempt status, even before seeking the assessment against DHMRI. Likewise, the Board had allowed late applications at thirteen other meetings in 2008 and there is no reason DHMRI's application should have been treated any differently. N.C. Admin. Code tit. 17, r. 11.0101 *et seq.* does not appear to contemplate the holding of more than one hearing to address an issue regarding a valuation or assessment. *See* N.C. Admin. Code tit. 17, r. 11.0209 (use of language "[t]he hearing" indicates holding of only one hearing). Thus, we cannot see that the County was prejudiced through the holding of one hearing to address all matters, as the evidence was clearly in DHMRI's favor. Consequently, we affirm the decision of the PTC in denying the Motion and reversing the Board's decision regarding DHMRI's late application.

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

STATE OF NORTH CAROLINA v. ALVIN MICHAEL WATKINS

No. COA11-1176

(Filed 1 May 2012)

Search and Seizure— motion to suppress—reasonable suspicion to stop vehicle—search incident to arrest—probable cause—warrantless search

The trial court did not err in a drug case by denying defendant's motion to suppress evidence seized during a warrantless search of the vehicle he was driving. The police officers had rea-

sonable suspicion to stop defendant's vehicle and the search of the vehicle was a valid search incident to the arrest of defendant's passenger for his possession of drug paraphernalia. Moreover, the objective circumstances provided the officers with probable cause for a warrantless search of the vehicle.

Appeal by defendant from judgment entered 19 January 2011 by Judge Alan Z. Thornburg in Graham County Superior Court. Heard in the Court of Appeals 20 February 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Marc Bernstein, for the State.

Michael E. Casterline for defendant-appellant.

HUNTER, Robert C., Judge.

Alvin Michael Watkins ("defendant") appeals from the denial of his motion to suppress evidence seized during a warrantless search of the vehicle he was driving. After careful review, we affirm.

Background

On 30 December 2009, the Graham County Sheriff's Office received an anonymous tip that a vehicle containing "a large amount of pills and drugs" would be traveling from Georgia through Macon County and possibly Graham County. The vehicle was described as a small or mid-sized passenger car, maroon or purple in color, with Georgia license plates. The caller was unable to say how many people would be in the car or what specific contraband it would be carrying. Officer Travis Brooks and Detective Jeremy Spencer ("the officers"), the department's narcotics investigators, decided the most likely route for the vehicle would be along NC Highway 28. Both men were experienced officers with specific training in narcotics investigation. The officers set up surveillance of NC Highway 28 that night in a single unmarked vehicle but did not see any vehicles matching the description given by the anonymous informant.

The next morning the officers again set up surveillance along NC Highway 28 near the Swain/Graham County line, this time in combination with officers from Swain County and the Cherokee Tribal Police. Graham County's canine handler, Officer Brian Stevens, was on standby. The officers followed several vehicles they considered to be a possible match to the description provided by the anonymous informant. At approximately 1:30 p.m. the officers were informed by

Officer Jason Gardener, who was conducting surveillance of NC Highway 28 in Swain County, that a small purple Chevrolet was approaching.

As the vehicle passed, the officers pulled out approximately three or four car lengths behind it to confirm that it was bearing Georgia license plates. As the officers' vehicle entered the highway, the Chevrolet made an abrupt lane change into the left lane without signaling and slowed down by approximately five to 10 miles per hour. The driver then maintained a speed below the speed limit and remained in the passing lane. Detective Spencer recognized this behavior by the driver as an attempt to avoid being stopped.

The officers ran the vehicle's license plate and discovered the vehicle was registered to Christopher Corey Jackson ("Jackson"). Jackson was a former resident of Graham County who was known to the officers to have outstanding arrest warrants. Although the officers were "pretty sure" that the driver of the vehicle was not Jackson, they were unable to see who was sitting in the passenger seat. They also observed that the driver appeared "really nervous," repeatedly looking in his rearview mirrors and glancing over his shoulder. The officers pulled the vehicle over for a traffic stop.

After coming to a stop the driver of the Chevrolet, later identified as defendant, got out of the vehicle, and approached the officers' car. Officer Brooks testified that he was trained to recognize that a driver exiting a vehicle and approaching an officer after being stopped is a sign "there's something in the vehicle that's illegal[.]" The officers asked defendant to get back in the vehicle but he refused to do so and stated that he did not have an active driver's license. The officers observed that defendant appeared nervous and that he was repeatedly looking into the vehicle and back at the officers. Officer Brooks informed defendant that he had been pulled over due to his lane change without signaling and because the car was registered to a person with outstanding arrest warrants. Detective Spencer walked around to the passenger side of the vehicle to talk to the passenger. The passenger identified himself as Henry Conway Watkins ("Conway"), defendant's brother.

Detective Spencer observed Conway putting something in his pocket as the officers approached. The officers patted down both occupants with their consent and found a metallic marijuana pipe in Conway's pocket. Detective Spencer placed Conway in custody for possession of drug paraphernalia.

Approximately five minutes after the Chevrolet was stopped, Officer Stevens arrived with Graham County's drug-sniffing dog. He waited less than two minutes for the other officers to move defendant and his brother away from the vehicle before leading the dog around the vehicle. On sniffing the exterior of the vehicle, the dog alerted at one of the rear passenger doors indicating the presence of narcotics. Officer Stevens opened the rear passenger door and placed the dog inside the vehicle. The dog attempted to climb under the front passenger seat and gave clear indications of narcotic odor. Officer Stevens testified that the dog was trained to detect the presence of narcotic odor including marijuana, methamphetamine, heroin, cocaine, and synthetic derivatives thereof, including opiate-based prescription pills, with a detection rate of 96 to 97 percent.

On the basis of the dog's alert and the pipe found in Conway's pocket, the officers decided to search the Chevrolet. Chief Deputy Gardener from Swain County searched the passenger side of the vehicle and found a brown grocery bag under the passenger seat that was tied closed and that contained pill bottles. The bag contained four large bottles of prescription narcotics; one bottle contained 23 pills and three bottles contained 80-100 pills each. Defendant and Conway denied any knowledge of the contents of the bag. However, defendant stated that he was on his way to meet someone to exchange the bag for $900 and half of an ounce of marijuana.

Defendant was issued a warning ticket for changing lanes without signaling. However, defendant was arrested and indicted for: two counts of trafficking in opium or heroin; maintaining a vehicle used for keeping and selling a controlled substance; felony possession of a Schedule II controlled substance; felony possession with intent to deliver a Schedule II controlled substance; felony possession of a Schedule III controlled substance; felony possession with intent to deliver a Schedule III controlled substance; and for driving while his license was revoked. Defendant moved to suppress all evidence recovered during the traffic stop on the basis that the officers had acted unconstitutionally in stopping and searching his vehicle. A hearing was held on the suppression motion before Judge Alan Z. Thornburg in Graham County Superior Court on 18 January 2011. At the conclusion of the hearing, the trial court denied the motion.

Following the denial of his suppression motion, defendant pled guilty to two counts of trafficking in opium and one count each of: possession with intent to deliver Schedule III controlled substances; felony possession of Schedule III controlled substances; maintaining

a vehicle used for keeping and selling a controlled substance; felony possession of Schedule II controlled substances; possession with intent to deliver Schedule II controlled substances; and driving while license revoked. All charges were consolidated into one charge and judgment entered for level II trafficking in opium; defendant was sentenced to a term of 90 to 117 months imprisonment and fined $100,000.00. Defendant appeals the denial of his motion to suppress.

Discussion

Pursuant to N.C. Gen. Stat. § 15A-979(b) (2011), "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." Such an appeal is permitted, however, only where the defendant has indicated his intent to appeal before the plea negotiations are finalized. *State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979). Upon review of the record and the transcript of the hearing on defendant's motion, it is unclear whether defendant gave notice of appeal. While there are ample facts to indicate that both the State and the trial court were aware of defendant's intent to appeal, we grant defendant's petition for writ of certiorari.

The scope of review on appeal 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. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Conclusions of law, however, are reviewed *de novo*. *State v. Hernandez*, 170 N.C. App. 299, 304, 612 S.E.2d 420, 423 (2005).

N.C. Gen. Stat. § 15A-977(f) (2011) states that in ruling on a motion to suppress evidence "[t]he judge must set forth in the record his findings of facts and conclusions of law." In interpreting this statute, our Supreme Court has held that "[i]f there is no material conflict in the evidence on voir dire, it is not error to admit the challenged evidence without making specific findings of fact[.]" *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980). This is because "the necessary findings are implied from the admission of the challenged evidence." *Id.*

Upon denial of defendant's motion to suppress the trial court did not make oral findings of facts or conclusions of law, but requested the State to prepare a written order. The order does not appear in the

record. However, we do not reach this issue as defendant makes no argument regarding the lack of a written order. *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned."); *State v. McCain*, ____ N.C. App. ____, ____ n.3, 713 S.E.2d 21, 27 n.3 (2011) (citing N.C. R. App. P. 28(a) and declining to address the lack of a written order denying the defendant's motion to suppress where the defendant did not raise the issue on appeal). Additionally, although the trial judge did not make any specific findings of fact, the facts were not materially disputed. Rather, defendant argues the trial court erred as a matter of law in denying his motion to suppress.

Defendant first argues that the trial court erred by denying his motion to suppress the evidence found during the search of the vehicle because the officers were not justified in stopping the vehicle. We disagree.

The federal constitution protects "[t]he right of the people to be secure . . . against unreasonable searches and seizures[.]" U.S. Const. amend. IV. A traffic stop is a "seizure" under the Fourth Amendment that may be held constitutional if based upon a reasonable suspicion that criminal activity is afoot. *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (citing *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)). Reasonable suspicion requires " '[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.' " *Id.* (quoting *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994)).

In *Styles*, our Supreme Court concluded that a police officer's observation of the defendant's unsignaled lane change, in violation of N.C. Gen. Stat. § 20-154(a) (2007), satisfied the reasonable suspicion standard required to stop the defendant's vehicle. *Id.* at 416-17, 665 S.E.2d at 441; *see* N.C. Gen. Stat. § 20-154(a) (2011) (requiring driver of a vehicle to give a signal before turning from a direct line of travel "whenever the operation of any other vehicle may be affected by such movement"). However, the defendant in *Styles* committed the traffic violation immediately in front of the police officer's vehicle, thereby making apparent the potential effect of the lane change on another vehicle. *Id.; see State v. McRae*, 203 N.C. App. 319, 323, 619 S.E.2d 56, 59 (2010) (holding that an unsignaled lane change on a road with "medium" traffic and executed a short distance in front of the police

officer's car justified a traffic stop). Here, the State's evidence established the officers were following three to four car lengths behind defendant's vehicle when he changed lanes. While Officer Brooks testified that shortly after the stop there was "heavy traffic" on the road with "a lot of vehicles going by," there are insufficient facts in the record to determine whether the lane change may have affected another vehicle. Indeed, the officers only issued defendant a warning ticket for " 'conduct constituting a potential hazard to the motoring public which does not amount to a clear-cut, substantial violation of the motor vehicle laws.' "

Assuming, *arguendo*, that defendant's unsignaled lane change was not sufficient to justify the traffic stop, the lane change in combination with the anonymous tip and defendant's other activities were sufficient to give an experienced law enforcement officer reasonable suspicion that some illegal activity was taking place: defendant's slow speed while driving in the passing lane, his frequent glances in his rearview mirrors, his repeated glances over his shoulder, and that he was driving a car registered to another person. *See State v. Fisher*, ____ N.C. App. ____, ____, ____ S.E.2d ____, ____, 2012 WL 924885 at *4 (No. COA11-980) (Mar. 20, 2012) (noting that the defendant's nervousness and the fact the he was driving a car registered to another person were "appropriate factor[s] to consider in a reasonable suspicion analysis" (citing *State v. Euceda-Valle*, 182 N.C. App. 268, 274-75, 641 S.E.2d 858, 863 (2007))). Moreover, not only was defendant not the owner of the vehicle, but the owner was known by the officers to have outstanding arrest warrants. It was reasonable to conclude that the unidentified passenger may have been the owner of the vehicle. Taken together these facts provided reasonable suspicion to justify the stop of defendant's vehicle. Defendant's argument is overruled.

Defendant next argues that even if the stop of his vehicle was proper, under the holding of *Arizona v. Gant*, 556 U.S. 332, 351, 173 L. Ed. 2d 485, 501 (2009), the search of the vehicle was not constitutional as he did not have access to the vehicle at time of the search and it was not reasonable for the officers to believe they would find evidence of the crime for which he was arrested. Although the record indicates that defendant was not arrested until after the search of the vehicle, we conclude the search was a valid search incident to the arrest of defendant's passenger for his possession of drug paraphernalia.

In *Gant*, the United States Supreme Court held that the federal constitution authorizes police to "search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching dis-

tance 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.* The North Carolina Supreme Court recently applied the holding of Gant in *State v. Mbacke*, ____ N.C. ____, ____, 721 S.E.2d 218, 222 (2012), and concluded that the "reasonable to believe" standard set forth in *Gant* "parallels" the reasonable suspicion standard necessary to justify a *Terry* stop. *Id.* at ____, 721 S.E.2d at 222. Thus, "when investigators have a reasonable and articulable basis to believe that evidence of the offense of arrest might be found in a suspect's vehicle after the occupants have been removed and secured, the investigators are permitted to conduct a [warrantless] search of that vehicle." *Id.*

The holdings of *Gant* and *Mbacke* do not distinguish between the arrest of the driver or a passenger, instead referring only to an "occupant." *Gant*, 556 U.S. at 351-52, 173 L. Ed. 2d at 501-02 (Scalia, J., concurring) ("[W]e are speaking here only of a rule automatically permitting a search when the driver or an occupant is arrested."); *Mbacke*, ____ N.C. at ____, 721 S.E.2d at 222. Therefore, we apply the same standard to a search incident to the arrest of a passenger. We conclude the officers had a reasonable belief that evidence relevant to Conway's possession of drug paraphernalia might be found in the vehicle, and thus the search of the vehicle was constitutional.

Moreover, we conclude the objective circumstances of this case provided the officers with probable cause for a warrantless search of the vehicle. In *Gant*, the Court cited *United States v. Ross*, 456 U.S. 798, 809, 72 L. Ed. 2d 572, 584 (1982), which allows a search of a vehicle if the search is "based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained." *See Gant*, 556 U.S. at 347, 173 L. Ed. 2d at 498 (noting that if there is "*probable cause* to believe a vehicle contains evidence of criminal activity," then "*Ross* allows searches for evidence relevant to offenses *other than the offense of arrest*, and the scope of the search authorized is broader" (emphasis added)). As stated in *Ross*, the scope of such a warrantless search is limited by "the object of the search and the places in which there is probable cause to believe that it may be found." 456 U.S. at 824, 72 L. Ed. 2d at 593. Here, the drug paraphernalia found on defendant's passenger, the anonymous tip, the outstanding arrest warrants for the car's owner, defendant's nervous behavior while driving and upon exiting the vehicle, and the alert by the drug-sniffing dog provided probable cause for the warrantless search of the vehicle. *See State v. Washburn*, 201 N.C. App. 93, 100,

685 S.E.2d 555, 560 (2009) ("[A] positive alert for drugs by a specially trained drug dog gives probable cause to search the area or item where the dog alerts."), *disc. review denied*, 363 N.C. 811, 692 S.E.2d 876 (2010). Defendant's argument that the warrantless search of the vehicle was unconstitutional is overruled.

Conclusion

For the reasons stated above, we conclude that the trial court did not err in denying defendant's motion to suppress.

Affirmed.

Chief Judge MARTIN and Judge STEPHENS concur.

STATE OF NORTH CAROLINA v. RANSOM MARTIN JONES

No. COA11-1330

(Filed 1 May 2012)

1. **Indigent Defendants—instructions to attorney—defer to defendant's wishes—theory unsupported by fact or law—no instruction required**

   The trial court did not err in a murder case by failing to instruct appointed defense counsel pursuant to *State v. Ali*, 329 N.C. 394, to comply with his client's wishes. The decision on whether to present theories of misconduct and conspiracy that had no basis in fact was clearly distinguishable from the tactical decision at issue in *Ali* (whether to use a peremptory challenge to strike a juror). Because nothing in our case law requires counsel to present theories unsupported in fact or law, the trial court did not err in failing to instruct counsel to defer to defendant's wishes.

2. **Constitutional Law—waiver of counsel—trial court's advice not erroneous—compliance with statutory requirements**

   Defendant's waiver of his constitutional right to counsel was not invalid in a murder case. The trial court did not erroneously advise defendant about his rights pursuant to *State v. Ali*, 329 N.C. 394, and the court fully complied with the requirements of N.C.G.S. § 15A-1242 in accepting defendant's waiver of counsel.

Appeal by Defendant from judgment entered 10 February 2011 by Judge Kenneth F. Crow in Carteret County Superior Court. Heard in the Court of Appeals 3 April 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Paul M. Green for Defendant.

STEPHENS, Judge.

Factual and Procedural Background

On 10 February 2011, a jury found Defendant Ransom Martin Jones guilty of second-degree murder in the 2006 death of Sarah Slaton. This conviction followed unusually tangled legal proceedings in the trial court, which began in November 2006 when Defendant was arrested and charged with first-degree murder. Between his 2006 arrest and eventual conviction in 2011, Defendant had three attorneys serve as both his appointed counsel and as standby counsel during several periods when Defendant waived counsel and proceeded *pro se*.

Richard T. McNeil was appointed counsel for Defendant in November 2006 after Defendant's arrest. At a July 2009 pretrial motions hearing, Defendant moved the court to allow him to waive the assistance of counsel and represent himself in all proceedings. Defendant's motion was granted, and McNeil was appointed standby counsel. In August 2009, with Defendant appearing *pro se*, the case was tried to a jury and resulted in a mistrial.

At a motions hearing on 12 January 2010, Defendant asserted that he wished to represent himself at his retrial. McNeil was again appointed standby counsel. At a February 2010 hearing, McNeil was removed as standby counsel due to a medical issue. On 9 March 2010, the trial court issued an order substituting Walter Paramore as standby counsel for Defendant. On 16 March 2010, Defendant requested that Paramore serve as his attorney of record instead of standby counsel, and the trial court entered an order assigning Paramore as Defendant's attorney of record for his retrial.

On 16 June 2010, however, Defendant submitted a *pro se* motion to disqualify Paramore as his attorney. Following a hearing, the trial court made findings of fact that "[D]efendant requested that Paramore be removed for . . . not pursuing claims (prosecutorial, law enforcement, and defense attorney misconduct) that [D]efendant

thinks relevant and germane to his defense." In addition, the court found that Paramore informed the court he would not pursue Defendant's suggested claims because the claims had no merit. Paramore asserted that he was ethically precluded from pursuing such frivolous claims. As a result, the court concluded that Paramore's ability to effectively represent Defendant was substantially impaired, and on 21 June 2010, issued an order removing Paramore as Defendant's attorney. William Gerrans was subsequently appointed as Defendant's new counsel. On 14 July 2010, Gerrans filed a motion to be appointed standby counsel for Defendant on the basis of a conflict between Gerrans and Defendant (regarding Defendant's requests for Gerrans to present theories of misconduct in his defense of Defendant).

At a hearing on 17 November 2010, Defendant again expressed his desire to represent himself and signed a written waiver of counsel. The court ordered a competency examination and thereafter deemed Defendant competent to stand trial by order filed 3 December 2010. Defendant, acting *pro se*, was convicted of second-degree murder on 10 February 2011 and sentenced to 300 to 369 months in prison.

Standard of Review

This Court reviews alleged violations of constitutional rights *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007). "Under the *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. Williams*, ____ N.C. App. ____, ____, 702 S.E.2d 233, 236 (2010) (citations and quotation marks omitted).

Failure of Counsel to Comply with Defendant's Wishes

[1] Defendant first argues that the trial court erred in failing to engage Defendant in a colloquy pursuant to *State v. Ali*, 329 N.C. 394, 402, 407 S.E.2d 183, 189 (1991), and instruct appointed defense counsel to comply with his client's wishes. We disagree.

Defendant presents arguments regarding his representation by McNeil. However, because McNeil was ultimately removed as Defendant's counsel for reasons that were *unrelated to the disagreement between Defendant and his counsel*, we need not consider any alleged violation regarding McNeil's representation of Defendant. Therefore, only Defendant's representation by Paramore and Gerrans is relevant on appeal.

Defendant contends that the trial court erred in failing to instruct his appointed counsel to defer to Defendant's own wishes regarding trial strategy and his defense. Defendant wished for both Paramore and Gerrans to present a theory of police, prosecutorial, and defense attorney misconduct and conspiracy in his defense. Defendant relies on *Ali*, in which "the defendant claim[ed] the trial court denied him his right to assistance of counsel by allowing him, rather than his lawyers, to make the final decision regarding whether [a particular person] would be seated as a juror." 329 N.C. at 402, 407 S.E.2d at 189. In holding that the defendant had not been denied his right to counsel, our Supreme Court noted that "[t]he attorney is bound to comply with her client's *lawful* instructions, and her actions are restricted to the scope of the authority conferred." *Id.* at 403, 407 S.E.2d at 189 (citation and quotation marks omitted) (emphasis added).

> [T]actical decisions, such as which witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer. However, when counsel and a fully informed criminal defendant client reach an absolute impasse *as to such tactical decisions*, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship.

Id. at 404, 407 S.E.2d at 189 (citations and quotation marks omitted) (emphasis added).

Here, there exists an entirely different situation than that presented in *Ali*, where the defendant and his counsel disagreed about *tactical* decisions. Defendant in this case sought to have his attorneys follow instructions to present claims that they felt "ha[d] no merit." Thus, the impasse was not over "tactical decisions," but rather over whether Defendant could compel his counsel to file frivolous motions and assert theories that lacked any basis in fact. Nothing in *Ali* or our Sixth Amendment jurisprudence requires an attorney to comply with a client's request to assert frivolous or unsupported claims. In fact, to do so would be a violation of an attorney's professional ethics: "A lawyer *shall not* bring or defend a proceeding, or assert or controvert an issue therein, *unless* there is a *basis in law or fact* for doing so that is *not frivolous* . . ." N.C. St. B. Rev. R. Prof. Conduct 3.1 (emphasis added).

Indeed, it is to their credit that Paramore and Gerrans both recognized that complying with Defendant's requests would have vio-

lated their duties as officers of the court. In the motion to be appointed standby counsel, Gerrans stated that

> Defendant is convinced that prior counsel Richard McNeil and Private Investigator Jerry Waller somehow conspired with Prosecutor Ann Kirby and the Morehead City Police Department to "frame" the Defendant. Mr. Gerrans is certain that neither Mr. McNeil, Mr. Waller, nor Ms. Kirby did anything improper. Counsel is ethically and professionally obligated to act in compliance with the law.

Defendant had the same disagreements regarding trial strategy with Paramore, whose response was substantially the same. In its order removing Paramore, the trial court stated: "Paramore candidly informed the court that he will not pursue [D]efendant's suggested claims because [] Paramore contends that said claims have no merit and that [] Paramore is ethically precluded from pursuing such claims."

In sum, the decision in this case (whether to present theories of misconduct and conspiracy that have no basis in fact) is clearly distinguishable from the tactical decision at issue in *Ali* (whether to use a peremptory challenge to strike a juror). Because nothing in our case law requires counsel to present theories unsupported in fact or law, the trial court did not err in failing to instruct counsel to defer to Defendant's wishes. This argument is overruled.

Waiver of Counsel

[2] Defendant's second argument on appeal is that the waiver of his constitutional right to counsel was invalid because the trial court "misadvised" Defendant regarding his right to compel defense counsel to comply with Defendant's wishes where they were at an impasse. As discussed *supra*, the trial court did not erroneously advise Defendant about his rights pursuant to *Ali* (*Ali* being inapplicable to Defendant's disagreement with his appointed trial counsel), and thus Defendant's argument regarding the validity of his waiver based on *Ali* must fail.

Although Defendant does not present any argument that his waiver was invalid beyond that premised on the alleged violation of the principles established by *Ali*, in an abundance of caution, we consider whether the trial court complied with the requirements for accepting a waiver of counsel as provided in section 15A-1242 of the North Carolina General Statutes:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2011).

At the 17 November 2010 hearing, after determining that Defendant was competent to go to trial, the trial court engaged in the following colloquy with Defendant:

> The Court: We're not going to talk about the facts of your case here but I do need to make some findings here. First of all, are you thinking clearly this morning?
>
> [Defendant]: Yes, sir.
>
> The Court: Have you taken any medication or consumed any substance that would impair your judgment in any way?
>
> [Defendant]: No, sir.
>
> The Court: Do you feel okay today?
>
> [Defendant]: Yes, sir.
>
> The Court: All right. Bill Gerrans now represents you. He is your attorney; do you understand that?
>
> [Defendant]: Yes, sir.
>
> The Court: He's indicated to me that once again you've confirmed to him that you wish to have him withdrawn and that he just serve as what's called Standby Counsel and that you be allowed to represent yourself; did you hear Mr. Gerrans say that?
>
> [Defendant]: Yes, sir.

The Court: Do you wish to represent yourself, Ransome?[1]

[Defendant]: Yes, sir.

The Court: Are you sure about that?

[Defendant]: Yes, sir.

The Court: Now once again, we've talked about this several times and I believe you understand that the Court is of the opinion that, that would be a mistake; is that true?

[Defendant]: Yes, sir.

The Court: And you understand that Mr. Gerrans is of the opinion that, that would be a mistake. Do you understand that to be the case?

[Defendant]: Yes, sir.

The Court: You also understand, and I believe the Court has told you before, that regardless of what the Court thinks about it and regardless of what Mr. Gerrans thinks about it, it's important as to what you think about it. Do you understand that?

[Defendant]: Yes, sir.

The Court: And that I will not impose my judgment on you if I'm satisfied that you're making an informed decision that you have the capacity to do that. Do you understand that?

[Defendant]: Yes, sir.

The Court: Now, you understand that if you are convicted of first-degree murder that the Court has no choice but to punish you by way of a sentence of the rest of your life in prison; do you understand that?

[Defendant]: Yes, sir.

The Court: And you also understand that the first trial resulted in a hung jury?

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1. Earlier in the hearing, the trial judge had noted that he and Defendant had encountered each other in various legal proceedings over many years, and the judge subsequently began referring to Defendant by his first name. In addition, Defendant's name is spelled "Ransome" in the hearing transcript, but appears on the conviction and judgment as "Ransom."

[Defendant]: Yes, sir.

The Court: Okay. And do you understand that the district attorney might have the benefit of using whatever transpired at the first trial to tweak or hone the way he presents evidence in this next coming trial. Do you understand that?

[Defendant]: Yes, sir.

The Court: Do you have any questions of the Court, Ransome? Is there anything that you want to say other than you just want to represent yourself because if you would like to make a statement or make a presentation or showing to the Court I'm going to listen to anything that you have to say.

[Defendant]: Nothing right now, Your Honor, except that I would just like Mr. Gerrans to talk about the motions that he's filed.

The Court: So before the Court rules on your motion to withdraw Mr. Gerrans and represent yourself, you want him to prosecute the motions on your behalf?

[Defendant]: Yes, sir.

The Court: I understand that. Here's the deal though and I probably am going to allow that.

[Defendant]: Yes, sir.

The Court: But if we get to the point where the Court subsequently withdraws Mr. Gerrans and puts him as standby counsel, what we can't do, Ransome, is like during the trial go back and forth between Mr. Gerrans representing you and Mr. Gerrans not representing you. We can't jump in and out of those particular status because Mr. Gerrans is either going to be your attorney or he's just going to be there to be of counsel to you in the event that you wish to ask him a question. Does that make sense to you?

[Defendant]: Yes, sir.

The Court: By way of illustration, if the Court withdraws Mr. Gerrans and has him as standby counsel, he'll be there during the trial. If you have a question during jury selection you can reach over and ask Mr. Gerrans a question or whisper to him and he'll whisper to you and he might give you his thoughts on

> the matter or give you some advice as to what to do. But ultimately when the Court makes a decision, the Court will be looking for you to make a statement as opposed to Mr. Gerrans.
>
> If it comes to opening statements or examination of witnesses or decisions as to whether or not to testify, you can call upon Mr. Gerrans during the course of the trial and ask upon him for his advice but ultimately it will be up to you to decide whether or not to make an opening statement, a closing argument, what questions to ask a witness, whether or not to testify. Do you understand all of that?
>
> [Defendant]: Yes, sir.
>
> The Court: All right. Do you have any questions about any of that?
>
> [Defendant]: No, sir.

At the conclusion of the hearing, the court stated:

> The Court is satisfied that Mr. Jones understands the nature and consequences of his actions. He understands the gravity of this case. He understands what the possible punishment could be if convicted. He understands the seriousness of the offense. He's clearly of sound mind. He's thinking clearly and he has unequivocally expressed to the Court his desire to represent himself.

In addition to the extensive colloquy between the trial court and Defendant at that hearing, Defendant also signed a written waiver of counsel on the same date.

The quoted colloquy establishes that, during the hearing, the court advised Defendant of his right to continue with Gerrans as his appointed attorney or to represent himself and have Gerrans act as standby counsel, satisfying subsection (1) of our State's waiver of counsel statute. The court further explained the role and limits of standby counsel and emphasized that final decisions during trial would be Defendant's responsibility. The court had also previously suggested strongly that Defendant *not* proceed *pro se*, explaining that Gerrans was an experienced criminal defense attorney who would represent Defendant ably. These exchanges ensured that Defendant understood the consequences of his decision as required by subsec-

tion (2). In addition, the court informed Defendant that he faced a charge of first-degree murder, which would result in a sentence of life in prison if Defendant was convicted, satisfying subsection (3). Thus, the court fully complied with the requirements of section 15A-1242. Accordingly, this assignment of error is overruled.

NO ERROR.

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

IN RE VICTORIOUS RONE BY AND THROUGH ARDEAL AND DIANNE ROSEBORO, PETITIONERS, V. WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION, RESPONDENT

No. COA11-642

(Filed 1 May 2012)

Attorney Fees—administrative appeal—not authorized

The trial court erred in an administrative appeal from the Winston-Salem/Forsyth County Board of Education's decision upholding a student's assignment to an alternative learning center by awarding attorney fees to petitioners' counsel pursuant to 42 U.S.C. § 1988. Because this case was not an action or proceeding under 42 U.S.C § 1983, the trial court lacked authority to award fees under § 1988.

Appeal by petitioners and respondent from order entered 15 March 2011 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 9 November 2011.

The Roseboro Law Firm, PLLC, by John Roseboro, for petitioners.

Womble Carlyle Sandridge & Rice, PLLC, by Reid C. Adams, Jr., Gemma L. Saluta, and Jonathan R. Reich, for respondent.

Tharrington Smith, L.L.P., by Deborah R. Stagner; and North Carolina School Boards Association, by Allison B. Schafer, General Counsel, for North Carolina School Boards Association, amicus curiae.

GEER, Judge.

Petitioners Ardeal and Dianne Roseboro and respondent Winston-Salem/Forsyth County Board of Education ("the Board") cross-appeal from the trial court's award of attorney's fees to petitioners' counsel pursuant to 42 U.S.C. § 1988 (2006). Because this case was not an action or proceeding under 42 U.S.C § 1983 (2006), the trial court lacked authority to award fees under § 1988. We, therefore, reverse and remand to the trial court for further proceedings.

Facts

On 10 November 2008, petitioners filed a petition for judicial review seeking review of the final decision of the Board affirming Victorious Rone's assignment to an alternative learning center for the 2008-2009 academic year. The petition invoked the superior court's jurisdiction under N.C. Gen. Stat. §§ 115C-45(c) and 115C-391(d) (2009). It alleged that "[t]he decision of the board of education upholding Victorious Rone's assignment to the Alternative Learning Center violates constitutional provisions, state law, and local board policy; was made upon unlawful procedure; is affected by other error of law; is unsupported by substantial evidence; and is arbitrary and capricious." With respect to the allegation of "unlawful procedure," the petition contended that the Board's "procedures violated Victorious Rone's due process rights under the federal and state constitutions, and local board policy . . . ."

The petition asked the superior court to reverse the decision upholding the assignment to the alternative learning center, that Victorious be returned to regular classes, and that the Board be ordered to expunge all references to the assignment from Victorious' official record. Finally, the petition asked "[t]hat the costs of this action, including reasonable attorney's fees, be taxed to Respondent . . . ."

The superior court, "[a]fter a full review of the Record, the transcript of the hearing below, the briefs and supporting cases," entered an order upholding the Board's decision. The court noted with respect to petitioners' claim for violation of federal and state due process rights that "[o]n appeal of a decision of a school board, a trial court sits as an appellate court and reviews the evidence presented to the school board." The court then concluded that Victorious' due process rights were not violated.

Petitioners appealed to this Court, which concluded, contrary to the superior court, that petitioners had shown a violation of Victorious' due process rights. *Rone v. Winston-Salem/Forsyth Cnty.*

Bd. of Educ., 207 N.C. App. 618, 630, 701 S.E.2d 284, 293 (2010). The Court reversed and remanded to the superior court with instructions to further remand to the Board "to expunge Rone's assignment to the [alternative learning center] for the 2008-09 school year." *Id.* at 632, 701 S.E.2d at 294. The Court further mandated that "on remand, the superior court should determine whether petitioners are entitled to the costs of the proceedings." *Id.*

Upon remand, petitioners filed a Motion for Costs and Attorney's Fees, citing as authority 42 U.S.C. § 1988 and N.C. Gen. Stat. §§ 6-1 and 7A-305 (2009). The motion sought $60,030.00 in attorney's fees and $1,565.71 in costs. As grounds for the motion, petitioners asserted that "[t]his is an action to which 42 U.S.C. § 1983, 1988 apply" because "[i]n their petition for judicial review, Petitioners alleged, among other things, that the decision was made in violation of Petitioner Victorious Rone's constitutional right to procedural due process."

On 15 March 2011, the superior court entered an order awarding attorney's fees and expenses under 42 U.S.C. § 1988 in the amount of $50,000.00. The superior court noted that North Carolina is a notice pleading state and concluded that the petition for judicial review gave the Board "sufficient notice that Petitioners alleged a violation of the federal constitution" and that they were seeking attorney's fees and costs. Petitioners and the Board each timely appealed to this Court.

Discussion

The central question for this appeal is whether the superior court had authority to award attorney's fees and expenses under 42 U.S.C. § 1988. 42 U.S.C. § 1988(b) provides in pertinent part: "In any action or proceeding to enforce a provision of . . . § 1983 of this title . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ."

In this case, petitioners argue that because they contended that the Board violated Victorious' right to procedural due process under the federal constitution, this case constitutes an action under 42 U.S.C. § 1983. 42 U.S.C. § 1983 authorizes an injured party to bring "an action at law, suit in equity, or other proper proceeding for redress" against a party who, acting under color of law, subjected the injured party "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

Contrary to petitioners'—and the superior court's—assumption, the mere assertion of a federal constitutional violation does not transform a legal proceeding into a § 1983 proceeding that carries with it the right to seek fees under § 1988. *In N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc.*, 479 U.S. 6, 15, 93 L. Ed. 2d 188, 198, 107 S. Ct. 336, 341-42 (1986), the United States Supreme Court emphasized that attorney's fees may be awarded under 42 U.S.C. § 1988 only by "a court in an action to enforce one of the civil rights laws listed in § 1988 . . . ."

Consequently, the issue before us is whether this case is an "action or proceeding to enforce . . . § 1983." 42 U.S.C. § 1988. This proceeding was brought by way of a petition for judicial review under N.C. Gen. Stat. § 115C-45(c). Section 115C-45(c) first authorizes an appeal to the local school board from, among other decisions, a final administrative decision regarding the discipline of a student under specified statutes, including, at the time of the petition, N.C. Gen. Stat. § 115C-391, the basis for the discipline in this case.[1] Section 115C-45(c) further provides that "[a]n *appeal* of right brought before a local board of education . . . may be further *appealed* to the superior court of the State on the grounds that the local board's decision is *in violation of constitutional provisions*, is in excess of the statutory authority or jurisdiction of the board, is made upon unlawful procedure, is affected by other error of law, is unsupported by substantial evidence in view of the entire record as submitted, or is arbitrary or capricious." (Emphasis added.)

Consequently, in this case, the superior court was " 'sit[ting] in the posture of an appellate court and [did] not review the sufficiency of evidence presented to it but review[ed] that evidence presented to the [local board].' " *In re Alexander v. Cumberland Cnty. Bd. of Educ.*, 171 N.C. App. 649, 654, 615 S.E.2d 408, 413 (2005) (quoting *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 12, 565 S.E.2d 9, 17 (2002)). While petitioners could have added a cause of action invoking the superior court's original jurisdiction and seeking redress for injuries resulting from the violation of the federal constitution, petitioners did not do so.

Under N.C. Gen. Stat. § 115C-391(e), judicial review by the superior court was required to be "in accordance with Article 4 of Chapter 150B of the General Statutes." Chapter 150B is the Administrative

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1. N.C. Gen. Stat. § 115C-391 was repealed effective 23 June 2011. 2011 N.C. Sess. Laws ch. 282, § 1.

Procedure Act and, under N.C. Gen. Stat. 150B-51(b)(1) (2009), which falls within Article 4, the superior court was authorized only to affirm, remand, or reverse or modify the decision of the Board if that decision was "[i]n violation of constitutional provisions." In other words, the authority invoked by petitioners' petition for judicial review included only review of the Board's administrative decision and could not encompass the assertion of a new cause of action, such as a claim for relief under 42 U.S.C. § 1983. Simply put, this proceeding was an administrative appeal.

The United States Supreme Court's decision in *Webb v. Bd. of Educ. of Dyer Cnty., TN*, 471 U.S. 234, 85 L. Ed. 2d 233, 105 S. Ct. 1923 (1985), established that attorney's fees, as a general matter, may not be awarded under § 1988 for administrative proceedings. In *Webb*, the plaintiff, after prevailing in a § 1983 action challenging the termination of his employment, sought attorney's fees not only for time spent in the actual § 1983 action but also for time spent in an administrative appeal of his discharge before a school board. *Id.* at 237, 85 L. Ed. 2d at 239, 105 S. Ct. at 1925.

The Court held that "[b]ecause § 1983 stands as an independent avenue of relief and petitioner could go straight to court to assert it," the school board "[a]dministrative proceedings established to enforce tenure rights created by state law simply [were] not any part of the proceedings to enforce § 1983." *Id.* at 241, 85 L. Ed. 2d at 241, 105 S. Ct. at 1927 (internal quotation marks omitted). The petitioner was, therefore, "not automatically entitled to claim attorney's fees for time spent in the administrative process . . . ." *Id.*

Following the reasoning in *Webb*, if a party cannot in an actual action brought under 42 U.S.C. § 1983 recover for time spent in a separate administrative proceeding, then there is no basis for awarding fees under § 1988 when petitioners pursued only administrative remedies and never filed an independent action under 42 U.S.C. § 1983 at all. Under *Webb* and *Crest Street Community Council*, this case was not an action to enforce § 1983.

The Court in *Webb* acknowledged that a "discrete portion of the work product from the administrative proceedings" could be included within a § 1988 fee award if that work "was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached" when the plaintiff became a prevailing party. *Webb*, 471 U.S. at 243, 85 L. Ed. 2d at 242, 105 S. Ct. at 1928. Since, however, petitioners never filed a § 1983 action, *Webb* precludes peti-

tioners from seeking recovery for any of the tasks performed in the administrative proceeding.

Petitioners attempt to suggest that their motion for costs somehow transformed this administrative proceeding into a § 1983 action. Not surprisingly, petitioners cite no authority indicating that a party may, for the first time, assert a cause of action in a motion for costs. Logically, petitioners' theory is procedurally impossible. Section 1988 allows fees only to the prevailing party, while N.C. Gen. Stat. § 6-1 (2011) authorizes a trial court to award costs "[t]o the party for whom judgment is given . . . ." In other words, by the time a party files a motion for costs, the proceeding must be over—a motion for costs cannot be a vehicle to initiate a new cause of action or transform the nature of the proceeding that has already concluded.

Consequently, the superior court in this case had no authority to award attorney's fees to petitioners under § 1988. We, therefore, reverse the trial court's order and do not address petitioners' argument regarding the sufficiency of the award. On remand, however, the superior court must consider whether petitioners are entitled to an award of fees under N.C. Gen. Stat. § 6-19.1 (2011) and whether petitioners are entitled to recover their costs apart from fees.

Reversed and remanded.

Judges STEELMAN and BEASLEY concur.

STATE OF NORTH CAROLINA v. FRED ADAMS, Defendant and BANKERS INSURANCE COMPANY, Surety

No. COA11-988

(Filed 1 May 2012)

Sureties—motion to set aside bond forfeiture—defendant failed to appear on two prior occasions—actual notice—denial of motion proper

The trial court properly concluded that N.C.G.S. § 15A-544.5(f) barred the surety from having defendant's bond forfeiture set aside. Defendant's shuck provided sufficient evidence that defendant had failed to appear in court on two previous occasions and the surety had actual notice of this fact where defendant's release

order included an explicit finding that defendant had previously failed to appear on two occasions.

Appeal by surety from order entered 21 April 2011 by Judge Keith O. Gregory in Wake County District Court. Heard in the Court of Appeals 14 December 2011.

Tharrington Smith, LLP, by Rod Malone and Benita N. Jones, for appellee Wake County Board of Education.

Bryant Saunders, PLLC, by Ta-Letta Saunders, for appellant Bankers Insurance Company.

CALABRIA, Judge.

Bankers Insurance Company ("surety") appeals the trial court's order denying its motion to set aside the forfeiture of a bond posted by surety on behalf of Fred Adams ("defendant"). We affirm.

I. Background

On 29 July 2009, defendant was charged with misdemeanor failure to file/pay income taxes. After his subsequent arrest, defendant posted a $5,000 appearance bond which was issued by Financial Casualty & Surety.

On 21 January 2010, defendant failed to appear in court as required and an order for arrest ("OFA") was issued. However, the OFA was recalled that same day by the district court judge and the failure to appear was stricken. On 11 May 2010, defendant again failed to appear in court, a new OFA was issued, and his case was rescheduled for 30 June 2010. Defendant again failed to appear on that date.

Defendant was subsequently re-arrested on the OFA. On 19 August 2010, the bail agent for surety issued defendant a $20,000 bond and defendant was released from custody. Defendant's release order included a finding by the magistrate that defendant had previously failed to appear two or more times in the instant case.

On 25 August 2010, defendant again failed to appear at his scheduled court appearance, and an OFA was issued. The bond issued by surety was forfeited. On 14 October 2010, surety filed a motion to set aside the forfeiture. The motion was opposed by the Wake County Board of Education.

After a hearing, the trial court denied surety's motion. The court concluded that surety had notice, via the release order, of defendant's previous failures to appear and that, as a result, N.C. Gen. Stat. § 15A-544.5(f) required the court to deny surety's motion. Surety appeals.

II. Standard of Review

In a hearing on a motion to set aside a bond forfeiture, "the standard of review for this Court 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." *State v. Dunn*, 200 N.C. App. 606, 608, 685 S.E.2d 526, 528 (2009).

III. Bond Forfeiture

Surety argues that the trial court erred by denying its motion to set aside defendant's bond forfeiture. We disagree.

N.C. Gen. Stat. § 15A-544.5 governs the procedure under which a bond forfeiture may be set aside. This statute specifically forbids the trial court from setting aside a bond forfeiture under certain circumstances:

> (f) Set Aside Prohibited in Certain Circumstances.—No forfeiture of a bond may be set aside for any reason in any case in which the surety or the bail agent had actual notice before executing a bail bond that the defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed. Actual notice as required by this subsection shall only occur if two or more failures to appear are indicated on the defendant's release order by a judicial official. The judicial official shall indicate on the release order when it is the defendant's second or subsequent failure to appear in the case for which the bond was executed.

N.C. Gen. Stat. § 15A-544.5(f) (2011). In the instant case, the trial court relied upon this provision in concluding that surety was not entitled to relief from forfeiture. Surety contends that this conclusion was erroneous and that the trial court's order included several findings of fact which were not supported by competent evidence.

A. Failure to Appear

Surety first challenges the trial court's finding that defendant had previously failed to appear on 11 May 2010 and 30 June 2010. Surety

argues that the trial court's finding that defendant failed to appear on 30 June 2010 is not supported by any evidence.

The trial court based its finding that defendant had failed to appear on 30 June 2010 upon a notation on the outside of defendant's district court file ("shuck"). The notation, "CF 6-30-10," meant that defendant's name had been called out in district court and he failed to respond on that date. Surety contends that this notation was insufficient because the shuck did not also contain an OFA for defendant after he failed to appear on that date. Surety argues that an OFA is statutorily required when a defendant fails to appear and that without an OFA, the trial court could not find that defendant failed to appear.

N.C. Gen. Stat. § 15A-305 governs OFAs. Under this statute, "[a]n order for arrest *may* be issued when . . . [a] defendant who has been arrested and released from custody pursuant to Article 26 of this Chapter, Bail, fails to appear as required." N.C. Gen. Stat. § 15A-305 (2011) (emphasis added). Thus, contrary to surety's argument, this statute does not require a court to issue an OFA when a defendant fails to appear. It merely permits the court to do so. *See Felton v. Felton*, 213 N.C. 194, 198, 195 S.E. 533, 536 (1938) ("The word 'may' as used in statutes in its ordinary sense is permissive and not mandatory."). Accordingly, surety's argument that an OFA was required to be issued after defendant failed to appear on 30 June 2010 is without merit.

In the instant case, it is undisputed that defendant failed to appear on 11 May 2010, and that as a result, the court issued an OFA. That OFA was still outstanding when defendant failed to appear on his next scheduled court date, 30 June 2010. Consequently, it was unnecessary for the trial court to issue a second OFA. Defendant's shuck clearly notes that he failed to appear in court as required on 30 June 2010. This notation fully supports the trial court's finding. This argument is overruled.

B. Notice of Defendant's Failure to Appear

Surety next contends that the trial court erred in finding that surety had actual knowledge that defendant had already failed to appear on two or more occasions before surety executed defendant's bond. Pursuant to N.C. Gen. Stat. § 15A-544.5(f), "[a]ctual notice as required by this subsection shall only occur if two or more failures to appear are indicated on the defendant's release order by a judicial official."

Surety does not dispute that defendant's release order contains an explicit finding that "defendant was arrested or surrendered after failing to appear in a prior release order . . . two or more times in this case." Rather, surety claims that it determined after an independent investigation that this finding was erroneous. Surety states that its agent performed a search of the court system's computerized database and determined that defendant had only forfeited a bond once previously, for defendant's failure to appear on 11 May 2010. There was no information in the database regarding defendant's failure to appear on 30 June 2010. Surety contends that since the database did not indicate a forfeiture for 30 June 2010 and there was no OFA for that date placed in defendant's shuck, its agent should have been free to disregard the finding on the release order.

However, surety's reasoning is inconsistent with the plain language of N.C. Gen. Stat. § 15A-544.5(f). The statute only requires a finding on a release order "when it is the defendant's second or subsequent *failure to appear* in the case for which the bond was executed." N.C. Gen. Stat. § 15A-544.5(f) (2011)(emphasis added). Thus, it is only a defendant's failure to appear in court that is relevant to the judicial official who is entering a release order. The statute contains no requirements regarding the number of bond forfeitures or OFAs, and we may not judicially impose such additional requirements. *See State v. Davis*, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010)("[C]ourts must give [an unambiguous] statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." (internal quotations and citation omitted)). Accordingly, the fact that surety's investigation only revealed one prior bond forfeiture and one prior OFA is immaterial. As previously noted, defendant's shuck provided sufficient evidence that defendant had failed to appear on 11 May 2010 and 30 June 2010, and thus, the finding on defendant's release order was proper.

Since defendant's release order included a finding, supported by the evidence from his shuck, which reflected that he had previously failed to appear on two or more occasions, the trial court properly found that surety had actual notice as defined by N.C. Gen. Stat. § 15A-544.5(f). This finding, in turn, supported the trial court's conclusion that surety was not entitled to relief from forfeiture. This argument is overruled.

IV. Conclusion

The trial court's finding of fact that defendant had failed to appear on two prior occasions was supported by competent evidence, because defendant's shuck demonstrated that he had failed to appear on 11 May 2010 and 30 June 2010. Moreover, defendant's prior failures to appear were noted on his release order, and therefore supported the trial court's finding that surety had actual notice as defined by N.C. Gen. Stat. § 15A-544.5(f). Accordingly, the trial court properly concluded that N.C. Gen. Stat. § 15A-544.5(f) barred surety from having the forfeiture set aside. The trial court's order is affirmed.

Affirmed.

Judges BRYANT and STROUD concur.

MASSIE HORSLEY AND DENNY HORSLEY, PLAINTIFFS v. HALIFAX REGIONAL MEDICAL CENTER, INC., DEFENDANT

No. COA11-1443

(Filed 1 May 2012)

Medical Malpractice—gross negligence—Rule 9(j) certification—not needed

The trial court erred by concluding that plaintiffs' gross negligence complaint alleged medical malpractice and by dismissing plaintiffs' complaint for failure to include a Rule 9(j) certification. The decision of whether to offer a cane to a patient who has trouble walking is not one that requires specialized skill and, as a result, expert testimony on the matter was not necessary to develop plaintiffs' negligence case for the jury.

Appeal by plaintiffs from order entered 22 June 2011 by Judge Quentin T. Sumner in Halifax County Superior Court. Heard in the Court of Appeals 5 April 2012.

Richard E. Batts, attorney for plaintiffs.

Bonnie J. Refinski-Knight and Luke A. Dalton of Harris Creech Ward & Blackberby, attorneys for defendant.

ELMORE, Judge.

Massie Horsley and Denny Horsely (together plaintiffs) appeal from an order dismissing their complaint without prejudice for failure to include a Rule 9(j) certification and ordering them to pay the costs of Halifax Regional Medical Center, Inc. (defendant). We reverse.

On 17 June 2008, Massie was admitted to the psychiatric unit of Halifax Regional Medical Center for a recurring nervous condition. Massie had difficulty walking and standing, and at the time of her admission, her husband, Denny, sought to bring Massie's walker or cane into the hospital. Denny was told not to include these items, because the hospital would provide Massie with everything she needed. The psychiatrist who admitted Massie then informed the nurses that she had trouble standing.

On the evening of 17 June 2008, Massie was preparing to walk to the cafeteria for her evening meal. She exited her room and stood against the wall near the nurses' station. While standing there she said aloud that she was going to fall. None of the nurses offered Massie a wheel chair, cane, or walker. She then fell to the floor and sustained injuries.

On 16 June 2010 plaintiffs filed suit against defendant for Massie's injuries, alleging gross negligence. Defendant then filed a motion to dismiss for failure to comply with N.C.R. Civ. P., Rule 9(j). In that motion, defendant argued that plaintiffs' complaint alleged medical malpractice, but that plaintiffs "failed to certify that they have had a health care provider who reviewed the medical records of this action prior to filing suit and who will testify that the medical care did not comply with the applicable standards of care." The trial court agreed, and entered an order dismissing plaintiffs' suit without prejudice and assessing defendant's costs against plaintiffs. In that order the trial court stated that plaintiffs "pled a medical malpractice action" and that plaintiffs "have had an opportunity to have the case reviewed by a healthcare provider . . . but have not yet done so[.]" Plaintiffs now appeal.

Plaintiffs first argue that the trial court erred in dismissing their complaint for failure to include a Rule 9(j) certification. Specifically, plaintiffs argue that the trial court erred in concluding that their complaint alleged medical malpractice. We agree.

"This Court must conduct a de novo review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C.*

Forest Prods., Inc., 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003), *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673-74 (2003). "Rule 9(j) of the North Carolina Rules of Civil Procedure provides that complaints alleging medical malpractice by a health care provider . . . shall be dismissed unless the complaint specifically asserts that the medical care has been reviewed by a person who will qualify as an expert witness or by a person the complainant will seek to have qualified as an expert witness." *Lewis v. Setty*, 130 N.C. App. 606, 607-08, 503 S.E.2d 673, 674 (1998) (quotations and citations omitted). "A medical malpractice action . . . is defined as a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish *professional services* . . . by a health care provider. *Professional services* has been defined by this Court to mean an act or service . . . involving specialized knowledge, labor, or skill[.]" *Id.* at 608, 503 S.E.2d at 674 (quotations and citations omitted) (emphasis added). A hospital is considered a health care provider. *See* N.C. Gen. Stat. § 90-21.11 (2011).

Here, plaintiffs' primary argument on appeal is that the nurses' decision, whether to provide Massie with a cane, involved a matter of ordinary care and did not require the exercise of clinical judgment and intellectual skill. Defendant argues the opposite and relies on this Court's ruling in *Sturgill v. Ashe Mem'l Hosp., Inc.*, as the basis for its argument.

In *Sturgill*, the plaintiff brought a claim against the hospital for the death of her father. There, the nurses failed to apply restraints to the plaintiff's father and he fell out of his hospital bed and died. The plaintiff alleged that "[i]f he had been *properly restrained*, [my father] would not have been able to have gotten out of bed and fallen." 186 N.C. App. 624, 630, 652 S.E.2d 302, 306 (2007) (emphasis in original). This Court concluded that "the decision to apply restraints is a medical decision requiring clinical judgment and intellectual skill" and that "plaintiff's complaint is a claim for medical malpractice, thus requiring [R]ule 9(j) certification." *Id.* However, in reaching this conclusion we found that "[i]t is undisputed in the record that the use of restraints is a medical decision that *normally requires an order written by a physician or physician's assistant.* It is also undisputed in the record that [a] medical assessment for the use of restraints can be delicate and complex, and as such, requires the application of clinical judgment." *Id.*

We find the facts of the case *sub judice* to be distinguishable from *Sturgill*. Here, nothing in the record indicates that the decision to offer a cane to a patient requires a written order or a medical assessment. Rather, that decision more closely mirrors the cases in which we have held that the actions of the healthcare provider did not require specialized skills.

In *Norris v. Rowan Memorial Hospital, Inc.*, the plaintiff sued the hospital for failure of its nurses to raise her bed side rails, causing her to fall out of her bed and be injured. We held that the nurses' actions "did not involve the rendering or failure to render professional nursing or medical services requiring special skills, [and that] expert testimony on behalf of the plaintiff as to the standard of due care prevailing among hospitals in like situations is not necessary to develop a case of negligence for the jury." 21 N.C. App. 623, 626, 205 S.E.2d 345, 348 (1974).

Likewise, in *Lewis* the plaintiff sued a physician for failure to lower the examination table prior to transferring him from his wheelchair to the table. We held that "the removal of the plaintiff from the examination table to the wheelchair did not involve an occupation involving specialized knowledge or skill, as it was predominately a physical or manual activity. It thus follows that the alleged negligent acts of the defendant do not fall into the realm of professional medical services." 130 N.C. App. at 608, 503 S.E.2d at 674. We then held that "[i]t was not necessary, therefore, for the plaintiff to specifically comply with Rule 9(j) and the dismissal must be reversed." *Id.* at 609, 503 S.E.2d at 674.

Here, we conclude that the decision of whether to offer a cane to a patient who has trouble walking is not one that requires specialized skill. As a result, expert testimony on the matter is not necessary to develop a case of negligence for the jury. Accordingly, we reverse the decision of the trial court dismissing plaintiffs' complaint and assessing defendant's costs against plaintiffs.

Reversed.

Judges GEER and THIGPEN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 MAY 2012)

ALLEN DESIGN ASSOCS. No. 11-724	Mecklenburg (10CVS2602)	No Error
BANK OF CAROLINAS v. BURKETT No. 11-1115	Forsyth (10CVS3979)	Affirmed
CRAVER v. RAYMOND No. 11-600	Watauga (07CVS607)	Affirmed in part; reversed and remanded in part
CURTIS v. CURTIS No. 11-1350	Caldwell (07CVD216)	Affirmed in Part; Reversed and Remanded in Part
DODEKA, L.L.C. v. COBB No. 11-860	Wayne (09CVD94)	Affirmed
DULANEY v. INMAR, INC. No. 11-1273	Forsyth (11CVS2591)	Affirmed
ELLISON v. DANA CORP. No. 11-950	Ind. Comm. (488865)	Affirmed
HERSHNER v. ESC No. 11-1425	Wake (10CVS7760)	Affirmed
IN RE A.E.F. No. 11-1432	Harnett (10JT14-16)	Affirmed
IN RE A.N. No. 11-1297	Catawba (08JT166-170)	Affirmed
IN RE A.N.M. No. 11-1250	Jackson (11JA16)	Affirmed
IN RE C.M. No. 11-1356	New Hanover (10JA157-158)	Affirmed
IN RE C.M.H. No. 11-1253	Henderson (08JT152)	Affirmed
IN RE FORECLOSURE OF WILSON No. 11-1487	Mecklenburg (10SP9920)	Dismissed
IN RE G.C. No. 11-1520	Martin (10JA9-10)	Affirmed
IN RE H.G.K. No. 11-1408	Johnston (08JT170-172)	Affirmed

IN RE J.J.C. No. 11-1605	New Hanover (07JT183) (07JT184) (07JT215)	Affirmed
IN RE K.B.G. No. 11-1495	Mitchell (09J32)	Reversed and Remanded
IN RE L.L. No. 11-1460	Alleghany (11JA14-15)	Reversed and Remanded
IN RE S.H. No. 11-1452	Wake (10JT14-15)	Affirmed
IN RE S.L.B. No. 11-1261	Forsyth (00JT121) (00JT147)	Vacated in part and remanded in part
IN RE W.Z.P. No. 11-1483	Buncombe (09JT284)	Affirmed
KEARNEY v. BARKER No. 11-883	Granville (08CVS712)	Reversed in part; dismissed in part
MCCOLLUM v. MCCOLLUM No. 11-903	Rockingham (09CVD1814) (09CVD1844) (10CVD1168)	Affirmed
MELSON v. CRANE No. 11-1237	Craven (07CVD1934)	Affirmed
RIGGS v. BURNS No. 11-1306	Currituck (11CVS48)	Affirmed
SCHWEIZER v. PATTERSON No. 11-1371	Transylvania (06CVD486)	Reversed and and Remanded
STATE v. BETTIS No. 11-1334	Durham (10CRS60281)	No Error
STATE v. BRIGMAN No. 11-1174	Buncombe (11CRS51094-95) (11CRS51097-98)	No Error
STATE v. CAMP No. 11-1122	Catawba (09CRS55586) (10CRS7968)	Vacated and remanded for resentencing.
STATE v. CHAMBERS No. 11-1121	Durham (09CRS53042)	No Error
STATE v. FELTON No. 11-1145	Wayne (09CRS54565) (09CRS54567)	No Error

STATE v. FRIEND No. 11-1322	Hertford (09CRS50425)	Vacated in part and remanded
STATE v. GLEASON No. 11-1439	Guilford (10CRS24798-99) (10CRS92339)	No Prejudicial Error
STATE v. GOODE No. 11-1299	Gaston (10CRS12289) (10CRS58321-22)	No Error
STATE v. HALL No. 11-1141	Wake (10CRS203841)	No Error
STATE v. HOLMES 11-1175	Johnston (09CRS50730)	Affirmed in part; No. Remanded for Correction of Clerical Error
STATE v. JEGEDE No. 11-1368	Forsyth (10CRS25415) (10CRS59447)	No Error
STATE v. KENNEDY No. 11-1214	Moore (08CRS53313) (09CRS31) (09CRS50739)	Affirmed
STATE v. KERR No. 11-749	Sampson (08CRS53496-97)	No Prejudicial Error
STATE v. LATHAM No. 11-1304	Beaufort (09CRS53059) (09CRS703334)	No Error
STATE v. LOCKLEAR No. 11-844	New Trial (04CRS53850)	Robeson
STATE v. MCNAIR No. 11-1150	Edgecombe (10CRS50988)	No error in part; Vacated and Remanded in part
STATE v. MCNEIL No. 11-1290	Sampson (07CRS54006)	No Error
STATE v. MUNN No. 11-1202	Onslow (08CRS51892)	No Error
STATE v. OXENDINE No. 11-1473	Robeson (09CRS2295)	No error in part; vacated and remanded in part
STATE v. PENNY No. 11-772	Durham (08CRS54143)	No Error

STATE v. RASH No. 11-1327	Cleveland (08CRS51592) (08CRS51598-600)	No Error
STATE v. RICHARDSON No. 11-640	Nash (08CRS1875-77) (08CRS50627)	No Error
STATE v. SHERLIN No. 11-405	Buncombe (09CRS56976) (10CRS255)	No Error
STATE v. SMITH No. 11-674	Wake (09CRS12546-47) (09CRS16245)	No Error
STATE v. TRIVETTE No. 11-1378	Ashe (08CRS50964-66)	Affirmed
STATE v. WATLINGTON No. 11-1243	Rockingham (10CRS1326) (10CRS51339-340)	No Error
STATE v. WILLIAMS No. 11-1288	Durham (09CRS895-896) (09CRS900)	No Error
STATE v. WRIGHT No. 11-841	Wayne (08CRS53979) (08CRS53981-82)	No Error
STATE v. YORK No. 11-807	Forsyth (10CRS16262) (10CRS56987)	Vacated and Remanded
STEPHENSON v. TIME WARNER CABLE INC. No. 11-1192	Orange (09CVS1752)	Affirmed
TRIVETT v. STINE No. 11-1339	Granville (09CVS1303)	Affirmed

BEROTH OIL COMPANY, PAULA AND KENNETH SMITH, BARBARA CLAPP, PAMELA MOORE CROCKETT, W.R. MOORE, N&G PROPERTIES, INC. AND ELTON V. KOONCE, PLAINTIFFS v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA11-1012

(Filed 15 May 2012)

1. Appeal and Error—interlocutory orders and appeal—denial of class certification—substantial right

The Court of Appeals addressed the merits of plaintiffs' appeal from the trial court's interlocutory order denying plaintiffs' motion for class certification as the order affected a substantial right.

2. Class Actions—denial of class certification—ends-means analysis proper—failure to establish existence of class

The trial court did not abuse its discretion in denying plaintiffs' motion for class certification of their inverse condemnation claim. The court trial correctly relied upon "ends-means" analysis in concluding that individual issues would predominate over common issues and that plaintiffs failed to establish a class. The Court of Appeals did not reach the issue of whether the class action mechanism would have been the superior method for adjudication of the matter.

3. Appeal and Error—inverse condemnation—equal protection—not properly before court

Plaintiffs' argument that the trial court's order in an inverse condemnation case resulted in unequal treatment for similarly situated property owners was not addressed as it was not properly before the Court of Appeals.

Appeal by Plaintiffs from order entered 20 May 2011 by Judge Lindsay R. Davis, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 8 February 2012.

Hendrick Bryant Nerhood & Otis, LLP, by Matthew H. Bryant, T. Paul Hendrick, Timothy Nerhood, and Kenneth C. Otis III, for Plaintiff-appellants.

Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury, for Defendant-appellee.

HUNTER, JR., Robert N., Judge.

Beroth Oil Company, Barbara Clapp, Pamela Moore Crockett, W.R. Moore, N&G Properties, Inc., Elton V. Koonce, and Paula and Kenneth Smith (collectively, "Plaintiffs") appeal from the trial court's 20 May 2011 order denying Plaintiffs' motion for class certification pursuant to Rule 23 of the North Carolina Rules of Civil Procedure. For the following reasons, we affirm.

I. Factual & Procedural Background

Plaintiffs are owners of real property located in Forsyth County in an area, hereinafter referred to as "the Northern Beltway," designated by the North Carolina General Assembly for highway construction. *See* N.C. Gen Stat. § 136-175 et seq. (2011). The proposed development consists of a 34-mile highway that loops around the northern part of Winston-Salem. The project ("the Northern Beltway Project") contemplates development of two sections: a section extending from U.S. 158 to U.S. 52 in western Forsyth County ("the Western Loop"), and a section extending from U.S. 52 to U.S. 311 in eastern Forsyth County ("the Eastern Loop").[1] Plaintiffs own property in both sections of the proposed development area.

On 6 October 1997, acting pursuant to powers vested in it under § 136-44.50 et seq. of our General Statutes (hereinafter referred to as "the Map Act"), Defendant North Carolina Department of Transportation ("NCDOT") filed a transportation official corridor map for State project R-2247 with the Forsyth County Register of Deeds. Project R-2247 entails construction of the Western Loop section of the Northern Beltway Project and extends across approximately 579 parcels of land in western Forsyth County. The corridor map was

> prepared for the purpose of setting forth the location of portions of the proposed Western Loop. Any property included within the Roadway Corridor shown on the Official Map is subject to restrictions on the issuance of building permits and subdivision approvals, and may be eligible for a special tax valuation.

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1. The Northern Beltway Project has been in the works for more than two decades. In 1989, our General Assembly established the North Carolina Highway Trust Fund to finance the construction of "urban loops" around designated urban areas. *See* N.C. Gen. Stat. § 136-175 et seq. (2011). The area encompassed by the Northern Beltway Project was and remains designated for development. N.C. Gen. Stat. § 136-180 (2011).

NCDOT subsequently filed corridor maps on 26 November 2008 in furtherance of State projects U-2579 and U-2579A, which contemplate development of the Eastern Loop section of the Northern Beltway Project. State projects U-2579 and U-2579A span across between 1,808 and 1,929 parcels located in the eastern portion of Forsyth County.[2] Along with each of these corridor maps, NCDOT filed a list of landowners who, based upon Forsyth County tax records, owned real property within the protected corridor and would therefore be affected by these maps of reservation.

When a corridor map is filed, the Map Act imposes certain statutory restrictions on landowners within the corridor. N.C. Gen. Stat. § 136-44.51 (2011). These include restrictions on the development of the affected property:

> (a) After a transportation corridor official map is filed with the register of deeds, no building permit shall be issued for any building or structure or part thereof located within the transportation corridor, nor shall approval of a subdivision . . . be granted with respect to property within the transportation corridor.

N.C. Gen. Stat. § 136-44.51(a) (2011).

The Map Act provides for three forms of administrative relief in order to alleviate the potentially negative impact of these restrictions. First, the Map Act authorizes NCDOT to acquire individual parcels within the protected corridor where the acquisition is determined "to be in the best public interest to protect the transportation corridor from development or when the transportation corridor official map creates an undue hardship on the affected property owner." N.C. Gen. Stat. § 136-44.53(a) (2011). To qualify for this relief, hereinafter referred to as the "Hardship Program," the affected property owner must file a written request that:

> (1) Supports the hardship acquisition by providing justification, on the basis of health, safety or financial reasons, that remaining in the property poses an undue hardship compared to others; and
>
> (2) Documents an inability to sell the property because of the impending project, at fair market value, within a time period that is typical for properties not impacted by the impending project.

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2. The parties offer conflicting figures regarding the precise number of parcels located in the Eastern Loop section of the Northern Beltway. Plaintiffs assert 1,929 parcels lie within the Eastern Loop; NCDOT avers there are 1,808 parcels within this area.

23 C.F.R. § 710.503(c) (2011). Six of the eight Plaintiffs in the instant case have not applied for administrative relief under the Hardship Program.[3] Second, landowners may apply for a building permit or subdivision plat approval, in which case the Map Act's restrictions on development are lifted a maximum of three years after the application is submitted. N.C. Gen. Stat. § 136-44.51(b) (2011). Plaintiffs have not applied for building permits or subdivision plat approvals. Third, landowners may request a variance from the Map Act's restrictions. N.C. Gen. Stat. § 136-44.52 (2011). Variances are granted where "no reasonable return may be earned from the land" and the Map Act's restrictions "result in practical difficulties or unnecessary hardships." *Id.* Plaintiffs have not applied for variances. In addition to these administrative remedies, the Map Act provides an 80 percent property tax reduction to qualifying landowners.[4] N.C. Gen. Stat. § 105-277.9 (2011).

NCDOT began acquiring properties in the Western Loop through its Hardship Program soon after recording the map of reservation for that section of the Northern Beltway Project. However, NCDOT's plans for property acquisition and development were postponed in 1999 when a coalition of citizens and owners of property within the corridor brought suit in the United States District Court for the Middle District of North Carolina and obtained an injunction prohibiting NCDOT from further acquisition and development of the Western Loop. *See generally N.C. Alliance for Transp. Reform, Inc. v. United States DOT*, 713 F. Supp. 2d 491 (M.D.N.C. 2010). The court lifted the injunction in May 2010, *id.* at 527, and NCDOT has since resumed acquisition of properties in both the Western and Eastern Loop sections of the Northern Beltway through its Hardship Program. While it is unclear precisely how many parcels NCDOT has purchased within the Northern Beltway to date, NCDOT describes the number as "over 300" as of 21 March 2011.[5]

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3. Plaintiffs Beroth Oil Company and N&G Properties, Inc. are the only Plaintiffs that have applied for early acquisition of their properties pursuant to NCDOT's Hardship Program. NCDOT has denied their applications for relief in each instance.

4. Property situated within the protected corridor "is taxable at twenty percent (20%) of its appraised value if . . . no building or other structure is located on the property[, and] [t]he property has not been subdivided . . . since it was included in the corridor." N.C. Gen. Stat. § 105-277.9 (2011).

5. At oral arguments on 8 February 2012, Plaintiffs alleged that NCDOT has acquired 41 additional properties since the filing of this suit. Plaintiffs further alleged that if NCDOT continues acquisition at its current rate, it would be another 31 years before NCDOT purchases all parcels in the Northern Beltway.

On 16 September 2010, Plaintiffs filed a complaint in Forsyth County Superior Court setting forth the following allegations regarding the Map Act and NCDOT's actions pursuant to the Map Act in furtherance of its plan to develop the Northern Beltway:

> The inordinate 13 years[6] and counting delay by NCDOT in acquiring Plaintiffs' property in the Western Loop, the filing of the Western Loop and Eastern Loop maps with the Forsyth County Register of Deeds, the restrictions on property imposed by [the Map Act], the existence of the Hardship Program, the statements of the NCDOT to Plaintiffs and Other Property Owners regarding the use of their properties, the statements of NCDOT that acquisitions in the Northern Beltway will not commence for an undetermined number of years, the expressed intent of NCDOT to depress future property values and development in the Northern Beltway, the acquisition of dozens of parcels in the Northern Beltway by NCDOT, NCDOT's demolition of homes in the Northern Beltway, the condemnation blight caused by NCDOT, and NCDOT's continued acquisition of property in the Northern Beltway subsequent to May 2010, are unequivocal, fixed and irreversible indications that NCDOT intends to purchase the Plaintiffs' Properties and Other Property Owners' properties at some future undisclosed time.

Plaintiffs further alleged that these acts "have placed a cloud upon all real property in the Northern Beltway" and "have rendered the Plaintiffs' Properties and Other Property Owners' real properties in the Northern Beltway unmarketable at fair market value, economically undevelopable, and depressed property values and rents throughout the Northern Beltway."

Based on the foregoing allegations, Plaintiffs' complaint set forth the following claims for relief against NCDOT: inverse condemnation pursuant to N.C. Gen. Stat. § 136-111 (2011) ("Claim 1"); a taking in violation of the Fifth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983 ("Claim 2"); a violation of Plaintiffs' rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983 ("Claim 3"); a taking in violation of Article I, Section 19 (the

6. As of the filing of this opinion, approximately 14 years and 7 months have passed since NCDOT filed its map of reservation for the Western Loop section of the Northern Beltway Project.

"Law of the Land" clause) of the North Carolina Constitution ("Claim 4"); and declaratory relief pursuant to N.C. Gen. Stat. § 1-260 (2011) seeking "a declaration of taking and the date of the taking[,]" or, in the alternative, "a declaration that the Hardship Program, and [the Map Act] are unconstitutional and invalid exercises of legislative power as they affect a taking by the NCDOT without just compensation and are unequal in their application to property owners" ("Claim 5"). Plaintiffs alleged these claims individually and on behalf of members of the following proposed class: "Plaintiffs and all others similarly situated who own property in the Northern Beltway in Forsyth County and are subject to [the Map Act]." Plaintiffs further alleged the proposed class members share a "genuine personal interest" in the action because they each own property subject to the Map Act's restrictions and "will continue to be damaged and injured if NCDOT is not compelled to purchase all property located in the Northern Beltway."

On 18 March 2011, Plaintiffs filed a motion for certification of the proposed class. Plaintiffs described a proposed class consisting of at least 800 members, identifiable through tax records and the maps of reservation recorded in furtherance of the Northern Beltway Project. Plaintiffs proposed bifurcated proceedings through which the class would seek to prove their common injury in the first phase of the action, and then class members would seek to prove their damages individually in the second phase. Plaintiffs also filed affidavits on behalf of each of the proposed class representatives in support of their motion for certification.

On 18 November 2010, NCDOT filed an answer and motion to dismiss Plaintiffs' claims pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure and raised the defense of sovereign immunity. NCDOT also filed a memorandum of law in support of its motion to dismiss and in opposition to Plaintiffs' motion for class certification with accompanying affidavits on 28 March 2011.

By order entered 19 April 2011, the trial court granted NCDOT's motion to dismiss Plaintiffs' Fifth Amendment taking claim (Claim 2); Plaintiffs' Fourteenth Amendment equal protection claim (Claim 3); Plaintiffs' taking claim under the North Carolina Constitution (Claim 4); and the portion of Plaintiffs' declaratory judgment claim seeking a declaration of a taking of their property and the date of the taking (first part of Claim 5). The trial court denied NCDOT's motion to dismiss Plaintiffs' inverse condemnation claim (Claim 1), and "that part of [Plaintiffs' declaratory judgment claim] seeking a declaration of unconstitutionality of [the Map Act]" (the second part of Claim 5).

Neither party has appealed from the trial court's 19 April 2011 order. Remaining to be heard before the trial court, therefore, are Plaintiffs' inverse condemnation claim pursuant to N.C. Gen. Stat. § 136-111 and Plaintiffs' declaratory judgment claim challenging the constitutionality of the Map Act.

On 20 May 2011, the trial court entered a separate order denying Plaintiffs' motion for class certification of their inverse condemnation claim. In its order, the trial court applied "ends-means" analysis and determined that Plaintiffs had failed to establish the existence of a "class" because the question of whether a taking had occurred with respect to each of the affected properties predominated over questions of law and fact common to all members of the proposed class. *See* discussion, *infra*, Part III(C)(1)(a)-(b). The trial court further concluded that even if Plaintiffs had established a class, the class action mechanism is not the superior method of adjudicating the claims at issue because "whether a taking has occurred must be determined on a property-by-property basis" and, therefore, "[n]one of the savings and expediencies that a class action offers would be realized." Plaintiffs timely filed notice of appeal from the trial court's 20 May 2011 order on 22 June 2011.

II. Jurisdiction

[1] At the outset, we note Plaintiffs' appeal is interlocutory, as the trial court's order denying Plaintiffs' motion for class certification was not a final disposition of Plaintiffs' claims. *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 192, 540 S.E.2d 324, 327 (2000) ("A class certification order is not a final judgment disposing of the cause as to all parties; the appeal of such orders is thus interlocutory."); *see also 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). An exception lies, however, where the order appealed from "affects a substantial right." N.C. Gen. Stat. § 1-277(a) (2011) ("An appeal may be taken from every judicial order or determination of a judge of a superior or district court . . . which affects a substantial right claimed in any action or proceeding[.]"); *see also* N.C. Gen. Stat. 7A-27(d)(1) (2011). "The *denial* of class certification has been held to affect a substantial right because it determines the action as to the unnamed plaintiffs." *Frost*, 353 N.C. at 193, 540 S.E.2d at 327. We adopt this rea-

soning in the instant case, and we now address the merits of Plaintiffs' appeal.

III. Analysis

[2] The sole issue presented on appeal is whether the trial court erred in denying Plaintiffs' motion for class certification of their inverse condemnation claim. Plaintiffs contend the trial court mistakenly applied the ends-means test in determining individual issues would predominate over common issues at a trial on the merits of Plaintiffs' inverse condemnation claim and that this error led to the court's erroneous conclusion that Plaintiffs had failed to prove the existence of a class. Plaintiffs further contend that even if the trial court did not err in employing ends-means analysis, the trial court erred in determining individual issues would predominate. Plaintiffs also contend the trial court's order results in unequal treatment for similarly situated property owners. Finally, Plaintiffs contend the class action mechanism represents the superior method for adjudicating their claims, as the Map Act and NCDOT's conduct taken pursuant thereto have adversely affected all members of the proposed class, and a class action would alleviate the need for individual adjudications of their common claims. After careful examination of these arguments, we hold the trial court did not abuse its discretion, and we affirm the trial court's 20 May 2011 order denying Plaintiffs' motion for class certification.

A. Standard of Review

"The trial court has broad discretion in determining whether a case should proceed as a class action." *Faulkenbury v. Teachers' & State Employees' Ret. Sys. of N.C.*, 345 N.C. 683, 699, 483 S.E.2d 422, 432 (1997). We review the trial court's decision to deny class certification for abuse of discretion. *Peverall v. County of Alamance*, 184 N.C. App. 88, 91, 645 S.E.2d 416, 419 (2007); *Nobles v. First Carolina Communications, Inc.*, 108 N.C. App. 127, 132, 423 S.E.2d 312, 315 (1992). "Under an abuse of discretion standard, we defer to the trial court's discretion and will reverse its decision 'only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.' " *Gibbs v. Mayo*, 162 N.C. App. 549, 561, 591 S.E.2d 905, 913 (2004) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)); *see also Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 547, 613 S.E.2d 322, 325 (2005) ("The trial court's decision constitutes an abuse of discretion where it is 'manifestly unsupported by reason, or so arbitrary that it could not have been the result of a

reasoned decision[.]' " (quoting *Frost*, 353 N.C. at 199, 540 S.E.2d at 331) (alteration in original)). Abuse of discretion occurs in the context of class certification " 'when (1) [the trial court's] decision [to deny class certification] rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.' " *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 300, 677 S.E.2d 1, 4 (2009) (citation omitted) (ellipsis in original).

In determining whether the trial court exceeded the broad discretion accorded to it under the abuse of discretion standard, we review issues of law *de novo*. *Id.* "Under a *de novo* review, [this Court] considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). Thus, while we afford significant deference to the trial court's ruling under the abuse of discretion standard, we review *de novo* the trial court's " ' "conclusions of law that informed its decision to deny class certification." ' " *Blitz*, 197 N.C. App. at 300, 677 S.E.2d at 4 (citations omitted). After conducting a *de novo* review of "the law underpinning the trial court's denial of class certification, we [then] turn to the specific facts of the instant case to determine if denial of class certification was proper." *Id.* at 310, 677 S.E.2d at 10. The trial court's findings of fact are binding on appeal if supported by competent evidence. *Nobles*, 108 N.C. App. at 132, 423 S.E.2d at 315.

B. Class Certification

Section 1A-1, Rule 23(a) of our General Statutes sets forth North Carolina's class action rule: "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." N.C. R. Civ. P. 23(a). The class action mechanism seeks to eliminate " 'repetitious litigation and possible inconsistent adjudications involving common questions, related events, or requests for similar relief.' " *English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 9, 254 S.E.2d 223, 230–31 (1979) (citation omitted), *overruled on other grounds by Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 354 S.E.2d 459 (1987). Rule 23 "is based on [its] federal counterpart [] as it existed prior to 1966, when North Carolina adopted a modified version of the Federal Rules of Civil Procedure for state proceedings." *Ehrenhaus v. Baker*, ____ N.C. App. ___ , ___ , 717 S.E.2d 9, 17 (2011) (citing *Crow*, 319 N.C. at

277-80, 354 S.E.2d at 463-64). Amendments to Federal Rule 23 have distinguished it from North Carolina's Rule 23; nonetheless, "the case law interpreting [Federal Rule 23] is extensive[,]" and although " 'federal cases are not binding on [North Carolina Courts,] we have held in the past that the reasoning in such cases can be instructive.' " *Id.* (citation omitted) (third alteration in original).

"The party seeking to bring a class action under Rule 23(a) has the burden of showing that the prerequisites to utilizing the class action procedure are present." *Crow*, 319 N.C. at 282, 354 S.E.2d at 465 (footnote omitted). Our Supreme Court has articulated the prerequisites for class certification as follows:

> "[A] 'class' exists under Rule 23 when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." Other prerequisites for bringing a class action are that (1) the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; (2) there must be no conflict of interest between the named representatives and members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state; (5) class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to all members of the class.

Faulkenbury, 345 N.C. at 697, 483 S.E.2d at 431 (quoting *Crow*, 319 N.C. at 280, 354 S.E.2d at 464) (internal citation omitted). "Where all the prerequisites are met, it is within the trial court's discretion to determine whether 'a class action is superior to other available methods for the adjudication of th[e] controversy.' " *Harrison*, 170 N.C. App. at 548, 613 S.E.2d at 326 (quoting *Crow*, 319 N.C. at 284, 354 S.E.2d at 466) (alteration in original). "Class actions should be permitted where they are likely to serve useful purposes such as preventing a multiplicity of suits or inconsistent results. The usefulness of the class action device must be balanced, however, against inefficiency or other drawbacks." *Crow*, 319 N.C. at 284, 354 S.E.2d at 466. "Among the matters and drawbacks the trial court may consider in its discretion involving class certification are matters of equity." *Blitz*, 197 N.C. App. at 301, 677 S.E.2d at 5 (citing *Maffei v. Alert Cable TV, Inc.*, 316 N.C. 615, 621, 342 S.E.2d 867, 872 (1986)). "[T]he trial court

has broad discretion in this regard and is not limited to consideration of matters expressly set forth in Rule 23 . . . ." *Crow*, 319 N.C. at 284, 354 S.E.2d at 466.

C. Plaintiffs' Appeal

The trial court denied Plaintiff's motion for class certification on grounds that Plaintiffs failed to prove the existence of a class. Specifically, the trial court determined Plaintiffs failed to bring forth a class because "[c]ommon issues of fact and law would not predominate" in a trial on the merits of Plaintiffs' inverse condemnation claim. Although not required to determine whether a class action represented the superior method of adjudication,[7] the trial court concluded that even if Plaintiffs had established the existence of a class, the class action mechanism would not provide the superior method for adjudication here due to the individualized nature of Plaintiffs' claims. The trial court also determined that Plaintiffs met their burden with respect to the remaining prerequisites regarding the adequacy of the class representatives and the numerosity requirement, and NCDOT has not challenged these conclusions on appeal.[8] The issue presented, therefore, is whether the trial court erred in concluding Plaintiffs failed to establish a class and, if so, whether the trial court abused its discretion in determining the matter not suitable for class adjudication.

1. Existence of a Class

Plaintiffs and all members of the proposed class appear connected by their common plight. The proposed class consists of individuals who own property within the Northern Beltway and are subject to the Map Act's restrictions. The Map Act precludes these landowners from obtaining permits to develop and increase the value of their property. The looming threat of condemnation poses a significant obstacle if they attempt to sell their property. These individuals either do not qualify for the Hardship Program, or they do qualify, but are subject to administrative discretion regarding the price at which

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7. Representing the final hurdle to class certification, the issue of whether a class action is the superior method of adjudication arises only when the party seeking class certification has established all of the prerequisites for class certification. *Crow*, 319 N.C. at 284, 354 S.E.2d at 466.

8. N.C. R. App. P. 28(c) permits an appellee 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."

NCDOT is willing to purchase their property. The mere existence of the Hardship Program indicates our Legislature's tacit acknowledgment that the Map Act adversely affects the property rights of at least some of these landowners. Moreover, any appraisal of property within the corridor—for purposes of private sale or for NCDOT's acquisition under the Hardship Program—will reflect the phenomenon of "condemnation blight" in the surrounding area alleged by Plaintiffs.[9]

Plaintiffs and all owners of real property located within the corridor have sustained the effects of government action. Whether this action constitutes a taking, however, is not the question before this Court, and we express no opinion on this issue. Rather, we must determine only whether the particular issues of law and fact to be resolved in a trial on the merits of Plaintiffs' inverse condemnation claim render the class action mechanism the proper mechanism for adjudication. In order to prove that a class action would best serve the interests of all members of the proposed class, Plaintiffs were required to demonstrate the existence of a class. As previously stated, "a 'class exists' under Rule 23 when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members." *Id.* at 280, 354 S.E.2d at 464. Plaintiffs contend a class exists and that the trial court's failure to reach this conclusion was the product of two errors: (1) the trial court's decision to employ ends-means analysis in examining Plaintiffs' takings claim; and (2) the trial court's conclusion that individual issues would predominate in a trial on the merits. We address these arguments in turn.

a. The Trial Court's Reliance Upon Ends-Means Analysis

The trial court engaged in the following analysis in determining individual issues predominate over common issues and, accordingly, Plaintiffs had failed to establish the existence of a class:

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9. " 'Condemnation blight' is a reduction in the value of condemned property that results due to the prospect of eminent domain and occurs between the time that the property is first considered for public acquisition and prior to the date of actual taking." *Nichols on Eminent Domain*, Vol. 8A, § 18.01 (2011). Here, Plaintiffs have alleged, *inter alia*, that NCDOT has purchased properties within the corridor and has not maintained these properties to the standards of other property owners within the corridor. Plaintiffs further allege that NCDOT rents these properties at less than fair market value, which has depressed rental rates for Plaintiffs and other property owners within the corridor. As the parties in the instant case acknowledge, condemnation blight is not judicially recognized in North Carolina.

> The [Map Act] contains no expression of its purpose, but there can be no reasonable dispute that at least one purpose of [the Map Act] is to protect against development of properties within the corridor which would increase the amount of which the NCDOT would be required to pay for future acquisitions. That protection of the public purse is a valid reason for exercising police power is hardly arguable. It is another question, however, whether such restrictions are "reasonable." Assuming arguendo, that they are, the second inquiry, whether the interference with the owner's rights amounts to a taking, depends on whether the interference renders the use of the property impractical and the property itself of no reasonable value.
>
> This determination would have to be made with respect to each property within the Northern Beltway. Some of those properties are improved and some are not. Some are residential and others are commercial. How the statutory restrictions affect each property will be different because each property is different. The taking question is different from computation of damages after a taking, and cases holding that differences in the amount of damages, alone, should not affect whether a class should be certified are inapposite. Common issues of fact and law would not predominate. Consequently, the plaintiffs have not defined a "class."

(Footnote and internal citation omitted).

Plaintiffs contend the trial court's reliance upon "ends-means" analysis in concluding individual issues would predominate over common issues was error, as this analysis applies only in instances where the alleged taking arises out of the State's exercise of its police power and, more specifically, only in the context of zoning regulation-based takings. Plaintiffs argue the trial court's "misapprehension of the law" in this respect was an abuse of discretion requiring remand to the trial court with instructions to apply the correct, "traditional" takings analysis. This Court has previously held a trial court's misapprehension of the law in denying class certification to constitute abuse of discretion. *Blitz*, 197 N.C. App. at 312, 677 S.E.2d at 11; *see also Nationwide Mutual Ins. Co. v. Chantos*, 298 N.C. 246, 252, 258 S.E.2d 334, 338 (1979) ("Where a ruling is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light."). For the reasons set out below, however, we hold the trial court did not err in relying upon ends-means analysis in the instant case.

Section 136-111 of our General Statutes serves as the basis for Plaintiffs' inverse condemnation claim and provides, in pertinent part:

> Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of [NCDOT] and no complaint and declaration of taking has been filed by [NCDOT] may . . . file a complaint in the superior court . . . alleg[ing] with particularity the facts which constitute said taking together with the dates that they allegedly occurred; said complaint shall describe the property allegedly owned by said parties and shall describe the area and interests allegedly taken.

N.C. Gen. Stat. § 136-111 (2011). "Inverse condemnation is simply a device to force a governmental body to exercise its power of condemnation, even though it may have no desire to do so." *Smith v. City of Charlotte*, 79 N.C. App. 517, 521, 339 S.E.2d 844, 847 (1986). "An action in inverse condemnation must show (1) a taking (2) of private property (3) for a public use or purpose." *Adams Outdoor Adver. of Charlotte v. N.C. Dep't of Transp.*, 112 N.C. App. 120, 122, 434 S.E.2d 666, 667 (1993). Thus, the question of whether Plaintiffs' properties have been "taken" is central to their inverse condemnation claim. To determine the proper takings analysis—and whether the trial court erred in employing ends-means analysis—we begin with a review of the pertinent takings law.

"The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides, *inter alia*, 'private property [shall not] be taken for public use without just compensation.' " *E. Appraisal Servs., Inc. v. State*, 118 N.C. App. 692, 695, 457 S.E.2d 312, 313 (1995) (citing *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897)).

> "The word 'property' extends to every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value. The term comprehends not only the thing possessed but also, in strict legal parlance, means the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use."

Long v. City of Charlotte, 306 N.C. 187, 201, 293 S.E.2d 101, 110 (1982) (citation omitted). The Fifth Amendment's limitation on the eminent domain power prevents government "from forcing some people alone to bear public burdens which, in all fairness and justice,

should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

> [A]lthough the North Carolina Constitution does not contain an express provision prohibiting the taking of private property for public use without payment of just compensation, this Court has inferred such a provision as a fundamental right integral to the 'law of the land' clause in article I, section 19 of our Constitution.

Finch v. City of Durham, 325 N.C. 352, 362-63, 384 S.E.2d 8, 14 (1989) (citing *Long*, 306 N.C. at 196, 293 S.E.2d at 107-08). Article I, section 19 of the North Carolina Constitution provides that "[n]o person shall be . . . in any manner deprived of his . . . property, but by the law of the land." N.C. Const. Art. 1, § 19. Indeed, our Supreme Court has described this fundamental right " 'as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken.' " *Chapel Hill Title & Abstract Co., Inc. v. Town of Chapel Hill*, 362 N.C. 649, 654, 669 S.E.2d 286, 289 (2008) (quoting *Long*, 306 N.C. at 196, 293 S.E.2d at 107-08).

In determining whether State action amounts to a taking, our Courts have employed different analyses depending upon the context in which the alleged taking occurs. "A taking does not occur simply because government action deprives an owner of previously available property rights." *Finch*, 325 N.C. at 366, 384 S.E.2d at 16 (citing *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 130 (1978)). " 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law.' " *Id.* (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). Where government action results in physical invasion of private property, the analysis focuses on the extent to which the government action interferes with the affected property owner's property rights. *Long*, 306 N.C. at 199, 293 S.E.2d at 109. These rights include "the right to possess, use, enjoy, and dispose of [the property], and the corresponding right to exclude others from its use." *Id.* at 201, 293 S.E.2d at 110. A taking occurs in this context if the government action amounts to "a substantial interference with elemental rights growing out of the ownership of property." *Id.* at 199, 293 S.E.2d at 109. In contrast, where the taking allegation arises out of State regulation, our Courts employ "ends-means" analysis in determining

whether the regulation at issue exceeds the scope of the State's police power, thereby resulting in a taking of the affected property:

> The test for a reasonable exercise of a police power rule or regulation is known as the "ends-means" test. In evaluating the regulation's effect, one first looks to the 'ends,' or goals, of the legislation to determine whether it is within the scope of the police power, and second, to the 'means,' to determine whether the interference with the owner's right to use his property as he deems appropriate is reasonable. A failure in either 'ends' or 'means' results in a taking.
>
> Within the second prong of the 'takings' analysis, the 'reasonable means' prong, a statute works a 'taking' of property if it (1) deprives the owner of all practical use of the property and (2) renders the property of no reasonable value. Mere restriction of 'practical uses' or diminishment of 'reasonable value' does not result in a 'taking.'

Weeks v. N.C. Dep't of Natural Res. & Cmty. Dev., 97 N.C. App. 215, 225, 388 S.E.2d 228, 234 (1990) (internal citations omitted).

Here, NCDOT's actions are regulatory in nature. NCDOT has filed maps of reservation to prevent further development of Northern Beltway property intended for future condemnation and development. While NCDOT possesses eminent domain power, it has not yet exercised that power. NCDOT's acquisition of properties through its Hardship Program is not an exercise of eminent domain power, but rather an attempt to mitigate the negative impact of the Map Act's restrictions on some of the affected property owners.[10]

Plaintiffs analogize this case to *Long and Dep't of Transportation v. Harkey*, 308 N.C. 148, 301 S.E.2d 64 (1983), in arguing the trial court was required to apply traditional eminent domain analysis, *i.e.*, whether NCDOT's conduct has substantially interfered with Plaintiffs' property rights resulting in a taking. *See Long*, 306 N.C. at 201, 293 S.E.2d at 110. Plaintiffs' reliance on these cases is misplaced, however, as both *Long* and *Harkey* involved instances of physical intrusion, *see id.* at 191, 293 S.E.2d at 105 (airplane flights overhead emitted noise and pollutants depressing the value of the plaintiffs' property); *Harkey*, 308 N.C. at 149, 301 S.E.2d at 65 (NCDOT project physically blocked property owners' access to abutting high-

10. We note NCDOT also acquires properties where the acquisition is in the best interest of preserving the corridor. N.C. Gen. Stat. § 136-44.53(a) (2011). This explains NCDOT's purchase of the Vienna Baptist Church for $1.6 million in August 2010.

way). The trial court recognized this distinction and analogized this case to "regulatory takings" cases, like *Finch*, that involve development limitations and variances similar to the restrictions imposed by the Map Act. The trial court applied ends-means analysis on this basis. Contrary to Plaintiffs' assertion, this Court has previously employed ends-means analysis outside the context of zoning regulation-based takings. *See*, *e.g.*, *E. Appraisal Servs.*, *Inc.*, 118 N.C. App. at 696, 457 S.E.2d at 314 (specifically holding ends-means analysis applicable outside the context of zoning regulations); *Weeks*, 97 N.C. App. at 225, 388 S.E.2d at 234 (citing *Finch* for proposition that "[t]he test for a reasonable exercise of a police power rule or regulation is known as the 'ends-means' test" and employing ends-means analysis in holding Coastal Resource Commission's denial of landowner's application to build pier on his property was not a taking); *King v. State*, 125 N.C. App. 379, 385-86, 481 S.E.2d 330, 334 (1997) (citing *Finch* in holding no taking had occurred because landowner had not been deprived of all practical use and reasonable value of her property). Our application of ends-means analysis in these cases demonstrates the broad applicability of ends-means analysis and reinforces our conclusion that the trial court did not err in employing ends-means analysis here.

Plaintiffs contend the trial court's reliance on ends-means analysis was error because NCDOT has exercised its eminent domain power, not its police power. Plaintiffs insist that the ends-means test applies only in examining State regulation under its police power, while the "substantial interference" test applies where the State has taken and condemned properties through its eminent domain power. This argument is misguided.

In *Barnes v. N.C. State Highway Comm'n*, our Supreme Court described the relationship between the police power and the eminent domain power as follows:

> The question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of eminent domain. If the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable. The state must compensate for property rights taken by eminent domain; damages resulting from the exercise of police power are noncompensable.

257 N.C. 507, 514, 126 S.E.2d 732, 737-38 (1962) (citations and quotation marks omitted).

Plaintiffs are correct in stating that police power and eminent domain power are analyzed in different terms: just compensation is required when the government flexes its eminent domain power; on the other hand, no compensation is required where the government acts within the boundaries of its police power. *See id.* Plaintiffs' argument is flawed, however, in that it assumes one analysis—the ends-means test—applies in examining police power regulation and a separate analysis—the "substantial interference" test—applies in examining the State's exercise of its eminent domain power. This is not the case. It is not the police power/eminent domain distinction that determines the applicable test; rather, it is the applicable test that determines whether the State action is an exercise of police power or eminent domain power. The applicable test, as described above, depends upon whether the State action is physically intruding upon, or merely regulating, the affected property.

To further clarify this point: "Police power" is a broad and general term that encompasses the State's power to act for the safety, health, and general welfare of its citizens. *See Finch*, 325 N.C. at 363, 384 S.E.2d at 14. Included under this umbrella of State police power is the State's eminent domain power. In the context of a regulatory taking, the relationship between police power and eminent domain power can be described as a continuum: where State regulation under its police power "goes too far," the State is, in essence, exercising its eminent domain power. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (quoting *Pennsylvania Coal Co.*, 260 U.S. at 415, for the proposition that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"). The purpose of employing the ends-means test is to determine whether the regulation at issue is a legitimate exercise of State police power, or, whether the "regulation" is in substance an exercise of eminent domain power requiring just compensation. In other words, the ends-means test is a tool used by the courts to determine whether the state has exercised its police power or its eminent domain power. The question whether NCDOT has exercised its police power versus its eminent domain power in the instant case is tantamount to asking whether NCDOT has effected a taking of Plaintiffs' property. As the merits of Plaintiffs' claims are not before this Court, we express no opinion on this issue.

In sum, the distinguishing element in determining the proper takings analysis is not whether police power or eminent domain power is at issue, but whether the government act physically interferes with or merely regulates the affected property. The trial court correctly relied upon the ends-means test in the instant case, as the alleged taking is regulatory in nature and as we have specifically held this analysis applicable outside the context of zoning-based regulatory takings. We accordingly hold the trial court did not err in relying upon ends-means analysis in examining Plaintiffs' inverse condemnation claim.

b. Individual Issues Predominate

Having determined that the trial court did not err in employing ends-means analysis, we now address whether the trial court applied this analysis correctly. Specifically, we must determine whether the trial court erred in concluding individual issues would predominate over common issues of law and fact in a trial on the merits of Plaintiffs' inverse condemnation claim. For the reasons that follow, we hold the trial court did not abuse its discretion in reaching this conclusion.

The party seeking class adjudication bears the burden of proving that each of the prerequisites for class certification is met. *Blitz*, 197 N.C. App. at 302, 677 S.E.2d at 5. Plaintiffs were required to prove before the trial court, *inter alia*, that a class exists, by showing that in litigating their claims issues of law and fact common to all prospective class members would predominate over issues of law and questions of fact unique to individual members of the proposed class. *See Faulkenbury*, 345 N.C. at 697, 483 S.E.2d at 431. This Court has described the predominance requirement as "the primary issue" upon which courts from other jurisdictions have based their decisions in ruling on motions for class certification. *Blitz*, 197 N.C. App. at 303, 677 S.E.2d at 6. The trial court is justified in denying the motion where the party seeking class certification fails to meet this requirement. *See, e.g.*, *Harrison*, 170 N.C. App. at 552, 613 S.E.2d at 328 (holding individual factual inquiries regarding contract formation among prospective plaintiffs predominated in breach of contract claim against employer). A variation in damages among the prospective plaintiffs is not a bar to class certification. *Faulkenbury*, 345 N.C. at 698, 483 S.E.2d at 432 (describing differences in amounts of recovery among class members as a "collateral issue"); *but see Perry v. Cullipher*, 69 N.C. App. 761, 763, 318 S.E.2d 354, 356 (1984) (holding no abuse of discretion in the trial court's denial of class certification where the damages might vary greatly among the parties).

Here, in order to prevail on their inverse condemnation claim, Plaintiffs must prove that NCDOT's conduct has resulted in a taking of their property. *See* N.C. Gen. Stat. § 136-111 (2011). The property interest at issue is in the nature of an easement right: Plaintiffs have relinquished their right to develop their property without restriction. *See Strickland v. Shew*, 261 N.C. 82, 85, 134 S.E.2d 137, 140 (1964) ("The grantor [of an easement right] is obligated to refrain from doing, or permitting anything to be done, which results in the impairment of the easement."). The alleged taking has occurred through a regulatory proceeding, and NCDOT has waited more than a decade to compensate Plaintiffs for their relinquished easement right. NCDOT possesses the authority to condemn Plaintiffs' property and has manifested its intent to do so, but has not yet exercised this power due to what it describes as funding constraints. The question of whether NCDOT's actions amount to a taking is a question of law common to all properties located within the protected corridor. *See Mattoon v. City of Norman*, 633 P.2d 735, 740 (Okl. 1981). Because each individual parcel of land is unique, however, and because the owner's expectations and interests in their individual properties vary, we must conclude that individual issues of fact will predominate in resolving Plaintiffs' inverse condemnation claim.

It is a well-known principle that land is unique. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 461 (1988); *Powell v. City of Newton*, 364 N.C. 562, 573-74, 703 S.E.2d 723, 731 (2010) (Hudson, J., dissenting), *reh'g denied*, ___ N.C. ___, 706 S.E.2d 241 (2011). In a trial on the merits, Plaintiffs must demonstrate (1) they have been deprived of all practical use of their property and (2) the property has been deprived of all reasonable value in order to prove their property has been taken. *See supra*, Part III(C)(1)(a); *Weeks*, 97 N.C. App. at 225, 388 S.E.2d at 234. Due to the unique nature of each individual parcel of land, and each individual property owner's interest in and expectations relating to that particular parcel, these determinations cannot be applied to the class in a general, broad-brush manner. What might constitute a taking as to one parcel of land might not constitute a taking as to others, depending on the characteristics of the land and the purpose for which the land is being used. NCDOT's actions in filing the corridor maps and acquiring properties through its Hardship Program may or may not qualify as a taking depending on a myriad of individualized evidentiary factors. While the Map Act's restrictions may be common to all prospective class members, liability can be established only after extensive examina-

tion of the circumstances surrounding each of the affected properties. Whether a particular property owner has been deprived of all practical use of his property and whether the property has been deprived of all reasonable value require case-by-case, fact-specific examinations regarding the affected property owner's interests and expectations with respect to his or her particular property.

This Court cannot know the extent of the disparity among the affected property owners in terms of their various property-related interests and expectations. The record before this Court does not provide all of the necessary information. We can determine from the record and from the trial court's findings, however, that such a disparity exists. The trial court found that some of the affected properties are improved and some are not; that some of the properties are used for residential purposes and others are used for commercial purposes. Competent evidence supports these findings and, indeed, Plaintiffs themselves highlight the diversity among the estimated 850 prospective class members in advocating for class certification. It is possible that some of these property owners have no desire to develop their property; others may intend to move out of the Northern Beltway area for reasons unrelated to NCDOT's conduct and the Map Act's restrictions. The information in the record before us is insufficient to make these determinations.

A trial on the merits will require separate inquiries into each property owner's use and expectations regarding his or her property. The court below relied upon this truth in determining that individual factual issues predominate and, accordingly, Plaintiffs had failed to establish a class. It was Plaintiffs' burden to introduce an effective methodology for bringing their claims together as a class. Within its discretion, the trial court concluded that Plaintiffs failed to meet this burden, and that Plaintiffs' inverse condemnation claim was not manageable as a class action. Because we discern no abuse of discretion in the trial court's determinations underlying its decision to deny Plaintiffs' motion for class certification, we must defer to the trial court's ruling.

The decisions of the highest courts in other jurisdictions support our conclusion that individual factual issues will predominate in resolving Plaintiffs' inverse condemnation claim. In *Basurco v. 21st Century Ins. Co.*, a California appellate court, quoting an earlier ruling by the California Supreme Court in *City of San Jose v. Superior Court*, 525 P.2d 701, 711 (Cal. 1974), stated the following

in upholding the trial court's denial of the plaintiffs' motion for class certification of their inverse condemnation claim:

> "[T]he [class action] scheme is incompatible with the fundamental maxim that each parcel of land is unique . . . . Although this rule was created at common law, the very factors giving it vitality in the simple days of its genesis take on added significance in this modern era of development. Simply stated, there are now more characteristics and criteria by which each piece of land differs from every other.
>
> We decline to alter this rule of substantive law to make class actions more available. Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going." Here, "[n]o one factor . . . will be determinative as to all parcels," and "each parcel of land is unique."

108 Cal. App. 4th 110, 120, 133 Cal. Rptr. 2d 367, 374 (2003) (citations omitted) (alterations in original).

In *Mattoon*, the Oklahoma Supreme Court squarely addressed the predominance issue in refusing to certify the plaintiff-landowners' inverse condemnation claim:

> In *Mattoon I*, we stated that the question of fact to be tried here is whether the enactment of the Ordinance did result in such a *substantial* interference with, or impairment of, the use and enjoyment of the affected land that it constitutes a taking. This determination will necessarily call for assessment of the *degree* of interference which is an element implicit in its *substantiality*. It is this inquiry—essential to *every* claim—that may tip the preponderance scales in the direction of individual questions, so as to preclude class action certification.

633 P.2d at 739 (footnote omitted). We believe it noteworthy that the *Mattoon* court applied "substantial interference" analysis—the analysis advocated for by Plaintiffs in the instant case, *see supra*, Part III(C)(1)(a)—in denying the plaintiffs request for class certification.

Although not specifically in the context of class certification, the Florida Supreme Court tangentially touched upon the predominance issue in addressing the issue of whether filing a corridor map can amount to a taking:

> [T]his Court has generally been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors-such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action-that have particular significance.
>
> Therefore, we are convinced that the taking issue may only be determined upon an individualized basis because the various property owners' interests will be different and will be affected by the thoroughfare map in a differing manner.

Palm Beach County v. Wright, 641 So. 2d 50, 54 (Fla. 1994) (quotation marks and internal citations omitted) (alteration in original). While we recognize these decisions are not controlling in the case at bar, *see Morton Bldgs., Inc. v. Tolson*, 172 N.C. App. 119, 127, 615 S.E.2d 906, 912 (2005) ("[D]ecisions from other jurisdictions may be instructive, [but] they are not binding on the courts of this State."), we find their reasoning persuasive in reaching our holding here. Accordingly, we hold the trial court did not abuse its discretion in concluding individual issues predominate over common issues.

2. Superior Method of Adjudication

Because we hold the trial court did not err in concluding that Plaintiffs failed to establish the existence of a class, we need not reach the question of whether the class action mechanism would be the superior method for adjudication of this matter. *Crow*, 319 N.C. at 284, 354 S.E.2d at 466 (failure to satisfy any one of the prerequisites precludes class certification). Although we do not reach this final prerequisite in the instant case, we find pertinent the Minnesota Supreme Court's reasoning in *Ario v. Metropolitan Airports Comm'n*, where the court held the plaintiffs' inverse condemnation claims unsuitable for class adjudication in light of the plaintiffs' proposed bifurcated proceedings:

> Plaintiffs suggest, nevertheless, that after a class action judgment adjudging a substantial invasion of property rights, the class members might then proceed in 2,000 separate condemnation actions to determine their individual damages, and at

> that time diminution in market value would be shown. To prove loss of market value, however, each property owner would have to show the nature and extent of the aircraft noise affecting his property's value, after first sifting out the non-noise factors. In other words, much the same proof that was presented in the class action would again be presented in each individual condemnation action. Diminution in market value is so wedded to noise invasion that the former cannot be proved without again proving the latter.

367 N.W.2d 509, 515 (Minn. 1985). Here, analogous to *Ario*, Plaintiffs have proposed bifurcated proceedings through which liability could be determined as to the class, collectively, in the first phase, and the class members could individually bring their damages claims in the second phase of the proceedings. These bifurcated proceedings would require duplication of evidence and would negate many of the benefits of the class action mechanism. Although unnecessary to our holding, we believe utilization of the class action mechanism here would not serve the best interests of the prospective class members, for both practical and equitable reasons.

Moreover, we stress that our holding today has no bearing on Plaintiffs' declaratory judgment claim. Plaintiffs' may still prevail in obtaining a declaration that the Hardship Program and the Map Act "are unconstitutional and invalid exercises of legislative power as they affect a taking by the NCDOT without just compensation and are unequal in their application to property owners," as that claim remains pending before the trial court. Plaintiffs do not need a class to achieve this objective. If the Map Act is declared unconstitutional to one, it is unconstitutional to all. This would afford relief to all members of the proposed class without the need for the class action mechanism.

3. Plaintiffs' Equal Protection Argument

[3] Finally, we note Plaintiffs' contention that the trial court's order results in unequal treatment for similarly situated property owners. Plaintiffs point out that the ends-means test, the test used by the trial court to determine whether a taking has occurred, employs a standard different from the standard for relief under the Hardship Program. However, the trial court denied class certification only on the basis on Plaintiffs' inverse condemnation claim. The trial court dismissed Plaintiffs equal protection claim in its 19 April 2011 order and the court raised, but did not rule on, Plaintiffs' declaratory judg-

ment claim concerning unequal application of legislative authority under the Map Act. Accordingly, this argument is not properly before this Court, and we decline to reach the merits of Plaintiffs' argument on this issue. We do note, however, that the Hardship Program addresses the proposition that all land is unique, meaning that some property owners within the Northern Beltway will be more adversely affected than others by the Map Act's restrictions. The Hardship Program provides relief to qualified property owners, regardless of whether they have endured a taking of their property in the technical sense.

IV. Conclusion

For the foregoing reasons, we hold that the trial court's order concluding that Plaintiffs failed to prove the existence of a class "was neither manifestly unsupported by reason nor so arbitrary that it could not have been the result of a reasoned decision." *Harrison*, 170 N.C. App. at 555, 613 S.E.2d at 330 (citing *Frost*, 353 N.C. at 199, 540 S.E.2d at 331). Accordingly, the trial court's 20 May 2011 order denying Plaintiffs' motion for class certification is hereby

Affirmed.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA v. DEMARIO JAQUINTA ROLLINS

No. COA11-969

(Filed 15 May 2012)

1. Evidence—prior crimes or bad acts—admitted for acceptable purpose—relevant—not unduly prejudicial

The trial court did not err in a second-degree murder case arising out of a vehicular accident by admitting evidence of defendant's shoplifting, citations for driving without a license, and actions immediately after the collision. The evidence was relevant for purposes other than to show that defendant had the propensity for the type of conduct for which he was being tried, the purposes were relevant to an issue material to the pending case, and the probative value of the evidence substantially outweighed the danger of unfair prejudice pursuant to Rule 403 of the Rules of Evidence.

2. Evidence—police officer testimony—legal conclusions—observations—no different outcome

The trial court did not commit plain error in a second-degree murder case arising out of a vehicular accident by allowing police officers to testify regarding their legal conclusions that defendant committed the criminal offenses of felony speeding to elude an officer, careless and reckless driving, and speeding over 15 miles an hour above the speed limit. The evidence was admissible under *State v. Anthony*, 354 N.C. 372, as the officers were not interpreting the law for the jury, but rather were testifying regarding their observations in order to explain why they pursued defendant in a high-speed chase. Furthermore, even if the officers' testimony had been excluded, the jury probably would not have reached a different verdict.

3. Homicide—second-degree murder—malice—sufficient evidence

The trial court did not err in a second-degree murder case by failing to dismiss the charge for insufficient evidence. The State presented sufficient evidence of all the elements of the crime, including malice.

4. Jury—instructions—duty to reach a verdict—not coercive

Although the trial court's instruction regarding the jury's duty to reach a verdict varied from the pattern jury instruction, when viewed in context, the instruction did not mislead the jury and was not, therefore, coercive of the jury's verdict.

Appeal by defendant from judgment entered 6 July 2010 by Judge Calvin E. Murphy in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 December 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

GEER, Judge.

Defendant Demario Jaquinta Rollins appeals from his conviction of second degree murder. Defendant, who had no license, collided with the victim's car during the course of a high speed chase by police. On appeal, defendant primarily argues that the State pre-

sented insufficient evidence of malice and, therefore, defendant could not be convicted of second degree murder. We find the evidence in this case materially indistinguishable from the evidence found sufficient in *State v. Mack*, 206 N.C. App. 512, 697 S.E.2d 490, *disc. review denied*, 364 N.C. 608, 704 S.E.2d 276 (2010), and *State v. Lloyd*, 187 N.C. App. 174, 652 S.E.2d 299 (2007). The trial court, therefore, properly denied defendant's motion to dismiss the second degree murder charge.

Facts

The State's evidence at trial tended to show the following facts. Defendant has never had a driver's license and twice—on 1 May 2009 and 19 May 2009—was cited for operating a motor vehicle without a license. Both citations were still pending on 22 May 2009.

On the afternoon of 22 May 2009, defendant and four women, Toni Jackson, Somona Johnson, Jalyssa Morris, and Jenesia Craig, decided to drive to Concord Mills Mall in defendant's Buick in order to shoplift. Defendant drove despite his lack of a license. Once at the mall, the group split up to shoplift, mostly taking clothes. They all left the mall, but then decided to go back to steal tennis shoes.

A manager at Finish Line shoe store saw Ms. Craig put a pair of shoes in a shopping bag. When confronted, she ran from the store, and a store employee called the police. Ms. Jackson drove defendant's car through the mall parking lot to pick up Ms. Craig.

Officer Joel Patterson of the Concord Police Department was sitting in his patrol car at the mall when he received a call about a larceny in progress with a description of the woman involved. Officer Patterson drove around the mall parking lot until he saw a woman matching that description get into the backseat of a Buick later identified as defendant's car. The Buick pulled out onto a road on the outside of the mall parking lot, and Officer Patterson immediately pulled behind the Buick, activating his blue lights and siren. Officer Curtis Anderson of the Concord Police Department also responded and started driving behind Officer Patterson.

Ms. Jackson wanted to stop when the police pulled up behind her because she also did not have a driver's license. She slowed down, and Officer Patterson thought "[i]t appeared that they were going to stop the vehicle." However, without the car ever actually stopping, defendant moved from the back seat to the front and took over driving.

Once defendant had control of the car, he immediately accelerated and made a sharp left hand turn onto Odell School Road and into the oncoming lane of traffic, although there were no cars in that lane. He continued to drive on the wrong side of the double yellow line in order to pass two cars that were in the right lane.

Defendant and the officers continued down Odell School Road toward Mallard Creek Road. Defendant was driving between 60 and 70 miles per hour in an area with a 45 mile per hour speed limit. Odell School Road has one lane traveling in each direction. When defendant wanted to pass cars heading more slowly in the same direction that he was, he used a turning lane designed for entrance into a sports complex.

At the intersection of Odell School Road and Mallard Creek Road, cars were stopped at a stop sign. To avoid the stop sign, defendant drove diagonally right across a mowed corn field, went through a ditch, and then turned right onto Mallard Creek Road. The police officers followed defendant, but used the shoulder of the road to pass the cars stopped at the stop sign.

Defendant then accelerated to 70 to 80 miles per hour, passing other cars stopped at a red light by using the left hand turn lane. At that point, Officer Patterson testified that he estimated defendant's vehicle was travelling at approximately 80 miles per hour. Defendant dropped off the right side of the road, jerked hard to the left, crossed the double yellow line, and went straight into oncoming traffic at the crest of a hill. Defendant's Buick crashed into another vehicle traveling in the opposite lane of travel. Defendant never hit his brakes.

An accident reconstruction expert, calculating the speed at impact conservatively, found the minimum speed for defendant's vehicle at the time of impact was 66 miles per hour. The posted speed limit is 45 miles per hour on that stretch of road.

Ms. Docia Barber, an 84-year-old widow on her way to pick up a prescription at Walgreens, was driving the other car—she was completely in her lane, traveling only about 25 or 30 miles per hour. The impact on Ms. Barber's vehicle, as described by the driver of the car immediately behind Ms. Barber (Jackie Stroman), was "so hard like it exploded . . . all I could see was debris." Mr. Stroman swerved as defendant's Buick pushed Ms. Barber's car back toward Mr. Stroman's vehicle, but Mr. Stroman was unable to avoid colliding with Ms. Barber.

After colliding with Ms. Barber's car, defendant's Buick hit an embankment. Officer Patterson parked behind the Buick, and all of

the Buick's doors opened. When Officer Patterson walked up to the vehicle, defendant was trying to get out from under the steering wheel and the crumbled dashboard. Although the passenger in the front middle seat was only semi-conscious, defendant elbowed her repeatedly until he was able to drag himself over her and out the back passenger door, leaving the female passengers in the car. At that point, defendant was arrested.

The fire department had to cut the roof off of Ms. Barber's vehicle to reach her. Ms. Barber died at the scene after suffering a broken neck, numerous broken ribs, a broken left arm, a broken right thigh, broken lower legs, and a broken right ankle. Mr. Stroman was taken to the hospital, examined, and released. All the occupants of defendant's Buick survived.

Defendant was indicted for second degree murder. At trial, defendant conceded he was guilty of manslaughter but argued that he was not guilty of second degree murder. After the jury found him guilty of second degree murder, the trial court sentenced him to a presumptive-range term of 180 to 225 months imprisonment. Defendant timely appealed to this Court.

I

[1] Defendant first contends that the trial court erred under Rule 404(b) of the North Carolina Rules of Evidence by admitting various pieces of evidence of bad acts he committed. Long ago, our Supreme Court established that "Rule 404(b) state[s] a clear 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).

We apply a three-step test in determining whether evidence was properly admitted under Rule 404(b). "First, is the evidence relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried? Second, is that purpose relevant to an issue material to the pending case? Third, is the probative value of the evidence substantially outweighed by the danger of unfair prejudice pursuant to Rule 403?" *State v. Foust*, 220 N.C. App. 63, 69, 724 S.E.2d 154, 159 (2012). With respect to the first and second prongs, we review questions of relevance *de novo*

although we give great deference to the trial court's relevancy determinations. *State v. Houseright*, 220 N.C. App. 495, 499, 725 S.E.2d 445, 448 (2012).

A. Evidence of Shoplifting

Defendant first contends the trial court committed plain error in admitting evidence regarding the details of the shoplifting expedition that took place immediately prior to the police chase that ended in the collision. We disagree.

It is well established that evidence is admissible under Rule 404(b) when the other bad acts are part of the chain of circumstances leading up to the event at issue or when necessary "in order to provide a complete picture for the jury." *State v. Madures*, 197 N.C. App. 682, 688, 678 S.E.2d 361, 365 (2009). *See also State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 853 (1995) ("Evidence of other crimes committed by a defendant may be admissible under Rule 404(b) if it establishes the chain of circumstances or context of the charged crime. Such evidence is admissible if the evidence of other crimes serves to enhance the natural development of the facts or is necessary to complete the story of the charged crime for the jury." (internal citation omitted)).

Here, the fact that defendant was part of a shoplifting group targeting the mall for clothes and sneakers helped explained why defendant took over driving from Ms. Jackson, who wanted to stop; why he did not want police to search the vehicle and, therefore, why there was a police chase; and, ultimately, why he was attempting so aggressively to evade the officers chasing him. Without information about defendant's participation in the shoplifting expedition, the jury would not have a complete picture of what occurred on 22 May 2009 and why.

Our appellate courts have previously upheld the admission of similar evidence. In *State v. Bray*, 321 N.C. 663, 675, 365 S.E.2d 571, 578-79 (1988), the Supreme Court held that in a trial for the shooting of a highway patrol trooper, the trial court properly admitted evidence of the defendant's escape from jail and everything that happened from the time of the escape through the shooting because the defendant's desire to do whatever necessary to avoid capture gave him a motive for killing the trooper. The Court explained: "The chain of events from the time of [defendant and another individual's] escape demonstrates their attempt to avoid apprehension: they assaulted the jailer with a pipe to escape from jail; they broke into an Arkansas home and stole a rifle and a truck; they drove to North

Carolina; they stole a South Carolina license plate for the truck; they borrowed a pistol; they shot a state trooper, stole his revolver, then fled the scene; they broke into another home, where they stole another gun." *Id.*

Just as the evidence in *Bray* of an escape, an assault, and larcenies explained why defendant shot the trooper, the voluminous and organized nature of the shoplifting in this case explained why defendant was driving in the manner that he was for purposes of the malice requirement of second degree murder. *See Mack*, 206 N.C. App. at 518-19, 697 S.E.2d at 494-95 (finding sufficient evidence of malice where defendant, whose license was revoked, drove more than 90 miles per hour, passed through a red light without stopping, and traveled the wrong way on a highway in order to evade arrest for breaking and entering and larceny); *Lloyd*, 187 N.C. App. at 176, 179-80, 652 S.E.2d at 300, 301 (finding sufficient evidence of malice for second degree murder conviction when defendant, who knew his license was suspended, drove extremely dangerously in an effort to avoid arrest for having stolen the vehicle he was driving, including driving 85 to 90 miles per hour, passing several cars in a no-passing zone despite oncoming traffic, and forcing a car off the road).

Although defendant argues that the specific details of the shoplifting should have been excluded, those details are important since a jury would not be able to understand why a person who had shoplifted a single shirt or DVD would be driving at speeds of up to 80 miles per hour in order to avoid arrest. We hold that the evidence regarding the shoplifting was relevant for a material purpose other than propensity and that this probative value was not outweighed by any unfair prejudice to defendant. The trial court did not, therefore, commit plain error in admitting the evidence of shoplifting.

B. Defendant's Citations for Driving Without a License

Defendant next contends that the trial court erred by admitting into evidence "the bare fact defendant received two criminal charges for no operator's license in May 2009" and by instructing the jury that it could consider that evidence to prove malice. The State presented evidence that defendant received two citations for driving without a license in May 2009, including one only three days before the crash resulting in Ms. Barber's death.

These citations—showing that defendant had been repeatedly directed that driving without a license was unlawful but persisted in doing so—were relevant to malice. This Court held in *Lloyd*, *id.* at

178, 652 S.E.2d at 301 (internal citations omitted) (emphasis added): "Whether defendant knew that he was driving with a suspended license tends to show that he was acting recklessly, which in turn tends to show malice. Malice is an essential element of second degree murder. *Thus, evidence that defendant was knowingly operating a motor vehicle without a valid license was relevant to the crime he was being tried for, and defendant's contention is without merit.*"

Defendant, however, cites *State v. Wilkerson*, 148 N.C. App. 310, 318, 559 S.E.2d 5, 10 (Wynn, J., dissenting), *rev'd for reasons in dissenting opinion*, 356 N.C. 418, 571 S.E.2d 583 (2002). Judge Wynn's dissent, adopted by the Supreme Court, concluded that the trial court erred, under Rule 404(b), in admitting "the bare fact of defendant's prior convictions" for drug offenses. *Id.* at 329, 559 S.E.2d at 17.

Judge Wynn reasoned that Rule 404(b) permits evidence of other crimes in order to prove purposes other than propensity, such as those enumerated in Rule 404(b), and a bare conviction, without the underlying facts, cannot in most cases prove any of the enumerated purposes. *Id.* at 319, 559 S.E.2d at 11. He noted, however, that a conviction for a traffic-related offense may "show the malice necessary to support a second-degree murder conviction," because it was "the *underlying evidence* that showed the necessary malice, not the fact that a trial court convicted the defendant." *Id.* at 325, 559 S.E.2d at 14.

In *State v. Rich*, 351 N.C. 386, 400, 527 S.E.2d 299, 307 (2000), one of the cases cited by Judge Wynn, the Supreme Court stressed that the defendant's prior speeding convictions were not offered to show that he was speeding at the time of collision, but rather "show that defendant knew and acted with a total disregard of the consequences, which is relevant to show malice," a proper purpose under Rule 404(b). Consistent with this emphasis on a defendant's knowledge—and not the bare fact of a prior conviction—this Court has held that pending charges as well as prior convictions can show the necessary knowledge to make the charges "admissible under Rule 404(b) as evidence of malice to support a second degree murder charge." *State v. McAllister*, 138 N.C. App. 252, 259, 530 S.E.2d 859, 864 (2000).

Thus, because *Lloyd* establishes that defendant's citations are relevant to malice for purposes of second degree murder, the analysis in *Wilkerson* does not apply. The trial court did not, therefore, err in admitting the evidence of defendant's citations for driving without a license.

C. Defendant's Post-Collision Actions

Finally, defendant contends that Officer Patterson should not have been allowed to testify about defendant's actions immediately after the collision. According to Officer Patterson, when he ordered everyone in the Buick to put their hands up,

> the driver was elbowing the middle passenger in the neck and face area, hitting her several times, until her body finally laid over the front seat to the back seat. The driver then drug himself out from underneath the dashboard, drug himself over the middle passenger's body out the back rear passenger door.

In continuing to relate what he witnessed, Officer Patterson characterized defendant's actions as "hitting" the semi-conscious woman in the middle seat and reported that "[h]er head was snapping back every time he hit her." Officer Patterson then described defendant as dragging himself over the woman's entire body to get out the rear passenger door of the vehicle and away from Officer Patterson.

Defendant claims this testimony was inadmissible evidence that he assaulted a female. However, Officer Patterson never testified that defendant "assaulted" the female passenger. Instead, he just described what he personally witnessed when he approached defendant's vehicle after the collision.

As for the evidence's admissibility under Rule 404(b), we note that defendant, as support for his contention that the State failed to prove malice, has argued that "the evidence about defendant's conduct after the accident shows lack of malice. Thus, defendant exited the wrecked Buick through an undamaged door, did not try to flee, promptly surrendered to police, allowed himself to be handcuffed, and waited patiently at the scene." The State's evidence—suggesting defendant was continuing to try to escape regardless of the collision and in callous disregard for the condition of his passengers—supports a finding of malice. *See State v. Wilkerson*, 295 N.C. 559, 581, 247 S.E.2d 905, 917 (1978) (holding that "any act evidencing wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person is sufficient to supply the malice necessary for second degree murder" (internal quotation marks omitted)). The trial court, therefore, properly admitted Officer Patterson's testimony about defendant's post-collision actions.

II

[2] Defendant next argues that the trial court committed plain error by allowing Officers Patterson and Anderson to testify to legal conclusions regarding whether defendant committed the criminal offenses of felony speeding to elude an officer, careless and reckless driving, and speeding over 15 miles an hour above the speed limit. "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).

During the State's examination of Officer Patterson, he testified that the officers were not allowed to engage in a car pursuit or continue a pursuit unless they observed conduct that they believed to be a felony. According to Officer Patterson, he believed that the requirements for felony speeding to elude arrest had been met because defendant had, while fleeing the police, engaged in the crime of careless and reckless driving and the crime of speeding over 15 miles per hour above the speed limit. Officer Anderson similarly testified that "the manner in which he was driving became a felony insofar as felony speed to elude. His driving became very fast and it was reckless." He also testified that defendant was going 25 miles per hour over the speed limit.

Our Supreme Court has previously recognized that some testimony of officers regarding violations of the law may constitute "a shorthand statement of fact rather than . . . a legal term of art or an opinion as to the legal standard the jury should apply," rendering the testimony admissible. *State v. Anthony*, 354 N.C. 372, 408, 555 S.E.2d 557, 581 (2001). In *Anthony*, the Supreme Court found no error when the officer testified that the defendant had violated a restraining order and that the officer, therefore, had authority to arrest him. The Court reasoned that the officer, based on his training and experience, "described the evidence available to him at the time; paraphrased the statute in neutral terms; then gave the opinion that under the statute, the facts described to him by [the victim's father] provided probable cause to arrest defendant." *Id.* The Court concluded that "[i]n so doing, [the officer] was not providing an interpretation of the law," but instead "was offering an explanation of his actions." *Id.*, 555 S.E.2d at 581-82.

Likewise, here, the officers were not interpreting the law for the jury, but rather were testifying regarding their observations in order

to explain why they pursued defendant in a high-speed chase. We hold that this testimony was admissible under *Anthony*.

Regardless, we cannot conclude that even if the officers' testimony regarding the potential crimes had been excluded, the jury would probably have reached a different verdict. The same officers who testified regarding the potential felony fleeing to elude arrest and traffic crimes also testified that they did not believe defendant was driving "so inherently dangerous, that somebody's going to get killed and he doesn't care." In other words, as defendant has vigorously argued, these officers testified contrary to the State's position regarding malice for purposes of second degree murder. Given the officers' entire testimony, we cannot conclude that the jury probably would have reached a different verdict in the absence of the challenged testimony.

III

[3] Defendant next contends that the trial court should have granted his motion to dismiss the second degree murder charge because of insufficient evidence of malice.[1] "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense.' " *State v. Lowry*, 198 N.C. App. 457, 465, 679 S.E.2d 865, 870 (2009) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002). "When reviewing a motion to dismiss based on insufficiency of the evidence, this Court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Bullock*, 178 N.C. App. 460, 466, 631 S.E.2d 868, 873 (2006).

Here, viewing the evidence in the light most favorable to the State, a reasonable juror could find the following facts. Defendant knowingly was driving without a license even though he had been cited twice for that offense in the prior three weeks. When another

1. Defendant also claims that his conviction violates the Fourteenth Amendment. Because he did not raise this constitutional argument in the trial court, we will not address it for the first time on appeal. *See State v. Gobal*, 186 N.C. App. 308, 320, 651 S.E.2d 279, 287 (2007), *aff'd per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008).

driver wanted to pull over for the police, defendant took control of the vehicle by climbing over the back seat without allowing the vehicle to come to a stop. He was attempting to evade the police because of a large volume of shoplifted items in his vehicle.

While traveling at a high rate of speed well in excess of the speed limit, defendant crossed a yellow line in order to pass cars, twice passed vehicles using a dedicated turn lane, drove through a mowed corn field and a ditch to get around cars stopped at a stop sign, and again crossed the center line to collide head-on with another vehicle while traveling 66 miles per hour and without having applied his brakes. Then, in a further attempt to avoid arrest, defendant repeatedly struck an apparently semi-conscious passenger in his efforts to get out of the vehicle and away from the police.

These facts are materially indistinguishable from those in *Mack* and *Lloyd* and, therefore, those decisions control. In *Mack*, we affirmed the denial of a motion to dismiss for second degree murder where "defendant, whose license was revoked, drove extremely dangerously in order to evade arrest for breaking and entering and larceny. The State presented evidence that when an officer attempted to stop defendant, because of the stolen televisions in his trunk, defendant fled, driving more than 90 miles per hour, passing through a red light without stopping, and traveling the wrong way on a highway . . . ." 206 N.C. App. at 518, 697 S.E.2d at 494-95.

In *Lloyd*, the defendant "was knowingly operating a motor vehicle without a valid license." 187 N.C. App. at 178, 652 S.E.2d at 301. He stole a van, was chased by the police, drove 85 to 90 miles per hour, and passed several cars in a no-passing zone where there was oncoming traffic. *Id.* at 176, 652 S.E.2d at 300.

Defendant does not address *Mack* or *Lloyd* in his initial brief, but rather only very briefly discusses them in his reply brief. He attempts to distinguish the two cases by pointing to the testimony of Officers Patterson and Anderson, which he summarizes as showing

> defendant had control over his vehicle, handled his car well, never ran a red light, maintained good lane control, and never came close to a "near miss" or "close call" until the moment of impact. Further, both officers testified defendant did not create a clear and unreasonable danger to others, did not drive dangerously in excess of safe speeds, did not drive in a manner inconsistent with due regard for the safety of others, and did not present a risk to the public. Still further, both officers tes-

> tified they themselves never believed defendant's driving was so reckless as to threaten public safety, was inherently dangerous, was a clear and imminent danger to others, or would result in a fatality.

Defendant also cites Officer Patterson's testimony that officers must abandon pursuit "if there is a clear and unreasonable danger to the officer or other vehicles" and that Officer Patterson did not discontinue pursuit in this case. Officer Anderson testified similarly. Defendant claims that the officers' testimony establishes that he acted without malice.

This purported distinction of *Mack* and *Lloyd* overlooks our standard of review. Defendant has, at best, pointed to inconsistencies in the State's evidence. It is, however, well established that "[c]ontradictions and discrepancies, even in the State's evidence, do not warrant the allowance of a motion to dismiss, these being for the jury to resolve." *State v. Curry*, 288 N.C. 660, 669, 220 S.E.2d 545, 552 (1975). Here, after the officers gave the testimony on which defendant relies, the State elicited evidence that Ms. Barber's family had filed a still pending lawsuit against the officers and the City of Concord, alleging that the officers had violated their department's pursuit policy. " 'It is elementary that the jury may believe all, none, or only part of a witness' testimony[.]' " *State v. Barr*, 218 N.C. App. 329, 340, 721 S.E.2d 395, 402 (2012) (quoting *State v. Miller*, 26 N.C. App. 440, 443, 216 S.E.2d 160, 162, *aff'd*, 289 N.C. 1, 220 S.E.2d 572 (1975)). Here, the jury reasonably could have chosen to credit the officers' and other witnesses' testimony about what defendant actually did while being chased, could have found that this conduct was sufficiently reckless to establish malice, and could have determined that the officers' claims that defendant presented no clear danger to others were self-serving and not credible.

When we view the evidence in the light most favorable to the State, the facts are virtually identical to those in *Mack* and *Lloyd*. Based on those decisions, the State presented sufficient evidence of malice, and the trial court properly denied the motion to dismiss.

IV

[4] Defendant lastly contends that the trial court's instruction regarding the jury's duty to reach a verdict varied from the pattern jury instruction in a manner that "unconstitutionally coerced the guilty verdict." The pattern instruction reads: "All twelve of you must

agree to your verdict. You cannot reach a verdict by majority vote. When you have agreed upon a unanimous verdict(s) (as to each charge) your foreperson should so indicate on the verdict form(s)." N.C.P.I.—Crim. 101.35 (2011). This pattern instruction is based upon N.C. Gen. Stat. § 15A-1235(a) (2011), which states: "Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty."

Here, the trial court instructed: "You must be unanimous in your decision. In other words, all twelve jurors must agree. When you have agreed upon a unanimous verdict, your foreperson may so indicate on the verdict form that will be provided to you." Defendant claims that telling the jurors that they had to agree—rather than that they had to agree to a verdict—caused the jurors to "erroneously construe" the charge to be "a mandatory instruction that a verdict must be reached."

Defendant bases his argument on a quote from *State v. Price*, 326 N.C. 56, 388 S.E.2d 84, *sentence vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7, 111 S. Ct. 29 (1990). In *Price*, after being told by the jury foreman that the jury was hung during the death penalty deliberation phase, the trial court instructed the jury that " 'I am going to ask that you resume your deliberations in an attempt to return a recommendation. I have already instructed you that your recommendation must be unanimous, that is, each of you must agree on the recommendation.' " *Id.* at 90, 388 S.E.2d at 104. Although the Court found no error in this instruction, the Court stressed that "in telling a jury that its recommendation as to punishment must be unanimous, the trial court must be vigilant to inform the jurors that whatever recommendation they *do* make must be unanimous and not to imply that a recommendation must be reached." *Id.* at 92, 388 S.E.2d at 105.

While the instruction at issue, standing alone, could be construed as implying that the jury was required to reach an agreement, we do not review a particular jury instruction in isolation. Instead,

> "[t]he charge of the court must be read as a whole . . . , in the same connected way that the judge is supposed to have intended it and the jury to have considered it . . . . It will be construed contextually, and isolated portions will not be held prejudicial when the charge as [a] whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal."

State v. Hooks, 353 N.C. 629, 634, 548 S.E.2d 501, 505 (2001) (quoting *Rich*, 351 N.C. at 393-94, 527 S.E.2d at 303).

Looking at the instructions given in this case as a whole, we cannot agree that the jury instruction was coercive. The language that "all 12 jurors must agree" comes directly from the statute. The sentences surrounding the language at issue both referenced unanimity in connection with an actual decision or verdict. Later, the trial court reiterated what the jury should do "[w]hen you have unanimously *agreed upon a verdict* and are ready to announce it . . . ." (Emphasis added.) Although the pattern instruction more carefully instructs the jury, we hold that the trial court's instruction, in this case, when viewed in context did not mislead the jury and was not, therefore, coercive of the jury's verdict.

No error.

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

JADA MARIE LAMPKIN BY AND THROUGH HER GUARDIAN AD LITEM, STEPHEN LAPPING, AND JAMES CONRAD PLAINTIFFS V. HOUSING MANAGEMENT RESOURCES, INC., CATAWBA-HICKORY LIMITED PARTNERSHIP AND SILVER STREET DEVELOPMENT CORPORATION DEFENDANTS AND HOUSING MANAGEMENT RESOURCES, INC., AND CATAWBA-HICKORY LIMITED PARTNERSHIP THIRD-PARTY PLAINTIFFS V. VALERIE RAULERSON, AKA VALERIE DAVIS THIRD-PARTY DEFENDANT

No. COA11-1062

(Filed 15 May 2012)

Negligence—landowner's duty of reasonable care—not extended to neighboring property—dismissal proper

The trial court did not err by dismissing plaintiffs' complaint alleging negligence where plaintiffs failed to allege facts sufficient to show that defendants breached a duty owed to the child who was the subject of the suit. A landowner's duty of reasonable care does not extend to guarding against injury caused by a dangerous condition on neighboring property.

Appeal by Plaintiffs from order entered 28 April 2011 by Judge Eric L. Levinson in Catawba County Superior Court. Heard in the Court of Appeals 9 February 2011.

West & Smith, LLP, by Stanley W. West, for Plaintiffs.

Brown Law LLP, by Gregory W. Brown, Joseph B. Chambliss, Jr., and Matthew R. Gambale, for Defendants.

No brief filed for Third-party Defendant.

STEPHENS, Judge.

Plaintiff Jada Marie Lampkin, by and through her Guardian *ad Litem*, Stephen Lapping,[1] and Lampkin's father, Plaintiff James Conrad, commenced this action in Moore County Superior Court against Defendants Housing Management Resources, Inc., Catawba-Hickory Limited Partnership, and Silver Street Development Corporation, seeking damages for personal injuries Lampkin sustained while a resident of the Silver Spring Terrace apartment complex ("the apartment complex"), a group of apartment buildings located on land owned by Defendant Catawba-Hickory Limited Partnership, operated by Defendant Silver Street Development Corporation, and managed by Defendant Housing Management Resources, Inc.

In their complaint, Plaintiffs alleged that on 15 January 2010, while Lampkin was playing on a playground in the common area of the apartment complex, she passed through a broken portion of a chain-link fence owned by the apartment complex to play on a frozen pond on adjacent property. When the ice on the frozen pond broke, Lampkin, who was four years old at the time, fell into the water and sustained permanent brain injury. Plaintiffs also alleged that, prior to Lampkin's injury, when the owner of the adjacent property notified the apartment complex that "children were coming through the fence onto her property" and that she "was concerned someone would get hurt," an apartment complex employee told her that "they would look into the matter." On these allegations, Plaintiffs sought to hold Defendants liable for Lampkin's injury on the grounds that Defendants negligently breached their duty to properly maintain a barrier between their property and the pond.

In their answer, Defendants moved to dismiss Plaintiffs' complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Defendants also impleaded the owner of the adjacent prop-

1. Lapping's name is listed as both "Stephen" and "Stephan F." in various documents filed by the Plaintiffs.

erty and pond. Following a hearing on Defendants' motion before the Honorable Eric L. Levinson,[2] the trial court concluded that Plaintiffs failed to state a claim upon which relief may be granted and entered a 28 April 2011 order granting Defendants' motion to dismiss. From the order dismissing their claims, Plaintiffs appeal, contending that the trial court's dismissal was error because their amended complaint sufficiently pleads a claim of negligence.

On appeal from a Rule 12(b)(6) dismissal, we review the trial court's decision *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), and we determine 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. *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001). To sufficiently state a *prima facie* claim of negligence, a plaintiff's complaint must allege the existence of a legal duty or standard of care owed to the plaintiff by the defendant, breach of that duty, and a causal relationship between the breach of duty and certain actual injury or loss sustained by the plaintiff. *Sterner v. Penn*, 159 N.C. App. 626, 629, 583 S.E.2d 670, 673 (2003). In this case, Defendants contend that Plaintiffs failed to set forth a *prima facie* claim of negligence in that Plaintiffs did not allege facts sufficient to show that Defendants breached a duty owed to Lampkin. For the following reasons, we agree.

A landowner in North Carolina owes to those on its land the duty to "exercise reasonable care in the maintenance of [its] premises." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998). In their complaint, Plaintiffs allege that this duty of reasonable care includes the duty to keep children on one's land from accessing potentially dangerous adjacent property owned by a third party. Plaintiffs further allege that Defendants negligently breached this duty by failing to ensure that a "suitable barrier was in place to prevent small children from wandering off the property and to the area of the pond." Plaintiffs analogize this case and the duty allegedly owed by Defendants to cases from this State applying the attractive nuisance doctrine, which, in one form, imposes upon a landowner that maintains a pond the duty to protect against injury from that pond where the landowner knows or should know that children gather and play at the pond. *See Fitch v. Selwyn Village, Inc.*, 234

2. Pursuant to a 12 January 2011 consent order transferring venue from Moore County to Catawba County, this hearing took place in Catawba County.

N.C. 632, 635, 68 S.E.2d 255, 257 (1951). Plaintiffs contend that a similar, reciprocal duty should be imposed on landowners whose property abuts property on which a third party maintains a pond, *viz.*, where a landowner knows that children from his property are gathering and playing on or near a dangerous condition on neighboring property, the landowner has a duty to protect those children from injury by that condition. We disagree with Plaintiffs' contention that a landowner's duty of reasonable care extends to guarding against injury caused by a dangerous condition on neighboring property, and we conclude that the imposition of such a duty would be contrary to public policy and the established law of this State.

Initially, we note that imposing a reciprocal duty on a landowner adjoining property with a dangerous condition would necessarily and, in our view, impermissibly shift the burden of making that condition safe from the owner of that condition, who has exclusive control over the use of her land, to the owner of the adjacent property, who has no control. Not only would the landowner adjacent to the land with the dangerous condition be burdened with the costs of protecting persons from the neighbor's use, that landowner would be burdened with the costs for compensation of injuries resulting from that use. This burden-shifting would allow the neighboring landowner to retain all benefits from the use, while externalizing some or all of the secondary costs of the use. As a matter of fairness and economics, where, as here, the neighboring landowner retains the exclusive right to control and benefit from the use of her land, the burden to prevent injury from such use should, likewise, be retained by that neighboring landowner.

This conclusion is in line with numerous decisions in this State establishing that the duty to protect from a condition on property arises from a person's control of the property and/or condition, and in the absence of control, there is no duty. *See*, *e.g.*, *McCorkle v. N. Point Chrysler Jeep*, *Inc.*, ___ N.C. App. ___, ___, 703 S.E.2d 750, 753-54 (2010) (adopting rule that "if a landowner relinquishes control and possession of property to a contractor, the duty of care, and the concomitant liability for breach of that duty, are also relinquished and should shift to the independent contractor who is exercising control and possession"); *see also Petty v. Charlotte*, 85 N.C. App. 391, 395, 355 S.E.2d 210, 213 ("The fact of possession or occupation underlies most forms of premises liability."), *disc. review denied*, 320 N.C. 170, 358 S.E.2d 54 (1987). In *Laumann v. Plakakis*, 84 N.C. App. 131, 351 S.E.2d 765 (1987), after the plaintiff was struck by a car when cross-

ing a road between a store and its parking lot and sued the store for failing to make the street crossing safe, this Court held that the duty to control traffic on the street belonged to the city and that the store, therefore, had no duty to ensure the plaintiff's safety in crossing the street. *Id.* at 133-34, 351 S.E.2d at 766-67. Further, we held that while the duty owed by the store to keep its premises reasonably safe is "extensive," "it only applies when the customer is on the [] premises." *Id.* Because the plaintiff in *Laumann* "was not injured on [the store's] premises or parking lot," the store did not breach "its duty to [the] plaintiff to keep its own premises safe." *Id.*

Similarly, in *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982), where the five-year-old plaintiff touched an allegedly exposed electrified portion of a transformer owned and maintained by a power company on land owned by the defendant, our Supreme Court held that because the power company had exclusive control of the transformer via an easement on the defendant's land, the power company "had the *sole* duty to keep safe the transformer which was [the power company's] sole property" and, therefore, "the only obligation to act was [the power company's], and the only possible liability in this case is [the power company's] alone." *Id.* at 611-12, 290 S.E.2d at 598-99 (emphasis in original).

In our view, the foregoing authority clearly establishes that a landowner's duty to keep property safe (1) does not extend to guarding against injuries caused by dangerous conditions located off of the landowner's property, and (2) coincides exactly with the extent of the landowner's control of his property.[3] As such, because Defendants did not control the pond on the adjacent property, their duty to keep their premises safe did not include an obligation to make the pond safe by preventing children on their land from accessing the pond. Rather, the adjacent landowner, with exclusive control over the pond, had the sole duty to keep the pond safe, the only obligation to act, and the only possible liability. *See Green*, 305 N.C. at 612, 290 S.E.2d at 599. Defendants' duty to keep Lampkin and other children safe could have only applied when those children were on Defendants' land and ended where Defendants' ownership and control of their property ended.

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3. We note one exception described in *Laumann*: where the defendant through some affirmative action *created* the dangerous condition that injures the plaintiff off of defendant's premises. *E.g.*, *Dunning v. Forsyth Warehouse Co.*, 272 N.C. 723, 158 S.E.2d 893 (1968). However, because Defendants did not create the pond on the adjacent land in this case, this exception is not applicable.

Contrarily, Plaintiffs cite several cases that they contend stand for the proposition that "North Carolina does not impose an arbitrary requirement that the dangerous instrumentality be something controlled by the [defendant-landowner]." *See Willis v. New Bern*, 191 N.C. 507, 132 S.E. 286 (1926); *Comer v. Winston-Salem*, 178 N.C. 383, 100 S.E. 619 (1919); *Bunch v. Edenton*, 90 N.C. 431 (1884). Those cases cited by Plaintiffs, however, lend support to, rather than undermine, our conclusion stated above. In each case, the dangerous condition or instrumentality that Plaintiffs contend was beyond the defendant-landowner's control created a dangerous condition *on property owned by the defendant-landowner* and the plaintiff was injured by that dangerous condition under the defendant-landowner's control. *See Willis*, 191 N.C. at 509, 511-13, 132 S.E. at 287-89 (where conditions beyond a street's end gave the impression that the street extended farther than it did and made the end of the street "dangerous," the city, which controlled the street and had the duty to keep it safe, had a duty "to erect a guard, rail, barrier, light, or some adequate device for giving reasonable notice of the danger to a traveler *using said street in a lawful manner*" (emphasis added)); *Comer*, 178 N.C. at 386, 100 S.E. at 621 (where use of a bridge owned by the city was made dangerous by rushing water below the bridge that impelled children playing on the bridge to lean through a railing and over the bridge's edge to look at the water, the city was negligent in failing to provide "sufficient protection for the children of the neighborhood frequenting" the bridge); *Bunch*, 90 N.C. at 435 (where excavation "immediately adjoining" the sidewalk made the sidewalk "perilous," the city had a duty to protect people walking on the sidewalk from the dangerous condition off the sidewalk). Unlike in those cases cited by Plaintiffs, the "dangerous instrumentality" on the adjacent property in this case did not create a dangerous condition on Defendants' property; people properly using Defendants' property were in no danger of drowning in the pond. The nearby pond could only have made Defendants' property "dangerous" insofar as one could access the pond by leaving Defendants' property. However, as discussed *supra*, Defendants did not have an obligation to prevent access to a pond over which they had no control. *See Green*, 305 N.C. at 612, 290 S.E.2d at 598-99 (the party that controls the dangerous condition is the only party that has the obligation to make the condition safe).

While we acknowledge that Plaintiffs have brought to our attention several decisions from other jurisdictions where the courts appear to have come to opposite conclusions facing similar circumstances, *see*, *e.g.*, *Calkins v. Cox Estates*, 792 P.2d 36 (N.M. 1990);

McDaniel v. Sunset Manor Co., 269 Cal. Rptr. 196 (Cal. Ct. App. 1990); *Limberhand v. Big Ditch Co.*, 706 P.2d 491 (Mont. 1985), we note that numerous other jurisdictions have ruled as we do. *See, e.g.*, *Scarborough v. Lewis*, 565 A.2d 122, 126 (Pa. 1989) (noting that "it is well settled that the law imposes no duty upon a possessor of adjacent land to erect fencing or provide warnings so as to deter persons from entering a third party's property on which there exists a dangerous condition not created or maintained by the landowner and over which the landowner has no control"); *Rodriguez v. Detroit Sportsmen's Congress*, 406 N.W.2d 207, 210 (Mich. Ct. App. 1987) (noting that "the law does not ordinarily impose a duty of care upon the occupier of land beyond the area over which he has possession or control. Where the occupant of one parcel of land has been held responsible for the condition of an adjoining parcel to which another has title or possession, such responsibility is predicated on the fact that he exercised control over the land beyond his boundaries." (footnote call number omitted)); *see also Guerrero v. Alaska Hous. Fin. Corp.*, 6 P.3d 250, 256 (Alaska 2000) (examining the rule in various jurisdictions limiting liability to risks on a landowner's property and noting that "courts traditionally have held that a landlord never had a duty to erect a fence protecting tenants from off-site conditions"). Further, in those cases cited by Plaintiffs, often a stated reason for extending the landowner's duty beyond his control is that the courts see no reason not to. *See Calkins*, 792 P.2d at 41 (where the injury occurred outside the boundaries of the property, the court stated that "we find no reason to deny liability as a matter of law"); *Limberhand*, 706 P.2d at 499 (where the dangerous condition was located on adjacent property, the court stated that "we see no reason to shield the landowner from liability as a matter of law"). However, where, as here, Plaintiffs are asking a court to impose on a landowner a new, heretofore unrecognized duty to make safe a condition on land not under the landowner's control, something more compelling than the absence of a reason not to is required.

> Legal rights and liabilities must rest upon some reasonably settled basis, fixed either by the common law or by statute. . . . "While the courts should and do extend the application of the common law to the new conditions of advancing civilization, they may not create new principles or abrogate a known one. If new conditions cannot be properly met by the application of existing laws, the supplying of needed laws is the province of the Legislature and not the judicial department of the government."

Briscoe v. Henderson Lighting & Power Co., 148 N.C. 396, 413, 62 S.E. 600, 607 (1908) (quoting *Walker v. R.R. Co.*, 53 S.E. 113, 115 (Va. 1906)). The case law in this State clearly establishes that while a landowner has a duty to exercise reasonable care in keeping his premises safe, the landowner is not an insurer of the safety of persons on the premises, *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638, 281 S.E.2d 36, 38 (1981), and certainly is not an insurer of the safety of persons off the premises. The landowner is not obligated to protect against injury from a dangerous condition over which the landowner has no control. As such, and contrary to the allegations in Plaintiffs' complaint, Defendants as landowners had no duty to erect a "suitable barrier" to prevent Lampkin's access to the pond on the neighboring property.[4]

In their brief on appeal, however, Plaintiffs appear to retreat slightly from their position at pleading, contending that even despite the nonexistence of a duty to erect a fence, Defendants had a duty "to *maintain* a fence already existing." In support of this contention, Plaintiffs first point out that it would be, "by simple maintenance, relatively easy" for Defendants to keep children on their land by fixing the existing fence. However, the "comparative ease or difficulty" of maintaining the fence is irrelevant to the existence of Defendants' alleged duty to use reasonable care to keep people on their property. Rather, that fact speaks to the extent of the duty once that duty is determined to exist. *See Fitch*, 234 N.C. at 635, 68 S.E.2d at 257 ("The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to . . . the comparative ease or difficulty of preventing the danger . . . and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions." (quoting *Peters v. Bowman*, 47 P. 113 (Cal. 1897))). Therefore, all those reasons that support the conclusion that Defendants had no duty to erect a fence to protect against injury at

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4. We note that Plaintiffs also cursorily argue on appeal that the existence of a duty to erect a fence is supported by a landlord's duty under N.C. Gen. Stat. § 42-42 to "[k]eep all common areas of the premises in safe condition." N.C. Gen. Stat. § 42-42(a)(3) (2011). As with the landowner's duty of reasonable care, this duty refers specifically to keeping the landlord's premises safe and has not been interpreted by our courts to extend beyond the control of a landlord. *See, e.g.*, *Vera v. Five Crow Promotions, Inc.*, 130 N.C. App. 645, 650, 503 S.E.2d 692, 696 (1998) (adopting "well[-]established common law principle" that a landlord who has neither possession nor control of the leased premises is not liable for injuries to third persons). Therefore, Defendants as landlords, likewise, had no duty to erect a barrier to prevent Lampkin's access to the neighboring pond.

the pond likewise support the conclusion that Defendants had no duty to mend their fence.

Plaintiffs next contend, however, that even if a landowner generally has no duty to properly maintain a fence and prevent access to a neighboring pond, Defendants in this case assumed that duty by "embark[ing] on a course of conduct . . . of actively erecting and/or utilizing a perimeter fence for the purpose of security and containment of children residing in the apartments." We are unpersuaded.

This "assumption of duty" theory, or "voluntary undertaking" doctrine, which arises from "the basic rule of the common law which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care," *Pinnex v. Toomey*, 242 N.C. 358, 362, 87 S.E.2d 893, 897 (1955), has been consistently recognized in North Carolina and is "implicated when a defendant voluntarily undertakes to provide needed services to the plaintiff when otherwise she would have no obligation." *Davidson v. Univ. of N.C. at Chapel Hill*, 142 N.C. App. 544, 558, 543 S.E.2d 920, 929 (internal quotation marks omitted) (quoting David A. Logan and Wayne A. Logan, *North Carolina Torts* § 2.20, at 27 (1996)), *disc. review denied*, 353 N.C. 724, 550 S.E.2d 771 (2001). As is obvious from the name of the doctrine, as well as from our cases applying it, the doctrine is only applicable where there is some showing of an act or acts by the defendant indicating that the defendant actually engaged in some undertaking. *See, e.g.*, *id.* at 559, 542 S.E.2d at 929-30 (holding that the defendant voluntarily undertook duty to "advise and educate cheerleaders in regard to safety" where the defendant "acknowledged that it assumed certain responsibilities with regard to teaching the cheerleaders about safety" by advising, educating, and informing students about safety and by insuring that safety information was communicated to the cheerleaders); *Hawkins v. Houser*, 91 N.C. App. 266, 270, 371 S.E.2d 297, 299 (1988) (holding that the defendants, in the active course of conduct of "telephoning for aid, had the positive duty to use ordinary care in performing that task").

In this case, the only allegations in Plaintiffs' complaint that arguably relate to an undertaking by Defendants are the following: (1) the fence "served to secure the apartment campus as well as provid[e] a level of containment for the many children residing in the apartments"; (2) when the owner of the pond informed an employee in the apartment complex office that children were coming on to her property, "[s]he was advised by the [employee] that they would look into the matter"; and (3) "the fence was owned by [the apartment

complex].” In our view, these allegations are insufficient to show that Defendants acted in any way that could constitute an undertaking and, thus, are insufficient to support the application of the voluntary undertaking doctrine in this case.

First, the allegation that the fence “served to” secure and provide some containment merely states two possible effects of the existence of the fence, and no more shows that Defendants assumed a duty to prevent access to the pond than does an allegation that the apartment complex has exterior doorways between interior hallways and outdoor common areas and that those doors serve to secure the apartments and contain children. Absent some allegation that Defendants intended for the fence to have those effects or maintained the fence for those purposes, the allegation that the fence served to secure and contain is insufficient to support application of the doctrine.

Second, the apartment complex employee’s statement that “they would look into the matter” is wholly noncommittal and, while it may, at best, be sufficient to show that the employee or Defendants did, in fact, look into the matter, the statement does not allow any inference that Defendants, upon looking into the matter and becoming aware of a possible danger, took any action to provide a needed service to Plaintiffs by remedying the danger. As such, the allegation is insufficient to support application of the voluntary undertaking doctrine.

We are left, then, with Plaintiffs’ allegation that Defendants owned the fence and the question of whether mere ownership of the fence is sufficient to show that Defendants undertook to prevent children’s access to the neighboring pond. We believe it is not.

As an initial matter, we note that there is nothing in the complaint to support an inference that Defendants erected the fence, which, combined with other circumstances, could in turn support an inference that Defendants erected the fence to remedy a known dangerous condition. However, even if we assume from the fact of their ownership of the property that Defendants erected the fence, there is nothing to indicate whether the fence was erected after the playground and pond came into existence or before. Were it the latter, Defendants’ erection of the fence could not support an inference that the fence was built to remedy any dangerous condition. Furthermore, beyond the absence of an allegation that Defendants erected the fence, there is nothing in the complaint indicating that Defendants ever undertook to maintain the fence or utilize it for any purpose. Faced with the absence of any further allegations, we must conclude

that the bare fact of Defendants' ownership of the fence—or, more accurately, Defendants' ownership of land on which a fence is located—is insufficient to show that, in this case, Defendants undertook to provide to Plaintiffs the service of preventing children's access to the neighboring pond. Accordingly, the allegations in Plaintiffs' complaint are insufficient to support application of the voluntary undertaking doctrine.

Finally, Plaintiffs support their contention that Defendants had a duty to maintain the fence by reference to an operating manual for the apartment complex that states: "If a property utilizes fencing along its perimeter as an exterior security fence whether owned by the property or not, the fencing must be evaluated for deficiencies." This argument is also unavailing because, as discussed *supra*, there is nothing in Plaintiffs' complaint to indicate that the apartment complex was *utilizing* the fence "as an exterior security fence" or in any other way. Thus, even if this operating manual were sufficient to impose a duty on Defendants, the complaint does not allege facts sufficient to show that Defendants would have breached this duty.

Based on the foregoing, we conclude that Plaintiffs' complaint fails to sufficiently allege that Defendants breached a duty owed to Plaintiffs, and, thus, Plaintiffs have failed to set forth a *prima facie* claim of negligence. Plaintiffs' complaint was properly dismissed, and the ruling of the trial court is

AFFIRMED.

Judges HUNTER, ROBERT C., and BEASLEY concur.

KATHY DAYTON, PLAINTIFF v. DOUGLAS EUGENE DAYTON AND BALTIMORE LIFE INSURANCE COMPANY, DEFENDANTS

No. COA11-1216

(Filed 15 May 2012)

Insurance—life insurance policy—plaintiff's decedent declared dead—proceeds distributed—no error

The trial court did not err in a life insurance proceeds case by denying defendant's motion to amend an order for distribution of insurance proceeds or, in the alternative, by failing to grant defendant's motion to deny the existence of coverage under N.C.G.S. § 28C-18(b). The trial court's 22 December 2010 decree was made pursuant to N.C.G.S. § 28C-11(a) and N.C.G.S. § 28C-18 was not relevant. The 22 December 2010 order was not interlocutory and defendant failed to appeal from that order.

Appeal by defendant Baltimore Life Insurance Company from order entered 5 April 2011 by Judge A. Moses Massey in Superior Court, Ashe County. Heard in the Court of Appeals 9 February 2012.

Walker & DiVenere, by Tamara C. DiVenere and Anne C. Wright, for plaintiff-appellee.

Bradley Arant Boult Cummings LLP, by Christian W. Hancock and Jason A. Walters, for defendant-appellant Baltimore Life Insurance Company.

STROUD, Judge.

Baltimore Life Insurance Company ("defendant") appeals from the trial court's order denying its motion to amend the order for distribution of insurance proceeds or, in the alternative, for the issuance of an order denying the existence of coverage under N.C. Gen. Stat. § 28C-18(b). For the following reasons, we affirm the trial court's order.

I. Background

On 7 January 2010, Kathy Dayton ("plaintiff") brought an action pursuant to N.C. Gen. Stat. § 28C-2 to be appointed as receiver of the estate of Douglas Eugene Dayton ("Mr. Dayton"); for a declaration that Mr. Dayton, a missing person, had died; and for payment of insurance proceeds pursuant to N.C. Gen. Stat. § 28C-14. The verified complaint alleged that plaintiff was Mr. Dayton's mother; Mr. Dayton had not been seen or heard from by plaintiff or anyone else since June of

2004; Mr. Dayton owned no real or personal property; Mr. Dayton was a policyholder of a Baltimore Life Insurance Policy; Mr. Dayton was not married and had no children; "under the application of North Carolina law of intestate succession[,]" plaintiff would be Mr. Dayton's only beneficiary; and plaintiff wished to be made temporary and permanent receiver of Mr. Dayton's estate. Included with the complaint was a copy of the life insurance policy which provided for a $50,000 benefit payable in the event of death and an accidental death and dismemberment benefit of $100,000 payable only if Mr. Dayton suffered an injury and sustained a loss ("the AD&D benefit").[1] Subsequently, a guardian *ad litem* was appointed to represent the interests of Mr. Dayton. On 16 April 2010, plaintiff amended her complaint to add defendant Baltimore Life Insurance Company as a party. By order dated 4 October 2010, the trial court appointed plaintiff as permanent receiver for Mr. Dayton's estate. On 8 November 2010, plaintiff filed a "motion for final findings and decree and distribution of insurance proceeds[,]" requesting that Mr. Dayton "be declared dead by reason of accident and that entry of a Death Certificate be ordered showing the same[,]" and that plaintiff be paid the proceeds from Mr. Dayton's life insurance policy pursuant to N.C. Gen. Stat. § 28C-14.[2] On or about 22 December 2010, the trial court entered its "decree of death and order for distribution of insurance proceeds[,]" decreeing that Mr. Dayton was dead; his death was to be declared by "an accidental death[,]" and ordering the proceeds from the life insurance policy be distributed to plaintiff as receiver of the estate of Mr. Dayton in the amount of $100,000. On or about 31 January 2011, defendant filed its answer to plaintiff's amended complaint, denying most of plaintiff's allegations and "demand[ing] strict proof thereof." Defendant also raised the following affirmative defenses: 1. Plaintiff was not entitled to the AD&D benefit under the policy "because there is no evidence that the insured's death satisfied the terms of the Policy for such coverage[;]" 2. Plaintiff did not satisfy the requirements of N.C. Gen. Stat. § 28C in order to obtain the distribution of the AD&D benefit; 3. Plaintiff is barred from obtaining a declaration of death satisfying the conditions for AD&D coverage because she did not make a demand in her amended complaint; and 4. Pursuant to

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1. Plaintiff was listed in the policy as the only beneficiary.

2. On or about 9 December 2010, the guardian *ad litem* filed an answer admitting all of plaintiff's allegations and requesting the Court to "award Plaintiff's requested relief as doing so will not substantially injure or impair any rights of Defendant in his current position." The guardian *ad litem*, on behalf of defendant Mr. Dayton, is not a party to this appeal.

N.C. Gen. Stat. § 28C-18, defendant's answer was to be considered a "supplemental pleading[]" and the court should amend its order based on the answer to declare that plaintiff was not entitled to the AD&D coverage. Defendant subsequently filed a motion requesting that the trial court amend its 22 December 2010 order to declare that plaintiff is not entitled to the AD&D benefit under the policy or, in the alternative, the trial court should enter a separate order pursuant to N.C. Gen. Stat. § 28C-18(b) declaring that plaintiff was not entitled to the AD&D benefit. On or about 1 March 2011, plaintiff filed a reply to defendant's motion, arguing that the motion is barred by the doctrine of collateral estoppel. The trial court entered an order on 5 April 2011 denying defendant's motions and concluding that

> 1. Defendant had other, more appropriate remedies, available to challenge the Decree of Death and Order for Distribution of Proceeds of which it did not avail itself.
>
> 2. Particularly, Defendant did not move to amend the judgment at issue within 10 days after the entry of judgment nor did Defendant exercise its right to appeal.
>
> 3. The Decree of Death and Order for Distribution of Proceeds previously entered in this matter is binding on all parties and dispositive on all issues.

Defendant appeals from this order.

II. Arguments

Defendant argues that the trial court erred in its 4 April 2011 order by not following the procedures set forth in N.C. Gen. Stat. § 28C-18 and by not considering the merits of its answer and motion to amend. Defendant argues that the trial court's 22 December 2010 order declaring that Mr. Dayton was dead and that his death was by accident and ordering payment of the insurance proceeds was the first step prescribed by N.C. Gen. Stat. § 28C-18(a) and pursuant to N.C. Gen. Stat. § 28C-18(b), it filed its "supplemental pleadings" in the form of its answer and motion. Defendant contends that the trial court erred by its failure to amend its order or to execute a new order to "determine all issues arising upon the pleadings" as required by N.C. Gen. Stat. § 28C-18(b). Defendant further argues that the trial court erred in its conclusion that defendant failed to appeal the 22 December 2010 order as that order was interlocutory, according to the procedures in N.C. Gen. Stat. § 28C-18, and not subject to immediate appeal. Defendant further argues that plaintiff's collateral

estoppel argument is not valid because the 22 December 2010 order was not a final judgment or order.

Plaintiff counters that the trial court did not err in denying defendant's motion, as the 22 December 2010 order, by operation of Chapter 28C of our General Statutes, was a final order. Plaintiff argues that the trial court's 22 December 2010 order is a final order because of the mandates in N.C. Gen Stat. §§ 28C-11 and 28C-12 which state that the trial court could only make its determination regarding the death of Mr. Dayton and proceed no further. Plaintiff further contends that the trial court properly denied defendant's motion because defendant failed to challenge this final order by filing a motion prior to the order, a timely answer, a timely Rule 59 motion to amend, or a timely appeal. Plaintiff further disputes defendant's interpretation of N.C. Gen. Stat. § 28C-18 arguing that subsection (b) does not say that an insurer must be ordered to pay insurance proceeds before the insurer refuses payment, as refusal could be raised in an answer or supplemental answer before the order was entered. Plaintiff concludes that "[t]he relief requested by [defendant] is barred by the doctrine of collateral estoppel[,]" because the 22 December 2010 decree was a final order.

We note that although neither party appealed from the 22 December 2010 order, we must examine this order to determine whether the trial court's subsequent 4 April 2011 order was correct. Based on the parties' substantive arguments, we look to the procedures in Chapter 28C to determine whether the 22 December 2010 order was an interlocutory order or a final order. "Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed *de novo*." *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citation omitted and emphasis added).

III. The 22 December 2010 order

This Court has noted that "[a]s a general rule, a party may properly appeal only from a final order, which disposes of all the issues as to all parties[.]" *Honeycutt v. Honeycutt*, ___ N.C. App. ___, ___, 701 S.E.2d 689, 693 (2010) (citation omitted). We have further stated that

> [a]n order is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy. There is generally no right to appeal an interlocutory order.

> An interlocutory order is subject to immediate appeal only if (1) the order is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to Rule 54(b) of the Rules of Civil Procedure, or (2) the trial court's decision deprives the appellant of a substantial right that will be lost absent immediate review.

Arrington v. Martinez, ___ N.C. App. ___, ___, 716 S.E.2d 410, 413 (2011) (citation omitted). To address the parties' arguments, we also look to the rules of statutory interpretation:

> "Statutory interpretation begins with [t]he cardinal principle of statutory construction . . . that the intent of the legislature is controlling. In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish." *Benton v. Hanford*, 195 N.C. App. 88, 92, 671 S.E.2d 31, 34 (2009) (citation and quotation marks omitted). "Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *In re Nantz*, 177 N.C. App. 33, 40, 627 S.E.2d 665, 670 (2006) (citation and quotation marks omitted). "If the language is ambiguous or unclear, the reviewing court must construe the statute in an attempt not to defeat or impair the object of the statute [. . .] if that can reasonably be done without doing violence to the legislative language." *Arnold v. City of Asheville*, 186 N.C. App. 542, 548, 652 S.E.2d 40, 46 (2007) (citations and quotation marks omitted).

State v. McCravey, 203 N.C. App. 627, 638-39, 692 S.E.2d 409, 418, *disc. review denied*, 364 N.C. 438, 702 S.E.2d 506 (2010). We next turn to the relevant procedures in Chapter 28C, titled "Estates of Missing Persons[.]"

N.C. Gen. Stat. § 28C-2 (2009) permits "anyone who would be entitled to administer the estate" of a person missing for a period of 30 days or more ("the absentee") or "any interested person" to file a complaint in superior court for the appointment of a receiver "to take custody and control of such property of the absentee and to preserve and manage the same pending final disposition of the action as provided in G.S. 28C-11." N.C. Gen. Stat. § 28C-3 (2009) permits the court to appoint a temporary or a permanent receiver to "take charge of"

the absentee's property.[3] Here, pursuant to N.C. Gen. Stat. § 28C-2, plaintiff filed a complaint requesting to be appointed as receiver of Mr. Dayton's estate, and pursuant to N.C. Gen. Stat. § 28C-3 the trial court declared plaintiff permanent receiver of Mr. Dayton's estate. N.C. Gen. Stat. § 28C-11 (2009), in pertinent part, states that

> (a) At any time, during the receivership proceedings, upon application to the judge by any party in interest and presentation of satisfactory evidence of the absentee's death, the judge may make a *final finding and decree that the absentee is dead;* in which event the decree and transcript of all of the receivership proceedings shall be certified to the clerk of the superior court for any administration as may be required by law upon the estate of a decedent, and the judge shall proceed no further except for the purposes hereinafter set forth in G.S. 28C-12, subdivisions (1) and (4); or
>
> . . . .
>
> (c) After the lapse of five years from the date of the finding of disappearance provided for in G.S. 28C-6, if the absentee has not appeared and no finding and decree have been made in accordance with the provisions of either subsections (a) or (b) above, and subject to the provisions of G.S. 28C-14, the judge may proceed to take further evidence and thereafter make a final finding of such absence and enter a decree *declaring that all interest of the absentee in his property*, including property in which he has an interest as tenant by the entirety and other property in which he is co-owner with or without the right of survivorship, subject to the provisions of G.S. 28C-8(7), has ceased and devolved upon others by reason of his failure to appear and make claim.[4]

(Emphasis added.) Upon the entry of any final finding and decree as noted above, in N.C. Gen. Stat. § 28C-11, N.C. Gen. Stat. § 28C-12 (2009) provides the process for winding-up and termination of the receivership:

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3. N.C. Gen. Stat. § 28C-8 (2009) lists the "powers and duties of [a] permanent receiver[;]" N.C. Gen. Stat. § 28C-9 (2009) requires the receiver to make "a search for the absentee[;]" and N.C. Gen. Stat. § 28C-10 (2009) addresses a receiver's duty to publish notice of the action to persons having claims against the absentee.

4. Subsection (b) is inapplicable because it addresses the situation of when a judge makes a decree "revok[ing] his finding that [the missing person] is an absentee[.]" Here, the trial court has not revoked any of its findings.

(1) In the case of a decree under G.S. 28C-11, subsection (a), that the absentee is dead:

a. By satisfying all outstanding expenses and costs of the receivership, and

b. By then deducting for the insurance fund provided in G.S. 28C-19 a sum equal to five percent (5%) of the total value of the property remaining for distribution upon settlement of the absentee's estate, including amounts paid to the estate from policies of insurance on the absentee's life, and

c. By then certifying the proceedings to the clerk of the superior court subject to an order by the judge administering the receivership, or

. . . .

(3) In the case of a decree under G.S. 28C-11, subsection (c), declaring that all interest of the absentee in his property has ceased:

a. By satisfying all outstanding expenses and costs of the receivership, and

b. By then satisfying all outstanding taxes, other debts and charges, and

c. By then deducting for the insurance fund provided in G.S. 28C-19 a sum equal to five percent (5%) of the total value of the property remaining, including amounts paid to the receivership estate from policies of insurance on the absentee's life, and

d. By transferring or distributing the remaining property as provided in G.S. 28C-13; and

(4) In all three cases by requiring the receiver's account, and upon its approval, discharging him and his bondsmen and entering a final decree terminating the receivership.[5]

N.C. Gen. Stat. § 28C-13 (2009) gives instruction as to the distribution of the absentee's remaining property. N.C. Gen. Stat. § 28C-18 (2009), in pertinent part states that

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5. Subsection (2) of N.C. Gen. Stat. § 28C-12 is inapplicable because it applies to a trial court's N.C. Gen. Stat. § 28C-11(b) revocation of its finding that the missing person is an absentee, as explained above.

> (a) At the time of the distribution under G.S. 28C-13 the judge may direct the payment of any sums as they become due on any policies of insurance upon the life of the absentee, to the proper parties as their interest may appear.
>
> (b) If the insurer refuses payment, the judge, upon the finding of appropriate supplemental pleadings in the pending action, shall determine all issues arising upon the pleadings, provided that all issues of fact shall be tried by a jury, unless trial by jury is waived.
>
> . . . .

N.C. Gen. Stat. § 28C-19 (2009) provides for the process for establishing an "Absentee Insurance Fund" as directed in N.C. Gen. Stat. § 28C-12(1) and (3). We find that the portions of the above relevant statutes are "clear and unambiguous" and, therefore, we "must apply the statute to give effect to the plain and definite meaning of the language." *See McCravey*, 203 N.C. App. at 638-39, 692 S.E.2d at 418.

We first note that the plain words of N.C. Gen. Stat. § 28C-11 provide for different procedures based on three different determinations by the trial court: (a) entry of a final finding and decree that the absentee is dead; (b) entry of a decree revoking its finding that the missing person is an absentee, which as noted above is inapplicable in this case; and (c) if after five years from the date of disappearance no determination as to (a) or (b) had been made, entry of an order declaring that all interest of the absentee in his property had ceased and been devoted to others. *See* N.C. Gen. Stat. § 28C-11.

If the trial court follows that first procedure (a) and makes a "final finding and decree that the absentee is dead[,]" then the administration of the receivership proceedings is directed to the clerk of superior court "and the judge shall proceed *no further* except for the purposes hereinafter set forth in G.S. 28C-12, subdivisions (1) and (4)[.]" *See id.* (emphasis added). N.C. Gen. Stat. § 28C-12(1) states that if the court makes a determination based on subsection 28C-11(a), the judge must wind up and terminate the receivership by (a) satisfying the expenses and costs of the receivership, (b) deducting 5% from insurance proceeds for the insurance fund pursuant to N.C. Gen. Stat. § 28C-19, and (c) certifying the proceeding to the clerk of superior court.

If the trial court follows the third procedure (c) in N.C. Gen. Stat. § 28C-11 and enters an order "declaring that all interest of the absentee in his property . . . has ceased and devolved upon others by rea-

sons of his failure to appear and make a claim[,]" then N.C. Gen. Stat. § 28C-12(3) directs the judge to wind up and terminate the receivership by (a) satisfying the expenses and costs of the receivership; (b) satisfying all outstanding taxes, and other debts; (c) deducting 5% from insurance proceeds for the insurance fund pursuant to N.C. Gen. Stat. § 28C-19; and (d) "[b]y transferring or distributing the remaining property as provided by G.S. 28C-13[.]" As noted above, N.C. Gen. Stat. § 28C-13 directs the procedures for distribution of "property remaining[.]" N.C. Gen. Stat. § 28C-18(a) states that "[a]t the time of the distribution under G.S. 28C-13 the judge may direct the payment of any sums as they become due on any polices of insurance upon the life of the absentee, to the proper parties as their interest may appear." Therefore, given the procedures in Chapter 28C, N.C. Gen. Stat. § 28C-18 is only applicable if the trial court in its order declares "that all interest of the absentee in his property . . . has ceased and devolved upon others[,]" pursuant to N.C. Gen. Stat. § 28C-11(c). We turn next to the trial court's 22 December 2010 decree.

The trial court's 22 December 2010 decree found, *inter alia*, that no one, including plaintiff, Mr. Dayton's employer, or law enforcement had seen or heard from Mr. Dayton since May or June of 2004; he had approximately $3,000.00 in debt; he owned no real or personal property; and he was a policy holder on a life insurance policy. Based on these findings the trial court concluded that it had jurisdiction to decree death and order distribution of the life insurance proceeds; venue was proper; and

> 3. Upon the presentation of satisfactory evidence pursuant to N.C. Gen. Stat § 28C-11, Petitioner's motion for a final finding and decree that Respondent is dead by reason of accident and for distribution of insurance proceeds should be granted.

Based on these conclusions, the trial court ordered:

> 1. That the respondent, Douglas Eugene Dayton, is decreed dead and a Death Certificate be entered showing such;
>
> 2. That the respondent's death is hereby declared an accidental death;
>
> 3. That the proceeds on the attached Baltimore Life Insurance Policy be distributed to Petitioner as Receiver of the Estate of Respondent in the amount of $100,000.00.

It appears that the trial court's 22 December 2010 decree was made pursuant to N.C. Gen. Stat. § 28C-11(a) as it made findings sup-

porting a conclusion that Mr. Dayton was dead. It certainly did not make the conclusion or declaration that "all interest of the absentee in his property . . . has ceased and devolved upon others" pursuant to N.C. Gen. Stat. § 28C-11(c). Therefore, N.C. Gen. Stat. §§ 28C-12(3), 28C-13, or 28C-18 are *not* relevant to our analysis. As noted above, if the trial court made a "final finding and decree that the absentee is dead" then N.C. Gen. Stat. § 28C-11(a) states that the court could direct the administration of the receivership proceedings to the clerk of the superior court and "shall proceed *no further* except for the purposes hereinafter set forth in G.S. 28C-12, subdivisions (1) and (4)[.]" (emphasis added). Therefore, by operation of the statute, the 22 December 2010 order was not interlocutory as it "requires [no] further action by the trial court[.]" *See Arrington*, ___ N.C. App. at ___, 716 S.E.2d at 413. The trial court could not make any more determinations based on the plain language of the statute. We note that it appears that the trial court failed to follow the winding up and termination procedures in N.C. Gen. Stat. § 28C-12(1) and its order of payment of the life insurance proceeds is unclear.[6] However, defendant raises no argument based on N.C. Gen. Stat. § 28C-12, *see* N.C.R. App. P. 28(a), and no appeal was made from the 22 December 2010 order. *See* N.C.R. App. P. 3(a). We also note that defendant failed to file an answer within 30 days after service of plaintiff's amended complaint, *see* N.C. Gen. Stat. § 1A-1, Rule 12(a)(1) (2009), nor did defendant file a timely motion to amend the 22 December 2010 order within ten days after entry of the judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 59(e). As all of defendant's remaining arguments on appeal challenging the 5 April 2011 order are based on N.C. Gen. Stat. § 28C-18, which is inapplicable, we need not address them.

For the foregoing reasons, we affirm the trial court's 5 April 2011 order.

AFFIRMED.

Judges STEPHENS and BEASLEY concur.

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6. Plaintiff requested in her amended complaint for payment of the insurance proceeds pursuant to N.C. Gen. Stat. § 28C-14. However, N.C. Gen. Stat. § 28C-14 is applicable only if there is a N.C. Gen. Stat. § 28C-6 hearing challenging the appointment of a permanent receiver. Here, there was no challenge to plaintiff's appointment as permanent receiver of Mr. Dayton's estate.

J. REED FISHER, JUNE C. FISHER, ROBERT S. THOMAS, MARY ANN S. THOMAS, JOSEPH HENRY JENKINS, JENNY COOKE JENKINS, GRANBY PROPERTIES, INC., JOSEPH G. FIVEASH, JR., TRUSTEE, ALICE JANE FIVEASH, TRUSTEE, CALVERT T. LESTER, HARRY LESTER, KATHERINE W. KITTRELL, ROBERT G. KITTRELL, JR., KATHERINE K. KERNS, TRENT S. KERNS, ROBERT G. KITTRELL, III, MEREDITH F. KITTRELL, DOROTHY O. READ, J. LLOYD HORTON, CAROLYN R. HORTON, NANCY FOREMAN SILVER, TRUSTEE, WINKIE SILVER, SOPHIE FOREMAN JORDAN, TRUSTEE; DANNY JORDAN, EDLA FOREMAN STEVENS, TRUSTEE, BILL STEVENS, JOHN W. FOREMAN, JR., TRUSTEE, HUGH L. PATTERSON, ANN PATTERSON SCOTT, PHILIP A. ROBERTS, JR., RUTH P. ROBERTS, JOHN H. HIGH, CAROLINE H. HIGH, VERNA'S COTTAGE, LLC, GRIZELLE B. FEARING, JOHN H. HALL, JR., ELIZABETH G. HALL, FRED M. DUNSTAN, III, DEBBIE L. HILL, WILLIAM HAILIN SKINNER, JR., FRED P. WOOD, JR., ELAINE W. WOOD, ELIZABETH W.J. PARRISH AND MELLON BANK, N.A., TRUSTEE, INDIVIDUALLY AND ON BEHALF OF ALL SIMILARLY SITUATED OCEANFRONT LANDOWNERS IN THE TOWN OF NAGS HEAD, PLAINTIFFS v. TOWN OF NAGS HEAD, DEFENDANT

COA11-1140

(Filed 15 May 2012)

Easements—eminent domain—sufficient compensation—sufficient notice—public trust doctrine not violated

The trial court did not err in an easement and eminent domain case by granting defendant's motion for judgment on the pleadings pursuant to Rule 12(c) of the Rules of Civil Procedure. Defendant adequately estimated that the benefit received from the project was sufficient compensation and the issue of whether that was reasonable was more properly left for the condemnation hearing. Further, defendant's notice to plaintiffs was sufficient to meet the requirements of N.C.G.S. § 40A-40 and otherwise did not prejudice plaintiffs. Moreover, defendant did not violate the public trust doctrine by asserting its rights of eminent domain.

Appeal by plaintiffs from order entered 2 June 2011 by Judge J.C. Cole in Dare County Superior Court. Heard in the Court of Appeals 21 February 2012.

Vandeventer Black LLP, by Norman W. Shearin, Wyatt M. Booth, and Kevin A. Rust, for plaintiff-appellant.

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

McCULLOUGH, Judge.

J. Reed Fisher, et al., (collectively "plaintiffs") appeal from the trial court's granting of the Town of Nags Head's ("defendant's") motion for judgment on the pleadings pursuant to N.C.R. Civ. P. 12(c) (2011). For the reasons discussed herein, we affirm the order of the trial court.

I. Background

Plaintiffs are oceanfront property owners along the Atlantic Ocean in Nags Head, North Carolina. Defendant has proposed a one-time beach nourishment project (the "project") over a ten-mile stretch, which would affect plaintiffs' properties. The project would involve the depositing of additional sand on the beach with a projected advancement in the shoreline of "anywhere from 50 to 125 feet."

On 14 January 2011, plaintiffs received correspondence (the "correspondence") from defendant seeking a voluntary easement across their respective properties for the implementation of the project. The correspondence threatened to obtain the easements by eminent domain should plaintiffs not voluntarily sign the request. It purported to also be a notice of condemnation pursuant to Chapter 40A of the North Carolina General Statutes. The notice aspect of the correspondence, in relevant part, states:

> It is critical that you sign the easement. The project's success relies on a stable, continuous deposit of sand. If you do not sign the enclosed easement and return it by February 18, 2011, you are hereby notified pursuant to North Carolina General Statute 40A-40 that the Town intends to condemn, by eminent domain, the necessary easement rights. The Town estimates that no compensation to the owners is required for the interest sought. The Town will file a condemnation action for the easement area on your property as soon as practical after said date. The condemnation action would be for a purpose as to which title to the easement interest would immediately vest in the Town when the complaint is filed to institute the action to condemn, pursuant to North Carolina General Statutes 40A-42.
>
> You have the right to file for injunctive relief and to answer the complaint after it has been filed. You should consult with an attorney regarding your rights.

Plaintiffs contend the voluntary easement, on its face, would have transferred rights to defendant over and beyond those necessary for the project or that otherwise could be lawfully obtained through

eminent domain. On 16 February 2011, two days before the date to return the request for voluntary easement, plaintiffs initiated the present suit seeking to enjoin defendant in advance of its exercise of eminent domain. The complaint alleges insufficiencies in the notice and violations of plaintiffs' constitutional rights. The complaint also asserted a class action, but plaintiffs voluntarily withdrew the Motion to Certify Class. Defendant subsequently filed its motions to dismiss and strike, as well as its answer, on 21 March 2011. Defendant also filed a motion for judgment on the pleadings on 24 March 2011, pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. The trial court held a hearing on the motion on 25 April 2011 and ultimately granted the motion by order dated 2 June 2011. Plaintiffs appeal.

II. Analysis

At issue in this case is whether the trial court correctly granted defendant's motion for judgment on the pleadings pursuant to N.C.R. Civ. P. 12(c). Specifically, plaintiffs contend their constitutional rights were violated by defendant's failing to offer just compensation for the voluntary easements and that defendant's notice was otherwise deficient. We disagree.

We review the granting of a motion for judgment on the pleadings pursuant to Rule 12(c) *de novo*. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005). As in a 12(b)(6) motion, our Court "must accept the allegations in plaintiffs' complaint as true." *Thompson v. Town of Warsaw*, 120 N.C. App. 471, 473, 462 S.E.2d 691, 692 (1995). The granting of a motion for judgment on the pleadings is proper where the pleadings fail to reveal any material issue of fact with only questions of law remaining. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). Furthermore, it "is not favored by law and the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmovant." *Carpenter v. Carpenter*, 189 N.C. App. 755, 762, 659 S.E.2d 762, 767 (2008). "The rule's function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499.

Plaintiffs raise an initial issue that the trial court and this Court should not consider the exhibits attached to defendant's answer because it is well-settled that "a document attached to the moving party's pleading may not be considered in connection with a Rule 12(c) motion unless the non-moving party has made admissions regarding the document." *Weaver v. Saint Joseph of the Pines, Inc.*,

187 N.C. App. 198, 205, 652 S.E.2d 701, 708 (2007). If the trial court considered matters outside the pleadings in reaching its decision, defendant's motion could not be disposed of under Rule 12(c), "but rather was converted into a motion for summary judgment under Rule 56." *Id.* at 205, 652 S.E.2d at 707. However, we cannot tell from the pleadings, or the trial court's order, whether or not the trial court incorrectly considered the exhibits attached to defendant's answer, other than the correspondence attached as Exhibit 1 which plaintiffs made admissions to in their complaint. "The trial court is not required to specify its reason for allowing a motion for judgment on the pleadings." *Wilson v. Development Co.*, 276 N.C. 198, 207, 171 S.E.2d 873, 879 (1970). Thus, we shall not, and the trial court correctly did not, consider the other exhibits attached to defendant's answer. We will, therefore, address this case as the trial court's granting of a Rule 12(c) motion for judgment on the pleadings.

Plaintiffs first argue defendant violated their constitutional rights by failing to offer just compensation for the proposed voluntary easements. "When private property is taken for public use, just compensation must be paid. . . . While the principle is not stated in express terms in the North Carolina Constitution, it is regarded as an integral part of the law of the land within the meaning of Art. I, Sec. 17." *Sale v. Highway Commission*, 242 N.C. 612, 617, 89 S.E.2d 290, 295 (1955) (internal quotation marks and citation omitted). Consequently, plaintiffs sought injunctive relief pursuant to N.C. Gen. Stat. § 40A-42(a)(2), (f) (2011), to enjoin defendant from taking their private property without offering just compensation. A party may seek injunctive relief prior to the bringing of an action for condemnation where there is a deficient notice. *Nelson v. Town of Highlands*, 358 N.C. 210, 210, 594 S.E.2d 21, 22 (2004), *adopting dissenting opinion in*, 159 N.C. App. 393, 583 S.E.2d 313 (2003) (Hudson, J. dissenting). A notice for condemnation

> shall contain a general description of the property to be taken and of the amount estimated by the condemnor to be just compensation for the property to be condemned. The notice shall also state the purpose for which the property is being condemned and the date condemnor intends to file the complaint.
>
> (b) In the case of a condemnation action to be commenced pursuant to G.S. 40A-42(a), the notice required by subsection (a) of this section shall substantially comply with the following requirements:

(1) The notice shall be printed in at least 12 point bold legible type.

(2) The words “Notice of condemnation” or similar words shall conspicuously appear on the notice.

(3) The notice shall include the information required by subsection (a) of this section.

(4) The notice shall contain a plain language summary of the owner’s rights, including:

a. The right to commence an action for injunctive relief.

b. The right to answer the complaint after it has been filed.

(5) The notice shall include a statement advising the owner to consult with an attorney regarding the owner's rights.

An owner is entitled to no relief because of any defect or inaccuracy in the notice unless the owner was actually prejudiced by the defect or inaccuracy, and the owner is otherwise entitled to relief under Rules 55(d) or 60(b) of the North Carolina Rules of Civil Procedure or other applicable law.

N.C. Gen. Stat. § 40A-40 (2011). This statute must be strictly construed. *State v. Club Properties*, 275 N.C. 328, 336, 167 S.E.2d 385, 390 (1969). Plaintiffs contend the notice failed to give a reasonable estimate of just compensation, a reasonable notice of the condemnation, a proper description of the property to be taken, and that otherwise plaintiffs suffered prejudice.

The law regarding just compensation “imposes upon a governmental agency taking or appropriating private property for public use a correlative duty to make just compensation to the owner of the property appropriated.” *Sale*, 242 N.C. at 617, 89 S.E.2d at 295. Furthermore, “[i]n this State when a person has been deprived of his private property for public use nothing short of actual payment, or its equivalent, constitutes just compensation.” *Id.* at 618, 89 S.E.2d at 296. Plaintiffs rely on this statement for the contention that defendant’s estimate of no compensation is inadequate and ludicrous because a monetary value is always necessary. However, we cannot find any case law requiring the providing of monetary compensation and moreover, the statement from above includes the language, “or

its equivalent." *Id.* Defendant argues plaintiffs are not entitled to monetary compensation due to the benefits plaintiffs will receive from the additional expanse of beach resulting from the project. We believe the value of the additional land could be considered an equivalent to "actual payment." *Id.* Nonetheless, the correct value of just compensation is an issue more adequately resolved in the condemnation proceeding and not for the preliminary injunctive issues of whether the notice was sufficient. Thus, we believe plaintiffs' argument that a lack of monetary compensation warrants injunctive relief is misplaced as the case law allowing a claim for injunctive relief seems to apply to situations involving deficient notice and other allegations. *See Nelson*, 159 N.C. App. at 394, 583 S.E.2d at 314, *overruled on other grounds by* 358 N.C. 210, 594 S.E.2d 21 (2004). As a result, we will turn to the issue of whether or not defendant provided sufficient notice as that is plaintiffs' other significant argument.

Plaintiffs contend any issues regarding the sufficiency of defendant's notice are issues of fact adequate to survive a Rule 12(c) motion and better left for a jury to resolve. However, we believe the issue of whether or not defendant satisfied the notice requirements of N.C. Gen. Stat. § 40A-40 is a question of law for us to interpret. Plaintiffs first take issue with defendant's estimate of just compensation for the property to be condemned. They argue defendant is required to give an estimate and constitutionally required to provide just compensation. *Club Properties*, 275 N.C. at 334, 167 S.E.2d at 388. In arguing so, plaintiffs claim that an estimate of zero does not constitute an estimate at all. Furthermore, they allege "the Town has not obtained appraisals of the property rights to be acquired or otherwise estimated fair market value." Nevertheless, we see no authority requiring that defendant obtain appraisals prior to giving its estimate of just compensation to satisfy the notice requirement. Defendant is within its rights to estimate that it does not owe plaintiffs monetary compensation due to the benefits plaintiffs will receive from the project. Otherwise, the issue is one for a jury to resolve in the condemnation proceedings. This Court has addressed the sufficiency of the notice pursuant to N.C. Gen. Stat. § 40A-40 in two cases and in neither have we held that defendant's estimate must be reasonable in plaintiffs' eyes. *See Scotland County v. Johnson*, 131 N.C. App. 765, 769, 509 S.E.2d 213, 215-16 (1998); *Catawba Cty. v. Wyant*, 197 N.C. App. 533, 541, 677 S.E.2d 567, 572-73 (2009). We believe the issue of whether the estimate of just compensation is proper is better left to the condemnation hearing and as a result we hold that defendant's estimate of no compensation adequately satisfies the notice requirement.

Plaintiffs next argue defendant did not provide sufficient notice of its intent to condemn the property should plaintiffs decline to sign the requests for voluntary easement. The alleged notice was provided on the second page of the correspondence within a paragraph set off in boldface type. The notice properly cites to the statute regarding the condemnation procedure. *See* N.C. Gen. Stat. § 40A-42. N.C. Gen. Stat. § 40A-40(b)(2), however, requires that "[t]he words 'Notice of condemnation' or similar words shall conspicuously appear on the notice." While the words were not on the first page in capital letters, the second page did contain in boldface type the language, "you are hereby notified pursuant to North Carolina General Statute 40A-40 that the Town intends to condemn, by eminent domain, the necessary easement rights." Moreover, plaintiffs seem to have understood the notice by filing this action for injunctive relief on 16 February 2011, two days before the 18 February 2011 deadline after which the condemnation action would be filed. Plaintiffs additionally argue that they were prejudiced by the inconspicuousness of the notice in arguing that defendant's "real purpose [was] to coerce Plaintiffs into conveying property rights without being paid for those rights[.]" Although the notice may not have been as conspicuous as required by the statute, we cannot find that plaintiffs were prejudiced by the notice being on the second page as they were able to ascertain its meaning and file this action prior to the deadline.

Plaintiffs also argue the notice was deficient in that it lacked a proper description of the property to be taken. The general description provided in the notice described the property as that which "lies waterward of the following locations, whichever is most waterward: the Vegetation Line; the toe of the Frontal Dune or Primary Dune; or the Erosion Escarpment of the Frontal Dune or Primary Dune." Furthermore, attached to the correspondence was a document describing the "Easement Area" and referring plaintiffs to N.C. Admin. Code tit. 15A, r. 07H.0305 (2011), which defines the terms used in the general description. The correspondence also referred to the PIN Number and Tax Parcel for each plaintiffs' particular piece of property.

Plaintiffs contend the notice must either describe the property with specificity or reference must be made to a survey. *In re Simmons*, 5 N.C. App. 81, 85, 167 S.E.2d 857, 860 (1969). In *Simmons* this Court held that the description "must be such that a surveyor could locate the parcel described without the aid of extrinsic evidence." *Id.* (citation omitted). It is difficult to describe a piece of property with speci-

ficity which can change with the fluctuation of the tides, but the description of the "Easement Area" utilizes terms that are well defined in the referenced portion of the Administrative Code, such that a surveyor with experience in oceanfront properties could accurately determine the "Easement Area." The seaward boundary has been determined to be the "mean high water mark," N.C. Gen. Stat. § 77-20(a) (2011), and can be located by natural indicators and observation. *Webb v. N.C. Dept. of Envir., Health, and Nat. Resources*, 102 N.C. App. 767, 771-72, 404 S.E.2d 29, 32 (1991). Due to the peculiarity of dealing with oceanfront property, we believe defendant's description of the "Easement Area" was sufficient for plaintiffs to determine the requested property, or at least for a hired surveyor to locate.

Plaintiffs make one final argument in regard to N.C. Gen. Stat. § 40A-40, in that they were actually prejudiced by defendant's deficiencies in the notice. Plaintiffs first make the same argument as above that the lack of just compensation caused them to be prejudiced, but this cannot be the case as they will have the opportunity to litigate the issue at the condemnation hearing. Plaintiffs next raise another similar argument as above, that potential plaintiffs who actually signed the voluntary easement request without defendant having provided an appraisal were prejudiced because defendant coerced those plaintiffs into thinking their potential loss in property contained no value. Unfortunately, as stated above, we believe this argument is meritless, mainly due to the fact that these "potential" plaintiffs are not involved in the current action and we cannot take their situations into consideration. Plaintiffs finally claim that defendant's deficient description of the property left them with little choice but to file the current action because they could not tell which property defendant intended to take. Again, this argument is completely meritless. We have already held the description to be sufficient. Consequently, plaintiffs' claims of prejudice are dismissed.

Plaintiffs' final argument is that defendant has no right or standing to assert public trust rights. "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." *Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 41, 621 S.E.2d 19, 27 (2005). Thus, plaintiffs contend that the State, in its sovereign capacity, and not defendant, may assert rights in private property by means of the public trust doctrine. *Id.* However, plaintiffs neglect to consider N.C. Gen. Stat. § 40A-3(b1)(10) (2011), when contending that the public trust doctrine prevents defendant from asserting any rights

of eminent domain over the beaches. Our General Assembly has authorized oceanfront municipalities to exercise the power of eminent domain when

> [e]ngaging in or participating with other governmental entities in acquiring, constructing, reconstructing, extending, or otherwise building or improving beach erosion control or flood and hurricane protection works, including, but not limited to, the acquisition of any property that may be required as a source for beach renourishment.

Id. Consequently, the State has granted defendant the authority to assert its eminent domain powers over certain parts of plaintiffs' property for the purpose of the project. Furthermore, the public trust doctrine does not preclude defendant from going forth with the project and to the extent defendant argues it has authority to take action under that doctrine, its argument is misplaced. *See Town of Nags Head v. Cherry, Inc.*, No. COA11-93, 2012 WL 540742 (N.C. App. Feb. 21, 2012). Nevertheless, we recognize that the powers of eminent domain constitute a distinct body of law and are routinely exercised by municipalities and other subordinate legal entities.

III. Conclusion

Plaintiffs' claim for injunctive relief fails for two reasons. First, defendant's decision to estimate that no compensation was required does not violate plaintiffs' constitutional rights requiring just compensation because defendant adequately estimated that the benefit received by the project was sufficient compensation and the issue of whether that is reasonable is more properly left for the condemnation hearing. Secondly, defendant's notice, as provided to plaintiffs, was sufficient to meet the requirements of N.C. Gen. Stat. § 40A-40 and otherwise did not prejudice plaintiffs due to their ability to file the current action and have a surveyor accurately locate the requested property. Moreover, defendant has not violated the public trust doctrine by asserting its rights of eminent domain as bequeathed to it by our state legislature. As a result, we affirm the trial court's granting of defendant's motion for judgment on the pleadings pursuant to Rule 12(c).

Affirmed.

Judges STEELMAN and GEER concur.

[220 N.C. App. 487 (2012)]

ARTHUR C. TADDEI AND ELIZABETH A. TADDEI, PLAINTIFFS v. VILLAGE CREEK PROPERTY OWNERS ASSOCIATION, INC. AND ALLEN E. RENZ, DEFENDANTS

No. COA11-650-2

(Filed 15 May 2012)

1. **Associations—homeowners association—restrictive covenants —properly amended**

   The trial court did not err in a case involving the amendment of restrictive covenants of a homeowners association by ruling that the covenants were lawfully amended. The covenants were properly amended, prior to the expiration of the first 20-year term, according to the language of Paragraph 3 of the covenants.

2. **Associations—homeowners association—restrictive covenants —amended covenants valid**

   The trial court did not err in a case involving the amendment of restrictive covenants of a homeowners association 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—president of homeowners association—insufficient evidence**

   The trial court did not err in a breach of fiduciary duty claim by granting defendant Renz summary judgment. The evidence presented by plaintiffs did not indicate that Renz breached his fiduciary duty as the president of the homeowners association and merely showed that he had a differing opinion from plaintiffs on a number of issues regarding the covenants and the housing development.

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. Petition for Rehearing granted on 2 April 2012.

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 property 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. An opinion affirming the trial court's order was filed by this Court on 21 February 2012. Plaintiffs filed a Petition for Rehearing, which was granted on 2 April 2012. Upon reexamination, we affirm the trial court's order, but we modify the originally filed opinion. This opinion supersedes the previous opinion filed on 21 February 2012.

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.

On 2 December 2006, the VCPOA Board of Directors, including Renz in his role as president, sent a letter to property 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 the VCPOA; (2) a derivative proceeding against the 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."

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. 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. Bissette*, 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.

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.

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 ordinance or other official action by the Town of Edenton . . . ." Plaintiffs' argument is without merit.

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. This provision does not conflict with Paragraph 33, which allows amendments to the Covenants at *any time*, "[n]otwithstanding" the other provisions in the Covenants, so long as the purpose of the amendment is to bring the Covenants into compliance with the ordinances of the Town of Edenton. In sum, there are two methods to amend the Covenants, one pursuant to Paragraph 3 and the other pursuant to Paragraph 33. Paragraph 3 is not subject to the limitation set out in Paragraph 33.

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. 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 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 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. Renz expressed his point of view regarding the amendments and plaintiffs did the same, as evidenced by a letter plaintiffs sent to other property owners expressing concerns and displeasure with Renz and the proposed Amended Covenants.

It is relevant to point out that Renz did request a written legal opinion prior to proceeding with the plan to amend the Covenants. The attorney stated that the Covenants could be amended pursuant to Paragraph 3, but expressed some concerns about the reasonableness of amending the Covenants to require assessments on a per-unit-owned basis. In a letter sent to the Village Creek property owners on 23 February 2007, Renz informed them that he had further discussed the matter with the attorney, and that the attorney was of the opinion that the proposed amendment would likely be deemed reasonable by a court should the matter be litigated; however, Renz attached the written opinion of the attorney in which the attorney expressed some doubts as to the reasonableness of the amendment. There is no indication that Renz engaged in any deceptive tactics. To the contrary, he hired an attorney on behalf of the VCPOA and took measures to ensure that the property owners were kept apprised of the attorney's written conclusions and subsequent conversations Renz had with the attorney.

Plaintiffs are correct in pointing out that Renz had a personal economic interest in the amendments because he was a multiple lot owner. Nevertheless, 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. Assuming, *arguendo*, that plaintiffs established that Renz acted in a manner incompatible with his fiduciary duty, this letter evidences that Renz acted in an open, fair, and honest manner. *Estate of Smith v. Underwood*, 127 N.C. App. 1, 9, 487 S.E.2d 807, 812 ("Once a plaintiff establishes a *prima facie* case of the existence of a fiduciary duty, and its breach, the burden shifts to the defendant to prove he acted in an 'open, fair and honest' manner, so that no breach of fiduciary duty occurred." (citation omitted)), *disc. review denied*, 347 N.C. 398, 494 S.E.2d 410 (1997). Knowing of Renz's personal interest and other material facts, the property owners still voted to amend the Covenants.

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. Renz sought legal counsel on behalf of the VCPOA; the property owners were aware of Renz's status as a

multiple lot owner; and there is no indication that the procedure for amendment stated in the Covenants was not properly followed. 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.

STATE OF NORTH CAROLINA v. ANTHONY LYNN HOUSERIGHT

No. COA11-1490

(Filed 15 May 2012)

1. Sexual Offenses—statutory sex offense—sufficient evidence

The trial court did not err by failing to dismiss one count of statutory sex offense for insufficient evidence. The State presented sufficient evidence that defendant committed a sex offense upon the victim during the time frame alleged.

2. Evidence—other crimes, wrongs, or acts—properly admitted to show plan—not unduly prejudicial

The trial court did not err in a sexual offenses case by admitting evidence of sexual conduct by defendant with another girl of similar age as the victim during the same time period, pursuant to Rule 404(b). The evidence was properly admitted for the purpose of showing defendant's plan, and the admission of the evidence was not unduly prejudicial.

3. Evidence—other crimes, wrongs, or acts—no prejudice—no plain error

The trial court did not commit plain error in failing to intervene *ex mero motu* to exclude testimony concerning defendant's conduct with another girl. Even assuming *arguendo* that the

admission of the testimony was error, defendant failed to demonstrate that the jury probably would have reached a different result had the evidence not been admitted.

Appeal by defendant from judgment entered 26 August 2011 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 2 April 2012.

Attorney General Roy Cooper by Assistant Attorney General Angenette Stephenson for the State.

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

STEELMAN, Judge.

The State presented sufficient evidence to survive a motion to dismiss on one count of statutory sex offense. The trial court did not err in admitting evidence of other sexual conduct by defendant with another girl of similar age as the victim during the same time period, pursuant to N.C.R. Evid. 404(b). The trial court did not commit plain error in failing to intervene *ex mero motu* to exclude testimony concerning defendant's conduct with another girl.

I. Factual and Procedural History

A grand jury indicted defendant for one count of first-degree rape of a child, one count of first-degree sex offense of a child, two counts of statutory sex offense, and seven counts of statutory rape.

The victim named in the indictments (B.F.) testified at trial. Two other girls, C.J. and E.S., also testified concerning defendant's sexual conduct with them. Defendant was found guilty of first-degree rape, first-degree sexual offense, two counts of statutory sex offense, and six counts of statutory rape. Defendant was found not guilty of one count of statutory rape. The trial court consolidated the convictions into two judgments and imposed two consecutive sentences of 192 to 240 months imprisonment, from the presumptive range.

Defendant appeals.

II. Sufficiency of the Evidence

[1] In his first argument, defendant contends that the trial court erred in failing to dismiss one count of statutory sex offense for insufficient evidence. We disagree.

We review 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). The trial court must determine whether there is substantial evidence of each essential element of the offense charged and that the defendant is the perpetrator of the offense. *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1985).

"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. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 256 (2002).

Defendant argues that there was no evidence that a sex offense occurred within the timeframe alleged at the Rosemont Avenue address. Defendant contends that as to this offense, B.F. testified that they had sexual intercourse, but did not specifically testify as to an act that would constitute a sex offense. However, B.F. testified that preceding each incident of sexual intercourse, defendant digitally penetrated her. This testimony was broad enough to encompass the incident that is the subject of defendant's argument. Taken in the light most favorable to the State, sufficient evidence was presented that defendant committed a sex offense upon B.F. at the Rosemont Avenue address.

This argument is without merit.

III. Evidence of Uncharged Sexual Conduct

[2] In his second argument, defendant contends that the trial court erred in admitting the testimony of another young girl, E.S., pursuant to N.C.R. Evid. 404(b). We disagree.

A. N.C.R. Evid. 404(b)

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C.R. Evid. 404(b) (2011). "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* Cases decided under N.C.R. Evid. 404(b) state 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) (emphasis in original).

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401 (2011). "North Carolina's appellate courts have been 'markedly liberal in admitting evidence of similar sex offenses to show one of the purposes enumerated in Rule 404(b).' " *State v. Thaggard*, 168 N.C. App. 263, 270, 608 S.E.2d 774, 780 (2005) (quoting *State v. Scott*, 318 N.C. 237, 247, 347 S.E.2d 414, 419 (1986)).

"The admissibility of 404(b) evidence is subject to the weighing of probative value versus unfair prejudice mandated by Rule 403." *Thaggard*, 168 N.C. App. at 269, 608 S.E.2d at 779 (internal quotation marks omitted).

B. N.C.R. Evid. 403

> When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value. Similarly, [w]hen otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor.

State v. Badgett, 361 N.C. 234, 243, 644 S.E.2d 206, 212 (2007) (alteration in original) (internal citation and quotation marks omitted).

N.C.R. Evid. 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. N.C.R. Evid. 403 (2011). "Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56. Unfair prejudice is "an undue tendency to suggest decision on an improper basis[.]" *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907 (2006) (alteration in original).

C. Standard of Review

This Court has previously stated that a ruling based on N.C.R. Evid. 404(b) is reviewed simply for abuse of discretion. *Summers*, 177 N.C. App. at 697, 629 S.E.2d at 907 ("We review a trial court's determination to admit evidence under N.C. R. Evid. 404(b) and 403, for an abuse of discretion."). A closer examination of the Rule and its

application leads us to conclude that while abuse of discretion is an integral part of a N.C.R. Evid. 404(b) analysis, the determination of whether evidence was properly admitted under N.C.R. Evid. 404(b) and 403 actually involves a three-step test.

First, is the evidence relevant for some purpose other than to show that defendant has the propensity to commit the type of offense for which he is being tried? *Coffey*, 326 N.C. at 278, 389 S.E.2d at 54. Second, is that purpose relevant to an issue material to the pending case? *State v. Anderson*, 350 N.C. 152, 174, 513 S.E.2d 296, 310 (1999). Third, is the probative value of the evidence substantially outweighed by danger of unfair prejudice pursuant to N.C.R. Evid. 403? *Summers*, 177 N.C. App. at 697, 629 S.E.2d at 907.

The first two steps involve questions of relevance as defined by N.C.R. Evid. 401. *Coffey*, 326 N.C. at 278, 389 S.E.2d at 54. In *State v. Wallace*, 104 N.C. App. 498, 410 S.E.2d 226 (1991), this Court held that "even though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard . . . such rulings are given great deference on appeal." *Wallace*, 104 N.C. App. at 502, 410 S.E.2d at 228. Our Supreme Court recently adopted the language set forth in *Wallace*, stating that "[a] trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal." *State v. Lane*, ___ N.C. ___, ___, 707 S.E.2d 210, 223 (2011).

This Court has consistently acknowledged the deferential standard since *Wallace*, but there have been instances where this Court has applied a type of *de novo review. See, e.g.*, *State v. Edmonds*, ___ N.C. App. ___, ___, 713 S.E.2d 111, 117 (2011) ("Though review of relevancy determinations is *de novo*, [a] trial court's ruling on an evidentiary point will be presumed to be correct unless the complaining party can demonstrate that the particular ruling was in fact incorrect." (alteration in original) (internal citation and quotation marks omitted)); *State v. Capers*, ___ N.C. App. ___, ___, 704 S.E.2d 39, 45 (2010) ("Although we review a trial court's ruling on the relevance of evidence *de novo*, we give a trial court's relevancy rulings great deference on appeal." (internal quotation marks omitted)), *appeal dismissed and disc. review denied*, ___ N.C. ___, 707 S.E.2d 236 (2011).

While we are bound by *Wallace*, and now *Lane*, to give deference to the trial court's ruling, we hold that questions of relevance are, in fact, reviewed *de novo*. This Court reviews the trial court's determination anew, but accords deference to the trial court's ruling.

The third step of the N.C.R. Evid. 404(b) analysis consists of the N.C.R. Evid. 403 balancing test. This test is reviewed for abuse of discretion. *Summers*, 177 N.C. App. at 697, 629 S.E.2d at 907.

D. Analysis

In the first step of our analysis, we review whether the evidence of defendant's conduct with E.S. was relevant for some purpose other than to show that defendant had the propensity for the type of conduct for which he was being tried. The trial court concluded that the evidence was relevant and admissible for the purpose of showing plan and intent.

Prior to ruling that the evidence was admissible, the trial court heard testimony on *voir dire* from E.S. During that hearing, E.S. testified that defendant engaged in sexual conduct with her when she was 13 or 14 years old. E.S. was 20 years old at the time of the hearing, and B.F. was 21 at the time of the trial. The indictments allege that defendant engaged in sexual activity with B.F. over a period of years when she was 13 to 15 years old. Defendant's conduct with E.S. took place within the same time period as the offenses alleged in the indictments, and with a young girl of similar age.

E.S.'s testimony as to her sexual encounter with defendant tends to make the existence of a plan or intent to engage in sexual activity with young girls more probable. We hold that the trial court correctly determined that the evidence of defendant's sexual conduct with E.S. was admissible for the purpose of showing defendant's plan or intent to engage in sexual activity with young girls.

In the second step of our analysis, we review whether the purpose is relevant to an issue material to the pending case. The trial court made no explicit conclusions regarding the relevance of defendant's plan to a specific issue in the case. However, the decision to admit the evidence implies that the trial court concluded that defendant's plan or intent was relevant to a material issue.

In this case, defendant was charged with nine counts of statutory rape or sex offense. The crucial element in each of these offenses was the age of the victim and the age of the defendant. E.S.'s testimony was relevant on this issue, showing defendant's plan. This is consistent with analysis in prior cases.

In *State v. Williams*, 303 N.C. 507, 513, 279 S.E.2d 592, 596 (1981), where the defendant was charged with two counts of first-degree sex

offense, evidence that a third young girl more than three years older than the victims was properly admitted to show intent and plan or design. In *State v. McKinney*, 110 N.C. App. 365, 372-73, 430 S.E.2d 300, 304 (1993), where the defendant was charged with first-degree rape of a child, evidence that the defendant molested young girls over a period of years was properly admitted to show a common plan to molest young girls. In *Thaggard*, 168 N.C. App. at 270-71, 608 S.E.2d at 780, evidence of similar sexual assaults on other girls of similar age within the past two years was properly admitted to show a common scheme.

We hold that the purpose of showing defendant's plan or intent is relevant to show defendant's plan to engage in sexual activity with young girls.

In the third step of our analysis, we review for abuse of discretion the trial court's determination that the probative value of E.S.'s testimony is not substantially outweighed by the danger of unfair prejudice pursuant to N.C.R. Evid. 403. The trial court concluded that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, based on the temporal proximity of the events and the similarity in the age of the girls.

Defendant cites *State v. Beckelheimer*, ___ N.C. App. ___, 712 S.E.2d 216 (2011), in support of his argument that E.S.'s testimony was not sufficiently similar for the purpose of showing defendant's plan. In *Beckelheimer*, the Court held that evidence of defendant's prior conduct was irrelevant to show a general plan. In that case, the witness was three or four years younger than the defendant; in contrast, the victim was 16 years younger than the defendant. *Beckelheimer*, ___ N.C. App. at ___, 712 S.E.2d at 219-20.

In the instant case, the prior bad act took place within the same time period alleged in the indictments. The timing does not support the exclusion of the evidence. Regarding the similarity of the acts, E.S. was "the same or within one year of the same" age as B.F., the victim. Defendant was an adult at the time of all alleged acts with B.F. and with E.S.

The trial court did not abuse its discretion in concluding that the proffered evidence was admissible under N.C.R. Evid. 403. We hold that E.S.'s testimony regarding a prior sexual encounter with defendant was properly admitted under N.C.R. Evid. 404(b) for the purpose of showing defendant's plan, and we further hold that the admission of this evidence was not unduly prejudicial.

This argument is without merit.

III. Failure to Intervene *Ex Mero Motu*

[3] In his third argument, defendant contends that the trial court committed plain error in failing to intervene *ex mero motu* to exclude evidence. We disagree.

A. Standard of Review

By failing to object to the evidence at trial, defendant has not preserved the issue for appeal. We review this issue for plain error. *State v. Rourke*, 143 N.C. App. 672, 675-76, 548 S.E.2d 188, 190 (2001).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (alterations in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted)).

To show plain error, "a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, ___ N.C. ___, ___, ___ S.E.2d ___, ___, 2012 WL 1242316 (April 13, 2012) (internal citation and quotation marks omitted).

B. Analysis

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C.R. Evid. 404(b).

Defendant argues that testimony from another young woman (C.J.) was "highly prejudicial negative character evidence." The evi-

dence consisted of one line of testimony that "Cammy" was a "girl that Tony [defendant] had—Tony got pregnant, but she moved." Cammy was mentioned in a letter that defendant gave C.J. to give to B.F. Defendant argues that this evidence was introduced solely for the purpose of showing defendant's propensity to have sex with underage girls.

The only evidence of Cammy's age was that she was older than C.J. There was no evidence that Cammy was underage. The State asked C.J. about Cammy while laying a foundation for the introduction of the letter from defendant. Defendant requested C.J. to give to B.F. this letter, in which defendant writes to B.F. "[y]ou thought I was cheating on you, but really it was you who cheated on me[.]"

Assuming *arguendo* that the admission of this testimony was error, the State presented substantial evidence of defendant's guilt through the uncontested testimony of B.F. Defendant has failed to demonstrate that the jury probably would have reached a different result had the evidence not been admitted. Defendant also fails to demonstrate that admission of the evidence resulted in a fundamental miscarriage of justice. The admission of this evidence does not rise to the level of plain error.

NO ERROR.

Judges CALABRIA and BEASLEY concur.

[220 N.C. App. 504 (2012)]

COUNTRYWIDE HOME LOANS, INC., PLAINTIFF v. JUDY C. REED, TROY D. REED, JUDY C. REED, EXECUTRIX OF THE ESTATE OF MARGARET D. SMITH, AND COUNTRYWIDE TITLE CORPORATION, TRUSTEE, DEFENDANTS

No. COA11-769

(Filed 15 May 2012)

1. Appeal and Error—cross-appeal—failure to file cross-appellant's brief—appeal dismissed

Plaintiff's cross-appeal in a case arising out of a dispute over real property was dismissed where plaintiff failed to file a cross-appellant's brief.

2. Real Property—deed of trust—encumbered decedent's property interest—joint tenancy—severed upon filing of deed of trust

The trial court did not err in a dispute over real property by concluding that there was no genuine issue as to any material fact and that plaintiff was entitled to a judgment as a matter of law on the issue of whether a deed of trust in this case encumbered decedent's one-half interest in the property as a tenant in common. The trial court did err by concluding that decedent's interest in the property vested in Troy D. Reed and wife Judy C. Reed pursuant to the right of survivorship and that defendants owned the real property in fee simple absolute, subject to plaintiff's deed of trust. The joint tenancy was severed upon the filing of the deed of trust and decedent's interest in the property converted to a tenancy in common, which has no right of survivorship.

Appeal by defendants from order entered 25 March 2011 by Judge Dale Graham in Iredell County District Court. Heard in the Court of Appeals 1 December 2011.

Travis E. Collum, Attorney at Law, P.A., by Travis E. Collum and Stacy L. Williams, for defendants.

Eisele, Ashburn, Greene & Chapman, P.A., by John D. Greene, for plaintiff.

THIGPEN, Judge.

Troy and Judy Reed ("Defendants") and Countrywide Home Loans, Inc., ("Plaintiff") appeal the trial court's order granting

Plaintiff's motion for summary judgment, in part, and denying Defendants' motion for summary judgment. After careful review, we conclude that Plaintiff's appeal is not properly before this Court; therefore, we dismiss Plaintiff's appeal. As to the remaining issues, we affirm the trial court's order, in part, and reverse, in part.

The record tends to show the following: On 25 March 2001, Margaret D. Smith ("Mrs. Smith") and Mrs. Smith's daughter and son-in-law, Judy and Troy Reed ("Defendants"), executed an offer to purchase and contract to buy a home in Mooresville, North Carolina. Countrywide Home Loans, Inc., ("Plaintiff") agreed to finance the purchase of the home and provided a loan to Mrs. Smith in the amount of $117,900.00. The general warranty deed named the grantees as "Margaret D. Smith and Troy D. Reed and wife, Judy C. Reed Joint Tenants with rights of survivorship[.]" The deed of trust to secure Plaintiff's loan and promissory note was prepared in Mrs. Smith's name only and was executed by Mrs. Reed, as attorney in fact for Mrs. Smith, on 1 May 2001. Neither Mr. Reed nor Mrs. Reed signed the deed of trust or promissory note in his or her individual capacity.

Defendants lived together in the home with Mrs. Smith and cared for Mrs. Smith, such that Mrs. Smith was not required to go to a nursing home.

On 19 October 2001, the loan went into default and foreclosure proceedings were commenced.

On 7 February 2004, Mrs. Smith passed away. After Mrs. Smith's death, Defendants began corresponding with Plaintiff regarding a modification of the loan, such that the loan would be in Defendants' name. Plaintiff drafted a loan modification agreement on 25 June 2004 and sent the agreement to Defendants. The agreement purportedly "amend[ed] and supplement[ed] (1) the Mortgage, Deed of Trust, or Deed to Secure Debt (the 'Security Instrument')." Defendants signed the agreement on 6 July 2004.

Defendants made payments on the loan to Plaintiff for a short period of time, until approximately August or September 2004. Defendants did not make any additional payments after 2004, and Plaintiff made demand for the payments. On 16 November 2004, Plaintiff notified Defendants that the loan was in default for nonpayment, and Plaintiff gave Defendants the opportunity to cure the default by paying or seeking a loan modification.

In 2006, Defendants requested that they be considered for a further loan modification. However, this modification was denied because Mr. Reed failed to provide proof of income as required.

On 22 January 2009, Plaintiff filed a complaint against Defendants praying that the court order reformation of the deed of trust to reflect the intent of the parties by making Defendants obligors.

On 16 April 2009, Defendants filed an answer and counterclaims alleging negligent misrepresentation and a violation of N.C. Gen. Stat. § 53-243.11.[1] Defendants claimed they were entitled to injunctive relief.

On 24 January 2011, Plaintiff filed a motion for summary judgment, stating that there was no genuine issue of material fact and that Plaintiff was entitled to judgment as a matter of law on both Plaintiff's claim and Defendants' counterclaims.

Likewise, on 17 February 2011, Defendants filed a motion for summary judgment alleging there was no genuine issue of material fact and that they were entitled to judgment in their favor as a matter of law for the following reasons: (1) The reformation of instruments is governed by a three year statute of limitations, and because the date of closing on the loan in this case was 1 May 2001, the statute of limitations was tolled before Plaintiff sought reformation of the Deed of Trust; and (2) Defendants were not a party to the contract in this case, as neither Defendant signed the Note.

The trial court entered an order on 25 March 2011, decreeing that there was no genuine issue of fact in this case and granting summary judgment in Plaintiff's favor. The trial court also "declar[ed] judgment . . . as follows":

> 1. Margaret D. Smith, prior to her death, owned a one-half undivided interest in the real property more particularly described at Deed Book 1259, page 1119-1120, Iredell County Registry. Margaret D. Smith's one-half undivided interest is encumbered by a deed of trust to the benefit of Plaintiff which is recorded at Book 1259, pages 1122-1134 of the ICR.
>
> 2. Troy D. Reed and Judy C. Reed, as Tenants by Entireties, own a one-half undivided interest in the subject real property

1. N.C. Gen. Stat. § 53-243.11, the Mortgage Lending Act, was repealed after the filing of Plaintiff's counterclaim in this case by 2009 N.C. Sess. Laws 374 § 1, effective 31 July 2009. The Secure and Fair Enforcement Mortgage Licensing Act, N.C. Gen. Stat. § 53-244.010, *et seq.*, was codified.

> which is not encumbered by the deed of trust to the benefit of Plaintiff.
>
> 3. Upon the death of Margaret Smith her interest, subject to the deed of trust to the benefit of Plaintiff, vested in Troy D. Reed and wife Judy C. Reed pursuant to the Right of Survivorship as set forth in the deed.
>
> 4. The Loan Modification Agreement executed by Troy D. Reed and Judy C. Reed on July 6, 2004 does not create an encumbrance on the Reed's original one-half undivided interest in the real property.
>
> 5. Troy D. Reed and wife Judy Reed own the real property in fee simple absolute; subject to Plaintiff's deed of trust encumbering a one-half undivided interest in said real property.

From this order, Defendants appeal.

I: Plaintiff's Appeal

[1] We first address Defendants' motion to dismiss Plaintiff's cross-appeal for Plaintiff's failure to file an appellant's brief. An appellant's brief is due thirty days after the Clerk of the Court of Appeals mails the printed record to the parties. N.C. R. App. P. 13(a) (2012). N.C. R. App. P. 14(d)(2) (2012) provides that "[i]f an appellant fails to file and serve its brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative[.]" *Id.* In this case, the briefs were to be filed no later than 10 August 2011. Plaintiff failed to file a cross-appellant's brief.

We find the case of *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 407 S.E.2d 819 (1991) to be instructive. In *Alberti*, the Court ruled:

> Plaintiffs gave proper notice of appeal on these issues [of attorneys' fees, treble damages, and interest] but did not file an appellant's brief within the time allowed under Rule 13 of the North Carolina Rules of Appellate Procedure. Rather, they attempted to argue the issues in their appellee's brief. The Court of Appeals, therefore, correctly held that plaintiffs had failed to preserve any of these questions for its review, and we affirm this decision.
>
> Because on these issues plaintiffs are seeking affirmative relief in the appellate division rather than simply arguing an alternative basis in law for supporting the judgment, they are not enti-

> tled to cross-assign error in their appellee's brief. N.C. R. App. P. 10(d). To have properly raised these issues plaintiffs should have filed, but did not file, an appellant's brief.

Id. at 739, 407 S.E.2d at 826.

Because Plaintiff did not file a cross-appellant's brief in this case, we grant Defendants' motion to dismiss Plaintiff's cross-appeal and will not address the question of whether the trial court erred by concluding that "[t]he Loan Modification Agreement executed by Troy D. Reed and Judy C. Reed on July 6, 2004 does not create an encumbrance on the Reed's original one-half undivided interest in the real property."

II: Defendants' Appeal

A: Standard of Review

We review a trial court's order granting or denying summary judgment *de novo*. *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citation omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011). "All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense[.]" *Id.* (citation omitted).

Summary judgment may be granted in a declaratory judgment proceeding, "and the scope of appellate review from allowance of a summary judgment motion therein is the same as for other actions." *N.C. Farm Bureau Mut. Ins. Co. v. Briley*, 127 N.C. App. 442, 444, 491 S.E.2d 656, 657 (1997), *disc. rev. denied*, 347 N.C. 577, 500 S.E.2d 82 (1998).

B: Summary Judgment

[2] In Defendants' argument on appeal, they contend the trial court erred by granting, in part, Plaintiff's motion for summary judgment and denying Defendants' motion for summary judgment because the

deed of trust did not survive Mrs. Smith's death. We find this argument without merit.

The question presented in this appeal is a novel one. The general warranty deed filed on 2 May 2001 created a joint tenancy between Mrs. Smith and Defendants, with right of survivorship. However, the deed of trust, which was filed one minute after the general warranty deed, encumbered the property. Mrs. Smith was the sole obligor on the deed of trust. This Court must determine whether the deed of trust severed the joint tenancy, such that only the portion of the property owned by Mrs. Smith was encumbered, or whether the deed of trust did not sever the joint tenancy, but instead obligated Mrs. Smith and Defendants, thus encumbering the entire property.

N.C. Gen. Stat. § 41-2(a) (2011) permits the creation of a joint tenancy with right of survivorship "if the instrument creating the joint tenancy expressly provides for a right of survivorship." *Id.* "Upon conveyance to a third party by one of two joint tenants holding property in joint tenancy with right of survivorship, *a tenancy in common is created* between the third party and the remaining joint tenant." *Id.* (emphasis added).

"A mortgage is a conveyance by a debtor to his creditor, or to some one in trust for him, as a security for the debt." *Walston v. Twiford*, 248 N.C. 691, 693, 105 S.E.2d 62, 64 (1958) (quotation omitted).

> North Carolina is considered a title theory state with respect to mortgages, where a mortgagee does not receive a mere lien on mortgaged real property, but receives legal title to the land for security purposes. In North Carolina, deeds of trust are used in most mortgage transactions, whereby a borrower conveys land to a third-party trustee to hold for the mortgagee-lender, subject to the condition that the conveyance shall be void on payment of debt at maturity. Thus, in North Carolina, the trustee holds legal title to the land.

Neil Realty Co. v. Medical Care, Inc., 110 N.C. App. 776, 778, 431 S.E.2d 225, 226-27 (1993) (citations omitted).

The doctrine of survivorship does not apply to tenancies in common, and upon the death of a person holding property as a tenant in common, the person's share descends to her heirs or is devised as her will provides. N.C. Gen. Stat. § 41-2; *see also See* 1 James A. Webster, Jr., Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 7.05 (6th ed. 2011). "Any joint ten-

ancy interest held by a husband and wife, unless otherwise specified, shall be deemed to be held as a single tenancy by the entirety, which shall be treated as a single party when determining interests in the joint tenancy with right of survivorship." N.C. Gen. Stat. § 41-2(b).

In this case, because North Carolina is a title theory State, and thus a mortgage is a conveyance, Mrs. Smith severed the joint tenancy when she, as the sole obligor on the deed of trust, filed the deed of trust encumbering the property. After the joint tenancy was severed, Mrs. Smith's interest as a tenant in common was one-half of the property; Defendants' interest, as tenants by the entirety, was also one-half. This is because Defendants are husband and wife; as such, they held the property "as a single tenancy by the entirety" and were "treated as a single party when determining interests in the joint tenancy with right of survivorship" upon severance of the joint tenancy. N.C. Gen. Stat. § 41-2(b).

Based on the foregoing, we hold the trial court was correct in concluding that "Troy D. Reed and Judy C. Reed, as Tenants by Entireties, own a one-half undivided interest in the subject real property which is not encumbered by the deed of trust to the benefit of Plaintiff[.]" In other words, the deed of trust executed by Mrs. Smith only encumbered Mrs. Smith's interest in the property—the portion of the property owned by Mrs. Smith as a tenant in common after the severance of the joint tenancy by the filing of the deed of trust. However, we further hold the trial court was incorrect in concluding that "[u]pon the death of Margaret Smith her interest, subject to the deed of trust to the benefit of Plaintiff, vested in Troy D. Reed and wife Judy C. Reed pursuant to the Right of Survivorship as set forth in the deed." The joint tenancy was severed upon the filing of the deed of trust, N.C. Gen. Stat. § 41-2, and Mrs. Smith's interest in the property converted to a tenancy in common, which has no right of survivorship. Lastly, because Mrs. Smith's interest in the property did not vest pursuant to the right of survivorship, we hold the trial court was also incorrect in concluding that "Troy D. Reed and wife Judy Reed own the real property in fee simple absolute[.]"[2]

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2. Other States have codified statutes addressing the particular question raised in this appeal, and our General Assembly may also consider and address this issue, should it be so inclined. South Carolina, S.C. Code Ann. § 27-7-40(a)(iii) (2011) prohibits any encumbrance of a joint tenancy unless all joint tenants join in the encumbrance. *See* S.C. Code Ann. § 27-7-40(a)(iii) (providing, "[t]he fee interest in real estate held in joint tenancy may not be encumbered by a joint tenant acting alone without the joinder of the other joint tenant or tenants in the encumbrance"). In Wisconsin, Wis. Stat. § 700.24 (2011) provides that on the death of a mortgaging joint tenant the survivor

In summary, we hold that the trial court was correct in concluding that there is no genuine issue as to any material fact in this case and that Plaintiff is entitled to a judgment as a matter of law on the issue of whether the deed of trust in this case encumbered Mrs. Smith's one-half interest in the property as a tenant in common. We further conclude that the trial court erred by concluding that Mrs. Smith's interest in the property "vested in Troy D. Reed and wife Judy C. Reed pursuant to the Right of Survivorship" and Defendants "own the real property in fee simple absolute[,] subject to Plaintiff's deed of trust." The joint tenancy was severed upon the filing of the deed of trust, and Mrs. Smith's interest in the property converted to a tenancy in common, which has no right of survivorship.

AFFIRMED, in part, REVERSED, in part, and DISMISSED, in part.

Judges ERVIN and BEASLEY concur.

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takes subject to the mortgage. *See* Wis. Stat. § 700.24 (stating that a real estate mortgage, a security interest, or a lien "on or against the interest of a joint tenant does not defeat the right of survivorship in the event of the death of such joint tenant, but the surviving joint tenant or tenants take the interest such deceased joint tenant could have transferred prior to death subject to such mortgage, security interest or statutory lien").

STATE OF NORTH CAROLINA v. NATHAN DARNELL WILLIAMSON

No. COA09-1475-2

(Filed 15 May 2012)

1. Robbery—dangerous weapon—common law robbery instruction not warranted—motion for appropriate relief appropriately denied

The trial court did not err in a robbery with a dangerous weapon case by failing to instruct the jury on the lesser-included offense of common law robbery and by denying defendant's motion to dismiss the charges. Because defendant presented no evidence at trial to rebut the presumption that the firearm used in the robbery was functioning properly, he was not entitled to either an instruction on common law robbery or dismissal of the robbery with a dangerous weapon charges.

2. Appeal and Error—preservation of issues—denial of motion of appropriate relief—order not included in record on appeal—motion to amend record on appeal—reason for omission not given

Defendant's argument that the trial court erred by denying his motion for appropriate relief (MAR) was dismissed because defendant failed to include the trial court's order denying his MAR in the record on appeal. Further, defendant provided no explanation in his motion to amend the record on appeal for his failure to include this order in the original record and his motion was denied.

On remand to the Court of Appeals from an order of the Supreme Court of North Carolina. Appeal by defendant from judgment entered 6 May 2009 and order entered 29 June 2009 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Originally heard in the Court of Appeals 27 April 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Sharon Patrick-Wilson, for the State.

Christy E. Wilhelm, for defendant-appellant.

CALABRIA, Judge.

Nathan Darnell Williamson ("defendant") appeals from (1) a judgment entered upon a jury verdict finding him guilty of two counts of robbery with a dangerous weapon and (2) the trial court's denial of defendant's post-trial motion for appropriate relief ("MAR"). We find no error at trial and dismiss defendant's appeal from the trial court's denial of his MAR.

I. Background

On 13 June 2009, defendant and Dorsey Lemon ("Lemon") entered T&B Amusements ("T&B") in Winston-Salem, North Carolina. Upon entering, Lemon struck employee Cecil Sanderlin ("Sanderlin") in the head with a black semiautomatic pistol. Lemon then cocked the gun in Sanderlin's face and announced, "this is a robbery." During the course of the robbery, defendant and Lemon took between five and seven hundred dollars and a radio belonging to T&B employee Ann Cheek. Once the robbery was completed, Lemon returned the gun to its owner, Jabriel Bailey, who was acting as a lookout during the robbery. The gun was never recovered by police.

Detective Phillip Cox ("Det. Cox") of the Winston-Salem Police Department was assigned to investigate the robbery. Witnesses interviewed by Det. Cox identified defendant as a participant in the robbery. Based upon this identification, Det. Cox located defendant, who voluntarily agreed to provide a statement to him. In his statement, defendant admitted his involvement in the robbery. Defendant additionally told Det. Cox that Lemon carried the gun during the robbery and that Jabriel Bailey and Donte Crews were the lookouts.

Defendant was subsequently arrested and indicted for two counts of robbery with a dangerous weapon and one count of conspiracy to commit robbery with a dangerous weapon. Defendant's jury trial in Forsyth County Superior Court began on 5 May 2009, in the afternoon. At the close of the State's evidence, defendant made a motion to dismiss all charges. The trial court allowed the motion to dismiss for the one count of conspiracy to commit robbery with a dangerous weapon but denied the motion for the two counts of robbery with a dangerous weapon. Defendant did not present any evidence.

At the charge conference, defendant's counsel requested a jury instruction on common law robbery, contending that the State failed to prove that the gun used was actually an operational weapon. The trial court denied defendant's request.

On 6 May 2009, the jury returned a verdict finding defendant guilty of two counts of robbery with a dangerous weapon. These convictions were consolidated and defendant was sentenced to a minimum of 45 months to a maximum of 63 months in the North Carolina Department of Correction.

Following his conviction, defendant filed an MAR on 18 May 2009, based upon allegedly new evidence. In the MAR, defendant asserted that on 4 May 2009, the State obtained a statement from Lemon that the handgun he used in the robbery was inoperable and unloaded, and that defendant's counsel, Michael Archenbronn, was not made aware of that statement until after defendant had been convicted and sentenced.

On 17 June 2009, the trial court conducted a hearing on defendant's MAR. At the hearing, it was established that after obtaining Lemon's statement that the gun used in the robbery was inoperable, the State placed a one-page report documenting Lemon's statement in defendant's counsel's mailbox located in the courthouse. Defendant's counsel did not check his court mailbox either in the late afternoon on 4 May or at any time on 5 May. As a result, defendant's counsel did not obtain the State's report until after defendant had been convicted on 6 May 2009. However, defendant's counsel conceded that he had independently interviewed Lemon during the evening of the first day of trial, 5 May 2009.

Lemon testified at the hearing that the gun he used during the robbery was unloaded and missing a firing pin, making it inoperable. Lemon stated that he had not previously mentioned that the gun was inoperable "[b]ecause I robbed somebody and I had a gun. I didn't know—I didn't know the law, that even if it was broken, it could have been broken down to common law. I didn't know that. You know what I'm saying?" Defendant's counsel told the trial court that when he interviewed Lemon on 5 May, Lemon never mentioned that the gun was inoperable. Defendant's counsel also told the trial court that if he had been aware of the information sooner, he would have called Lemon to testify at defendant's trial. The trial court denied defendant's MAR in open court. On 29 June 2009, the trial court entered a written order denying defendant's MAR.

Defendant appealed his conviction and the denial of his MAR to this Court. The record on appeal did not include the trial court's written order regarding the denial of the MAR. On 7 September 2010, a divided panel of this Court issued a decision finding no error at defend-

ant's trial and affirming the denial of defendant's MAR. Since the record on appeal did not include a written order and neither party mentioned a written order in their respective briefs, this Court's review was limited to examining the trial court's oral rendering of its decision to determine whether the denial was appropriate.

Defendant appealed the decision of this Court to the North Carolina Supreme Court on the basis of the dissenting opinion. On 9 December 2011, the Supreme Court issued an order in which it stated that "[d]uring the course of our review, it came to the attention of this Court that a written order actually was entered by the trial court on or about 29 June 2009 (copy attached to this Order), the existence of which apparently was not known to appellate counsel." *State v. Williamson*, 365 N.C. 326, 722 S.E.2d 592 (2011). As a result, the Supreme Court vacated the decision of this Court and remanded the case so that we may determine:

> 1. Whether to amend the record on appeal under the North Carolina Rules of Appellate Procedure to permit consideration of the [trial court's written] order;
>
> 2. Whether to order new briefs and/or oral arguments in light of [this Court's] ruling on item 1 above;
>
> 3. Whether to address defendant's issues on the merits; and
>
> 4. Whether to enter any other or further relief as [this Court] may deem appropriate.

Id. On 2 February 2012, defendant filed a motion to amend the record on appeal to include the trial court's written order denying defendant's MAR entered 29 June 2009.

II. Errors During Trial

[1] Defendant appeals, in part, from alleged errors during his trial. Specifically, defendant argues that the trial court erred by failing to instruct the jury on the lesser included offense of common law robbery and by denying defendant's motion to dismiss the robbery with a dangerous weapon charges. However, both of defendant's arguments are premised upon the evidence obtained after the trial tending to show that the gun was inoperable.

In *State v. Joyner*, our Supreme Court held that "where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon and nothing to the contrary appears in evidence, the presumption that the

victim's life was endangered or threatened is mandatory." 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985). Defendant acknowledges that the jury was presented with no evidence at his trial that the gun was inoperable or unloaded. Since defendant presented no evidence at trial to rebut the presumption that the firearm used in the robbery was functioning properly, he was not entitled to either an instruction on common law robbery or dismissal of the two counts of robbery with a dangerous weapon. Defendant's arguments regarding errors during his trial are overruled.

III. Motion for Appropriate Relief

[2] Defendant argues that the trial court erred by denying his MAR. Since defendant failed to include the trial court's order denying defendant's MAR in the record on appeal, we dismiss this issue.

Rule 9(a)(3) of the North Carolina Rules of Appellate Procedure provides that in criminal appeals, the record on appeal shall contain "copies of the verdict and of the judgment, order, or other determination from which appeal is taken[.]" N.C.R. App. P. 9(a)(3)(g) (2011). Moreover, "[i]t is the appellant's duty and responsibility to see that the record is in proper form and complete." *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983). In the instant case, the trial court's written order was entered on 29 June 2009, as evidenced by the file stamp on the order. In his motion to amend the record on appeal, defendant provides no explanation for his failure to include this order in the original record. Consequently, in our discretion, we deny defendant's motion to amend the record on appeal.

Without the trial court's written order, which contains the trial court's findings of fact and conclusions of law, we are unable to adequately review defendant's arguments regarding the denial of his MAR. *See State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) ("When considering rulings on motions for appropriate relief, we review the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." (internal quotations and citation omitted)). Accordingly, we dismiss defendant's appeal of the trial court's denial of his MAR.

IV. Conclusion

Because there was no evidence presented during defendant's trial that the gun used during the robbery of T&B was inoperable, defend-

ant was not entitled to either a jury instruction on common law robbery or dismissal of the robbery charges. Thus, defendant received a fair trial, free from error. Because defendant's counsel failed to include the trial court's written order denying defendant's MAR in the record on appeal, his appeal of this order must be dismissed.

No error at trial; dismissed.

Judge McCULLOUGH concurs.

Judge STEELMAN writes separately.

STEELMAN, Judge, writing separately.

I would grant defendant's motion to amend the record on appeal to include the written order.

The written order is substantially the same as the oral order dictated by the trial judge in open court. The oral order was evaluated in our prior opinion and affirmed. For the reasons set forth our prior opinion in this case, *see State v. Williamson*, ___ N.C. App. ___, 698 S.E.2d 727 (2010), *vacated*, 365 N.C. 326, 722 S.E.2d 592 (2011), I would affirm the denial of defendant's motion for appropriate relief by the learned trial judge.

STATE OF NORTH CAROLINA v. DARRIUS LAVALE TYSON

No. COA11-1078

(Filed 15 May 2012)

Pretrial proceedings—transcript of prior proceedings—indigent defendant—denial of transcript—erroneous

The trial court erred in a robbery with a dangerous weapon case by denying defendant's request for a transcript of the proceedings in his first trial prior to any retrial. The trial court's findings of fact failed to satisfy the two-part test enumerated in *State v. Rankin*, 306 N.C. 712, for determining whether a transcript must be provided to an indigent defendant.

Appeal by defendant from judgment entered 23 February 2011 by Judge Paul C. Ridgeway in Durham County Superior Court. Heard in the Court of Appeals 30 April 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Scott T. Slusser, for the State.

Sue Genrich Berry for defendant-appellant.

GEER, Judge.

Defendant Darrius Lavale Tyson contends on appeal that his right to equal protection of the law was violated because the trial court improperly denied his motion to be provided with a transcript before retrial after his first trial resulted in a mistrial. As the oral findings of the trial court do not reflect the legal standard required by controlling caselaw, we remand to the trial court for a new trial.

Defendant was indicted for robbery with a dangerous weapon. Defendant's case first came on for trial on 21 February 2011. However, the jury was unable to reach a unanimous verdict, and the trial court declared a mistrial on 23 February 2011.

The trial court proposed setting the retrial of defendant to begin the next day, 24 February 2011. Defendant objected, arguing in part that he wanted a transcript of the testimony of the State's witnesses from the first trial before starting the retrial. The trial court overruled defendant's objections and set the retrial to begin the next day.

The next morning, defendant renewed his request for a transcript of the first trial, and that request was again denied. The jury for the second trial found defendant guilty. The trial court sentenced him to a presumptive-range term of 67 to 90 months imprisonment. Defendant timely appealed to this Court.

Defendant contends that the trial court erred in denying his request for a transcript of the proceedings in his first trial prior to any retrial. Defendant argues that the trial court's denial of his motion violated his constitutional right to present a complete defense and the constitutional requirement that the State provide him with the basic tools of an adequate defense. We agree.

It is well established that "the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to

other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227, 30 L. Ed. 2d 400, 403, 92 S. Ct. 431, 433 (1971). These basic tools include "a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." *Id.*

In determining whether a transcript must be provided to an indigent defendant, the courts must apply a two-step test and decide: "(1) whether a transcript is necessary for preparing an effective defense and (2) whether there are alternative devices available to the defendant which are substantially equivalent to a transcript." *State v. Rankin*, 306 N.C. 712, 716, 295 S.E.2d 416, 419 (1982). When a trial court denies a defendant's motion for a transcript of prior proceedings "without evidence or findings that defendant had no need for a transcript or that there was available to defendant a substantially equivalent alternative" and proceeds without defendant's having been furnished a transcript of the prior proceedings, the defendant is entitled to a new trial. *State v. Reid*, 312 N.C. 322, 323, 321 S.E.2d 880, 881 (1984).

Here, at the close of the first trial, the trial court overruled defendant's objection to his immediate retrial without a copy of the transcript, stating:

> I do not find that the anticipation or the speculation that a witness may get on the stand and alter their testimony to be sufficient basis to delay a trial so that a transcript can be produced. If in fact testimony is altered and there is some prejudice that can be shown, or the need for a transcript—and obviously, this last trial was of record and we can take measures to ensure that the rights of all parties are adequately protected. So for those reasons, I'm going to overrule the objections and start this trial at 9:30 a.m. tomorrow.

At the beginning of the retrial, the trial court denied defendant's renewed request for a transcript, stating:

> And again, if needing a transcript of a prior trial is based on speculation that a witness will take the stand and alter their testimony to be inconsistent from that which they gave at a prior trial, at this point that is just pure speculation. If that occurs, there are means that we can take to ensure that the defendant's due process rights are protected.

We hold that these findings are not sufficient under the *Rankin* two-part test. Defendant, in this case, argued he needed the transcript to effectively cross-examine the State's witnesses, just as the defend-

ant in *Reid* argued. *Id*. The trial court's ruling in this case that defendant's asserted need constituted mere speculation that a witness might change his or her testimony would apply in almost every case. A defendant would rarely if ever be able to show that the State's witnesses would in fact change their testimony. The trial court's ruling makes no determination why, in this particular case, defendant had no need for a transcript, especially in light of the fact that the State's case rested entirely on the victim's identification of defendant as the perpetrator.

Further, the finding that the trial court could take "measures" or had "means" to protect defendant's rights, without any explanation of what those measures or means would be, is not sufficient to establish that there were alternative devices available to defendant that were substantially equivalent to a transcript. Accordingly, defendant is entitled to a new trial. *See id*. ("Under these circumstances, requiring defendant to be retried without providing him with a transcript of his first trial is error entitling defendant to a new trial."). Because of our disposition of this appeal, we need not address defendant's remaining argument.

New trial.

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

LESLIE EATON AND WIFE, DANITA EATON, PLAINTIFFS v. JERRY CAMPBELL, SR., CHRISTIAN REALTY, INC., KAREN S. CAMPBELL, F & I MORTGAGE & FINANCIAL SERVICES, LLC D/B/A MIRACLE MORTGAGE, FRANK E. BETHEL, JR., ANGELA S. BETHEL, AND ANGELA LISCOMB, DEFENDANTS

No. COA11-1362

(Filed 15 May 2012)

Damages and Remedies—appellants' argument unsupported by law—trial court's order affirmed

The trial court did not err in an actual and constructive fraud, breach of contract, breach of fiduciary duty, unfair and deceptive trade practices, conversion, and conspiracy to commit conversion case by determining that plaintiffs had been damaged in the amount of $40,532.00 and, as a result of defendants' unfair and deceptive acts, awarding treble damages in the amount of $121,596.00 plus interest and attorney fees. Defendants failed to identify what, if any, relevant law was the source of the purported confusion and misinterpretation in the trial court's rulings, and which, if any, law should have been applied in its stead. Defendants' limited and unsupported arguments gave the Court of Appeals no reason to disturb the trial court's judgment.

Appeal by defendants from judgment entered 23 December 2010 by Judge Ronald L. Stephens in Franklin County Superior Court. Heard in the Court of Appeals 23 April 2012.

T. Allen Gardner, Jr., for plaintiffs–appellees.

Jerry Campbell, Sr. and Karen S. Campbell, pro se, for defendants–appellants.

MARTIN, Chief Judge.

Defendants[1] Jerry Campbell, Sr. and Karen S. Campbell appeal from a judgment awarding treble damages and attorney's fees to plaintiffs Leslie Eaton and Danita Eaton. We affirm.

Plaintiffs brought an action against defendants alleging actual and constructive fraud, breach of contract, breach of fiduciary duty, unfair and deceptive trade practices, conversion, and conspiracy to commit conversion. After hearing the matter without a jury, the trial

1. Defendants Frank E. Bethel, Jr., Angela S. Bethel, and Angela Liscomb were dismissed from the action and did not participate in this appeal.

court made numerous findings—none of which are effectively challenged on appeal—and concluded that defendants breached their contract with, and fiduciary duty to, plaintiffs; converted plaintiffs' property to their own; committed actual and constructive fraud against plaintiffs; and committed unfair and deceptive acts against plaintiffs. The court then determined that plaintiffs had been damaged in the amount of $40,532.00 and, as a result of defendants' unfair and deceptive acts, awarded treble damages in the amount of $121,596.00 plus interest and attorney's fees. Defendants appealed.

"The function of all briefs required or permitted by [the Appellate R]ules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon." N.C.R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs."). "It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358, *supersedeas and disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005); *see also Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (per curiam) ("It is not the role of the appellate courts . . . to create an appeal for an appellant."), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

In the present case, although defendants "question[] the law that should have been applied to decide the issues presented herein," defendants fail to identify what, if any, relevant law was the source of the purported "confusion and misinterpretation in the [trial court's] rulings," and which, if any, law should have been applied in its stead. Because defendants' limited and unsupported arguments give us no reason to disturb the trial court's judgment in which its conclusions of law are supported by its findings of fact which are, in turn, supported by the record evidence, *see Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) ("It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts."), we affirm.

Affirmed.

Judges BRYANT and McCULLOUGH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 15 May 2012)

Case	County	Disposition
AREA STORAGE, INC., v. OLD OAK ESTATES COMMUNITY ASSOCIATION No. 11-1221	Currituck (10CVS631)	Affirmed
ARTIS v. WILLIFORD No. 11-1059	Pitt (11CVD739)	Vacated
DODD v. MANHEIM AUCTIONS, INC. No. 11-1527	Johnston (10CVS1188)	Affirmed
HARRELL v. PALACE ENTM'T HOLDINGS, INC. No. 11-796	Ind. Comm. (W17633)	Affirmed
IN RE A.C.C. No. 11-1596	McDowell (11JA70)	Reversed and Remanded
IN RE A.M.R. No. 11-1385	Watauga (11J21)	Reversed in Part, affirmed in Part
IN RE J.J.D. No. 11-1595	Guilford (07JT432)	Affirmed
IN RE H.G. No. 11-1593	Yadkin (08J16-18)	Affirmed
IN RE L.A.T. No. 12-26	Stokes (09J71-72)	Affirmed
IN RE R.V.G. No. 11-968	Mecklenburg (09JB517)	Affirmed
MARKS v. MARKS No. 11-1183	Forsyth (10CVD2545)	Affirmed
PICKNEY v. N.C. DEP'T OF TRANSP. No. 11-1296	Wake (08CVS21446)	Affirmed
ROBINSON v. N.C. DEP'T OF CORR. No. 11-1477	Ind. Comm. (TA-17357)	Affirmed
STATE v. BOSTIC No. 11-1453	Wake (10CRS17659) (10CRS222120)	No Error
STATE v. BRISTOW No. 11-1423	Lee (07CRS54677) (07CRS54682)	Affirmed

STATE v. BROWN No. 11-984	Vance (07CRS51929)	Reversed
STATE v. CLEMONS No. 11-1034	Harnett (08CRS57099) (10CRS2096) (10CRS935)	Affirmed
STATE v. CREWS No. 11-1308	Vance (07CRS53497)	No Error
STATE v. CURRY No. 11-1207	Gaston (08CRS59152) (08CRS59153)	No Error
STATE v. DIXON No. 11-1416	Mecklenburg (10CRS229528) (10CRS56699)	No Error
STATE v. DUNN No. 11-1505	Guilford (08CRS83207-08)	No prejudicial error
STATE v. FLOYD No. 11-1111	Wake (09CRS210668)	Affirmed
STATE v. GOLDMAN No. 11-1346	Dare (09CRS51157)	No Error
STATE v. GRAHAM No. 11-806	Mecklenburg (07CRS239333-34)	No Error
STATE v. HALL No. 11-1021	Durham (10CRS55334-35)	No error, in part, remanded for correction of clerical error, in part.
STATE v. HOUGH No. 11-1422	Montgomery (04CRS50419)	No Error
STATE v. KRAMER No. 11-1524	Haywood (09CRS52668-70) (09CRS52672) (10CRS2671)	No Error
STATE v. LITTLE No. 11-1069	Stanly (08CRS52283)	Affirmed
STATE v. MCCORKLE No. 11-916	Mecklenburg (09CRS240450-51) (09CRS76460)	No Error
STATE v. MCMILLAN No. 11-881	Guilford (08CRS95007) (08CRS95010) (10CRS24133)	No Error

STATE v. MONTGOMERY No. 11-1134	Mecklenburg (07CRS215042) (07CRS215044)	No Error
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APPEAL AND ERROR

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Preservation of issues—denial of motion for appropriate relief—order not included in record on appeal—motion to amend record on appeal—reason for omission not given—Defendant's argument that the trial court erred by denying his motion for appropriate relief (MAR) was dismissed because defendant failed to include the trial court's order denying his MAR in the record on appeal. Further,

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defendant provided no explanation in his motion to amend the record on appeal for his failure to include this order in the original record and his motion was denied. **State v. Williamson, 512.**

Preservation of issues—photographic lineup procedures—plain error review—Defendant in a possession of a firearm by a felon, robbery with a dangerous weapon, and carrying a concealed weapon case waived any argument as to potential error in a photographic lineup procedure, except as to plain error, by failing to object during the examination of a witness concerning the photographic lineup and failing to object to that witness's in-court identification of defendant. **State v. Stowes, 330.**

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Homeowners association—restrictive covenants—amended covenants valid—The trial court did not err in a case involving the amendment of restrictive covenants of a homeowners association 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. Village Creek Prop. Owners Ass'n., Inc., 487.**

Homeowners association—restrictive covenants—properly amended—The trial court did not err in a case involving the amendment of restrictive covenants of a homeowners association by ruling that the covenants were lawfully amended. The covenants were properly amended, prior to the expiration of the first 20-year term, according to the language of Paragraph 3 of the covenants. **Taddei v. Village Creek Prop. Owners Ass'n., Inc., 487.**

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Administrative appeal—not authorized—The trial court erred in an administrative appeal from the Winston-Salem/Forsyth County Board of Education's decision upholding a student's assignment to an alternative learning center by awarding attorney fees to petitioners' counsel pursuant to 42 U.S.C. § 1988. Because this case was not an action or proceeding under 42 U.S.C § 1983, the trial court lacked authority to award fees under § 1988. **In re Rone v. Winston-Salem/Forsyth Cnty. Bd. of Educ., 401.**

Breach of contract—insufficient findings of fact—The trial court erred in a breach of contract case by awarding attorney fees and costs to plaintiff without making any findings of fact to support the awards. **Rink & Robinson, PLLC v. Catawba Valley Enters., LLC, 360.**

Breach of contract—notification of intent to seek attorney fees—Plaintiff's argument that pursuant to N.C.G.S. § 6-21.2, defendant failed to properly notify her it was seeking attorney's fees in a breach of contract case was without merit. N.C.G.S. § 6-21.2(5) was inapplicable to this situation. **Finch v. Campus Habitat, L.L.C., 146.**

Breach of contract—statutorily allowed amount—award exceeded amount— The trial court erred in a breach of contract case by awarding defendant attorney fees of more than 15% of plaintiff's outstanding rent balance. The trial court awarded attorney fees pursuant to N.C.G.S. § 6-21.2 but awarded ten times the statutorily allowed amount. **Finch v. Campus Habitat, L.L.C., 146.**

Domestic case—separation agreement—inadequate findings of fact—The trial court failed to make sufficient findings of fact to justify its award of attorney fees in a domestic case regarding the breach of a separation agreement. The matter was remanded. **Praver v. Raus, 88.**

Unfair trade practices—properly awarded—The trial court did not err in awarding attorney fees in favor of defendant where she prevailed on her unfair and deceptive trade practices claim. **N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 212.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Larceny—assault on a female—sufficient evidence—motion to dismiss properly denied—The trial court did not err by denying defendant's motion to dismiss charges of first-degree burglary, larceny after breaking and entering, and assault on a female because there was substantial evidence that defendant was the perpetrator of the crimes for which he was convicted. **State v. Barnhart, 125.**

CLASS ACTIONS

Denial of class certification—ends-means analysis proper—failure to establish existence of class—The trial court did not abuse its discretion in denying plaintiffs' motion for class certification of their inverse condemnation claim. The trial court correctly relied upon "ends-means" analysis in concluding that individual issues would predominate over common issues and that plaintiffs failed to establish a class. The Court of Appeals did not reach the issue of whether the class action mechanism would have been the superior method for adjudication of the matter. **Beroth Oil Co. v. N.C. Dep't of Transp., 419.**

COMMON LAW

Vested rights doctrine—landfill project—no permit issues—no vested right—no misuse of political process—The trial court did not err in granting defendants' motion for summary judgment in a case concerning a franchise agreement for a solid waste landfill. Plaintiffs did not have a common law vested right in the proposed landfill as no permit had been issued before the challenged legislation became applicable. Furthermore, there was no evidence that the legislature misused the political process in order to dictate the outcome of plaintiff's application for the proposed landfill. **Waste Indus. USA, Inc. v. State of N.C., 163.**

CONSTITUTIONAL LAW

Commerce Clause—insufficient evidence of discrimination—insufficient evidence that burden clearly outweighed purpose—The trial court did not err by concluding that N.C.G.S. § 130A-295.6, which places limitations on the size and location of solid waste landfills, did not violate the Commerce Clause by discriminating against out-of-state waste and granting summary judgment in favor of defendants. Plaintiffs failed to demonstrate that the legislation was discriminatory facially, in purpose, or in effect. Furthermore, plaintiffs failed to forecast evidence that the burden on interstate commerce clearly outweighed the State's legitimate purposes. **Waste Indus. USA, Inc. v. State of N.C., 163.**

Contract Clause—insufficient evidence of unconstitutional impairment—The trial court did not err by concluding that N.C.G.S. § 130A-295.6, which places limitations on the size and location of solid waste landfills, did not violate the Contract Clause and granting summary judgment in favor of defendants. Plaintiffs failed to forecast any evidence that their contract with Camden County was unconstitutionally impaired. **Waste Indus. USA, Inc. v. State of N.C., 163.**

Due process claims—no service on plaintiff required—adequate state remedy existed—The trial court did not err by granting defendant's motion for summary judgment as to plaintiffs' due process claims. Defendant was not required to serve notices, complaints, and orders regarding the demolition of plaintiffs' mobile homes on plaintiff Keith Patterson as his interest in the mobile homes did not appear anywhere in the public record. Furthermore, plaintiffs' claim that they were denied due process under the North Carolina Constitution when defendant failed to give them notice of a City Council meeting and an opportunity to be heard before the passing of the ordinance of demolition was barred as an adequate remedy existed at state law to redress their alleged injury. **Patterson v. City of Gastonia, 233.**

Due process claim—not barred by governmental immunity—amended complaint—no prejudice—The trial court erred by dismissing plaintiffs' cause of action to the extent it asserted a claim for violation of due process under the North Carolina Constitution as the claims were not barred by governmental immunity. However, because the court subsequently allowed plaintiffs to amend their complaint to reassert their due process claims, plaintiffs were not prejudiced by the error. **Patterson v. City of Gastonia, 233.**

Right to counsel—revocation proceedings—waiver of counsel—failure to conduct sufficient inquiry—The trial court erred in a probation revocation proceeding by allowing defendant to proceed without counsel. Defendant had not waived counsel entirely but had waived only assigned counsel and the trial court did not conduct the inquiry as required by N.C.G.S. § 15A-1242 to ensure that defendant wanted to proceed *pro se*. **State v. Ramirez, 150.**

CONSTITUTIONAL LAW—Continued

Waiver of counsel—trial court's advice not erroneous—compliance with statutory requirements—Defendant's waiver of his constitutional right to counsel was not invalid in a murder case. The trial court did not erroneously advise defendant about his rights pursuant to *State v. Ali*, 329 N.C. 394, and the court fully complied with the requirements of N.C.G.S. § 15A-1242 in accepting defendant's waiver of counsel. **State v. Jones, 392.**

CONTRACTS

Breach of contract—filed outside statute of limitations—improper basis—insufficient allegations—third-party beneficiary claims—The trial court did not err when it dismissed plaintiffs' claims for breach of contract. The claims were filed outside the statute of limitations, violation of N.C.G.S. § 65-60 was not the proper basis for plaintiff's breach of contract claims, and the allegations failed to provide even general terms of the contract which were necessary to determine whether a breach occurred. Plaintiffs' claims for breach of contract based on a theory of third-party beneficiary were properly dismissed for the same reasons. **Birtha v. Stonmor, N.C., LLC, 286.**

CRIMINAL LAW

Motion for appropriate relief—evidentiary hearing required—summary denial erroneous—The trial court erred by summarily denying defendant's motion for appropriate relief and an accompanying discovery motion in a drug case. Defendant's motion for appropriate relief raised issues of fact with sufficient particularity to merit an evidentiary hearing and the trial court erred by failing to conduct a hearing so that defendant would have an opportunity to produce evidence to substantiate his allegations. **State v. Jackson, 1.**

Post-conviction DNA testing—motion failed to meet criteria for testing—The trial court did not err in a first-degree murder, discharge of a weapon into occupied property, and misdemeanor violation of a domestic violence protective order case by denying defendant's motion for post-conviction, independent DNA testing. There was no reasonable probability that the disclosure of DNA evidence in support of defendant's contention would result in a different outcome in a jury's deliberation and defendant's motion failed to meet the criteria for a request for post-conviction DNA testing pursuant to N.C.G.S. § 15A-269(a)(1). **State v. Hewson, 117.**

Prosecutor's closing argument—no reference to defendant's failure to testify—The trial court did not abuse its discretion or err by failing to intervene *ex mero motu* in a first-degree rape case by allowing several statements during the State's closing arguments. The challenged statements did not improperly refer to defendant's failure to testify. **State v. Foust, 63.**

Prosecutor's closing argument—statement not inflammatory—The trial court did not err in a first-degree rape case by failing to intervene *ex mero motu* in the State's closing argument. The State's comparison of defendant to a hunter or beast in the field was not a characterization of defendant himself, and the analogy was limited to non-inflammatory statements. **State v. Foust, 63.**

DAMAGES AND REMEDIES

Appellants' argument unsupported by law—trial court's order affirmed—The trial court did not err in an actual and constructive fraud, breach of contract,

DAMAGES AND REMEDIES—Continued

breach of fiduciary duty, unfair and deceptive trade practices, conversion, and conspiracy to commit conversion case by determining that plaintiffs had been damaged in the amount of $40,532.00 and, as a result of defendants' unfair and deceptive acts, awarding treble damages in the amount of $121,596.00 plus interest and attorney fees. Defendants failed to identify what, if any, relevant law was the source of the purported confusion and misinterpretation in the trial court's rulings, and which, if any, law should have been applied in its stead. Defendants' limited and unsupported arguments gave the Court of Appeals no reason to disturb the trial court's judgment. **Eaton v. Campbell, 521.**

DIVORCE

Breach of separation agreement—voluntary unemployment to suppress income—The trial court did not err in a domestic case by concluding that defendant was in breach of the separation agreement. Defendant's argument that the evidence showed he lacked the ability to perform under the agreement was without merit where defendant presented evidence of an inability to pay but the trial court found, based on other evidence, that defendant was voluntarily unemployed with the intent of depriving the plaintiff of support. **Praver v. Raus, 88.**

Separation agreement—argument abandoned—specific performance—inadequate remedy at law—The trial court did not err in ordering specific performance of a separation agreement on the ground that the order contained no findings of fact regarding whether plaintiff fully complied with her obligations under the agreement. Defendant abandoned any claim that plaintiff breached the agreement and the Court of Appeals declined to address the argument. The matter was remanded for findings and conclusions as to whether plaintiff's remedy at law was inadequate with regard to the arrearages owed by defendant under the separation agreement. **Praver v. Raus, 88.**

Separation agreement—not entered into under duress—The trial court did not err in a domestic case by concluding that defendant was not acting under duress when he signed the separation agreement at issue. The trial court's findings of fact were supported by evidence. **Praver v. Raus, 88.**

EASEMENTS

Eminent domain—sufficient compensation—sufficient notice—public trust doctrine not violated—The trial court did not err in an easement and eminent domain case by granting defendant's motion for judgment on the pleadings pursuant to Rule 12(c) of the Rules of Civil Procedure. Defendant adequately estimated that the benefit received from the project was sufficient compensation and the issue of whether that was reasonable was more properly left for the condemnation hearing. Further, defendant's notice to plaintiffs was sufficient to meet the requirements of N.C.G.S. § 40A-40 and otherwise did not prejudice plaintiffs. Moreover, defendant did not violate the public trust doctrine by asserting its rights of eminent domain. **Fisher v. Town of Nags Head, 478**.

EMBEZZLEMENT

Sufficient evidence—agent of corporation—The trial court did not err in an embezzlement case by denying defendant's motion to dismiss the charge as the State's evidence showed that defendant was an agent of the company and not an independent contractor. **State v. Smalley, 142.**

EMBEZZLEMENT—Continued

Sufficient evidence—constructive possession of corporation's money—The trial court did not err in an embezzlement case by denying defendant's motion to dismiss the charge as the State presented sufficient evidence to prove that defendant had constructive possession of the corporation's money. **State v. Smalley, 142.**

EMINENT DOMAIN

Inverse condemnation—no authority that actions constituted a taking— The trial court did not err in granting summary judgment as to plaintiffs' claim for inverse condemnation. Plaintiffs cited no authority, and the Court of Appeals found none, suggesting that defendant City's entry into a leasehold in accordance with its authority under the City's Minimum Housing Code and the enabling legislation constituted a taking within the meaning of inverse condemnation. **Patterson v. City of Gastonia, 234.**

ESTOPPEL

Judicial estoppel—inconsistent positions in prior and present actions—no abuse of discretion—The trial court did not abuse its discretion in its application of the doctrine of judicial estoppel as to plaintiff Harris. Harris's failure to list on his bankruptcy petition his involvement and ownership interest in plaintiff T-WOL was inconsistent with the position that he took in this action. Thus, Harris was estopped from claiming any ownership interest in or position as an officer or director of T-WOL. **T-WOL Acquisition Co., Inc. v. ECDG South, LLC, 189.**

EVIDENCE

Behavior of victim—not relevant to charges—properly excluded—The trial court did not err in a first-degree murder case by excluding evidence of the victim's behavior. The specific instances of conduct for which the victim received minor disciplinary infractions were not relevant to the issues presented to the jury. **State v. Laurean, 342.**

Motion to suppress—not timely—denial not erroneous—Defendant's motion to suppress evidence in a possession of a firearm by a felon, robbery with a dangerous weapon, and carrying a concealed weapon case was not timely and the trial court did not err in denying it. **State v. Stowes, 330.**

Other crimes, wrongs, or acts—no prejudice—no plain error—The trial court did not commit plain error in failing to intervene *ex mero motu* to exclude testimony concerning defendant's conduct with another girl. Even assuming *arguendo* that the admission of the testimony was error, defendant failed to demonstrate that the jury probably would have reached a different result had the evidence not been admitted. **State v. Houseright, 495.**

Other crimes, wrongs, or acts—properly admitted to show plan—not unduly prejudicial—The trial court did not err in a sexual offenses case by admitting evidence of sexual conduct by defendant with another girl of similar age as the victim during the same time period, pursuant to Rule 404(b). The evidence was properly admitted for the purpose of showing defendant's plan, and the admission of the evidence was not unduly prejudicial. **State v. Houseright, 495.**

EVIDENCE—Continued

Other wrongs—relevant—admitted for proper purpose—not unduly prejudicial—The trial court did not err in an uttering a forged instrument and attempting to obtain property by false pretenses case by admitting evidence concerning a second forged check. The evidence was relevant because it made defendant's explanations for possessing the check at issue less probable, was offered for the proper purpose of proving defendant's intent in committing the offenses for which he was charged, and was not unfairly prejudicial under Rule 403 of the Rules of Evidence. Defendant's argument that the evidence was not admissible to impeach him lacked merit because the trial court did not admit the evidence for that purpose. **State v. Conley, 50.**

Police officer testimony—legal conclusions—observations—no different outcome—The trial court did not commit plain error in a second-degree murder case arising out of a vehicular accident by allowing police officers to testify regarding their legal conclusions that defendant committed the criminal offenses of felony speeding to elude an officer, careless and reckless driving, and speeding over 15 miles an hour above the speed limit. The evidence was admissible under *State v. Anthony*, 354 N.C. 372, as the officers were not interpreting the law for the jury, but rather were testifying regarding their observations in order to explain why they pursued defendant in a high-speed chase. Furthermore, even if the officers' testimony had been excluded, the jury probably would not have reached a different verdict. **State v. Rollins, 443.**

Prior crimes or bad acts—admitted for acceptable purpose—relevant—not unduly prejudicial—The trial court did not err in a second-degree murder case arising out of a vehicular accident by admitting evidence of defendant's shoplifting, citations for driving without a license, and actions immediately after the collision. The evidence was relevant for purposes other than to show that defendant had the propensity for the type of conduct for which he was being tried, the purposes were relevant to an issue material to the pending case, and the probative value of the evidence substantially outweighed the danger of unfair prejudice pursuant to Rule 403 of the Rules of Evidence. **State v. Rollins, 443.**

Prior crimes or bad acts—burning personal property—felony breaking and entering—properly admitted—The trial court did not err in a burning personal property and felony breaking and entering case by admitting N.C.G.S. § 8C-1, Rule 404(b) evidence of an out-of-state break-in at the victim's Atlanta apartment for which defendant was not investigated, charged, or convicted. The State offered substantial evidence tending to support a reasonable finding by the jury that defendant committed the out-of-state break-in. Furthermore, the evidence was properly admitted to show proof of defendant's common plan or scheme, identity, and motive; the evidence was relevant to prove defendant's identity as the perpetrator of the Raleigh burglary as well as his motive and the existence of a common plan or scheme; and the trial court did not abuse its discretion in determining that the probative value of the evidence outweighed the prejudicial effect. **State v. Adams, 319.**

Prior crimes or bad acts—inadmissible under 404(b)—The trial court erred in a first-degree kidnapping, assault with a deadly weapon inflicting serious injury, and indecent exposure case by admitting evidence from two witnesses about prior sexual encounters with defendant where the evidence was inadmissible under Rule 404(b). **State v. Glenn, 23.**

Prior crimes or bad acts—relevant—probative value not outweighed by prejudice—The trial court did not commit plain error in a first-degree rape case by introducing evidence of defendant's prior altercation with the victim's friend and a

EVIDENCE—Continued

name-calling incident. The altercation and the name-calling incident were relevant to demonstrate the victim's state of mind and the probative value of the evidence was not outweighed by any prejudice to defendant. **State v. Foust, 63.**

Unavailable witness—prior crimes or bad acts—testimonial statements—no opportunity for cross-examination—prejudicial—The trial court committed reversible error in a first-degree kidnapping, assault with a deadly weapon inflicting serious injury, and indecent exposure case by overruling defendant's objections to the admission of a statement from an unavailable witness concerning a prior act by defendant. The statement was testimonial and defendant had not had the opportunity to cross-examine the witness. Furthermore, the State failed to prove that the introduction of the statement was harmless beyond a reasonable doubt. **State v. Glenn, 23.**

Witness testimony—co-defendant in prison for murder—no plain error—Defendant's argument in a first-degree murder case that the trial court committed plain error when it allowed the State to introduce evidence that defendant's "co-defendant" was already in prison for murder was overruled. Even assuming that the person characterized as a "co-defendant" was involved in the same events for which defendant was charged, and that the trial court erred in allowing evidence of this co-defendant's prior conviction for murder, in light of the remaining evidence, any alleged error by the trial court did not amount to plain error. **State v. Williams, 130.**

Witness testimony—prior crimes or bad acts—opened the door—The trial court did not commit plain error in a first-degree murder case when it allowed the State to introduce evidence that defendant had been charged with and convicted of crimes involving armed robberies. Defendant's mother's testimony as to his peaceful nature opened the door to the State's cross examination as to his prior crimes. Further, the State did not seek to introduce any portion of defendant's juvenile *record*, so no *in camera* hearing was needed under N.C.G.S. § 7B-3000(f) and the evidence fell squarely under Rule 404(a). **State v. Williams, 130.**

FIDUCIARY RELATIONSHIP

Breach—president of homeowners association—insufficient evidence—The trial court did not err in a breach of fiduciary duty claim by granting defendant Renz summary judgment. The evidence presented by plaintiffs did not indicate that Renz breached his fiduciary duty as the president of the homeowners association and merely showed that he had a differing opinion from plaintiffs on a number of issues regarding the covenants and the housing development. **Taddei v. Village Creek Prop. Owners Ass'n., Inc., 487.**

Breach of fiduciary duty—alleged accountant for corporation—no duty owed—The trial court properly dismissed plaintiffs' claims for breach of fiduciary duty, civil conspiracy, constructive fraud, and unfair and deceptive trade practices against defendant Clark. Clark, alleged to be the accountant for plaintiff T-WOL, did not owe any duty to T-WOL. Furthermore, plaintiffs' claims against defendant ECDG South, LLC were also properly dismissed as ECDG's only role in the lawsuit was that it was the company to which the disputed property was transferred, a transfer which was determined to be valid. **T-WOL Acquisition Co., Inc. v. ECDG S., LLC, 189.**

Breach of fiduciary duty—sole shareholder of corporation—no duty owed to directors or officers—The trial court did not err in dismissing plaintiff Colbert's claims of constructive fraud, civil conspiracy, usurpation of corporate opportunity,

FIDUCIARY RELATIONSHIP—Continued

and unfair and deceptive trade practices, which were based on defendant Edmond's alleged breach of fiduciary duty due to the transfer of the disputed property. Edmonds, as the sole shareholder of plaintiff T-WOL, did not owe a fiduciary duty to the directors or officers of T-WOL and could dispose of the disputed property as he saw fit. **T-WOL Acquisition Co., Inc. v. ECDG South, LLC, 189.**

Breach of fiduciary duty—sole shareholder of corporation—no duty owed corporation—The trial court did not err by dismissing plaintiff T-WOL's claims of constructive fraud, civil conspiracy, usurpation of corporate opportunity, and unfair and deceptive trade practices, which were based on defendant Edmonds alleged breach of fiduciary duty. As defendant Edmonds was the sole shareholder of plaintiff T-WOL, he did not owe a fiduciary duty to the corporation itself and could dispose of the disputed real property as he saw fit. **T-WOL Acquisition Co., Inc. v. ECDG South, LLC, 189.**

FORGERY

Uttering forged instrument—obtaining property by false pretenses—sufficient evidence—denial of motion to dismiss proper—The trial court did not err in an uttering a forged instrument and attempting to obtain property by false pretenses case by denying defendant's motion to dismiss the charges against him at the close of all the evidence. There was substantial evidence of all the elements of each crime and that defendant was the perpetrator. **State v. Conley, 50.**

Uttering forged instrument—jury instruction—sufficiently clear—no reasonable possibility of different result—The trial court did not err or commit plain error in an uttering a forged instrument and attempting to obtain property by false pretenses case by failing to clarify in its instructions to the jury that the charged offenses related only to defendant's conduct regarding the check at issue, and not a second forged check admitted into evidence. The jury was apprised of this fact based on the trial court's statements and the evidence presented at trial. Furthermore, even if the jury instructions were erroneous for lack of clarity, there was no reasonable possibility that, had the error not been committed, a different result would have been reached at trial. **State v. Conley, 50.**

FRAUD

Common law—failure to allege claim with particularity—properly dismissed—The trial court did not err by dismissing plaintiffs' claim for common law fraud because plaintiffs failed to properly allege the fraud claim with particularity. **Birtha v. Stonmor, N.C., LLC, 286.**

Upon the public—not recognized theory—properly dismissed—The trial court did not err by dismissing plaintiffs' claim of fraud upon the public for failure to state a claim. Fraud upon the public is not a recognized theory of recovery under North Carolina law. **Birtha v. Stonmor, N.C., LLC, 286.**

HOMICIDE

First-degree murder—failure to instruct on lesser-included offense—second-degree murder—no evidence to support instruction—The trial court did not err in a first-degree murder case by failing to submit the lesser-included-offense of second-degree murder to the jury. The facts in the case fully supported a jury verdict

HOMICIDE—Continued

of first-degree murder and there was no evidence presented to support an instruction on second-degree murder. **State v. Laurean, 342.**

Second-degree murder—malice—sufficient evidence—The trial court did not err in a second-degree murder case by failing to dismiss the charge for insufficient evidence. The State presented sufficient evidence of all the elements of the crime, including malice. **State v. Rollins, 443.**

IDENTIFICATION OF DEFENDANTS

In-court identification—not tainted by impermissibly suggestive photo lineup—The trial court did not commit plain error in a possession of a firearm by a felon, robbery with a dangerous weapon, and carrying a concealed weapon case by allowing a witness to make an in-court identification of defendant. The identification was not tainted by an impermissibly suggestive photo lineup conducted prior to the trial. **State v. Stowes, 330.**

Photographic lineup—Eyewitness Identification Reform Act violation—motion to suppress untimely—exclusion of evidence not warranted—The trial court did not err in a possession of a firearm by a felon, robbery with a dangerous weapon, and carrying a concealed weapon case by denying defendant's motion to suppress two exhibits relating to a photographic lineup based on a violation of the Eyewitness Identification Reform Act (EIRA). Defendant failed to make a timely motion to suppress the identification procedures and defendant cited no case law in support of his argument that the EIRA violation warranted exclusion of the evidence. **State v. Stowes, 330.**

Photographic lineup—procedure not impermissibly suggestive—no plain error—The trial court did not commit plain error in a possession of a firearm by a felon, robbery with a dangerous weapon, and carrying a concealed weapon case by overruling defendant's objection to the State's admission of two exhibits relating to a photographic lineup. The investigating officer's presence in the room with the witness during the photographic lineup did not create an impermissibly suggestive lineup procedure. **State v. Stowes, 330.**

IMMUNITY

Noerr-Pennington doctrine—not applicable to the facts—The trial court did not err in a malicious prosecution case by concluding that the *Noerr-Pennington* doctrine, which immunizes conduct undertaken to influence or petition government bodies from antitrust liability, was inapplicable. The action underlying the N.C.G.S. § 75-1.1 claim was plaintiff's instigation of a malicious prosecution without probable cause, which was done for the improper purpose of gaining leverage in a lawsuit, and the doctrine did not apply to these facts. **N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 212.**

INDIGENT DEFENDANTS

Instructions to attorney—defer to defendant's wishes—theory unsupported by fact or law—no instruction required—The trial court did not err in a murder case by failing to instruct appointed defense counsel pursuant to *State v. Ali*, 329 N.C. 394, to comply with his client's wishes. The decision on whether to present theories of misconduct and conspiracy that had no basis in fact was clearly distinguishable

INDIGENT DEFENDANTS—Continued

from the tactical decision at issue in *Ali* (whether to use a peremptory challenge to strike a juror). Because nothing in our case law requires counsel to present theories unsupported in fact or law, the trial court did not err in failing to instruct counsel to defer to defendant's wishes. **State v. Jones, 392**.

INSURANCE

Life insurance policy—plaintiff's decedent declared dead—proceeds distributed—no error—The trial court did not err in a life insurance proceeds case by denying defendant's motion to amend an order for distribution of insurance proceeds or, in the alternative, by failing to grant defendant's motion to deny the existence of coverage under N.C.G.S. § 28C-18(b). The trial court's 22 December 2010 decree was made pursuant to N.C.G.S. § 28C-11(a) and N.C.G.S. § 28C-18 was not relevant. The 22 December 2010 order was not interlocutory and defendant failed to appeal from that order. **Dayton v. Dayton, 468.**

JUDGES

Answer to jury question—not an impermissible opinion—repetition of fact—The trial court did not commit plain error in an uttering a forged instrument and attempting to obtain property by false pretenses case by misstating and impermissibly expressing an opinion on the evidence. The trial court's response to the jury's question was not an opinion on the evidence but was merely the repetition of a fact that a witness had already testified to. **State v. Conley, 50.**

Duty of impartiality—jury instruction—reasonable doubt—not erroneous—no violation—The trial court did not violate its duty of impartiality in a driving while impaired and driving while license revoked case by giving an erroneous jury instruction which lowered the State's burden of proof. The trial court's additional language in the jury instruction on reasonable doubt was not erroneous. **State v. Foye, 37.**

JURISDICTION

Personal—insufficient minimum contacts—defendant properly dismissed—The trial court did not commit reversible error in a negligence, breach of contract, fraud, fraud upon the public, and unfair and deceptive trade practices case when it dismissed defendant SCI from the suit for lack of personal jurisdiction. Plaintiffs failed to allege facts that permitted the inference of jurisdiction under the long-arm statute. **Birtha v. Stonmor, N.C., LLC, 286.**

Subject matter—arbitration award—The superior court's judgment confirming an arbitration award in an action arising out of twelve consolidated foreclosure actions was reversed because there was no subject matter jurisdiction to compel or confirm arbitration. The clerk and trial court are limited to making the findings contained in N.C.G.S. § 45-21.16(d). **In re Foreclosure of Cornblum, 100.**

JURY

Instructions—duty to reach a verdict—not coercive—Although the trial court's instruction regarding the jury's duty to reach a verdict varied from the pattern jury instruction, when viewed in context, the instruction did not mislead the jury and was not, therefore, coercive of the jury's verdict. **State v. Rollins, 443.**

JUVENILES

Delinquency—failure to order publication of witness list—failure to remedy violation of mandate—prejudicial—The trial court erred in a juvenile case by failing to order petitioner to publish a list of the witnesses it intended to call at trial. The court erred in failing to allow petitioner's motion *in limine*, continue the case, or find another way to remedy the situation created by the petitioner's failure to comply with the plain mandate of N.C.G.S. § 7B-2300(b). Petitioner's failure to comply with a statutory mandate and the court's failure to remedy the situation was prejudicial. **In re A.M., 136.**

LIBEL AND SLANDER

Libel and Slander—libel per se—false statement—insufficient evidence of actual knowledge—The trial court did not err in a libel action by denying plaintiff's motion for partial summary judgment and granting defendant's motion for summary judgment with regard to a 9 April publication. Although it was undisputed that defendant made false statements about plaintiff in the publication, plaintiff failed to forecast any evidence that defendant acted with actual malice. **Lewis v. Rapp, 299.**

Libel and Slander—libel per se—defamatory accusation—not constitutionally protected opinion—actual malice—The trial court erred in a libel action by denying plaintiff's motion for partial summary judgment with regard to a 12 April publication. Defendant's accusation in the publication was subject to one interpretation; that the accusation was defamatory; and the accusation was not a constitutionally protected opinion. It was, therefore, defamation *per se* as a matter of law. Furthermore, plaintiff forecast sufficient evidence to show that defendant acted with knowledge, or at the least with reckless disregard, of the falsity of his publication. **Lewis v. Rapp, 299.**

MALICIOUS PROSECUTION

Immunity—actual malice not required—malice inferred from lack of probable cause—The trial court did not err in a malicious prosecution counterclaim by failing to find that plaintiff was immune from civil liability. N.C.G.S. § 58-79-40(c) does not require actual malice and malice may be inferred from probable cause. **N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 212.**

Initiation of proceedings—competent evidence to support determination—The trial court did not err in a malicious prosecution counterclaim by concluding that plaintiff initiated proceedings against defendant. There was competent evidence in the record to support the trial court's determination that except for the efforts of plaintiff, it was unlikely that there would have been a criminal prosecution of defendant. **N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 212.**

Probable cause for prosecution—lacking—The trial court did not err in a counterclaim for malicious prosecution by finding probable cause lacking to criminally charge defendant with obtaining property by false pretenses. There was competent evidence in the record for the trial court to conclude that a reasonable person would not have believed defendant was hiding information that she had already provided to plaintiff. **N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 212.**

Unfair and deceptive trade practices—additional element—separate injuries—The trial court did not err by concluding that defendant suffered separate injuries resulting from a malicious prosecution and an unfair and deceptive trade

MALICIOUS PROSECUTION—Continued

practices claim. Plaintiff failed to address the trial court's conclusion that there was a separate, additional element involved in the N.C.G.S. § 75-1.1 claim. **N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 212.**

MEDICAL MALPRACTICE

Gross negligence—Rule 9(j) certification—not needed—The trial court erred by concluding that plaintiffs' gross negligence complaint alleged medical malpractice and by dismissing plaintiffs' complaint for failure to include a Rule 9(j) certification. The decision of whether to offer a cane to a patient who has trouble walking is not one that requires specialized skill and, as a result, expert testimony on the matter was not necessary to develop plaintiffs' negligence case for the jury. **Horsley v. Halifax Reg'l Med. Ctr. Inc., 411.**

MOTOR VEHICLES

Driving while impaired—driving while license revoked—jury instructions—reasonable doubt—burden of proof not lowered— no plain error-—The trial court did not commit plain error in a driving while impaired and driving while license revoked case by giving an erroneous instruction to the jury on reasonable doubt which improperly lowered the State's burden of proof. Additional language added by the judge, when viewed together with the correct pattern jury instruction, did not lower the burden to less than reasonable doubt or otherwise prejudice defendant. Furthermore, the trial court's additional language did not amount to a structural error which infected defendant's entire trial process. **State v. Foye, 37.**

Driving while impaired—driving while license revoked—jury instructions—reasonable doubt—no coercion—The trial court did not coerce the jury into returning guilty verdicts in a driving while impaired and driving while license revoked case by defining reasonable doubt in a way that facilitated findings of guilt on both charges. The trial court's additional language to the jury instruction on reasonable doubt was not erroneous. **State v. Foye, 37.**

Driving while impaired—driving while license revoked—sufficient evidence—driver of vehicle—The trial court did not err in a driving while impaired and driving while license revoked case by denying defendant's motion to dismiss for insufficient evidence. The State presented sufficient evidence of all elements of both charges, including that defendant was the driver of the vehicle. **State v. Foye, 37.**

NEGLIGENCE

Agency relationship—argument unsupported—Plaintiff's argument in a negligence case that defendants were liable to him based upon agency relationships was unsupported and without merit. **Mynhardt v. Elon Univ., 368.**

Duty of care—not owed to plaintiff—summary judgment proper—The trial court did not err in a negligence action by granting summary judgment in favor of defendants. Defendants assumed no duty to protect plaintiff from drinking-related injuries at an off-campus party and no special relationship resulting in the imposition of a duty existed between defendants and plaintiff when plaintiff voluntarily, an without an invitation, attended an off-campus party of which defendant Elon had no knowledge. **Mynhardt v. Elon Univ., 368.**

NEGLIGENCE—Continued

Joint venture—argument unsupported—Plaintiff's argument in a negligence case that defendants were liable to him based upon a joint venture was unsupported and without merit. **Mynhardt v. Elon Univ., 368.**

Landowner's duty of reasonable care—not extended to neighboring property—dismissal proper—The trial court did not err by dismissing plaintiffs' complaint alleging negligence where plaintiffs failed to allege facts sufficient to show that defendants breached a duty owed to the child who was the subject of the suit. A landowner's duty of reasonable care does not extend to guarding against injury caused by a dangerous condition on neighboring property. **Lampkin v. Hous. Mgmt. Res. Inc., 457.**

PLEADINGS

Breach of contract—insufficient notice—The trial court did not err in a breach of contract case by disallowing recovery from defendants individually for personal tax returns. Plaintiff's complaint failed to sufficiently state a claim against either defendant in their individual capacities for personal tax returns. Plaintiff's remaining arguments on appeal regarding whether the trial court erred in excluding evidence of the personal tax returns were thus overruled. **Rink & Robinson, PLLC v. Catawba Valley Enters., LLC, 360.**

Motion to amend—clerical error—theory of recovery not changed—The trial court did not err in a breach of contract case by granting plaintiff's motion to amend its pleadings. The trial court did not abuse its discretion by allowing a typographical error to be fixed and did not allow plaintiff to change its theory of recovery by granting the motion. **Rink & Robinson, PLLC v. Catawba Valley Enters., LLC, 360.**

Motion to amend complaint to conform to evidence—evidence objected to—amendment not appropriate—The trial court did not abuse its discretion in a breach of contract case by denying plaintiff's motion to amend its complaint to conform to the invoices on personal tax returns. As defendants objected to the evidence of personal tax returns, an amendment to conform the pleading to this evidence was not appropriate. **Rink & Robinson, PLLC v. Catawba Valley Enters., LLC, 360.**

POLICE OFFICERS

Wrongful conduct—obtaining and executing search warrants—warrants properly sought—probable cause—defendants immune—The trial court erred in a case in which plaintiff alleged wrongful conduct by defendant police officers in obtaining and executing arrest warrants against plaintiff by denying defendants' motion for summary judgment. Plaintiff only challenged the existence of probable cause for the seeking and issuance of the warrants, and as the warrants were properly sought and issued based upon probable cause, and as plaintiff failed to demonstrate any deliberate falsehood or reckless disregard by defendants in seeking the warrants, defendants were shielded by immunity. **Beeson v. Palombo, 274.**

PRETRIAL PROCEEDINGS

Transcript of prior proceedings—indigent defendant—denial of transcript—erroneous—The trial court erred in a robbery with a dangerous weapon case by denying defendant's request for a transcript of the proceedings in his first trial prior to any retrial. The trial court's findings of fact failed to satisfy the two-part test

PRETRIAL PROCEEDINGS—Continued

enumerated in *State v. Rankin*, 306 N.C. 712, for determining whether a transcript must be provided to an indigent defendant. **State v. Tyson, 517.**

PROBATION AND PAROLE

Judgment revoking probation—original judgments—impermissible collateral attack—appeal dismissed—Defendant's appeal from the trial court's judgments revoking his probation was dismissed as defendant's brief on appeal only asserted error with respect to the original judgments in which the trial court imposed and suspended seven consecutive sentences pursuant to defendant's guilty plea. This challenge was an impermissible collateral attack on the original judgments. **State v. Long, 139.**

PUBLIC RECORDS

Delivery of previously sealed records to Clerk—hearing not required—sufficient notice given—compliance with mandate—The trial court did not err in a case involving sealed search warrants by ordering the clerk of court to deliver documents previously sealed by orders of the superior court without any motion, hearing, or notice to the State. As the prosecution failed to make a timely motion to extend the orders sealing the warrants, the trial court was not required to engage in a test to balance the right to access the contents of the sealed search warrants against the governmental interests in protecting against premature release. Further, the State's contention that it was not on notice of the delivery of these previously sealed records was rejected and the trial court's compliance with the senior resident judge's administrative order was not an abandonment of the court's obligation. **In re Baker Investigation, 108.**

Sealed search warrants—order unsealing records—complied with mandate—The trial court did not err in a case involving sealed search warrants by failing to give effect to the plain language in the original orders commanding that the records remain sealed and not released to the public until further order of the court. The trial court complied with the senior resident judge's mandate regarding the duration of orders sealing search warrants from public review. **In re Baker Investigation, 108.**

Sealed search warrants—release—not impermissible exercise of jurisdiction—The trial court's order releasing previously sealed search warrants and corresponding documents did not impermissibly exercise appellate jurisdiction to resolve a conflict between the administrative order and the prior orders issued sealing the search warrants. The order releasing the sealed warrants was not in conflict with the prior orders sealing the warrants. **In re Baker Investigation, 108.**

Sealed search warrants—release in accordance with administrative order—The State's argument that the trial court erred in concluding that the administrative order at issue limited the discretion of the court in entering orders sealing warrants and related documents lacked merit. The search warrants and corresponding documents were unsealed in accordance with administrative procedures established by the senior resident superior court judge. **In re Baker Investigation, 108.**

REAL PROPERTY

Deed of trust—encumbered decedent's property interest—joint tenancy—severed upon filing of deed of trust—The trial court did not err in a dispute

REAL PROPERTY—Continued

over real property by concluding that there was no genuine issue as to any material fact and that plaintiff was entitled to a judgment as a matter of law on the issue of whether a deed of trust in this case encumbered decedent's one-half interest in the property as a tenant in common. The trial court did err by concluding that decedent's interest in the property vested in Troy D. Reed and wife Judy C. Reed pursuant to the right of survivorship and that defendants owned the real property in fee simple absolute, subject to plaintiff's deed of trust. The joint tenancy was severed upon the filing of the deed of trust and decedent's interest in the property converted to a tenancy in common, which has no right of survivorship. **Countrywide Home Loans, Inc. v. Reed, 504.**

ROBBERY

Dangerous weapon—common law robbery instruction not warranted—motion for appropriate relief appropriately denied—The trial court did not err in a robbery with a dangerous weapon case by failing to instruct the jury on the lesser-included offense of common law robbery and by denying defendant's motion to dismiss the charges. Because defendant presented no evidence at trial to rebut the presumption that the firearm used in the robbery was functioning properly, he was not entitled to either an instruction on common law robbery or dismissal of the robbery with a dangerous weapon charges. **State v. Williamson, 512.**

SEARCH AND SEIZURE

Motion to suppress—reasonable suspicion to stop vehicle—search incident to arrest—probable cause—warrantless search—The trial court did not err in a drug case by denying defendant's motion to suppress evidence seized during a warrantless search of the vehicle he was driving. The police officers had reasonable suspicion to stop defendant's vehicle and the search of the vehicle was a valid search incident to the arrest of defendant's passenger for his possession of drug paraphernalia. Moreover, the objective circumstances provided the officers with probable cause for a warrantless search of the vehicle. **State v. Watkins, 384.**

Motion to suppress—strip search—probable cause—exigent circumstances—reasonable manner—The trial court did not err in a felony possession of cocaine case by denying defendant's motion to suppress evidence obtained after a "strip search" of defendant's person. The officers had probable cause to believe defendant was hiding the drugs on his person and exigent circumstances existed to justify the roadside strip search. Furthermore, the search was conducted in a reasonable manner. **State v. Fowler, 263.**

SEXUAL OFFENDERS

Sex offender registration—petition for termination—Jacob Wetterling Act—Adam Walsh Act—petitioner complied with requirements—The trial court erred as a matter of law in finding that petitioner's removal from the registry would not comply with the provisions of the federal Jacob Wetterling Act. The Jacob Wetterling Act had been repealed and replaced by the Adam Walsh Act (42 U.S.C. § 16915) and the uncontroverted evidence before the trial court was that petitioner had fully complied with all requirements of 42 U.S.C. § 16915 regarding termination of the registration period. Furthermore, the trial court failed to find the facts on all issues joined in the pleadings and the matter was remanded. **In re Hamilton, 350.**

SEXUAL OFFENDERS—Continued

Sex offender registration—petition for termination—not moot—no automatic termination—The trial court did not err in failing to dismiss petitioner's petition for termination of his sex offender registration for mootness and in automatically declaring that petitioner's registration requirement had ended. Petitioner failed to show mootness. Further, N.C.G.S. § 14-208.7 was amended to provide that registration of convicted sex offenders could continue beyond ten years, even when the registrant had not reoffended, and Section 14-208.12A provides that persons wishing to terminate their registration requirement must petition the superior court. **In re Hamilton, 350.**

SEXUAL OFFENSES

Statutory sex offense—sufficient evidence—The trial court did not err by failing to dismiss one count of statutory sex offense for insufficient evidence. The State presented sufficient evidence that defendant committed a sex offense upon the victim during the time frame alleged. **State v. Houseright, 495.**

STATUTES OF LIMITATION AND REPOSE

Breach of contract—defendants induced delay—not bar to plaintiff's claim—The trial court did not err in a breach of contract case by denying defendants' motion for directed verdict and judgment notwithstanding the verdict. Defendants were precluded from relying on the statute of limitations as a bar to plaintiff's claim as defendants induced the delay by their own representations. **Rink & Robinson, PLLC v. Catawba Valley Enters., LLC, 360.**

Continuing wrong doctrine—discovery rule—duty to support negligence claim not established—The trial court did not err by granting defendants' motion to dismiss claims of negligence, fraud, and breach of contract. As neither the continuing wrong doctrine nor the discovery rule were applicable to plaintiffs' claims, a majority of the claims were barred by the statute of limitations. Moreover, plaintiffs' argument that N.C.G.S. § 65-60 established the duty supporting both their common law negligence and negligence *per se* claims was rejected. **Birtha v. Stonmor, N.C., LLC, 286.**

SURETIES

Motion to set aside bond forfeiture—defendant failed to appear on two prior occasions—actual notice—denial of motion proper—The trial court properly concluded that N.C.G.S. § 15A-544.5(f) barred the surety from having defendant's bond forfeiture set aside. Defendant's shuck provided sufficient evidence that defendant had failed to appear in court on two previous occasions and the surety had actual notice of this fact where defendant's release order included an explicit finding that defendant had previously failed to appear on two occasions. **State v. Adams, 406.**

TAXATION

Ad valorem—late application for exemption—taxpayer's exempt status—motion to dismiss properly denied—exemption properly granted—The North Carolina Property Tax Commission (PTC) properly denied Cabarrus County's motion to dismiss and reversed the Cabarrus County Board of Equalization and Review's denial of a taxpayer's late application for exemption from *ad valorem* taxes. The

TAXATION—Continued

PTC appropriately reviewed the materials presented by both parties prior to the hearing and based its decisions on competent evidence. Furthermore, the County had prior knowledge of the taxpayer's exempt status before seeking an assessment against it. **In re Appeal of Murdock, 377.**

Privilege license tax—insufficient evidence tax was unreasonable—conflicting evidence—The trial court did not err in a case involving a privilege license tax by granting summary judgment in favor of defendant City and denying summary judgment for a majority of plaintiffs. Those plaintiffs failed to present sufficient evidence to rebut the presumption that the license tax was reasonable and not prohibitive. The trial court erred by granting summary judgment in favor of the City as to the remaining plaintiffs as there was conflicting evidence on the issue of whether the City's privilege license tax on those plaintiffs' businesses was reasonable and not prohibitory. **Smith v. City of Fayetteville, 249.**

TERMINATION OF PARENTAL RIGHTS

Findings of fact not supporting conclusion of neglect as ground for termination—evidence of changed circumstances not considered—The trial court erred by terminating respondent father's parental rights based on neglect because the trial court's findings were not supported by clear, cogent, and convincing evidence of neglect at the time of the hearing and, in turn, those facts did not support the trial court's conclusion that respondent neglected his children within the meaning of N.C.G.S. § 7B–101(15). The trial court failed to consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. **In re G.B.R., 309.**

Termination petition—motion to amend—improperly granted—no prejudice—The trial court erred in allowing DSS to amend motions to terminate respondent father's parental rights to conform to the evidence presented at the termination hearing as there is no right to amend a termination petition to conform to the evidence at a hearing under N.C.G.S. § 1A-1, Rule 15(b). However, respondent was not prejudiced by the amendment to the motions as the trial court did not rely upon the amendment in terminating his parental rights and DSS's motion to terminate parental rights gave respondent notice that DSS was seeking to terminate his parental rights based on neglect stemming from his incarceration. **In re G.B.R., 309.**

TRIALS

Doctrine of litigation by consent—evidence objected to—The doctrine of litigation by consent was not applicable in a breach of contract case and the issue of defendants' personal tax returns was not tried by implied consent where defendants' attorney clearly objected to evidence of the personal tax returns. **Rink & Robinson, PLLC v. Catawba Valley Enters., LLC, 360.**

UNFAIR TRADE PRACTICES

Argument unsupported—summary judgment proper—The trial court did not err in granting summary judgment in favor of defendant on plaintiff's unfair or deceptive trade practice claim as plaintiff failed to offer any support for her argument that defendant's conduct as manager of Downtown Properties constituted unfair or deceptive trade practices. **Rev O, Inc. v. Woo, 76.**

UNFAIR TRADE PRACTICES—Continued

Breach of contract not sufficient to establish claim—failure to allege aggravating circumstances—The trial court did not err in dismissing plaintiffs' claim for unfair and deceptive trade practices. A mere breach of contract, even if intentional, was not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1 and plaintiffs failed to allege substantial aggravating circumstances. **Birtha v. Stonmor, N.C., LLC, 286.**

Malicious prosecution claim—in or affecting commerce—judgment proper—The trial court did not err by entering judgment for defendant on her counterclaim for unfair and deceptive trade practices. Defendant's claim was premised on her malicious prosecution claim, which was entered without error. Also, plaintiff failed to object to the trial court's statement that he stipulated to the fact that insurance was in or affecting commerce. Further, the trial court was correct in concluding that plaintiff, by engaging in the unfair and deceptive act of malicious prosecution in order to gain leverage in the civil action, caused defendant to suffer damages. **N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc., 212.**

UNJUST ENRICHMENT

No genuine issue of material fact—summary judgment proper—The trial court did not err in granting summary judgment in favor of defendant on plaintiff's unjust enrichment claim as there was no genuine issue of material fact remaining as to whether defendant was unjustly enriched to the detriment of plaintiff by her acts as manager of Downtown Properties. **Rev O, Inc. v. Woo, 76.**

Unfair trade practices—LLC Act—allegations unsupported—recovery unsupported—The trial court did not erroneously grant summary judgment in favor of defendant on plaintiff's unjust enrichment and unfair or deceptive trade practice claims as plaintiff failed to established that defendant's alleged violations of the Chapter 57C of the North Carolina General Statutes (LLC Act) occurred or that any violations of the LLC Act would support a damage recovery in favor of plaintiff. **Rev O, Inc. v. Woo, 76.**

Unfair trade practices—public policy violations—not supported—Plaintiff's argument in an unjust enrichment and unfair or deceptive trade practice case that defendant's approval of the sale of Downtown Properties' assets was against public policy lacked merit. Plaintiff failed to cite any authority or advance any argument explaining why the alleged public policy implications of defendant's actions as manager of Downtown Properties would support reversal of the trial court's order. **Rev O, Inc. v. Woo, 76.**